

COPYRIGHT IN THE YEAR 2010: No longer an issue for scholarly electronic publishing

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I. INTRODUCTION

So much time and so much energy have been devoted in the 1990s to debating issues of copyright that it seems as though the quarrels are eternal. It is relatively easy to imagine that we could find ourselves in the year 2010, still wrangling over fair use, transfer of rights, and the high cost of information. It is indeed sobering to realize how much time has passed since, for example, since the North Carolina Research Triangle Universities' proposal for retention of copyright ownership by academic faculty and researchers was first floated in the early 1990s, or even how much time has elapsed since the U.S. Government's "white paper" on copyright of 1995. And the arguments linger on.

But I will here argue that copyright will not be a nearly as serious an issue for producers or consumers of scholarly electronic information in 2010. Insofar as copyright has a story in the early 2000s, it will be marked by continuing moves towards greater protection of owners' and producers' rights -- for we must remember that the great driver behind all governmental involvement in the copyright ownership issue is respect for the huge economic engines that derive national and global billion-dollar revenues from "intellectual property" of sorts that have nothing to do with science or scholarship. That is, creations such as popular music and literature, film, video, and magazines are the chief concerns of the intellectual property business.

That realization should give us great confidence that the copyright issues that currently consume our societal energies will, in fact, be resolved by 2010. It is too strongly in the interest of too many powerful economic and governmental forces that an electronic market be successfully

created, for there to be any realistic chance of continuing uncertainty or impasse vis a vis copyright. The mass-market entertainment and information producers will assuredly find a way to profitably sell their wares. The national and international *laws and treaties* will certainly be constructed to protect these industries, and in the marketplace it is precisely the huge infotainment vendors who will find it in their interest to deliver their product in a way that responds to the needs and practices of their consumers. One need only remember, for example, the failure of software producers in the 1980s to establish "copy protection" on their products to realize that the market does have power in this regard.

Opinions will vary as to whether the eventual but assured triumph of the commercial information providers is a good thing for scholarly and scientific information producers. My own belief is that two main streams of development will extend from now to 2010 and will define the academic electronic information landscape ten years from now. The only real question is in which stream the preponderance of information will flow. Neither of these streams will rely heavily on the copyright regimes that are in place in 2010.

II. Information Stream #1 – Academic Publishers

The first stream of academic information is that produced by individuals and organizations who need to be compensated for their production work. This stream will include the high profile producers of information – the learned societies and the for-profit publishers, those who add value to raw scholarly and scientific information. They are professionals and they engage in this activity because of the compensation they receive and deserve for their value-adding expertise. In this category, we already see that electronic information producers and consumers alike recognize that copyright law does not provide an adequate framework to guarantee either side its needs in the relationship between producer and consumer. In the last few years, licensing agreements have ceased to be the kind of one-sided documents that a landlord hands a tenant – that sort of lease agreement in which, if one reads the fine print, it seems that all the responsibilities are the tenant's and all the rights are the owner's. Instead, in an ongoing, quiet process of negotiation and accommodation, we have seen enormous progress towards a mutual settling on terms and conditions of the use of electronic information that assures the publishers of

their revenue streams and at the same time assures the users that their information access and re-use needs will be met. Landmarks in this development include the recent (early 1998) recognition by at least one major for-profit publisher that "Interlibrary Loan" can continue to be a feature of the practice of libraries that buy journals from publishers, even in the electronic information landscape.

While licensing recognizes the overarching authority of copyright, it moves the parties into the domain of contract law. In that domain, it becomes possible to work out practical agreements between the willing buyer and the willing seller. Since the terms of the license or contract agreement are limited in time and coverage, both sides can often be more venturesome and take greater risks in order to secure an agreement and make a sale – than would ever be the case under the regime of the copyright laws of nations. If agreed-upon terms do not work for one party or the other, those terms can be amended when the contract comes up for renewal. At the same time, the *universe* of contracts that is negotiated in this way begins to build and shape a community of practice far more flexibly and pragmatically than would be possible if one were depending on the laws of nations to change to fit circumstances. A electronic information licensing contract requires one publisher and one customer to make a deal together; whereas, change in copyright law requires vast interests to find long-term compromises and assurances for the preservation of their interests. Copyright law changes slowly and should change slowly. Licensing can adapt to the world as it really is far more rapidly and effectively.

This is not to say that the world of licensing is or will be free of tensions. But the tensions are becoming familiar ones -- chiefly there exists one single familiar tension: price. Long before electronic transmission of information became a reality, journal producers and subscribers had begun to wrangle over price – and at times even how to come to a kind of grudging accommodation. Price rises are moderated, or not, by the behavior of customers who cancel some subscriptions and take out some new ones. The journal marketplace is one in which perhaps no one thinks they are getting a really *good* deal, but the continuing prosperity of the publishing industry suggests that everybody agrees they are getting a *tolerable* deal – even if they then try to get a better one next time. The world of licensed electronic information will be even more like that: price will be an issue, customers and producers will be variously at odds

with each other, and nevertheless deals will be made and information will flow. In that regard, 2010 will be a lot like 1990.

III. Information Stream #2 – Academic Authors

The second, parallel stream of developments in the next decade will, on the other hand, surround information that flows more or less unmediated from academic authors to their readers. Without the intervention of publishers (vendors, editors, and the like) authors and academics are increasingly communicating with each other in informal to more formal electronic modes and venues. Because these authors' interests lie mainly in the transmission of information and not in acquiring any revenue from the process (academic authors and researchers are characteristically compensated by their employers rather than through their publications, as journalists are), money does not need to change hands. Such author to reader information will flow relatively freely without license or copyright concerns – except for the concern that authors will have about assuring that their information not be commercialized against their will or copied and redistributed under some other author's name (plagiarism). The Los Alamos National Laboratory's high energy preprint archive, launched in 1991, is an early precursor of this kind of model, but it is striking to observe that just now in 1999 the Director of the National Institutes of Health in the U.S. – arguably the most important funding science agency around the world – has spoken out on behalf of creating a preprint distribution process that will make the products of funded research available quickly and at no charge to the recipients.

Will these two streams come together? It is too early to tell how much impact the second stream will have on authors' behavior or to what extent the academic culture will modify itself in order to accept the validity of informally distributed electronic information. It is clear, however, that the formal journal publishers, both for-profit and not-for-profit, will want to find means to capture at least some of the articles that have been distributed at no charge, in order to add value through repackaging, polishing, and distribution. The dialogues between the representatives of the two streams will be in many ways the most interesting ones of the next decade. And they too will be negotiations, and at times they will involve contracts. Copyright will simply cease to be the key issue.