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Legally Speaking

by Glen M. Secor, J.D. (Yankee Book Peddler, Inc.)

The Pub and the Pendulum

In the June edition of this column, I argued that much of the current debate over copyright is misplaced, in that we tend to focus on who should own copyright in scholarly works and how those copyrights should be managed, rather than how the system of scholarly communication should work. If the goals of scholarly communication are clear and agreed to by the major constituencies, which may not be the case today, copyright is one tool with which we can pursue those goals. Again, copyright is a means, not an end unto itself.

In support of the proposition that we are missing the point on this issue, an article in the *Chronicle of Higher Education*, June 16, 1993, page A15, describes the ongoing battle between publishers and copy shops over course packs. In arguments to those familiar with Kinko's and other cases, publishers maintain that permissions are required for course packs, while copy shops contend that too many publishers are too slow in granting permissions, and that royalty rates are inconsistent and in many cases exorbitant. Each side, as is to be expected, contends that its approach is in the best interests of education. According to James Lichtenstein, vice president of the Higher Ed. Division of AAP, "... the whole enterprise — publishing and academe — rests on the notion of protecting intellectual property. If we don't protect it, there's no incentive to create." James M. Smith, owner of Michigan Document Services, the defendant in a copyright infringement case brought by three publishers, counters that "[i]t's really not possible for a shop to get copyright permissions, pay the royalties, and still be economically viable."

Mr. Lichtenstein's lumping of publishing and academe into one enterprise is a convenient but debatable proposition. Publishers, commercial and non-commercial, are undeniably major players in the process of scholarly communication. Their interests, however, are not identical to those of academic institutions. Indeed, the interests of the two are

frequently at odds, a reality which contributes to the current tension over access to and pricing of scholarly material.

At issue in the case of Mr. Smith and his Michigan Document Services, as it was in Kinko's and Texaco, is the definition of fair use. Publishers argue for a narrow definition of fair use. After all, fair use is uncompensated use. Mr. Smith maintains that the Kinko's court got it wrong, and the *Chronicle* article quotes another copy shop owner who asserts that the legal pendulum of fair use "has swung too far toward the publishers."

Two prominent legal scholars, William F. Patry and Shira Perlmutter, concur somewhat with this assessment in their recent law review article, Fair Use Misconstrued: Profit, Presumptions, and Parody (*Cardozo Arts & Entertainment Law Journal*, v. 11, no. 3). Patry and Perlmutter criticize the mechanical, formula-driven approach which courts have begun to follow in fair use cases. While space prohibits a full discussion of the article, Patry and Perlmutter make one key point which is worth noting here: fair use is the key mechanism for the achievement of the constitutional goals of copyright, namely to promote the progress of science and useful arts. Fair use is not supposed to be a legal football bouncing between publishers and copy shops, or between any other parties or constituencies. In the words of Patry and Perlmutter, fair use "is a critical safety valve of copyright." That safety valve is turned on when society's interests are better served by encouraging the second author than by compensating the first author.

And therein lies the rub. Because copyright is a monopoly, and because fair use is uncompensated use, fair use winds up being an all-or-none proposition. If fair use, then the copyist can copy for free. If not fair use, then the copyist must pay what the copyright owner demands. In such a win/lose scenario, especially against a backdrop of high economic stakes and rapid technological development, it is not surprising that the interests of society can get lost

among the interests of the competing parties. One could assume that whatever result emerges from the battle, say between publishers and copy shops, will be in the best interests of students, scholars, and society generally, but I am not enough of a free marketer to buy that proposition. At the least, one can argue that the current generation of students and scholars is suffering as copyright law and the economics of scholarly communication attempt to catch up with new copying and distribution technologies. Judging from the article in *The Chronicle*, this appears to be the case as publishers and copy shops continue to slug it out over course packs. Where course packs are concerned, the publishers and copy shops also seem to be losing out: a healthy black market for course packs exists, and it is estimated that 60% of course packs being produced today do not comply with the Kinko's ruling.

What is the solution? Well, the Copyright Clearance Center is one option for streamlining the permissions process. Of course, participation in CCC is not mandatory for publishers, and publishers are free to set their own royalty rates even through CCC. The question is whether such a voluntary system can bridge the gaps between copyright owners, who seek a reasonable (and in some cases unreasonable) profit on their intellectual property, and users of copyright material, who generally seek to pay the lowest amount possible (including nothing) for their usage. CCC requests doubled in 1992-93, to 160,000, but this is but the tip of the iceberg. While I hope that CCC is the answer, I suspect that we will have to consider something less voluntary if permissions continue to be a stumbling block in the scholarly communications process.

NEXT ISSUE: International approaches to reproductive rights organizations (RROs) . . . Would compulsory licenses or collective distribution work here? ☛