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Program G2: Emerging Issues in Copyright: What You Need to Know

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Coordinator and Speaker: D.R. Jones, Associate Dean for Information Resources, Law Library Director, and Assistant Professor of Law, University of Memphis School of Law

Speakers: Meg Kribble, Research Librarian and Outreach Coordinator, Harvard Law School Library; **Kevin Miles**, Ph.D. Librarian, Fulbright & Jaworski, LP

Copyright law affects almost every aspect of law librarianship. The purpose of this session was to bring attendees up to date on a number of important developments in copyright law and to present some online tools for keeping up with this constantly developing field.

Following an introduction by moderator D.R. Jones, Meg Kribble began the substantive part of the program by discussing developments in the first sale doctrine, which protects the right of the purchaser of a print copy of a work to resell, lend, rent, or give away that copy without the permission of the copyright holder. This doctrine is fundamental to the traditional business model of lending libraries. While the first sale doctrine seems to be secure at least with regard to print materials and was recently found in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) to cover books manufactured outside the U.S., at least one publisher tested the boundaries of the doctrine this year. In May, Aspen Law introduced its Connected Casebook program, where purchasers of a printed casebook would be given permanent access to an electronic version of the text if they agreed to return their print copy to the publisher at the end of the course. This agreement would effectively eliminate the purchaser's first sale rights in the purchased book. An Internet hue and cry was raised, and Aspen altered the Connected Casebook program so that students would have the option of buying or renting Connected Casebooks. But Aspen's revised policy vindicates the first sale doctrine only if the cost of purchasing the case book as opposed to renting it remains reasonable. If the cost of purchasing the book, and therefore retaining the right to resell it, is too high, the first sale doctrine's protection of the free market in used casebooks will be endangered.

Another copyright doctrine that is important to librarians, fair use, received significant judicial attention in the past year. Fair use, codified at 17 U.S.C. §107, allows a work protected by copyright

to be used without the permission of the copyright holder under certain circumstances. Those circumstances are evaluated according to a four-prong test. Each of the factors is weighed to determine whether a particular use constitutes a fair use. Three recent cases, the Google Books case, the Hathi Trust case, and the Georgia State University e-reserves case, were decided on fair use grounds and have been read as very good news for libraries.

In *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), Judge Chin found that Google's efforts to digitize books and make their contents available on the web was, in fact, a fair use under the Copyright Act. While fair use analysis requires that all four of the fair use factors be weighed independently, that analysis often turns on the first factor, the purpose and character of the use. Courts are more likely to find fair use if the use of the copyrighted work is found to be "transformative"; that is, the use is not merely duplicative of the original work but changes it into something genuinely new. Judge Chin found that Google's use of scanning of books protected by copyright is transformative because their purpose is not merely to copy them but to turn them into searchable data. The judge also found that in this case the fourth factor, the effect of the use on the potential market for the copyrighted work, weighed in favor of fair use since that effect would be positive as Google users discover and purchase books that would have otherwise been buried in library stacks and would have been inaccessible to most potential readers. The plaintiff's appeal of Judge Chin's decision is pending in the 2nd Circuit. Additional details about this case can be found in the AALL Issue Brief on the Google Books case available at www.aallnet.org/Documents/Government-Relations/Issue-Briefs-and-Reports/2010/ib062010.pdf.

A second victory for the fair use doctrine came in *Authors Guild, Inc. v. HathiTrust*, 755 F. 3d 87 (2nd Cir. 2014), where the court found that digitization of copyrighted works to permit full-text searching is fair use, as is digitization of copyrighted works to make those works accessible to print-disabled readers.

Concluding her portion of the presentation, Kribble suggested that both the Google Books and the Hathi Trust cases are very good news for libraries, allowing them greater latitude to make use of copyrighted materials.

Next, program moderator D.R. Jones spoke about the third recent fair use victory, the Georgia State University e-reserves case, *Cambridge University Press, et. al. v. Becker*, 863 F. Supp. 2d 1190 (N.D. GA, 2012). In this case, a number of publishers sued Georgia State University for violating copyright law by posting excerpts of copyrighted materials without permission in the Georgia State University Library's e-reserve system. The court found mostly for the defendant and identified only five works out of more than 100 listed in the complaint that were likely to be infringing. Looking at the four factors, the court found that the nonprofit educational purpose of the use (factor one) favored a finding of fair use, but the court did not find the use to be transformative. The judge focused primarily on the third and fourth fair use factors. On the third factor, the amount and substantiality of the portion used in relation to the work as a whole, the judge found that as long as the excerpt placed on e-reserve is narrowly tailored to the purposes of a particular course and as long as no more than 10 percent of the whole work is posted, fair use is indicated. As for the fourth factor, the effect of the use on the potential market for or value of the work, the judge found that the effect on a potential market for the complete copyrighted work of placing an excerpt on reserve is negligible. Further, the potential market for licenses to use the excerpts was not damaged because no mechanism exists by which the defendant could purchase an easily accessible, reasonably priced license for digital copies of excerpts at issue. This case is currently on appeal.

In other recent fair use developments, in February 2013, the Southern District of New York granted summary judgment for the defendants in a suit brought by lawyers who, in the course of litigation, had submitted legal briefs that later appeared in litigation-related databases in Westlaw and Lexis (*White v. West Publishing*, 12 Civ. 1340 [JSR] [S.D.N.Y. 2013]). The judge said that the use of these documents was transformative since the databases used them as part of an interactive research tool and not for their original purpose—the furtherance of litigation. The court also found no effect on the market for the copyrighted materials as there is no market for already-filed briefs.

Finally, in several recent cases, publishers sued lawyers for copyright infringement for including copyrighted material, namely scholarly articles, in patent applications. In two of these cases, *American Institute of Physics v. Schwegman Lundberg & Woessner* (D. Minn) and *American Institute of Physics*

v. Winstead (N.D. Texas), district courts found for the defendants on fair use grounds. Appeals in both cases were dismissed. Both of these courts looked primarily at the first and fourth fair use factors. They found that the use of scholarly articles as evidence in patent litigation is transformative because it is very different from the purpose of the original work, i.e., scientific or technical scholarship. The courts also found that the copying did not negatively affect the market for the original articles. The plaintiff argued that it lost licensing revenue because the defendants used the materials without seeking licenses, but the judges did not find this reasoning determinative.

Next, the presentation turned to legislative highlights. Kevin Miles spoke about seven bills before Congress in the first half of 2014. Of particular interest are the *Satellite Television Access Reauthorization Act of 2014* (S. 2454), which would extend the statutory license under which satellite carriers retransmit television broadcast stations to viewers who cannot receive over-the-air signals, and the *Respecting Senior Performers as Essential Cultural Treasures Act* (H.R. 4772), which would require Internet, cable, and satellite radio providers to pay royalties for sound recordings made before February 15, 1972. None of the copyright-related bills currently before Congress have gone beyond being read and sent to committee. Miles also discussed a number of legislative committee hearings and administrative roundtables that focused on copyright issues this year.

Finally, Jones returned with a list of blogs and websites that librarians can consult to keep abreast of current developments in copyright. A number of the suggested sites are listed here:

AALL Copyright Committee Blog:
bit.ly/aallcopyrightblog

AALL Copyright Committee Twitter:
twitter.com/aallcopyright

AALL Washington Blawg: aallwash.wordpress.com

ALA District Dispatch copyright category:
www.districtdispatch.org/category/copyright

ARL Policy Notes: policynotes.arl.org

Copyright Alliance:
https://copyrightalliance.org/in_focus

Electric Frontier Foundation: <https://www.eff.org>

Kevin Smith:
<https://blogs.library.duke.edu/scholcomm>

Rebecca Tushnet's 43(B)log: tushnet.blogspot.com