Discussion of issues raised by the current draft policy on copyright at UBC

submitted from the DSR committee, to accompany the draft

The current proposed copyright policy was the result of extensive discussion, which could not be included in the policy proposal itself. In order to make the proposal more coherent, some of the issues raised concerning copyright ownership will be brought up here.

1. **What is the current University policy regarding copyright ownership?**

The current policy on copyright is part of UBC's Policy #88 on **Patents and licensing**, now perhaps 15 years old. This divides intellectual property into three types:

(1) **Audiovisual and computer material** — *Audio and video tapes, films, slides, photographs, computer programs, and material stored on a computer.*

(2) **Inventions and discoveries** — *Data bases [!], computer material, and other products of research which may be licensable.*

(3) **Literary works** — *Books, lecture notes, visual art, and music.*

Ownership of literary work is vested in the author. For all other categories, in the event of proposed commercialization ownership is to be assigned by the author to UBC, and the author is to receive in compensation 50% of net income.

2. **Why is a new policy needed?**

The situation has changed considerably since the present policy was written. In the meantime computers have become ubiquitous.

(1) Since currently nearly all scholarly work and much artistic work begins life on a computer, the current policy's distinction between material stored electronically and literary work is no longer reasonable. This is made even less reasonable by widespread Internet publication.

(2) In addition to basic changes in the way scholarly work is created, there have also been changes in its nature, blurring to some extent the distinction between ordinary text and a program that produces that text.

(3) Electronic publication—particularly the Internet—is now used extensively for teaching.

(4) Rapid increases in the expense of traditional research publication, coupled with new possibilities of electronic publication, have made it important for the University to think about retaining some control over the copyright of its members' research publications.

(5) Canadian copyright law has been recently revised.

3. **What changes are proposed?**

The most important change eliminates the distinction between electronic and other form of storage. In so far as scholarly work is concerned, among the three categories defined in the current policy, only the rights to patentable or licensable material are to be retained by the University. If the current proposal is adopted, then Policy #88 will have to be modified suitably.

No solid answer to the problems of currently escalating research publication expense is offered, largely because it is not clear what the future will bring, but a few first steps are suggested.

4. **In what cases would the University retain part or all of a members' copyright under the new policy?**

Under the proposed revision, the University would retain rights in roughly four cases: (1) Patentable material and certain computer programs (not clearly defined) requiring a license to use; (2) material produced for administrative purposes; (3) material whose production was supported by a substantial use of University resources; (4) material whose development was supported by an external grant.

5. **How and why are computer programs treated differently from other intellectual property?**

The draft policy distinguishes computer programs from other forms in the words

> *If the work is a computer program, then the author is the first owner of the copyright and is free to publish the computer program. If, however, the computer program is a tool and the author proposes to commercialize the computer program, then a disclosure must be made to the University, the Copyright assigned and the Moral Rights waived in accordance with Policy #88.*

In the draft there is also a footnote:

> *Many multi-media works will use embedded tools for navigating, displaying graphics, and modeling. Should these be included under the definition of a tool?*

There are many ways in which a computer program is different from other forms of expression subject to copyright.

(1) It is fairly easy to produce. (2) It is extremely easy to reproduce. (3) It is, in some circumstances, subject to patent rights as well as copyright. (However, most computer programs, even if they are commercially valuable, rarely depend on patentable new ideas.) (4) It is potentially more valuable in terms of financial return.

Of course there would be no real problem except for (4).

In addition there is the problem of distinguishing source code from executables, which many people do not appreciate. But in this respect and in many others, however, it is hard to distinguish computer program source and an executable from a musical score and a recording of that music. Many of the special problems created by computer programs are also dealt with clumsily by the law, and it should be kept in mind that Canadian law regarding computer programs differs at least in principle from US law.

One major point is that computer programs now form an indispensable role in publishing, and at all levels. It should be especially kept in mind that these days it is sometimes difficult to draw a clear line between a text and a program which produces that text. This difficulty will increase as time goes on. Such a confusion is not a minor matter, but inherent in the nature of information processing. Examples of this sort of thing include programs making a graphical inclusion, where the graphic itself is often a program, or programs in Java incorporated into interactive text. Even macro packages for word-processors might reasonably be called ‘programs which are tools’. On the face of it, the current draft policy would seem to assert that the University retains ownership in all this material. This will probably prove to be a nuisance if the policy is not reworded.

One example of the sort of problems that might arise would come up if a faculty member’s book were to be accompanied by interactive computer programs on a CDROM. In present circumstances, some kind of software tool would be very likely included. Would the University then claim part of the proceeds from sale of the text?

The committee did not really attempt to resolve this issue, perhaps because for various reasons there were real differences in opinion among members of the committee. Some of the committee, at least, felt that it would be consistent with the University’s overall goal of stimulating productivity in society at large to be as liberal on these matters as possible.

Perhaps one criterion for University ownership would be scale. At one end of a spectrum would be computer programs included on a CDROM accompanying a textbook, and produced in much the same way that the text itself was produced. At the other end would be those produced by teams of several people with major financing from the University, for example to use in large scale financial analysis.

It is hard to distinguish precisely among the various possibilities, and the current draft does not attempt to do this. Whatever policy is finally adopted, it should be at least clearer than the current draft. In formulating it, a wide range of scenarios should be considered, and the special nature of computer programs, which creates many of the problems in dealing with it, should be considered at length.

Incidentally, the term 'computer program', as opposed to other almost synonymous terms, is defined in Canadian copyright law, as pointed out in the draft policy.

6. **In what ways is the draft policy incomplete?**

First of all, as the previous section suggests, it does not specify clearly how ownership of computer programs is to be determined.

In addition, there are two major issues on which the subcommittee could not come to a decision. These are indicated in the draft, where they are posed as questions.

(a) *What provisions should be included for sharing of revenue derived from the sale of copyrighted works where the ownership vests in the author and substantial University resources were used in its development?*

In an earlier draft, a substantial tax was to be assessed by the University on even traditional academic work which realized revenue above a certain amount. Nearly all, perhaps all, of the committee felt that the resentment caused by such a policy would far exceed the actual financial return to the University. Implementing such a tax also posed serious legal problems. Some on the committee felt also that the University's return from a member's copyright work should somehow be related to its investment in the work, rather than set arbitrarily in terms of income. In the present policy, the residue of the idea that the University should share in income on copyright work is contained in the point that if the University is to retain any rights in copyright material, this should be stipulated before the work is substantially begun.

(b) *Should the author's copyright be subject to the University's perpetual, non-exclusive right to reproduce and use, free of royalties, all or part of the work for purposes of the University's teaching and research?*

In an earlier draft, such rights were called **academic rights**, and it was proposed that the University retain them. The exact statement, which on the face of it seems reasonable, was this:

> *In cases where the University assigns copyright in a traditional academic work to the faculty or staff member who created it, the assignment will be subject to retention by the University of academic rights to the work. Any assignment, license, or other exercise of rights by the creator will be subject to the retention of these rights by the University.*

The basic principle was agreed to by almost all, perhaps all, of the committee, but nonetheless the statement above was not considered precise enough to be acceptable, and in fact the committee could not find a satisfactory formulation. For one thing, the formulation above was considered far too general, and many troubling cases came to mind. Would the policy affect the disposition of royalties on text books written by University authors and used by its students? Was the University to be allowed to publish on the Internet a faculty member's lecture notes, against his or her desires? Was one faculty member to be allowed to use another's lecture notes without explicit permission?

7. **What was suggested about taming the escalating cost of research journal subscriptions?**

This question is closely connected with that of academic rights. One point of the retention of academic rights by the University would be to counteract the increasing strictness of research journal publishers regarding an author's rights. The idea would be that independently of what rights a publisher thought the author had signed away, the author's rights at least to use the material in teaching and research would be retained in this scheme, whether explicitly or not. Similarly, an author's right to post an article on the Internet even after journal publication would be retained. However, the situation in this area is changing rapidly at the moment. It was felt to be impossible to formulate a policy that would be flexible enough to deal with what might happen even in the near future. One point made was that if the University imposed a rule for this purpose, University authors might find themselves at a disadvantage compared to those from other Universities. It was also pointed out that the solution to some of the current problems can only be solved by the cooperative effort of several Universities.

One of the committee members contributed this comment:

The serious problems arising from escalating serial prices have been written about many times and most recently in an article entitled "To Publish and/or(?) Perish" [noted below]. It reports on the deliberations of university presidents, provosts, faculty. librarians, counsels, and representatives of scholarly societies and university presses who participated in a special Roundtable on Managing Intellectual Property in Higher Education. University libraries are increasingly unable to subscribe to the journals in which their own faculty are publishing their research. Faculty continue to sign away their intellectual property rights to large monopolistic commercial publishers.

The article contrasts the expectation of an open exchange of information within the scholarly community with the pricing and copyright practices of commercial publishers that control many of the major scholarly publishing venues. One of 5 strategies recommended was that universities, led by their national associations, help faculty understand the implications of signing away their intellectual property rights.

The participants stated that "The outcome we seek is a set of specific arrangements - linking institutions, their faculty, and their scholarly organizations - that protects the rights of faculty and secures for their appointing institutions a more assured ability to provide access to research and scholarly information."

8. **How do other Universities deal with similar matters?**

One interesting thing is that in spite of the problems involved with retention of academic rights, it is not uncommon for Universities to retain them. Here, for example, is the policy of the University of Waterloo:

Owners of [intellectual property] rights in scholarly works created in the course of teaching and research activities grant the University a non-exclusive, free, irrevocable license to copy and/or use such works in other teaching and research activities,but excluding licensing and distribution to persons or organizations outside the University community. Any such licensing and/or distribution activity would be authorized only by an additional license from the owner(s).

It would be interesting to see how problems arising are dealt with in practice at Waterloo.

The range of existing policies at other Universities is tremendous. Some Universities, for example Waterloo, make essentially no distinction between different forms of intellectual property and consider all rights, with a very few exceptions, to be the author's. Others also make no essential distinction, but retain the rights!

A few of these policies and some discussion of related topics can be found at these Internet sites:

Waterloo: **`http://www.adm.uwaterloo.ca/infosec/Policies/73a.html`**

Stanford: **`http://www-leland.stanford.edu/dept/DoR/Chpt5.html`**

SFU: **`http://www.sfu.ca/policies/research/`**

Memorial University: **`http://www.mun.ca/munfa/newca.html#27`**

Many useful documents are available on the Internet. One interesting example discussing ownership and other matters is

`http://www.cause.org/information-resources/ir-library/html/cem9734.html`

One specifically concerned with library journal expenses is

`http://www.arl.org/newsltr/196/sparc.html`

The article paraphrased above appeared in the March 1998 issue of *Policy Perspectives* and can be found at

`http://www.irhe.upenn.edu/pp/pp-main.html`