

Copyright and the New Digital Media: What does it mean for Information Services  
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The speaker, Thomas Lipinski has a law background, and so he approached the topic from a very legal perspective, focusing on whether the library would be liable and if it could win a court case if sued on a particular issue. Much of it was quite complex.

Anything tangible is automatically protected by copyright law, whether or not there is notice (the copyright symbol along with the author's name and the year) or it is registered. But if it is not registered, damage costs won't be as great. Lipinski suggested asking these four questions when considering if we are infringing copyright: 1) Is it protected by copyright? 2) Does the use violate the exclusive rights of the copyright holder? 3) Are there specific exceptions in the code that give us rights to do this? 4) If there are no specific exceptions, does fair use cover it? Fair use is more vague and therefore you would have a better case in court if you can use the specific exceptions.

The exclusive rights copyright holders have include rights to reproduction, public display, public performance, derivative works and public distribution. To "display" means to transmit the item or give out multiple copies. You can show a single copy. He discussed a case involving a church where it had made copies of a microfilm work for their different branch libraries, and they were sued. They argued that the copies had been made long ago, which meant they were exempt because there is a three year statute of limitations on copies being sued. However, they lost because there was still the issue of public distribution. Any copies that are distributed to the public must be lawfully made.

There was another case involving derivative works in California where someone took pictures from a book, shellacked them on tiles and sold them. They were found guilty of creating a derivative work. However, Lipinski said that the federal court in our circuit (the 7<sup>th</sup> Circuit) would not have thought of it as a derivative work.

He described the time limitations of copyright, which is complex because of the different acts that were passed at different dates. There is also the problem of orphan works, where the owner of copyright cannot be determined. Lipinski is working on getting new federal legislation through which would allow people to treat such items as though they were in the public domain and out of copyright, until the owner shows up. They could not be sued for damages, but only charges for the use they've already made.

The extent of liability depends on whether the infringement is direct, contributory or vicarious. Direct infringement is if you committed the act yourself. In this case it is strict liability – you don't have to know that it violated copyright to be guilty. Vicarious

infringement happens when you have a relationship with the person doing the infringing where you could control what they do and you receive financial benefit. An employer/employee relationship is an example. Therefore, an institution could be liable for professors infringing copyright. Finally, contributory infringement is when you helped the person violate copyright, and you knew that it was violating. For example, if you help a student download files that you know are illegal, you could be guilty of contributory liability. He suggested that when assisting students with downloading or a copier you demonstrate how to do it with your own document, and then walk away when they do it themselves.

Section 108 of the copyright code discusses the exceptions libraries can claim to copyright. He suggested reading this section frequently, so you can get to know it well. Libraries are allowed to copy complete materials in their collection if it is an unpublished work or if it is damaged or lost and a replacement is not available for a fair price. Digital copies can be made, as long as they are not available outside the library building.

Section 110 covers exceptions instructors can claim. Instructors can show full movies in their classes as long as it is directly related to the instruction and only students in the class are allowed to see it. Home-made or bootleg copies cannot be shown in the classroom – fair use only applies to lawfully-made or acquired material. The law is different when it comes to distance courses and distance students – entire theatrical films cannot be shown in a distance course because the transmission (which equals the “display” right of copyright holders) is not protected by fair use. Excerpts can be transmitted, however. There was some discussion about course packs. Lipinski said that the court case involving Kinko’s meant that course packs are a violation of copyright. He said there hasn’t been a case involving an academic institution yet, but there could be in the near future. Essentially, he said that coursepacks are “never” fair use – meaning that they will always require permission/licensing (usually through the Copyright Clearance Center, although some databases specifically allow material to be used in coursepacks). He also stressed that if material is used in a way that falls under fair use, it will always be a fair use – he had not seen anything in the legislative history or the law or guidelines to suggest that fair use was only for the first time material was used. He did emphasize, though, that handing out a journal article in its entirety to a class would probably not be a fair use – his argument largely revolved around the factor of “amount” – excerpts of articles were fine. The four factors used to determine whether a use is fair or not are: purpose and character of the use (commercial vs. non-commercial); nature of the work (highly factual materials such as newscasts, documentaries, even most scientific articles tend to favor fair use, highly creative works such as feature films, poetry, and fiction do not); amount of substantiality of the work taken; effect of the use on the potential market. Given that, a faculty member would be more able to argue fair use if she handed out a highly factual scientific article in a class than if she handed out a copy of a poem. Each application of fair use needs to be evaluated on its own merits.

Section 512 provides institutions a way to limit their liability for infringement done by students. The institution must register as a 512 institution, and then they must follow guidelines for addressing violations when they are brought to their attention. They must

have consequences for students found violating, such as disabling their access. If the institution follows all these procedures and are sued, they cannot be charged for damages.

He also discussed transformative use – an example was a play that used short excerpts of popular songs of the 1960s to create a mood in a play about Vietnam. He said this was an example of transformative use – the excerpts used in the play were not a substitute for the original. No one would go to the play instead of listening to the songs off a recordings if they were interested in hearing pop songs from the Vietnam era. Transformative use is protected and allowable.