

FAIR USE GUIDELINES FOR EDUCATORS

4TH Edition

Books and Periodicals
-
Music
-
Off-Air Recording of Broadcasts
-
Multimedia
-
Distance Learning
-
Digital Images
-
Software

- Compiled By -
Linda K. Enghagen, J.D.

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THE SLOAN CONSORTIUM
A Consortium of Institutions and Organizations
Committed to Quality Online Education

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This book is designed to be accurate. Nevertheless, the law is subject to varying interpretations. Furthermore, as is pointed out in the text of this book, the guidelines and other documents contained herein are not laws but agreed upon interpretations by some interested parties. Consequently, the sale of this book does not constitute the rendering of legal advice. If you want a legal opinion, consult a qualified attorney. It is your responsibility to determine whether the information contained herein applies to your specific and unique circumstances.

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INTRODUCTION

Not that many years ago, the most common legal issue technology regularly posed for educators arose at the office copy machine. How much of a copyrighted work could be reproduced? How many copies could be made? How often could this be done?

Advances in modern technology severely complicate these relatively simple inquiries—which is not to say that the earlier questions were necessarily easy to answer or the rules widely known. Nevertheless, the range of technological advances that carry potential copyright law implications for educators has exploded in the last two decades. The prevalence and relative low cost of televisions and VCRs makes it tempting to simply copy educational programs from the television and use them in class for the cost of a blank videocassette. Computer software can be pirated in the few minutes it takes to copy a disk or load someone else's disk onto a hard drive. Downloading from the Internet is cheap and can be learned with relative ease.

For educators, these advances in technology further cloud the question of when the legal principles of fair use permit such inexpensive and easy copying. This confusion is only aggravated by pressure created by one of the realities of the teaching profession that is known only too well to educators. That is, though it is never written into a formal job description, educators routinely use personal funds to pay for materials necessary for their work. It is then not surprising that many search for inexpensive sources. Even as the economy turns toward brighter times, teachers continue to purchase class materials, and technological advances only multiply available resources and copyright law questions. Distance education courses, multimedia productions, educational software, and the

Internet represent only part of the current information explosion. But access isn't free, and each form of information raises fair use questions.

Similarly, these technological advances make it easier for educators to create instructional materials. This raises other copyright questions, key among them being who owns these creations—the educators or their institutions? Copyright law doesn't treat educators in the same way it treats other employees. Nevertheless, educators can't automatically assume everything they create belongs to them.

In an effort to bring a measure of clarity to the spectrum of copyright law questions confronting modern educators, this compilation provides an overview of the basic rules of copyright law, including the rules governing ownership as well as the texts of relevant fair use documents, which serve to guide educators through the maze of how to lawfully use copyright-protected works for educational purposes.

COPYRIGHT LAW

Copyright law is part of a larger body of law known as intellectual property law. Unlike many other areas of law for which there is both state and federal regulation, intellectual property law is almost exclusively federal in origin. This is grounded in a constitutional mandate. Article I, Section 8, Clause 8 of the U.S. Constitution states that “Congress shall have [the] power...To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries...” As a matter of constitutional law, not only is Congress granted this power, but it is given a specific framework in which to operate. While the courts are clear that the primary purpose of intellectual property is to benefit society by promoting “the progress of science and the useful arts,” the Founding Fathers directed Congress to develop what is essentially a system of limited monopolies for creators and inventors. The limited monopolies provide an incentive. Creative undertakings involve the risk of failure and loss of capital and income. The limited monopolies provide a financial incentive to counterbalance those risks. This method of balancing the needs of society with the needs of creators and inventors provides a consistency between the rules of law and an economic system grounded in free enterprise and the private ownership of property.

The Basic Rules

Copyright law governs the ownership and use of copyrighted materials. In its broadest terms, a copyright refers to the legal rights of the owners of “original works of authorship.” Traditionally, the types of works covered by copyright law include books, musical scores, movies, videos, architectural works, and works of art. In the information age, copyright law applies to a new range of works as well, including software, multimedia

productions, computerized databases, e-mail, web sites, FTP sites, listservs, and USENET groups.

The Five Exclusive Rights of Copyright Owners

A copyright is the legal right that protects the expression of an idea. Copyright law does not protect an idea in and of itself. There are, nevertheless, other legal mechanisms for protecting ideas only. The most common of these are trade secrets law (if the idea is eligible for trade secret protection) and contract law. A contract in the form of a confidentiality or nondisclosure agreement can protect an idea only. For copyright protection to apply, the idea must be expressed in a fixed, tangible form. That is, it is no longer merely an idea in someone's mind. When the words are on the page, the computer code is on the disk, the notes are recorded, or the drawings are rendered, copyright law applies because the idea has been expressed.

Copyright law gives copyright owners five exclusive rights. These exclusive rights are, however, not absolute. They are limited by, among other things, the fair use rules and the rules governing the duration of a copyright. The five exclusive rights are:

1. The right to reproduce the copyrighted work;
2. The right to prepare derivative works based on the copyrighted work;
3. The right to publish the work by distributing copies to the public by sale, rental, lease, or lending;
4. The right to publicly perform the work; and
5. The right to publicly display the work.

Fair Use Rules

In developing copyright law, Congress recognized the competing interests involved. As noted earlier, creators need an incentive for undertaking risky (i.e., often unsuccessful) endeavors. Hence, creators are given a monopoly in the form of the exclusive rights. The theory is that at least some creators will be successful enough at some of their endeavors that they will be able to make a living at it and therefore continue generating other creations. Society as a whole benefits from this, so social policy in the form of copyright law should encourage it. On the other hand, precisely because some of these creations are beneficial and of interest to society, it is appropriate that the public have access to the creations. The fair use exceptions permit public access by allowing limited use of copyrighted works for teaching, criticism, comment, news reporting, scholarship, or research without requiring the permission of or payment to the copyright owner. That is, if properly used for one of these purposes, such use does not constitute an unlawful copyright infringement. The precise language outlining the fair use exceptions is found at Section 107 of the Copyright Act of 1976.

Notwithstanding the provisions of Section 106, the fair use of copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the 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.

Duration of a Copyright

Another limitation on the exclusive rights of copyright owners is the duration of a copyright. Copyright protection doesn't last forever. As a result of changes in the law enacted as part of the Digital Millennium Copyright Act, the duration of copyright protection is now longer than under previous law.

The duration of a copyright depends on the identity of the creator. If the creator is a natural person (i.e., a human being), the copyright lasts for the life of the creator plus 70 years. That is, the copyright lasts for 70 years after the creator's death. For works jointly created by natural persons, the copyright lasts for 70 years after the death of the last to die of the joint creators. There are a number of circumstances under which the creator is not recognized by law as a natural person. For example, some works do not identify a creator or use a company name or pseudonym. In such situations, the duration of the copyright is 95 years from the date of publication.

When a copyright expires, the work goes into the public domain. In other words, it is no longer protected by copyright law. Consequently, it can be used without the permission of or payment to the owner.

Copyright Ownership

Increasingly, educators are confronted with the question of who owns the copyright to works they create. And the answer is of profound practical significance. As previously detailed, it is the *owner* of a copyright who possesses the five exclusive rights to the work. In other words, the copyright owner controls who can use the work (i.e., reproduce it, distribute it, and perform or display it) and whether new editions or versions may be developed (i.e., prepare derivative works). Consequently, if an educator prepares instructional materials and retains the copyright, he or she decides when to make revisions, whether to share the materials with other educators, and whether to sell the materials if they have commercial value. If the employer (i.e., school, college, or university) owns the copyright, the employer possesses the legal rights and gets to make those decisions. Similarly, if the employer owns the copyright to the works, the employer can prevent the creator from continuing to use the works if, for example, the educator takes a new job at another educational institution.

Many of the works created by educators fall under the protection of copyright law. For example, text-based materials such as books, assignments, syllabi, instructional materials, exam questions, lecture notes, overheads, and web sites are only some of the works routinely created by educators that fall under the rules of copyright law.

Unfortunately, sorting out when an educator owns his or her creations and when they are the intellectual property of the institution is not always easy. In any event, however, the sorting must begin with the basic rules of copyright ownership.

Under the general rules of copyright law, copyright ownership depends first on whether there is an agreement governing ownership. One such

agreement is a union contract. Union contracts often address the ownership of works created by educators. Typically, collective bargaining agreements protect academic freedom by explicitly reserving to educators the ownership of their copyright-protected works. A second type of agreement is an institutional employment policy. Courts sometimes treat employment policies (e.g., handbooks) as contracts between the employer and employees. In the absence of a union contract addressing copyright ownership, such employment policies may control who owns what. Third, if an educator creates a copyright-protected work under an award from a grant or contract, the terms of that agreement (i.e., the grant or contract) determines ownership. Finally, the creator of a copyright-protected work may transfer ownership of the copyright by assigning the copyright to, for example, the employer. However, for an assignment to be valid, it must be in writing.

In the absence of an agreement determining the ownership of a copyright, the general rules of copyright law outlined by federal statute serve as a default to establish who owns what. Under these rules, the copyright to a creation is owned by the creator of the work unless the work is a work-for-hire. There are two types of works-for-hire, the most common being works created by employees in the course of their employment. For example, a technical writer is hired to write technical materials, so the creations resulting from this activity belong to the employer. The second type of work-for-hire is referred to as a commissioned work. Commissioned works are works-for-hire belonging to the employer if two criteria are met. First, there must be a written agreement indicating the work product is a work-for-hire. Second, the commissioned work must fall under one of the following categories: a contribution to a collective work, part of a movie or audiovisual work, a translation or compilation, a supplementary work or atlas, an instructional text, a test, or test answer materials. Under these

default rules, if a copyright-protected work is not created by an employee in the course of his or her employment and does not satisfy the requirements of a commissioned work, the creator of the work retains the ownership of the copyright. At first blush, it may appear that educators don't own their creations unless there is an agreement granting them ownership. On its face, it may appear that in the absence of such an agreement, their works fall under the work-for-hire rules covering works created by employees in the course of their employment. Fortunately for educators, it's not that simple.

Educators are not technical writers hired to write specific materials. Educators are not researchers assigned to specific research projects in a corporate research and development department. Depending on the nature of the educational institution, educators are hired to teach and/or engage in research and scholarly activity within a tradition of academic freedom. Educators are employees, but not in the same sense as most other employees. Academic freedom protects educators from being dictated to and directed in the same manner as most employees. Furthermore, educators do not routinely punch a clock, and many routinely work at home using personal resources such as computers, office supplies, and books. Consequently, the work-for-hire rules don't automatically give to their employers the copyright to works created by educators because it is difficult to determine when educators are employees for the purposes of copyright law and when they are not.

The only work-for-hire case ever decided by the U.S. Supreme Court (*CCNV v. Reid* 490 U.S. 730 (1989)) delineated a number of factors to be evaluated in determining whether an individual is an employee under copyright law. According to the U.S. Supreme Court, whether an individual is an employee depends on the extent to which the hiring party

controls “the manner and means” by which the copyright-protected work is created. While pointing out that no single factor is determinative, the court included the following as relevant considerations: the skill required, who owned the tools and other resources used, where was the work performed, length of relationship between the parties, who determined the work schedule, how was payment made, how were taxes and benefits handled, and who hired and paid assistants. It is clear from a quick perusal of these factors that many of the copyright-protected works created by educators fall in the gray area of the law. The fact that educators receive regular paychecks and benefits weighs in favor of the institutions owning the copyright. However, the degree of skill and independence inherent in academic work along with the fact that many educators use personal time and resources weigh in favor of educators owning the copyright to their works. In the end, if there is no agreement governing ownership, educators who wish to retain ownership of their copyrights should (as much as possible) use their own materials and resources, create their works on their own time, and place a copyright notice on them.

Joint Authorship

Copyright-protected works are often created as the result of joint or collaborative efforts. Under the general rules of copyright law, in the absence of an agreement to the contrary, joint authors own the copyright jointly. For example, many textbooks have multiple authors. In the case of multiple authors, the copyright is jointly owned by all the authors.

These same rules apply to all types of copyright-protected works. This is particularly significant to educators involved in the creation of distance education courses, multimedia projects, electronic portfolios, web sites, and the like. In many cases, these creations result from a collaboration between faculty members, students, and technical support staff while using

institutional resources. Consequently, even though a faculty member may be the primary or sole content provider, the resulting work may be jointly owned for the purposes of the general rules of copyright law.

Nevertheless, as discussed earlier, these general rules of copyright law apply only when there is no agreement creating a different ownership arrangement. So again, the provisions of a union contract, institutional policy, or other agreement (i.e., assignment of the copyright or term of grant or contract funding the project) will control the ownership structure when applicable.

Obtaining a Copyright

Obtaining a copyright is deceptively simple. A copyright is obtained by creating a copyright-protected work. That is, copyright registration is not required although it can have its advantages. Under older versions of copyright law, copyright protection did not apply unless a copyright notice was placed on the work. Modern law does not require the notice.

Consequently, works without a notice cannot be assumed to be in the public domain. However, because this is a widely misunderstood aspect of copyright law, placing a copyright notice on protected works is wise. The format for the notice is as follows.

Copyright © Year Your Name

Copyrights are registered with the U.S. Copyright Office in Washington, D.C.

Copyright Infringement and Plagiarism

The relationship between copyright infringement and plagiarism can be confusing. The simplest way to differentiate between them is in that

copyright infringement is against the law and plagiarism is not. That is, copyright infringement occurs when one of the five exclusive rights of the owner is violated. Plagiarism is a violation of academic protocols. While oversimplified, plagiarism occurs when the creator of a new work uses the work of another and fails to properly credit that person.

Nevertheless, while copyright infringement is against the law and plagiarism is not, some acts of copying are both plagiarism and copyright infringement. For the most part, the difference rests in the nature and degree of copying. For example, the failure to properly use quotation marks around a direct quote of a single sentence constitutes plagiarism, but does not constitute copyright infringement. In contrast, copying multiple pages of text word-for-word constitutes copyright infringement unless the fair use rules apply.

The Rights of Users of Copyright-Protected Works

As previously discussed, the owner of a copyright possesses five exclusive rights in the work. However, these rights create only a limited monopoly and are not absolute. The rights of users derive from the other side of the constitutional mandate "...To promote the progress of science and the useful arts..." To achieve this goal, the law evolved to permit free access to the use of copyright-protected works under certain circumstances. Specifically, this means that the user doesn't need the permission of the owner and the owner cannot require payment for the use.

Two of these circumstances were discussed earlier. First, anyone can use a previously copyright-protected work after the copyright has expired. Second, a use that satisfies the requirements of the fair use rules does not require permission or payment. A third circumstance in which users do not need permission or to make any payment is when the work is in the public

domain. A work is in the public domain when it is placed there by the owner (look for an explicit statement relinquishing ownership) or when the work was created by the federal government. (Caution: Some works are created for the federal government by private contractors. The copyright for such works may rest with the contractor. So even when working with federal documents, it is wise to look for a copyright notice indicating private ownership.) The works of state governments do not fall under this rule.

Finally, a copyright-protected work may be used without explicit permission or payment to the owner when permission is implied. For example, the Copyright Management Center of Indiana University posts to its web site a form entitled Fair Use Checklist. The purpose of the form is to assist faculty members in evaluating whether a particular use of a copyright-protected work is permitted under the fair use rules. Among other things, it includes instructions on downloading the document and advises user to keep a copy of the form for their project records. Obviously, the form was posted for the purpose of faculty members printing it, filling it out, and keeping it. Permission to copy and use the form is, therefore, implied and users need not get explicit permission or make any payment. (The site is not restricted or subscription-based.)

ESTABLISHED FAIR USE GUIDELINES

Understanding the general principles governing copyright law and the fair use exceptions takes educators only so far. The question of what they mean in a specific context remains. In an attempt to fill the gaps created by general legal principles, various affected groups joined to establish fair use guidelines. Early guidelines were developed beginning in 1976 and addressed the fair use of copyrighted material found in books and periodicals, music, and broadcast programming (e.g., television). Fair use guidelines for educational multimedia were released in the fall of 1996. In December of 1996, proposed guidelines were released for digital images and distance education. Library use of computer software is considered in a series of scenarios released in December of 1996.

In discussing specific fair use practices, the use of the word *guidelines* rather than the word *laws* is not an accident. The guidelines are not laws. They are merely standards agreed upon by some affected institutions and organizations. Only the courts can decide whether a particular use meets the requirements of the fair use rules. Consequently, as is typically pointed out within the text of each set of guidelines, using copyrighted works in a manner that exceeds guideline limitations may be a lawful fair use. Despite these limitations, the guidelines offer educators and copyright owners a measure of certainty by establishing a benchmark for acceptable fair use. Furthermore, and perhaps more importantly, an honest and reasonable belief that a use meets the requirements of fair use can protect nonprofit libraries, archives, and educational institutions as well as their employees. That is, in such contexts, even though a court finds that the fair use rules were violated, the judge has the discretion to reduce or excuse any award of monetary damages to the copyright owner. One way to establish the honest and reasonable belief necessary for a judge to exercise this

discretion is to show the guidelines were used even if only as a reference point.

BOOKS AND PERIODICALS

In 1976, the Authors League of America and the Association of American Publishers, Inc. along with the Ad Hoc Committee on Copyright Law Revision (a congressional committee) formally announced they had reached an agreement regarding the meaning of *fair use* in reference to books and periodicals.

AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that*:

- A. The copying meets the tests of brevity and spontaneity as defined below; *and*
- B. Meets the cumulative effect test as defined below; *and*
- C. Each copy includes a notice of copyright.

Definitions

Brevity

- (i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.
- (ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt of not more than 1,000 words from any prose work or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in (i) or (ii) above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

- (iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- (iv) “Special” works: Certain works in poetry, prose or in “poetic prose” which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph (ii) above notwithstanding such “special works” may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

- (i) The copying is at the instance and inspiration of the individual teacher, and
- (ii) The inspiration and decision to use the work and moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

- (i) The copying of the material is for only one course in the school in which the copies are made.
- (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, not more than three from the same collective work or periodical volume during one class term.
- (iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in (ii) and (iii) above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II above

Notwithstanding any of the above, the following shall be prohibited:

- A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.
- B. There shall be no copying of or from works intended to be “consumable” in the course of study or teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
- C. Copying shall not:
 - a. substitute for the purchase of books, publishers’ reprints or periodicals;
 - b. be directed by a higher authority;
 - c. be repeated with respect to the same item by the same teacher from term to term.
- D. No charge shall be made to the student beyond the actual cost of photocopying.

Agreed March 19, 1976.

MUSIC

Later in the spring of 1976, representatives of music publishers and music educators generated a similar set of guidelines for the use of copyrighted music. Publishers and educators were represented by the Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, the Music Teachers National Association, the Music Educators National Conference, and the National Association of Schools of Music. They were also joined by the Ad Hoc Committee on Copyright Law Revision.

GUIDELINES FOR EDUCATIONAL USES OF MUSIC

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of HR 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

A. Permissible Uses

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.
2. For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole that would constitute a performable unit such as a section, movement or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.
3. Printed copies that have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered, or lyrics added if none exist.
4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.
5. A single copy of a sound recording (such as a tape, disc, or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright that may exist in the sound recording.)

B. Prohibitions

1. Copying to create or replace or substitute for anthologies, compilations, or collective works.
2. Copying of or from works intended to be “consumable” in the course of study or of teaching

such as workbooks, exercises, standardized tests, and answer sheets and like material.

3. Copying for the purpose of performance, except as in A(1) above.
4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.
5. Copying without inclusion of the copyright notice that appears on the printed copy.

Agreed April 30, 1976

TELEVISION PROGRAMS

Guidelines for the copying (off-air recording) of television programs did not follow until 1979. A congressional subcommittee appointed a negotiating committee with representatives from educators, copyright holders, and creative guilds and unions.

GUIDELINES FOR OFF-AIR RECORDING OF BROADCAST PROGRAMMING FOR EDUCATIONAL PURPOSES

1. The guidelines were developed to apply only to off-air recording by nonprofit educational institutions.
2. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable transmission) and retained by a nonprofit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. Broadcast programs are television programs transmitted by television stations for reception by the general public without charge.
3. Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster, or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period. School days are school session days—not counting weekends, holidays, vacations, examination periods, or other

scheduled interruptions—within the forty-five (45) calendar day retention period.

4. Off-air recordings may be made only at the request of, and used by, individual teachers, and may be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.
5. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.
6. After the first ten (10) consecutive school days, off-air recording may be used up to the end of the forty-five (45) calendar day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other non-evaluative purpose without authorization.
7. Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.
8. All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.
9. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

Agreed October 1979

MULTIMEDIA

After two years of deliberations, fair use guidelines for multimedia productions were released in the fall of 1996. These guidelines were developed by the Consortium of College and University Media Centers (CCUMC) and later adopted by the Council on Fair Use (CONFU), which was convened out of the deliberations of the National Information Infrastructure Working Group on Intellectual Property Rights.

FAIR USE GUIDELINES FOR EDUCATIONAL MULTIMEDIA

1. INTRODUCTION

1.1 Preamble

Fair use is a legal principle that provides certain limitations on the exclusive rights of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educators, scholars and students who develop multimedia projects using portions of copyrighted works under fair use rather than seeking authorization for non-commercial educational uses. These guidelines apply only to fair use in the context of copyright and to no other rights.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act sets forth four fair use factors that should be considered in each instance, based on particular facts of a given case, to determine whether a use is a fair use: (1) the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the 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..

While only the courts can authoritatively determine whether a particular use is fair use, these guidelines represent the participants' consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The participants also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain—such as U.S. government works or works on which copyright has expired for which there are no copyright restrictions—or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works, and users should refer to the applicable license terms for guidance.

The participants who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase, there may come a time when it is necessary to review the guidelines. Nothing in these guidelines shall be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of educational multimedia projects.

This preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright protection of these guidelines is claimed by any person or entity.

1.2 Background

These guidelines clarify the application of fair use of copyrighted works as teaching methods are adapted to new learning environments. Educators have traditionally brought copyrighted books, videos, slides, sound recordings, and other media into the classroom, along with accompanying projection and playback equipment. Multimedia creators integrated these individual instructional resources with their own original works in a meaningful way, providing compact educational tools that allow great flexibility in teaching and learning. Material is stored so that it may be retrieved in a nonlinear fashion, depending on the needs or interests of learners. Educators can use multimedia projects to respond spontaneously to students' questions by referring quickly to relevant portions. In addition, students can use multimedia projects to pursue independent study according to their needs or at a pace appropriate to their capabilities. Educators and students want guidance about the application of fair use principles when creating their own multimedia projects to meet specific instructional objectives.

1.3 Applicability of These Guidelines

(Certain basic terms used throughout these guidelines are identified in bold and defined in this section.)

These guidelines apply to the use, without permission, of portions of lawfully acquired copyrighted works in educational multimedia projects that are created by educators or students as part of a systematic learning activity by nonprofit educational institutions. **Educational multimedia projects** created under these guidelines incorporate students' or educators' original material, such as course notes or commentary, together with various copyrighted media formats, including but not limited to motion media, music, text material, graphics, illustrations,

photographs, and digital software, which are combined into an integrated presentation. **Educational institutions** are defined as nonprofit organizations whose primary focus is supporting research and instructional activities of educators and students for noncommercial purposes.

For the purposes of these guidelines, **educators** include faculty, teachers, instructors, and others who engage in scholarly, research, and instructional activities for educational institutions. The copyrighted works used under these guidelines are **lawfully acquired** if obtained by the institution or individual through lawful means such as purchase, gift, or license agreement but not pirated copies. Educational multimedia projects which incorporate portions of copyrighted works under these guidelines may be used only for **educational purposes** in systematic learning activities, including use in connection with non-commercial curriculum-based learning and teaching activities by educators to students enrolled in courses at nonprofit educational institutions or otherwise permitted under Section 3. While these guidelines refer to the creation and use of educational multimedia projects, readers are advised that in some instances other fair use guidelines such as those for off-air taping may be relevant.

2. PREPARATION OF EDUCATIONAL MULTIMEDIA PROJECTS USING PORTIONS OF COPYRIGHTED WORKS

These uses are subject to the Portion Limitations in Section 4. They should include proper attribution and citation as defined in Sections 6.2.

2.1 By Students

Students may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for a specific course.

2.2 By Educators for Curriculum-Based Instruction

Educators may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for their own teaching tools in support of curriculum-based instructional activities at educational institutions.

3. PERMITTED USES OF EDUCATIONAL MULTIMEDIA PROJECTS CREATED UNDER THESE GUIDELINES

Uses of educational multimedia projects created under these guidelines are subject to the time, portion, copying and distribution limitations listed in Section 4.

3.1 Student Use

Students may perform and display their own educational multimedia projects created under Section 2 of these guidelines for educational uses in the course for which they were created and may use them in their own portfolios as examples of their academic work for later personal uses such as job and graduate school interviews.

3.2 Educator Use For Curriculum-Based Instruction

Educators may perform and display their own educational multimedia projects created under Section 2 for curriculum-based instruction to students in the following situations:

3.2.1 for face-to-face instruction,

3.2.2 assigned to students for directed self-study,

3.2.3 for remote instruction to students enrolled in curriculum-based courses and located at remote sites, provided over the educational institution's secure electronic network in real-time, or for after class review or directed self-study, provided there are technological limitations on access to the network and educational multimedia project (such as a password or PIN) and provided further that the technology prevents the making of copies of copyrighted material.

If the educational institution's network or technology used to access the educational multimedia project created under Section 2 of these guidelines cannot prevent duplication of copyrighted material, students or educators may use the multimedia educational projects over an otherwise secure network for a period of only 15 days after its initial real-time remote use in the course of instruction or 15 days after its assignment for directed self-study. After that period, one of the two use copies of the educational multimedia project may be placed on reserve in a learning resource center, library or similar facility for on-site use by students enrolled in the course. Students shall be advised that they are not permitted to make their own copies of the educational multimedia project.

3.3 Educator Use for Peer Conferences

Educators may perform or display their own educational multimedia projects created under Section 2 of these guidelines in presentations to their peers, for example at workshops and conferences.

3.4 Educator Use for Professional Portfolio

Educators may retain educational multimedia projects created under Section 2 of these guidelines in their personal portfolios for later personal uses such as tenure review or job interviews.

4. LIMITATIONS—TIME, PORTION, COPYING AND DISTRIBUTION

4.1 Time Limitations

Educators may use their educational multimedia projects created for educational purposes under Section 2 of these guidelines for teaching courses, for a period of up to two years after the first instructional use with a class. Use beyond that time period, even for educational purposes, requires permission for each copyrighted portion incorporated in the production. Students may use their educational multimedia projects as noted in Section 3.1.

4.2 Portion Limitations

Portion limitations mean the amount of a copyrighted work that can reasonably be used in education multimedia projects under these guidelines regardless of the original medium from which the copyrighted works are taken. **In the aggregate** means the total amount of copyrighted material from a single copyrighted work that is permitted to be used in an educational multimedia project without permission under these guidelines. These limitations apply cumulatively to each educator's or student's multimedia project(s) for the same academic semester, cycle or term. All students should be instructed about the reasons for copyright protection and need to follow the guidelines. It is understood, however, that students in kindergarten through grade six may not be able to adhere rigidly to the portion limitations in this section in their independent development of educational multimedia projects. In any event, each such project retained under Sections 3.1 and 4.3 should comply with the portion limitations in this section.

4.2.1 Motion Media

Up to 10% or 3 minutes, whichever is less, in the aggregate of a copyrighted motion media work may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines.

4.2.2 Text Material

Up to 10% or 1000 words, whichever is less, in the aggregate of a copyrighted work consisting of text material may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines. An entire poem of less than 250 words may be used, but no more than three poems by one poet, or five poems by different poets from any anthology may be used. For poems of greater length, 250 words may be used but no more than three excerpts by a poet or five excerpts by different poets from a single anthology may be used.

4.2.3 Music, Lyrics, and Music Video

Up to 10%, but in no event more than 30 seconds, of the music and lyrics from an individual musical work (or in the aggregate of extracts from an individual work), whether the musical work is embodied in copies, or audio or audiovisual works, may be reproduced or otherwise incorporated as a part of a multimedia project created under Section 2. Any alterations to a musical work shall not change the basic melody or the fundamental character of the work.

4.2.4 Illustrations and Photographs

The reproduction or incorporation of photographs and illustrations is more difficult to define with regard to fair use because fair use usually precludes the use of an entire work. Under these guidelines a photograph or illustration may be used in its entirety but no more than 5 images by an artist or photographer may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2. When using photographs and illustrations from a published collective work, not more than 10% or 15 images, whichever is less, may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2.

4.2.5 Numerical Data Sets

Up to 10% or 2500 fields or cell entries, whichever is less, from a copyrighted database or data table may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines. A field entry is defined as a specific item of information, such as a name or social security number, in a record of a database file. A cell entry is defined as the intersection where a row and a column meet on a spreadsheet.

4.3 Copying and Distribution Limitations

Only a limited number of copies, including the original, may be made of an educator's educational multimedia project. For all of the uses permitted by Section 3, there may be no more than two use copies, only one of which may be placed on reserve as described in Section 3.2.3.

An additional copy may be made for preservation purposes but may only be used or copied to replace a use

copy that has been lost, stolen, or damaged. In the case of a jointly created educational multimedia project, each principal creator may retain one copy but only for the purposes described in Sections 3.3 and 3.4 for educators and in Section 3.1 for students.

5. EXAMPLES OF WHEN PERMISSION IS REQUIRED

5.1 Using Multimedia Projects for Non-Educational or Commercial Purposes

Educators and students must seek individual permissions (licenses) before using copyrighted works in educational multimedia projects for commercial reproduction and distribution.

5.2 Duplication of Multimedia Projects Beyond Limitations Listed in These Guidelines

Even for educational uses, educators and students must seek individual permissions for all copyrighted works incorporated in their personally created educational multimedia projects before replicating or distributing beyond the limitations listed in Section 4.3.

5.3 Distribution of Multimedia Projects Beyond Limitations Listed in These Guidelines

Educators and students may not use their personally created educational multimedia projects over electronic networks, except for uses as described in Section 3.2.3, without obtaining permissions for all copyrighted works incorporated in the program.

6. IMPORTANT REMINDERS

6.1 Caution in Downloading Material From the Internet

Educators and students are advised to exercise caution in using digital material downloaded from the Internet in producing their own educational multimedia projects, because there is a mix of works protected by copyright and works in the public domain on the network. Access to works on the Internet does not automatically mean that these can be reproduced and reused without permission or royalty payment, and, furthermore, some copyrighted works may have been posted to the Internet without authorization of the copyright holder.

6.2 Attribution and Acknowledgement

Educators and students are reminded to credit the sources and display the copyright notice and copyright ownership information if this is shown in the original source, for all works incorporated as part of educational multimedia projects prepared by educators and students, including those prepared under fair use. Crediting the source must adequately identify the source of the work, giving a full bibliographic description where available (including author, title, publisher, and place and date of publication). The copyright ownership information includes the copyright notice (©, year of first publication and name of the copyright holder).

The credit and copyright notice information may be combined and shown in a separate section of the educational multimedia project (e.g., credit section) except for images incorporated into the project for the uses described in Section 3.2.3. In such cases, the copyright notice and the name of the creator of the image must be incorporated into the image when, and to the extent, such

information is reasonably available; credit and copyright notice information is considered incorporated if it is attached to the image file and appears on the screen when the image is viewed. In those cases when displaying source credits and copyright ownership information on the screen with the image would be mutually exclusive with an instructional objective (e.g., during examinations in which the source credits and/or copyright information would be relevant to the examination questions), those images may be displayed without such information being simultaneously displayed on the screen. In such cases, this information should be linked to the image in a manner compatible with such instructional objectives.

6.3 Notice of Use Restrictions

Educators and students are advised that they must include on the opening screen of their multimedia project and any accompanying print material a notice that certain materials are included under the fair use exemption of the U.S. Copyright Law and have been prepared according to the educational multimedia fair use guidelines and are restricted from further use.

6.4 Future Uses Beyond Fair Use

Educators and students are advised to note that if there is a possibility that their own educational multimedia project incorporating copyrighted works under fair use could later result in broader dissemination, whether or not as commercial product, it is strongly recommended that they take steps to obtain permissions during the development process for all copyrighted portions rather than waiting until after completion of the project.

6.5 Integrity of Copyrighted Works: Alterations

Educators and students may make alterations in the portions of the copyrighted works they incorporate as part of an educational multimedia project only if the alterations support specific instructional objectives. Educators and students are advised to note that alterations have been made.

6.6 Reproduction or Decompilation of Copyrighted Computer Programs

Educators and students should be aware that reproduction or decompilation of copyrighted computer programs and portions thereof, for example the transfer of underlying code or control mechanisms, even for educational uses, are outside the scope of these guidelines.

6.7 Licenses and Contracts

Educators and students should determine whether specific copyrighted works or other data or information are subject to a license or contract. Fair use and these guidelines shall not preempt or supersede licenses and contractual obligations.

Agreed September 1996

DISTANCE LEARNING

The Conference on Fair Use addressed a number of fair use issues. In addition to adopting the previously outlined multimedia guidelines, the conferees released drafts of fair use guidelines for distance learning and digital images.

PROPOSED EDUCATIONAL FAIR USE GUIDELINES FOR DISTANCE LEARNING

1. PERFORMANCE & DISPLAY OF AUDIOVISUAL AND OTHER COPYRIGHTED WORKS

1.1 Preamble

Fair use is a legal principle that provides certain limits on the exclusive rights of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educational institutions, educators, scholars and students who wish to use copyrighted works for distance education under fair use rather than by seeking authorization from the copyright owners for non-commercial purposes. The guidelines apply to fair use only in the context of copyright.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act sets forth four fair use factors that should be considered in each instance, based on the particular facts of a given case, to determine whether a use is a fair use: (1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the 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.

While only the courts can authoritatively determine whether a particular use is a fair use, these guidelines represent the endorsers' consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The endorsers also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain—such as U.S. government works or works on which the copyright has expired for which there are no copyright restrictions—or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works, and users should refer to the applicable license terms for guidance.

The participants who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase, there may come a time when it is necessary to revise these guidelines. Nothing in these guidelines should be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of distance education. The guidelines do not cover non-educational or commercial digitization or use at any time, even by nonprofit educational institutions. The guidelines are not intended to cover fair use of copyrighted works in other educational contexts, such as educational multimedia projects, electronic reserves, or digital images, which may be addressed in other fair use guidelines.

This preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright protection of these guidelines is claimed by any person or entity.

1.2 Background

Section 106 of the Copyright Act defines the right to perform or display a work as an exclusive right of the copyright holder. The Act also provides, however, some exceptions under which it is not necessary to ask the copyright holder's permission to perform or display a work. One is the fair use exception contained in Section 107, which is summarized in the preamble. Another set of exceptions, contained in Sections 110(1)–(2), permits instructors and students to perform or display copyrighted materials without permission from the copyright holder under certain carefully defined conditions.

Section 110(1) permits teachers and students in a nonprofit educational institution to perform or display any copyrighted work in the course of face-to-face teaching activities. In face-to-face instruction, such teachers and students may act out a play, read aloud a poem, display a cartoon or a slide, or play a videotape so long as the copy of the videotape was lawfully obtained. In essence, Section 110(1) permits performance and display of any kind of copyrighted work, and even a complete work, as a part of face-to-face instruction.

Section 110(2) permits performance of a nondramatic literary or musical work or display of any work as a part of a transmission in some distance learning contexts, under the specific conditions set out in that Section.

Section 110(2) does not permit performance of dramatic or audiovisual works as a part of a transmission. The statute further requires that the transmission be directly related and of material assistance to the teaching content of the transmission and that the transmission be received in a classroom or other place normally devoted to instruction or by persons whose disabilities or special circumstances prevent attendance at a classroom or other place normally devoted to instruction.

The purpose of these guidelines is to provide guidance for the performance and display of copyrighted works in some of the distance learning environments that have developed since the enactment of Section 110 and that may not meet the specific conditions of Section 110(2). They permit instructors who meet the conditions of these guidelines to perform and display copyrighted works as if they were engaged in face-to-face instruction. They may, for example, perform an audiovisual work, even a complete one, in a one-time transmission to students so long as they meet the other conditions of these guidelines. They may not, however, allow such transmissions to result in copies for students unless they have permission to do so, any more than face-to-face instructors may make copies of audiovisual works for their students without permission.

The developers of these guidelines agree that these guidelines reflect the principles of fair use in combination with the specific provisions of Sections 110(1)–(2). In most respects, they expand the provisions of Section 110(2). In some cases, students and teachers in distance learning situations may want to perform and display only small portions of copyrighted works that may be permissible under the fair use doctrine even in the absence of these guidelines. Given the specific limitations set out in Section 110(2), however, the participants believe that

there may be a higher burden of demonstrating that fair use under Section 107 permits performance or display of more than a small portion of a copyrighted work under circumstances not specifically authorized by Section 110(2).

1.3 Distance Learning in General

Broadly viewed, distance learning is an educational process that occurs when instruction is delivered to students physically remote from the location or campus of program of origin, the main campus, or the primary resources that support instruction. In this process, the requirements for a course or program may be completed through remote communications with instructional and support staff, including either one-way or two-way written, electronic, or other media forms.

Distance education involves teaching through the use of telecommunications technologies to transmit and receive various materials through voice, video, and data. These avenues of teaching often constitute instruction on a closed system limited to students who are pursuing educational opportunities as part of a systematic teaching activity or curriculum and are officially enrolled in the course. Examples of such analog and digital technologies include telecourses, audio and video teleconferences, closed broadcast and cable television systems, microwave and ITFS, compressed and full-motion video, fiber optic networks, audiographic systems, interactive videodisk, satellite-based and computer networks.

2. APPLICABILITY AND ELIGIBILITY

2.1 Applicability of the Guidelines

These guidelines apply to the performance of lawfully acquired copyrighted works not included under Section 110(2) (such as a dramatic work or an audiovisual work) as well as to uses not covered for works that are included in Section 110(2). The covered uses are (1) live interactive distance learning classes (i.e., a teacher in a live class with all or some of the students at remote locations) and (2) faculty instruction recorded without students present for later transmission. They apply to delivery via satellite, closed circuit television or a secure computer network. They do not permit circumventing anti-copying mechanisms embedded in copyrighted works.

These guidelines do not cover asynchronous delivery of distance learning over a computer network, even one that is secure and capable of limiting access to students enrolled in the course through PIN or other identification system. Although the participants believe fair use of copyrighted works applies in some aspects of such instruction, they did not develop fair use guidelines to cover these situations because the area is so unsettled. The technology is rapidly developing, educational institutions are just beginning to experiment with these courses, and publishers and other creators of copyrighted works are in the early stages of developing materials and experimenting with marketing strategies for computer network delivery of distance learning materials. Thus, consideration of whether fair use guidelines are needed for asynchronous computer network delivery of distance learning courses perhaps should be revisited in three to five years.

In some cases, the guidelines do not apply to specific materials because no permission is required, either because the material to be performed or displayed is in the public domain, or because the instructor or the institution controls all relevant copyrights. In other cases, the guidelines do not apply because the copyrighted material is already subject to a specific agreement. For example, if the material was obtained pursuant to a license, the terms of the license apply. If the institution has received permission to use copyrighted material specifically for distance learning, the terms of the permission apply.

2.2 Eligibility

2.2.1 Eligible Educational Institutions

These guidelines apply to nonprofit educational institutions at all levels of instruction whose primary focus is supporting research and instructional activities of educators and students but only to their nonprofit activities. They also apply to government agencies that offer instruction to their employees.

2.2.2 Eligible Students

Only students officially enrolled for the course at an eligible institution may view the transmission that contains works covered by these guidelines. This may include students enrolled in the course who are currently matriculated at another eligible institution. These guidelines are also applicable to government agency employees who take the course or program offered by the agency as a part of their official duties.

3. WORKS PERFORMED FOR INSTRUCTION

3.1 Relation to Instruction

Works performed must be integrated into the course, must be part of systematic instruction and must be directly related and of material assistance to the teaching content of the transmission. The performance may not be for entertainment purposes.

4. TRANSMISSION AND RECEPTION

4.1 Transmission (delivery)

Transmission must be over a secure system with technological limitations on access to the class or program such as a PIN number, password, smartcard, or other means of identification of the eligible student.

4.2 Reception

Reception must be in a classroom or other similar place normally devoted to instruction or any other site where the reception can be controlled by the eligible institution. In all such locations, the institution must utilize technological means to prevent copying of the portion of the class session that contains performance of the copyrighted work.

5. LIMITATIONS

5.1 One Time Use

Performance of an entire copyrighted work or a large portion thereof may be transmitted only once for a distance learning course. For subsequent performances, displays or access, permission must be obtained.

5.2 Reproduction and Access to Copies

5.2.1 Receiving Institution

The institution receiving the transmission may record or copy classes that include the performance of an entire copyrighted work, or a large portion thereof, and retain the recording or copy for up to 15 consecutive class days (i.e., days in which the institution is open for regular instruction) for viewing by students enrolled in the course. Access to the recording or copy for such viewing must be in a controlled environment such as a classroom, library, or media center, and the institution must prevent copying by students of the portion of the class session that contains the performance of the copyrighted work. If the institution wants to retain the recording or copy of the transmission for a longer period of time, it must obtain permission from the rightsholder or delete the portion which contains the performance of the copyrighted work.

5.2.2 Transmitting Institution

The transmitting institution may, under the same terms, reproduce and provide access to copies of the transmission containing the performance of a copyrighted work; in addition, it can exercise reproduction rights provided in Section 112(b).

6. MULTIMEDIA

6.1 Commercially Produced Multimedia

If the copyrighted multimedia work was obtained pursuant to a license agreement, the terms of the license apply. If, however, there is no license, the performance of the copyrighted elements of the multimedia works may be

transmitted in accordance with the provisions of these guidelines.

7. EXAMPLES OF WHEN PERMISSION IS REQUIRED

7.1 Commercial Uses

Any commercial use including the situation where a nonprofit educational institution is conducting courses for a for-profit corporation for a fee such as supervisory training courses or safety training for the corporation's employees.

7.2 Dissemination of Recorded Courses

An institution offering instruction via distance learning under these guidelines wants to further disseminate the recordings of the course or portions that contain performance of a copyrighted work.

7.3 Uncontrolled Access to Classes

An institution (agency) wants to offer a course or program that contains the performance of copyrighted works to non-employees.

7.4 Use Beyond the 15-Day Limitation

An institution wishes to retain the recorded or copied class session that contains the performance of a copyrighted work not covered in Section 110(2). (It also could delete the portion of the recorded class session that contains the performance.)

Draft Released December 1996

DIGITAL IMAGES

The Conference on Fair Use issued proposed guidelines for digital images at the same time it released its proposed guidelines for distance education.

PROPOSED EDUCATIONAL FAIR USE GUIDELINES FOR DIGITAL IMAGES

1. Introduction

1.1 Preamble

Fair use is a legal principle that provides certain limitations on the exclusive rights of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educational institutions, educators, scholars, and students who wish to digitize copyrighted visual images under fair use rather than by seeking authorization from the copyright owners for non-commercial educational purposes. These guidelines apply to fair use only in the context of copyright.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act sets forth four fair use factors that should be assessed in each instance, based on the particular facts of a given case, to determine whether a use is a fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the 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. While only the courts can authoritatively determine whether a particular use is fair use, these guidelines represent the

endorsers' consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The endorsers also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain—such as U.S. government works or works on which copyright has expired for which there are no copyright restrictions—or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works, and users should refer to the applicable license terms for guidance.

The participants who developed these guidelines met for an extended period of time, and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase, there may come a time when it is necessary to review the guidelines. Nothing in these guidelines should be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of digital images. These guidelines do not cover non-educational or commercial digitization or use at any time, even by nonprofit educational institutions. These guidelines are not intended to cover fair use of copyrighted works in other educational contexts such as educational multimedia projects, distance education, or electronic reserves, which may be addressed in other fair use guidelines.

This preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright

protection of these guidelines is claimed by any person or entity.

1.2 Background: Rights in Visual Images

As photographic and electronic technology has advanced, the making of high-quality reproductions of visual images has become easier, cheaper, and more widely accessible. However, the fact that images may be easily available does not automatically mean they can be reproduced and reused without permission. Confusion regarding intellectual property rights in visual images arises from the many ways that images are created and the many sources that may be related to any particular image. Clearing permission, when necessary, requires identifying the holder of the applicable rights. Determining all the holders of the rights connected with an image requires an understanding of the source of the image, the content portrayed, and the creation of the image, both for original visual images and for reproductions of images.

Visual images can be original works or reproductions of other works; in some cases, original works may incorporate reproductions of other works as well. Often, a digital image is several generations removed from the visual image it reproduces. For example, a digital image of a painting may have been scanned from a slide, which was copied from a published book that contained a printed reproduction of the work of art; this reproduction may have been made from a color transparency photographed directly from the original painting. There may be intellectual property rights in the original painting, and each additional stage of reproduction in this chain may involve another layer of rights.

A digital image can be an original visual image, a reproduction, a published reproduction, or a copy of a

published reproduction. An original visual image is a work of art or an original work of authorship (or a part of a work), fixed in digital or analog form and expressed in a visual medium. Examples include graphic, sculptural, and architectural works, as well as stills from pictures or other audio-visual works. A reproduction is a copy of an original visual image in digital or analog form. The most common forms of reproductions are photographic, including prints, 35 mm slides, and color transparencies. The original visual image shown in a reproduction is often referred to as the “underlying work.” Digital images can be reproductions of either original visual images or of other reproductions. A published reproduction is a reproduction of an original visual image appearing in a work distributed in copies and made available to the public by sale or other transfer of ownership, or by rental, lease, or lending. Examples include a plate in an exhibition catalog that reproduces a work of art, and a digital image appearing in a CD-ROM or online. A copy of a published reproduction is a subsequent copy made of a published reproduction of an original visual image, for example, a 35 mm slide that is a copy of an image in a book.

The rights in images in each of these layers may be held by different rightsholders; obtaining rights to one does not automatically grant rights to use another, and therefore all must be considered when analyzing the rights connected with an image. Rights to use images will vary depending not only on the identities of the layers of rightsholders, but also on other factors such as the terms of any bequest or applicable license.

1.3 Applicability of These Guidelines

These guidelines apply to the creation of digital images and their use for educational purposes. The guidelines

cover (1) pre-existing analog image collections and (2) newly acquired analog visual images. These guidelines do not apply to images acquired in digital form, or to images in the public domain, or to works for which the user has obtained the relevant and necessary rights for the particular use.

Only lawfully acquired copyrighted analog images (including original visual images, reproductions, published reproductions, and copies of published reproductions) may be digitized pursuant to these guidelines. These guidelines apply only to educational institutions, educators, scholars, students, and image collection curators engaging in instructional, research, or scholarly activities at educational institutions for educational purposes.

1.4 Definitions

Educational institutions are defined as nonprofit organizations whose primary purpose is supporting the nonprofit instructional, research, and scholarly activities of educators, scholars, and students. Examples of educational institutions include K–12 schools, colleges, and universities; libraries, museums, hospitals, and other nonprofit institutions also are considered educational institutions under this definition when they engage in nonprofit instructional, research, or scholarly activities for educational purposes. Educational purposes are defined as non-commercial instruction or curriculum-based teaching by educators to students at nonprofit educational institutions, and research and scholarly activities, defined as planned non-commercial study or investigation directed toward making a contribution to a field of knowledge and non-commercial presentation of research findings at peer conferences, workshops, or seminars.

Educators are faculty, teachers, instructors, curators, librarians, archivists, or professional staff who engage in instructional, research, or scholarly activities for educational purposes as their assigned responsibilities at educational institutions; independent scholars also are considered educators under this definition when they offer courses at educational institutions. Students are participants in instructional, research, or scholarly activities for educational purposes at educational institutions.

A digital image is a visual work stored in binary code (bits and bytes). Examples include bitmapped images (encoded as a series of bits and bytes each representing a particular pixel or part of the image) and vector graphics (encoded as equations and/or algorithms representing lines and curves). An analog image collection is an assemblage of analog visual images systematically maintained by an educational institution for educational purposes in the form of slides, photographs, or other stand-alone visual media. A pre-existing analog image collection is one in existence as of [December 31, 1996]. A newly acquired analog visual image is one added to an institution's collection after [December 31, 1996].

A visual online catalog is a database consisting of thumbnail images of an institution's lawfully acquired image collection, together with any descriptive text including, for example, provenance and rights information that is searchable by a number of fields, such as source. A thumbnail image, as used in a visual online catalog or image browsing display to enable visual identification of records in an educational institution's image collection, is a small scale, typically low-resolution digital reproduction that has no intrinsic commercial or reproduction value.

2. Image Digitization and Use by Educational Institutions

This Section covers digitization by educational institutions of newly acquired analog visual images and Section 6 covers digitization of pre-existing analog image collections. Refer to the applicable section depending on whether you are digitizing newly acquired or pre-existing analog visual works.

2.1 Digitizing by Institutions: Newly Acquired Analog Visual Images

An educational institution may digitize newly, lawfully acquired analog visual images to support the permitted educational uses under these guidelines unless such images are readily available in usable digital form for purchase or license at a fair price. Images that are readily available in usable digital form for purchase or license at a fair price should not be digitized for addition to an institutional image collection without permission.

2.2 Creating Thumbnail Images

An educational institution may create thumbnail images of lawfully acquired images for inclusion in a visual catalog for use at the institution. These thumbnail images may be combined with descriptive text in a visual catalog that is searchable by a number of fields, such as the source.

2.3 Access, Display, and Distribution on an Institution's Secure Network

Subject to the time limitations in Section 2.4, an educational institution may display and provide access to images digitized under these guidelines through its own secure electronic network. When displaying digital images on such networks, an educational institution should

implement technological controls and institutional policies to protect the rights of copyright owners, and use best efforts to make users aware of those rights. In addition, the educational institution must provide notice stating that digital images on its secure electronic network shall not be downloaded, copied, retained, printed, shared, modified, or otherwise used, except as provided for in the permitted educational uses under these guidelines.

2.3.1 Visual Online Catalog

An educational institution may display a visual online catalog, which includes the thumbnail images created as part of the institution's digitization process, on the institution's secure electronic network, and may provide access to such catalog by educators, scholars, and students affiliated with the educational institution.

2.3.2 Course Compilations of Digital Images

An educational institution may display an educator's compilation of digital images (see also Section 3.1.2) on the institution's secure electronic network for classroom use, after-class review, or directed study, provided that there are technological limitations (such as a password or PIN) restricting access only to students enrolled in the course. The institution may display such images on its secure electronic network only during the semester or term in which that academic course is given.

2.3.3 Access, display, and distribution beyond the institution's secure electronic network

Electronic access to or display or distribution of images digitized under these guidelines, including the thumbnail images in the institution's visual online catalog, is not permitted beyond the institution's own electronic network,

even for educational purposes. However, those portions of the visual online catalog that do not contain images digitized under these guidelines, such as public domain images and text, may be accessed, displayed, or distributed beyond the institution's own secure electronic network.

2.4 Time Limitations for Use of Images Digitized by Institutions from Newly Acquired Analog Visual Images

An educational institution may use and retain in digital image collections images that are digitized from newly acquired analog visual images under these guidelines as long as the retention and use comply with the following conditions:

2.4.1 Images digitized from a known source and not readily available in usable digital form for purchase or license at a fair price may be used for one academic term and may be retained in digital form while permission is being sought. Permission is required for uses beyond the initial use; if permission is not received, any use is outside the scope of these guidelines and subject to the four-factor fair use analysis (Section 1.1).

2.4.2 Where the rightsholder of an image is unknown, a digitized image may be used for up to 3 years from first use, provided that a reasonable inquiry (see Section 5.2) is conducted by the institution seeking permission to digitize, retain, and reuse the digitized image. If, after 3 years, the educational institution is unable to identify sufficient information to seek permission, any further use of the image is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1).

3. Use by Educators, Scholars, and Students

Subject to the time limitations in Section 2.4, images digitized under these guidelines may be used by educators, scholars, and students as follows:

3.1 Educator Use of Images Digitized Under These Guidelines

3.1.1 An educator may display digital images for educational purposes, including face-to-face teaching of curriculum-based courses, and research and scholarly activities at a nonprofit educational institution.

3.1.2 An educator may compile digital images for display on the institution's secure electronic network (see also Section 2.3.2) to students enrolled in a course given by that educator for classroom use, after-class review, or directed study, during the semester or term in which the educator's related course is given.

3.2 Use of Images for Peer Conferences

Educators, scholars, and students may use or display digital images in connection with lectures or presentations in their fields, including uses at non-commercial professional development seminars workshops, and conferences where educators meet to discuss issues relevant to their disciplines or present works they created for educational purposes in the course of research, study, or teaching.

3.3 Use of Images for Publications

These guidelines do not cover reproducing and publishing images in publications, including scholarly publications in print or digital form, for which permission is generally required. Before publishing any images under fair use, even for scholarly and critical purposes, scholars and scholarly publishers should conduct the four-factor fair use analysis (see Section 1.1).

3.4 Student Use of Images Digitized Under These Guidelines

Students may:

- Use digital images in an academic course assignment such as a term paper or thesis, or in fulfillment of degree requirements.
- Publicly display their academic work incorporating digital images in courses for which they are registered and during formal critiques at a nonprofit educational institution.
- Retain their academic work in their personal portfolios for later uses such as graduate school and employment applications. Other student uses are outside the scope of these guidelines and are subject to the four-factor fair use analysis (see Section 1.1).

4. Image Digitization by Educators, Scholars, and Students for Spontaneous Use

Educators, scholars, and students may digitize lawfully acquired images to support the permitted educational uses under these guidelines if the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission. Images digitized for spontaneous use do not

automatically become part of the institution's image collection. Permission must be sought for any reuse of such digitized images or their addition to the institution's image collection.

5. Important Reminders and Fair Use Limitations Under These Guidelines

5.1 Creation of Digital Image Collections

When digitizing copyrighted images as permitted under these guidelines, an educational institution should simultaneously conduct the process of seeking permission to retain and use the images.

Where the rightsholder is unknown, the institution should pursue and is encouraged to keep records of its reasonable inquiry (see Section 5.2).

Rightsholders and others who are contacted are encouraged to respond promptly to inquiries.

5.2 Reasonable Inquiry

A reasonable inquiry by an institution for the purpose of clearing rights to digitize and use digital images includes, but is not limited to, conducting each of the following steps: (1) checking any information within the control of the educational institution, including slide catalogs and logs, regarding the source of the image; (2) asking relevant faculty, departmental staff, and librarians, including visual resource collections administrators, for any information regarding the source of the image; (3) consulting standard reference publications and databases for information regarding the source of the image; and (4) consulting rights reproduction collectives and/or major

professional associations representing image creators in the appropriate medium.

5.3 Attribution and Acknowledgement

Educators, scholars, and students should credit the sources and display the copyright notice(s) with any copyright ownership information shown in the original source for all images digitized by educators, scholars, and students, including those digitized under fair use. Crediting the source means adequately identifying the source of the work, giving a full bibliographic description where available (including the creator/author, title, publisher, and place and date of publication) or citing the electronic address if the work is from a network source. Educators, scholars, and students should retain any copyright notice or other proprietary rights notice placed by the copyright owner or image archive or collection on the digital image, unless they know that the work has entered the public domain or that the copyright ownership has changed. In those cases when source credits and copyright ownership information cannot be displayed on the screen with the image for educational reasons (e.g., during examinations), this information should still be linked to the images.

5.4 Licenses and Contracts

Institutions should determine whether specific images are subject to license or contract; a license or contract may limit the uses of those images.

5.5 Portions from Single Sources Such as Published Compilations or Motion Pictures

When digitizing and using individual images from a single source such as a published compilation (including but not limited to books, slide sets, and digital image collections),

or individual frames from motion pictures or other audiovisual works, institutions and individuals should be aware that fair use limits the number and substantiality of the images that may be used from a single source. In addition, a separate copyright in a compilation may exist. Further, fair use requires consideration of the effect of the use on the potential market for or value of the copyrighted work. The greater the number and substantiality of images taken from a single source, the greater the risk that the use will not be fair use.

5.6 Portions of Individual Images

Although the use of entire works is usually not permitted fair use, it is generally appropriate to use images in their entirety in order to respect the integrity of the original visual image, as long as the limitations on use under these guidelines are in place. For purposes of electronic display, however, portions of an image may be used to highlight certain details of the work for educational purposes as long as the full image is displayed or linked to the portion.

5.7 Integrity of Images: Alterations

In order to maintain the integrity of copyrighted works, educators, scholars, and students are advised to exercise care when making any alterations in a work under fair use for educational purposes such as criticism, comment, teaching, scholarship, and research. Furthermore, educators, scholars, and students should note the nature of any changes they make to original visual images when producing their own digital images.

5.8 Caution in Downloading Images from Other Electronic Sources

Educators, scholars, and students are advised to exercise caution in using digital images downloaded from other sources, such as the Internet. Such digital environments contain a mix of works protected by copyright and works in the public domain, and some copyrighted works may have been posted to the Internet without authorization of the copyright holder.

6. Transition Period for Pre-Existing Analog Image Collections

6.1 Context

Pre-existing visual resource collections in educational institutions (referred to in these guidelines as “pre-existing analog image collections”) often consist of tens of thousands of images that have been acquired from a wide variety of sources over a period of many years. Many pre-existing collections lack adequate source information for older images, and standards for accession practices are still evolving. In addition, publishers and vendors may no longer be in business, and information about specific images may no longer be available. For many images there may also be several layers of rightsholders: the rights in an original visual image are separate from rights in a reproduction of that image and may be held by different rightsholders. All these factors complicate the process of locating rightsholders, and seeking permissions for pre-existing collections will be painstaking and time consuming.

However, there are significant educational benefits to be gained if pre-existing analog image collections can be digitized uniformly and systematically. Digitization will

allow educators to employ new technologies using the varied and numerous images necessary in their current curricula. At the same time, rightsholders and educational institutions have concerns that images in some collections may have been acquired without permission or may be subject to restricted uses. In either case, there may be rightsholders whose rights and interests are affected by digitization and other uses.

The approach agreed upon by the representatives who developed these guidelines is to permit educational institutions to digitize lawfully acquired images as a collection and to begin using such images for educational purposes. At the same time, educational institutions should begin to identify the rightsholders and seek permission to retain and use the digitized images for future educational purposes. Continued use depends on the institutions' making a reasonable inquiry (see Section 5.2) to clear the rights in the digitized image. This approach seeks to strike a reasonable balance and workable solution for copyright holders and users who otherwise may not agree on precisely what constitutes fair use in the digital era.

6.2 Digitizing by Institutions: Images in Pre-Existing Analog Image Collections

6.2.1 Educational institutions may digitize images from pre-existing analog image collections during a reasonable transition period of 7 years (the approximate useful life of a slide) from [December 31, 1996]. In addition, educators, scholars, and students may begin to use those digitized images during the transition period to support the educational uses under these guidelines. When digitizing images during the transition period, institutions should simultaneously begin seeking the permission to digitize, retain, and reuse all such digitized images.

6.2.2 Digitization from pre-existing analog image collections is subject to limitations on portions from single sources such as published compilations or motion pictures (see Section 5.5). Section 6 of these guidelines should not be interpreted to permit the systematic digitization of images from an educational institution's collections of books, films, or periodicals as part of any methodical process of digitizing images from the institution's pre-existing analog image collection during the transition period.

6.2.3 If, after a reasonable inquiry (see Section 5.2), an educational institution is unable to identify sufficient information to seek appropriate permission during the transition period, continued retention and use is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1). Similarly, digitization and use of such collections after the expiration of the transition period is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1).

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SOFTWARE

In most cases, computer software is sold under very restrictive terms. Consequently, the copying of software beyond that allowed by those terms usually violates fair use. Nevertheless, this is not always the case. Therefore, in an effort to bring more clarity to this area, the Conference on Fair Use released a statement on the use of copyrighted computer programs in libraries. The statement offers different scenarios that are analyzed under fair use principles.

STATEMENT ON USE OF COPYRIGHTED COMPUTER PROGRAMS (SOFTWARE) IN LIBRARIES: SCENARIOS

These scenarios illustrate some uses of computer programs and multimedia works by nonprofit libraries, including those at nonprofit educational institutions, for administrative purposes and for on-site and off-site circulation, in light of the following provisions of the Copyright Act of 1976:

Section 107: Fair use privilege for certain unauthorized reproduction, distribution, adaptation, and public performance and display.

Section 109(b): Exemption from the software rental right for lending by nonprofit educational institutions, and exemption from the software rental right for lending by nonprofit libraries for nonprofit purposes.

Section 117: Exemption for archival “back-up” copies and adaptations essential for using computer program with machine.

Please note that the guidelines for classroom copying in not-for-profit educational institutions are explicitly limited to books and periodicals and do not encompass other types of copyrighted works, including computer programs.

1. Library Administration

General Rule: Unauthorized reproduction, distribution, or adaptation of computer programs for library administration is governed by the same rules as other end uses, and will be considered infringement unless it constitutes fair use under Section 107 or it is exempted under Section 117.

a. A nonprofit university library purchases a spreadsheet program for managing accounts payable, and the MIS director adapts the program so it can be used on the library's computers.

This use qualifies for the Section 117 exemption. The owner of a lawfully acquired copy of a computer program is permitted to make an adaptation of a computer program "as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner." If the library licenses, rather than purchases, the program, then it should refer to the license agreement or contact the copyright owner before making an adaptation.

b. The administrator of a nonprofit university library licenses a spreadsheet program for managing accounts payable, but the university business office uses a different program. The library administrator prepares monthly reports with the program, which are sent to the university's business office on diskette or via e-mail with a copy of the library's spreadsheet program.

No fair use defense or statutory exemption is available. Because the copy sent to the university business office was not lawfully made, this does not qualify for the nonprofit library lending exemption, or the nonprofit educational lending exemption permitting transfer of possession of computer programs to “faculty, staff, and students.”

c. Assume the same facts as in (b) above, except that the library administrator does not send the monthly report with a copy of the library’s spreadsheet program, but rather reformats the monthly report in text for transmission to the university business office.

Fair use defense or statutory exemptions are not necessary. Because the library administrator has not made an unauthorized reproduction or distribution of the spreadsheet program, it has not infringed the copyright.

d. A nonprofit library purchases a single-machine license for a spreadsheet program to be used in calculating employee payroll. A library employee opens the sealed envelope containing the CD-ROM or diskette and installs the computer program on a computer without reading the license agreement. Later, he makes a copy of the program and gives it to a colleague on the library staff, who loads it on her computer.

No fair use defense exists under Section 107. The library has infringed the copyright by making an unauthorized reproduction of the computer program, and there are no other statutory exemptions available.

e. A librarian busy archiving the papers of a noted alumna decides to work at home. To keep track of his hours, he makes a copy of the spreadsheet program installed on his

office computer and takes it home to install on his home computer.

No fair use defense or statutory exemption is available. Because many end-users now want to work at home as well as the office, many business application publishers now offer “single user licenses,” which permit the licensee to install and use the computer program on both an office and a home computer provided the two copies are not in use simultaneously.

f. A librarian licenses and installs a spreadsheet program to manage her budget. Two years later, the librarian licenses a functional upgrade for the program, installs it on her office computer, and installs the older version alone on her home computer.

No statutory exemption or fair use defense exists if a valid license for the functional upgrade prohibits transfer of the older version to another machine or another user. Software license agreements distinguish between functional upgrades of licensed software and the current version licensed by new customers. Because functional upgrades are licensed on the assumption that the customer has already licensed a previous version of the software, their prices are usually about two-thirds lower than the price of the current title for new customers. Therefore, most functional upgrade licenses restrict or prohibit the transfer of the previous version to another user or machine.

There is disagreement about whether the same result would be reached if the functional upgrade and the older version are part of the library collection.

g. Assume the same facts as in (f), except that the librarian obtains a full price license to the new version of the program, rather than the less expensive functional

upgrade, for her office computer, and installs the older version alone on her home computer.

It is unnecessary to consider fair use or statutory exemptions. Because the librarian has licensed two complete and independent programs, the copyright in the programs has not been infringed.

2. Lending Copies of Computer Programs to Library Patrons

General Rule: Provided that the required warning is placed on lawfully acquired copies of computer programs, they may be lent by nonprofit libraries to patrons for nonprofit purposes under Section 109(b) of the Copyright Act. In looking at these scenarios, keep in mind that the library patron may be liable for copyright infringement even if the library is not.

a. A nonprofit library possesses one copy of a popular word processing program pursuant to a valid license, affixes to the package the required copyright warning, and makes it available at the circulation desk for patrons to borrow.

This is permissible under Section 109(b)(2), provided that the lending library is unaware or has no substantial reason to believe that the computer is lent for a for-profit purpose.

b. Assuming the same facts as in (a). A student working on an English literature research paper borrows the word processing program and installs it on her personal computer. Later, when the word processing program is overdue, she returns the packaged copy to the library, but keeps the copy installed on her computer to complete the research paper.

Statutory exemptions are available to the library, but not to the student. The Section 109(b)(2) lending exemptions permit “transfer of possession” and “lending” of computer programs by schools and libraries for users, but not unauthorized reproduction by patrons. The library would not face liability unless contributory infringement or vicarious liability is proved, such as demonstrating that the library encouraged patrons to copy.

c. A nonprofit library loans its copy of applications software that was purchased, not licensed. The required warning is affixed to the package.

This is permissible under 109(b)(2) provided that the borrowing library is unaware or has no substantial reason to believe that the software is to be used for for-profit purposes. Lending the applications software is impermissible if the library acquired it under a license which did not permit loans.

d. A library purchases a book with supplemental software on a disk in the book pocket. The library lends the book with the accompanying software in response to an interlibrary loan request.

This is permissible under Section 109(b)(2), provided that the book and software is lent for a nonprofit purpose, and the library affixes to the book or disk the required copyright warning.

3. Patron Use From Remote Servers

a. A library at a nonprofit educational institution obtains a single-machine license for a popular word processing program, but makes it available via a campus-wide computer system that any number of students, faculty, and staff may access simultaneously from either on or off

campus. The required copyright warning is displayed whenever an end user signs on to the computer system.

The fair use defense and statutory exemptions are unavailable. The lending exemptions for nonprofit libraries and nonprofit educational institutions apply to lawfully made copies, but not to the unauthorized reproduction and public display that occurs with network distribution. The fair use defense also should not apply to this reproduction, despite its non-commercial purpose, because the entire computer program is reproduced, the computer program may be unpublished, and the serious commercial effect caused by lost license fees and pirated copies.

b. Assume the same facts as in (a), except that the library obtains a network version of the word processing program and a site license permitting simultaneous access for faculty, staff, and students.

There is no infringement by library or faculty, staff, or students.

c. A nonprofit library has installed a computer program on its network and made it available to patrons, pursuant to a license agreement, via on-site terminals. Despite warnings to the contrary, a patron copies the computer program onto a diskette for his personal use.

There is copyright infringement by the library patron, and neither the fair use defense nor a statutory exemption is available.

d. A student at a nonprofit educational institution licenses a computer program for her personal computer, and uploads the computer program to the school library's network, where it can be accessed and copied by several

hundred students, faculty and staff without permission of the copyright owner.

There is copyright infringement by the student. Her unauthorized reproduction of the computer program is not covered by Section 109(b) exemptions for nonprofit library lending for nonprofit purposes or nonprofit educational institutional lending.

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THE TEACH ACT

In an effort to address the poor fit between existing copyright law and the proliferation of distance learning, the Technology, Education, and Copyright Act (TEACH Act) was passed by Congress and signed into law by President George W. Bush. It applies only to accredited, nonprofit educational institutions and became effective November 2, 2002. The TEACH Act imposes certain affirmative obligations on educational institutions and faculty members that, if met, permit expanded uses of certain types of copyright-protected works in distance learning classes. That is, as long as the conditions are met, faculty members may use certain copyright-protected works in their distance learning classes without seeking permission or paying any royalties. If the conditions are not met, the copyright-protected materials may be used, but only if permission is obtained (and required royalties paid) or the use qualifies under the fair use rules.

Institutional Obligations

All the institutional obligations imposed by the TEACH Act are directed toward achieving copyright compliance. They include the creation of institutional policies, educating the institution's community, and implementing appropriate technological measures to prevent the unauthorized use, access, or distribution of copyright-protected works.

While the TEACH Act doesn't specifically dictate what they must address, it requires educational institutions to implement copyright policies. Most commentators agree that the likely expectation behind this requirement is that institutions will create and implement policies to guide faculty members and staff when they are incorporating copyright-protected works into distance learning classes. That is, the policies will form an institutional

standard for using copyright-protected works. Presumably some of this will be quite straightforward. For example, to be in compliance with copyright law, incorporated works must originate from a lawfully acquired copy (not a bootleg or pirated copy) of the work. In other areas, the standards will vary from institution to institution depending on many variables, one of which is risk tolerance.

Another provision of the TEACH Act conditions its protections on institutions providing faculty members, students, and relevant staff with information about copyright compliance. The specific language of the statute requires the materials to “accurately describe, and promote compliance with, the laws of the United States relating to copyright.” It doesn’t specify how this must be done, however. Consequently, institutions are free to develop and distribute this information in any manner appropriate. This may include providing the information via written materials, face-to-face workshops, distance learning instruction, or web sites. In addition to this general requirement to provide information, another provision of the TEACH Act imposes a specific duty to provide “notice to students that materials used in connection with the course may be subject to copyright protection.” The law does not specify the language to be used in this notice. Given the obligation to create and implement copyright policies discussed earlier, one strategy for complying with the notice requirement is simply to incorporate a provision in the copyright policies specifying the language to be used and where it is to be placed in distance learning courses so students are certain to see it.

From a technological perspective, the TEACH Act focuses on the security of the course content. One requirement of the TEACH Act is that the course content must be transmitted for the sole use of enrolled students. In most cases, courses delivered via learning management systems are password

protected and restricted to registered students, so this is not an issue. However, other course content made available to students online may not meet this requirement for limited access. For example, many faculty members develop web sites for their courses. Unsecure web sites do not satisfy the requirement of being transmitted solely for registered students. Therefore, greater care must be used when posting copyright-protected works to unsecure sites. Other technological requirements of the TEACH Act focus on limiting the retention of copyright-protected works beyond the time required for the course and interference with measures taken by copyright owners to control the storage and dissemination of their works. Generally, the responsibility for developing and implementing practices and procedures for compliance with the technologically oriented requirements of the TEACH Act will rest with those responsible for information technology administration.

What is Allowed by the TEACH Act

Prior to the TEACH Act, audiovisual works, sound recordings and many dramatic works could not be used in distance learning courses. Earlier versions of copyright law specifically prohibited such uses. In contrast, the TEACH Act specifically allows the performance of nondramatic literary and musical works in their entirety. Nondramatic literary works include such things as poetry and short stories. Nondramatic musical works includes most music except operas, music videos and musicals. In addition, the TEACH Act permits the transmission of any other performance (including dramatic and audiovisual works) as long as the portions used are limited and reasonable. Further, the TEACH Act permits the transmission of the display of any work as long as the display is comparable to that typically used in face-to-face instruction. Under this provision, still images may be transmitted as part of a distance learning course.

What is Prohibited by the TEACH Act

The TEACH Act specifically prohibits the use of certain types of copyright-protected works in distance learning courses. One provision explicitly states that a faculty member is not allowed to use copyright-protected materials if he or she knows or has reason to believe the materials were not lawfully made or acquired. It's worth noting that the TEACH Act does not limit this rule to situations in which the faculty member unlawfully made or acquired the work. It also applies, for example, to a pirated work someone else makes and gives or sells to the faculty member.

Another provision prohibits faculty members from using the rights granted under the TEACH Act to use copyright-protected works created and marketed for distance learning courses without paying for the right to do so. Similarly, the TEACH Act is specifically written so as not to apply to things like textbooks, coursepacks, or software students typically buy for their courses. Like many other dimensions of copyright law, the provisions of the TEACH Act are designed to balance the interest of society in access to copyright-protected works with the need to sustain incentives for authors and creators by appropriately protecting the marketplace.

FAIR USE ONLINE

In addition to the TEACH Act, fair use remains a viable tool for permitting the use of copyright-protected works without requiring each student to purchase materials or pay royalties after obtaining permission. Generally, with the notable exception of the specific types of transmissions regulated by the TEACH Act, any use that qualifies as a fair use in a traditional face-to-face classroom qualifies as a fair use in an online classroom environment as well. The following will examine a number of examples and how to approach them under the rules of copyright law and fair use.

Electronic Reserve

Given the nature of online courses, faculty members aren't in a position to place hard copies of materials on reserve and require students to come to campus to use them. However, many colleges and universities now have electronic reserve systems. Because this is an institutional service, many institutions have policies outlining permitted uses. That is the place to start. Electronic reserve materials should be selected and used in a manner consistent with institutional policy. If the material is in the library's collection (e.g., article from an electronic journal), it can be freely used by linking directly to it. If it is not in the collection and must be scanned to create an electronic document, it must be evaluated under fair use.

Generally, using a single article from an issue of a journal or single chapter from a book is not a problem under fair use as long as access is restricted to enrolled students. However, a fair use problem arises when that same article or chapter is used repeatedly (i.e., from semester to semester). Certainly, the first use falls under fair use. For repeated uses, either obtain permission or use an alternative work. The market for permissions has increased significantly with the advent of the Internet. Consequently, even though the law doesn't specifically address repeated uses, experts caution

that repeated uses of the same work are unlikely to be permitted under fair use. That advice is consistent with the types of limitations found in the guidelines. Similarly, when using charts, graphs and other images, limit the number taken from any single source. Look at the appropriate guidelines for a reference point.

Posting Materials Within A Learning Management System

Posting material within a learning management system is allowed as long as the posting qualifies as a fair use or permission is obtained and required royalties are paid. Posting materials refers to copying the work into a file that students access from within their learning management system. For example, an electronic file of a document is saved and the file containing the document is loaded into the course for students to download and view. This involves the acts of reproduction and distribution which are among the five exclusive (not absolute) rights of copyright owners. Consequently, it is allowed under fair use if the fair use factors are met. Like materials posted to electronic reserve, limitations must be met. As long as the portions are sufficiently small and the materials not used repeatedly, fair use allows posting works to a secured learning management system. Again, the appropriate guidelines are a good reference point.

Unsecured Class Web Sites

Unsecured class web sites present the greatest challenge under fair use. That is, by virtue of the fact that the web sites are not limited to enrolled students, anyone with access to the Internet may access and further disseminate posted materials. Consequently, fair use should not be relied on as the basis of copyright compliance when creating unsecured course web sites. Unsecured course web sites may lawfully contain documents and materials to which the faculty member creating it holds the copyright. Further, documents and materials may be posted as long as permission is

obtained from the copyright holder with appropriate acknowledgement provided and required royalties paid. Beyond that, linking to library resources or free materials available on the Internet are copyright compliant options.

Electronic Course Packs

Electronic course packs afford another option for providing materials to students. Some campus bookstores and private companies offer this service. When developed and delivered by a commercial enterprise, permissions must be obtained and required royalties paid. If a faculty member chooses to develop an electronic course pack delivered directly to students at no cost, fair use would apply. Essentially, this is the electronic equivalent of using the departmental copy machine and giving students hard copy handouts. However, the issues of avoiding repeated uses of the same material and appropriately limiting the amount reproduced and distributed remain.

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