

---

# Managing Fair Use on Campus: The Online Academic Administrator's Dilemma

---

*Michael R. Wiggins, J.D., M.B.A.*  
*Georgia Southern University*  
[mwiggins@georgiasouthern.edu](mailto:mwiggins@georgiasouthern.edu)

## Abstract

University administrators who have distance learning programs under their charge are on the horns of a dilemma. Given the growing litigiousness of copyright holders and the unsettled state of the law, it has become very difficult to establish failsafe administrative rules to guide faculty and student use of copyrighted materials. But the use of intellectual property such as texts, videos and scholarly articles is essential to the delivery of higher education, so administrators must face the dilemma head on. Against this backdrop, university administrators must take preventative measures to avoid improper uses of intellectual property while simultaneously encouraging beneficial uses of such materials. This is a harrowing balancing act.

## Introduction

This paper explains the basics of copyright law and the fair use doctrine, points out the uncertainties and trouble inherent in U.S. copyright law, then provides policy recommendations from a legal perspective for university administrators charged with overseeing online programs.

There are three general forms of property recognized by the law. The first two are straightforward: real property, or land and those things built upon it, and personal property, the tangible objects we possess. But a thirdblic. They are memod form of property, intellectual property, the creations and products of the mind, has become more important in our economy perhaps than the other two combined. Intellectual property rights have been recognized from the outset of the U.S. Reputalized in the U.S. Constitution under Article I, Section 8, Clause 8, which includes the so-called "Copyright Clause". This clause empowers the U.S. Congress specifically to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". Contemporary copyright protections in the U.S. are memorialized in Title 17 of the United States Code, also known as the *Copyright Act of 1976*. The act gives holders of a copyright five basic rights: the exclusive right to reproduce, adapt, publish, perform, or display their works.

## A Few Maxims of Copyright

There are a few maxims of copyright law that should be understood by those involved with the delivery of distance learning. First, the right to sue for an infringement upon a copyright is possessed by broad classes of people. A textbook publisher, the author of a scholarly article, an author of a blog or forum posting, an artist, a photographer, even the author of a private email, holds a copyright in what he has created.

Second, just as several classes of people receive copyright protection for their works, several classes of copyrighted works can be protected. As Section 102 of the Copyright Act states, copyright law covers virtually anything a professor can cut and paste onto an online course site, set up in an e-reserves system, or assign for reading or viewing by a student. Such protections cover graphics, textbooks, videos and most other educational materials (Levy, 2003), as well as works of literature, art, music, and movies (Radcliffe & Brinson, 1999). Virtually anything produced with even a modicum of creativity, so long as it is fixed in a tangible medium, is protected by copyright law (Bayard, 2001). In theory, copyright protection would apply even to a sketch jotted on a napkin (Ehrenpries, 2009).

Third, under the Copyright Act, a copyright exists from the moment the work is created. As Section 101 puts it, when a work is "fixed in a copy...for the first time" it becomes copyrighted. Contrary to popular misconception, copyrights do not exist only when registered or filed with a government office (Diotalevi, 2000). A work is copyrighted and becomes the exclusive property of the creator from the moment of its creation (Gard & Gard, 2011). Neither must a creator give notice of a copyright for it to have legal enforceability. Copyright symbols or other forms of notice, such as the common symbol ©, indicate that the copyright holder may seek certain additional statutory damages for infringement, but they are not necessary for a copyright to exist, or for the holder to sue for infringement. In fact, by definition material is copyrighted merely by being created and posted on a website or otherwise published in any form; both the creation and the posting constitute fixing the image in a copy as required under the law to create a copyrighted work.

In light of these maxims, administrators must come to terms with the fact that copyrights are both easily to create and exist everywhere. Virtually anything that can be used by a professor to educate a student is protected by copyright law. This has created an environment in which litigation against universities is an ever-present concern.

## Illustrating the Issues

To illustrate issues in copyright law, this paper will follow the actions of a hypothetical professor at a public university. Assume our professor is charged by her chair with developing an online course entitled "Introduction to Business Law". As she is developing the course, assume she wants to include a graphic on the main page (the author, like many other online course developers, has done this while developing courses). She chooses as a graphic the symbol of our legal system, Lady Justice. A search of graphics on a popular search engine with the phrase "Lady Justice" yields over 70,000 images. From these, she could pick an image, copy and save it to her computer, then paste it onto her course site. Assume she also wishes to include an excerpt, approximately five pages of a fifteen page article, on her course site from the *Harvard Business Review (HBR)*, which is available online. She could easily download an article from the *HBR* by copying it from the online website, pasting the pertinent five pages to a word file, and uploading it onto her course site as a word document. Both the graphic and the article could be taken without knowledge or permission of the copyright holders. Such unattributed uses of graphics and articles are common in online academia, and often class developers assume such uses are permitted in an academic environment. But what is the bright line between a safe use and a use that will generate major litigation? This is one of the questions this paper will address.

## The Fair Use Exception

Federal copyright law does not entirely foreclose the right of a professor to use another's intellectual property without permission. Certain uses are privileged, and academics are accorded some of these privileges. The so-called "fair use exception", contained in Section 107 of the Copyright Act, is an avenue through which academics are privileged to make use of intellectual property without permission of the copyright holder. It is limited to endeavors such as journalism, criticism, commentary, and—pertinent to academic administrators—"teaching...scholarship or research". In the legislative history of the Copyright Act, Congress wrote approvingly of the practice of making "multiple copies for classroom use" on a one-off basis, presumably putting this practice within the protection of fair use as well. Fair use exists as a policy because it is considered to promote the progress of knowledge, science and the arts. From this perspective, a professor who takes another's work and expands upon or uses it to further knowledge, is serving the central purpose of copyright law as defined by the U.S. Constitution.

An important point to remember is that not every academic use of copyrighted material, even one that furthers constitutional principles, is protected by the law of fair use. The fair use exception is commonly relied upon in higher education to produce scholarship (as the author has done in quoting in this article from the

work of others), or to make academic resources available to students without paying exorbitant fees for them. Examples include the e-reserve systems developed by thousands of university libraries as well as excerpts from academic articles, books, news reports, movies or television, and educational videos. But depending upon the circumstances, any of these uses might fail to qualify as a fair use. Fair use might or might not shield our hypothetical business law professor and her university from liability, but the answer to this question depends upon an understanding of the four prongs of the fair use test.

The fair use test looks at the following: 1) the character of the use, 2) the nature of the copyrighted work, 3) the proportion of the copyrighted work used, and 4) the effect of the fair use on the market for the copyrighted work. The character of the use involves more than one analysis, but the main consideration is whether the use serves the primary constitutional purpose of copyright, that of “stimulat(ing) creativity for public illumination” (Leval, 1990). Presumably, our hypothetical professor’s use of the copyrighted materials would be considered to stimulate creativity inasmuch as it is used in the pursuit of higher education, so she might well pass this part of the fair use test. Another of the factors in this determination is whether the use is transformative, that is, does it take the copyrighted materials and turn them into something new and creative, or is the new work merely derivative, a rehashing of the old (Kudon, 2000)? The more a use transforms the original work, the more likely it will be to qualify as a fair use. This part of the analysis may well trip up our hypothetical professor, for she has done nothing transformative in merely cutting and pasting a graphic, and she has done little transformative work in excerpting an article, though the process of excerpting itself is considered to involve at least minimal transformation (Reese, 2008). Another issue in play in the first prong of the analysis is whether the use of copyrighted materials is for a commercial purpose. If so, it will be less likely to qualify as fair use (Epstein and Zulieve, 1998). Our hypothetical business law professor is supported by this part of the test, as the delivery of higher education in a non-profit environment is, per Section 107 of the Copyright Act, explicitly identified as a non-commercial use: “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include...the purpose and character of the use, including whether such use is of a commercial nature *or is for nonprofit educational purposes*” (17 U.S.C.A. § 107, Sub. 1) (italics supplied).

The second fair use prong is the nature of the copyrighted work itself. Two factors are considered by courts here. The most crucial element is whether the copyrighted work was published or unpublished; if the former, fair use is more likely to be upheld, if the latter, fair use is less likely to be upheld (Gaffney, 2001). This takes into consideration the fact that unpublished materials by nature tend to be more private, such as personal emails or manuscripts that an author decided not to submit for publication; use of such items is somewhat violative of public policy privacy considerations which have had constitutional significance for over 40 years. While the distinction between published and unpublished works is not specifically recognized in the Copyright Act, it is nonetheless recognized by the federal courts and must be considered by those charged with setting institutional fair use guidelines (Gaffney, 2001). The second element considered under the second prong of the fair use test is whether the copyrighted work is purely creative, in which case fair use is less likely to be found by the courts, or purely informative, in which case fair use is more likely to be upheld (Epstein and Zulieve, 1998). Our business law professor’s fair use argument will be both strengthened and weakened by the second prong of the fair use test. The Lady Liberty graphic and the *Harvard Business Review* articles are published works, so this bolsters her fair use claim, however, both graphic and articles are purely creative, so this cuts against a fair use claim.

The third fair use factor is the proportion of the work utilized. As a professor utilizes a higher proportion of a copyrighted work, it becomes less likely that it will be considered fair use. Not only uses that involve large proportions of copyrighted works are in danger of being deemed infringements, in certain cases, uses that involve very small proportions of a work, just a few percent of the whole, can disqualify a fair use. This can occur when the portion of a copyrighted material used involves the crucial part of it. Courts have used language such as “heart of the work” to describe minimal uses in terms of percentage that yet form the very essence of the work (DeVito, 2003). The third factor cuts against our business law professor in her use of the Lady Liberty graphic, because her use was not of a portion of the work, but of the entire thing. This analysis also militates against her use of the *HBR* article, as while courts have not laid out a hard and fast rule, significant use of an article, such as five of fifteen pages, have generally been considered to fall beyond the outer limits of fair use. Twenty percent has occasionally been cited as the outer limits of fair use, albeit without a clear common law holding to support it, but neither twenty percent nor ten percent nor five can be considered failsafe by academics. As stated above, any use of the very heart of the work will not be protected by fair use law. For example, if the author of a journal article was proposing some unique theory, and the main statement of that theory comprised 500 words out of a 50,000 word article, a professor copying those 500 words without permission and posting them as a downloadable document for online class use would likely have infringed, even though it was but 1% of the whole.

The fourth fair use factor considers how the use will affect the market for the original work. For example, if a university’s distribution to students of copyrighted materials unduly limits the possibility of the author selling the work in that market, this can disqualify a claimed fair use. In the case of our business law professor, the effect of this prong is unclear. Often, graphics procured at random from the internet are created with no commercial purpose; on other occasions, they are created with pure profit motives. For example, if our hypothetical professor downloaded digital artwork from one of the many online clip art sites that market computer generated graphics without seeking permission, she will most certainly have engaged in a use that negatively affected the site’s market. While scholarly articles are seldom if ever created by academics to make money, the academic journals themselves that hold the copyrights often benefit from a huge market for their product. The materials used by our hypothetical professor are from the *Harvard Business Review*. Through its publishing arm Harvard Business Publishing, this journal does business in excess of \$144 million per year (Powerprofiles.com, 2011). Our professor will have an exceedingly difficult time supporting a fair use argument if the court places emphasis on this factor.

In the opinion of the author, the hypothetical business law professor’s use of the copyrighted materials for her course site would probably not be covered by fair use. She used purely creative material, did little transformative work on one item, none on the other, used the entire copyrighted work in one case and one third of an article in another, and she has quite likely affected the market at her university for at least one of works, possibly both. This use probably fails the fair use test and in any event could lead to litigation. Thus, it is imperative that administrators establish policies that will minimize such infringements. However, this is no easy task.

### **The Trouble with Academic Usage and the Fair Use Test**

Fair use is a difficult legal doctrine for university policy makers to administer. First, fair use cannot be analyzed in a simple or straightforward manner. This ambiguity makes the doctrine difficult to craft policy around. The fair use test has been referred to as “notoriously nebulous” and “troublesome” (Weiler, 1994), and distance learning administrators must consider this when promulgating policy. For example, an old Georgia State University directive on fair use, defunct since the 1980s, used an elegantly simple scorecard approach: “Where the factors favoring fair use outnumber those against it, reliance on fair use is justified” (Thatcher, 2010). In other words, three fair use factors favoring your use versus one against shields you from liability. Prima facie, such a policy made good sense, but the problem was that it failed to represent the actual fair use doctrine that is applied by courts. In fact, the “three out of four” standard has yet to be used by any court to date. Even one negative factor given sufficient weight by a court is sufficient to defeat a fair use claim (Leval, 1990). Fair use has typically been applied by the courts in a holistic manner, using the factors as a model for determining whether a use furthers the overarching goal of copyright. But the “overarching goal” has been variously stated by courts, some have viewed it more from the copyright holder’s perspective, making fair use more of an issue of property rights, (Leval, 1990), while others have viewed it more from the fair user’s perspective, looking at the constitutional standard of whether the use furthers knowledge. In this light, the fair use test should be seen at best as a general guide to judicial analysis rather than a hard and fast test for the university administrator. The ambiguity a judge considering a copyright infringement claim must deal with also must be accounted for by an administrator establishing preventative university policy.

A second issue is that the law of copyright is in a state of flux, and exactly what constitutes the fair use of copyrighted materials may well change in the near future. Further, the doctrine as applied to higher education has scarcely been litigated in the federal courts, forcing university administrators to craft policy with little knowledge of how the doctrine would be applied in their particular case in the event of litigation. Administrators crafting policy must base it primarily on court decisions involving commercial uses of copyrighted materials, which are not entirely analogous, or on their own or other university’s interpretations of fair use, which are unreliable.

A third issue with fair use is that no safe harbor exists in the doctrine. That is, there is no judicial or statutory guidance to establish that using a certain percentage of a copyrighted work, a certain number of pages, or distribution to a certain number of students will ensure a finding of fair use. In the past, some universities have created policies permitting copying of up to 20% and/or 1,000 pages from a textbook or article, but such policies do not provide certitude and may well run

afoul of the fair use doctrine. As stated, our hypothetical business law professor could be in infringement even when posting a very small portion of an article if it is held by the court to comprise the central thesis of the article (DeVito, 2003).

A fourth issue with fair use, at least from the perspective of the university itself, is grounded in agency law. When a professor infringes upon a copyright, the liability typically falls upon the university employing her. This is via the doctrine of respondeat superior, which places liability upon an employer vicariously for the acts of an employee. Vicarious liability is grounded in common law doctrines of agency, it is a judge-made doctrine (Sony, 1984). Nowhere in the Copyright Act is the doctrine explicitly mentioned, yet it has been often applied through the common law to copyright cases (Yen, 2000). Vicarious liability can give rise to legal liability to an organization that neither knew of the infringement nor authorized it (Moore and Anderson, 2008). Should our hypothetical business law professor's unauthorized use of the Lady Justice graphic or the *Harvard Business Review* article be found to be an infringement, her university will almost certainly be held liable as well. Vicarious liability is not strictly limited to employment relationships, it also applies when a principal exercises some form of control over an infringing party, known in the law as the "agent". The greater the level of control, the greater the likelihood vicarious liability will render the principal liable for an agent's activities, but absolute control is not required for liability to attach (LaRocque, 2001). Liability for the principal, or university, is thus not limited to the infringements of employees, but also to the actions of many of those who are utilizing the universities resources to infringe. For example, a university offering online courses containing infringing copyrighted materials could be liable under agency theory for the acts of the students using these materials. Thus, liability for a university can occur through the great majority of actions taken by those under the university's charge, often whether their individual actions are under the direct control of the university or not, whether the university would have sanctioned the actions or not. A large university literally has thousands of potential infringers, each of whom could set in motion events culminating in a lawsuit.

A fifth issue with fair use is a recent phenomenon. Academic publishers and other holders of copyrights are becoming aggressive in their legal pursuit of what previously has been left unchallenged and considered fair use (Smith, Dec. 17, 2010). This is a particularly acute problem with the administration of online education, as online courses and programs are growing, with some 5.6 million students matriculating as of 2009 (Allen and Seaman, 2010), and such courses are freely available throughout the world for anyone with the wherewithal to access a computer and pay tuition. This ready availability from remote locations makes it relatively easy for an organization that holds copyrights to police them online and pursue alleged infringement.

### **The Levee Breaks: Recent Fair Use Litigation in Higher Education**

For many years, a detente seemed to exist between academic publishers, the holders of many of the copyrights that academics use, and academics themselves. Lawsuits based upon fair use from publishers against universities were rare. Not a single suit based on e-reserves had been filed as of 2008. But the status quo changed in April of 2008, when a troika of publishers, Oxford University Press, Sage Publications and Cambridge University Press, filed suit against Georgia State University in the Eleventh Federal Circuit. Georgia State had done three primary things with their e-reserves policies that caught the attention and stoked the fire of academic publishers: 1) Their institutional guidelines approved (and still approve) of up to 20% of a work being used under fair use policy, rather than the more typical institutional policy of 10% (Georgia State, 2011); 2) They allowed a very large amount of works to be placed on e-reserves—6,700 alleged "infringing copies" had been posted on Georgia State's e-reserves system in over 600 courses (Albanese, 2011); and 3) They allegedly didn't adequately police their e-reserves system to ensure that the general public had no access to materials placed on e-reserves, as for some time, many articles on e-reserve at Georgia State were not password protected (Sain, 2010). Georgia State later revised its e-reserves policies and instituted a "fair use checklist" for academics to follow that incorporated many of the guidelines publishers had long recommended, but the plaintiffs persisted with their suit. The Georgia State trial was held in the summer of 2010 and as of late 2011, judge Orinda Evans has not yet issued a ruling. However, as both sides have shown no inclination to settle, an appeal seems a foregone conclusion regardless of the ruling. The Georgia State litigation, if it eventually does generate an appellate decision, should establish precedent to guide administrators in fair use and e-reserves.

In December of 2010, the Association for Information Media and Equipment (AIME), a trade group representing marketers of educational videos, and Ambrose Media, an AIME member, filed a federal suit in California against UCLA and a number of UCLA officials, including members of the Board of Regents (AIME, 2010). The AIME alleged that the university's practice of purchasing, then making videos available, for students in online courses was in violation of fair use (Parry and Howard, 2011). The plaintiffs acknowledged that the videos could have been shown in a classroom or the library, but they drew the line at UCLA professors streaming the videos and making them available to any student who could access UCLA's e-reserves system (Kolowich, 2010). The UCLA litigation brings to light the tortured relationship between the apparently legal policy of distributing "multiple copies for classroom use", i.e., classroom handouts, and the new technologies that have made online distribution of educational materials possible. The question posed by the UCLA litigation is: should the electronic distribution of such materials be treated the same from a legal standpoint as traditional classroom handouts, the latter of which Congress spoke approvingly in the legislative history of the Copyright Act (Ross, 2010)? In October of 2011, the UCLA litigation was dismissed in federal district court, but the dismissal was on grounds other than fair use. It was based largely on the court's view that the AIME, an association, lacked standing (the legal right to sue) on behalf of its individual members (Kelley, 2011), and that UCLA, a state entity, is shielded by Sovereign Immunity, a constitutional doctrine that protects states from certain legal claims (Parry, 2011). However, within a month the plaintiffs refiled the suit in an amended form in an attempt to establish standing (Smith, 2011). If the suit survives a second motion to dismiss, it could define the parameters of fair use with regard to e-reserves and online streaming in an educational setting. Together, the Georgia State and UCLA litigations may give insight into the scope of fair use in online education and provide administrators needed guidance in crafting policies for fair use.

### **"Top Nine" Fair Use Policy Recommendations for Online Administrators**

There are many recommendations that could be made vis-à-vis fair use and its application to academic administrators, but I will confine this paper to nine that I believe salient, delivered as if I were preparing a brief in legal practice for a university client. The recommendations should not be considered the definitive statement of fair use law, a statement of what the law ought to be, or as predictive of a university's success in a given litigation. They are written solely as a practical guide for managing risk: four are general principles, five are practical tips. The following rules of thumb should be followed by administrators of online programs and others with policy-making authority over online course programs and e-reserves systems.

First, a system of training in the fair use doctrine should be standard operating procedure. Sorting out the differences between allowed and disallowed copyright use is a vexing job even for legal experts, but it is incumbent upon higher education administrators to establish training programs and educate personnel in fair use. One of the greatest holes in the administration of online programs is that administrators and professors for the most part are unaware of the law of copyright and only vaguely aware that misuse of materials can have legal ramifications. Professor Phyllis Sweeney has extensively cataloged the paucity of fair use knowledge on campuses. One study found that not one of 64 professors from a dozen universities responding to an intellectual property survey could get even 50% of questions correct on a test that measured rudimentary knowledge of fair use law (Sweeney, 2006). Assuming the sample was representative, either copyright education for faculty is minimal or nonexistent at many universities, is not being internalized by the faculty, or some combination of the two. The author can personally attest to eight years in academia, directly employed by or affiliated with five colleges and universities, without receiving a single copyright or fair use training session. Against this backdrop, the need for focused training in copyright law is clear. Professors should either be required to take online training and tests in copyright and fair use, or administrators of online programs should get busy educating themselves on the applicable law and scheduling information sessions on copyright at departmental meetings.

Second, the nature and legal structure of institutions of higher education are strong factors in the selection of appropriate fair use policies. Thus, administrators should consider the type of institution they oversee and promulgate fair use policies that are appropriate thereto. The fair use rules applied by a court will likely vary if an institution is private or public, for-profit or non-profit. For example, the Eleventh Amendment to the U.S. Constitution provides immunity for state actors from monetary damages in lawsuits. Public universities are state actors and as such enjoy protections from most monetary damages claims. A claim for monetary damages against a public university based on infringement is almost certain to be dismissed, while a claim for an equitable remedy such as an injunction would be, on its face, valid. A private university, however, does not enjoy immunity from monetary claims. There are over 4,400 degree granting institutions of higher education in the United States (U.S. Department of Education, 2010), of these, approximately 2,400, or about 55%, are private institutions that can be sued for monetary damages. Thus, good fair use policy for private universities will draw the lines more conservatively than for public universities. This is not to suggest the Eleventh Amendment is a legal panacea for public universities, as virtually all litigation involves undue expenses and the unwanted

redirection of resources, and of course, equitable remedies remain a concern for all universities, but it is clear that the proper management of risk at private universities should take into account greater potential liabilities. Additionally, non-commercial uses of intellectual property enjoy broader protections than commercial uses. This was illustrated in a Sixth Circuit federal court decision, in which the court held that a for-profit entity, Michigan Document Services, could not claim fair use when making multiple copies of various academic articles and excerpts from books, commonly known as coursepacks (Princeton, 1996). Michigan Document Services was producing these for professors at the University of Michigan, and the court reasoned that the ruling would likely have been different if the suit had been filed against the University of Michigan itself (Groves, 1996). This distinction between commercial and non-commercial use may not be of consequence for most university administrators, as the great majority of institutions, public or private, are nonprofit, but there are hundreds of for-profit schools in the United States, comprising approximately 9% of all university students. It is an open question whether a federal circuit court would treat a for-profit such as the University of Phoenix with the relatively low level of deference given a commercial enterprise like Michigan Document Services or the higher level of deference given the University of Michigan.

Third, administrators should instruct professors to avoid using the same articles, under a fair use exception, from semester to semester. Courts often make a distinction between one-off and recurring uses of copyrighted materials. One time, spur of the moment fair uses are given greater latitude than repeated uses of the same materials.

Fourth, administrators should admonish professors that when in doubt, link. The safest way to make use of copyrighted materials on an online course is to use, where possible, a link on the course site to the website containing the copyrighted materials. This obviates the need to cut and paste materials onto the course site. Cutting and pasting can lead to infringement litigation, linking does not. So long as desired materials are available online, this is simple for the student and safe for the university.

Fifth, read the fine print. Often, copyrighted materials include contractual obligations that waive fair use rights. As a general rule, contract law trumps fair use rights. This is another contention of the copyright holders in the UCLA litigation previously cited. The videos UCLA made available for students to stream in online classes were sold with a user license agreement, requiring that additional fees be paid by UCLA as more users had access to the videos (Smith, Dec. 12, 2010).

This is something like the seat license agreements common with the institutional purchase of computer software. The court initially dismissed the case on non-fair use grounds as previously discussed, but the judge has not yet issued a ruling on the re-filed case. If the case survives an anticipated second motion to dismiss and moves forward on substantive fair use grounds, it is quite possible that the court will hold UCLA to the terms of the contract and rule against their fair use claims.

Sixth, if you feel compelled to establish a percentage rule for fair use at your institution, set one within industry standards. For example, policies that permit "fair use" of 20% or more of a document stand out; policies that set the limits at 10% fit in. The Georgia State litigation cited previously was generated in large part because the administration set fair use guidelines marking them as outliers. This attracted the attention of academic publishers, and over three years later, the litigation grinds on.

Seventh, professors should be instructed to password protect their courses. A professor teaching an online course should limit access to those enrolled in the class. Such limitations are reasonable, don't impede the delivery of higher education, and have in the past dissuaded publishers from pursuing litigation (Albanese, 2010).

Eighth, as an overarching principle, administrators should err on the side of caution. As uncertainties persist in the common law of fair use as applied to academics, pushing fair use to its limits is poor administrative policy. There are a number of advocates who encourage liberal fair use policies, such as the Intellectual Property Caucus for the Conference on College Composition and Communication in their publication "Use Your Fair Use: Strategies Toward Action", where they encourage professors and administrators to utilize fair use to the limits of the law (CCCC-IP, 2000). Those participating in colloquia that promulgate such recommendations are for the most part professors operating in relative safety, they are not administrators in the crosshairs of academic publishers. Even if in the abstract you are correct in your interpretation of fair use, this does not foreclose the possibility of expensive litigation. There is a gypsy curse appropriate to the mindset of the administrator who must prove a point by promulgating policy to the perceived outer limits of fair use: "May you be involved in a lawsuit in which you know you are right." The Georgia State litigation has, in its first three years, generated approximately 400 legal entries (and counting) on [www.justicia.com](http://www.justicia.com), a service that catalogs legal documents in pending litigation. Included are briefs, depositions, motions, and hearing transcripts totaling in the thousands of pages, not including the outlay of resources as multiple professors answered hundreds of questions under deposition, the time and money in the weeks-long trial, the likely future appeals. With legal fees averaging in the range of \$300 to \$400 per hour, it is easy to foresee the potential administrative nightmare involved with a liberal institutional interpretation of fair use. The Georgia State and UCLA litigations, active as of the writing of this article, should one or both reach the appellate phase, will do much to define the limits of fair use for academics, the "point" will be "proven" in the federal courts, and the law should be more clearly defined in upcoming years. Policy will then be easier to craft with court guidance, but in the meantime, caution is in order.

Finally, fair use training should clearly inform professors that fair use does indeed exist and that the law permits the free use of copyrighted materials under a wide range of circumstances. The legislative history to the *Copyright Act* acknowledges "multiple copies in the classroom" and the free use of copyrighted materials for "scholarship or research" are specifically mentioned in the *Copyright Act*. While the author strongly recommends that fair use policies should never be drawn so liberally as to invite litigation, this is done with the understanding that institutional policies should nonetheless encourage fair use.

## Conclusion

Fair use is a difficult doctrine to administer because the law at this point is uncertain and because the doctrine from the outset had been unclear. These issues are particularly acute as applied to online education, as the application of fair use to distance learning has not yet been well defined by either the federal courts or Congress. Although cases are wending their way through the federal courts that may clarify the law and give needed guidance, the resolution thereof may be years in the future. With this in mind, administrators should be circumspect when establishing fair use policy. The guidelines in this article should be a reasonable starting point towards producing or modifying policies that help teachers teach, student schools from lawsuits. Professors, students, and administrators protect their

---

## References

- AIME v. the Regents of the University of California, et. al. (2010), U.S. District Court, Central District of California, Case No. CV10-09378 CBM (MANx).
- Albanese, A. (2010), A Failure to Communicate, *Publisher's Weekly*, June 14, 2010. Retrieved from: <http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/43500-a-failure-to-communicate.html>
- Albanese, A. (2011), Judge Sets Trial Date in Georgia State University E-Reserves Lawsuit, *Publisher's Weekly*, March 29, 2011. Retrieved from: <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/46638-judge-sets-trial-date-in-georgia-state-university-e-reserves-lawsuit.html>
- Allen, E. and Seaman, J. (2010), Class Differences: Online Learning in the United States, 2010, *Sloan Consortium*, Retrieved from: [http://sloanconsortium.org/publications/survey/pdf/class\\_differences.pdf](http://sloanconsortium.org/publications/survey/pdf/class_differences.pdf)
- Bayard, S. (2001), Chihuahuas, Seventh Circuit Judges and Movie Scripts, Oh My!: Copyright Preemption of Contracts to protect Movie Scripts, *Cornell Law Review*, 86 Cornell L. Rev. 603.
- Cambridge University Press, et. al. v. Patton, et. al. (2008), U.S. District Court, Georgia Northern District Court, Case No. 1:2008cv01425.

Carliner, S. (2001), Administering Distance Courses Taught in Partnership with Other Institutions, *Online Journal of Distance Learning Administration*, 4(2), Retrieved from: <http://www.westga.edu/~distance/ojla/summer42/carliner42.pdf>

CCCC-IP (2000), Use Your Fair Use: Strategies toward Action, *College Composition and Communication*, 51:3, February 2000.

Copyright Act of 1790, 1 Statutes at Large, 124.

Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

DeVito, S. (2003), The Ontology of Copyright Infringement: Puzzles, Parts and Pieces, *Connecticut Law Review*, 35 Conn. L. Rev. 817.

Diotalevi, R. (2000), Copyright Dot Com: The Digital Millennium in Copyright, *Online Journal of Distance Learning Administration*, 3(2), Retrieved from: <http://www.westga.edu/~distance/ojla/summer32/diotalevi32.pdf>

Ehrenpreis, N. (2009), Frustrating the Purpose of the Copyright Clause: First Circuit Restrictively Interprets Copyright Registration Requirements - Torres-Negron v. J & N Records, L.L.C., 504 F.3d 151 (1st Cir. 2007), *Suffolk University Law Review*, 42 Suffolk U. L. Rev. 389, Retrieved from: [http://www.law.suffolk.edu/highlights/stuorgs/lawreview/documents/Ehrenpreis\\_Comment\\_WDFP.pdf](http://www.law.suffolk.edu/highlights/stuorgs/lawreview/documents/Ehrenpreis_Comment_WDFP.pdf)

Epstein, E. and Zulieve, A. (1998), The Fair Use Doctrine: Commercial Misappropriation and Market Diversion, *Maine Bar Journal*, 13 Maine Bar J. 142.

Gaffney, J. (2001), The Fair Use of Unpublished Works: Where Privacy and Copyright Collide, *Connecticut Law Review*, 34 Conn. L. Rev. 233.

Gard, W., & Gard, E. (2011), The Present (User-Generated Crisis) is the Past (1909 Copyright Act): An Essay Theorizing the “Traditional Contours of Copyright” Language, *Cardozo Arts & Entertainment Law Journal*, 28 Cardozo Arts & Ent LJ 455.

Georgia State University Library Guidelines (2011), Library Services: Course Reserves: Instructor FAQs, Retrieved from: <http://www.library.gsu.edu/reserves/instructorfaqs.asp>

Groves, A. (1996), Princeton University Press v. Michigan Document Services, Inc.: The Sixth Circuit Frustrates the Constitutional Purpose of Copyright and the Fair Use Doctrine, *Georgia Law Review*, 31 Ga. L. Rev. 325.

Kelley, M. (2011), Major Copyright Case Against UCLA Dismissed, *LibraryJournal.com*, October 4, 2011, Retrieved from: [http://www.libraryjournal.com/lj/home/892274-264/major\\_copyright\\_case\\_against\\_ucla.html.csp](http://www.libraryjournal.com/lj/home/892274-264/major_copyright_case_against_ucla.html.csp)

Kolowich, S. (2010), Hitting Pause on Class Videos, *Inside Higher Ed*, January 26, 2010, Retrieved from: <http://www.insidehighered.com/news/2010/01/26/copyright#Comments>

Kudon, J. (2000), Form Over Function: Expanding the Transformative Use Test for Fair Use, *Boston University Law Review*, 80 B.U.L. Rev. 579.

LaRocque, E. (2001), No Free Music: Effect of A & M Records, Inc. v. Napster, Inc. on the Music Industry and Internet Copyright Law, *University of Hawaii Law Review*, Retrieved from: <http://www2.hawaii.edu/~dcjones/ILP/Emily%20Larocque.htm>

Leval, P. (1990), Toward a Fair Use Standard, *Harvard Law Review*, 103 Harv. L. Rev. 1105.

Levy, S. (2003), Six Factors to Consider when Planning Online Distance Learning Programs in Higher Education, *Online Journal of Distance Learning Administration*, 4(1), Retrieved from: <http://www.westga.edu/~distance/ojla/spring61/levy61.htm>

Moore, M., and Anderson, G. (2008), *Handbook of Distance Education*.

Parry, M. (2011), Judge Dismisses Lawsuit Against UCLA Over Use of Streaming Video, *The Wired Campus*, Retrieved from: [http://chronicle.com/blogs/wiredcampus/judge-dismisses-lawsuit-against-ucla-over-use-of-streaming-video/33513?sid=pm&utm\\_source=pm&utm\\_medium=en](http://chronicle.com/blogs/wiredcampus/judge-dismisses-lawsuit-against-ucla-over-use-of-streaming-video/33513?sid=pm&utm_source=pm&utm_medium=en)

Parry, M. and Howard, J. (2011), 2 Universities Under the Legal Gun, *Chronicle of Higher Education*, May 29, 2011, Retrieved from: <http://chronicle.com/article/2-Universities-Under-the-Legal/127688/>

Powerprofiles.com (2011), Retrieved from: [http://www.powerprofiles.com/profile/00005163722793/HARVARD+BUSINESS+SCHOOL+PUBLISHING+CORPORATION-WATERTOWN-MA-\(617\)+783-7400](http://www.powerprofiles.com/profile/00005163722793/HARVARD+BUSINESS+SCHOOL+PUBLISHING+CORPORATION-WATERTOWN-MA-(617)+783-7400)

Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996).

Radcliffe, M. and Brinson, D. (1999), *Copyright Law*, Retrieved from <http://library.findlaw.com/1999/Jan/1/241476.html>

Reese, A. (2008), Transformativeness and the Derivative Work Right, *The Columbia Journal of Law & the Arts*, 31 Colum. J.L. & Arts 467.

Ross, C., (2010), Taking AIME at UCLA, *Copyright on Campus*, Retrieved from: <http://campuscopyright.wordpress.com/2010/12/11/taking-aime-at-ucla>

Sain, M (2010), Publishers Sue School Over E-Reserves Material, *The Signal: The Official Student Newspaper of Georgia State University*, December 7, 2010, Retrieved from: <http://www.gsusignal.com/news/publishers-sue-school-over-e-reserves-material-1.2424176>

Smith, K. (Dec 12, 2010), The Other Shoe Drops, *Scholarly Communications @ Duke*, Retrieved from: <http://blogs.library.duke.edu/scholcomm/2010/12/12/the-other-shoe-drops>

Smith, K. (Dec. 17, 2010), Is the Sky Falling on Library Lending?, *Scholarly Communications @ Duke*, Retrieved from: <http://library.duke.edu/blogs/scholcomm/category/copyright-issues-and-legislation>

Smith, K. (Oct. 31, 2011), Silly Season, *Scholarly Communications @ Duke*, Retrieved from: <http://blogs.library.duke.edu/scholcomm/2011/10/31/silly-season>

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434 (1984).

Sweeney, P. (2006), Faculty, Copyright Law and Online Course Materials, *Online Journal of Distance Learning Administration*, 9(1). Retrieved from: <http://www.westga.edu/~distance/ojla/spring91/sweeney91.htm>

Thatcher, S. (2010), From the University Presses – Georgia State and (Un)Fair Use: A Rebuttal to Kenneth Crews, Retrieved from: <http://www.against-the-grain.com/2010/03/v-22-1-from-the-university-presses-georgia-state-and-unfair-use-a-rebuttal-to-kenneth-crews>

U.S. Department of Education, National Center for Education Statistics. (2011), *Digest of Education Statistics, 2010* (NCES 2011-015), Table 5, Retrieved from <http://nces.ed.gov/fastfacts/display.asp?id=84>

Weiler, F. (1994), Copyright in the Twenty-First Century: The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity, *Cardozo Arts & Entertainment Law Journal*, 13 *Cardozo Arts & Ent LJ* 223.

Yen, A. (2000), Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment, *Georgetown Law Journal*, 88 *GEO. L.J.* 1833.

[17 U.S.C.A. § 107](#) (1) (1976).

---

*Online Journal of Distance Learning Administration, Volume XIV, Number V, Winter 2011*  
*University of West Georgia, Distance Education Center*  
[Back to the Online Journal of Distance Learning Administration Contents](#)