

FAIR USE OF COPYRIGHTED MATERIAL

An informative guide

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Q: What is "fair use"?

A: Fair use is the right to use a copyrighted work **under certain conditions** without permission of the copyright owner. The doctrine helps prevent a rigid application of copyright law that would stifle the very creativity the law is designed to foster. It allows one to use and build upon prior works in a manner that does not unfairly deprive prior copyright owners of the right to control and benefit from their works. Together with other features of copyright law, fair use reconciles the copyright statute with the First Amendment.

Q: What is the test for fair use?

A: The fair use defense is now codified in Section 107 of the Copyright Act. It is a defense that is mounted when a challenge to fair use is made. There is no need to make or draft an argument for fair use absent the legal challenge to such use. The statute provides that fair use of a work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use, scholarship, or research)" is not an infringement of copyright. To determine whether a given use is fair use, the statute directs, one must consider the following four factors:

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.

These factors are not exclusive, but are the primary—and, in many cases, the ONLY—factors courts examine. The following questions consider each of these four factors, in turn.

Q: What considerations are relevant in applying the first fair use factor—the purpose and character of the use?

A: One important consideration is whether the use in question advances a socially beneficial activity like those listed in the statute: criticism, comment, news reporting, teaching, scholarship, or research. Other important considerations are whether the use is commercial or noncommercial and whether the use is "transformative."

Noncommercial use is more likely to be deemed fair use than commercial use, and the statute expressly contrasts nonprofit educational purposes with commercial ones. **However, uses made at or by a nonprofit educational institution may be deemed commercial if they are profitmaking.**

In recent years, the courts have focused increasingly on whether the use in question is “transformative.” A work is transformative if, in the words of the Supreme Court, it **“adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.”** This does NOT mean you have just transformed it from one medium to another. Remember, you cannot borrow the “heart of the work.” Two good questions to ask if you are trying to determine whether your use is transformative are:

- 1. Has the material you have taken from the original work been transformed by adding new expression or meaning? For example: Professor X borrows several passages from a speech given by a CEO of a logging company. Professor X places these quotes under photos of old-growth redwoods in his environmental newsletter. By juxtaposing these quotes with photos of endangered trees, he has transformed the remarks from their original purpose and uses them to create new insight. This is transformative.**
- 2. Was value added to the original by creating new information, new aesthetics, new insights and understandings? For example: Use of a quotation from an earlier work in a critical essay to illustrate the essayist’s argument is a classic example of transformative use.**

A use that supplants or substitutes for the original work is less likely to be deemed fair use than one that makes a new contribution and thus furthers the goal of copyright, to promote science and the arts.

Courts have also recognized, however, that non-transformative uses may be socially beneficial, and that a use does not have to be transformative to support a finding of fair use. The Supreme Court has cited reproduction of multiple copies for classroom distribution as the most obvious example of a non-transformative use that may be permitted as fair use in appropriate circumstances.

The Court’s emphasis on whether a use is transformative, however, makes it difficult to know how to weigh uses that are for non-profit educational purposes but are also non-transformative. In addition, it could be argued in some circumstances that verbatim copying of a work for classroom use is “transformative,” in that the instructor is adding “something new, with a further purpose or different character, altering the first with new expression, meaning or message” in the course of presenting the material.

Other factors that sometimes weigh in the analysis of the first fair use factor include whether the use in question is a reasonable and customary practice and whether the putative fair user has acted in bad faith or denied credit to the author of the copyrighted work.

Q: What considerations are relevant in applying the second fair use factor—the nature of the copyrighted work?

A: The two main considerations are whether the work is published or unpublished and how creative the work is. Unpublished works are accorded more protection than published ones, as the author has a strong right to determine whether and when his or her work will be made public. **The fact that a previously published work is out of print may tend to favor fair use, since the work is not otherwise available.**

Works that are factual and less creative are more susceptible of fair use than imaginative and highly creative works. This is in keeping with the general principle that copyright protects expression rather than ideas or facts.

However, the second factor is typically the least important of the fair use factors.

Q: What considerations are relevant in applying the third fair use factor—the amount and substantiality of the portion used in relation to the copyrighted work as a whole?

A: Courts have taken both a quantitative and a qualitative approach in assessing the impact on the fair use analysis of the amount and substantiality of the portion used. What percentage of the original work has been used? *There are no bright lines, but the higher the percentage, the more likely this factor is to weigh AGAINST fair use.*

Even if the percentage is fairly small, however, if the material used is qualitatively very important, this factor may weigh against fair use. Thus, for example, in a case in which *The Nation* magazine published excerpts, totaling only 300–400 words of verbatim quotes, from Gerald Ford’s forthcoming book-length memoir, the Supreme Court held that the third factor weighed against fair use, because the excerpts included Ford’s discussion of his pardon of Nixon and other central passages that the court found to be the “heart” of the work. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

Also important in applying the third factor is the nexus between the purpose of the fair use and the portion of the copyrighted work taken. The extent of permissible copying varies with the purpose and character of the use. Taking more of the copyrighted work than is necessary to accomplish the fair user’s salutary purpose will weigh against fair use. In some cases, the fact that the entire work—for example, an image—was needed to accomplish the fair use purpose has led the courts to hold that the third factor was neutral, favoring neither the copyright holder nor the putative fair user.

Q: What considerations are relevant in applying the fourth fair use factor—the effect upon the potential market for or value of the copyrighted work?

A: Use that adversely affects the market for the copyrighted work is LESS LIKELY to be a fair use. This ties back to the first factor, and the question whether the putative fair use supplants

or substitutes for the copyrighted work. The fact that a use results in lost sales to the copyright owner will weigh AGAINST fair use. Moreover, courts have instructed that one must look at the likely impact on the market should the use in question become widespread; the fourth factor may weigh AGAINST fair use even if little market harm has yet occurred.

This inquiry is not confined to the market for the original, but also takes into account derivative markets. This is a difficult and evolving area of the law. Here are a few generalizations:

1. Uses that substitute for the copyrighted work in its original market or an established derivative market generally cause market harm that is cognizable under the fourth factor.
2. Where there is no established market, harm is less likely to be found, but still may be found depending on the facts, especially if the fair use case under the other factors is weak and the “market” in question is under development by copyright owners or obviously attractive commercially.

In any case, the Supreme Court has said, market harm is a matter of degree, and the importance of the fourth factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.

Q: How should one weigh the various factors in arriving at a determination whether there is fair use?

A: The fair use test requires an assessment **of all the factors together**. The courts have repeatedly emphasized that there are no bright line rules, and that each case must be decided **on its own facts**. The factors often interact in the analysis. For example, the Supreme Court has stated that the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. The more transformative the secondary use, the less likely it is that the secondary use will substitute for the original and cause direct market harm.

In reaching a fair use determination, all of the factors should be explored, and the results weighed together, in light of the goal of copyright law to “promote the progress of science and useful arts” (U.S. Const., art. I, § 8, cl. 8). See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

Q: How does fair use apply to photocopying of course materials?

A: When the Copyright Act of 1976 was being enacted, there was extensive debate about photocopying of copyrighted material for educational and scholarly purposes. Congress declined to adopt a specific exemption for such photocopying, and instead left this to be addressed under the fair use doctrine. Section 107 provides that, if the traditional criteria are

met, fair use can extend to reproduction of copyrighted material for purposes of classroom teaching. **The difficulty comes in applying those criteria.** Recognizing that difficulty, the House Judiciary Subcommittee urged representatives of copyright owners and educational institutions to work out a set of specific guidelines, and the resulting guidelines were included in the House Report on the Copyright Act of 1976. The Guidelines are available for review as **Appendix 1.**

The Guidelines are intended as a “safe harbor,” to define certain activities that, at a minimum, will qualify for fair use. The Guidelines set forth requirements for “brevity” (limiting the amount of material that may be copied), “spontaneity” (requiring that there not be time to secure permission between when the decision to copy is made and the copy is used in class), and “cumulative effect” (limiting the aggregate amount of such copying). In addition, **the Guidelines contain a number of further restrictions, including that an item may not be copied again by the same teacher for use in a subsequent term.** The Guidelines also permit, somewhat more liberally, the making of a single copy of excerpts of a work for use by an instructor in research or teaching.

Looking at cases and the legislative history of the Copyright Act of 1976, the following are factors that a court might take into account, in the framework of the four factor fair use analysis, in determining whether a given instance of photocopying for course use constituted fair use.

First Factor: Purpose and Character of Use

1. Will the material be the subject of significant commentary, criticism, explanation or the like by the instructor? The more the material functions to illustrate, support or enable the *new* meaning or message delivered by the instructor—as opposed to functioning mainly as material for students to engage in its own right—the more likely its reproduction and distribution for course use will qualify as “transformative” in the sense described above and hence FAVOR a finding of fair use.
2. Is the copied material integral to the nonprofit educational purpose of the course? For example, is the material important to a lecture or classroom discussion? Even if the use is not “transformative,” use for a nonprofit educational purpose will weigh in FAVOR of fair use.
3. Is the copyrighted material recently published (for example, in a newspaper), or is the instructor inspired at the last minute to use the material in class, with the result that there is little or no time to obtain permission? An affirmative answer will weigh in FAVOR of fair use.
4. Are copies distributed to anyone other than students in the course who need one? Distribution to others could weigh AGAINST a finding that the use is for a nonprofit educational purpose. Unless there is a compelling educational reason to do otherwise, materials copied in reliance on fair use should be restricted to enrolled students.

5. Are students being charged for the copies? If so, does the charge have any profit component, or does it only recover costs? Copying and distribution of a commercial nature will weigh AGAINST fair use.

Second Factor: Nature of the Work

1. Is the copyrighted material published or unpublished? Unpublished works have **traditionally been accorded stronger copyright protection** than published works.
2. Is the copyrighted material factual in nature or creative? More fair use latitude is accorded to factual works.
3. Is the copyrighted material readily available for purchase? Is it in print or out of print? The fact that a work is out of print and unavailable for purchase through normal channels will FAVOR fair use copying for educational purposes, though this may be mitigated if permission to photocopy may readily be purchased.
4. Was the copyrighted material prepared primarily for the higher educational market— e.g., a textbook? Fair use is likely **to be more restricted** for such material, since photocopying it is more likely to harm the market for it than would be true if the original were aimed primarily at a different market.

Third Factor: Amount Copied

1. How much of the copyrighted work is being copied? How long is the portion copied and what percentage of the work does it represent? The smaller the portion, the more likely the copying WILL QUALIFY as fair use. Generally, a strong showing on the other factors will be needed to justify copying more than one chapter of a book, or one article from a periodical or newspaper, or one short story, short essay or short poem, or other similarly small parts of a work.
2. Is the portion copied the “heart” of the work? Even a quantitatively small portion of a work may weigh AGAINST fair use if it is the most important or commercially valuable part of it.
3. Is the amount copied limited to that which is necessary for the educational purpose to which it is being put? You should copy **no more than is necessary** for the educational purpose.

Fourth Factor: Effect on the Market

1. Will the photocopying result in lost sales of copies of the copyrighted work? Copying that substitutes for sales of the copied work will weigh significantly AGAINST a finding of fair use.
2. Can permission to photocopy the material in question readily be purchased through the Copyright Clearance Center (the “CCC”) or another efficient licensing mechanism, such as the publisher? Even if the copying will not supplant sales of the entire work, the

market for the work may nonetheless be harmed if there is an efficient mechanism for buying copies of the excerpt you want or for buying permission to copy the excerpt. Whether this market harm, if present, will tip the overall determination AGAINST a finding of fair use depends on how the other fair use factors weigh in the particular situation. The economic significance to the publisher of permission fees, as compared to revenues from book sales, may also weigh in the analysis.

3. Is it difficult or perhaps impossible to locate the copyright holder or are there other significant obstacles to seeking permission? Is the expense of seeking permission greater than the value of the permission sought? Where there is no cost-effective way to obtain permission, that fact will weigh in FAVOR of a finding of fair use, which can be seen in part as a means for remedying market failure.
4. Does the University, or other person making the copy, own a lawfully acquired or purchased copy of the work? A negative answer will weigh AGAINST fair use.
5. Is the price of permission prohibitive—i.e., so high that the instructor would reasonably forego educational use of the material in question rather than pay it? If so, the societal value of the educational use may tend to counter the potential harm to the market for the work in proceeding without buying permission.

Other Considerations Bearing on Various of the Factors

1. Is any copyright notice on the original reproduced on the photocopy? You should reproduce the copyright notice, so that users know the work is in copyright and where to start in seeking permission for subsequent uses, and should include appropriate citation or attribution to the source.
2. Is this the first time this instructor has photocopied this excerpt for course use, or has photocopying of the same material been repeated from term to term without permission? Some people assume that “the first use is fair.” This is incorrect. Each use – whether it is the instructor’s first use or a later use – ought to be evaluated on its own merits.
3. How extensive is the reliance on fair use in providing materials for this course? Is the copied material supplementing other copyrighted materials purchased or licensed for use in the course, rather than replacing such materials? Copying that fills out a reading list of purchased or licensed materials—for example, to bring a subject up to date or supply missing pieces—may be more likely to qualify as fair use than copying that substitutes altogether for materials that are purchased or for which a license or permission has been acquired.

As is evident, the law in this area is difficult to apply. Outside of the limited Classroom Guidelines, it is hard to know with certainty when fair use applies to photocopying for course use. **If you wish to make photocopies for course use without obtaining permission from the**

copyright owner, you should have a good faith reasonable belief that the copying qualifies as fair use.

Q: How does fair use apply to use of third-party materials on a course website?

A: The basic considerations that bear on the use of copyrighted material on a course website are similar to those discussed above concerning photocopying. The questions discussed above are generally relevant and provide a good starting point. But the difference in the medium—a digital network rather than hard copies—and the fact that more kinds of content can readily be provided via a website—audiovisual works, music and color images, for example, in addition to text—alter the application of the four fair use factors in various ways.

There are some practical statements we can gather from the litigation around this matter.

1. Taking no more than one chapter of a book WILL NOT assure that the third factor favors fair use, and vice versa, but it is a good starting point gauge. Be especially careful in your fair use analysis if you take more than one chapter, or if the excerpt consists of more than 50 pages or 10% of the work, or if you are taking the “heart of the work.”
2. In all cases, limit the size of the excerpt to the amount needed for the pedagogical purpose. Use less than a whole chapter, if that will suffice.
3. If a license to use the excerpt you want cannot readily be purchased from the copyright holder or the Copyright Clearance Center, the risk of infringement is significantly reduced.
4. If such a license is available, much will turn on the nature of the work, the size of the excerpt taken, the manner in which it is used (including how transformatively it is used), and the likely economic impact of not paying the license fee on the copyright holder and on the incentive to create and distribute such works.

When you apply the fair use factors to multimedia content, the analysis is likely to differ in some ways from the analysis of textual materials above. Taking images, for example, there may be two different copyrights in an image—one in the underlying work of art and the other in the photograph—that need to be considered, though it is sometimes difficult or impossible to identify the photographer; you typically need to use the entire image to achieve your educational purpose, and courts have recognized that copying the entirety of an image where necessary for a legitimate fair use purpose will not weigh against a fair use finding; there is a longstanding tradition in higher education of making slides from art reproductions in periodicals, exhibition catalogs and books for teaching and study; there is no centralized and efficient mechanism for licensing educational images that is analogous to the CCC in the case of text; and the reproductions made for educational use on a course website are typically lower in resolution and quality than the images that copyright holders sell or license for publication, thus reducing the likelihood that a digitized image will harm an existing market.

The following are some general measures that, while not substituting for the four factor fair use test, will tend to assist a finding of fair use when copyrighted material is made available on a course website:

1. Use others' copyrighted material in your course website ONLY if the material is integral to the course curriculum.
2. Include your own comments, criticism and explanation, or otherwise make your use of the copyrighted material transformative.
3. Use only a limited portion of others' copyrighted material, and only what is necessary for your educational purpose.
4. Be wary of using others' copyrighted material that is produced in digital form primarily for instructional use, or where your use would reasonably be expected to harm the market for the analog version of the material.
5. Consider whether a license (permission) allowing the educational use of the material that you wish to make can readily be purchased. If it can, this fact generally will weigh against fair use, though it still may be possible to prevail on fair use depending on the other circumstances.
6. Don't incorporate material in your website in lieu of having students buy books or other such material.
7. Limit access to students enrolled in the course and other qualified people (e.g., a professor's graduate assistants). Assuming access is provided over a network, require a password or PIN.
8. Allow access only during the term in which the course is given, and disable student access thereafter.
9. Wherever feasible, employ streaming formats and technological limits on copying, retention and further dissemination of the work by students.
10. Only incorporate portions from lawfully acquired copies of others' materials.
11. Avoid taking many excerpts or portions from any one work.
12. Alter others' works only where necessary to support specific instructional objectives.
13. Credit the sources fully and display the copyright notice from the original.
14. Include a notice that material on the website is being provided under fair use, and that the material may only be used for personal, noncommercial educational purposes. The notice example is included in **Appendix 2**.

For each item of copyrighted material you wish to use, make a good faith fair use determination. If you do not reasonably believe your proposed use passes the four-factor test, you should obtain permission for the material or should not use it.

Q: What are the rules for performing a musical or literary work, or showing a film or video, in class?

A: Apart from fair use, the Copyright Act contains a special provision, Section 110(1), that allows teachers to perform or display a copyrighted work, either live or recorded, "in the course of face-to-face teaching activities . . . in a classroom or similar place devoted to instruction." Thus, you can use sound recordings, live performances, readings, films or videotapes, slides or

any other performance or display of copyrighted works without restriction and without permission, so long as you are teaching students in a classroom or similar place such as a studio. The only exception is that you may not use a film or videotape that you have reason to believe is an illegally made copy.

Note, however, that this special classroom dispensation applies to performance and display only. It does not authorize making copies. Nor does it appear to enable you to put materials on your web page, even for course use, because it requires that the performance or display occur "in the course of face-to-face teaching . . . in a classroom or similar place devoted to instruction." Similarly, if you wish to videotape a class session in which you have performed or displayed others' copyrighted material and to transmit the video to remote students (e.g., via streaming), a different set of considerations comes into play. Amended by the TEACH Act in 2002, Section 110(2) of the Copyright Act provides a special exemption for such distance learning activities. The exemption is conditioned on a detailed set of requirements.

If you cannot meet all of the TEACH Act requirements, you may be able to rely on fair use, if the statutory four factor test is satisfied, or you should obtain permission to use the copyrighted material in the video of your class session.

Requirements of the TEACH Act

Signed by President George W. Bush on November 2, 2002, the Technology, Education, and Copyright Harmonization (TEACH) Act is the product of discussion and negotiation among academic institutions, publishers, library organizations and Congress. It offers many improvements over previous regulations, specifically sections 110(2) and 112(f) of the U.S. Copyright Act. Under the TEACH Act:

1. Instructors may use a wider range of works in distance learning environments.
2. Students may participate in distance learning sessions from virtually any location.
3. Participants enjoy greater latitude when it comes to storing, copying and digitizing materials.

In order for the use of copyrighted materials in distance education to qualify for the TEACH Act exemptions, the following criteria must be met:

1. The institution must be an accredited, non-profit educational institution.
2. The use must be part of mediated instructional activities.
3. The use must be limited to a specific number of students enrolled in a specific class.
4. The use must either be for 'live' or asynchronous class sessions.
5. The use must not include the transmission of textbook materials, materials "typically purchased or acquired by students," or works developed specifically for online uses.
6. The institution must have developed and publicized its copyright policies, specifically informing students that course content may be covered by copyright, and include a notice of copyright on the online materials.

7. The institution must implement some technological measures to ensure compliance with these policies, beyond merely assigning a password. Ensuring compliance through technological means may include user and location authentication through Internet Protocol (IP) checking, content timeouts, print-disabling, cut and paste disabling, etc.

An online class is allowed to use copyrighted materials as long as:

- 1) The transmission is made under the direction of the teacher as an integral part of the class session (17 U.S.C.A. §110 (2)(a)).
- 2) The transmission is made solely for, and to the extent technologically feasible, the reception of such transmission is limited to students officially enrolled in the course for which the transmission is made (§110(2)(c)(i)).
- 3) The College provides informational materials to faculty and students about copyright law as well as notice that the movie is subject to copyright law (§110(2)(d)(i)).
- 4) The College takes reasonable technological measures to prevent retention or dissemination of the movie by the students (§110(2)(d)(ii)(I)(aa, bb)).

As far as whether we need to preemptively claim that our use is fair use or not, the answer is that we do not. It is an affirmative defense and we only need claim/show fair use if an action claiming unfair use is brought against us.

The following are duties for individual campus stakeholders. These duties must be met to enjoy TEACH ACT protections.

Duties of Institutional Policymakers

1. Accredited nonprofit institution. The benefits of the TEACH Act apply only to a "government body or an accredited nonprofit educational institution." In the case of post-secondary education, an "accredited" institution is as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education.

2. Copyright policy. The educational institution must "institute policies regarding copyright," although the language does not detail the content of those policies. The implication from the context of the statute, and from the next requirement about "copyright information," suggests that the policies would specify the standards educators and others will follow when incorporating copyrighted works into distance education. For most educational institutions, policy development is a complicated process, involving lengthy deliberations and multiple levels of review and approval. Such formal policymaking might be preferable, but informal procedural standards that effectively guide relevant activities may well satisfy the statutory requirement. In any event, proper authorities within the educational institution need to take deliberate and concerted action.

3. Copyright information. The institution must "provide informational materials" regarding copyright, and in this instance the language specifies that the materials must "accurately describe, and promote compliance with, the laws of United States relating to copyright." These materials MUST be provided to "faculty, students, and relevant staff members." Some of this language is identical to a statutory requirement that educational institutions might already meet regarding their potential liability as an "online service provider." In any event, the responsibility to prepare and disseminate copyright information is clear; institutions might consider developing websites, distributing printed materials, or tying the information to the distance-education program, among other possible strategies.

4. Notice to students. In addition to the general distribution of informational materials, the statute further specifies that the institution must provide "notice to students that materials used in connection with the course may be subject to copyright protection." While the information materials described in the previous section appear to be more substantive resources detailing various aspects of copyright law, the "notice" to students may be a brief statement simply alerting the reader to copyright implications. The notice could be included on distribution materials in the class or perhaps on an opening frame of the distance-education course. Taking advantage of electronic delivery capabilities, the educational materials may include a brief "notice" about copyright, with an active link to more general information resources.

5. Enrolled students. The transmission of content must be made "solely for . . . students officially enrolled in the course for which the transmission is made." The next session will examine the technological restrictions on access, but in addition, the law also requires that the transmission be "for" only these specific students. Thus, it should not be broadcast for other purposes, such as promoting the college or university, generally edifying the public, or sharing the materials with colleagues at other institutions. Educators might address this requirement through technological restrictions on access, as mentioned in the following section.

Duties of Information Technology Officials

1. Limited access to enrolled students. The law calls upon the institution to limit the transmission to students enrolled in the particular course "to the extent technologically feasible." Therefore, the institution may need to create a system that permits access only by students registered for that specific class. As a practical matter, the statute may lead educational institutions to implement technological access controls that are linked to enrollment records available from the registrar's office.

2. Technological controls on storage and dissemination. While the transmission of distance education content may be conducted by diverse technological means, an institution deploying "digital transmissions" must apply technical measures to prevent "retention of the work in accessible form by recipients of the transmission . . . for longer than the class session." The statute offers no clarification about the meaning of a "class session," but language throughout

the statute suggests that any given transmission would require a finite amount of time, and students would be unable to access it after a designated time.

Also, in the case of "digital transmissions," the institution must apply "technological measures" to prevent recipients of the content from engaging in "unauthorized further dissemination of the work in accessible form." Both of these restrictions address concerns from copyright owners that students might receive, store, and share the copyrighted content. Both of these provisions of the statute call upon the institution to implement technological controls on methods for delivery, terms of accessibility, and realistic abilities for students to download or share copyrighted content. These provisions specifically demand application of "technological measures" that would restrict uses of the content "in the ordinary course of their operations." In other words, when the restrictive controls are used in an "ordinary" manner, they will safeguard against unauthorized reproduction and dissemination. This language apparently protects the institution, should someone "hack" the controls and circumvent imperfect technology.

3. Interference with technological measures. If the content transmitted through "digital transmissions" includes restrictive codes or other embedded "management systems" to regulate storage or dissemination of the works, the institution may not "engage in conduct that could reasonably be expected to interfere with [such] technological measures." While the law does not explicitly impose an affirmative duty on educational institutions, each institution is probably well advised as a practical matter to review their technological systems to assure that systems for delivery of distance education do not interrupt digital rights management code or other technological measures used by copyright owners to control their works.

4. Limited temporary retention of copies. The statute explicitly exonerates educational institutions from liability that may result from most "transient or temporary storage of material." On the other hand, the statute DOES NOT ALLOW anyone to maintain the copyrighted content "on the system or network" for availability to the students "for a longer period than is reasonably necessary to facilitate the transmissions for which it was made." Moreover, the institution may not store or maintain the material on a system or network where it may be accessed by anyone other than the "anticipated recipients."

5. Limited long-term retention of copies. The TEACH Act also amended Section 112 of the Copyright Act, addressing the issue of so-called "ephemeral recordings." The new Section 112(f)(1) explicitly allows educational institutions to retain copies of their digital transmissions that include copyrighted materials pursuant to Section 110(2), provided that no further copies are made from those works, except as allowed under Section 110(2), and such copies are used "solely" for transmissions pursuant to Section 110(2). As a practical matter, Congress seems to have envisioned distance education as a process of installments, each requiring a specified time period, and the content may thereafter be placed in storage and outside the reach of students. The institution may, however, retrieve that content for future uses consistent with the new law. Incidentally, the TEACH Act did not repeal the earlier language of Section 112 that generally

allowed educational institutions to keep some copies, such as videotapes, of educational transmissions for a limited period of time.

Duties of Instructors

Thus far, most duties and restrictions surveyed in this examination of the TEACH Act have focused on responsibilities of the institution and its policymakers and technology supervisors. None of the details surveyed so far, however, begins to address any parameters on the substantive content of the distance-education program.

Under traditions of academic freedom, most such decisions are left to faculty members who are responsible for their own courses at colleges and universities. Consequently, to the extent that the TEACH Act places restrictions on substantive content and the choice of curricular materials, those decisions are probably best left to the instructional faculty. Faculty members are best positioned to optimize academic freedom and to determine course content. Indeed, the TEACH Act does establish numerous detailed limits on the choice of content for distance education. Again, the issue here is the selection of content from among copyrighted works that an instructor is seeking to use without permission from the copyright owner.

1. Works explicitly allowed.

Previous law permitted displays of any type of work, but allowed performances of only "nondramatic literary works" and "nondramatic musical works." Many dramatic works were excluded from distance education, as were performances of audiovisual materials and sound recordings. The law was problematic at best. The TEACH Act expands upon existing law in several important ways. The new law now explicitly permits:

- Performances of nondramatic literary works;
- Performances of nondramatic musical works;
- Performances of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions"; and
- Displays of any work "in an amount comparable to that which is typically displayed in the course of a live classroom session."

2. Works explicitly excluded.

A few categories of works are specifically left outside the range of permitted materials under the TEACH Act. The following materials may not be used:

- Works that are marketed "primarily for performance or display as part of mediated instructional activities transmitted via digital networks"; and
- Performances or displays given by means of copies "not lawfully made and acquired" under the U.S. Copyright Act, if the educational institution "knew or had reason to believe" that they were not lawfully made and acquired.

The first of these limitations is clearly intended to protect the market for commercially available educational materials. For example, specific materials are available through an online database, or marketed in a format that may be delivered for educational purposes

through "digital" systems, the TEACH Act generally steers users to those sources, rather than allowing educators to digitize the upload their own copies.

3. Instructor oversight.

The statute mandates the instructor's participation in the planning and conduct of the distance education program and the educational experience as transmitted. An instructor seeking to use materials under the protection of the new statute must adhere to the following requirements:

- The performance or display "is made by, at the direction of, or under the actual supervision of an instructor";
- The materials are transmitted "as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities" of the educational institution; and
- The copyrighted materials are "directly related and of material assistance to the teaching content of the transmission."

The requirements share a common objective: to assure that the instructor is ultimately in charge of the uses of copyrighted works and that the materials serve educational pursuits and are not for entertainment or any other purpose. A narrow reading of these requirements may also raise questions about the use of copyrighted works in distance-education programs aimed at community service or continuing education. While that reading of the statute might be rational, it would also be a serious hindrance on the social mission of educational institutions.

4. Mediated instructional activities.

In perhaps the most convoluted language of the bill, the statute directs that performances and displays, involving a "digital transmission," must be in the context of "mediated instructional activities." This language means that the uses of materials in the program must be "an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting." In the same provision, the statute specifies that "mediated instructional activities" do not encompass uses of textbooks and other materials "which are typically purchased or acquired by the students."

The point of this language is to prevent an instructor from including, in a digital transmission, copies of materials that are specifically marketed for and meant to be used by students outside of the classroom in the traditional teaching model. For example, the law is attempting to prevent an instructor from scanning and uploading chapters from a textbook in lieu of having the students purchase that material for their own use. The provision is clearly intended to protect the market for materials designed to serve the educational marketplace. Not entirely clear is the treatment of other materials that might ordinarily constitute handouts in class or reserves in the library. However, the general provision allowing displays of materials in a quantity similar to that which would be displayed in the live classroom setting ("mediated instructional activity") would suggest that occasional, brief handouts-perhaps including entire short works-may be permitted in distance education, while reserves and other outside reading may not be proper materials to scan and display under the auspices of the new law.

5. Converting analog materials to digital formats.

Troublesome to many copyright owners was the prospect that their analog materials would be converted to digital formats, and hence made susceptible to easy downloading and dissemination. Some copyright owners have held steadfast against permitting digitization in order to control uses of their copyrighted materials.

The TEACH Act includes a prohibition against the conversion of materials from analog into digital formats, except under the following circumstances:

- The amount that may be converted is limited to the amount of appropriate works that may be performed or displayed, pursuant to the revised Section 110(2); and
- A digital version of the work is not "available to the institution," or a digital version is available, but it is secured behind technological protection measures that prevent its availability for performing or displaying in the distance-education program consistent with Section 110(2).

These requirements generally mean that educators must take two steps before digitizing an analog work. First, they need to confirm that the exact material converted to digital format is within the scope of materials and "portion" limitations permitted under the new law. Second, educators need to check for digital versions of the work available from alternative sources and assess the implications of access restrictions, if any.

Role for Librarians

Nothing in the TEACH Act mentions duties of librarians, but the growth and complexity of distance education throughout the country have escalated the need for innovative library services. Fundamentally, librarians have a mission centered on the management and dissemination of information resources. Distance education is simply another form of exactly that pursuit. More pragmatically, distance education has stirred greater need for reserve services and interlibrary loans in order to deliver information to students in scattered locations. Librarians are also often the principal negotiators of licenses for databases and other materials; those licenses may grant or deny the opportunity to permit access to students located across campus or around the world.

Within the framework of the TEACH Act, librarians may find many new opportunities to shape distance-education programs, such as:

- Librarians may participate in the development of copyright policy, including policies on fair use that long have been of central importance to library services.
- Librarians may take the lead in preparing and gathering copyright information materials for the university community. Those materials may range from a collection of books to an innovative website linking materials of direct relevance.

- Librarians may retain in the library collections copies of distance-education transmissions that the institution may make and hold consistent with the law. In turn, the librarians will need to develop collection polices, usage guidelines, and retention standards consistent with limits in the law.
- Many materials used in distance education will come from the library collections, and librarians may be called upon to locate and deliver to educators proper materials to include in the transmissions. Librarians may need to evaluate materials based on the allowable content limits under the law.
- Librarians often negotiate the licenses for acquisition of many materials. To the extent that the law imposes undesirable restrictions, the librarians are in a position to negotiate necessary terms of use at the time of making the acquisition.
- Librarians have many opportunities for offering alternative access to content that cannot be included lawfully in the distance-education programming. When materials may not be lawfully scanned and uploaded, the library may respond with expanded reserve services, or enhanced database access, or simply purchasing alternative formats or multiple copies of needed works.
- Librarians long have recognized the importance of fair use and often have the best grasp of the doctrine. Librarians are usually best positioned to interpret and apply fair use to situations and needs not encompassed by the rigorous details of the TEACH Act.
- Librarians may research and track developments related to the TEACH Act, including policies, information resources, and operating procedures implemented at other educational institutions. That effort can allow one university to learn from others, in order to explore the meaning of the law and to consider options for compliance.

APPENDIX 1

Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals

Published in House Report 94-1476

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under § 107 of H.R. 2233. 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 § 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.

*** Guidelines ***

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:
- 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 from any prose work of not more than 1,000 words 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" and "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 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.

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 are reproduced and used separately.
- B. There shall be no copying of or from works intended to be "consumable" in the course of study or of 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 high 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 the photocopying.

AGREED

March 19, 1976

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

By Sheldon Elliott Steinbach

AUTHOR-PUBLISHER GROUP

AUTHORS LEAGUE OF AMERICA

By Irwin Karp, Counsel

ASSOCIATION OF AMERICAN PUBLISHERS, INC.

By Alexander C. Hoffman, Chairman Copyright Committee

APPENDIX 2

USER NOTICE FOR COURSE WEBSITES

Note: If you are including copyrighted material on a course website in reliance on fair use or with permission, it is advisable, among other measures, to include a notice to that effect on the site. The following notice may be used for that purpose:

This course website contains copyrighted materials. Those materials may include text, images, graphics, audio and video clips, and other content (collectively, the “Content”). In some cases, the copyright is owned by third parties, and Salt Lake Community College is making the third-party Content available to you by permission or under the fair use doctrine. The Content is made available only for your personal, noncommercial, educational, and scholarly use. You may not use the Content for any other purpose, or distribute or make the Content available to others, unless you obtain any required permission from the copyright holder. Some Content may be provided via streaming or other means that restrict copying; you may not circumvent those restrictions. You may not alter or remove any copyright or other proprietary notices included in the Content.

For additional information or if you have questions or concerns, please contact the Office of the General Counsel at 801-597-7094 or Melissa.Flores@slcc.edu.

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