

Campus Copyright Rights and Responsibilities:

A Basic Guide to Policy Considerations

securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

United States Constitution, Article I, Section 8, Clause 8

United States Constitution, Article I, Section 8, Clause 8

This document was developed by representatives of the Association of American Universities (John Vaughn), the Association of Research Libraries (Duane Webster and Mary Case), the Association of American University Presses (Peter Givler), and the Association of American Publishers (Allan Adler). These organizations represent sectors which play central roles within higher education in the creation, use, and management of copyrighted works. The principal objective of this project was to bring together these groups, which have differing perspectives and often conflicting views on the appropriate use of copyrighted works, to produce a document that conveys their common understanding regarding the basic meaning and practical significance of copyright for the higher education community. The association representatives above gratefully acknowledge the invaluable advice and drafting assistance of Professor Laura Gasaway (University of North Carolina, Chapel Hill) and attorney Bruce Joseph (Wiley Rein & Fielding LLP) in producing this document.

Copyright of the material in this booklet is held jointly by Association of American Universities, the Association of Research Libraries, the Association of American University Presses, and the Association of American Publishers. Permission is granted to reproduce and distribute copies of the work in its entirety for nonprofit educational or library purposes, provided that copies are distributed at or below cost, that the copyright notice is included on each copy, and that no alterations or modifications in the text are made.

December 2005

TABLE OF CONTENTS

Introduction.....	1
Importance and Purpose of Copyright.....	3
Part I: Copyright Basics.....	5
<u>Section</u>	
A. What is Copyright?.....	5
B. How Does a Copyright Come into Being?.....	6
C. Duration of Copyright and the Public Domain.....	6
D. Ownership of Copyright and Transfers.....	7
E. Licenses.....	8
F. Exceptions and Limitations on the Copyright Rights.....	9
G. Exceptions and Limitations on the Copyright Rights—Fair Use.....	9
H. Exceptions and Limitations on the Copyright Rights —Fair Use Guidelines.....	11
I. Exceptions and Limitations on the Copyright Rights —Face-to-Face Instruction.....	12
J. Exceptions and Limitations on the Copyright Rights —Distance Education.....	13
K. Exceptions and Limitations on the Copyright Rights—First Sale.....	15
L. Exceptions and Limitations on the Copyright Rights —Libraries and Archives.....	15
M. Copyright Infringement and Applicable Legal Remedies.....	17
N. Limitations on Liability for Infringement—Service Provider Liability.....	19
O. Technological Protection Measures.....	21
P. Special Case—State Institutions.....	21
Part II: Institutional Policy Issues.....	23
<u>Section</u>	
A. Why Adopt a Copyright Policy?.....	23
B. Educational Materials about Copyright Law.....	23
C. The Policy Requirements of the TEACH Act.....	24
D. The Policy Requirements of the Service Provider Liability Limitation.....	24
E. Other Potential Policy Issues—Faculty Ownership of Copyrights.....	26
F. Other Potential Policy Issues—Fair Use and the Classroom Guidelines.....	27
G. Other Potential Policy Issues—Coursepacks.....	27
H. Other Potential Policy Issues—Reserves and Electronic Reserves.....	28
Conclusion.....	30

INTRODUCTION

This document has been prepared by the Association of American Publishers, the Association of American Universities, the Association of American University Presses, and the Association of Research Libraries; and has been endorsed by the American Council on Education and the Authors Guild. It is intended for the following purposes:

- to present a basic explanation of copyright law with an emphasis on its application to colleges and universities;
- to provide a discussion of current copyright issues in the higher education setting that reflects the concerns and points of view of colleges and universities and the publishing community with which these institutions regularly interact and collaborate;
- to encourage colleges and universities to review their institutional policies on the use and management of copyrighted works in light of the continuing evolution of digital technologies and the numerous revisions to copyright and related laws generated in part by that evolution; and
- to provide information to colleges and universities concerning the development of educational materials for their students, faculty, and staff that provide guidance on the creation, use, and management of copyrighted works in this shifting legal and societal landscape.

Part I of this document provides a primer on copyright law. Part II addresses specific issues that may be relevant to development of an institutional copyright policy.

Copyright law protects the author's original expression in creative works such as writings, music, movies, art, and images. Copyright law should not be confused with trademark law, which protects symbols and other designations of the origin of a product or service, or with patent law, which protects inventions. Although all three are referred to generally as "intellectual property law," the subject matter and nature of protection in each are very different.

Why would universities and colleges find this document useful?

- Creation and use of copyrighted works lie at the heart of the educational and research activities of institutions of higher learning. Colleges and universities create and use hundreds of copyrighted works every day.
- Although the underlying principles of copyright have not substantially changed, the legal landscape has changed considerably as a result of a number of statutory amendments and court decisions.
- Developments in digital technologies have produced new ways to create and use copyrighted works, enhancing their availability and utility, while

simultaneously increasing the potential risks of infringement to copyright owners.

- As more copyrighted works are made available in digital formats, efforts are increasingly being made to control access and use by contractual licenses, rather than sale of a copy.
- Because educational institutions have become operators of digital networks, they should understand laws that can limit the risk of institutional liability for copyright infringement by faculty, students, and other network users, conditioned on certain institutional policies and actions.

This document is not intended to provide legal advice or serve as a substitute for consultation with competent legal counsel on matters regarding the development and implementation of institutional policies or compliance with copyright law.

Every institution appropriately will have its own approach to the formulation of institutional policy and the development of educational material. This document should not be read to suggest that any one policy or set of materials is appropriate for all institutions. Institutions have great flexibility to shape copyright policies and develop materials to meet their own needs. Similarly, copyright owners are likely to have their own views regarding uses of their copyrighted content in particular circumstances.

IMPORTANCE AND PURPOSE OF COPYRIGHT

Universities and colleges are major stakeholders in the world of copyright. As part of the scholarship, research, and teaching activities conducted at these institutions, faculty and students frequently create and exercise rights with respect to their own copyrighted works while also making extensive use of the copyrighted works of others.

The Constitution authorizes the enactment of copyright laws by granting to Congress the power to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” In practical terms, copyright law serves public ends by providing individuals with an incentive to pursue private ones: copyright rewards authors for the creative exercise of their talents through the provision of proprietary rights for the commercial exploitation of their works, which provides an economic incentive for them to create new works that advance the public welfare through the proliferation of knowledge and ideas.

At the same time, copyright law recognizes the public interest in ensuring the free flow of information and ideas, and imposes important restrictions on the scope of copyright that are designed to facilitate this free flow of information and ideas. Many of these limitations on the rights of copyright owners are particularly important in the academic environment and several are specifically designed for nonprofit educational institutions.

Copyright provides a basis for the publishing operations of university presses and scholarly societies, and makes possible the contributions of innumerable other authors and publishers to the educational process. In this capacity, copyright benefits colleges and universities economically in the form of payments from the sale or licensing of a work, and also provides important non-economic benefits that accrue to faculty authors, including heightened professional visibility and scholarly reputation, as well as preservation of the integrity of their creative works—all of which factor into considerations for tenure and promotion.

In sum, copyright law supports a fundamental mission of colleges and universities to create and disseminate new knowledge and understanding through teaching, research, and scholarship in two basic ways: (1) by providing incentives for the creation of new works through the provision of proprietary rights to copyright owners, and (2) by providing limitations on those rights in order to facilitate public access to and use of creative works.

SECTION A**WHAT IS COPYRIGHT?**

Copyright is a doctrine of federal law that invests the “author” of a creative work of original “expression” with certain exclusive rights, enforceable by law, for a limited period of time, and subject to defined limitations. U.S. copyright law is found in the Copyright Act, Title 17 of the United States Code. Unless otherwise noted, statutory references in this document are to the Copyright Act and Title 17.

These exclusive rights, set forth in Section 106 of Title 17, include the rights to do, and to authorize others to do, the following:

- reproduce copies of the work;
- distribute copies of the work to the public;
- create derivative works based on the work;
- perform the work publicly (in the case of certain types of works) and, in the case of sound recordings, to do so by digital transmission; and
- display the work publicly (in the case of certain types of works).

Violation of any of these rights, by engaging in the activity without authority from the copyright owner or a relevant statutory exception or limitation on the right at issue, is called “infringement” and is subject to potentially significant civil liability and, in certain cases, criminal liability. Infringement and the legal remedies for infringement are discussed in Part I.M.

Copyright can apply to a wide array of different types of works, including those identified in Sections 102(a) and 103:

- literary works (including novels, articles, texts, poems, and computer programs);
- musical works (the notes and lyrics written by songwriters);
- dramatic works (such as plays);
- pantomimes and choreographic works;
- pictorial, graphic and sculptural works (including photographs and drawings);
- motion pictures and other audiovisual works (including television programs and home movies);
- sound recordings (the sounds made by the performing artist and record company);
- architectural works; and
- compilations and databases of the foregoing and of other material (to the extent they reflect original “authorship” in the selection or arrangement of elements).

Copyright *cannot* apply to the following (even if they are contained within works of the types identified above) (see Section 102(b)):

- facts
- ideas
- processes or procedures
- concepts
- principles
- systems or methods of operation
- discoveries

Copyright does not apply to works created by an officer or employee of the United States Government, acting within the scope of his or her official duties. There is no similar exception with respect to works created by state or local government officials or employees. See Sections 105, 101.

In the United States, copyright is governed exclusively by federal law, which generally preempts state laws addressing the same rights.

The federal courts have exclusive jurisdiction to interpret, apply, and enforce the copyright statutes enacted by Congress, which means that state courts generally cannot consider copyright cases. See Section 301 (preemption) and 28 U.S.C. § 1338 (exclusive jurisdiction).

It is important to distinguish the *copyright* in a work from the *ownership* of a particular copy of a work. For example, ownership of a copy of a book does not include ownership of any of the copyright rights, such as the right to make copies of the content of that book. See Section 202. There are, however, specific exceptions and limitations on the copyright rights that allow the owner of a copy of a work to take certain actions with respect to that work that do not violate the exclusive rights of the copyright holder. See Parts I.F-L.

SECTION B

HOW DOES A COPYRIGHT COME INTO BEING?

A copyrightable original work of creative expression is protected by copyright automatically, from the moment it is fixed in any “tangible medium of expression” (such as paper, film, or a computer disk or memory) from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. For example, copyright attaches to a literary work such as an article or a novel as soon as the author writes it on paper or types it onto a computer hard drive. No other act or process need take place.

Although registration of a work with the U.S. Copyright Office is not necessary to obtain copyright protection, there are significant benefits to the copyright owner from registration if the owner must go to court to enforce a copyright against an alleged infringer. See discussion of remedies in Part I.M.

A work is protected by copyright even if it does not contain a formal copyright notice (the word “copyright,” abbreviation “copr.,” or symbol “©” with the year of first publication and name of the copyright owner), although works first published before March 1, 1989, without notice, may have entered the public domain (see discussion of the public domain in Part I.C).

SECTION C

DURATION OF COPYRIGHT AND THE PUBLIC DOMAIN

Copyrights may last for a long time. Determination of the precise term is complex and, in the United States, depends on when the work was first created and published.

- As a general rule, works first published before January 1, 1978, are protected for 95 years from the date of first publication, or 120 years from the date of creation, whichever is longer, but there are numerous exceptions.
- Works by named authors first published after January 1, 1978, are protected for the life of the author plus 70 years.
- “Works made for hire” (see Part I.D), anonymous works and pseudonymous works are protected for the 95- or 120-year term described above.
- As a result of the way copyright terms are calculated, and as a result of a 20-year extension of copyright terms enacted in 1998, a good rule of thumb is that works first published in the United States in 1922 and before are in the public domain.

A work whose term of copyright protection has expired, or a work that was not subject

to copyright protection (e.g., a work of the U.S. Government), is said to be “in the public domain.” Such a work may freely be copied, distributed, performed, displayed, or otherwise used in ways unrestricted by copyright rights.

International copyright is quite complex and is beyond the scope of this brochure. Copyright is territorial, but the U.S. has copyright agreements with the vast majority of countries of the world. A general rule of thumb is that works by authors of those countries or works first published in those countries are protected in the U.S. as if they were U.S. works, with some exceptions and differences.

Copyright notice was required to be placed on published works prior to 1989. Works published under the authority of the copyright owner without copyright notice prior to March 1, 1989, are likely to be in the public domain, but their status should be checked.

SECTION D

OWNERSHIP OF COPYRIGHT AND TRANSFERS

As noted, the initial owner of the copyright in a work is the “author” of the work. A surprising number of issues can arise relating to identification of the “author.”

Normally, the author of a work created by an individual is the individual.

A “joint work” is defined as a work created jointly by two or more authors with the intention that their contributions be merged into inseparable parts of a single work. Each author owns an undivided interest in a joint work, and may freely use and exploit the rights in the work, subject to a duty to share the profits from such exploitation with the other joint author(s).

The “author” of a work created by an employee acting within the scope of his or her employment is the employer, which may be a person or an entity, such as a corporation. This is the so-called “work made for hire” doctrine. There are certain complexities:

- The status of a person as an employee is typically analyzed under the common law applicable to the employee-employer relationship, not a special copyright rule. The courts have identified relevant factors to be considered in making this determination.
- An independent contractor is not an employee. However, there is a special rule by which the work of an independent contractor also may be a “work made for hire.” Specifically, the work must fall within one of nine enumerated categories (notably including instructional texts, translations, tests, answer materials for tests, compilations, and audiovisual works, but not computer programs) and the parties must agree in writing that the work is a “work made for hire.”
- The ownership of copyright in course materials and writings created by university and college faculty acting within the scope of their employment, particularly new forms of digital course materials, raises a complex set of issues. For a more detailed discussion, see Part II.E.

Ownership of all or any part of any right under a copyright may be shared or transferred, in whole or in part, by the author. This is often the case when a work is to be published, as publishers often seek ownership of the copyright, or at least of the exclusive right to distribute copies of the work within the United States and certain other rights.

Transfer of ownership of all or any part of a copyright must be accomplished in writing signed by the transferor. A transfer of the entire copyright is often referred to as an “assignment.”

Each of the copyright rights is divisible across numerous parameters (for example, by time period, geographical area, medium, etc.) and transfers may be for all or any such division of one or more of the rights. Examples of partial transfers include: transfers of all or some of the exclusive rights for a limited period of time; transfers of certain rights limited by territory; transfer of rights (e.g., distribution) in certain forms, or by certain media.

Only the “owner” of a relevant right under the copyright may bring an infringement action.

SECTION E

LICENSES

A license is a grant of rights to a third party to exercise all or part of one or more of the copyright rights. Again, the rights are divisible across numerous parameters for purpose of licensing.

Licenses may be “exclusive” or “non-exclusive.” Exclusive licenses grant the right to exercise all or part of the copyright rights to a single person or entity. Exclusive licenses are treated under the law as transfers of ownership of the licensed rights. Thus, they must be in writing and they include the right to sue for infringement.

A licensee under a non-exclusive license typically is not the only person or entity granted the right to do the specified actions. An example would be the license to use Windows 2000, which all users receive.

A non-exclusive license need not be in writing; it may be oral. Written licenses, however,

are more likely to avoid subsequent disputes between publishers and institutions regarding what rights have actually been licensed.

A license may be implied by the parties’ reasonable expectations or conduct. For example, if one hires a contractor to create materials for a Web site, even though the contractor may retain ownership of the copyright in the materials, the expectation of the parties could well lead to an implied non-exclusive license to include the materials on the Web site.

Licenses are contracts. As contracts, they create rights and obligations for both publishers and institutions as parties to those contracts. Institutions may wish to consider ways to communicate information about contractual rights and obligations to those within the institution who are bound by them or can benefit from them.

Licenses typically are governed by state contract law rather than by federal copyright law. Depending on the circumstances, violation of the terms of a license relating to a copyrighted work may give rise to a claim for breach of contract under state law or for copyright infringement under federal law, or to both types of claims. License terms may be negotiable or non-negotiable (as they often are for works available in standard form in the mass market). Some non-negotiable licenses may be unenforceable under the laws of certain states.

Licensing has become common for digital forms of works. There continues to be disagreement about the advantages and disadvantages of licensing and certain license restrictions.

Some argue that the licensing of digital media permits more options for control and use of a work and more variety and choice in arranging pricing and other terms of use.

Others counter that licensing is often used in an effort to curtail the statutory limitations on copyright, including certain actions available to the owner of a copy of a work. For this reason, there is an ongoing debate as to whether all such licenses concerning the use of a copyrighted work are, and should be, enforceable contracts apart from copyright law, or whether there are circumstances in which, as a matter of law and public policy, the statutory limitations on copyright rights (discussed in the next section) can, and should, pre-empt license terms that narrow or eliminate the ability to engage in uses of a copyrighted work that are otherwise permitted under copyright law.

This debate, and the limitations on copyright rights, should be kept in mind when negotiating licenses or acquiring copies of copyrighted works that are subject to licenses.

Copyright owners are free to forego the assertion of any of their rights and may, likewise, shorten the term of their copyright. Some copyright owners are choosing to accomplish this by the way in which they structure their licenses. One example is the range of online agreements available through the Creative Commons (<http://www.creativecommons.org>).

SECTION F

EXCEPTIONS AND LIMITATIONS ON THE COPYRIGHT RIGHTS

Copyright is limited to a bundle of expressly stated rights, as described in Part I.A. For example, a copyright owner does not gain exclusive rights to control the reading of a work, private performance or display, or other uses that are not enumerated in Section 106.

In addition to these inherent limitations, the Copyright Act contains numerous express

statutory limitations on rights granted to the copyright owner. Several are particularly relevant to institutions of higher learning. Most of the exceptions and limitations are found in Sections 107 through 122 of the Act.

The exceptions and limitations include:

- fair use—Section 107;
- performances and displays in face-to-face teaching—Section 110(1);
- distance learning—Sections 110(2) and 112(f);
- first sale—Section 109;
- reproduction by libraries and archives—Section 108; and
- limitations on liability for digital network service providers—Section 512.

Another important exception has already been mentioned in Part I.A: the rule that copyright protection does not extend to any fact, idea, system, process, or method of operation. See Section 102(b).

SECTION G

EXCEPTIONS AND LIMITATIONS ON THE COPYRIGHT RIGHTS—FAIR USE

The “fair use” doctrine is one of the important safety valves of U.S. copyright law. The doctrine arises under a statutory provision (Section 107) which provides that certain uses of a copyrighted work that might otherwise violate an exclusive right of the copyright owner are not infringement.

The doctrine is flexible, but its application often is uncertain, as it generally requires consideration of all of the facts and circumstances surrounding the particular use of the copyrighted work at issue. As a result, the fair use doctrine has been the subject of numerous court cases.

Section 107 includes a non-exhaustive, illustrative list of uses that may qualify as fair use: “[T]he fair use of a copyrighted work, including such use...for purposes such as criticism, comment, news reporting, teaching (including multiple copying for classroom use), scholarship, or research, is not an infringement of copyright.”

Section 107 then lists four non-exclusive factors that a court must consider when assessing whether a particular use is fair use. The four factors are weighed against each other; no one is determinative in every case:

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

In evaluating the *purpose and character of the use*, nonprofit uses and educational uses are generally favored and more likely to be deemed fair use than commercial uses. However, not all nonprofit educational uses are fair use; and not all commercial uses fail to qualify as fair use. Transformative uses of a work (those that add something new, with a further purpose or different character, altering the first with new expression, meaning, or message) rather than those that merely reproduce the work, are generally favored in considering this factor in fair use determinations.

The *nature of the copyrighted work* focuses on the work itself. The legislative history and case law suggest that certain types of works are more susceptible to fair use than others; for example, scientific articles that are factual in nature may

be more subject to fair use than creative works such as musical compositions, novels and motion pictures. Some works are less likely to support fair use, such as standardized tests and work booklets that by their nature are meant to be “consumable.”

The *amount and substantiality* of the portion used considers how much of the copyrighted work is used in comparison to the copyrighted work as a whole. Generally, the smaller the amount used, the more likely the use will be considered to be a fair use. Conversely, the larger the portion of a work used, the less likely it is to be fair use, although in appropriate circumstances (e.g., research, classroom display or distribution, parody) use of an entire work (e.g., an article, a short poem, musical work or photograph) may be a fair use. There is no bright line for determining whether a certain percentage, number of words or bars of music used qualifies as a fair use. The “amount and substantiality of the portion used” also is a qualitative test; even though one reproduces only a small portion of a work, that portion still may be too much if what is reproduced is deemed to be the “heart of the work.”

The *effect on the potential market for or value of the work* factor calls for consideration of the extent to which the use is likely to cause economic harm to the owner due to the displacement of opportunities to sell the work or license its use. Courts have typically limited this inquiry to markets that have been or are likely to be developed by the copyright owner. Even if the loss an owner incurs from a particular use is not substantial, courts have held that, in appropriate cases, this factor requires consideration of whether there would be substantial harm to the market for the work, or derivative works based on the work, if the use were to become widespread.

SECTION H

EXCEPTIONS AND LIMITATIONS ON THE COPYRIGHT RIGHTS—FAIR USE GUIDELINES

Because fair use requires a case-by-case assessment, efforts have been made over the years to develop guidelines in order to reduce some of the uncertainties for institutions in making such assessments.

During the course of the debates leading up to the Copyright Act of 1976, representatives of a number of publishers, authors, and education associations developed the “Classroom Guidelines” (see Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions, H.R. Rep. No. 94-1476 at 68-70, reprinted in 1976 U.S. Code Cong. & Ad. News 5681-83), which were intended to provide greater clarity concerning the application of fair use to the reproduction of certain copyrighted works by teachers in nonprofit educational institutions for research or instructional purposes. Several important points should be considered when relying upon the Classroom Guidelines:

- The Guidelines provide a safe harbor for teachers who make single copies of works for their own scholarly research or for their use in teaching or preparation for teaching.
- The Guidelines also define the scope of a “safe harbor” for teachers who wish to distribute multiple copies of copyrighted works to their students without seeking permission or paying royalties.
- As a safe harbor, the Guidelines represent minimum and not maximum allowances. By definition, therefore, there will be instances in which actions that fall outside the Guidelines are still fair use.

- The Classroom Guidelines are not law or regulation. However, they were published in the House Report that accompanied the 1976 Copyright Act, and were specifically cited in the Conference Report to the 1976 Act “as part of [the legislators’] understanding of fair use.” The Guidelines also were endorsed by the American Council on Education and have been cited with approval by some courts. See H.R. Rep. No. 94-1733, at 70-71, reprinted in 1976 U.S. Code Cong. & Ad. News 5811-12.

As is often the case with such guidelines, the Classroom Guidelines are regarded by many to embody a trade-off between certainty and flexibility. Some instructors keep their copying of copyrighted materials for classroom use within the limits defined by the Guidelines in order to take advantage of the safe harbor they provide. However, not all members of the academic community support such guidelines; concerns have been expressed that guidelines, by their nature, will be construed as limiting the flexibility of fair use, rather than establishing minimum safe harbors. Indeed, some institutions, in their own policies, have mistakenly treated the guidelines as defining the extent of fair use. They do not.

The Guidelines identify considerations relating to the reproduction and distribution of multiple copies for students: brevity, spontaneity, and cumulative effect. Additionally, the students may not be charged more than the cost of making the copies, and each copy must contain a notice of copyright.

- The *brevity* factor sets forth word and portion limitations.
- *Spontaneity* means that the copying is done at the instigation of the individual teacher and that the decision to reproduce the work is made so close in

time to the moment the faculty member wants to use the work that it would be unreasonable to expect timely reply to a request to the copyright owner for permission.

- The *cumulative effect* factor limits the copying of particular material to one course and places limitations on what may be copied. For example, the safe harbor generally is limited to one article or two excerpts per author or three per periodical volume or other collective work during the class term.

The safe harbor provided by the Guidelines:

- does not include copies of the same item made by the same teacher from term to term,
- will not apply to the reproduction and distribution of more than nine instances of multiple copying for one course during the class term.

There are two other Guidelines developed in 1976 and endorsed by Congress that deserve attention—the “Guidelines on the Educational Uses of Music” and the “Guidelines on Photocopying-Interlibrary Arrangements.” The former Guidelines appear immediately after the Classroom Guidelines, in H.R. Rep. No. 94-1476 at 70-71, 1976 U.S. Code Cong. & Ad. News 5684-85; and the latter Guidelines may be found in H.R. Rep. No. 94-1733 at 72-3, 1976 U.S. Code Cong. & Ad. News 5813-14.

In the mid-1990s, the U.S. Patent and Trademark Office sponsored a series of discussions, known as the Conference on Fair Use (CONFU), which sought to develop consensus among representatives of education and library groups, publishers, and copyright owners, on guidelines for fair use of digital works. Although the conference fostered useful exchanges among the groups on the

opportunities and challenges confronting copyrighted works in the digital environment, none of the proposed fair use guidelines was formally adopted.

SECTION I

EXCEPTIONS AND LIMITATIONS ON THE COPYRIGHT RIGHTS—FACE-TO-FACE INSTRUCTION

Section 110(1) provides that the performance or display of a copyrighted work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution are not infringement of copyright, notwithstanding the rights of the copyright owner. There are certain limitations:

- The performance or display must be in a classroom or similar place devoted to instruction.
- A performance or display of a motion picture or other audiovisual work or an image from such a work must be from a lawfully made copy (or one that the person making the performance or display had no reason to believe was unlawfully made). A copy made pursuant to permission or an applicable exception or limitation on the copyright rights (e.g., fair use) would be considered “lawfully made.”

The exception applies to any type of copyrighted work. Thus, for example, it is permissible to perform a play or a motion picture, or to display a photograph or a poem in the classroom.

Like the other specific exceptions and limitations to the copyright rights, uses that do not meet the specific limitations of Section 110(1) may still qualify as fair use.

There is a separate, related exception to the copyright rights that is not specifically directed to educational settings but that is relevant to face-to-face teaching. Under Section 109(c), the owner of a particular lawfully made copy, or any person authorized by such owner, may display that copy publicly, either directly or by projection of no more than one image at a time, to viewers present at the place where the copy is located. Unlike Section 110(1), this exception applies only to the owner of a copy or someone authorized by the owner, not to a person who acquired the copy through rental, lease, or loan. This exception, however, is not subject to some of the Section 110(1) limitations.

SECTION J

EXCEPTIONS AND LIMITATIONS ON THE COPYRIGHT RIGHTS—DISTANCE EDUCATION

In 2002, Congress enacted the Technology, Education and Copyright Harmonization Act—or TEACH Act—which expanded the scope of the copyright exception applicable to distance education transmissions (e.g., over the air or over the Internet), as well as to the use of online materials in the context of face-to-face teaching.

The TEACH Act revises Section 110(2) in an effort to permit the use of copyrighted materials in real time and asynchronous digital distance education on much the same terms as in live face-to-face teaching.

The exception applies to any copyrighted work other than a work produced or marketed primarily for performance or display as part of “mediated instructional activities” using digital networking (i.e., materials expressly created for use during online distance education classes), subject to certain limitations:

- The exception for performances applies only to “limited portions” of works other than non-dramatic literary or musical works.

- The exception for displays applies only to the display of amounts comparable to that which is typically displayed in the course of an in-person classroom session.
- The exception does not apply to the performance or display of a work if given from a copy that was not lawfully made and the institution making the performance knew or had reason to believe it was not lawfully made.
- The exception applies only to performances or displays that (1) are made by, at the direction of, or under the supervision of, an instructor (e.g., by the instructor or a student) as an integral part of the distance education analog of a “class session” offered as a regular part of the systematic “mediated instructional activities” of a nonprofit educational institution or governmental body, and (2) are directly related and of material assistance to the teaching content of the transmission.
- The exception applies only if the transmission is made solely for, and—to the extent technologically feasible—reception is limited to students enrolled in the course (e.g., by password access).

The exception is available to an institution only if it has instituted policies regarding copyright, provided informational materials to faculty, students, and relevant staff members that describe and promote compliance with U.S. copyright law, and provides notice to students that materials used in connection with the course may be subject to copyright protection. These institutional policy issues are discussed in greater detail in Part II.C.

The exception is available in connection with a digital transmission (e.g., an Internet-based

course) only if the institution has applied technological measures that reasonably prevent retention of the work in accessible form by the recipients (i.e., on the recipients' computers) for longer than a comparable in-person class session, and reasonably prevent further unauthorized dissemination of the work. In addition, the institution must not interfere with technological measures used by copyright owners to prevent such retention and further dissemination.

The legislative history of the TEACH Act makes clear that the limitation on retention refers to retention by the students and does not limit the length of time the work may be made available on the institution's server.

Technologies available today to prevent retention and further dissemination include various digital rights management (DRM) technologies, and streaming technologies that prevent retention on the receiving computer.

The legislative history, in the Conference Report, describes a class session as generally "that period during which a student is logged on to the server of the institution" making the display or performance. It is "likely to vary with the needs of the student and with the design of the particular course." A particular class session is not the entire semester or term, but the materials can remain on the institution's server for the duration of its use in one or more courses (e.g., the entire semester or term). The materials "may be accessed by a student each time the student logs on to participate in the particular class session of the course in which the display or performance is made." See H.R. Rep. No. 107-685 at 231, reprinted in 2002 U.S. Code Cong. & Ad. News 1183-84.

The "mediated instructional activities" to which the TEACH Act applies are those that use a work as an integral part of the class experience, controlled or supervised by or under the

direction of the instructor and analogous to the type of performance or display that would take place in a live classroom setting; the instructor need not be online at the time of the student transaction. Mediated instructional activities do not include other uses of copyrighted works in the course of digital distance education, including student use of supplemental or research materials in digital form, such as electronic reserves and other digital library resources. Moreover, even within the context of the mediated class experience, the TEACH Act exception does not apply to the use of such works as textbooks, coursepacks, or other material, copies of which are typically purchased or acquired by students in higher education for their independent use and retention in connection with the class.

The TEACH Act also amended Section 112 of the Copyright Act, which allows institutions to store material on their servers to enable distance education transmissions.

This provision applies primarily to digital versions of copyrighted works.

However, an institution may digitize those portions of an analog version of a work to be displayed or performed under Section 110(2) if no digital version of the work is available, or if the digital version is subject to technological protection measures that prevent its use.

Like the other specific exceptions and limitations to the copyright rights, uses that do not meet the specific limitations of Section 110(2) may still qualify as fair use.

SECTION K

EXCEPTIONS AND LIMITATIONS ON THE COPYRIGHT RIGHTS—FIRST SALE

As a general rule, and subject to certain limitations and exceptions, one who has acquired ownership of a lawfully made copy of a copyrighted work may dispose of possession of that copy by sale, gift, loan, rental, or any other means of transfer, without running afoul of the copyright owner's right of public distribution. This doctrine is codified in Section 109(a) and is generally known as the "first sale" doctrine because once a copy is sold, the copyright owner loses his or her right to control further distribution of that copy. The first sale doctrine is the basis of significant economic activity, such as stores that purchase copies of videos and DVDs and then rent the copies, second-hand bookstores that sell copies of books they have purchased, book owners who donate those books to libraries, and libraries that lend copies of materials that they own. The first sale doctrine has some limitations:

- Section 109(d) provides that the first sale doctrine does not apply to copies that are obtained by rental, lease, or loan, without acquiring ownership.
- Notwithstanding the first sale doctrine, the Act specifically prohibits the rental, lease, lending, or similar temporary disposal of possession of a phonorecord or a copy of a computer program for direct or indirect commercial advantage. However, this prohibition does not apply to nonprofit educational institutions or nonprofit libraries under certain defined circumstances. Specifically, the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or educational institution is not prohibited by Section 109(b). The transfer of possession of a lawfully made copy of a computer program by

a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students is not prohibited by Section 109(b). There also is a specific exception for the lending of computer programs by nonprofit libraries under certain conditions.

The first sale doctrine applies to all forms of copies of works that can be physically transferred, including copies embedded in such digital formats as CDs and DVDs. The Copyright Office has expressed the view that digital transmissions of copies are not subject to the first sale doctrine, although the appropriateness of application of a first sale doctrine to such transmissions remains the subject of debate. The principal arguments against including a digital transmission within the first sale doctrine are that such an exception would allow reproduction as well as distribution of the work and, in contrast to physical copies such as a book, digital copies can be easily and flawlessly duplicated, thereby creating the risk that the transmission of a single copy becomes the redistribution of limitless copies. However, if and when technological management systems support the reliable transmission of a single copy together with the destruction of the sender's copy, the current reservations about digital transmission under the first sale doctrine would seem to be eliminated, and some form of first sale doctrine could then be implemented for the distribution of a copy of a copyrighted work via digital transmission.

SECTION L

EXCEPTIONS AND LIMITATIONS ON THE COPYRIGHT RIGHTS—LIBRARIES AND ARCHIVES

At the request of libraries and archives, Congress enacted a series of specific exceptions to copyright owners' exclusive rights, as well as a general protection from liability for unsupervised copying by library

users on library premises. See Section 108. These specific exceptions are safe harbors, and do not preclude the right of fair use. Depending on the circumstances, the general right of fair use under Section 107 may allow more or less copying and distribution of copyrighted works than the specific rights extended by Section 108. The Section 108 exceptions do not supersede contractual obligations that may be assumed by a library when it obtains a copy of a work. The Section 108 exceptions are of two types:

- *Copying for library users*

One of the most important provisions of Section 108 is the right of libraries or archives to make for a user “single copies” of an article or other contribution to a copyrighted collection or periodical, or a copy of a small part of any other copyrighted work, where the copy becomes the property of the user and the library has no notice that it will be used for a purpose other than private study, scholarship, or research. This right applies to copies made from journals or other works in the library’s own collection, or copies obtained from another library by “interlibrary loan.”

An additional right to make a copy of an entire work, or a substantial part of a work, for a user is extended to libraries and archives, provided the library has determined that a copy of the work cannot be obtained at a fair price, the copy becomes the property of the user, and the copy will be used for private study, scholarship, or research.

These rights extend to the isolated and unrelated reproduction and distribution of single copies, but not to “related or concerted” reproduction of multiple copies of the same material or the “systematic reproduction or distribution”

of single copies of journal articles or other parts of collective works.

The provision makes clear, however, that these limitations do not prevent a library or archive from participating in interlibrary loan arrangements, so long as those arrangements do not have as their purpose or effect the receipt of copies by the requesting library in aggregate quantities that substitute for a subscription to or purchase of the work.

The Conference Report on the 1976 Act notes that the National Commission on New Technological Uses of Copyrighted Works (CONTU), after consulting with interested parties, developed guidelines that allow a library to receive up to five articles in any year from the same journal or other collective work published in the past five years. The guidelines do not address works more than five years old. Guidelines on Photocopying-Interlibrary Arrangements, H.R. Rep. No. 94-1733 at 70-73, reprinted in 1976 U.S. Code Cong. & Ad. News 5811-14.

- *Copying for the library’s collection*

In addition, Section 108 extends specific rights to make three copies of unpublished works for preservation purposes, and three copies of published works to replace deteriorated, damaged, lost, or stolen copies, or if the existing format in which the work is stored has become obsolete. The copies may be digital, provided that they are not made available to the public in that format outside the premises of the library or archives.

Another provision of Section 108 allows a library or archive to

exercise substantially broader rights of reproduction and distribution of copyrighted works in the last 20 years of their copyright terms, provided the works concerned do not continue to be subject to normal commercial exploitation.

Section 108 establishes conditions that the library must satisfy in order to qualify for the exemptions, as well as establishing certain exclusions from the exemptions:

- In order to qualify for the “single copy” authorization, a library or archive must display a warning of copyright at the place where copy orders are taken and on its order form, and the copy of the work should contain an appropriate copyright notice.
- Except for the preservation right and the right to replace copies that are lost, stolen, damaged, etc., these rights do not apply to a musical work, a pictorial, graphic, or sculptural work, or a motion picture or other audiovisual work (except for illustrations or other adjuncts to works whose copying and distribution is otherwise permitted by Section 108).

Section 108 makes clear that it is not intended to impose liability on libraries or their employees for the unsupervised use of reproducing equipment on the library’s premises, provided that the equipment displays a notice that the making of a copy may be subject to the copyright law. However, this limitation on library liability does not extend to a person who makes copies, or requests for copies, in excess of what is permitted under the fair use provisions of Section 107.

SECTION M

COPYRIGHT INFRINGEMENT AND APPLICABLE LEGAL REMEDIES

A violation, or infringement, of a right of a copyright owner occurs when a protected work is used in a manner that constitutes the exercise of any exclusive right of the copyright owner (e.g., reproduction or distribution), but such use is neither (1) authorized by the copyright owner, nor (2) within the scope of one of the limitations applying to the copyright owner’s assertion of that exclusive right.

Generally, violation of the copyright owner’s exclusive right requires that the amount of the protected work that is taken (e.g., copied) is “substantial.” However, substantiality generally is tested both in terms of the quantity and quality of what is taken, and the standard used by courts is often quite low—that is, a relatively small amount, measured quantitatively or qualitatively, may be judged to be substantial. Copying need not be verbatim; substantial similarity to expression in the copied work can constitute infringement. However, where the similarity involves expression that is not original to the author of the copied work, there is no infringement.

The issue of whether what is taken is substantial should not be confused with the third factor of the fair use doctrine, which requires consideration of the amount and substantiality of the portion used. The considerations are different, and fair use typically permits a greater quantity of taking than the underlying question of whether the amount taken is “substantial” enough to constitute infringement. Thus, if the taking is not substantial enough to qualify as infringement in the first place, then the issue of fair use would not arise; if the amount taken is substantial enough to constitute possible infringement, then a fair use analysis may

conclude that the taking was not infringement based on the greater substantiality permitted by the third factor of the fair use doctrine.

There are three types of infringement: direct infringement, contributory infringement, and vicarious liability for infringement. They are subject to different requirements:

- *Direct infringement* is the doctrine that applies to the party that actually carried out the act that violates the copyright owner's exclusive rights. Often, this doctrine has been extended to apply to acts of employees acting within the scope of their employment. The doctrine is based on "strict liability," meaning one will be liable whether or not one knew that the work was copyrighted and whether or not one intended to infringe or knew that one's conduct was infringing.
- *Contributory infringement* is the doctrine that applies to a party that, with knowledge of an act of infringement, induced, caused, or materially contributed to the act of infringement. Courts have held that providing significant facilities used for infringement can count as material contribution. Different courts have construed the requisite "knowledge" differently, with some requiring actual knowledge and others finding liability if the alleged contributory infringer knew or should have known that the infringing act was occurring.
- *Vicarious liability* may be imposed on one who obtains a financial benefit from an act of infringement and has the right and ability to control the infringing conduct. Again, courts vary on the nature of financial benefit and the level of control that may give rise to liability.

The U.S. Supreme Court's decision in the *Grokster* case recently held that the concept of intentional "inducement" could give rise to liability for one who distributes a product that is capable of both lawful and unlawful uses. The Court, in a case concerning distributors of free software products that allow computer users to share electronic files through peer-to-peer networks, ruled that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." Although the Court's decision provided some examples of the kinds of "expression or other affirmative steps" that could provide evidence supporting one person's liability for inducing infringing acts by others, a clear picture of the scope and nature of this basis for liability will require further development by the federal courts in future cases.

The Copyright Act provides numerous remedies against the infringer, including the possibility of substantial monetary liability:

- In any case of infringement, the copyright owner may seek temporary and permanent injunctions against continued infringement.
- In any case of infringement, the copyright owner may obtain "actual damages" from the defendant in the amount of financial losses suffered by the copyright owner as a result of the infringement, as well as any profits made by the defendant as a result of the infringement (to the extent that such profits are not already taken into account in calculating the losses suffered by the copyright owner).
- The copyright owner may seek an order impounding articles involved in the infringement.

- If the copyright was registered before the infringement (or within three months of publication in the case of infringement of a published work), the copyright owner may obtain reasonable costs and attorneys' fees in the discretion of the court. Note that a prevailing defendant may also seek attorneys' fees that may be awarded in the discretion of the court.
- If the copyright was registered before the infringement (or within three months of publication in the case of infringement of a published work), the copyright owner, in lieu of actual damages, may seek statutory damages within a specified range in an amount to be determined by the finder of fact (i.e., the jury in a jury trial or the judge if there is no jury). The range is between \$750 and \$30,000 per infringed work (*not* per infringing act). The amount may be increased to up to \$150,000 per infringed work in a case of willful infringement, or reduced to not less than \$200 per work if the infringement was truly innocent.
- There is a special rule for nonprofit educational institutions and libraries which provides for elimination of statutory damages if the infringing reproduction was undertaken with reasonable grounds for believing that the infringement was a fair use. See Section 504(c)(2).
- The Copyright Act provides for criminal liability in cases of willful infringement for commercial advantage or private financial gain, or in cases of willful electronic distribution or reproduction of works with a total retail value of more than \$1,000. See Section 506.

SECTION N

LIMITATIONS ON LIABILITY FOR INFRINGEMENT—SERVICE PROVIDER LIABILITY

Section 512, added by the Digital Millennium Copyright Act (DMCA) in 1998, provides certain limitations on the potential copyright liability of colleges and universities that provide Internet access and other digital network services to students, faculty, and other third party users of the services.

The section precludes any monetary remedies and limits the scope of injunctive relief against a service provider if certain conditions are met, and the service provider would otherwise be found liable for copyright infringement as a result of the conduct of a third-party user of the service provider's system or network, to the extent that the service provider:

- serves as a conduit for the communication (e.g., where the user is browsing the World Wide Web, receiving or sending email, or engaging in peer-to-peer file sharing of material on the user's own computer);
- automatically caches material on its own servers to facilitate its users' access to off-network materials;
- hosts material that third parties cause to reside on the service provider's system or network (e.g., providing Web page hosting services); or
- provides directories, links, or other information location tools that may lead to infringing material.

The conditions that apply to each of the foregoing activities vary, with protection for the conduit function being essentially unconditional,

and protection for hosting and linking depending on a carefully negotiated “notice and takedown” procedure. The notice and takedown procedure conditions the liability limitation on the service provider removing or disabling access to allegedly infringing material upon (1) the receipt of a compliant “takedown” notice; (2) the acquisition of “actual knowledge” that the material is infringing; or (3) awareness of facts and circumstances from which infringing activity is “apparent.”

Certain copyright owners have been serving “takedown” notices in connection with peer-to-peer file sharing and other examples of the service provider conduit function. An institution may choose voluntarily to respond to such notices. However, the liability limitations of Section 512 do not require such response.

The Section 512 service provider liability limitations apply to the transmission, storage, and caching of material on the institution’s system as a result of the conduct of third parties. They do not apply when the institution itself is acting as the content provider (e.g., on departmental home pages or other official pages of the institution’s Web site).

However, Section 512 also includes a subsection that addresses the relationship between a nonprofit institution of higher education and its faculty and graduate students. See Section 512(e). Specifically, the knowledge or actions of a faculty member or graduate student who is performing a teaching or research function will not be attributed to the institution if certain conditions are met. See Part II.D.

Section 512 also protects a service provider from liability claims by users for removing allegedly infringing material if the service provider takes appropriate steps to notify the affected user.

Section 512 makes clear that a service provider is not obligated to monitor the material on its system or network.

The section also includes an expedited subpoena process that allows a copyright owner to seek the identity of an alleged infringer who has been the subject of a takedown notice. There is an ongoing dispute about whether the subpoena process applies only to material residing on the service provider’s system or extends to the conduit function. The two federal appellate courts that have considered the issue have held that the expedited DMCA subpoena provision does not apply to the conduit function.

Certain of the liability limitations in Section 512 are subject to institutional requirements, which are discussed in greater detail in Part II.D. Notably:

- To qualify for any protection of Section 512, a service provider (including a library or an institution of higher learning) must adopt, reasonably implement, and inform subscribers about a policy that provides for the termination in appropriate circumstances of subscribers and account holders who are repeat copyright infringers.
- To qualify for protection against liability for material residing on the system or network, a service provider must designate an agent to receive takedown notices, must post information about that agent on its Web site, and must provide the same information to the Copyright Office.
- To qualify for the special non-attribution rules applicable to institutions of higher education in Section 512(e), the institution must provide its users with materials that accurately describe and promote compliance with U.S. copyright law.

Section 512 only applies if a service provider, under the applicable circumstances, would be found liable as an infringer absent the liability limitations. The section explicitly preserves other defenses to the claim of infringement (e.g., fair use).

SECTION O

TECHNOLOGICAL PROTECTION MEASURES

Copyright law was expanded in 1998 by the DMCA to include a number of prohibitions on the circumvention of technological protection measures that are applied by copyright owners to protect their works. These prohibitions, and the remedies for their violation, are different from those applicable to copyright infringement.

Specifically, the law prohibits the act of circumventing a technological protection measure (e.g., encryption) that effectively controls access to a copyrighted work.

The law also prohibits the manufacture, sale or trafficking in devices, services, software, or components that are primarily designed to circumvent a technological protection measure that either (1) controls access to a copyrighted work, or (2) protects a right of a copyright owner.

The scope of these prohibitions, and their relationship to fair use and other copyright exceptions, has been a continuing source of controversy and concern.

SECTION P

SPECIAL CASE—STATE INSTITUTIONS

There is currently substantial doubt as to whether public universities, as state entities, are subject to liability for damages under federal copyright, patent, and trademark law because of the doctrine of sovereign immunity under the Eleventh Amendment to the Constitution. They are, however, subject to injunctive remedies for infringement.

Congress has considered but not enacted legislation to require states to waive their sovereign immunity as a condition for being able to use federal intellectual property law to protect their own intellectual property. The constitutional questions are exceedingly intricate and complicated. Public universities may wish to consult with their counsel and their state governments concerning these issues.

SECTION A**WHY ADOPT A COPYRIGHT POLICY?**

As both users and producers of copyrighted works, colleges and universities rely on copyright and have an interest in fostering respect for copyright and in promoting the availability and use of copyrighted works for research and education.

Two provisions of the Copyright Act are expressly conditioned on the existence of a copyright policy:

- under the service provider liability limitation discussed in Part I.N, a service provider must adopt, reasonably implement, and inform subscribers about a policy that provides for the termination in appropriate circumstances of subscribers and account holders who are repeat infringers; and
- the distance education exception discussed in Part I.J, is available to an institution only if it has instituted policies regarding copyright.

Copyright law increasingly is becoming the focus of significant attention in society, and consequently, institutions may wish to provide information about copyright law as part of their educational activities.

Copyright infringement is unlawful, and the adoption of a copyright policy affords an opportunity to make this point clear to students, faculty, and staff.

Fair use is one of the ways in which copyright law accommodates First Amendment protections, and higher education institutions have an interest in developing copyright policies that encourage the full exercise of fair use.

The following sections raise issues that institutions may wish to consider in developing or updating their copyright policies; these sections provide suggestions only and are not intended to be construed as model elements of an institutional copyright policy.

SECTION B**EDUCATIONAL MATERIALS ABOUT COPYRIGHT LAW**

The distance education exception and one aspect of the service provider liability limitations also are expressly conditioned on an institution developing and providing its students and faculty members with information that accurately describes and promotes compliance with copyright law.

- To qualify for the distance education (TEACH Act) exception discussed in Part I.J, an institution must provide informational materials about copyright law to faculty, students, and relevant staff members.
- Under the service provider liability limitation discussed in Part I.N, an institution of higher education must provide all users of its system or network with materials that accurately describe and promote compliance with U.S. copyright law in order to qualify for the special non-attribution rules of Section 512(e).

The material provided in Part I of this document easily may be adapted and used as the basis for those educational materials.

SECTION C

THE POLICY REQUIREMENTS OF THE TEACH ACT

The TEACH Act states only that a condition of the exemption is that the institution “institutes policies regarding copyright.” The legislative history adds little, stating that the requirement, together with the requirement to provide information, is intended to promote an environment of compliance with the law. The lack of specificity suggests that an institution has substantial flexibility in the development of a copyright policy to meet the condition of the TEACH Act. The institution should consider developing policies that address the issues discussed in this document as the institution believes appropriate.

Among the issues that an institution may want to include in a policy directed to the TEACH Act are means of complying with the various conditions imposed by the TEACH Act itself. Thus, the policy may include guidelines or rules:

- limiting the type and, for works other than nondramatic literary or musical works, the amount of works that may be placed on a server for distance education (absent a determination that a given use is, independently, fair use). For example, the institution may want to provide that instructors should not, without permission, (1) use works produced primarily for digital “classroom” use or works that otherwise would typically be purchased as a textbook or part of a coursepack for that class; (2) for other than nondramatic literary or musical works, use more than the appropriate portions of works covered by the exemption; (3) digitize analog versions of works unless the conditions for such digitization are satisfied; or (4) use source material other than lawfully made copies;
- providing that performances or displays should (absent a determination that a given use is, independently, fair use) be limited to those made by, at the direction of, or under the supervision of an instructor as an integral part of the analog of a “class session”;
- addressing how instructors or the institution will limit, to the extent feasible, access to enrolled students; the legislative history makes clear that this is not intended to impose a general requirement of network security, and identifies systems such as “password access or other similar measures”;
- addressing how the institution will apply technological measures that reasonably prevent retention or further dissemination of the performed work; the legislative history recognizes that flexibility with respect to these requirements is necessary to accomplish the pedagogical goals of distance education; and
- addressing whether, to what extent, and in what manner, if at all, the institution will exercise control over the decisions of faculty in selecting materials for use in distance education.

SECTION D

THE POLICY REQUIREMENTS OF THE SERVICE PROVIDER LIABILITY LIMITATION

Section 512 specifically requires a service provider that wishes to rely on the liability limitation extended by that section’s provisions to adopt, reasonably implement, and inform subscribers about a policy that provides for the termination in appropriate circumstances of subscribers and account holders who are repeat copyright infringers.

The legislative history to the DMCA, which embodied the full agreement among the parties that negotiated Section 512, makes clear that Congress contemplated substantial flexibility in the design of such a policy.

The Senate Report recognizes that “there are different degrees of online copyright infringement, from the inadvertent to [sic] the noncommercial, to the willful and commercial.” See S. Rep. No. 105-190 at 52.

Further, the Report makes clear that the provision is not intended to suggest that a service provider “must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.” As discussed in connection with exceptions and limitations, there are many unauthorized uses of copyrighted works that are not infringing.

In short, it would be reasonable to adopt a policy directed to actual repeated infringement (not merely a copyright owner’s allegations), where appropriate circumstances (e.g., particularly harm or willfulness) exist to justify termination.

The legislative history indicates that in determining—for purposes of making a decision about terminating a subscriber or account holder—whether infringement has occurred, it would be reasonable for an institution to conclude that the requirement is limited to adjudicated or other clear cases of infringement that have been subjected to full internal review.

Such a policy may include provisions regarding:

- the showing that is needed before a person will be deemed an infringer or a repeat infringer (e.g., adjudication of liability, un rebutted takedown notices);
- the notifications and opportunity for response that will be provided to a person deemed to be a repeat infringer;

- the factors that will be taken into account in determining what sanctions are appropriate under the circumstances (e.g., whether the infringement was undertaken for commercial or malicious purposes, the number of times the person infringed, whether the person has previously been warned under the institution’s policy); and
- the process that will be invoked to make the foregoing determinations.

In order to ensure that the non-attribution provisions of Section 512(e) are available, the institution may want to include policies:

- that instruct a faculty member or graduate student not to provide online access (other than as authorized by the TEACH Act or the copyright owner, or permitted as a fair use) to instructional materials that were required or recommended reading for a course taught at the institution by the faculty member or graduate student within the prior three-year period; and
- that address circumstances where the institution has received more than two valid takedown notices pertaining to a graduate student or faculty member during the preceding three-year period.

In addition to the required policy, an institution may consider it advisable to adopt a policy to address additional service provider liability issues raised by Section 512, such as:

- who will serve as “designated agent” for the institution, and what system will be in place to provide the name, address, telephone number, and email address of the agent to the Copyright Office and to post that information on the institution’s Web site;

- how a designated agent should respond to takedown notices, including both notices for which takedown is necessary to preserve the liability limitation (e.g., for compliant notices relating to material residing on Web pages hosted on the institution’s servers) and for those where it is not (e.g., for conduit activities, such as peer-to-peer file sharing by users);
- when an institution should consider itself to have “actual knowledge” or awareness of facts and circumstances from which infringing activity is apparent;
- what systems the institution will have in place promptly to provide notice to a user when it responds to a takedown notice from a copyright owner by removing material residing on its system or network placed by that user, and what systems the institution will have in place to respond to “counter notices” asking for the material to be replaced and notice to be given to the copyright owner that the material was lawfully on the system or network;
- how a designated agent should respond to non-compliant takedown notices (e.g., in the case where the notice contains some of the required information and Section 512 withholds liability limitations unless the service provider contacts the person providing the notice); and
- how the institution should respond to subpoenas issued pursuant to the expedited, *ex parte* process in Section 512(h) (including the institution’s position on the scope of the Section 512(h) subpoena authority).

SECTION E

OTHER POTENTIAL POLICY ISSUES— FACULTY OWNERSHIP OF COPYRIGHTS

Under the “work made for hire” doctrine, copyrighted works created by an employee acting within the scope of his or her employment are owned by the employer. However, institutions typically take the position—as a matter of academic tradition, institutional policy, or both—that a faculty member owns the copyright in textbooks, journal articles, and other scholarly works he or she writes for publication. New digital media present a new set of ownership issues distinct from the cases of faculty ownership of traditional scholarly publications and institutional ownership of unambiguous works for hire. Increasingly, new digital media involve significant investments of intellectual, financial, and physical resources from both faculty members and the institution. In such cases, many institutions are establishing policies that decide issues of ownership and revenue based on considerations of academic mission and the relative contributions of the parties.

Institutions should consider how to resolve these potentially conflicting strains and to address issues such as rights in new media, the effect of institution support for the work, and the status of work done specifically at the request of the institution.

In the traditional publication process, faculty members usually sign contracts that transfer some or all of the exclusive rights to their work to publishers. Electronic communication and the Internet provide new opportunities for faster, broader, and more economical dissemination of research and scholarship; and authors, publishers, and universities are exploring new arrangements that substantially improve scholarly communication. To facilitate these developments, some universities are discussing with faculty and publishers ways to retain

the rights to use faculty members' own work in the classroom, in their research, in future publications, and to post their work on publicly accessible Web sites.

SECTION F

OTHER POTENTIAL POLICY ISSUES—FAIR USE AND THE CLASSROOM GUIDELINES

As discussed in Part I.G, determination of whether a given use is fair use depends on a careful consideration of four factors. Faculty members making the decision to use copyrighted materials may not always have all of the relevant information. At the same time, the law provides substantial protection (e.g., remission of statutory damages) in favor of faculty members who believe and have reasonable grounds for believing that their conduct is fair use. An institution may wish to consider whether it is best to leave fair use decisions up to individual faculty members or whether it is possible to provide centralized guidance or advice regarding fair use issues.

Alternatively, an institution may decide it is appropriate to identify certain activities that it concludes would clearly not qualify as fair use. As fair use requires consideration of complex factors, the institution may wish to obtain legal advice from counsel that specializes in copyright law.

Similarly, an institution may wish to adopt policies related to the Classroom Guidelines discussed in Part I.H. Such policies might advise faculty members of conduct permitted under the guidelines or might provide procedures for evaluating conduct that exceeds the guidelines.

Universities may wish to develop fair use policies that accommodate the inherent ambiguity and situation-specific nature of fair use.

SECTION G

OTHER POTENTIAL POLICY ISSUES— COURSEPACKS

Coursepacks have evolved over time, from essentially ad hoc collections of short readings designed to supplement the assigned text to pre-planned collections of book chapters, articles, exercises, and other copyrighted and instructor-created materials that form the core assigned reading for a class. When does the reproduction and distribution of such material constitute fair use? When does it require permission for the use of the material?

Two court cases have held that the unauthorized production and sale of coursepacks containing copyrighted works by commercial photocopy services constitutes copyright infringement and not fair use. In these cases, the coursepacks were pre-planned collections of substantial portions of copyrighted works constituting assigned reading. In one case, the packs formed “an entire semester’s resources.” One important factor in these decisions was the commercial nature of the copy service. No court has yet considered the extent to which the institution may be liable for the copying of coursepacks by commercial centers, or whether possible institutional liability would be affected if the copying is done by an arm of the institution rather than a commercial entity.

Some argue that the reproduction and distribution of a coursepack cannot be fair use when the selections are pre-planned and constitute the primary assigned reading. Although ad hoc supplemental selections are more likely to be considered fair use, others believe analysis of the four fair use factors could still lead to a finding of fair use even for primary assigned readings.

Similarly, no court has yet addressed the issue of “electronic coursepacks.” Some argue that electronic distribution of material as

assigned readings creates a greater risk to the market for a work in light of the possibility of further electronic dissemination. However, institutions may have procedures to limit the distribution of electronic coursepacks through password-controlled access or other technological mechanisms. To the extent that such mechanisms offset the potential risks, the pedagogical benefits of electronic coursepacks should argue for their use, consistent with existing requirements for managing traditional coursepacks.

A related practice is the posting by faculty of assigned materials for a course, either on faculty-generated Web sites or using course management software. The posted content often is not monitored or controlled by the institution, but may create liability for the institution. Although making such material available without permission is not necessarily infringement, the considerations relevant to coursepacks and electronic coursepacks are likely to apply. Some concerns may be reduced by encouraging faculty members to work through the institution's library, which may have established or can establish authorized access to assigned course materials, or by encouraging faculty members to post links to copyrighted material on the copyright owner's Web site or other Web sites authorized by the copyright owner. The discussion of service provider liability limitations in Part I.N, also may be relevant to the issue of the institution's risk.

An institution may conclude that it is appropriate to establish policies relating to coursepacks and faculty posting of assigned material, to minimize potential risk and to provide norms for copyright compliance. Factors that an institution may wish to address in such a policy could include the amount of material to be copied and how it relates to the source work as a whole, who is to do the copying, whether permissions are practical to obtain, the period of time for which materials

are to be made available, whether the institution has a license to the electronic full-text of the material, and whether it is possible to apply technological protections to materials that are to be distributed electronically.

SECTION H

OTHER POTENTIAL POLICY ISSUES— RESERVES AND ELECTRONIC RESERVES

Reserve operations in libraries developed as a means for faculty to provide students with material intended as supplemental reading, or with access to important materials not included in the textbook but of such limited extent that purchase of the entire additional work was not warranted. Print reserves usually include one or a few copies of books (which may include a copy of the textbook or coursepack used in the class as a backup) and one or a few photocopies of articles, along with copies of previous exams, syllabi, and other materials. In general, materials reproduced for reserve are owned by the library or the faculty member. Students are allowed to use materials for a limited period of time and often photocopy the material for later reading.

Most academic libraries have developed local policies for reserves. Some academic libraries follow the 1982 American Library Association *Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use*. This policy treats reserves as an extension of classroom use and is based on the Classroom Guidelines. Although the policy was neither negotiated nor agreed upon by publishers, libraries have used it for over twenty years to guide their reserve operations. Other academic libraries, however, base their reserve policies on a direct analysis of the four fair use factors rather than on the Classroom Guidelines' generic interpretation of the fair use exemption. An institution may wish

to consider including a discussion of library reserve policies in its copyright policy.

Many libraries now also offer electronic reserves, based on fair use principles, adaptations of the 1982 ALA *Model Policy*, or other policies or guidelines. The development of electronic reserve systems offers the opportunity to provide access to course materials in a more effective way, but also creates some additional risk of unauthorized reproduction and distribution. Materials that are digitized for electronic reserve typically are owned by the library or faculty member. Students may access electronic reserve materials from anywhere they have Internet access and often are able to download and print copies for later use.

Many libraries limit access to electronic reserve materials through the use of Internet Protocol (IP) or password authentication.

Libraries may also link to licensed electronic works where such activity is not prohibited by the license.

There is disagreement over the definition and appropriate use of electronic reserves. To the extent that electronic reserves are extensions of traditional print reserves, providing access to important excerpted materials or supplementary material, their use should be compliant with copyright law and not raise concerns, particularly if distribution is limited through password-controlled access or other technological mechanisms. However, to the extent that electronic reserves exceed the purpose and scope of print reserves and have functionally become electronic coursepacks, they are likely to raise all of the issues and concerns discussed in Part II.G.

CONCLUSION

The groups that produced this document have sought to describe their common understanding of the basic aspects of copyright law and its application to academic practice. They do not agree on all issues and have tried in those cases to convey the differing perspectives that institutions might take into consideration in developing or refining their own policies. Inevitably, disagreements will arise concerning the use of copyrighted works, but if institutions make concerted efforts to incorporate the principles of copyright law into their campus policies, and affirmatively educate their faculty, students, and staff about copyright rights and responsibilities as defined by those policies, such disagreements will likely be minimized and can be resolved through good-faith discussions. We hope that this document will assist institutions in such efforts to develop or refine their copyright policies.

Sponsored by:

Association of American Universities
Association of American University Presses
Association of Research Libraries
Association of American Publishers