

Rights, Copyrights and Licenses: the Basics and What They Mean

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INTRODUCTION

The buoyant days of free Internet culture seem to many have faded into the past. While there are scientists and activists who dream of free information for all, through initiatives such as the international Public Library of Science movement or the United States' PubMed Central, the reality is that we have moved into a world in which we realize that high quality electronic information carries a cost. Therefore, such electronic information can, will, and must be governed somehow by the rules of economics -- and thus lends itself to analysis in terms of "rights." For it seems that all we hear of these days are the "rights" of all parties to arrangements to supply and maintain electronic scientific and scholarly information.

HOW DO WE UNDERSTAND "RIGHTS?"

Rights may involve people or property: in the Internet world, we speak about property rights. These rights would not exist if it were not for the eighteenth century invention of the concept of copyright, the idea that turned words and artistic creations into marketable property. Copyright was an extraordinary invention, one that has driven centuries of dynamic intellectual and cultural activity and has become part of our most basic unspoken assumptions about how we live and move and have our being within an advanced social organism.

But if words and pictures can be owned, they can thereby be bought and sold: that is the purpose of creating the notion of "intellectual property". And in any such property arrangement, buyers and sellers both have rights that maybe exercised or yielded, sold or asserted, and perhaps made the basis of courtroom litigation. It is a peculiarity of copyright law that many transactions between buyers and sellers are governed quite explicitly by a law that is never mentioned in the course of the buying/selling transaction (that is, by copyright itself), and many others are more formally negotiated in explicit ways to limit and manage the rights created by copyright -- i.e., in transactions governed by the special form of contract known as "licenses."

So if I sell you a book I have written and rely on copyright for protection, there are many things you can do with that particular physical object, that book. You can resell it to someone else, for example. But if I were to wish to restrict your use, then before ever I sell the book to you I could try to insist that you agree to a contract limiting your rights to use that physical book. In that case, I would propose to license the book to you, and in that license I might insist that you could never sell the book to anyone else -- and that if you ever attempt to do so, I have the right to claim it back from you. Such peremptory behavior would be in no way supported by any copyright law I know of, but if you, the customer, are willing to sign a contract of purchase on those terms, then you and I may make that arrangement.

I have given the above example as an extreme case; yet it is meant to illustrate how far away from standard copyright provisions a "license" might go. That is, copyright forms the basis for understanding the rights of information buyer and seller, even as licensing can restrict either or both party's standing dramatically. Ideally, a license would be agreed to freely and willingly by both parties, but if the seller has a product that the buyer desperately wants, then the seller may be very demanding about what the buyer must agree to.

In fact, in the typical case involving commercially retailed software products, the buyer usually finds a "shrinkwrap" license -- that is to say, he or she purchases a package wherein the text of a license is enclosed inside a plastic sealed package. That text informs the buyer, that once the package is opened, he or she must either abide by the terms of the license or return the product to the dealer. At the very least, the purchaser is in a weak position to contest such a shrinkwrap contract, and the result is slanted sharply in favor of the publisher.

LIBRARIES AND PUBLISHERS DO BUSINESS TOGETHER

But my topic today is really about a set of relationships. Publishers and libraries have known each other for many years and have negotiated many kinds of contracts. The licenses we know establish for digital information are really an extension of business deals we have been conducting for a long time. Even so, unfamiliarity breeds confusion and there are many real and potential conflicts among authors' rights, publisher's rights, users' rights, library rights -- and even institutional responsibilities. My purpose today is to introduce some of the fundamental issues and reflect upon their importance and their future resolution.

Libraries have long-established regimes and practices already in place in the print environment . These answer such fundamental questions as who may have access to information sources; how and where and when; how we provide for sharing information content with others by lending it for a time; and who may reproduce information for the benefit of others, especially through photocopying for local use or for "document delivery" via interlibrary loan. Library practices are governed by our national copyright laws in their traditional forms. The last real technological challenge before the onslaught of digital information in the 1990s was the arrival in the 1960s of photocopying. A series of legal adjustments and court cases about photocopying now exist, and they reflect the modifications of practice required when for the first time in history ordinary readers had the cheap and easy use of a tool for rapid and inexpensive multiplication of copies of a printed document.

Electronic information rules might seem as if they ought to be the same as for paper information, but they now seem to be evolving somewhat differently. The relative uncertainties within the new electronic networked environment make copyright owners reluctant to trust the broad umbrella of copyright to protect them, and so they wrap themselves in what they hope are airtight and watertight license agreements in order to have more control in what seems a dizzyingly uncontrollable environment. So when it comes to using electronic information, licenses may attempt sharply to restrict who may access a particular information site, how many people may do so at one time, and where they must be when they do so. Licenses may similarly restrict how information can be passed around (downloading, forwarding, sharing passwords) or duplicated (copying, printing, etc.).

How does this happen? By legal definition, copyright begins its life as a right exclusive of the creator of a given work. The author's set of rights may, by law, be transferred in whole or in part -- and often the first transfer occurs when author signs rights over to the publisher. Copyright transfers are by definition exclusive: only those named in a contract acquire such rights until some final time when the copyright protection period has ended and the work passes into the public domain. Copyright is by definition limited in duration (though some governments now pass extensions periodically and make activists worry that some works may now *never* go out of copyright if the practice continues indefinitely). An author or creator's assignments of rights may be made for the whole of copyright's life or for any lesser period. Once copyright is transferred, the intellectual property itself is understood as changing hands. Owning copyright is very different from owning a physical object that contains or represents a copyrighted work. That is, the buyer of a book buys only that object and the limited legal rights inherent in owning that particular copy; he or does not buy the copyright.

When licenses are struck, the original ownership right in the information also does not change hands. The user of the information, or the licensee, has a right to use the information on specific terms, but ownership remains with the original creator. Licenses can be exclusive (very often this is true when an author licenses someone to publish his work), but they can also be non-exclusive (when an author allows different users the same access to his work). A license time period always needs to be established, but we should bear in mind that if the object of the license is subject to copyright, then the expiration of copyright could affect the ability to extend a license.

COPYRIGHTS AND LICENSES: DIFFERENCES

Both copyrights and licenses assume that the concept of intellectual "property" exists and is the appropriate vehicle for commerce in words and images. But copyright depends on a statutory enactment; it is the law of the country. Copyright law prescribes general concepts and values at a high conceptual level and is typically, sometimes infuriatingly, low in specifics. Some of the most contentious aspects of the 1976 U.S. Copyright Act, for example, arise from the "fair use" provisions that have never yet, after twenty-five years, been subject to a thorough examination in a court of law and thus remain maddeningly (or advantageously) vague. Copyright law defines the rights of owners and limits the lawful uses of copyright materials by non-owners. Copyright has the virtue of solidity and the defect of relative immutability: it can be changed only slowly and contentiously by appropriate legislative authority.

Librarians, who like to live in orderly and stable environments, believe "copyright" is a good thing.

Licenses do not transfer copyright: Granting a license means granting rights of use to that whose intellectual property one does not own. A license is, first and foremost, the embodiment of a business deal. It defines every aspect of a business arrangement between library and publisher, such as what users may do with the information, where, when, for what price, with what undertakings. Licenses are quite specific, generally tailored for each customer and resource. Everything is negotiable, and if no agreement is reached, no license happens. But once agreement is reached and signatures affixed, the agreement is legally binding.

Librarians, who often feel at a disadvantage when faced with the lawyers and financial resources of big publishers, are inclined to think "license" is not as good a construct as "copyright". But when we engage in licenses, they can and do help us to manage our business in specific ways. Licenses can restrict or clarify rights granted by copyright; they can incorporate specific copyright definitions and principles (such as the right to interlibrary loan or fair use) and even make them more specific and less ambiguous; and they can even extend rights granted by copyright beyond what would be the case under the law alone. Copyright is always there in the background: if the license does not address an issue, copyright is presumed to be the governing and overarching regime.

What if there is conflict between licensor and licensee? Who prevails? Here it is hard to predict. In practice, irresolvable conflict has been rare. It makes sense to assume that your license will be legal and to agree to the terms your institution is willing to live with. It is not wise to expect or plan on lawsuits. court tests take a long time and are costly; in an educational setting, students will have graduated by the time litigation is finished. They will be richer; we will be poorer.

WHY LICENSE?

Why is licensing increasingly prevalent in the sale and use of digital information? Here are several reasons:

- Many authors and publishers (i.e., rights owners) feel that copyright does not adequately address a high-tech world of rapid copying and distribution. Copyright laws have for the most part not yet been supplemented by reasonable (nationally mandated) electronic fair use guidelines. In the U.S., a three-year process called the Conference on Fair Use (CONFU) was not successful in reaching consensus between publishers and librarians. So it is that all sides may feel unsure of where they stand under copyright law and may seek the protection of more explicit local agreements.
- Copyright, moreover, does not address all the questions and details concerning complicated and alarmingly expensive "deals" for electronic resources. A license can provide reassuring specificity. It will answer such important questions as:

Exactly who are the parties involved?
What rights do the parties have?
Under what terms and conditions?

And if we know the answers to those questions, we can achieve success in what often become big, complicated business deals involving a single library or regional and even national consortia of libraries and users.

- There is another crucial reason for the rise of licensing arrangements. Copyright does not give any ownership rights in public domain materials, but there are many digital projects that involve repackaging and re-presenting such public information. These projects can include not only out-of-copyright material from long ago, but also current information contained in databases and not eligible for copyright for content, but of high value to the producer for the arrangement and implementation in a particular technological form. In such cases, *only* licensing can protect the rights and investment of the creator and publisher.
- Copyright law is currently in a state of flux, and at such times, licenses can be substantial protection in a volatile legal environment.

And we can expect that copyright will remain in flux for some time to come, as we learn to understand the impact of the rapid information distribution technologies on society. A quick outline merely of the U.S. experience gives a sense of this volatility. First, under the Clinton administration in 1994 and 1995, a government-written "white paper" set off a firestorm of debate regarding commercial use vs. fair use. That initiative led to further discourse, such as the long-lasting CONFU, a series of meetings between numerous information stakeholders representing both public and private interests. The 1996 European database legislation had considerable and profound impact upon us. Even though that legislation had no legal standing in the U.S., the need of American firms to operate in a global environment means that legislative actions taken elsewhere often have a great deal of influence. At about the same time, WIPO members were working to harmonize protection of intellectual property and to advance global commerce. The Digital Millennium Copyright Act (DMCA) served as WIPO's implementation in the United States. The passage of the DMCA brought with it numerous changes: for example, it contains provisions affecting the responsibilities of Internet Service Providers (ISPs); access to information for distance learning projects; and an increased term protection under existing copyright law to life of the creator plus 70 years. The DMCA also outlawed circumvention of technological protection measures (and this has been very controversial among researchers and digital activists and is now being tested in the courts).

In a world as volatile as ours, licenses can seem to be a safe harbor. Of course, they need to be undertaken with some cautions and concerns. For example:

Licenses should not exclude or negatively impact any statutory rights that may be granted under copyright law – be sure not to give away what is already yours.

A good license will respect users' privacy, but vendors often want to acquire information about your users as part of the bargain: watch that carefully.

A license will, of course, give your readers the access and rights they need to do their work, and a realistic sense of what patrons need is probably the most important thing a librarian takes to the negotiating table.

And finally, a license should be clear and easy to understand -- neither of the actual negotiating parties will be there in the library when real users have to figure out how they may use the material, and neither negotiator may be present when the contract comes up for renewal.

RELATED MATTERS

Now it is worth spending a little time on some related issues.

- First, "click" or "shrinkwrap" licenses, the kind that are bundled with an electronic resource (say a CD that is purchased) and appear to offer the library no negotiation space. The inability to negotiate is a serious disadvantage: provisions may be included that are difficult or impossible or undesirable for an institution and its users. Sometimes the agreement is one that is presented in fine print on the web and the user is asked to click agreement in order to proceed. These arrangements are of questionable legal authority, but it is generally believed that they may be legally binding, at least in the U.S.

Such shrinkwrap or click licenses tend to afflict individual users more than libraries. Specific negotiation will almost always be to an institution's advantage. In principle our library says that all licenses are negotiable and we act accordingly.

- Authors' rights loom as another issue of great importance. Two categories of authors feel very differently about rights: (1) authors who earn a living through creation (journalists for example), want to be paid for their work; and (2) scholarly authors who are paid for their research (scientists for example) tend to want to have their work widely and freely distributed. The former group is more likely to be active in ways that will affect the information purchaser.

On September 24, 1999, in the legal case known as *Tasini v. The New York Times*, the U.S. Second Circuit overturned a previous federal district court ruling and found that the New York Times, Lexis-Nexis, and other publishers cannot place or re-sell freelance newspaper and magazine articles into electronic databases without authors' express permissions. The court said: "It is undisputed that the electronic databases are [not] the original collective work . . . Moreover, Nexis does almost nothing to preserve the copyrightable aspects of the publishers' collective works as distinguished from the preexisting material employed in the work . . ."

This ruling was appealed to the Supreme Court, which has now heard the arguments of the two sides. It is a potential nightmare for vendors of large collections of online texts, but for the librarian's purpose it leads to one pointed question: Does your database licensor have the rights to license the content to you? If your partner in the contract does not have those rights, then the license will be null and void to that extent.

- Peer-to-peer information transmission. Little needs to be said here, save that the development of softwares that enable users to share information directly and bypass any middle-folk, technologies such as Napster and Gnutella, lead rights owners to be concerned that all information will become free and that the incentives to be in business will be altogether gone – along with their livelihoods. Those who support the unfettered use of such technologies, on the other hand, say that the ability to control information is now over; no rules will govern the networked environment at all – if they do, those rules will be broken and will seem foolish.

- Non-commercial authors such as scientists have their own concerns. There is a growing authors' backlash against the high prices charged by certain for-profit and not-for-profit scientific, technical, and medical publishers. This backlash has expressed itself on a small scale for years in movements in particular disciplines to make information freely available. In recent years, particularly since encouraged by the former head of the National Institutes of Health, Nobel Prize-winner Harold Varmus, this movement has gained visibility, now leading to agitation for scientists to refuse to supply their articles and services to journals that will not agree to make the resulting articles freely available on the Internet within six months of original publication. Along with this, scientists are creating preprint sites and new journals in which authors do not transfer copyrights to publishers (instead issuing their own license to the publisher!). These are complicated issues involving a very large (multi-multi-billion-dollar) business and it is too early yet to predict where this revolt will go.

WHAT WILL THE NEXT FEW YEARS BRING?

Let me close with a few prophecies stretching all the way to the year 2005:

First, here are some predictions about the general landscape:

- All significant English-language scholarly journals are or will be available on the WWW.
- All significant journals will be linked and interlinked, starting with STM fields
- We will see significant media enrichment beyond print (content that can't be printed) in many journals.
- Current scholarly books will begin to appear online in appreciable numbers, with perhaps some fading of the printed scholarly monograph.
- Hand-held books, wireless technologies will become nearly ubiquitous.

Then the business side of things:

- Copyright and related rights will be strengthened in law and in practice.
- More legislation will be enacted to protect producer investments.
- More lawsuits to define and enforce the rules will occur.
- The information world will work under a series of multiple, intertwined licensing and arrangements:
 - Authors will license publishers;
 - Publishers will license third parties;
 - Libraries and consortia will license content.

It is no secret that all of this will be potentially confusing and risky. The astute consumer of information will be one who is well-informed, up-to-date, and active in defense of what is important.

But it is important to be appropriately optimistic. We in libraries, archives, and museums, i.e., the information services arena, *can* provide our users what they need to study, do research, teach, and publish. By working with the providers and users, we are becoming well-informed about their needs, and we are learning to be better negotiators.

Short List of Useful Readings:

● *The Digital Dilemma; intellectual property in the information age.* Washington, DC, National Academy Press, 2000. Also available for free: <<http://books.nap.edu/catalog/9601.html>>

● The LIBLICENSE web site (all you ever wanted to know about licensing), at: <<http://www.library.yale.edu/~llicense/index.shtml>> See particularly the new DLF Model License at: <<http://www.library.yale.edu/~llicense/modlic.shtml>>

● IFLA Licensing Principles, at: <<http://www.ifla.org/V/ebpb/copy.htm>>

● Public Library of Science, at: <<http://www.publiclibraryofscience.org/>>
"Should the record of scientific research be privately owned and controlled?"