Whose Article Is It Anyway?

Copyright and Intellectual Property Issues for Researchers in the 90s

Ann Okerson

Copyright Is a Hot Topic

Copyright has been a vexing topic throughout the centuries. Michael Gieseckein in his book entitled *Der Buchdruck in der freuhen Neuzeit*, published in Germany in 1991, writes: "From the beginning, printing was accompanied by complaints over the effects of illegal reprinting which God will surely punish and which is seemly for no honorable Christian man." He is writing about the dawn of the age of printing. But before that St. Columba, in the sixth century in Ireland, copied a Psalter and was told by the arbiter to give it up. The king who was hearing the case said, "As the calf belongs to the cow, so the copy belongs to the book." Columba went on to fight a war about this. He left Ireland and moved to Scotland, where he is thought to have discovered the Loch Ness monster, a story that shows that copyright can have numerous unanticipated social consequences.

What I want to discuss here are not so much the technical and legal aspects of copyright; these you can read and hear about in many places. I want to focus more on the social and political aspects of copyright, why it is important, and who cares about it these days, for a great many people do. One used to be able to go to copyright sessions in a meeting in 1990 or 1991 and be lucky if twelve people showed up. Now every society and library organization sponsors such sessions, and they have standing room only. We will also consider why you might want to take an interest in copyright and how you can do so.

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Litigation = Negative Awareness

So, copyright is a particularly hot topic these days. Mostly we hear about it in ways that don't relate to our work. We hear about it, for instance, when Viacom tries to buy Paramount at huge prices for the content; these are the "Wall Street" kinds of issues. We hear about it through reports of litigation. There have been a couple of recently settled cases that have certainly taught academics and researchers a great deal about copyright. And for the most part it seems to have been a negative awareness that makes us all say, "I think I don't like copyright; I think I don't like the publishers who enforce it." The two most celebrated cases that relate directly to copying of articles are *Kinko's* and *Texaco*.

The Kinko's case was a coursepack campus copy shop case settled in 1991. The court decision affirmed that copy shops must pay a royalty for articles produced in coursepacks; that is, they must pay a royalty to publishers with fees as set by the publisher (in this case the Copy-

right Clearance Center was prime intermediary in the collection of these fees). *Kinko's* made all of us, at least in the academy, much more concerned about the copying we do and much more cautious. I am not sure what the results for the classroom were, but I believe a great deal more care is being exercised by a lot of faculty in order to comply with the ruling.

The *Texaco* case is slightly different. In the *Texaco* decision, scientists at a for-profit corporation were deemed to have to pay royalties to publishers registered with the Copyright Clearance Center for each article copied for use in their research work. This was in spite of the fact that the Texaco company itself, in the case of Dr. Donald Chickering (around whose copying the case was constructed), already took three subscriptions at institutional prices to the *Journal of Catalysis*, one of the journals used in the case. The appeal by Texaco, Inc., was supported by a number of library organizations. The appeal briefs argued that this is a case of "fair use" and that the "for-profitness" of the company should not be at issue. It is the research and the contribution to building science that makes the use "fair". The appeal decision was handed down on October 31, 1994, in the Second Circuit of New York, which had upheld the first decision. Whether the decision is a good one or a bad one, it is clearly a marker telling us that increasingly the article is going to be treated as an entire work. It can be unbundled from the journal; it can be sold as a separate piece—and some courts believe payment can be made for the article unit.

Copyright:

"The exclusive legal right to publish and sell the matter and form."

Technology Raises New Situations and Questions

Such questions are: Are electronic formats protected? What about collaborative works that have been created by a number of people at a number of institutions over time? Who has the rights to such a work? Who can assign what rights? Who owns what? What are the transborder implications for copyright over a world which is electronically globally linked? In the area of telecommunications, different nations have laws which are quite different from each other. What is the liability of conduit providers? (In a recent case, *Playboy* sued a carrier saying, "on your bulletin board system there is material from *Playboy* that one of the people in your group has uploaded. Such uploading is a copyright infringement.") How does one keep track of rights in a time of rights segmentation? At what point does a "morph" become a brand new work? What can one hyperlink to? What about including others' electronic works in one's own electronic work? Recently, a session of copyright lawyers analyzed the point at which six seconds of green grass from a Wisconsin dairy association was allowable in a video without permission of the rights holder: When would one have to seek permission, and would the user have to pay the dairy association?

The U.S. Copyright Act (1976) is a legal construct that ascribes ownership to a particular kind of intellectual form: any expression of an idea in a "fixed" form on paper, canvas, tape, or pixels or other formats. Copyright governs ownership of that kind of material, while patents govern inventions. Because the law says that a work is owned, it makes it possible to treat that work as property. Owning an artifact or "expression" makes it possible to sell it and do whatever the purchaser likes with it.

During your lifetime you will probably create many works in some fixed tangible form: articles, books, videos, code, CDs. According to U.S. copyright law, you will be the creator and thus the original owner of your work. You will have the initial power then to decide how to deploy your work and who is going to deploy it for you. The way the system currently works is roughly this: Authors have the initial rights to their work as creators, and they can keep the rights or transfer them to publishers (this has been the prevailing model in science journal publishing). Most science journal copyright transfer forms say (more or less), "I hereby attest that this work is mine, and I hereby assign and transfer my rights to the publisher for the duration of copyright in any and all media which exist or which may be created." The length of copyright is currently fifty years beyond the lifetime of the author, so transfer is a legal transaction binding for quite a long time. Authors can divide or segment their rights. Creators can, for example, transfer the first print rights to one owner, transfer the video rights to another owner, transfer the translation rights to another owner. Segmentation tends to be the practice more in trade and popular publishing than in science journal publishing. Or, creators can place their works in the public domain; in other words, anybody else can use the works in any way they want. There are some authors who do this, but it is a little bit risky because, of

course, it leaves creators open to all kinds of uses of their work that they might not anticipate or approve of.

U.S. Copyright Law: Balance for Owners and Users

Copyright owners, whether they were the initial creators or whether they are owners to whom rights have been transferred, through the copyright law obtain five basic rights: 1) to reproduce copies, 2) to prepare derivative works, 3) to distribute the work, 4) to perform the work, 5) to display the work. All in all, they may provide economical benefit "for the progress of science and useful arts," as the U.S. Constitution says.

U.S. law is pretty careful about balancing owners' rights with the rights of users. Thus, users also have a number of rights in the copyright law, even though the owners do have the exclusive rights above. Users can do personal copying under the provisions of fair use, Section 107 of the Act. Libraries have certain privileges for making backup or archival copies via Section 108. In Section 105, works of government employees on government time are defined as being in the public domain. Thus works of the Bureau of the Census, Fisheries, the U.S. Geological Survey, etc., are actually owned by all of us, and you will probably find that you can get them from the GPO or government departments rather inexpensively. If they have been through a value-adding process through an intermediary, what you are paying that publisher is the value added to them by that process.

When copyright expires, works become public property, and so you can probably be sure that any work published before 1920 is in the public domain (that's why the copyrighted materials converted in so many digital pilot projects are that old). To find out who owns copyrighted work and to get the permissions to digitize, let alone copy, can be time consuming and expensive.

Copyright Pro-Activists

U.S. Government

Who are the players interested in copyright? There are at least three categories. One is the U.S. Government. During the Clinton administration, we have seen the hastening of the concept of the NII (the National Information Infrastructure); several working groups at the national level are addressing issues that need to be resolved in order for the NII to go forward. I am not sure precisely how many NII task forces there are, but the administration has charged groups in areas such as privacy and security, interoperability, and standards. One of the NII working groups that has received a lot of press is the Working Group on Copyright. This is a group of twenty-five government agency representatives, chaired by Bruce Lehman, the commissioner of patents in the Department of Commerce. This task force released a report in July 1994 affectionately dubbed the "Green Paper". (It has a green cover but the rest of it is white!) The Green Paper has received a great deal of coverage in this country, and its authors have traveled and discussed the report with a number of societies, organizations, and publishing groups and have made representations at a number of intellectual property and copyright venues overseas. Let us discuss some of the key recommendations of this Green Paper to get a sense of who thinks what about its main recommendations.

Although the NII working group proposes "tweaking of the law" and argues the law does not need major changes at this time, critics think that some of the proposed changes go beyond tweaking. The first thing that the Green Paper states is that electronic works are subject to copyright because they are in their own way "fixed". They are tangible expressions of ideas. I don't think that this disagrees with anything that most of us believe. Most of us accept that works presented in electronic format are created and so they are certainly owned. The Green Paper is interesting in that it makes arguments that do not address the spirit of the law or the spirit of "ownership" but rather the technical business of what happens to pixels. The fact that pixels are trapped in some kind of a hard disk or a RAM, however briefly, means at that point that they are fixed, argues the report, and this equals a copy.

Another recommendation in the report is that the United States has to work with other countries, as we are all part of the GII (Global Information Infrastructure). Now, it is not too hard (although not easy) for us to work with other countries on copyright because there is an overarching agreement, the Berne convention, which the United States joined in 1989. Being signatory to Berne means that when a work created in one country is deployed in another country, it is subject to the laws of the country in which it is being used. This is a sensible practice, and it allows creators to have appropriate protection in countries where the work is used. However, in issues of communications (satellite communications, telecommunications, and so forth) there isn't such an explicit overarching international accord. The laws in different nations are very different in this area.

The Green Paper also advocates a new right, the right of transmission.[1] The Green Paper advocates the abolition of the "Doctrine of First Sale".[2]

A controversial portion of the Green Paper is the recommendation of severe penalties for those who break encryption codes and violate intellectual property. I have more concerns about that recommendation than, perhaps, many of my colleagues. Some of the presumptions of guilt

before trial, some of the fines, and some of the measures that will be taken against infringers could be a violation of basic rights that we Americans have as citizens.

Universities

Another group of players very interested in copyright are universities. In July 1993 the Triangle Research Library Network, a group of North Carolina universities, published a model copyright policy. It recommended that academic authors publish in reasonably priced journals (generally from societies and university presses), that when they transfer rights to publishers, they retain rights to use the work for themselves as well as to permit any research or educational uses of the work. That model policy is not too long and is quite well argued. It is worth reading.

A task force of the Association of American Universities met for a year and a half and produced an intellectual property report for university presidents in the spring of 1994. I had the opportunity to serve on that group with about sixteen people representing administrators, faculty, librarians and legal scholars of the universities. We were charged by the presidents to tell universities what they might do to more effectively deploy copyrights in an electronic era. This group agreed that copyright was a much more complicated issue than we had all realized. Various participants in universities have different interests at different times. As teachers, faculty members want the use of copyrighted works in the widest possible form for their classrooms and their students. As authors, academics generally want their work widely read, so their material interests are limited. However, if they are going to receive income for a copyrighted work such as a textbook or a popular work or a multimedia teaching aid, their interests become quite different. Their interests shift to appreciating controls over the copies of material. Also, universities as publishers (that is, presses) need the revenue that copyrights generate.

We examined copying and copyright ownership policies at many universities and found that faculty and researchers were rarely part of the policy creation process, they rarely knew what policies were in place, they did not necessarily understand them very well, and a lot of copyright policies were indeed very hard to understand.

There are generally no identified sources on campus for help or questions in this complicated area.

We recommended that authors and universities consider copyright agreements different from the types that are currently signed. We recommend either ownership retention by authors or some kind of shared ownership of copyrights between faculty and universities, provided the university in turn offered incentives for such sharing (e.g., copyright management services, or publishing sites). As a result of, or contiguous with our recommendations, a number of campuses have begun reviewing intellectual property management and copyright policies (see box).

Authors

One more group with an interest are authors. The National Writers Union launched a lawsuit in December 1993 against a number of major publishers. Basically, they argue that publishers add less value in the electronic environment than in paper, and therefore authors are entitled to the maximum economic benefit from their work, more than they are getting now in print media. Obviously, researchers and faculty also have an interest in changing the status quo. How do we

Copyright Pro-Activists

U.S. Government

NII Working Group on Copyright "Green Paper", July 1994
Conferences on Fair Use, 1995+
Final Report due September 1995
`http://www.uspto.gov/niiip.html`

Universities

Triangle Research Libraries Network Model Policy, July 1993
`http://ccat.sas.upenn.edu/jod/trln.html`
Association of American Universities IP Task Force, April 1994
`http://arl.cni.org/aau/Frontmatter.html`
General Resource
`http:arl.cmi.org/scomm/copyright/UniCipy.html`

Authors

National Writers Union
Lawsuit, December 1993, Position Paper, September 1994
`http//ccat.sas.upenn.edu/jod/nwu.html`

Researchers and faculty-wide copying and access on the Internet for scholarly works and scientific research

[1] *This would form another kind of exclusive right for owners. That is, any information electronically transmitted would constitute a copy, and thus it would be governed by copyright. Some of the respondents to the Green Paper have liked the new right, but there have also been a number of objections from many library groups questioning the need for such a transmission right.*

[2] *"First Sale" (Section 109) in the Copyright Act says that when one buys a piece of intellectual property, one is the owner of it. So if you buy a copy of Scientific American, say, containing the article on scientific communications which appeared in the December 1994 issue, you are the owner of that artifact. You can read it, donate it to someone, sell it on the street, burn it, do whatever you want to. You are the owner and that magazine is yours. The Green Paper argues that First Sale does not apply to electronic information, because if you sell or give away an electronic work, in addition to transmitting a copy, you, the transmitter, have a copy in your hard disk or memory, even if for a short time. That is really making two copies, not one.*

know that? We know it because authors and researchers have started retaining more rights to their works, they have started segmenting their rights, and they have started creating e-journals and preprints that feature a new kind of copyright policy, one that allows wide deployment and copying of their work. Unlike members of the National Writers Union, who earn their living from their copyrighted works and seek those economic benefits, scholarly authors are showing that, at least in many instances, they place a higher priority on dissemination than on economic rights.

Copyright Turmoils

Let us speculate on conclusions of these copyright discussions. (I don't think there will be a simple conclusion.) Copyright will continue to evolve as it has been evolving since the days of Columba in the sixth century. But, to what extent will the copyright law be changed? John Perry Barlow argues in a well-written article in the March 1994 issue of *Wired* that copyright as we have known it has no conceivable future. It is irrelevant to a network environment. His view, of course, is quite different from that of the NII Green Paper and from the mainstream of legal scholars and lawmakers. Who is right? We don't know. Time will tell. And likely a long time will be required.

What to do?

Work towards new models of sharing ownership

Use value-adding talents of publishers for works that benefit from it; redefine the values

Develop good mechanisms to identify owners of works in the electronic environment

Experiment to find what works

Embrace change—things will never be quite the same again; authors and research institutions will never be as compliant as they used to be!

What next?

Authors' rights gain momentum—academic and popular authors pay attention to transfers

More authors' rights retention, segmentation

Research works widely available on servers as preprints

Value adding, final products by formal publishers continues

Some confusion about who owns what and of whom to ask permission

Maybe John Perry Barlow is right...???

The certainty is that the ways we in research and academia are now using the copyright law, that is, the social and economic practices and relationships, are changing. Authors are making different choices. They are segmenting rights, which makes for a much more complicated world. Knowing who owns what rights is very tricky, but it is key if you intend a use for which you may need the copyrightholder's permission. Of course, knowing who owns what copyrights has been tricky all along in the paper environment because most of the signed permissions and contracts reside in publishers' filing cabinets and so one cannot absolutely know what they say. Another certainty is that so far authors like increasing the new kinds of options for copyright deployment. They feel a sense of greater control over what happens to their work.

The shifts that we are experiencing are by and large positive, and I am pretty sure that in spite of all the rational arguments that can be made about how useful it is to have a publisher manage all the rights associated with a work, we will never go back to the total transfer of copyrights from authors to publishers of scientific articles.

My advice about copyright is to inform yourself. Know what you want to have happen to your work. Learn the policies of your institution, read the contracts publishers give you before signing them, know what they mean. Join the national copyright conversation. The NII copyright process is open to everyone. The Department of Commerce and Bruce Lehman are collecting hundreds and hundreds of responses to the Green Paper and are paying attention to them before putting out a final version as a White Paper[3] in summer 1995. Join the conversation directly or join it through the way that you act to manage your own intellectual property.

[3] *The White Paper was released on September 9, 1995. Unlike the Green Paper, it does not propose a separate new transmission right. However, it does recommend that transmission be included within the rights of reproduction, distribution, and performance or display, as appropriate.*

The White Paper does not specifically recommend the end of "first sale" for e-publications. However, it argues strongly that networked transmission and first sale are incompatible. E-transmission technically keeps a copy in the sender's machine even as it sends a copy to the recipient. Thus a complete copy is made, even if the sender's is discarded momentarily.