

Minutes*

**Senate Consultative Committee
meeting jointly with the Senate Library Committee
January 20, 1994
12:00 - 1:00
Room 626 Campus Club**

- Present: (SCC) Judith Garrard (chair), John Adams, Lester Drewes, Amanda Geist, James Gremmels, Kenneth Heller, Derek Jensen, Geoffrey Maruyama, Toni McNaron, Harvey Peterson, Linda Pham, Sandy Pham, Irwin Rubenstein, Anne Sales, Rabun Taylor, Shirley Zimmerman
- Present: (SLC) Kay Cooper (chair), F. R. P. Akehurst, Edward Cushing, Michael Hancher
- Present: Kirk Allison (Graduate and Professional Student Association)
- Absent: Love Goel, Erick Harper, Robert Jones, Tom Lopez
- Regrets: Mario Bognanno, Karen Seashore Louis, Dale Vathauer
- Guests: Joseph Branin and Thomas Shaughnessy (University Libraries), Lisa Freeman (University Press), Christine Rinik (General Counsel's Office), Associate Vice President Donald Riley (Academic Affairs)
- Others: Rich Broderick and Maureen Smith (University Relations)

[In these minutes: Copyright issues and problems]

Professor Garrard convened the meeting at 12:15 and welcomed everyone. The purpose of the meeting was an information discussion of copyright issues. Her own bias, she confessed, is that as a teacher, and in talking with her colleagues, she sees the symbiotic relationship between universities and publishers getting out of balance. University faculty obtain grant funding, do the research, write the articles, and submit them to journals--which then hold the copyright and which then slow the learning process by requiring copyright permissions and charges and doubling the costs of class packets for students. Copyright issues are very complicated, she concluded, so she invited the panel of experts to inform it. She turned first to Ms. Rinik to discuss the legal issues.

Ms. Rinik began by explaining that a copyright grants a limited monopoly to the owner on duplication and distribution of materials. The courts recognize "fair use," a judicial doctrine that was codified in the 1976 copyright law adopted by Congress. "Fair use" is the privilege for one not the owner of the copyright to use copyrighted materials in a reasonable manner without the consent of the owner;

*These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate or Twin Cities Campus Assembly; none of the comments, conclusions, or actions reported in these minutes represent the views of, nor are they binding on, the Senate or Assembly, the Administration, or the Board of Regents.

four factors are considered in determining whether use is "fair use." The courts disagree on the application of the four factors and the law on the issue is not settled. The preferred method of knowing that use is acceptable is to write to the copyright owner, explain the proposed use, and seek permission to do so. The issues arise when no permission has been sought.

The Kinko's case is illustrative of the judicial application of the fair use factors, she told the Committee. Kinko's lost the case; 12 specific incidents of copyright infringement were alleged. Kinko's copied materials selected by faculty members (at Columbia and NYU) for class packets. The court found against Kinko's on the basis of the four factors considered in determining "fair use."

- Purpose and character of the use: Kinko's is commercial; non-profit organizations are given more leeway.
- The scope of fair use is greater for factual materials than fictional, on the assumption that factual materials are more important to the public. (This element of the doctrine provoked a round of indignant laughter from the Committee.)
- The amount of use: there is no absolute rule. It is a matter of the amount copied compared with the length of the work from which the excerpt is taken. But if the material copied is the "heart" of the material, the allowable length may also vary with the "quality" of the portions excerpted; in this case, since faculty members had picked out the materials, it was inferred by the court that they MUST be important.
- The market effect; to negate fair use, it must only be shown that the practice, if widespread, would adversely affect the potential market for the publication.

Kinko's argued that an adverse decision would pose a threat to the educational system. The court response, recognizing that Kinko's is commercial, disagreed. Kinko's lost and was fined.

There have been attempts in Congress to address the copyright problems in education even before the 1976 law. There was an "Agreement on Guidelines for Classroom Copying Not for Profit Educational Institutions with Respect to Books and Periodicals" signed by representatives of the Ad Hoc Committee of Educational Institutional Organizations on Copyright Law Revision, the Authors League of America, Inc., and the Association of American Publishers, Inc. that set minimum guidelines; they were not binding on the court. There are multiple tests for classroom use: brevity, cumulative effect, and spontaneity. In the latter case, one is suddenly inspired to include the material in a course and there is insufficient time to obtain copyright permission to duplicate. The guidelines contain onerous provisions and much is not clear. They have been criticized by the AAUP and the American Association of Law Schools, especially with respect to restrictions they place on universities and graduate education.

Professor Garrard thanked Ms. Rinick and turned to Dr. Shaughnessy for comments.

Dr. Shaughnessy complimented Dr. Garrard on bringing the panel together to focus on the issue, which is national and international in its complications. The American Association of Universities (AAU) has a task force on intellectual property, as does the National Association of State Universities and Land Grant Colleges (the President of which is now President Hasselmo and the Executive Director of

which is C. Peter Magrath). Even though there has been copyright law on the books for many years, copyright issues are now coming to a head. Part of the reason is because of technological developments, but there are other factors as well.

One is that in the last 10 - 15 years there has been an explosion in the number of journals published--there are hundreds of new ones each year. In scientific, technical, and medical (STM) areas, there are now often three journals where there was only one before, due to specialization; libraries are being asked to subscribe to three journals.

Another reason is that there are fewer publishers, even though there are more journals. According to one study at LSU, three publishers in Europe that do almost all the STM publishing accounted for 20% of LSU's journal subscriptions but 80% of the increase in their acquisitions budget. Those journal costs are increasing at the rate of 10 - 16% per year.

As new journals are issued, Dr. Shaughnessy observed, publishers ask faculty to serve on editorial boards--which is an honor that pleases faculty and helps in the promotion and tenure process. But those are new journals, commercial enterprises, and no library can keep up with the number and exorbitant prices of journals. (One journal on brain research--the premier journal--recent increased from \$7500 to \$9000 per year.) Scholars are both part of the problem and suffer under it.

How can faculty help? Librarians have developed a number of ideas:

- faculty could insist that non-profit institutions can copy from journals as they need (although journals would likely then not accept an article).
- articles could be sent to a scholarly society for publication (although they often have queues of 2 - 3 years) instead of to commercial publishers.
- we should all turn to university presses--beg/entreat (but not pay!) them to get into the journal-publishing business. The presses might not be the answer, he noted, and they do a very good job at what they now do, which is publish monographs that might not otherwise be available.
- when an article is submitted to a journal, tell the journal editor that a copy is being put on an electronic server at the local institution (again, publishers might be reluctant to take such an article).
- try to get Congress to move away from copyright law and adapt patent law, which provides that both the faculty member and the university have rights. If the university owned the copyright, it could make an article available for classes and to other institutions.

Professor Garrard thanked Dr. Shaughnessy and asked Lisa Freeman, Director of the University Press, to offer her insights. Ms. Freeman, Professor Garrard told the Committee, has been a national leader in the debate on copyrights.

Ms. Freeman began by pointing out that copyright is not the enemy and that it is important to both

authors and publishers. It protects the author's rights; when the copyright is transferred to the publisher, it grants the right to publish but also obligates the publisher to protect the rights of the author (e.g., to pursue plagiarism cases). There ARE advantages to copyrights.

Copyrights also let the publishers recoup their costs invested in the publication--although no one is defending publishers who may be gouging universities. They spend a lot of money on publications. Book costs for the University press, for example, are about \$10,000 - \$15,000 per book, and that does not include overhead.

As with the libraries, much has changed in publishing. In 1980 publishers assumed they could sell 1500 - 2000 copies of any book on any subject at a reasonable price; that number has dropped to about 200 copies. The reduction is primarily due to the reduction in library budgets, pressures on remaining budgets from the STM publishers, and cuts in subsidies to university presses. The problem is in the funding for scholarly communication generally, for scholars, libraries, and presses, not just publishers.

The problem publishers have with non-exclusivity--a faculty member putting an article on an electronic server, for example--is that it undermines their ability to recoup their costs. As costs increase and subsidies decrease, ANYTHING that infringes on recovery is serious.

Jill Braaten headed, until recently, the Copyright Permission Center, which coordinates faculty requests to duplicate copyrighted material. It received 5000 requests Winter Quarter. It has been generally successful in obtaining permission; typically there is a fee, the amount of which varies but they are usually reasonable--and they are passed on to students. Requests usually have to be made 4 - 6 weeks before the beginning of the term. This clearinghouse, one Committee member explained, is what all faculty must use in order for Copies on Campus to duplicate course materials.

The matter of copyright requests has been a problem, Ms. Freeman told the Committees; as the number of requests has increased, publishers have been surprised by the demand. The University Press, for example, has gone from 25 - 30 such requests per quarter to over 450. Publishers are doing better, and this is not a long-term problem; they simply need to get used to the workload.

In terms of fees for out-of-print materials, Ms. Rinik added, the publishers have argued--and the courts have been sympathetic to the position--that fees are appropriate since that is the ONLY source of income the publisher receives from the material. (The logic of this argument provoked a number of raised eyebrows.)

Professor Garrard thanked Ms. Freeman and then turned to Dr. Riley to talk about the future.

Dr. Riley started by saying that in providing an electronic infrastructure for the University, there is also worry about liabilities--plagiarism, stolen materials or software. The fear is that those providing access may be liable.

There has been an explosion in technology, he told the Committee, that raises issues. Up to now electronic transmission was not important to publishers--only academics were using it and the only thing that could be transmitted was text--usually in a form significantly less attractive than the printed version. As the capabilities of the system have increased, with transmissions more attractive and readable, with multi-media possibilities, and with federal interest in the information highway, the stakes become much

higher as many more people have access. But the expectation of Internet users is that "it's free." Ms. Freeman is right, he said--someone must pay or things will not be available--so a way to recoup costs will be important.

In addition, image and video transmissions--art collections and more complicated graphics--will increase. The rise of technology includes more than just the print world--there are on-line data bases and abstracts that are costing university libraries a lot of money. The University tries to combat the costs by using in conjunction with the University-developed Internet Gopher software.

There is a question if the national data highway will be that or a money pipe away from universities. Even in Gopher, one could ask for a credit card or budget number before use would be permitted. That function is currently helpful for libraries because of the nature of the licenses the University has purchased (limiting use of a program to Twin Cities campus faculty, staff, and students, for example); it permits another level of authentication.

One question is how to recoup costs. Another is about the NSF subsidy to the NSFNet infrastructure. Overall responsibility for the funding and development of the National Information Infrastructure (NII) has been moved to the Department of Commerce, which may give an idea of the direction in which thinking is going. The NII advisory committee has almost all business people on it; no one who helped build the NSFNet/Internet are involved in the discussions about its future.

Dr. Riley then touched on the distribution of federal data and the attempts to develop a state network for distribution of public information, at a cost. Sponsors are seeing this as a way to make money rather than as a "free" public service.

As a University, he said, we need to think about our missions vis-a-vis copyright assignment and editorial board participation. Faculty need publications and to be on boards, but consideration must be given to the larger needs and interests of the University; it may be that the University should work with professional societies to address needed changes. The AAU will be the focal point to spearhead representation and lobbying activities in Congress on copyright and related issues.

Professor Garrard thanked Dr. Riley and asked if there were questions from Committee members. One said this was useful information and that they must be looked at not only from the point of view of producers but also as consumers. There are multiple levels involved and what has been discussed are national versus macro responses. It is appropriate for the governance system to take a position.

Committee member commented that while it is important to initiate action on the national level in response to what appear to be macro changes in the market for scholarly works, it is also important to have consistent, and, as far as possible, uniform policy around the University so that students can have rational and informed expectations about both (1) the costs of instructional materials like textbooks and course packets and (2) what to expect from their professors in terms of how to gain access to materials needed for classes. This policy should probably be developed in SCEP, since it is educational policy in a broad sense. On the macro level, if diminution of copyright (or transgression of copyright) is part of what is feeding the inflation in the costs of texts and other published materials, then perhaps some form of consensus about what is fair and equitable for all parties needs to be considered in making decisions about what policies to develop.

One also sees that in computing software, Dr. Riley commented; faculty and students need to be educated to the liabilities and exposure they risk if they copy software. Some say that the laws governing software and publications are ridiculous and ignore them. In doing so, they put the University at risk. Every department received a letter about not copying articles without permission, one Committee member recalled. Ms. Freeman pointed out that Ms. Braaten had conducted two sessions on copyright permission that were not well attended. There is a willingness to know but the University has not found a good way to do it.

In terms of student access, said one Committee member, a packet of materials for a course would have cost students \$75, so they are on reserve instead. Library rules, however, create an impediment to students making copies. Mr. Branin explained that the libraries follow a policy approved by the Senate Library Committee, which accords with copyright law and fair use policy. The library cannot put packets--anthologies--on reserve; it can put individual articles on reserve. Students trade time for access, it was said, because they can copy the articles, page by page. Those articles, Mr. Branin added, can only be on reserve for one quarter or there is a violation of the "spontaneity" guideline. If faculty members intend to use an article for more than one quarter, copyright permission has to be obtained.

How is the extraction of money from the universities for things their faculty write to be controlled? asked one Committee member. Who recoups the faculty and university investment? asked another. The publishers do, Dr. Shaughnessy responded. The notion of fair use is essential, he added, and it must be stretched as much as possible or it will be lost.

One Committee member said that it seemed that part of what might be driving up costs is something analogous to "defensive medicine" whereby publishers, anticipating that people will violate copyrights, increase the prices of publications hoping to recoup their costs through higher prices, since they anticipate that volume will be diminished. Moreover, increasing costs are not only reflected in the cost of course packets. There are, for example, book costs and the costs of libraries--costs rise in ways that one sometimes cannot figure out. All of this may reflect "defensive publishing."

Ms. Freeman offered what she said could be considered a controversial proposition: that there is too much pressure on faculty to publish quantity--without a lot of regard for quality. If quantity were to decrease and quality increase, publishers would reduce their volume of publications and consider quality more often. A number of Committee members rumbled support for her statement.

Professor Garrard thanked the panelists for meeting with the Committee and adjourned the meeting at 1:15.

-- Gary Engstrand