EDITORIAL

One, two, three. . . .

What are we fighting for? The library and educational communities have been engaged in trench warfare with the major copyright holders for several years now. We fly the banner ''fair use'' and proclaim that ''it'' is in jeopardy, and that its loss or diminishment would be a critical blow to the things that we value. But how many of us can clearly describe why this blow would be critical? Where did fair use come from? Why is it so important?

The first modern copyright law is the Statute of Anne, enacted in England in the early eighteenth century. The ensuing decades saw a succession of cases, out of which developed our modern notion of copyright. Just as in modern times, those arguing for strong copyright protections claimed that they were arguing for the rights of authors, but in fact, it was the interests of the printers (the publishers of the day) that were really at stake. The Stationers' Company of London, to which the major London booksellers belonged, had a virtual monopoly on most books printed in England. Some Scottish booksellers, however, began printing their own editions for sale in the north of the island, and in 1743 they were sued for piracy by a group of London booksellers [1].*

In the debates that followed, the Stationers' Company and its allies argued forcefully that intellectual property was no different than any other property and that the fruits of authors' minds were like authors' children and could not be taken away by the state. Once those rights were transferred from the author to the bookseller (or publisher), they were as permanent and immutable as if the transfer had been a piece of real property.

But the argument did not hold, and, in a series of judgments, the crown codified the principle that such rights must be limited and could not be held perpetually. After a certain period, the material had to go into the public domain and could thereafter be printed by anyone. The rights of the individual had to be balanced with the rights of the public. The seeds of fair use had been sown.

Fair use was not explicitly defined in the United States until the copyright revision of 1976, but the notion appeared in a number of court cases and discussions of copyright during the nineteenth and early twentieth centuries. The groundwork for our contemporary understanding of fair use was laid in the famous case of Williams & Wilkins Co. versus the United States.

By the mid-1960s, the National Library of Medicine (NLM) was routinely making photocopies of articles for researchers at the National Institutes of Health. Williams & Wilkins sued, claiming infringement of their copyright, and, for the next seven years, the case slowly wound its way through the courts before the Supreme Court finally settled the matter in NLM's favor. Much of what we think of as standard copyright practice for libraries rose out of the discussions and arguments that surrounded that case [2].

The issue was principles, not money. The amount that Williams & Wilkins calculated they were losing was miniscule in terms of their total revenue; NLM could have paid the royalties requested with scarcely a budget adjustment. But both sides felt that there were fundamental issues of principle at stake that would affect the way intellectual property was handled for decades to come. They were right.

In the January 2000 issue of the *Bulletin of the Medical Library Association,* I discussed some of the legal issues of differential pricing of journals, noting that it was not a copyright issue [3]. But there is a copyright connection. As the long legal battle wore on, Williams & Wilkins, fearing that the tide was turning against them, tried another tack. They would establish an institutional price for journal subscriptions that was higher than the amount of an individual subscription. The difference in price would be an explicit license fee for the institution to make photocopies from the journals. Martin Cummings, director of the National Library of Medicine, refused, and he persuaded a number of the major biomedical libraries to follow suit. They would not pay an institutional price that included a license to copy. They would boycott Williams & Wilkins, if need be.

Williams & Wilkins capitulated. While they would continue to request institutional rates (justified on the basis that a library subscription potentially cut into the number of individual subscriptions they might otherwise be able to sell), they made it clear in a letter to their subscribers that the new rates ''shall have no connection whatever with a license to photocopy, implied or otherwise . . . Libraries may continue to supply their users with royalty-free, single-copy reproductions of W&W journal articles'' [4]. The financial impact was the same, but a critically important principle was preserved.

The Williams & Wilkins case persuaded the legislators who were drawing up language for the revi-

* The Rose and Goldstein books from which I have quoted are both superb, and I strongly recommend them to anyone wishing to understand the story of the emergence of the modern notion of copyright.

sion to the copyright law that fair use and the principles underlying it had to be made explicit in the revision. Thus we ended up with the sections of the law that define fair use and the four factors that one uses to determine if it is in effect in a particular case, along with the section on library copying in particular. To provide further guidance, the National Commission on New Technological Uses of Copyright Works (CONTU) was charged with developing more detailed guidelines regarding copying of materials under fair use. The results of their deliberations, along with other relevant guidelines can be found in Circular 21 from the copyright office—indispensable reading for all librarians [5].

And things were quiet, and life was good in libraryland . . . until the Green Paper arrived. In 1993, President Clinton formed the Information and Infrastructure Task Force to develop vision and policy for the National Information Infrastructure. In 1994, the Working Group on Intellectual Property Rights issued a preliminary report, known as ''the Green Paper,'' which was widely disseminated. The final report was issued in 1995 [6]. It rippled like a shockwave through the community of those who paid attention to the workings of copyright and the importance of fair use in the world of education.

Many people felt that the arguments in the Green Paper implied a much stricter view of copyright than had been in effect in the world of print. It recognized that the new technologies might provide cost-effective tools that would enable producers of information to charge for each and every use of information and argued that the laws should promote such a state of affairs. Whether intended that way or not, the Green Paper was a direct assault on the principle of fair use. The copyright wars of the 1990s were underway.

In his book, *Copyright's Highway,* Paul Goldstein makes what one might call the ''transaction costs'' argument for fair use [7]. Under this view, fair use is a strictly pragmatic device, and Goldstein implies that it has outlived its usefulness. The argument goes something like this: ideally, every time someone makes use of someone else's intellectual property, that use should be compensated for. However, when the cost of obtaining that compensation exceeds the amount of return that one can reasonably expect, the principle of fair use comes into play to allow the uncompensated use, on the principle that uncompensated use is better than no use at all (when the transaction cost exceeds the amount of compensation). At the time of the Williams & Wilkins suit, this was the case. The overall cost of recovering compensation from each of those articles that NLM photocopied was higher than the amount of compensation that could be obtained, so the courts ruled that ''half a loaf was better than none,'' having some use and no compensation would be better than no use and no compensation.

Goldstein argues that the creation of the Copyright Clearance Center (CCC) changed the model, because the CCC provided a much more effective means of obtaining compensation. By acting as a central agent, the CCC could drive the transaction costs much lower, thereby shrinking the fair use window. However, by the time the CCC was created, the copyright revision of 1976 was in place, and the guidelines interpreting fair use had been established.

Now, however, as we enter the digital age and the digital economy, recovering costs, even in minute amounts, is extremely easy. So one might argue, why not do that? After all, should not the creators (or at least the copyright holders) be compensated for each and every use if it is easy to do that? Why should libraries get away with distributing this intellectual property for free? Why should they not be forced to negotiate licenses that are more fair to the copyright holders and that compensate reasonably for each and every use?

In many of the licenses that I look at now, the vendor explicitly refers to the copyright law and to the principles of fair use. One might argue that it is, after all, in the interests of the vendors to put into their licenses those provisions that are of critical importance to their customers, and that for a library that feels that those provisions are crucial, negotiating them into licenses is a perfectly reasonable way to gain assurance.

We have come a long way from the Statute of Anne. The arguments that the producers make increasingly resemble those made by the Stationers' Company. The response that our society must make needs to be the same as the response made by the English courts in the eighteenth century—we must maintain the balance. In 1918, Supreme Court Justice Louis Brandeis enunciated what we might call the idealistic view of fair use: ''The noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use'' [8]. If we rely on licensing clauses to preserve our ability to function as we think we ought to, we have taken that notion, removed it from the realm of social principle, and turned it into a negotiable item of commerce. It should not be up to the producers of information to decide whether or not they are willing to negotiate fair use; it is the right of the people to have that limited access to knowledge, truth, and ideas that our current copyright law protects. The issue is not simply an economic one, though we often think of it in those terms. The balance that copyright law protects, and that fair use explicitly supports, maintains that society as

a whole has a fundamental, constitutional right to benefit from the intellectual achievements of members of that society. When we turn the protection of those rights into a matter of license negotiations, when we uphold unnecessarily restrictive technological impediments to use, when we extend copyright terms to ridiculous lengths, when we exempt certain types of materials from fair use protections altogether, we are chipping away at this right. This is the principle that is at stake. It is a principle worth fighting for.

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7. GOLDSTEIN, op. cit.
8. Quoted in Goldstein, op. cit. 14.

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My sincere apology to Judith Messerle for omitting to acknowledge her help with the obituary of Jean Miller. She served as president-elect during Jean's presidency. It is also my sad task to apologize to Gerald Oppenheimer whose first name was misspelled. I hope he will forgive me.

Erich Meyerhoff