THEOLOGICAL LIBRARIANS AS COPYRIGHT LEADERS

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USING <----> CREATING

Remember that all creators are users of others’ work, whether directly, e.g., creating derivative works or commentaries, or indirectly, e.g., using (shared) genres and conceptual-linguistic-artistic frameworks.

Especially in digital environments, users are increasingly creators and distributors.
THE FUNDAMENTAL TENSION

The members of the information professions, particularly academic librarians, have a special responsibility to our patrons:

How can we encourage them to use the richness of our cultural heritage, especially to create new works, while not misusing other people’s creative property?

The tension has increasingly become highlighted as rightsholders protect their property more aggressively and as digital technologies proliferate.
AIMS OF THE PRESENTATION

- To consider how public service theological librarians can be advocates for fair use and for responsible use of others’ intellectual property
- To review some fundamental characteristics of copyright, especially fair use and first sale
- To examine three real-life situations related to copyright
- To offer some suggestions about how to be a copyright leader in one’s institution and beyond.
THE PUBLIC POLICY CONTEXT OF COPYRIGHT, 1/3

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

U.S. Constitution, Article I, Section 8, clause 8
POLICY CONTEXT, 2/3

Copyright was designed for cultural, technological, and social conditions that have constantly evolved over the past three centuries.

All IP protections have adjusted to new technologies, e.g., print making, photography, sculpture, movies, software, and so on.

In fact, uncertainty about evolving technologies and IP, especially copyright, has been the rule, not the exception.
As Justice O’Connor put it in *Feist v. Rural Telephone*:

The primary objective of copyright is not to reward the labor of authors, but “to promote the Progress of Science and useful Arts” . . . . Copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.

499 *U.S. 340*
REHABILITATING COPYRIGHT PROTECTION

We have mistaken means for ends.

We have valorized the private, financial interests of rightsholders at the expense of the public interest in copyright: the creation and spread of ideas.

Owners’ interests have been too strongly pressed, frustrating the aims of copyright.

We must reclaim the public interest in fair use, first sale, and other users’ rights. These concepts are key to education.
1976 COPYRIGHT ACT (PL 94-553)

"fixed in tangible medium of expression"

Five exclusive rights of copyright holders:

- to reproduce and to exclude others from reproducing
- to derive new works and to exclude . . .
- to distribute copies and to exclude . . .
- to perform a work publicly and to exclude . . .
- to display a work publicly and to exclude . . .

Duration of copyright, since 1998, is life of the creator + 70 years (the Supreme Court just upheld the latest 20-year increase)
LIMITATIONS ON RIGHTSHOLDERS’ INTERESTS

Fair use

Reproduction by libraries and archives

Transfer of a particular copy (doctrine of first sale)

and others.
FAIR USE (17 USC 107)

§107

"A privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent [or knowledge], notwithstanding the monopoly granted to the owner" (Black's Law Dictionary, 1990, p. 598)

Fair use is opposed to misappropriation or infringement, which is "unauthorized use of copyrighted material without permission [or, often, knowledge] of copyright holder" (p. 781)
WHAT IS FAIR USE?

Not entirely clear, by design of Congress

§107: includes, but need not be limited to, "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research"
IS A USE FAIR?

That is, is a use that usurps rightsholders’ five exclusive rights NOT infringing? Determined, formally, only by a court using the infamous four-factor test:

Character and purpose of the use
Nature of the copyrighted work
The proportion that was taken
The economic impact of the taking.
A GLANCE AT FIRST SALE

Transfer of a particular copy -- doctrine of first sale (17 USC §109)

Someone other than the copyright holder can sell, lease, loan, destroy, display, or give away a legally obtained copy without the knowledge and/or permission of the copyright holder.
THREE REAL-LIFE SITUATIONS, 1/6

Master’s thesis -- circumstances

During the research, friends and the student made a film related to the thesis.

The student gave a paper copy of the thesis and the (separate) film to the institution’s library.

These questions were prompted by some of the librarians’ concerns.
THREE REAL-LIFE SITUATIONS, 2/6

Is the student’s gift a legally obtained copy? Yes.

Can the library make an unlimited number of copies to circulate? No.

Can the library exhibit/play the copy that it holds for large groups? No.
E-reserves --circumstances

A faculty member at a major research university in the northern United States is teaching a class with password-protected e-reserves.

This series of questions emerged in faculty meetings and elsewhere.
THREE REAL-LIFE SITUATIONS, 4/6

Can the faculty member or anyone else give the password to other faculty members or students to read and/or print out the reserve materials? No.

What about giving the password so that other persons can get access to material generated by the instructor herself on the course password-protected site? Perhaps.

Can the instructor hand out paper copies of copyrighted work in class, if this is the first time she has done so? Yes.
THREE REAL-LIFE SITUATIONS, 5/6

Organizational policy questions -- circumstances

Questions that emerged from a course in a major university in the upper mid-western United States and IT committee deliberations in another major university in the western U.S.

A significant concern of some is how new technologies may allow and lead to unexamined infringing copying and distribution.
THREE REAL-LIFE SITUATIONS, 6/6

Students do not regard making copies of a few pages from a book for personal use as infringing. Are they right? Yes.

Aren’t peer-to-peer file sharing programs, like those used to index large, “communal” databases of MP3 (music) files, illegal? No.

Should we take the hard line against digital copying and sharing of files favored by the RIAA, especially since educational institutions bear special responsibility about copyright? No.
THE CRUX OF THE MATTER

Can theological librarians be strong advocates for the (public) concepts of fair use and first sale as well as strong advocates for the (private) property interests of copyright holders?

Fair use is the key to achieving the public policy purposes of copyright protection, including the support of future creativity, and is essential to education.
BE A COPYRIGHT LEADER, 1/2

In your institution . . .

Do not rely on “guidelines” from professional associations

Write institutional policies

Interact with legal counsel

Educate your users
BE A COPYRIGHT LEADER, 2/2

In the national and international policy conversation . . .

Document your users’ behavior and needs, especially as creators

Define the meaning of fair use and first sale by aggressive professional practice

Document your professional practice to help establish law

Be an unceasing advocate for users’ rights
A RALLYING CALL OF SORTS . . ., 1/2

Particularly in educational institutions:

EVERY CREATOR IS A USER OF OTHERS’ WORK.

EVERY USER IS A CREATOR, ESPECIALLY IN DIGITAL ENVIRONMENTS.
Our job is not simply to preserve the cultural record, but to help supplement, question, undermine, and re-create it.

This imperative drives education.

Without aggressive assertion of fair use, first sale, and other users’ rights, creation is compromised, expression stifled, and education impossible.