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Ann Okerson

Yale University Library, okerson@pantheon.yale.edu

Karen Hunter

Elsevier Science, Inc., k.hunter@elsevier.com

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The Digital Dilemma: A Publisher's Perspective

by **Karen Hunter** (Senior Vice President, Elsevier Science, Inc.) <k.hunter@elsevier.com>



In 1971, I made my first trip as a librarian to a professional meeting. I was working at **Cornell** and the meeting was in New York City. I had been to New York before, but this was my first trip there alone, as a working person. I recall being asked afterwards to write a report on the meeting. What I remember about that report is talking about the smell of roasting chestnuts sold by the street vendors and the incredible canyon-effect of New York office buildings. I know I must have written primarily about the meeting (or I hope I did), but it was the total experience that made the most lasting impression.

The same thing is true now in writing about the two-year process of being on the **National Research Council Study Committee on Intellectual Property and the Emerging Information Infrastructure**. While there is much I could say about this issue in the report (and I will do some of that), it is the total experience and process that is much more vivid in my mind. It inevitably colors my view of the report itself.

When I received an invitation from the **National Research Council** in January, 1998, to participate on the committee, I turned to the **Reed Elsevier** General Counsel for advice. I had been involved in copyright matters for over twenty years, but I was not a copyright expert. Our company was actively following many copyright matters and I felt I needed his blessing if I was going to represent the company on such a committee.

The immediate reaction was "no." His worry was that, in his judgment, the **National Research Council's** reports in the past had not been balanced, under-representing or totally ignoring the interests of intellectual property owners. The 1997 NRC study, *Bits of Power: Issues in Global Access to Scientific Data*, was particularly upsetting. Therefore, he was concerned that my presence on a committee that was otherwise heavily weighted toward the user community would be inadequate to stem the natural bias toward the library and user points of view and, in the end, would leave the impression that we agreed with all of the positions taken.

I argued that our position would never be heard unless we were at the table. The compromise: a strong letter from the Gen-

eral Counsel to the **NRC** and the Study Committee Chair, **Randall Davis**, indicating our concerns and asking that there be a broader representation of intellectual property owner interests on the committee. As it happened, this was also the balance that Randy wanted for the committee and he and the **NRC** staff were diligent in adding others to diversify the mix.

With this somewhat awkward start, we began. There were probably as many views of what we were trying to accomplish as there were people around the table. I spent much of the first year wondering what, indeed, we were trying to get our hands around. Initially, I thought our charge from the **National Science Foundation** (the sponsor of the project) was to predict what new technologies could be expected and how these new technologies would affect intellectual property (IP) issues. Under that scenario, the technologies could either enhance or inhibit the distribution and use of information (and you could argue that a technology providing more control over information was both—it might be viewed as an inhibitor by the potential user, but as something that enhanced access by the IP owner, as it provided sufficient security to encourage making things available electronically).

Pretty quickly, though, the technologists around the table said that we really shouldn't be worrying about technological advances that would enhance communication—they would be more of the same, just better (i.e., would not necessarily raise any new IP issues that were not already on the table). They also argued that the technologies to inhibit (e.g., encryption) were tools that might be used, but they were not solutions, in the IP wars. So technology was put into the context of something that must be discussed, but discussed in order to be put aside as not the core issue.

So, then, what was at the core? Well, as things developed, there were several cores—reflecting the interests of several of the committee members. And that is probably as it should be: you need to incorporate the things people feel strongly about. Also, there were issues that were likely not on anyone's agenda at the start, but which emerged as the work progressed, arising both from vigorous discussion and from the information provided by the many people who made presentations to the committee.

The process of reaching agreement—or not—was a major part of the second year

of work. The text was argued over word by word. Sometimes we could not reach consensus and the text reads "Some of the Committee members." We had many times when the best you could do was say "I can live with that." There were threats of resignation by committee members. I threatened to resign at the very end—after the preliminary text had been released to the public but before the printed version—over a change I discovered in something I had written; it was fixed for the printed version. Words that describe the process include: anger, frustration, acceptance, accommodation, irritation, and, in the end, fulfillment.

Standing back from the process now, I think my general counsel may have been right. As many pro-copyright experts have told me, the report is strongly biased toward the user of information rather than the IP owner. I had not anticipated and did not handle well the heavy advocacy of "the public good" that dominated certain topics. Objections or alternatives that I made on an issue-by-issue basis often resulted in one sentence or one paragraph being inserted in what was one or two pages advocating a differing point of view. Yes, my point is there—but it is easy to miss. But these were tradeoffs that I personally made at the time (as a committee member, you are required to keep the text and discussion confidential) and most of them I can continue to live with. But they should be viewed as my personal actions, not those of my company. And there was nothing malevolent about the process—good people of deep conviction strongly advocated their points.

Let me comment, now, on some of the issues in the report. That may explain the process in more detail.

1 Public access and licensing. The report expresses considerable angst about the possibility that the public will have less access to information, not more, in a digital environment. This is linked to the perceived menace of using licenses rather than first sale as the means of acquiring access to information. This was an extremely difficult issue for me, as virtually everything hypothesized by those expressing concern about public access could theoretically happen.

However, the reality of the moment seems contrary to the fears. It would appear that the public has much greater access to information now than in a paper (or other non-digital) environment. Some licenses increase access, giving libraries rights they would not have under the copy-

continued on page 48

A Publisher's Perspective from page 47

right law (a point I did get into the report). I understand the concerns and, for that reason, did not fight some of the points made as hard as perhaps I should have. But it is clear that many of my publishing colleagues are not comfortable with the level of attack on licenses made in the report.

2 Education on copyright. This was an issue that arose from several of the people who made presentations to the committee. Copyright is complicated, the public generally misunderstands it and overstates what they “have a right” to do. Something has to happen to correct that process and part of that something is copyright education. On that we all agreed—and it didn’t matter whether you were an advocate for the user or the IP owner. Where we could not agree (and there were no “sides”) was on how that could most effectively be accomplished. It is easy to be cynical and say nothing will work. Even the most dedicated people on this point had trouble reaching a compromise.

3 Anticircumvention. The report goes on in great detail (primarily in an appendix) about changes that should be made in the **Digital Millennium Copyright Act** on issues related to what is known as “anticircumvention.” This means hacking through security systems: under what cir-


cumstances can you do this? I believe this discussion is out of place in the report and I argued to have it at least shortened. I felt it dealt with specific legislation (which we had agreed at the start we would not do) and was not in proportion with the rest of the report. However, as certain members of the committee had this as high priority (in relation to cryptographic research and to fair use), it stayed in.

4 Digital archiving. This section probably comes closest to a consensus statement as any part of the report. This is an issue that is important to me and occupies a great deal of my current activities and I think the text and the recommendations here deserve attention. At one point in the discussions, it looked as if there would be a recommendation for legislation or other action to sanction what I called “intellectual imminent domain”—the unilateral taking of IP when you think it might otherwise not be archived. There are sufficient problems with such an approach that cooler heads prevailed. But that is not to say that at some point some type of unilateral action may not be warranted to preserve things “for the public good.” (See, even I can be won over.)

5 Business models. Of the many issues in the report, this is the last one I want to comment on. The report advocates out-of-the-box thinking about various business models that reduce the reli-

ance on copyright, substituting other marketing or strategic approaches (such as giving away part of the product). There is nothing wrong with such approaches, and they may well work for some products or services in some circumstances. But I think we fool ourselves if we think that copyright will not remain and need to remain at the foundation of the information business. At some point, regardless of the new business model you employ, there has to be some compensation for the value added at various stages in the information process. Copyright lays the foundation for that compensation.

Finally, I can’t leave this topic without credit to two people. As with probably most committees, some people worked harder than others. Enormous credit has to go to **Randy Davis**, the committee chair, and **Alan Inouye**, the NRC program officer shepherding our committee, for shaping the final report. They worked extremely hard to make a coherent whole out of many disparate pieces.

Now, it is off into the NRC sunset, with largely good memories (holding the baby drives out the pain of childbirth). It was a fascinating process. I got to know a number of really good people that I would not otherwise have encountered and they stimulated my brain cells. You can’t ask for much more than that. 

Origins of the Digital Dilemma from page 46


works makes it easy for any individual to become a large-scale copyright infringer. Thus, copyright education and other efforts to shape individual behavior become much more important.

The judicious selection of a business model can reduce or eliminate the need to protect intellectual property or to enforce copyright laws. The basic premise of using business models (which are often implemented through licenses) is to “make it easier to buy than to steal.” One example is the use of extreme customization—devising products or services tailored to the preferences of an individual—to discourage copying, because how many other people would want such a product? The use of technical protection techniques, which are often based on encryption, can also effectively manage access to digital information in many situations. Some of these technologies attempt to simulate the physical barriers to copying (by radically increasing the individual’s costs of making a copy), while other technologies facilitate after-the-fact monitoring and copyright enforcement activities.

There are consequences to an increased

dependence on business models and technical protection and to a decreased reliance on copyright law, because certain public policy goals are built into copyright law. For example, the first sale doctrine enables the building and lending of collections by libraries, archives, and other cultural institutions, allowing these institutions great latitude with what they do with copyrighted materials once purchased. A greater reliance on licensing in lieu of purchasing information products may fundamentally change the way in which these institutions operate. The fair use doctrine is an established component of copyright law and is the basis for the use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research as permitted under 17 U.S.C. sec. 107. How are the important goals of the fair use doctrine affected by the digital revolution and an increased dependence on business models and technical protection?

Ultimately, a new framework for copyright may be needed. However, we are in the midst of the digital revolution. Given that laws are difficult to change once enacted, it would be premature to overhaul copyright law or policy at this time; the digital revolution needs time to play itself out. But we must also be mindful that impor-

tant public policy provisions are inherent in the copyright law. How are such provisions accommodated within the context of the increased use of business models/licensing and technical protection? 

Endnotes

¹ Alan S. Inouye is a study director and program officer for the Computer Science and Telecommunications Board of the National Academies in Washington, D.C. He has many interests in the intersection of social science and information technology, which include improving access to digital government information, adapting copyright for the digital context, and understanding the impact of information technology on work and workplaces. Prior to receiving his Ph.D. from the University of California, Berkeley, School of Information Management and Systems, Inouye worked as a programmer/analyst and information systems manager in the computer industry. Readers can contact Inouye at <ainouye@nas.edu>.

² The former Federal Networking Council was succeeded by the Large Scale Networking Working Group of the Subcommittee on Computing, Information, and Communications <http://www.ccic.gov>.

³ The fulltext of *The Digital Dilemma* may be found at <http://www.cstb.org>

⁴ See the appendix for the membership of the study committee.