

UNIVERSITYWIDE TASK FORCE ON COPYRIGHT

REPORT and RECOMMENDATIONS

October 1999

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RECOMMENDATIONS

EXECUTIVE SUMMARY

1. The University of California should formally adopt the 1996 draft "Copyright Legislation and Scholarly Communication: Basic Principles" as its framework for policy and practice. These Principles are consistent with and do not override existing University policy.
2. The University should reaffirm the policy that a faculty member owns his or her scholarly and aesthetic works.
3. The rights and responsibilities of student authors, where they are different from those of faculty, should be addressed in policy.
4. The University should establish a standing joint Senate-Administration Committee on Copyright and the University.
5. UC should provide copyright education and services on every campus. Such services may be managed locally or centrally. They should make available to all members of the University community information on how to comply with copyright law when using works owned by others and how to exercise the rights of copyright owners in ways that promote the dissemination of knowledge. Such information should include case studies and model contracts that demonstrate how collaborative works and assignment of copyrights to third parties may be managed to protect the integrity of works and ensure that they are freely accessible for teaching and research.
6. UC should proactively promote and defend fair use.
7. UC should anticipate allegations that University technology infrastructure is being used to make infringing material available to the public and should establish due process procedures for determining when such allegations require that materials that are alleged to be infringing be removed or access to them blocked.
8. UC copyright policies should address ownership issues and ambiguities surrounding class materials, especially works that fix the classroom experience in tangible form, such as recordings of classroom lectures and discussions and interactive compendia that incorporate the contributions of students. Policy should ensure that such recordings will not be made, reproduced, or distributed without the permission of faculty and student participants and of responsible University administrators. Policy principles should not distinguish between the media in which class materials are created.

9. The University should promote collaborative works by offering various models for contract agreements and options for ownership that serve the interests of all contributors.
10. Circumstances may occur in which the University should offer to invest in the creation of special classes of works in exchange for ownership or co-ownership. Similarly, faculty may seek University investment in projects that require unusual resources to complete. As provided in Section IX.B of the Policy on Ownership of Copyright, specific agreements on the allocation of copyright rights should be concluded when substantial University investment and coauthorship is involved. Such investment and associated agreements should be managed to maximize the dissemination of knowledge. The routine provision of office space, computers, and library access should not be treated as “substantial University investment” under Section IX.B.
11. UC should assure that authority is appropriately delegated so that works owned by The Regents are managed in ways that promote their dissemination.
12. UC should ensure continuing access to works it owns.
13. UC should participate in experiments to create new forms of scholarly communication.
14. UC should dedicate adequate staffing to implementing the above recommendations.

INTRODUCTION

Works of authorship are so central to the academic mission of teaching, research and public service that the significance of their management to the University can hardly be overstated. Management of this critical resource involves a complex interaction between the law of copyright, institutional tradition, and individual practice, which has evolved in ways that generally served the interests of institutions, individuals, and the public. The Constitutional balance between private rights and the public good that underlies copyright law has been mirrored within the academic world by an ethic of authorship that both compels publication and condemns plagiarism. The academic ethic protects authors who share their work with colleagues and students by demanding accurate attribution and respect for the integrity of material derived from the work of others. Copyright law protects authors' economic interests by reserving the rights related to making works available to the public.

Yet there have been tensions in the apparent alignment of academic ethic and copyright law. Academic institutional structures insulate faculty and students from direct dependence on economic returns from specific intellectual properties. For many within the academic community, attribution and the integrity of their works has been more important than the legal details of copyright law. In part, this was because the majority of copyrighted academic works had little commercial value and attracted audiences primarily within the academic community. Similarly, breaches of copyright law within the confines of the classroom attracted little attention from the outside and had negligible effects within the University. Nor did the academic community have much concern for the defense of its own copyrights or anxiety about the demands of external copyright owners. Changes in the law and the technology and business of publishing are forcing reexamination of these historic assumptions and practices.

In the last several decades, universities have become increasingly linked to commercial, governmental, and civil organizations and authorities. As a result, universities are directly affected by the growing commercialization of copyrighted and copyrightable works. At the same time digital technologies are making possible the creation of new genres of works never before imagined, and their capacity for instantaneous reproduction and transmission extends the arena of teaching interactions from the classroom to the virtual world. Today, academic institutions are engaged in the full spectrum of activities regulated by the laws governing copyright and related intellectual properties, and they must be sensitive to the rising market value of these activities, to the balance of interests embodied in them, and to the need to improve coordination of institutional and individual concerns.

In the legislative arena, the Digital Millennium Copyright Act (DMCA), enacted in 1998, lays out rules for managing traditional copyright rights and exemptions in the digital environment. Among other provisions, it prohibits tampering with technological measures that protect digital materials, requires that digital identifiers attached to copyrighted digital works be left intact, and spells out limited conditions under which an online service provider (including a university) may avoid some liability for infringement that takes place on its systems. These provisions of the DMCA

demonstrate how the same digital technologies that open promising new capabilities for teaching and research also expose academic practices to unprecedented scrutiny and provide owners with new means of enforcing their exclusive rights.

These issues come to a head when public Internet sites add visibility to activities that formerly took place only in enclosed classrooms. The rapid obsolescence of digital technologies means that many copyrighted works will disappear from the marketplace within short periods. Yet their copyrights will persist for the life of the individual author plus 70 years or, in the case of corporate works, for 95 years. Thus, for example, a faculty member who might once have photographed a copyrighted work for display in a classroom may face formidable challenges in preparing the same material for incorporation into a class Web site, since she may have to do extensive research to determine who owns the copyright and under what circumstances permission may be granted for that purpose.

University administrations are also deeply concerned about the relationship of traditional copyright management practices to the two-decade-old crisis of university libraries.¹ Scientific and technical journals targeted to both academic institutions and private industry have transformed some forms of scholarly communication from the free sharing of information to a market for high-priced commodities. Electronic products, including digital journals, digital versions of print journals, and independent digital databases, are now licensed rather than sold. License terms vary, but restrictive contracts commonly specify exactly how the licensed products may be used and seldom make adequate provisions for archiving and preservation. Other factors are also in play, as documented in the March 1998 Final Report of the Library Planning and Action Initiative, but one element in the rise of for-profit journals has been the customary and unchallenged transfer of individual copyrights to publishers.

Each of these developments emphasizes the significance that copyright ownership has acquired: If copyright belongs to another, a University researcher may not be able to obtain access to material that is essential to his or her continued research or teaching. If copyright ownership is unclear, opportunities to expand the distribution of new works through commercial partnerships will not be realized. In addition, the unauthorized use of copyrighted works by faculty or students will expose the University to unacceptable levels of liability. With increasing urgency, the University is challenged to build an institutional capability to comprehend and respond to the rapidly evolving copyright environment with appropriate policy direction, education, and action initiatives.

University copyright policies must be flexible, adaptable, and grounded in well-accepted values and principles of academic life if they are to function well in an evolving environment where new models of teaching and research are emerging. But policy is not enough. Policy development must proceed hand-in-hand with systematic education and assistance which can be provided only by a staff infrastructure. The University must help faculty, students, and staff understand the interaction between copyright and their use of new technologies. It must provide guidance in how to respect copyrights held by others and on how to exercise the rights of authors and owners. Without such support, the University's substantial investments in libraries and teaching and learning technologies will be at risk, as will its role in promoting scholarly communication in the national arena.

¹ An analysis of this issue is contained in a study co-sponsored by the Pew Higher Education Roundtable, the Association of American Universities, and the Association of Research Libraries, "To Publish and Perish," *Policy Perspectives* 7:4 (March 1998). It is available at <http://www.irhe.upenn.edu/cgi-bin/pp-cat.pl#V7N4>

Copyright Task Force

The Copyright Task Force met from November 1997 to April 1998, working in parallel with the Library Planning and Action Initiative Task Force. Because copyright policy is so sensitive, the Task Force determined that its work would be most effectively focussed on a framework for policy and infrastructure which could be widely discussed within the University before any new policy would be drafted. We anticipate that the next stages of copyright policy development, education, and support will proceed in close cooperation with the initiatives on scholarly communication emerging from the newly established Library and Scholarly Communication Committee and the California Digital Library.

The Task Force was charged to:

...review University policies and recommend revisions if and as appropriate to enhance the creative work of members of the academic community. Its overarching purpose is to assure that institutional policy continues to serve University and academic values in a rapidly changing environment.

- A. Review proposed changes in copyright law for digital works in order to understand how institutional policies interact with the law.
- B. Determine specific areas in which policies should be reviewed or developed and recommend the substance of appropriate policies that will foster scholarly creativity and that reflect the needs of the University and its members as both users and creators of copyrighted work. Address issues surrounding the use and creation of digital works.
- C. Determine specific areas in which implementation of existing or proposed policies requires development of more detailed guidelines.

We responded to A and B but concluded that response to C should be incorporated into the next phase of policy development.

Throughout the period of our work, legislation was pending that would strengthen the rights of copyright owners and increase individual and institutional liability for infringing copyrights.² Given the fluidity of the legislative situation, we did not find it productive to devote significant attention to the details of what the law might require. Instead, we concentrated on identifying the areas in which policy is needed and the approach a policy should take in order to facilitate compliance with existing law and promotion of the University mission.

To ensure that our work would cover the most critical issues, the Task Force formed two subgroups to consider (1) what copyright arrangements would be necessary to achieve desirable future scenarios and (2) what issues are most important to faculty. The work of the two groups converged in recommendations that both envision a future and reflect the strongly felt present needs of faculty.

² The Digital Millennium Copyright Act (DMCA) was enacted in October 1998, after the Task Force had finished its work but before comments on the draft report had been received. Reference will be made to the DMCA where necessary, but the Task Force did not attempt to analyze its implications in depth. Key provisions are summarized in Appendix III.C, Copyright Policy Review in Context.

The working group on future scenarios envisioned a much enlarged university publishing role, growing complexity of relationships in the creation of teaching materials, and widening interaction between the University and the public. The working group quickly concluded that these possibilities and the changing copyright environment cannot be accommodated by a one-time policy revision. Instead, the University needs an ongoing body to guide continuous evolution. From the faculty issues group came equally strong insistence that information about and help with copyright matters must be made systematically available throughout the University. The faculty issues group report is attached as Appendix III.

We are convinced that the University of California requires a comprehensive copyright policy that is formulated at the level of "constitutional" principles rather than detailed procedures and addresses both use and ownership of copyrighted materials. The existing Policy on Copyright Ownership provides an excellent framework but needs extension to reflect new technologies and methods of authorship. The Policy on Reproduction of Materials for Research and Teaching and the Policy on Off-Air Taping of Broadcast Materials for Educational Purposes need substantial updating to be incorporated into a unified Copyright Policy. Implementing guidelines are essential. The following recommendations lay out key principles and subject matter for a comprehensive policy. They also indicate the areas in which consultation and debate must take place in order to reach an appropriate conclusion. We urge that this work begin immediately.

In addition, it is essential that the University dedicate staff to policy development and provision of systematic education about copyright and support in mastering its detail. Such support is essential for effective policy implementation in ways that benefit the University and all members of its community.

INSTITUTIONAL

Until the early 1980s, the University of California maintained a central Patent, Trademark, and Copyright Office that served all campuses. Enactment of the Bayh-Dole Act in the early 1980s allowed universities to own patents emerging from federally sponsored research and caused the central office to shift its focus to patent and trademark. It became the Office of Technology Transfer (OTT). At the end of the 1980s, campuses were allowed to choose whether to establish their own technology transfer offices or to rely on OTT, but copyright management was decentralized to the campuses. Now, OTT and campus technology licensing offices on some campuses provide management for commercializable software, but there is no systematic support for management of or education about such copyrightable works as scholarly writing, creative works of art and music, and multimedia course materials.³

As the changing environment heightens the importance of copyright, current structures for managing copyright may not be adequate. The Task Force takes no position on the relative value of central and decentralized functions, but it urges that the University recognize the importance of providing for copyright management and education on every campus, whether through an accessible central office, campus offices, or some combination of the two.

³ A slightly longer history of UC's intellectual property management is contained in the 1994 report of the Technology Transfer Advisory Committee, available at <http://www.ucop.edu/>

Framework

1. The University of California should formally adopt the 1996 draft "Copyright Legislation and Scholarly Communication: Basic Principles" as its framework for policy and practice. These Principles are consistent with and do not override existing University policy.

The document should be retitled "University of California Principles for Copyright and Scholarly Communication."

2. The University should reaffirm the policy that a faculty member owns his or her scholarly and aesthetic works.

The free flow of information and dissemination of knowledge is enhanced when faculty control their own scholarly work, a tradition which has served the academic mission well and can be expected to continue to do so. The University should clarify its commitment to this tradition and reassure those who fear that it may lay claim to individual faculty works of authorship. Further institutional deliberation is necessary to clarify the application of this policy to copyrightable software. However, as indicated below the University should provide education and information that helps individuals exercise the rights associated with ownership in ways that ensure reasonable access to these works for teaching and research purposes by members of the University Community.

3. The rights and responsibilities of student authors, where they are different from those of faculty, should be addressed in policy.

Students may be simultaneously employees of the University and independent agents. They may also participate in creating new works in situations that range from work for hire to coauthorship with faculty or fellow students. They may contribute to the creation of collaborative works whose authorship extends over years and involves successive generations of students. Students' complex relationships to the creation of new works should be addressed by:

- Providing policy guidance for acknowledging student contributions to faculty works;
- Establishing guidelines for determining when student work should be treated as work for hire⁴ and when it should be considered as works of individual authorship;
- Recognizing student interests in collaborative works created in the course of instruction.

4. The University should establish a standing joint Senate-Administration Committee on Copyright and the University.

The Committee should be charged with developing a high level of understanding of the legal, technical, and business dimensions of the copyright environment and how institutional copyright

⁴ Copyright law provides that works created by employees "in the course and scope of their employment" are works made for hire and belong to the employer.

policy affects the core activities of the University. The Committee should approach the future proactively by:

- Monitoring the copyright environment and making recommendations to the President and the Academic Council on how to align University copyright policy and management with the goals of the academic mission in the context of continuous and rapid change;
- Monitoring technological restrictions and contract practices that impede fair use and the advance of knowledge;
- Setting priorities for continuous Universitywide education on copyright;
- Joining representatives of other research universities in national discussions of institutional policy;
- Assessing the implications of new legislation for University policy and practice; and
- Making recommendations about substantive participation in national initiatives, such as electronic publishing efforts currently under development by the Association of American Universities (AAU) , the Association of Research Libraries (ARL), the Pew Higher Education Roundtable, and the National Research Council.

Committee membership should be stable, reflecting knowledge of copyright and commitment to the Principles. Its members should serve staggered, multi-year terms, and it should be adequately staffed to ensure development of a cumulative institutional memory and competence. It should include members from or liaisons to each campus who also represent different University functions that deal directly with copyright.

The Committee's charge should identify areas of actual or potential overlap with other standing bodies such as the Committee on Scholarly Communication, the Technology Transfer Advisory Committee, and the standing Senate committees. Its membership should be constructed to facilitate links with such bodies. Its work should be informed by awareness of the interaction between copyright policy and policies governing academic personnel, faculty and student conduct, research, and use of University resources, including electronic communications facilities.

Education and services

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| <p>5. UC should provide copyright education and services on every campus. Such services may be managed locally or centrally. They should make available to all members of the University community information on how to comply with copyright law when using works owned by others and how to exercise the rights of copyright owners in ways that promote the dissemination of knowledge. Such information should include case studies and model contracts that demonstrate how collaborative works and assignment of copyrights to third parties may be managed to protect the integrity of works and ensure that they are freely accessible for teaching and research.</p> |
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Increasingly, copyright ownership affects the availability of works for teaching and research. Hence, the University and all members of its community have a strong mutual interest in becoming more conversant with copyright rights and responsibilities, particularly as they apply to situations involving more than one party, such as relationships between multiple authors of collaborative works or between authors and third party publishers. Lack of understanding of the consequences of

copyright transactions can, for example, lead members of the University community to enter into agreements that allow commercial interests to control access to their works. They may also expose themselves and the University to liability for infringing uses of works owned by others. University-sponsored education about copyright will reduce these and other risks and benefit individual faculty and students, the institution itself, and the public.

The interests of faculty, students, the University, and the public will all be served, for example, if individuals manage their agreements with commercial journal publishers so that they retain those rights necessary to ensure that they may freely use their own works in teaching and research. Such arrangements serve the academic mission of the University by facilitating the dissemination of and development of knowledge. Advice to individuals about how to structure agreements should be directed toward preserving necessary access to scholarly works for the University and should not be used to promote private interests, such as higher royalties. The University and the public will benefit if individuals are well informed about University policy and choices they have in concluding contracts. Model contracts and opportunities to discuss choices are educational tools for this purpose.

Educational efforts and model contracts are also needed to assist Contracts and Grants officers and faculty researchers in negotiating contracts with private-sector research sponsors. Anecdotal evidence indicates increasing demands for copyrights to all works produced in the course of sponsored projects. Existing UC policy assigns ownership of contract deliverables to the University but permits contracts and grants to specify otherwise. Existing policy also grants individual authors copyright in scholarly works that grow out of sponsored projects but are not deliverables, and existing Guidelines on University Relations with Industry spell out the importance of protecting the ability to publish. However, Contracts and Grants officers and individual faculty members do not always understand how to apply these principles to specific cases. New demands for copyright and some sponsors' efforts to restrict publication in order to protect proprietary information threaten to interfere with the ability of researchers (whether faculty or graduate students) to publish their research findings.

Education is also necessary to clarify the rights of all contributors to collaborative works, such as multimedia materials, so that appropriate arrangements may be made. For example, contributors may be legally coauthors with rights that persist long after they leave the University. Current University policy, developed before multimedia works were in wide use for teaching or research, provides little guidance for reducing confusion about who may claim rights in a collaborative work. Such confusion may become troublesome if one or more authors wishes to work with a third party publisher. Written agreements at the outset of a collaborative project are one means of avoiding problems, and model agreements can serve as useful tools for raising understanding of the issues to be resolved.

As discussed in Recommendation 6 below, the risk of institutional and individual liability for infringement also demands that educational services be provided. The University and individual faculty and graduate student instructors are both liable if required or recommended class materials made available online infringe copyrights. University liability for student work and personal creations is less likely, but students need to be taught what is acceptable copyright behavior. For multimedia works, which represent some of the most interesting uses of digital technologies for

teaching and learning, there is little agreement about what uses are fair and what constitutes infringement. Accordingly, faculty must be able to obtain competent advice about how and when they must seek permission if they are to feel confident in making frequent use of such works.

The Task Force does not advocate a specific organizational plan for delivering copyright education and services but urges coordination to meet the differing needs of each campus with minimal duplication of effort. Individuals on every campus should be able to obtain from local or central sources:

- A comprehensive and regularly updated set of educational materials that includes case studies and examples of fair use, the educational exemptions, the rights of copyright holders, and infringement⁵;
- Access to a regularly updated educational Web site;
- Individual guidance on how to apply the principles of fair use and the educational exemptions to specific cases;
- Guidance on how to secure permission to use work owned by others;
- Guidance on how to exercise the rights of a copyright holder in interactions with external publishers, research sponsors, and others interested in works produced in the University (see below);
- Model agreements for use in negotiating with publishers, research sponsors, and other partners⁶.

The responsible manager or managers for copyright education and services should be advised on priorities by the Committee on Copyright and the University.

Fair use

6. UC should proactively promote and defend fair use.

Fair use is the legal doctrine that permits limited exceptions to the exclusive rights of copyright owners. It is constructed as a defense against allegations of infringement for actions taken without permission from a copyright owner when such actions, including reproduction, distribution, and public performance, serve the public good without materially harming the copyright owner. Fair use is essential for teaching and research, which build systematically on the work of others. However, because fair use is situational, its promotion and defense require a substantial commitment of institutional resources to raise understanding of the principles of fair use, to assess degrees of risk, and, if necessary, to defend against charges of infringement.

Fair use is determined on a case-by-case basis by balancing four factors against each other to estimate the relative social benefit of an unauthorized use against its cost to the copyright owner.

⁵See Appendix IV for excellent examples available at the University of Texas (<http://www.utsystem.edu/ogc/intellectualproperty/index.htm>) and Indiana University (<http://www.iupui.edu/it/copyinfo/home.html>). Licensing the right to adapt these materials would provide one means for UC to offer the recommended information to its community.

⁶ An example is contained in Appendix VI. Contract issues and faculty need for support will be discussed more fully below.

The four factors are: the nature of the work, the nature the of use, the proportion of the work that is used, and the effect of the use on the market for the work. This calculation ranges from the obvious to the arcane. It may seem obvious, for example, that copying portions of a scholarly article for research purposes is fair use, but controversy would arise over a three-minute segment of a feature film on a publicly accessible class Web site. In every case, the distinction between fair use and infringement is a judgment call that requires understanding of the principles underlying the law.

Widespread use of the Internet raises the stakes significantly. By enabling rapid and broad distribution, Internet transmission increases the potential for copyright infringement to do real harm to the owners of a work. This is particularly true if the work is normally sold in the commercial marketplace. The same easy accessibility increases owners' ability to discover infringement and make claims against the infringer. In the near future, digital copyright management information will be routinely attached to digital works--and removing or altering it is illegal under the DMCA. As a result, network robots will be able to locate potentially infringing works cheaply and efficiently. Such robots are already seeking out pirated copies of commercial music and feature films made available over the Internet. An equivalent in the world of photocopies would be a mechanism by which copy machines informed copyright owners every time a copy of a work was made. In practical terms, this means that the judgments of individuals and institutions about what constitutes fair use will be subject to routine review by copyright owners.

One way to reduce the risk involved in making such judgments is to formulate detailed "safe-harbor" guidelines. These would specify uses of copyrighted works that most people agree are fair and would direct users to seek permission for most uses that exceed the guidelines. However, the certainty embodied in this approach is achieved by abandoning substantial areas in which significant fair use can take place on the basis of case-by-case judgments. UC's existing guidelines on reproducing materials for teaching and research is typical of such institutional guidelines as they apply to photocopying. In the digital environment, there is still little agreement about what constitutes fair use, and some guidelines that have been proposed are narrowly restrictive.⁷

An alternative approach is to encourage individuals to make informed decisions about when specific uses of works owned by others require permission. This approach encourages active exploration and negotiation of the boundaries of fair use. However, it will be institutionally viable only if it is supported by a well-staffed infrastructure of education and support that will help faculty, students, and staff throughout the University become competent to make reasonable judgments. The University should prepare the kinds of educational materials proposed in Recommendation 5 above, should make expert advice available to individuals when their University teaching and research activities involve complex decisions, and should pledge

⁷ A Federal effort sponsored by the Patent and Trademarks Office to develop nationally acceptable guidelines for fair use of digital works founded in 1997. Although guidelines were drafted during two years of meetings among representatives of copyright owners and user communities, there was no consensus among participants that these guidelines described the extent of fair use. Many participants and observers considered that the guidelines violated the principle of *ad hoc* assessment embodied in the law's "four factors" approach. Nonetheless, the Conference on Fair Use Guidelines are available as an example of uses that copyright owners accept as fair. The Patent and Trademarks Office has posted the Guidelines at <http://www.uspto.gov/web/offices/dcom/olia/confu/>

institutional legal support to faculty who have followed institutional advice and are challenged by copyright owners for the ways they have used copyrighted material in teaching.⁸

In addition, the Task Force recommends that the University continue to play an active role in legislative activity, national discussions, and pilot projects related to the definition of fair use in the digital environment.

Due process

7. UC should anticipate allegations that University technology infrastructure is being used to make infringing material available to the public and should establish due process procedures for determining when such allegations require that materials that are alleged to be infringing be removed or access to them blocked.

The DMCA spells out limited conditions under which online service providers will not be held responsible for infringement that occurs on their electronic systems. For purposes of the DMCA, the University is generally an online service provider for students and for faculty and graduate student instructors who make material available online for teaching and research. However the University is responsible for material “required or recommended” for a class. The limited shelter (which does not apply to administrative and technical staff or undergraduate student employees) applies only so long as the service provider is unaware of the infringing acts of its users. When service providers receive notification that infringement is allegedly taking place, avoidance of liability requires that they remove or block access to the offending material, at least temporarily.

Copyright owners already complain when they find materials on UC systems that they believe to be infringing, and system administrators generally try to resolve the complaint by working with both the complainant and the alleged infringer. Under the DMCA, there will be times when decisions whether to seek shelter from liability by removing or blocking access to allegedly infringing works will have to be made under very rigorous time constraints. Although University policy must state explicitly that University systems may not be used for infringing activities, responses to specific instances must balance the need to reduce University legal exposure with the need to protect academic freedom and Constitutional free speech. Procedures must be in place and legitimate authorities must be recognized to investigate whether allegations of infringement are valid and to take appropriate action when necessary to comply with the law. Such authorities must possess the necessary understanding to make reasonable distinctions between infringement and fair use.

Specific procedures should be established for:

- Investigation within a specified time period whether allegations are based on facts that justify removing or blocking access to the material;
- Intervention on an emergency basis prior to investigation when necessary to prevent immediate harm to a copyright owner; and
- Appeal of decisions to remove or block access to material.

⁸ Indiana University has recently adopted such a policy and backs it with a Center for Copyright Management. The policy is available at <http://www.iupui.edu/it/copyinfo/iupolicies.html>

Two principles should be affirmed in developing such procedures:

- Those accused of infringement should maintain access to their own legally obtained copies of material they are alleged to have used in an infringing manner (see language in faculty issues report, Appendix III) during the investigation; and
- Action to reduce University liability by removing material from University systems should not prejudice the resolution of any action that might later ensue under faculty or student codes of conduct or staff personnel policies.

The investigation and intervention described here should be used only to determine whether to block access to or remove material from the University's system. If such investigation suggests that disciplinary action might be indicated, the evidence must be turned over to the appropriate Senate body or administrator, depending on whether the individual is a member of the faculty, a student, or University staff, for review and further action if necessary. Further investigation and action should be conducted without prejudice according to normal personnel procedures and protections.

OWNERSHIP, PARTNERSHIP, AND MANAGEMENT

The University and its faculty are partners in the academic mission of creating and disseminating knowledge. Historically, faculty ownership and control over copyrights in the works they create has served this mission, helping authors to disseminate new knowledge and protect the integrity of their works. As noted in Recommendation 2 above, the Task Force reaffirms this practice. However, the Task Force urges a wide ranging discussion of the opportunities that might occasionally make voluntary departures from this norm desirable.

As noted in the Introduction, questions about the costs to the academic mission of individual copyright assignments first rose in the context of scientific publishing. Scholarly communication among scientists has been transformed by the multiplication of scientific journals and the rise of for-profit publishers. Faculty, acting as individuals in their relationships with publishers, typically assign or transfer rights as a condition of publication. In many cases when the journal publisher is a for-profit enterprise, they cannot obtain permission to reproduce or reuse their own work after transferring the copyright. The same journals structure their prices so that institutions rather than individuals will buy them, with the result that they are available to members of the campus community only through the library. Prices in the thousands of dollars per year and requirements for specific journals to support particular research areas combine to place severe pressure on library acquisition budgets. As a consequence, journal cancellations and reduced acquisition of books and other publications have become routine. This trend is accelerating as publishers add digital formats and bundle electronic subscriptions with print at added cost. Such consequences might be ameliorated if individual authors negotiated contracts with publishers that retain some rights to reproduce and distribute their own work, at least within their own institutions.⁹

⁹ See the Pew Education Roundtable study cited in footnote 1 above.

More recently, the extension of digital technologies into the teaching activities of the University has created new scenarios of unintended consequences. Digital technologies can make permanent records of live classroom activities, including both faculty lectures and collaborative student-faculty simulations. These technologies also encourage many faculty to substitute various interactive projects for traditional lectures as primary classroom activities. These changes have given rise to controversies over various scenarios, such as:

- Scenario 1 (factual): Attendees in large lecture classes have created audio recordings from signals transmitted by wireless microphones used by faculty. These recordings have been reproduced and sold commercially by third parties outside the University without permission from the faculty member or any University authority. Such incidents raise questions about ownership and who has the right and responsibility to prevent abuses.
- Scenario 2 (hypothetical): Whatever the provocation, faculty and others have shared rumors that academic administrators on some campuses have claimed University ownership of original materials, such as syllabi and lecture notes, posted on class Web sites. Such reports have been linked to speculation that University administrators intend to package and reuse courseware, whether within the University or in public distribution, without the permission or participation of the faculty member who created the course.
- Scenario 3 (hypothetical): Administrators and others have speculated that individual faculty members might record their University classroom lectures, possibly along with materials created by University students in interactive exercises, and sell full courses to for-profit educational institutions for public distribution in competition with or at cost to the University.

The Task Force considers all three of the above scenarios to be unacceptable and urges that copyright issues surrounding classroom materials be addressed in ways that prevent any such practices. Two recent reports by the Association of American University Professors note similar concerns along with the positive opportunities that may arise for University-faculty partnerships in creating and managing new kinds of classroom material with the use of high-end equipment and software and teams of experts.¹⁰ Such materials occupy a position in teaching that may be quite different from that of textbooks and will require development of specific University resources to create them.

It is premature to propose across-the-board solutions of any kind, and this issue will require ongoing discussion and experimentation before a new consensus arises regarding the ways the University, individual members of the faculty, and students handle copyright.

¹⁰The AAUP issued a Statement on Distance Education and a Statement on Copyright in 1998. Both Statements affirm the traditional faculty control of the curriculum and of individually created works. Both explore ways in which responsibilities must be shared by institutions and their faculty if the academic community is to achieve the full potential presented by digital technologies. The reports are available on the Web at <http://www.aaup.org>

Classroom materials

8. UC copyright policies should address ambiguities in ownership issues surrounding class materials, especially works that fix the classroom experience in tangible form, such as recordings of classroom lectures and discussions and interactive compendia that incorporate the contributions of students. Policy should ensure that such recordings will not be made, reproduced, or distributed without the permission of faculty and student participants and of responsible University administrators. Policy principles should not distinguish between the media in which class materials are created.

In classes where faculty act as mentors to students who work with interactive digital technologies, assignment and management of copyrights will become increasingly complex as traditional distinctions between live lectures, materials created by the faculty member for distribution to students, and materials created collaboratively by faculty, students, and technical staff break down. The rapid evolution of new technologies makes this a fluid and unfamiliar area in which anxiety is high and feelings strong.

The Committee on Copyright should monitor evolving practices and identify opportunities and risks related to the allocation of copyright ownership and assignment of specific use rights. Issues to be addressed include:

- How to protect the interest of individual faculty and student authors in protecting the integrity and controlling the use of recordings of live lectures or other classroom presentations for such purposes as distance education or remedial study.
- When the institution may have an interest, in addition to the interests of individual authors, in determining who may have access to materials that permanently record classroom activities for asynchronous use;
- Who is responsible for preventing copyright infringement when class materials are made available online;
- How to manage material produced in collaboration among, e.g., faculty and students, students and staff, or successive groups of students;
- Use of course materials created with the extensive involvement of students and/or staff in cases when faculty members leave UC;
- Application of the principle of noncompetition with UC. ¹¹

In addition to the evolving influence of new technologies, the large and varied groups with interests in the development and uses of University courses makes this deliberation unpredictable and complex. The roles of key groups are summarized below:

- Faculty, who create and direct the creation of course materials, and who may wish to use them in derivative works and to teach in other institutions;

¹¹Academic Personnel Manual 25 states that "...with the exception of occasional lectures or continuing education programs, regular employment in teaching or research at another educational institution while employed as a full-time faculty member at the University is not permitted without prior written approval of the Chancellor." This academic personnel principle suggests that the University might not want to allow course materials developed with UC resources to be sold to non-UC distance learning providers for use in California.

- Faculty Senate committees which have the authority to approve and authorize the granting of credit for courses;
- Students, who use course materials, whose contributions may be included in course materials, and who may wish to create derivative works;
- Administration, which is accountable for meeting institutional goals and budgets;
- Staff, who may make substantial contributions to course materials and who may be responsible for archiving them and managing their use and migration to new formats and media;
- Non-matriculated distance learners, who may be encouraged to pay market rates for access to course materials; and
- The public, whose taxes support the University and whose children are potential students.

Universities are beginning to grapple with these issues, but few research institutions have proposed generally applicable policies. Recent policy adoptions have occurred at Stanford, the Massachusetts Institute of Technology, and the University of Kansas.¹² An alternative approach, more common than institutional policy and likely to be more productive in the short term, is the use of case-by-case contracts to experiment with the consequences of differing allocation of rights. Contracts could, for example, make available instructional development or media resources in exchange for vesting all or part of copyright rights in the institution.

The Task Force does not recommend a blanket University of California policy in this area. Experimentation and reiteration will be necessary for the foreseeable future as unanticipated new situations arise. Nonetheless, UC should relieve anxiety by asserting that it will protect both institutional and individual interests related to classroom lectures and recorded collaborative works by faculty and students. The University should not allow classroom lectures and other activities to be recorded or otherwise exploited by third parties without the permission of the faculty and student participants and of responsible administrators. This position was first explicitly stated in 1995 by the Workgroup on the Commercialization of Lecture Materials,¹³ and it provides a framework for negotiating how specific rights should be allocated.

9. The University should promote collaborative works by offering various models for contract agreements and options for ownership that serve the interests of all contributors.

New media open new creative possibilities that can be realized only by collaboration. However, when there are multiple contributors, some of whom may be staff, complex issues arise which are best resolved by contracts at the outset of the project. Although it is premature to propose policy, opportunities exist to make collaboration easier by offering various options for ownership of collaborative work that can be applied as appropriate to different situations. These should include joint ownership, assignment of rights to a single owner, and University ownership. Assignment of

¹² The University of Kansas policy is available at <http://www.ukans.edu/~kbor/ipdraft.html>. In a draft policy recently issued for discussion, the University of Kansas has proposed an institutional claim on "mediated courseware," arguing that they are created and offered with substantial investment of university resources and that the university must be able to use them again. The draft policy provides for additional compensation to authors if the mediated courseware is used by other faculty members. The university grants faculty authors full rights to create derivative works. It retains the right to transfer institutional rights to a third party. Stanford claims institutional ownership of all Stanford course materials.

¹³ See Appendix II.

rights to the University is likely to be most appropriate when the University provides the services expected from a publisher. Such ownership options should recognize and reward the roles of all contributors to a work. They should also provide means by which joint authors can avoid the difficulties that can arise when it is not possible to ensure that all rights holders have consented to a transaction. Policy should encourage creative arrangements by contract, and capability should be developed to represent collaborative groups in dealings with external partners. See Appendix IV on ownership issues.

Examples of groups of collaborators who might benefit from voluntary contractual arrangements in which the University assumes ownership of copyright or acts as agent for the various participants are those involving many individuals with potentially conflicting interests, such as:

- Works with multiple and serial authors who belong to different employment categories (e.g. faculty and staff);
- Works created and modified over time by groups whose membership changes, including successive generations of students; and
- Works, other than conventional works of authorship, created by groups whose members belong to more than one institution.

University-owned works

10. Circumstances may occur in which the University should offer to invest in the creation of special classes of works in exchange for ownership or co-ownership. Similarly, faculty may seek University investment in projects that require unusual resources to complete. As provided by Section IX.B of the Policy on Ownership of Copyright, specific agreements on the allocation of copyright rights should be concluded when substantial University investment and coauthorship is involved. Such investment and associated agreements should be managed to maximize the dissemination of knowledge. The routine provision of office space, computers, and library access should not be treated as “substantial University investment” under Section IX.B.

New modes of creating works and new kinds of works create new opportunities for partnership that should be approached collaboratively on the basis of negotiation. Policies regarding ownership of new works should be flexible and adaptable as circumstances change and new opportunities and liabilities become apparent. For example, partnerships might involve investment of University resources in the creation of new works, investment in new forms of publication or archiving, active protection of copyright, or brokering relationships with third-party investors.

- The University should develop a mechanism for evaluating when an investment of University resources will encourage the creation of works that will enhance the academic mission. It should be prepared to make such investments and to use them to promote new kinds of partnership between the institution and its faculty and students. See Recommendations 8 and 9 above.

- The University should provide information that will help faculty evaluate circumstances and terms under which they might benefit from undertaking a project with explicit University sponsorship and special investment.

11. UC should ensure that authority is appropriately delegated so that works owned by The Regents are managed in ways that promote their dissemination.

To facilitate management of University-owned works, project managers should ensure that these works contain adequate information to enable users to identify the individuals or academic or administrative units with authority to grant permission for uses protected by copyright. This authority is delegated by The Regents through the campus Chancellor. For those works for which the original author might have a continuing interest in derivative works, the author should be consulted before permissions are granted. Currently, delegations of authority are often unclear for works bearing The Regents copyright notice, particularly those created decades ago, which cannot be traced to the author or responsible department.

UC should provide services for managing copyrights in works owned by the University or owned jointly by the University and individuals. Copyright management should be aimed at preserving and enhancing academic freedom and scholarly communication. Copyright management should promote publication in support of the University's teaching, research, and public service mission. Included in this task are the development of mechanisms for meeting contractual obligations to third parties, and for tracking works bearing The Regents' copyright notice. Because of the scope and scale of the associated tasks, it will be necessary to develop priorities for selecting works that will be managed as properties of The Regents.

12. UC should ensure continuing access to works it owns.

Digital works require regular updating if they are to remain accessible, but electronic archiving is not well developed among commercial publishers. In addition, many works are now distributed informally through such mechanisms as "listservs" and "newsgroups" without being preserved in an organized and accessible manner. UC should establish criteria for determining which works are worthy of being archived and judiciously invest in doing this as an array of solutions emerges for digital archiving.

New forms of scholarly communication

13. UC should participate in experiments to create new forms of scholarly communication.

UC copyright policy and management should promote the development and use of lower cost and more effective means of scholarly communication. As new forms of scholarly communication emerge, faculty and administration should be encouraged to work together to develop alternatives that have the potential to be more cost-effective and beneficial than assigning copyrights to outside

entities. Ways in which this might be implemented, including development of practical opportunities for faculty to publish and archive material in digital form, are more fully described in the Final Report of the Library Planning and Action Initiative Task Force.

The University's copyright policy should facilitate recognition of work that has been disseminated in new ways. To the extent that recognition of work is an academic personnel issue, it is beyond the scope of copyright policy. However, copyright policy can help ensure that authorship is properly attributed and that the integrity of works is protected, regardless of the medium in which the work is created or the means by which it is distributed.

Staffing

14. UC should dedicate adequate staffing to implementing the above recommendations.
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Copyright issues affect every aspect of the University's academic mission with such potential force that they require a new commitment of dedicated staff to deliver the services described in Recommendation 5. Without this investment in human resources, many related investments in such areas as libraries, teaching and learning technologies, and electronic publishing initiatives will be placed at risk. In addition, failure to staff the copyright management function will leave the University exposed to risks of litigation, compromise its ability to meet its obligations to research sponsors, and may prevent the University from obtaining full use of its copyrightable works.

Professional staff will be necessary to provide policy analysis to the Copyright Committee, to organize and deliver education and services, and to provide direct services to authors and users. As indicated above, the Task Force does not propose a specific organizational structure or location for this function, which requires a mix of central and distributed personnel and services that is appropriate to each campus' individual needs.

UNIVERSITYWIDE TASK FORCE ON COPYRIGHT

REPORT AND RECOMMENDATIONS

REFERENCES

I. UC Policies and Studies

**Included in Appendices*

+Accessible from the Copyright Task Force Web site at

<http://www.ucop.edu/acadinit/copyright/>

- **Policy on Copyright Ownership*+**
- **Policy and Guidelines on Reproduction of Materials for Classroom Use*+**
- **Policy for Off-Air Recording of Broadcast Programming for Educational Purposes*+**
- **Report of the Committee on Commercialization of Lecture Materials***
- **Final Report of the Library Planning and Action Initiative Task Force, Section 6***
- **UCLA Draft Policy on Videotaping Distance Learning Courses***
- **Copyright Legislation and Scholarly Communication: Basic Principles*+**
- **Copyright Issues for Faculty-Authored Multimedia Courseware+**
- **1-400 Publication Policy And Guidelines On Rights To Results Of Extramural Projects Or Programs+**
- **Guidelines on University-Industry Relations+**

II. Reports from the Task Force Working Groups

Included in Appendices or accessible at Copyright Task Force site

- **Some Thoughts about Future Models of Teaching, Research, and Scholarly Communication**
- **Faculty Issues**
- **UC Review of Copyright Policy in Context**
- **Classroom Lectures and Copyright**

III. Sample Educational Materials from UC and Other Institutions

A. University of California Office of Technology Transfer

<http://www.ucop.edu/ott/crprimr.html>

The Office of Technology Transfer provides basic information about copyright and UC policies.

B. University of Texas

<http://www.utsystem.edu/ogc/intellectualproperty/index.htm>

The University of Texas Office of General Counsel has posted an online primer on copyright which provides practical advice and guidance for both owners and users of a wide range of academic uses of copyrighted material.

C. Indiana University

<http://iupui.edu/it/copyinfo/>

Indiana University supports informed individual decisions about fair use with a Copyright Management Institute, which prepares educational materials, hosts seminars and symposia on fair use, and provides staff and legal advice. Its Web site includes materials in greater depth than what is available at the Texas site.

D. California State University and the State University of New York

[<http://www.cetus.org>]

In a joint effort, CSU and SUNY published a four-pamphlet series that included a practical guide to fair use and an analysis and proposals related to the ownership of copyrighted works created in universities. The policies proposed and adopted on ownership are tailored to an institutional environment in which faculty are represented by collective bargaining units, but the discussion is useful and relevant to UC.

IV. Sample Policies and Proposals from Other Institutions

A. Indiana University [http://www.iupui.edu/it/copyinfo/Fair_Use_Policy.html]

B. University of Kansas [<http://www.ukans.edu/~kbor/ipdraft.html>]

The University of Kansas issued a draft policy on intellectual property for discussion in Spring 1997. It is one of the first research universities to propose a policy on mediated course materials.

C. University of Wisconsin Faculty Senate

[<gopher://gopher.adp.wisc.edu:70/00/browse/.METASOFSD2.SFSD24/>].

The University of Wisconsin Faculty Senate adopted a resolution in 1996 that encourages faculty to publish their work in journals controlled by academic institutions and professional societies rather than commercial publishers.

D. Stanford University

[<http://www-portfolio.stanford.edu/101242>]

Stanford issued a new policy on copyright in 1998.

V. National Initiatives

A. Scholarly Communication and the Need for Collective Action (ARL)

[<http://www.arl.org/sparc/discuss.html>]

The Association of Research Libraries and the Association of American Universities have developed a number of proposals for new forms of scholarly communication. This discussion paper provides a concise overview. Updates on these initiatives are frequently reported in the *Chronicle of Higher Education*.

B. Statements on Distance Education and Copyright by the American Association of University Professors Special Committee on Distance Education and Copyright

[<http://www.aaup.org/spccntnt.htm>]

The AAUP Special Committee examined the complex circumstances surrounding asynchronous learning, multimedia class materials involving joint authorship and major institutional investments. The statements, issued in Fall 1998, outline faculty and institutional interests in an unfamiliar new environment.

C. Intellectual Property and New Media Technologies: A Framework for Policy Development at AAU Institutions

[<http://www.tulane.edu/~aau/IPNewMediaReport.html>]

A report to the AAU Digital Networks and Intellectual Property Management Committee by the Intellectual Property Task Force, made up of provosts and presidents. Considers institutional concerns related to rights, investment, and revenues.

VI. “Publish and Perish,” report of the Pew Higher Education Roundtable

<http://www.irhe.upen.edu/cgi-bin/pp-cat.pl#V7N4>

Co-sponsored by the Pew Higher Education Roundtable, the Association of Research Libraries, and the Association of American Universities, this report provides an excellent analysis of the crisis in scholarly communications and research libraries.

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APPENDIX III. Report from the Faculty Issues Work Group

APPENDIX IV: Classroom Lectures and Copyright

Appendix V: AAUP Statements on Distance Education and Copyright

APPENDIX VI. Sample Publishers' Contract with Rights Withheld for Academic Use

Appendix VII: Summary of Digital Millennium Copyright Act