

## **ETLG Recommendations on Copyright Support (Revised)**

### **May 31, 2012**

*Revisions by: Martin Brennan (UCLA), Jeff Henry (UCSD), George Michaels (UCSB), Jim Phillips (UCSC), and Chuck Rose (UCSD).*

*Based on feedback from the ITLC, OGC, UCEP, and UCOLASC, the Educational Technology Leadership Group (ETLG) makes the following revisions to its recommendations on copyright:*

### **Introduction**

Various groups in the UC system have considered the evolving landscape of copyright law for a good many years. The efforts of the Office of General Counsel, the Systemwide Library and Scholarly Information Advisory Committee (SLAISAC) and its subcommittee, the Standing Subcommittee on Copyright Policy (SSCP), have helped to advance the understanding of copyright and fair use across the UC campuses.

When the ETLG was formed in 2009, discussions among its members covered a broad range of topics related to educational technology. It was quickly apparent that copyright, specifically as it pertains to the storage and use of digital content within enterprise instructional applications such as the campus Learning Management System, presented some unique challenges for technology support staff. Further, a cursory inventory of support provisions across the UC campuses conducted by the ETLG revealed some unevenness and gaps in copyright support. The ETLG put forward some initial recommendations with the intent to reduce legal liability and clarify our service provision to faculty. Our objective has been to complement and not contradict the good work of other groups in this area.

A 2009 UC Office of General Counsel memo, regarding a lawsuit (*Cambridge University Press et al. v. Patton et al.*) against Georgia State University concerning the use of eReserves, has prompted discussions in various corners of the university. Several groups, including librarians and the ETLG, have acknowledged a need to better understand the current state of our copyright service provision systemwide and to coordinate campus-level response. The ETLG recognizes that the trial in the Georgia State case has now concluded, and both the recent ruling in the case and the anticipated injunction resulting from that ruling may provide guidance for state universities such as the UC.<sup>1</sup>

Pursuant to that ruling and injunction, we assume the OGC will swiftly issue guidance to all campuses regarding any recommended modifications to campus policies and procedures in regards to Fair Use, which may impact these recommendations.

For the past decade or so, due to the increased incidence of sharing of digital content in our educational endeavors, proper use of copyright-protected materials for instructional purposes has become increasingly confusing, with misconceptions abounding. Coupled with the widespread adoption of micro-transactions (and consequent disintermediation of publishers), there is

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<sup>1</sup> For more information on that case visit: <http://www.educause.edu/policy/campus/resources/gastate>

renewed interest by publishers and distributors in pursuing instructional copyright violations at universities. The laws are intentionally ambiguous, their practical application continues to be only sparingly tested by litigation, and they have evolved over time, reflecting the emergence of digital rights and the persistent impact of technological change and obsolescence.

Working as both independent actors bound by law and employees bound by policy, faculty can often become frustrated by the lack of procedural clarity, the paucity of academic support (both human and financial) to assist them in confronting the challenges associated with the determination of fair use, and the sometimes excessive length of time involved in securing permission clearance. While support in this area has grown, that growth is inconsistent from campus to campus. In this context, even faculty operating in good faith are likely engaging in activities that skirt the boundaries of compliance, and may unwittingly infringe without the proper support.

As OGC has pointed out, each campus must do their best to educate faculty about law and policy in this area, often stretching scarce resources in the process. The revised recommendations below target faculty and the staff that support this area of their work, and the information systems underpinning these activities. The primary objective: to familiarize faculty and staff with the topic of copyright law and to disseminate best practices. This work needs to continue, and each campus should examine staffing and resources in this area continuously, increasing resources when necessary.

Though responsibility for handling copyright education, consultation, and responding to legal challenges will remain at the campus level for the foreseeable future, there is much that can be done centrally to reduce duplication of effort at the UC campuses, and clarify a more consistent message and approach to the use of copyrighted materials.

## **Recommendations**

1. UCOP, OGC, or other suitable statewide group develop and maintain a single UC Copyright and Fair Use website, that provides all UC Faculty and Staff:
  1. Comprehensive information, self-help tools, and educational materials on copyright law.
  2. Links to all UC policies that address copyright, with concise descriptions of the language pertinent to this topic from each policy.
  3. Links to campus-specific pages that clarify how campus systems independently and/or uniquely interpret and conform to these policies, and identify:
    1. A designated single point of contact for faculty and staff who seek consultation related to fair use and copyright issues, and who consults with UC attorneys as needed.
    2. A designated single point of contact within each Campus Counsel's office to provide legal advice, consultation, and other representation when appropriate.

*There are several websites at the UCOP level that address these issues to one degree or another, and much good information can be found.<sup>2</sup> We are suggesting reducing the number of sites that address copyright and Intellectual Property (IP) to one central clearinghouse, for many reasons of clarity and efficiency.*

2. Draft a statement of support for the "[Codes of Best Practices in Fair Use](#)" approach to employing the Fair Use exception to copyright law.

The Center for Social Media at American University has been developing Codes of Best Practices in Fair Use, working with distinct communities of practice to identify common rationales for the employment of Fair Use in specific situations. The most recent [Code of Best Practices in Fair Use for Academic and Research Libraries](#) contains much that is relevant to the higher education enterprise, but further guidance can be found for activities common to teaching and research within the following codes:

- [Code of Best Practices in Fair Use for Poetry](#)
- [Code of Best Practices in Fair Use for OpenCourseWare](#)
- [Code of Best Practices in Fair Use for Media Literacy Education](#)
- [Code of Best Practices in Fair Use for Online Video](#)
- [Documentary Filmmakers' Statement of Best Practices in Fair Use](#)
- [Society for Cinema and Media Studies' Statement of Best Practices in Fair Use in Teaching for Film and Media Educators](#)
- [Code of Best Practices in Fair Use for Scholarly Research in Communication](#)
- [Visual Resources Association: Statement On The Fair Use Of Images For Teaching, Research, And Study](#)

Each code identifies common practices and sets parameters on how each activity is best kept within Fair Use. Unlike "guidelines," which try to set fair use parameters across many contexts, these Codes situate activities within specific communities of practice and advise how everyday practitioners of Fair Use make their determinations within those communities. The codes are drafted by practitioners for practitioners, and are reviewed by copyright legal experts before formally issued. It is expected that those who make Fair Use determinations using these Codes as a guide will be looked upon more favorably by a judge, though this expectation has yet to be tested in court since the first code was published in 2005. Regardless, these Codes have [achieved remarkable success](#) in allowing practitioners of Fair Use to act with confidence.

UCOP, OGC, relevant statewide committees (such as SLAISAC and UCOLASC), and campus policymakers are urged to draft statements of support for employing these codes as a rationale for Fair Use determinations.

3. Adopt a standard (online) training curriculum across the UCs to enable students, faculty and staff to lawfully use and store information within our IT systems (both at the campus and systemwide level).

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<sup>2</sup> For a select listing of UC websites on copyright, see Appendices 1 & 2.

1. Consider for possible inclusion in the “Mandatory Education” initiative defined in the *Working Smarter Progress Report: Administrative Efficiency at the University of California* (dated January 1, 2011, p. 43).
  1. If a mandatory approach is not feasible, craft incentives for UC faculty and Staff to participate.
2. Periodically revisit the learning objectives of this training curriculum to align with legal developments and new requirements.
3. Periodically assess the efficacy of this training curriculum.
4. Make sure the training curriculum and training activities are accessible (ADA).

*Feedback from UCEP indicates that faculty would appreciate additional support in this area. After consultation with OGC, ETLG feels that this training would best be administered via a central entity such as a systemwide committee or UCOP itself. Delivery of this training via the UC Online Education (UCOE) platform may also be worth considering.*

## Conclusion

One recommendation that slipped off this revised set of recommendations related to the creation of a program to assess copyright compliance across the campuses. The ETLG decided to drop this recommendation after the UC Ethics and Compliance Office displayed some interest in considering this topic further. To that end, the ETLG will engage in discussions with the UC Ethics and Compliance Office (tentatively scheduled for summer 2012) to determine viability of producing and sharing reports across the UC as a way to better understand the risks and the adequacy of campus resource provision around academic support for copyright. If those discussions turn out positive, one additional recommendation may be forthcoming.

In the coming years it is predictable that increasing amounts of digital content will be produced, procured, and consumed by UC students and faculty. If recent history is any indicator, this surge will likely also be accompanied by increased litigation. Regardless, faculty and the academic staff who support them will face daunting challenges as they confront a myriad of compliance requirements: copyright, Intellectual Property, electronic accessibility (WCAG 2.0 AA standard), FERPA and security. More than any of the other compliance issues listed above, copyright and Fair Use are unique in that the law is currently in a state of flux and the underlying legal definitions intentionally ambiguous. The recommendations put forward in this document represent an effort to help faculty and students make informed decisions, to increase balance across academic support structures on our campuses, and to help the university navigate through a particularly dynamic and potentially litigious period in our history.

## Appendix 1: Selected System Wide Copyright Resources

1. Copyright Information at the Office of the President. This is the main page for UCOP Copyright Education. <http://www.universityofcalifornia.edu/copyright> (Last modified October, 2003)

In the past, a Copyright Working Group situated in UCOP (OGC) advised on legal issues that had broad impact for the UCs. This group later became known as the Standing Committee on Copyright. In 2006, the Standing Committee on Copyright merged with the Systemwide Library and Scholarly Information Advisory Committee, resulting in the formation of the Standing Subcommittee on Copyright (SSCP).

2. A compendium of campus level copyright sites. <http://www.universityofcalifornia.edu/copyright/campgroup.html> (last modified March 2008)
3. Information on Digital Copyright Protection at the UC on the Information Resources and Communication (IRC) website. Index page includes a variety of (mostly) UC links on digital copyright. <http://www.ucop.edu/irc/policy/copyright.html> (Last modified April, 2012)
4. The Systemwide Library and Scholarly Information Advisory Committee (SLAISAC) and its subcommittee, the Standing Subcommittee on Copyright Policy (SSCP), is the group primarily responsible for maintaining the UC Copyright Education website, that includes information on copyright and particularly as it pertains to library materials. <http://libraries.universityofcalifornia.edu/planning/SLAISAC/sscp.html> (last updated June, 2011)

## Appendix 2: Selected System Wide Copyright Resources that Provide Guidance on Fair Use

Some of the following links are sub-links to the ones above, but deserve mentioning here as they describe Fair Use and/or are in need of review or updating. Most are still using the older “four standards” for reviewing Fair Use and don't include reference to the newer "transformative" measures:

### Additional sub-links of [universityofcalifornia.edu/copyright](http://www.universityofcalifornia.edu/copyright)

1. An index site:  
<http://www.universityofcalifornia.edu/copyright/usingcopyrightedworks.html>
2. Fair Use explanation and guidelines:  
<http://www.universityofcalifornia.edu/copyright/fairuse.html> (last updated February, 2003)
3. This page, developed by the Standing Committee on Copyright, provides links to non-UC links with a variety of copyright and fair use information, including a tool for evaluating Fair Use sponsored by the American Library Association.  
<http://www.universityofcalifornia.edu/copyright/fairuseresources.html> (last updated in 2003)
4. A page specifically for reproduction of copyrighted material  
<http://www.universityofcalifornia.edu/copyright/systemwide/pgrcmtrgiii.html> (last modified February, 2003)<sup>3</sup>
5. A page specifically for reproduction of copyrighted material - Quick Guide of the information from the previous link  
<http://www.universityofcalifornia.edu/copyright/systemwide/fairuseguide.html> (last updated October, 2003)

### Additional [www.ucop.edu](http://www.ucop.edu) links:

1. Using Copyrighted Works of Others (from the Technology Transfer Office (OTT)  
<http://www.ucop.edu/ott/faculty/crothers.html> (last updated April, 2009)
2. The site below was linked to from the previous site. It is a list of "campus OTT Copyright Contacts" and was supposedly updated as late as April, 2011. N.B.: People might be tempted to use these folks as a resource for Fair Use questions, but it appears to be rarely used according in inside info. <http://www.ucop.edu/ott/faculty/crcontac.html> (last updated,

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<sup>3</sup> This is a summary (and quasi update) of <http://www.ucop.edu/ucophome/coordrev/policy/4-29-86.html>

April 2011)

3. UNIVERSITY OF CALIFORNIA POLICY/GUIDELINES ON THE REPRODUCTION OF COPYRIGHTED MATERIALS FOR TEACHING AND RESEARCH

This is very dated, and specifically designed for physical reproductions, but does include guidance for determining Fair Use. There may be faculty who are accustomed to using this, and that at the very least this should be updated to include at least a reference to its \*digital\* equivalent. <http://www.ucop.edu/ucophome/coordrev/policy/4-29-86.html#append1> (last updated April, 1986)

4. Review of the Fair Use content on the Copyright Education website. These are just review notes, but came up in a search for Fair Use, and should probably just disappear as the information exists on actual UC websites and it references non-existent sites. Some difficulties opening PDF on a Mac as well.

[http://www.ucop.edu/copyright/2003-04-29/FairUse\\_Content.pdf](http://www.ucop.edu/copyright/2003-04-29/FairUse_Content.pdf) (last updated April 2003)

#### **UC Libraries Site**

1. SLAISAC's Standing Subcommittee on Copyright Policy – some Fair Use info here (but not a whole lot). <http://libraries.universityofcalifornia.edu/planning/SLAISAC/sscp.html> (last updated June, 2011)