

CALIFORNIA STATE UNIVERSITY, EAST BAY

DESIGNATION CODE: 07-08 BEC 4 revised

DATE SUBMITTED: October 16, 2007

TO: The Academic Senate

FROM: The Executive Committee of the Academic Senate

SUBJECT: Intellectual Property Policy

PURPOSE Action by the Senate

ACTION

REQUESTED: That the Academic Senate approve the proposed Intellectual Property Policy; effective upon the signature of the President

BACKGROUND

INFORMATION: In 06-07 the Executive Committee established a Task Force to draft a new Copyright Policy for CSUEB. The Task Force submitted several versions to ExCom in 06-07. At its meeting on October 16, 2007, the Executive Committee reviewed the following Intellectual Property Policy with Aline Soules, Chair of the Task Force, and approved the policy to be forwarded to the Senate unanimously. The included Guidelines are not part of the policy, but helpful information, which will be amended to meet changing conditions.

California State University, East Bay
Intellectual Property Policy

California State University, East Bay faculty, students, and staff **shall** observe all laws pertaining to intellectual property, including patents, copyrights, trademarks, and software.

Ownership

Those who engage in scholarship and creative endeavors have specific privileges and responsibilities associated with the products of their work. Unless extraordinary university resources were used to develop the work, CSUEB **shall** observe the general principle that the results of their creations are their property and that the creators have the right of ownership or final disposition of their work.

The University facilitates creative activities among its faculty and students and makes its facilities available for such purposes.

Ownership, while governed by intellectual property laws, may also be governed by contracts, which take precedence over intellectual property laws.

CSUEB and its faculty, students and staff **shall** comply with intellectual property clauses in employment contracts established with bargaining units and observe CSU documents on intellectual property developed in consultation with faculty.

It is the policy of California State University, East Bay that all rights in copyright shall remain with the creator, unless:

- the material is prepared by specific contractual agreement in writing with the university ~~or as a specific university assignment.~~

If the copyrightable material is prepared as a result of a specific contract/agreement between the creator and the university or its auxiliaries, the contract will specify the product expected, the terms of copyright ownership, and advance distribution of royalties. The university and faculty will establish ownership terms as part of the contract ~~or the assignment~~.

- the university makes the enterprise possible through extra or special support directly for that purpose.

If the copyrightable material is prepared with extra or special support by the university, the product is considered “substantially supported” by the institution because there is additional cost to the institution. That support includes costs which would not have been incurred by the institution otherwise. In those cases, the university and faculty will establish ownership terms as part of the arrangements for additional or special support at the time the support is requested.

- the effort leading to copyrightable material is sponsored in whole or in part by a third party, but only as may be required by the third party.

If obligations to third-party sponsors are incurred as part of the activity that generates copyrightable material, prior agreement regarding copyright ownership is essential and must be negotiated before that sponsorship is accepted by the university or its auxiliaries.

Nothing in the contract specifications, additional university support, or third-party sponsorship shall prohibit a decision by the university or its auxiliaries to award copyright solely to the creator.

An employee’s obligations regarding teaching, scholarship, or creative work, or obligations related to sabbaticals, difference-in-pay, or RSCA leave proposals shall not be interpreted as a specific contract nor as additional university support unless specified in advance and in writing by all parties. In addition, materials customarily created within and for teaching assignments are not subject to university claim of copyright unless all parties agree in advance and in writing.

Contracts and agreements must be reviewed by appropriate parties prior to closure or signature. Reviewers must include designated university personnel, particularly those responsible for research and sponsored programs, to ensure compatibility with other contracts and relevant federal regulations. The contract will specify the expected outcome, ownership terms, and arrangements regarding distribution of royalties.

In cases where the university retains ownership, the university name will be specified as follows:

Copyright [year], California State University, East Bay. All rights reserved.

In cases of joint ownership, the specification will be as follows:

Copyright [year], California State University, East Bay and [name(s) of other owner(s)].

As a general principle, CSUEB advises individuals and organizations to clarify conditions and clauses prior to beginning work.

User Rights

Where appropriate and for educational purposes, as such purposes are defined by law, CSUEB and its faculty, students, and staff **shall** exercise fair use rights in regard to copyright.

Where particular laws require formal compliance structures, CSUEB will ensure that those structures are in place to enable faculty, students, and staff to exercise the rights included in those laws.

Copyright information will be provided on an appropriate web site and access to legal advice for copyright issues related to CSUEB matters will be provided by the campus or through the California State University system.

Administration and Education

The Office of the Provost and Vice President for Academic Affairs will administer the policy and will respond to queries regarding intellectual property issues, particularly as regards negotiations and income rights.

Procedures and appropriate mechanisms to educate CSUEB faculty, students, staff, and affiliates, facilitate their compliance, and monitor campus activity will be developed by an advisory committee that includes the following individuals or their designees:

- The Provost (chair)
- The University Librarian
- The Information Security Officer
- The Chief Information Officer
- The AVP of the Office of Research and Sponsored Programs
- Two faculty recommended by the Academic Senate
- A Student representative

An intellectual property web site will be maintained and the current URL will be posted with the policy.

Disputes will be reported to the Provost's office and referred to the advisory committee for review prior to a decision. Advice on legal issues will be sought from university counsel. Agreements between the university and creator(s) of intellectual property will receive final approval from the Office of the Provost and Vice President, Academic Affairs.

Policy

This policy will be reviewed as needed or every five years.

Guidelines to Accompany CSUEB policy on Intellectual Property

(to be amended to meet changing conditions)

What is intellectual property?

Intellectual property encompasses copyright, patents, and trademarks. For faculty, students, and staff, the primary focus is usually copyright, but if you are an inventor or working with multimedia, patent can come into play. If you engage in technology transfer or some other commercialization of your creation, both patents and trademarks may be a consideration.

Why is intellectual property different today than it was yesterday?

In some ways, copyright is no different from the way it was when the current foundational law was enacted in 1976, but today, more attention is given to it, particularly by owners, who are working in a more competitive financial world than ever. In other ways, it is different. Technological advances – the Internet, the Web, iPods, social software, the list goes on – have created challenges to the fundamental goal of copyright, namely to balance the rights of creators, owners, users, etc. This requires creators to be more aware of who uses their creations and what contracts they sign. Publishers need to be more diligent about who uses the creations in which they invest their business dollars. Users need to be more aware of the law, to understand that guidelines are just that – guidelines, not the law – and determine reasonable fair use and fair copyright payment.

See: [Intellectual Property, Fair Use, and the Unbundling of Property Rights](#) (an official Guideline for CSU Policies on Intellectual Property authored by the Academic Senate of California State University, March 2003)

See: http://www.library.csueastbay.edu/copyright/copyright_overview.htm (CSUEB’s copyright page)

Author/Creator Issues

I’ve created a book, a book chapter, an article, a piece of music, a multimedia work as part of my responsibilities at Cal State East Bay. Who owns my work?

In the United States, authors/creators own the work they created unless they agree to “work for hire.” The contract or agreement by which they work for hire determines the ownership of the creation. Often, as a part of employment, it is owned by the person, institution, or company that hires the creator. In the case of California State University, East Bay, employees should check their contracts or other written memoranda or agreements of understanding to determine the conditions of their hire. For example, the California Faculty Association contract includes a clause on Intellectual Property Rights. The CSU Employees Union contract contains no equivalent clause.

See: http://www.calfac.org/allpdf/contractpages2007/Article_39.pdf (faculty contract clause on “Intellectual Property Rights”)

Should I register my copyright?

For the most part, you will not need to do this. Your work is under your copyright the moment you create it. As of the 1976 copyright act, you no longer needed a copyright symbol ©.

Creators generally register copyright when they have entrepreneurial intentions. If your goal is to “protect” yourself from being scooped, legitimate publishers are not interested in doing that. They want your work and, if your work is successful, your future work. It is not in their interest to steal it. It is in their interest to cultivate a creative relationship with you.

The caveat to this is that your work needs to be registered if you want to take someone to court over a copyright issue.

See: <http://www.copyright.gov/register/> (Copyright registration at the U.S. Copyright Office)

I’m thinking about putting my created work on BlackBoard or another university web site or server. What does that do to my rights?

Mounting your material on BlackBoard or any other campus web site or server doesn’t change whether you own the creation or it is a “work for hire” as stipulated in employee contracts (see FAQ on “who owns my work” above).

I’ve created a book, a book chapter, an article, a piece of music, a multimedia work as part of my work responsibilities, and a publisher accepts it. What’s a reasonable contract?

There’s a big difference between commercial or trade publishers and those publishers who are involved in break-even or subsidized scholarly publishing or who simply publish for the love of sharing information. In all cases, however, read the contract or agreement *before* you sign or agree verbally to anything. If the contract is not available on a web site or in a previous issue of the publication, ask the publisher for a copy. If you don’t like the terms, *negotiate*. Ultimately, you have to agree to something if you want a publisher to take your work and you will likely make compromises. The challenge in securing a contract is generally greater for not-yet-tenured tenure-track faculty because the pressure to publish is stronger. Regardless, make sure you know the terms to which you are agreeing and make sure that you can live with them. There are few absolutes in the copyright world, but one of them is that *contracts take precedence over copyright*.

In the case of commercial publishers, in particular, it is also possible to work with an agent. Agents know the publishing business and can provide such services as a close reading of contracts and protection of your rights as an author (including copyrights). If you still have doubts about your rights, you can also hire an intellectual property lawyer, although, if possible, it is advisable to find one who specializes in working with authors.

Arrangements are generally easier with non-commercial publishers. Conditions are generally more relaxed, although there are exceptions and equivalent vigilance should be exercised. For most faculty members, articles are the content they offer and *First North American serial rights* are generally what a publisher requests. That gives the publisher the right to publish it first. After that, your rights revert to you or, at least, you regain the right to do what you want with that material.

There are many other rights – world rights, rights for the publisher to create other types of media (audio, visual, electronic, etc.). Unless you have created a multimedia work, you will likely encounter these conditions more in the commercial publishing world than in the scholarly one (there are exceptions, however).

The worlds of music and multimedia are different from text (see below). Owner rights are much more “locked down” and the copyright conditions for use are more complicated and, generally, more stringent. Music guidelines for creators are more developed than multimedia guidelines for creators. Further, with multimedia, slightly different guidelines are evolving for various providers, e.g., libraries, museums, etc.

See: <http://www.nwu.org/nwu/> (the National Writers Union for freelance writers working in U.S. markets)

See: [American Society of Journalists and Authors](#) (for freelance writers writing books and articles)

See: [Society of Academic Authors](#) (monitors trends in authoring contracts for academic authors)

See: [Text and Academic Authors Association](#) (check out their news pages)

See: <http://www.edu-cyberpg.com/Music/musiclaw.html> (Music law: contracts and deals).

See: <http://www.author-network.com/agents.html> (list of agents)

What is the open access movement? What is the Creative Commons?

The open access movement is an attempt to find an alternate way to publish and cope with copyright. The focus is on sharing information and crediting creators, rather than on making money. One model for this is the Creative Commons which provides template licenses and a structure for “authors, scientists, artists, and educators” to “mark their creative work with the freedoms they want it to carry. You can use CC to change your copyright terms from ‘All Rights Reserved’ to ‘Some Rights Reserved.’” (quote from Creative Commons web site). Of course, there is no guarantee against someone behaving unethically, but that’s the risk the creator takes. This risk, however, occurs in all sorts of ways – when you put material on the web, when you publish anything an someone behaves unethically and isn’t caught.

See: <http://creativecommons.org/> (Creative Commons)

See: <http://www.earlham.edu/~peters/fos/overview.htm> (Open Access Overview)

User Issues

I want to use an article in my class. How do I figure out “fair use”?

There are four factors to consider individually and then as a whole. They are *purpose*, *nature*, *amount*, and *effect*. To quote from the 1976 law:

1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Here are the steps to implement a fair use evaluation:

1. Determine your *purpose*. In the academic world, this is relatively easy. It’s non-profit and educational, which works in favor of fair use.

2. Determine the *nature* of the work. This is a little more complicated. If you are using *factual* material, you have more rights than if you are using *fictional* material.
3. Determine the *amount* you will use. This is obvious in one way and not so obvious in another. The classroom guidelines, for example, are the oldest guidelines for the 1976 law and what people tend to remember from them is the 10% “rule”; however, this is a *guideline*, not the law. You are asked to determine, in each case, a *reasonable* amount. Sometimes that can be more than 10%, sometimes less. There are guidelines for poetry and other types of textual creations in print form.
4. Determine the *effect* on the market. Is what you do going to affect the publisher’s ability to generate revenue? The more you affect that market, the fewer fair use rights you have.
5. Finally, considering these four factors, look at your overall intended use. Make a final decision as to whether your use is *fair* or not.

Why is this so vague? Why can’t someone just tell me what to do? The answer to this lies in a fundamental goal of copyright, which is to create a balance among the rights of creators, owners, publishers, users, etc., so that everyone gives a little and everyone gets a little. Flexibility is the key to adapting to individual situations, which is why you make your assessment *in each case*. How do you know if you’re right or wrong? The courts decide on a case by case basis and you won’t know the answer unless you are taken to court and a ruling is made.

See: <http://www.copyright.gov/fls/fl102.html> (U.S. Copyright Office on fair use)

See: [Crash Course in Copyright](#) (University of Texas): a simple, straightforward approach, plus links to multimedia, digital libraries, licensing of electronic resources, and the needs of particular audiences (students, staff, librarians, artists, administrators)

See: [Copyright Management Center](#) (Indiana University - Purdue University - Indianapolis)

I want to put an article or a book chapter in my BlackBoard course. What about copyright?

Your first step, with an article in particular, is to check the library databases or periodical locator to see if the article exists in electronic form in one of the many sources the library has licensed because the library has *already* paid for copyright permissions as part of that license. If you find it, give students instructions on how to reach it themselves. You do not have permission to download it and then upload it to your BlackBoard site, even though it is a “closed” or “secure” site that requires authentication. You are only free to give students a path to find it for themselves.

As for providing other material in digital form, you need to establish the copyright status of each item. Is it in the public domain? Under open access? Under a Creative Commons license? By a commercial publisher? Observe copyright requirements accordingly.

Recently, Cornell University developed a set of guidelines as to what should and should not be placed in learning management systems. These guidelines are rapidly becoming the standard for these decisions.

See: <http://pressoffice.cornell.edu/Sept06/AAPCopyright.shtml> (Cornell press release and Cornell Electronic Course Content Copyright Guidelines)

I want to put something on e-reserve or reserve in the library? What about copyright?

The University Libraries currently administer both e- and print reserves. Current policy is first to check to verify whether the requested item is in one of the electronic databases, for which copyright has *already* been paid. In those cases, the item is referred back to the faculty member so that s/he can put a link or a set of instructions on the course BlackBoard site to direct students to that article.

If a whole book is requested, the library puts its copy or an instructor's copy on regular or print reserve because digitizing a whole book violates fair use (in addition to various logistical issues that make such an action impractical).

Books chapters and articles, however, are put on e-reserve as much as possible. From a copyright perspective, however, the item must either be in the public domain or copyright permission must be secured. This requires faculty to sign a copyright statement. The library will seek permissions (which are never guaranteed) through such sources as the Copyright Clearance Center or the publisher, but there is currently a financial cap. Details are on the library web site.

The degree to which a library exercises fair use is guided by the 1976 copyright law which affords libraries some exemption for purposes of preservation, interlibrary loan, and private study by users; however, library policies vary from institution to institution based on institutional philosophy and the degree of risk each institution is willing to take.

Publishers are increasingly concerned about revenue loss in areas such as electronic reserves, seeing them as no different from an electronic course pack. Recently, Cornell University developed guidelines about what can be offered in a system like BlackBoard, but the guidelines can also be applied to electronic reserves and are becoming an important factor in resolving this issue.

See: <http://pressoffice.cornell.edu/Sept06/AAPCopyright.shtml> (Cornell press release and Cornell Electronic Course Content Copyright Guidelines)

See: <http://www.library.csueastbay.edu/reserve.htm> (Reserves at CSUEB)

What about my online classes and distance learning? How does the TEACH Act help me out?

The TEACH Act, the Technology, Education, and Copyright Harmonization Act, addresses the use of digital resources by educators, but it's very limited. It allows dramatic literary or musical works to be used in distance education by adding the ability to use dramatic works and audiovisuals, but only in "*limited and reasonable portions*." To meet requirements, institutions must a) be accredited and nonprofit, b) have a copyright policy in place, and c) distribute copyright information to faculty, students, and staff. There are also technological restrictions and restrictions as to what types of material qualify. Further, use of digital works in distance situations must be the same as what would take place in a live classroom (equivalence). It is not a license to go beyond fair use, except in very limited circumstances.

See: <http://www.utsystem.edu/OGC/IntellectualProperty/teachact.htm> [the TEACH Act as explained by Georgia Harper, University of Texas System. Be sure to scroll down to the description of the rights in Section 110 (2)].

What is the DMCA and how does it affect me?

Much of the Digital Millennium Copyright Act helps Cal State East Bay in its role as an online service provider, offering immunity from liability under certain circumstances. There is also an anti-circumvention provision designed to stop piracy of digital works, but which increases restrictions on access to copyrighted works and erodes fair use rights. If the material is behind a technological “key” and it’s illegal to go around it to exercise your fair use rights, you no longer have any. Basically, you have to negotiate a contract to use that information. Every three years, the United States Copyright Office must review exemption possibilities and one exemption, instituted in 2006, was to allow an “educational library of a college or university’s film or media studies department” to circumvent technology to make “compilations of portions of [audiovisual] works for educational use in the classroom by media studies or film professors (United States Copyright Office, Statement, 2006). It’s a small and limited step, but it’s a step even though it’s only in place until the next review in 2009.

See: <http://www.copyright.gov/legislation/dmca.pdf> (DMCA summary, U.S. Copyright Office)

See: <http://www.copyright.gov/1201/> (Rulemaking on Exemptions, Nov 2006, U.S. Copyright Office)

What is the public domain? What is the length of copyright?

Some things are never under copyright. You can’t copyright ideas, only their *expression*. You can’t copyright facts, titles, names, short phrases, or slogans, although some are protected through patents or trademarks. There is not copyright on work created by United States federal government employees if that work is created as a direct result of their jobs.

The public domain includes all of the above plus a) older works where the copyright has expired; anything that’s not “*in a tangible medium of expression*,” such as an extemporaneous speech that *remains unrecorded*.

Figuring out the length of copyright can be tricky and the length of copyright keeps extending. At the moment, it is the life of the author plus 70 years, but there are other conditions, e.g., corporate creations, works for hire, or anonymous or pseudonymous works. In those cases, the length of copyright is 95 years from the date of first publication or 120 years from the date of creation, whichever expires first. Of course, there is always copyright renewal as well, thereby lengthening things further. In the United States, if it’s published before 1923, you can safely consider it in the public domain.

See: http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm (Cornell’s copyright term and the public domain in the United States)

See: <http://www.pdinfo.com/> (public domain music)

What about music?

Using music is complicated matter. There are scores, sound recordings, and performance issues. Further, what might be expected to be in the public domain, e.g., a composition by a long-dead composer, may not be because the *edition* under consideration may have copyrights attached to it. There are also differences among classroom use, performance for a non-paying audience, performance for a paying audience, etc.

See:

<http://www.musiclibraryassoc.org/Copyright/Guidelines/Accepted%20Guidelines/Copyright%20and%20Fair%20Use.asp> (Statement on the Copyright Law and Fair Use in Music)

What about multimedia?

Multimedia can be even more complicated than the use of music, but while there are fewer guidelines for multimedia creators, there are guidelines for multimedia users. The difficulty is that they have not been updated since 1996 and must now be considered in light of technological changes and new laws, such as the DMCA and the TEACH Act.

See: [Fair Use Guidelines for Educational Multimedia](#) (American Distance Education Consortium)

What about off-air taping?

The standard rule is that you can show your class an off-air taping for 10 days after the program has been taped and use the tape for research purposes for 45 days after the program has been taped. After that, you are required to destroy the tape.

See: <http://www.lib.berkeley.edu/MRC/Kastenmeier.html> (U. of California, Berkeley, Guidelines for Off-Air Taping for Educational Purposes - Kastenmeier Guidelines)

Who do I call for copyright advice?

If you need personal legal advice on a creative work, call an intellectual property lawyer.

If you need legal advice on a creative work as it relates to your CSUEB employment, the campus has access to a lawyer in the Chancellor's Office. Contact Cheryl Washington, Executive Director, Information Technology and Chief, Information Security, and she can discuss the matter with you and relay your need to the lawyer at the Chancellor's Office. Cheryl Washington, cheryl.washington@csueastbay.edu, 510-885-4745.

If you need information about copyright or to discuss copyright options and your need does not require legal interpretation, contact Aline Soules, aline.soules@csueastbay.edu, tel. 510-885-4596.

If you need information about copyright as it relates to grants, contact Victoria Jensen, victoria.jensen@csueastbay.edu, tel. 510-885-2205.

If you have a concern about intellectual property rights as they are described in the contract, contact Tom McCoy, thomas.mccoy@csueastbay.edu, tel. 510-885-3189.