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Fair Use or Foul Play

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Fair Use or Foul Play

by **Norman Desmarais** (Acquisitions Librarian, Phillips Memorial Library, Providence College, Providence, RI 02918; Phone: 401-865-2241; Fax: 401-865-2823) <normd@postoffice.providence.edu>

The **Copyright Act of 1909** introduced the concept of "fair use" while leaving it to the courts to define the doctrine. The courts eventually allowed exceptions to copyright for research, teaching, news reporting, and other productive purposes. The **Copyright Act of 1976** formulated the doctrine by specifying the limitations on exclusive rights of copyright holders (17 USCA § 107) by identifying the four factors to consider (purpose and character of the use, nature of the work, amount and substantiality of the portion used, and the effect on the potential market.)

"Fair use" rights have been an important resource and support for librarians and their patrons, allowing them to make convenient and incidental copies of copyrighted works without obtaining the prior consent of copyright owners. But, as the interests of information consumers usually conflict with those of copyright holders, we must constantly deal with the legal tension.

Digital Millennium Copyright Act

Content owners have never felt comfortable with fair use and have tried to erode it. In 1997, motion picture studios, record producers, book publishers, and other content owners proposed to **Congress** that if the copyright law would allow them to protect their works with technical protections and make it illegal to circumvent those measures, they would be more willing to release new content in digital formats. The **Digital Millennium Copyright Act of 1998 (DMCA)** [Section 1201(a)(1)] now allows the use of technical protections and prohibits the circumvention of technological measures used by copyright owners to control access to protected works; prohibits manufacturing or "otherwise trafficking in" a device designed to circumvent a technological measure that controls access or that protects rights of a copyright owner (copy controls); and prohibits providing false copyright management information and removing or altering copyright management information with the intent to conceal or facilitate copyright infringement.

Sonny Bono Copyright Term Extension Act

Some people believe that the **Sonny Bono Copyright Term Extension Act** (PL 105-928) which was signed into law the day after the **DMCA** (October 28, 1998), came about largely from pressure by the **Walt Disney Studios**. They wanted to protect the rights to **Steamboat Willy** that would have gone into the public domain the following year.

The **Sonny Bono Copyright Term Extension Act** extends the duration of a copy-

right by twenty years for works published after January 1, 1978. The copyright for works by a single author now lasts for the life of the author plus seventy years (formerly life plus fifty). The copyright for works of joint authorship endure for the life of the last surviving author plus seventy years. Anonymous and pseudonymous works and works made for hire have a copyright period that extends for ninety-five years (formerly seventy-five years) from the date of first publication or 120 years from the date of first creation.

Erosion of Rights

The extension of the term of copyright and the allowance of technological measures to prevent copying are gradually eroding the right of fair use. Libraries, universities, consumer electronics manufacturers, Internet portals, and others warned that the broad wording of the **DMCA** would stifle new technology, threaten access to information, and establish "pay per use" more broadly. It also makes violators subject to both civil and criminal penalties.

Technological "locks" could have a great impact on libraries over the long term. Librarians have already experienced adverse effects from technological measures that limit their ability to provide access to, lend, and archive material. **DMCA** also adversely affects the ability of library patrons to make full legitimate use of library resources; so librarians need an exemption to ensure that they and their patrons can continue to exercise fair use and other activities permitted under copyright law.

Crime Of Circumvention

While copyright should be technology neutral, the application of anti-circumvention measures threatens the viability of the fair-use doctrine in the digital age. But **Congress** often pays more attention to the loudest voices in the debate and is frequently influenced by the bigger campaign supporters and more affluent lobbyists. So now, instead of just having a crime of piracy, the **DMCA** has created the new crime of circumvention. In so doing, the **DMCA** refocuses the **Copyright Act** on complete protection and away from information availability.

As in political campaigns, the content owners have not lived up to their promise to produce new digital content. Instead, they

have made it more difficult to use information resources already purchased. For example, we are now seeing compact discs produced that cannot be played in computers or even some CD players. They cannot be used to create custom compilations of favorite songs. Music or video products purchased for personal use in one format can no longer be readily copied to another medium without breaking the law. In this scenario, it is illegal to copy music from a vinyl recording or a cassette tape to a CD; so one must repurchase albums to keep up with technology and remain a law-abiding citizen. The decision in the **Napster** case, for example, rejected fair use as a legitimate use of the **Napster** service.

Criminal Citizens

We all depend on the ability to make limited copies of copyrighted material without having to pay a fee or obtain prior approval of the copyright owner. Yet the breadth of the **DMCA** threatens those fair-use rights we have come to enjoy. Will it now become illegal to photocopy a page from a library book or print an article from a newspaper's Website for use in a report? Are we breaking the law when we record a television program or movie for viewing at a later time?

Many aspects of our democracy depend upon the information availability and use facilitated by the fair-use doctrine. Yet, when the **DMCA** allows technological protection measures to prohibit unauthorized access to a work, it threatens the exercise of fair-use rights. The law does distinguish between permissible and illegal applications to circumvention; but it recognizes only two "classes of works" as exemptions:

1. Compilations consisting of lists of Web sites blocked by filtering software applications; and
2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence.

Any other action of circumvention without the consent of the copyright owner becomes a criminal activity. This puts at risk all types of traditionally accepted activities. Resources available for free in libraries may eventually be available only on a pay-per-use basis. A copyright owner could easily require

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Papa Lyman Remembers ABA/BEA — Then and Now

by Lyman Newlin (Book Trade Counsellor)

Just as I began to write this piece, I glanced at the day's mail and found *Publishers Weekly* May 13 2002 on top of the pile. Sure enough the feature story is titled "BEA in New York: Bright and Busy, the Big Apple Brings Out the Crowds."

I do not in any way disagree with that lead — it was written by a pro, **John Mutter**, and its several pages (9-20) are packed with details. But I am a veteran **ABA** attendee — no I did not attend from **ABA's** startup in 1900! but I did begin attendance in the late 1930s and have missed very few since — from the long-gone **Sherman House Hotel** in Chicago to **BEA** at **Javits Center** in NYC May 3-5, 2002. My presence this time was, as it has been for the last twenty years, on behalf of **Fred Gullette's Book News**.

So here come some comments and some gripes. First: the venue. Without any doubt, **Javits** is the worst of any convention site I have ever encountered. It was a disaster, as was the **ABA** meeting there about ten years ago when NYC Fire Department trucks surrounded the building because the sprinkler system was not yet in operating condition. In May 2002, only one out of four elevators indicated for the handicapped could be depended upon to

mind level commands. Next, aisles: many were far too narrow; reminding one of those long ago in Washington's **Shoreham Hotel** or Chicago's **Hilton Hotel** garage. And what has happened to the restriction on using two-wheeled carts for toting luggage and books through those aisles? This from a compelled user of electric "scooters." Which brings up the utter neglect of **BEA/Javits** of the need for these scooters. I had been given a couple of names of scooter renters by **BEA** and made a reservation in March with credit card, etc. Upon arriving at **Javits**, not a single scooter was available. I was offered the last non-electric wheelchair available. Fortunately my son, **Fred**, was with me and spent six hours pushing — no easy task even for an athletic body to push over the lush carpeting of exhibits.

The above comment is in contrast to **ALA's** handling of help for the handicapped: scooters are always available to members at conventions and are rent-free to members.

Here are some further comments: **BEA's** Madison Avenue approach: phony "Retail Value \$40" printed on the front cover of the **Official Directory and Buyers' Guide**. I trust that there were no suckers for this.

BEA obviously considers **Frankfurt** to be a competitor. I observed untrampled aisles consigned to foreign publishers and

long faces at many exhibitors' booths in the 2200 and 2300 aisles. Exceptions were several nice food and drink parties in these foreign publisher aisles which attracted crowds of free-loaders, including this writer. (Apologies to **Herbert Lottman**, *PW*, May 13, p. 16.)

After all this griping I want to say that after fifty or more **ABA** shows I still find great pleasure in attending. Although most of the attendees from my earliest show visits are retired or gone on to eternal book activity, I get a thrill that I can't explain when I see publishers and sellers from past years... Ignorance and therefore fear of electronic publishing still rule my mind but my fear does not get out of control because **Mr. Mutter** and reports from **Frankfurt** shows sprinkle enough information about print-on-demand activities (in which I am hoping to soon produce one or two books for which I have rights) to maintain my strong conviction that the printed book is here to stay for eons to come.

Let's express the hope now that all who are enticed by the thought of Los Angeles in 2003 are happily satisfied and that we all survive until 2004 to attend **BEA** in that city of cities and hall of all convention halls, **McCormick Center** in Chicago. And let's stay there!!!

Reality Check

by Edna and Earl Laughrey
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734-429-1711)

Book Expo is a wonderful place to see books, meet authors and get to know more about the publishing industry. We attended **BEA** again this year and found a perception we think is not accurate. Consequently, we need your help.

We believe librarians use the following sources to select materials: **ALA** publications (including *Choice*), *Against the Grain*, *Library Journal*, *Publishers Weekly*, vendor bibliographic slips, and publisher flyers. For people who have comprehensive collections in a specific subject area, a variety of society and association publications are used.

What other publications do librarians use to select material?

Please respond to:
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the payment of a small fee each time a library patron accesses a digital book or video documentary. Copyright owners already use "click on" licenses to limit what purchasers of a copyrighted work may do with it. Some eBook licenses go so far as to make it a violation of the license to even criticize the contents of a work, let alone to make a copy of a paragraph or two. The **Uniform Computer Information Transactions Act (UCITA)** contains just such a stipulation that will become law in those states which pass **UCITA**.

Corrective Actions

The Supreme Court agreed on February 19, 2002, to hear *Eldred v. Ashcroft*

which challenges the **Sonny Bono Copyright Term Extension Act**. Rep. **Rick Boucher**, who introduced the bill that eventually became the **DMCA**, wants **Congress** to revise section 1201, which can be used to keep library patrons from copying even a paragraph from a book without making a separate payment, to counter the emerging threat to fair-use values. He also wants to limit criminal circumvention to the purpose of infringing a copyright. This would provide adequate protection for copyright owners without infringing on the legitimate fair-use rights of consumers, libraries, educators, and other users. The **Copyright Law** should preserve the balance between the interests of copyright owners and the rights of information consumers.