

# Legal Issues Affecting Graduate School Administrators

Council of Graduate Schools  
52<sup>nd</sup> Annual Meeting  
December 5, 2012

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UNIVERSITY OF  
MARYLAND



# TOPICS

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- ❑ Copyright Update
- ❑ Technology Transfer/Patent Update
- ❑ Graduate Student, Faculty Authorship Issues
- ❑ Public Information Requests
- ❑ International Graduate Student Exchanges



# COPYRIGHT UPDATE

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- Georgia State University
- Authors Guild v. Hathi  
Trust

# SAGE V. GEORGIA STATE

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- ❑ Cambridge, Oxford & Sage presses sued GSU alleging reproduction, display and distribution of academic books through electronic reserves and course websites w/o a license violated ©
- ❑ As public university, GSA not subject to monetary damages; only injunctive relief
- ❑ May 11, 2012 decision: 350 pages

# GEORGIA STATE

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- ❑ Suit filed in 2008 at a time when GSU's copyright policy was quite liberal
- ❑ GSU modified its policy in 2009 to adopt a fair use checklist

[http://www.gsu.edu/images/legal/Fair\\_Use\\_Checklist.pdf](http://www.gsu.edu/images/legal/Fair_Use_Checklist.pdf)

# JUDGE'S FIRST CONSIDERATION

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- Did students access the e-reserve or Course website material?
  - If students did not read the text, infringement is *de minimis* & those texts thrown out



# GSU: FAIR USE FACTORS

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## □ Purpose & Character of Use

- Educational, nonprofit use although not transformative
- Strongly favors GSU

## □ Nature of Copyrightable Works

- Texts at issue were non-fiction, informational
- Law & policy favor broad dissemination of facts
- Favors GSU

# GSU: FAIR USE FACTORS

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- ❑ Amount & importance of copied portion
  - Judge established line of no infringement if :
    - ❖ 10% or less of books w/10 chapters or less were copied or 1 chapter from a book w/10+ chapters and
    - ❖ Copied portions not the heart of the book
  - Judge included indexes, credits etc. in page count
  - Individual chapters not treated as separate works even if different authors wrote each chapter
  - Rejected repeated use as irrelevant



# GSU: FAIR USE FACTORS

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- Effect of use on value &/or market for book
  - Little harm because digital license for excerpts from books not available at a reasonable price
  - Unlicensed use & lack of royalty payments to authors (largely academicians) did not stifle creativity & authorship; authors more influenced by enhanced reputation, achievement & dissemination of knowledge

# AUTHORS GUILD V. HATHI TRUST

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- ❑ 2008: Hathi Trust formed out of Google Project—university Google partners + others
- ❑ Google made digital scans of HT books & HT also scanned some of their books—10million + volumes: HT placed scans in databases
- ❑ + some HT members identified “orphan works” among scanned books & made them available to their users for on-line review



# HATHI TRUST

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- HT scans used for following purposes:
  - Full text searches (non-consumptive research)
  - Preservation
  - Access to persons with print disabilities
  - Provide access to orphan works whose © owners could not be located &/or were out of print



# HATHI TRUST

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- ❑ 2011: Authors Guild & others sued HT, seeking an injunction & impoundment of scanned books
- ❑ 2012 (October): Decision: Judge ruled
  - ❑ Digital databases of scanned books was a fair use
  - ❑ Did not address orphan works issue because they had not been made available for access

# HT: FAIR USE

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- Nature & purpose of use favors HT
  - Research & scholarship = fair uses
  - + access to blind & searchable database text constituted **transformative** uses
    - Actually change the works or
    - Use them for an “entirely different purpose than the original works”

# HT: FAIR USE

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- ❑ **Nature of works:** many of the works were creative (fiction, poetry, drama) but this factor is less important given transformational use
- ❑ **Amount of work used:** Used entire work but that was appropriate for the purpose
- ❑ **Market harm:** Publishers did not offer scans for the transformative uses & harm to a “potential” market is irrelevant

# TECH TRANSFER UPDATE

- **Stanford v. Roche (Sup. Ct. June 2011)**
  - In the first instance, faculty inventors – not universities -- own inventions they create with federal funding unless:
    - Faculty sign an employment contract that requires them to assign and “hereby assign” all rights in future inventions to the university or
    - University policy has been changed to reflect current assignment of all rights in future inventions to university & faculty must comply with policy as condition of employment

# TECH TRANSFER UPDATE

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- March 16, 2013 US switches from first-to-invent to **first-to-file patent** system bringing US in line with the world
  - Creates a “race to patent office”
  - Educate faculty @ change & the need to disclose ASAP when invention may be at a patentable state
  - File applications on submitted disclosures before law changes



# AUTHORSHIP ISSUES

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- ❑ 2005 10% of NIH-funded researchers surveyed had assigned authorship “inappropriately”
- ❑ 2011 Nature reports:
  - Tenfold increase in published retractions of published articles in past 10 years/44% increase in published papers
  - China, South Korea & Turkey offer cash rewards for publications in prestige journals



# AUTHORSHIP ISSUES

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- ❑ Raise issues of professional responsibility and ethics
- ❑ Practices may differ from field to field and journal to journal
- ❑ Should be addressed at researcher level when possible

# AUTHORSHIP

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- ❑ Requires significant intellectual contribution & responsibility for the research
- ❑ Commonly accepted criteria for authorship:
  - “Substantial contributions to conception, design, acquisition, analysis or interpretation of data
  - Drafting or revising the article critically for important intellectual content **AND**
  - Final approval of the version to be published”

International Committee of Medical Journal Editors  
(2001)

# AUTHORSHIP

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Actions that don't contribute to concept of research & don't justify authorship listing:

- ❑ Institutional position
- ❑ Providing funding, lab space or equipment
- ❑ Performing routine technical work or services for a fee
- ❑ Guest and ghost authors

# AUTHORSHIP

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- ❑ Establish university authorship guidelines
- ❑ Educate faculty about authorship issues & how to initiate & discussions in research groups
- ❑ Use author work sheets or agreements & document who is expected to contribute what & the related value & time effort: revisit as changes occur
- ❑ Student duty to learn customs in their field

# AUTHORSHIP CONVENTIONS

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- ❑ Student is usually listed as first author on multi-authored paper that is based primarily on the student's dissertation or thesis
- ❑ Customarily in some fields for head of research lab to be listed last
- ❑ Order of other authors listed based on amount and importance of contributions

# PUBLIC RECORD REQUESTS

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- ❑ Public universities must comply with state public record laws regarding access to information, data, records received or created and maintained by the State in connection with government business

# PRR: EXAMPLES

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- ❑ UVA: professor's research on global warming
- ❑ U. of Wis.: Wis. Republican Party request for professor's emails related to legislators and union leaders
- ❑ Wayne State, Michigan & MSU: Mackinac Center for Public Policy requested emails related to collective bargaining





# PRR: MORE EXAMPLES

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- District Board of Trustees of Santa Fe College: received request from faculty member for emails received from student complaining about professor
- Columbus State Community College received request for emails in connection with termination dispute

# PRR LAW COMMONALITIES

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- ❑ Emphasis on transparency & access
- ❑ Numerous statutory exemptions from disclosure; e.g.,
  - FERPA records
  - Employee records
  - Institutional deliberations
  - Human subject data
  - Research data but not uniformly

# PERSONAL V. PUBLIC RECORDS

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- Public record: made or received by government unit in connection with transaction of public business
- Issues: What @ communications
  - received or stored on personal smart phones or computers?
  - Re peer reviewed articles for a journal?
  - Re research proposal ideas?
  - From a private university not subject to PRR?

# PRR: RELATED ISSUES

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- ❑ University record retention policy
- ❑ Confidentiality agreements signed by individuals but not the institution
- ❑ Does a “trade secret” exemption apply to universities?
- ❑ OMBA-133: duty to disclose research data used in legislative process
- ❑ NIH/NSF: data management requirements

# INTERNATIONAL EXCHANGES

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- Exchange programs much less complicated than setting up programs in a foreign country
- Major contractual terms in any international program contract (other than business terms):
  - Dispute resolution (judicial/arbitration, venue, language, etc.)
  - Selection of students (academic and language competence, final acceptance authority)

# INTERNATIONAL EXCHANGES

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## □ Disputes

- If foreign partner does not have assets in US, it will be difficult to enforce US judgment abroad
- Arbitration: 75% of nations are members of the “NY Convention” that requires members to enforce arbitration awards issued in a member country
  - Negotiate location, language, # of arbitrators, terms of arbitration

# INTERNATIONAL EXCHANGES

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- Student recruitment issues
  - Use a third party agent? DOE: may not use one to recruit US citizens living abroad; ethical concerns
  - Word of mouth: alumni living abroad, former students, foreign recruitment fairs
  - Establish a program with a specific university focused on specific academic fields

# INTERNATIONAL EXCHANGES

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- Student selection issues
  - Minimum criteria: academic standing, language
  - Authority to make final acceptance decision?
- Financial issues: student must demonstrate ability to pay all expenses incurred during exchange (US law), including insurance
- Academic issues:
  - Course selection & award/transfer of credit



# INTERNATIONAL EXCHANGES

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- Student issues:
  - Orientation to university & culture
  - Faculty mentor
  - Housing: University housing, off-campus housing (who signs lease)
  - Policies: Academic, conduct, intellectual property policies
  - Emergency procedures

# IN COUNTRY INTERNATIONAL PROGRAMS

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- RAISE VERY COMPLEX ISSUES
  - Legal presence, authority to operate, tax & employment of foreign workers & US workers overseas, privacy
  - US laws: Foreign Corrupt Practices Act, anti-boycott, Foreign Agents Registration Act

DO NOT INITIATE OR IMPLEMENT WITHOUT ADMINISTRATIVE AND LEGAL ASSISTANCE

# RESOURCES & REFERENCES

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Sage v. GSU:

[http://copyright.syr.edu/wp-content/uploads/2012/05/GSU\\_decision.pdf](http://copyright.syr.edu/wp-content/uploads/2012/05/GSU_decision.pdf)

Authors Guild v. Hathi Trust:

<http://www.scribd.com/doc/109647049/HathiTrust-Opinion#download>

Copyright Crash Course: Commentary on GSU

<http://copyright.lib.utexas.edu/GSUcommentary.html>

Fair Use Checklist:

[http://www.gsu.edu/images/legal/Fair\\_Use\\_Checklist.pdf](http://www.gsu.edu/images/legal/Fair_Use_Checklist.pdf)

Blogs: <http://james.grimmelman.net/>

<http://blogs.library.duke.edu/scholcomm/>

# RESOURCES & REFERENCES

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- Stanford v. Roche:  
<http://www.supremecourt.gov/opinions/10pdf/09-1159.pdf>
- AUTM Discussion on decision  
[http://www.autm.net/Stanford\\_v\\_Roche.htm](http://www.autm.net/Stanford_v_Roche.htm)
- AAU et. al. comments on first to invent
- <http://www.autm.net/Content/NavigationMenu/Government/LegislativeIssues/assnPTOcommentsonFITFfinaldraft.pdf>
- AAU on Patent Reform:  
<http://www.aau.edu/policy/article.aspx?id=9602>

# RESOURCES & REFERENCES

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Committee on Publication Ethics:

<http://publicationethics.org/>

DHHS:

[http://ori.dhhs.gov/education/products/niu\\_authorship/index.htm](http://ori.dhhs.gov/education/products/niu_authorship/index.htm)

On Being a Scientist: <http://www.nap.edu/catalog/12192.html>

A Graduate Student's Guide to Determining Authorship Credit and Authorship Order:

<http://www.apa.org/science/leadership/students/>

# RESOURCES & REFERENCES

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APA Authorship checklists & agreements:

<http://www.apa.org/science/leadership/students/authorship-paper.aspx?item=5>

Washington University:

<http://research.wustl.edu/PoliciesGuidelines/Pages/authorshipdisputes.aspx>

Duke University:

[http://www.provost.duke.edu/pdfs/Authorship\\_guidelines.pdf](http://www.provost.duke.edu/pdfs/Authorship_guidelines.pdf)

# RESOURCES & REFERENCES

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- “Who’s on First?,” 489 Nature 591 (Sept.27, 2012)
- How to handle authorship disputes: a guide for new researchers, The COPE Report (2003)
- “A Sharp Rise in Retractions Prompts Calls for Reform,” NY Times (Apr. 16, 2012)
- International Comm. of Medical Journal Editors, [http://www.icmje.org/ethical\\_1author.html](http://www.icmje.org/ethical_1author.html)

# RESOURCES & REFERENCES

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- State ex rel. Zidonis v. Columbus State Community College, 133 Ohio St.3d 122 (Ohio Sept. 19, 2012)
- Univ. of Conn. V. Freedom of Information Comm’n, 303 Conn. 724 (Feb. 21, 2012)
- Rhea v. District Bd. Of Trustees of Santa Fe College, 2012 WL 2924068 (July 19, 2012)
- “Recent Freedom of Information Requests for Faculty Email,” Memorandum from American Federation of Teachers to AFT Higher Education Locals (Apr. 12, 2011)



# RESOURCES & REFERENCES

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- Research Data Sharing, Security & Preservation, PART II. Public Records Act Requests and Subpoenas of Research Data & Documents, Madelyn Wessel, Univ. of Va.(Nov.14-16, 2012 NACUA Conference)

# RESOURCES & REFERENCES

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- Dispute Resolution Clauses in International Contracts: Pitfalls and Best Practices, Mark N. 4242, Winston & Strawn LLC (June 29, 2012 Annual NACUA Meeting)
- Going Global Legal Trends in University International Programs, William F. Ferreira, Hogan Lovells US LLP (Apr. 29, 2011 NACUA CLE Workshop)