

Final Report

UNC-CH Copyright Committee, 1997-98

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Executive Summary

For the past two decades prices paid by academic libraries for scientific journals have increased at roughly three times the rate of inflation, owing largely to monopolistic practices by large, for-profit publishers. In essence, faculty give away copyright to their scholarly work in exchange for publication of that work, and universities buy that work back at extraordinarily high prices. The resulting crisis in library funding has led to numerous efforts to develop new models for scholarly publication wherein the rights associated with copyright ownership would be managed to protect the universities from unreasonable prices and to preserve for the faculty certain rights to use and distribute their work. The UNC Copyright Committee was formed by the Provost to examine models for copyright ownership proposed in 1994 by the Task Force on Intellectual Property Rights in an Electronic Environment, sponsored by the Association of American Universities, and to investigate other issues related to copyright policy of importance to the University.

Much has happened since the 1994 Task Force Report was released. In particular, the development and maturation of digital communication has created a host of new issues with respect to both ownership and use of copyrighted material. Class and faculty Websites, distance learning, and multimedia instruction are among the developments that present a bewildering set of legal issues about which faculty and staff are at best poorly informed and with respect to which the University is exposed to potential litigation.

The Committee proposes that, as an initial step, UNC-CH and the University system adopt general principles with respect to copyright use and ownership to guide development of institutional policy, shaping of positions for the political arena, and response to proposals for interinstitutional collaborations. The specific policy statement proposed by the Committee focuses on encouraging and educating faculty to exercise fully the fair use provision of the federal copyright law. The Committee further recommends that the UNC system join other institutions in endorsing the "Principles for Managing Intellectual Property in the Digital Environment" proposed by the National Humanities Alliance.

Issues related to ownership of copyrighted materials have become too complex for individual faculty to maintain necessary awareness without assistance. The University needs a mechanism for promoting awareness of copyright law and for providing specific guidance to individuals with questions related to use of copyrighted materials. We recommend the establishment of an Office of Scholarly Communication at UNC-CH. Its purpose would be to support the University's teaching, research and service missions in matters related to the creation, dissemination and use of scholarly information. The office would assist members of the University community in dealing with copyright issues that arise in the course of creating original work and in the use of copyrighted works for teaching, research, and service. The office would also offer legal advice when appropriate, provide draft contracts designed to protect faculty and

university rights, and provide suggested copyright ownership policies for faculty to propose to their professional associations. Establishment of the Office is critical to the implementation of most of the other proposals in this report. In addition, we recommend the formation of a standing University Committee on Copyright to propose and monitor application of policy and guidelines with respect to copyright, and to work with the Office of Scholarly Communication in evaluating faculty needs in this area.

The University requires a basic set of principles with respect to use of copyrighted material to guide faculty, staff and students. These principles should be broad in outline and recognize the ability of faculty and staff to make good faith decisions about particular circumstances. The Committee has developed and proposes adoption of a "Copyright use policy for faculty, staff and students." Preparation of detailed guidelines (not rules) for implementation of the Copyright Use Policy would be the responsibility of the Office of Scholarly Communication.

The question of who owns copyright of scholarly works produced by faculty and staff is not especially important if the rights associated with copyright ownership are appropriately distributed. Authors should be encouraged to retain rights for themselves and their campuses, and should be given guidance as to how best to do so. With respect to books, music and works of art, faculty members should retain full rights to select publishers and retain royalties, regardless of changes in copyright ownership policies that may be adopted by UNC-CH with respect to journal articles.

The unconditional assignment to publishers of copyright for works produced by University faculty, staff and students can and often does lead to inappropriate, undesirable and unnecessary constraints on the distribution of the knowledge created by the university community. In order for universities to effectively defend against monopolistic practices by for-profit academic publishers, and to consistently retain critical rights associated with ownership of copyright, universities must agree to work together. No single university or state system is large enough to have a significant impact if it acts alone. Although the Committee does not advocate any immediate change in copyright management or ownership on the part of the University, the Committee recommends that UNC-CH position itself to encourage and participate in major, multi-university collaborations aimed at implementing new copyright management and ownership models and publication mechanisms designed to alleviate or eliminate the current crisis in the cost of journals and other scholarly information sources. The Committee proposes a resolution for adoption by UNC-CH and the University system indicating interest in and willingness to cooperate with large-scale, multi-institutional programs involving new models for copyright ownership for journal articles. The University should thereby publicly express its desire to negotiate with other universities collaborative agreements that would, through changes in acquisition practices, development of alternatives to commercial publication of scholarly work, or changes in the distribution of rights associated with copyright ownership, assure the more widespread distribution of the knowledge created by its faculty, staff and students, and the protection and retention of critical rights by the creators of the copyrighted works and the University.

The University lacks clear ownership policies for some forms of copyrightable material used in instructional activities, particularly digital material such as course Websites, course software, distance-learning products and multimedia productions. For some of these items there should be joint ownership between faculty and the University with a distribution of royalties. In other cases, there should be an unambiguous distribution of rights that protects the interests of both the creator and the University. The Committee recommends that the UNC System establish policy on ownership of instructional materials.

Committee Report

1. Introduction

1.1 Background. During the decade 1986-96 the Consumer Price Index rose 44 percent, prices of monographic books rose 62 percent, the price of health care rose 84 percent, and the prices of scientific journals rose 148 percent, or three times the rate of inflation.¹ The run-away inflation in the prices of scientific journals, which has been ongoing for two to three decades, stems largely from monopolistic practices by a few very large commercial publishing conglomerates that specialize in what they describe to their shareholders as "must-have" information. Similar runaway inflation characterizes prices for critical information these publishers provide for other fields such as law and business.

Perhaps the most extreme case is that of Reed-Elsevier, one of the world's largest and most profitable publishing firms. In 1996 Reed-Elsevier made gross profits of \$3.5 billion on sales of \$5.7 billion.² Currently, the average ARL (Association of Research Libraries) library pays \$628,000 for 378 journal subscriptions from Elsevier Scientific (a component firm of Reed-Elsevier). This represents 3.5 percent of its serials titles, but 21 percent of its acquisitions budget. Each year UNC-CH pays more to Elsevier Scientific for acquisitions than to all 110 university presses combined. The situation continues to grow worse: price increases for a representative set of Elsevier Scientific journals increased between 45 and 66 percent during the period 1995-98.³ Subscription prices for journals published by scholarly societies range from a fifth to a tenth the price per page of those published by for-profit firms, yet those scholarly societies typically record surplus income in their journal operations, which they use to support other society activities.

High prices paid by libraries for journals published by commercial publishers have necessitated cancellation of numerous journal subscriptions and dramatic decreases in book purchases. Owing to high prices, personal subscriptions to these scientific journals are now almost non-existent, which leaves individual researchers particularly dependent on libraries. The commercial publishers power over this market is directly linked to the absolute need of scholars for the information in their copyrighted journals. Scholarly journals are the primary form of communication in the scientific community and constitute a crucial part of the entire scholarly enterprise. Article publications and citations will continue to be used for evaluation of faculty candidates

¹ David Shulenburger, Provost, University of Kansas. 1997. *Cited in:* To publish and perish. Policy Perspectives 7(4). Institute for Research on Higher Education. (<http://www.irhe.upenn.edu/pp/pp-main.html>)

² <http://www.reed-elsevier.com/combstat.html>; also see Case, M.M. 1998. ARL promotes competition through SPARC: The Scholarly Publishing and Academic Resources Coalition. ARL Newsletter 196. (<http://www.arl.org/newsltr/196/sparc.html>)

³ For representative examples, id. Table 1)

being considered for promotion or tenure, as well as for evaluation of funding proposals and of entire university departments.

1.2 The charge. The crisis in serial costs has generated numerous conferences and collaborations aimed at devising new policies and models for publication and copyright ownership. One such group, sponsored by the AAU (Association of American Universities), was the Task Force on Intellectual Property Rights in an Electronic Environment. This group generated a report⁴ in 1994 that proposed four scenarios for improving the management of copyrights at research universities. The UNC-CH Copyright Committee was formed primarily to evaluate whether UNC-CH should adopt one of these new models. The full charge to the Committee is included as Attachment 1.

1.3 Scope of activities. The Committee was also charged to consider any additional issues it identified during its deliberations. This is fortunate, as much has happened with respect to copyright issues since the Task Force Report was released in 1994. The recent development and maturation of digital communication has created a host of new issues with respect to both ownership and use of copyrighted material. Use of websites for purposes of instruction and scholarly communication has exploded, but most creators of websites know little if anything about the relevant copyright laws and policies. Distance learning and multimedia presentation present special problems. The University needs to consider how best to protect the rights of the institution and its constituent faculty and students, and how to educate the faculty and students as to legal issues related to copyrighted materials.

The deliberations of this committee have gone well beyond what was envisioned at the time its charge was crafted. In the judgment of the Committee, the best interests of the University have been served by being proactive in addressing as broad a range of copyright issues as possible. Had we focused exclusively on copyright ownership for articles in scientific journals, another committee would have been needed within a year to address other issues, especially those related to use of copyrighted materials. The Committee agreed that it should attempt to address as broadly as possible issues related to ownership of copyright and access to copyrighted material by members of the University community. These included, among others, (1) copyright ownership for materials produced by the various members of the University community, (2) copyright ownership for non-journal publications such as books, images and performances, (3) use of copyrighted material in teaching, with particular emphasis on electronic reserves, course websites, multimedia and distance learning, (4) compliance with copyright law by University personnel, and (5) uncertainty for faculty and other problems associated with copyright law.

In this report we first propose general principles that should guide the University in all its deliberations with respect to copyright ownership and copyright use. Core to all recommendations of the Committee is a mechanism for educating and advising faculty. Toward this end we propose creation of an Office of Scholarly Communication. We next propose general policy with respect to use of copyrighted material by faculty, staff

⁴ <http://arl.cni.org/aau/IPTOC.html>

and students. The complexities of use of copyrighted material in a digital environment represent an area of rapidly growing concern and one in which the Committee felt it might have the largest immediate impact. We then return to the issue of copyright ownership, which was the primary focus of our charge. This issue is extremely complex and cannot be resolved by the University in isolation. We observe that copyright ownership is not a significant issue if the rights associated with ownership are appropriately distributed. We also observe that the underlying problems that caused ownership issues to be examined cannot be resolved by any unilateral action on the part of the University; a large-scale, multi-institutional effort will be required. We propose that the University declare its interest in formulating and participating in such an effort.

2. General University principles with respect to copyright

The University of North Carolina and the Chapel Hill campus have been and will for the foreseeable future continue to be confronted by the dual challenges of unacceptable price inflation for library and other information resources and a rapidly changing legal environment with respect to use of copyrighted material, especially as related to digital communication. Before grappling with legislative initiatives, responding to proposals for interinstitutional collaborations, or developing new University policy, it is important to articulate a set of broad principles that can be used to guide positioning in the political arena and development of institutional policy.

2.1 Principles with respect to fair use. Copyright law exists both to protect the rights of the creators of copyrighted works and to ensure the availability of those works to the public. Faculty, staff and students create copyrighted works, the University supports and facilitates the development of copyrighted works, its Press publishes copyrighted works, and students, faculty and staff use copyrighted works in teaching, research and learning. Although authors and other creators are entitled to exclusive rights in the works they develop, the users of copyrighted works also have certain rights. The U.S. Constitution, in Article 1, section 8, clause 8, states that “the Congress shall have Power...to promote the Progress of Science and useful arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Promotion of learning and creativity is the reason that copyright law exists, a mission that coincides with that of the University.

The Copyright Act of 1976⁵ details the exclusive rights of the copyright holder: reproduction, distribution, adaptation, performance and display.⁶ Equally important are the limitations on the exclusive rights of the copyright owner that are included in the

⁵ 17 U.S.C. §§ 101-1101 (1994).

⁶ *Id.* § 106.

statute.⁷ Of these, fair use is the most important. According to section 107,

... [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or any other means specified by that section for purposes such as criticism, comment, news reporting, teaching (including multiple copying for classroom use), scholarship or research, is not an infringement of copyright.⁸

According to the statute, teaching, scholarship and research are favored uses of copyrighted works. Although not all nonprofit educational uses are fair uses, many are.⁹

Rights that are not exercised often are forfeited. If the University were to require that permission be obtained to use copyrighted works when the use is a fair use, fair use rights enjoyed by members of the University community would be threatened. UNC-CH has traditionally encouraged its faculty, staff and students to exercise their rights to use copyrighted works in the furtherance of teaching and learning.

Fair use depends on the facts and circumstances of the given situation. Therefore, the person closest to those facts is best suited to determine the law's application. It is essential that the University continue to express confidence that its faculty, staff and librarians are able to make good-faith decisions about fair use and that their decisions will best reflect the particular circumstances relevant to the decision. Furthermore, the University must be committed to protecting the fair use rights accorded members of the academic community.

Recommendation 2-1. WE RECOMMEND ADOPTION OF THE FOLLOWING POLICY STATEMENT.

As an institution devoted to the creation, discovery and dissemination of knowledge to serve the State of North Carolina, the University of North Carolina at Chapel Hill is committed to complying with and taking responsible advantage of all applicable laws regarding intellectual property. That commitment includes the full exercise of the rights accorded to users of copyrighted works under the fair use provision of federal copyright law.

Fair use depends on the facts and circumstances of a given situation, and the University is confident that its faculty, librarians and staff are able to make good-faith decisions about fair use that reflect the

⁷ *Id.* §§ 107-121.

⁸ *Id.* § 107.

⁹ There are four factors that a court applies in determining whether a use is a fair use: purpose and character of the use, nature of the copyrighted work, amount and substantiality used and market effect. *Id.*

particular circumstances relevant to such decisions. The State of North Carolina provides insurance for faculty, librarians and staff, and the Attorney General generally provides legal representation for employees sued within the course of their employment, including such cases that might arise through reasonable attempts to exercise fair use of copyrighted materials.

It is therefore the policy of the University of North Carolina at Chapel Hill to encourage the exercise in good faith of full fair use rights by faculty, librarians and staff in furtherance of their teaching, research and service activities. To that end the University shall:

- 1. Inform and educate the community about their fair use rights and the application of the four factors for determining those rights set forth in 17 U.S.C. § 107.*
- 2. Develop and make available through the office of the University Counsel, the Office of Scholarly Communication¹⁰ and other appropriate units, effective resources concerning fair use and intellectual property laws generally and the application of fair use in specific situations, and*
- 3. Avoid, whenever possible, adopting or supporting policies or agreements that would restrict fair use rights.*

2.2 Endorsement of the National Humanities Alliance Principles. The Committee on Libraries and Intellectual Property of the National Humanities Alliance, in order to help build consensus within the educational community on the uses of copyrighted works in the digital environment, prepared a statement of ten basic principles on the uses of copyrighted works in the digital environment.¹¹ The National Humanities Alliance seeks endorsement of these principles by institutions and associations.

We have carefully reviewed the NHA principles and feel that they provide a balanced view of the needs of both providers and users of copyrighted material, while clearly articulating principles of fundamental importance to institutions of higher learning. The introduction to the NHA principles explains that as digital technologies revolutionize the means by which information is recorded, disseminated, accessed, and stored, they are eliminating the technical limits that have supplemented the legal framework of balance between ownership and public dissemination. Specifically, the

¹⁰ A full description of the proposed Office of Scholarly Communication is provided as Section 3 of this document.

¹¹ http://www-ninch.cni.org/ISSUES/COPYRIGHT/PRINCIPLES/NHA_Complete.html; also see Attachment 2.

unlimited technological capacity to disseminate by transmission in ways that can violate the rights of copyright holders confronts the equally unlimited technological capacity to prevent works from being used in ways contemplated by law. Carried to its logical extreme, either trend would destroy the balance, with results that would likely undermine core educational functions as well as radically transform the information marketplace. A primary tenet of the NHA principles is that it is in the interest of the evolving U.S. information society that the legal environment foster rather than disrupt the balance between private intellectual property owners and the public good that is embodied in current law.

The ten NHA principles are as follows. A full elaboration of the rationale can be found in Attachment 2.

- 1. Copyright law provisions for digital works should maintain a balance between the interests of creators and copyright owners and the public that is equivalent to that embodied in current statute. The existing legal balance is consonant with the educational ethic of responsible use of intellectual properties, promotes the free exchange of ideas, and protects the economic interests of copyright holders.*
- 2. Copyright law should foster the maintenance of a viable economic framework of relations between owners and users of copyrighted works.*
- 3. Copyright laws should encourage enhanced ease of compliance rather than increasingly punitive enforcement measures.*
- 4. Copyright law should promote the maintenance of a robust public domain for intellectual properties as a necessary condition for maintaining our intellectual and cultural heritage.*
- 5. Facts should be treated as belonging to the public domain as they are under current law.*
- 6. Copyright law should assure that respect for personal privacy is incorporated into access and rights management systems.*
- 7. Copyright law should uphold the principle that liability for infringing activity rests with the infringing party rather than with third parties. Institutions should accept responsibility for acts undertaken at their behest by individuals but should not be held liable for the acts of individuals--whether or not associated with the institution--acting independently. This principle is an essential underpinning for academic freedom.*
- 8. Educational institutions should foster a climate of institutional respect for intellectual property rights by providing appropriate information to all members of the community and assuring that appropriate resources are available for clearing rights attached to materials to be used by the institution, e.g., in support of*

distance learning.

9. New rights and protections should be created cautiously and only so far as experience proves necessary to meet the Constitutional provision for a limited monopoly to promote the "Progress of Science and useful Arts."

10. Copyright enforcement provisions should not hinder research simply because the products of a line of inquiry might be used in support of infringing activity.

Recommendation 2-2. WE RECOMMEND FORMAL ENDORSEMENT BY THE UNIVERSITY OF NORTH CAROLINA OF THE NATIONAL HUMANITIES ALLIANCE "PRINCIPLES FOR MANAGING INTELLECTUAL PROPERTY IN THE DIGITAL ENVIRONMENT."

3. Office of Scholarly Communication

3.1 Rationale. Faculty, students, and staff at UNC-CH face complex issues related to the use of copyrighted material in teaching, research and publication. Few in the community are well versed in the fundamentals of copyright law, and many are not taking full advantage of fair use because they do not know what is legal. Faculty need help in determining fair use of copyrighted works in paper and electronic formats and legitimate uses of copyrighted material in distance learning and multimedia components. At present, policies are proliferating in conjunction with such projects as Simple Start and Custom Publishing, but faculty involved in assembling or developing course materials have no clearly defined channel or campus agency for assistance on copyright issues.

The University needs a mechanism for promoting awareness of copyright law in the community and for providing specific guidance to individuals faced with questions related to use of copyrighted materials. An office assigned this responsibility would bring greater efficiency to efforts to resolve copyright issues as well as consistency in practice across the campus. Responsible decision making requires that individuals within the community know the fundamentals of copyright and how to apply them in typical situations. The University may be open to significant liability risks if it does not attempt to provide this general awareness and specific guidance when needed.

The issues related to ownership of copyrighted materials have become too complex for individual faculty to maintain necessary awareness without assistance. If the faculty and the University are to successfully negotiate to retain or share critical rights, legal advice must be provided. The faculty also lacks a means to maintain awareness and a working understanding of ongoing judicial interpretations of copyright law and proposed changes in laws. In addition, the University needs a focal point for the development and evolution of intellectual property policy that is responsive to changes in the legal and scholarly communications environment.

The need for an office dedicated to scholarly communication and copyright issues is also driven by several critical trends in the scholarly communication environment which, if not managed in the best interests of our faculty, staff, and students, have the potential to inhibit the free flow of information for scholarly purposes. These trends include:

- possible revision of copyright law that would restrict free access to digital information beyond that currently allowable by law in the print environment;
- development of digital technologies that provide opportunities to extend access to information beyond that now acceptable by law and current practice;
- emergence of digital technologies that provide opportunities to monitor each and every use of electronic information, and to restrict such access except under certain allowable conditions;
- growth of digital libraries as print materials are converted to electronic format and new materials are published only in electronic form;
- growing demand for access to electronic information to support distributed research and learning networks and distance education;
- an increase in the licensing of copyrighted scholarly works, rather than sale, which has the potential to introduce a host of new issues for the users of those works;
- collaborative efforts in developing courseware products and the accompanying issues of shared ownership of intellectual property.

In response to these trends, many research universities (e.g., Indiana University-Purdue University at Indianapolis, University of Texas System, M.I.T.) have begun to establish scholarly communication offices staffed by attorneys. The formal charge to our Committee asked that we consider whether the University needs a staff member dedicated to advising faculty and staff on issues related to copyright. We quickly agreed that such a staff member and an associated office are critically needed to advise on matters related to both copyright ownership and use of copyrighted materials. All four of the AAU scenarios the Committee was charged to evaluate call for increased advice for faculty with respect to ownership of copyright, as did a California State University - SUNY - CUNY Consortium (CETUS)¹² that evaluated copyright ownership issues in higher learning.

This proposal for an Office of Scholarly Communication with emphasis on exercising the full legal rights of users under copyright law is based in part on a model recently established at North Carolina State University. Like the Scholarly Communication Center at NCSU, the office would be housed in the University Library so as to provide a convenient and central location for scholars while simultaneously ensuring ease of access for the library staff. This proposal differs from the NCSU center in that the Director of the office would be authorized to provide legal counsel on copyright issues to the UNC-CH community.

¹² Consortium for Educational Technology for University Systems. 1997. Ownership of new works at the University: Unbundling of rights and the pursuit of higher learning. California State University, State University of New York, City University of New York. (<http://www.cetus.org>).

Recommendation 3-1. WE RECOMMEND THE ESTABLISHMENT OF AN OFFICE OF SCHOLARLY COMMUNICATION AT UNC-CHAPEL HILL. ITS PURPOSE WOULD BE TO SUPPORT THE UNIVERSITY'S TEACHING, RESEARCH AND SERVICE MISSIONS IN MATTERS RELATED TO THE CREATION, DISSEMINATION AND USE OF SCHOLARLY INFORMATION. THE OFFICE WOULD ASSIST MEMBERS OF THE UNIVERSITY COMMUNITY IN DEALING WITH COPYRIGHT ISSUES THAT ARISE IN THE COURSE OF CREATING ORIGINAL WORK AND IN THE USE OF EXISTING COPYRIGHTED WORKS FOR TEACHING, RESEARCH, AND SERVICE, AND WOULD OFFER LEGAL ADVICE WHEN APPROPRIATE. THE DIRECTOR OF THE OFFICE SHOULD BE A LICENSED NORTH CAROLINA ATTORNEY HOUSED IN THE UNIVERSITY LIBRARIES AND REPORTING JOINTLY TO THE ASSOCIATE PROVOST FOR UNIVERSITY LIBRARIES AND THE UNIVERSITY COUNSEL.

3.2 Responsibilities. Proposed responsibilities for the Office of Scholarly Communication fall into four areas:

(1) Provide legal advice to the faculty and others in the UNC-CH community concerning the appropriate use of copyrighted and licensed scholarly information resources.

- Oversee implementation of an approved University policy regarding "fair use" of electronic and non-electronic media.
- Advise faculty and others based on official University policy and interpretations of current law and practice.
- Educate faculty and others concerning "fair use" of electronic and non-electronic media for teaching, research and service.
- Advise faculty and others about obtaining permission to use copyrighted and licensed works.
- Offer access to information resources on scholarly communication issues.
- Offer programs and services to raise faculty awareness about copyright and licensing issues that affect their access to scholarly resources.

(2) Provide legal advice to libraries and other agencies in the institution (e.g., Custom Publishing and the Center for Teaching and Learning) concerning copyright and licensing issues affecting access to scholarly information resources.

- Provide guidance and clarification on desired language, when warranted, on licensing and user privacy issues.
- Provide advice on library-related copyright and patent issues related to theses and dissertations.
- Provide advice on copyright and license issues related to library digitization activities, including such activities performed for faculty and students.
- Serve as the UNC libraries' primary resource regarding fair use and other copyright and licensing-related issues as they relate to library collections and services.
- Offer access to information resources on scholarly communication issues.

(3) Represent the University of North Carolina at Chapel Hill at the regional and

national level.

- Coordinate activities named above with colleagues in similar roles at consortia and other institutions in the area, especially those engaged in cooperative purchase agreements with UNC-CH.
- Take a leadership role in obtaining campus support for new ownership models for scholarly information created by University personnel .
- Take an active role in helping to shape national policies relating to scholarly communication through collaborative efforts with a variety of organizations.
- Develop University policy in areas related to appropriate use and ownership of scholarly information.

(4) *Work with the proposed standing University Committee on Copyright*¹³.

The establishment of the Office of Scholarly Communication is the key recommendation of this report in that many other recommendations depend upon the Office for implementation. Among these are developing a plan and process for implementation of the proposed "Copyright Use Policy for Faculty, Staff, and Students," completing sections of the policy and guidelines designated for future development, promoting and coordinating the dialogue on ownership policies, and pursuing further development of model licensing contracts. The Office will also be critical in pursuing collaborative agreements with scholarly societies, university presses, and other organizations and establishing their legal arrangements.

3.3 Organization. The proposed Office of Scholarly Communication should be staffed by a Director who, ideally, would be a librarian as well as an attorney. This preparation brings to the office the expertise needed to provide legal advice as a member of the University Legal Counsel's staff. It also ensures attention to promoting the greatest degree of access to scholarly information that is allowable by law and current practice. This office will require at least one full-time support staff position and possibly student assistants.

The Director should report jointly to the Associate Provost for University Libraries and the University Legal Counsel. This arrangement should allow the University Legal Counsel to expand its influence and participation in intellectual property matters. The Office of Scholarly Communication should be housed in the Academic Affairs Library to be close to the center of such faculty and student research, digitization efforts, faculty development programs, and digital archiving projects. This proximity would help to ensure that matters related to copyright become an integral part of all projects related to the use and creation of scholarly resources.

The Director should play a leadership role in shaping campus policy and practice relating to "fair use" of copyrighted and licensed scholarly information. The Director should also coordinate closely with other relevant University offices and personnel,

¹³ See recommendation 4-1

especially the Office of Technology Development and the Director for Computer Policy in Academic Technology and Networks.

The need for an organization to provide the services proposed for the Office of Scholarly Communication is urgent. A proposed schedule for implementation that assumes quick approval of this part of the report appears as Attachment 3. A proposed budget for the office appears as Attachment 4.

4. Standing Committee on Copyright

Because fair use of, appropriate access to, and ownership of scholarly information is vitally important to the University community, and because the issues surrounding such access are complex, the University would benefit from the perspective of a campus-wide standing committee. This committee should be charged with proposing and monitoring the application of policies and guidelines supporting ownership and use of licensed and copyrighted scholarly works.

Recommendation 4-1. WE RECOMMEND THE FORMATION OF A STANDING UNIVERSITY COMMITTEE ON COPYRIGHT. THIS COMMITTEE SHOULD BE APPOINTED BY THE CHANCELLOR AND CONSIST OF MEMBERS DRAWN FROM THE FACULTY AND OTHERS. [*A proposed charge and composition is included as Attachment 5.*]

5. Copyright use policy

5.1 Policy statement. The University requires a set of basic principles with respect to use of copyrighted material to guide faculty and students. These principles should be broad in outline and recognize the ability of faculty to make good-faith decisions about particular circumstances. Through educational efforts the University should move toward common understandings of fair use for local needs, but detailed interpretations should not be part of the policy statement. This will allow the University to preserve the flexibility inherent in fair use law and preserve the opportunity to respond to a changing law and the changing demands of education and research. The proposed policy does not mandate particular decisions in particular cases but instead calls on each member of the University to be responsible for the fair use determinations with respect to the projects within his or her authority. The Office of Scholarly Communication and other offices will be available to assist with these determinations.

RECOMMENDATION 5-1. WE RECOMMEND ADOPTION BY THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL OF THE ATTACHED "COPYRIGHT USE POLICY FOR FACULTY, STAFF AND STUDENTS" (*Attachment 6*).

5.2 Guidelines. Detailed guidelines (not rules) for implementation of the proposed Copyright Use Policy will be needed; development of these guidelines should be the

responsibility of the Office of Scholarly Communication and should be undertaken in consultation with the proposed University Committee on Copyright and the University Legal Counsel.

RECOMMENDATION 5-2. WE RECOMMEND THAT SPECIFIC GUIDELINES FOR IMPLEMENTATION OF THE "COPYRIGHT USE POLICY FOR FACULTY, STAFF AND STUDENTS" BE DEVELOPED BY THE OFFICE OF SCHOLARLY COMMUNICATION IN COLLABORATION WITH A UNIVERSITY COMMITTEE ON COPYRIGHT.

5.3 Permissions database.

A significant obstacle to the use of scholarly material in coursepacks, in electronic reserves and on course Websites is that it is difficult to identify items available for use free of the need to obtain permission and pay royalties. The scholarly community could benefit greatly from the creation of a database that identifies such material. All four of the scenarios in the AAU Task Force Report we were charged to review explicitly mention or assume the existence of a database detailing ownership of academic works. For example, the most conservative scenario advocates "a database or registry of university-originated copyrighted works and the permissions and restrictions associated with these works" that could feed into or be linked to an AAU register.

Creation of a UNC-CH database could be efficiently accomplished if departments were asked to code with respect to copyright status publications listed in their annual reports. The coding would identify items that could be used on campus without permission, as well as those open for use by the entire academic community. This portion of the annual report could be submitted in digital format to reduce costs. Linkage to the annual report would have the added benefit of increasing faculty awareness of the limitations placed on use of their works, which might inspire faculty to more actively work to retain rights for personal and University use.

The institutional administrative costs and potential for interinstitutional collaboration, to say nothing of faculty response, have not yet been explored. Consequently, we feel it is premature to recommend specific details of how a permission database should be implemented or maintained. Nonetheless, it is clear that such a database would be of sufficient value to the University and the academic community that the option should be explored further by the new standing University Committee on Copyright and the Office of Scholarly Communication, with the expectation that it will be implemented in the near future.

RECOMMENDATION 5-3. WE RECOMMEND THAT THE CHANCELLOR DIRECT THE PROPOSED STANDING UNIVERSITY COMMITTEE ON COPYRIGHT TO EVALUATE MECHANISMS FOR THE DEVELOPMENT AND MAINTENANCE OF A DATABASE OF MATERIAL FOR WHICH COPYRIGHT PERMISSION NEED NOT BE SOUGHT FOR USE IN COURSEPACKS, ELECTRONIC RESERVES

AND CLASS WEBSITES. THIS DATABASE SHOULD INCLUDE ALL SUCH MATERIAL PRODUCED BY FACULTY, STUDENTS AND STAFF OF THE UNIVERSITY. WE FURTHER RECOMMEND THAT THE DIRECTOR OF THE OFFICE OF SCHOLARLY COMMUNICATION PURSUE COLLABORATIONS WITH OTHER INSTITUTIONS TO JOINTLY DEVELOP AND LINK SUCH DATABASES FOR GENERAL USE IN THE ACADEMIC COMMUNITY.

6. Copyright Ownership

6.1 Current UNC policy on copyright ownership. Within the university environment, ownership of works of scholarship and creativity (e.g., books, journal articles, art, music), as well as instructional materials, has traditionally remained with the creator until otherwise disposed of, except where the creator was specifically hired or contracted to create the work. Policies of UNC-CH and the UNC system have, thus far, remained consistent with this general pattern, though progressively more universities are rethinking their policies on copyright ownership.

The essence of UNC policy is contained in a policy document approved by the Board of Governors in 1983.¹⁴ "As a general rule, all rights to copyrightable material are the property of the creator. The distribution of royalties, if any, is a matter of arrangement between the creator and his publishers or licensees. Different treatment may be accorded by the institution in the case of specific contracts providing for an exception, in cases where the constituent institution or sponsor may employ personnel for the purpose of producing a specific work, where different treatment is deemed necessary to reflect the contribution of the institution to the work, as in the case of software or audiovisual material, or where a sponsored agreement requires otherwise." (See Attachment 7 for further details and additional relevant policy statement and guidelines.) Any change that is not consistent with this policy statement will require approval at the System level

6.2 Evaluation of AAU Task Force scenarios for ownership of copyright. The primary charge to the Committee was to evaluate the four alternative scenarios for copyright ownership proposed in the "Report of the Task Force on Intellectual Property Rights in an Electronic Environment." Most of our discussion of these models focused on journal publications, as this was the primary focus of the Task Force Report.

Current University policy is that the faculty member owns copyright to a scholarly work. Typically he or she then transfers this copyright to the journal or book publisher when the work is published. As discussed at the beginning of this document, this has resulted in excessively high prices for journals acquisition by libraries, limited access for scholars (to both current and past issues), and limited rights of the author and others in the University to copy and reuse material for teaching or research. In evaluating the four

¹⁴ The University of North Carolina. Patent and copyright policies. XII copyrights. Board of Governors, June 10, 1983.

scenarios, we weighed the degree to which each scenario would likely ameliorate the recognized problems inherent in the current system against the likely costs to faculty in terms of academic freedom, professional advancement, financial reward, and administrative burdens.

Scenario 1 represents an enhancement of current practice. This scenario calls for voluntary and consensual changes by authors that would lead to greater retention of rights for on-campus and interinstitutional distribution and use. These changes would be realized through increased education of faculty¹⁵ and by providing copyright advice and model language for contracts and licenses for use with academic publishers.¹⁶ The only way this scenario might lead to reduced prices for journals and increased access to articles is through the increased awareness by the faculty of the policies of various publishers.

The core elements of Scenario 1 are fully represented in the other recommendations presented in this report, especially, establishment of an Office of Scholarly Communication (Recommendation 3-1), appointment of a University Copyright Committee (Recommendation 4-1), adoption of model contracts (Recommendation 6-3), and encouragement of faculty to modify the copyright policies of their professional organizations (Recommendation 7-1).

Scenario 2 calls for the individual author to retain copyright, but to provide the publisher exclusive rights to distribute the work for a fixed time. In so doing the author would retain certain rights of ownership and would assure that the work would eventually find its way into the public domain for access by scholars. The retention of copyright could be either voluntary (which is functionally equivalent to Scenario 1) or it could be mandatory.

Adoption of Scenario 2 would place a substantial burden on the author with respect to granting permissions for use of the material. Users might find it difficult to locate the owner of the copyright if permissions were needed. For these reasons alone, the Committee finds Scenario 2 unacceptable. An even more serious problem concerns how to adopt the scenario without causing professional harm to our faculty relative to faculty at other institutions. Unless a large group of major universities were to simultaneously adopt the policy of faculty or university retention of copyright, faculty would be at a significant disadvantage in their efforts to negotiate with publishers to accept their work for publication.

Adoption of Scenario 2 is unlikely to have a significant impact on prices of scholarly publications. However, the suggestion that the publisher should receive the exclusive right to distribute for only a limited term is worth further consideration.

¹⁵ See Recommendation 3-1

¹⁶ See Recommendation 6-4, and model contracts for assigning copyright to publishers of scholarly journals and books provided in Appendix 8 and Appendix 9.

Although publishers need at least a short-term exclusive right to distribute if they are to recover their costs and earn a profit, a long-term exclusive right to publish has the potential to greatly inhibit scholarly research, particularly as journals progressively shift to digital distribution.

Scenarios 3 and 4 call for joint ownership of copyrighted works by the faculty member and the university or a consortium of universities. Universities can legally assert this right, though traditionally they have not done so. This approach has the advantage that it would not burden faculty members with administration of copyrights they own, but it would place an additional administrative burden on the University (which should be more than offset by the saving in long-term costs for access to published material if coupled with limited-term exclusive rights for publishers). The Task Force anticipated that universities would have an interest in where articles were submitted for publication, and could prevent publication in exorbitantly priced journals. Like Scenario 2, Scenarios 3 and 4 have the potential to harm faculty unless undertaken as part of a large, multi-institutional initiative.

Recommendation 6-1. AUTHORS SHOULD BE ENCOURAGED TO RETAIN RIGHTS FOR THEMSELVES AND THEIR CAMPUSES, AND SHOULD BE GIVEN GUIDANCE ON HOW BEST TO DO SO. THIS EMBRACES THE CORE ELEMENTS OF SCENARIO 1, WHICH CALLS FOR THE VOLUNTARY AND CONSENSUAL ADOPTION OF CHANGES. SCENARIO 2 SHOULD BE REJECTED.

Recommendation 6-2. RETENTION OF SOME RIGHTS BY THE UNIVERSITY OR A CONSORTIUM OF UNIVERSITIES WITH RESPECT TO JOURNAL ARTICLES IS THE CORE RECOMMENDATION OF SCENARIOS 3 AND 4. THESE SCENARIOS SHOULD NOT BE ADOPTED AT THIS TIME, BUT SHOULD BE VIEWED FAVORABLY AT SUCH TIME AS THE UNIVERSITY HAS AN OPPORTUNITY TO PARTICIPATE IN SUCH AN ENDEAVOR WITH A LARGE MULTI-INSTITUTIONAL CONSORTIUM (*see Recommendation 6-4*).

The success of any attempt to sell a new copyright ownership model to the faculty will likely hinge on a combination of showing minimal losses in academic and financial freedom while providing greater freedoms and flexibility in the emerging digital information age. Efforts to convince faculty of the merits of joint faculty/University ownership of copyright should benefit from the fact that faculty interest in the articles they publish usually is not economic; they have more interest in the dissemination and republication of the articles. The benefits should be more apparent to faculty when explained in the context of new technologies for electronic communications and the difficulties of exploiting these technologies without retention of copyright.

In contrast to the situation with respect to journal articles, there likely would be significant resistance to a change in copyright ownership policy with respect to books, visual images, music, dramatic art and other material with the potential to earn significant royalties. Any proposal for a change in the distribution of rights associated with material with the potential to earn royalties must preserve for the faculty rights to those royalties.

Recommendation 6-3. WITH RESPECT TO BOOKS, MUSIC AND WORKS OF ART, FACULTY MEMBERS SHOULD RETAIN FULL RIGHTS TO SELECT PUBLISHERS AND RETAIN ROYALTIES, REGARDLESS OF CHANGES IN COPYRIGHT OWNERSHIP POLICIES THAT MAY BE ADOPTED BY THE UNIVERSITY WITH RESPECT TO JOURNAL ARTICLES.

6.3 Model contracts and the distribution of rights. In order to implement the enlightened behavior through volunteerism advocated by Scenario 1 of the AAU Task Force Report, and to encourage appropriate distribution of rights, the University will need to provide faculty with model contracts and other assistance from the proposed Office of Scholarly Communication.

Recommendation 6-4. THE UNIVERSITY SHOULD ENCOURAGE FACULTY TO NEGOTIATE COPYRIGHT CONTRACTS THAT RESERVE KEY INTELLECTUAL PROPERTY AND USE RIGHTS FOR FACULTY AND THE UNIVERSITY. ALTHOUGH THE COMMITTEE RECOGNIZES THAT UNDER PREVAILING PRACTICE MANY PUBLISHERS REQUIRE AUTHORS TO ASSIGN COPYRIGHT TO THEM, WE RECOMMEND THAT THE UNIVERSITY PROVIDE ANNUALLY TO THE FACULTY COPIES OF CONTRACT CLAUSES RECOMMENDED AS ADDITIONS TO COPYRIGHT RELEASE AGREEMENTS OR FOR USE IN NEGOTIATIONS WITH PUBLISHERS. [*Proposed contract addenda are included as Attachments 8 and 9.*]

6.4 Multi-institutional initiatives on copyright ownership In order for universities to effectively defend against monopolistic practices by for-profit academic publishers and to consistently retain critical rights associated with ownership of copyright, they must agree to work together and jointly negotiate with publishers. No one university or state system is large enough to have a significant impact if it acts alone.

A new model of copyright ownership with distributed rights will likely be a necessary prior condition for universities to work together to negotiate prices and rights. A significant problem with most proposals for change in copyright management and publication practice is that of who goes first. No major research university would be willing to adopt on its own policies that might harm its faculty by making them less able to publish their work in the best possible journals. For any significant change to be acceptable, a substantial number of the more prestigious research universities would have to agree to adopt the changes simultaneously. This situation has led to a number of on-going collaborative efforts to devise alternative models for copyright ownership or management. One such on-going collaborative effort is SPARC,¹⁷ the Scholarly Publishing and Academic Resources Coalition of the Association of Research Libraries (the UNC-CH Library is a founding member of SPARC). The Triangle Research Library Network (TRLN) undertook a similar effort in 1993¹⁸ and might well join a regional, multi-

¹⁷ Case, Mary M. 1998. ARL promotes competition through SPARC: The Scholarly Publishing & Academic Resources Coalition. ARL Newsletter 196. <http://www.arl.org/newsltr/196/sparc.html>.

¹⁸ Copyright Policy Task Force of the Triangle Research Libraries Network. Durham, Raleigh and Chapel Hill, NC. 1993. Model university policy regarding faculty publication in Scientific and Technical Scholarly Journals: A background paper and review of the issues. <http://ccat.sas.upen.edu/jod/trin.html>

institutional partnership with similar goals.

Although the Committee does not advocate any immediate change in copyright management or ownership on the part of the University, the Committee feels strongly that UNC-CH should position itself to encourage and participate in major, multi-university collaborations aimed at implementing new copyright management and ownership models and publication mechanisms designed to alleviate or eliminate the current crisis in the cost of serials and other scholarly information sources. This positioning should include adoption of a set of policies with respect to the range of copyright ownership and management models the University would be willing to support. In addition, the Director of the Office of Scholarly Communication should monitor, maintain professional contact with, and represent the University in such activities. The Director should keep the University Copyright Committee advised on on-going deliberations so that the University might be prepared for rapid endorsement of any satisfactory proposals.

We affirm the tradition of faculty ownership of their copyrighted works, but feel that certain rights could be shared with or jointly owned by the University at no cost and with significant benefit to the author and the University. The Committee favors eventual adoption of a model in which rights are distributed in a standard fashion that protects the interests of all parties. If rights are appropriately distributed, then details of copyright ownership are not really critical.¹⁹ Although we realize there may be some resistance on the part of faculty to restrictions on ownership, we expect that if faculty understand clearly the degree to which constraints placed on authors by publishers inhibits the full use of their own work--and that these restrictions might be prevented or minimized by a new model--they could readily be convinced to accept a change. However, such faculty agreement would depend on inclusion of a mechanism for wide-spread, multi-institutional adoption of the new model and retention of current faculty rights to royalties.

Recommendation 6-5. THE UNIVERSITY OF NORTH CAROLINA SYSTEM AND THE CHAPEL HILL CAMPUS SHOULD ADOPT THE FOLLOWING RESOLUTION THAT INDICATES ITS INTEREST IN AND WILLINGNESS TO COOPERATE WITH LARGE-SCALE, MULTI-INSTITUTIONAL PROGRAMS INVOLVING NEW MODELS FOR COPYRIGHT OWNERSHIP FOR JOURNAL ARTICLES.

1. *Whereas it is a major mission of the University of North Carolina to create and distribute knowledge, and*
2. *Whereas toward this end the University supports and facilitates the creation of copyrighted works by its faculty, staff and students, and*

¹⁹ Consortium for Educational Technology for University Systems. 1997. Ownership of new works at the University: Unbundling of rights and the pursuit of higher learning. California State University, State University of New York, City University of New York. (<http://www.cetus.org>).

3. Whereas the unconditional assignment to publishers of copyright for works produced by University faculty, staff and students can and often does lead to inappropriate, undesirable and unnecessary constraints on the distribution of the knowledge created by the University community, and

4. Whereas the University of North Carolina cannot by acting alone have sufficient market influence to assure appropriate, reasonable and fair prices for scholarly publications,

Therefore, the University of North Carolina publicly expresses its desire to negotiate with other universities collaborative agreements that would, through changes in acquisition practices, development of alternatives to commercial publication of scholarly work, or changes in the distribution of rights associated with copyright ownership, assure the more widespread distribution of the knowledge created by its faculty, staff and students and the protection and retention of critical rights by the creators of the copyrighted works and the University.

6.5 Ownership of courses and instructional materials. The University lacks clear ownership policies for some forms of copyrightable material used in instructional activities, particularly digital material. Faculty have traditionally assumed that they own course materials they have produced, much as they may own copyright on textbooks, which can be sold to their students. These rights should be protected. In contrast, when individuals have been hired by the University to develop specific instructional material, copyright has typically remained with the University. Ownership of course Websites, course software, distance-learning products and multimedia productions remains ambiguous. For some of these items there should be joint ownership between faculty and the University with a distribution of royalties. In other cases, there should be an unambiguous distribution of rights that protects the interests of both the creator and the University. This area is developing rapidly in both the educational and the private sectors, and litigation is sure to follow unless policy is established soon. To protect itself from legal liability, and to protect the rights of its faculty and staff, the University should establish policies that address who owns materials developed for educational purposes and programs, how they should be used in accordance with "fair use" provisions of the Copyright Act, and how to insure that whoever receives the materials understands and acknowledges that they may not be used without appropriate authorization.²⁰

Recommendation 6-6. THE UNC SYSTEM SHOULD ESTABLISH POLICY ON OWNERSHIP OF INSTRUCTIONAL MATERIALS, SUCH AS COURSE WEBSITES, SOFTWARE FOR PROGRAMMED INSTRUCTION, LABORATORY MANUALS, COURSE MATERIALS FOR DISTANCE LEARNING, MULTIMEDIA PRESENTATIONS AND THE LIKE.

²⁰ Sheldon Elliot Steinbach and Anthony V. Lupo. 1998. The hidden legal traps in distance-learning programs. Chronicle of Higher Education. February 6. Page A52.

7. Policies for professional organizations and university presses.

Most professional organizations and societies, as well as all university presses, have among their primary goals the dissemination of high-quality monographs and journals, rather than the maximization of profits (regardless of the impact on dissemination) that characterizes many for-profit publishers. These professional organizations and university presses could bring considerable pressure to bear on for-profit publishers by establishing user-friendly policies with respect to use of copyrighted material. As these policies become more valued and demanded by authors and their employers, for-profit publishers will have to change their policies or lose contributors.

Among the faculty of UNC-CH are many officers, editors and influential members of professional societies. If these faculty were made aware of the need for professional societies to adopt more user-friendly policies on use of copyrighted material, they could potentially have a major impact on availability of materials for scholarly and educational purposes.

Recommendation 7-1. WE RECOMMEND THAT THE UNIVERSITY, THROUGH ITS FACULTY AND STAFF, ENCOURAGE PROFESSIONAL ORGANIZATIONS AND UNIVERSITY PRESSES TO ADOPT COPYRIGHT POLICIES THAT FACILITATE SCHOLARLY AND EDUCATIONAL USE OF COPYRIGHTED INFORMATION. IN PARTICULAR, MODELS THAT ALLOW FREE POSTING OF MATERIALS AS ELECTRONIC RESERVES OR ON COURSE WEBSITES SHOULD BE ENCOURAGED. TOWARD THIS END THE OFFICE OF SCHOLARLY COMMUNICATION SHOULD BE CHARGED BY THE CHANCELLOR TO DISTRIBUTE TO FACULTY MODEL COPYRIGHT-USE POLICIES FOR POSSIBLE ADOPTION BY THEIR PROFESSIONAL ORGANIZATIONS. [*For an example model policy recently adopted by the Ecological Society of America, see Attachment 10.*]

Committee

Robert K. Peet, Chair (Biology)
 Bruce W. Carney (Physics & Astronomy)
 Gillian Debreczeny (Academic Affairs Library)
 R. Ann Dunbar (African and Afro-American Studies)
 Susan H. Ehringhaus (University Counsel)
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 Gerry S. Oxford (Physiology)
 Anne S. Parker (Academic Technology & Networks)
 C. David Perry (UNC Press)
 John J.W. Rogers (Geology)
 Jeanne Smythe (Academic Technology & Networks)

Attachment 1.

Charge to the Committee

As we enter the electronic age, throughout higher education, research universities are considering what changes, if any, should be made in the current system of copyright ownership and management. The Association of American Universities has a Task Force on Intellectual Property Rights in the Electronic Era and it has recommended that universities explore the current system for copyright ownership, consider its effect on the institution, and adapt new models taking advantage of recent technological advances and their growing universal availability, when appropriate.

Currently, for most journal publishing, authors must assign their copyrights to the publishers of the journals, resulting frequently in serious restrictions on the faculty author's re-use of the article in classes, little ability to update the article or incorporate the articles into a later work (such as using it as a chapter in a book) without permission of the publisher who now holds the copyright. Further, the faculty author seldom receives any compensation for writing the article or any royalties for subsequent reproductions in coursepacks. Not only do faculty authors face these problems; they also have a serious impact on the University community. For example, the prices of commercially produced journals, and some society published journals, have escalated far in excess of inflation, with the cost for many bearing little relation to the cost of production of the journal. University libraries must repurchase the journals that contain the work of their own faculty members at these inflated prices. Also, students pay high royalties for the incorporation of some of this faculty-produced work in coursepacks that are assigned for courses.

Several universities are exploring better models of copyright ownership and management that would assist the faculty member and enhance the universities' attempts to contain costs and provide leadership and creativity in the electronic era. The AAU Task Force on Intellectual Property recommended four models of copyright ownership and management for consideration and testing by universities. The question is whether The University of North Carolina at Chapel Hill should adopt one of these new models. In addressing this question, important issues must be addressed, including but not limited to :

1. Should textbooks and other royalty-producing materials be excluded from discussions concerning a new model of copyright ownership and management?
2. What problems will be caused by the displacement of traditional outlets by new University-managed and controlled efforts?
3. Can the University Press "publish" electronic scholarly journals if the University and the Press determine that they wish to fund such an effort?
4. Must tenure and promotion policies be altered to recognize publication in electronic journals sponsored by educational institutions?

5. Does the University need a staff member to advise faculty members on copyright issues?
6. What are the compensation and royalty issues if a model is adopted which allows faculty ownership of copyrights?
7. Is there a department that might agree to test the model for the University?
8. How can resource shifting from the purchase of journals containing faculty works to University-funded scholarly publishing efforts be accomplished?

This committee is charged to examine the four models and consider the above issues along with any the Committee itself identifies. The Committee would be charged with advising the administration on whether one model or a hybrid of models should be adopted. If the administration decides after further consultation that a change is desirable, the Committee may be asked to recommend implementation strategies that reflect the views of affected faculty.

Attachment 2.

NATIONAL HUMANITIES ALLIANCE

BASIC PRINCIPLES FOR MANAGING INTELLECTUAL PROPERTY IN THE DIGITAL ENVIRONMENT

March 24, 1997

PREFACE

The following document was prepared by the Committee on Libraries and Intellectual Property of the National Humanities Alliance (NHA) in an effort to build consensus within the educational community on the uses of copyrighted works in the digital environment. While the Committee members represent primarily institutions within higher education, the Committee believes that the principles presented here apply to a broadly defined educational community encompassing many other institutions and individuals, including primary and secondary schools, independent research laboratories, faculty and students, and independent scholars. Participants in the NHA Committee's discussions are listed at the end of the document.

The Committee would like to thank the University of California System for giving us permission to use as the foundation of our work their excellent draft document, "University of California Copyright Legislation and Scholarly Communication Basic Principles."

CONTEXT

Introduction

The educational community encompasses a broad range of public and private institutions whose primary missions include research, education, and the preservation of our scientific and cultural heritage. In the process of carrying out their missions, these institutions, which include research universities, colleges, university presses, libraries, scholarly societies, museums, and archives, among many others, are both creators and consumers of scholarly communication. As such, these institutions participate in the full spectrum of activities regulated by the laws governing copyright and must be sensitive to the balance of interests embodied in them. While a degree of consensus has been reached concerning the rights of creators, copyright holders, and users of information in the print environment, new proposals for the copyrights of digital works are threatening to disrupt the balance between the rights of owners and public access in the electronic world.

As they revolutionize the means by which information is recorded, disseminated, accessed, and stored, digital technologies are eliminating the technical limits that have supplemented the legal framework of balance between ownership and public dissemination: Unlimited technological capacity to disseminate by transmission in ways that can violate the rights of copyright holders confronts equally unlimited technological capacity to prevent works from being used in ways contemplated by law. Carried to its logical extreme, either trend would destroy the balance, with results that would likely undermine core educational functions as well as radically transform the information marketplace.

Scholarly Communication

The educational community is heavily invested in scholarly communication. This process includes such functions as: exchange of cutting-edge discoveries and works-in-progress among scholars, scientists, curators; publication of new and synthetic works for the broad scholarly community; dissemination of new and existing knowledge to students through teaching; establishment of repositories to enable handing knowledge down from generation to generation; and transmission of knowledge beyond the educational community to the public. It requires the ability to cite and quote the work of others, regardless of format. Whereas quotations from text can be manually transcribed,

quotations from digital objects may require machine mediation. Scholarly communication involves individuals, academic departments and research units, libraries, archives, university presses, museums, commercial publishers, external research sponsors, academic and industrial software developers, and others.

Because it carries information that ranges from complex graphical and sound data to plain text, and must reach an audience that ranges from Nobel scientists to freshmen in remedial courses to citizens visiting a local museum, scholarly communication must include the full range of content and take place in all media. It must flow back and forth between all of its participants and be capable of moving rapidly enough to contribute to the evolution of understanding and knowledge. It must be disseminated through an economically viable system, and it must not be overwhelmed by a permissions system so burdensome that it makes rapid movement impossible.

Scholarly communication is based on an ethic of authorship that both compels publication and condemns plagiarism. It demands accurate attribution and respect for the integrity of works while asserting the importance of evaluating and interrogating sources for cumulative advance of knowledge. By promoting trust between authors, owners, and users, adherence to this ethic facilitates the rapid and broad dissemination of information. Educational institutions have developed organizational structures that insulate faculty, curators, and students--the core, but not the only, participants in scholarly communication--from direct dependence on economic returns from specific intellectual properties. Instead, they rely first on institutional rewards for their cumulative success in creation and dissemination. The institutions, however, function as both owners and consumers of the intellectual properties that circulate in the process of scholarly communication. As such, some of these institutions, such as museums, university presses, and scholarly societies, depend on the revenue from copyright ownership to support their educational, dissemination, and preservation missions.

The Documentary Record

New knowledge cannot be created without extensive reference to work already done by others and to the accumulated records of human and natural phenomena. Nor can the accumulated collective knowledge of a society be transmitted intact to succeeding generations without its preservation and organization. Libraries, museums, and archives play crucial roles as custodians of knowledge and must continue to do so in order to carry out core educational missions. Faced with an exponential increase in the rate at which documentation is growing, libraries, museums, and archives increasingly seek to exploit the unprecedented storage capacities and facility for more effective access strategies of digital media. Moreover, the increased data creation and storage capacities generate new pressures on systems for preservation, organization, and access.

Although the functionalities of digital technologies will continue to give rise to practices and relationships that bear little resemblance to those surrounding print, neither novel arrangements nor enhanced capabilities should obscure the fundamental continuity of purpose underlying preservation and organization. The requirements of the academic mission and the accumulation of a cultural heritage do not cease when information and documentation cease to have commercial value and pass out of the marketplace. Hence, relations among copyright holders, educational institutions, and the law must reflect the needs of the future as well as the present and should acknowledge the added value to society of preservation and of well-ordered systems for navigating information.

Approaches to Change

During 1995 and 1996, the U.S. Congress and the World Intellectual Property Organization (WIPO) have attempted to revise intellectual property law to address issues raised by the still evolving digital environment. Domestic legislation died in subcommittee during the second session of the 104th Congress amidst contentious debate. Internationally, the WIPO treaties proved more supportive of the principle of balance between the rights of owners and the need for public use. But the treaties must now return to the U.S. for ratification and the possible development of implementing and related legislation.

The educational community urges that changes in the law be carefully crafted to enhance rather than impede the rich and timely circulation of information as well as its preservation and organization. The educational community recognizes the difficulty of prescribing a priori practices for a digital environment in which:

- commercial, academic, and public practice is still experimental and fluid;
- works as different as software, research reports, textbooks, primary text sources, visual art, and sound recordings are included;
- a volatile set of technologies for protection, dissemination, and tracking is being developed, whose implications are often not clear; and
- a wide variety of formats and media is involved.

Working on the frontiers of technological, economic, and legal knowledge, the educational community seeks opportunities for experimentation with new institutional arrangements for managing the dissemination and preservation of knowledge contained in copyrighted and public-domain works. It also seeks a legislative and economic environment that fosters collaboration and a search for consensus rather than confrontation and litigation. In preparation for the ongoing legislative debates on intellectual property in the digital environment, the educational community believes it necessary to develop its own consensus on a common set of broad principles which would provide standards against which coalitions and individual institutions can evaluate legislative proposals. Faced with the strong interests of the infotainment industry to maintain tight control of intellectual property in a global marketplace, the educational community may strengthen its more balanced position by speaking as one voice guided by the principles. The following principles are based on the draft document, "University of California Copyright Legislation and Scholarly Communication Basic Principles," Working Draft, December 2, 1996.

PRINCIPLES

The educational community approaches pending changes in copyright and neighboring intellectual property law (e.g., Sui Generis Database Protection Act) with the overriding conviction that it is in the interest of the evolving U.S. information society that the legal environment foster rather than disrupt the balance between intellectual property owners and the public good that is embodied in current law.

- 1. Copyright law provisions for digital works should maintain a balance between the interests of creators and copyright owners and the public that is equivalent to that embodied in current statute. The existing legal balance is consonant with the educational ethic of responsible use of intellectual properties, promotes the free exchange of ideas, and protects the economic interests of copyright holders.**

Intellectual property is a significant form of social capital, whose growth depends on its circulation, exploitation, and use. As a major arena in which intellectual property is created and disseminated, educational institutions have nurtured an ethic of intellectual property based on:

- respect for the rights of creators and copyright owners;
- accurate attribution and respect for integrity;
- guarantees of preservation;
- promotion of dissemination and access; and
- economic viability of the scholarly communication system.

This ethic complements the provisions of copyright law, which provide one form of protection for certain kinds of intellectual properties and a framework for their dissemination that encompasses all sectors of society, including both market and non-market transactions.

Existing copyright law recognizes the tension between the needs of society and the rights of creators by permitting a defense against charges of infringement for certain uses of copyrighted works as specified in sections 107-110 of the U.S. Copyright Act of 1976. Among these uses are: the fair use of copyrighted works for teaching, scholarship, or research, among other activities; the reproduction of copyrighted works by libraries and archives under certain conditions for specific purposes; and the performance or display of a work by instructors or pupils in the course of face-to-face instruction. Equivalent qualification of owners' rights should be extended into the digital environment with appropriate safeguards against abuse.

These principles should be independent of particular technologies. Current statutory language embodies some of them in detailed prescriptions for specific practices in the print, tape, and broadcast environment. These are based on the print context in which the same object--a copy--is used to store, distribute, and use a work, and the simultaneous performance of more than one function (e.g., storage and distribution) requires the creation of more than one copy. In the digital environment, storage, distribution, and use are accomplished by algorithms instead of copies, and practices sanctioned by law in the paper environment may have significant unintended consequences. Accordingly, legislative efforts to extend print practices into the digital environment should focus on objectives rather than on strictly analogous practices.

2. Copyright law should foster the maintenance of a viable economic framework of relations between owners and users of copyrighted works.

The rich and timely circulation of information--regardless of whether it is contained in physical or electronic media--underlies the educational mission. It depends upon a viable publishing industry to promote communication across institutional and disciplinary boundaries and upon a sustainable library system to store, preserve, organize, and provide access to information. Other institutions, such as museums and historical societies, depend on a reliable source of revenue from their copyrighted collections to support their equally important stewardship responsibilities.

- To this end, the educational community supports the use of copyright ownership to enable publishers, creators, and owners to secure reasonable returns on investments in intellectual products and sustain their enterprise.
- Management of rights should encourage a reasonable balance between the cost of permission seeking and the use for which permission is sought.
- The educational community opposes extensions of copyright protection that would suppress fair competition or allow monopolies to prevent users from accessing and using information in an economical and convenient form. (For example, the proposed Sui Generis Database Protection Act, with its perpetually renewing rights, could suppress fair competition. In addition, excessive extension of copyright term could have the same effect.)
- Debate over whether and how the first sale doctrine should be applied to digital works is ongoing. Its resolution is likely to involve a complex combination of technical, legal, and business measures. Under existing law, the doctrine of first sale permits the legal purchaser of a copy of a work to dispose of it in any way the purchaser wishes, including reselling, lending, or giving it to others. The ability of libraries to lend is based on this doctrine. Because digital works can be instantly reproduced and transmitted--e.g., by posting on a Web site for browsing--while an "original copy" is retained, many copyright owners fear that extension of first sale rights into the digital environment will destroy their markets. Some have sought to protect their products by asserting that they are licensed rather than sold and that these works can be used only as the license prescribes. Concerned that license restrictions will prohibit the digital equivalent of examining the contents of or borrowing a book or journal without purchase, some libraries argue that a digital first sale equivalent is essential to the teaching and research enterprise. Emerging technologies not yet in the commercial marketplace may provide a means of simulating first sale conditions with "envelope" or "lockbox" software, but it is not yet possible to predict whether they can be applied in desirable ways that are acceptable to consumers.

3. Copyright laws should encourage enhanced ease of compliance rather than increasingly punitive enforcement measures.

The law should create an environment that provides incentives for simplified rights clearance and payment while preserving the principle of fair use contained in current law. Burdensome and inconclusive permissions systems may stifle dissemination of copyrighted works or encourage widespread violation of the law, as may undue constriction of fair use exemptions. In extending copyright law and practice to the digital environment, care should be taken that the creation of new rights does not become a disincentive to the circulation of information.

- Copyright law should provide a framework for voluntary contractual agreements that both provide fair returns to copyright owners and create incentives for broad dissemination of information. The law should not permit such contracts to abrogate fundamental legal guarantees, however.

- The law should permit the fair use defense in a contractual environment. At the same time, the law should encourage the application of fair use principles to digital works in a manner that maintains respect for the rights of copyright owners consistent with the provisions of current statute.
- The development and use of automated rights tracking, security technologies, and licensing mechanisms may reduce incentives for many kinds of infringement while simultaneously facilitating enhanced access to copyrighted works of others. Copyright law should encourage such innovations.
- Careful consideration should be given to the advantages and disadvantages of compulsory licensing schemes which require copyright owners to permit certain kinds of uses of their properties and automatically collect fees to pay for such use. Compulsory licensing provisions are already in effect for the broadcast of audio recordings of music. Broader application of this concept has not been thoroughly discussed, and it is premature to advocate for or against such a system for digital works.

4. Copyright law should promote the maintenance of a robust public domain for intellectual properties as a necessary condition for maintaining our intellectual and cultural heritage.

The public domain is an intellectual commons that is the essential foundation for an informed and participatory society. It is critical for education, research, and the creation of new knowledge. With copyright terms extending for periods that can exceed 100 years (life of the author plus 50 years), the digital format in which a work is first fixed is likely to become obsolete long before the copyright expires. Security technologies used to protect copyrighted works from unauthorized use will exacerbate this danger if provision is not made for "unlocking" the work at the appropriate time.

- Information created by governments and public agencies, including under contract, should reside in the public domain as they do under current law.
- Privately created works that have passed a certain age should reside in the public domain as they do under current law.
- Copyright terms should expire on dates that are certain and easy to determine.
- Copyright law should assure that new technologies do not impede the passage of works into the public domain as contemplated by current law.
- Copyright law should facilitate preservation and migration to new media as technologies change. The educational community encourages a distinction between activities necessary for preservation and storage and activities to provide access to copyrighted works. Because technology evolves rapidly, the statutes and regulations governing preservation and storage should be flexible enough to apply to successive generations of technology.

5. Facts should be treated as belonging to the public domain as they are under current law.

The educational mission requires that all who are engaged in it be able to examine and analyze facts without restriction. Compilations of facts that are creative or add value may be protected by copyright, but the facts themselves are and should remain in the public domain.

6. Copyright law should assure that respect for personal privacy is incorporated into access and rights management systems.

Academic freedom and the Constitutional guarantees of freedom of thought, association, and speech require that individual privacy be respected. In the print environment, individuals may examine works in libraries and examine and purchase them in sales outlets without leaving records of their identities. The educational community urges that legislation be crafted to assure that the rights of individuals to access copyrighted works without recording personal identities are comparably protected in the digital environment.

7. Copyright law should uphold the principle that liability for infringing activity rests with the infringing party rather than with third parties. Institutions should accept responsibility for acts undertaken at their behest by individuals but should not be held liable for the acts of individuals--whether or not associated with the institution--acting independently. This principle is an essential underpinning for academic freedom.

The creation and dissemination of knowledge depends on a community of individuals who develop their own scholarly investigations and syntheses. Such a community can only be sustained if the tenets of academic freedom, including freedom of speech and rejection of prior restraint, are upheld. The educational community opposes copyright legislation that would make institutions liable for the acts of individuals acting on their own initiative, or that would impose prior censorship. Copyright enforcement provisions should uphold principles of due process in determining whether specific allegations of infringement are valid. Educational institutions accept responsibility for establishing policies, carrying out due process when appropriate, and creating climates in which all those who use their facilities and resources use copyrighted materials appropriately.

8. Educational institutions should foster a climate of institutional respect for intellectual property rights by providing appropriate information to all members of the community and assuring that appropriate resources are available for clearing rights attached to materials to be used by the institution, e.g., in support of distance learning.

As creators and repositories of vast amounts of intellectual property, educational institutions have both a responsibility and a need to assure that their own institutional practices conform to the requirements of intellectual property law and that their constituencies are well informed about their responsibilities. Institutional practices should set high standards for compliance and can serve as an educational tool for heightening the consciousness of individuals within the educational community of what the law demands. Assurance that institutional practices are fully aligned with legal requirements will strengthen the position of educational entities in negotiating legislative and contractual conditions.

9. New rights and protections should be created cautiously and only so far as experience proves necessary to meet the Constitutional provision for a limited monopoly to promote the "Progress of Science and useful Arts."

Sui generis protections should be considered with extreme care and only after an adequate body of case law has accumulated to define the dimensions of what is at stake. Extension of copyright to new classes of works should be regarded with skepticism until it is demonstrated that the extension affirms the traditional balance between owners and users, and care should be taken to consider whether other bodies of law might be more appropriate vehicles for the protection sought and what the consequences of such applications might be.

10. Copyright enforcement provisions should not hinder research simply because the products of a line of inquiry might be used in support of infringing activity.

While the law should provide penalties for acts of infringement, attempts to criminalize the possession or acquisition of technologies or devices that might be used for illegal purposes will sweep with too broad a broom. Both applied and basic research related to encryption technologies and computer science may require that researchers be able to obtain state-of-the-art devices in order to participate in the creation of new knowledge. Moreover, decryption technologies may be necessary to place works in the public domain at the expiration of copyrights or to engage in legitimate activities, i.e., preservation. Legal sanctions should be reserved for those activities that violate or directly support violation of the law.

PARTICIPANTS

Participants in the discussions of the National Humanities Alliance, Committee on Libraries and Intellectual Property

American Association of Museums
 American Council of Learned Societies
 American Historical Association
 American Political Science Association
 Association of American Universities
 Association of American University Presses
 Association of Art Museum Directors

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College Art Association

Commission on Preservation and Access/Council on Library Resources

Modern Language Association

National Association of State Universities and Land-Grant Colleges

National Coordinating Committee for the Promotion of History

National Humanities Alliance

National Initiative for a Networked Cultural Heritage

ENDORSEMENTS

The National Humanities Alliance is actively seeking endorsement of these principles. Please send all comments and endorsements to John Hammer, Executive Director, National Humanities Alliance, 21 Dupont Circle, 6th floor, Washington, DC 20036; tel: 202/296-4994; fax: 202/872-0884.

The following organizations and institutions have endorsed these principles, as of January 23, 1998:

AMERICAN COUNCIL OF LEARNED SOCIETIES
AMERICAN HISTORICAL ASSOCIATION
AMERICAN LIBRARY ASSOCIATION
ART LIBRARIES SOCIETY OF NORTH AMERICA
ASSOCIATION FOR COMPUTERS AND THE HUMANITIES
ASSOCIATION OF RESEARCH LIBRARIES
COLLEGE ART ASSOCIATION
GETTY INFORMATION INSTITUTE
LINGUISTICS SOCIETY OF AMERICA
MASSACHUSETTS CENTER FOR RENAISSANCE STUDIES
MODERN LANGUAGE ASSOCIATION
MUSIC LIBRARY ASSOCIATION
NATIONAL COUNCIL OF TEACHERS OF ENGLISH
NATIONAL HUMANITIES ALLIANCE
NATIONAL INITIATIVE FOR A NETWORKED CULTURAL HERITAGE
SOCIETY OF AMERICAN ARCHIVISTS
UNIVERSITY OF MARYLAND, COLLEGE PARK
VISUAL RESOURCES ASSOCIATION

Attachment 3.**Office of Scholarly Communication****Proposed implementation schedule**

May-June 98	Approval of proposal to establish Office
July 98	Fund proposed budget
July-August 98	Establish Director position, write job description, announce position, set up search committee.
August 98 - January 99	Recruit and hire Director
September 98 - March 99	Design and construct offices in Davis Library
March - April 99	Director begins work
May - June 99	Establish assistant position, recruit and hire assistant

Attachment 4.**Office of Scholarly Communication****Proposed budget**

This budget addresses primarily salaries and benefits, including a contribution from the Academic Affairs Library of approximately \$37,000. The Academic Affairs Library will provide from existing budget on-going operations funding including supplies, telephone, travel, equipment, etc., estimated to be about \$6,000 per year. During the first year the Academic Affairs Library will also provide one-time start-up equipment funds for office furniture, microcomputers, etc., expected to total approximately \$10,000.

1. Total salaries and benefits

Object	Description	Amount
1110	Director	55,000
1210	Administrative Secretary II (grade 60)	20,664
1830	Hospital Insurance (2 FTE @ 1,736 each)	3,472
1812	Social Security / Medicare (7.65%)	5,789
1822	State retirement (10.46%)	7,915
	Total funds required for salaries and benefits	92,840

2. Portion of salaries and benefits to be provided from existing library resources

1110	Librarian's salary	30,000
1830	Health Insurance (1 FTE @ 1736)	1,736
1812	Social Security / Medicare (7.65%)	2,295
1822	State retirement (10.46%)	3,138
	Total existing funds to be provided by library	37,169

3. Total additional continuing funds requested 55,671

4. One-time requirement for renovation to build office space 75,000

Attachment 5.**University Committee on Copyright****Draft Charge and Composition****Charge**

The University Committee on Copyright is charged with representing the needs of faculty and other users of scholarly information to the Chancellor and the University community. To that end, the Committee will work with the Director of the Office of Scholarly Communication to propose and monitor the application of University policies and guidelines regarding ownership and use of copyrighted or licensed scholarly works. Specific responsibilities include, but are not limited to the following:

The Committee will monitor trends in such areas as institutional or consortial copyright use policies; changes in copyright ownership models; and guidelines for fair use of information in electronic formats. The Committee will identify new areas in which policy development is needed, and will recommend to the Chancellor new policies or revisions to existing institutional policies and guidelines in these and other related areas.

The Committee will assist in identifying educational needs of the faculty and others related to compliance with copyright policies and guidelines and will advise on appropriate ways to address those needs.

The Committee, in cooperation with the Office of Scholarly Communication, will advocate for public policy that protects the rights of creators of scholarly information while supporting its fair use, in various forums such as professional societies and organizations.

Composition

The University Committee on Copyright will be a standing committee appointed by the Chancellor. Its membership will be composed of faculty in the majority, who are selected in consultation with the Chair of the Faculty, with each serving a rotating term of three years. There will be at least one graduate student member, selected in consultation with the President of the Graduate and Professional Student Association, serving a one-year renewable term. The Committee will be chaired by one of the faculty appointees.

In addition, the Committee will include voting *ex officio* liaison members from campus units that are involved in intellectual property matters. These might include, but are not limited to: Ackland Art Museum, UNC Press, Center for Teaching and Learning, Information Technology Services, campus libraries, Office of Technology Development,

and the Office of Legal Counsel. It is important to maintain communication among these units on matters related to copyright, as well as between these units and the faculty. Selection of representatives from these units should be at the discretion of the unit head.

Attachment 6.**University of North Carolina at Chapel Hill****Proposed copyright use policy for faculty, staff and students****I. Introduction**

The copyright law of the United States 17 U.S.C. § (101-1101) provides legal protection for works of original authorship that are fixed in tangible medium of expression.²¹ Copyright law protects the rights of the owners of copyrighted works from unauthorized reproduction, distribution, adaptation, performance and display.²² The Act provides for monetary damages for copyright owners who suffer losses from infringement of rights they have in protected work.²³ Works eligible for copyright protection include works such as books, journal articles, musical and dramatic works, works of fine art, photographs, choreography, motion pictures, videotapes, sound recordings, and the like.²⁴

The University of North Carolina-Chapel Hill is committed to compliance with all applicable laws regarding intellectual property, including the copyright law, while encouraging the community to take full advantage of exceptions to the rights of the copyright owner, such as fair use. Where needed, guidelines will be developed by the University to assist faculty, students and staff in the implementation of these policies.

II. Fair Use

The most important exemption to the rights of the copyright holder is fair use. Fair use excuses uses of copyrighted works that ordinarily would be infringement. In order to determine whether a use is fair, the statute directs courts to consider certain factors such as: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality used and (4) the effect on the potential market for or value of the work.²⁵ Courts apply the factors on a case-by-case

²¹ 17. U.S.C. § 102(a) (1994).

²² *Id.* § 106.

²³ *Id.* § 504.

²⁴ *Id.* § 102(a).

²⁵ *Id.* § 107.

basis, and it is difficult to predict with certainty whether a particular use will be held to be a fair use.

Uses of works in nonprofit educational institutions are more likely to be fair use than are commercial uses. Although courts have often found educational uses to be fair, not all educational uses are so favored.²⁶ The University of North Carolina at Chapel Hill encourages faculty to take full advantage of the fair use exemption, but to follow this policy and established University guidelines, and to consult legal counsel when in doubt about whether a planned use of a copyrighted work is likely to be a fair use.

III. Use of Copyrighted Works in Teaching

A. Providing Materials for the Classroom

1. *Distribution of materials to students*

Fair use permits instructors to use a wide range of copyrighted works to prepare for teaching. Faculty members may reproduce single copies of copyrighted works such as journal articles and the like to prepare for teaching. Copies of copyrighted works also may be reproduced for distribution to classes under fair use. The Guidelines on Multiple Copying for Classroom Use (Classroom Guidelines) reproduced in the House Report that accompanied the Copyright Act, state the general conditions for multiple copying for the classroom.²⁷ UNC-CH complies with the Classroom Guidelines.

2. *Coursepacks*

Coursepacks consist of facsimiles of copyrighted articles, book chapters, etc., produced by a faculty member or at the request of a faculty member by a commercial or nonprofit copying service such as the campus bookstore and which are distributed or sold to students for profit or otherwise in lieu of a textbook or other materials. UNC-CH's policy is that production and sale of coursepacks is not fair use and that permissions to copy must be obtained from the copyright holder and royalties must be

²⁶ See *Marcus v. Rowley*, 695 F.2d 1171 (2d Cir. 1983) in which one teacher incorporated large portions of another's cake decorating booklet into one she made available to students for the nominal charge of \$2.00. The court found that although the use was a nonprofit educational use, it was not a fair use.

²⁷ H. Rept. 1476, 94th Cong., 1st Sess. (1976). The Guidelines "state the minimum standards of fair use" and are not maximum guidelines which means that staying within the Guidelines is a safe harbor. Going beyond the Guidelines is not necessarily infringement, however.

paid if requested.²⁸ Although the two court decisions that have dealt with the commercial production of coursepacks for university courses were outside of this jurisdiction,²⁹ UNC-CH has determined that coursepack production, even by the bookstore, cannot be interpreted as fair use.

3. *Placing copyrighted works on Webpages*

Placing copyrighted works, such as an article, a photograph or a graph, on a faculty Webpage constitutes multiple copying, and such activity cannot be used to avoid paying royalties. Faculty members should follow the Guidelines on Multiple Copying for Classroom Use when placing copyrighted works on a website and additionally restrict access to students enrolled in the class. For materials in excess of that permitted by the Guidelines, faculty must seek permission and pay royalties, if requested.

4. *Library reserves*

The UNC-CH Libraries' policies are based on the Model Policy of the American Library Association³⁰ for placing photocopies of materials on library reserve at the request of faculty members. Materials placed on reserve may include either assigned or supplemental readings, but they should not comprise all or the major portion of the readings for the course. Faculty members may not substitute library reserves in lieu of coursepacks for which royalties should be paid.

Campus libraries may place materials on electronic reserves instead of reproducing photocopies. University libraries follow the existing ALA Model Policy for printed works as a model for establishing its own policies and guidelines for electronic reserve collections. Electronic reserves may include materials under the conditions detailed above and may not be used as a substitute for a coursepack for which royalties should be paid. Additionally, access to electronic reserve materials is restricted to students enrolled for that class.

B. Software Use

Most software is governed by license agreements. Faculty and staff members may not make copies of copyrighted software unless such reproduction is permitted under the license agreement. Reproduction for student use or in the classroom is

²⁸ See Association of American Publishers, Inc., National Association of College Stores, Inc. and Software Publishers Association, *Questions and Answers on Copyright: For the Campus Community, Includes Software and Internet Issues* (1997).

²⁹ See *Basic Books v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) and *Princeton University Press v. Michigan Documents Service*, 99 F.3d 1381 (6th Cir. 1996).

³⁰ American Library Association, *Model Policy for Classroom, Research and Library Reserve Use* (1982).

similarly restricted.

C. Performance and Display in the Classroom (the Classroom Exemption - § 110(1))

The University encourages its faculty and staff to take full advantage of the Copyright Act's classroom exemption governing the performance and display of copyrighted works in face-to-face teaching. Faculty and students are permitted to perform or display any work in the classroom, as long as the copy used is a legitimate copy. Classroom is broadly defined to include any location where instruction occurs, including a laboratory, lecture hall or the library. The performance or display must be for instruction and not for entertainment. The critical limitation is that of face-to-face teaching, which means simultaneous presence of teachers and students in the same place.

1. *Distance learning*

The face-to-face teaching exemption does not cover distance learning. Section 110(2) governs distance learning, and it is much more limited in both the works that may be performed and the location where instruction must occur. Although any work may be displayed, only nondramatic literary works or musical works may be performed. In order to use other works for distance learning courses, a license must be obtained. Even performances of nondramatic literary and musical works must be directly related and of material assistance to the teaching content of the course. Limitations on where instruction may be received restrict such reception to a classroom or similar place normally devoted to instruction.

UNC-CH has not yet developed a policy on the use of copyrighted materials in distance learning, but it takes note of the Proposed Distance Learning Guidelines developed by the Conference on Fair Use³¹ and pending federal legislation.

2. *Music performances*

Performances of music and other nondramatic literary works outside the classroom may be exempted under the Copyright Act if certain conditions are met. The performances must be nonprofit, there can be no payment of fees to performers, organizers or promoters and if there is an admission charge, it must go back for charitable purposes.³²

For performances of copyrighted music on campus that do not meet these requirements, the University pays annual license fees to the music performing rights societies such as the American Society of Composers, Authors and Publishers and

³¹ CONFERENCE ON FAIR USE REPORT, September, 1997
<http://www.uspto.gov/web/offices/dcom/olia/confu/conclu2.html#appi> [hereinafter CONFU REPORT].

³² 17 U.S.C. § 110(4) (1994).

Broadcast Music, Inc.

D. Development of Multimedia Works by Faculty

The University has not yet developed a policy on the use of copyrighted materials in multimedia works created by faculty. UNC-CH takes note of the Proposed Multimedia Guidelines developed by the Coalition of College and University Media Centers in conjunction with the Conference on Fair Use,³³ but believes that the portion limitations are too restrictive.

E. Digitization of Visual Images

The University has not yet developed a policy on the reproduction of copyrighted visual images in digital form and their use. UNC-CH takes note of the Conference on Fair Use Proposed Guidelines on Digitization of Visual Images,³⁴ but believes they are too restrictive for a university. UNC-CH has not yet developed its own policy.

IV. **Library Compliance with the Copyright Law**

Section 108 of the Copyright Act covers reproduction by libraries and archives. Additionally, libraries have fair use rights.³⁵ Campus libraries comply with the provisions and requirements imposed on libraries under the Act.

A. Preservation

Section 108(c) of the Copyright Act states that when unused copies of a work are available, in order to replace a lost, damaged, stolen or deteriorating work, a library will purchase such copy if it is available at a fair price. If an unused copy is not so available, the library may reproduce the work. UNC-CH libraries make every effort to preserve deteriorating materials in whatever form is appropriate. UNC-CH considers “facsimile form,” as specified in the Act,³⁶ to include a digital version when it is an exact reproduction of the page.

³³ CONFU REPORT, supra note 11, at <http://www.uspto.gov/web/offices/dcom/olia/confu/conclu2.html#appj>

³⁴ *Id.* <http://www.uspto.gov/web/offices/dcom/olia/confu/conclu2.html#apph>

³⁵ 17 U.S.C. § 108(f)(4) (1994).

³⁶ *Id.* § 108(b)-(c).

B. Reproduction for Users

Although University libraries generally do not copy for users, they may do so under the conditions detailed in the Copyright Act.³⁷ The major limitations for libraries include that the request from the user be for one article only from a journal issue or other contribution to a collective work, that the copy become the property of the user and that the library provide the warning of copyright in accordance with the Register of Copyright's regulation.³⁸

1. *Interlibrary loan*

University libraries participate in for both interlibrary lending and borrowing activities and comply with the Interlibrary Loan Guidelines.³⁹ Copies may be supplied or received in either analog or digital form. Generally, for interlibrary borrowing in excess of the Suggestion of Five,⁴⁰ the libraries will pay royalties.

2. *Document delivery*

For copies exchanged within the UNC-CH campus, no records will be maintained or royalties paid. For copies obtained from other libraries (including TRLN libraries) University libraries comply with the Interlibrary Loan Guidelines Suggestion of Five.

C. Creating Digital Libraries

Most library digitization projects involve works within the public domain. Before digitizing copyrighted works that will be made generally available, such as by posting on a public Webserver, permission will be sought and royalties paid, if the copyright owner so requests.

³⁷ *Id.* § 108(d)-(e).

³⁸ *Id.* § 108(d).

³⁹ H.Rept. 1733, 94th Cong., 2d Sess. (1976).

⁴⁰ *Id.* The "suggestion of five" states that each year a borrowing library may make five requests from a periodical title going back over five years.

Attachment 7.

Policies of the University of North Carolina System and the University of North Carolina at Chapel Hill with respect to ownership of copyright.

1. The University of North Carolina. Patent and copyright policies. VII.

Publication. "A major function of the University of North Carolina is the advancement and dissemination of knowledge. Any practice that unnecessarily restricts the publication of results of scientific work is to be avoided..." XIII Copyrights. "As a general rule, all rights to copyrightable material are the property of the creator. The distribution of royalties, if any, is a matter of arrangement between the creator and his publishers or licensees. Different treatment may be accorded by the institution in the case of specific contracts providing for an exception, in cases where the constituent institution or sponsor may employ personnel for the purpose of producing a specific work, where different treatment is deemed necessary to reflect the contribution of the institution to the work, as in the case of software or audiovisual material, or where a sponsored agreement requires otherwise." (Board of Governors June 10, 1983.)

2. University Copyright Guidelines (issued August 21, 1985). The *Guidelines* supplement and explain copyright provisions of the University Patent and Copyright Policy. Key sections are:

- Section II.A., which provides that the University may jointly own copyright with a faculty or staff member using unique University resources on a sustained or significant basis to create the copyrighted work, but clarifies that the University must inform the faculty or staff member in writing of potential joint copyright ownership prior to use of the resources.
- Section III., which sets out situations in which the University will own copyright to works created by employees.
- Section IV., which provides that after consultation with the affected faculty or staff member, the University can enter into a contract with an external research sponsor that requires assignment of copyright to the sponsor.
- Section V., which explains how University copyright policy applies to student works.

3. Patent and Copyright Procedures of the University of North Carolina at Chapel Hill. Copyright procedures. A. "While, as a general rule, all rights to copyrightable material are the property of the creator, and the distribution of royalties, if any, is a

matter of arrangement between the creator and his or her publishers or licensees, different treatment may be accorded by the University in case of specific contracts providing for an exception, in cases where the University is a joint author with the creator, in cases where the University or sponsor may employ personnel for the purpose of producing a specific work, in cases where different treatment is deemed necessary to reflect the contribution of the University to the work, as in the case of software or audiovisual material, or in cases where a sponsored agreement requires otherwise." B. "An institute, center, or other unit of the University that is itself a publisher and that engages faculty members and other employees to write for publication by that unit as a part of their professional duty or produce other copyrightable materials, such as audiovisual materials or computer software, may, subject to the approval of the Chancellor, adopt rules providing that copyright in materials prepared by such faculty members and other employees in the course of their professional work for that units vests in the unit and not in the author." (January 1, 1994).

Attachment 8.**Model contract addendum for use when assigning copyright to publishers of scholarly journals**

The author transfers to _____ the exclusive rights comprised in the copyright of the article, except that the author retains the following:

1. The right to make copies of all or part of the work for the author's use in classroom teaching.
2. The right to use, after publication, all or part of this material in a book [or other work] by the author.
3. The right to make copies of the work for internal distribution within the institution which employs the author.
4. The right to use figures and tables from the work and a reasonable amount of text, for any purpose.
5. The right to make oral presentation of the material in any forum.
6. The right to distribute individual copies to members of the specific community outside of UNC for peer communication, in response to scientific requests, and through placement on author's personal Webpage.

Attachment 9.**Model contract addendum for use when assigning copyright to publishers of scholarly books**

The author transfers to _____ the exclusive rights comprised in the copyright of the book, except that the author retains the following:

1. The right to make copies of portions of the work for the author's use in classroom teaching.
2. The right to use figures and tables from the work, and a reasonable amount of text, for any purpose.
3. The right to make oral presentation of the material in any forum.

Attachment 10.**Model copyright use policy
for scholarly and professional publications**

"Permission to make digital or hard copies of part or all of this work for personal use or educational use within one's home institution is hereby granted without fee, provided that the first page or initial screen of a display includes the notice "Copyright © by the [Society name]," along with the full citation, including the name of the author(s). Copyrights for components of this work owned by others than [Society name] must be honored. Authors may post their articles to their personal or home institution's Web pages and may make and distribute photocopies of such articles. Instructors may post up to 10 articles from [Society name] publications to a publicly available class Web page, or an unlimited number of articles to a Web page or other electronic medium with access restricted to class use. To copy or transmit otherwise, to republish, to post on public servers, to redistribute to lists, or to use any component of this work in other works, or to use this work for commercial or promotional purposes, requires prior specific permission and possible fee. Permissions may be requested from the Permissions Editor,[Society name], [full address]."