

Copyright: What Librarians Need to Know in 2015

Law Library Association of Maryland
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Steve Anderson
Maryland State Law Library
steve.anderson@mdcourts.gov
410-260-1432

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Today's Topics

- What is copyright?
- What is “fair use”?
- What is the “public domain”?
- What is the “library exemption”?
- What use is prohibited?
- Other questions?

What is copyright?

■ Constitution

- Article 1, Section 8: “Congress ***shall*** have the power... To ***promote*** the progress of science and ***useful arts***, by securing for ***limited*** times to authors and inventors the ***exclusive*** rights to their respective ***writings*** and discoveries.”

■ Statutes

- Based on the 1710 British copyright law, the Statute of Anne
- 1790 – First U.S. copyright act
- 1976 – Current copyright act

What is copyright?

■ What can be protected?

- Software, lyrics, music, dances, photographs, movies, paintings, sound recordings, architectural works... AND writings
 - Statutory framework is very "work"-dependent
 - Copyrightable things must be original (have a "spark of creativity").

■ What is not protected by copyright?*

- Ideas, processes or procedures, systems, discoveries, facts, recipes, designs, short phrases/slogans/titles
 - Directories and databases?
 - * There could be protection from other types of laws, such as patent and trademark.

What is copyright?

- What is owned by whom?
 - Joint authors (if applicable)
 - First sale doctrine: Sale of the physical object does NOT transfer or destroy copyright. It just transfers the ownership of the physical object.
 - Does this apply to books? Yes!
 - Does this apply to databases? No! (Because there is no transfer of a physical object.)
 - Work for hire: Copyright is owned by the employer if it is prepared by an employee “within the scope of his or her employment.”
 - Copyright ownership can be transferred or licensed (and must be in writing and signed).

What is copyright?

- What **exclusive** rights are granted to the copyright holder?
 - Right to reproduce copies
 - Right to prepare derivative works
 - Right of public distribution
 - Right of public performance
 - Right of public display
 - Moral rights (very limited—attribution and integrity to visual art; more prevalent in Europe)

What is “fair use”?

- 6 examples of uses that are considered to be “fair” (see 17 U.S.C. § 107):
 - 1. Criticism
 - 2. Comment
 - 3. News reporting
 - 4. Teaching (including multiple copies for classroom use)
 - 5. Scholarship
 - 6. Research

What is “fair use”?

- 4 factor balancing test:

- 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
 - Inquiry of whether or not the use is “transformative” (does it alter the original with new expression, meaning, or message?)
- 2. The nature of the copyrighted work.
 - The more factual the work, the more likely there will be a finding of “fair use”.

What is “fair use”?

- 4 factor balancing test:

- 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
 - Determination is both quantitative (how much?) and qualitative (is the portion the heart of the work?)
- 2. The effect of the use upon the potential market for or value of the copyrighted work.
 - Could the second use become a substitute for the original work?

What is “fair use”?

- Applicability to digital content:

- *The Author’s Guild, Inc. v. Google*, 954 F.Supp.2d 282 (S.D.N.Y. 2013) held that the Google Books Project use of copyrighted works was highly transformative and thus a fair use.
- *American Institute of Physics v. Schweman Lundberg & Woessner, P.A.*, 2012 WL 3799647 (D. Minn. 2013) held that law firm’s copying of online articles for the purpose of filing patents was a fair use.
- *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) held that “thumbnails” of copyrighted photos was a transformative use.

What is the “public domain”?

- Works in the public domain are those whose intellectual property rights have expired or are inapplicable.
 - Anything authored by the federal government, e.g., documents
 - The law itself is always in the “public domain”. (Laws are facts.)
 - Anything authored by your company which you are copying at the request of your company
 - Certain items marked as such under a Creative Commons license
 - Everything published **before** 1923

What is the “public domain”?

DATE OF WORK	PROTECTED FROM	TERM
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years ¹ (or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation ²)
Published before 1923	In public domain	None
Published from 1923 - 63	When published with notice ³	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not so renewed, now in public domain
Published from 1964 - 77	When published with notice	28 years for first term; now automatic extension of 67 years for second term
Created before 1-1-78 but not published	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2002, whichever is greater
Created before 1-1-78 but published between then and 12-31-2002	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2047 whichever is greater

What is the “public domain”?

- Remember that unpublished works and most works without notice are NOT necessarily in the public domain.
- Online works and state and local government works are NOT necessarily in the public domain.
- See also:
 - https://copyright.cornell.edu/resources/public_domain.cfm

What is the “library exemption”?

- Not an infringement for a library or archives to reproduce no more than one copy of a work or to distribute such a copy (see 17 U.S.C. § 108) if:
 - the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
 - the collections of the library or archives are open to the public, or available also to other persons doing research in a specialized field; and
 - the reproduction or distribution of the work includes a notice of copyright

What is the “library exemption”?

- A library may also make three copies of a published work solely for the purpose of replacement of a copy that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if:
 - the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and
 - any such copy that is reproduced in digital format is not made available to the public outside the premises of the library or archives.

What is the “library exemption”?

- A library may also make a copy for a library user of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy of a small part of any other copyrighted work, if:
 - The copy and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and
 - The library or archives displays prominently, at the place where orders are accepted, and on its order form, a warning of copyright.

What is the “library exemption”?

- No library liability exists for the unsupervised use of reproducing equipment located on its premises when such equipment displays a notice that the making of a copy may be subject to the copyright law
 - Set forth in 37 C.F.R. § 201.14, “Warnings of copyright for use by certain libraries and archives”

What is the “library exemption”?

http://www.lawlib.state.md.us/services/documentdelivery.html

File Edit View Favorites Tools Help

Maryland STATE Law Library

Document Delivery Request Form

Use this form to request a copy of a specific item available at the Library. Materials are also available to libraries via [Interlibrary Loan](#).

The library **cannot** send legal forms via document delivery. Many court forms are available online at the [Judiciary web site](#).

Name:

Organization:

Phone:

Alt Phone:

Fax:

E-mail:

Address:

Requested Material:

NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

I agree with the copyright restrictions above.

Please send copies by:

Mail

E-mail PDF File

3:31 PM
03/16/2015

Prices and Policies

Prices:

All fees must be pre-paid.

- Staff-made copies: \$.50 per page
- User-made (self-service): \$.25 per page

Fees are set by the State Law Library Committee in conformity with "The Revised Schedule of Circuit Court Charges, Costs, and Fees Established Under Courts Article, § 7-202, Effective October 1, 2004."

Policies:

- Payment must be received in advance.
- We accept VISA, Mastercard, cash, and checks. The library does NOT accept American Express or Discover.
- There is no charge for materials requested by Maryland state government agencies.

What use is prohibited?

- Infringement occurs where there is an exercise of any of the copyright owner's **exclusive** rights without permission.
 - Just because something is **posted online** does not mean you can use it without permission.
 - Just because something is **written by a state or local government** does not mean you can use it without permission.
 - Copy only what you have permission for or make sure it is in the public domain, a "fair use", or permitted by the library exemption.
 - For more, see: <http://www.copyright.gov>

What use is prohibited?

- Strict liability
 - No scienter requirement
 - Helping someone else infringe can be either vicarious or contributory infringement.
 - Damages include injunctive relief, actual damages and statutory damages up to \$150,000.
- Registration
 - A copyright holder does NOT need to register his or her copyright before the infringement takes place.
 - (The copyright holder only needs to register before bringing suit.)

Other Questions?

- If you were asked to scan post-1922 material to put on an intranet, how would you approach the matter?
- If you were asked to use perma.cc, the new service that makes copies of web pages found in legal opinions, how would you approach the matter?
- More?
- Thank you!