Point/Counterpoint on the DMCA and CTEA

Point/Counterpoint on the DMCA and CTEA: a session hosted by the Public Policy Committee during the Art Libraries Society of North America's annual conference.

Several years into the DMCA and CTEA, differences of opinion as to their effectiveness and impact are still sharply drawn. The implications for research and dissemination of information are particularly acute in the visual arts as the use of images in printed and electronic media is a major consideration. Two D.C. area lawyers, representatives from consumer and provider communities, were invited to evaluate the legislation from their constituents' viewpoints and to answer questions from an audience of art information professionals.

In the spring of 2003 the Public Policy Committee (hot link) of the Art Libraries Society of North America (hot link) hosted a point-counter-point session at its annual conference in Baltimore, Maryland. The committee invited two attorneys with expertise in copyright law to discuss the implications of Digital Millennium Copyright Act (DMCA) and the Copyright Term Extension Act (CTEA) for libraries in general and art libraries in particular . One month prior to the session the committee furnished suggested talking points to each speaker (see end notes - hot linked). The session was recorded and a twenty-one page typescript was subsequently generated. The typescript has been edited to improve readability. The essence of the presentation and audience exchanges remains intact.

The moderator for this session was Barbara Rockenbach, member of the Public Policy Committee and past co-chair. Roger Lawson, member of the Public Policy Committee and past chair, took a lead role in inviting and coordinating with the speakers, and Tony White, member of the Public Policy Committee, was the recorder for this session and editor of the typescript. Both speakers edited the final typescript as well.

The format of this session allowed each attorney 20 minutes to discuss their viewpoints on the DMCA and CTEA. Following the point-counter-point presentation questions were taken from the floor.

Since the 2003 conference, the Public Policy Committee has continued to monitor developments of the DMCA and CTEA to keep ARLIS/NA members up to date and aware of relevant legislation. There was no follow up session at the 2004 conference in New York city, nor will there be follow up at the 2005 conference in Houston, Texas. However, the Public Policy Committee did sign onto legislation supporting the DMCRA.

After greeting and welcoming the audience, Ms. Rockenbach introduced the speakers, **Arnold Lutzker** and **Alan Adler**.

Mr. Lutzker started with a brief introduction about the relatively short history of the

DMCA.

Lutzker: . . . I understand that as a group you have a general appreciation of the DMCA and some of these other issues. But I'm going to give you a general overview as well, including the DCMA vocabulary and a sense of where things are today from the perspective that I come from representing, the library community for the last ten years in connection with digital issues, both before Congress and in their implementation. The DMCA was passed in 1998. So we are basically looking at a child who is now entering kindergarten...and from the parents perspective there is a lot of kicking and screaming, and other activities that are going on when you are dealing with a five year old. And that is really where we are.

. . . It was the relationship of the internet to commerce that inspired a lot of the activity in the mid 90's; there were international discussions which lead to a treaty in 1996. And the DMCA was the implementation act of that 1996 treaty...which puts this in context. And the core concept that the DMCA addressed was the relationship between control of works in the digital environment and the control of access to works by the creation of a new species of rights. Copyright law, which had traditionally recognized a number of very specific rights - the right to control copying, the right to control preparation of derivative works, public performance, public display, and the like, did not deal with the issue "Can I go look at something without obtaining permission?" By contrast the DMCA tried to answer that question in the digital environment: A) Who can control access to works? and B) When you legally control access to works, what happens thereafter? And that became a very pivotal part of this debate, at least from the library community perspective, because access to works, particularly published works, become a focal point of the ability to understand what those works are, to be able to comment, critique, and analyze them. The library community was not alone in its presentations of concerns about what did this mean for fair use, what did the digital millennium act mean for the ability of the individuals to access works fairly for educational comment and critique. It wasn't alone but it was not with a big crowd. And the content community was really the driving force behind the DMCA, and not surprisingly, most of the key provisions in the DMCA, are oriented towards the content community. Now our child [is] a kindergartener of school age.

One of the open issues that the DMCA did not resolve, but which was resolved in the past year, was the notion of digital distance education. It was agreed upon during the debate in 1998, this was a tough complex issue that required more study, and the Congress empowered the Copyright Office to take a close look at it and make recommendations, which they did, over a period of a couple of years. And with many people in the content, and education, and library community, seated at a table, and Alan and I were there for pretty much all the sessions, we hammered out language which was eventually to become the TEACH Act. And the hallmark of the TEACH Act is essentially to recognize - from my perspective, it's a recognition of what's already been in place for a long period of time, to some significant degree, with some qualifications - what's involved in an educational environment, and that students and faculty are using the computers and the

internet to communicate. Exactly what are the rules in play? What can you do? And what can't you do in connection to the use of content in an internet environment? It became necessary among other things to expand the definition of what was covered in the existing laws. In the existing laws from the 1970's, the issue of distance education was addressed. But the paradigm in those days was cable television. And the cable television environment was visual, it was closed circuit communications. And now we are dealing with open access via the internet, and the question we have to deal with is how do you translate the closed circuit cable environment in education to a computer environment, where students can be in dorm rooms and communicate with other students. Students can meet in other cities; you can create a virtual classroom with students around the city, around the country, around the world. How do you establish a classroom environment and share educational materials? The core concepts that were developed were the compromises and what we would call the activities that are going on. But the most critical concept was mediated instruction: that there has to be a faculty member who is aware, sensitive, and controlling what is going on, Number One. The second core concept is that if works are specifically designed for a digital distance environment, those works would essentially have to be acquired through the normal course of purchase and the like. But where materials are not specifically designed to that particular class, there are allowances that we made to allow the materials to be used in a digital environment. So a faculty can post material to a class. There are requirements about who is in the class. How do you define the student? How do you define how long they can have access to the material? The statute works through many of these issues...it's a complex statute. And we will, hopefully, deal with specific concerns and questions about that. But resolving, handling the digital distance education issue was one of the leftover businesses of the DMCA which was resolved last year.

Another issue which was laid on the table and remained, from the library perspective, really an open issue is the concept of digital first sale. Under the copyright law the first sale doctrine says if you have acquired a work you own a copy--you don't own the copyright--but you own a copy, and you can make that material available to third parties. You can give it away. You can loan it. Or whatever. Libraries acquire copies and loan [them] out. How do you do this in a digital environment? Should you be able to do it in a digital environment? Does the law need to be changed to deal with this? The Copyright Office studied the question and concluded that no immediate change needs to be made. Now some of you in this audience--and I hope we will have some questions about this--deal with this question, if you receive a digital work, that's typically not purchased outright, it may come with a license. What's the relationship of the license to your ability to loan this out? How do you reconcile the first sale doctrine, which is a core concept of copyright law, in a digital environment? The rules have not been finalized in this area and, in fact, there is pending legislation which was introduced just a couple of weeks ago by Congresswoman Zoe Lofgren. The legislation is entitled the 'BALANCE Act', or the Benefit of Authors without Limiting the Advancement or Net Consumer Expectations. Among the issues that the BALANCE Act is going to be dealing with is the question of what is fair use in a digital environment? Because we still haven't got it right. We don't yet have complete confidence that the fair use provisions of the copyright law fairly apply

in a digital environment. And fair use, of course, is the ability to make use of materials without prior consent of the copyright owner, in a way that allows for comment, criticism, research, teaching, education, and the like. There are criteria that are set up in the copyright act that have to be addressed. But they are not hard and fast, they are judgmental. And that's the beauty of fair use. It's a judgmental analysis that permits individuals to assess what it is you are using; how you are using it; and to exploit that material appropriately. Zoe Lofgren's bill will deal with not just the fair use, but she also has a provision that recognizes, in a digital environment, there is a concept of a first sale. And that you can transfer works if you hold the work, you can transfer it, so long as you relinquish your possession over that material. It's a passing on of what you have. There's another bill, which was filed very early on in the session, along with the Zoe Lofgren bill, in fact it was introduced at the end of the last session. And Rick Boucher, who is a staunch advocate of the fair use concept, filed and got HR107, - which is quite significant for those in the know, as you will now be with the copyright law, because the fair use provision of copyright is section 107. So HR107 is again set to define the concept of fair use in the digital environment, and the most critical concept that was debated during the DMCA and resolved in a way that contradicted some of the precepts that came before it. But when the Supreme Court dealt with the issue, in the 1980's, of the video recording box, the Sony Betamax machine, it drew a concept that if a piece of hardware is capable of non-infringing purposes, as the VCR was in those days, as it is today, then it would qualify for fair use purposes. In addressing the DMCA the standard was made more strict in connection with technology, equipment, software, boxes, computers and the like. And it's not just a non-infringing purpose. The primary purpose has to be an appropriate use recognized by the copyright law. And what the Boucher bill, HR107, is designed to do, is to restore the concept of non-infringing uses as the primary basis for analysis of the appropriateness of technology. Rick Boucher also has a provision there which is intriguing, and again this shows the linkage between many of these legal principals. Copyright law can be linked with principles of trademark law and unfair competition. And his legislation will also have a provision that says, if publishers sell certain technology (e.g. software) and if it cannot perform certain functions, which you would normally think the software should be able to do, the consumer should be notified upfront, so they can have a decision of what to do with this. Most particularly, this concern goes to the ability to make copies of portions of materials that may be on CDROMs or other software that one receives electronically. Tell the consumer, before they buy it, what they are getting. And if you don't tell them, then there are violations that would fall into place.

As with any piece of legislation that has a gestation period of several years, litigation comes out. And court litigation over the past number of years, has involved both the DMCA and the copyright law related to digital rights.

Mr. Lutzker followed up by highlighting cases he considered important to the library community. The first, the Tasini case, " . . . involved . . . an interpretation of a working provision of copyright law dealing with the re publication or revision of a newspaper when it is placed in a database and whether that technically constitutes a revision of the

work...which under copyright law would not require re-approval of freelance authors to have the work republished in digital form, or whether it wasn't a revision and therefore required that approval. And the Supreme Court said in this case, when you create databases and you put your content in databases, in fact there is an issue that requires the re consent of the author.

Mr. Lutzker cited another case: ...[T]he Eldred case . . . tested the constitutionality of the Copyright Term Extension [Act] (CTEA). The copyright term was extended 20 years, not in the DMCA, but a parallel bill passed in 1998. The Supreme Court upheld the validity of the statute. The library community, on whose behalf I filed a brief in the Supreme Court, tested the extension from a core copyright law perspective, but the court held that it did not violate the copyright law, because the Congress is granted enormous discretion in this area, and the court did not want to second guess the issue. However, you could read into some of the language of the majority opinion, and also the dissenting opinion, of Justices Breyer and Stevens, that there was concern about what Congress was doing by granting these extensions.

. . . [A]nother case . . . that was moving along at a little slower pace involving a group of symphony conductors in Denver who are challenging not just the Copyright Term Extension [Act] but another provision that was passed in the 1990's to restore copyrights of certain foreign works. In this case, symphonies and musical works that entered the public domain, but which were restored [to copyright protection] under virtue of treaty negotiations under NAFTA and GATT. And that case combines Copyright Term Extension with the appropriateness of restoring works that have entered the public domain. Public domain is a very important area for copyright, particularly for library communities, for that is the moment at which works become available without prior requirements of clearance.

[A fourth example:] . . . was one case in the Museum community . . . involving Bridgeman art group which basically had the issue of copyright and photographs in the public domain [of] paintings and two dimensional works. And the courts held that the photographs were not copyrightable; rather, they were slavish copies and did not meet the statutory requirement of originality. In creating copyrighted work you need originality. The progeny of that case is presumably working its way through the museum community now, as is another case involving Kelly v. Arriba Soft, which involves the digital database creation of thumbnail photos of art collections and the relation of copyright law to the thumbnail sketches, which were held to be fair use, and full blown up imagery, which was held not to be fair use when placed in a database.

I'll mention very briefly . . . two additional progeny from the DMCA. One is, every three years the Copyright Office is to hold proceedings dealing with exemptions from the access requirements of Section 1201. And we are right now in the middle of a period where comments have been filed and the Copyright Office will take a close look in April at a public hearing with potentiality for exceptions to claims of the works - particular

classes of works - that should be pulled out of access requirements.

And I'll mention one final point, that there is a procedure which we brought into the DMCA, which is actually in the Copyright Term Extension [Act] for the library community, which allows libraries in particular during the last 20 years of this extended copyright term, to make special use of materials that are not subject to normal commercial exploitation. . . . Thank you.

The second speaker, **Mr. Allan Adler**: I always find myself very grateful to Arnie whenever we get to appear together to discuss copyright issues because he sets the table so well. Arnie and I, as lawyers, would probably start at the same place together in discussing copyright, and it is only when we begin talking about the meaning and intent of specific legislation or caselaw that we wander off in different directions. And the reason is not that we interpret the language so differently, but rather that the people we represent, respectively, have different perceptions of the meaning and intent as it affects them in terms of their fears and sense of the opportunities that are presented as a result of these new technologies and related laws. Frankly, the DMCA came along as a result of one major paradigm shift regarding copyright and the works protected by it - and that was digital technology. Digital technology really changed everything as far as copyright is concerned. And remember, I speak for the industry for whom copyright was originally created. . . . Publishers have produced pretty much the same product for the last three hundred years . . . copyrighted works fixed in ink printed on bound paper . With that kind of a product, interestingly enough, we never really had any great fear of massive copyright infringement destroying the market place for a particular copyrighted work.

The limited technology used provided most of the protection that copyright needed with respect to literary works--which are the types of works you talk about when you talk of book and journal publishing -- because it has always been awkward to create reproductions [and] distribute them in that format. Frankly, the binding on a typical book has always been the best anti-copyright infringement measure [audience laughter] that publishers could have invented. You had to turn pages to be able to copy an entire book, and when you did copy it, using the latest state of the art technology -- which was photocopying, until the digital age came along -- you still got a degraded copy. And if you copied successive generations of copies, you'd have successive generations of degradations in the copies produced.

. . . [I]t is sort of ironic that publishers have always been joined at the hip with the library community in ardently defending the First Amendment's protection of freedom of expression, which includes freedom of speech and of the press. Both communities , at least in some measure, consider copyright - as the U.S. Supreme Court has said - to be the engine of the freedom of expression. Remember, one of the things that copyright was designed to do was to free the artist from the tyranny of the patron. There was a time when any artist who wanted to be able to work in their art, and also to be able to put food on their table, had to depend on the largess of the nobility - to depend on someone willing and able to subsidize and support their work - but that, of course, brought along the

notion of censorship with it, which meant curbing the independence of the artist and freedom of expression in [respect] to the artist's creative work. Copyright was designed, in part, to change this.

But today, the library and publishing communities -- while still standing shoulder to shoulder on First Amendment issues -- almost routinely do battle over copyright. Some of the battles today are different from those in the past. Some of them are just a little bit more exaggerated because of digital technology. We have always fought over what fair use actually means in terms of its practical scope and limitations, although f both communities have always thought, generally speaking, that it's really fortunate that fair use is not defined in specific black letter terms that designate what is or is not fair use because it is the very uncertainty of what constitutes fair use in any particular circumstances that gives this important rule its flexibility, and its ability to breathe and evolve . Because of its situational nature, that flexibility is very important.

But, as I said at the outset, digital technology has changed our respective views of copyright . And why is that so? Because the central feature of copyright law . . . has been the notion of controlling the copying a work through a right of reproduction. Hence the word copyright. There are other exclusive rights enjoyed by copyright owners, as you know: the right to create derivative works; the right to adapt a work ; the right to distribute copies of a work. But that copying question -- the ability to have copies of a copyrighted work made so that they can be distributed -- has for centuries been at the core of what is considered to be the market for exploitation of a copyrighted work. It is that right to engage in marketplace exploitation of copyrighted works that gives economic value to copyright, and makes copyright protection an incentive to creation of works of original expression by artists and authors all around the world. Well, digital technology comes along and we find out that it has, as an inherent, automatic part of its operational functionality, the constant creation of copies. The lawyers and technicians refer to them as ephemeral copies or temporary copies in some instances. But the fact is that, when you transmit something digitally, from one person to another, when for example you send email from one person to another, what's happening along that pathway is that a series of copies of what you're sending is being made. Some of those copies are not easily accessible to people because of the nature of digital transmission technology. But some of them are easily accessible, and that factor alone transforms the notion of copyright once it is clear that we were now dealing with the first truly global communications medium. Not only does digital technology not only allow the perfect reproduction of a copy of a literary work, in successive generations, with the thousandth copy made from the thousandth copy, being an exact duplicate of the original master copy;.

But in the context of transmission networks, it also allows anyone with a PC to engage in instantaneous global distribution of those copies just at the push of a button. Why does this change things so dramatically? It's because we've always known that society tends to be seduced by the capabilities of technology. Even if we assume--as we would be want to do--that most people are basically decent and honest, and that they understand the notion that the people who create works of original expression for a living should be entitled to

the earnings that they can obtain from that endeavor, there is a certain seductive quality to the fact that, with this type of technology, the ability to make copies is so simple; the ability to acquire copies is so simple; the ability to distribute copies, in endless levels of multiplicity, is so simple, that people forget the question of whether anyone is harmed by these actions. It just seems to such people that these capabilities coming from this new technological development are good things that they are entitled to exploit and enjoy for their own purposes.

And what has happened to our interpretation of copyright law as a result of this tendency? Well, as Arnie told you at the outset, over a period of years, as digital technology was developing, people began to see where we were headed: to the Internet. To Interactive digital networks connecting people worldwide, and allowing instantaneous reproduction and distribution of endless copies of copyrighted works. There had to be some adjustment to copyright law to deal with the capabilities of the new technology. And so as [Mr. Lutzker] told you, some 96 nations got together in 1996, and they adopted two international treaties under the auspices of the World Intellectual Property Organization . . . . The basic thing they did in those treaties was to say that, when a copyright owner uses technology to meet the risks posed by technology (in order to be able to protect their economic interests in a given copyright work) the law of their national country must provide adequate protection for the copyright owner's use of those technological measures, along with effective remedies against those who would violate such protections. Many people mistakenly believe that the treaties, as well as the DMCA legislation which implemented them in U.S. law, marked the first time that copyright owners were authorized to use technology as a way of protecting their interests in copyrighted work. But that isn't true. Fully a generation before the DMCA came along, it was well established in US telecommunications law that you could not, for example, intercept cable tv signals that you hadn't paid for, and you could not intercept satellite signals that you were unauthorized to receive. And in those laws that prohibited your unauthorized reception of such commercially-transmitted signals were provisions that also made illegal the devices that would allow someone to engage in such unauthorized reception You heard Arnie talk about the SONY case, which is the famous case decided by the Supreme Court in 1984, that by a very narrow margin of a very divided court, basically said that, if you want to record an off the air broadcast television program with your VCR, for purposes of watching it at a time after the broadcast it was ok for you to do so as a matter of fair use of the copyrighted programming contained in the broadcast. And because such copying was considered to be fair use, the Court ruled that manufacturers and distributors of VCR's would not be considered purveyors of illegal circumvention devices that facilitate illegal copying of copyrighted works . But, folks, that was 1984. And in the digital age that's Paleolithic. They didn't know in 1984 about the wide spread connectivity that interactive digital networks would bring to the world . In 1984, even the VCR itself was so new and so limited in its utility that they had no idea what that divided 5 to 4 decision was going to bring about two decades later, when people talked about how to apply the Court's ruling on reproduction of a work for delayed viewing in a world of distribution through interactive digital networks and digital

repositories of copyrighted works.

Now, the same thing has been true with other concepts of copyright that Arnie mentioned to you. Fair use is a good example. Believe it or not, just as we are staunch defenders of the First Amendment, because after all the industry wouldn't even exist without it, publishers are also fair users of other people's copyrighted works. So we respect the notion of fair use. We may balk a little bit when people try to make fair use of our works, but there is [audience laughter] this kind of a give and take, back and forth, in our view of the fair use doctrine because we are fair users, and we recognize it as an important part of the law. But then along came those seductive capabilities of digital technology to infect people's view of fair use. In a world in which digital technology makes it so easy for people to reproduce, acquire and distribute reproductions of copyrighted works, the notion of fair use began to expand dramatically in people's minds. For example, never before had fair use been viewed as involving a right of access to a particular copy of a copyrighted work. Fair use had always, in the pre-digital age, been limited to issues regarding what use could be made of a copyrighted work in the absence of the permission of the copyright owner, or compensation to the copyright owner. But now people began asserting that fair use is more than that; it's about a right of access to the work itself, some claim, because it's the access to the work that obviously enables the ability to use the work. And without access to the work in the digital environment, what good is fair use? So we began to see expansion in the library community's conception of fair use , when its advocates in Washington started asserting that fair use provided rights based on what they called initial lawful access to a copyrighted work. This came up when Arnie and I spent a lot of time arguing about legislation four years ago, when the Digital Millennium Copyright Act was being enacted, because at that time we began talking about copyright treatment of electronic journal and magazine subscriptions. What would happen, for example, when you subscribe to your favorite magazine...Now, what typically happens is, let's say you subscribe to it for a year, it's a monthly magazine, and at the end of the year, the subscription expires, and you don't renew it. Well, you still have those twelve monthly editions that were the subject of your subscription to enjoy and to continue to review later on. But what if you had an electronic subscription and, at the end of that year period you don't renew. Should you be entitled as a matter of law to have copies of those twelve monthly editions of that subscription given to you for your permanent possession and use? Well, there is a disagreement about that, [audience laughter] as you might suppose [more laugher].

Similarly, an expanded view of user rights has emerged with respect to the first sale doctrine. First sale is a doctrine that came along in the early 20th Century analog environment - the physical environment - of copyrighted works. And what the first sale doctrine said, basically as articulated by the U.S. Supreme Court - in a 1909 case, by the way, that was lost by book publishers, was that, once a copyright owner had lawfully parted with ownership of a copy of a copyrighted work through a sale of that copy, ownership of that copy was transferred and the copyright owner no longer had any say over the subsequent disposition of that copy, whose lawful owner could now sell it, give it away or otherwise dispose of it without giving any thought to the copyright owner. The

basis for that ruling was the fact that the value of physical property is in large part related to its transferability. If you can't transfer physical property, it has less value as a sellable commodity in the marketplace. In a digital environment, this doesn't mean that there is no first sale doctrine. With respect to a copyrighted work that is embodied in a CD-ROM or downloaded onto a floppy disk or CD, if you are the lawful owner of that CD-ROM, floppy disk, or CD, the first sale doctrine fully applies to give you the right to dispose of that particular copy as you will. However, digital transmission of a copy is something different. The notion of creating a first sale doctrine with respect to the disposition of a copy through digital transmission ignores how the transmission itself works because the the doctrine serves only as a limitation on the copyright owner's right with respect to distribution of a particular copy of a work, not to the owner's right regarding reproduction of the copyrighted work. Applying the first sale doctrine to the digital transmission of a copy would restrict the copyright owner's ability to safe guard against unauthorized reproduction of the work. Why? Think of what happens when you put an attachment on an email and send it to somebody. You still have your copy of it, but now you have also reproduced another copy that you've given to the recipient of your email. And you can do this endlessly - distribution throughout the world - and you'll still have your copy. The idea of first sale, in preventing the inalienability of physical property, was that, if you want to give that copy to somebody else, fine. But you must part with that copy in the transaction and you can't reproduce it to give to that other person. That's the reason why the digital transmission first sale doctrine advocated by librarians (among others) has been opposed by publishers and rejected by Congress and the Register of Copyrights.

I want to use these last few minutes to talk about the other law I was asked to address today because I think this is where I have the most important lesson leave with you. And that has to do with copyright term extension legislation[CTEA]. It also has to do with the notion that copyright-based industries are homogeneous in their views on these issues, and all tend to look at these difficult questions in the same way. That couldn't be further from the truth, and the publishing community's view of term extension legislation is a good demonstration of the mistaken nature of that notion. Copyright-based industries may all be engaged in the commercial business of producing and distributing copyrighted works for profit, but the nature of those works - their targeted audiences, their business models that develop around them in the process of exploiting their rights - make those industries all very different, so they don't see all these issues in the same light . Whenever you read a newspaper article that uses the word 'Hollywood' as a synonym for copyright interests, I want you to remember what I am going to tell you right now. The Copyright Term Extension Act of 1998 is also sometimes called the Mickey Mouse legislation, or the Disney legislation, because of the Disney Company's concern that, absent its enactment, Disney's copyright on the character of Mickey Mouse would soon expire and Mickey Mouse would enter the public domain. But how was that legislation viewed by the book publishing community? Well, let me give you a very simple example that everyone will readily understand. The publisher of an author like Fitzgerald, or Hemingway, felt like the Disney people did. They looked at the copyright clock, and feared that they were soon going to see the works of those authors enter the public domain as their copyrights expired. But other publishers who are in the business of

producing copies of literary works - like Hemingway's and Fitzgerald's -- for high school and college literature courses - waited eagerly for the copyright on these works to run out so their publication of those works for the steady educational markets would not require obtaining permission or paying license fees to the copyright owner. As a result, when we had to look at the question of lobbying in support of copyright term extension legislation, we had an irreconcilable conflict within the publishing industry. Why? Because publishers are not all in the same business, and their views on such issues will depend upon what kind of books they sell [and] who they expect to purchase them . Their business models are very different, and they will look at the law differently as well. This is now something we are beginning to understand more fully with respect to the difference between e-books and print books as well. Where you stand on such issues will depend on what it is you are trying to accomplish in the marketplace.

So I'd like to leave you with that important factor as you continue to hear about the copyright debates in Washington. Not everyone is the music industry. Not everyone is the motion picture industry. And copyright certainly stands for a lot more than those industries may have led you to believe.

Now I hope to have a bit of interactivity with you on Q & A so that will be the end of my remarks. So thank you."

At this point the moderator thanked both speakers and opened the floor to questions.

First question from the audience: . . . It seems that with the Arriba Soft case and the Bridgeman case turned on phrases such as slavish copy and thumbnail, but as we know technology is a moving target, and what is defined as a thumbnail today may be completely different several years from now, it may be now what we consider a delivery image will tomorrow be a thumbnail, and I'm wondering, given these limitations...how do libraries continue to expand and grow in their communities and not having to worry about copping the line on about what the industry defines. It doesn't seem that laws are going to keep being revised as technology moves along...so its constantly a position of wanting to take advantage of what technology offers, and yet worrying about being . . . in violation of the law."

Lutzker: . . . "These are complicated areas, the questions you have are judgmental, they can't be answered, in many cases, absolutely. You do have to exercise judgment. . . . Taking the photography cases, the general concept is that a photographer does things that add enough originality, to qualify for copyrighted work, . . . It has to be your created inspiration which is what is encouraged, then gives you certain exclusive rights. And that's a question, a judgment call, in this case, of course - that a thumbnail sketch, doesn't satisfy that . . . So the problem is, that if . . . you are dealing in a fair use area, . . . it's not like a line in the sand. It's sort of like this drifting, blowing sand, where you evaluate factors, you weigh things. . . . Even . . . the Kelly v. Arriba Soft case, the court was making judgments about, on the one hand this, and on the other hand that. I give two

points here, three points there, so the three points would win. You have to look at the totality of the information . . .

Digital is different is a mantra which we've heard during the course of the DMCA, but you know there were many people in publishing who said Xerox is different. Xerox has changed the environment. . . . There were hardware issues for the library and scholarly community dealing with the . . . photocopy of a single page or multiple pages. VCRs are different. There was a huge debate about the VCR machine. They were going to be ... and Alan will separate from this, . . . the downfall of the Hollywood community. That people could record programming at their whim. This would be the end of entertainment and information as we know it.

Now, "digital is different." Well, digital has certain elements that are different, but it has certain elements that are the same. But from a policy point of view the outlines that we have ... are friendly because the library community is probably the largest purchaser of rights and information from the publishing community. So there has got to be this appreciation and understanding of the rules of the road. But it still boils down to the question of where people paid for this content...what can they do with it? The notion that you have paid for an electronic subscription, and it's expired, what rights do you have, in the material that you have paid, that because it was delivered electronically, you don't have anymore? Should there be a right to go back to require that? Can . . . technology offer a solution and allow you to have access to that? Even though you may not have access to an entire library material. I would like to pose that..."

Adler interjects: "Let me just comment on the question that was asked for a minute. . . . Remember, I talked about copyright as being about freedom of expression, and it is very important that way, but fundamentally, it's also an economic right. It's a marketplace doctrine. And it helps to demarcate and define rights with respect to exploitation of a product in the marketplace. . . . The thumbnail sketch concept is one that's going to evolve, depending upon the attributes it brings to that model. Are you all familiar with CONFU? (provide a hotlink) [the audience murmurs assent] You all remember that. One of the issues we tried to deal with was a set of fair use guidelines with respect to the use of images - images of art in particular. And we tried to rough out this doctrine with respect to thumbnail sketches. Because the content side was willing to accept the premise that, . . . at that basic level of resolution, thumbnail images don't threaten the market for a full-size copy of the work that is designed for the market, and was primarily going to be used as a reference to that work, they were willing to agree that the use of thumbnail images should be permitted generally, and that there should be a broader gauge of fair use applied to it. But, of course, we may now see technology continue to evolve to a point where somebody can take a thumbnail image and blow it up so that you don't lose that fine quality of detail that the thumbnail had, and can create something of market quality. That's going to change and evolve as time goes on. Now Arnie's point about digital not changing copyright and peoples perception of it - I just have to fundamentally disagree with him on that because you can see how the public image of copyright has changed from the relatively staid, arcane, esoteric, backwater of the law that it was until 1995 into

an emotional source of populist movements. [audience laughter] That should say something to you. And when you look to see what it is out there that affected that, you can only see that in terms of digital technology, and the impact it has had on the global market place. Now, regarding the question that Arnie posed to me about the example I had given you about the electronic subscription, the answer to that is simple. If I tell you that you can have that yearly electronic subscription at half the cost that your analog subscription would cost but at the end of it you don't have copies to keep, maybe there are some potential subscribers who only want or need to read these materials once, when they are contemporaneously published, and don't care whether or not they are going to have the back issues as archival records. And if that's the case, then their decision, economically, is going to be that they would rather pay half the price for the subscription in order to be able to get it in a way that meets their need for use. At the same time, however, publishers will offer a variety of digital media materials. Say, if you pay a certain amount for that electronic subscription, at the end of your subscription we will give you a CD-ROM that contains those various editions that were part of the subscription. But that is going to be more expensive than the electronic subscription without the CD-ROM. Or they could say to you, we will give you remote access to those editions at a central point the publisher maintains. That would be an entirely different economic entity, too. The point is, you want to give [audience laughs because Arnie is pointing at his watch] - Arnie can't stand this - you want to use the technology along with licensing. Not to bottle up information, because we're publishers, for God's sakes. We wouldn't make any money if we bottle up information. But the idea is to maximize choice. To be able to get customers who would say "I'm not going to buy all that because I don't need that...that's too expensive coming in the full set. I only need a small part of it. I only need limited use of it." And if that can be offered to them, at a proportionately lower price, then that's a customer we don't lose. It's a customer we gain. And that's the objective. But now, does it all work perfectly? Would everybody say that in every case you could look at these different arrangements and, in fact, [audience laughter] the change in price is exactly proportionate to the difference of the benefit? Well, no. You know why? Because people see the benefits, or the lack there of, differently in different models and arrangements, in which products and services are offered. That's what makes a market place. And hopefully . . . a competitive marketplace will allow consumers to find what they need at the price, terms, and conditions they want."

Lutzker: "Now let me tell you what you just heard [audience laughter] Copyright law is a law, a statute. It's a negotiated, legislative solution to issues that have been laid out in a marketplace . The fundamental concept of copyright law is . . . there's an economic force to copyright that's good. But, the law, in the first chapter of copyright, which now runs probably 30, 40 pages of text, it has a grant of rights that are exclusive to the owners ...and then a set of limitations on those rights. There's a balance that was statutorially dictated. It's the law that there are certain rights you get exclusively, but those rights are limited. They are limited by concepts of fair use, they're limited by concepts of educational free play, they're limited by first sale, they're limited by compulsory licensing. There are balances that have been struck. Now, what we just heard is fundamentally "You want a license? I'll give you a license. You wanna get it for $50 for 2

years and $20 for one year? I'll give it to you. You want to get it for 10 years? I'll give it to you for $500." Hey! You can work out a license. But that is not what copyright law and the limitations are about. That's the economics of copyright. But the policy limitations in fair use say that you are allowed to have certain rights that are fundamental, and you don't have to pay for them because fair use is an engine of creativity, a comment or criticism. If I want to get a permission, . . . what is the relationship of the creator to the work? If the creator of the copyright work is an employee, the employer owns the work, and the creator is not the author under copyright law. And there was a debate in the movie community with the studios as to who is the author of Casablanca, Gone with the Wind, and great American films. Is it the Turner Entertainment Company or John Huston or someone else? . . . But the issue, in the moral rights area, is the question of independent of economic interests. How do you control the reputation with respect to work? In a digital environment, if you want to pay for it, you can get it. But the issue is, if I pay for it, and the payment is done, what is my relationship, under fair use principles, to that work? Do I have to get permission again? Fair use says I don't need to get permission. So how do we reconcile that in a digital age? And I think the calibration, which was the core of the debate in the DMCA, is now playing itself out in the communities. The public will have to address the concept of . . . initial acquisition of a particular work. What can you expect in respect to a particular work. Now, what happens after you have concluded your lawful acquisition under a commercial license arrangement? . . . And how can you properly exploit works within in the limitations that are inherent in copyright law?.. Alan, respectfully, I did not hear an answer to that. What I heard was, "You want a license? You want it for a shorter time or a long time? We'll give it to you but you will have to pay for it." But how do you reconcile the non-licensed uses that are inherent in copyright law?"

Adler: "The answer is you are speaking about a world that never existed to begin with. [audience laughter] ... [more audience laughter] Now think for a minute, okay? When you buy a ticket - let's forget about DVDs for a minute, let's go back to a world, where when somebody wanted to see a motion picture they saw it in one of two ways. They went into the theater to see a motion picture. Or they waited until the movie made its way to broadcast television. Okay. That was the world of my childhood. [audience member: You didn't read any books?] Hhmmm. [audience laughter] Okay. OKAY. Look, I am offering this as an example, because it is a very common one that that most people seem to understand. You bought a ticket to go see that movie. You saw the movie. That was it. You didn't have the right to then say, "Well, you know, I am doing a book report on this at school tomorrow, so I need to take about 15 minutes of that movie for fair use." Or, my initial access to the movie gives me continuing rights, since I purchased the right to see it once. That gives me the ability to go back and see it again. With respect to books, the simple fact is - they were literary works whose copies were embodied in physical objects and thus were always fully subject to the first sale doctrine. But what happens when you have book that isn't a physical object? What happens when you have a book that is intangible? What happens when you have a book that, because it is intangible, you can now do things with it that greatly enrich and enhance your experience as a user that you couldn't do with the old technology. Are we going to be limited by the position that we

have to rigidly stay within the confines of the old use rules? Just because there were old use rules? - Despite the fact that now we are capable of enjoying copyrighted works in ways that we couldn't enjoy them under those rules? There have to be some trade offs. If you want, for example, to be able to read a bible today in electronic form - and it's fully searchable, and without missing a beat you can go between a concordance to check your source for a quotation, and go back to the text instantaneously, with fully automated search capabilities - do you think that is still just an ink on paper book, and must be subject to exactly the same rules that copyright applied across the board to that kind of a work? If you do, the answer is simple: no one is going to produce the electronic book because the electronic book is too easily reproducible and distributable in a way that could injure the market for the person who produces it, [and] who invests in the production of it. This is not a static world. And copyright was never static to begin with. . . . "

The moderator gives the floor to an audience member for the next question:

"The distance between these types of arguments suggests to me that Mr. Lutzker's observation that we haven't got a right yet is probably closer to the idea that we do have rights. There has been a lot of distance between these two arguments. Could you just speculate a little bit on what areas of compromise there might be with respect to these rights. I would especially like to hear if there is any . . . way of . . . getting at the fact that big money is clearly in play in these types of decisions. Is there a way of just making the decisions in a way so that when big money is involved it doesn't impact little money [audience laughter] in a way so that Mickey Mouse is protected, but the silly little advertisements in the back of a magazine that don't even exist anymore in 1926, isn't."

***** Lutzker:** "Well let me follow directly on that point. . . . One of the things that came out of our policy debate in the Copyright Term Extension Act was just that concept. . . . There is a point at which certain materials have a longevity and copyright now for over 100 years. . . . You can still sell certain copyrighted works a hundred years later, but there is a gigantic amount of material of which there is no commercial value in the sense that Alan's industry would recognize it. Not only that, I dare say, more material resides in libraries that the publishers don't even know they have. And when we had the debate on the copyright term extension, a concept that we addressed and that is now in a provision of the copyright statute - a provision was given very reluctantly by the publishers who were focusing on this very point - was that if a work is not subject to normal commercial exploitation - meaning you can't get it at a regular price, it is not sold at book stores or otherwise available - libraries and educators who have access to a copy should be able to use it during this copyright term as if it were in the public domain. And if that use, or any other use, creates a market - like Jane Austen's long lost novel becomes discovered in the garage and has best seller potential - you pull it back. You are dealing with a handful of works. But the issue you raise is just that point. There is a gigantic amount of material, even in the digital age I dare say, most of the material that is created today is going to be not really commercially exploited 5, 10, 15, 20 years from now. But copyright law says

exclusivity is good for 100 years. And we need to reconcile these positions.

. . . But when you reach a point with material that is for scholastic purposes, that publishers don't even know whether they have it or not, there ought to be a line drawn at that point in favor of greater availability. And the way you deal with that, and again I repeat, and I don't want Alan to get away with this, frankly ... copyright law gives rights, but it also comes with burdens, limitations on those rights. Fair use is a limitation. You have fair use whether you know it or not. Just as a publisher has a right to disseminate digitally whether they do it or not, you've got the right of fair use. How do you reconcile that? . . . You reconcile it by not contesting every single use. You establish understandings - whether in the statute or not - that you don't bring lawsuits. If you believe thumbnail images are okay, then the publishers should stand back and allow certain activities. But by making every single use a focal point of litigation concern -- "I'll sue you if you do that" -- we now have an environment in which everybody can approach even minor things with trepidation. And you don't really know the full dimensions of the limitations until they are resolved in court.

Adler: But again let me remind you about the lack of homogeneity among the copyright based industries and their approach to these issues. . . .

Most people engage in fair uses every day, as a kind of safety valve with respect to copyright, that go unknown, unquestioned, and may occur in a school or in a library or in your own home. That kind of fair use works quite well that way. But when fair use gets pumped up to become an affirmative right, and people want to list those rights in terms of "I've got to be able to use this work that I bought on all five different digital platform devices that I bought," publishers and other copyright owners rightly ask "Where's that written in copyright law?" There's nothing in copyright law that says a publisher has to put out a digital edition of a book. Nothing! The only reason a publisher does that is because the publisher's business is to promote the sale or the use under license of works that are commercially produced for that purpose. So, for example, . . . E-books are now out in their first generation, sort of like the Edsel. It's not surprising that consumers haven't taken to them very readily. Why? Well, the main reason is that publishers, who only control the rights to literary works that [are] published in electronic form, are not the people who control the devices in which these books are used, or the software that allows these electronic versions of these books to be used in those devices. Right now, while Adobe is still battling with Microsoft for proprietary dominance in the software market governing E-books, they've made E-books relatively unpopular, because they are not interoperable. You have to worry about whether or not the author you want to read is being published in a Microsoft reader lit format or in Adobe's PDF format. That's not something publishers can control. That is something consumers control in the marketplace. Now, consumers have sent a message back to the publishers, saying unless you resolve this problem and make this completely transparent to us so that we don't have to worry what particular devices we want to use our E-books on, or which kind of formats the E-books have been published in, we are simply not going to buy E-books. And you know what'll happen? That will be just one of very many products that were

introduced into the marketplace and didn't make it. The one thing I can assure you is this: if ebooks are going to make it, it will be because of consumer acceptance in the marketplace, based on a dialog between the consumers and producers and sellers, not because the government, in all of its great timely wisdom, is going to step in and be able to prescribe exactly how the law should require ebooks to be designed for consumers' expectations. I find it extremely ironic to hear the call for Government internvention, because I have often hear[d] Arnie in [other] contexts, talk about copyright law stifling technological innovations. Copyright law is not stifling technological innovation. Technological innovation is occurring at such a rapid pace, with such diversity, that of course copyright law, like other laws, can't keep up with it as a matter of policy. But that's good, because basically in our society, we operate in an open competitive marketplace. While there are laws dealing with things like fraud and misrepresentation, generally speaking the law does not tell producers of products how those products should be designed, what capabilities they should operate with, and how they should meet or not meet, whatever expectations consumers consider in deciding whether to purchase those products. So the answer to the question is that - with technology moving at such a rapid pace that it not only outstrips the law itself, but even the pace of businesses, who after all are not as adroit as some might claim them to be, and can't turn on a dime in completely reshaping their business models in terms of investment, in terms of marketing, in terms of how a product is presented on the marketplace - we need time to transition. Right now the internet clock moves so rapidly that people don't realize it has been only four years since the Digital Millennium Copyright Act was enacted. It's not even ten years since Al Gore invented the internet. [audience laughter] Okay. But the problem is that technology changes so rapidly, we see new applications of it every day. We expect the market place to be adroit and sometimes it's not. But it's a mistake to ask the Government to come in and make those adjustments for the consumer in the market place. What you will have is a second rate, unsatisfactory product that will disappear from the market before consumers have a chance to see them perfected based upon they are telling the producers they want to purchase."

The moderator takes another question:

". . . I wanted to go back to the issue of access, and the fact that in the internet environment, access also means the ability to copy and to download and that's obviously the big issue in the music industry, and also could apply to the . . . years of a subscription for which you have access to, and you want to cancel your subscription, you could theoretically download those issues and have them in your possession. And I'm wondering . . . what controls are being applied or investigated and how that affects the whole fair use issue."

Adler: "Well basically this is where the debate about the use of technological measures really comes to the fore. And our industry just produced a white paper, which you'll find if you go to our website at www.publishers.org (hot link). You'll see a white paper that was jointly produced with the American Library Association which, interestingly enough, has become the main test bed for E-books. They're doing more than any publisher, or

Microsoft, or Adobe, or GemStar, . . . is doing to try to introduce the public to E-books and get around questions of how it works . We . . . [evaluated] what is out there in the way of literature, surveys, and Q & A, that explains what consumers want from E-book products. What kind of preferences, what capabilities they want to see, what problems they have with respect to the way ebooks operate today. And unquestionably, one of the lessons we learned is that we are a little too heavy handed with technological protection measures because of our fear that this material, in digital format,

. . . can so easily get away from us because of its capability of being reproduced and distributed globally, that perhaps we have been a little too heavy handed with technological protection measures. So again there is an effort here to try to adjust that. And that's an adjustment pattern that exists with respect to any commercial product that's been introduced into the marketplace to less than resounding acceptance. The difference, though, is that there are critics of the DMCA, and there are critics of copyright owner's use of the technological measures, . . . [who] want the government to step in and say 'we want the right to be able to circumvent technological measures that are used by the copyright owner, if our purpose is to engage in fair use of the work that is being protected.' It sounds, superficially, quite reasonable but there is one big problem with that: there is not [a] technology today that can tell the difference between a fair use and an unfair use. And if you legalize the ability to circumvent technological protection measures - ostensibly for the purpose of facilitating fair use or other non-infringing uses - you will of course at the same time, as a practical matter, legalize the ability to circumvent for unfair uses. The problem is that the people who argue in favor of such an exception also, quite naturally, demand that the tools to facilitate that circumvention must be legal and widely available. And if those tools are legal and widely available, [the problem is that] they can't tell the difference between whether or not they are circumventing the technological protections to allow somebody to make a fair use of the work, or they're circumventing technological protection measures to allow somebody to run off 600,000 copies of it and distribute it around the world. Right now Congress had to make a judgment that - until the business model develops, until we find other ways of being confident about our ability to market materials in digital format, including on the internet - we need this kind of protection. It's not going to last forever, and it's not going to be perfect, because we all know that what we are really trying to do is control the leakage sufficiently to give us a valid business model. But right now, four years after the enactment of the DMCA, less than 10 years after vice president Al Gore's pinnacle... we're not there."

Lutzker: "Let me try to clarify. [audience laughter] The debate on the DMCA was an access issue. What are the rules about getting access to work? And the DMCA set up prohibitions on unauthorized access...and the Copyright Office engages in these proceedings every three years as a fail safe, theoretically, to fill in the gaps. When . . . you haven't paid [for] . . . access, . . . there are certain specific limitations that the statute permits so the law can be reconciled with other public policy. When the situation is "I paid for access...I've got the license," then the question is, can I make a copy of what I've [accessed]? You've now moved out of the DMCA, and you're back in the good old

regular copyright law domain. There's a provision in the DMCA that says nothing in the DMCA is going to limit what you otherwise could do under copyright law - meaning fair use, first sale, library photocopying, educational uses. So when Alan starts mixing metaphors, in terms of access and copying, we're really now into the nub of what it [the DMCA] is about, because, . . . you have certain rights if a work has been published. This is the deal with this publishing community, if they make the investment and publish, then the public has certain entitlements to make use of that published work. Not to make 600,000 copies! We'll join together to find those people and tell them and deal with them, because the law is very, very rigorous, and the publishing community knows how to enforce the law. That's not the issue. [audience laugher] I'm restraining myself [more audience laughter] trust me . . . The copyright law says that you can make certain copies [and] you can make fair uses of that published work. And that's what the DMCA says. Now you have a situation, technologically, and this is really where the source of the nub is, if you have an access control, that restricts access to authorized users, and buried within that access control is a technological measure that also limits the copying of that work, you have merged access and copy controls to such an extent that an individual may be constrained in the fair application of fair use or other rights. And that's where the debate was, theoretically let's say, because one of the arguments in 1998 was this stuff is so new it's not out in the market place yet. But now it's coming out in the market place. And now the issues are the merger of access and copy controls and what are the implications from a policy, from an implication of copyright law. So what are the basics of copyright legal principles? Alan will leave it to the market place; he doesn't want the government to regulate. But I got news for you. The copyright law is one of the most heavily regulated statutes that we've got. It recognized that the interplay of commerce and of the players in the market place. Now historically . . . there was a . . . relationship - a friendly relationship - between the content-holding community and the statutory-creating community. And where there has been tension in recent years is the user community has come more to the fore, and while the user rights have been there, the question now is, in a digital environment, what are the rights of users? Are they lawful users? If they're lawful, you fit a certain category. . . . And again I say we haven't completely calibrated this correctly yet because people, when they start realizing what's happening, may get an unsettling feeling, I've paid for something, what can I do with it? Or I'm in a library, what can a librarian get me if it's a digital work. And recognize, this is where the products are heading in the future. And so again, I say we need to distinguish between access and copy controls, and when you start dealing with copy controls your in a different domain."

The moderator takes one last question from an audience member: "I don't know if this is a pertinent question, but I have a question for Mr. Lutzker about Bridgeman. You referred to the progeny of Bridgeman working their way through the museums. And I didn't know if you were talking about legal lawsuit progeny or museum rights, reproductions, etc. . . . [C]ould you talk about Bridgeman and its progeny and where we stand."

Lutzker: "Well, one of the things . . . that was intriguing about Bridgeman was that it was a case that no one quite wanted . . . to be brought. And the fact that it disappeared

when it did was viewed with some, shall we say, relief within the community. And you know, like anything, the Bridgeman concept that a photograph, which traditionally was viewed as a protectable work, was not protectable in this particular case, has a very limited set of facts that it was dealing with . . . because it was a two dimensional work.. . . [If]you take a photograph of a public domain three dimensional work, what's the implication of that? If you have a copyrighted work that you are taking a photograph of, what is the relationship of the ruling to those facts? I don't have great insight or know . . . exactly where the museum community is headed in this, but when I first read the decision it struck me as, in some ways, counter intuitive, because photography has its entitlements. But the slavish copy/originality issue was really at the core. And I know that the museum community was not excited about the case being in play. So, maybe, I suspect that there is not a whole lot of progeny at this point, but that case stands for what it is...which is a district court decision. It wasn't appealed, so you don't have the laws of the larger second circuit. It does have important implications for the museum community. I don't know if that is specific enough but I'd say that the progeny right now maybe limited because it raises more questions than it may answer."

The moderator thanks the speakers and notes that this was our first point counter point session. [audience applause]

TALKING POINTS for the session as provided by the Public Policy Committee:

--With other media, a consumer could either lend or make a copy without hurting profits. There are many impediments, both legal and technological, from doing this in electronic formats. Why the reluctance? Many consumers who borrow or copy material end up purchasing more works as a result of this initial access.

--If circumventing is done as an academic exercise to further research that prevents unlawful circumvention, why have researchers been prohibited from sharing and publishing their findings within their community?

--Won't media corporations eventually suffer if the public domain from which they benefit continues to dwindle?

--Couldn't there be separate legislation protecting individual copyright holders and creators so that corporations can't hide behind them for protection?

--What is your opinion on Lawrence Lessig's proposal for a nominal copyright tax (Eric Eldred Act)?

--Will we see more disputes over what constitutes commentary on popular culture or parody and what constitutes copyright infringement?

--Will certain works be unavailable for academic study because of the time and expense involved in getting permission to use them for teaching or further investigation?

--Are there other documents of public record in danger of being controlled in a monopolistic way that will put them out of the information commons as in the case of West Publishing copyrighting its pagination for WestLaw? What is the relevance of pagination if WestLaw is available online?

--What do you see as the legislative prospects for the 108th Congress - in particular, Rep. Boucher's bill?

--Attempts to strengthen copyright and IP protections have addressed several aspects of law recently, including length of term (CTEA), copyrightability of facts (database protection), the new anit-circumvention provisions of the DMCA, and the enforcibility of contracts of adhesion (UCITA). Art librarians have been especially concerned about the debate over the definition of "originality" in the law, particularly as applied to photographs (and other "slavish copies") of works of art. Since the recent Bridgeman decision did not settle the legal issue, do you foresee further action to address this issue, either in the legislative or judicial areana?

--It seems that some of the recent US legislative proposals regarding copyright have been prompted by European harmonization efforts and international treaties/negotiations (WIPO). How directly is US policy driven by this, and what is the role of possible trade imbalances caused by failure to "harmonize"?

Allan Robert Adler

"At present, Mr. Adler is Vice President for Legal and Governmental Affairs in the Washington, D.C. office of the Association of American Publishers (AAP), the national trade organization which represents our Nations's book and journal publishing industries.

From 1989 until joining AAP in 1996, Mr. Adler practiced law as a member of Cohn and Marks, the Washington, D.C. communications law firm. His practice focused primarily on government relations in areas of federal law, regulation and policy concerning information, telecommunications & technology. Mr. Adler's practice included work on federal legislation and rulemaking affecting cable & broadcast television, telemarketing, electronic publishing, copyright, postsecondary education and career training programs, and First Amendment interests of the news media.

Prior to joining Cohn and Marks, Mr. Adler served as legislative Counsel to the American Civil Liberties Union (1981-1989), where he presented testimony before various committees of Congress on a broad range of issues concerning the public's right to obtain and disseminate information. He also represented the ACLU concerning a

variety of public policy matters relating to national security, privacy, and the due process rights of employees in the workplace.

During his years as an ACLU attorney, Mr. Adler became well-known for his work involving the Freedom of Information Act; the Privacy Act; requirements for classification and safeguarding of National Security Information; the Federal Personnel Security Clearance Program; and polygraph and drug testing in the workplace.

For over sixteen years, Mr. Adler was the editor of annual editions of Litigation Under the Federal Open Government Laws, a popular attorney's handbook for which he received the Playboy Foundation's First Amendment Award for Book Publishing in 1991.

Before representing the ACLU, Mr. Adler was a staff attorney with the Center for National Security Studies (1978-1981) and Staff Director for The Reporters Committee for Freedom of the Press (1977-1978).

Mr. Adler holds a B.A. in History from the State University of New York at Binghamton (1974) and a Juris Doctor from the National Law Center of The George Washington University in Washington, D.C. (1978).

Mr. Adler has been a member of the State Department's Advisory Committee on International Communications and Information Policy ("ACICIP") since his appointment to it in 1997." (Supplied by Mr. Adler to Roger Lawson, Public Policy Committee Co-Chair).

Arnold Lutzker

Arnold Lutzker practices copyright, trademark, Internet, entertainment and art law. He counsels on issues of ownership and exploitation of intellectual property and assists clients in matters of selection and registration, licensing, infringement and effective management and exploitation of copyright and trademark portfolios. He has special expertise in the copyright and trademark issues that surround the print and electronic media, television and film production, the Internet, multimedia, information infrastructure and intellectual property policy.

In 30 years of private practice, Mr. Lutzker has advised many media companies, including Cox Enterprises, Multimedia Enteratinement, Newhouse Broadcasting, USA Networks, Home Shopping Network and gannett Co., Inc. Since 1994, he has represented a consortium of five national library associations regarding copyright and Internet issues. He has also counseled numerous colleges and universities (including Ohio State, Arkansas and Wisconsin) about intellectual property law and assisted institutions in establishing licensing programs. He has served as outside counsel to UDV (Diageo), handling trademark matters for the company's famous brands that include J&B, Ouzo #12 and Malibu.

A successful advocate, Mr. Lutzker has won U.S. Court of Appeals cases involving the cable copyright compulsory license, video monitoring and trade dress. For the library associations, he filed amici briefs in the U.S. Supreme Court in Tasini v. New York Times and National Geographic Society v. Greenberg (work for hire cases) and Eldred v. Ashcroft (the legal challenge to the Copyright Term Extension Act). He has also handled multi-million dollar copyright royalty claims for the producers of Donahue and Sally Jesse Raphael television shows and routinely counsels clients on music rights and clearances.

In the legislative and policy area, he advised the Directors Guild of America in connection with its effort to protect classic American movies and to secure residuals for directors. He has prepared prominent witnesses (notably Steven Spielberg, George Lucas, Woody Allen, Jimmy Stewart, Milos Forman and Martin Scorcese) for hearings before House and Senate committees. In the Digital Millennium Copyright Act debate, he represented library and educational interests. He was chief negotiator for these associations on bills dealing with Online Service Provider limitation on liability, Copyright Term Extension, Fair Use, Distance Education and Database. Among legislation he has worked on are the following: The Satellite Home Viewers Act (1987), The Berne Treaty Implementation Amendments (1988), The National Film Preservation Act (1988), The Digital Millennium Copyright Act (1998), The Copyright Term Extension Act (1998) and the TEACH Act (2002, awaiting final House action).

In the arts, since 1988 he has served as General Counsel of the Cultural Alliance of Greater Washington, A nonprofit service organization comprised of more than 300 arts organizations and civic institutions. He is a member of the Board of Directors of the DC International Film Festival and was special legal advisor to the American Russian Cultural cooperation Foundation and its touring art exhibition, JEWELS OF THE ROMANOVS: Treasures of the Russian Imperial Court. Mr. Lutzker is co-founder of Palace Arts Foundation, and organized its critically acclaimed touring exhibition, Palace of Gold & Light: Treasures from the Topkapi, Istanbul.

He also is co-founder of three commercial ventures, InterStar Releasing (a theatrical motion picture production and distribution company that was sold to Westinghouse's Group W. Division), Cineports International (a broadband startup that will provide on a streaming, subscription basis movies from more than a dozen countries) and Entera Entertainment (an entertainment company specializing in Spanish and Hispanic-themed music, television programs and film).

He is the author of two books, Copyrights and Trademarks for Media Professionals (Focal Press, 1997) (currently working on a second edition) and Legal Problems in Broadcasting (Great Plains University Press, 1974); a video, Copyrights: The Internet, Multimedia and the Law (Taylor Communications, 1997); The Primer on the Digital Millennium Copyright Act; and numerous articles on copyright and trademark issues. Prior to establishing Lutzker & Lutzker LLP, he was a partner in the Washington firms of Fish & Richardson, P.C. and Dow, Lohnes & Albertson, and was legislative counsel to

Cong. Jonathan B. Bingham. He graduated City College of New York (1968, magna cum laude) and Harvard Law School (1971, cum laude).