COPYRIGHT AND COLLABORATION: THE FUTURE OF ACADEMIC LAW LIBRARIES

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Knowledge of copyright and licensing law has become essential to being a modern law librarian. It arises in numerous areas vital to libraries, such as inter-library loan, supporting scanning stations, managing courseware websites, understanding your OPAC's open-source license, digitizing content, and preserving digital content that came from another sources.

The goal of this chapter is to highlight future directions for academic law librarianship and suggest that knowledge of copyright and licensing law is likely to become more, rather than less, important. This is due, in part, to the trend toward increasing patron demand for digital content, which requires making copies in memory and on hard drives, rather than loaning out the same physical work time-after-time. It is also due to the greater aspirations of law libraries in general. Instead of merely serving our geographically local user base, we now attempt to make content accessible to anyone, anywhere, at any time. With this new set of goals, we become more like publishers and hence enter new legal realms.

I will discuss five areas that US academic law libraries are exploring and how a knowledge of copyright and licensing law is essential to those efforts. The five areas are licensing digital content, creating digital archives, managing institutional repositories, preserving print and digital content, and coordinating consortial arrangements.

The library is no longer primarily its collection. The modern academic law library serves at least three functions- as a print and digital collection, a space for reading and study, and a service where the library staff can meet the changing needs of its users. As the efforts of the staff increase to keep up with the diverging needs of our patrons, including computer assistance, empirical research, non-legal research, and the desire for remote and 24/7 access. As the demands and expectations increase, the library becomes a more complicated and demanding place for the staff to work.

Licensing Digital Content

In the past, the acquisition of books and most print materials was fairly straight forward. Some print materials were harder to obtain than others and the cost was not always low, but a basic collection was within the reach of most law schools. With time, and cancellations of print volumes, those volumes that are purchased have become more and more expensive, particularly case reporters

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and annotated codes.[1] In part, this is due to the transition to digital content generally, and more specifically, the reliance on online sources for full-text searching of free and licensed case law databases.

Over the past ten years, the idea that a library can have reliable access to legal materials in digital form without owning the content or physically possessing and controlling it has become increasingly accepted. Although in retrospect this policy might be unwise, it is truly a necessity given shrinking law library budgets. However, unlike the purchase of print materials, which is relatively straight forward, the licensing and use of digital content is far more complex. Licenses have not become standardized liability clauses in such licenses mayexpose the library to liability in a way it has never been exposed before. The primary example is if the end user of the database misuses the content, should the library be liable if the staff should have known of the misuse and failed to act?[2] Database publishers are primarily concerned that patrons will download substantial portions of their database and repost it on a publicly accessible website. The concern in this area is that the ethos of librarians includes refraining from intereference with the research of patrons. We do not want to become copyright or license police, as that would stifle the patron-librarian relationship. At the same time, end users have the ability to do far more economic damage to database creators than ever before, through copying and publicly posting the contents of the database to the Internet.

In addition to liability clauses, licenses also require librarians to understand choice of law and forum, use on mobile devices, the technicalities of how e-books may and may not be loaned, and whether the materials are useable in courses and for filling interlibrary loan requests.[3] There is a substantial literature on this topic within this volume,[4] so I will not repeat the specific concerns, but will note that different countries have different laws about the relationship between copyright and licenses. For example, in the United States, licenses may conflict with and override copyright law. In India, that is not the case.[5] Indian database licenses, therefore, are likely to be more favorable to libraries than the same licenses in the United States.

It is unclear how these trends will evolve and what the role of the law library will be in providing information to patrons in 20 years. Will we license content from online bookstores to provide to students, faculty, and perhaps public patrons who cannot pay? Will we become more of a service industry where everyone can read vast quantities of open access content, and we will provide quality control for those sources? Perhaps we will become creators of open access content and we will become curators of our own databases, rather than consumers of for-profit databases.

Creating Digital Content

Librarians are already becoming curators of digital content. We see it in the digitization of traditional library publications, such as indexes, bibliographies,

and research guides.[6] As we create these resources and make them available for worldwide consumption, we are playing a greater role than we were when these works were distributed locally in small quantities.

With this broader distribution comes greater scrutiny. We cannot rely on obscurity to cover up for our potentially illegal practices. In some cases, we must license content from the creators to make it available on terms that will permit the project to move forward. To license such content or evaluate whether or not it is fair dealing/fair use, we need greater knowledge than we needed in the past when most violations would never be discovered. At the same time, we cannot live in fear of these laws and let them stifle legitimate academic practices. To find the right balance, we must educate ourselves about the relevant laws and publisher expectations. By becoming institutional experts, we will become a resource for the law school and universities within which we exist. This will in turn increase our status and concretely demonstrate how libraries and library staff contribute to the greater institution.

In turn, we can use our legal knowledge to implement plans that will lead to the creation of important digital archives. Scholars everywhere will use these archives, thereby strengthening the brand of the law library, law school, and university. This will further reinforce the importance of the library to the greater institution, potentially leading to improved staffing and funding.

Preservation

Libraries exist largely to preserve the knowledge of those who came before the current generation. As such, a major part of our role is to preserve content from the past and make it accessible to those in the present and the future. The print-to-digital transition is a challenge we are all facing. How do we preserve the print, in case it is needed, while migrating as much content as possible to the digital environment where it will be accessible to far more people than when the same work was in print? This is the greatest fear of publishers, but does not necessarily create an adversarial relationship between publishers and libraries for several reasons.

First of all, libraries are already working to preserve content that currently exists in the public domain, such as books that are out of copyright and uncopyrightable government documents. In addition, some libraries have licensed the right to preserve certain content that does not have great economic value to the publisher. These efforts are in addition to projects like HathiTrust,[7] which attempt to preserve protected content in case the original creators or licensees disappear.

Even as acidic paper is self-destructing on the shelves, we also face the challenge of preserving cassette tapes, VCR tapes, CD-ROMs, and other obsolete formats. Preserving these formats is difficult because we need machines to play the old formats as well as computers to encode the new ones. In addition, we need to preserve the original quality to the best of our abilities, even as the

particles are falling off the tapes we are trying to preserve. In terms of copyright, it is especially difficult to get permission to migrate data and make it more available when the creators are impossible to find or the work is still of great commercial value.

We have all had the experience of going to a website one week and finding it gone the next week. The preservation of content on the web is a huge challenge, given both the quantity of information and copyright law. For now, many are very selective in how they preserve web content in digital archives. Looking forward, we will have even greater challenges when the traditional computer file formats of HTML, Microsoft Word, and Adobe PDF are no longer industry standards.

Institutional Repositories

So far, we have discussed the importance of copyright knowledge to libraries and their greater institutions, as a way to offer unique content globally. One step beyond that is the creation of institutional repositories that showcase the work of our faculty members, staff, and students. This is a special type of digital archive that makes content created by the law school more easily accessible for those outside the law school by posting the full text of articles and book chapters on the Internet. Institutional repositories improve the image of the school as well as contributing to the greater legal information ecosystem. Institutional repositories are in addition to including the content in SSRN, be press, and other collections of related content, rather than instead of them. The theory is that the more accessible a work is, the more widely it will be read and cited.

The creation of institutional repositories is just the first step in the creation of this new ecosystem. Following the creation of these repositories, we will need to create tools to facilitate searching multiple repositories as well as perhaps creating metadata to provide subject access to related articles across schools. These interlinkages are already being done for case law and can be done either through cataloging practices or with technology that can search and automatically link articles that cite the same cases or have unusual keywords in common.[8]

The creation of an institutional repository takes some technical skill and significant hard work. Much of the hard work lies in ensuring that you have the right to post all the articles you want to. This process involves multiple steps, including determining whether inclusion of the article in the repository is fair dealing/fair use, figuring out who can legally permit you to reprint the article or book chapter, and explaining to the publisher why an institutional repository will not hurt sales of the journal. After these steps, the scanning, tagging, and uploading of the content is neither difficult nor time consuming.

Unlike a digital archive of historical content, an institutional repository should continually grow as your faculty, staff, and students publish more

content. Due to this growth, keeping the repository up-to-date is a significant commitment, which must be staffed on an ongoing basis. An additional challenge for institutional repositories is ensuring that everyone in the community informs you when something has been published and ideally gives you a copy. Finally, although institutional repositories are largely textual, some may include audio and video content, such as television and radio interviews, which need to be planned for and licensed in advance.

Consortia and Collaboration

It can be overwhelming to contemplate the changes law libraries will face in the near future. How can we preserve all legal knowledge in all formats for all time? What happens if we fail or make the wrong choices? What will libraries even look like in 10, 20, or 50 years?

We cannot know the answers to these questions. At the same time, we cannot let these questions paralyze us. We must move forward, and one way to do that is to collaborate more with our peer institutions. Right now, we are all getting our feet wet with these projects. We are experimenting on a small scale and waiting for the technologies to settle down. Unfortunately, I don't think technologies will settle down. What we can do is talk to our peer librarians at other schools and start to plan how multiple schools can break up these immense tasks into manageable projects.

For example, in a consortium of law libraries, one library could be in charge of licensing content, another could do the scanning, and a third could do the tagging and uploading. Yes, they would all need to agree on the scope of the project and the timeline, but it would mean that not every library would need to experiment with all aspects of each digital project.

Currently, there are consortia for licensing databases, coordinating print collection development, and resource sharing. In the future, similar consortia could work on digital archive creation and maintenance. One the greatest challenges to this vision is that the future is uncertain, and the project as a whole is only as strong as its weakest link. If one of the libraries loses half its staff to budget cuts, this loss will affect all libraries in the consortium. How can we all rely on each other in these times of uncertainty? In short, we cannot. We must take a leap of faith and begin with a project that is not too large or ambitious. If the project is achievable in a brief two or three year timespan, the risk of an institution dropping out is lower.

Librarians are better than almost any other profession at sharing and coordinating because that is the reason libraries exist as institutions. Now is the time for us to gain the copyright and licensing knowledge needed and to collaborate on the creation of this next wave of content.

Endnotes

1. Svengalis, Kendall F., The Legal Information Buyer's Guide and Reference Manual, Barrington, Rhode Island, Rhode Island Law Press, 2011.

2. Sims, Nancy. "Library licensing and criminal law: The Aaron Swartz case." College & Research Libraries News72:9 (October 2011): 534-537.

3. Ferullo, Donna L. "Major Copyright Issues in Academic Libraries: Legal Implications of a Digital Environment" Journal of Library Administration 40:1-2 (2004): 23-40.

4. [Priya – this should be a citation to this book, specifically, the section discussion licensing.]

5. India Copyright Law, 1957 [Sec. 30]? - Priya – I discussed this with several people at the conference but cannot find the law or case that stands for the proposition that, for example, a license cannot prohibit a user from exercising their right to fair dealing. I do not have access to many Indian legal research tools from here.

6. University of Washington Gallagher Law Library, Current Index to Legal Periodicals, 1948-; National Law University-Delhi, Index to Indian & Foreign Legal Articles, NLUD Press, 2011-.

7. http://www.portico.org/digital-preservation/services/evaluating-your-preservation-options

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