DOCUMENT DELIVERY AND COPYRIGHT
IN A UNIVERSITY ENVIRONMENT

Sanford G. Thatcher

(presented at a workshop on "Document Delivery: Threat or Opportunity?" sponsored by the Association of American Publishers, New York, NY, Friday, September 18, 1992)
In this talk I want to focus on the university environment not only because it is the one with which I am most familiar but also because it presents an unusually complex set of challenges for publishers and copyright law. Judge Leval's decision in the Texaco case in July—even though Texaco has decided to appeal it—is so strongly supportive of publishers' interpretation of what constitutes "fair use" in the commercial sector that we should all feel confident about being able to protect our copyright interests in that arena. And the Copyright Clearance Center's Electronic Access Pilot Program has shown us that document delivery electronically within a corporate environment, although it requires very careful working out of contractual arrangements, is susceptible to solutions that allow publishers to maintain control of their copyrights. Operating in a university environment, however, is a quite different matter.

What explains this difference? Essentially, I think, it is the openness of the environment in which universities function, compared with the closed environment of the corporation, that creates the problems for publishers. The corporate environment structures incentives in such a way that, even though researchers may feel inclined as researchers to share their advances in knowledge with colleagues in their field everywhere, proprietary interests dictate severe limits on what can be shared. So concerned are corporations about allowing their competitors to find out what they are doing that, as Judge Leval noted in his opinion, they prevailed upon the CCC to change its Transactional Reporting Service so that after 1983 information given to the CCC about copying within companies no longer included the identity of the individual articles copied lest their competitors learn "where their research efforts were being concentrated"! So companies that receive licenses to allow electronic or print document delivery to their employees are not about to let them redistribute these materials to the employees of other companies. But within universities the incentives are structured in quite the contrary fashion. Sharing information with colleagues
in other universities is not prohibited; rather, it is encouraged. In fact, the widest possible dissemination of knowledge is the raison d'être of university life: the more their work becomes known by their colleagues throughout the world, the more profitable it becomes for university professors, who lust after high citation counts and whose career advancement depends vitally on having their writings read and respected by as many other scholars as possible. This is also the reason that university librarians take "free access" to be the watchword of their profession; they play a major role in maximizing the dissemination of knowledge and become disgruntled when they are faced with having to accept restrictive licenses for use of electronic media like CD-ROMs or to pass user fees onto their patrons. What explains the enthusiasm for electronic communication among academics is precisely the enhancement it offers to rapid, widespread, and relatively inexpensive dissemination of scholarly knowledge. Academics want to redistribute information they obtain over networks, not seclude it. And librarians want to share their resources, at the lowest possible cost. But it is the very openness of this environment that creates special challenges for publishers who want to keep control over and maintain the integrity of their copyrighted materials.

There are many problems that one could discuss in relation to copyright as it can function, successfully or not, in this kind of open environment. The interactive nature of electronic communication over networks, for instance, raises fascinating questions about ownership of collaborative, evolving work that issues from computer conferences and about the relationship between original and derivative works in even a single scholar's efforts to revise his online publication over time. The Coalition for Networked Information in cooperation with Harvard's Science, Technology and Public Policy Program recently initiated a set of computer conferences to explore some of these issues, and some of you may want to get plugged into this ongoing dialogue. I encourage you to write or call Brian Kahin, who is director of the Harvard project, for more information about it and also to request
a copy of his background paper, which deals with a number of these topics.

In the short time I have available to me today, however, I want to concentrate on just three copyright-related concerns that document delivery in the university environment raises in my mind: the question of interlibrary loan in its now more expansive, post-CONTU phase; the proliferation of electronic databases; and the looming challenge of the "take-back-our-copyrights" movement that is gaining momentum within universities, promoted most vocally so far by librarians. Each of these issues can be analyzed in relation to recent decisions in the courts--respectively, American Geophysical Union et al v. Texaco Inc. (1992), Feist Publications v. Rural Telephone Service Co. (1991), and Community for Creative Non-Violence v. Reid (1989), the latter two of which were Supreme Court decisions.

I won't attempt any exhaustive legal analysis of these cases, which as I am not a lawyer is beyond my capacity to do; and, in any event, my interest in using these cases is less to reach any definitive answers to these questions as to highlight the "political" dimensions of the problems they pose for publishers. Another way of thinking about these issues is to array them along a temporal spectrum, with interlibrary loan presenting the most immediate challenge, electronic databases a fast-growing concern that will preoccupy us all a few years hence, and universities' efforts to reappropriate their faculty's copyrights a problem that is at this point purely hypothetical but nevertheless could become a reality if publishers do not take the threat seriously enough. In projecting this timeline I take my cue from no less an authority than James Kels, Chairman of Elsevier Science Publishers, who is quoted in Rights (Vol. 6, No. 2) as having declared at the meeting of the International Publishers Association this past January that "the traditional journal will survive for at least another decade while we are gearing up" for the electronic future.
We all have at least some general sense of how fast interlibrary sharing of resources, still quaintly referred to as interlibrary "loan," has grown in recent years. But let me give you some hard data. The following quotation comes from the recently released statistical report prepared by the Association of Research Libraries: "Over the five years from 1986 to 1991, the chief audience for ARL libraries, students and faculty, has grown by 10-16%. The new information resources available on campuses during that period, however, have declined by 15% for books and 2% for journals.... At the same time, there has been a 47% increase in books and journal articles that ARL libraries are getting from other libraries for their users; and, since a large amount of this resource-sharing traffic is among ARL members, lending of books and providing copies of articles has similarly risen 45%." What accounts for this rapid growth? Is it the increasing availability of new technology itself or more demands placed on libraries by users? Not according to one library director, Nancy Eaton of Iowa State, who says in the current issue of College and Research Libraries News: "I would submit that economic forces will shape the future library more than either user needs or evolving information technology. The driving force which will mandate changes in libraries is the economic reality that higher education and society in general can no longer economically support scholarly communication and scholarly publishing in their present configurations. We all must balance our personal checkbooks each month or face the creditors. I submit that we can no longer balance our library checkbooks and that scholarly publishing will be forced to reconfigure itself, albeit over a significant period of time"—ten years perhaps? The budgetary squeeze, indeed, has already prompted librarians to engage in large-scale cancellations of journal subscriptions; when the ARL surveyed its members in 1990, 52% of them were at that time targeting cancellations averaging $120,000, and both the percentage and amount have grown since. When you realize that these
ARL libraries have had to cope with a 72% increase in the unit cost of their serials over the past five years and face the prospect of having to pay about 20% more for them in this coming year, you can appreciate the desperation that is now rampant among university librarians and fueling their rebellious activities.

The system truly cannot bear much more of this strain; it is a geometric progression, with widespread cancellations forcing publishers to increase prices ever more rapidly to cover their costs, leading to more cancellations and sharper price hikes, which simply cannot continue indefinitely—"the end is nigh," as a Biblical prophet might warn.

Although librarians tend to see publishers as the enemy in this doomsday scenario—and regularly engage in "publisher bashing" in such places as the online Newsletter on Serials Pricing Issues (which all publishers should nevertheless have the courage to read)—in truth the blame is ours at least in an accessory way. The real culprits, we all know, are academics themselves, particularly academic scientists whose journals are the ones that have precipitated this whole crisis. I want to read you part of a memo sent to me recently by a former member of our Press's Editorial Committee, who is a mathematician himself: "Journals and monographs are supposed to be about communication, the dissemination of new and exciting ideas. Instead, they have become the vehicle for validating the worth of faculty research, and it's that excess baggage that gets in the way. The most important sharing of new ideas, at least in mathematics, is already taking place over the electronic networks. We are collaborating, sending preprints out for comments, keeping track of what is happening on the cutting edge of our fields through e-mail. The journals are most useful for maintaining contact with what has been happening on the periphery. That service too could easily be provided electronically. Everyone recognizes that there is far too much useless material preserved in print. I pulled a quote off netnews the other day. It's the opening to
the article "What's wrong with this library?" from Physics Today, Aug. '88:

'An extrapolation of its present rate of growth reveals that in the not too distant future Physical Review will fill bookshelves at a speed exceeding that of light. This is not forbidden by relativity, since no information is being conveyed.' Don Knuth has recommended that before submitting any article for publication, the author ask whether sharing this information is important enough to him that he would be willing to spend $1,000 out of his own pocket to see it published. Only if the answer is 'yes' should it be sent in. Most of my own articles would fail this test (there are a few that would pass). This probably doesn't count as contrition, but I think that scientists recognize that we are part of the problem." The future of scholarly publishing, both in journal and book form, I suggest, depends a lot on the rapid growth of this kind of honest self-awareness among our academic scientists—and among academics in general.

I preface my analysis of the Texaco decision as it relates to interlibrary loan in this way in order to emphasize that the current burgeoning of library resource-sharing is only a symptom of the problem we face in scholarly publishing, not its root cause, and that any efforts to challenge the interlibrary loan system on copyright grounds need to take into account the full context of scholarly communication, not only one aspect of it in isolation—otherwise, [we] will only end up "tilting at windmills."

But let's now assume, as the AAP statement on document delivery surely does, that interlibrary loan has grown well beyond the point of limited resource sharing as contemplated at the time the CONTU guidelines were devised. Is the Texaco decision, presuming it will be upheld, going to set the kind of precedent that would make a frontal legal challenge to the present-day interlibrary loan system on copyright grounds likely to be successful? Putting aside the question of whether such an initiative would be politically wise, I venture to say that the outcome would be
far less likely to favor publishers than the outcome of the Texaco case itself has. Consider Judge Leval's analysis of the four factors of "fair use" as they applied to Texaco's situation: (1) "Secondary users have succeeded in winning the first factor by reason of either (1) transformative (or productive) nonsuperseding use of the original, or (2) noncommercial use, generally for a socially beneficial or widely accepted purpose.... I conclude that on either branch of the analysis plaintiffs win the first factor, as Texaco's copying is neither transformative nor noncommercial." Interlibrary loan probably cannot be construed as transformative either, but it is carried out in a noncommercial context "for a socially beneficial or widely accepted purpose"; therefore, it is at best uncertain whether the first factor could be awarded to the plaintiff in a suit against interlibrary loan. The most publishers might be able to accomplish with this factor would be to prevent the supply of documents by university libraries to commercial firms having no attachment to the university. (2) Judge Leval found the second factor, relating to the nature of the copyrighted work, to favor Texaco because courts have often ruled that the scope of fair use is greater with respect to factual than nonfactual works. Surely, the second factor would favor the interlibrary loan system, too, to the extent that the vast bulk of material transmitted would be factual in nature rather than expressive, as in fiction. (3) The third factor, having to do with the amount and substantiality of the portion used, "clearly" favored the plaintiffs, Judge Leval asserted, because whole articles were copied. In a case involving interlibrary loan, plaintiffs would likely be able to count on benefitting from this factor—if they chose carefully to challenge a system where the bulk of the materials shared involved whole-article copying. (4) Finally, regarding the fourth factor, the effect on the market for the copyrighted work, Judge Leval found for the plaintiffs, too, disputing Texaco's claim that Academic Press's revenues would not grow if the unauthorized copying ceased; the judge
speculated that, whether through a modest increase in subscriptions or use of
document delivery services or resort to CCC licensing or, likely, some combina-
tion of all three, the publisher would indeed gain significant new income. But
what is important to note here is that the judge did accept Texaco's argument
"that to give dominant significance to loss of revenue under the fourth factor
can result in denying protection to secondary uses that richly deserve it on the
basis of other factors (primarily the first)." The judge thereby questioned
a crucial assumption that many publishers have relied upon to win cases, viz.,
that the fourth factor is always the most important one and will be given the
heaviest weight. It all depends, is the message that Judge Leval's opinion gives
us--and what it can all depend upon is precisely that "socially beneficial or widely
accepted purpose" that makes the difference to the decision about which side the
first factor favors. So, even though the fourth factor by itself would tend to
favor publishers in a suit over interlibrary loan, it might not be held to outweigh
the first factor. The result of this quick four-factor analysis of a typical
interlibrary loan situation, then, is at best a draw—with the first two factors
likely favoring the defendant and the last two the plaintiff. Since so much would
depend on the individual judge's interpretation of how "socially beneficial or
widely accepted" a practice interlibrary loan is, publishers should be very cautious
about attempting any head-on legal challenge. If I had to bet, I'd say that the
publishers would lose.

If interlibrary loan poses one kind of challenge to copyright holders, the
proliferation of electronic databases poses another. There are two sides to this
problem for publishers: as the providers of electronic databases themselves and as
the owners of materials that are inputted into databases by others. Both roles
are impacted by the Feist decision. Without going into any detail about that
decision, it suffices here to say that its principal result was to undercut the
"sweat of the brow" argument as a basis on which publishers could claim copyright
protection for certain types of compilations. The mere investment of effort in putting these works together and making them available, however considerable, can no longer count as a reason for considering a work copyrightable. Publishers must now show at least a minimal degree of originality in the selection, coordination, and arrangement of materials in the database to establish a claim; the nature of the "value added" by the publisher is all the more critical now to asserting a claim to copyright. The immediate effect of this decision is to cast doubt upon the copyright status of some already existing compilations, both in print and in electronic form. Since these generally are not journal publications, I won't spend much time talking about them in this forum, but let me give you at least one example of a type of publication in which university presses, and some commercial publishers, have invested huge amounts of effort and whose copyright status has been thrown into question by the Feist decision—viz., the "critical edition" of a famous author's work. Where the author died so long ago as to make his already published writing "public domain" material, we now have to worry whether we can sustain any copyright claim in the critically reconstructed texts of such an author; the editor's introduction and annotation, of course, because they constitute original new material, are protectible under copyright, but the texts as such may not be. This is a major concern because already, some years ago, texts of such classic authors were being scanned and input into electronic databases to facilitate scholars' content analyses of these works. Publishers used to be able to assume that they had the right to license such inputting and use, but no longer, after Feist. As you might imagine, the scholarly associations that support the preparation of critical editions are alarmed, too. The Center for Scholarly Editions, which oversees the ongoing projects to publish the critical editions of American authors like Cooper, Dewey, Emerson, James, Melville, Twain, etc., in fact had a meeting yesterday in New York to discuss this potential problem about which
I had alerted it. (Parenthetically, I might add that this matter is of concern to at least some journal publishers, including my own Press, which issues two journals containing material of this type—Legacy: A Journal of American Women Writers and Resources for American Literary Study.) Another possible effect of this decision is to make more uncertain what copyright claim a database creator and vendor could make for certain of its products. There has been some talk among journal publishers within the Association of American University Presses of collaborating on the production and sale of a CD-ROM product that would contain electronic full-text of all AAUP presses' journals, partly in order to maintain greater control of their distribution than can be gained through the licensing of electronic rights to commercial CD-ROM vendors. But would Feist allow the AAUP as an association to claim copyright in this compilation above and beyond the separate copyrightability of its individual journal contents? I'm not sure, at this early stage of the proposal, how important a concern this needs to be, but at least it illustrates the potential impact of Feist on publishers' claims to copyright in their own electronic products.

These and other worries have led some groups of publishers, not only in the U.S. but in Europe and elsewhere also, to begin calling for legislation to recognize a separate "publisher's right" apart from the claim to copyright that publishers receive through assignments from authors. An example of such a publisher's right, but a very limited one, exists under current British law, which protects a publisher against unauthorized photoreproduction of the typography and design of its works. But publishers now are looking for a much more broadly gauged form of protection, either as an integral part of copyright law or else as a "neighboring" or sui generis right. The Commission of the European Community, in fact, currently has under consideration a proposal for an "unfair extraction" right of the latter kind, which would provide protection for publishers' "sweat-of-the-brow" investments in creating
databases for a period of ten years. I would suggest that this kind of alternative protection may become increasingly necessary for publishers as we approach the end of my projected timeline, where universities may have reached the point of implementing the proposals that librarians are already making for them to recapture their copyrights.

Thus we reach the last of our three challenges—the prospect that universities may start flexing their muscles as copyright owners. Since so much of the shouting in this arena has been directed at commercial publishers of scientific journals, hardly any attention has been paid to the fact that, in reality, universities already do own a very large number of copyrights—not, however, of their own faculty exclusively, as librarians are advocating, but of all those authors (whether academics or not, U.S. or foreign) who publish with their own university presses. In only one case I can think of—Princeton University Press—the copyrights of all university press books and journals are owned by the parent university. The problem here, then, is not so much university ownership as such but rather the way universities themselves interact: universities presumably could insist that their presses charge nothing, or only minimal fees, for any uses of materials by other universities; but of course, if they do, then those universities will have to come up with the money from other sources to keep their presses in existence.

University presses now happen to operate the way other publishers do, in licensing subsidiary rights (though usually with some discrimination between fees charged to commercial versus nonprofit users), but there is nothing in principle to prevent universities from having their presses operate differently.

It is true, however, that university presses are not heavily engaged in science publishing, which is where the major problem lies; only 20% of the over 700 journals that AAUP-member presses publish are in scientific fields. And it is particularly scientific article copyrights that librarians are anxious to have universities
control. Some librarians are calling merely for faculty retention of copyright. This is the gist of the model "University Policy Regarding Faculty Publication in Scholarly Journals" issued in second draft in June by the Triangle Research Libraries Network (consisting of Duke, NC State, and UNC) in North Carolina. It begins: "Faculty employees of this university should retain copyright in the results of their university research and other scholarly activities when these are published in scholarly journals. As a non-profit institution dependent largely on government and foundation grants to support its research activities, this university encourages faculty to use publication channels that provide access to scholarly information at the lowest cost for the benefit of the largest number of researchers, students, and interested citizens.... Faculty retention of copyright to their journal articles will help to insure that research scholars and their universities maintain the right to share this information, as appropriate, with colleagues, students and the public at large using existing and emerging print and electronic technologies." Other librarians have gone a step farther by suggesting that universities themselves exert control directly by defining their faculty's publications as "works made for hire." Scott Bennett and Nina Matheson, two librarians at Johns Hopkins, made such a proposal in an article entitled "Scholarly Articles: Valuable Commodities for Universities" in the May 27 issue of The Chronicle of Higher Education. It provoked a response from a Las Vegas attorney, who declared that Bennett and Matheson "misinterpret current copyright law," which according to him does not allow for scholarly articles to be considered as "works made for hire."

This, to my mind, is a much more open question than that attorney seems willing to admit—and I followed with a letter of my own to The Chronicle in which I explained my reasoning, drawing on the language of the Supreme Court's decision in CCNV v. Reid. This is what I said:
It is not certain however, that a university could not successfully argue for having the scholarly publications of its faculty as opposed to say, novels they may write on the side, considered as work made for hire because they fall "within the scope" of their employment. Lichtenstein says that scholarly "articles are not written within the scope of employment, as the U.S. Supreme Court has defined it." Presumably, he is referring here to the Court's decision in the case of CCEV v. Reid. Lichtenstein tells us that "while each publication may reflect on the general quality of the professor's scholarship for promotion, tenure, and merit-pay purposes, the university exerts no control over any individual article." But in CCEV v. Reid the Court explicitly repudiated "actual control" as a basis for determining the status of a work as "made for hire," and it even said that "the hiring party's right to control the product simply is not determinative."...

The Court put a lot of emphasis in this case on the employer's right to control the manner and means of production, rather than the right to control the product itself. But it also listed the other kinds of factors "relevant" to making this determination, including "the source of the instrumentalities and tools: the location of the work: the duration of the relationship between the parties: whether the hiring party has the right to assign additional projects to the hired party: the extent of the hired party's discretion over when and how long to work: the method of payment: the hired party's role in hiring and paying assistants: whether the work is part of the regular business of the hiring party: whether the hiring party is in business: the provision of employee benefits: and the tax treatment of the hired party." Now many of these factors, it seems to me, could be cited by a university in favor of its defining the scholarly output of its faculty as "work made for hire." Contrary to what Mr. Lichtenstein suggests.

Moreover, the leading reference work in copyright law, Nimmer on Copyright, makes it clear that this is very much an open question still. Although, under interpretations of the 1976 law, the writings of professors based on lectures, for instance, were generally considered not to be work made for hire. Melville B. Nimmer cites a 1988 case saying "it is widely believed that the 1976 Act abolished the teacher exemption," and he himself is rather cautious in stating how the current law applies to the university's relationship with its professorial staff: "Given that universities typically do not dictate the manner and means for a professor to reduce his lectures to writing,... perhaps such works still fall outside the work-for-hire doctrine even under the 1976 Act." (italics added). I take this "perhaps" very seriously and think Mr. Lichtenstein should, too.

It is one thing, of course, to ask whether universities can (legally) control faculty copyrights, but quite another to ask whether they will (politically) try to do so and whether they might (economically) succeed. Let me speculate a bit on these latter two questions in bringing this talk to a close.

Politically, it is certainly going to be a sensitive issue—maybe so sensitive that university administrators won't have the courage to try. Even Bennett and Matheson anticipate considerable faculty opposition, at least at the outset: "Since faculty members tend to resist administrative interference, they probably will resist the idea that journal articles are work done for hire—until they are convinced that such a system can lower the overall cost of communication and thereby benefit scholarship."
Bennett and Matheson therefore call for a campaign to educate faculty and administrators "about the existing system of scholarly communication and the value of copyrights" that "can begin through the committees and study groups" of various organizations in higher education, including the Association of American University Presses. If you are inclined to dismiss this as just so much wishful thinking on the part of a few frustrated librarians, think again: already efforts along these lines are under way. One is a proposal, floated by the ARL and the American Mathematical Society, which also hope to engage the AAUP as a joint venture partner, that would establish a Consortium for Electronic Publishing that would provide the technical advice and services enabling resource-poor groups of nonprofit publishers like university presses, which could otherwise not afford to undertake such ventures individually, to find cooperative ways of getting into electronic publishing. Thus would university presses and associations begin to create those channels of communication "at the lowest cost for the benefit of the largest number of researchers" that is the announced goal of the Triangle Research Libraries Network. And where would that leave commercial publishers? Presumably, out in the cold.

Whether universities have much chance of succeeding economically in taking over the role of scientific publishers is a big question. It requires a lot of capital to do scientific publishing successfully—and capital is in short supply in higher education these days! Moreover, university bureaucracies are not notably quick on their feet to take advantage of opportunities, compared with private entrepreneurs, and often operate in ways that add to costs rather than reduce them—ask those of us publishers who have to deal with the bureaucratic procedures of universities every day! It will take a crisis of truly major proportions to awaken universities—and I mean here not just administrators but the faculty, especially the scientific faculty, who wield so much influence over financial
decisionmaking in universities—to think creatively about alternatives to our currently creaking and groaning system of scholarly communication. They certainly are not focusing on the problem today, evidence of which is the desubsidization of university presses that is happening all over the country now. If universities that have presses already don't recognize the need to support them more, what chance is there that more universities will see the light and begin to take on publishing responsibilities?

To conclude, then, while I think universities can control their faculty's copyrights if they so choose, I am not optimistic that they will attempt to do so anytime soon and even less optimistic that they will undertake to do what is necessary to provide themselves with real publishing capabilities beyond what the existing university presses now offer.

The problems in all three areas I have touched upon are more political, in a broad sense, than they are technical or legal. Here university presses find themselves in a peculiar situation. As publishers we share many interests, including our interest in copyright, with other publishers, commercial and non-profit alike. But as integral parts of universities we must always bear the interests of our parent institutions in mind, too. And, when push comes to shove, since universities are the ones that pay our salaries, on which side of any confrontation do you think we'll finally end up? Maybe uniquely, we are in a position to mediate between universities and the publishing community and try to find solutions that will satisfy the needs of both sides. That, to my mind, should be a major task for university presses in the challenging years ahead.