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Publishers' Rights and Wrongs in the Cyberage

Thomas G. Field Jr
Franklin Pierce Law Center, tfield@piercelaw.edu

PUBLISHERS' RIGHTS AND WRONGS IN THE CYBERAGE

THOMAS G. FIELD, JR.*

In 1994, William S. Strong said at a meeting of the Association of American University Presses: "I have heard Chicken Littles say that the sky is falling . . . . in the tones once reserved for statements that God is dead."[1] He also observed that much nonsense comes out of the university community and stressed that publishers need to educate the public about the functions of copyright. Yet, more than education may be required.

Just last September, Lisa Guernsey reported that Steven Koonin, Provost at Caltech, would prefer that Caltech's professors retain copyrights and license publishers: "What's more, he said, controlling the copyrights could give Caltech faculty members — or larger groups of researchers — the chance to vet and distribute research results on line by themselves, bypassing traditional publishers altogether. At first, Mr. Koonin says, 'it was something of a joke.'"[2]

Few publishers are likely to laugh. Guernsey went on to say: "Already, journal publishers are feeling the ground shift beneath them as the Internet takes over one of their main roles: the timely distribution of written works. Compared with the speed of the Net, the months-long process of putting out a journal seems tedious."[3]

Still, Strong had explained why bypassing publishers would not be helpful: "Already most of us feel so inundated by random information that we despair of ever managing to know even the essentials of what we

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* Professor, Franklin Pierce Law Center. Prof. Field has been a prolific contributor to IDEA since 1975. His contributions include *Ovarian Epic: A Comment on 35 U.S.C. § 103*, 17 IDEA 102 (1975), probably the only poem ever published in IDEA.

1 William S. Strong, *Copyright in the New World of Electronic Publishing*, J. ELEC. PUBL'G (visited Mar. 19, 1999) <http://www.press.umich.edu/jep/works/strong.copyright.html>. These remarks were initially presented at the workshop "Electronic Publishing Issues II," at the annual meeting of the Association of American University Presses, June 17, 1994, in Washington D.C.

2 Lisa Guernsey, *A Provost Challenges his Faculty to Keep Copyright on Journal Articles*, CHRON. HIGHER EDUC., Sept. 18, 1998, at A29.

3 *Id.*

must know. Good publishers, by screening this information for quality and validating it . . . perform an enormous service."[4]

The debate now extends outside academia. For example, the *Atlantic Monthly* recently sponsored an online roundtable[5] based on the article, *Who Will Own Your Next Good Idea?*[6] Paraphrasing and responding to John Perry Barlow's argument "that in the long run the drop in costs spells the end of the 'moribund' publishing industry and the beginning of direct artist-to-public contact," Charles Mann said, in part: "According to . . . [some] e-pundits, the situation will be remedied by new services that truckle through the Net for worthy works and help present them to the attention of the public."[7] Yet, he found differences between such scenarios and traditional publishing "elusive."[8] I am equally baffled.

That writers increasingly can publish whatever and whenever they desire, signifies little in terms of capturing an audience. Who can find, much less is inclined to read, books from "vanity" presses that will publish anything at cost? Beyond that, academic and professional works in many fields receive little if any recognition without peer review. Such review is often critical. It not only has a major role in tenure decisions but also may determine the courtroom admissibility of evidence based on scientific research.[9]

Still, unless works are created in the course of employment[10] or, say, as components of much larger works,[11] authors hold copyright. Why should they give up one iota more than absolutely necessary to be published? The short answer is that authors' refusing to transfer all rights to publishers, at best, leads to wasted time and money. When publishers hold copyright, a single registration protects an entire composite work.

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4 Strong, *supra* note 1.

5 (visited Mar. 19, 1999) <http://theatlantic.com/unbound/forum/copyright/intro.htm>.

6 Charles C. Mann, *Who Will Own your Next Good Idea?*, ATLANTIC MONTHLY, Sept. 1998, at 57 (visited Mar. 19, 1999) <http://theatlantic.com/issues/98sep/copy.htm>). There is, of course, a serious problem with the title of Mann's article, insofar as copyright does not protect ideas, *see* 17 U.S.C. § 102(b) (1994).

7 Round two of three online exchanges (visited Mar. 19, 1999) <http://theatlantic.com/unbound/forum/copyright/mann2.htm>.

8 *Id.*

9 *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-94, 27 U.S.P.Q.2d (BNA) 1200, 1206 (1993); *see also* General Elec. Co. v. Joiner, 522 U.S. 136, 145-46 (1997) (discussing the appropriate standard of appellate review for district court rulings on the admissibility of published scientific studies).

10 *See* 17 U.S.C. § 101 (1994) ("work made for hire").

11 *Id.*, ¶ (2) of the definition of "work made for hire."

Individual writers are, thus, spared the need to register separately — something most wouldn't do anyway. Also, registration — particularly prompt registration — confers benefits that are foolish to ignore.[12]

Although some argue that copyright is meaningless when digital piracy is so easy,[13] there is evidence that the public respects such rights — particularly when their function is understood. A *Boston Globe* poll, conducted shortly before Strong's, talk showed that most people regard unauthorized copying as wrong.[14]

Further, at least with regard to text and named works, it is often as easy to *catch* pirates as it for them to *be* pirates.[15] If that weren't enough, under the recent NET Act,[16] even noncommercial infringement, if willful, may be criminal.[17]

That copyrights retain vitality in the cyberage and that publishers should hold them at the time of first publication, however, does not dispose of the question of who should hold them later. After registration, rights can be transferred back. Publishers may give authors such an option, retaining, for example, rights only to reprint back volumes or

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12 *See* 17 U.S.C. § 412 (1994) (prompt registration is a prerequisite to statutory damages and attorney fees).

13 This situation was responsible for the No Electronic Theft ("NET") Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997), and partly responsible for the Digital Millennium Copyright Act ("DMCA"), Pub. Law No. 105-304, 112 Stat. 2860 (1998). The former is discussed briefly, *infra*; the latter added § 1201 ("Circumvention of copyright protection systems") to the Copyright Act. It is interesting to note that Congress was in such a rush at the rend of 1998 that both the DMCA *and* the Fairness in Music Licensing Act, Pub. L. 105-298, 112 Stat 2827, 2831, added a different, new § 512 to Title 17 of the U.S. Code. *See* UNFAIR COMPETITION, TRADEMARK, COPYRIGHT AND PATENT: SELECTED STATUTES AND INTERNATIONAL AGREEMENTS 241-242.10 (Paul Goldstein et al, eds. 1999).

14 Strong, *supra* note 1. As described by Strong, the poll seems to have been conducted as a result of events leading up to United States v. LaMacchia, 871 F. Supp. 535, 33 U.S.P.Q.2d (BNA) 1978 (D. Mass. 1994).

15 This may be accomplished by using, for example, Alta Vista (a web-based search engine) <http://www.altavista.com/>. *See also* Eliot Marshall, *The Internet: A Powerful Tool for Plagiarism Sleuths*, 279 SCIENCE 474 (1998) (discussing an algorithm that is particularly helpful where more than direct copying is involved).

16 The NET Act was primarily sparked by the blatant instance of non-commercial piracy addressed in *LaMacchia*, 871 F. Supp. 535, 33 U.S.P.Q.2d 1978. The NET Act is codified in several sections of Titles 17 and 18 of the U.S. Code. *See* H.R. REP. NO. 105-339 (1997) (visited Mar. 19, 1999) <http://thomas.loc.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(hr339):>.

17 NET Act § 2(b), *amending* 17 U.S.C. § 506(a).

authorize inclusion in online databases such as Westlaw.[18] Yet, writers who have the option of taking most of their rights back should rarely exercise that right.[19]

With the possible exception of those who earn their living from writing as such,[20] authors benefit most from the widest possible dissemination of their work. To the extent that academic or professional journals keep copyright, this is facilitated. Those who wish to reproduce, say, for classroom use or inclusion in anthologies are more apt to approach publishers. To the extent that copyright is held by easily-found publishers, both dissemination of works and respect for copyright are fostered — and writers are spared much bother. In a related context, Laura N. Gasaway has aptly observed that "[c]opyright holders need to simplify the permissions process for use of their material . . . for both nonprofit and for-profit users. Until this is done, the temptation to use the work without permission will remain strong."[21]

Further, publishers should not keep rights beyond those required for economic viability. More attention must be given to this: Sometimes reproduction is as likely to generate publicity and encourage submissions as to interfere with cost recoupment. For example, the editor of the *New England Journal of Medicine* is quoted as saying "We allow authors to freely use their material — with no charge, no penalty, nothing" for paper copies.[22] However, he apparently restricts web access to paid subscribers.[23] Why is that important? Are randomly distributed copies linked to curriculum vitae or course pages, for example, likely to erode sales of printed copies or paid access to the full contents of any given journal? It seems doubtful.

Such basic issues seem repeatedly to be ignored. As even more recently described in *Science*, a blue ribbon panel has proposed that, insofar as no copyright exists in works of federal employees, copyright in articles describing work done under federal grants should be retained by their authors.[24] How one leads to the other is difficult to see, and how

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18 *See, e.g.*, Publication Permission Form for *Risk: Health, Safety & Environment*, (visited Mar. 19, 1999) <http://www.fplc.edu/tfield/RskPerm.htm>.

19 In nearly ten years, no one who has published in *Risk* has asked for a return of rights.

20 *See, e.g.*, Tasini v. New York Times Co., 972 F. Supp. 804, 43 U.S.P.Q.2d (BNA) 1801 (S.D.N.Y. 1997).

21 *Distance Learning and Copyright in the For-Profit Environment*, IPFRONTLINE, Oct. 1998, *online at* <http://www.ip.com/ipFrontline/issues/currentguest_col.htm>.

22 Guernsey, *supra* note 2.

23 *Id.*

24 Steven Bachrach et al., *Who Should Own Scientific Papers?*, 281 SCIENCE 1459 (1998).

this would serve the committee's apparent aim of facilitating dissemination is even less clear. Yet, an accompanying editorial[25] that largely rejected the committee's proposal did no better in identifying or addressing core issues.

It would seem that publishers' charging universities to photocopy their own faculties' work is sparking needless controversy. Publishers who impose unnecessary restrictions on academics or their employers do themselves and others a disservice. It is difficult to imagine why authors, particularly ones who aren't paid, should not usually have a royalty-free license to copy for students and colleagues in hard copy or on the web. Those who fail to accord such rights without good, clearly stated, reasons seem ever more likely to disrupt a scheme that has heretofore benefited authors, the public and publishers alike.

[25] Floyd E. Bloom, *The Rightness of Copyright*, 281 SCIENCE 1451 (1998).

FRANKLIN PIERCE LAW CENTER IN THE IP SPOTLIGHT

U.S. News and World Report

For the third year in a row, *U.S. News and World Report* has named Franklin Pierce Law Center as the top law school in the country for the study of intellectual property law. FPLC shares the top spot in the 1999 survey with the University of California at Berkeley. This ranking appears in the magazine's special publication, *America's Best Graduate Schools*. Franklin Pierce Law Center has been rated among the top five intellectual property law schools ever since the survey began.

Saul Lefkowitz Trademark Moot Court Competition

Teams from Franklin Pierce Law Center had a big impact on the 1999 Saul Lefkowitz Trademark Moot Court Competition, sponsored by the Brand Names Educational Foundation. At the Eastern Regionals, Jim Laboe ('00) and Gina McCool ('00) won the award for Best Brief and finished third overall, while Molly McPartlin ('00) and Steve Zemanick ('00) were named Best Oralist Team and finished first in the region. At the National Finals, competing against teams from Hastings, DePaul, and the University of Southern Mississippi, McPartlin and Zemanick finished second overall and won the award for Second Best Oralist Team. In addition, Lebeau's and McCool's brief was named best in the nation. Both teams were coached by Professor Susan Richey, with the assistance of Dana Metes ('99), who last year, along with partner Andrew Klungness ('99), finished second in the 1998 Eastern Regionals and won the award for Best Oralist Team. One of the bailiffs at the 1999 National Finals was FPLC graduate Jim Calkins ('98), a two-time national champion in the Giles Sutherland Rich Moot Court Competition and currently a law clerk for Judge Rich of the CAFC.