



THE LEGAL ISSUE

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Student Privacy: Recent Amendments to FERPA

By Jennifer Watson, Assistant University Counsel, UCCS

On December 9, 2008, the Department of Education published its final changes to the Family Educational Rights and Privacy Act (FERPA) regulations, 34 CFR Part 99. The amendments clarify best practices regarding several student privacy issues and codify FERPA interpretations previously held by the Department. A few of the amendment's most significant changes are summarized below. The full text of the amendments, a section by section analysis, and a full summary of the amendments can be found on the Family Policy Compliance Office's web site at <http://www.ed.gov/print/policy/gen/guid/fpco/hottopics/ht12-17-08.htm>.



I. Health and Safety Emergency Disclosures

The old regulations allowed an institution to disclose personally identifiable information from education records to appropriate parties if knowledge of the information was necessary to protect the health or safety of students or other individuals. The old regulations provided that the health and safety exception was to be "strictly construed." The new amendments remove the strict construction language and add a provision that allows institutions to take into account the totality of the circumstances pertaining to a threat to the safety or health of the student or other individuals. If the institution determines there is an articulable and significant threat to the health or safety of a student or other individual, it may disclose information from education records to appropriate parties whose knowledge of the information is necessary to protect the health and safety of the student or other individuals. Such parties include parents, potential victims, peers, law enforcement, and health professionals. If there is a rational basis, the Department will not substitute its judgment for that of the institution in deciding to release the records.

  **Double Check.** Make sure campus procedures related to health or safety emergencies include how the release of student education records will be handled. The procedures should reference the articulable and significant threat standard and factors for identifying who may be considered an appropriate party to whom disclosure may be made.

II. Disclosing Education Records to Other Schools

The old regulations allowed an institution to disclose education records without consent to officials of another school or education institution, where the student sought or intended to enroll. There was confusion in the education community regarding whether the "seeks to or intends" to enroll language authorized an institution to continue sending education records to a student's new school once the student actually did enroll. The new regulations clarify that the authority to disclose or transfer education records to a student's new school does not cease the moment a student enrolls in the new school. An institution may continue to transfer education records to the student's new school so long as the disclosure is for purposes related to the student's enrollment or transfer. The new regulations also clarify that an institution may disclose any records to a new institution, including disciplinary and health records.

  **Double Check.** Make sure campus policies and procedures allow education records to be disclosed to other institutions where the student seeks or intends to enroll or has enrolled.



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III. Disclosures to School Officials

The old regulations allowed institutions to disclose education records, without consent, to school officials with a legitimate educational interest in the records. However, the old regulations did not address disclosure of education records without consent to non-employees retained to perform institutional services and functions. The new regulations clarify that “school officials” may include contractors, consultants, volunteers, and other outside service providers used by an institution to perform institutional services and functions. A contractor (or other outside service provider) that is given access to education records under this provision must be under the direct control of the disclosing institution and subject to the same conditions on use and redisclosure of education records that govern other school officials. Direct control means control of the outside service provider’s maintenance and use of information from education records and is not intended to affect the outside party’s status as an independent contractor. The contractor must ensure that only individuals with legitimate educational interests obtain access to personally identifiable information from education records it maintains. Further, the contractor may not redisclose personally identifiable information without consent unless the institution has authorized the redisclosure under a FERPA exception and the institution records the subsequent disclosure. An institution may not disclose education records to an outside service provider under this exception unless it has specified in its annual FERPA notification that it uses contractors, consultants, and volunteers as school officials to provide certain institutional services and functions.

  **Double Check.** Review campus policies and procedures to ensure that contractors, consultants, volunteers, and other service providers are included in the definition of “school officials.” In addition, confirm that outsourced services are limited to those that would otherwise be performed by employees. Include contract provisions to ensure that the university retains direct control over the contractor’s maintenance, use, and disclosure of education records provided to outside service providers. Require agreement from outside service providers that information may only be used for the purposes for which the records were disclosed, access is permitted only to those with legitimate educational interests, and that no re-disclosure of personally identifiable information is permitted from the education records except as authorized by the student or the institution.

IV. Deidentification of Information

The old regulations allowed institutions to release education records without consent if all personally identifiable information had been removed. The new regulations clarify that the removal of personally identifiable information must take into account unique patterns of information about the student. The definition of personally identifiable information has been amended to include “information that alone, or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.” Personally identifiable information also includes “information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.” The new regulations clarify that an institution must look to local news, events, and media coverage in the school community to determine whether “other information” would make a particular record personally identifiable even after all direct identifiers have been removed. With regard to targeted requests, an institution may not release information from education records if the requester asks for the record of a particular student, or if the party has reason to believe that the requester knows the identity of the student to whom the requested records relate.

  **Double Check.** Make sure those who release redacted or aggregate student data on your campus are aware that they now must consider whether the release of such data could be used with other widely known information to identify the student. If other information could be used to identify the student, the data should not be released.

V. Student Issues

A. Expanded Definition of “In Attendance”

Under the old regulations, FERPA applied to those students who were in attendance at an institution. The definition of “in attendance” was limited to students who were physically present or who attended the institution by correspondence.

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The new regulations expand the definition of “in attendance” to include students who attend via videoconference, satellite, Internet, or other electronic information and telecommunications technologies. This change will ensure that individuals who receive instruction through distance learning and other technologies are covered as students and that their records are protected under FERPA.

B. Peer-Graded Papers

Peer grading is the practice of students exchanging homework or in-class assignments with each other, grading each others' work, and then calling out the grade or turning the work in to the teacher for recordation. Although peer-grading results in students finding out each other's grades, the Supreme Court has ruled this practice does not violate FERPA because grades on student papers do not become education records until they are maintained by the teacher (i.e. after the teacher has collected the papers). The new regulations codify the Supreme Court's decision by explicitly excluding grades on peer-graded papers before they are collected from the teacher from the definition of “education records.”

C. Student Identification and Communication in Class

The old regulations did not address whether a student who opts out of directory information disclosures may prevent school officials from identifying the student by name or from disclosing the student's institutional email address in class. The new regulations provide that a student's opt-out from directory information disclosures does not prevent a school from identifying a student by name or from disclosing a student's email address in class. This change clarifies that the right to opt out of directory information disclosures does not include a right to remain anonymous in class, and may not be used to impede routine classroom communications and interactions, whether the class is held in person or online.



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- ◆ UCB: (303) 492-7481
- ◆ UCCS: (719) 262-3820
- ◆ UCD: (303) 315-6617
- ◆ SYSTEM: (303) 860-5686

Edited by Emilia Negrini, System Counsel Office

Google's Effort to Create the World's Largest Library

By Michelle Krech, Research Associate Attorney, UCB

Among its many other ventures, over the last few years Google has been developing the most extensive online database of books and similar media that has ever been created. Google calls this virtual library project "Google Books."¹ Though Google asserts the main goal of Google Books is to serve the public, including institutions of higher education, a variety of commentators are skeptical of Google's professed altruism. Since its inception, some have been critical of Google for the copyright, antitrust, and author compensation concerns that Google Books raises. Google Books' fate currently hangs on the results of ongoing legal battles with authors and publishers and an on-going investigation by the U.S. Department of Justice ("Justice Department"). This article gives an overview of these issues and the potential implications for higher education institutions.

The Launching of Google Books and Resulting Litigation

Google Books is the composite result of two prior projects: Google's 2003 "Partner Program" with book publishers and Google's 2004 "Library Project" with higher education libraries. In the Partner Program, publishers authorized Google to access already existing digital books so that Google could create a searchable online database and display a few sentences from the book (called snippets). Google would provide further content display (such as pages instead of sentences), only if the book's copyright holder agreed. In the Library Project, Google teamed up with some of the nation's leading higher education libraries, including Stanford and the University of Michigan, to scan their collections into a Google database; however, copyright holders were not as a matter of course consulted in this process.² Google combined the resources it obtained from the Partner Program and Google Library Project into Google Books, which Google describes as an online database in which public users may research, preview some content, print books, and explore options for purchasing books.

Subsequently, the Author's Guild and members of the American Publishers Association filed a class action lawsuit against Google in 2005 in U.S. District Court alleging that some of its digitization of books infringed the rights of copyright holders. Google disputed these allegations, taking the position that scanning books, creating its database, and displaying content snippets without prior approval from rights-holders was acceptable "fair use" under copyright law. After years of negotiation, in the fall of 2008 the parties filed a proposed settlement agreement with the court. However, due to subsequent complications, the court has yet to approve the settlement agreement – a prerequisite to the settlement taking effect.

Summary of How the Settlement Agreement Would Affect Higher Education

There are three main effects that the settlement agreement, if approved, would have on institutions of higher education. First, while the existing features of Google Books already provide students and faculty with the online ability to find, preview, research within, and buy books, if the settlement agreement is approved, this quantity of books and degree of access will greatly expand, creating a substantial new market posing solid competition for bookstores and potentially impacting visitation to libraries. However, the second effect on higher education may minimize impact on libraries, as under the settlement Google would provide all public libraries, including public university libraries, a free computer terminal with a license for the public to view the full library of Google Books and print them within the confines of the building for a fee.³ Lastly, Google would offer higher education institutions specialized subscriptions in which authorized users would gain full viewing, with remote access, of all books within the subscription, the ability to make and share annotations with students and instructors, and the ability to print 20 pages at a time with a watermark. Such features are not currently offered to this extent by other companies. In addition, Google is looking into offering subset subscriptions for discipline-based databases.⁴

¹ The website for Google Books is <http://books.google.com>.

² Unless Google affirmatively heard otherwise from a rights-holder, it continued its scanning and display efforts. This set Google Books apart from other similar programs like Amazon, which provides a similar option for snippets and previews, but only *after* gaining the prior approval of rights-holders.

³ However, there is a valid question whether a digital book would be equivalent to the hard copy, as it may not contain the same quality or images.

⁴ The costs of this subscription are not yet defined, but Google proposes to base it on the number of full time student users.

Google

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Summary of How the Settlement Agreement Would Affect Authors and Publishers

If approved, the settlement agreement would authorize Google Books' continued existence, but would require Google to establish a mechanism to communicate with and compensate rights-holders (authors and publishers). Google would initially fund a Book Rights Registry ("BRR"), a non-profit entity that would identify rights-holders and manage compensation issues. The settlement would require Google to pay 45 million dollars to BRR to compensate right-holders whose books it scanned prior to January 5, 2009. Google would keep 37% of online book sale and advertisement revenue and then pass the remaining 63% to the BRR, which would keep a fee and then disburse the remainder to right-holders.

Under the settlement agreement, the degree to which Google would have the right to access books is determined by the copyright and print status of the book. The settlement would not affect Google's access to "public domain" books in which copyright protection has expired (including books published prior to 1923). Since the inception of the Partner Program, Google Books has been making public domain books searchable and available for full online viewing, free of charge.

For books currently in print and still under copyright protection, Google would not be authorized to display any of the content of those books unless the rights-holder contacts Google and gives express permission. However, the settlement agreement would authorize Google to display the bibliographic info, index, and the front material (such as title page and table of contents) of such books.

How the settlement agreement handles books that are out of print but still protected by copyright has been the most controversial aspect of the settlement. By default, Google would be allowed to scan these books, display up to 20% of their content, and make the books available for purchase in their entirety, all without liability to rights-holders unless they contact Google and explicitly opted out of these terms.⁵ Moreover, if such rights-holders want to receive compensation, they must opt in to the settlement, which requires them to not only agree to Google's scan and display terms, but also to release Google from liability. This arrangement has been controversial because many out-of-print book rights-holders are unidentified (such books are commonly referred to as "orphan works"). Therefore, Google would obtain digital authority over "orphan" books that no other entity currently has or, for all practical purposes, would be able to gain in the future.⁶

As Google estimates that out-of-print books make up about 70% of all books, the settlement agreement has the potential to affect the book market on a large scale in favor of Google. These concerns, among others, have lead many of Google's competitors, including Amazon, Microsoft Corp., and the Internet Archive to file objections to the settlement. Moreover, after the Justice Department received complaints, it began to investigate the settlement agreement. In September of 2009 the Justice Department filed a brief with the court which highlighted significant class-action, copyright, and antitrust law issues with the settlement agreement, and therefore recommended the court not approve the agreement unless it was modified.

Current Status of the Settlement Agreement

The court was initially poised to hear arguments on approving the settlement agreement in October, 2009. After the Justice Department weighed in on its concerns, the court postponed its review of the agreement until February 18, 2010. Subsequently, Google, along with the Authors Guild and the publishers group, responded with a revised settlement agreement crafted to address some of the Justice Department's concerns and other objections.⁷

⁵ There are associated deadlines for opting in and out of the settlement terms; therefore, it behooves authors and publishers to keep abreast of the status of the settlement. Google has posted a summary of the settlement agreement at: <http://books.google.com/googlebooks/agreement/> and a questions/answers article at: <http://www.googlebooksettlement.com/help/bin/answer.py?answer=118704#q0> which both address deadline concerns.

⁶This is because the settlement agreement authorizes Google to completely bypass the usual copyright negotiation and licensing processes with individual rights-holders of out-of-print books. No other entity currently has similar rights because they are unique to the settlement agreement and therefore it is very unlikely such rights could be obtained in the future by a competitor. Ironically, this arrangement may also be the biggest benefit for the public, as it would allow Google to virtually unlock orphan works so that users would be able to view, print, and buy millions of books that are not currently locatable in many libraries or bookstores or on the internet.

⁷ A copy of the settlement, as amended, may be found at:

http://www.googlebooksettlement.com/r/view_settlement_agreement

While the settlement agreement was revised in some areas,⁸ concerns still remain. Although the amended agreement empowers a trustee to oversee the royalties earned from the sale of access to orphan books, critics continue to question whether parties to the agreement should have the right to speak for, and profit from, potentially millions of absent copyright holders or orphan books in any case. Further, some argue that the issues raised in the settlement agreement, even as amended, are more appropriately addressed by Congress rather than via litigation.

Critics have until January 28, 2010, to file objections to the amended settlement agreement with the court. The Justice Department has until February 4, 2010, to file its follow-up comments. It is unclear how the case will ultimately be resolved. But if Google's track history proves consistent, there is one thing which can be counted on – Google Books, regardless of format, is not going away.

Resources

1. Electronic Frontier Foundation, www.eff.org
2. Association of Research Libraries, <http://www.arl.org>
3. American Library Association, <http://www.ala.org>
4. Association of American Publishers, <http://www.publishers.org>
5. Congressional Research Service, relevant reports may be found at <http://openocrs.com>
6. American Constitution Society for Law and Policy, <http://www.acslaw.org/>
7. Google Books, <http://books.google.com/books>



⁸ Among the most significant changes made in the amended settlement agreement is that the scope of books covered has been reduced to remove books published outside of the U.S., Canada, the United Kingdom, and Australia. The original agreement covered any book with a U.S. copyright, regardless of publishing location. Another change removes a provision that prevented other companies from getting more favorable licensing terms than what Google would have secured under the settlement, addressing a Justice Department concern over the lack of competition should Google be assured the most favorable financial terms.



THE LEGAL ISSUE

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Federal Regulators Propose Greater Role for Institutions in Managing Conflicts of Interest

By Catherine Shea, Senior Associate University Counsel, System

On May 21, 2010, the U.S. Department of Health and Human Services (HHS), the parent agency of the National Institutes of Health, published proposed regulations designed to promote objectivity in Public Health Service (PHS) funded research.¹ The agency issued these proposed regulations in response to a growing clamor from the public, Congress, and the media to have great transparency and accountability in government-funded research. In the preamble to the proposed regulations, HHS writes that:

The growing complexity of biomedical and behavioral research; the increased interaction among Government, research institutions, and the private sector in attaining common public health goals while meeting public expectations for research integrity; as well as increased public scrutiny, all have raised questions as to whether a more rigorous approach to Investigator disclosure, management of financial conflicts, and Federal oversight is required.

In response to these questions, the agency answers a definite "yes" and institutions can expect a more rigorous approach for the disclosure, review, and management of financial conflicts of interest in the proposed regulations, which apply to PHS-funded grants, cooperative agreements, and contracts.

Some of the more dramatic changes proposed include requirements for institutions to:

- Lower and in some circumstances eliminate the threshold of significant financial interest
- Clarify the distinction between significant financial interests which must be disclosed and financial conflict of interest which must be managed or eliminated
- Conduct mandatory training for investigators at least every two years
- Assume from investigators the responsibility for determining whether a financial conflict of interest exists
- Maintain an institutional Web site that lists investigators' financial conflicts of interests

What is quite clear throughout the commentary to the proposed regulations is that HHS is striving to strike the appropriate balance between the administrative burden on investigators and institutions with the increasing pressure from Congress to ensure transparency and accountability in PHS-funded research. In its unlucky task, HHS ventures forward in this uncharted territory soliciting public comment on these critical issues through this proposed rulemaking as it did in the earlier May 8, 2009 Advanced Notice of Proposed Rulemaking.² Comments are due on July 20, 2010. HHS, with its statutory mandate to strengthen Federal and institutional oversight,³ proposes these regulatory requirements for financial disclosure on institutions and investigators. The key provisions that would affect institutions, including the University, are described in more detail here.

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¹ See 75 Fed. Reg. 28688 (May 21, 2010).

² See 74 FR 21610-21613 (2009).

³ See Public Law 111-117, Div D, Title II, sec 219, 123 Stat 30304 (2009).

Certification of Institutional Requirements

In each PHS-funded grant, cooperative agreement, and contract, the recipient institution certifies compliance with the law and regulations. In the proposed regulations, HHS would require the institution to certify that the institution:

- has in effect an up-to-date, written, and enforced administrative process to identify and manage Financial Conflict of Interest (FCOI) with respect to all research projects for which funding is sought or received from the PHS;
- shall promote and enforce Investigator compliance with the regulations' requirements, including those pertaining to disclosure of Significant Financial Interests (SFIs);
- shall manage FCOI and provide initial and ongoing FCOI reports to the PHS consistent with the regulations;
- agrees to make information available, promptly upon request, to the HHS relating to any investigator disclosure of financial interests and the institution's review of, or response to, such disclosure, whether or not the disclosure resulted in the institutions' determination of a FCOI; and
- shall fully comply with the requirements of the regulations.

What is a Financial Conflict of Interest?

Under the proposed regulations, a financial conflict of interest exists if an *institution* determines that an investigator holds a significant financial interest that could directly and significantly affect the design, conduct, or reporting of the PHS-funded research. The current regulations allow the investigator to determine whether a financial interest is relevant to a specific project; the proposed regulations would have the institution evaluate the financial interests in light of the investigators' institutional responsibilities. In its commentary, HHS stresses that this substantive evaluation will allow institutions to exercise judgment, and not every significant financial interest would constitute a financial conflict of interest. Here's how.

Before any expenditure of PHS funds, an investigator must disclose his significant financial interests. The proposed definition of "significant financial interest" would lower and in some cases eliminate the existing monetary thresholds for disclosure. According to the proposed revised definitions, a significant financial interest is a financial interest held by the investigator, investigator's spouse, or dependent children that exceeds \$5,000 in a publicly traded company or any amount in a non-publicly traded entity (e.g., equity). A "significant financial interest" also includes intellectual property rights (excluding royalties paid by the investigator's home institution). The previous threshold for publicly and non-publicly traded entities was \$10,000. The proposed threshold is in accordance with recommendations from the Association of American Medical Colleges and other organizations on the forefront of conflict of interest issues.

Under the current regulations, the investigator submits what he *believes* to be a financial interest related to the project. The proposed regulations require that the investigator submit ANY financial interest that meets the thresholds provided above and reasonably appears to be related to the investigator's institutional responsibilities. The institution would then evaluate those interests in light of the investigator's institutional responsibilities, not just a specific project.

In its commentary, HHS observes that respondents to the Advance Notice of Proposed Rulemaking confirmed "HHS own sense that Institutions would welcome greater transparency regarding Investigator financial interests because additional information would help them to better manage identified FCOI." This approach is intended to correct the current arrangement whereby institutions were frequently caught unaware of an investigator's conflict of interest because the investigator misread the regulations or, in rare cases, purposefully failed to disclose the interest.

A Publicly Available Web Site

In one of the more controversial provisions, HHS proposes that institutions make available via a publicly accessible Web site information concerning any significant financial interest that the agency determines is a financial conflict of interest for an individual investigator. The institution would not publish all investigator disclosures of significant financial interests but instead the institution would only publish information on a Web site IF and AFTER the institution determines the significant financial interest meets the following criteria:

- The significant financial interest was disclosed and is still held by the project director, principal investigator, or any other investigator who has been identified by the institution as senior/key personnel for the PHS-funded research project in the grant application, contract proposal, contract, progress report, or other required report submitted to the PHS;
- The institution determines that the significant financial interest is related to the PHS-funded research; and
- The institution determines that the significant financial interest is a financial conflict of interest.

HHS Research

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It is important to note, the institution would not disclose ALL significant financial interests on the Web site, only those that the institution determines are financial conflicts of interest. On an annual basis, the institution would post the investigator's name and position with respect to the research project as well as the nature and approximate dollar value of the significant financial interest.

HHS recognizes and shares concerns from institutions and investigators about the availability of investigators' personal financial interests on a publicly accessible Web site. Yet, in light of similar disclosure requirements enacted in the Patient Protection and Affordable Care Act (Affordable Care Act), Public Law 111-148, HHS is attempting to strike the appropriate balance between disclosure and privacy. Under the Affordable Care Act, designated manufacturers of covered drugs, devices, and biological or medical supplies are to submit certain information to HHS regarding certain payment made to designated physicians and teaching hospitals. In turn, HHS is required to make such information publicly available on its Web site no later than September 30, 2013.

In searching for a compromise and perhaps in an attempt to forestall additional legislation, HHS proposes that the institution post the value of the significant financial interest that is a financial conflict of interest within certain ranges, e.g., less than, \$20,000, less than \$50,000, etc. Again, HHS solicits comment and other solutions on this topic.

Management of Financial Conflicts of Interest

Before the expenditure of any funds under PHS-funded research, designated officials of an institution shall review all investigator disclosures of significant financial interests, determine whether any significant financial interests relate to PHS-funded research, determine whether a financial conflict of interest exists and, if so, develop and implement a management plan that shall specify the actions that have been, and shall be, taken to manage such financial conflict of interest.

While the existing regulations require institutions to manage conflicts, they do not use the term "management plan." In the proposed regulations, HHS does not propose any specific components for the conflict management plan but defers to institutions to define the management plan components. Institutions can find guidance, however, in the new section that creates the obligation to report description of certain "key elements" of the institution's management plan in financial conflict of interest reports. These key elements include:

- Public disclosure of financial conflict of interest (e.g., when presenting or publishing research)
- For research projects involving human subjects research, disclosure of the financial conflict of interest directly to participants
- Appointment of an independent monitor capable of taking measures to protect the design, conduct, and reporting of the research against bias, or the appearance of bias, resulting from the financial conflict of interest
- Modification of the research plan
- Change of personnel or personnel responsibilities or disqualifications of personnel from participation in all or a portion of the research
- Reduction or elimination of a financial interest (e.g., sale of an equity interest)
- Severance of relationships that create actual conflicts
- A description of how the management plan will be monitored to ensure investigator compliance
- Other information as needed.

Reporting on the Institutional Conflict Management Program

As described above, HHS has proposed two newly revised definitions: "significant financial interest" and "financial conflict of interest." The clarification in the definitions is intended to assist entities to segregate and appropriately manage the investigator's private financial interests. The significant financial interest is the information the investigator discloses to the institution. This information is protected and not disclosed unless it meets all the criteria for a financial conflict of interest. The financial conflict of interest is information the institution discloses to the PHS-awarding component and posts on its Web site.

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HHS Research

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The proposed regulations continue the requirement (with updated definitions) that the institution disclose to the PHS awarding component the investigator's financial conflict of interest and management plan to the level that the PHS awarding component can understand the nature and extent of the conflict and assess the appropriateness of the Institution's management plan.

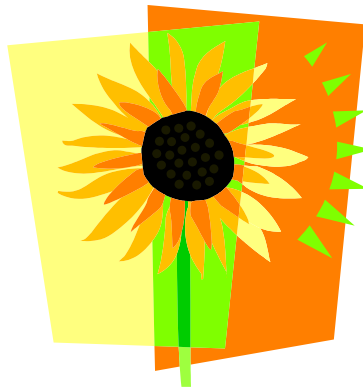
The proposed regulations set forth the key elements required in the report to the PHS Awarding component. At a minimum, the report would include the following information:

- Project/Contract number
- Project director or principal investigator
- Name of the investigator with the financial conflict of interest
- Nature of the financial interest
- Value of the financial interest (ranges permissible) or statement of no market value
- Description of how financial interest relates to the research and basis for institution's determination that financial interest conflicts with research
- Description of the key elements of the management plan, including the investigator's role, the rationale for including the investigator despite the conflict, how the management plan will safeguard objectivity, confirmation that the investigator agrees with the plan, and how the plan will be monitored.

According to these proposed regulations, institutions would also be required to submit follow-up reports addressing the status of the financial conflict of interest and management plan, including whether the financial conflict has changed or no longer exists. Institutions would also be required to update plans within 60 days of discovering a conflict which was omitted in the new report or arises due to some other change in circumstances (e.g., marriage, purchase, etc.).

Conclusion

Final regulations are expected from HHS in approximately 12 months. Once these regulations become final, institutions can expect to see similar requirements proposed from other federal agencies. For Congress and the public, many aspects of the regulations are either necessary or inevitable, and we can anticipate that the University will take on additional responsibilities with regard to the identification and management of financial conflicts of interest. From the tone of the proposed regulations, HHS has taken these concerns seriously and is looking for more engagement and oversight from institutions in educating and investigators and managing any financial conflicts of interest which may arise in PHS-funded research.



Attorney Speaker and Workshop Services

Attorneys in the Office of University Counsel are available to offer presentations to faculty, student, and administrative groups on a wide variety of legal issues facing the University community. Below is a list of topics on which our attorneys have prepared presentations. If you would be interested in scheduling a speaker from our office on one of these topics -- or on a legal issue that does not appear on this list -- please contact Emilia Negrini at emilia.negrini@cu.edu

- Family Educational Rights and Privacy Act (FERPA)
- Health Insurance Portability and Accountability Act (HIPAA)
- Gramm-Leach-Bliley Act (GLBA)
- Americans with Disabilities Act (ADA)
- The Colorado Governmental Immunity Act - what it means to you
- Public records under the Colorado Open Records Act (CORA)
- The proper use and storage of electronic mail in the context of the Open Records Act, the University's records retention policy and the University's discovery obligations in litigation settings
- Data Privacy
- The Perils of Email
- Political Activities on Campus, including: The First Amendment in public employment settings, lobbying activities, private and professional conduct related to political campaigns
- The Free Speech Rights of Students, including the law governing student organizations and student publications and doctrines related to speech in public forums
- Free Speech in Higher Education
- The Ethical Obligations of Public Employment: Gifts, Amendment 41, the Colorado State Ethics Code, and the special obligations of a state employee
- Governance: Where the University fits in the State Government; the role of the Regents as a constitutionally created body made up of elected officials; shared governance and the University's administrative structure; Legal History of the University
- State Personnel System, What is it and How Does it Work at the University?
- Progressive Discipline in the State Personnel System
- Public Contracting
- Contract Law Basics
- Athletic contracts
- Employment Law: Anti-discrimination and whistleblower laws; sexual harassment in the workplace
- Information reported to the Ombuds Office, Victims Assistance, Office of Sexual Harassment or the Police Department - how privileged is it and who owns the privilege?
- Anti-discrimination Training
- Background Checks
- Alternate Dispute Resolution: Litigation is not Always the Answer
- Democracy 101: The United States Constitution in a Nutshell; Individual Rights under the US Constitution; the American Democratic System.
- The American Legal System 101: The role of courts in our constitutional democracy; the ins and outs of the US court system.
- Due Process
- Avoiding Risk
- Privilege and Tenure Actions
- The Rights of Academics
- Copyright Law, including copyright basics, fair use, and filesharing
- Federal Trademark
- Export Law
- Tech-Transfer and Conflicts of Interest
- Universities as Highly Regulated Industries
- Issues in Experiential Learning

OUC News

Congratulations, Michelle!

Michelle Krech was recently appointed to serve as Assistant Counsel at the Boulder Campus Office of University Counsel. Ms. Krech joined the University in 2008 as a Legal Research Associate. Michelle graduated summa cum laude from the Honors College at Arizona State University receiving a B.A. in Anthropology and the Alumni Award. She went on to earn her J.D. from the Sandra Day O'Connor College of Law at Arizona State University. Before joining the Office of University Counsel in April 2008, she practiced law with emphasis on corporate, real estate, and business transactions for three years with a private law firm located in Arvada, Colorado. Best wishes in your new position, Michelle!

Farewell, Becki!

Rebecca "Becki" Currey has left her role as Senior Associate University Counsel for the University of Colorado at Boulder. Becki joined the University's Office of University Counsel in August 2006. Becki earned her B.A. in biology and chemistry from Carroll College and her J.D. at the University of Montana. She began her law practice in Montana, where she worked for several years in both public and private practice before moving to Arizona where she had a private litigation practice. She then worked for six years in the employment litigation section of the Arizona Attorney General's Office. For the next seven years, and prior to joining the Office of the University Counsel, she worked as assistant general counsel at Maricopa County Community College District in Phoenix, Arizona. Her focus throughout her career has been public employment and education law. Here's wishing you good luck in your new adventures! We wish you the best.



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THE LEGAL ISSUE

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Circumvention of Copyright Protection Technologies under the DMCA

By Annalissa Philbin, Research Associate Attorney, UC Denver

The ability to make and share copies of digital media, such as movie clips, for educational purposes is an issue faced by many in the academic community today. Questions regarding what may be copied and subsequently shared with students and by what mechanism arise every semester. Many faculty are likely familiar with copyright restrictions against copying and distributing copyrighted materials, but may not be as familiar with the restrictions of the Digital Millennium Copyright Act¹ (the "DMCA"), which generally prohibits the circumvention of technological measures² that control access to copyrighted works,³ such as the encryption technology intended to prevent copying that is included on nearly all DVDs of commercial movies. This article will provide general background regarding the anti-circumvention provision of the DMCA and certain classes of works that have been exempted from the anti-circumvention provision by the Library of Congress and will offer the University community some basic guidelines regarding how to comply with the anti-circumvention provision of the DMCA in the use of copyrighted digital content for teaching and research.

What is the DMCA?

The anti-circumvention provision of the DMCA makes it illegal to bypass technological measures that control access to digital works, such as software, video games, and DVDs containing movies, even where the ultimate use of the copyrighted material would be legal.⁴ For example, although fair use is a valid defense to a use of copyrighted material that might otherwise be considered copyright infringement,⁵ fair use is not a defense to a violation of the anti-circumvention provision of the DMCA.⁶ While use of a movie on a course website may be a fair use of that movie, the 'ripping' of the movie off of a DVD in order to create a copy on a computer hard drive will violate the anti-circumvention provision.⁷

Persons or entities that violate the anti-circumvention provision may be subject to civil liability by the copyright owner, which may include statutory damages of between \$200 and \$2,500 per act of circumvention.⁸

¹ 17 U.S.C.A. §§ 1201 *et seq.*

² Under the DMCA, to "circumvent a technological measure" means "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner." 17 U.S.C.A. § 1201(a)(3)(A).

³ 17 U.S.C.A. § 1201(a)(1). This provision is commonly referred to as the anti-circumvention provision. The DMCA also prohibits the manufacture, sale or trafficking in any technology primarily designed to circumvent a technological measure controlling access to a copyrighted work, commonly referred to as the anti-trafficking provision. 17 U.S.C.A. § 1201(a)(2). A discussion of the anti-trafficking provision is beyond the scope of this article.

⁴ Posting of Jason Mittell to ProfHacker, *Letting Us Rip: Our New Right to Fair Use of DVDs*, <http://chronicle.com/blogPost/Letting-Us-Rip-Our-New-Right/25797> (July 27, 2010, 03:00 PM ET).

⁵ 17 U.S.C.A. § 107.

⁶ David Polin, J.D., 18 Causes of Action 2d 225 § 9 (West 2010) (2002).

⁷ Most, if not all, DVDs containing commercially produced movies use technological measures (called the content scramble system or CSS) to prevent copying of the movie. Even though a person may not be specifically aware of it, any software used to 'rip' a movie off a DVD likely will be acting to circumvent such encryption measures. *Id.* at § 2.

⁸ 17 U.S.C.A. § 1203.

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Additionally, for repeat violations, a court may triple any monetary award.⁹ Persons who violate this provision may also face criminal liability if a court finds that such person has willfully violated the anti-circumvention provision for purposes of commercial advantage or private financial gain, including fines of up to \$1,000,000 and imprisonment for up to ten years.¹⁰

What Are the Exemptions to the DMCA?

The DMCA sets forth several narrow exemptions to the anti-circumvention provision. This article will focus on the exemptions provided under section 1201(a)(1)(C), which allows the Librarian of Congress to exempt certain classes of works from the circumvention prohibition where the prohibition is adversely affecting or is likely to adversely affect the ability of users of those classes of works to use such classes of works for non-infringing purposes.¹¹ On July 27, 2010, the Librarian of Congress issued a final rule setting forth six classes of works that are exempt from the anti-circumvention provision.¹²

The exempt classes are:

- (1) Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:
 - (i) Educational uses by college and university professors and by college and university film and media studies students;
 - (ii) Documentary filmmaking;
 - (iii) Noncommercial videos
- (2) Computer programs that enable wireless telephone handsets to execute software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications, when they have been lawfully obtained, with computer programs on the telephone handset.
- (3) Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized by the operator of the network.
- (4) Video games accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works, when circumvention is accomplished solely for the purpose of good faith testing for, investigating, or correcting security flaws or vulnerabilities, if:
 - (i) The information derived from the security testing is used primarily to promote the security of the owner or operator of a computer, computer system, or computer network; and
 - (ii) The information derived from the security testing is used or maintained in a manner that does not facilitate copyright infringement or a violation of applicable law.
- (5) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace; and
- (6) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.¹³

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⁹ 17 U.S.C.A. § 1203(c)(4).

¹⁰ 17 U.S.C.A. § 1204.

¹¹ Statement of the Librarian of Congress Relating to Section 1201 Rulemaking, <http://www.copyright.gov/1201/2010/Librarian-of-Congress-1201-Statement.html> (July 26, 2010).

¹² Exemption to Prohibition on Circumvention of copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43825 (July 27, 2010) (to be codified at 37 C.F.R. pt. 201).

¹³ *Id.* at 43839.

DMCA

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Guidelines for Use of Copyrighted Digital Material

Generally, where digital content is protected by technological measures to prevent access to such content, members of the University community are advised not to use methods to circumvent such technological measures in order to use such content for teaching or research purposes. This advice holds even where such uses are likely to meet the requirements for fair use, unless the digital content that is to be used fits within one of the narrow exemptions to the DMCA set forth above.

However, specifically regarding movies contained on DVDs, faculty may now create digital repositories of movie clips directly from DVDs, either personally or for an entire department, which movie clips may then be used for any non-infringing purposes, such as incorporation into class lectures or for uploading to online course websites.¹⁴ Film and media studies students have the same ability to create digital repositories of movie clips for academic purposes.¹⁵ Persons who are neither faculty nor film and media studies students may create movie clips from DVDs for incorporation into a documentary film or other noncommercial video where the purpose for incorporating such movie clips is for criticism or commentary.¹⁶

It is important to note that the exemption only applies where *short clips* are incorporated into a *new work*, such as a compilation of clips for use in the classroom or a documentary or noncommercial video that incorporates movie clips.¹⁷ This exemption does not make it legal to 'rip' an entire movie to a hard drive to be uploaded to an online course website for viewing by the students enrolled in such online course. Additionally, the exemption only applies where the original DVD is lawfully acquired. For example, the exemption would not apply where a movie clip is 'ripped' from a rented DVD. If you have specific questions regarding the use of copyrighted material under the DMCA, please contact your campus Office of University Counsel.



¹⁴ Posting of Jason Mittell to ProfHacker, *supra* note 4.

¹⁵ *Id.*

¹⁶ 75 Fed. Reg. at 43828.

¹⁷ *Id.*

Legal Issues in Experiential Education

By Chris Puckett, Assistant University Counsel, UC Denver and
Mary Beacom, Director, University of Colorado, Anschutz Medical Campus and Denver Campus, University Risk Management

Experiential learning is an important component of the education and training that many of the University's degree programs offer. Instead of learning in a somewhat controlled environment led by a university faculty member, students involved in experiential learning take part in activities far from campus with people who may have no connection with the university. Because experiential learning differs from the typical classroom model, it is important that everyone involved with experiential learning know the associated legal issues and risks.

For purposes of this article, a broad definition of experiential learning is helpful. From the Experiential Learning Center at the University of Colorado Denver, "Experiential learning is a process through which students develop knowledge, skills, and values from direct experiences outside a traditional academic setting." These types of experiences include clinical experiences for the health professions, as well as undergraduate and graduate internships/practicum.

Agreements Governing Experiential Learning

Because experiential learning involves engaging with entities, companies, and people outside of the University, it is important that the relationship be documented. The relationship can be documented in an overarching affiliation agreement between the University and the outside employer that may cover many students, or in a learning agreement that covers the placement of one student in a small business. Whether the program is small or large, these agreements have several key features.

First, the agreement should identify the expectations for the student and for the provider/employer. It is important to spell out exactly who will do what and when. In most agreements, the provider/employer will require the student to follow its codes of conduct and be subject to expulsion from the workplace if the student violates these codes. Some agreements require background checks on the student before placement, while medical placements often require evidence of health insurance, HIPAA training, and immunizations. For some agreements, learning objectives are identified and course expectations made clear. Second, most written agreements include language about who is liable or responsible if a student is injured or causes damage in the workplace.

Insurance Issues Related to Experiential Learning

An area of concern for most employers/providers is who will provide worker's compensation insurance for a student injured on the job. Worker's compensation insurance is unique in that it does not require an injured worker to show liability or who was at fault. Generally, if the injury occurs in the course and scope of the job, worker's compensation will pay for the treatment. Colorado law requires that the employer pay for the worker's compensation insurance. This requirement typically applies when a student is paid by an employer for an internship; the employer provides worker's compensation. For other, unpaid **bona fide student internship programs sponsored by an educational institution**, the University pays for and provides worker's compensation.¹⁸ Whether an internship program is bona fide can be a difficult question, but those internships for which a student receives credit, and those sponsored by or required by the University, are probably bona fide. For assistance assessing other types of programs you should contact your campus Office of University Counsel or Risk Management Office.

In addition to on-the-job injuries, employers will be concerned about their potential liability arising out of student involvement in injuries to other people and/or damage to property. The University of Colorado's General Liability and Auto Liability insurance afford coverage to defend the University and its employees acting within the course and scope of their University employment against claims brought by third-party claimants in the event of alleged acts of negligence or omission. Students are not defined as University employees and are not covered by the University General Liability and Auto Liability Insurance. Your campus Office of University Counsel or Risk Management Office can assist in providing appropriate agreement language and insurance information to address these issues.

Employers may also ask for medical malpractice liability for clinical students acting under the direction of a health care practitioner. This insurance may be provided through the University Professional Risk Management program. Please contact Professional Risk Management on the AMC campus for additional information.

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¹⁸ § 8-40-302(7)(b), C.R.S.

Experiential Learning

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Federal Law and Experiential Learning

One of the most interesting areas of legal concern surrounds whether unpaid internships run afoul of the Fair Labor Standards Act ("FLSA"). Although not a direct concern for the University, it is a major concern for private employers/providers and the experiential learning community. The FLSA is the federal act that controls the minimum wage and the number of hours in a workweek before someone is able to earn overtime. In addition, it determines when something is "work" and an employee is required to be paid. Currently, the test to determine whether an unpaid intern should be treated as an employee or a trainee is based on a Supreme Court case from 1947.¹⁹ To qualify as a trainee, the individual must meet each of the following criteria:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainee;
3. The trainees do not displace regular employees, but work under close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; and
6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.²⁰

As noted in a recent New York Times article, these requirements do not mirror the needs of the modern workforce and are being reconsidered by the U.S. Department of Labor.²¹ There are many industries where the only way to get experience is through an unpaid internship. However, these criteria continue to be the standards by which an employer should determine whether someone is a volunteer intern and not entitled to pay, or when an employer should be aware that it may be liable for salary to an employee.

As a government agency, the University has more leeway in the application of these rules to those interning within university offices, but departments should be careful not to replace regular employees with interns. As for the other factors, an intern at the University will typically not be considered an employee if the expectations are clear that the intern will not be paid.²²

If you have questions about these legal issues in experiential learning, contact your campus Office of University Counsel.



¹⁹ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

²⁰ Guidance Letter from Alfred B. Robinson, Acting Administrator, Wage and Hour Division, U.S. Department of Labor, Guidance (April 6, 2006); 1/29/10 DOL Advisory.

²¹ Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y.TIMES (April 2, 2010), available at <http://www.nytimes.com/2010/04/03/business/03intern.html>.

²² 29 C.F.R. § 553.104(a).

OUC News

Welcome, Alex!

Alex Loyd joined the Office of University Counsel on the Boulder campus as a Legal Staff Associate/Researcher. Alex received his B.A. in History and Political Science from the University of Vermont. He received his J.D. from the University of Miami School of Law, where he was president of the Environmental Law Society and graduated *cum laude*. Before joining University Counsel, Alex was a staff assistant for the Senior Vice Chancellor and Chief Financial Officer on the Boulder Campus. Alex is a member of the Colorado Bar Association and the Boulder Bar Association.

Farewell, Rhonda!

Rhonda Thornton has accepted a position as the Vice President for Legal Affairs/General Counsel for the Arkansas Children's Hospital in Little Rock, Arkansas.

Rhonda Thornton joined the University Counsel's office as Senior Associate Counsel on the University of Colorado Denver campus in 2008. Rhonda previously served as legal counsel to the University of Arkansas for Medical Sciences (UAMS), which is Arkansas's only comprehensive academic health center and one of the state's largest public employers. Prior to her stint at UAMS, Rhonda spent seven years in the University of Arkansas System's legal counsel's office. Rhonda has also done defense-side medical malpractice and products liability work for the law firm of Mitchell, Williams, Selig, Gates & Woodyard; served as an assistant attorney general for the State of Arkansas; and taught law and coached the trial team at University of Arkansas at Little Rock. Rhonda received her undergraduate degree from the University of Arkansas at Fayetteville and her law degree from the University of Arkansas at Little Rock (UALR), where she served as executive editor of the UALR Law Journal. Rhonda is a member of the Arkansas and Pulaski County Bar Associations, of the National Association of College and University Attorneys, and of the American Health Lawyers Association. She is licensed to practice law in Arkansas, Colorado, the District of Columbia, the 8th Circuit Court of Appeals, and the U.S. Supreme Court. Rhonda is a member of the Colorado Bar Association and Denver Bar Association.

Please join us in congratulating Rhonda about this great career opportunity and thanking her for her three years of dedicated service to the University of Colorado. She has been a great colleague within our office and will continue to be a part of our network of friends and colleagues as she continues her legal career in the world of academic medicine.

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