Coping with Copyright and Beyond: New Challenges as the Library Goes Digital

by Karen Hersey

While speed, convenience, and sheer volume of information made accessible by digital technology and delivery is a boon, market factors and the business enterprise are bringing digital information to libraries at a substantial cost, not just in dollars. This article examines the tension that results as these forces meet head-on, and identifies some issues for campus libraries to be aware of in the networked information world.

Today, with the explosion of electronic-based delivery system technology, except for books and journals purchased in printed, hard copy form, virtually all knowledge and information our educational institutions and libraries wish to acquire for student and faculty research use, or that our libraries wish to add to their physical collections, comes neatly tied up in a legal document. Universities at present simply cannot acquire electronically delivered knowledge without first agreeing to legal terms and conditions that are structured by the seller of knowledge for one purpose, and one purpose only: to get the greatest possible financial return, from the greatest number of information consumers, without risk of losing control over the revenue-producing asset. It may be crass, but the packaging and delivery of information is big business today—a growth industry that moves far beyond traditional publishing.

Consequently, as the library, a public service provider, embraces new technologies to remain a relevant resource for Americans who seek to acquire and expand their intellectual capacities, it collides head-on with American entrepreneurialism in search of profit margin. Corporate America (and corporate Europe, for that matter) is focused on maximizing profits and maintaining a competitive edge for its knowledge-based products.

No one condemns the commercial knowledge provider for doing what comes naturally in this country—seeking to build a successful business and doing it better, quicker, and smarter—because the public generally benefits from this kind of activity. In reaching for the brass ring, however, an existing balance of interests between the providers of knowledge and the users of knowledge is being tipped, by using legal agreements, in favor of the providers.

To get a clearer sense of what is really happening out there, we might look at how three information-related innovations are changing the way the library has to do business and in doing so is tipping those scales away from the careful balance that the 1976 Copyright Act achieves:

- Electronic delivery systems (including journals, multimedia works, books, computer programs);
- Database collections (including maps, images, raw data, genetic materials, anything under the sun, coming to you via a friendly CD-ROM or by online access);
- Real-time, online access services (including dynamic information products such as daily news feeds and daily stock-market statistics, static collections of information such as encyclopedias residing on a server, controlled not by the library but actually at the vendor’s site).

Before the digital revolution, libraries acquired journals, books, collections, daily newspapers, trade press, etc. in print/paper format or on film, and knew fairly well where they stood with respect to permitted uses of these materials—squarely in the Copyright Comfort Zone. There were, of course, occasional disagreements between copyright holders and libraries associated with fair use and interlibrary loan, but for the most part libraries were confident about how to conduct their business.

When we ask what’s different in the world of digitized information, the answer is, in a word, everything. Publishers and copyright holders who, like the libraries, were comfortable in a
world of print, now find themselves in a world of instant mass dissemination. Information is now capable of flowing through electronic and fiber-optic networks for simultaneous delivery to millions of sites, via systems that allow the information to be copied into print or electronic format with the stroke of a key. Information work products can be added to or diminished on a computer screen, stored for later retrieval in files that can be rearranged or otherwise manipulated, all without the touch of a human hand.

So, both providers and users of information must cope in a world where they are no longer sure of the rules, and since the providers of information are first and foremost businesses, their reaction has been to cover any potential lapses in the old legal framework of copyright law by the next best thing—a strong dose of contract law.

**Electronic delivery systems**

In this new environment the publisher is now unsure as to whether the basic elements of copyright law will adequately protect the material that is delivered to the library electronically. The publisher should perhaps not be too harshly judged when reaching the conclusion that because the method of delivering the material has changed and is now computer-based, a new form of agreement—one that not only establishes fees, but also is useful in adding new rules to the game—is needed.

For instance, the publisher is not sure that an electronic copy sent from one library to another under the interlibrary loan guidelines or the copyright statute will be protected from all sorts of scurrilous misdeeds by libraries. Therefore, the subscription agreement may include a restriction on making copies and may prohibit electronic copying. As a result, despite the possibilities ushered in by the new electronic technology, interlibrary loan may continue only via paper and perhaps via the fax machine, if anything.

Some publishers are already making changes in the publisher/user relationship through the contract; fair use, always a burr under the saddle, has become another target. Some publishers are seeking to get rid of it, through a subscription agreement wherein the library agrees to make only such use of the journal as specifically permitted in the contract and will make no other uses. It’s no longer a matter of copyright law, but of having a contract between consenting, if not equal, parties. And the law is thoroughly supportive of contract terms!

In the following table we see how the delivery and use of materials can begin to change based on the medium. Whereas in the print medium access and use and distribution and duplication are governed by the Copyright Act, in the electronic medium these issues are dependent upon the technology available to the library and upon the terms of a legal agreement.

**Database collections**

Database collections present a very interesting turn of events for the digital library that wants to provide anthologies or collections of information previously available in print, but now residing on a CD-ROM or by online access. In fact, because collections are residing on a CD-ROM, we have access to more information than ever before, so of course we want to be able to use this new wondrous technology. We are all comfortable with the copyright rules governing permitted and prohibited uses of collected information, but, unfortunately, before we can get our new database to install in the reference room, we are asked to sign a license agreement that permits the database provider to place even greater restrictions and conditions on use of the product.

For example, we are seeing, more often than not, the database provider seizing the opportunity to place trade-secret protection on the data contained in the database. The fact that the data often is public domain information or not actually owned by the database publisher seems to be irrelevant, as non-disclosure requirements are placed in the license agreement.

Adding trade-secret protection is generally not the end of the database owner’s conditions with which users will be expected to comply. We also see requirements to submit for review research papers using any data or to provide papers for unlimited use by the database publisher. Even worse, we see total prohibitions against publishing or making a commercial use of the collected database information. Publication restrictions can go so far as to prohibit publishing research findings that use the collected data, and may prohibit publishing or disclosing the data itself, even though that data may be in the public domain. In the case of one database owned and controlled by a pharmaceutical company, a right was added to the agreement allowing the company to acquire licenses to inventions made during research projects that utilized the database.

By allowing these kinds of requirements to...
be included in licenses, we are straying far from the concept of copyright, which, remember, historically protects the copyright holder from unauthorized uses related to expression and nothing else.

In addition to all of the license restrictions typically used for electronic delivery systems, additional restrictions for database collections raise a series of new issues. The following questions should be asked before signing a license:

- What are the non-disclosure obligations for data, and can the library enforce them?
- What are the use restrictions—academic v. commercial—and can these be policed?
- Must copies of research papers be sent to the publisher?
- Do users have to seek permission for publication of papers?
- Does the license control rights to, and/or ownership of, inventions made using the data?

Online access systems

To introduce issues associated with online access systems, we begin with a quote from the Britannica Online Agreement:

All usage of Britannica Online is governed by the terms of the Encyclopaedia Britannica’s [EB] Software Licensing Contract, to be signed in advance of access, which sets forth the terms, conditions, and limitations of use. That message from EB sends a very strong signal that we can expect to have more to deal with than just matters of copyright law!

Perhaps a quick run-through of MIT’s difficulties with the Encyclopaedia Britannica license, as it was first structured, will provide an idea of what educational and research institutions are up against and why it took a team of lawyers, librarians, and computer systems people at MIT to reach a mutually acceptable arrangement with EB.

- The definition of "authorized users" was too limited to serve the MIT community. It took many discussions just to arrive at an acceptable definition of "part-time students."
- Copying was restricted except as permitted under “applicable law”—perhaps a benign admission that U.S. copyright law (including fair use) applied, but initially was not at all clear.
- MIT had to agree that it would not provide access to third parties; meanwhile the database itself sits on an EB server, not an MIT server; that meant MIT did not control access, EB did.
- In addition, we were prohibited from allowing access by unauthorized users, but it was not within MIT’s control to keep them out because

of our layered and hopefully seamless computing environment. Without the aid of our computer systems people, MIT would not have been able to structure an agreement with EB that would have worked. Certainly, EB was in no position to know whether the terms of its license would be consistent with the parameters of MIT’s computing environment.

- There was an automatic termination of the license if MIT breached the terms of the license. EB would turn off MIT’s access—an interesting concept for a library. We went through extensive negotiations to prevent a campuswide turn-off for a single breaching event by a wayward student.
- In addition, there were all of the other indemnity obligations, disclaimers of liability, etc. on the part of EB—all of those things that strike terror in the hearts of lawyers at educational institutions.

When contemplating procuring online access systems, you will be faced with the same restrictions that apply to electronic delivery systems and database collections and perhaps even more. The issues to be aware of are:

- Fee structures may be based on the size of the community served, rather than on actual usage of the system.
- Student access may or may not be permitted. Consider the case of the New York Stock Exchange online access agreement, which initially did not allow student access.
- Some providers impose prohibitions against copying for any purpose, regardless of fair use.
- Frequently there is a clause restricting disclosure of data despite the fact it’s publicly available.

I hope these examples bring home the push-pull of the digital revolution for the library. On the one hand, the speed, convenience, and sheer volume of information made accessible by digital technology and delivery is a boon. On the other hand, market factors and the business enterprise are bringing digital information to the libraries at a substantial cost, not just in dollars. We are routinely accepting many more limitations on our use of information than we did in the era of print.

One final thought to ponder: How does the academic community, most particularly the libraries, regain and maintain the balance of interests between the providers of knowledge and the users of knowledge? More accurately, are we really talking about regaining an old balance, or should we be considering a new one that will work for both the knowledge provider and the knowledge user of the future?