

COPYRIGHT TOWN MEETING: Houston, April 25, 2001

Copyright Perspectives Rice University Meeting Report

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Introduction

Sara Lowman and David Green

Sarah Lowman, Director of Fondren Library and Associate University Librarian, Rice University, welcomed 165 participants to the second Town Meeting in the 2001 series. The meeting at Rice was designed to provide an overview of copyright law and its implications for educational and cultural institutions. Presenters, Ms. Lowman explained, would explore the law's historical foundations and its evolution in an increasingly digital environment, as well as examine current trends and legal battles.

David Green then presented an overview of the series since its inception in 1997.

Panel 1. Copyright Law and Policy in Higher Education

Moderator: John Warren

Georgia Harper, *Copyright Law in Cyberspace* (see [presentation slides](#))

This talk summarized many of the arguments in the author's article "Endurance & Change," Educause Nov/Dec 2000, pp. 21-26.

Harper opened with an overview of copyright basics and the relationship of copyright law to new technologies. She argued that copyright has a noble purpose, set out in the Constitution, "to improve society through the advancement of knowledge." Copyright law achieves this purpose by balancing "the rights of the public for access to information with the incentives for creation; providing authors with exclusive rights but limiting what copyright protects and the time period of copyright protection; and giving users certain rights, such as fair use, that restrict the owner's monopoly."

Harper was concerned, however, that changes in copyright provisions brought about by new technology were tipping the delicate balance between owners and users.

Copyright protects original expression — not facts, ideas, systems, or processes — from the moment that it is "fixed in a tangible medium." Today, protection is automatic and does not require that the creator give notice or register work, although registration does confer certain benefits should one be involved in a court case. However, this was not always the case. Between 1923 and 1978, owners had to register their works in order to gain copyright protection for an initial term of 28 years, and for another 28 years upon renewal. The term of protection has been repeatedly lengthened; now works published between 1923 and 1978 are protected for 95 years. Works published after 1978 are protected for the life of the author plus 70 years. [See "When Works Pass Into the Public Domain," the chart compiled by Professor Lolly Gasaway showing terms of protection.] When the term of protection was shorter and owners had to actively seek renewal, the balance was more in favor of the public. That balance shifted, and continues to shift, in favor of owners as the terms have been lengthened since 1978.

Owners

The owner of intellectual property rights (IPR) is the author or creator of a work. Frequently, however, the creator assigns certain rights to others (usually distributors such as publishers, record companies, broadcasters, etc.) Works can also have joint owners if a work is collaborative. The author is the owner, creator. However, there may be more than one author, if two or more people have contributed original

expression to a work with the intention of being joint authors. Employers can own their employees' works under the "work-for-hire" provisions of the law. [For further details, Harper referred the audience to her own Crash Course in Copyright.]

Rightsholders have exclusive rights that include the right to make copies of the work, to create derivative work from it, and to perform, distribute, and display the work publicly, or to authorize others to do any of the above. Exclusive rights form the incentive to authors and therefore insure that copyright fulfills its purpose. Control over copies has been crucial to the exercise of these rights. In the analog world, controlling copies is not that complicated; in the digital world it is very difficult. The inability to control copies has been a major block to the creation of online content. Entertainment industries' business models have been based on controlling copies of moving images and music. Technologies like Napster that easily circumvent controls prove that it is time to move on and to find incentives aside from copy control to the creation of knowledge. In other words, new economic and business models are called for.

Users

There are exemptions to owners' exclusive rights. These include the Fair Use defense in using copyrighted material (again see the section on Fair Use in Harper's Crash Course). Users need to test their use against the interconnected "[Four Factors](#):"

What is the character of the use?

What is the nature of the work to be used?

How much of the work is to be used, and is it substantial?

And what is the effect on the market of the use?

Fair use is not a blanket exemption for educators; it is an exemption that permits certain uses of certain works for certain purposes, taking into account the rights of the copyright owner. Statute allows for broad individual judgement. The ambiguity of the test has brought people together to create guidelines [see the Final Report on the Conference on Fair Use (CONFU)]. However, the attempt to create guidelines by CONFU failed through the lack of general agreement between all parties involved. Although some guidelines do exist, the community at large found them too specific and too restrictive.

Harper pointed out that the right to perform works in the classroom is not the same as in distance (or online) education. When teachers wish to share others' works digitally, rights shrink tremendously because digitizing a work in order to perform or display it online is a form of copying. However, she alerted the audience to the update to the restrictive [section 110](#) now going through Congress.

The effect of technology on copyright's purpose

Harper declared that digital technology is putting a lot of stress on copyright law. Long terms of copyright protection, and the universality of protection, have drastically diminished the public's ability to derive its benefit from the copyright bargain. As Harper put it, "technology offers great opportunity, but it also poses great threats, and copyright owners have secured changes and are trying to secure more changes in our

laws to counter that threat – but at the expense of public access and use.” Internet service provider liability limitations, the anti-circumvention provisions of the DMCA, and state law provisions that would validate shrink-wrap and click-on licenses are effective tools for owners to combat unauthorized uses of their works – but, again, at the expense of public access and use. Harper argued that those tools are easily abused and that the law has gone too far in controlling copies by limiting access. Instead, we in the community need to encourage alternative business models that do not focus on copy controls.

Rodney Petersen, NEThics and Digital Policy

Petersen, who runs "Project NEThics^(sm)" at the University of Maryland, reviewed the landscape of key copyright issues and legislation. He encouraged the audience to become actively involved in copyright and intellectual property issues at their own institutions, especially in developing institutional policies.

Key Themes and Policy Dimensions

The 1998 Copyright Term Extension Act was challenged in *Eldred v. Reno*. Plaintiffs are now calling for the Supreme Court to hear the case and a mounting number of amicus briefs are being filed (see the [Open Law](#) site for updates on this).

Internet Service Provider Liability. Interim regulations were issued in 1998; final regulations have not been promulgated. There are interesting scenarios around the Napster case that raise the question, what exactly does liability exemption cover? For example, is the ISP or the user liable in peer-to-peer computing? For further information and updates on this issue, see Interim Regulations for Designation of Agent to Receive Notification of Claimed Infringement (Library of Congress); Complying with the Digital Millennium Copyright Act: Responding to Notices of Alleged Infringement; University Liability for Student Infringement: "Napster" and Internet Service Provider Liability Limitations (Harper's Crash Course); and On-line Service Provider Liability Limitations Memorandum (Association of American Universities).

Anti-Circumvention Provisions of the DMCA (Section 1201). The first [report on the impact of section 1201](#), and specifically what kinds of anti-circumvention measures are acceptable was disappointing (see for example the letter of concern about the future of fair use, submitted by the [Assistant Secretary of Commerce](#)). Libraries and the educational community tried to argue that some forms of circumvention should fall under fair use, but the court did not agree. The next report will be made in 2003.

First Sale. What is the future of first sale in the light of digital first sale? As we move away from ownership of physical copies, or books, to a world that is about licensing of electronic resources, what will keep individuals from transmitting their copy to many others? These questions have subsequently been partially answered by the August 2001 Library of Congress Report, in which the Register of Copyrights recommended no change in the law, especially with respect to extending the first sale doctrine into the digital age

Distance Education. Following a Copyright Office Report, Orin Hatch and Patrick Leahy have sponsored the TEACH Act (Technology, Education, and Copyright Harmonization Act), claiming it is "important for the growth of online education." Section 110 in the current copyright law alludes to the notion of face-to-face teaching and allows for fair use in that context. However, distance education and online teaching eliminates that physical classroom requirement. The TEACH Act allows storage of material on a server for asynchronous use and expands the categories of works performable in distance education. The Act expands rights to account for the Internet by limiting distance to enrolled students. It does require safeguards, limiting distribution to enrolled students (in course or institution) and requiring materials to be used in mediated instruction in order to prevent downstream re-distribution. The Senate passed the Act in June 2001; it is stalled at the time of writing. See commentary by Consortium for School

Networking; Association of American Universities. See *Educause* article, "[Balancing Copyright Concerns: The TEACH Act of 2001](#)," by Laura Gasaway.

Database Legislation. While neither facts in themselves nor facts compiled by "sweat of the brow" are entitled to copyright protection, there is some real need for some degree of protection of databases to disallow-commercial re-appropriation and re-sale of databases. Databases consist of individual pieces of factual information, making that information easier to access. Some recent legislation is very protective of databases and there is a gap in the law. There is a need for intellectual property law to protect proprietary databases against copying while promoting public dissemination. See the American Association of Universities resource page for background and updates.

States Immunity to Copyright Infringement. In 1999 the Supreme Court said that states are immune to claims for damages. Thus, public universities may not be liable for copyright infringement. The Intellectual Property Protection Restoration Bill was introduced in 1999 to address this gap. It was not passed and there is currently no legislation before Congress.

UCITA (Uniform Computer Information Transactions Act). UCITA is a state-by-state overhaul of states contract law, designed to give some degree of uniformity. However, components of the act that validate click-through licenses have caused grave misgivings. After some early passages of UCITA, few states have now passed the law. See Americans for Fair Electronic Commerce Transactions (AFFECT) for updates on this issue.

Panel II: The Digital Millenium Copyright Act (DMCA) and Anticircumvention Technologies *Moderator: Shisha van Horn*

[Tyler Ochoa](#), *From Betamax to the DMCA: Copyright Owners and Device Control*

The anti-circumvention provisions of the DMCA, which offer copyright owners new rights separate from and in addition to those provided within copyright law, was enacted in October 1998, although some provisions were not put in force until 2000. The first section adds new causes of action or limits on what users can do with copyrighted materials, in addition to the restrictions within copyright.

"Thou Shalt Not Hack"

A key point is that [Section 1201](#) represents a new restriction on users' ability to access material in addition to early copy restrictions. Not only does 1201 allow new electronic protections, it criminalizes any attempt to circumvent those protections, even if the purpose is a legal one. It also criminalizes the sale of devices to hack around protections. A key paradox of the DMCA, said Ochoa, is that even though it asserts fair use, it makes no provision for its exercise.

The DMCA in Historical Context

Ochoa's thesis is that the DMCA is the culmination of forty years of effort on the part of owners to gain control of copies and represents a shift from copy-control to access-control.

Ochoa proposed a circular history of copyright control: from device control to copy control to access control and back to device control. Arduous copying of a manuscript by hand in the middle ages gave one the right to own it. It was not until the printing press was invented that copyright was needed. Still, the first reaction to the printing press was not copy control, but device control. When the printing press arrived in England, authorities demanded that only licensed publishers use the device and that they acquire governmental approval of all publications. Publishers thus had a monopoly, but eventually the monopoly

collapsed and publishers sought legislation in 1710 that controlled the reproduction of copyrighted material thereafter. While copyright gave many rights to authors/owners, it also made those rights transferable to publishers.

Throughout its history, copyright has focused on controlling the reproduction of copyrighted works, not on controlling devices. Presses that infringed copyright (by making paper copies) were relatively easy to police. But with millions of individuals able to make perfect copies from home computers and printers, it was no longer economical to prosecute each infringer. Therefore owners have tried to prosecute intermediaries, or creators of devices used to infringe.

During the 1960s, the creation of commercial photocopiers was thought by many in publishing to be the “end of academic publishing as we know it.” Publishers of academic journals sued libraries that copied articles for their patrons. While there was no decision in that lawsuit (the Supreme Court decision was 4/4), the 1976 Copyright Act, [Section 108](#), clearly defined what libraries could and could not copy.

During the 1970s, the invention of the first videocassette recorder, the Sony Betamax, signaled to many “the end of the movie industry as we know it.” Film studios feared for the future of theater distribution when audiences could stay home watching their favorite films on a VCR. As it was impractical to sue infringing home users the studios sued the manufacturer of the device, Sony, for contributory infringement (knowingly creating a device that people use to infringe). In its first fair use decision, the Supreme Court voted 5 to 4 that home videotaping for the purpose of time shifting was a fair use. The manufacturer was not liable because the device was capable of “substantial non-infringing uses.”

In the 1980s, digital audio cassettes were the harbingers of the “end of music industry as we know it.” Because analog copies degraded over time and digital copies were perfect, music industry representatives were afraid that no one would buy original recordings, but would instead purchase pirated digital copies. Again, it was uneconomical to prosecute home users, so the industry went after the intermediary, the manufacturer of digital audiocassettes. However, instead of suing, they launched a preemptive strike by passing legislation that forced manufacturers to pay royalties for every cassette sold into a fund to be distributed to copyright owners. The idea was to compensate owners for all the infringing that would certainly go on. The digital audiocassette bombed in the market place. Ochoa suggests that perhaps the preemptive legislation served to dampen the market. By contrast, after the Betamax was legitimized, the film industry developed new business models and now some 50% of studio income derives from VCRs.

Napster is the next big fight and a part of the same phenomenon. The music industry has sought to prosecute the intermediary, rather than the millions of users/infringers. The court ruled that copyright owners had to identify copyrighted works and then Napster had to block those works. While the service was not shut down outright, so much of the material was copyrighted that it has been severely limited and Napster has been forced to create a new business model.

For Ochoa, the DMCA demonstrates that while owners know it doesn't make economic sense to sue individual infringers, they can go after intermediaries or creators of devices that make copying possible. The DMCA is about device control and access control, more than copy control. The entertainment industry has moved away from business models based on copy control, toward ones that are predicated on access control. The ultimate business model in the new world of electronic media is a pay-per-view model.

Dan Wallach, *Adventures in Copy Protection Research*. (See [Wallach's slides](#))

Wallach, an Assistant Professor of Computer Science at Rice University, was part of a team of researchers from Rice, Princeton, and Xerox PARC, that took up the HackSDMI Challenge in September 2000.

The Secure Digital Music Initiative (SDMI), a coalition of 200 technology and content companies, spearheaded by the RIAA (Recording Industry Association of America), challenged “hackers” to break the code used to create a watermark on four digital audio clips. The research team successfully broke all four watermark codes and wrote an academic paper on the subject that they planned to present at a conference. SDMI issued a “cease and desist” letter. Both the academic paper and the letter were leaked to Slashdot.org the week before the conference at which the researchers were scheduled to present their results. SDMI claimed that there was no threat to sue and there was no court case. However, there was clearly a “chilling effect” on computer security research (one of Wallach's professional specialties). See the stories as reported in [Slashdot](#); [Salon](#); [Wired](#) (Aug 16, 2001). Also see Dr. Edward Felten's [website](#) about the status of the SDMI paper.

Dan Wallach was primarily concerned about the impact that the DMCA might have on computer security research but a strong sub-theme of his talk was that technical protection would never be enough to safeguard material. The music and film industries were most concerned about piracy and had invested heavily in technology to protect its materials from online piracy. Although this copy-protection software lay at the heart of the DMCA, Wallach asserted that such technology has never worked and probably would never work effectively. The only good technical model he'd come across was with digital satellite broadcasters that re-program set-top boxes at unpredictable intervals (but usually at peak viewing times), so that anyone who had hacked a box and was getting free TV would likely lose the connection at a key moment.

Wallach maintained that Internet piracy was completely different from regular computer security, where the machines are trusted but the potential users are not. Today it's the machines themselves that are suspect. Creating effective copy protection software, Wallach said, is virtually impossible. He found the attempt to solve the problem through the “big and ugly” DMCA very peculiar. The statute has civil and criminal penalties; it validates copy protection research but it makes it practically difficult to study a system and it is unclear whether it actually allows publication of the research. In addition, although it allows reverse engineering it does so under very narrow and vague conditions. As owners cannot go after the end-users they set their sights on the inventor of the anti-copy protection software: the hacker.

Wallach emphasized that the only effective protection against piracy would be new economic models, such as subscription models, which would remove the incentive to cheat.

Questions 1. Click-Through Licenses

A question about whether Wallach's lawyer was concerned about the SDMI click-through license that was part of the case led into the broader question of the legal authority and enforceability of these click-through licenses. Rodney Peterson replied that in the two states (Maryland and Virginia) that had passed the UCITA, click-through licenses were enforceable, but it was more questionable outside UCITA. Tyler Ochoa clarified that a contract has to comprise an offer, consideration of the offer and acceptance. The issue, he said, was whether the “consideration” was meaningful in a click-through license. Also, even if such contracts are considered acceptable, are they pre-empted by Federal contract law? The cases are all over the map: courts are enforcing and not enforcing - so you can't assume either way. Ochoa also stated that in reality no-one reads such contracts; they are what are called “adhesion contracts”, contracts that are heavily weighted in favor of one party, a “take-it-or-leave-it” undertaking. They are not inherently unenforceable, but are if the terms are simply unconscionable and you don't have the realistic opportunity for choice.

2. Public versus Private Access

A questioner asked if publishers made a distinction between public and private access. Rodney Peterson replied that private systems, such as Blackboard and WebCT, which would be important under the TEACH Act or with e-reserve systems, do have the added layer of password protection for individual or class use. This is important because, to allow distance education to thrive online there must be a method for distinguishing between allowed classroom use of material and other uses.

3. Distance Education is Fair Trade in Public Knowledge

A participant asked whether by putting its course material online, MIT was implying that other schools' courses should also be freely available.

Georgia Harper clarified that by mounting material on the Web, MIT was not necessarily putting it into the public domain, although in this case MIT stated that the material is available for re-use. But this had no implications for other schools' material. There is a big distinction, though, between material that is published and is still protected by copyright and publishing a patentable business or teaching method. By publishing patentable or trade-secret material one had, in the U.S., one year to protect it. But for all intents and purposes it would be gone: patent and copyright law here are quite different.

Tyler Ochoa reiterated the idea:expression dichotomy. Ideas are not copyrightable and as soon as a work is published the idea enters the public domain. However, the unique expression of an idea is protected for a certain period under copyright. Tyler concluded by stating that, as a rule of thumb, if you really do not want anybody to copy any material you have, do not put it online because you will have lost all practical, if not legal, control.

As a footnote, MIT's [OpenCourseWare \(OCW\) initiative](#) is designed to make core teaching materials from virtually all of its courses freely available on the World Wide Web for non-commercial use. However, as MIT itself stresses, it is essentially the relationship between teacher and student that is at the heart of education -- the materials only go so far.

4. Napster, Liability and University Contracts

Answering a question on how important the intent to infringe was in liability cases, Tyler Ochoa clarified the basic issues. Intent is not in itself a factor in liability if you infringe copyright. To be guilty of contributory infringement a party had to know that what they were doing was enabling infringement. Thus in the Napster case, Napster had to demonstrate knowledge of illegal copying of specific files, which it denied: it simply set up the mechanism for peer-to-peer file sharing. However an employer, such as a university, can be liable for infringement, even if the employer has no knowledge of the infringement.

How do you police that? Georgia Harper replied that universities do not police infringement. However, universities do have the responsibility to educate their communities about the law and the Internet, and to take material down in case of an accusation of infringement to which there is no defense. The University of Texas also includes an indemnification clause in contracts with employees who are creating online content to ensure they understand their responsibilities and liabilities.

Was this part of a regular academic contract or was it a separate contract? Harper replied that Texas policy allocates broad ownership by faculty of faculty product, but it calls for a separate contract, which itemizes many details of ownership, when a faculty member requests significant funding for an online project.

5. Permission for Manipulating Content

To a question of whether permission is required for manipulating the content of a copyrighted work to create an invitation, Tyler Ochoa replied that yes, any such derivative work would require permission. Anytime you do anything commercial, fair use is very limited.

6. Permission for Satirical Use

To a question on the need for asking permission to use material for satirical purposes, Ochoa replied that the Supreme Court had suggested a line between parody, which targets a work, and satire, which uses a work to target something else. Satire receives less protection than parody. He referred all those interested in this issue to his article, "Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody," 45 *J. Copyright Society of USA* 546 (1998). Also see Ochoa's response to a similar question on the CNI-Copyright listserv (Feb 9, 1999).

7. DMCA, Copyright Law and Imminent Change

One questioner sought clarification on the relationship of the DMCA to Copyright Law and further asked what the likelihood of significant change in copyright law might be in the foreseeable future.

Ochoa replied that the DMCA is a statute that provides rights in addition to copyright law. The DMCA, said Ochoa, was more akin to what Peter Jaszi has called "para-copyright" or neighboring rights that are in addition to copyright. He added that he thought the chances were very slim of any major changes in the law in the next decade. There will certainly be further copyright legislation but it will take many years to shake out the many problems accruing around the DMCA in particular and digital copyright in general. To give an example of how long such change can take, Ochoa cited linking problems that first surfaced in 1996 but for which there are still no published legal opinions because no well-funded opponents have wanted to take the issue to court. He also pointed out that the Betamax case took six years to settle. Ochoa did draw attention to the Eldred v. Ashcroft case that held that the Copyright Term Extension Case was unconstitutional. [This case will be heard by the Supreme Court: see the [Open Law](#) site for updates.]

Panel III: Copyright: Community Concerns **Moderator: Maryhelen Jones**

Geraldine Aramanda, Museums and Archives and the Management of Intellectual Property

Geraldine Aramanda addressed the complexity of administering intellectual property rights within a museum. She pointed out that, more often than not, museums do not hold the copyright to objects in their collections. Until copyright expires or is transferred, museums themselves must obtain copyright clearance before reproducing objects in their collections for catalogs and other merchandise. [The Menil Collection](#) is committed to making the collection as accessible as possible and reproduces items in its collection for patrons who request them, charging appropriate commercial or nonprofit fees, and often waiving them altogether for authors, poets, scholars and others, whose means were limited.

Aramanda emphasized, however, that every IP transaction has unique considerations, which makes IP Management very complex and more like detective work than museum administration. Requests for images came from many unexpected sources: the sciences are as likely as the arts to request permission to reproduce work. She had several stories to tell about unusual requests (such as the San Francisco Museum of Modern Art requesting permission for using a reproduction of a Magritte image including a green apple to sticker 65,000 Granny Smith apples to advertise its Magritte show) and of tracking down unauthorized reproductions, including one that had inverted an artist's work.

Rhoda Goldberg, *Copyright: An Indispensable Element in Fulfilling the Mission of the Library*

Goldberg declared that, for her, copyright is at the heart of the library's mission, notably copyright's provisions for the public interest. Indeed, she said "it's all about access." In the past in libraries, patrons had access to books, microfiche or film and a reserve room. Today, electronic media, such as e-books, electronic inter-library loan and electronic reserves enable libraries to give patrons even more of what they're looking for more quickly than ever.

Despite changes in technology, the mission of libraries – to provide information to the public – has not changed. Public libraries have a role as bridges across the digital divide, leveling the playing field between the haves and have-nots. Technology has made it possible to expand the mission, to bring information to everyone.

An effective instrument for this expansion in Texas is Texshare. Founded in the 1990s, Texshare is a resource-sharing consortium that enables delivery of documents between public and academic libraries. It includes a statewide courier service and a Texshare card system that allows users to access the collections of several libraries in the consortium. A Tex Treasures program enables special collections materials to be digitized and networked. The Texas Education Infrastructure Fund also helps by funding Internet connectivity for libraries, museums and schools. The E-rate program also has helped schools and libraries to connect to the Internet.

Goldberg declared that another central library mission is to archive information and make available material that is not so popular. This is especially important in the digital age. The effectiveness of libraries hinges on their ability to borrow and lend information in both print and electronic forms. The benefits of the new technologies will be cancelled out if fair use and copyright become doctrines that limit, rather than promote, access to knowledge. She ended by asking us to pay attention to database protection bills and to UCITA and to advocate for their defeat.

Marshall Schott, *Instruction*

Schott heads the Distance Learning Program at the University of Houston. His experience deploying instructional technology has raised many intellectual property issues, especially when faculty are involved in course development. When using instructional television there is no practical justification for the fair use of material when the general public has access to the programs. However, with the use of online instruction, often with password protection of sites, fair use is possible but brings with it many problems.

As elsewhere the issue of faculty ownership of material has come up and Schott has been involved in an initiative to clarify policy and assist faculty in developing courseware and to guarantee that content of online courses will belong to faculty. However, faculty need also to be aware of the investment by the university in developing online courses and institutions need to assess their own policies in an effort to develop effective and fair policies.

The University of Houston has allocated resources toward faculty development and education in copyright and fair use issues, especially in response to faculty members' need to know what they can use in an electronic context. The university offers seminars and workshops for faculty and help faculty negotiate for permission to use copyrighted materials.

Questions

1. Professional Development in Copyright & Fair Use

An audience member asked Schott how the university has managed to offer professional development, especially for adjunct faculty. Schott acknowledged how difficult it is to communicate with adjunct faculty. The university sponsors workshops that are listed in the employee handbook distributed to all faculty members. The handbook also includes information on copyright and fair use, which will shortly appear online. In future, the university will provide a website with copyright and fair use information on a website. Maryhelen Jones, also of the University of Houston, added that instructional designers work with individual faculty members to suggest ways to add library components that will educate faculty about intellectual property issues. It is often the instructional designer that faculty ask for help in navigating copyright problems.

2. Costs

To a question about the costs built into course creation, Schott answered that there are vast differences across the fields. Some courses are virtually cost-free and others costs several thousands of dollars. Decisions are made on an ad hoc basis. Television courses cost about \$10,000-\$12,000 per course. online courses take more time to create and costs range from \$5-6,000 up to \$15,000 per course.

3. Linking Policy

To a question whether there was any policy on links to other sites in distance learning courses, Schott replied there was no formal policy as yet.

Panel IV: Point/Counterpoint: Approaches to Copyright Moderator: Geneva Henry Ross Reedstrom, *Copyright and the Free Software Community*

Reedstrom said he was opening a new direction in the meeting by focusing on what he called the "culture of the Internet" -- that is, the culture that he felt is most indigenous to the Internet, the culture of those who built it. "Free software" he defined as software developed by a community of enthusiasts for their own and others' use. Enthusiasts do not have financial reward as a goal; their activity generally lies outside the commercial realm. The free software movement produces tools and software to solve problems; it is not about content.

Reedstrom declared that the Internet itself is an artifact of the free software movement. The Internet Engineering Task Force ([IETF](#)) sets the standards for running the Internet. It is, in its own words, an "open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet. It is open to any interested individual." It runs by sending out requests for comments that lead to "rough consensus and working code."

As commercial companies became increasingly involved in shaping the Internet, MIT's Richard Stallman became concerned that the culture was being changed (for example, ATT had changed the licensing terms for the UNIX operating system on which the Internet had been built) and developed the [GNU](#) project "to develop a complete Unix-like operating system" that is free software.

Free software, for Stallman, had to possess the "[Four Freedoms](#)":

0. The freedom to run the program, for any purpose;
1. The freedom to study how the program works, and adapt it to your needs;
2. The freedom to redistribute copies so you can help your neighbor;

3. The freedom to improve the program, and release your improvements to the public, so that the whole community benefits.

As others signed on, Eric Raymond, one of the first GNU contributors, began studying the culture at large and published *The Cathedral & The Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary*. For Raymond, the hacker culture was a "gift culture" in which prestige is built up by giving away as much as possible. Credit for building and distributing software is also important. For Reedstrom, the free software movement is much like an idealized version of academia: "a culture of open communication, built on one another's ideas, with credit given to original work."

Some examples of free software include: [Linux](#), X (the graphic environment developed for the UNIX workstation), Apache (a very popular web server), [sendmail](#) (the original email server); [PostgreSQL](#); Magicpoint; and [GIMP](#) (the GNU Image Manipulation Program).

Licenses are not the same in the free software world. Rather than restricting, they are designed to expand users' rights. A principal license is the [General Public License](#), or GPL. The GPL allows users to copy licensed software and make changes, then to license their changes. All these licenses give away more than they restrict. Although it doesn't mention it by name, the GPL enshrines the "copyleft" notion that if you receive GPL software you can change it and use it to produce something else, but if you distribute the revised or new program you are constrained to license it under the GPL. The GPL has never been tested in court. While there probably is some cheating going on, the movement has found that it can survive free riders -- even as today there are more users than programmers.

The OSI or [Open Source Initiative](#) created its own Open Source Definition that reveals some of the practical freedoms of free software: copying is okay; users fix bugs; and there is no pressure to upgrade. By contrast, proprietary formats force users to upgrade and they forbid reverse engineering through their click-through licenses. With free software, open standards encourage the creation of new content and tools.

Reedstrom declared that the free software and open source community defended traditional notions of copyright by using the general framework of copyright and reminding the larger user community that there are values other than economic ones. See the following sites for more information on the Open Source Movement:

www.fsf.org
www.eff.org
www.cpsr.org

Coe Miles, *Licensing and the Public Domain* (See [PDF of Coe Miles' presentation](#))

Miles was the Associate General Counsel of [Questia](#), a commercial online collection of some 70,000 books and journal articles in the humanities and social sciences. He began by explaining to the audience Questia's mission and business model (see Carol Hughes' talk on Questia at the Chicago Town Meeting, 2001). He explained the methods Questia uses to gain permission to reproduce books in its online library, as well as the stumbling blocks to getting cooperation from copyright owners.

He opened a discussion on the public domain by referencing the recent milestone events that served to limit the availability of works in the public domain. These include, most famously, the 1998 Sonny Bono Copyright Extension Act (extending copyright term to life of the author plus 70 years) as well as the Uruguay Round Agreements Act (URAA) restoring copyright protection to foreign works that had fallen out of copyright.

Miles cited the variety of types of contracts, including assignments whereby the author assigns all rights to a publisher, and licenses whereby the right to publish is given to the publisher. Under both of these contract types, there is an opportunity for authors to reclaim their rights when their work goes out of print, although the author must request the rights be returned. Generally, if a work is still in print, permission should be sought from the publisher for permission to copy. If the work is out of print, permission should be sought from the author.

Miles spoke about the difficulty of determining the public domain status of any work (Lolly Gasaway's chart "When Works Pass Into the Public Domain, is most often cited as the starting point for such determination), especially whether foreign works had had their copyright restored under the URAA.

Questia's approach to restoration is to perform all possible research into the status of works. Its staff looks for copyright office records such as renewal notices and searches global Books-in-Print references. If Questia mistakenly classifies material in the public domain, and it's still under copyright, its customer logs will enable repayment of any owed fees. Questia acquires licenses from publishers whenever possible.

Lee Hilyer, "In this case, it's better to get permission . . ."

Hilyer, the Interlibrary Loan Librarian at Rice University's Fondren Library, offered a practical "this is what we do" as a counter to much of the theory of the day. He explained how the Library deals with the practical considerations of providing copies of copyrighted materials to patrons. Fondren pays the [Copyright Clearance Center](#) for copies it has made for patrons in what he called "excess of fair use". The "one-one five-five" rule or "Guideline of Five," developed under CONTU (the National Commission on New Technological Uses of Copyright Works) governs the numbers of free copies made. The "Guideline of Five," suggests that in one calendar year a borrowing library may receive or copy five articles from one journal title for articles published within the previous five years.

In many universities and libraries, Hilyer said, the interlibrary loan department has become the default authority on copyright clearance. The library uses the CCC's Transactional Reporting Service to pay a copyright royalty and a small processing fee for all copies it makes "in excess of fair use". The CCC's Academic Permissions Service facilitates the creation of coursepacks and handouts; its Electronic Course Contents service facilitates electronic reserves; and its Media Image Resource Alliance allows licensing of stock photographs for re-publication.

If a source is not contained in the CCC, Hilyer must find the rightsholder through other means. He begins by looking for the author, using databases such as the *MLA International Bibliography* that contain author contact information. He also uses a variety of other directories, *Who's Who* reference tools or the Google search engine.

Above all, Hillyer, stressed, it is access that is key: getting access to the material for those who need it. Alternatives to licensing material include placing items on reserve, purchasing reprints from the publisher, and purchasing back issues from publishers. Hillyer's final word of wisdom was that "if you can't clear for copyright on material for the purpose for which you need it there's often a way to get access to it for the people who need it"

Open Forum

David Green offered a synthesis of the day's events and opened the floor for discussion.

He declared that the audience had heard:

- legal perspectives (both at the national and state level);
- legal and scientific responses on attempts to over-control material;
- museum, library and instructional voices on specific and local concerns and on the critical nature of copyright and fair use issues in everyday business;
- pleas for legislative action, notably to prevent UCITA from being enacted and against over-control of databases;
- the voice of traditional "Internet culture" (on which content is built)
- the voice arguing for the right and ability to copy
- the voice of a commercial service and its interest in ensuring the availability of material in the public domain; and
- the voice of those whose everyday work it is to track down copyright owners and seek permission to use copyrighted material.

Notable themes of the day had included:

- the delicate and increasingly complex balance between owners and users and how to ensure continued fairness to all parties;
- the encouragement by IP counsels (often as opposed to administrative counsel) to empower faculty to do what they want to do as legally and efficiently as possible;
- the importance of negotiation and the unbundling of rights in any dispute and the imperative to discover the real interests of each party;
- the positive potential of the currently stalled distance education bill (the TEACH Act);
- the negative aspects of the DMCA, which emphasizes access control rather than copy control;
- the positive aspect of the DMCA that encourages us to be more aware of the public interest and the threats it faces;
- the conviction by many scientists that technological control of content have never been and will never be effective;
- the need to encourage creative development of new business models that recognize the new reality of the Internet;
- the conviction that open source software may lead to more open content; and, lastly,
- the question of whether to encourage the strong assertion of fair use or a more robust method of clearing copyright permissions?

1. Copyright Enforcement

One audience member asked the speakers to address the issue of copyright enforcement in a digital world. She suggested that enforcement may be moot in a few years anyway because material will be so accessible on the Internet. Her concern was that museums and archives might lose control of images once they are online.

Ochoa responded that first museums need to check that they have the right to display images from their collections. Assuming that they do, then the only real enforcement mechanism is the court system, which is expensive. Ochoa pursued the point by asking what the questioner meant by "losing control" of a work. Museums have generally not lost commercial control of their images. There has always been some "leakage" within the system and the Internet increases the amount of leakage, but if someone uses a museum image to make money without permission, the museum's remedy is no different than before the Internet: an infringement suit. Although a museum might lose control by not knowing who has copies of museums' works, generally there is no lost revenue. He emphasized that traditional sources of revenue have not disappeared and publishers will continue to clear permission through the museum.

Petersen urged people to remember that academics are owners as well as users. He also added that the current copyright system does not offer incentives to authors in the way the Constitution meant it to; the incentives are for publishers. He strongly urged us to do what we can to return to the core premise of copyright under the Constitution: that it be an incentive for new creativity.

Green said that the concern over museums losing control of material had been strongly voiced throughout the Copyright Town Meetings - though less frequently as the meetings progressed. His answer was to offer examples of museums, such as the [National Gallery of Art](#), that mount high-definition images and clear copyright statements, with no resultant damage. [The Fine Art Museums of San Francisco](#) plan to digitize their entire collections and at the San Francisco Town Meeting, Dakin Hart had reported that the only complaints were from artists who wanted their work online and didn't see it yet. Green advocated unwrapping the interests and examining what is to be gained and what is to be lost from networking cultural materials, allowing them to be freely accessed.

Later on another audience member reported that some museums are concerned about "misuse" of their images. She also felt that some of the speakers were denying the importance of copyright and were advocating giving everything away to the general public, while only charging publishers.

Petersen suggested that this is a slippery issue in academia and publishing, and was very sensitive to the charge that "librarians wanted to give everything away for free." Rhoda Goldberg was also sensitive to this charge, made by Pat Schroeder, President of the American Association of Publishers. Goldberg emphasized that we need creators and need the incentives that copyright protection offers, but many now were looking to redress the balance of interests between private and public that many felt had gone too far towards the interests of the large copyright owners.

Ochoa returned to the issue of misuse, pointing out that the European tradition of moral rights responds to this but that the U.S. does not have a moral rights tradition and allows for parody as valid self-expression covered by fair use. The only concession Congress has made to moral rights is through the Visual Artists Rights Act ([section 106a of the Copyright Act](#)), which is very narrowly constructed.

2. ArtSTOR

A questioner wanted to know more about ArtSTOR, recently announced by the Mellon Foundation.

Green answered that although it had indeed been announced, there were many pieces that had to be worked out and that probably it would be a while until details were announced.

2. Quality of Images

An audience member suggested that the quality of images on the web will determine whether they get re-used or whether permission will be sought from the institution. He knew of one institution that mounts material suitable for highschool use but withholds high-resolution material.

3. Use of Material in the Classroom

An ESOL teacher said she used a "don't ask, don't tell approach" to copyright. She uses her own video-recordings of TV shows, song lyrics, scripts, and parts of books, (for example, a grammar chart) in her teaching; but she's a little worried about the legality of what she's doing. Harper pointed out that these items fall into two categories affecting fair use: the effect on the market of an intended use, and on the value of the work. Both of these are covered in "Fair Use of Copyrighted Works," part of Harper's Crash Course in Copyright. In this case, she said, the fourth fair use factor is quite flexible and favors users. As for TV use, she didn't know where one would start to seek permission. For movies, you could go to the [Motion Picture Licensing Corporation](#), which, she said, will charge \$25,000 for three minutes of use.

There's no discrimination between commercial and non-commercial use. At the moment the market for permissions for TV, movies and music still has nothing for educational copying. So when the market fails to provide a reasonable avenue, the fair use factors can come into play. For text, Harper recommended one-time fair use but then to ask permission for any subsequent use.

Peterson added that it was still important to show that you had a legally-acquired copy of the work that you were then making a fair-use copy from. Ochoa added that under current section 110, the teacher is on very solid ground if she was performing or displaying the material in face-to-face teaching, if using a legally acquired copy. As getting a copy of a TV show is so difficult he thought off-air taping probably would qualify. Everything shifts again if the teacher were engaged in distant education, and, as Petersen and others had pointed out, the TEACH Act is designed to remedy some of the significant copyright obstacles encountered there.

An audience member asked if the teacher would be covered under First Sale and was told that First Sale only allows you to pass materials on, not to make a copy.

4. Control

A participant wanted clarification about whether Dan Wallach retained copyright when he posted material on the web. Wallach asserted that he clearly did, that simply by disseminating his work he wasn't giving up his copyright. Wallach elaborated by saying that that it is the practice of his profession, Computer Science, for authors to make their scholarly papers available on their websites. He's never had the problem of not finding a paper he wanted to reference.

However, Reedstrom pointed out that when Wallach publishes a paper in a journal then he almost certainly has assigned his ownership to the publisher of that journal and he no longer has the right to publish his paper on the web. Miles Coe volunteered that he knew that IEEE, one of Dan's publishers, insists on assignment. However, Wallach again pointed out that here was a gap between practice and the ability and desire to always enforce copyright. In fact he pointed to Citeseer, <http://www.citeseer.com> that indexes scientific papers available online and makes it easy to find related work.

Miles Coe commented that for certain work there was an "implied license" that work was available for copying and re-use unless there was a clear statement indicating the owner's assertion of their copyright. Ochoa pointed out that while the Internet offers us many more opportunities than before to copy, it also makes enforcement of copyright easier. He offered the example of Google as a way for owners to search for unauthorized copies of their works on the net.

There was concern about database aggregators who might have the effect of restricting access by enabling only a pay-per-view through their portal. Coe Miles saw commercial, news journals going more to a subscription basis for increasing access (with either new or archived material for free) as advertising-base was not working.

One commentator cited Westlaw and Nexus that aggregate material easily through licensing and increasing accessibility of material. Another commentator pointed to such aggregators discovering the complementary market of electronic courseware and distance education (see Bell & Howell's [XanEdu](#), for example) offering "CoursePacks that give you personal on-demand access to copyright-cleared resources from the world's most respected databases, enhanced with your own notes and commentary." The problem here is that often the student is paying twice for this material. Peterson, with experience of these systems, spoke up for the value-added by the software that makes it easier to have electronic courseware tied to WebCT or Blackboard rather than going through the databases of material. However, he said that libraries and educational institutions should be willing to push back the way they had done so effectively with publishers over licensing fees. Let's pay for the software but not again for the content that we already have in the library.

At that point, Green called for the adjournment of the meeting.