

ENSURING ACCESS TO INFORMATION: A LIBRARIAN'S DILEMMA

by Vyva Victoria M. Aguirre, M.L.S., LL.M.

Abstract

Shows the problem of librarians in creating the balance between upholding the right to access information and intellectual property rights. Discusses the concept of authorship as it affects understanding of copyright and related rights. Shows the reasons and the manner by which copyright protection serves as a barrier to access. Presents what has been done to mitigate the effects of this barrier brought about by copyright to access of information.

Introduction

To paraphrase Dr. Federico Macaranas, economist, probably the most important commodity in these post modern times is information. This statement is very relevant to the profession of librarianship because we are in the business of information. As information professionals, our main job is to see to it that the public has access to information, when they need it, where they need it. This is the librarian's contribution to development.

Right of Access to Information

Republic Act No. 9246, otherwise known as the *Philippine Librarianship Act of 2003*, "recognizes the essential role of librarianship in developing the intellectual capacity of the citizenry" and "the role of library service as a regular component for national development" (Sec.2).

Access to information and sources of knowledge is also a public good founded on the dignity of man as implied from the preamble of the UNESCO Constitution (1945), declaring that "the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern". The same preamble further exhorts States Parties to develop and increase the means of communications between their peoples, "believing in full and equal opportunities for education

for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge”. It is in this broader context that right of access to information is discussed here rather than in the more technical and legalistic definition embodied in Art.III, sec.7 of the Philippine Constitution, referring to information in official government records and documents.

The right of access to information is an important component of the freedom of expression, guaranteed by the *Philippine Constitution* (Art.3, Sec.4) and the *Universal Declaration of Human Rights* (Art.19). According to the latter, the right to freedom of opinion and expression “includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (underscoring supplied). This, according to the International Federation of Library Associations (IFLA), constitutes intellectual freedom which is the right of every person “*both to hold and express opinions and to seek and receive information*” (IFLA, 2002). *Right of access to information is essential to intellectual freedom; and intellectual freedom, according to the IFLA Manifesto, is at the core of library service.*

Right of Access and Intellectual Property Rights

The right to access and use information, on the other hand, is not absolute but is subject to limitations imposed by law. One such limitation is reflected in *Republic Act No. 8293* (1997), otherwise known as the *Intellectual Property Code of the Philippines*.

Access to information and sources of knowledge help in the development of the intellectual capacity of the citizenry while protection of intellectual property rights is assumed to ensure national development through a continuous supply of creative works. According to the *Philippine Constitution*, the purpose of intellectual property protection is to secure scientists’, inventors’ and artists’ exclusive rights to their intellectual creations, particularly when beneficial to the people (Art.XIV, sec.13), assuming that this exclusivity of benefits will encourage scientists, inventors and artists to keep on creating and allowing public access to their creations. At the same time, the law itself sets limitations of time to copyright protection “to the extent necessary to allow others to access and thereby build on those works” (Hoffman, 2005, p.3). To quote the dissenting opinion of Judge Boyce Martin, Jr. in the case of *Princeton University Press v. Michigan Document Services, Inc.* (99 F.3d 1381),

Copyright protection as embodied in the [U.S.]

Copyright Act of 1976 is intended as a public service to both the creator and the consumer of published works. Although the Act grants to individuals limited control over their original works, it was drafted to stimulate the production of those original works for the benefit of the whole nation.

In the Philippines, as elsewhere, apprehensions about intellectual property laws stem largely from a lack of understanding of how they operate. As a result, librarians tend to swing towards either of two extremes: towards a strict interpretation and implementation of the rules, thus hampering service; or towards complete disregard of them, bordering on irresponsibility that can open them to charges of copyright violation, or abetting violation of the law by their clients.

Librarians and information professionals play a vital role in dissemination of information and are likewise called upon to protect intellectual property rights which tend to limit access. How do they do this in today's information infrastructure? According to Miriam Nesbitt, legislative counsel of the ALA, "The mission of libraries is to ensure access... The nature of copyright is to restrict access" (in Torrans, 2004, p.61). In this lies possible conflicts that can arise with copyright implementation. In the face of this apparent conflict it is necessary, as Christine Borgman suggests, to find the proper balance between the citizen's right to access to information and the rights of creators to be compensated (Borgman, 2000).

The objective of this paper is to find a way of reconciling the aforementioned apparent conflict between these two values. Specifically, it discusses (1) the concept of authorship as it affects understanding of copyright and related rights, (2) why and in what manner copyright protection serves as a barrier to access, and (3) what, so far, has been done to mitigate the effects of this barrier to access. Finally, recommendations will be made for librarians to play a more proactive role in the development of the doctrine of "fair use" in their capacity as providers of information.

Authorship as Moral Right

Under Section 193.1 of the *Intellectual Property Code of the Philippines* (Rep. Act No. 9293, 1997),

The author of a work shall, independently of the economic rights..., have the right to require that the authorship of the work be attributed to him, in

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particular, the right that his name, as far as practicable, be indicated in a prominent way on the copies, and in connection with the public use of his work...

This provision falls under the Chapter on 'Moral Rights'. Unlike copyright, an author's moral right is not simply a right of ownership. It is a right founded on ethics. While the right may be waived, "no such waiver shall be valid where its effects is to permit another:

"195.1. To use the name of the author, or the title of his work, or otherwise to make use of his reputation with respect to any version or adaptation of his work which, because of alterations therein, would substantially tend to injure the literary or artistic reputation of another author; or

"195.2. To use the name of the author with respect to a work he did not create."

Sometimes, however, it is not always easy to determine who the author of a work is, for instance, when the work is collaborative. The *Authorship Guidelines* of the Faculty of Medicine of Harvard University (2000) defines 'authorship' as "an explicit way of assigning responsibility and giving credit for intellectual work." The most important criteria for assigning authorship, according to the same Harvard guidelines is "intellectual contribution to the work" and that contribution must be "substantial" and "direct". This seems clear enough. And yet, other authorities disagree. According to some, authorship policy can differ in each country and in different fields (Ganatra, 1996). In some countries, the practice of assigning co-authorship to the head of the sponsoring institution is acceptable. According to Ganatra, this practice "is justified by the argument that he was responsible for providing facilities for carrying out research."

The determination of authorship of a work factors into several of professional decision-making by librarians. For instance, it is sometimes difficult to determine to whom to ascribe authorship of a work in cataloging as well as indexing. It also affects selection of which materials to acquire using the criteria of author's reputation. Likewise affected are reference work and similar users services where librarians are expected to deliver accurate information or access to the right sources of information. On the one hand, the digital environment has made this task a lot easier for many of us. On the other hand, the wealth of information available today has

also made it more difficult, so to speak, to pick out the wheat from the weeds. It has also escalated the age-old academic problem of plagiarism and librarians' fear that the services they provide might be contributing to this problem.

Plagiarism

Plagiarism is defined as the “uncredited use (intentional or unintentional) of somebody else’s words or ideas” (OWL at Purdue, retrieved 2008). It is “the act of claiming authorship for another’s words or ideas” (Russell, 2004, p. 131). He enumerates distinctions between plagiarism and copyright violation in this manner:

1. Using even a small amount of a work written by someone else without attribution is plagiarism, but to be guilty of copyright infringement, the amount copied must be in some sense substantial.
2. One can plagiarize any work that has ever been written, no matter how old and no matter who the author, but copying even an entire book that is in the public domain... is not a violation of copyright.
3. It is possible to plagiarize ideas, even facts (if, for example, they are presented in the same order and context as another work) but copyright law does not protect facts or ideas, only the original way in which they are expressed within a particular work.

According Dames (2007) plagiarism allegations damages a person’s professional reputation much more than allegations of copyright infringement because it is intellectual dishonesty. If proven, academics charged with this offense can lose not only their jobs but their standing in the academic community, and students can be expelled. Plagiarism, however, can be committed unintentionally (see OWL at Purdue, 2008), especially by students, out of ignorance. Therefore, academics must embark on an anti-plagiarism campaign that is more preventive than punitive in nature.

Where does the librarian come in? Librarians give access to all sorts of information sources, in print format and in digital format, including access to the Internet. Librarians, therefore, must work with the institution’s faculty to combat or, at least, minimize plagiarism by exercising vigilance in their respective domains. Formal instructions on plagiarism and the use of proper citations should form part of the library instruction programs of academic and secondary school libraries. Librarians, too, can produce video or power point presentations on the subject, and make these available to faculty and researchers, especially those who are new in the organization.

In addition librarians can help faculty members educate students to

the proper use of the Internet, the most popular source of plagiarized materials. The task of educating students to be discerning about the quality of Websites is something that librarians can do by preliminarily evaluating Websites themselves and alerting library users to those sites that provide quality and accurate information (Embleton, et al., 2007). When students have learned how to evaluate sites and information, it would hopefully follow that they will learn to use information properly. This is the beginning of information literacy.

Copyright in Today's Information Infrastructure

If plagiarism is a violation of an author's moral right, copyright infringement is a violation of the author's ownership right. The *Civil Code*, provides that "ownership is acquired either by occupation [or] by intellectual creation" (Art.712). This provision is clear: copyright is acquired by the mere fact of intellectual creation, not by registration with the Copyright Office. Subject to certain limitations, all intellectual creations that fulfill the following requirements are, according to the U.S. Copyright Act of 1976, eligible for copyright protection:

1. an expression
2. that is an original work of authorship
3. with a modicum of creativity
4. and that is (a) fixed in a tangible medium of expression, whether now known or later developed and (b) from which the work can be perceived, reproduced, or otherwise communicated, whether directly or with the aid of a machine or device (*Copyright Act of 1976, U.S. Code, vol.17, sec.101; Feist Publ'ns Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 1991, cited in Hoffman, 2005, p.15)

The copyright owner is granted the exclusive right (1) to reproduce the work or a substantial portion of the work; (2) to produce derivative works of the work such as dramatizations, translations, adaptations, abridgments, arrangements or other transformations; (3) to the first public distribution or public display of the original and each copy of the work; (4) to the public performance or other communication to the public of the work (*IP Code, sec.177*).

As an object of ownership, however, copyright is subject to certain limitations. Two of the most interesting limitations are: fair use, including the right of libraries to make a single copy of a copyrighted work by reprographic reproduction under certain conditions, and the first sale

doctrine.

Fair Use

Through the court-developed doctrine of “fair use”, the general public is given the right to reproduce a work subject to specific limitations. Under Philippine law, fair use of a work for criticism, comment, news reporting, teaching, including multiple copies for classroom use, scholarship, research and similar purposes does not infringe copyright (*Sec. 185.1, IP Code*). Traditionally, fair use is more easily accepted when the purpose of copying is educational in character and purpose than when it is commercial or for profit. It does not mean, however, that all copying for educational or classroom purposes is fair use (for example, one cannot photocopy an entire book, even for personal, educational or research purposes if the book is still available in the market).

The doctrine of fair use has been affected by laws enacted in the U.S.A. and Europe to respond to the problems brought about by the new information infrastructure. It is very easy to download materials from the Internet and people have the idea that if it's in the Web then it must be free for all. Yes and No. Yes, it is free for all if one can access it at all but use must still not infringe copyright: one cannot multiply copies, publish and sell a work that had copied substantially from another person's work. To protect their reputation, it is now common practice for academic journal publishers to require that writers sign a certification that nothing in the article submitted for publication had infringed anyone's copyright.

Library Photocopying as Fair Use

The *Intellectual Property Code of the Philippines* allows non-profit libraries and archives to make single copies of a work by reprographic reproduction under the following conditions:

- (a) Where the work by reason of its fragile character or rarity cannot be lent to users in its original form;
- (b) Where the works are isolated articles contained in composite works or brief portions of other published works and the reproduction is necessary to supply them when this is considered expedient, to persons requesting their loan for purposes of research or study instead of lending the volumes or booklets which contain them; and
- (c) Where the making of such a copy is in order to preserve and, if necessary in the event that it is lost, destroyed or rendered unusable,

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replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed or rendered unusable and copies are no longer available with the publisher (Sec.188.1).

Legal repository libraries that are entitled to receive copies of printed works are further allowed “to reproduce a copy of the published work which is considered necessary for the collection of the library but which is out of stock” (Sec.188.2). However, they are not allowed “to produce a volume or a work published in several volumes or to produce missing tomes or pages of magazines or similar works, unless the volume, tome or part is out of stock” (Sec.188.2).

Library photocopying as fair use has been an accepted practice in other jurisdictions, particularly in North America. The principle was upheld in the landmark case of *Williams & Wilkins Company v. The United States* (487 F.2d 1345, 1973) where the U.S. Federal Court held that respondent libraries’ practice of photocopying articles from medical journals published by plaintiff was fair use under circumstances summarized as follows: (1) that the respondent institutions were nonprofit and were devoted solely to advancement and dissemination of medical knowledge, (2) that both institutions normally restricted copying on an individual request to a single copy of a single article and to articles of less than 50 pages, (3) that library copying had been going on ever since the 1909 Act [which allowed them to do that] was adopted, (4) that medical science would be seriously hurt if such photocopying were stopped, and (5) that there was no showing of economic injury to plaintiff publishers of the journals.

Libraries exist in order to give access to knowledge. The rationale for allowing them to make copies of copyrighted materials under certain circumstances is anchored on this role. To borrow from *Williams & Wilkins* (1973), intellectual development would be seriously hurt if fair use photocopying in libraries were stopped. However, not all forms of copying for educational and research purposes is fair use.

Photocopying for Educational Purposes

In the landmark case of *Princeton University Press v. Michigan Document Services, Inc.* (99 F.3d 1381, 1996), the majority opinion drew some fine distinctions between what is “fair” and “not fair” photocopying. The case involved the photocopying of copyrighted works by defendant Michigan Document Services, Inc., a commercial enterprise. The copyrighted works

copied were assigned readings by professors at the University of Michigan, bound into what are called “coursepacks” and sold to students. As in Philippine law, U.S. Copyright law grants fair use presumptions for copying for educational and research purposes. However, in the Michigan Document Services case, the Court ruled against the defendant and declared that the coursepacks they produced were not covered by fair use.

According to the Court, while the law provides that “the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright,” this does not give “blanket immunity” for making multiple copies for classroom use. While the students use the photocopied coursepacks for educational purposes, the copying done by defendant here is done for profit since it is a commercial entity and the coursepacks are not sold at cost to students. Further, defendant, unlike the other copyshops, does not pay “permission fees” to copyright holders. Thus, it has undue advantage over its competitors in the copyshop business (*Princeton University Press v. Michigan Document Services, Inc.*, 1996).

In a more recent case, Georgia State University figures in a copyright infringement case filed by Oxford University Press, Cambridge University Press, and Sage Publications for “systematic, widespread, and unauthorized copying and distribution of a vast amount of copyrighted works . . . through a variety of online systems and outlets utilized and hosted by the University for the digital distribution of course reading material” (AALL, 2008). In a newsbrief by George H. Pike dated March 29, 2010, it was reported that motions for summary judgment were filed by both parties. Meanwhile, Georgia State University had amended its guidelines on electronic coursepacks. The new policy offers faculty members a “fair use checklist” and educates them about copyright law. This new policy allows faculty members to determine, on the basis of the checklist and other information on copyright, whether the use of copyrighted materials is fair or not.

Legal and Technological Barriers to Fair Use

Today’s libraries operate in a global environment generations away from Gutenberg. Consequently, today’s fair use exceptions to copyright experience barriers not present when this doctrine was first enunciated by the courts.

The first of the laws enacted as a result of digital or online publishing
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is the U.S. Digital Millennium Copyright Act (DMCA, 1998, 179 ALR Fed. 319) which gives copyright owners of materials in digital format the right to control access to technologically protected works. The law penalizes the circumvention of these technological barriers, subject to certain exemptions. Analogous laws were also passed in the European Union where a number of member-states have passed laws dealing with technological protection measures. Likewise, the *WIPO Copyright Treaty* (2002) obliges contracting parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights” (Art.11).

Since technological barriers can control such matters as terms of payment and limitations on the number of copies one can make, among others, and can even tie use of the work to a certain technology, it can have a negative impact on the quantity and quality of library service and, to a certain extent, limit the exercise of our primary function as providers of information. More importantly, it renders “fair use” useless as far as information in digital format is concerned since it goes beyond copyright – it penalizes circumvention of the technological barrier or unauthorized access, rather than the act of copying or reproduction itself. By this, it even protects works that are not subject to copyright, like laws and court decisions, when they form part of an electronic database with a technological barrier to access.

Nevertheless, the U.S. DMCA (1998) included a provision allowing the U.S. Librarian of Congress, in consultation with the Copyright Office, to conduct an evaluation of the exemptions to the prohibition every three years and to permit further exemptions that are found to be necessary (Section 1201(a)(1), in *Torrans*, 2004). Among the exemptions “found to be necessary” allows “nonprofit libraries, archives and educational institutions to circumvent solely for the purpose of making a good faith determination as to whether they wish to obtain authorized access to the work” (Section 1201[d], in *U.S. Copyright Office Summary*, 1998). Further, later rulings indicate that “the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of four classes of copyrighted works” as follows:

- compilations consisting of lists of Web sites blocked
- by filtering software applications literary works,

including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence. People with vision or print disability are allowed to circumvent technological protection measures in order to access literary works, including e-Books, via a 'screen reader' or text-to-speech or text-to-Braille device. Circumvention is allowed in the case of computer programs and video games in formats that have become obsolete (Torrans, p.115).

The American Library Association objects to the three year period of review considering the rapid changes that are happening in technology. It reported that "Libraries, researchers, technologists and other critics of this section of the law have insisted that the anticircumvention provision stifles fair use of copyrighted information and chills legitimate research crucial to the advancement of science and technical innovation" (ALA, 2003, in Torrans, p.116).

First Sale Doctrine

The first sale doctrine is another important exception to intellectual property rights protection. The first sale doctrine allows a person to sell or otherwise dispose of a work that he or she has legally acquired (see U.S. Code, Title 17 [Copyright Law], Sec.109a). The American Association of Law Libraries (AALL, 2003-2010) confirms that libraries rely on this doctrine to lend books and other items to patrons. We might add that the doctrine also allows libraries to transfer or donate unwanted materials to other libraries.

The question is, does this doctrine apply to works "born digital" and available only online and protected by a technological barrier to access? In the first place, any form of copying not covered by fair use is not allowed even under the first sale doctrine. Quinn of IPWatchdog (retrieved 2009) gives a scenario in what he calls the new digital economy:

If you purchase software or perhaps an MP3 and you load it to your computer and then keep it on your computer and sell it to another you have committed copyright infringement. In order for the first sale doctrine to apply to this situation you would have had to erase your copy upon transfer. If you did this it would be the same as transferring what you purchased. Keep a copy, however, and you are now not only distributing,

but also copying, which is prohibited by the Copyright Act (par.5).

Earlier, R. Anthony Reese (2004) noted that the first sale doctrine was designed to increase affordability of works by providing possibilities of secondary sale, rental and lending markets. These possibilities will no longer be open in the digital environment where it is not possible to transfer copies of works without copying. Note that the mere act of downloading a bought software into your computer is already “copying”. While this is allowed (see Sec.189, *IP Code*), transfer of that copied software with the computer can be considered unlawful distribution, as shown by Quinn’s scenario. Thus, before selling or giving away computers with “copied” software, the software must first be removed. In the same manner, before selling or giving away the storage device containing the original copy of the software, the copy in the computer must first be removed or uninstalled. The same is true with music downloaded from CDs.

In the second place, with DMCA and similar laws in place, today’s copyright owners of works produced digitally are using technology that interfere with this first sale doctrine (AALL, 2003-2010). Note, too, that more and more journals are published online and most of them are not available with publishers but with “aggregators” like ProQuest and EBSCO. Where we used to purchase copies of printed journals, we now sign licenses with these aggregators. Conclusion: we don’t buy, we are licensed to use or access; therefore, we don’t acquire ownership over the works that we pay for. The first sale doctrine can no longer apply to electronic journals. The same is true with certain software products where the terms designate the transaction as license to use rather than sale. Von Lohmann (in King, 2001), fears that copyright laws are “moving away from the first-sale doctrine” in this “era of digital envelopes – where the copyright owner determines what you can do with your purchase”.

Licensing

A license is a contract, binding on the parties: the licensor and the licensee where the licensor retains ownership over the items licensed. In the digital environment such as we are in now, many electronic works are subject to license. Therefore, the use of these works are covered by the licensing contract rather than by copyright law with its exceptions of “fair use” and “first sale”. In the United States, there is a proposed law entitled the Uniform Computer Information Transaction Act that would standardize

licensing of digitally-created works. If enacted, fears are that it would give software companies unfair advantage in determining the terms of a license agreement (AALL, 2003-2010).

Most licensing contracts for electronic resources, particularly electronic journals, are fixed by the licensor. In most instances, too, licenses are signed with aggregators rather than publishers and it is more often than not “all or nothing” contracts. Libraries subscribe to aggregators, or vendors, rather than individual publications and librarians have to be very careful to evaluate the titles that the aggregators provide access to or they will be left with quite a number of titles that they don’t need while being deprived of what their users actually need.

Aggregators usually dictate the terms of a license agreement. However, this does not mean that libraries cannot negotiate for better terms. In fact, some academic libraries in the United States have successfully drawn up some negotiating points. Alford (2002) mentions some of them: pricing, users, access, uses.

According to Alford, “Librarians must carefully consider the pricing mechanism offered by the publisher and make sure the use of materials is clearly understood along with the price consequences” (Alford, par. 42), “must carefully consider who should fall within the definition of ‘users’ within their particular library community” (par.44), “must consider how users will access the electronic material” (par.45), e.g., will off-campus use be allowed?, and must be “particularly aware of any restrictions on the fair use of electronic materials as provided under ... copyright law” (par.46). Alford further recommends what libraries should seek to achieve when negotiating electronic license agreements, namely, that the license should allow for the following:

1. copies to be made for course packs of faculty of the institution;
2. electronic materials to be loaned to other libraries (at a minimum, libraries should be allowed to print an article from the electronic materials and send the printed material as part of their interlibrary loan service just as they do for printed materials);
3. copies by users of electronic materials within the limits of the law of fair use; and
4. formatting the electronic data in another form to be used within the limits of fair use (par.48)

North Carolina State University Libraries Licensing Guidelines (2003) cautions librarians to look out for “undesirable terms” in a license that can lead to risks and costs for the library. Examples of these are: agreeing to

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indemnify the vendor (e.g., for violations of copyright committed by users); agreeing to be governed by laws of a foreign jurisdiction (e.g., the U.S.A., or Canada, or Japan); agreeing to submit to mandatory or binding arbitration. According to the guidelines, NCSU libraries also negotiate terms that limit the access of patrons, or that limit fair use rights. An important thing to consider is asking the vendor to issue an intellectual property warranty, guaranteeing that nothing in its database violates copyright. The library should not deal with a vendor or aggregator who refuses to issue such a warranty because it would not want to find itself being sued by copyright owners.

California Digital Library (CDL, 2009) outlines a checklist of terms that should be included in license agreements. To name only a few, these are,

- (1) *Archiving* – the license should clearly state archiving responsibility and allow copying of data for preservation purposes;
- (2) *Perpetual license* – the license should grant a nonexclusive, royalty-free perpetual license to use licensed materials that were accessible during the term of the agreement (means that access survives the life of the agreement);
- (3) *Completeness of content* – applicable when the electronic format coexists with print format. There should be nothing in the print version that is not in the electronic version;
- (4) *Linking to and from content* – users should be able to link to citations and also from abstracts and indexes to full text;
- (5) *Technical support* contact person must be named;
- (6) *List of journal titles licensed* (with complete bibliographic information).

CDL further requires reasonable assurances regarding the availability and performance of the vendor's servers and continuing improvements and updates at no additional cost. In addition, permitted uses should allow fair use, including interlibrary loan, use in coursepacks and electronic reserves, and classroom use. The license must also allow use of incidental, walk-in users in the library in addition to members of the library's regular user community.

Copyleft, and the Use of Free and Open Sources as a Less-Costly Alternative

In addition to traditional but negotiable licensing, a new form of licensing that works with copyright but which guarantees freedom of

creators to share their work under certain conditions has emerged in recent times. This form of licensing is called copyleft. The concept of copyleft licensing started with sharing of computer programs with the objective of allowing continuous improvements on original products.

GNU Project (2009) defines “copyleft” as “a general method for making a program (or other work free), and requiring all modified and extended versions of the program to be free as well.” It allows anyone to use the work, or to redistribute it with or without change, as long as the person also passes on the freedom to further use, copy and change it. Copyleft assumes that the work is copyrighted. It does not do away with copyright. It merely provides for distribution terms. Because copyleft is a general concept, it needs to be embodied in a concrete instrument to be usable. This instrument is called the GNU General Public License (GNU GPL).

Creative Commons

The copyleft concept of GNU has been modified in some way by an organization called the Creative Commons by allowing creators to reserve some rights. According to its Website, “Creative Commons is a **nonprofit** corporation dedicated to making it easier for people to share and build upon the work of others, consistent with the rules of copyright”. It offers “**free** licenses and other legal tools to mark creative work with the freedom the creator wants it to carry, so others can share, remix, use commercially, or any combination thereof.” It is also known as a “some rights reserved copyright”. It is not an alternative to copyright. It does not do away with copyright. Instead, it works alongside copyright, so copyright owners can modify the copyright terms to best suit their needs (Creative Commons, n.d.).

Creators who want to register their work with the Creative Commons license may do so with a choice of conditions, namely, (1) attribution, (2) noncommercial, (3) no derivative works, and (4) share alike.

Attribution means you let others copy, distribute, display, and perform your copyrighted work – and derivative works based upon it – but only if they give credit the way you request;

Noncommercial means you let others copy, distribute, display and perform your work – and derivative works based upon it – but for noncommercial purposes only;

No derivative works means you let others copy, distribute, display and perform only verbatim copies of your work,

not derivative works based upon it; and *Share alike* means you allow others to distribute derivative works only under a license identical to the license that governs your work. (Creative Commons, n.d.).

Libraries can access materials with Creative Commons license for the benefit of their users, or at least, inform the latter of the existence of such an option.

Open Source Software

The availability of free and open source software is a breath of fresh air for organizations with limited financial resources, like government and small enterprises. State universities and colleges are among those who benefit from this relatively new development. These institutions are no longer forced to bite expensive software peddled by profit-oriented IT companies – they can use free and open source software, subject to certain conditions, from which they can develop their own according to their needs and the specific character and nature of their organization.

The Open Source Initiative (OSI) is a California based non-profit organization, founded in 1998, that advocates the use of open source. One of its important activities is maintaining the Open Source Definition as a standards body (Tiemann, 2006). Open source use is subject to the following criteria (Coar, 2006):

1. Free Redistribution - The license shall not restrict any party from selling or giving away the software as a component of an aggregate software distribution containing programs from several different sources. The license shall not require a royalty or other fee for such sale.
2. Source Code - The program must include source code, and must allow distribution in source code as well as compiled form. Where some form of a product is not distributed with source code, there must be a well-publicized means of obtaining the source code for no more than a reasonable reproduction cost, preferably downloading via the Internet without charge. The source code must be the preferred form in which a programmer would modify the program. Deliberately obfuscated source code is not allowed. Intermediate forms such as the output of a preprocessor or translator are not allowed.

3. Derived Works - The license must allow modifications and derived works, and must allow them to be distributed under the same terms as the license of the original software.
4. Integrity of the Author's Source Code - The license may restrict source-code from being distributed in modified form *only* if the license allows the distribution of "patch files" with the source code for the purpose of modifying the program at build time. The license must explicitly permit distribution of software built from modified source code. The license may require derived works to carry a different name or version number from the original software.
5. No Discrimination Against Persons or Groups - The license must not discriminate against any person or group of persons.
6. No Discrimination Against Fields of Endeavor - The license must not restrict anyone from making use of the program in a specific field of endeavor. For example, it may not restrict the program from being used in a business, or from being used for genetic research.
7. Distribution of License - The rights attached to the program must apply to all to whom the program is redistributed without the need for execution of an additional license by those parties.
8. License Must Not Be Specific to a Product - The rights attached to the program must not depend on the program's being part of a particular software distribution. If the program is extracted from that distribution and used or distributed within the terms of the program's license, all parties to whom the program is redistributed should have the same rights as those that are granted in conjunction with the original software distribution.
9. License Must Not Restrict Other Software - The license must not place restrictions on other software that is distributed along with the licensed software. For example, the license must not insist that all other programs distributed on the same medium must be open-source software.
10. License Must Be Technology-Neutral - No provision of the license may be predicated on any individual technology or style of interface.

Applications for Open Source License are subject to a public review process to ensure compliance with "community norms and expectations" (Axmark, 2006).

Conclusion

The Library Bill of Rights of the American Library Association “affirms that all libraries are forums for information and ideas”. As such, librarians are tasked with the responsibility of seeing to it that everyone has access to information. At the same time, librarians face problems of implementation, especially in the present information infrastructure. The ease with which literary, artistic and other intellectual creations are copied and distributed with the help of technology has led to a tightening of controls. Developments in the digital environment has also affected library services. While the proliferation of formats where information are packaged is a welcome phenomenon as it has made retrieval faster and easier, this same developments have led to more costly and more restricted access. For this reason, today’s librarians should be armed with the right information on less costly alternatives, as well as a clearer understanding of their responsibility in the performance of their role as disseminators of information.

Access to information and intellectual property rights protection are both oriented towards development. Both facilitate the free flow of information so that the public may benefit from it (Russell, 2004) and, fortunately, they are not mutually exclusive. What is needed is for librarians to understand how the rights of creators vis-à-vis their creations can be protected without jeopardizing the right of the public to access information.

Librarians, too, must be trained in the art of negotiating licensing agreements in order to get the best terms possible for the sake of their clients. This could be a very good topic for continuing professional education programs for professional librarians. Further, librarians can take an active and proactive role in the development of the fair use doctrine especially as it applies to copying for educational and research purposes. For instance, professional librarians associations like the Philippine Librarians Association, Inc. (PLAI) and the Philippine Association of Academic and Research Librarians (PAARL) could be at the forefront of efforts to revisit *Republic Act No. 8293* with the objective of expanding the exceptions to copyright holders’ exclusive right of reproduction in the interest of education and research. One important change can be drawn from the U.S. DMCA provision allowing the Librarian of Congress to conduct an evaluation of exemptions and permit additional ones that are found to be necessary. In this way, the “unrestricted pursuit of knowledge”, so necessary for national development, can be protected.

Finally, librarians must keep abreast of the latest available alternatives to copyright protected resources and learn how to take full advantage of these less costly ways of accessing information without violating copyright laws and contractual obligations.

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