

Legal and Policy Challenges for Libraries in the Age of Digital Books

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Libraries and Copyright

- The copyright regime has always been intricately (if uneasily) linked with the successful building of libraries.
 - Libraries historically were insulated from authorial claims
 - National policies supplied creative works to libraries
 - Libraries were a primary cultural institution—a gateway for education, research, scholarship, creativity and discovery
- Protection for libraries and copyright spring from similar policy considerations:
 - The importance of **collected knowledge**
 - The importance of **dissemination**
 - Placeholders for **preservation** of information
 - **Educating** the general public
 - **Facilitating** democratic exchange

Public Interest and Copyright

- As copyright regimes matured, particularly in the global context, rights associated with authorial interests became more removed from the public oriented goals embedded in copyright policy.
- Yet, public interest limits to copyright have long been a fundamental part of the system:
 - “*limits to absolute protection are rightly set by the public interest.*” Numa Droz, Swiss official and co-founder of the Berne Union
 - Such limits, however, were not global in nature, in values or in policy

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- Since the Berne Convention was focused on transnational protection of authors rights, public interest limits were only constructed as outer boundaries of the negotiating mandate.
 - Cultural institutions were not conceived within the emerging framework of the Berne Convention.
 - As concluded in 1886, the Berne Convention did not include limitations and exceptions as such.

The Berne Bifurcation

Authors


- Rights protected
- Global substantive minima

Public

- Limits and national policies acknowledged
- National context only

Technological Change and Conflict

- As copyright law responded to new technologies by expanding rights, the cultural role played by libraries, and educational institutions came under intense pressure.
- New rights to withhold content and control access converged with uncertainty about how to effectuate those rights

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- Libraries were not regulated by copyright per se, but became recognized as gateways to effectuate the incentive and natural rights impulses of copyright regimes in Europe and the U.S.
 - At the same time, the role of libraries expanded also to take advantage of new technologies—e.g., photocopying, document delivery services.
 - A key conflict was brewing: could libraries appropriate technological gains to advance its dissemination function? Or could such gains only be neutral at best?

- No answers under international copyright law—these were to be resolved at the national level subject to the three-step-test (TST) formally codified in the Berne Convention.
- Subtly, another conflict had already defined the copyright system: **the Berne bifurcation left matters of public policy to the states, but constrained the exercise of policy discretion through the TST**—regardless of technological gains that could improve libraries and their role in the public/cultural life of communities.

- The result was an acceptance of some amount of disharmony in international copyright law. Some states exercised policy discretion and enacted specific provisions for libraries, but some did not.
- This patchwork of “libraries’ copyright” made room for authors to fill the gap by insisting that the Berne default is the authorial—not public—interest.
- Till today, exceptions for libraries are left to national discretion.
- In the absence of explicit legislative protection, libraries increasingly are treated as users—not facilitators—of the copyright system.

Major Copyright Treaties Affecting Libraries

- The Berne Convention (1886)
- The Rome Convention (1961)
- The Agreement on Trade-related Aspects of Intellectual Property Rights (1994)
- The WIPO Copyright Treaty (1996)
- WIPO Performers and Phonograms Treaty (1996)

In a digital environment, no copyright or copyright - related treaty is irrelevant to libraries!

New Treaties, New Threats?

- Free Trade Agreements
- ACTA
- WIPO Broadcasting Treaty
- What about other regimes?
 - Contracts
 - Technological Protection Measures
 - ISP liability
- Even without explicit direction to libraries, new constraints on users will exert an *in terrorem* effect on the role, functions and legitimacy of services libraries are able to perform.
- Libraries also need intermediaries!

Common Exceptions for Libraries: Beyond Form and Function to Substance and Service

A key structural problem in international and national copyright laws is that exceptions for libraries often are not for libraries as such but for **functions** performed by libraries. This model must change in a digital era.

- Reproductions (including archives) made for users;
- Reproductions made on behalf of other libraries and archives;
- Reproduction for purposes of preservation and storage;
- Reproduction of unpublished works;

Beyond the Reproduction Right

- Exceptions for libraries have tended to follow the scheme of the Berne Convention
- In the digital environment, libraries need more room within the copyright system than exceptions to the reproduction right. Some examples could be:
 - A communication right?
 - A display right?
 - A per se exception from TPMs to conduct searches of content on behalf of users?
 - A performance right?

The Emergence of “i-Libraries?”

- Without libraries, copyright would merely be a contractually mediated system of access dissemination
- Control of content would be subject to individual (or governmental) prerogatives
- It would eliminate any viable sources of dissemination of diverse works of literature and art
- “Private” collections of culture become the norm
- A return to the pre-Berne social markers that distinguished between those with access to knowledge and those that lacked such access

What would be the legal basis for a library focused copyright system?

- Reform of the TST—highly contentious and unlikely
- Legislative reform at the domestic level?-- may be uneven and involve costly tradeoffs
- Implementing the Agreed Statements to the WIPO Copyright Treaty
- Extending the Berne Appendix to libraries
- A per se exemption for libraries under the Berne Convention
- **A Treaty for Libraries**

Benefits and Challenges of a Global Copyright Treaty for Libraries

- Is it consistent with the TRIPS Agreement?
- Is it consistent with the Berne Convention?
- Can it simultaneously protect libraries and advance users rights?
- What about moral rights for e-books and other creative content?
- Institutional Considerations—WIPO, WTO and IFLA.

Key Roles of a Global Treaty for Libraries (GTL)


- The GTL as a platform for broader policy considerations in copyright reform
- Harmonizing library interests across uneven cultural landscapes
- Insulating libraries from pressure to become copyright police, copyright lawyers, copyright enforcers and copyright fine collectors
- Developing a distinct policy space for mediating between print and digital creative products.

Looking Beyond a GTL

- ISP relationships with libraries
- E-lending and distributorship agreements
- Contracts that restrict lending
- What does fair use look like when users combine, remix or otherwise re-mix content made available in libraries?
- First sale?

Infusing new life into the “Public” Interest

- A transnational Library?
- A minimalist future for copyright and a maximalist role for limitations and exceptions
- International copyright reform
- A global system for the production of creative works needs more, not less, robust libraries to facilitate dissemination.

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- Libraries are one of very few examples of public-oriented interest groups that seek to provide a counterweight to the strong lobby of copyright owners in matters such as orphan works or the anti-circumvention prohibitions of the Digital Millennium Copyright Act. Yet, here also digitization and the emergence of a networked society impose complexities. It is a question, whether within the new evolving map of knowledge intermediaries, libraries are not becoming an interest group that is more particular.
 - Guy Pessach 2007

Conclusion

Preserving copyright's purposes and advancing the were never designed to be mutually exclusive. Libraries are the last remaining cultural institutions that make this “arranged” marriage possible and fruitful. Co-integration, not just co-existence, should be the end goal.

THE END