Copyright Law and University Issues

by

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Introduction

In January 1998, it was proposed that graduate students be required to sign a form agreeing to obtain written permission from the holder of the copyright for any tables or figures reproduced from a previously published work, including their own work, for any inclusion in a thesis or dissertation. It was also stated in the form that this was required by copyright laws. Circulation of this proposal raised a host of comments, concerns, side issues, and questions.

This project investigated the current copyright law focusing on university issues. Specific attention was given to the area of student theses and dissertations. This project has yielded three proposed items for implementation. The first item is a set of guidelines (Part 1) for both the use of other’s materials as well as the protection of a student’s own work. It is written for and recommended to be included in the respective departments’ Specifications for Theses / Dissertations (T/D). The second item is a consolidated series of the most frequent questions from students, faculty and the literature that have been answered here in the form of a quick tutorial (Part 2). Future use of this tutorial on the subject of copyright
considerations could be in hand-out form or, ideally, on-line. The third item involves discussion of electronic publishing and considerations for UMR (Part 3). Included in this section is the contract from U.M.I. Dissertation Publishing Company (UMI). The contract language was changed approximately two years ago to allow electronic publishing. There are several considerations presented and suggestions made for re-negotiation. The need for an Electronic Publishing (EP) Task Force is introduced, explored and recommended.

**Chronology of Implementation**

This paper is being submitted to Dr. Don Myers. A copy will go also to Dr. Don Madison, head of the Graduate Faculty. It has been forwarded to UM General Counsel Office for review. The contact there is Nanci Hawke, who has been advised to direct comments back to Dr. Myers and Dr. Madison. Review and discussion are required prior to implementation decisions. This will be coordinated by Dr. Madison with the appropriate people involved.

**Part 1 : Proposed Copyright Guidelines**
An excellent place to include copyright guidelines is the *UMR Graduate Studies Specification for Theses and Dissertations (T/D)*. This would give required information at the time of use. The Engineering Management Department’s copy of the specification, revision 12-01-97, was used for the following format. This format was selected for ease of entry to update the specification following discussion and approval. Here, the existing specification language is shown under *Current*. The advised specification wording is shown exactly under *Proposed*. Following each change, under *Reasoning*, the details of the legal basis and other references are discussed and noted.

**Preface**

**Current:** page ii, paragraph 1, line 4, now reads, “Doctoral dissertations will be published on demand by xerographic methods through University Microfilms International (UMI) Dissertation Information Service and made available to researchers throughout the world unless the publication rights are reserved by you.”

**Proposed:** Change to read, “Doctoral dissertations may be published on demand through U.M.I. Dissertation Publishing (UMI) and made available to researchers throughout the world if the student executes a license or agreement which permits this. UMI’s contract is non-exclusive which allows
you to use your work and have it published elsewhere in the future. In addition to standard xerographic methods, UMI’s contract currently includes their right to “electronically publish” your work, which in some cases will preclude the future acceptance of your work by some journals or other publishers. It is recommended that the student strike through the words “electronically publish” before signing.” (Wording for specification entry continues.)

“All publishing agreements should be carefully read and negotiated before signing. Any or all of the five exclusive rights comprising a copyright can be assigned separately. These five items are the right to: 1) Reproduce the work; 2) Prepare derivative works; 3) Distribute copies; 4) Perform the work publicly; and 5) Display the work publicly. (The Copyright Act, 17 U.S.C. SS 106) Ordinarily, the publisher will need non-exclusive rights to reproduce and distribute copies (items 1 & 3 above). The author many times wants non-exclusive rights for items 1 & 3, also, as well as exclusive rights for items 2, 4 and 5 from above.”

Reasoning: Many students need guidance in law, contractual information, and possible consequences in order to assess, and possibly negotiate, the various situations and contracts they may encounter. Students need to understand, firstly, that contracts can be changed and, secondly, the
Section 1.9. Copyright

Insert: Pg 3, para. 4: 1.9.1. General Guidelines

Current: Move the existing text later as section 1.9.2. No general guidelines exist for non-infringing use of previously published material under copyright to the student or to other authors.

Proposed: On page 4, add under 1.9.1: “Copyrights are distinctly different from issues of plagiarism. Citing your source and giving full credit are important to avoid plagiarism, but do not satisfy copyright law. Copyright considerations are best done by the author at the time of contemplated use, following a simplified procedure, as shown here.” (Spec entry continues.)

Jeffrey R. Young, “Requiring Theses in Digital Form: the First Year at Virginia Tech.” The Chronicle of
1.9.1.1 Assessment Procedure

“This procedure starts with: 1) the fundamental definition of what copyright protection is; then continues with 2) an analysis of fair use criteria that allows some use as non-infringing; and ends with 3) requesting permission to use the material from the copyright holder, when necessary. Each of these steps is detailed below. Copyrights and fair use are sometimes clear and other times complicated. If difficult questions arise, it is best to request permission or to seek legal advice.” (Spec entry continues.)

“1) Copyright protection covers the original work of an author regardless of the medium used. Copyrights do not protect the ideas, principles, concepts, discoveries or methods contained in the expression. (The Copyright Act, 17 U.S.C. SS 102a.) Reproducing someone’s text, picture, graph, data table or chart, for example, could require written permission of the copyright holder. Using the ideas, data or facts contained therein and going on to transform, significantly add to or propose a new relationship in a non-profit, academic setting could fall under fair use and not require written permission.” (Spec entry continues.)
“2) **Fair use** under copyright law allows use, including reproduction, for teaching, research, scholarship, criticism and comment, as non-infringing determined by four factors. (17 U.S.C. SS 107, effective June 1, 1991.) These factors need to be considered at the time of contemplated use. The answers on balance will help decide if written permission is needed. The four factors are:” (Spec entry continues.)

**Purpose of the use** - Non-profit, educational use weighs in favor of fair use, but anything involving sales moves into commercial use which will most likely not be considered non-infringing. Even if the use is for non-profit, educational purposes, this alone does not mean the use of another’s work is a fair use. Courts have refused to find fair use and have found infringement in several cases as shown and summarized in Attachment 1. Significantly adding to or transforming would probably be fair use, but simply copying may or may not be acceptable, based on the other three factors.” (Spec entry continues.)

**Nature of the work** - If the item contemplated for use is written, non-fiction and factual, this weighs in favor of fair use. Items such as photographs, fiction and audiovisual are more difficult to defend as acceptable since the creativity content in expression is viewed as higher by the courts.” (Spec entry continues.)
“c) **Substantiality of the portion used** - Here both quantitative as well as qualitative considerations come into play. A small percentage of the written word, one quotation or a single table or graph out of many, may weigh in favor of fair use, depending upon its’ proportion or its’ significance to the whole work. If the item used is the “heart of the work”, where everything comes together, the use could be considered infringing.” (Spec entry continues.)

“d) **Effect on the potential market for the work** - Unpublished works are very sensitive, including your own, because of undetermined future value. If use of the item will result in an adverse impact on the market or the value of the copyright owner’s work, this will be a factor against a finding of fair use. Special care should be applied when looking at use of computer programs, videotapes, questionnaires, interviews or survey instruments.” (Spec entry continues.)

“After analyzing these four factors, it may be necessary to request written permission to use the copyrighted item. “(Spec entry continues.)

**Requesting permission** begins with obtaining the name and contact address of the copyright owner(s). The five best sources to pursue will be the author, the publisher, the university, the Copyright Office or the Copyright Clearance Center (a private institution sponsored by the
Association of American Publishers). The UMR library can be of help with information and directories in the reference section. Because copyrights are often assigned, it is a good idea to place a telephone call confirming ownership and address first, to save time or disappointment later.” (Spec entry continues.)

“Once the owner and address are confirmed, a brief letter for signature by the owner should be created. A reference and description of the material to be used should be included along with details of how, where and when it will be used. Above the signature line and date at the end of the letter, type this statement as shown:

The undersigned copyright owner of the material described herein grants permission for the above detailed use.

________________________________ ______________
Owner Date

This signed permission letter should be included and/or referenced in the final document (e.g. T / D, paper, questionnaire, program, etc.) that includes the copyrighted item. Copies of a the signed permission letter should be kept on file both by the author and the school/college dean’s office.”

“Liabilities for infringement can include injunctions, impounding, and damages. A finding of “willful infringement” carries with it the potential of a
$100,000 damage award for each infringing use. It could also mean requiring removal of the item from the thesis or dissertation and republishing prior to graduation.”

**Reasoning:** A set of guidelines will allow the student to consider the copyright issues in an informed manner and handle each item appropriately.

**Insert:** 1.9.2. Theses/Dissertation Guidelines

**Current:** Page 3, paragraph 1, line 2 reads: “A copyright may be secured by inserting the proper notice (as follows) of copyright in the thesis or dissertation:”

**Proposed:** Change to new position in spec to read: “The proper notice of copyright in the thesis or dissertation follows:”

**Reasoning:** It is in students’ best interest to be strongly encouraged toward copyright notice and registration, but it is no longer in fact required by law. ² Copyright vests with the author automatically and is not dependent legally upon notice being given nor is registration required. ³ An author will not lose their copyright by omission of the notice or by failing to register. Registration can occur at any time in the duration of the copyright, although doing so within five years of publication will establish court validity. ⁴ At the same

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² Copyright Act of 1976.
³ 17 U.S.C. SS 408.
⁴ 17 U.S.C. SS 408, 410.
time, initiating legal action to stop infringement or pursue retribution requires registration first. Having no notice can lead to innocent infringement with less legal recourse.

**Current:** pg. 4, para. 1, line 1 reads: “and by registering the copyright with

**Proposed:** change to new position in spec to read: “Register the copyright

**Reasoning:** Same as above in that registration is not a requirement for owning a copyright.

**Current:** pg. 4, para. 1, line 4 reads: “A copyright is valid for 28 years and is

**Proposed:** change to new position in spec to read: “A copyright is valid for the lifetime of the author plus fifty years.”

**Reasoning:** The Copyright Act of 1976 changed the duration and eliminated the need for renewal for all works published after January 1, 1978. With two or more authors, the duration is the lifetime of the last surviving author plus fifty years. If the work is made for hire, the duration is 75 years from first publication or 100 years from creation, whichever occurs first.

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6 Ibid.
Current: pg. 4, para. 3, line 2 reads: “The candidate does not have to copyright the work, but once it is submitted to the school or college dean’s office and UMR, if it is not copyrighted, it is considered public domain and cannot then be copyrighted nor can fees later be collected (as in the case of computer program licenses).”

Proposed: Change to new position in spec to read: “It is important to register the copyright and give notice to have clear, legal rights and in order to collect fees later (as in the case of computer program licenses).”

Reasoning: Publication no longer invalidates a copyright by placing it in the public domain. Copyright registration can take place, as noted above, at any time in the duration of the copyright. Court standing for using the registration as prima facie evidence is most favorable if registered within 5 years for printed matter, but is required within 3 months for audiovisual, transmitted works. 7

Current: pg. 4, para. 4, lines 1 & 2 read: “In summary, . . . jeopardizes the author’s rights. If authors . . . registering the copyright.”

Proposed: change to new position in spec, to read: “Authors hold the copyrights, and the five rights that go with them exclusively (as detailed in the Preface) unless signed away, in whole or in part, by the author’s

signature to a contract or other agreement. If authors expect monetary return, careful consideration must be given to each agreement and the issue of payment dealt with directly and separately from other issues."

Reasoning: The author’s copyrights are not jeopardized by publishing or distributing copies, only by assigning their rights in a legal instrument. Copyrights or the assignment thereof do not directly translate to monetary return. One can hold full or partial copyright without necessarily being guaranteed any remuneration. ⁸

⁸ Ibid.
2.6.8. Publication Thesis/Dissertation Option

Current: pg. 8, para. 4, line 8 reads: “Acknowledgments and appendices

Proposed: Change to read: “Signed letters granting copyright permission, if copyrighted material is used, and acknowledgments and appendices should be added as appropriate. A copy of the copyright permission letter should also be given to the school/college dean’s office.”

Current: pg. 8, para. 4, line 11 reads: “If copyrighted material is used...”

Proposed: Delete and include as shown above.

Reasoning: This change keeps the letter of permission with the material using the copyrighted item as well as securing a back-up copy in the dean’s office. Add Attachment 1 - next page
Attachment 1
Fair Use Court Case Examples

1. **Withal v. Crow** - 309 F. 2d 777 (8th Cir 1962) -
   A choir director who distributed copies of a song to his students.

   Authors of a college text who included a psychological instrument in their text.

3. **Marcus v. Rowley** - 695 F. 2nd 1171 (9th Cir. 1983) -
   A teacher who copied eleven pages of another teacher’s work into a 24 page instructional pamphlet.

   A teacher who instructed an off-campus copy shop to make copies of anthologies compiling various book chapters and articles.

   A school tapes educational broadcasts for later viewing by students.

End of Specification Changes
Part 2: Copyright Tutorial Questions & Answers

Many questions have been asked making it possible to create a tutorial based on answering the most frequent topics of interest. These answers are brief, but provide a general, working knowledge for copyright issues. In the following format, pertinent references to the Copyright Act have been typed into the text for inclusion in the final tutorial. The footnotes are for readers of this project paper and are probably not required in the final tutorial format. This section is written to stand alone as a hand-out, pamphlet or on-line information source, starting on the next page.
Quick Copyright Tutorial

by Karla Callahan: kmcallah@umr.edu

Last update: January 5, 1999

1. Who ordinarily owns the dissertation / thesis copyright?

   If a publisher, such as U.M.I. Dissertation Publishing, presents a contract assigning rights, the student should carefully read, seek advice and probably negotiate before signing. Copyright ownership vests initially with the creator (The Copyright Act, 17 U.S.C. SS 408). The creator may negotiate an agreement transferring ownership of the copyright. Like most contracts, these agreements will generally not be enforceable unless some compensation (money or service) is given to the author in exchange for the transfer of rights. The author may retain any of the five rights or copyright by agreement. It is unlikely that a student’s dissertation will be a “work for hire.” A written agreement, policy or contract with the student is a good idea to verify notice and to allow negotiation for limited rights for future derivative or educational uses by the author.

2. If work is done under grant, is it considered “work for hire” with copyright going to the grantor?

   Not automatically, but if the work is within the scope of employment, or is commissioned as a “work for hire” pursuant to a written agreement, the paying institution will own the work. It is important to discuss and understand this status at the outset of the work relationship. Contract details and negotiation require attention, especially when corporations are involved.

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3. If a student performs work and creates the documentation, and a professor publishes the work solely later, who owns the copyright?

These agreements will generally not be enforceable unless some compensation in money or service is given to the author in exchange for the transfer of rights. The author may retain any of the five rights of copyright by agreement. It is unlikely that a student’s dissertation will be a “work for hire”. If the student’s contribution was substantially most of the work, copyright goes the student as the creator. It is important to note that only the creation of the expressed work is considered contribution toward copyright ownership, ideas given are not.\textsuperscript{10,11}

4. When several names appear on a paper, whose agreement is needed to release the paper for publication?

One author can grant release, unless a separate copyright has been obtained for a portion of the joint effort.\textsuperscript{12} However, if any royalties are generated, an accounting must be made to the other authors, and the royalties will be divided by agreement or litigation.

5. What is needed if the student wants to include previously published works in a dissertation / thesis?

The answer will depend upon whether the author conveyed exclusive rights to the publisher. That agreement must be examined before the author uses the work again. If the material used consists of the data, facts, ideas etc. and they are transformed or expanded (rather than mere reproduction); and if the use is in the educational setting; no release may be needed. If the changes to the item used are not significant, a release is probably needed from the publisher, if all copyrights were assigned previously by the author. A recommended approach is for authors to negotiate for future derivative use before signing the publication agreement.

\textsuperscript{11} 846 F.2d 1485, 1498 (D.C. Cir. 1988).
\textsuperscript{12} Copyright Primer. 64-65.
Consequently, you should carefully assess the impact to you before agreeing to electronic or Web publishing. Also note that in any Web publishing you do personally, it is important to state your copyright notice, if it applies.

7. If copyright infringement occurs, who is liable and what are the consequences if the infringer is:

   a.) A student, and infringement found prior to graduation?

       The student is liable. Personal liability could include injunctions and damages. University action against the student would be dependent upon the facts of the case. (17 U.S.C. SS 501-511)

   b.) A past student, and infringement found after graduation?

       Personal liability, injunction and damages. If the rights are transferred to the university, or a publisher, or other, depending on circumstances, additional damages may be sought by those entities. (17 U.S.C. SS 501-511)

   c.) A faculty member?

       Personal liability, injunctions, damages, and ethical questions involving diligence and willfulness. (17 U.S.C. SS 501-511)
8. Under what circumstances can other material be copied and included in a thesis or dissertation?

Copyright protection covers the original work of an author regardless of the medium used. Copyrights protect the expression of the work and rights to reproduce it. Copyrights do not protect the ideas, principles, concepts, discoveries or methods contained in the expression. (17 U.S.C. SS102) Copyrights are distinctly different from issues of plagiarism. Citing your source and giving full credit are important to avoid plagiarism, but do not satisfy the copyright law. Copyright considerations are best done by the author at the time of contemplated use, following a simplified procedure that is outlined in your department’s Specification for Theses / Dissertation. Reproducing someone’s text, picture, graph, data table or chart, for example, could require written permission of the copyright holder.

9. Is there an alternative to assigning rights to organizations such as U.M.I. Dissertation Publishing (UMI)? Can new terms be negotiated?

UMI’s contract is non-exclusive which allows you to use your work and have it published elsewhere in the future. UMI and others may specify their right to “electronically publish” your work. But this may preclude the future acceptance of your work by some journals or other publishers. It is recommended that the student strike through the words “electronically

All publishing agreements should be carefully read and negotiated before signing. Any or all of the five exclusive rights comprising a copyright can be assigned separately. These five items are the right to: 1) Reproduce the work; 2) Prepare derivative works; 3) Distribute copies; 4) Perform the work publicly; and 5) Display the work publicly. Ordinarily, the publisher will need non-exclusive rights to reproduce and distribute copies (items 1 & 3). The author many times wants non-exclusive rights for items 1 & 3, also, as well as exclusive rights 2, 4 and 5.

10. How do I apply for copyright registration? How much does it cost?

   Forms are on-line at http://lcweb.loc.gov/copyright/forms.html. Samples are available in the UMR library. The fee is $20.00.

11. How long does a copyright last?

   The Copyright Act of 1976 changed the duration and eliminated the need for renewal for all works published after January 1, 1978. With two or more authors, the duration is the lifetime of the last surviving author plus fifty years. If the work is made for hire, the duration is 75 years from first publication or 100 years from creation, whichever occurs first. (17 U.S.C. SS 302).

Please direct comments or additional questions to either:
Dr. Don Myers: dmyers@shuttle.cc.umr.edu
Karla Callahan: kmcallah@umr.edu

End of Quick Copyright Tutorial

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Section 3 - Electronic Publishing

UMR Considerations and Recommendations

The future direction of information and communication is clearly moving on-line, growing toward multimedia. The philosophies and legalities are evolving rapidly now, but the path is not clear. Discussion of on-line publishing advantages and disadvantages, as they are currently understood, is included below. At this date, there are three actions that are recommended:

1) The official university contact with UMI should negotiate removing the option of electronic publishing from their contract. More considerations for the future are included below.

2) In the interim, until a renegotiated contract is in place, students and faculty will need information and support, if challenged, when the words “electronic publishing” are crossed-out on a case by case basis.

3) It is advisable to identify an electronic publishing (EP) task force from UMR to address the issues and help prepare for the future by:

   A) Establishing the best interests of the students and university.

   B) Monitoring the trend of other universities, societies and publishers and assess the impact.
C) Making recommendations for proactive steps during this peak time of change (the next 1-3 years).

**Discussion Of Recommendations**

1) **UMI Contract** - U.M.I. Dissertations Publishing Company used to be named University Microfilm International and is still referred to by the abbreviation UMI. They are located in Ann Arbor, Michigan and work with colleges and universities throughout the United States and Canada. UMI serves as a clearinghouse for theses and dissertations. Their business used to be microfilming, listing, and fulfilling orders (with paper copies) for theses and dissertations they had on file. This is still their business, with one important change. Two years ago they changed their focus and their contracts to allow electronic publishing.

The primary issue at this time, is the jeopardy that on-line availability poses to future journal publications. The Specification for Theses and Dissertations includes information for the interim handling of electronic publishing rights. The current decision of a number of societies, journals and publishers; including the American Chemical Society and the American Society for Microbiology; is that electronic publication “would remove the
article from consideration” by their group. Because the issue is unclear and heated at this time, conservative entry into digital format has merit for UMR.

As on-line publishing continues to grow, the surrounding industry and market will feel the shift. This presents a threat to conventional companies and services that do not keep up. When negotiating with UMI, it is important to keep in mind that their competition is expanding, carrying all the associated risks. The information that is easiest to obtain has had an advantage. At the same time, the demand for insurance of veracity of on-line information is increasing quickly. Digital journals will offer the veracity, but also at a price, making it necessary for them to select papers that are not widely distributed previously. For example, Virginia Tech’s program is two years old, with about 700 T/D on-line. The access rate has ranged between 2-7,000 times per T/D. Clearly, before electronic publishing, the dissertation with 7,000 call-ups would have been valuable to UMI or a journal. Since 1997, new dissertations are available from UMI over the Internet for a $20.00 fee. The most popular Virginia Tech dissertation could

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16 Ibid.
have garnered UMI $140,000.00, if the fee was paid by the same number of interested parties.

As a side note, electronic information resources may also increase university license acquisition costs. Negotiating these contracts for fairness will require a good grasp of the applicable laws as well. \(^{17}\)

2) **Interim Solutions** - The first step to interim management is providing information to students and faculty. The tutorial questions and answers will provide a starting place. The Specification for Theses and Dissertations, as updated, will provide detail at a time of high need. Sensitivity to the students’ position and providing support for contracts is key.

3) **EP Task Force** - The need for a UMR task force will grow at an increasing pace. Momentum is building nationally as Congress proposes Internet and copyright legislation, universities band together and funding is directed toward educational information and linkages. The timing may be right for UMR to decide where and how to participate in the changing environment.

On-line copyright issues are being addressed by the government’s National Information Infrastructure (NII) Task Force for applying copyright
law to digital storage and Internet communication. A report was issued in September 1995 proposing copyright law revisions. This generated concern that rights would be strengthened without adequately balancing fair use allowances. 18

University activity is growing as shown in the following two examples. Three universities; California State University, State University of New York, and City University of New York; have joined together and are seeking alliances to promote educational interests. 19 Virginia Tech is leading a program named the Networked Digital Library of Theses and Dissertations, with 21 universities agreeing to participate. Support comes from the U.S. Department of Education, with $210,000.00, along with corporate sponsors Adobe, IBM and Microsoft contributing over $1 million. 20,21 This effort will pose direct competition for UMI.

International issues and laws will probably come more into play with the Internet pervasiveness. In the United States, facts themselves are not copyrightable, but sometimes compilations of facts are. How the facts are selected, manipulated and presented involve creativity and the final work

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18 Ibid.
can be protected. Also copyright can not be viewed as protection or reward for the hard work that goes into discovering facts and obtaining data. The protection extends only to the originality of compilation and presentation. Data-base services (e.g. target marketing, credit-worthiness, business clients, customers) are not copyright protected for their facts, only for their selection and arrangement. Other countries do not align with the U.S.

The EU 1992 Directive parts ways with U.S. copyright principles by establishing a “right for the maker of the database to prevent unauthorized extraction, or re-utilization, from the database, of its contents, in whole or substantial part for commercial purposes.” 22 Their term of protection is 15 years from the date the database is made available to the public. It is allowable to take insubstantial portions for commercial purposes as long as source is acknowledged. A license to take portions must be given fairly and without discrimination, if the information cannot be independently collected from another source. The U.S. may adopt this policy in order to obtain equivalent protection, which is available to non-EU nationals only if their home country provides the same to EU nationals.

21 Information available on-line from http://www.ndltd.org/; Internet.
Conclusion

The possibilities over the next five years for electronic publishing and multi-media theses and dissertations are profound. Copyright laws will evolve commensurately and require regular monitoring. The inclusion of color photographs, sound, video clips, simulations and demonstrations will significantly change the final product as well as the effort required to produce it. The philosophy of approach will need to balance educational value, cost, competition and academic positioning. The ramifications of the training, equipment, cost and time needed for each student to create such a format will involve many considerations and lengthy planning. Copyright issues will be one of many areas of attention.
Sources Consulted


Sources Consulted (con’t)


846 F.2d 1485, 1498 (D.C. Cir. 1988).


