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April 3, 2014

Re: Study on the Right of Making Available; 79 Fed. Reg. 10571 (February 25, 2014.) [Docket No. 2014-2]

This letter is a response from the University of North Carolina at Chapel Hill (UNC) Scholarly Communications Office to the February 25, 2014 Copyright Office Notice of Inquiry regarding a proposal to add a making available right to Title 17 of the U.S. Code.

Our comments center on concerns over linking and what the provision of a separate making available right might mean for the work of libraries and for the work of universities in general. Changing current copyright law to include a “making available” right would have an adverse impact on our provision of material online for education and scholarship.

When Glynn S. Lunney, Jr. of Tulane University School of Law testified at the Hearing on The Scope of Copyright Protection, held by the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, he noted that one of the problems of including a separate “making available” right as part of the copyright code could be the restrictions that the right might impose on linking and embedding.¹ Experience in Europe confirms this concern. After the European Union passed new legislation that included “making available” as part of the exclusive rights, The International Literary and Artistic Association argued that “making available” included links “. . . that enable members of the public to access specific protected material.”² Recently, this prediction was realized when the Court of Justice of the European Union agreed with that interpretation in Nils Svensson and Others v Retriever Sverige AB.³ In this decision, the court sided against the copyright holders, because the defendants had not directed the copyrighted information to a **new** public.⁴ However, despite the safety net of the qualification of a new audience and the court’s distinction between openly available content and links to content behind a pay wall, a number of potential problems with this decision remain, in part because neither content nor audience is always neatly distinguished or unchanging.⁵

¹ <http://docs.house.gov/meetings/JU/JU03/20140114/101642/HHRG-113-JU03-Wstate-LunneyG-20140114.pdf>

Professor Lunney testified on January 14, 2014 and the case was decided on February 13, 2014.

² <http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf> pg. 1.

³ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/cp140020en.pdf>

⁴ Id.

⁵ For a fuller discussion, see Pekka Savola, “Hyperlinks Making Available and the ‘New Public’ or Just a Dead End, 1709 Blog, Feb. 14, 2014, <http://the1709blog.blogspot.com/2014/02/hyperlinks-making-available-and-new.html>

The inclusion of a separate “making available” right in Section 106 would cause instability, uncertainty, and expensive, unnecessary litigation throughout many segments of society. This is certainly true for our university. If “making available” became the new standard, and courts were to interpret this to include hyperlinking, as the European Union court has done, there would be uncertainty about the legality of one of the ways UNC and many other educational institutions provide resources for students. Programs, departments, and centers at UNC link to resources on the Internet to provide information to students at every point in their academic careers. These include, but are not limited to: links to entrance exams; links to reviews of UNC to aid in admissions decision-making; links for course material; links for library research; and links to material to help students toward post-graduation success.

UNC links to entrance exams for its various programs, including links to the websites for the GMAT,⁶ GRE,⁷ LSAT,⁸ MCAT,⁹ SAT,¹⁰ and English language tests, like the TOEFL and IELTS.¹¹ In addition, UNC links to national websites for applications to the dental school¹², the law school,¹³ the medical school,¹⁴ and the common application for undergraduates.¹⁵ Similarly, entities at UNC link to various ranking websites, such as the Chronicle of Higher Education’s Faculty Scholarly Productivity Index,¹⁶ US News and World Report,¹⁷ Forbes,¹⁸ and The Scientist,¹⁹ in order to promote admissions and help in fundraising.²⁰ UNC departments link to copyrighted material available on the open web, such as the top 10 most circulated newspapers in the United States²¹ for course content. Links to openly available content enrich the educational experience and help form habits that may lead to a more informed

⁶ <http://www.kenan-flagler.unc.edu/admissions/emba/applicant-qualifications>

⁷ <http://sils.unc.edu/programs/graduate/admissions>

⁸ <http://www.law.unc.edu/admissions/applynow/jd/>

⁹ <http://www.med.unc.edu/admit/general-info/admissions-process>

¹⁰ <http://advising.unc.edu/for-families/courses-and-schedules/sat-math-subject-test/>

¹¹ <http://gradschool.unc.edu/admissions/instructions.html#toefl>

¹² <https://www.dentistry.unc.edu/academic/dds/applicationprocess.cfm>

¹³ <http://www.law.unc.edu/admissions/applynow/jd/>

¹⁴ *Id.* At 7

¹⁵ <http://admissions.unc.edu/apply/first-years/>

¹⁶ <http://www.cs.unc.edu/cms/publications/news/department-ranked-10th-on-ches-faculty-scholarly-productivity-index> (Reporting the Computer Science Program at #10 in 2007.)

¹⁷ <http://www.law.unc.edu/news/story.aspx?cid=905> (Reporting UNC Law at #31.)

¹⁸ <http://www.kenan-flagler.unc.edu/news/2013/10/Forbes-MBA-ranking> (Reporting the Kenan-Flagler Business School at #11 in 2013).

¹⁹ <http://www.the-scientist.com/?articles.view/articleNo/34849/title/Best-Places-to-Work-Postdocs-2013/> (Ranking the University of North Carolina at #18, as a top institution to do a postdoc).

²⁰ <https://alumni.unc.edu/article.aspx?sid=10187>

²¹ Top 10 most circulated newspapers: [Wall Street Journal](#) (allows for sharing on the following platforms: Facebook, Twitter, Google Plus, LinkedIn); [New York Times](#) (allows for sharing on the following platforms: Facebook, Twitter, Google Plus, LinkedIn; Reddit; and also creates a permalink); [USA Today](#) (allows for sharing on the following platforms: Facebook, Twitter, Google Plus, LinkedIn); [Los Angeles Times Today](#) (allows for sharing on the following platforms: Facebook, Twitter, LinkedIn, Pinterest, Tumblr, Digg, Del.icio.us, Stumble Upon, and Reddit); [New York Daily News](#) (allows for sharing on the following platforms: Facebook, Twitter, Reddit, Google Plus, Digg, Tumblr, Del.icio.us, and Stumble Upon); [New York Post](#) (allows for sharing on the following platforms: Facebook and Twitter); [Washington Post](#) (allows for sharing on the following platforms: Facebook, Twitter, LinkedIn, Google Plus, Tumblr, Digg, Del.icio.us, Stumble Upon, and Reddit); [Chicago Sun Times](#) (allows for sharing on the following platforms: Facebook, Twitter, Pinterest LinkedIn, and Google Plus); [Denver Post](#) (allows for sharing on the following platforms: Facebook, Twitter, LinkedIn, and Google Plus); [Chicago Tribune](#) (allows for sharing on the following platforms: Facebook, Twitter, LinkedIn, and Google Plus). Circulation records from <http://www.auditedmedia.com/news/blog/top-25-us-newspapers-for-march-2013.aspx>

citizenry. Like most university libraries, UNC Libraries also link to openly available content to assist students with research projects. For example, UNC library staff members have created guides that link to resources such as music websites,²² physical education websites,²³ lists of foreign newspapers,²⁴ professional databases,²⁵ and the Pew Center.²⁶ These links enrich our licensed offerings and provide students with examples of the wealth of material available for life-long learning. In addition, UNC departments link to a variety of copyrighted material for post-graduation success, such as job websites²⁷ and sites for licensing exams, like the Praxis for education,²⁸ NCLEX for nursing,²⁹ or the USMLE for medicine.³⁰

Links to freely available copyrighted content on the Internet are an essential component in the quality educational experience we provide to undergraduate and graduate students. The university links to copyrighted content that is useful to our students at every stage of their educational careers. The inclusion of a separate “making available” right in 17 U.S.C §106 would introduce uncertainty as to the legality of our linking practices, and the educational process at UNC would be the poorer for it. The current bundle of rights articulated in Section 106 provides sufficient protection for rights holders, and an enlargement of that bundle with a “making available” right would do more harm than good.

Yours sincerely,



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²² http://albustanseeds.org/digital/kulthum/#.UzCtv_ldU4i

²³ <http://eresources.lib.unc.edu/web/subject.php?subjectName=Exercise+and+Sport+Science>

²⁴ <http://library.columbia.edu/locations/global/africa.html>

²⁵ <http://guides.lib.unc.edu/findingPeople-2>

²⁶ <http://www.c2es.org/science-impacts/basics>

²⁷ <http://soe.unc.edu/services/careers.php>

²⁸ http://soe.unc.edu/services/student_affairs/licensure/masters_praxis.php

²⁹ <http://nursing.unc.edu/tag/nclex/>

³⁰ <http://www.med.unc.edu/cpd/registrar/academic-services/step-1-step-2-of-the-usmle-boards>