

University Rejects American Association of Publisher's Claim that Electronic Reserves Violate Copyright Law

As we are now all aware, scholarly publishing is in a state of crisis with real and potentially long-lasting impact on the University and on the academy more generally. The Senate, in cooperation with the administration, has taken several steps, previously reported in these pages, to address issues arising from this situation. These have included informing faculty about the economic crisis in scholarly publishing, rallying faculty support for the University's position in contract negotiations with publishers, and creating an Academic Council Special Committee on Scholarly Communication with a wide-ranging charge to investigate a host of current scholarly publishing issues from the faculty perspective. Yet another manifestation of the crisis is a recent assertion by a publisher's organization that threatens the fair use principles that are so central to research, teaching, and learning.

The American Association of Publishers (AAP) has asserted that the electronic reserves at the UCSD library violate federal copyright law because the amount of posted material exceeds "fair use." The AAP obtained a listing of a small percentage of electronic reserve material for the fall 2003 term at UCSD from a "confidential source," and contends that it represents the most complete information it has for any electronic reserve system in the country. UCSD, through its campus counsel and the Office of the General Counsel, denies that its practices violate fair use, and the Office of General Counsel has cautioned the AAP about undertaking legal action against the University.

It is unclear whether the AAP will ultimately file a lawsuit against the University, will simply use the available information as a springboard to heighten the legal issues around electronic reserves and possibly create a chilling effect, or will pursue both avenues. The AAP calls into question electronic reserve practices at all UC campuses, but apparently does not have detailed information about reserves at the other campuses.

The AAP asserts that the "firewalls" around electronic reserves (which typically are available only to users with campus IP addresses or enrolled students who access the information via password) potentially hide wide-scale copying of whole works or significant portions of them, which would likely violate copyright law. The organization has proposed as a solution that faculty post on a publicly accessible website at the beginning of each term a listing of course reserves, indicating the title, author, and the amount of material placed on reserves. In this way, the AAP would be able to monitor whether the amounts used fall into the "fair use" allowed under the Copyright Act.

General Counsel's office has described in detail for the AAP the processes and procedures used by UCSD's library staff to ensure that proposed reserves meet "fair use" standards and has cautioned against suing a university whose faculty provide prodigious amounts of material for the publishers the organization represents. General Counsel has also informed AAP that the University cannot simply direct faculty to make the type of public postings it (AAP) has suggested.

Although the AAP has singled out UCSD at the moment, the issue of electronic reserves and applicable fair use standards is a national one for which there is no current consensus. In 1994, the federal government convened the national Committee on Fair Use (CONFU), with representatives of publishers, academia, and others, for the purpose of negotiating guidelines for the fair use of materials in electronic media by non-profit entities. One working group was specifically charged with developing guidelines for electronic library reserves, but it was unable to reach consensus. CONFU was disbanded in 1997.

The University has urged AAP to direct its efforts to re-igniting the national discussion rather than pursuing legal action, the “benefits” of which would be limited because universities generally already agree that “fair use” applies to electronic reserves and a court would not have the authority to develop guidelines for what is acceptable fair use.

Recent press coverage of this matter can be found in:

- “Legal Battle Brews Over Texts on Electronic Reserve at U. of California Libraries,” *Chronicle of Higher Education* 51:33, p. A36, April 22, 2004 (also available to subscribers at <<http://chronicle.com/prm/weekly/v51/i33/33a03601.htm>>).
- “Students Toss Textbooks Aside and Download Articles Online,” *Wall Street Journal*, April 20, 2005).
- “Sides Clash Over Online Library,” *National Law Journal*, April 25, 2005 (available at <<http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/Preview&c=LawArticle&cid=1114679112558>>).
- “With UCSD on the Front Lines, Battle Brews Over E-Reserves,” and “When it Comes to E-Reserves, Will AAP Become the Next RIAA?” *Library Journal Academic Newswire*, April 26, 2005.

University Librarians
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