Copyright for Sc

often begin workshops designed to raise faculty members' awareness of copyright issues by asking the participants to identify content to which they hold the copyright. The examples they cite typically include journal articles, book chapters, textbooks, art works, musical performances, lyrics and musical arrangements, video productions, computer software, Web pages, their own graduate thesis or doctoral dissertation, and the like.

Occasionally, although not always, participants will point out that they do not own the copyright to works that they created because they signed their rights to written materials over to the publisher at the time of publication. But this common practice raises an interesting and potentially serious set of issues that are increasing in importance and complexity as our digital age progresses.

REWARDS FOR ACADEMIC AUTHORS

There is little reason to question faculty members' intentions in assigning their copyrights to publishers. Those publishers frequently demand it, and faculty members are part of a "publish or perish" tenure system in which peer-reviewed publication in reputable venues is expected for advancement. "Especially with regard to journal articles, authors commonly give away their ownership rights in exchange for prestigious publication," the Association of Research Libraries has noted.

Colleges and universities typically have policies that allow faculty members to hold the copyright to materials that otherwise could be claimed by the institutions under the "work made for hire" doctrine (which generally posits that intellec-

Rodney J. Petersen is a policy analyst with EDUCAUSE. His Web site, CopyOwn (www.umd.edu/CopyOwn), contains resources on copyright ownership for the higher education community.

Management holarship

BY RODNEY J. PETERSEN

tual property produced during the normal course of any employee's work belongs to the employer).

However, we normally would not expect faculty members to be well versed in how to negotiate their intellectual property rights when they deal with commercial entities. And rarely do institutions of higher education provide much guidance to faculty authors, even institutions that aggressively manage other forms of intellectual property, including patentable inventions and computer software that could have major financial payoffs.

It is also difficult to fault commercial or nonprofit academic publishers for wanting to have the copyrights to content. After all, they add value to the original scholarship through the process of editing and indexing, as well as bearing the responsibilities for reproducing and disseminating the content. Recently, however, faculties, libraries, and institutions of higher education—in this country as well as abroad—have begun to see some troubling implications in this long-standing practice of authors assigning copyrights to publishers.

HYPOTHETICAL SCENARIOS

Scenario One. A faculty member who is nearing retirement desires to put his professional writings on his university Web site so that students and others can have easy access to his lifetime of scholarship and research. He has written 200 to 300 articles that were published in as many as 20 different journals. Is he within his rights to post his writings on a publicly accessible Web site?

Scenario Two. A professor teaching a Web-enhanced course plans to assign her students a book chapter and several other articles that she has written. Rather than create a course pack or require students to acquire the publications, she would like to digitize the content and upload it into the reserved read-

ing section of her online course. May she post her writings on a Web site limited to students enrolled in her course?

Scenario Three. A physics professor is teaching an advanced course that will require her students to have access to specialized scientific journals. Due to budget limitations and the high cost of the journals, the library is unable to subscribe to all of the journals that are needed. Some of the assigned articles were written by other faculty in the department. What are the faculty member's options for maximizing the students' access to the available scholarship?

OPTIONS FOR MANAGING AUTHORS' RIGHTS

The pervasive practice of faculty assigning the copyright to works they create results from the mistaken belief that copyright ownership is an "all or nothing" proposition. Thus, faculty members have been eager to exchange their legal rights of ownership in return for professional publication and the publishing credentials that result. Similarly, publishers have maintained that in order for them to maximize their profit and retain control over copyrighted works, they need exclusive rights to the material.

However, in a 1997 report, "Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning," the Consortium for Educational Technology for University Systems explained that the exclusive rights of the copyright holder (initially, the author of the work) can be "creatively reallocated" according to various parties' needs and preferences.

For example, if in Scenario One the author had retained the copyright or preserved the right to publish and disseminate his work on a Web site, he would be free to do so. Similarly, the professor in Scenario Two could make her writings accessible to her students if she had taken the appropriate steps to reserve those rights at the time of publication. Scenario Three also illustrates the important role of institutional copyright ownership policies, which often relinquish any rights of the institution when it comes to traditional scholarly materials.

Historically, the faculty members in each case probably would not have made arrangements to reserve the necessary rights, believing that all of their rights had to be signed away in return for publication and because it was permissible to do so under institutional policies.

> A principled approach to copyright management would focus on the needs and interests of the stakeholders, with the goal of seeking win-win solutions.

The concept of "unbundling" rights, accompanied by a principled approach to negotiation, offers new opportunities to both authors and publishers. Drawing upon the method of principled negotiation outlined by Roger Fisher and William Ury in their 1983 book *Getting to Yes*, the interests of various stakeholders can become the basis for reaching an agreement.

Rather than focusing on policy positions (such as whether an author or publisher owns material), a principled approach to copyright management would focus on the needs and interests of the stakeholders, with the goal of seeking win-win solutions. For example, a publisher may be willing to let a professor use his or her scholarly materials in his or her courses at no cost to enrolled students or as the basis for future publications. Furthermore, a faculty member is typically eager to get his or her work professionally published and would consider the publisher's interest in having "first publication rights" to be reasonable.

The author's agreement with a publisher could accommodate the interests of both parties, for example, either as a non-exclusive license granted to the publisher from the faculty author allowing the publisher first publication rights, a non-exclusive license granted to the faculty author by the publisher following the author's assignment of copyright to the publisher, or a variety of other arrangements.

A commercial publisher might maintain that it needed exclusive rights to a work in order to avoid its becoming available from another source, including a competitor or a free Web site. Additionally, a publisher would typically prefer to own the copyright (as a result of an assignment from the author) rather than to receive a license to publish from the author because ownership conveys additional legal rights, including standing to sue in case of infringements.

Furthermore, the management and enforcement of a copyright is not a simple or inexpensive endeavor. Commercial publishers could argue that they are able to market a copyrighted work and protect against infringement more effectively than the author.

Some publishers also would contend that their support of the peer-review process is another value-added feature of commercial publishing. Nonetheless, a process that focuses on the overall interests of all the parties involved can be an

OBJECTIVE

To assist stakeholders—including authors, publishers, librarians, universities and the public—to achieve maximum access to scholarship without compromising quality or academic freedom and without denying aspects of costs and rewards involved.

PRINCIPLES*

1. Achievement of this objective requires the optimal management of copyright in scholarly works to secure clear allocation of rights that balance the interests of all stakeholders.

2. Optimal management may be achieved through thoughtful development and implementation of policies, contracts, and other tools, as well as processes and educational programs, (collectively "Copyright Management") that articulate the allocation of rights and responsibilities with respect to scholarly works.

3. Appropriate Copyright Management and the interests of various stakeholders will vary according to numerous factors, including the nature of the work; for example, computer programs, journal articles, databases and multimedia instructional works may require different treatment.

4. In the development of Copyright Management, the primary focus should be on the allocation to various stakeholders of specific rights.

5. Copyright Management should strive to respect the interests of all stakeholders involved in the use and management of scholarly works; those interests may at times diverge, but will in many cases coincide.

6. All stakeholders in the management of the copyright in scholarly works have an interest in attaining the highest standards of quality, maximizing current and future access, and ensuring preservation; stakeholders should work together on an international basis to best achieve these common goals and to develop a mutually supportive community of interest.

7. All stakeholders should actively promote an understanding of the important implications of copyright management of scholarly work and encourage engagement with the development and implementation of Copyright Management tools to achieve the overarching objective.

* February 18, 2003

---

effective way to manage the allocation of rights to scholarly materials.

Beyond authors and publishers, other stakeholders include librarians and academic administrators who are deeply troubled by the rising costs of scholarly journals and the threats to access to the material by both faculty and students. They are equally frustrated by a system that requires them to acquire or license content developed by their employees, including faculty and staff.

Finally, the proliferation in the number of publications and types of journals makes it difficult and impractical to provide access to the array of scholarly materials that are now available. Of course, the proliferation of published academic materials is a phenomenon that the academy through its standards of "publish or perish" has helped to create.

However, the growing popularity of Web-enabled scholarship and the availability of digital libraries are exerting additional pressure for better, more thoughtful management of faculty scholarship. A relatively recent concept, institutional repositories, seeks to preserve scholarly materials produced by faculty and provide access through a digital collection and archives.

There are many technical and procedural challenges to realizing the promise of institutional repositories, not the least of which are the intellectual property rights of creators and the determination of what rights, if any, remain for materials already submitted for professional publication (see Crow in Resources).

Nevertheless, the idea of such repositories warrants careful consideration because of the importance to scholarship of continued access to material generated by faculties, students, and professional staff.

EMERGING PRINCIPLES FOR SCHOLARLY COMMUNICATIONS

One effort to improve the current situation resulted from an international meeting a couple of years ago designed to bring stakeholders together to establish a set of principles to guide management of scholarly copyrights. The working conference took place in June, 2001 at Zwolle, in the Netherlands, and emphasized the management of intellectual property rather than the allocation of rights.

The international participants agreed to develop a set of principles (See sidebar) aimed at optimizing access to scholarly information in all formats, explaining the underlying relationships of the stakeholders involved and providing a guide to good practice on copyright policies in universities.

The principles are set within the framework laid out by the Tempe principles (www.arl.org/scomm/tempe.html), developed by leaders representing higher education and library associations, and the report "Seizing the Moment—

- Crow, Raym, "The Case for Institutional Repositories: A SPARC Position Paper," ARL Bimonthly Report 223, August 2002

- Consortium for Educational Technology for University Systems (CETUS), "Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning," 1997 www.cetus.org

- "Copyright Management for Scholarship," www.surf.nl/copyright

- Fisher, Roger and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, New York: Penguin Books, 1983

- "Managing Your Copyright," *Create Change: A Resource for Faculty and Librarian Action to Reclaim Scholarly Communication*, Association of Research Libraries (ARL) www.createchange.org/librarians/issues/controlling.html (accessed on September 29, 2000)

- Petersen, Rodney. *CopyOwn: A Resource on Copyright Ownership for the Higher Education Community* www.umd.edu/CopyOwn

- "Principles for Emerging Systems of Scholarly Publishing" www.arl.org/scomm/tempe.html

- "Seizing the Moment—Scientists' Authorship Rights in the Digital Age," American Association for the Advancement of Science (AAAS) www.aaas.org/spp/sfrl/projects/epub/finalreport.html

- "To Publish and Perish," *Policy Perspectives*, Institute for Research on Higher Education, Volume 7, Number 4, March 1998. ◌

Scientists' Authorship Rights in the Digital Age," from the American Association for the Advancement of Science (www.aaas.org/ spp/sfrl/projects/epub/finalreport.html).

The Tempe Principles state: "The academic community embraces the concepts of copyright and fair use and seeks a balance in the interests of owners and users in the digital environment. Universities, colleges, and especially their faculties should manage copyright and its limitations and exceptions in a manner that assures the faculty access to and use of their own published works in their research and teaching."

The AAAS report recommends that "...scientists, as authors, should strive to use the leverage of their ownership of the bundle of copyright rights, whether or not they transfer copyright, to secure licensing terms that promote as much as possible ready access to and use of their published work."

The establishment of a set of core principles, focused on the thoughtful understanding and application of copyright law to the management of scholarly works, can permit the principal stakeholders in scholarly communication—including authors, publishers, librarians, universities, and the public—to achieve maximum access to scholarship, to strengthen academic freedom, and to enhance the quality of academic work.

The draft principles were presented to a second working conference in December 2002 with the intention of urging the stakeholders to publicly endorse the principles and to actively promote them. A third working conference was convened in February 2004 to focus on implementation of the principles, including the utilization of a Copyright Management Toolkit. (More information regarding the principles and toolkit are available at www.surf.nl/copyright)

CONCLUSION

College and university administrators have refused to get involved in the management of the copyrights for faculty-written works because of academic freedom concerns and because they have assumed that the revenues from traditional scholarship are too slight to warrant institutional involvement or investment of resources to oversee them.

However, the stakes are greater than most realize. The ability for institutions of higher education, scholars, and the public to have affordable and optimal access to scholarly works is at risk. The ability to now create, store, and distribute content in digital form across the Internet —affordably and instantaneously—presents opportunities to reconsider scholarly publishing practices and business models. Therefore, it is imperative that faculty authors and college and university administrators begin to better manage copyrights for such materials.

Institutions' copyright ownership policies should contain provisions that permit ongoing access and use of scholarly materials created by their faculties and professional staff. Institutions' policies should be careful to provide academic authors with the necessary incentives for new scholarship, including the corresponding rewards and requisite academic freedom to conduct research and publish the results.

Faculties, students, and professional staff should have access to training or other institutional resources that accurately describe copyright law, explain institutional policies, and provide guidance on how to best negotiate agreements with publishers. Focusing on unbundling current and future rights to scholarly materials could usher in a new era of copyright management that can better meet the needs of scholars and publishers alike. ◲