Internet and IP as Seen by A Law Teacher, Author, and Electronic Publisher

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When I was an undergraduate at Cornell in the 1960's and even when I joined the faculty a decade later the university was free of concern about copyright. That was not simply the bliss of ignorance but a reflection of the legal reality that the copyright law of that era did not intersect critically with the educational technology of that era.

- Teachers spoke and students listened, taking notes as best their minds and pens could manage. Neither had to worry about infringing copyright.
- Teachers and students read from books and shorter works that they bought as well as others acquired by the university and stored in its library.
- Faculty members also wrote and some of that writing was published, very little of it in any form that caused anyone to pay great attention to a royalty stream or the terms of the agreements between those few and their publishers.

There were such exceptions as Sienko and Plane whose chemistry text did so well that Bob had to bury the cash flow in a vineyard up the lake. But they were few and far between. And copyright questions did not hover over the faculty-student and faculty-university relationship.

The University's core copyright policy (like those of its peers) was forged in those pre-digital days. It's central tenet was (and is) that the writings of both faculty and students are owned by them and not the university. This affirms the fundament principle of

academic freedom. For whoever owns the copyright controls whether and how the work is distributed. But it stands in fundamental contrast to the university's policy on patents and equally in contrast to the norms of institutions that surround and in varying degrees compete with the university.

The world in which the university operates has since changed radically. I find myself now teaching a course in copyright law, not because I chose the field but because by virtue of my work with the law school's web publishing activity and my own works of authorship created for the Net and disc distribution I have been forced to master its complexity.

Faculty, staff, and students can no longer operate without attending to copyright. (Or they do so at their peril.) The university cannot continue to operate with a copyright policy shaped by and for a different world. (Or it does so at its peril.) And institutions like Cornell, collectively, should not ignore legislative policy and proposals for change in this field. (Or they do so at their peril.)

Let me explain how we've come to this point, provide some examples of current challenges and confusions, and then try to escape without providing any solutions.

How we've come to this point

The aggregation of people and activities that comprise the university are and have always been immense producers and consumers of ideas and expression (the central components of copyright) but prior to the Copyright Act revision in 1976 and important subsequent

amendments much of the teacher-student and peer-peer exchange within the university took place outside the Federal Copyright Act. Changes in the law during my professional lifetime have brought about a world in which any expressive communication fixed in any form is copyright protected, with a very flexible definition of what fixed means and no requirement for notice or registration. Had I been speaking to you in this kind of forum during my first years as a faculty member here my remarks would not have been protected by the Federal Copyright Act. Today they are.

Higher education was not asleep during the deliberations that led up to the 1976 Copyright revision but regrettably while the Act established a broad and flexible definition of what copyright protects, one that has adjusted perhaps overadjusted to the electronic age, its principal shield of education activities was crafted in technology specific terms, rather than equivalently broad or principled ones. As a repeated practitioner of distance learner, the phrase over which I continually stumble grants an important privilege for activities done "in the course of face-to-face teaching activities … in a classroom or similar place devoted to instruction."

Following close on the heels of the 1976 copyright law revision came the spread of such important technologies as photocopying, audio and video recording at prices that swiftly dropped to levels that put them in the hands of faculty and students. In both copyright and pedagogical terms a lecture delivered in a room where some students may have tape recorders is very different from one delivered to note takers. And a library with ubiquitous photocopying is a library transformed.

Last but certainly not least has come the explosion of digital technology and the Internet. It has created a digital world in which in theory one should think copyright every time one takes information in or communicates with another. How has this happened? Because while copyright law allows one to read and listen and speak without concern about infringing the intellectual property of others -- none of those acts being embraced by the rights of a copyright holder -- it grants the copyright holder an exclusive right to make copies. And given the broad definition of "copy" in the 1976 act it was probably unavoidable that courts would conclude that a file on a computer hard drive or even loaded into its temporary memory constituted a "copy". In short, while I can read, listen, and speak on campus without worrying that I am infringing someone's copyright I cannot retrieve a file to read or view it in my Web browser, download an audio clip in order to listen, or forward an e-mail message with comments without bumping into the copyright act. Since each one of those acts uses a computer it necessarily involves making a copy, which might, even without my knowing it, be an infringing copy.

That’s simply the law in theory you might say (as some of my students do); copyright law won't be enforced so close to the ground. To which my response is three-fold: 1) don't count on non-enforcement; 2) any field of law that relies on non-enforcement for reasonable outcomes puts too much authority into the hands of those with the power to enforce (and in this instances they are not public officials but large rights holders); and 3) important university values are severely undercut if we are forced to adopt procedures that ignore the legal rights of others.

Speaking at a more practical level, I need simply observe that the university is a large and attractive target for any copyright rightsholder concerned about the contents of a course pack or items at the website of a faculty member or student and that thrusts the university into the role of copyright law enforcer and interpreter -- a role that it has not been prepared by history to assume.

Current Confusions

Given the complexity of copyright law and the decentralized nature of the university responding competently is a challenge. Last week together with other law school colleagues I received an e-mail from the head of the course pack unit of the campus store. Its subject line proclaimed "good news" and it explained that the sender had achieved agreement at a recent meeting with a representative of the AALS under which law journal articles could henceforth be included in law school course packs here without royalty. I found myself in the awkward position of having to explain to the source and my colleagues why that news was too good to be true.

1) The AALS has, so far as I know, no authority to license copyrights held by member schools.

2) The law journals of the AALS member schools, with perhaps a few exceptions, hold copyright only in the collection of articles contained in their issues and not in the articles themselves. Under 17 U.S.C. § 201(c) in the absence of an express transfer from the author to the journal the author and not the journal has the authority to say "yes" or "no" to the inclusion of a piece in someone's course pack and set the terms.

Current Challenges

Probably more important than the direct legal and technology shifts on which I have focused up to now, are the powerful indirect effects of the digital revolution, channeled today through the Internet.

Within a decade's time or less, the publishers whose products faculty and students have relied upon and to whom faculty writers have turned have been bought up and reconfigured. The university still buys print. In too many cases, it is buying works of faculty members on this campus and others at exorbitant prices from international conglomerates, even as others of its faculty and students are generating licensing charges for accessing those same works on-line. At both the macro and micro level the university finds itself in competition with new institutions, for profit institutions, some of them quite prepared, if they can to compete with the university using its own output. Because Cornell operates at the high end of the higher education spectrum the threat of some of these new players may seem quite remote in Ithaca, but they are for sure headed our way and nothing on the Net is remote from Ithaca.

Because of the university's breadth the threat takes many different forms. In law the early shapes include a totally on-line law school based in California but reaching out to the entire U.S. with a four-year professional degree program. It is a serious venture of Kaplan (the test preparation people), which in turn is a subsidiary of the Washington Post and we have begun to see fully or near fully packaged courses coming from entities that

do continuing education for lawyers. To address some of this competition competently the university must take copyright policy as seriously as they do.

Another example: the New York Times enlivened its labor day issue with a front page story about a new Web enterprise: www.studentU.com. Cornell is not yet on its list of covered institutions but Yale and Columbia are. It offers free Web distribution of course notes prepared by paid note-takers enrolled in each covered course. I'm not swift enough to be clear on what stance the university should take on such a service, but am clear that to have any choice in the matter it must be clearer about its rights in what is delivered to students in the classroom.

The challenge we face, discipline by discipline is creating new frameworks that move copyright issues out of the way of our everyday teaching process -- far enough out of the way so that they are not overburdened with the administrative costs of seeking permissions on an ad hoc basis for each item in a course pack, each posting to a course web site and at the same time deploy appropriate copyright protections around the university's educational program.

These have been among the aims of the law school's legal information from the start. Since 1992 we have been creating core teaching materials for law courses, unencumbered by high prices or licensing terms that get in the way of flexible use. By placing key legal documents on the Internet and offering them at a modest price on disc we have I think had a significant impact on education about law at the high school and college levels.

And our CD-ROM library of legal ethics materials - priced at $25 has no match in the commercial sector. At the core of this project is a radically different copyright licensing approach.

As I explained at the beginning I've been forced into this field. In the course of preparing these materials for Net and disc distribution I have received a cease and desist letter from the American Bar Association and a similar but more tactful directive from the editorial board of the Uniform Commercial Code. I have had to send a few myself, on behalf of the Institute's electronic publications, and draft licenses that implement the innovative approach to law publishing we have pursued.

In concluding these brief remarks, let me turn to copyright policy -- at the university and national level.

In 1990 (pre-Internet and therefore ancient history by now) the Executive Committee of the Board of Trustees promulgated a formal copyright policy. From today's perspective it seems both simplistic, and in desperate need of fresh attention. I judge it simplistic because it takes an either or approach to creative works emanating from the faculty. Either the faculty member has full and exclusive rights -- the norm -- or the university owns the work -- under exceptional circumstance. Copyright is not a single right but a cluster of rights and in today's environment the interests of both faculty and university need greater protection than that either/or approach provides.

Turning to the national level my pitch is straightforward: copyright policy has become so important to the university that it and its peers must be attentive advocates in Washington. Currently, this means at least two things -- active work on adjustments to the act that create the same copyright free zone for distance learning that classroom teaching currently enjoys. My course web pages and electronic exchange with the full class warrant the same protection from infringement claims the law grants face-to-face teaching in a classroom. Secondly, higher education must not sleep through the current efforts to extend copyright protection to data collections. From the hard sciences to the humanities, all of us have a huge stake in how this particular legislative initiative by the large database proprietors plays out. There is a mile of difference between H.R. 354 supported by the major database proprietors and H.R. 1858 favored by the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges. Today and for as far as I can see, Congressional deliberations over copyright questions demand the close attention of the university and its friends.