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Conference Session III: Advocacy

Kevin Smith, the Dean of Libraries at the University of Kansas, offered a thoughtful yet practical presentation on the advocate role in copyright education. He began by noting that copyright law evolves through a series of decisions and actions, and understanding the forces operating in the environment for these decisions is necessary. He acknowledged a debt to James Boyle, a law professor and cofounder of the Center for the Study of the Public Domain at Duke University, who developed the idea of copyright reform modeled on the environmental movement. This comparison helps the participants understand the interests, incentives, and obstacles that are in play for the decision makers on this issue.

Copyright is instrumental; it is intended for a specific purpose (promoting the progress of science and useful arts). Yet competing beliefs and values come into play in interpreting how this purpose is achieved. He offered the example of copyright term extension. For some, this action supports the incentive purpose of copyright. One factor that was probably persuasive for some lawmakers was the idea that we needed to match the terms in other countries. The idea that extending the term of copyright would increase profits also played into some decisions. The efforts that lobbyists make on behalf of well-funded interests clearly influence positions, arguably more than the “unorganized and under-informed public.”

While some may think that data should be the basis for such decisions, data are “elusive and controversial” in copyright discussions. Copyright-related data are difficult to gather and are often held by parties who do not see it in their interest to make the data available. Other obstacles in the environment also influence decisions, such as inefficiencies in the copyright management system that make fair use challenging to practice and that cre-

ate opportunities for profit-making ventures (such as the Copyright Clearance Center) to operate. Another force in the environment against fair use is that most copyright laws in other countries do not offer similar exceptions and limitations, and this creates pressure to harmonize with the international legal environment. Given the fact that data for making judgments about copyright are difficult to obtain, what does work to persuade policy makers? Storytelling is an effective way to make one's case because human beings respond more to stories than they do to data. The narratives embedded in copyright case law are more interesting and memorable than the rules and abstract principles they demonstrate.

Smith offered some examples from his own experience, including the story of a student at Duke who had to use his campus login to access paywalled content while serving as a Congressional intern. Hearing this story persuaded the professors in attendance to realize that real barriers were in place that could reduce the impact of their work in the public sphere.

Tailoring examples and approaches to a specific audience is also important. Analogies and metaphors that the audience can recognize and understand should be chosen. For example, publishers easily understand the *Harper & Row v. Nation* case, while fair use advocates are drawn to a case such as *Sony v. Universal*, where they can see a widespread, everyday version of fair use. When speaking to faculty, copyright librarians are usually focused on author rights, so they should emphasize the personal benefits of keeping copyright to increase citation rates and public impact. A useful strategy is to ask the audience to imagine what would happen if the position they espouse were universally practiced, as well as what would happen if the opposing view were promoted.

When speaking about policy to administrators or faculty leaders, focusing on mission, institutional benefits, and how the practice will appear to higher-level stakeholders or funding bodies is advisable. Addressing the question of risk is important. Audiences should be encouraged to see the realistic risks on both sides, including the risks of *not* fulfilling the institutional mission out of misplaced fears or concerns.

When copyright librarians are talking about law, the audience is typically legislators, their aides, and bureaucrats. This is usually a more formal, adversarial setting in which someone will explicitly argue against the presenter's view. Using a combination of stories and "anecdota" that convey how a decision will make a concrete difference in the lives of constituents is the best approach. At the same time that librarians advocate a particular position, they have to be open to alternatives and compromises. If the first choice cannot be had, a next-best alternative that is better than what the opposing group is proposing should be pursued. Copyright librarians should

be prepared to accept the best deal they can get, even if it is not what they demanded.

Presenting risk in a way that minimizes fears is an important part of advocacy in copyright, and the law itself explicitly increases and mitigates risk in certain areas. For instance, statutory damages increase risk, but this is counterbalanced by section 504(c)2, which protects library employees who conscientiously practice fair use from these damages.

Finally, Smith offered a very basic but very important strategy: to simply “be nice.” Advocates who are perceived as cooperative and friendly are rewarded with success in the courtroom and in negotiations. They can be passionately committed to a position but remain professional and respectful toward those with opposing viewpoints.

During the question and answer session that followed the presentation, the audience members shared some challenges they had experienced in advocating various copyright positions. One person described her efforts to counter what she saw as a very laissez-faire attitude toward copyright infringement on her campus. Smith noted that librarians are often in the position of advocating for rights holders on campus, and they should embrace this role so that sometimes-suspicious policy makers will see that we are not on one side or the other, but are advocating balance. Kenneth Crews reiterated this point, acknowledging that librarians have to keep reminding themselves that they are often on both sides of the issue at the same time. Smith observed that the basic principle of “do unto others as you would have them do unto you” is a good way to think about the ethics of copyright. He offered a perspective from another colleague at Duke, who asserted that it is inevitable that operating on both sides of an issue will lead to mistakes. Copyright librarians need to work together to make good decisions and work toward the balance of rights and interests.