

OFFICE OF THE GENERAL COUNSEL

Copyright Working Group Advisory

August 24, 2012

Charles F. Robinson
General Counsel
Vice President for Legal Affairs

www.ucop.edu/ogc

SUMMARY

Recent legal developments recommend a comprehensive and thoughtful approach to eReserves.

If you have any questions regarding the University's eReserves or similar programs, please contact one of the following:

- Amy Blum, Senior Counsel (UCLA)**
- Julie Conner, Associate Campus Counsel (UCB)**
- Rita Hao, Senior Counsel (OGC)**
- Liv Hassett, Associate Campus Counsel (UCSC)**
- Kyhm Penfil, Campus Counsel (UCI)**

This practice group advisory is issued by the Office of the General Counsel to provide updates regarding important legal and regulatory developments that affect the University. For additional information or assistance with a specific legal matter, please contact the Office of the General Counsel.

TWO RECENT DEVELOPMENTS UNDERSCORE THE NECESSITY OF A COMPREHENSIVE AND THOUGHTFUL APPROACH TO eRESERVES AND SIMILAR PROGRAMS

In January 2012, the Association of Research Libraries released its *Code of Best Practices In Fair Use for Academic and Research Libraries*. ARL's Code is available at: <http://www.arl.org/bm~doc/code-of-best-practices-fair-use.pdf>. In May 2012, the U.S. District Court for the Northern District of Georgia issued its final order in the Georgia State eReserves case. Judge Evans' opinion in *Cambridge University Press v. Becker*, -- F. Supp. 2d -- (N.D. Ga. May 11, 2012) is available at: <http://docs.justia.com/cases/federal/district-courts/georgia/gandce/1:2008cv01425/150651/423/>. Taken together, these developments provide a framework for mitigating copyright infringement risks when administering eReserves.

The ARL Code comprises eight "Principles" that assist research libraries in making fair use decisions (i.e., decisions about when it is legally permissible under Section 107 of the Copyright Act to use copyrighted materials without the copyright owner's permission). The Code identifies "limitations" (factors that cut against fair use) and "enhancements" (factors that favor fair use) for each principle that are important in making a fair use assessment. The Code provides an effective approach for handling the complex fair use assessments that UC Libraries and faculty are required to undertake, and the Office of the General Counsel encourages faculty, staff and students to use the Code as a fair use tool.

Although all eight principles in the ARL Code are important, Principle One affects eReserves most directly: "It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks." The limitations and enhancements for Principle One more fully delineate the circumstances under which professors posting materials on eReserves might rely on fair use. For example, the Code suggests the following factors as favoring fair use: the materials are available only to registered students, only for the duration of the course and only after the faculty member has articulated a nexus between the pedagogical purpose of using the materials and the course. The Code suggests using standardized forms or a fair use checklist for each item posted on eReserves. Such standardized forms can remind faculty to assess the use and to document: (1) the pedagogical purpose for the content, and (2) the use rights (e.g., whether content is in the public domain and freely usable, permitted by a UC license, permitted by a Creative Commons or other license, used with express permission or subject to a fair use determination). Once it is determined that a fair use assessment is needed, the Code and other tools can serve as both a valuable aid and as evidence of a good faith fair use evaluation. A sample checklist and instructions are available at: <http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>. Additionally, the *Fair Use Case Law Guideline* issued in 2011 may be a helpful resource: <http://www.campuscounsel.ucla.edu/documents/FairUseDiscussion.pdf>.

The closely watched and anticipated Georgia State opinion articulated criteria for determining when posting material on eReserves without obtaining permission constitutes fair use. While the opinion was issued by a lower court in Georgia (and may still be appealed) and is not controlling in California, federal courts in California may find its detailed approach instructive or persuasive. Thus, due consideration of its approach is advisable.

The most notable (and perhaps most controversial) aspect of Judge Evans's opinion is her finding that using more than 10% of a book with nine or fewer (or no) chapters, or more than one chapter of a book with ten or more chapters, argues against fair use,

OFFICE OF THE GENERAL COUNSEL

Copyright Working Group Advisory

August 24, 2012

Although the rules set forth in the Georgia State case have not yet been endorsed by other courts, in light of the ARL *Code* and the George State opinion, a comprehensive and thoughtful approach to eReserves and other similar services will ensure the greatest use of content consistent with the Copyright Act, while also mitigating the risks of potential infringement.

particularly where electronic excerpt licenses (also called “permissions”) are readily available. The Court separately analyzed each item that had been posted to eReserves, considering both the faculty member’s testimony and the checklist factors. In light of the opinion, publishers wishing to capitalize on this finding will likely start to make reasonably priced excerpts available for licensing. The Court found a significant effect on the market (Fair Use Factor 4) when permission revenue is great or increasing (e.g., if a book is out of print and excerpt use is high) such that the permissions revenue is a larger part of the value of the copyright.

More recently, the Court issued its order for declaratory and injunctive relief. There, the Court found that fair use in the eReserves context requires sufficient protection against unwarranted distribution, including: (1) limiting access to excerpts by a passcode or password to only students enrolled in the course and only for the term of the course; (2) prohibiting students by stated policy from distributing copies to others and reminding them of the limitations of the copyright laws each time they access excerpts on eReserves; and (3) ensuring that each excerpt fills a demonstrated, legitimate purpose in the course curriculum and is narrowly tailored to accomplish that purpose. The Court also ordered Georgia State to maintain copyright policies consistent with these findings and to disseminate the opinion to faculty and staff.

Although the rules set forth in the Georgia State case have not yet been endorsed by other courts, in light of the ARL *Code* and the George State opinion, a comprehensive and thoughtful approach to eReserves and other similar services will ensure the greatest use of content consistent with the Copyright Act, while also mitigating the risks of potential infringement. As UC Libraries develop policies and practices best suited to their campus, the following recommendations are worth consideration, particularly in light of the increased litigation activity targeting academic libraries:

- Identify each office on campus that offers eReserves, postings on course websites or collaborative learning environments or other similar services.
- Implement use of a fair use checklist to assess the four factors when rights are based on fair use.
- Ensure that Library staff and/or other staff responsible for posting content review the standardized forms and checklists and raise any concerns with the faculty and in consultation with Campus Counsel.
- Offer and encourage widespread training of faculty and teaching assistants regarding use of copyrighted materials in teaching and their accountability for the fair use determination.