COPYRIGHT, FAIR USE, AND NEW ECONOMIC MODELS OF SCHOLARLY PUBLISHING

Delivered at the H-Net affiliate session Scholarly Communication and Copyright, at the annual meeting of the American Historical Association, New Orleans, January 5, 2013

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See also Michael Les Benedict, “Landmark Decision on Electronic Reserves for Courses.” Perspectives of History 50, no.6 (Sept. 2012):
http://www.historians.org/perspectives/issues/2012/1209/Landmark-Decision-on-Electronic-Reserves-for-Courses.cfm

H-Net is sponsoring this panel because both 1) the law and application of copyright, and 2) the technology by which ideas and creative products are being disseminated are changing so quickly and radically. Developments in copyright and technology are linked, of course. The information revolution has made expressions, ideas, and information valuable not only as they are embodied in material goods—books, art, recordings, film, or other products embodying their material manifestation—but in themselves. Ideas, creative expressions, and information have been commodified as "intellectual property." A great deal of effort is made to realize the value that can be realized by their circulation. There is an irony here: on the one hand, the drive to commodify information is driven by the facts that technological change has made information more valuable than ever if one can control access to it; but on the other, technology has made access harder to control, undermining the value of the traditional vehicles for delivering it—printed materials and other hard media.

There has been resistance to this commodification, a desire to make the circulation of creative expressions and especially information free. One way to do this is to provide "open access," with investigators making knowledge freely available immediately or after a brief delay. That is the spirit behind efforts like the Creative Commons (www.creativecommons.org). Another was a movement to persuade courts to interpret copyright law in a way that encouraged free electronic circulation not only of information but of creative products like music, limiting the ability of creators to control the circulation of their work. This effort has failed. The thrust of copyright law remains to provide a legal structure in which those who create are able to profit from their creations through the control of their circulation.

Research and teaching-oriented institutions are trying to offset the trend towards legislative and judicial expansion of intellectual property rights through what is being called "self-help"—especially by establishing formal codes of best practice that reflect the interests of their members. These generally take expansive views of what constitutes "fair use" of copyrighted materials. They are being promulgated to counteract the tendency to over-caution in the use of materials because of uncertainty about what constitutes fair use, but also in the hope
that courts will defer to the considered interpretations of the law by organized users of copyrighted material. While there is precedent for such deference, it is doubtful that courts will accept codes of best practice that express only the interests of users and minimize those of creators and publishers. H-Net's copyright statement is essentially a code of best practice for H-Net editors. (http://www.h-net.org/about/intellectualproperty.php) It is outstanding in its regard for the interests of both users and producers of scholarship, in part because it was written in 1998, before the recent trend towards unbalanced codes.

In this technological environment publishers of scholarly work face a great problem in realizing its value. The law gives them the right to control circulation of the work they publish, but whole chunks are circulated online without payment. This is exacerbated, from their standpoint, by the combination of new technology with the legal concept of "fair use," which is taken to authorize systematic electronic circulation of portions of published work without permission or payment in the very place where they hope to make money: the classroom. Technology and a broad concept of fair use enables teachers and college libraries to post, without compensation to publishers, significant amounts of published historical work online for student use as "electronic reserves." Scholarly presses, in particular, are afraid that electronic reserves will be used in lieu of the purchase of their publications. Unless scholarly presses can figure out how to secure the value of their publications, they will have to give up on a commercial model. They will either have to become fully subsidized by scholarly institutions and foundations, or they will have to charge authors to publish their work.

There is a way out, although not without cost to education, and it is consistent with the direction that technology is taking publishing generally: instead of charging for books, charge for electronic access to their contents. That is what Amazon and Barnes and Noble have arranged with publishers to do with Kindle and Nook. Textbook publishers are beginning to "rent" electronic access to textbooks. And now a very important recent court case encourages scholarly publishers to go in the same direction—Cambridge University Press v. Becker, the so-called Georgia State University (GSU) case. (863 F. Supp. 2d 1190 [N.D. Ga., Atlanta Div. 2012]) In that case university presses challenged what originally were very broad guidelines GSU's library used for allowing teachers to post books on electronic reserve. They continued the case even after GSU brought its rules into line with most other college libraries. The case was very widely and closely watched by publishers and librarians and the result is likely to be very influential. (See Benedict, "Landmark Decision on Electronic Reserves for Courses," AHA Perspectives Online [http://www.historians.org/perspectives/issues/2012/1208/Landmark-Decision-on-Electronic-Reserves-for-Courses.cfm].)

What I think most important in the decision was that the judge recognized permissions to use a work to be part of the work's market value. That is something new. Traditionally, an important factor in whether a use was fair was the affect of the use on the market value of the original work. Taking a restricted portion of a work for classroom use was generally not seen to affect the general sale of the work. Taking a restricted portion of a work for classroom use was generally not seen to affect the general sale of the work. There was no likelihood that the teacher would have required students to buy the whole book in order to read a small part, and thus the assignment did not deprive the publisher of a sale. But in the GSU case, the judge concluded that there was a market in permissions themselves, if a publisher made use of it. So the question was, had the publisher participated in such a market by making it easy and reasonable for a teacher or library to secure permission for the posting? If not, then putting a portion on electronic reserve did not affect the market for the whole book. But if they had, putting a portion
on electronic reserve without securing permission deprived the publisher of the value of the permission.

I think this will be a very influential decision and will point scholarly publishers in the direction of making permissions easily and reasonably available through a system like that provided by the Copyright Clearance Center. I think it will encourage publishers to separate the content of works from the physical book. Why not sell the one-term electronic use of a book’s contents in part or in whole, just as publishers sell permanent, nonreproducible electronic access to books today through electronic reading devices. Unlike present-day electronic reserves, this will cost either students or (more likely) university libraries the cost of permissions, which is not a welcome burden but perhaps an inevitable one in light of new technology and the commitment of copyright law to maintaining creators’ and publishers’ rights in intellectual property.

Can this affect out interactions on a moderated list like H-Net? The answer is "maybe." It depends on how easy and automatic permissions can be made in an electronic environment. One can envision an electronic world where uses of copyrighted materials, especially published material, are registered and billed, with the amounts deducted automatically from established accounts. Not what H-Net users want to hear, I think. But the law of copyright favors treating our work as a commodity. We can exempt ourselves as authors and H-Net participants, but we can't expect to be able freely to use the works of others.