

October 22-24
2018
Arlington, VA



Depository Library Council & Federal Depository Libraries
FEDERAL DEPOSITORY
LIBRARY CONFERENCE



#FDLConference

After Eldred: Open Access and Expanding Access to Library Collections

Federal Depository Library Conference
October 22, 2018
Crystal City, Virginia

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Sonny Bono Copyright Term Extension Act of 1998

- Added 20 years to copyright term of protection
- Life plus 70 years
- Works for hire/anonymous/pseudonymous works – 95 years from publication, or 120 years from creation
- Prospective and *retroactive*
- No public policy justification
- A bit of a sneaky deal



Eldred v. Ashcroft 537 U.S. 186 (2003)

- 7-2 decision (!)
- Copyright can last as long as Congress says as long as it is limited
 - Forever minus a day would be ok
 - Forever would be unconstitutional
- Totally different rationale for term length than the Founders
 - Incentive to create? (for dead people?)
 - Inheritance for heirs?
- Silver lining—Creative Commons (1.1 billion works) and the open access movement
- Changes in copyright policy are determined in large part “on the ground”



“Finding the Public Domain”

- Copyright Management Review System (CMRS)
- University of Michigan and some other HathiTrust partners
- Extensive research model (but one that could be followed by others, documentation and work flow records available)
- Process improvement along the way
- As of today, 410,448 titles have been identified as public domain
- Full text access for university community
- Accessible to students with print disabilities
- “By the book”
- No controversy



The Sonny Bono Memorial Collection

- Internet Archive
 - Uses existing copyright exception §108(h)
 - “...during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.
- (2) No reproduction, distribution, display, or performance is authorized under this subsection if—
- (A) the work is subject to normal commercial exploitation;
 - (B) a copy or phonorecord of the work can be obtained at a reasonable price; or
 - (C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.”

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The Sonny Bono Memorial Collection

- Another diligent search
- “By the book”





Open Library

- Internet Archive – eight years ago
- “Borrow modern ebooks”
- Includes more library partners
- Becomes controlled digital lending (CDL) based in part first sale and fair use
- Make an eBook copy of a print book (lawfully acquired) in your collection



Risk assessment

- Mitigated by
 - 1 copy 1 user only
 - Technical measures for security
 - Collection choices
 - Library policies
 - Public policy
 - Accessibility
 - Physical access to the collection removed
 - Research efficiency



Risk assessment

- Liability is low risk
- Eleventh Amendment
- No immediate market harm if collection choice is conservative
- §504 (c)(2) 504 (c) (2)
 - “The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under [section 107](#), if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords...”



Does anyone care?

- Publishers are aware of practice
- Market harm? There is a more viable eBook market today.
- Case law, regulatory filings not supportive of CDL
- ReDigi
- Can you get away with copying an entire book that is still under copyright?

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Thanks!

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Jessica Abel, 2012