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Copyright Issues & Principles in the Digital Environment

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Rumors from page 16

grates e-reference books in an easy-to-use database interface. To be released in October 2003, **Gale Virtual Reference Library^{SM}** will offer libraries the opportunity to select from an initial collection of more than 50 reference sources — encyclopedias, almanacs, and series — to create a customized, completely integrated online information service. www.gale.com/ebooks

Meanwhile, back at the print ranch, I am looking forward to reading the latest **Nicholas Basbanes** <Nabasbanes@aol.com> book, *A Splendor of Letters: The Permanence of Books in an Impermanent World*, HarperCollins, 464 pp., December 2003. ISBN 0-06-008287-9. Starred review in *Kirkus Reviews* September 15, 2003. Remember when he spoke in Charleston several years ago?

I tell you what. **Norm Desmarais** <normd@providence.edu> is something else. Besides keeping up with innovations (see **Hyperbolic Browsers: From GUI to KUI**, this issue, p.95), he recently participated in the reenactment of the **Battle of Rhode Island** (25th anniversary commemoration). The battle was fought as a running battle over 3/4 of a mile. Norm's group kept ambushing the Crown forces as they advanced from field to field. What can I say? I'm speechless.

Did you read **Mark Funk's** and **Barbara Schader's** <bschader@library.ucla.edu> article in the September *ATG* on "Simultaneous Users vs. FTE Pricing Model — Stairway to Heaven or Jail House Blues?" yet **Barbara** will be in

Charleston for the **Conference** and presenting a paper. FYI, recently, there was discussion on **Liblicense** about usage-based pricing and its perhaps negative implications for research intensive universities.

Communication Abstracts, published by **SAGE Publications**, is now available on the **Internet Database Service (IDS)** from **CSA (Cambridge Scientific Abstracts)**. The IDS platform is the only online service offering the complete **Communication Abstracts** database. **Communication Abstracts**, edited by **Tom Gordon** at **Temple University**, is a comprehensive source of information about communication-related publications on a world-wide scale. www.csa.com

I tell you, **computers are wonderful**, there's no getting around it, BUT, boy, can they be a pain sometimes. For example, downloading and printing *ATG* image files has gotten so much more complicated in the online world than it ever was in the print world. Accordingly, this caught my eye. **ScholarOne, Inc.** has announced that it will integrate **DigitalExpert^{TM}**, the digital image preflighting tool from **The Sheridan Group**, with **Manuscript Central^{TM}**, the application for online submission, review, and tracking of scholarly content, with more than 425 systems. **DigitalExpert** checks whether image files meet print specifications. If a file does not pass inspection, the system creates a report with detailed suggestions for improving the image. Because **DigitalExpert** will be accessible from within the **Manuscript Central** user interface, **ScholarOne's** customers will not need to download any software or be required to upload additional files to preflight images. **ScholarOne,**

Inc. based in Charlottesville, Virginia, provides comprehensive workflow management systems for scholarly journals, books, and conferences. www.ScholarOne.com

It is very rare for a week to pass without someone wanting to have access to a paper that was given in Charleston at one of the **Conferences**. The **Charleston Conference Proceedings** for 2001 and 2002 — both edited by **Rosann Bazirjian** and **Vicky Speck** — are available from **Greenwood Press**. The 2000 Proceedings are available from yours truly. www.info.greenwood.com

Alexander Street Press has announced the expansion of its business and the creation of a new marketing department. **Jennifer Heffelfinger** has joined the company as Manager of Marketing and Public Relations. A graduate of Medieval Studies from the **University of Victoria** in Canada, Jennifer brings a deep passion for the humanities to the position, as well as nearly ten years of marketing and public relations experience in the academic and educational worlds. Jennifer is also the founder of **Thomas Press**, a scholarly publisher in the fields of history, history in art, literature, religion, and social sciences. <http://alexanderstreet.com>.

Was talking to **Steve Johnson** <johnsos@CLEMSON.EDU> — the fantastic — the other day. As usual, **Steve** is doing yeoman's work in **Charleston** at the **Conference** helping out with the beer and wine tasting. He was telling me that he just got back from **NASIG** where he climbed **Mt. Hood**.

Speaking of refreshments, time to take a break. See you in **Charleston**. — Yr. Ed.

Exploring the Digital Terrain... from page 1

Laura Gasaway, Director of the Law Library and Professor of Law at the University of North Carolina, discusses the effects of copyright term extension and offers her suggestions for ways to ameliorate potential problems. **Bryan M. Carson**, Coordinator of Reference and Instructional Services, Librarian for Philosophy, Religion, & Russian/Eastern European Studies, Western Kentucky University Libraries, then tackles the Technology, Education and Copyright Harmonization (TEACH) Act, highlighting how the Fair Use provision and the Public Performance exception, in particular, positively impact distance learning. Finally, I offer my views on the status of copyright on campus, the impact of digitization, and the valuable role of the college librarian.

We share our perspectives with hopes of advancing the discussion at a time when the subject of copyright is so timely, relevant and visible. Although our opinions may differ, we are in agreement in several key areas: the need to keep abreast of new developments; our excitement at being able to witness and participate in the current copyright debate and the outcome; and our invitation for you to join us in that endeavor.

Copyright Issues & Principles in the Digital Environment

by **Eric S. Slater, Esq.** (Manager, Copyright, Publications Division, American Chemical Society) <slater@acs.org>

As you are likely aware, copyright issues in the burgeoning digital environment have not been easy to navigate. Users and owners of copyrighted works have experienced what can be a complex process in using or protecting works. Fundamentally, the rule is that the basic principles of copyright law apply, no matter the content format — print, electronic or whatever may come in the future.

This article touches on the issues I face in the digital environment as a manager of copyright for a non-profit, Scientific, Technical and Medical publisher; principles you can employ when dealing with these issues; and lists recent court cases and copyright legislation.

The Internet is Not a "Free for All"

Some general misconceptions about copyrighting and the Internet include

"if it's on the net, it's free," or "if there's no copyright notice, it must be in the public domain," or, "photographs of old artwork are in the public domain, therefore it's not necessary to obtain copyright permission." These statements couldn't be further from the truth.

Under United States Copyright Law, copyright extends to works of original authorship posted on the Internet because it is fixed in a tangible medium of expression. Essentially, copyright protection automatically attaches to electronic documents, just as it does to print. Even if there's no copyright notice, it is protected. It is, however, recommended that a copyright notice be placed along with documents, advising a particular material is copyrighted. Registering with the US Copyright Office, while not mandated, is suggested because it affords greater protection to the copyright owner.

The statement concerning photographs of old artwork can be tricky. While old artwork itself is considered public domain and would

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not require a copyright, a *photograph* of old artwork could require one. For example, if the **Vatican** commissions someone to photograph **Michelangelo's** work in the **Sistine Chapel**, either the **Vatican** or the photographer owns copyright to that photo, and copyright permission is necessary if a third party wants to use it.

The point is you cannot assume that a photograph or a written work is public domain. The following situations define when a work is public domain: (1) when the copyright has expired — generally works created before 1923; (2) when it's United States Government-authored material, which is not subject to copyright; and (3) when a work has been dedicated to the public domain. The rule is "ask for permission if in doubt."

Know To What You're Agreeing

The *New York Times v. Tasini* and *National Geographic v. Greenberg* decisions helped educate owners and creators of copyrighted works on rights granted under a license and, as a result, they have become more rigid and savvy.

Tasini and *Greenberg* involved freelance authors who retained copyright to their works, but did not negotiate electronic use as the technology did not exist when the original agreements were created. The publishers that were granted nonexclusive licenses to publish in print format only subsequently used the respective works in electronic formats. The publishers claimed they were acting under Section 201(c) of the Copyright Act concerning revisions of collective works. The courts were not persuaded and found in favor of the freelance authors.

The result of these cases forced publishers to revise their agreements to include electronic uses and, in many cases, a "catch all" provision indicating that the publisher reserves the right to use a work in all formats, now known or later developed. Similarly, creators of works who retain copyright may attempt to bargain for greater compensation, and take advantage of the so-called "bundle of rights" under copyright law.

Electronic Content Creates Controversy and Confusion

As illustrated, making content available electronically has caused challenges for owners and confusion for users of copyrighted works.

Publishers, in particular, have had to tackle these challenges, which has spawned a host of varying business models. As a result, controversies have ensued around product pricing and product availability, i.e., should some content be freely accessible, and some available via license only.

Content users, alternatively, are confused by the differing models, expecting industry standards: if some publishers offer free access upon publication or soon thereafter, why don't all?

Publishers are in business to generate revenues, be it commercial or not-for-profit, so the idea they will give users free access is unlikely. Until industry standards are created, users will remain confused and owners challenged.

Protecting Unauthorized Use Isn't Easy

When users subscribe to print material, there is an inherent knowledge that when re-using material, copyright permission is necessary. This principle seems to vanish when it comes to electronic site licenses or subscriptions. Many users assume the license extends to copyright permissions and do not seek the publisher's "official" permission when re-using content. This has become evident as publishers see their content used in creative ways, such as library and/or university electronic reserves use. Publisher groups are seeking to create guidelines for electronic reserve use. The problem is content appearing on publicly accessible Websites, which conflicts with many publishers' policies of prohibiting electronic posting of content.

Under the **TEACH Act** (<http://www.copyright.gov/legislation/pl107-273.html>), some use is permissible; however, certain conditions must be met, including posting content on restricted access sites. The **TEACH Act** does not expand fair use, but there are a number of interpretations of how far it can go. This is likely a matter for the courts.

Publishers, whose goal is to protect their intellectual property from unauthorized uses, often require users to indicate up-front how material will be used, e.g., context, formats, etc. Publishers rarely issue "blanket permission." While this is true for content publisher-owned copyright, U.S. Government works under Section 105 of the Copyright Act are not subject to copyright, thus publishers' policies take this into consideration regarding access. While the government works classification would seem straightforward, wrinkles such as the proposed Sabo legislation (Public Access to Science bill <http://www.house.gov/sabo/pr03-20.htm>) could wreak havoc with publishers' policies. The recent Supreme Court ruling in *Eldred v. Ashcroft* (<http://www.supremecourt.us/opinions/02pdf/01-618.pdf>) has weakened the pro-public domain camp; the Sabo bill and Public Domain Enhancement Act (http://www.house.gov/apps/list/press/cal6_lofgren/pr_030625_PublicDomain.htm) are arguably end-runs around *Eldred*.

In short, between recent legislation and the ease of access to content via the Internet, protecting unauthorized use of works is not easy.

Constituencies Need to Join Forces to Solve Issues

While there is not space for detailed discussion on the issues covered, the point is, conflicts exist: users want convenient, easy access to content, and publishers, while wanting to make content available, need to protect their intellectual property. The challenge is how both parties can work together to develop mutually beneficial solutions. The solution: education and enforcement.

To educate users, organizations such as the **Association of American Publishers (AAP)** and **Society for Scholarly Publishing (SSP)** have developed programs on copyright law and issues. In addition, many companies are actively educating their employees and academic institutions their staff and student populations, so as not to run afoul of the law.

At the same time, publishers have begun to step-up enforcement of copyright. Over the past year or so, publishers both independent and collective have successfully litigated settlements against unauthorized use. These successes include settlements with companies engaging in unauthorized document delivery (usually electronic), and with copy shops.

The hope is that this combination of education and enforcement will ultimately lead to compliance. Cooperation among all constituencies is crucial to make this work.

Cases/Legislative Update

Below are recent court cases and copyright-related bills introduced during the current congressional session (108th Congress) that address some of these issues.

Cases

1. **RIAA v. Verizon** — On April 24, 2003, the U.S. District Court for the District of Columbia held that **Verizon** must provide the **RIAA** with the name and contact information of an individual Internet subscriber who illegally downloaded hundreds of music files. **Verizon** in this case is an **Internet Service Provider (ISP)**.

See: Opinion, <http://www.dcd.uscourts.gov/03-ms-0040.pdf>

Order, <http://www.dcd.uscourts.gov/02-ms-323a.pdf>

2. **MGM v. Grokster** — On April 25, 2003, the U.S. District Court for the Central District of California held that two peer-to-peer software providers (**Grokster** and **Morpheus**) were not liable for contributory copyright infringement. The plaintiffs are the movie studios, record labels and music publishers. This is very similar to **Napster**, but with the opposite result. The plaintiffs have appealed to the Ninth Circuit Court of Appeals, which also ruled in the **Napster** litigation.

See: <http://news.findlaw.com/hdocs/docs/mgm/mgmgrokster42503ord.pdf>

3. **In Re Aimster Litigation** — On June 30, 2003, the U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's ruling that **Aimster** infringed on music copyrights, much in the same fashion as **Napster**. In a previous separate ruling, a court ruled that **Aimster** could not do business under that name because of a trademark infringement on **AOL's Instant Messaging** service (**AIM**). **Aimster** subsequently changed its name to **Madster**.

See: <http://caselaw.lp.findlaw.com/data2/circs/7th/024125p.pdf>

Legislation

For the actual text of these and other copyright-related bills, see <http://www.copyright.gov/legislation>.

1. **Digital Media Consumers' Rights Act of 2003** (H.R. 107) — Introduced 1/7/03. **Purpose** — To allow digital media users to bypass copyright-protection schemes for legitimate "fair use" purposes. **Boucher** states that this legislation "will assure that consumers who purchase digital media can enjoy a broad range of uses for their own convenience in a way which does not infringe the copyright in the work."

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See: <http://www.house.gov/boucher/internet.htm>

2. **Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003** (H.R. 1066) — Introduced 3/4/03. **Purpose** — To amend the DMCA to preserve consumers' rights to make digital copies of music, movies and books for their own use. BALANCE is designed to specifically extend fair use rights to the digital environment, allowing lawful consumers the tools to utilize digital entertainment in their home, car, or on mobile devices.

See: http://www.house.gov/apps/list/press/ca16_lofgren/pr_030304_consumerrights.html

3. **Digital Consumer Right to Know Act** (S. 692) — Introduced 3/24/03. **Purpose** — To amend the DMCA in establishing a requirement that consumer-electronic devices or media such as music CDs be clearly labeled with explanations of any anti-copying restrictions. Designed to be informational to consumers, allowing them to see a product they are about to buy has restrictions.

See: http://wyden.senate.gov/media/2003/03242003_digitalrights.htm

4. **Intellectual Property Protection Restoration Act of 2003** (S. 1191 and H.R. 2344) — Introduced 6/5/03. **Purpose** — To restore the ability of copyright owners to obtain appropriate remedies for infringement by States. Under current law, based on Supreme Court rulings in 1999, States have broad Eleventh Amendment immunity (known as sovereign immunity) to claims for intellectual property infringement, including copyright.

See: <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=158> and <http://www.publishers.org/press/monthly.cfm#126>

See also the US Copyright Office statement: <http://www.copyright.gov/docs/regstat061703.html>

5. **Piracy Deterrence and Education Act of 2003** (H.R. 2517) — Introduced 6/19/03. **Purpose** — To allow copyright owners to target the massive pirating of copyrighted songs via illegal file sharing on peer-to-peer networks. It calls for the FBI to "develop a program to deter members of the public from committing acts of copyright infringement," including increased information sharing of suspected online copyright violations among law enforcement agencies, copyright owners and Internet service providers (ISPs). In addition, the Department of Justice would be required to formulate programs to educate the public on copyright laws.

See: <http://lamarsmith.house.gov/news.asp?FormMode=Detail&ID=264>

6. **Public Domain Enhancement Act** (H.R. 2601) — Introduced 6/25/03. **Purpose** — A proposed modification to U.S. copyright law. Under this law, all copyrights would expire after fifty years - unless a small fee (\$1) is paid to keep the copyright active. This act would restore the flow of works into the public domain.

See: http://www.house.gov/apps/list/press/ca16_lofgren/pr_030625_PublicDomain.html

7. **Public Access to Science Act** (H.R.2613) — Introduced 6/26/03. **Purpose** — To allow free public access to scientific research that has "substantial" federal funding. This is an expansion of sorts of public domain, which applies to all works authored by employees of the United States Government.

See: <http://www.house.gov/sabo/pr03-20.htm>

8. **Author, Consumer, and Computer Owner Protection and Security (ACCOPS) Act of 2003** (H.R. 2752) — Introduced 7/16/03. **Purpose** — To provide authors, consumers, and computer owners with much-needed protection against several online threats. Law enforcement authorities would be given additional tools to effectively deal with online scams, crimes, and illegalities.

See: <http://www.house.gov/berman/press/pr071603.html>

Other

1. In May 2003, the RIAA settled separate lawsuits with four university students for running services that searched computers connected to their college networks for MP3 song files. The students also shared copyrighted music

from their own computers. The settlements range from \$12,000-\$17,000 per student, payable to the RIAA.

See: <http://news.com.com/2100-1027-999332.html>

2. In June 2003, the RIAA issued a release stating it will actively pursue individuals who illegally download music on the Internet. Presumably, this is based on the RIAA's success in the **Verizon** case. As of mid-September, the RIAA had brought 261 copyright infringement lawsuits against individuals who downloaded music on the Internet.

See: <http://www.riaa.com/news/newsletter/062503.asp>, and http://www.usatoday.com/tech/news/techpolicy/2003-09-15-riaa-parents_x.htm

3. In June 2003, **Rep. Orrin Hatch** stated that he favors developing technology to remotely destroy computers used for illegal downloads, with a "three strikes and you're out" approach to deal with individuals who illegally download copyrighted music on the Internet.

See: http://www.usatoday.com/tech/news/techp.../2003-06-18-hatch-wants-computers-dead_x.htm

DRM and Research Libraries: Common Ground?

by **Bill Rosenblatt** (President of GiantSteps Media Technology Strategies and Publisher of *DRM Watch* newsletters) <billr@giantstepsmts.com>

There's a lot of hype and misconception surrounding digital rights management (DRM) these days. Most media attention involves the music industry and Hollywood, where DRM is a core technology in legitimate online content services, like **RealNetworks's Rhapsody** and the Hollywood studio joint venture **MovieLink**, which compete with pirate activities on peer-to-peer networks, like **Kazaa** and **LimeWire**. DRM's influence on the publishing industry is just as profound, although it has yet to infiltrate the research library world to any great degree.

In this article, we'll examine how DRM is gaining traction in publishing and look at ways that it could bring value to the world of research libraries.

Defining DRM

Before we explore DRM's impact on our industry, let's look at its various definitions. The narrower definition applies to systems that use encryption for controlling access to digital content, where the primary purpose is to prevent abuse of copyright or licensing terms. A broader definition refers to any system that tracks and/or controls rights to content that are acquired and made available. Systems that fit the broader definition may include encryp-

tion-based copy protection schemes, but not necessarily, such as an academic publisher's internal system for granting permission requests.

Acceptance in the Content Administration World is Limited

Since its birth in the mid-1990s, DRM technology has been in an early adopter phase, with most implementations pilot projects. But over the past few years, DRM has taken hold in niche markets such as eBooks, which should become popular as textbooks in secondary and higher education. Another promising application is e-periodicals, which are digital facsimiles of print newspapers and magazines.

Yet DRM adoption in the world of site-licensed serials and reference content has been limited. Aside from general objections, one reason is research content tends to be embedded in publishers' and vendors' proprietary delivery systems and interfaces (e.g., password-protected Websites); it would be expensive to re-engineer those systems to include DRM functionality. Another reason is many vendors' proprietary environments already contain some of the functionality associated with DRM, such

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