

COPYRIGHT & DISTANCE EDUCATION: Meeting Report

Tuesday March 7, 2000
Triangle Research Libraries Network
University of North Carolina at Chapel Hill
Chapel Hill, NC

With thanks to Kimberly L. Armstrong and Jordan Skepanski. See their report, on which this account is largely based, "Copyright, Fair Use, and Distance Education: A Town Meeting," in *Library Hi Tech News*, Vol. 17, No.9, 2000.

Introduction

Jordan Skepanski, executive director of the Triangle Research Library Network (TRLN), and Duke University Librarian David Ferriero, chair of the TRLN Board, welcomed the audience and noted the rich tradition of cooperation in the Research Triangle among its educational institutions. Ferriero noted the town meeting concept got its start in Salem in 1636 and even though later the town meeting tradition was branded as "mobbish" he trusted the spirit of the original meetings would be present on this occasion. Both trusted that this meeting would continue to invigorate discussion of intellectual property issues on all campuses within the Triangle. David Green gave his overview of the Town Meetings series and the meeting was then divided between Peggy Hoon's review of the current legislative situation, a lively discussion on copyright and distance education moderated by James Boyle and a role-playing situation in which several issues, especially those concerning copyright ownership, were presented and discussed.

1. REVIEW OF CURRENT LEGISLATIVE DEVELOPMENTS: *Affordable Distance Education is Inextricably Linked to Copyright Law.*

Peggy Hoon, Scholarly Communication Librarian, North Carolina State University

Distance Education Basics

Ms. Hoon pointed out that distance education had been around for many years but was expanding rapidly. At NC State it is defined as "an educational process that is physically remote from the main campus and in which teacher and learner are separated in time and space." The goal for distance education

is surely "equality in education for the distance learner and the on-campus learner." Both teachers and student expect that the content (course and library materials) provided in a distributed environment should be identical to that made available to on-campus learners and that those materials will be accessible and affordable.

Copyright Basics

Hoon then reviewed some copyright basics. Copyright protection:

1. covers all types of original works (literary, musical, dramatic, pictorial, graphic, motion picture, sound recording, choreographic, architectural, etc.);
2. begins as soon as the original work is fixed in a tangible means of expression;
3. does not require registration or publication, although lack of registration can limit damages in case of a suit.

Copyright holders have some exclusive rights. They can reproduce the work, prepare derivatives, distribute copies, publicly perform the work and publicly display it directly or via telecommunication. There are limitations on exclusive rights, described in sections 107 and 110 of the copyright law. [Section 107](#) describes "Fair Use" of copyrighted works and [section 110](#) covers the "Exemption of certain performances and displays."

Copyright & Distance Education

In traditional teaching, section 110 (1) of the copyright law clearly allows faculty and students to perform or display a work if such performance or display takes place face-to-face, is at a nonprofit educational institution, occurs in a classroom or a similar place devoted to instruction and if the audiovisual work is lawfully acquired. Section 110 (2) takes up the "broadcast exemption" by which teachers and students may perform a non-dramatic literary or musical work or display a work by or in the course of transmission if three criteria are met:

1. The performance/display must be a regular part of the systemic instructional activities of a nonprofit educational institution;
2. The performance/display has to relate directly and be of material assistance to the teaching content of the transmission;
3. The transmission is made primarily for reception in classrooms or similar places normally devoted to instruction or to persons with

disabilities or other special circumstances which prevent their attendance in the classroom or similar places.

Copyright Office Report on Distance Education

Hoon pointed out that this third condition had greatly limited the material that can be used, but that now several developments could change this.

First, section 403 of the Digital Millennium Copyright Act that deals with distance education called for the Copyright Office to submit a report with recommendations to Congress, after consulting with "representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives." The report would deal with "how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works." The report was published in May 1999 and is available at <<http://lcweb.loc.gov/copyright/disted/>>. Some of its key recommendations, according to Hoon, were the following:

- That the law should authorize reproduction of copyrighted material to the extent necessary to transmit it for teaching.
- That there should be an emphasis on the concept of mediated instruction.
- That the law should eliminate the requirement of a physical classroom.
- That safeguards should be put in place to counteract new risks to copyright.

Hoon noted that in the hearings the content providers testified that the law didn't need changing, while the users of copyrighted material (notably those represented by university and library associations) asserted that the law was counter intuitive, especially in its insistence on a traditional "classroom". They made a strong statement that fair use be recognized as still applicable in this environment. The report did recommend that the laws expand the scope of works permitted under Section 110 (2) and that Congress confirm that fair use applies in the digital environment. She noted, however, that database-licensing issues, online reserves and other library services and the production and use of coursepacks were not covered by the report.

Anti-circumvention Provision

Hoon went on to introduce section 1201 of the DMCA, known as the "Anti-circumvention Provision," established to protect copyrighted material in the

digital environment. "No person," states section 1201, "shall circumvent a technological measure that effectively controls access to a work protected by copyright." The paradox here is that although the DMCA asserts that fair use still applies in the digital environment this measure prohibits the circumvention of protection measures that would enable fair use.

The Copyright Office was preparing to report on the likelihood of adverse effects of this section, especially on the educational community. To the dismay of many, the "classes of works" to be exempt from this prohibition were very narrowly construed in the report, see <http://lcweb.loc.gov/copyright/1201/anticirc.html>. This dismay can be seen in the Digital Future Coalition's press release. Even the Librarian of Congress noted that "potential damage to scholarship may well ensue in the course of a three-year period" before the next scheduled rulemaking on this issue. The National Telecommunications and Information Agency of the Department of Commerce (NTIA) issued [a strong statement](#) in defense of fair use.

Hoon closed by inviting questions and urging the audience to be at the table whenever there is a dialogue or debate on the use of materials in the digital environment. Often the stakeholders who have the most influence over legislation are the content providers, because their revenue streams depend on copyright protections. Universities and libraries have been slower to enter the discussion as users and as protectors of fair use.

2. COPYRIGHT, FAIR USE, AND DISTANCE EDUCATION - A DIALOGUE

[James Boyle, Professor of Law at American University](#)

Professor Boyle opened the more interactive part of the meeting with some education facts and figures: at \$600 billion dollars annually, education is the second largest segment of the US economy; college education costs have risen from 9% of a typical family's budget in 1980 to 15% in 1997. Although distance education is not new, the Internet is already transforming its impact on education as a whole. One estimate predicts that 50% of students in community colleges and 35% of those registered in four-year colleges will be taking distance education courses by 2010. Distance education can enable institutions to increase their programs at a lower cost than traditional bricks-and-mortar campus expansions. It is also potentially far more democratic in its ability to reach all segments of the population.

What will distance education really look like in the future?

Boyle's opening question was about what distance education would look like in the future? He asked if the most prestigious schools would control the market because their degrees, now available through distance education, would be the most desirable, or if state universities will be invigorated by new opportunities to serve the citizens of their states. The response was that many universities would vie for position in the online market. One participant asked whether the typical content would be the traditional humanities or social sciences courses now taught on campuses or more vocational courses that focus on marketable skills?

Boyle suggested that colleges and universities might define specialty or niche areas in which they can be competitive in the distance education marketplace. There may be a divergence in types of education. Students might choose either the "full ride" traditional education, attending college on a campus with the socialization and maturation experience implicit in such, or the distance education environment, which may be more vocational in nature.

Put another way, will distance education expand the democratic potential of current education by bringing in a new portion of the population, such as retirees, or will it focus on making higher education a more "efficient" machine by applying corporate business models?

How will changes in the marketplace change the role of the academic professions?

Boyle's second question was, "How will changes in the marketplace change the role of the academic professions?" Boyle asserted that librarians, researchers, and academics have long been stakeholders in protecting the public domain. However, the marketplace is being driven by for-profit entities that support privatization of all digitized material and the dominance of a pay-per-view model. The audience was in agreement that safe harbors for fair use in the distance education environment must be expanded and that it is critical for all types of academics to create and articulate a defensible position for fair use in this new environment.

Boyle continued by suggesting that faculty might be tempted by the for-profit sector to create online content for a fee. Since universities typically do not assert copyright over faculty publications (unlike the model for patents where the university shares in any revenue derived from the research resulting in a patent), faculty members conceivably could create and sell distance education

materials that would not necessarily be provided by their own universities. However, as the New York Town Meeting (and the next section of this meeting) emphasized, this scenario is also changing with universities asserting more of an interest in faculty's intellectual property.

Wouldn't a no-fair-use, profit-driven environment introduce innovation and dynamism to the education market because it encourages the development of better material?

A third topic generated much interest and discussion. Boyle posited that fair use exists only because of the enormous transaction costs that can be involved in obtaining permissions for every use of a copyrighted work. But the Internet has reduced overhead to a point where transaction costs for use of a work can be measured by the chapter, the page, and even the paragraph. In other words, fair use might now be characterized as *passe*, an old model that can now be replaced. "Wouldn't a no-fair-use, profit-driven environment introduce innovation and dynamism to the education market because it encourages the development of better material?"

The response was that it would be slow and difficult to move entirely to a pay-as-you-read or pay-per-view system. Payment likely would result in people valuing information differently, with reading and study preferences altered by the cost of the materials. A for-profit environment also might mean that certain material might never be available online because it would not be cost efficient to produce for a small readership.

What should be the position of the educational community on use of material for teaching and learning over the Internet for distance education purposes?

Boyle then directed the discussion to roles and policies. He agreed that academics have strongly held opinions about copyright and fair use but that they also find it hard to explain why copyright is so important to their educational mission. So what should be the position of the educational community on use of material for teaching and learning over the Internet for distance education purposes? What should be the role of university legal staffs as advocates for the public domain? Boyle suggested that faculty challenge universities' legal counsels to create clear, understandable guidelines on distance education. He also encouraged faculty to push counsels to become as familiar with copyright issues as they are with other intellectual property matters and, indeed, to become advocates for the public domain along with faculty and librarians.

General Principles

Concluding, Boyle asked what themes or general principles of distance education had emerged from the discussion. The audience responded with three:

- You should be able to do anything in distance education that can be done in the classroom.
- You should pay one time for copyrighted material but be able to use it liberally in teaching.
- Students who are physically distant from the campus should get the same services as students on campus.

3. PRESTIGIOUS STATE UNIVERSITY: AN INTELLECTUAL PROPERTY SCENARIO & ROLE-PLAY

Anne Klinefelter, Associate Director and Clinical Associate Professor of Law, Kathrine R. Everett Law Library, University of North Carolina at Chapel Hill [Legal Counsel]

James A. Curtis, Associate Director for Administrative Services, Health Sciences Library, University of North Carolina at Chapel Hill [Publisher]

E. Christian Filstrup, Associate Director for Collection Management, Organization, and Preservation, North Carolina State University Libraries [Publisher]

Dr. Deborah L. Jakubs, Director, Collection Services, Perkins Library, Duke University [Chancellor]

Dr. Benjamin F. Speller, Jr., Professor and Dean, School of Library and Information Sciences, North Carolina Central University [Librarian]

Five administrators drawn from TRLN libraries explored distance education, fair use, and copyright matters at a fictitious university in a role-play panel. The university's chief executive officer, head legal counsel, a faculty member, a librarian, and a major publisher's representative considered the following scenario involving a professor's preparation of an online course and portrayed the varying interests and perspectives at play.

Dr C, a professor of interdisciplinary studies at Prestigious Southern University (PSU) and an internationally recognized scholar, teaches a unique, popular, specialized course developed over many years of classroom instruction and extensive research. Professor C's work - and

the course - has significantly enhanced PSU's reputation and other universities with similar programs would like to offer such a course, recognizing it would fit nicely into their curricula, but they have neither the resources nor faculty expertise to readily do so.

PSU's chancellor is most interested in developing PSU's distance education offerings and has asked the vice chancellor for academic affairs and the deans to identify faculty members who could adapt their courses for provision online. The administration also believes that attractive classes might be licensed to other universities. Professor C's course is an obvious choice and he has been provided release time and substantial staff technical assistance to convert his syllabus into a digital format.

Meanwhile, the university library has asked for suggested titles of materials that might be added to its new electronic reserves system. The library would like Professor C's bibliography and other supporting items, given the broad appeal and large enrollment of the course. With Professor C involved in the preparation of a "virtual" class, the library also sees digitization of his course materials as an excellent means of providing its services at a distance.

The nature of the course provides an opportunity for Professor C to use a wide variety of learning materials: books, articles, images taken from film and television, music, graphs, drawings and items downloaded from the World Wide Web. However, Professor C has not sought permission to use copyrighted materials in his class. Quite a few of the items the professor uses while teaching, and which he expects his students to consult outside of class, are taken from the products of Big Publishing Conglomerate (BPC, Inc.).

Professor C provides the library with citations, sources, and, in some cases, the actual materials he would like to have placed on electronic reserves. He directs university technology personnel to add all of these resources to his course Web page. However, as he hears about the university's plans to market the course and to license it to other institutions, he begins to think about the possible benefits accruing to himself and his department from this effort. He decides that before he agrees to teach online he should speak to the administration.

Meanwhile, the library has questions about mounting on its server some of the materials Professor C has asked to be placed on reserve and is seeking the opinion of university counsel. Through an employee who is enrolled part time at PSU, and who is one of Professor C's students, BPC has been alerted to the unauthorized use of many of its

copyrighted items at the university. It determines that a meeting with PSU officials is in order.

During interaction with her colleagues the university's chancellor saw her responsibility as maintaining and enhancing the reputation of the university, ensuring that her institution was in the forefront of educational developments, and protecting the university's investment in its intellectual property.

Of major concern to the university's chief counsel was making certain that the institution did not become embroiled in unnecessary and costly litigation but at the same time being certain to uphold its legal rights. This legal staffer also sought to educate employees on their rights and responsibilities.

The faculty member's objective was the advancement of knowledge through legitimate use of the research and scholarship of others while providing the most up-to-date and comprehensive course possible for his students. However, he was used to running his courses as he saw fit and now librarians were hemming him in with rules he had never heard about. Not having thought much about copyright in the past, he was now anxious to protect his own intellectual property rights.

The librarian wanted to provide open and comprehensive access to information necessary for teaching and learning at the university. He wanted to assist faculty and staff in adhering to the law while asserting all of their legal rights. Increasingly he felt like a gatekeeper.

The publisher had concerns about copyright incursions in academia. He expressed a desire for good profit margins, which would assure the viability of his company and he wished to realize maximum sales in the higher education community and beyond. He also noted BPC's intention of making a gift of a new Center to the university.

The complementary and conflicting interactions - enhanced by lively role playing by some members of the audience - brought the town meeting to an entertaining, instructive, and successful conclusion.