

COPYRIGHT & LICENSING IMPLICATIONS FOR INTERLIBRARY LOAN PRACTICE

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As the world enters into a new millennium, libraries face increasingly challenging task of meeting the demand of patrons for digital content. The legal landscape of the digital environment, however, is much different from that of the traditional print environment. International copyright regime itself has undergone profound changes in the recent years. Long-held legal principles and notions such as fair use and the first sale doctrine have either disappeared, been marginalized or transformed into a different identity in this digital revolution. The aim of this paper is to explore the shift of legal paradigm and its implications upon the operation of interlibrary loan practices. This paper further suggests that libraries should participate in the campaign to establish a digital first sale doctrine and to exempt libraries from the onerous legal burdens imposed by the Digital Millennium Copyright Act (DMCA), which was the domestic implementation of the World Intellectual Property Organization Copyright Treaty (WIPO) in the United States.

I. The International Copyright Protection Regime

International Copyright Law came into existence in the late 1800s when a group of European countries adopted the 1886 Act of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention). It is premised upon the legal principle of “the national treatment,” i.e., works originating in one of the member countries must be provided the same protection in each of the other member countries as the latter grants to the works of its own national. In more than one century, the Berne Convention has undergone five revisions, most recently the Paris Act of 1971, to become

the predominant international copyright protection system relating to authors' rights. It is a multilateral international treaty embodying national treatment and minima standard regarding duration and formalities of copyrighted works. This trend is reinforced by the fact that the United States and China joined the Berne Convention in 1988, and in 1992 respectively (Joyce, Patry, Leaffer, & Jaszi, 2001, p. 33).

The past two centuries have witnessed the transformation of the United States from a leading pirate nation to the largest producer of copyrighted works in the world. However, for more than a century, the United States had no formal legal relationship with the Berne Convention, since the U.S. Copyright Law is much different from those of the Berne Convention with respect to the duration, formality, notice and deposit requirements. The U.S Copyright Law has been built upon the legal philosophy of copyright law while the Berne Convention recognizes the author's right derived from the continental law tradition. After the World War II, United States pushed forward an international copyright regime under the auspices of the United Nations Education, Science and Culture Organization (UNESCO). The Universal Copyright Convention (UCC) was the result of American leadership in this effort. The UCC is an international copyright treaty largely tailored to the peculiarities of U.S. copyright law derived from the common law tradition (Ginsburg, & Kernochan, 1988). The UCC is comprised of many members of the Berne Convention as well, but it offers lower legal protection to copyrighted works than that of the Berne Convention. According to the "Berne Safeguard Clause" in the U.C.C., a UCC member country must offer the same level of legal protection to Berne Convention member, instead of providing the lower legal protection standard prescribed by the UCC. The importance of the UCC today as an international

treaty has been substantially downgraded after the United States joined the Berne Convention in 1988.

The Berne Convention is a “Union for the protection of the rights of authors in their literary and artistic works”(Berne Convention for the Protection of Literary and Artistic Works, Paris Text, 1971). It represents a limited international codification of the law relating to authors’ rights (Ricketson, 1987, p. 151-152). The entry of the United States in the Berne Convention marked the retreat of the United States stance toward the universal codification of international copyright protection regime since the United States traditionally holds the competing common law notion of “copyright” theory rather than the “author’s right.” It also clearly demonstrates the failure of the United States in its efforts to build up a unified international copyright protection regime based on the common law and American Copyright law as indicated by the U.C.C.

Compared with those of the UCC, the Berne Convention has set up more significant Convention minima. First, it provides that any member country must offer national treatment copyright protection for any works originating in one of the member countries. Secondly, it does not require any formalities outside the country of origin. Formalities, however, can be imposed on a work if it originates within the country requiring compliance. Thirdly, it establishes a minimum term of protection of life plus 50 years, or 50 years from publication for anonymous and pseudonymous works. Fourthly, the authors enjoy certain exclusive rights such as translation right, reproduction, public performance and adaptation. These rights, however, are not as extensive as those granted by the §106 of the 1976 U.S. Copyright Act, since the U.S. grants five exclusive right to

authors (Berne Convention for the Protection of Literary and Artistic Works, Paris Text 1971).

The current U.S. Copyright Act of 1979 implements the essential contents of the Berne Convention into the law. It provides for the protection of the work of the author's life plus 70 years, allows for copyright alienability through licensing or assignment of copyright in whole or in part, and guarantees the five exclusive rights to reproduction, adaptation, public distribution, performance and display (17 U.S.C. §106, 2000).

As the economic globalization has continued at an unprecedented pace, the international codification of the copyright law has gradually gained momentum. The General Agreement of Tariffs and Trade (GATT) started including intellectual property on the agenda of the Uruguay Round in the early 1990s. In 1994, the GATT passed the "Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods," the so-called "TRIPS Agreement." This agreement is one major step forward in developing an effective international intellectual property protection regime both substantively and procedurally. Compared with the Berne Convention, the TRIPS agreement has made major progress in a number of important aspects. First, it mandates the protection for computer programs under copyright, and member states commit themselves to prohibiting unauthorized commercial rentals of computer programs and audiovisual works. Second, it sets up a range of specific measures to enforce intellectual property rights of all kinds (Reichman, 1995, p. 348).

The United States enacted the Uruguay Round Agreements Act ("URAA") in late 1994 as the implementing domestic legislation since the TRIPS Agreement is not a self-executing treaty. It banned the rental of computer programs for purposes of direct or

indict commercial advantage; Second, it added a new chapter 11 to Title 17, United States Code, which provides a civil cause of action for performers to prevent the unauthorized fixation or communication to the public of the sounds and images of their live musical performances, and the unauthorized reproduction, distribution, sale, rental or trafficking in copies or phonorecords made from such unauthorized fixations; and third, it provides retroactive protection for works whose source country is a member of the Berne Convention or the World Trade Organization (WTO), the successor of the GATT, or the subject of a presidential proclamation if the subject works are in the public domain in the United States through failure to comply with U.S. formalities, lack of national eligibility, or in the case of pre-1972 sound recordings, lack of subject matter protection (Joyce, Patry, Leaffer, & Jaszi, 2001, p. 47).

The World Intellectual Property Organization (“WIPO”) is an intergovernmental organization headquartered in Geneva, Switzerland. WIPO is a specialized agency within the United Nations system whose main function is to promote intellectual property protection worldwide and to administer the Berne Convention. In December 1996, the WIPO hosted a diplomatic conference in Geneva for developing a more comprehensive international copyright law. As a later comer of international copyright decisionmaking process, the United States delegation played a major role in pushing for an aggressive digital agenda at the WIPO aimed at writing the roadmap for the emerging e-business at home and the global information industry. Meanwhile, the Clinton administration officials also pursued the same digital agenda before the U.S. Congress. The Clinton administration delegates believed that their success at the WIPO would help them convince the U.S. Congress to pass the same digital intellectual law at home.

The proposed American rules are basically as follows: “(1.) grant copyright owners an exclusive right to control virtually all temporary reproductions of protected works in the random access memory of computers; (2) treat digital transmissions of protected works as distributions of copies to the public; (3) curtail the power of states to adopt exceptions and limitations on the exclusive rights of copyright owners, including fair use and first sale privileges; (4) enable copyright owners to challenge the manufacture and sale of technologies or services capable of circumventing technological protection for copyrighted works; (5) protect the integrity of rights management information attached to protected works in digital form; and (6) create a sui generis form of legal protection for the contents of databases.” Under these rules, copyright owners would have considerably stronger rights than ever before, and the rights of users of protected works would largely be confined to those for which they had specifically contracted and paid (Samuelson, 1997, pp. 372-373).

The U.S. digital agenda at WIPO is almost the same as the digital agenda the Clinton administration presented to the U.S. Congress. However, this agenda was so controversial in the United States, and many domestic constituents rose to oppose it. The underlying reason for this widespread discontent was that this agenda only reflected the core interest of the powerful high-tech and copyright industries riding the high tide of high-flying Internet booming stocks. It eliminated, curtailed and neglected the interests of the general public in regard to their right to access information, fair use and first sale privileges for the purposes of research and education, etc. It has substantially deviated from the balanced approach of general public policy making process, which runs contrary to the purpose and function of the WIPO Copyright Treaty as to maintaining a balance

between the interests of authors and the larger public interest, particularly education, research and access to information (WIPO Copyright Treaty, preamble, 1996).

However, none of the original American digital agenda was eventually accepted by the WIPO member countries without being substantially compromised to the competing interests of other member countries. The WIPO finally concluded two new international intellectual property treaties, “the WIPO Copyright Treaty” and “the WIPO Performances and Phonograms Treaty.” The WIPO Copyright Treaty for the first time in history recognizes computer programs as literary works, and copyright law extends to the digital environment. It further developed a series of legal principles in regulating the digital economy. These principles are as follows: (1) Copyright owners should have an exclusive right to control the making of copies of their works in digital form; (2) They should have an exclusive right to control the communication of their works to the public; (3) Member countries can continue to apply existing exceptions and limitations, such as the fair use doctrine as appropriate to the digital environment, and can even create new exceptions and limitations appropriate to the digital environment; (4) Merely providing facilities for the communications of works should not be a basis for infringement liability; (5) It should be illegal to tamper with copyright management information insofar as this would facilitate or conceal infringement in the digital environment; and (6) Member countries should have adequate legal protection and effective legal remedies against the circumvention of effective technological measures used by copyright owners to protect their works from infringing uses (Samuelson, 1999, p. 519). Of these rules, the most important is that the treaty not only preserved existing user right privileges in national laws, but it also recognized that new exceptions might be created. Although it

required states to provide adequate anti-circumvention measures, it leaves the member countries to enact implementing domestic legislation depending upon the member states' own domestic situation. Equally important, the WIPO Performances and Phonogram Treaty broke significant new legal ground by affording not only more extensive economic rights, but moral rights as well, compared with the TRIPS agreement.

Furthermore, the anti-circumvention measure clause adopted by the WIPO is quite different from what the U.S. originally proposed, since the United States tried to push for a more strict anti-circumvention measure that protects every work technologically and make illegal any attempt to circumvent that protection. Likewise, the United States would like to eliminate fair use right whenever a use is licensed, and do away with the first sale doctrine in a digital environment. The WIPO, however, took a balanced approach to preserve the right of the general public in general and education, research and access to information in particular.

II. Fair Use and First Sale Doctrine Under the WIPO Copyright Treaty and the DMCA

The Clinton Administration promoted the same digital agenda before the U.S. Congress as it was doing in the WIPO. The purpose of this digital agenda is to promote the continued growth and development of e-commerce, which has exerted a revolutionary impact upon the American society in the 1990s. This digital agenda, as discussed earlier, only reflected the interests of a group of copyright owners such as the high-tech computer industry and the publishing industries, and it did not take into consideration the information access right of the American general public. The purpose of American copyright law, as put by the U.S. Supreme Court Justice Sandra O'Connor, is "...not to

reward the labour of authors, but to promote the progress of science and useful arts. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. The result is neither unfair nor unfortunate. It is the means which copyright advances the progress of science and art” (Feist Publications Inc. v. Rural Telephone Service Company, Inc., 1991). This view is also embedded in the U.S. Constitution Article I Section 8, Clause 8. U.S. Const. Art I, §8, Cl.8.

The dominant theory behind American copyright law is utilitarian theory or the economic incentive theory. Under this utilitarian theory, economic incentive is needed to encourage people to create and innovate. Throughout history, the U.S. Copyright Law has walked a fine line by balancing the competing interests of copyright owners and information users. It regulates the use of information instead of the devices or means by which the information is delivered to reach this optimal balance. Under this legal umbrella, American society has benefited from this legal mechanism by creating and using the first sale doctrine and fair use doctrine to freely disseminate information without being liable for copyright infringement activities. It has provided a strong legal platform for Americans to invent and innovate on the shoulders of ancestors.

The delicate balance created by the U.S. copyright law is facing a direct challenge in the digital age due to the unique characteristics of digital technology as follows: 1. Ease of replication; 2. Ease of transmission and multiple use; 3. Plasticity of digital media; 4. Equivalence of works in digital form; 5. Compactness of works in digital form; 6. New search and link capacities (Samuelson, 1990; Tomlinson, 1994).

These unique characteristics of digital technology have made rampant piracy over the Internet possible. The Clinton Administration believed that the only answer for the rampant digital piracy was to build up a digital fence by making circumvention technologies illegal, to eliminate the first sale doctrine and to scale back the fair use doctrine. The Clinton Administration successfully made its digital agenda materialize in the 1998 Digital Millennium Copyright Act (DMCA), as a domestic implementing legislation of the WIPO treaty in the United States. It made the anti-circumvention measure and copyright management information a centerpiece, eliminated the first sale doctrine and marginalized the fair use doctrine. The DMCA also opted out of the provision regarding the moral rights of performers because the U.S. Copyright Law does not formally recognize an author's specific independent moral rights to claim attribution of their works and to prevent the alteration or mutilation of their works, which was recognized and protected by Article 6 of the Berne Convention. This phenomenon is due to the conflict underlying legal notion between the common law legal system and the European Continental legal system, since the former emphasizes copyright while the latter focuses on an author's right.

On the one hand, the DMCA runs afoul of the WIPO treaty's legal principle that each member country can retain the existing exceptions, and create new exceptions. On the other hand, it deviates from the long held American copyright law tradition by regulating the use of information rather than the devices by which the information is delivered. It legalizes the anti-circumvention measures, eliminates the first sale doctrine, marginalizes the fair use doctrine, and makes an automated digital copyright management system become a fortress to block the information access right of the general public.

Consequently, the DMCA provides a legal umbrella for the growing trend that computer codes are gradually displacing law as the primary defender and enforcer of intellectual property in cyberspace (Lessig, 1999, p. 126). The access controls have enabled copyright holders to charge on a pay-per-view basis, an essential feature of any working online business operation models to generate profits to make e-commerce sustainable. This fact itself indicated that the computer industry and the publishing industry have successfully flexed their muscle in achieving legislation favorable to their special interests. In the last decade, they first circumvented the first sale doctrine through licensing contracts, and then through the DMCA later, thereby legitimatising the elimination of first sale doctrine and marginalization of fair use doctrine in cyberspace.

The first sale doctrine and the fair use doctrine were really two pillars in the U.S. copyright law until the passage of the DMCA in 1998. The first sale doctrine was first established in 1908 in the *Bobbs-Merrill Co. v. Straus* (1908). It basically states that a purchaser has the property right to freely dispose of the lawfully acquired copyrighted materials. This doctrine has since become the legal foundation for the business operation of modern libraries. This bedrock, however, was first effectively bypassed by licensing contracts drafted by digital content providers. They characterized the computer software, database or other electronic products as a license to use them rather than as a sale of copy. Without a sale, there would be no owner, while copyright law only accords an owner the first sale doctrine (Klinefelter, 2001, p. 178). Section 109 of the U.S. Copyright law further legalizes this licensing approach, thereby extinguishing the first sale doctrine in cyberspace (2000).

The fair use doctrine, other pillar of the American modern copyright law has also been seriously undermined by the constant assault of the computer and publishing industry in the past decade. Under the fair use doctrine, users can access copyrighted materials in a reasonable manner without the consent of the copyright owners. The fair use doctrine was codified in section 107 of the Copyright Act which lists unauthorized uses that are fair including criticism, comment, news reporting, teaching, scholarship or research (17 U.S.C. §107, §1008, 2000). The access of the copyrighted materials is needed in order to evaluate their quality accurately and completely. The access might be excessive, but it does not infringe on the rights of copyright owners. These are the free speech rights protected under the First Amendment of the U.S. Constitution. The American courts typically use the “nature, purpose, amount and effect” four-factor analysis method to determine whether the disputed use is fair (17 U.S.C. §107, 2000).

The DMCA, however, basically marginalizes the fair use doctrine, since section 1201(a) prohibits a general defense of fair use (Nimmer, 2000, p. 723). The DMCA makes it illegal to manufacture or distribute devices designed to bypass technology that protects copyrighted materials, and it further makes it illegal for an individual to make a back-up copy of a digital work for himself to use such device. Consequently, it is quite ironic that the DMCA makes it illegal to break through the copy-protection measures to make copies while making the copies does not violate the U.S. Copyright Act. In addition, people can copy portions of a work for purposes of comment, news reporting, educational activities and scholarship; nevertheless, it is illegal to circumvent copy protection technological fences to exercise this fair use right under the DMCA (Zimmerman, 2001). The computer and publishing industry believe that the fair use

doctrine has to be marginalized since it encroaches on the copyright owner's exclusive control and restricts a copyright owner's economic interest to reap the benefits of his creation (Africa, 2000, p. 1152). In their eyes, the first sale and the fair use doctrine are the two major stumbling blocks in their road towards developing profitable e-commerce. The U.S. Congress basically accepts their view that the first sale doctrine is not applicable to digital content, while fair use is the last refuge of defending copyright infringement. They must be removed in order to maintain the U.S. leadership in the global information and e-commerce industry. This new copyright regime was enacted for the benefits of the computer and publishing industry at the expense of the information access right of the American general public. This new restriction has made non-profit organizations such as libraries much harder to achieve their mission as the information repository and disseminator. And interlibrary loan (ILL) is one major victim in this new digital environment.

III. Interlibrary Loan Practice in a Digital Age

Interlibrary loan (ILL) is a legal exception as a resource sharing arrangement among libraries recognized by the U.S. Copyright Act of 1976. It is by and large also a type of document delivery (Gasaway, 2000, p. 146). Section 108 permits libraries to participate in interlibrary loan arrangement. And the total amount of interlibrary loan will not reach a point that the aggregate quantities are substitute for a subscription to purchase such work (17 U.S.C. §108(g)(2), 2000). Interlibrary loan is one type of document delivery for print content among libraries in the United States, and it is basically operated under the guideline of the National Commission on New Technological Uses of Copyrighted Works (CONTU). CONTU was appointed by the U.S. Congress in 1975 to

develop the interlibrary loan guidelines (National Commission on New Technological Uses of Copyrighted Works (CONTU), 1979). It issued a report in 1978, and the U.S. Congress endorsed the CONTU's recommended amendments to the copyright statute (Samuelson, 1984, p. 666 ; Gasaway, 2000, p. 147). CONTU guidelines basically restrict a borrowing library to make no more than five requests from a periodical title in the past five years. Otherwise it would constitute aggregate quantities prohibited by the copyright law. These restrictions imposed by the U.S. Copyright Law and the CONTU guidelines are quite extensive. Interlibrary loan, however, is widely used for print content in practice among American libraries. Libraries pay royalties for ILL copies if they already used up the five requests stipulated by the CONTU guideline (Gasaway, 2000, p. 148). The Interlibrary Loan has played a major role in promoting research and education by sharing resources among libraries. And it has become a role model for many developing countries such as China to operate more efficiently under restraint of shrinking budgets. The Interlibrary Loan practice is really an ideal business operation model shaped by the market force, since it maximizes the investment returns with minimum investment. This situation has become more apparent since the academic libraries today invariably faced shrinking budget and escalating costs in acquisition of print contents in the past decade.

As far as the interlibrary loan of digital content is concerned, the DMCA has basically taken away this privilege of libraries because it eliminated the first sale doctrine and fair use is no longer a viable defense. Facing the outcry from libraries and other non-profit organizations, the DMCA allows libraries to make three copies for preservation purposes. Under the reign of the DMCA, however, the interlibrary loan of digital content is not possible anymore, despite the statute specifically permitting libraries to preserve

the copy in digital format (17 U.S.C. §108(b)–(c), 2000). Additionally, section 108(h) also allows a library or a non-profit educational institution to reproduce, distribute, display or perform in either facsimile or digital form, a copy of copyrighted works for the purposes of preservation, research or scholarship, but only during the last 20 years of a published work's term, so long as the following three preconditions are satisfied: (1) the work is not subject to normal commercial exploitation; (2) a copy cannot be acquired at a reasonable price; (3) a copyright owner provides notice that neither of the above conditions applies. This section, however, does not apply to any subsequent uses by users other than that library. This section is also called the Sonny Bono Copyright Term Extension Act (1998). It is observed, however, that the exemption afforded to libraries is very limited and that the exemption does not allow libraries to conduct online document delivery service, even for the sole purpose of preservation, let alone the regular research and educational activities happened on a daily basis.

The automated digital copyright management system legalized by the DMCA has posed a more serious threat to interlibrary loan in particular, and other online document delivery methods libraries are currently exploring for the purposes of promoting research and education. All CMS or other computer software today have invariably contained technological fences such as remote disablers and digital watermarks to protect the digital content, protected by the restrictive licensing agreements imposed by digital content providers. American courts are increasingly willing to enforce these shrink-wrap licensing agreements not favorable to consumers (Chou, & Zhou, pp. 49-50). The CMS has gradually penetrated into the American libraries and become a regular part of the library collection based on the licensing agreements. The market of cyberspace no longer

sells the fee simple ownership of digital content. Instead they become all leased information subject to various restrictions imposed by digital content providers and enforced by the computer codes and the DMCA. Libraries lose their own autonomy over licensed portions of their digital collection as a result of the elimination of the sale first doctrine (Bartow, 2003, p. 76). The restrictive terms of the licensing agreements have made it possible that all digital content will be available only on a pay-per-use basis, since American libraries themselves are constrained by the restrictive licensing terms of CMS. Therefore, the right of the general public to access information free of charge is in serious danger today.

The online document delivery service many libraries are currently exploring in a digital environment is limited to a designated portion of population in a given environment such as a class or department in a university, including students and faculty. It is observed that this type of online document delivery service has a number of unique characteristics as follows: (1) it restricts access to certain number or group of people with authenticated e-identity status who are usually registered students or faculty in a university; (2) it has obtained the prior consent from copyright owners or holders with specific guidelines as to how the copyrighted materials are used; (3) It is a fee-based use permitted under the licensing agreement signed with digital content providers; (4) it is a fair use in a strict sense for the purposes of research and educational activities not subject to commercial exploitation; and (5) the number of copies a user can obtain or keep is clearly stipulated in licensing agreements.

Under the current copyright protection regime in the United States, a viable solution for the ILL is a system similar to what was discussed above. This type of ILL

system, in addition to the above features, shall also contain technical devices that are able to detect and to restrict the number of copies available to a user. To implement this system, it requires libraries or the American Library Association to conduct negotiation with digital content providers with respect to how it should be used and monitored, an initiative similar to CONTU. While this solution might not be the ideal one for many libraries, it represents a realistic approach under the current American copyright protection regime. It is at least an effort to push forward the ILL in cyberspace by following the normal custom of ILL in the print world.

Justin Graham suggested a digital first sale doctrine in cyberspace by following the regular practices in the print world (2002). This proposal represents a right direction in developing a balanced copyright protection regime in cyberspace. It still needs, however, new technologies that are currently unavailable to make it a real workable system. Therefore, it still requires more time to materialize these technologies before this solution can be implemented effectively for libraries.

Prof. Ann Bartow proposed the statutory library use exemption concept. It is a more fundamental, practical and foreseeable approach that is able to solve the difficulty facing libraries at present (2003). It requires libraries, however, to form strategic alliances with various other interest groups to combat the influence of the publishing and computer industries to make the U.S. Congress pass a more balanced new copyright law to ensure public access rights and to restrict the overreaching ownership of copyright holders. It may take at least a couple of years for the U.S. Congress to enact the statutory library use exemption for libraries. Therefore, the negotiation of licensing contracts allowing ILL practices in cyberspace remains a favored approach in the short term.

V. Conclusion

The United States was a major player in the WIPO treaties. The WIPO, however, took a balanced approach in protecting the rights of copyright owners or holders while ensuring the access right of the general public to copyrighted materials for future advancement of science and useful arts. The American delegation to the WIPO failed to materialize its various digital agenda. Nevertheless, it has achieved most of its digital agenda at home. The DMCA has thrown the first sale doctrine out of the window of cyberspace, and crippled the fair use doctrine. The legal measures, along with the licensing contracts, have made ILL struggle for survival. Without the adoption of digital sale doctrine or library exemption, it would be very difficult for libraries to continue their customary practice of ILL in real space. Under the current copyright protection regime, the only viable solution for libraries is to negotiate an arrangement acceptable to both libraries and digital content providers so that libraries can conduct ILL practice in cyberspace. There might be lots of hurdles lying ahead of libraries in achieving this challenging agenda. It is, however, the only narrow path currently available for libraries to move toward the right direction.

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