

Minutes*

**Senate Research Committee
Monday, January 27, 2002
1:15 - 3:00
238A Morrill Hall**

- Present: Gary Balas (chair), Melissa Anderson, Victor Bloomfield, Kathleen Conklin, James Cotter, Sabine Fritz, Yev Garif, David Hamilton, Paul Johnson, Katherine Klink, Phillip Larsen, Wendy Pradt Lougee, James Luby, Sharon Neet, James Orf, Mark Paller, Thomas Schumacher, Barbara VanDrasek
- Absent: Gerry Baldrige, Sharon Danes, Kris Davidson, Robin Dittman, Lawrence Jacobs, Scott McConnell, Virginia Seybold, Mehul Vora
- Guests: Nancy Hoyt (Office of the General Counsel); Associate Dean George Green (Graduate School); Senior Vice President Frank Cerra, Ross Janssen (Academic Health Center); Edward Wink (Sponsored Projects Administration); Winifred Schumi (Oversight Analysis and Reporting)
- Other: a DAILY reporter

[In these minutes:

1. Digital Millennium Copyright Act

Professor Balas convened the meeting at 1:15 and welcomed Nancy Hoyt, from the Office of the General Counsel, and Wendy Pradt Lougee, the University Librarian, to discuss copyrights and the Digital Millennium Copyright Act (hereinafter DMCA).

Ms. Hoyt provided an overview of copyright issues that affect the University generally. There is a great deal happening in copyright law, she said, and they want to provide details that are useful to the Committee. As a lawyer at the University, she commented, she represents all sides of copyright issues because the University creates, uses, performs, licenses, and acquires copyrighted works--and transmits a lot of them. Anything involving copyright hits many corners of the University. She said she wants to help faculty, staff, and students understand the limits on what they can do as well as their rights and responsibilities.

Under the copyright laws, an owner has the right to make copies, display, _____, and so on. One looks to the number of ways a copyrighted work will be used. Permission can be granted by the owner. Without permission, there are a number of exemptions from the law: fair use (which is a balance), a library exemption, a teaching exemption, and a DMCA exception for liability for Internet Service Providers (such as the University). Damages for violating copyright law can be significant, ranging from \$500 to \$20,000, and up to \$100,000 if willful, actual damages can be recovered, injunctive

* These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate or Twin Cities Campus Assembly; none of the comments, conclusions, or actions reported in these minutes represents the views of, nor are they binding on, the Senate or Assembly, the Administration, or the Board of Regents.

relief is available, and attorneys' fees can be paid. (It is for these reasons that software companies go after infringements.) There are dangers in copyright law and potential violations.

One part of the DMCA that engenders a lot of activity on campus is the limitation of liability for ISPs. The law provides shelters for universities: it protects them if there are copyright infringements on its ISP site. There can be a lot of such infringements when students are involved (e.g., downloading movies); the University receives many charges each week that there have been alleged copyright violations. Under the DMCA, the University must have a designated officer to receive notices (that person is in the Office of Information Technology); the University notifies individuals of an alleged violation by a process set forth in the law; the individual has a right to appeal. The process seems to work with students, Ms. Hoyt commented, although it takes a lot of resources and it is an educational process. The recording and movie industries sent letters to college and university presidents around the country asking and encouraging them to enforce copyright laws and suggested the institutions begin monitoring use. The University has not monitored, in part for legal reasons.

The law requires the institutions to do certain things, Professor Balas pointed out; do the industries ask the institutions to go beyond the law? The institution must identify the individual who is alleged to have violated the law and he or she has a number of days to eliminate the violation; it is a fairly complicated structure, Ms. Hoyt responded. The University works with the Office of Information Technology (OIT) to be sure there is compliance. The industry must tell the University where the infringement is occurring, it must certify there is an infringement, and must send the notice to the University's designated agent. Asking the University to monitor usage, however, goes beyond the DMCA.

Professor Neet asked questions about the process that has been followed at the Crookston campus and whether alleged violations there are reported centrally. They are, Ms. Hoyt said; the decision was made to handle these matters centrally so the Office of Information Technology works with all of the campuses. Some may not know that, Professor Neet observed. There is much information about copyright that needs to get out to the University community, Ms. Hoyt agreed, because it touches almost everyone's work.

How does the education take place, Professor Balas asked? In a number of ways, Ms. Hoyt explained. She offers training to faculty and staff on all campuses, OIT is encouraged to offer training in the dorms, the library has an initiative concerning library resources, the Digital Media Center also provides information. She said she would welcome any suggestions the Committee might have.

Is the University monitoring web usage, Professor Conklin asked? It is not, Ms. Hoyt said, in part because then the University might be aware of copyright violations and thus become responsible for them. It relies on notices from outsiders (or sometimes insiders, such as faculty or students) that there is a possible copyright violation. The issue of monitoring is under study.

Professor Balas noted that many faculty who publish papers give authority to grant permission to publish to the publisher--but then some also put their papers on their website. Does a faculty member have the right to host a publication on his or her own website or is that a violation of the journal copyright? That depends on the contract with the publisher, Ms. Hoyt said. A number of agreements give authors the right to use their publications on their own website and to use copies for academic purposes even if copyright is assigned to the journal. Faculty need to look at the contract.

Ms. Lougee now told the Committee that there are three critical areas that affect the libraries and the faculty in terms of what information they can have access through libraries. First, libraries share a lot of information--because they cannot collect all that they want, they share with other libraries; such sharing, or interlibrary loan, typically falls under fair use. The problem is with electronic content that the libraries must acquire access through a license or contract with the publisher that stipulates the conditions under which the content can be used. (One must rely on lawyers to review contracts with electronic publishers; in contrast, the libraries never needed a lawyer to buy a book.) The licenses from electronic publishers typically either prohibit sharing altogether or establish obstacles to doing so. She said she can understand the concern of publishers--if the University can send out hundreds of copies to other universities, why would other institutions bother to purchase a license?

The University of Minnesota has a particular stake in these matters because its libraries are the largest lender in the United States. The libraries want to look closely at the license apparatus because it is a significant issue if they cannot loan materials or if it requires a lot of work to do so, Ms. Lougee said.

The second issue has to do with making copies of something when the original has deteriorated. The libraries estimate that well over one million books in its collections are so brittle (due to production on acidic paper) that they have a very limited useful life.. In the past, libraries made copies if they could not buy a replacement; it is not clear what rights to create a new copy through digitization exist. There are also concerns about long-term access to digital content created by publishers. The electronic publisher often takes on the responsibility for archiving material so the license must define rights and indicate how long material will be available--but what happens to availability if the University's license lapses or if the publisher goes out of business?

Professor Balas inquired about Elsevier, for example. In this case, Ms. Lougee said, Elsevier is one of the "good guys": it has a very good archiving system, its licenses allow libraries to own the content, and if the license is suspended, the University has the right to obtain a copy of the previously licensed materials. The issue of ownership is key. Often licenses do not allow libraries to own the electronic content; rather, access is simply "leased" on an annual basis. There is also the potential of a tremendous difference in cost associated with leasing vs. ownership. Is this a worrisome issue for the libraries, Professor Balas asked? It is, Ms. Lougee said. Given the uncertainties of archiving, libraries often feel the continuation of licenses is necessary to ensure long term access to electronic content.

The third issue is course materials (which is not just a libraries issue). When the libraries put materials on course reserve, the first time the material is copied for reserve is considered (by policy) to be fair use; any subsequent copying requires permission and the department must pay (even though the course may use the same material more than one term). Ms. Hoyt is evaluating the situation to determine whether the University can be less restrictive; is use of material in a course more than one time still fair use? The law is silent on rights and risks in this regard.

An overarching concern is the "gift economy" embodied in scholarly publishing. Faculty create the content, often assist in peer review and editorial work, and also typically turn over copyright to authored work to publishers. Libraries then must "buy back" the work of the scholarly community. There are forces at work to create alternative publishing venues in competition with commercial enterprises. Physics, for example, has embraced a system of e-prints for distributing content. A proposed Public Library of Science put forward a context to move scientific articles into the public domain, but ultimately

failed to secure sufficient acceptance. Some university libraries are creating their own publishing ventures. The problem is that the commercial enterprise is strongly rooted, it has prestige, and the journals often have significant recognition as preferred venues for publishing. . Change has come slowly and universities will not be able immediately to get away from the fetters that now exist. People must be careful what they sign and what rights they give away, Ms. Lougee said, because these agreements affect what authors can do with their works, including use in course contexts.

How frequently do things change, Professor Orf asked? Faculty need to know what has changed recently so they know what will happen with their courses. It is a moving target, Ms. Lougee responded. Much is now being negotiated, Ms. Hoyt added; the law is trying to catch up with technology. How are faculty to be updated, Professor Orf asked? There should be notices to all faculty when the law will have an impact on what they do; much of what they do now is a result of ignorance. That is why education is important, Ms. Hoyt said; the question is what is most effective. She said she would like suggestions.

One thing that has changed is that what one is used to in the print world (such as giving copies of something to a class) may not be appropriate in the electronic world, Ms. Lougee said. One of the factors to consider in establishing a determination of fair use is the potential for financial damages to the copyright owner: in the electronic world, there is a much greater potential for financial damage to the owner. The courts take the view that it is easier to get permission for electronic publications so universities have an alternative. (This comment met with some skepticism from Committee members as well as Ms. Hoyt.)

A lot of publications encourage leasing rather than ownership, Mr. Garif said; over the long term a source may disappear. Is there any federal or other effort to create a backup? In Europe and East Asia there are instances of national licensing, Ms. Lougee said, but that model has not emerged in the United States. There is some state licensing (for example, the MINITEX operation in Minnesota licenses some content access by libraries in the state).. There is a risk with respect to long-term access. In terms of backup, there are experiments and collaborations underway to establish independent digital archives that could be a fail-safe for the community. The model proposed is a third-party non-profit organization handling archiving. There are, however, significant technical issues as well as the increasing problem of archiving dynamic content.

One thinks of the University as a different entity in terms of the way it handles and uses content, Professor Johnson said, and it has had a lot of degrees of freedom. Publishers are cutting the slack about copies; will they not be allowed? If attorneys are busier, reflecting increased pressure from publishers, will that change the way universities do their work? Will there be accommodations or will universities fundamentally have to change the way they think about and use content? Or will the various industries try to understand universities? That is a hard question, Ms. Hoyt said. Copyright is much more visible now, and a larger part of the economy, so there will be more attention paid to it. She said she did not know if there would be any attempt at understanding; some of the changes in copyright law do recognize how universities work. There has to be a solution, she said, and she hoped it avoids litigation.

Professor Balas asked Ms. Hoyt to provide an overview of the TEACH Act. The law provides that in face-to-face teaching, one can do what one wants but it sets limits on what one can show in a class (e.g., in distance education). If an instructor puts up a video, he or she can only use segments. But the law did not go as far as many wanted it to.

Dr. Hamilton agreed with Professor Orf: his experience as a faculty member is that people comply by rumor. No one he knows can give him the answer and not all 3000 faculty can go to Ms. Hoyt with questions. There must be some organization in the University that assumes responsibility for giving answers and identifying things that put the University at risk (and it should NOT be the Office of the Vice President for Research!). There IS the potential for considerable risk, he added.

Dr. Bloomfield said one consequence is that as journal prices go up and library budgets are squeezed, constraining purchases of monographs (and ultimately the market for monographs). This has implications for tenure. There has been discussion of electronic publication of books and collaboration between university presses and libraries. He asked Ms. Lougee to comment on electronic book publishing. A number of significant electronic book enterprises have failed in the past year, she said; in many cases the technology apparatus and the pricing models were significant obstacles. If one thinks about how a book is used, it is understandable why the flexibility of print is often preferred. A critical issue is the pricing models used for books since the individual purchase of books is more commonplace and yet trends for electronic products often focus on institutional licenses. How can publishers be assured of sustained revenue if the market changes and individual sales decline in light of institutional licenses? She concluded that there would not likely be any significant change in the book domain in the near term, although experimentation is actively being pursued in a number of disciplines.

Professor Balas thanked Mss. Hoyt and Lougee for joining the Committee. He noted that the Committee would like Ms. Lougee to return in the future to talk about the libraries, which are central to research.

2. Graduate Assistant Fringe Rates

Professor Balas turned to Interim Dean Bloomfield, who in turn said he had asked Associate Dean George Green to join the meeting because it is Dr. Green who knows the details of graduate assistant fringe benefit issues.

Dean Green distributed a handout recapping experience with the GA tuition fringe rate pool since 1997-98. He explained that the GA fringe benefits are financed by a fixed hourly charge (rather than a percentage of salary, which was the practice earlier). He then described the complexities of the funding and how the pool fluctuates annually depending on a variety of factors which are sometimes impossible to predict. The result is that some years there is an overcharge (which must be refunded, by federal law) and some years there is a deficit in the pool, which must then be made up in the succeeding years. The result, illustrated on a graph, is that the fringe rate hourly charge, on a percentage basis, jumps around more than tuition.

Would it be possible to use a rolling average, Dr. Paller inquired, so that the fluctuations could be smoothed out? Dr. Green said the University uses a two-year correction model, although he said he was not sure that was mandatory. He agreed that the volatility poses difficulties for grant-writers, who are affected by two factors: tuition and fringe benefits. Tuition is hard to project; it was 5% one year, then 13%, so there was a big expense not in grant budgets. Fringe rate fluctuations have the same result.

What is the reason the University does not adopt a direct-charge system, Professor Balas asked? In 1997-98 the University was just implementing the PeopleSoft system, Dr. Green said, and they were asked not to make the situation more complicated, so they stayed with the status quo.

If one could reset the clock, Professor Conklin asked, would the problem go away, or does it date from 1997-98? It might be reduced, Dr. Green said, but as long as one prediction is wrong, there will be over- or under-recovery. They cannot hit the mark every time so the deficit or surplus in the fringe benefit pool must be made up later. He is thinking about starting to look at current year data in order to get a better idea of what is happening and what the rate should be for the following year; that might smooth out the fluctuations somewhat. Dean Green had used a 10% tuition increase for hypothetical purposes in looking at the possible fringe benefit rate in 2003-04; if he expects only a 10% increase, Professor Balas told Dr. Green, "I will sprout wings and fly." The problem is not the tuition rate, Dr. Green said; that can be set later in the year and can be set at the actual rates set by the Regents.

Dr. Hamilton pointed out, for the benefit of the DAILY reporter, that all of this was purely speculation. Dean Green said that he was NOT predicting what tuition would be.

Mr. Wink suggested that perhaps rates could be set for two years in order to dampen the swings; that is what the University does with other rates, he noted. Dr. Green agreed that would make for more gradual fluctuations, but he said it would still not be possible accurately to project rates for three years (e.g., for a three-year grant). Professor Balas said it is discouraging when tuition increases, the fringe benefit charge increases, and a grant that could support two people one year can only support one and a fraction the next. Dr. Green said he did not know grant rules on making projections two or three years in advance.

Mr. Wink said the University does make out-year predictions for civil service and P&A rates, but if there is over- or under-recovery, the amounts must balance over time. Dr. Hamilton said that the University can make any projections that are reasonable. The federal government would likely consider most projections reasonable; most PIs, however, will not like them because the increases will take up their funds.

Professor Balas thanked Dean Green for joining the meeting.

3. Health Insurance Portability and Accountability Act

Professor Balas next welcomed Senior Vice President Cerra and Mr. Janssen to the meeting to discuss HIPAA.

Research policies are being drafted by the Office of the General Counsel, Mr. Janssen explained, and will be brought to the Committee in February; there is not a lot of institutional discretion. Today they are reporting briefly on the education and training that will be delivered with respect to HIPAA. The policies (and HIPAA) apply to the entire University; they will require the training for all faculty and staff in the Academic Health Center and are identifying those departments outside the AHC that must also be included. They are evaluating each unit to determine whether or not it is covered by HIPAA, Dr. Cerra said; the law covers any unit that deals with human subjects.

The education will consist of viewing a 7-minute video (which was played at the Committee meeting) and then 70 minutes of instruction on Protected Health Information. The goal is to keep patient/individual health information private, whether collected from the individual as a patient, a research subject, or for any other reason, Mr. Janssen said. (The sanctions for violating the law are

significant and can include fines of \$25,000 to \$250,000 as well as up to 10 years in prison for a knowing violation.) People will then receive additional training depending on what they do. The training will be available on line but a course can be set up if a unit needs it. Training will start in mid-February. The web site for people in the AHC is myahc.umn.edu; for people outside the AHC it is my.umn.edu (guests, volunteers, can log in as well). The training will be available on the web at any time and there will be a log that indicates an individual has completed the training, Dr. Cerra explained. The University must get about 25,000 people trained by April but the system can handle the task, Mr. Janssen added.

Mr. Schumacher said that this is a preview of things to come; there will be more in the next two years. It is a new culture, he said.

Are there telephone numbers that one can call, Professor Balas asked? The one-stop help number, Mr. Janssen said, and people are being trained now. Professor Balas said the Committee would like to be informed how all of this goes--as the training evolves and how people respond to it.

He thanked Dr. Cerra and Mr. Janssen and adjourned the meeting at 3:00.

-- Gary Engstrand

University of Minnesota