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Legally Speaking/ Copyright and the Charleston Conference

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Legally Speaking

by **Glen Secor** (Yankee Book Peddler, Inc.
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What Is This Thing Called Copyright?

In my November 1992 column on intellectual property, I promised to report back on copyright-related discussions at the 1992 Charleston Conference. Here, albeit an issue late, is that report. Copyright has been prominent on the agenda of nearly every conference I have attended in recent months, and will likely be the subject of these columns for the remainder of this year.

There were two copyright-related sessions at Charleston: one in the main program, and the "rump session" on Saturday afternoon. **John Cox** of Blackwell's spoke during the main program, and his remarks are neatly summarized by **Janet Flowers** at page 15 of the February issue of *ATG*. John gave an excellent primer on copyright law and a wonderful exposition of the key principles to be followed in the future development of rights. These key principles, quoting from Janet's report, are: "1) the ability of the publisher to receive a reasonable remuneration, 2) easy access to the material for the researcher, 3) fair use of the material, 4) practical mechanics for monitoring use."

It would be difficult to argue with any of these as a broad goal or guiding principle. The difficulty comes in trying to reconcile them in the real world, especially in the face of new and emerging technologies. John discussed, and Janet reported, the need for new economic (i.e., pricing) models for document delivery. It is worth noting, though, that even with document delivery, we are still talking about information in a traditional print form. There is something tangible (book, journal, article) to be bought and sold. Yes, advances in photocopying technology have facilitated legal and illegal copying, but the basic model of a sale of the item and copyright protection over the contents of that item remains intact. Document delivery really does not seem to add much in the way of new copyright issues. The

pricing issue, i.e., how to recoup enough in document delivery and copyright fees to offset lost subscriptions (and book sales), is undeniable, though.

Electronic information raises both economic and copyright issues. Most of us, I think, understand the economic issues, i.e., upon what should charges be based and what should those charges be, even if we do not yet know the solutions. In the application of copyright law to electronic information, even the issues are harder to identify and grasp. Our experience in applying copyright law to software will provide us some guidance, but software copyright law is very jumbled.

What is an electronic "writing," especially in the network context? What constitutes electronic "publication" and "copying"? How can use be monitored when the thing being used exists out there in the ether, and access to it is also electronic? How will fair use determinations be made when all of us, commercial and non-commercial enterprises, are wired to the same networks and have access to the same databases of information?

I know, I know . . . these are technical problems for which there must develop technical solutions. Possibly. Encryption/decryption technology has been developed to allow for tracking and charging for access to the information contained on CD-ROM. Perhaps similar technology will develop for networked information. The point is that electronic information raises a number of copyright questions, some of which can be answered with the same logic used for print and software products, but some of which demand new reasoning. The traditional sale-of-the-tangible-product-plus-copyright-protection-of-the-contents model may not hold in the future.

John also addressed the question of who should hold the copyright, author or publisher, a topic taken up again at the rump session. In both arenas,

sentiment was strong that rights management by authors, meaning that anyone seeking the right to use a work would obtain that right directly from the author, is impractical. This clearly goes to the value added by publishers, and the future viability of the publishing function. As anyone who has dealt with rights departments of publishing houses knows, rights are difficult enough to obtain when there are a limited number of sources for them and personnel at those sources are (usually) knowledgeable in that field. However frustrating publishers' rights departments are, having to track down and negotiate with individual authors would be infinitely worse.

The rump session turned out to be a very pleasant surprise for me. Although I had agreed to facilitate the session, and had been assured that it would be very low-key, I had serious reservations right up to the time we started. I honestly did not think that people would want to talk about copyright, and expected that after the first few minutes we would move on to serials pricing or some other such familiar topic. Instead, much to my delight, we had a lively, intense, two-hour discussion on copyright. Wow!

In the rump session, we got right to the essence of copyright, dealing with it in the most practical of terms. People were surprised at the legalities and technicalities of rights management. It seems odd to us that a publisher could hold the copyright over the text of a book, but not photographs or drawings contained therein (meaning that the publisher cannot grant to anyone else the right to use that photograph or drawing). Such complexities, of course, go right to the very nature of intellectual property.

Rump session attendees also discussed the limitations and realities of library fair use, the mechanics of obtaining copyright protection, and

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remedies available for copyright infringement. In the end, most of us seemed to agree that copyright is about money. It is not, as some would maintain, about protecting the integrity of one's work. We do not have moral rights per se in our copyright law, although we have certain rights that authors do retain over their works even after transferring copyright. Copyright in this country is essentially an economic right.

But while an economic right, the aim of copyright law is not necessarily to protect the financial return of authors and publishers. The AAP, in its "Statement on Commercial and Fee-Based Document Delivery," states, "The purpose of the copyright law is to ensure authors and publishers the economic wherewithal to devote their energies, talents and funds to the creation and effective packaging and distribution of intellectual works." Publishers no doubt wish that this was the purpose of U.S. copyright law, but this is not so.

Our copyright law is about stimulating the creation of intellectual works, but not by ensuring adequate compensation to authors and publishers. As I have written in the past, copyright law attempts to balance the interests of creators (i.e., compensation) with the interests of society (i.e., easy access to intellectual works, including for the purposes of building upon those works). Copyright law, if you will, was the arena for the original "ownership vs. access" debate. If progress in the useful arts and science is best served by my having free access to your work, rather than by your being able to charge me for it, the law would have me get it for free (not on an individual basis, of course, but by categories of people and uses).

When copyright law achieves its desired balance, the amount that I pay you for access to your works will not discourage me from seeking that access, but will provide you with adequate compensation for your effort. It cannot be accurately said, though, that the primary goal of copyright law is to provide you, as creator, with financial return on your past works or incentive to create other works. Intellectual property rights, as opposed to most other property rights, attempt to serve the interests of society first, then those of the property owners. When the two are in harmony, all the better. Unfortunately, they are often at odds, and perhaps will be even more so in the electronic age. ☞

Off The Wall

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and stampede them into shorting T-bills and loading up on gold bullion, Teflon ammo and canned goods. He told me about Tulipomania in Holland in 1634.

You didn't know about that? Tulips aren't native to Holland. They came from Turkey at the time that Holland was the major world power just behind Spain and ahead of Britain. And anyhow with an excess of wealth to squander, the Dutch started speculating in tulip bulbs (rather than Vermeers or diamonds) and this led to a market crash like the South Seas Bubble, Mississippi Bubble and various other panics of 1837, 1873 and 1929. And that led to deflation, depression and dyspepsia. I didn't find this comforting. My husband doesn't see comfort as his assigned role in our fiduciary partnership.

So — what happened, already? —

as they used to say up North?

FINALLY, I found a wise woman who knew how to deal one-on-one with bulbs. One of those serene, in-touch-with-nature's rhythms, cosmic types like in the goddess books that are currently so popular. She lives several blocks away from me. I arranged for her to "help me" plant the bulbs.

The rest is history. The bulbs are fine. They are alive and well because someone else took charge of them. Spring is here and they will soon do their blossoming thing. The Chas. Conf. and I are saved.

In the meantime, back in Holland, there is the magnificent Herman who speaks five languages, oozes with charm, and has yet to hear from me about the bulbs. So, here is my public apology.

Herman, thank you. *I love the bulbs.* I have done my best to assure that they will live and thrive. Thank you! ☞

ALCTS

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PVLR also agreed with the liaison to **RLMS Micropublishing Committee** that RLMS will review complaints having to do with completeness of the microform itself and PVLR will review complaints having to do with suspected publisher malpractice, and continued work on the internship proposal.

The **Foreign Book Dealers Directories Series Subcommittee** of the **Publications Committee** (Ellen Pletsch, Chair) heard reports on the progress made in compiling survey results for the Africa and Asia and the Pacific directories and agreed to prepare a proposal for funding support from the **ALA Cultural Diversity Committee** in support of this work. The **Guides Subcommittee** (Kathryn Soupiset, Chair) reported that *Guide to Preservation in Acquisition Processing* was published in the fall of 1992 by ALA (Acquisitions Guideline no. 8, \$8, ISBN 0-8389-0611-7); reviewed the current draft of *Guide to the Acquisition of CD-ROMs, Software, and Similar Materials Published in Electronic Format*, which should be ready for release to ALA Publishing by summer and published in the winter. Other

topics under development by this committee include: managing of approval plans, acquiring OP materials, and financial management.

It should be no surprise that the **Serials Section Acquisitions Committee** (Richard Brumley, Chair) discussed the latest draft of *Guidelines for Serials Vendor Performance Evaluation*, and they also reviewed the status of the *Serials Acquisitions Glossary* in order to form a plan for its ultimate publication and distribution by ALCTS.

Electronics

The **Scholarly Communication Committee** (Fred Lynden, Chair) finalized program plans for its **New Orleans program**, "Academic Libraries at Risk," heard a forum on electronic projects, including a report on copyright issues (see summary in AN2, vol. 5, no. 15; letter in vol. 5, no. 17) and recommended a program for Miami on rights and permissions for electronic products as it is a key issue in the growing environment of document delivery.

And, on this note, I might mention that PVLR established a task force to explore the development of guidelines for reasonable licensing agreements for electronic information products. ☞