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Legal Spotlight

E-Reserves and "Fair use" after Cambridge University Press

As most university educators are aware, in 2008, three publishers (Cambridge University Press, Oxford University Press, and SAGE Publishers) brought a copyright infringement suit against four administrators at Georgia State University over the practice of putting class readings on electronic reserve and course management systems. This was a complicated case, but the claim of most concern to universities was that the administrators did not seek permission or pay fees to the publishers for using and making available to faculty and students electronic reserve materials (E-reserve). Georgia State claimed that their use was a "fair use" under copyright law.

In May of 2012, Judge Orinda Evans of the U.S. District Court in Atlanta dismissed all but five of the copyright infringement claims brought by the plaintiffs. And in August, Judge Evans issued an order denying injunctive and declaratory relief for those five remaining claims. Judge Evans evaluated the challenged uses according to the four fair use factors in the Copyright Act, 17 U.S.C. §107. In terms of fair use, the highlights of the decision were: (1) The **purpose and character** of the use strongly favors libraries and non-profit educational users in every analysis because it is the type of use intended to be covered by the fair use provisions of the Copyright Act. (2) The **nature of the use** will generally favor the university because the works at issue will (generally) be scholarly non-fiction, which is more informational than creative and thus has a broader scope of fair use. (3) The third fair use factor, the **amount and substantiality** of the portion copied, favors the university only if it used no more than 10% of works with ten chapters or less, or one chapter for books with more than ten chapters, and the portion copied is not the "heart of the work". The court rejected the Classroom Guidelines as incompatible "with the language and intent of § 107" and suggested its own quantitative test. (4) The fourth factor, **the effect of the use on the potential market or value of the plaintiff's work**, will strongly favor the publisher in every analysis as long as there is a reasonably priced and readily available license for digital excerpts. In this case, the court found that this favored the plaintiffs in those instances where digital licensing was available through the CCC. But in the majority of cases the fourth factor still favored Georgia State because there was *"no evidence in the record to show that digital excerpts from this book were available for licensing" as of the date of infringement."* It is important to note that, in this context, photocopying licenses were not seen to be a substitute for digital reserve licenses. Another important piece of context here is that students would not have bought the assigned books as a substitute for the excerpts posted on the e-reserve system.

Consequently, only five out of seventy-four course reserve listings fell on the wrong side of Judge Evans' fair use analysis. The only relief that the publishers obtained was an order that the defendants' fine-tune their copyright policy to make it "not inconsistent" with the Judge's ruling. And, in a final "knock-out" punch, Judge Evans determined that Georgia State was the prevailing party and entitled to reasonable attorney's fees.

Although the publishers will likely appeal the District Court decision, at least for now there is judicial precedent that non-profit university libraries can rely on to make digital course packs and e-reserves available to students and faculty.

Question of the Month

"Are university employees allowed to accept terms of agreement when downloading software to be used for university business?

State and federal law prohibit the University from agreeing to certain terms commonly found in contracts, including software agreements.

Recognizing the University's obligations under state and federal law, as well as the non-negotiable nature of many electronic "clickwrap" agreements, which require a user's click-through acceptance of contract terms in order to download or use a software product, the Office of General Counsel (OGC) and Office of Information Technology (OIT) have recently developed a framework for evaluating and processing these agreements.

When an employee encounters an electronic agreement requiring the acceptance of terms in order to download, install, or use software, prior to accepting the terms the employee must contact the OIT at **software@ncsu.edu** to review the agreement in question and instruct the employee whether it is acceptable to proceed. OIT is currently developing a website that will list software products and applications with terms OIT previously reviewed and that may be accepted by University employees without additional review. The Howling Counsel will announce this website in a future edition once it is published.

'Tis the Season: Holiday Q&As

Question: Our office wants to have a holiday function that includes alcohol. Are we allowed to do that?

Answer: It depends. The answer is determined by **NC State REG 04.20.01 (Alcohol Regulation)** and the Chancellor's 3-D memo concerning the **Drug-Free Workplace Act (September 21, 2012)**. The alcohol regulation makes it clear that no alcohol may be served at any campus location (exceptions are the Lonnie Poole Golf Course Clubhouse, the University Club and Park Alumni Center) on any business day until after 5:00 p.m. In addition, the Drug-Free Workplace Act memo prohibits any employee from reporting to work under the influence of alcohol. Read together, these essentially put the brakes on serving alcohol at any office function on or off campus during the work day. If you want to have a party with alcohol at an on-campus location after 5:00 p.m., it is possible if a number of requirements are met: the function is invitation-only; you receive permission from the Dean (if an academic unit) or the appropriate Vice Chancellor (if a non-academic unit); and you receive permission from the Vice Chancellor in charge of the facility or space in which the event is proposed to be held. Even if your event is invitation only and the appropriate approvals are secured, there are several other requirements that must be met such as protecting against underage drinking, providing food and non-alcoholic alternatives. If you have an after hours holiday function off-campus at someone's home that includes alcohol, no permission is required, however, the host should be aware of North Carolina's law regarding social host liability. Permission is also not required to have an after hours office holiday party at an off-campus restaurant or private club where alcohol is served—however, no matter where the function is held, keep in mind that no alcohol may not be purchased with state-appropriated or federal funds.

Question: We are getting ready to decorate the lawn, lobby, reception and common areas of our building for the holidays. Because NC State is a public institution, do we have to be concerned about what we can display in public areas?

Answer: Questions involving holiday displays require consideration of both the Establishment and Free Exercise Clauses of the First Amendment. Generally (though facts do matter), only overtly religious symbols (crèche, cross, menorah, etc.) displayed alone are problematic. When such items are included in a display with an overall secular purpose or included as part of a broader seasonal display, the courts have shown less concern. Christmas and holiday trees, reindeer, candy canes, tinsel, assorted holiday-themed decorations and poinsettia plants have not been deemed overtly religious by the courts and may be displayed without any legal concern.

Question: Okay, well then can I display a religious symbol or religious images (e.g., Star of David, cross, star/crescent, image of Jesus) in my private office?

Answer: This question is slightly more complicated because in addition to the Establishment and Free Exercise Clauses of the First Amendment, it also raises questions that touch on free speech and potentially Title VII of the Civil Rights Act. Again, the answer to the question will be driven by the facts and circumstances of each individual case. However, the short answer is that generally if you have a private office, you may display a religious symbol as long as it can be viewed as personal expression, and not one sanctioned by the university's message. If you have any questions about what you may or may not be permitted to display at the university either in a public or private space, feel free to call our office for guidance.

"We order our office supplies from Staples. Today UPS delivered a fruit basket from our Staples representative with a card saying "Season's Greetings." Can we eat the bananas?"

In accordance with **NCGS 133-32** it is unlawful for a covered employee to accept a gift from a person or company who (1) has a contract with the university; (2) has performed under a contract with the university within the past year; or (3) anticipates bidding on a university contract in the future. A covered person is a university employee who (1) is charged with preparing plans, specifications or estimates for university contracts; (2) is charged with awarding or administering a university contract; or (3) inspects or supervises construction. Furthermore, state employees may not receive gifts in exchange for recommending or influencing a contract by the university. Although you may not be a "covered university employee," for purposes of this statute, the best practice would be to place the perishable gift basket in a public area where it can be consumed by all university employees, given to university dining for students or donated.