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Legal Issues in Information Sharing in the Era of Sci-Hub

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Against the Grain

"Linking Publishers, Vendors and Librarians"

Legal Issues in Information Sharing in the Era of Sci-Hub

by **Will Cross** (Director, Copyright & Digital Scholarship Center, NCSU Libraries) <wmcross@ncsu.edu>

Welcome to Our Special Issue!

"Nobody sues libraries." This bit of folk wisdom, given to me when I first entered the profession, felt reassuring for a newly minted "lawyer in the library" still finding his footing. Then everyone started suing libraries. From archiving and search (*Author's Guild v. Hathi*), to library lending (*Kirtsaeng v. John Wiley*), e-reserves (*Cambridge v. Patton*), streaming media (*AIME v. UCLA*), and accessibility (the NAD's ongoing lawsuit brought against **Harvard**), the legal issues baked into nearly every facet of information sharing seem to be on some court's docket, and thus up in the air for establishing "safe" or best practices for librarians, publishers, scholars, and students. Good news for my job security, I suppose.

Despite judicial interrogation of so much of the scholarly communication lifecycle, the most significant changes in information sharing seem to be coming from systems that bypass the legal rules so many of us seek to understand. After more than a decade of pitched battles over changing publication agreements from copyright transfer to

licenses, clever application of the work made for hire doctrine, and recent federal mandates for openness, for millions of scholars in 2017 access to scholarly articles is driven by a small website created by a student in Kazakhstan.

While reports of subscription journals' demise as a result of what **Nature** called "Sci-Hub's cache of pirated papers" may be greatly exaggerated, it is the case that scholarly publishing is being transformed, just as the music industry was fifteen years ago, just about the time I was being reassured about the improbability of a lawsuit against libraries. Like those **Napster**-era creators, publishers, librarians, and scholars today have important questions to answer about applying old laws to new methods of sharing information.

Universities that have traditionally relied on the suite of copyright exceptions designed to support nonprofit, educational use are currently adapting to a digital, licensed, and open world. **Anali Perry** explores the copyright and

licensing challenges that must be met for her institution, **Arizona State University** to fulfil its goal to be the **New American**

University, "dedicated to the simultaneous pursuit of excellence, broad access to quality education, and meaningful societal impact." By offering open, online courses, **Perry's** institution hopes to reach new audiences and make higher education attainable for global populations, but U.S. copyright exceptions crafted in 1976 are often ill-suited to educational practice in 2017. Similarly, business practices and licenses built around the concept of enrolled students and costs tied to FTE strain to fit these new approaches. Even when a shared goal is clear, institutions must answer questions about the law, even when the law does not keep pace.

In one area, at least, **Carla Myers** argues that those answers are available and quite hopeful. **Myers** offers insights into a legal issue that libraries, publishers, and other hosts of content are currently wrestling with: accessibility. With ongoing litigation from advocacy groups and

continued on page 8

If Rumors Were Horses

To our colleagues in **Houston and surroundings**, we send our heartfelt condolences. We know about hurricanes. Thanks to all the volunteers who come together to help at times like this. Our prayers are with you as you recover from the devastation.

Aren't these beautiful? When our Conference registrar, **Sharna Williams**, is off duty, she grows amazing flowers.

Meanwhile, it's like fall here in Charleston. Unbelievably cool and breezy! Hmmm. Wonder when the heat will settle back in? And here's hoping for an end to the hurricane season! The sooner the better!

Just heard from the efficient **Tim Davenport**, **EDItEUR** and Executive Director of **ISNI** — the **International Standard Name Identifier** — concerning the establishment of a specialized **ISNI Organizations Registry**. The **ISNI International Agency Ltd (ISNI-IA)** is announcing changes to its infrastructure focused on providing open identifiers for organizations working in the field of scholarly communications. The **ISNI Organizations Registry** will

continued on page 6

What To Look For In This Issue:

<i>Native American Activism.....</i>	<i>36</i>
<i>Academic Blogging.....</i>	<i>38</i>
<i>Going Green at a Library Near You...45</i>	
<i>Misleading Perceptions of the Open Access Book Market.....</i>	<i>49</i>
<i>Digital Verisimilitude.....</i>	<i>67</i>
<i>The 2017 Electronic Resources & Libraries Conference.....</i>	<i>69</i>
<i>News and Announcements for the Charleston Library Conference.....</i>	<i>77</i>

Interviews

<i>Keith Webster and Daniel Hook.....</i>	<i>39</i>
---	-----------

Profiles Encouraged

<i>New profiles for nine people, one library and one company.....</i>	<i>74</i>
<i>Plus more.....</i>	<i>See inside</i>

1043-2094(201709)29:4:1-3

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Rumors *from page 6*

were alcoholics though apparently her father was a successful lawyer and wrote detective fiction at night. Her mother was “vivacious, outgoing, pretty and friendly” when she was sober. **Sue** talks about being afraid of water in the basement of their huge house in Louisville, Kentucky, because of big rains and sitting at home with a butcher knife because she was afraid of “bad guys.” No wonder she writes fiction! A fascinating and wonderful article. <https://www.wsj.com/articles/author-sue-grafftons-scary-childhood-home-1503413068>

While we are talking about books, we have been spending a lot of time in our new **ATG** and **Charleston Conference** office on **Sullivan’s Island** and my son **Raymond**, the real bookman, discovered **sullivans-trade-a-book-mount-pleasant**. It’s a delightful bookstore with wonderful inventory (we bought many new additions for our personal libraries including a **Sue Grafton**). Between the **Edgar Allan Poe Branch** of the **Charleston County Library** on **Sullivan’s** and **Trade A Book in Mt. Pleasant**, I think we will have plenty to keep us reading! An aside, **Poe** was stationed on **Sullivan’s** as a private in the

continued on page 24

Legal Issues in Information ... *from page 1*

numerous investigations by the Department of Justice, there is no more live issue, particularly for online materials. While core academic values clearly support full accessibility, many institutions are struggling with both the cost of making materials accessible and a perception that copyright law creates additional obstacles in tension with the requirements of the **Americans with Disabilities Act**. **Myers** provides a guided tour through these complex issues and reminds us that copyright is in much greater harmony with accessibility than some may fear.

Just as institutions must understand legal issues like copyright as they seize new opportunities, individual creators need guidance, not only on copyright, but also privacy, free expression, and the impact of terms of service tied to the various tools and platforms used to create, share, and archive scholarship. As with **Sci-Hub**, these legal issues run parallel to changes in scholarly communication technology and practice. **Mira Waller** offers an introduction to this intersection of law, technology, and social expectations with a series of case studies from the front lines supporting student work at **North Carolina State University**. Like the grey market sharing facilitated by **Sci-Hub**, the grey literature **Waller** describes raises thorny legal issues of ownership, but also tests the boundaries of what we consider scholarship, how we value and evaluate work done in higher education, and what relationship libraries should have with new formats that move the

scholarly communication ecosystem beyond the traditional walls of the academy. **Waller** argues for active engagement through hosting and educating, but ends with a series of her own questions to be answered.

Adapting to these new challenges will require new approaches and new partnerships designed to leverage the opportunities created by digital and global communication. **Josh Bolick** and **Maria Bonn** introduce one promising approach: an open educational resource (OER) for scholarly communication and legal issues. This project, which I am proud to be participating in, leverages the collaborative and iterative potential of OER to develop resources that prepare librarians for this environment. By adopting an explicitly open licensing model, OER removes many of the legal barriers addressed by **Perry**. This project reflects the promise of **Sci-Hub’s** distributed model, but grounds the work of understanding, interpreting, and explaining legal issues in a dynamic community with aboveboard open values. As with any platform, however, gathering, hosting, and curating content brings its own set of legal challenges.

As new approaches are developed, partnerships between libraries, scholars, and publishers remain essential for navigating this changing landscape. As a model for this approach, **Darby Orcutt** describes his Basic Access to Mining principles for text and data mining rights. This program, which has been a model for practice across the field, points to the ways that contract law can bridge the divide between stakeholders and the gaps left by other areas of law. **Orcutt** argues that these agreements offer a way forward that is tailored to

the nuances of specific communities and users. They also offer concrete, actionable practice that cuts through legal confusion to actually get information into the hands of scholars.

With (now former) Register of Copyright **Maria Pallente’s** promised “Next Great Copyright Act” a distant memory and the general political discord in Washington, changes to statutory law seem unlikely. Litigation around scholarly communication is more likely to persist: almost a decade after the first motions were filed, three judges in Atlanta are deliberating about the reserves system at **Georgia State University** as I write these words. Observers from oral arguments suggest that we are likely to see yet another round of remand and reconsideration that extends well beyond the time you read them. This has not been a winning strategy for plaintiffs so far, and, as we saw with **Elsevier’s** lawsuit against **Sci-Hub**, which ended out primarily as free advertising for the platform, even a legal victory can end out more pyrrhic than substantive.

If, as has been commonly observed, **Sci-Hub** is analogous to the file sharing site **Napster**, it similarly points to opportunities to create models that are built on sustainable partnerships. From **Orcutt’s** license to **Bolick** and **Bonn’s** OER, this special issue suggests paths forward and raises questions for each person to answer as they make their way through the often tangled set of legal issues that surround information sharing. Whether moving towards the beacon set by **Myers**, into the untamed wilds that **Waller** and **Perry** explore, or blazing your own trail, I hope this issue will help you find your way. Happy reading! 🐾