

TOPIC 4:

USING COPYRIGHTED MATERIALS ON THE LIBRARY INTRANET

Topic question

Can the library make available copyrighted material such as periodical articles on its intranet or use other copyrighted material to create indexes?

Overview

Rather than creating a digital clippings or vertical file discussed in Topic 3, Topic 4 discusses the use of the library Internet to disseminate periodical articles. This dissemination might be one-to-one or one-to-many. In either case, the library is distributing the full text of periodical literature within its intranet, sending it directly to a patron as part of a selective dissemination service (one to one) or by posting the article onto its intranet for numerous intranet users to read (one to many). Recent case law suggests the posting and distribution of articles in this fashion is not likely a fair use, even in nonprofit settings. The use of a library Intranet is contrasted with the creation of a library e-reserve, which is not discussed in this Report and which many commentators say is supported by fair use.¹⁰²

Because the articles are loaded into the reserve or intranet as a substitute for purchase, the use here is not transformative but merely a substitute for the work or a copy of it.¹⁰³ This use surely impacts the market for the work, since a secondary market for reproductions of periodical literature exists.

A third fair-use factor, the amount, would also weigh against a finding of fair use as a complete copy of the article is made. The nature of the work may or may not favor fair use depending on whether the article is scientific in nature (thin copyright) or creative (thick copyright). At best only one or two of the fair-use factors would favor this sort of reproduction and dissemination on the library intranet. This conclusion assumes the work is on the thin end of the copyright protection scale, but since it is a complete taking, it impacts the market, and it is merely a substitute for the original. It is unlikely a fair use.

A library that uses (posts or disseminates) periodical literature retrieved from online databases to which the library subscribes on its Intranet may run afoul of the terms of the license agreement governing the use of the online database. The same might also be true of periodical literature retrieved from an open Web site. The Web site may not charge a fee for use or downloading of articles on its site, but the Web site restricts the further dissemination of material. The Web site may contain a legal notice that indicates that further distribution of articles on the site is prohibited and may ask site users to “click here” to agree to these terms.

Are these conditions binding on the library? Whether the conditions are binding may depend on the vehicle (shrink-wrap, Web-wrap, and Web-browse) the other site used to control subsequent downstream use of the material it posted. Several courts have validated the use of shrink-wrap and

Web-wrap, but others have been more cautious with terms and conditions contained Web-browse or browse-wrap agreements where no requirement exists that a site visitor actually read the information.

What you need to know

Familiarity with the following is helpful to fully comprehend the discussion of this topic:

- A thorough understanding of Section 107 (fair use) and how it is applied in the library.

Why watch this topic?

With more and more information available only in digital formats, libraries naturally want to take advantage of the ease with which digital information can be accessed and distributed to patrons. Contractual or license restrictions notwithstanding, the further distribution of digital material within the library and the ability of patrons to copy or pass along the information may deprive the copyright owner of the full economic return due for the library's use of the information. For example, a library could retrieve an article from an online database and make the article available in an in-house database for patrons to download, print, or redistribute.

Most information obtained from an online database, CD-ROM or similar product is governed by a license agreement that determines whether further distribution (on the library intranet, for example) is allowed or prohibited. Alternatively, a library may be permitted this use under the license, but the vendor wants to be compensated for each copy—whether distribution, download, or print—that is made of the article.

But what of cases in circumstances such as when a library imports an article from a Web site where the information is available for free, or when an article is scanned and loaded onto the library intranet from a paper source? (This case also assumes the material is not obtained through any other collection development or subscription service.)

Although this topic does not discuss the use of material in reserve or electronic reserve collections, much of this discussion applies to those settings, too. Again, library use of an article may be restricted by the terms and conditions posted at the site from which the information was obtained. In the absence of any such restrictions, does fair use support the incorporation of the article into the library intranet? Case law suggests not.

Background: Section 108 and systematic reproduction

Subsections (d) and (e) of Section 108 allow the library or archive to make a single copy of an item for a patron. What of circumstances where a patron makes an interlibrary loan (ILL) request, so that over time, multiple copies of the same item are made? Section 108(g) attempts to address this common occurrence by stating that "[t]he rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions."

By the plain language of the statute (“same material on separate occasions”), if over time the library has made multiple copies of the same item, these reproductions should not sound an alarm. The library, however, must be aware of the bigger picture—specific quantitative limits are suggested in ILL guidelines proposed as part of the legislative history of Section 108 and have since become widely implemented as the operational norm of most libraries and archives.

Section 108(g) has two significant limitations on the concept of repeat copying of the same item. The first limitation states that multiple copying over time is not allowed when the “library or archives, or its employee is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group.”¹⁰⁴

These words seem to sound a death knell for reserve or intranet collections, unless the intranet is used only as a distribution mechanism and retains the one-to-one of typical and acceptable ILL scenarios. But when the single intranet item can be accessed by multiple parties, it violates the Section 108(g)(1) prohibition on “multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group.” This same limitation applies to library reserves.

The second limitation, set forth in Section 108(g)(2), states that the rights of reproduction and distribution “do not extend to cases where the library or archives, or its employee engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): Provided, that nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.”¹⁰⁵ The Section 108(g)(2) restriction functions as a counterpart to the additional requirement on subsection (d) reproductions and distributions contained in Section 108(d): the copying of “no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work,” on the assumption that this sort of copying is more frequent in libraries and archives and thus potentially subject to more abuse.

The legislative history suggests most of the concern about these kinds of abusive distributions centers on the concept of systematic copying in Subsection (g)(2), not on (g)(1), perhaps because the concerted or related multiple copying language of (g)(1) is straightforward. For example, the 1976 Senate Report suggests that Section 108 could not be used to support multiple copying by the library for student or classroom use.¹⁰⁶ Multiple copying for classroom use is covered by guidelines drafted under Section 107.¹⁰⁷ Section 108(g)(1) also prohibits a library from making a copy for the same patron who comes to the ILL desk or copy center every day and asks for a second, third, fourth, and so on, copy of the same article.

What about a situation where a patron approaches the circulation staff, asks for \$10 in dimes, and indicates that he or she is a teacher preparing for a class and intends to make multiple copies of several articles he or she found in the library? Section 108(g)(1) appears not to require the library to intervene

for two reasons. First, Section 108(g)(1) focuses on reproduction or distribution performed by the library or archive. Here, the patron performs the copying, even though the library might be seen as assisting in this endeavor. Second, recall that Section 108(f)(1) also works to -insulates the library from secondary liability, provided the photocopier the patron uses make his or her copies has the proper warning notice on it.

The subsection of greatest concern to libraries is the concept of systematic reproduction, which can be either single or multiple and is prohibited under Section 108(g)(2). Thus a mechanism established by a qualifying Section 108(a) library or archive that results only in single copies of journal articles being made (no repeated copying whatsoever) might still be deemed systematic reproduction and violate Section 108, in spite of initial language in Section 108(d) or (e) suggesting that single copies are acceptable. Subsections (d) and (e) must be read in tandem with Subsection (g). Although Section 108(g)(1) ("multiple copies of the same material") could apply to both Subsections (d) and (e), Section 108(g)(2) applies only to Subsection (d).

In addition to the CONTU (Conference on New and Technological Uses) Guidelines on Photocopying and Interlibrary Loan Arrangements¹⁰⁸ that have since become part of the de facto rules on quantitative limits on ILL, Section 108(g)(2) has a rich legislative history. The CONTU ILL Guidelines indicate that there is a point when a library makes too many copies made from a particular periodical and that the requesting library is using the ILL process to avoid either paying for the articles through a copyright licensing mechanism or paying for a subscription to the periodical from which the articles comes. These guidelines concern articles that are less than five years old. If more than six (up to five are allowed) ILL requests for articles published within the last five years from a single periodical are filled in a given calendar year, however, the ILL Guidelines state that the number of requests represents "aggregate quantities as to substitute for a subscription to or purchase of such work," and the ILL is not permissible within Section (g)(2) ILL allowance. The five-year age limit combined with the five-copy allowance is known as the rule of five.

A library could still be found culpable for systematic reproduction and distribution when making a single copy. The 1976 Senate Report on Section 108 provides some harsh words and examples for libraries and archives involved in various common practices of systematic reproduction and distribution. The Report suggests the following are systematic and prohibited by Subsection (g): certain lending or collection development consortia practices where one library agrees to subscribe to certain journals, other libraries refrain from collecting those journals and the subscribing library photocopies the articles for the non-subscribing libraries, a routing or photocopying service, and collection development plans among branches of the same library to avoid repeat subscriptions.¹⁰⁹

Analogizing an intranet article collection as a sort of interlibrary loan might be attractive. But the main reason why Section 108 cannot be used to create this sort of standing collection (assuming the articles were obtained in a manner similar to ILL requests) on the library's intranet (or an e-reserve collection for that matter) is that both Subsection (d) and (e) require that articles copies obtained through ILL become the property of the patron. The library cannot store a copy or otherwise use ILL material to bulk up its own collections, intranet, electronic reserve, or otherwise.

Further, placing an article on the library intranet and making patrons aware of its existence—so that patrons can request it, print, download, or redistribute it—appears to be the sort of "related or concerted reproduction or distribution of multiple copies" of the same material prohibited under

Section 108(g)(1) or the “systematic reproduction or distribution of single or multiple copies” prohibited under Section 108(g)(2).

Software and sound recordings: Rules and exemptions

Section 109 states that: “Notwithstanding the provisions of Section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”¹¹⁰ Section 109 is a significant limitation on the right of copyright owners. The first-sale doctrine limits the copyright owner’s right of distribution and “assures the copyright owner that, until she parts with ownership, she has the right to prohibit all others from distributing the work. On the other hand, once a sale has occurred, the first-sale doctrine allows the new owner to treat the object as his own.”¹¹¹ This expansive right allows the buyer of the work to determine the conditions under which a lawfully obtained copy of a work might be resold, lent, or otherwise distributed.

Concerned that software and CD resale shops would undermine the market for their products, the software and music industry lobbied Congress for an exception to the general tenet of the first-sale doctrine and lobbied for a return to the copyright owner of some level of control over subsequent transfers of the work, including sales.

The Computer Software Rental Amendments Act of 1990¹¹² addressed these industry concerns by amending Section 109 to provide an exception to the first-sale doctrine with respect to two categories of works. “Neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending.”¹¹³ The right to dispose of a computer program or phonorecord by rental, lease, or lending requires the permission of the copyright owner. Section 109(b) operates at least with respect to rental, leases or loans as an exception to the first-sale doctrine (embodied in Section 109(a)).

Section 109 (b) protects libraries and provides that the phonorecord or computer program exception to the first-sale doctrine “shall [not] apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution.”¹¹⁴ In other words, there is an exception to the exception for nonprofit library and educational institutions for the rental, lease or lending of phonorecords, such as a music compact disc.

A second exception to the exception is provided for software. Section 109(b)(2)(A) exempts libraries from any limitation with respect to the lending of software programs, if such programs have a copyright warning notice somewhere on the packaging.¹¹⁵ Notice that the Section 109(b)(2)(A) exception to the exception only applies to lending, but it does not apply to software rental or lease by a nonprofit library or educational institution. Section 109 is only the second provision in the copyright law to require the promulgation of regulations that requires some sort of notice¹¹⁶ to be used and disseminated by nonprofit libraries.¹¹⁷

In passing the 1990 legislation, Congress was concerned that libraries might become hotbeds of copyright infringement. To balance the rights of owners and users, Congress required that libraries remind patrons of their obligation to honor the copyright of others, such as software and phonorecord owners, in its legislation, Congress stated, "The Committee does not wish, however, to prohibit nonprofit lending by nonprofit libraries and nonprofit educational institutions. Such institutions serve a valuable public purpose by making computer software available to students who do not otherwise have access to it. At the same time, the Committee is aware that the same economic factors that lead to unauthorized coping in a commercial contest may lead library patrons also to engage in such conduct."¹¹⁸

In 1991,¹¹⁹ the U.S. Copyright Office promulgated regulations proscribing the notice (language) that must appear on "the [software] packaging, which is lent by a nonprofit library for nonprofit purposes."¹²⁰ If a library or nonprofit educational institution intends to circulate software or software containing products such as CD-ROMs, the packaging must contain the appropriate notice.¹²¹

*According to the Congressional regulations for software loans, the copyright warning notice "shall be affixed to the packaging that contains the copy of the computer program, which is the subject of a library loan to patrons, by means of a label cemented, gummed, or otherwise durably attached to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copy of the computer program. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual user of the computer program."*¹²²

Finally, a nonprofit educational institution can transfer (give or donate) a copy of a software program to another school. This transfer is provided for by Section 109(a), which states: "The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection."

Licenses and limited uses

If a library subscribes to an online database, the license agreement between the library and database owner likely governs the subsequent use (redistribution on the library Intranet) of articles obtained from the database. Some advocates of greater use rights want to extend the first-sale concept, and infer that first-sale doctrine be applied to articles retrieved from a database in the same way a subscription to a paper copy or the purchase of a book allows the library certain uses of the original magazine issue or book edition. This extension of the first-sale concept means the library could circulate items from a database, or sell, display, or put them on reserve, and so on. Since the library has purchased through its license fees the right to access and use the contents of the database, the library's right should include the ability to treat its copy of the work as it does any serial volume or book in its collection. This issue has not been litigated and is part of the growing debate in the copyright versus contract battle.

Main discussion

The ease with which material may be posted or linked to an institutional Web site may raise concerns about copyright. Recent litigation suggests that in the same way unauthorized photocopying of a copyrighted work may infringe on copyright, unauthorized reproduction (posting or uploading) in a digital or Web environment also is considered infringement.

Library intranet, fair use, and case law

A case with implications for the library or for any fair-use setting is *Los Angeles Times vs. Free Republic*,¹²³ in which a listserv known as the Free Republic was found liable for copyright infringement when it ran a discussion board where entire newspaper articles were posted for comment and discussion.

Using a four-factor fair-use analysis, the court examined instances when the listserv owners posted the articles and decided whether direct copyright infringement occurred. The question of contributory infringement by Free Republic operators, who provided a means (the discussion board) through which members could engage in infringing acts, was not at issue in the case. The use of the newspaper articles was arguably noncommercial and fit under the Section 107 fair-use purposes¹²⁴ of criticism or comment, the court, however, determined the verbatim copying was neither transformative nor necessary for the purpose of commentary, stating that: "Commentary on news events requires only recitation of the underlying facts, not verbatim repetition of another's creative expression of those facts in a news article."¹²⁵ This distinction tipped the scale against a finding of fair use regarding the first fair-use factor, the purpose or nature of the use. A library that imports a full-text article onto its intranet for use by its patrons would, like the defendant operators of the Free Republic bulletin board, not be making a transformative use of the article.

The second factor, the nature of the newspaper articles, worked in favor of the Free Republic bulletin board operators, as the news stories were factual in nature. Depending on the nature of the subject matter, a library intranet article might be factual or it might be creative. If the article is creative, this factor could also weigh against a finding of fair use.

The next factor, the amount and substantiality of the work, again played in favor of the plaintiffs as complete articles were copied onto Free Republic discussion boards. The fourth factor, the market for the work, also weighed against a finding of fair use as the posting of articles on the Free Republic site tended to offer a substitute for the works as the plaintiff was "attempting to exploit the market for viewing their articles online, for selling copies of archived articles, and for licensing other to display or sell the articles."¹²⁶ Although articles imported onto the discussion were available for free, the court observed that the subscription market for archived stories on the *Los Angeles Times* Web site are impacted by the ongoing accumulation of news stories on the *Free Republic* discussion boards.

Verbatim, nontransformative uses are suspect, even if performed by nonprofit or noncommercial libraries. Like the newspaper articles on the *Free Republic* board, the articles on the library intranet serve as a substitute for a

separate retrieval from an online database, for example, where each download, print or transfer is often treated a separate copy of the article. This sort of intranet circulation also appears to be suspect. Further, 100% complete copying of articles in commercial or for-profit corporate tip three factors (amount, purpose, market) against a finding of fair use.¹²⁷ Note that nothing is wrong per se with using the library intranet as a delivery vehicle for copyrighted materials, binding license provisions to contrary notwithstanding the library, however, must have the legal right to do so.

Using copyrighted material to create an index

Compare the fair-use analysis in *Los Angeles Times vs. Free Republic* with a case mentioned earlier, *Kelly vs. Arriba Soft Corp.*,¹²⁸ also from the Central District of California. In *Kelly*, the defendants copied photographs from various Web sites onto their own site, but presented the photos only in thumbnail (miniaturized) form. Clicking on a particular thumbnail took the viewer to the full-size image elsewhere on the Web. The full-size image did not reside on the defendant's Web site. The defendants, Arriba Soft, maintained an indexed database of about 2 million thumbnail images, taken from sites all over the Web.

The court used the four-factor fair-use analysis to determine whether the thumbnail index of images infringed the copyright of one of the photographers, the plaintiff, Kelly. Regarding the first factor, the purpose of use was deemed fair by the court, even though the Arriba Soft site was commercial. The court wrote, "it was also of a somewhat more incidental and less exploitative nature that more traditional types of 'commercial sites.'"¹²⁹ The thumbnail index also was considered transformative because it was "designed to catalog and improve access to images on the Internet."¹³⁰ This factor weighed in favor of fair use. The photographs were highly creative, so unlike the news stories in the *Los Angeles Times* case, these works were protected by a thick copyright and weighed against a finding of fair use.

Most significant in this case is the discussion of the third factor, the amount or substantiality of work excerpted. The photographs were taken in their entirety, just as the articles in *Los Angeles Times*. But the "reduction in size and resolution mitigates damage that might otherwise result from copying."¹³¹ This distinction is somewhat unique, because the court is saying that the format or degree of functionality of the reproduction affects the amount or substantiality. As a result, the court concluded the "third factor weighs slightly against fair use."¹³² The fourth factor weighed in favor of fair use as the court found no evidence of market harm, which is not the same as saying that none could be conceived of with similar facts. The plaintiff merely failed to demonstrate harm in this case.

What is also significant is the *Kelly* court's refuting the "lost advertising revenue" argument that many Web site proprietors have forwarded in recent cases. Web site proprietors argue that deep links, frames, and similar extractions of content that bypass home pages harm the proprietor's economic interests. In *Kelly* the plaintiffs argued that the link from the thumbnail to the full size image was made possible through a deep link into the site where the original image resides; this link bypassed the potential advertising or promotional pages of the original site. The court, however, felt that the plaintiff failed to provide any evidence of harm or negative impact. Since two factors favored fair use and two did not, the court concluded that the overall use was fair because of the transformative

and functional nature of the use in the first factor.

Factually, this case parallels many library activities involving the use of metadata and the creation of similar Web indexes. Despite the *Kelly* decision, libraries must not interfere with the market for the original work, and—if anything—should add to the work’s market potential as a result of the increased functional presentation and manipulation of the work (as part of an index, for example). By making sites easier for Web users to find and patronize from which material is copied or framed or to which library material is linked, the market for a work is enhanced.¹³³ For example, a deep link from an online library catalog could take patrons into an online bookstore where patrons can buy a copy of the item or related items, even though the links bypass the bookstore’s home page of advertising.

Some Web site proprietors have argued that framing a site, such as when a site appears inside the frame of a library OPAC, can result in the creation of a derivative site that changes the appearance of the framed site. These proprietors contend that the derivative use of a copyrighted work is an exclusive right of the copyright owner. Courts have proceeded with caution in this area with no definitive ruling so far.¹³⁴

Extracting unprotected material

In *Ticketmaster Corp. vs. Tickets.com., Inc.*,¹³⁵ the court addressed a copyright issue when Tickets.com, in compiling its ticket service Web site, copied the Ticketmaster Web pages in their entirety to extract the factual information. Tickets.com argued this copy was a fair use because factual information is not protected by copyright. Ticketmaster argued that although the underlying event or concert time, date, and place might be factual and unprotected, other parts of the Web page copied as a part of the extraction process contained copyrightable material.

The court found that the copying-extraction was an acceptable practice, much like the software cases in which a programmer has to copy an entire program to decompile the program to sort the unprotected from the protected material.¹³⁶ “Reverse engineering to derive unprotected functional elements is not the same process used here but the analogy seems to apply. The copy is not used competitively. It is destroyed after its limited function is done. It is used only to facilitate obtaining nonprotectable data—here the basic factual data. The copy may not be the only way of obtaining that data (that is, a thousand scribes with pencil and paper could do the job given time), but it is the most efficient way, not held to be an impediment in *Connectix*.”¹³⁷ Ticketmaster makes the point that copying the URL (the electronic address to the Web pages) which is not destroyed, but retained and used, is copying protected material.”¹³⁸ As far as copyright law, the web site copying as a first step in extraction is permissible.

A library might want to do the same with a portion of a proprietary database of factual information, since the underlying facts would be unprotected. The legality of this situation turns, in the court’s words, “on the necessity of downloading the TM [Ticketmaster] electronic signals into the T.Com [Tickets.com] computers for purposes of extracting the unprotected factual material.”¹³⁹ The developing copyright law would have no problem with the initial copying as a first step in the extraction process. If the data is obtained from a database from which the library is under agreement concerning its use, though, the license agreement may prohibit framing, extracting, or

other manipulation of database contents. If so, this clause will be upheld. Contract overrides copyright, as discussed in Topic 3.

Claim of misappropriation

Although legal concepts beyond copyright is not in the scope of this Report, a brief word is needed regarding two cases involving extraction and use of information located on rival Web sites. In both cases, rival Web sites extracted factual information such as concert dates and movie listings from another Web site. Since this sort of information is factual and not actual copying, framing, or importing of the rival site, a claim of copyright infringement could not be made. Under the concept of misappropriation, however, certain extraction of factual material might still expose a Web designer to legal liability.

One aspect of the misappropriation concept is known as the hot news doctrine. Courts are reluctant to recognize the concept of misappropriation since it borders on the protection of facts or other basic information, however, certain information has such a short life span in terms of its worth and sometimes a court offers legal protection to its collector. One such category of information is hot news, an example might be professional sport game scores. This exception offers a remedy for the taking of otherwise unprotected information when the five following conditions exist:

- The information was compiled or collected at a high cost
- The information is time sensitive
- The parties are in direct competition
- A sense of commercial free-riding exists by the subsequent competitor
- Whether allowing the taking reduces the incentive to collect the information in the first place so that overall less information is made available to the public at large

These factors were developed in a case involving professional basketball game scores and paging technology.¹⁴⁰

For a finding of misappropriation, information extracted by a library Web site must be for commercial gain. Two of the five hot news factors implicate this condition: there must be commercial free riding and the parties must be in direct competition. A library in a for-profit corporation setting seems to satisfy the commercial use requirement if the information was used, for example, to further the organizational for-profit purpose. A public library or public school library that extracted such information for use in a local current events portion of the Web site, however, would not satisfy the commercial use requirement because the information used in those circumstances does not qualify as hot news.

Determining when a Web-click license is valid

License agreements may address whether material may be imported from another information product or service such as an online database. The library should ensure that the license allows for further distribution of the material. Similar restrictions or terms and conditions of use might govern material obtained from a free Web site, as well. In these cases, an explicit presigned

license between the Web site owner and the library does not exist, but the operators of such free sites may nonetheless seek to impose restrictions on the use of material found on the site. If the source of the material is from a Web site, check the terms and conditions or legal page of the Web site. Another possibility is that the terms and conditions governing use of a CD-ROM product might not be available until the CD-ROM is used in the library and the librarian completes several click-to-agree icons on successive screens during the product installation.

In the CD-ROM or Web site scenario, the use of the product contents may be based on one of several license mechanisms: Web-click, Web-wrap or Web-browse (sometimes also called a browse-wrap). Courts are generally finding these license mechanisms to be valid when two sets of circumstances exist—either the user of the material cannot proceed further and access the material without clicking an 'I accept' or similar icon assenting to the terms and conditions of use, or there is clear and conspicuous language to the effect that some other event, such as a query submission or download, is binding on the site visitor-user.¹⁴¹

In situations (CD-ROM and Web products) where reading the terms and conditions of use are merely discretionary (visitors are instructed to "please review"), these so-called browse wrap agreements are generally not accepted by courts as binding terms in the absence of more definite language or assent. In *Register.com vs. Verio*, a case where the on-screen language stated that by submitting a query, the user would be is-bound by the terms and conditions of the site, the court concluded the browse-wrap was valid and binding on the site user.¹⁴² This case contrasts with other cases, where courts found that without requiring visitors to read the site's terms and conditions, a download of Netscape software could not make the downloading person subject to the site's terms.¹⁴³

Posting periodical articles obtained from online databases or other Web sites to the library Intranet would neither appear to be a fair use nor comply with the provisions of Section 108. Not all uses of Web material are suspect though. Transformative uses, such as using copyrighted material to create a Web index as in *Kelly* or where copying is an intermediate step in a data extraction process (*Ticketmaster*), can also be argued a fair use. Copyright is just the beginning of legal issue involved in the use of material from databases, Web sites, and so on. For example, contract or license may govern the use of this material. In commercial settings, the renewed doctrine of misappropriation (hot news) may limit even the use of factual or otherwise uncopyrightable material.

Thus the nature of each item the library places onto its intranet for general use by patron-employees must be reviewed as to source and condition of use. Is the material truly available for free and if the material is governed by license? Does the library contract permit such redistribution? If not, then making the material part of the library intranet may impact the market for additional copies of the work. And, when combined with two or possibly three additional fair-use factors disfavoring fair use, the inclusion of the material on the library intranet should not proceed without further authorization.

Unresolved points or issues

- The validity of licenses that contain clauses that override the use rights such as fair use or the first-sale doctrine.

- How the concept of fair use can be applied to libraries and in sharing information in digital format. There is no case law involving libraries per se.
- Whether a deep link that bypasses advertising or other commercial content on a site causes economic harm to the linked site by causing visitors who activate the deep link to miss viewing the advertising. The developing case law is inconsistent.

Resources

Helpful URLs

www.onlineinc.com/onlinemag/OL1999/kirkwood1.html Lists many resources on intranets, some of which discuss the legal issues.

From the library literature

J. Mathers. (1997) "Using the Intranet." *Records Management Bulletin*, 79(9-14) (discussion of legal issues related to intranets including copyright).

H. Robinson (1999) "The Development of an Intranet as a Knowledge Management Tool." *Law Librarian*, 30(2), 95-97.

R. Poynder. (1999) "What Price Copyright? New Concerns: Intellectual Property—the Fuel of the Information Industry—Is in Danger." *Information Today*, 16(11), 14, 16, 17.

From the legal literature

David J. Loundy. "Revising the Copyright Law for Electronic Publishing," 14 *The John Marshall Journal of Computer & Information Law* 1 (1995).

Sidney A. Rosenzweig. "Comment: Don't Put My Article Online!: Extending Copyright's New-Use Doctrine To the Electronic Publishing Media And Beyond," 143 *University of Pennsylvania Law Review* 899 (1995).

Gregory C. Lisby. "Web Site Framing: Copyright Infringement through the Creation of an Unauthorized Derivative Work," 6 *Communication Law and Policy* 541 (2001).

ENDNOTES

¹⁰² David Ensign, Copyright and Photocopies in Library Reserve Practice: Fair Use and Recent Trends, *Kentucky Libraries*, Winter, 1994, at 11; Christopher B. Loring, Library Reserves and Copyright: Thirty Years on and Still Changing, *Library Acquisitions*, Spring, 1997, at 29; Scott Seaman, Copyright and Fair Use in an Electronic Reserves System, *Journal of Interlibrary Loan, Document Delivery & Information Supply*, Vol. 7, 1996, at 19; Mary Brandt Jensen, Electronic Reserve and Copyright; Implications of Scanning Reserve Readings into Machine-Readable Form, *Computers in Libraries*, March 1993, at 40.

¹⁰³ *Princeton University Press vs. Michigan Document Services*, 99 F.3d 1381, 1389 (6th Cir. 1996), *Basic Books, Inc. vs. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

¹⁰⁴ 17 U.S.C. § 108(g)(1) (2000).

¹⁰⁵ 17 U.S.C. § 108(g)(2) (2000).

¹⁰⁶ S. Rep. 94-473, 94th Cong. 2nd Sess. (1976), reprinted in U.S. Copyright Office, Circular 21: Reproduction of Copyrighted Works by Educators and Librarians 17 (1993).

¹⁰⁷ Guidelines for Classroom Copying in Not For Profit Educational Institutions with respect to Books and

Periodicals, reprinted in U.S. Copyright Office, Circular 21: Reproduction of Copyrighted Works by Educators and Librarians 10-12 (1993).

¹⁰⁸ See H. Rpt. 94-1733, 94th Cong. 2nd Sess. (1976) (Conference Report), reprinted in U.S. Copyright Office, Circular 21: Reproduction of Copyrighted Works by Educators and Librarians 22-23 (1993).

¹⁰⁹ S. Rep. 94-473, 94th Cong. 2nd Sess. (1976), reprinted in U.S. Copyright Office, Circular 21: Reproduction of Copyrighted Works by Educators and Librarians 17 (1993) (examples (1), (2), and (3)).

¹¹⁰ 17 U.S.C. § 109(a) (2000).

¹¹¹ Arthur R. Miller and Michael H. Davis, *Intellectual Property, Patents Trademark, and Copyright in a Nutshell* 324 (2d ed. 1991).

¹¹² P.L. No. 101-650 (Title VIII), 104 Stat. 5134 (1990).

¹¹³ 17 U.S.C. § 109(b)(1) (2000).

¹¹⁴ 17 U.S.C. § 109(b) (2000).

¹¹⁵ 17 U.S.C. § 109(b)(2)(A) (2000).

¹¹⁶ Pending legislation amending Section 110(2) would require notices on material used in distance education or other transmissions under Section 110(2).

¹¹⁷ 17 U.S.C. § 109(b)(2)(A) (2000).

¹¹⁸ H.R. Rep. No. 101-735, 101st Cong. 2d Sess. 8 (1990).

¹¹⁹ 56 FR 7812 (Feb. 26, 1991).

¹²⁰ 37 C.F.R. § 201.24 (2000) (warning of copyright for software lending by nonprofit libraries). 37 C.F.R. § 201.24(b) provides that “[a] Warning of Copyright for Software Rental shall consist of a verbatim reproduction of the following notice, printed in such size and form and affixed in such manner as to comply with paragraph (c) of this section.” The text of the notice is: “Notice: Warning of Copyright Restrictions. The copyright law (Title 17, U.S. Code) governs the reproduction, distribution, adaptation, public performance, and public display of copyrighted material. Under certain conditions specified in law, nonprofit libraries are authorized to lend, lease, or rent copies of computer programs to patrons on a nonprofit basis and for nonprofit purposes. Any person who makes an unauthorized copy or adaptation of the computer program, or redistributes the loan copy, or publicly performs or displays the computer program, except as permitted by Title 17 of the U.S. Code, may be liable for copyright infringement. This institution reserves the right to refuse to fulfill a loan request if, in its judgement, fulfillment would lead to a copyright law violation.

¹²¹ 17 U.S.C. § 109(a) (2000).

¹²² 37 C.F.R. § 201.24(c) (2000).

¹²³ *Los Angeles Times vs. Free Republic*, 2000 U.S. Dist. LEXIS 5669 (C.D. Cal. April 4, 2000).

¹²⁴ 17 U.S.C. 107 (The purposes listed are: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”).

¹²⁵ *Los Angeles Times vs. Free Republic*, 2000 U.S. Dist. LEXIS 5669, at *39 (C.D. Cal. April 4, 2000).

¹²⁶ *Los Angeles Times vs. Free Republic*, 2000 U.S. Dist. LEXIS 5669, at *73 (C.D. Cal. April 4, 2000).

¹²⁷ Donald Sovie, “Downloading from the Net Is Dangerous,” *The National Law Journal*, Dec. 14, 2000, at B5, B9.

¹²⁸ *Kelly vs. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999).

¹²⁹ *Kelly vs. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1119 (C.D. Cal. 1999).

¹³⁰ *Kelly vs. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1119 (C.D. Cal. 1999).

¹³¹ *Kelly vs. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1120 (C.D. Cal. 1999).

¹³² *Kelly vs. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1120 (C.D. Cal. 1999).

¹³³ *Ticketmaster Corp. vs. Tickets.Com, Inc.*, 2000 U.S. Dist. LEXIS 12987, at *17 (C.D. Cal. 2000) (“While TM sees some detriment in T.Com’s operation (possibly in the loss of advertising revenue), there is also a beneficial effect in the referral of customers looking for tickets to TM events directly to TM.”).

¹³⁴ *Futuredontics, Inc. vs. Applied Anagramics, Inc.*, 1998 U.S. Dist. LEXIS 2265 (C.D. Cal. 1998), aff’d without opinion, 152 F.3d 925 (9th Cir. 1998).

¹³⁵ *Ticketmaster Corp. vs. Tickets.Com, Inc.*, 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. 2000).

¹³⁶ The *Ticketmaster* court cited *Sony Computer Entertainment, Inc. vs. Connectix Corporation*, 203 F.3d 596 (9th Cir. 2000), at 2000 U.S. Dist. LEXIS 12987, *12. See also, Morgan Malino, Court Reconsiders Reverse Engineering and Fair Use, *The National Law Journal*, Oct. 16, 2000, at C11.

¹³⁷ Referring to *Sony Computer Entertainment vs. Connectix Corp.*, 203 F.3d 596 (9th, 2000).

¹³⁸ *Ticketmaster Corp. vs. Tickets.Com, Inc.*, 2000 U.S. Dist. LEXIS 12987, at *12 and *13 (C.D. Cal. 2000).

¹³⁹ *Ticketmaster Corp. vs. Tickets.Com, Inc.*, 2000 U.S. Dist. LEXIS 12987, at *14 (C.D. Cal. 2000).

¹⁴⁰ *NBA vs. Motorola*, 105 F.3d 841 (2d Cir 1997).

¹⁴¹ *ProCD vs. Zeidenberg*, 86 F. 3d 1347 (7th Cir. 1996) (click-on shrink-wrap contained in product is valid); *Hill vs. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (shrink-wrap terms within product container valid when kept beyond 30-day activation period); *Register.com vs. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) (submitting a request with clear statement that submission equals assent is valid contract); *In re RealNetworks Privacy Litigation*, 2000 U.S. Dist Lexis 6584 (N.D. Ill. 2000) (a required click-wrap online assent before users can proceed is valid). Contra, *Klocek vs. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (shrink-wrap terms within the product container not valid).

¹⁴² *Register.com vs. Verio*, 126 F. Supp. 2d 239 (S.D.N.Y. 2000).

¹⁴³ *Specht vs. Netscape, Inc.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001).