ON CSU/COLD STATIONERY

Andrew Jones

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Office of General Counsel

California State University

Office of the Chancellor

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CC: Chancellor Joseph Castro,

[who else should be copied on this?]

January 10, 2022

Dear Mr. Jones:

The sudden shift to online teaching and learning brought by the pandemic impacted all 23 campuses, pushing most classes into online learning environments while providing technology and training on how to use it to teach. While the information technology needs of faculty, staff, and students have been addressed on an emergency basis in the pivot to online learning, a number of issues regarding the routine use of intellectual property in the online environment (related both to online teaching and changes in the legislative landscape) have not been addressed and indicate a need for clear information, often in real-time, about how copyrighted materials can be used in teaching and learning. These questions are asked of library personnel, many of whom, while receiving some training in how to answer basic questions, are under-prepared to respond to the situations brought to them by faculty, staff, and students ([as detailed in a recent study](https://hdl.handle.net/2286/R.2.N.160716) of library personnel in 13 Western States that indicates that currently only 6% of library personnel consult campus counsel, if available, when they have questions). In addition to these questions which are routinely asked and answered at libraries, changes in technology and law that impact the use of materials online (particularly the [CASE Act](https://fairuse.stanford.edu/2021/06/07/new-legislation-the-case-act/)) and how libraries operate ([Association of Research Libraries CONTU White Paper](https://experts.illinois.edu/en/publications/modern-interlibrary-loan-practices-moving-beyond-the-contu-guidel), and [Controlled Digital Lending](https://asistdl.onlinelibrary.wiley.com/doi/abs/10.1002/pra2.438), although many other examples appear in the Appendix) create areas of uncertainty for library personnel and the faculty, staff, and students who consult them about copyright issues.

While the Office of General Counsel (OGC) provides intellectual property counsel, a number of issues (including that most of the OGC lawyers have had a focus on trademark and patent protection rather than copyright, particularly the use of copyrighted items in an academic setting) impede users from accessing counsel and information necessary to doing their work. The fluidity of the talent market and the structure of OGC, with regular turnover of counsel, has meant that a lawyer who can help with copyright issues has not been regularly available. Furthermore, for a faculty member to approach counsel, the request must first make its way through the local campus approval structure, which delays the resolution of the issues, dissuades faculty and staff from seeking further support via counsel, and leads to questions about the use of copyrighted material in classes remaining unanswered.

As teaching-focused institutions, all locations on campus—physical and digital—are learning spaces, and issues regarding copyright affect everyone using those spaces, whether they be campus music center directors, students building virtual reality models in a library makerspace, club advisors wanting to show French-language films at meetings, or instructional designers supporting faculty trying to make their courses accessible to all. At the same time, educational copyright law in the United States almost exclusively focuses on what happens in physical classrooms, leaving many across our campuses with copyright-related questions. While many faculty and staff, particularly within CSU libraries, work to support campus entities with regard to copyright through both regular education and outreach as well as individual consultations, nowhere are the conundrums and challenges in this work more visible than those regarding teaching spaces and materials. Entities within the CSU system who work in this space include academic technology, media resources, teaching and learning support, information technology, library and other faculty, student activities officials, housing advisors, and event coordinators.

Ongoing access to a lawyer who specializes in copyright and online learning issues would greatly help clarify for our teaching faculty that the routine academic work of the University is being completed in a legal fashion. Having one legal resource in the OGC, as other universities provide to their libraries, would significantly reduce the redundant work being done at all 23 campus libraries (sometimes without consulting legal expertise) to develop policies, procedures, and educational outreach about the use of IP as well as respond to ongoing developments in teaching and learning situations that need clarification by a lawyer.

We look forward to discussing possible solutions to this gap between what the OGC currently provides and these unmet needs of faculty, students, and staff. Please let me know whom from your office, or other offices, should be invited to an initial meeting.

Sincerely,

[signed by whomever we expect will get the best response from the OGC/C.O.]

COLD (or those in the work group that drafted this, or the names of all library faculty and staff [who can be invited to sign the letter online during an open-signing two-week period])

APPENDIX

The issues for which teaching faculty, library faculty, staff, and students need clarification (and an ongoing education effort) can be broken into two categories: General Teaching and Learning Issues, and Library-Specific Issues.

## General Teaching and Learning Issues

* Final decisions in the [Georgia State case](https://copyrightconference.lib.miamioh.edu/wp-content/uploads/2021/08/MUL-GSU-End.pptx) need clarification on how to be applied to the 23 campuses of the CSU system. Answering the question of whether the CSU considers learning management systems and other online environments to be campus facilities/classrooms is particularly important. Legal assistance is needed to determine this.
  + These determinations affect the daily work of instructors, librarians, educational technologists, and others in terms of their comfort level for using copyrighted materials in courses, digitizing physical materials, etc. Stronger support by the OGC \would assist all of these parties in more confidently and comprehensively utilizing their (and the University’s) rights regarding the use of copyrighted material.
* The growth of online education: In the wake of COVID-related campus closures, more faculty teach courses online and more campuses and departments are developing more online sections of courses. Commensurately, questions arise from campus stakeholders regarding the ethical and legal use of materials in online classes as well as using digital technologies such as learning management systems.
  + Academic technology offices, faculty resource centers, libraries, and others supporting this work all have different understandings of the issues and may be providing instructors with conflicting information in the absence of easily accessible, timely, and direct copyright support. For example, a librarian might suggest that faculty use direct permalinks to an article they want their students to read to provide user statistics and a stronger Fair Use case, but an academic technologist might recommend to the same faculty member posting a remediated PDF for accessibility purposes.
* The use of media in courses, a topic that cannot be disconnected with that of online education, needs legal clarification.
  + Playing a DVD or even a streaming video in a physical classroom is a straightforward matter in terms of copyright. Complications enter with the use of educational technology such as learning management systems or online education modalities, access to streaming media, digitization of physical materials (owned by the library or an instructor), and the definition of “educational use.” Specific concerns here can include:
    - Accessing media available only via streaming services [such as Netflix or Hulu](https://libguides.umflint.edu/faculty/media#s-lg-box-21086642), whose terms of use largely prohibit educational uses. Some faculty may try to circumvent this issue by showing the media during class time via Zoom and other technologies.
    - What are faculty options when their media title is not commercially available in a usable media format or at a “fair price”? What units on campus are supporting this work, and are they in compliance with current laws?

Many at campuses are doing this work “under the radar” due to their need to provide materials to students amid a lack of clear institutional support clarifying how the law applies to their teaching situations.

* Faculty rights to control use of course materials that they created, especially when the materials reside in a university-provided learning management system, and how does this intersect with the Collective Bargaining Agreement.
  + When faculty create course content within a learning management system, such as Canvas or Moodle, the lines surrounding how those materials can be used and reused can be murky. A campus academic technology unit might receive requests for "a copy of Prof. So-and-so's last class to help the new instructor." When the previous instructor is still around, the process is straightforward: Academic technology would contact that person to get their approval. But the options (and the ethical issues) change when the faculty member is no longer affiliated with the university, due to retirement, termination, or being off-contract for a period of time. Technology professionals may be unsure of what to do when a faculty member is temporarily inaccessible—e.g., has a medical emergency—and the new instructor asks for access to their course site? Some units may have created internal policies for these situations or just handle them on an *ad hoc* basis. These questions are not strictly intellectual property issues but involve contractual/labor matters.
* Copyright and intellectual property questions beyond course materials, such as assignment artifacts, which are increasingly digitally created and disseminated by teaching faculty. Examples include:
  + Digital humanities projects that are created through a course and then made publicly available on the internet, using tools such as Scalar and hypothes.is.
  + Student journals created for course credit and disseminated via ScholarWorks, Open Journal Systems, or Google tools.
  + Items created using campus-operated makerspaces.
  + Open educational resources created, remixed, or used by faculty, which sometimes involve students in their development.
  + Coordination of intellectual property and copyright licenses and workflows across campuses: At any given CSU campus, various entities may be working with copyrighted materials, contracts, and organizations, including music and theater departments, performing arts centers peripherally connected to the university, student activities offices responsible for concerts and movie nights, campus Digital Millennium Copyright Act agents, Information Technology staff, strategic communications, event planners. Typically, no coordination or conversation happens among these groups.
  + Student intellectual property rights: The CSU’s increased focus on experiential learning, collaboration, and workforce development means that students are often creators in their own right. Current policy does not adequately address this issue.
    - To what extent are students being educated about their rights to their own intellectual property, particularly when mandated to use third-party vendors such as Turnitin that collect that intellectual property?
    - When students collaborate with faculty members, to what extent can mandatory dissemination products, such as theses, be embargoed or authorship “shared”?
    - The issue of ownership is further muddied if a student uses university technology or tools to create something or creates software for course credit during an internship. One campus example involves a virtual reality app created in a university-owned makerspace by a student under the supervision of an instructor. Another example involves class notes that have been uploaded by a student into a third-party product such as Course Hero but is based on instructor-owned content presented during class sessions. Clarifying issues such as these requires assistance from a lawyer.
* The [Technology, Education and Copyright Harmonization (TEACH) Act:](https://www.ala.org/advocacy/copyright/teachact/distanceeducation) The Act requires institutional support and a multi-pronged approach for it to be applied.
  + Instructors, librarians, and other stakeholders may have difficulties with the process or may be unaware that Fair Use evaluations can be used instead for various forms of online teaching (including on learning management systems).
  + In particular, much confusion surrounds the question of using the TEACH Act vs. Fair Use evaluations for decisions about materials shared online during classes.
* Copyright and accessibility: Are accessibility offices partnering with libraries, IT offices, and other institutional stakeholders to best apply library rights and other exceptions portions of copyright law to make materials accessible? Are accessibility offices coordinating across campuses to support the development of accessible formats of course materials, and do they have access to ongoing counsel to resolve their issues? Issues regarding digitization and accessibility (and how the store the digitized items once created) impact both the accessibility offices and libraries on campus; access to legal counsel familiar with the intricacies of digitization and its role on campus would help our campus professionals address the needs of our students and faculty.
* Student intellectual property, specifically: What education are students receiving about copyright, plagiarism, and intellectual property across the CSU? What education are students receiving about their own rights as creators and authors? Considering the importance of intellectual integrity within student conduct standards and the teaching focus of the CSUs, this issue cannot be ignored. Guidance from legal counsel aware of the laws concerning copyright and the intellectual property created during courses seems crucial in this area.
* The digitization of physical materials, whether within the library or by instructors of items they own themselves. This issue illustrates the extent to which library-specific copyright exceptions and work cannot be separated from broader campus information access and use issues.
  + For example, at some campuses few opportunities exist to educate faculty about best practices for digitization and use of materials within their courses.
  + The elimination of media centers and digitization support outside the library may lead instructors and others to pressure libraries to digitize materials beyond the library’s policy standards or to demand services for which the libraries are not staffed.
  + Without such support on campus despite a demonstrated need, faculty may obtain films and other materials through less than lawful means to use in their courses.

## Library-Specific Issues

* Librarians in other state education systems have access to counsel well versed in library and education issues of copyright, but CSU Library faculty and staff don’t have this access. That relationship needs to be there for us to do our jobs.
  + Librarians that have access to institutional copyright management training or certification are taught their first responsibility is to align with campus counsel to understand institutional risk tolerance and procedure on addressing copyright concerns. Not having access to counsel undermines alignment so the librarian is forced to look to outside institutions for perspective and to guess as to how to apply those perspectives locally, creating a fragmented approach that significantly increases institutional risk.

* CASE Act and Tribunals - their impact on faculty and libraries
  + New small-claims copyright tribunals are being set up outside of the court system that will allow copyright holders to file complaints directly against our users. As all determinations are binding, if faculty and students are not properly trained to navigate the subpoena process, they may incur severe penalties through negligence or feel they may have no other recourse than to yield to plaintiff demands. The fact that they have the option to opt out may not be known or understood and some may erroneously believe that opting out may automatically mean going to court. Librarians will be asked and will need to know how to address questions from our faculty, staff and students who may not know where else to turn if they receive a subpoena as a result of their work on behalf of the University or in pursuit of a degree (or even in their personal uses of intellectual property). The support of a dedicated position in OGC that works with libraries would greatly assist our campus faculty.

* ILL & CONTU
  + In 2020, the Association of Research Libraries released a white paper “Modern Interlibrary Loan Practices: Moving beyond the CONTU Guidelines (2020)” recommending abandoning the 1978 Commission on New Technological Uses of Copyrighted Works (CONTU) guidelines for interlibrary loan and instead relying directly on Section 108 for developing modern copyright policies and practices. These outdated guidelines recommended a “rule of five” which is to pay copyright fees on each article after fulfilling the fifth (fee-free) interlibrary loan (ILL) request.
  + Based on this recommendation, the CSU Libraries have begun discussions of what a modern ILL policy should be based directly on the copyright law rather than the CONTU guidelines. These discussions may result in practices that expose the institution to legal risk since publishers have an expectation that library ILL practices will continue to conform to the “rule of five**.”**

* Digitization and Film (in-library and by end users who are instructing with the materials)
  + While showing films in the context of face-to-face teaching is protected by section 110(1), the use of film in virtual classrooms has no clear or consistent legal framework. While the Teach Act allows showing “reasonable and limited” portions of films in online education, many faculty need to show the entire film in order to fulfill their educational objective. Some films may be available for the library or academic department to purchase through a streaming license, but these licenses tend to cost significantly more than the DVD. Licensing agreements through Netflix, Amazon, Hulu and other services generally do not allow for educational use of their materials (although some very limited exceptions do exist). In many cases, students are forced to get an individual license to the entire service rather than accessing the particular film assigned by the professor. In violation of licensing agreements, faculty are turning to screen capture technology to make copies of the work available to their students, sharing the files through university course management systems.
  + The pandemic exacerbated what was already a controversial practice, the ripping of DVDs and storage of film files for educational use. *The library owns the DVDs that are being copied.* Some campuses are hosting streaming services through IT, in Faculty Support Services, or in the library. In the absence of leadership, a decentralized and *ad hoc* approach to providing faculty guidance on best practices leaves accommodations to local decision makers.
  + There tends to be little coordination between units on the same campus, so that IT, faculty educational technology support, and the Library are often engaged in different sets of practices when digitizing materials. A coordinated conversation across these units and a single legal framework would allow stakeholders from different units across campus to work from the same set of rules and to coordinate effort and reduce redundant practices.
  + The Digital Millennium Copyright Act (DMCA) prohibits the circumvention of technological protections on copyrighted content but allows some limited capturing of clips under the Library of Congress rulemaking which is reviewed and renewed every three years. Faculty that might want to extend beyond small portions of films may seek to rely on “fair use” as an affirmative defense, but there is no clear indication in the courts if the DMCA prohibition against circumvention is an absolute or if fair use can still apply. There are court cases documenting both arguments. Institutions across the country are having to decide one way or the other in order to assist faculty.

* Copyright and Accessibility
  + Accessibility of library electronic resources begins by securing a Voluntary Product Accessibility Template or VPAT for all resources to which the library or other units subscribe on behalf of the University. The VPAT details the software’s level of accessibility compliance. As contracts for library e-resources are negotiated system-wide and locally at each campus library, storing VPATs and making them available to campus disability services (and other units involved in protruding software and content) is a critical component to maintaining digital accessibility to state standards, thereby minimizing Section 508 liability.

* Thesis agreements (for prospective and retrospective digitization/sharing of theses online)
  + On behalf of academic departments, librarians are asked to draft depository agreements for theses, dissertations, and electronic Masters projects. These non-exclusive agreements allow each campus to retain, copy, bind, display, host, and share the student’s work with ProQuest dissertation services for further redistribution and sale. Currently, these agreements get drafted at 23 campuses, rather than centrally; a centralized effort would reduce error and assure that legal experts review the document before it is deployed.
* Controlled Digital Lending
  + Libraries across the country are embracing [Controlled Digital Lending](https://controlleddigitallending.org/) (CDL), a new practice of digitizing print books and lending the electronic copies on a one for one basis with the print. When the digital copy is checked out, the print is not available and vise-versa. With a strong [policy framework](https://controlleddigitallending.org/statement) under first sale and fair use, CDL is quickly becoming a widespread and exciting trend in libraries. The CSU Libraries are [signatories](https://controlleddigitallending.org/signatories) in support of this practice, but we are waiting to receive support or endorsement from the Office of the Chancellor. Having a legal specialist focused on library issues would help all 23 campuses and expand access to materials for our students, faculty, and staff.
* Open Access materials for materials in campus Institutional Repositories (IRs)
  + Through the libraries, the CSU system provides access to and support for institutional repositories for each of the 23 campuses. The Library trains faculty on the Creative Commons licensing framework underpinning Open Access (OA) publishing, Open Educational Resources, and modern scholarly communications. These licensing tools are built on copyright law and allow scholarly publications to be available free of charge to anyone in the world with an internet connection.
  + Both Green and Gold OA models are supported to varying degrees on different campuses. Green OA occurs primarily through voluntary deposits of published scholarship and white papers by faculty in institutional repositories managed by CSU libraries. Gold OA is often facilitated through scholarly communications publishing funds managed by libraries that assist faculty in paying the article processing charges (APCs) that publishers charge for making faculty scholarship open to the world.
  + CSU faculty have begun to have success in getting campus OA mandates, that occur at many universities and which would preserve a copy of the scholarly and creative output in the faculty member’s home campus IR while making it available to other campuses, passed through campus Academic Senates (even with support from the Statewide Academic Senate). These mandates preempt individual faculty copyright contracts, mandating that faculty deposit their work in the institutional repository to create open access to the work. Faculty have the flexibility to impose an embargo on the institutional repository release date to allow publishers first publication of the document. A legal expert from the OGC working with the libraries could help clarify any issues for campuses whileHaving the OGC involved in these discussions would assist University administrators (in the Chancellor's Office and at each campus) voice their concerns while laying a policy groundwork that would support the CSU enter into the conversations that have been occurring for the past three decades that have initiated significant changes in the scholarly publications ecosystem.

* Authors retaining rights for their work.
  + To understand their authorship rights under copyright law and collective bargaining, faculty consult with librarians for advice on negotiating licensing contracts with publishers, discovery of rights abuses on the internet, control of faculty-developed course materials, and the ethics of using student work in their publications. As faculty authors seek to place their work in disciplinary IRs (in addition to their campus IR), issues regarding rights come into play. Easy access to a legal expert, and an educational campaign focused on CSU authors, would help educate faculty authors about their rights when depositing work in non-CSU repositories.
* *Archives, Digital Exhibits, and Museum Exhibits*
  + Librarians are consulted on exhibits and displays by Special Collections and Archives with questions ranging from fair use in the preparation of exhibition flyers and pamphlets to applying copyright law for digital exhibitions. Art departments seek librarian guidance on displaying ephemera collected from years of student exhibits. Students reach out to the library for guidance on how they can integrate archival materials into their coursework. Faculty may ask librarians to consult on orphan works such as photographs for their publications. Other institutions may reach out to the library for permission to use archival materials that were published by the campus or its alumni.
  + Issues that arise needing to be addressed (and which often need legal input) include
    - Photos - what are appropriate disclaimers to include when the name of the creator or copyright holder are not known?
    - Ephemera - when including ephemera in online exhibits, what is considered sufficient documentation of a rights search (particularly when no rights holder can be identified, often called ‘orphan works’)?
    - When non-CSU libraries, museums, or publishers request permission to use documents, photos, or other items in their exhibitions or publications, it would be very helpful to have access to legal counsel regarding who (on campus or at the Chancellor’s Office) has authority to grant permission to use the materials.

END OF APPENDIX

NOTES /PARKING LOT

* *Data from Western Copyright Alliance report*
* Campus DMCA agents: Who is responsible for training them, and to what extent are issues such as Fair Use covered in the training? What are the policies and procedures when the university receives a take-down notice, particularly when the use is one that may actually fall under Fair Use?