OPEN ACCESS: OPPORTUNITIES & OBSTACLES

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OVERVIEW

• How some degrees of open access have been achieved in the past
• Why © has become an obstacle to library activities
• Why open access has become a popular concept in the current era
• What obstacles besides © impede open access
• How those obstacles might be overcome so that promise of open access can be realized
OPEN ACCESS IN THE PAST

• Copyright used to be an “opt-in” regime
  – Works of authorship were in the public domain unless authors complied with formalities (e.g., registration and notice on copies)
  – Public domain works can be made freely accessible

• Now it’s an “opt-out” system
  – Rights attach automatically by operation of law
  – Last life of the author + 50 or 70 years

• Some works ineligible
  – Lack of originality; US gov’t works ineligible; laws, etc.
ROLE OF LIBRARIES

- Libraries have traditionally been sites at which patrons can have an open access experience.
- Repositories for collections often developed over considerable time.
- Qualified persons are eligible to come and examine resources, use for research, borrow some resources for a period of time.
- Some special rules for libraries in © laws.
- Mostly stable situation for many decades.
SPECIAL RULES

• ©’s exclusive rights have generally been limited in scope so that lending was not within rights holders’ control

• Nowadays © regulates the distributions of copies, but the “1st sale” or “exhaustion” rule generally allows lending
  – © owner is entitled to control the 1st sale of works to the public, after which distribution right is said to be “exhausted”
  – Countries vary on national, regional, or int’l exhaustion
  – In some countries (e.g., UK), © laws regulate public lending

• Most countries have special rules to protect library activities (e.g., preservation copying, ILL)

• Some countries (e.g., the US) have fair use, fair dealing rules that allow some copying for research purposes
FAIR USE

• Fair uses are not infringements
• 4 factors typically considered:
  • Purpose of D’s use
  • Nature of ©’d work
  • Amount & substantiality of taking
  • Harm to actual & potential markets for the work
• Favored uses include research, scholarship, & teaching
  – “Productive” uses favored over “consumptive” uses
  – Noncommercial uses favored over commercial uses
COPYING FOR PATRONS

• One flashpoint historically has been photocopying by patrons in libraries, or library photocopying for patrons
  – Some countries handle this through levies (i.e., OK to copy but have to pay fee)
  – Fair use litigation in the US:
    • Williams & Wilkins v. U.S. (1973): Fair use for NIH to make photocopies for researchers
    • American Geophysical Union v. Texaco (1995): Copying for archival purposes was unfair
CURRENT LITIGATION

• Electronic reserve policies at universities are under challenge in *CUP v. Becker*
• Library digital preservation practices are also under challenge in *AG v. HathiTrust*
• Ability of libraries to lend foreign books is at stake in *Kirtsaeng v. Wiley*
• Whether exhaustion rules apply to transfers of digital copies tested in *ReDigi*
CUP v BECKER

• Cambridge University Press sued Becker, who works for Georgia State University, over GSU’s policy & guidelines for uploading of in-© materials for electronic course reserves
• Becker raised fair use defense
• Trial judge in 350 pg opinion ruled in B’s favor
• CUP has appealed with amicus briefs filed in support by the Authors Guild & AAUP
• Matter now before an appellate court
BECKER’S FAIR USE

+ Purpose: educational, noncommercial

+ Nature of works: most written to promote learning, not to make $

+ Amount: less than 10%, 1 chapter from books (although not textbooks)

+ Harm: no existing convenient licensing system
CUP’s RESPONSE

- Purpose: non-transformative, consumptive use
- Nature of work: texts created and disseminated for educational markets
- Amount: substantial amounts taken; often the “heart” of the work
- Harm to the market: willing to license through CCC; equivalent to coursepacks
- Anything beyond §108 bears heavy burden of proof that the use is fair
IMPLICATIONS

• A win for Becker would enable educational uses of materials by research libraries
  – It would also help with other educational uses of in-© works
  – It would help with fair use for digitization of orphan works

• A win for CUP will help CCC’s strategy to license all uses of ©’d works in university settings
  – Never followed up on American Geophysical Union v. Texaco vs. universities, but it’s always been a goal
AUTHORS GUILD v. HT

• HathiTrust is a consortium of research library partners of Google
• HathiTrust is the repository of library digital copies (LDCs) that Google supplied to its partners of books from their collections scanned for the Google Book Search (GBS) project
• Authors Guild has sued HT & UC, among others, claiming that the LDCs are infringing copies
• HT won at trial court on fair use; AG has appealed
AG: NOT FAIR USE

- Purpose: commercial, non-transformative
- Nature of work: creative works of all genres,
- Amount: whole works copied, systematically, stored permanently, copies given to library partners
- Harm: Presume it because lack of control, risk of loss from inadequate security; plus we want to license such uses
- Very nature of © to require users to get permission in advance
WHY HT WON FAIR USE

• Purpose of use = “transformative”
  • Preservation of works in research library collections
  • Computational research (e.g., digital humanities)
  • Enhanced access for print-disabled persons

• Nature of ©’d works: mostly nonfiction

• Amount copied: reasonable in light of purposes; sometimes necessary to copy whole works for purposes

• Impact on market: no quantifiable harm to date
  – Harm to future licensing markets = speculative
  – Prohibitively expensive to license on book-by-book basis for preservation, computational research & disabled access
MASS DIGITIZATION AS FAIR USE?

• Google aimed to bypass © obstacles to mass digitization of in-© books through fair use
  – Fair use to scan for purposes of indexing
  – Fair use to scan for purpose of providing snippets
    • With links to sources from which the books could be purchased or borrowed
    • No advertising unless RH agreed
    • Willing to exclude works if RHs asked for this
  – Implicitly also claiming fair use to make non-expressive uses, such as analytics aimed at improving search and translation tools
  – Fair use to give LDCs to library partners for preservation, privileged uses
  – Over time, G might have been willing to make the full texts of orphan books available, either as fair uses or on terms authorized by Congress through orphan works legislation
GOOGLE: FAIR USE

+ purpose: transformative because promotes public access to information

+ nature of work: most books in GBS are scholarly nonfiction & out-of-print

+ amount: whole thing, but necessary to index; only snippets available unless RH agrees to more

+ harm: transactions costs problems with clearing rights = market failure; GBS enhances market for many books (we’ll link to where you can buy them); not serving ads
+ we’ll take your book out if you don’t want it in GBS
IMPLICATIONS

• If appellate court affirms in HT, this would mean that other nonprofit libraries & educational institutions would be free to scan works for similar purposes
  – It would help G’s fair use defense as well
  – It would also strengthen fair use argument for making orphan works available
  – It might also support library lending of ebooks (scanned from their collections)
• If AG wins on appeal, an invaluable resource (10M books in HT corpus) will be endangered
  – © owners entitled to impound & destroy infringing wks
KIRTSANENG v. WILEY

- Kirtsaeng’s family bought copies of textbooks lawfully made and sold in Thailand, shipped the books to him at Cornell, where he resold them on eBay; this helped him pay his graduate school expenses.
- Wiley sued K for infringement alleging that he unlawfully distributed copies of its works.
- K raised 1st sale/exhaustion defense; lost at trial; $600K judgment vs. him (statutory damages).
- Wiley claims 1st sale only applies to copies lawfully made on U.S. soil.
- SCT will decide by June.
CAPITOL v REDIGI

- ReDigi developed software to enable a market for “resale” of digital music
  - Resale of ebooks in contemplation also
- Capitol sued for © infringement because copies made using R’s sw in course of resale
- ReDigi raised 1st sale defense
- Capitol argues inapplicable because only limits distribution right, not reproduction right
- But Court of Justice of EU: exhaustion applies to “licensed” SW

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IMPLICATIONS

• A win for Kirtsaeng would put libraries at ease
• A win for Wiley would mean that foreign-published books in library collections could not be lawfully lent to patrons
• Legislation to address exhaustion seems likely
• A win for ReDigi would mean 1st sale/exhaustion is applicable in digital environment
• License v. sale issue not posed in ReDigi, but also unsettled in the U.S.
• Some libraries have been digitizing out-of-print books in their collections, lending them with DRM
  – Victories in CUP & ReDigi would help with their fair use defenses
“ORPHAN WORKS”

• Millions of works are still in-© but rights holder is unknown or unfindable after a diligent search

• Copyright Office study in 2006 recommended legislation to limit liability for those who reuse orphan works (OW) after search attempt; renewed interest in this in 2013

• Recent EU Directive would authorize libraries to make some types of OWs available

• Berkeley Digital Library Project has five “white papers” on OW subjects

• Especially troublesome to track down foreign works
  – In the U.S., ©s were “restored” for works long thought to be in the public domain for failure to comply with formalities (required notices on copies)
FAIR USE FOR OWs?

• Purpose: transformative because increased access to knowledge
  – Nonprofit libraries could emphasize benefits to research & learning as favored uses
• Nature of work: orphans; out-of-print
• Amount copied: whole thing cuts vs. but should not be given too much weight
• Harm to market: none because RH not there to establish a market for these works
WHY OPEN ACCESS NOW?

• In part this is because new opportunities for sharing have been opened up by the Internet
• In part this is because many creators are more interested in sharing than in restricting access
• In part this is because conventional publishers are not needed to disseminate knowledge much as in the past
• Creative Commons has developed a series of licenses to accommodate open access
  – Building off open source software licensing concepts
OBSTACLES

• Legacy works

• Mindsets of authors & others

• Special problems for some creators

• Sustainability

• Preservation
LEGACY

• Many works were published before open access norms & practices were developed
• Libraries house many of these legacy artifacts
• Many libraries would like to digitize collections and make them available online
• © may stand as an obstacle to this
• Some authors could exercise reversion & termination rights to make past works available on open access basis, but inertia slows this
MINDSETS

• Many academic authors are used to the status quo, have benefited by it
• Academic advancement often depends on publishing in proprietary journals, presses
• © is unfamiliar terrain, & authors don’t want to think about it or be bothered by it
• Scholarly societies may depend on journal subscriptions to support services
OTHER PROBLEMS

• Some academic authors find open access mandates to be objectionable interferences with their freedoms

• Some academic authors have special difficulties because they have to clear rights to images or photographs for their publications
  – Not in a position to agree to open access
SUSTAINABILITY

• Open access publications still cost money
• PLOS, for example, has staff of 200 people to manage the flow of manuscripts
• Scientists can often pay fees from grant money to fund open access publications
• But how are humanities & social sciences scholars going to manage the economics of open access?
• Who will preserve these works for the future?
HOW TO MAKE PROGRESS?

• Promoting open access policies with repositories
• Convincing faculty not to assign ©s
• Adopting policies for university retention of a license to make faculty work available for educational uses
• New business models for university presses and journals, perhaps becoming parts of libraries
• Role for Authors Alliance
• Pressing JSTOR, et al., to broaden access
OTHER MOVES

• Work with professors, academic presses, universities, other open access advocates
  – Professors can insist going forward that their books be available in digital libraries, can request their publishers to agree to library licenses for past books, particularly OOP
  – Professors may well have e-book rights under the *Random House v. Rosetta* decision to make available in digital libraries

• What if major university presidents announced that their university presses would allow CC-licenses for all OOP books & encouraged faculty to do this?
  – Might set good example for others to follow
  – Send link to faculty to click here “I agree to CC license for the following books for a digital library repository”
CONCLUSION

• Open access has attained considerable momentum in recent years

• Open access provides opportunities for libraries to make many artifacts more widely available, fulfilling their missions better than ever before

• Some obstacles exist to open access, but with careful leadership, these can be overcome