The Copyright Conundrum

“May you live in interesting times”—a saying of perhaps dubious origins—is alternately viewed as either a curse or a positive wish. To be working in the copyright space on a campus today is to be living in interesting times. Copyright, once the yawn of subjects that garnered enthusiasm only in esoteric circles, is increasingly a hot topic covered both in the mainstream and by social media. Why this change, and why does it matter to higher education?

Copyright and Its Tensions

Copyright law in the United States has its origins in Great Britain’s 18th-century Statute of Anne and is grounded in the U.S. Constitution. Copyright law conceives and promotes “progress,” as described in the Constitution, in two distinct but related ways. First, it seeks to increase both the quantity and the quality of creative output. Second, it seeks to broaden public access to creative works. The two “progress” goals exist in substantial tension with one another. The incentives granted to authors allow them to restrict access to and use of their works for a limited time so that they can benefit from their creations and also have the incentive to create additional intellectual products. This delicate equation is complicated by many factors, and public policy seeks to find the balance of copyright scope and duration, limitations and exceptions like fair use, and appropriate remedies in case of infringement.

Although digital technologies provide new opportunities for authors and producers to create interesting enhancements based on existing works, these technologies also make it harder to determine the boundaries between true derivative works and mere copies. Therefore, the detection of infringement and the subsequent enforcement of rights become increasingly difficult and costly. Rights holders, in this disrupted environment, gravitate toward building technological and contractual barricades around their “property” because monetizing copyrightable “products” is very profitable today. Fair uses of protected works (an important sphere in which education and scholarship operate) can also be constrained in this environment, since technology permits creators and producers to more perfectly control access to their works and to dictate how these are used.

Technological advances have made copying easier, but at the same time, they have caused tensions in the copyright system. Digital technologies exacerbate this tension by also making distribution easier, faster, and cheaper. Under real and perceived threats of “piracy,” some copyright owners agitate for expanded protection, since they fear that their market will be undercut because of the speed and ease with which digital content can be copied and disseminated, thereby negating the limited-time advantage of their monopoly.

Likewise, licensing is replacing the sale of digital content, and this shift carries with it more control by content owners. The licensing model enables copyright holders to determine which uses are the most productive and then licenses these accordingly. Technological constraints on the use and reuse of content give copyright owners the ability to control the after-market use of all their digital content, which is especially problematic in higher education, where sharing and building on the knowledge of others is fundamental.

Digital technologies enable new forms of communication, interaction, and presentation in unimaginable ways that can enrich teaching and learning. Yet these technologies also bring the higher education community face-to-face with the tangled web of copyright issues. As Kenny Crews writes: “Research and education seem to be routinely reinvented with the creation of new software and technological devices.” This of course creates more tensions on the copyright system.

The Public Policy Environment

The central question of copyright public policy is obvious: How do we optimize the incentive to create new works while minimizing the constraints to innovate? Copyright policy should serve the constitutional purpose of promoting “the progress of science and the useful arts” while maintaining the balance between public and private interests. In today’s copyright policy atmosphere, the balance favors the incentives and rewards for rights holders more than is necessary to maximize creative production. However, proposals backed by the entertainment industry do worse than skew the balance in the other direction; they aim to negate any kind of balance at all, abolishing rights already granted in the law, usually without a corresponding increase in the incentive to create new works.

SOPA, in particular, had unprecedented provisions that sought to make network providers more responsible for infringement. EDUCAUSE, which had long argued that copy-
right infringement is an issue between consumers and producers of copyrighted material (not network providers), found SOPA and also PIPA to be excessive. In opposing these bills, higher education had important allies including Google, Verizon, and other network providers. SOPA and PIPA threatened not only higher education but also websites such as YouTube and Wikipedia. The social media industry became engaged, opposition to SOPA and PIPA spread, and the bills were withdrawn.

These skewed pieces of legislation were not new. SOPA and PIPA were revisions of an earlier bill: COICA. Congress has passed one-sided copyright laws since 1976: the Copyright Term Extension Act kept covered works from entering the public domain; the No Electronic Theft Act established criminal prosecution of individuals who engage in copyright infringement, even when there is no monetary profit or commercial gain from the infringement; the Digital Millennium Copyright Act provided a safe harbor for online service providers but created new obligations on them as well, and it prevented circumvention of technological protection measures.

The Campus Environment

So, creative works and information goods are being squeezed by legal, market, and technology forces, as well as by users who want to mix, repurpose, and build on the original ideas. In a perfect world, these four forces would work in harmony. Today, however, these forces are at odds. The copyright law has not been comprehensively revised since 1976 (long before the advent of digital technologies). Digital content is cheap to produce and reproduce, without any degradation of quality, and is easy to distribute and redistribute. Content owners are desperately trying to hold on to markets that have been fundamentally changed by digital technologies. And, very important, users are creating content and have become accustomed to easy access to and use of content. Where does this leave those who are dealing with copyright issues in teaching and learning, research, and network operations on a daily basis?

The campus community, as both a copyright producer and a consumer, is right in the swirl of the copyright battles. To date, without comprehensive copyright legislation revision, we are left with a crazy quilt of laws that fail to provide clarity. The courts, including the Supreme Court, have issued contradictory decisions: the Georgia State University fair-use case had a positive outcome for higher education, unlike Eldred v. Ashcroft, which failed to overturn the Copyright Term Extension Act. As Crews points out: “This mix of change and inactivity has motivated private parties to take the lead in shaping some implications of copyright law.”

Digital technologies facilitate creative uses of content, with many of these uses serving as legitimate cornerstones of the academic enterprise. This dynamic and inconclusive situation raises complex questions about copyright management and leaves faculty, students, librarians, curriculum designers, academic technologists, and network administrators with a murky minefield to navigate, especially in the online environment.

What to Do?

In August 2012, EDUCAUSE convened a small group of stakeholders from various sectors of higher education to discuss copyright issues and the corresponding challenges and opportunities in the context of e-learning. The group explored the legal and policy issues associated with educational uses of copyrighted materials, the implications of licensing digital content, and ways to work together to proactively shape the future of federal and international law while simultaneously providing guidance to help campuses deal with the murkiness of the current environment as they strive to fulfill their teaching, learning, and research missions.

Among the myriad issues discussed, two broad themes emerged. The first is the need to establish and pursue an approach to rights management throughout higher education. The second is the need to develop policy engagement strategies at both the domestic and the international levels so that higher education interests are well positioned and well represented in the public policy sphere.

Yes, we do indeed live in interesting times. Is this a negative or a positive situation? In today’s copyright conundrum, it is often both.

Notes

1. 8 Anne 19 (1710); U.S. Constitution, art. I, sec. 8, cl. 8.

Joan Cheverie (jcheverie@educause.edu) is a Policy Specialist for the EDUCAUSE Washington Office.

© 2012 Joan Cheverie. The text of this article is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 United States License (http://creativecommons.org/licenses/by-nc-nd/3.0/).