

**The Kernochan Center for Law, Media and the Arts
Columbia University School of Law**

**Copyright Exceptions in the United States
For Educational Uses of Copyrighted Works**

**By June M. Besek, Jane C. Ginsburg,
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Executive Summary

We provide this report in connection with the Australian Law Reform Commission's ongoing study of copyright and the digital economy, and in particular its request for comments on the possibility of a new free use exception for education or an open ended "fair use" type exception. We have been asked to describe the principal US copyright exceptions relevant to educational uses of copyright-protected materials, with an emphasis on broadcast materials, and the application of the US fair use doctrine to those uses.

The principal exceptions in US copyright law relating to educational uses of copyright-protected materials – in addition to fair use – are sections 110(1), 110(2), 108, and 121. Section 110(1) permits performances of copyrighted works in face-to-face teaching situations in the classroom. Section 110(2) permits certain performances to be transmitted to students; it was intended to address distance education. Section 110(2) has a number of restrictions designed to protect copyrighted materials from unauthorized use. Section 108 provides exceptions for libraries and archives, including exceptions permitting libraries, in certain circumstances, to make copies of a copyrighted work upon a user's request, for scholarship or research. Section 121 provides an exception for making copies of works in specialized formats for the visually impaired.

The US fair use doctrine dates from the early 19th century, but was codified only in the last major revision of the US Copyright Act in 1976. That codification was not meant to change the law as it then existed, nor to freeze it. Section 107 of the Copyright Act requires four factors to be taken into account in all fair use determinations, although courts may consider other factors they deem relevant. The factors are to be weighed together; there is no formula for determining whether a use is a fair use, nor is any one factor dispositive. Educational uses are not automatically deemed to be fair use.

The fair use doctrine continues to develop through case law. The US Supreme Court has decided a number of cases that provide guidance as to how fair use should be evaluated. While the Supreme Court has not directly addressed fair use in the context of educational materials, a number of US district courts and appellate courts have done so, and there are relevant lawsuits that are ongoing.

While fair use is not entirely unpredictable, in some cases even copyright attorneys have difficulty determining in advance whether a use will be deemed a fair use. There are fair use cases that have been reversed at every level in the courts, in litigations that have lasted for several years. A number of different fair use "guidelines" have been developed under the 1976 Copyright Act; some have been widely followed (in particular, those with Congressional approval) but others less so.

Even assuming Australia were to adopt a fair use doctrine like that of the US, it is likely that the laws would diverge – first, because many US decisions have been close and could easily have gone the other way (indeed, in the US, the law can sometimes diverge from circuit to circuit), and second, because the economic, legal and social aspects of the two countries can differ. For example, the ready availability of a license tends to weigh against fair use, so to the extent collective licensing means are more readily available in Australia, it could affect the scope of fair use.

CAG Schools advocates an exception for fair use or educational use from legislation prohibiting circumvention of technological protection measures. It also recommends invalidating contract terms that would restrict educational fair use. The US has neither provision; as a general matter, copyright law in the US is a “default rule” and does not override contracts. Exceptions from the US anti-circumvention provisions for certain types of educational uses can be achieved only by participating in a triennial “rulemaking” proceeding in the US Copyright Office and establishing through evidence that a particular fair use is or will be adversely affected by the anti-circumvention provisions.

Finally, any comparison between a proposal for a fair use provision in Australian law and the existing US law must recognize that US law is a “moving target.” Some significant issues with respect to fair use of educational materials are still working their way through the US courts. Moreover, it is possible that the US will pass laws over the next few years that in some measure will affect the educational use of copyrighted works.

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1.0 Introduction and Background

The Australian Law Reform Commission (ALRC) has undertaken a study of Copyright and the Digital Economy to consider, *inter alia*, whether the existing exceptions in Australian copyright law are sufficient to promote creativity and innovation in the digital economy, and whether they should be modified or supplemented. Its report is due in November 2013.

Specifically with respect to broadcast works, the ALRC's Copyright and the Digital Economy Issues Paper (ALRC Issues Paper) raises the question whether the existing statutory licensing scheme for the copying and communication of broadcasts by educational institutions (part VA of the Australian Copyright Act) should be amended. It asks whether some of the material covered by the statutory license should be removed from its purview and covered instead by a free-use exception (either under fair dealing or as a new stand-alone exception), e.g., a new exception to allow educational institutions to copy and communicate free and publicly available material. The ALRC has also sought comments on the advisability of creating an open-ended "fair use" type exception, to supplement existing exceptions (or possibly, in some cases, to substitute for them).

We have been asked to describe the principal US copyright exceptions relevant to educational uses of copyright-protected materials, with an emphasis on broadcast materials, and the application of the fair use doctrine to those uses.

We begin in section 2.0 with a description of the principal exceptions in US law relating to educational uses of copyrighted works, other than fair use. Section 3.0 focuses on the fair use doctrine, including the statutory factors, significant cases, guidelines created over the years, cases concerning educational uses such as course packs and online course materials, recent cases that represent assertions of fair use that involve copying of complete copyrighted works, and finally, the interface between fair use and the specific exceptions in the US Copyright Act.

We turn in section 4.0 to the anti-circumvention provisions in section 1201 of the US Copyright Act, and what the Copyright Office's rulemaking proceedings indicate with respect to its view of fair use of audiovisual materials in the educational context. Section 5.0 addresses current practices of educational institutions. In section 6.0 we discuss a specific issue of US law – state sovereign immunity – that may be affecting the development of the fair use doctrine in the educational context. In section 7.0 we discuss recent proposals for change in US law and policy.

In Section 8.0 we focus specifically on CAG Schools' proposal. We describe it briefly (as it relates to educational use of broadcast materials), and then compare it to US law. Section 9.0 considers source licensing of audiovisual materials to educational institutions. We conclude in section 10.0.

2.0 Overview of Principal US Exceptions Relating to Educational Uses of Copyrighted Works

United States copyright law is contained in Title 17 of the US Code. It is available at <http://www.copyright.gov/title17/> and relevant provisions have been included in Appendix A hereto. The last overall revision of the US Copyright Act took place in 1976 (effective in 1978), but there have been many legislative amendments since that time. The revision process leading to the 1976 Copyright Act took almost 20 years. The previous major revision was the 1909 Act.

Exceptions and limitations to copyright are addressed in chapter one of Title 17, sections 107 to 122. In this section we address the statutory exceptions for in-classroom performances and displays, distance education, copying and distribution by libraries and archives, and exceptions for the visually impaired. In section 3.0 we address the fair use doctrine.

2.1 Section 110(1): In-Classroom Performances and Displays

Section 110(1) of the U.S. Copyright Act was enacted as an exception for academic institutions, to allow performances or displays of copyrighted works, including audiovisual works, "in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction."² The language of section 110(1) specifies four conditions that must be met for the exception to apply. First, the performance or display must be made by the instructor or by the pupils. While guest lecturers would qualify as instructors for the purpose of the exception, performances by actors, singers, or instrumentalists brought into a school would not.³ Second, the performance must take place "in the course of face-to-face teaching activities."⁴ The concept of "face-to-face" is vital, as it plays a pivotal role in distinguishing section 110(1) from section 110(2). While the former permits a wide range of uses in "face-to-face" teaching activities, the latter is invoked when the uses are in "transmissions." The legislative report from the US House of Representatives concerning the 1976 Copyright Act explains the face-to-face requirement:

The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would

² 17 U.S.C. § 110(1) (West 2013). The legislative history provides that "nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display." H.R. REP. NO. 94-1476, at 81 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5695.

³ 2 NIMMER ON COPYRIGHT § 8.15 (2012).

⁴ 17 U.S.C. § 110(1) (West 2013).

extend to the use of devices for amplifying or reproducing sound and for projecting visual images.⁵

Third, the statute requires that the performance take place in “in a classroom or similar place devoted to instruction,” which includes studios, gymnasiums, libraries, and more, as long as those venues host instructional activities.⁶ The educational institution in which the performance is conducted must also be nonprofit, to exclude profit-making bodies, e.g., dance studios and language schools, from the exception.⁷ Finally, in the case of a motion picture or other audiovisual work, the section 110(1) exception does not pertain to a situation where “the performance... is given by means of a copy that was not lawfully made under this title,” and “the person responsible for the performance knew or had reason to believe was not lawfully made...”⁸

The legislative history of the 1976 Copyright Act provides that “nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display.”⁹

2.2 Section 110(2): Distance Education Use (“the TEACH Act”)

As explained above, section 110(1) of the Copyright Act is strictly confined to traditional face-to-face teaching, and does not offer a similar exception for distance learning. As passed in 1976, section 110(2) provided for performances and displays in the course of certain transmissions that were part of systematic instructional activities, but the provision was too narrow to cover distance education.¹⁰ Congress amended section 110(2) with the Technology Education and Copyright Harmonization Act of 2002 (hereinafter referred to as the TEACH Act).¹¹

The TEACH Act expanded the scope of section 110(2) to apply to performances and displays of all copyrighted works, except for works that are “produced or marketed primarily for... mediated instructional activities transmitted via digital networks,” as well as performances and displays “given by means of a copy... not lawfully made and acquired,” which the transmitting institution “knew or had

⁵ H.R. REP. NO. 94-1476, at 81.

⁶ NIMMER, *supra* note 3.

⁷ NIMMER, *supra* note 3.

⁸ 17 U.S.C. § 110(1). Nimmer notes that while the statute used the verb “believe,” the House Report used the verb “suspect.” NIMMER, *supra* note 3.

⁹ H.R. REP. NO. 94-1476, at 81.

¹⁰ The provision as originally passed applied to transmissions of nondramatic literary or musical works made primarily for reception in classrooms or similar places devoted to instruction, to persons to whom the transmission is directed because of disabilities or other special circumstances that precluded their classroom attendance, or to government employees (all subject to certain conditions). 17 U.S.C. § 110(2) (1976), (current version at 17 U.S.C. § 110(2) (West 2013)).

¹¹ Technology Education and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, § 13301, 116 Stat. 1758 (2002).

reason to believe fell into such category.”¹² However, while non-dramatic literary or musical works can be performed in their entirety, performances of other works are limited to “reasonable and limited portions” thereof.¹³ To determine what constitutes “reasonable and limited portions,” distance educators must consider the nature of the market for the work and the academic objectives of the use.¹⁴ Displays of copyrighted works are not subject to the “reasonable and limited portions” requirement. Instead, as displays of certain works (like displaying text using an ebook reader) could substitute for the original work and discourage students from purchasing a lawful copy, a transmitted display is confined to “an amount comparable to [what] is typically displayed in the course of a live classroom setting.”¹⁵

The distance education exception applies to any “nonprofit accredited educational institution.” Accreditation is determined based on the nature of the institution for those offering elementary, secondary or post-secondary education.¹⁶ The “nonprofit” requirement applies equally to public and private institutions, and does not demand that the courses be offered free of charge, or as part of a degree program. Transmission by the educator must be limited to either those students enrolled in the class for which the transmission is conducted, or to governmental employees within the scope of their employment.¹⁷

Under the TEACH Act, the performance or display must meet certain cumulative requirements to ensure that the exception applies only to the equivalent of a traditional classroom setting. Hence, the permissible use of copyrighted works shall be “at the direction of or under the actual supervision of the instructor,” and “as an integral part of a class session offered as a regular part of the systematic mediated instructional activities.” The first part demands that the use of copyrighted materials is conducted by the instructor or by a student, under the direction or under the “actual supervision” of the class instructor. The Senate Report explains that “actual supervision” requires that “the instructor is, in fact, supervising the class activities, and that supervision is not in name or theory only.”¹⁸ The supervision requirement is intended to prevent students from broadcasting works for entertainment purposes under the guise of educational activity.¹⁹

The second part of the TEACH Act directs that the performance or display must be essential to the class, as opposed to merely supplementing it. It must also be “directly related and of material assistance to

¹² 17 U.S.C. § 110(2) (West 2013). See also STEVEN A. ARMATAS, *DISTANCE LEARNING AND COPYRIGHT, A GUIDE TO LEGAL ISSUES*, 430 (2008).

¹³ ARMATAS, *supra* note 12, at 430.

¹⁴ *Id.*

¹⁵ *Id.* at 431.

¹⁶ According to the American Library Association: “For higher education, regional or national accrediting agencies recognized by the Council on Higher Education Accreditation or the U.S. Department of Education provide authorized accreditation. For primary and secondary institutions, applicable state certification or licensing agencies provide accreditation.” Kenneth D. Crews, *The TEACH Act and Some Frequently Asked Questions*, AM. LIBRARY ASS’N, <http://www.ala.org/advocacy/copyright/teachact/faq>.

¹⁷ Stephana I. Colbert & Oren R. Griffin, *The Teach Act: Recognizing Its Challenges and Overcoming Its Limitations*, 33 J.C. & U.L. 499, 502 (2007).

¹⁸ S. REP. NO. 107-31, at 9 (2001).

¹⁹ ARMATAS, *supra* note 12, at 433.

the teaching content of the transmission.”²⁰ The Senate Report notes on this point that the portion used may not be “for the mere entertainment of the students or as unrelated background material.”²¹ The second part also requires that the class session, to which the performance or display is essential, is offered as a regular part of “systematic mediated instructional activities.” Mediated instructional activities are defined as activities that make use of copyrighted works “as 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.”²²

To qualify for the TEACH Act exception, distance educators are required to adopt policies designed to further compliance with copyright law. Such policies should be implemented and communicated to students, faculty, and relevant staff members.²³ The institution must employ technological protection measures to reasonably prevent unauthorized retention and unauthorized dissemination of the copyrighted material.²⁴ The TEACH Act allows the work to remain “in accessible form” to the students during “the class session” only. “Accessible form” refers to the use of technological protection measures that encrypt the material and limit access to the keys and the period in which the copyrighted content may be in use.²⁵ The duration of the “class session” is generally considered “the period during which a student is logged on to the server of the institution . . . but is likely to vary with the needs of the student and with the design of the particular course.”²⁶

The Act also mandates that access to the copyrighted materials in online education is provided exclusively to students officially enrolled in the class. Under this requirement the educational institution must use standard measures to deliver secure transmission, e.g., password protection, so that the copyrighted content will not be accessible to unauthorized users.²⁷ Students must be notified in the course of each session that the online class includes materials that may be subject to copyright protection. If a copyright owner has adopted technological measures to block retention and distribution of her work, the institution must not interfere with those measures.²⁸

While the only rights afforded under section 110(2) itself remain the transmission of *performances and displays*, the TEACH Act also added subsection (f)(1) to section 112 (“Ephemeral recordings”), which authorizes the storage of the transmitted copyrighted material on online servers.²⁹ Specifically, section 112(f) (1) allows an educational institution or government body entitled to the 110(2) exception to make copies of works in digital form to facilitate such transmissions, provided those copies are used solely by

²⁰ 17 U.S.C. § 110(2)(B).

²¹ S. Rep. No. 107-31, at 11.

²² 17 U.S.C. § 110 (2).

²³ 17 U.S.C. § 110(2)(D).

²⁴ 17 U.S.C. § 110(2).

²⁵ S. Rep. No. 107-31, at 12.

²⁶ *Id.*

²⁷ ARMATAS, *supra* note 12, at 434. Armatas emphasizes the need for “standard” measures; circumvention of an “imperfect technology” employed by the educator should not expose it to liability.

²⁸ 17 U.S.C. § 110(2)D(ii)(II).

²⁹ 17 U.S.C. § 110(f) (1); see Raquel Xalabarder, *Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education Through the Internet*, 26 COLUM. J.L. & ARTS 101, 115 (2003).

the institution that created them, only for transmissions authorized under section 110(2), and no further copies are made. The institution may also convert analog versions of works to digital if no digital version is available (or those that are available are subject to technological protection measures), but only to the extent that section 110(2) permits use of the works.³⁰

The TEACH Act was intended to reduce the gap between distance education and its traditional face-to-face counterpart, at least with respect to performances and displays of copyrighted works. While it eliminated much of the disparity between the two forms of teaching, the TEACH Act cannot be said to put them on equal footing.³¹ For example, for distance education the instructor may use only "reasonable and limited" portions of most copyrighted works (including audiovisual works), whereas she could use the entire work under the face-to-face teaching exception. As one commentator pointed out: "a professor wishing to show the movie *Ben Hur* to his Roman History course may play the entire movie for his on-campus class without the need to obtain permission. Conversely, only 'reasonable and limited' portions thereof may be shown to students taking the same course over the Internet. Even students viewing the class simultaneously at a regional campus of the same university must receive an 'edited' broadcast."³²

One difficulty educators associate with the TEACH Act concerns its "all or nothing" approach.³³ An educational institution that strictly follows the mandate of using only "reasonable and limited" portions of the work would not be entitled to the exception unless it also implements the administrative and technical measures specified in the Act (e.g., developing institutional copyright policy, and installing protective measures to prevent unauthorized access to copyrighted works).³⁴ Implementing these measures may be prohibitively expensive for some schools.³⁵ Users also complain about the vagueness of the "reasonable" standard and the complexity of some of the Act's requirements.³⁶

While the TEACH Act applies mainly to instructors, it is said to have a significant effect on libraries and the ways they make information available. As one commentator pointed out: "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."³⁷

³⁰ 17 U.S.C. § 110(f)(2).

³¹ ARMATAS, *supra* note 12, at 446.

³² *Id.*, at 447.

³³ ARMATAS, *supra* note 12, at 447-448.

³⁴ *Id.*

³⁵ *Id.* at 448.

³⁶ See Ralph Oman, *Five Years Later, What Has the TEACH Act Taught Us?*, 1 No. 1 LANDSLIDE 26, 28 (Sept./Oct. 2008).

³⁷ Kenneth D. Crews, *New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act*, available at <http://www.ala.org/PrinterTemplate.cfm?Section=distanceed&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25939#newc>.

2.3 Section 108: Exceptions for Libraries and Archives

Section 108 of the US Copyright Act contains a number of copyright exceptions specific to libraries and archives.³⁸ The section 108 exceptions are primarily directed toward library copying and, in some cases, limited distribution of copyrighted materials. Most relevant are section 108(d), which allows libraries and archives to reproduce individual articles or short excerpts of a longer work at the request of a user;³⁹ and section 108(e), which permits them to reproduce a complete work or a substantial portion thereof, if a copy of the work cannot be obtained at a fair price.⁴⁰ The library or archives must have “no notice that the copy would be used for any purpose other than private study, scholarship, or research,” and the copy must be turned over to the user (and not used to augment the library’s collection).⁴¹ In either case, certain categories of works are excluded from these “copies for users” provisions. The excluded categories include musical works, pictorial works, or motion pictures or other audiovisual works (other than an audiovisual work dealing with news – see the discussion of section 108(f)(3), below).⁴²

Section 108(d) does not require a library to check first if a copy is available on the market. Recognizing the potential adverse effect on journal subscriptions if libraries were to terminate subscriptions and systematically rely on each other to supply journal articles, Congress provided in section 108(g) that the exceptions apply only to “the isolated and unrelated reproduction or distribution of a single copy . . .” but not to systematic reproduction or distribution of one or multiple copies of a work. At the same time, Congress, trying to achieve a balance among the stakeholders, included a proviso in section 108(g) that “nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies . . . for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.”

With regard to what qualifies as “aggregate quantities” that would substitute for purchase of the works, Congress relied on guidelines developed by the National Commission on New Technological Uses of Copyrighted Works (CONTU) in consultation with the stakeholders. Those guidelines, reproduced in the Conference Committee Report accompanying the 1976 Copyright Act, provide, for example, that six or more copies of an article or articles from a given periodical within five years (or for other material

³⁸ To qualify, the library or archive must be open to the public, or at least to researchers in a specialized field; it may not be using the copyrighted work for commercial advantage, and it must include a copyright notice (or legend) on copies that it makes. 17 U.S.C. §108(a) (West 2013). Sections 108 (b) and (c) set out the conditions on which libraries may make copies of works in their own collections: they may make up to three copies of an unpublished work for preservation or deposit at another library, and up to three copies of a published work to replace one that is damaged, deteriorating, lost, stolen, or obsolete, if an unused replacement can’t be obtained at a fair price. §108(b), (c). The copies may be made in digital form, but digital copies may not be made outside the premises of the library. *Id.*

³⁹ 17 U.S.C. §108(d).

⁴⁰ 17 U.S.C. §108(e).

⁴¹ 17 U.S.C. §108(d)(1), (e)(1).

⁴² Section 108(f)(3) makes clear that section 108 should not to be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts of an audiovisual news program by a qualifying library or archives.

described in section 108(d), six or more copies during the copyright term) constitutes “such aggregate quantities.”⁴³

Section 108(f)(3) is one of the few provisions that allow libraries to make copies for their own collections: “Nothing in this section . . . shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program” This exception permits libraries and archives to acquire copies of audiovisual news programs by copying them off the air for their collections. Copies made may be lent to users so long as copies are in physical (as opposed to digital) form and are returned to the library after a reasonable period. In contrast, copies of text-based works made for users must become the property of the user.

According to the House of Representatives Report accompanying the 1976 Copyright Act:

Section 108(f)(3) is intended to apply to the daily newscasts of the national television networks, which report the major events of the day. It does not apply to documentary (except documentary programs involving news reporting as that term is used in section 107), magazine-format or other public affairs broadcasting dealing with subjects of general interest to the viewing public.⁴⁴

Section 108(f)(4) situates fair use in the context of other laws. First, it states that section 108 does not affect “the right of fair use.” Second, it provides that section 108 does not affect any contractual obligations the library or archives undertook when it obtained the copy for its collections.

Finally, section 108 (h) provides for broader use by libraries of works in their last 20 years of copyright, if the works are not commercially available or not available at a fair price. Libraries may reproduce, distribute, display or perform such works for purposes of preservation, scholarship or research. Unlike sections 108(d) and (e), this exception applies to all categories of works, including audiovisual works.

2.3.1 Proposals to Amend Section 108

In 2005 the US Copyright Office and the Library of Congress convened a Study Group whose mission was to review section 108 and recommend how it should be amended in light of digital technologies. The Section 108 Study Group had 19 members, including representatives from libraries, archives, and various sectors of the copyright industries (books, movies, software, etc.). Their report, published in 2008, made a number of recommendations for legislative change.⁴⁵ For example, the Study Group recommended an exception to allow libraries under certain conditions to proactively make digital copies of works in their collections for preservation (rather than waiting until the work is damaged or lost). It

⁴³ H.R. REP. NO. 94-1733 at 71-72 (1976) (Conf. Rep.). The Committee cautioned that these guidelines were not to be considered rigid rules and would likely require adjustment over time. *Id.* at 71.

⁴⁴ H.R. REP. NO. 94-1476 at 77 (1976). This provision aims to ensure independent third-party resources for news broadcasts and the public’s ability to access these resources. See S. REP. NO. 94-473, at 70 (1975).

⁴⁵ SECTION 108 STUDY GROUP REPORT xiv (Mar. 2008), available at <http://www.section108.gov>.

also recommended an exception to allow libraries to crawl and copy websites for preservation purposes, and to make those copies available online. It recommended conditions to protect right holders of websites who derive revenue from their sites. First, only publicly available websites that are not restricted by access controls or registration requirements are subject to such archiving; second, a website owner would be entitled to opt out of the copying; and third, no website could be made publicly available online until some specified period of time after it was crawled and copied.⁴⁶

Although the Section 108 Study Group did not make a specific recommendation with respect to the provisions in section 108 that permit libraries to make copies for users for private study, research, and scholarship, it did conclude that electronic copies (rather than hard copies) under section 108(d) and (e) should be permitted only if libraries take adequate measures to ensure that access is provided only to the requesting user, and to deter unauthorized reproduction and distribution. The Study Group also concluded that it might be possible to expand these exceptions to cover non-text based works currently excluded under section 108(i) -- such as musical works or audiovisual works -- but more investigation would have to be done to determine whether such a change would adversely affect the market for certain categories of works currently excluded, and whether it would otherwise harm the legitimate interests of the rights holders. It suggested a number of ways in which such harm might be mitigated (e.g., by excluding commercial entertainment works) but made no overall recommendation for legislative change on this issue.⁴⁷

2.4 Section 121: Reproduction for Blind or Other People with Disabilities

While reproduction for the visually impaired is not directly relevant to our study, we discuss it briefly here because section 121 is implicated in the *Authors Guild v. HathiTrust* decision, discussed below in section 3.5.2.

Section 121 provides a statutory limitation on the exclusive right of reproduction to enable certain nonprofit organizations or governmental agencies to provide alternative accessible copies of previously published nondramatic literary works in specialized formats exclusively for use by blind or other persons with disabilities.

Section 121 aims to serve as a safe harbor for the activities of certain authorized entities, allowing them to operate without having to perform the more particularized analysis required by section 107. Since it was passed over 15 years ago, the only case to interpret and apply this section has been the *HathiTrust* case, discussed below, which provided only a cursory analysis of defendants' section 121 defense.

To benefit from the protections of section 121, the following requirements must be satisfied:

- The entity engaged in reproduction or distribution of the section 121 copies must be an "authorized entity." This is defined in section 121(d)(1) as a nonprofit organization or governmental agency that has a primary mission to provide specialized services relating to

⁴⁶ *Id.* at viii.

⁴⁷ The Study Group made a "recommendation" only when it reached unanimous agreement. *Id.* at ii.

training, education, or adaptive reading or information access needs of blind or other persons with disabilities.

- The use of the copyrighted work must be limited to reproduction or distribution and cannot include such uses as performance or display.
- The works copied must be published, nondramatic literary works. Making copies of any unpublished or dramatic literary works, or any other type of copyrighted work such as audiovisual works, is not covered by this section and must rely on section 107 for protection.
- The copies must be reproduced or distributed in “specialized formats” exclusively for use by blind or other persons with disabilities. “Specialized formats” is defined in section 121(d)(4) as Braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities. Copies made under this provision must bear a notice that any further reproduction or distribution in a format other than a specialized format is infringing.
- Copies made under this provision must include a copyright notice identifying the copyright owner and the date of original publication.

3.0 Section 107: Fair Use

3.1 Fair Use Principles

Fair use is a defense to an action for copyright infringement. It “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.”⁴⁸ It has been defined as “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.”⁴⁹

Fair use was originally a judicial doctrine and dates back almost two centuries.⁵⁰ Congress codified fair use in 17 U.S.C. section 107 to “‘restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way’ and intended that courts continue the common-law tradition of fair use adjudication.”⁵¹

Section 107 provides:

Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or

⁴⁸ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

⁴⁹ *Harper & Row, Publrs v. Nation Enters.*, 471 U.S. 539, 549 (1985) (quoting H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

⁵⁰ See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (holding that in deciding whether use of a copyrighted work in developing a new work is a “justifiable use” a court must “look to the nature and object of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”)

⁵¹ *Campbell*, 510 U.S. at 577 (quoting H.R. REP. NO. 94-1476 at 66 (1976)).

research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Section 107 requires a case-by-case analysis to determine if a use qualifies as a fair use, taking into consideration the four statutory factors.⁵² The analysis is “not to be simplified with bright-line rules...” and no single factor is determinative.⁵³ Rather, “all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.”⁵⁴ While the four factors dominate most fair use discussions, they are non-exclusive and courts explore additional considerations where relevant.

Factor 1: The Purpose and Character of the Use

The first fair use factor requires courts to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁵⁵ The preamble to section 107 offers a list of purposes which will weigh in favor of fair use, including “criticism, comment, news reporting, teaching, (including multiple copies for classroom use), scholarship, [and] research.”⁵⁶ However, these purposes are not automatically deemed fair use; all of the factors must be considered. Also, this list is not exhaustive, and other non-enumerated purposes will be considered.⁵⁷ In deciding whether a particular use weighs in favor of fair use under the first factor, courts have looked primarily at whether the use was transformative or productive, and whether the use was commercial.

A particular use is more likely to be fair if it is transformative or productive. A transformative or productive use is one where the defendant has created something new, repurposed the original work, or otherwise added value. While easily stated, determining whether a use is transformative or productive is not entirely predictable. Examples of transformative or productive uses include presenting

⁵² *Harper & Row*, 471 U.S. at 549.

⁵³ *Campbell*, 510 U.S. at 577.

⁵⁴ *Id.*

⁵⁵ 17 U.S.C § 107(1) (2006).

⁵⁶ 17 U.S.C § 107 (2006).

⁵⁷ *See Harper & Row*, 471 U.S. at 561.

images of magazine covers for historical reasons;⁵⁸ copying of an entire photo in conjunction with commentary about that photo;⁵⁹ and superimposing an actor's face on a copy of a famous photograph for the purpose of parody.⁶⁰ Examples where a transformative or productive use was not found include direct translation of news articles;⁶¹ creation of a multiple-choice test based on a TV-series;⁶² and the use of copyrighted jewelry in an advertisement for a clothing line.⁶³

A particular use is less likely to be fair if it is commercial. However, if a commercial work is substantially transformative, it may still qualify as a fair use.⁶⁴

Finally, a particular use is less likely to be fair if the infringer's conduct is viewed as improper. For example, removal of a copyright notice⁶⁵ and knowing use of stolen material⁶⁶ weighed against a finding of fair use.

Factor 2: The Nature of the Copyrighted Work

The second fair use factor requires courts to consider "the nature of the copyrighted work." According to the Supreme Court: "This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."⁶⁷ The major distinction in evaluating the nature of the copyrighted work is whether the work is factual or fictional. "[F]or example, informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment."⁶⁸

Another consideration is whether the work is available to the public. Courts are less likely to find fair use in the copying of an unpublished and confidential work.⁶⁹ However, the unpublished nature is not dispositive. Section 107 explicitly states that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of [the four] factors."⁷⁰

Factor 3: The Amount and Substantiality of the Portion Used

⁵⁸ Warren Publ'g Co. v. Spurlock, 645 F. Supp. 2d 402 (E.D. Pa. 2009).

⁵⁹ Nuñez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000).

⁶⁰ Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998).

⁶¹ Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc., 166 F.3d 65 (2d Cir. 1999).

⁶² Castle Rock Enter. v. Carol Publ'g Group, Inc., 150 F.3d 132 (2d Cir. 1998).

⁶³ Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001).

⁶⁴ Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); see *Cariou v. Prince*, No. 11-1197-ev, 2013 U.S. App. Lexis 8380 (2d Cir. Apr. 25, 2013).

⁶⁵ *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992).

⁶⁶ *Harper & Row*, 471 U.S. 539.

⁶⁷ *Campbell*, 510 U.S. at 586.

⁶⁸ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 496-97 (1984).

⁶⁹ *Harper & Row*, 471 U.S. 539.

⁷⁰ 17 U.S.C. §107 (West 2013).

The third fair use factor requires courts to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”⁷¹ This factor calls for “a determination of not just quantitative, but also qualitative substantiality.”⁷² For example, the copying of 300 words from an unpublished 200,000-word manuscript was considered substantial because the words were essentially the heart of the manuscript.⁷³ In contrast, reproduction of concert posters in their entirety in a much reduced size as part of a chronology of the group of performers, was not considered substantial because the reproductions did not capture “the essence or ‘heart’ of the original work.”⁷⁴

Factor 4: The Effect of the Use Upon the Actual or Potential Market for or Value of the Copyrighted Work

The fourth fair use factor requires courts to consider “the effect of the use upon the potential market for or value of the copyrighted work.”⁷⁵ “It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market’ for the original.”⁷⁶ The cognizable market harm, however, does not include harm resulting from criticism of the original work.⁷⁷ The role of courts is to distinguish between criticism, which suppresses demand, and copyright infringement, which usurps demand.⁷⁸

Both commentators and courts have noted the danger of circularity inherent in factor four. This is because “a potential market, no matter how unlikely, has always been supplanted in every fair use case, to the extent that the defendant, by definition, has made some actual use of plaintiff’s work, which could in turn be defined in terms of the relevant potential market.”⁷⁹ To avoid circularity, courts have recognized limits by considering only “traditional, reasonable, or likely to be developed markets.”⁸⁰ Thus, for example, the law does not recognize a derivative market for critical works.⁸¹ A court is apt to find that a genuinely transformative use will not result in lost revenue to the right holder. See the discussion of *Bill Graham Archives* in section 3.5.

The interplay between fair use and the other exceptions in the Copyright Act are discussed below in section 3.6.

⁷¹ *Id.* §107(3).

⁷² 4 NIMMER, *supra* note 3, § 13.05 (A)(4).

⁷³ *Harper & Row*, 471 U.S. 539.

⁷⁴ *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

⁷⁵ 17 U.S.C. § 107(4) (West 2013)

⁷⁶ *Campbell*, 510 U.S. at 590 (quoting 4 NIMMER, *supra* note 3, § 13.05(A)(4)).

⁷⁷ *Id.*

⁷⁸ *Id.* (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

⁷⁹ 4 NIMMER, *supra* note 3, § 13.05 (A)(4).

⁸⁰ *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 7 (S.D.N.Y. 1992), *aff’d*, 60 F.3d 913, 930 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).

⁸¹ *Campbell*, 510 U.S. at 592.

3.2 Fair Use in Application

Fair use develops over time, usually through case law. We discuss in this section several cases that have had a significant effect on the law of fair use: *Sony v. Universal City Studios*, *Harper & Row v. Nation Enterprises*, and *Campbell v. Acuff-Rose*, all Supreme Court cases, and *American Geophysical Union v. Texaco*, a decision of the US Court of Appeals for the Second Circuit. Additional fair use cases, including cases relevant to uses for educational purposes, are described below in sections 3.4 and 3.5, after we have discussed various fair use guidelines.

Sony Corp. of America v. Universal City Studios, Inc.⁸²

This suit grew out of Sony's introduction of its Betamax videotape recorder (VTR), which had a tape playback feature as well as a tuner to allow users to copy broadcast television programs. Certain copyright owners of television programming brought a lawsuit for secondary infringement against Sony, claiming that Sony was liable for Betamax users' copyright infringement because it was furnishing the means for that infringement.

Borrowing from patent law doctrine, the Court held that there is no liability for selling a "staple article of commerce" suitable for noninfringing use. The issue, according to the Court, was whether the product is "widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."⁸³ The Court ultimately concluded that the Betamax VTR was capable of commercially significant noninfringing uses, in part based on its conclusion that private in-home copying of free broadcast television for time-shifting purposes, even without authorization, is a fair use and therefore noninfringing.

In this respect, it disagreed with the Ninth Circuit, which had held that home VTR use was not fair because it was not "productive." Instead, the Court focused on the distinction between commercial and noncommercial uses. "If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption [was] appropriate" in the *Sony* case, according to the Court, because time-shifting for private home use was noncommercial.⁸⁴ Evidence had shown that a substantial majority of VTR uses were for time-shifting, and plaintiffs had failed to demonstrate that this practice impaired the value of their copyrights, or was likely to do so in the future.

Harper & Row Publishers, Inc. v. Nation Enterprises⁸⁵

In this case, the Supreme Court was asked to consider the extent to which fair use allowed a news magazine to make unauthorized use of quotations from the unpublished manuscript of former President Gerald Ford's autobiography, *A Time to Heal*. The manuscript contained previously unpublished material concerning the Watergate crisis, Ford's pardon of former President Nixon, and Ford's

⁸² *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417.

⁸³ *Id.* at 442.

⁸⁴ *Id.* at 449.

⁸⁵ *Harper & Row*, 471 U.S. 539.

reflections on those events. *Time* magazine had contracted with Ford's publisher for the exclusive right to print prepublication excerpts, but the *Nation* magazine obtained an unauthorized copy of the Ford manuscript, and used it to develop an article – consisting of quotes, paraphrases and facts taken from the manuscript – timed to “scoop” the *Time* article. As a result of the *Nation*'s article, *Time* canceled its agreement, and Harper & Row brought suit against the *Nation*.

The case turned on whether the *Nation*'s use qualified as fair use, as the *Nation* conceded that otherwise its verbatim copying of excerpts from the manuscript would constitute infringement.

The Court observed at the outset that

[C]opyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.⁸⁶

The Court next turned to the *Nation*'s claim that the First Amendment requires a different rule when the work at issue relates to matters of high public concern. It viewed First Amendment concerns as satisfied by the idea-expression dichotomy, under which Ford's expression was protected, but his facts and ideas remained available for use. It criticized the *Nation*'s expansive view of fair use, warning that it would “effectively destroy any expectation of copyright protection in the work of a public figure” and significantly diminish the incentive to create or finance such memoirs.⁸⁷ The Court declared that

It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. . . . “If every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading.”⁸⁸

In evaluating the purpose and character of the use, the Court observed that news reporting was one of the specific examples mentioned in the preamble to 17 U.S.C. section 107, but that did not mean it was presumptively a fair use. That the use is for news is only one factor in the fair use analysis. The Court also concluded that the commercial nature of the use weighed against a finding of fair use. According to the Court, “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁸⁹ It observed that the *Nation* intended to scoop the publication of the *Time* article and knowingly exploited the manuscript of Ford's book. The second factor – the nature of the copyrighted work – weighed heavily against the *Nation*: Ford's work was unpublished, and the *Nation* had usurped Ford's right to determine whether and how to first publish his memoirs. It was clear that the unpublished nature of the Ford manuscript was critical to the Court's decision. The Court

⁸⁶ *Id.* at 545-46.

⁸⁷ *Id.* at 557.

⁸⁸ *Id.* at 559 (citations omitted).

⁸⁹ *Id.* at 562.

stated that “[u]nder ordinary circumstances, the author’s right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use.”⁹⁰

On the third factor, the Court found that although as a quantitative matter the 300 words quoted were an insubstantial part of *A Time to Heal* taken as a whole, the *Nation* “took what was essentially the heart of the book.” The fourth factor – the effect on the potential market for or value of the copyrighted work – also weighed strongly in plaintiffs’ favor, since the evidence of actual harm was clear cut. *Time* magazine, which had a contract with Harper & Row to publish prepublication excerpts of the book, had cancelled its contract when the *Nation* article came out, and refused to pay.

Campbell v. Acuff-Rose Music, Inc.⁹¹

Campbell was the Supreme Court’s most recent opportunity to address the fair use defense. The work at issue was the rap group 2 Live Crew’s commercial parody of Roy Orbison’s song “Oh, Pretty Woman.” In *Campbell*, the Court emphasized that there are no “bright line rules” for determining fair use and that all four statutory factors had to be weighed. Turning to the first factor – the purpose and character of the use, including whether the use is of a commercial nature or for nonprofit educational purposes – the Court emphasized that the “central purpose of the investigation” is to determine the extent to which the new work is “transformative.” It defined “transformative” as adding “something new, with a further purpose or different character, altering the first with new expression, meaning or message.”⁹² The Court made clear that transformative use is not essential, but 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.”⁹³

According to the Court, the goal of parody is to comment at least in part on the original author’s work. If the new work has no critical bearing on the original and the alleged infringer merely used it to “avoid the drudgery of working up something fresh,” then support for the borrowing diminishes and “other factors, like the extent of its commerciality, loom larger.”⁹⁴ The Court found that 2 Live Crew’s song did qualify as a parody, as it could reasonably be perceived as commenting on the original or criticizing it, to some degree.⁹⁵

The Supreme Court held that the Court of Appeals had erred in giving dispositive weight to the commercial nature of 2 Live Crew’s song, and had failed to evaluate its transformative character. The Court emphasized that the commercial nature of a work is but one element in the first factor inquiry. It also ruled that a commercial use should carry no presumption against a fair use finding, retreating from its earlier statement in the *Sony* case.

⁹⁰ *Id.* at 555.

⁹¹ *Campbell*, 510 U.S. 569.

⁹² *Id.* at 579.

⁹³ *Id.* See *Cariou v. Prince*, 2013 U.S. App. Lexis 8380 at *23 (“Although there is no question that Prince’s artworks are commercial, we do not place much significance on that fact due to the transformative nature of the work.”).

⁹⁴ *Id.* at 580.

⁹⁵ *Id.* at 583.

Although the Court concluded that the second factor favored Acuff-Rose because Orbison's creative expression "falls within the core of copyright's protective purposes," it found this factor of little help, "since parodies almost invariably copy publicly known, expressive works."⁹⁶ Assessing the third fair use factor – the amount and substantiality of the portion used – the Court observed that parody's humor springs from its "recognizable allusion to its object," and so it must take enough to "conjure up" the original.⁹⁷ The Court held that 2 Live Crew had taken no more of the lyrics than were necessary to its parodic purpose, and remanded to the lower court on the question whether repetition of the bass riff constituted excessive copying.

Turning to the fourth fair use factor, the Court said that no such presumption of likelihood of harm is warranted from the parody's commercial purpose. The Court stated that parody is unlikely to harm the market for the original since the two works serve different purposes. It further observed that some kinds of harm – such as the market effect of a scathing parody – are not cognizable under copyright. The relevant consideration under factor four is the harm of market substitution and, according to the Court, there was insufficient evidence in the record to determine the effect of 2 Live Crew's parody on a potential rap version of the original. It left this issue to be dealt with on remand.

American Geophysical Union v. Texaco, Inc.⁹⁸

The *Texaco* case was a class action brought by publishers of scientific, technical and medical (STM) journals challenging Texaco's photocopying of journal articles for its 400-500 research scientists doing research on issues related to the petroleum industry. The plaintiffs' journals were registered with the Copyright Clearance Center (CCC), a corporation that acts as a clearinghouse for owners and users of copyrighted journals and texts. Users who sign up with the CCC enjoy an efficient licensing process, under which they would be charged with the licensing fee after the use, but do not have to obtain advance authorization for making a copy of CCC-registered works.⁹⁹ CCC customers could choose from two licensing alternatives – the "Transactional Reporting Service," under which users give an account of each copy made to the CCC and pay the fee required by the publisher, and the "Annual Authorization Service," under which users are charged annually with a fixed price and do not need to report the copies made.¹⁰⁰ The plaintiffs claimed that Texaco, which had opted for the transactional service, was underreporting the number of copies made by its employees, and was liable for copyright infringement.¹⁰¹ Texaco responded that any unreported photocopying was lawful under fair use.¹⁰²

To spare the time and expense of discovery concerning the photocopy practices of all of the Texaco scientists, the parties agreed to choose one at random to represent the group. Dr. Donald Chickering,

⁹⁶ *Id.* at 586.

⁹⁷ *Id.* at 588.

⁹⁸ *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995). The case was originally decided in 1994 and reported at 37 F.3d 881 (2d Cir. 1994), but the court amended and reissued its decision in July, 1995.

⁹⁹ *See, e.g., American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913.

¹⁰⁰ 60 F.3d at 929 n. 16.

¹⁰¹ *Id.*

¹⁰² *Id.*

like other Texaco scientists, had relevant journals routed to him by Texaco's library, and made copies (or had copies made for him) of articles that he thought would be helpful for "current or future professional research."¹⁰³ The case focused on photocopies of eight articles Chickering made from the monthly journal *Catalysis*.

At the outset, the court emphasized that the case was about systematic institutional photocopying, rather than copying by an individual for personal use. On the purpose and character of the use, the court observed that Chickering copied the articles for the same reason one might purchase them – for ready reference. In that respect, the court characterized the photocopying as "archival," that is, "done for the purpose of providing numerous Texaco scientists (for whom Chickering served as an example) each with his or her own personal copy of each article without Texaco's having to purchase another original journal."¹⁰⁴

The first factor weighed against Texaco, in the court's view, because the photocopies "were part of a systematic process of encouraging employee researchers to copy articles so as to multiply available copies while avoiding payment."¹⁰⁵ The copying did not of itself amount to commercial exploitation, but the court was unable to ignore the for-profit nature of Texaco's enterprise. It rejected Texaco's argument that it was making a transformative use by copying the article into a more useful form, pointing out that Texaco was transforming only the material object that embodied the work, not the work itself. Nor did mere use for research render the copies transformative.

The second factor favored Texaco, since the articles were predominately factual. The third factor favored the STM journal publishers, because each of the copied articles was a discrete work of authorship.¹⁰⁶

In evaluating the effect on the potential market for or value of the copyrighted work, the court concluded that evidence of lost journal subscriptions did not strongly support either side. It was the evidence of lost licensing revenue that tipped the fourth factor in the publishers' favor. If Texaco couldn't legally make the copies, it would have to procure them from document delivery services (which would pay royalties), negotiate with the publishers, or obtain licenses through CCC.¹⁰⁷ The court acknowledged that it would be circular to consider *all* potential licensing revenues under factor four, since by definition every fair use involves lost licensing revenue because the user did not pay a fee. "Only an impact on potential licensing revenues for traditional, reasonable or likely to be developed markets should legally be cognizable when evaluating a secondary use's 'effect on the potential market for or value of the copyrighted work.'" In this case, according to the court, publishers had created "a

¹⁰³ *Id.* at 915.

¹⁰⁴ *Id.* at 919.

¹⁰⁵ *Id.* at 920.

¹⁰⁶ Note that in *Cambridge University Press v. Becker*, discussed in section 3.4, the court reached a different conclusion, that the "work of authorship" was the book as a whole and not the individually authored articles.

¹⁰⁷ *Id.* at 929.

workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying.”¹⁰⁸

According to the court,

Despite Texaco’s claims to the contrary, it is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means of paying for such a use is made easier. This notion is not inherently troubling: it is sensible that a particular unauthorized use should be considered “more fair” when there is no ready market or means to pay for the use, while such an unauthorized use should be considered “less fair” when there is a ready market or means to pay for the use.¹⁰⁹

The court decided that the fair use factors considered in the aggregate led to the conclusion that Texaco’s photocopying was not fair use.

3.2.1 Assessing Fair Use

It is said that that “fair use in America simply means the right to hire a lawyer to defend your right to create.”¹¹⁰ That is something of an overstatement, and in any event is rather meaningless. One might just as easily say “Copyright is the right to hire a lawyer to defend your right to your own work.”

Fair use is not entirely unpredictable.¹¹¹ But it cannot be denied that fair use is sometimes difficult to assess – even for attorneys – and reasonable, knowledgeable people often disagree.¹¹² It can often take a long time to get final fair use determinations, with lower courts being reversed with regularity. For example, in *Harper & Row Publishers v. Nation Enterprises*, many people thought the news purpose of the taking would lead to a finding of fair use. Nevertheless, the district court found that the Ford memoirs had been infringed. A divided panel of the Second Circuit reversed, and the Supreme Court reversed the Second Circuit, with Justices Brennan, Marshall and White dissenting.¹¹³ The case was filed in 1980; it was 1985 before the Supreme Court issued its decision and remanded the case to the lower court.

In *Sony v. Universal City Studios*, the district court held that Betamax users made fair use and therefore it was noninfringing. The Ninth Circuit Court of Appeals reversed, and the Supreme Court reversed the

¹⁰⁸ *Id.* at 930.

¹⁰⁹ *Id.* at 930-31.

¹¹⁰ Lawrence Lessig, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY*, 187 (2004).

¹¹¹ See, e.g., Barton Beebe, *An Empirical Analysis of the Fair Use Doctrine*, 156 U. PA. L. REV. 549 (2008).

¹¹² A recent article argues, based on statistical analysis, that fair use is not as unpredictable as one might think. See Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L. J. 47 (2012). However, it is not clear whether patterns that show up in statistical analysis would be relied on to make a fair use decision *ex ante*. And in any event, Sag identifies transformative use as the strongest predictor of fair use (as does Barton Beebe, *see supra* note 110), a conclusion that is not particularly helpful for educational institutions when the transformation they make is minimal.

¹¹³ *Harper & Row Publrs. v. Nation Enters.*, 557 F. Supp. 1067 (S.D.N.Y.), *rev’d in part, aff’d in part*, 723 F.2d 195 (2d Cir. 1983), *rev’d and remanded*, 471 U.S. 539 (1985).

Ninth Circuit, with Justices Blackmun, Marshall, Powell and Rehnquist dissenting.¹¹⁴ The case began in 1976; the Supreme Court issued its decision in 1984.

In *Campbell v. Acuff-Rose*, the district court found that 2 Live Crews' song was a parody and fair use; the Sixth Circuit Court of Appeals reversed and remanded, and the Supreme Court reversed the appellate court.¹¹⁵ The suit was filed in 1990; the Supreme Court's decision did not issue until 1994, and it remanded the case to the lower court.

As the history of these cases demonstrates, it can sometimes take years to get a final determination as to whether or not a use qualifies as a fair use. Of course not all fair use issues are litigated. Prospective users often will consult with attorneys who, if fair use is uncertain, may counsel users to alter their conduct in some measure to be more secure in their reliance on the fair use defense.

3.3 Fair Use Guidelines

When the Copyright Act was amended in 1976 to include a statutory provision on fair use, Congress deliberately, after many years of hearings and recommendations, chose to give fair use little definition in the Act.¹¹⁶ Instead, Congress urged stakeholders to negotiate their concerns about educational uses and to reach agreement about the application of the law in particular circumstances. The outcome of that effort was a series of guidelines, including classroom photocopy guidelines, guidelines for educational uses of music, and later, guidelines for off-air recordings of broadcasts for educational use. These guidelines are reprinted in Copyright Office Circular 21, "Reproduction of Copyrighted Works by Educators and Librarians," which the US Copyright Office provides for guidance.¹¹⁷ For convenience, Circular 21 is included as Appendix B.

Later years saw further attempts to develop guidelines, notably CONFU, discussed below. More recently various sectors of users have attempted to create their own fair use guidelines. But as explained below, these guidelines, most developed without right holder input, have a doubtful legal effect.

The various guidelines are discussed in further detail below, in chronological order.

3.3.1 1976 Act Classroom Photocopy Guidelines

After stakeholders expressed concerns over the ambiguity of the fair use doctrine in the educational context,¹¹⁸ Congress encouraged them to negotiate their interests and to reach an understanding as to

¹¹⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 429 F. Supp. 407 (C.D. Cal. 1977), *rev'd in part, aff'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

¹¹⁵ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd and remanded*, 972 F.2d 1429 (6th Cir. 1992), *rev'd and remanded*, 510 U.S. 569 (1994).

¹¹⁶ See H.R. REP. NO. 94-1476, at 66 (1976).

¹¹⁷ Circular 21 is available at <http://www.copyright.gov/circs/circ21.pdf>.

¹¹⁸ Pierre N. Leval, *Commentary, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105-07. See also Stephana I. Colbert & Oren R. Griffin, *The Impact of "Fair Use" in the Higher Education Community: A Necessary Exception?*, 62 ALB. L. REV. 437, 439 (1998)

the meaning of the law and the “permissible educational uses of copyrighted material.”¹¹⁹ A series of negotiations between representatives of educators, authors, and publishers ensued, producing the “Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions,” also known as the “Classroom Guidelines” or the “Classroom Photocopy Guidelines.”¹²⁰ These guidelines are included in the Copyright Office’s Circular 21, attached as Appendix B hereto.

Other sets of guidelines, including the guidelines for off-air recording, were developed later (see 3.2.3) but the Classroom Guidelines are of particular interest because they have been addressed by courts on more than one occasion, and so provide some insight into the influence such guidelines have in litigation.

The Classroom Guidelines were designed to represent the minimum standard for educational fair use and to serve as a “safe harbor” in litigation involving fair use copying.¹²¹ While the educational community sought to include additional uses, the Classroom Guidelines embodied the greatest extent upon which the interested parties could agree.¹²² The rigid yet simple scheme set forth by the Classroom Guidelines stands in contrast to the open-ended and uncertain four-factor fair use analysis for classifying a use of copyrighted work as lawful.

The guidelines authorize educators to make single copies of short items, such as an article or book chapter, for the purpose of research or class preparation. Multiple copies (but no more than one copy per student in a class) may also be made by or for a teacher for classroom use or discussion. Such copies, however, must meet the tests of “brevity,” “spontaneity,” and “cumulative effect,” and must also include a notice of copyright.¹²³ All of those criteria were set in terms of raw amounts of content, irrespective of import, relative to the entire work. The first test, “brevity,” limits the number of words that may be copied from each work – for poems (or excerpts of poems), less than 250 words and for prose excerpts, a range of 500 to 2500 words, depending on the nature of the work.¹²⁴ The second test, “spontaneity,” requires that the copying is at the individual professor’s “instance and inspiration,” and must be so close in time to when the material is used in the classroom “that it would be unreasonable to expect a timely reply to a request for permission.”¹²⁵ The “cumulative effect” test includes additional requirements to limit the number of copies an instructor may make under the guidelines. First, copies may be made for only one course in the school in which the copies are made.¹²⁶ Second, the instructor may not copy “more than one short poem, article, story, essay or two excerpts . . . from the same author, nor more than three from the same collective work or periodical volume, during one class

¹¹⁹ Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, H.R. REP. NO. 94-1476 at 68-70 (1976) [hereinafter *Classroom Guidelines*]. See also Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 617 (2001); Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 871 (1987).

¹²⁰ H.R. REP. NO. 94-1476 at 68-70 (1976).

¹²¹ Steven J. Melamut, *Pursuing Fair Use, Law Libraries, and Electronic Reserves*, 92 L. LIB. J. 157, 178 (2000).

¹²² Crews, *supra* note 119 at 669-70.

¹²³ H.R. REP. NO. 94-1476 at 68 (1976).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 69.

term.¹²⁷ Multiple copies of works may not be made over nine times for one class during one term.¹²⁸ The Classroom Guidelines also prohibit certain activities. For instance, an instructor cannot copy the same content in more than one term, and educators may not charge for the copied material beyond the actual copying cost.¹²⁹ Nor can the instructor copy for the purpose of creating an anthology.

Even though the Classroom Guidelines were intended to provide minimum standards of educational fair use, in practice, some educational institutions adopted them as a maximum standard of allowable uses.¹³⁰ That may be the result of a few copyright infringement cases that involved educational copying. In 1980 and 1981 publishers filed lawsuits against two shops that were photocopying educational materials for students. The settlement agreement in both cases required the shops to follow the Classroom Guidelines as a ceiling for fair use.¹³¹ Another famous case was brought against New York University ("NYU") and individual faculty members by a group of publishers in the early 1980s.¹³² The litigation's settlement stipulated incorporation of the Classroom Guidelines into the NYU's official policies.¹³³ The NYU settlement prescribed the guidelines model as the appropriate fair use standard for other educational institutions, many of which ultimately adhered to the guidelines to avoid litigation.¹³⁴ Consequently, the minimum benchmarks of the Classroom Guidelines turned into maximum standards, followed by the majority of educators and librarians in the U.S.¹³⁵

The first judicial decision discussing the Classroom Guidelines was given in 1983. The Ninth Circuit Court of Appeals in *Marcus v. Rowley*¹³⁶ applied the guidelines while noting that those guidelines "are not controlling on the court," but "are instructive on the issue of fair use in the context of this case."¹³⁷ Later cases, including *Basic Books, Inc. v. Kinko's Graphics Corp.*,¹³⁸ *Princeton University Press v. Michigan Document Services Inc.*, and the pending case, *Cambridge University Press v. Becker*, are discussed below in section 3.4.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Crews, *supra* note 119 at 669-70.

¹³⁰ Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VIRGINIA L. REV. 1899, 1920 (2007) (noting that "the Berkman Center for Internet & Society recently estimated that eighty percent of American universities comply with the Classroom Guidelines.")

¹³¹ Crews, *supra* note 119 at 639-640 (citing *Harper & Row, Publishers, Inc. v. Tyco Copy Servs., Inc.*, Copyright L. Dec. (CCH), 25,230 (D. Conn. 1981)); *Basic Books, Inc. v. The Gnomon Corp.*, Copyright L. Dec. (CCH), 25,145 (D.C. 1980).

¹³² Rothman, *supra* note 130, at 1920 (citing *Addison-Wesley Publishing Co., Inc. v. New York University*, Copyright L. Dec. (CCH) 25,544 (D.C.N.Y. 1983)).

¹³³ Bernard Zidbar, *Fair Use and the Code of the Schoolyard: Can Copyshop Compile Coursepacks Consistent with Copyright?* 46 EMORY L.J. 1363, 1377 (1997). Kenneth Crews mentions that the settlement "adopted the guidelines without the opening preamble about "minimum" standards." Crews, *supra* note 119 at 640-641.

¹³⁴ Crews, *supra* note 118, at 640-41.

¹³⁵ Rothman, *supra* note 130, at 1920.

¹³⁶ 695 F.2d 1171 (9th Cir. 1983).

¹³⁷ *Id.* at 1178. The court also pointed that the guidelines were intended to offer "minimum standards of fair use."

¹³⁸ *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

3.3.2 Guidelines for Educational Uses of Music

The Guidelines for Educational Uses of Music were developed after the Classroom Photocopy Guidelines, but like those guidelines, were included in the U.S. House of Representatives Report accompanying the 1976 Copyright Act. They were negotiated among the Music Publishers Association of the US, the National Music Publishers Association, the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision. They provide for emergency copying to replace purchased copies which are unavailable for an imminent performance, provided replacement copies are later substituted; single or multiple copies for academic purposes of excerpts that are less than 10% of the work and do not qualify as a performable unit, etc.

The Guidelines prohibit copying to create collective works or anthologies, copying items intended to be "consumable" such as workbooks, and copying for purposes of performance, except as provided above. The guidelines are incorporated in the Copyright Office's Circular 21, attached as Appendix B hereto.

The Guidelines for Use of Music in Education do not appear to have received judicial attention. Their appearance is rare in litigation and scholarship.

In 1999, the U.S. Department of Justice's Office of Legal Counsel ("OLC") offered an opinion about whether and under what circumstances government reproduction of copyrighted materials is a non-infringing fair use. OLC wrote regarding the Copyright Clearance Center, Inc.'s attempt to negotiate licenses with federal government agencies. The opinion makes cursory reference to the Guidelines:

[I]t may be instructive to look to the legislative history of the 1976 Act, in which the House Committee on the Judiciary reproduced (i) an "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals," which had been promulgated by representatives of author/publisher and educational organizations, and (ii) a similar, more specialized set of "Guidelines for Educational Uses of Music," which had been promulgated by representatives of music publishing and educational organizations. . . . (On the question of the legal effect, if any, of these guidelines, see, e.g., *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1390-91 (6th Cir. 1996) (en banc), cert. denied, 520 U.S. 1156 (1997)). . . .¹³⁹

OLC categorizes the Guidelines for Use of Music in Education as being on approximately the same plane as the Classroom Photocopying Guidelines, which have been persuasive, though nonbinding, authority for courts.

The Kansas State Attorney General also found the Guidelines persuasive in 1981. When addressing the question of whether an educator could distribute musical scores to judges in a competition without infringing copyright, the Kansas State Attorney General issued an opinion that relied in part on the

¹³⁹ *Whether & Under What Circumstances Gov't Reprod. of Copyrighted Materials Is A Noninfringing "Fair Use" Under Section 107 of the Copyright Act of 1976*, 1999 WL 33490240 (U.S.A.G. Apr. 30, 1999).

Guidelines: "While [the] guidelines are not conclusive upon judicial construction of section 107, we believe the courts are constrained to give considerable weight to the House Judiciary Committee's approval of these guidelines as an expression of congressional intent. Accordingly, we have relied, in part, on these guidelines in concluding that music scores may not be duplicated for the use of judges at state music competitions."¹⁴⁰

Scholarly references to the Guidelines are similarly sparse. Scholars tend to use the Guidelines as a reference point while focusing on their shortcomings, in particular their inability to adapt quickly to changes in technology (such as streaming music).¹⁴¹ The Guidelines may not sufficiently address reserve collections of audiotapes reproduced from sound recordings.¹⁴² Nor may they be fully adequate to deal with the high school band's focus on musical performance, or the high school music directors' tendencies to create musical arrangements.¹⁴³ One note writer paints the picture of a musical education system that is aware of the Guidelines but does not always follow them.¹⁴⁴

Universities and community colleges do circulate the Guidelines for Educational Uses of Music. However, the Guidelines are usually reposted with little explanation. Stanford University adopts the Guidelines with a brief explanation about the difference between fair use and the Guidelines.¹⁴⁵ The University of Connecticut Library reprints them verbatim.¹⁴⁶ University of Washington posts them with a disclaimer saying, "UW has not adopted official guidelines for determining fair use. The guidelines in this section have been abstracted from the legislative notes associated with the implementation of the current copyright law in 1976."¹⁴⁷ Maricopa Community College lists them on their general counsel's website without much further clarification.¹⁴⁸ In general, the Guidelines for Educational Uses of Music are in circulation among educational institutions but they have not been tested or applied by courts.

3.3.3 Guidelines for Off-Air Recording of Broadcast Programs for Educational Purposes

In March 1979, Congressman Robert Kastenmeier, chairman of the House Subcommittee on Courts, Civil Liberties, and Administration of Justice, appointed a Negotiating Committee to draft a set of guidelines reflecting the Committee's consensus as to the application of fair use to the recording, retention, and

¹⁴⁰ Kan. Att'y. Gen. Op. No. 81-202 (1981), 1981 WL 156503.

¹⁴¹ Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 152-53 (2000).

¹⁴² *Id.*

¹⁴³ James Marshall Digmon, *Playing Fair: Music Arranging in Public Music Education*, 41 U. MEM. L. REV. 413, 444 (2010).

¹⁴⁴ *Id.*

¹⁴⁵ See *Educational Uses of Non-coursepack Materials*, STANFORD UNIVERSITY, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/7-b.html (last visited Apr. 11, 2013).

¹⁴⁶ See *Guidelines for Educational Uses of Music*, UNIVERSITY OF CONNECTICUT LIBRARIES, <http://www.lib.uconn.edu/copyright/guidelinesForMusic.html> (last visited Apr. 11, 2013).

¹⁴⁷ *Educational Uses of Music*, UNIVERSITY OF WASHINGTON, http://depts.washington.edu/uwcopy/Using_Copyright/Guidelines/Uses.php.

¹⁴⁸ See *Copyright Guidelines: Audio-Visual Performances*, MARICOPA COMMUNITY COLLEGES, <http://www.maricopa.edu/legal/ip/guidelines/audiovisual.htm> (last visited Apr. 11, 2013). See also WASHBURN UNIVERSITY, <http://www.washburn.edu/faculty-staff/faculty-resources/faculty-handbook/faculty-handbook-appendix-vii.html>.

use of television broadcast programs for educational purposes. The Committee, comprised of representatives of education organizations, copyright proprietors, and creative guilds and unions, sought to establish a set of guidelines in order to provide standards for both owners and users of copyrighted television programs. The result was the Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes ("Off-Air Guidelines"), printed in House Report No. 97-495 and included in Copyright Office Circular 21, Appendix B hereto.

Although the guidelines were implicitly endorsed by Congress, they have not been free from criticism. As a preliminary matter, not all of the groups involved in the development of the guidelines ultimately endorsed them in their final form. For example, The Motion Picture Association of America took "no position," though seven individual studios did assent to the guidelines, while The Association of Media Producers voted not to endorse the guidelines altogether.¹⁴⁹ Some of the letters from those groups that refused to endorse the guidelines are included in the House Report.¹⁵⁰

More generally, the Off-Air Guidelines (like the Classroom Guidelines) have been criticized as negotiated legislative history that is not a legitimate source of statutory interpretation for section 107, confusing to judges and to users. Some commentators have criticized the guidelines for chilling other potentially fair uses notwithstanding the fact that they are presented as minimum standards of fair use.¹⁵¹ In the over thirty years since the drafting of the Off-Air Guidelines, courts have had no occasion to address their scope, and none of the principal cases to address fair use involved copies being made for nonprofit educational purposes.

The Off-Air Guidelines

The Off-Air Guidelines, like the other guidelines negotiated following the passage of the 1976 amendment, are not built explicitly on the four statutory fair use factors. Although elements of the Guidelines are relevant to satisfaction of the factors, there is no direct connection to the language of the law in the guidelines themselves. Unlike the other guidelines, the Off-Air Guidelines are not extraordinarily precise in their measure of fair use. For example, while the guidelines specify the span of days during which the recording may be used, there are no limits on the quantity of the broadcast that may be either recorded or used. Accordingly, the Off-Air Guidelines are regarded as easier to apply than the other guidelines, but not necessarily a more accurate statement of the law of fair use.

The following is a summary of the Off-Air Guidelines.

¹⁴⁹ See Gregory Klingsporn, *The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines*, 23 COLUM.-VLA J.L. & ARTS 101 (1999). For example, as mentioned above, the Association of Media Producers ("AMP") declined to endorse the Guidelines. AMP wrote that the Guidelines "are not in keeping with the principal objectives of our industry, and we are fearful that they may seriously jeopardize the future well-being of the small but vital educational media industry, its market, and the availability of a broad variety of instructional materials essential to maintaining quality educational programs." H.R. Rep. No. 97-495 at 10 (1982).

¹⁵⁰ H.R. Rep. No. 97-495, at 9-11 (1982).

¹⁵¹ Klingsporn, *supra* note 149.

- The guidelines apply only to off-air recording by nonprofit educational institutions, which are further expected to establish appropriate control procedures to maintain the integrity of the guidelines.
- A broadcast program (programs transmitted to the general public without charge) may be recorded and retained by a nonprofit educational institution for up to 45 days following the date of recording at which time it must be erased or destroyed.
- The recordings may be shown to students only within the first ten school days of the 45-day retention period.
- The recordings are to be shown to students no more than two times during the 10-day period, and the second time only if necessary for instructional reinforcement.
- The recordings may be viewed after the 10-day period only by instructors for evaluation purposes to determine whether to include the broadcast program in the curriculum in the future.
- The off-air recordings may not be physically or electronically altered or combined with others to form anthologies, but they need not necessarily be used or shown in their entirety.
- Recordings must be made only at the request of an individual instructor for instructional purposes. They may not be regularly recorded in anticipation of later requests.
- If several instructors request recording of the same program, duplicate copies are permitted to meet the need.
- All copies must include the copyright notice on the broadcast as recorded.

The application of these guidelines in practice is discussed in section 5.0.

3.3.4 CONFU

In the early 1990s, Congress and the Clinton Administration perceived a need for copyright law to “adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials.”¹⁵² Responding to the changing technological frontier, the Administration launched the Information Infrastructure Task Force (“IITF”) in 1993.¹⁵³ IITF formed a Working Group on Intellectual Property Rights, which in turn convened a Conference on Fair Use (“CONFU”) to address copyright owner and user interests in the “particularly complex” area of digital fair use.¹⁵⁴ Bruce Lehman, the Assistant Secretary of Commerce and the Commissioner of Patents and Trademarks, chaired the Conference.¹⁵⁵

CONFU was comprised of organizations of copyright owners, educators and librarians, who met in public sessions. The participating organizations expanded from forty to approximately one hundred over

¹⁵² S. REP. NO. 105-190 at 2.

¹⁵³ *Id.*

¹⁵⁴ *Id.* See also Robert Thornburg, *The Impact of Copyright Law on Distance Education Programs: How Fair Use and the CONFU Guidelines May Shape the Future of Academia*, 27 S. ILL. U. L.J. 321, 323-24 (2003).

¹⁵⁵ U.S. COPYRIGHT OFFICE, *Report on Copyright and Digital Distance Education* 111-12 (May 1999), available at http://www.copyright.gov/reports/de_rprt.pdf#page=111&zoom=auto,0,311 (last accessed Apr. 7, 2013) (citing Notice of First Meeting of Conference on Fair Use and the National Information Infrastructure (NII), 59 Fed. Reg 46, 823 (1994)).

several years.¹⁵⁶ They divided into working groups to address fair use in the context of digital images, distance learning, educational multimedia, electronic reserve systems, interlibrary loan and document delivery, and use of computer software in libraries.¹⁵⁷ These groups aimed to follow the model of the Classroom Guidelines of 1976 and generate similar guidelines to the extent possible.¹⁵⁸

Although CONFU fostered discussion, the outcome of this discussion was ultimately “mixed.”¹⁵⁹ The process “became controversial” partially because of “conflicting views of the value and function of fair use guidelines generally” and partially because of the potential for Congressional action.¹⁶⁰ In addition, the number of participants made the process unwieldy. CONFU generated some proposals for guidelines, but many of these did not garner widespread approval from members.¹⁶¹ For example, participants concluded that they did not widely support drafting guidelines for electronic reserve systems, interlibrary loan and document delivery activities because it would be premature.¹⁶²

CONFU recommended legislative solutions to the issues of reproducing works for disabled or visually-impaired individuals and digital preservation.¹⁶³ It was successful in developing and disseminating guidelines for educational multimedia, digital images, and some aspects of distance learning.¹⁶⁴ Its Educational Multimedia Fair Use Guidelines address multimedia projects created by students or teachers in a nonprofit educational institution for curriculum-based activities.¹⁶⁵ Those Guidelines, developed in conjunction with Consortium of College and University Media Centers (CCUMC), provide recommendations for the time period during which a project may be used, how that project may be copied and distributed, and call for students to be instructed about the reasons for copyright protection.¹⁶⁶ Those guidelines probably achieved the widest acceptance of any CONFU initiative, and by 1999 the Copyright Office reported that many educational institutions included the Guidelines on their websites, or linked to them.¹⁶⁷ However, it has been reported that CCUMC recently retired these Guidelines and endorsed the Association of Research Libraries’ Code of Best Practices in Fair Use for Academic and Research Libraries.¹⁶⁸ See the discussion of Fair Use “Best Practices,” below.

¹⁵⁶ BRUCE A. LEHMAN, THE CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE 1, 2 (1998), <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf> (last visited Apr. 7, 2013).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 6.

¹⁵⁹ U.S. COPYRIGHT OFFICE, *supra* note 155 at 112.

¹⁶⁰ U.S. COPYRIGHT OFFICE, *supra* note 155 at 112-13.

¹⁶¹ *Id.*; LEHMAN, *supra* note 156 at 10, 17.

¹⁶² LEHMAN, *supra* note 156 . at 17.

¹⁶³ *Id.* at 7, 17.

¹⁶⁴ *Id.* at 19-20.

¹⁶⁵ LEHMAN, *supra* note 156 at 49; U.S. COPYRIGHT OFFICE, *supra* note 155 at 114. The guidelines can be found <http://www.ccumc.org/assets/documents/MMFUGuidelines.pdf>.

¹⁶⁶ U.S. COPYRIGHT OFFICE, *supra* note 155 at 114.

¹⁶⁷ *Id.* at 115.

¹⁶⁸ Patricia Aufderheide, *CCUMC Adopts Librarians’ Code, Retires Previous Fair Use Guidelines* (Jan. 29, 2013), <http://www.centerforsocialmedia.org/blog/fair-use/ccumc-adopts-librarians%E2%80%99-code-retires-previous-fair-use-guidelines>.

3.3.5 Fair Use “Best Practices”

The Center for Social Media, in cooperation with a number of user groups, has in the last few years facilitated the development of codes or standards of best practices for fair use in various fields. They include, for example, best practices for academic and research libraries, documentary filmmakers, dance-related materials, media literacy education, media studies publishing, online video, open courseware, poetry, scholarly research in communication, and film and media educators.¹⁶⁹

The codes were developed ostensibly to guide users in applying fair use in their fields, and to aid courts in making fair use determinations compatible with industry practice and custom. According to their drafters, these best practices are based upon existing law and aimed at striking a balance between the interests of content owners and content users. However, some commentators suggest that these best practices are in fact more normative than descriptive, expressing an ideal (from the perspective of copyright users) rather than reflecting the current reality of copyright law. As one commentator has observed, these best practices statements, “although purporting to objectively state the principles of fair use, ultimately state what the drafters wish fair use was.”¹⁷⁰ Although some of the guidelines have been developed with input from content owners,¹⁷¹ in other cases the best practices were drafted and endorsed exclusively by copyright users, and as a result the best practices are skewed to their interests. They lack the imprimatur from Congress that the Classroom Photocopy, Music and Off-Air Guidelines have.

Sometimes there are even contradictions to be found within the best practices themselves. While it is asserted in the codes’ preambles that such practices are based on existing law, their findings are presented in the form of “principles” that cite no common or statutory law for their support and are framed in terms of what “should be” fair use as opposed to what “is” fair use. Accordingly, they are of doubtful validity as evidence of custom and practice.

3.4 Course Packs and Online Course Materials under the 1976 Copyright Act

Since the 1976 Copyright Act went into effect, there have been a handful of court decisions construing fair use (and the Classroom Guidelines) in the educational context. In *Basic Books, Inc. v. Kinko's Graphics Corp.*¹⁷² the court found that course packs made by two New York City copyshops constituted copyright infringement and were not lawful under the fair use doctrine.¹⁷³ The court also reviewed the Classroom Guidelines, and held that the defendant’s use of the copyrighted texts did not meet the

¹⁶⁹ See *Best Practices*, CENTER FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/fair-use/best-practices>.

¹⁷⁰ Jennifer Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC’Y 371, 376 (2010).

¹⁷¹ For example, we understand that the Documentary Filmmakers’ Statement of Best Practices in Fair Use had some input from content owners, and the College Art Association is in process of developing guidelines with input from owners and users.

¹⁷² *Basic Books, Inc.*, 758 F. Supp. 1522.

¹⁷³ *Id.*

requirements specified in the guidelines.¹⁷⁴ Anthologies are prohibited by Classroom Guidelines. Nevertheless, the court, while ultimately deciding for the plaintiffs, refused to conclude that all anthologies created without consent are infringing, without a fair use analysis.¹⁷⁵

*Princeton University Press v. Michigan Document Services*¹⁷⁶ involved a 316-page course pack containing substantial excerpts of copyrighted works reproduced without authorization, created by a copyshop at the behest of university professors. The court concluded that the copying was not a fair use. Despite the fact that the end users were students who used the course packs for noncommercial purposes, the court found that it was the “nature and purpose” of the defendant copyshop’s use that was relevant, and that use was commercial and only minimally transformative. It also found, in connection with factor two, that the copied works were creative.

The court found that the amount and substantiality of the portion used weighed against a finding of fair use. The defendants used amounts ranging from 5% to 30% of defendants’ works, which was “not insubstantial,” according to the court.

The court measured the copying against the Classroom Photocopy Guidelines, and concluded:

In its systematic and premeditated character, its magnitude, its anthological content, and its commercial motivation, the copying done by MDS goes well beyond anything envisioned by the Congress that chose to incorporate the guidelines in the legislative history. Although the guidelines do not purport to be a complete and definitive statement of fair use law for educational copying, and although they do not have the force of law, they do provide us general guidance. The fact that MDS is light years away from the safe harbor of the guidelines weighs against a finding of fair use.¹⁷⁷

Concerning the fourth factor, the court considered lost licensing fees in determining the market effect of the copying, and ultimately concluded that the copyshop’s activities did not qualify as fair use.

Cambridge University Press v. Becker,¹⁷⁸ an ongoing case, involves an online reserve system used by the faculty and students of Georgia State University for digital distribution of course materials. Three academic publishers sued officials of the university to halt this practice. Georgia State had a different electronic course reserve system in place when the case was originally filed, but it changed its practices in 2009 so the court evaluated only the current practices. Georgia State’s new policy requires each professor to complete a fair use checklist with respect to material that she wishes to place on electronic

¹⁷⁴ *Id.* at 1534 (referring to the defendant’s use as “grossly out of line with accepted fair use principles”).

¹⁷⁵ *Id.* at 1537.

¹⁷⁶ *Princeton Univ. Press, Macmillan, Inc. v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (*en banc*), *cert. denied*, 520 U.S. 1156 (1997).

¹⁷⁷ *Id.* at 1390.

¹⁷⁸ *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).

reserve. If the professor concluded it was a fair use, library personnel uploaded the material to the e-reserve system where it would be accessible to students enrolled in the course.

The lawsuit alleged that 75 of the articles or book excerpts on the e-reserve system infringed plaintiffs' works. All of the materials were nonfiction and used as "supplemental" readings (though not necessarily optional) for upper level courses. Defendants' principal argument was that the use they were making of these materials was a fair use under section 107.

There have been cases that involved printed course packs, which present many of the same issues, but those suits were generally brought against copyshops, which are commercial entities, rather than educational institutions. For that reason the court viewed this as a "novel" issue.

The court proceeded to analyze each infringement claim as follows. First, it determined whether plaintiffs had established a *prima facie* case of infringement – for example, whether they properly established ownership of copyright in the work at issue. If so, the court proceeded to determine whether use of the work was *de minimis*.¹⁷⁹ If ownership was established and use was more than *de minimis*, the court proceeded to the fair use analysis.

In the court's view, the first factor weighed heavily in favor of defendants because their use of plaintiffs' works was for nonprofit education and scholarship. It concluded that the second factor favored defendants as well because most of the works were informational in nature rather than fictional works. On the third factor, the court decided that copying no more than 10% of the pages in a book with fewer than ten chapters, or one chapter of a book that has ten or more chapters, is a "decided small amount," permissible under factor three.¹⁸⁰ Unlike the court in *Texaco*, a case discussed in section 3.2 above, the *Becker* court looked at the percentage of the copied material as compared with the work as a whole, and rejected plaintiffs' claim that each individually-authored book chapter was a separate work of authorship. According to the court, plaintiffs raised this argument too late in the proceedings.¹⁸¹

Plaintiffs argued that defendants' use was substantially in excess of the Classroom Photocopy Guidelines. The *Cambridge University Press* court declined to measure the amount of defendants' copying against the Classroom Photocopy Guidelines. The court concluded that the guidelines were not part of the statute, and that resort to legislative history was appropriate only when the statute itself is ambiguous, which – in its view – the fair use provision in the copyright law is not. It further emphasized that the Classroom Guidelines were negotiated by interest groups, were not satisfactory to all of the

¹⁷⁹ The court deemed a use *de minimis* if no students, or only very few, accessed the material. See, e.g., *id.* at 1314. Presumably instructors are on safer legal ground if they assign works that students don't actually read.

¹⁸⁰ However, on at least one occasion the court held that "the heart" of the work had been copied, shifting factor three in favor of plaintiffs. *Id.* at 1259.

¹⁸¹ *Id.* at 1230-31.

negotiators, and in any event were intended to be a minimum rather than a maximum standard for educational fair use.¹⁸²

The court concluded that factor four would weigh in favor of plaintiffs if in fact licenses for digital excerpts were available through the publishers or the Copyright Clearance Center (“CCC”). On the other hand, if in the court’s view there was no “proof of a ready market for electronic excerpts of the work” and “no avenue through which Defendants could obtain permission to post excerpts of the work to [the online reserve system] with reasonable ease,” the court concluded that factor four favored fair use.¹⁸³ (The court did not find it significant that license fees were paid with respect to similar materials included in hard copy course packs sold in Georgia State’s bookstore, because, as it explained, it is the commercial copy shop that pays the fees.¹⁸⁴)

Employing this analysis, the court found that the vast majority of the 75 claims failed. The main factors the court used to justify the failure of a claim were (1) insufficient evidence that the publishers held the copyrights to the work, (2) *de minimis* infringements, (3) decidedly small use, (4) no digital market, (5) an unprofitable permissions market, and (6) portions of the work were copied with advance permission by the publisher.

It is important to bear in mind that *Cambridge University Press* is a trial court decision, and it is currently on appeal to the Eleventh Circuit Court of Appeals. One of the briefs filed in support of Cambridge University Press on its appeal is by two former Registers of Copyright and one former General Counsel of the U.S. Copyright Office, all of whom were involved in the development of the copyright law over several decades. The brief argues that the district court’s decision is inconsistent with the language and history of section 107 because it inappropriately favors educational use over the other purposes of copyright, and that Congress did not intend to create a broad exception from copyright for nonprofit educational purposes.¹⁸⁵

We cannot be certain that this brief (or any other briefs filed on the appeal) will be dispositive, but it demonstrates that there are troubling issues involved in *Cambridge University Press* and divergent views on the proper application of fair use in the educational context. It will likely be some considerable time before this issue is finally resolved.

3.5 Recent Assertions of Fair Use for Complete Copies

In several recent copyright cases defendants have successfully used the fair use defense in connection with copying entire works. While such cases have occurred in the past, they were quite rare.

¹⁸² *Id.* at 1227-29.

¹⁸³ *Id.* at 1290.

¹⁸⁴ *Id.* at 1217-18.

Brief for Marybeth Peters, Ralph Oman and Jon Baumgarten as Amici Curiae supporting Plaintiffs-Appellees in *Cambridge University Press v. Becker*, No. 12-14676-FF, 11th Cir. (brief filed Feb. 4, 2013)

3.5.1 Commercial Entities

In *Bill Graham Archives v. Dorling Kindersley Ltd.*,¹⁸⁶ the Second Circuit Court of Appeals held that Dorling Kindersley's (DK's) use of Grateful Dead concert posters in its book, *The Grateful Dead: The Illustrated Trip*, was a fair use. DK's book was a 480-page "coffee table book" that used a timeline running throughout the book, accompanied by collages of images, text and graphic art, to track the history of the Grateful Dead. The court held that the poster images, which were substantially reduced in size and accompanied by captions describing the related concerts, were transformative in purpose; the purpose for DK's use (as "historical artifacts") was substantially different from the posters' original use, for artistic expression and promotion of the concerts. Even though entire posters were copied, that did not weigh against fair use because of DK's transformative purpose and its efforts to change the visual impact of the posters. Because DK's purpose in using the poster images was more transformative and original than other uses that Bill Graham Archives licensed, the court concluded that Bill Graham Archives could not control the market for such uses, and there was no significant lost revenue.

In *Perfect 10, Inc. v. Google, Inc.*,¹⁸⁷ the Ninth Circuit Court of Appeals held that Google was likely to succeed on its claim that its use of thumbnail images of plaintiff's works in response to queries to Google's search engine was a fair use. The court found Google's use of the thumbnails was "highly transformative" since Google used the photos not for their original expressive purposes but for indexing, and emphasized the "significant public benefit" of Google's search engine. According to the court, the photos were creative, but Google's use of entire images was reasonable in light of its purpose. Although Perfect 10 established that there was a market for thumbnail images, it failed to show that any Google users had downloaded thumbnails.

In *A.V. v. iParadigms, LLC*,¹⁸⁸ the Fourth Circuit Court of Appeals held that iParadigms' use of complete copies of plaintiffs' papers in its database was a fair use. Defendant iParadigms operates a database known as "Turnitin Plagiarism Detection Service." It is designed to assess the originality of a written work to deter plagiarism. Schools and universities that subscribe to iParadigms' service generally require students to submit their works to iParadigms directly or through the school's course management system. After Turnitin compares a student work to the works in its database and the contents of commercial databases of journal articles and the like, it issues an "originality report" for the work, which the assigning professor may, if necessary, follow up. Schools have the option of archiving student works previously submitted, to use in evaluating whether students' future submissions are original. A number of students whose school subscribed to Turnitin and the archiving service filed suit, alleging that Turnitin infringed their copyrights by archiving their works without permission.¹⁸⁹

¹⁸⁶ *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

¹⁸⁷ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), later proceeding, 653 F.3d 976 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1713 (2012).

¹⁸⁸ *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

¹⁸⁹ The school made submission of papers to Turnitin mandatory; before submitting a paper a user had to agree to Turnitin's terms and conditions.

The court held that iParadigms' use of the student papers was a fair use. In the court's view it was a transformative use since Turnitin was using the papers for a different function and purpose, i.e., to detect plagiarism, than the originals, which were created for their expressive content. Although the papers were unpublished, Turnitin did not adversely affect the students' right of first publication. Turnitin used the entire works, but only for a very limited purpose. Finally, the court concluded that Turnitin's use would not affect the actual or potential market for plaintiffs' papers.

*Author's Guild v. Google, Inc.*¹⁹⁰ is another case where a commercial entity has tried to "push the envelope" as far as the fair use doctrine is concerned. Google, in cooperation with several research libraries, scanned all or most of the works in each library, regardless of copyright status. Google's "book search project" provided each library with a digital version of the full text of scanned books from its collection, and Google then used the resulting database in a number of ways: to provide users with bibliographic information on books in which a particular search term appears, as well as sentences or phrases ("snippets") to illustrate the context; internally for its own research in creating a translator, improving its search engine, and so on; and to provide users with full text of public domain works. Authors and publishers challenged Google's book search project and claimed Google's copying and providing snippets to users infringed their works. Google takes the position that these uses are permissible under the fair use doctrine.

The parties reached a settlement which allowed Google to continue scanning as well as to license access to the full text of each work (subject to a right holder's ability to "opt out"). Payments for these uses would be divided between Google and a "Book Rights Registry" that would have been responsible for identifying, locating and paying right holders. The settlement had to be approved by a federal court, since the case was brought as a class action. In March 2011 the court refused to approve the settlement because, *inter alia*, the parties were not sufficiently representative of the absent right holders, and in addition, there were competition concerns about the Book Rights Registry. Subsequently the publishers settled with Google on undisclosed terms. The authors' case against Google continues and the court has yet to rule on the fair use issue.

Taken together, these cases indicate that the courts are willing to countenance complete copies under the fair use defense as long as defendant is perceived as using them for transformative (as opposed to substitutive) purposes.

3.5.2. Educational Institutions

Another pending lawsuit, *Authors Guild v. HathiTrust*, grew out of related facts. Many of the libraries that had received digital copies of works in their collections from Google pooled their digital copies to create a large shared digital repository under the aegis of HathiTrust, a nonprofit entity operating out of the University of Michigan Library. The repository was being used for searches (which provided information but no excerpts of text) by library patrons, preservation, and providing the full text of books

¹⁹⁰ See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

in the libraries to persons who are visually impaired. HathiTrust announced plans to make available to the libraries' user communities the full text of works in their collections it had identified as "orphans," but it turned out that many of the works had right holders who were easily located, so HathiTrust suspended the program, at least temporarily.¹⁹¹ Subsequently the Authors Guild filed a lawsuit alleging infringement.

On cross-motions by the parties, the court dismissed the claim concerning orphan works as not ripe for adjudication. In the court's view, since the orphan works program had been suspended and the court could not anticipate whether any orphan works program that defendants might adopt in the future would have the same features as the one suspended, it could not adjudicate the issue.

Plaintiffs contended that defendants' fair use defense is precluded by section 108 and in particular by section 108(g), which prohibits a library from engaging in systematic copying. Their argument was twofold: (1) as a matter of statutory construction, the specific governs the general; because section 108 contains specific rules, a library that fails to meet those rules cannot then resort to section 107; (2) the legislative history suggests that fair use is not available as a defense in this situation. The court, citing language in section 108 (f)(4), concluded that Congress did not intend to preclude a fair use defense when a library's activities fell outside section 108. It also concluded that the legislative history that plaintiffs cited was subject to different interpretations.

The court turned next to defendants' fair use defense. It concluded that HathiTrust's use was transformative since it was using the works for a different purpose than the originals – providing a searchable index that enabled locating books, data mining, and providing access for the print-disabled. On factor two, it decided that although most of plaintiffs' works (at least the ones complained of) were fictional, this factor is not particularly relevant when the use is transformative.

On factor three, the court concluded that the amount copied was reasonable in relation to the transformative purpose. Finally, on factor four, the court concluded that there was likely to be little impact on the market for plaintiffs' works. In its view, the plaintiffs were unlikely to set up a licensing system for this type of use since it would be cost prohibitive. It was also unmoved by plaintiffs' concerns about the security of the database.

3.6 The Relationship Between Fair Use and Other Statutory Exceptions.

The interaction between fair use and other statutory exceptions continues to be the subject of debate. Section 108 (exceptions for libraries and archives) specifically provides that "Nothing in this section ...in any way affects the right of fair use as provided by section 107."¹⁹² So while it is clear that fair use remains an available defense for a library or archives, how if at all the section 108 exceptions may be relevant to a fair use determination is still an open question. The House Report accompanying the 1976 Copyright Act observes:

¹⁹¹ Authors Guild, Inc. v. HathiTrust, No. 11 CV 6351 (HB), 2012 U.S. Dist. Lexis 146169 (S.D.N.Y Oct 10, 2012).

¹⁹² 17 U.S.C. § 108(f)(4) (West 2013).

No provision of section 108 is intended to take away any rights existing under the fair use doctrine. To the contrary, section 108 authorizes certain photocopying practices which may not qualify as a fair use.¹⁹³

In *Authors Guild v. HathiTrust*,¹⁹⁴ plaintiffs argued that because HathiTrust did not qualify for the section 108 exceptions – principally because it was engaging in systematic copying – it was prohibited as a matter of law from availing itself of fair use. Their theory was that the specific takes precedence over the general. They also argued that a 1983 Report from the Register of Copyrights supported plaintiffs' reading of the statute. The report stated:

Much of the "108" photocopying would be infringing but for the existence of that section, thus leaving section 107 often clearly unavailable as a basis for photocopying not authorized by section 108.¹⁹⁵

Defendants argued that this language merely tells the court that it should take into account the section 108 copying that has already occurred in evaluating fair use. The court rejected plaintiffs' argument that section 108 precluded the libraries from invoking fair use in these circumstances, citing the language in 108(f)(4) that nothing in section 108 "in any way affects the right of fair use."

The nature of plaintiffs' arguments made it unnecessary for the court to address a more nuanced claim: that section 108 is relevant to the scope of section 107.¹⁹⁶

Section 121 (exception for blind or other people with disabilities) does not have the same statutory reservation concerning fair use as section 107 does, but the court held that "[n]othing in [section 121] indicates an intent to preclude a fair use defense as to copies made to facilitate access for the blind that do not fall within its ambit."¹⁹⁷ The court held that defendants were entitled to rely on section 121 in connection with providing copies to the blind or other people with disabilities; moreover, it held that copying the libraries did for this purpose that was outside of the parameters of section 121 could be justified by fair use.¹⁹⁸

¹⁹³ H.R. REP. No. 94-1476 at 74 (1976)

¹⁹⁴ *Authors Guild v. HathiTrust*, 2012 U.S. Dist. Lexis 146169 at *36-*38.

¹⁹⁵ *Id.* at *36 (quoting Register of Copyrights, Report of the Register of Copyrights, Library Reproduction of Copyrighted Works at 96 (1983)).

¹⁹⁶ The libraries argued that the legislative history that plaintiffs cite means merely that courts should take into account the section 108 copying that has already occurred in evaluating a fair use claim based on library copying. *Authors Guild v. HathiTrust*, 2012 U.S. Dist. Lexis 146169 at * at 9.

¹⁹⁷ *Id.* at *63 n. 33.

¹⁹⁸ *Id.* at *61 - *63.

4.0 Section 1201 (re Circumvention of Access Controls) and Educational Uses of Audiovisual Works

In the course of its rulemaking proceedings under section 1201, the Copyright Office has had an opportunity to discuss fair use of audiovisual materials in the educational context.

Title 17 section 1201 provides that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”¹⁹⁹ There are a number of statutory exceptions to this prohibition, such as for law enforcement and intelligence activities, reverse engineering and security testing. There is no statutory exception for educational use or fair use.

The law also provides the possibility for new exceptions on a periodic basis. The prohibition on circumvention “shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title,” as determined by a rulemaking proceeding.²⁰⁰ Based on the recommendation of the Register of Copyrights, the Librarian of Congress issues a determination every three years, on the basis of evidence submitted in the rulemaking proceeding, of which persons are likely to be adversely affected in their ability to make noninfringing uses by the prohibition.²⁰¹ In making that determination, the Librarian is instructed to examine a number of factors including “the availability for use of works for... educational purposes;” the impact that the prohibition... has on... teaching, scholarship, or research;” and “other factors as the Librarian considers appropriate.”²⁰²

In the 2012 rulemaking, the Librarian designated five “classes” of audiovisual works as excepted from the prohibition on circumvention. These five “classes” can be found in 37 C.F.R. § 201.40 (4), (5), (6), (7), (8) and are defined in part by the reason for the circumvention. They can be summarized as follows:²⁰³

- Motion pictures on DVDs or distributed by online services, for purposes of criticism or comment in noncommercial videos, documentary films, nonfiction multimedia ebooks offering film analysis, and for certain educational uses by college and university faculty and students and kindergarten through twelfth grade educators.
- Motion pictures and other audiovisual works on DVDs or distributed by online services, for the purpose of research to create players capable of rendering captions and descriptive audio for persons who are blind, visually impaired, deaf or hard of hearing.

¹⁹⁹ 17 U.S.C. §1201 (a)(1)(A) (West 2013).

²⁰⁰ *Id.* §1201 (a)(1)(B).

²⁰¹ *Id.* §1201 (a)(1)(C).

²⁰² *Id.* §1201 (a)(1)(C)(ii)-(iii),(v).

²⁰³ U.S. COPYRIGHT OFFICE, *Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 3* (Oct. 2012) available at <http://www.copyright.gov/1201/>.

It is instructive to consider what evidence of noninfringing uses of DVDs the Register relied on to decide those uses may be impaired. The Register concluded that proponents of the classes had demonstrated that at least some of their proposed uses may qualify as fair uses. On factor one, the Register concluded that “more than a trivial portion” of the examples would qualify as transformative. Concerning the second factor, it concluded that motion pictures are generally creative in nature, but called this factor “of limited assistance.” Evidence submitted to the Office indicated that most of the uses by educators, students, etc. involved quantitatively small portions of the motion pictures. Even if the uses were qualitatively important, their transformative nature made it likely that it would not affect the market for the motion pictures. The Register concluded that “many of the uses sought by the proponents may be considered fair use.” The Report emphasized that it was not making any judgment as to whether any particular example is a fair use, and that some uses in the educational, documentary, and noncommercial will likely be infringing.

Under the Register’s fair use analysis, factor one favors fair use, as the listed uses are likely to be transformative.²⁰⁴ While uses by documentary filmmakers and multimedia ebook authors are likely to be commercial, they are also likely to be sufficiently transformative to favor fair use under the first factor.²⁰⁵ Factor two does not favor fair use since motion pictures are generally creative.²⁰⁶ However, factor two is also not particularly relevant because it is of “limited assistance” in evaluating whether a use is fair if it is a transformative use.²⁰⁷ Factor three favors fair use because only a short portion of the work is used.²⁰⁸ Finally, factor four favors fair use because transformative works, for the purposes of criticism and comment, are unlikely to interfere with primary or derivative markets for the underlying work.²⁰⁹

Not only are these uses likely to be fair, but according to the Copyright Office they are also likely to be adversely impacted by the prohibition on circumvention. First, the distribution of motion pictures is now primarily limited to formats that are protected by access controls.²¹⁰ Second, clip licensing and smart phone recordings were not shown to be sufficient alternatives to achieve the desired uses.²¹¹ Third, while screen capture software could be a sufficient alternative in situations where high quality was not necessary, some content holders may deem screen capture software a form of circumvention.²¹² Finally, for certain uses, only the high quality video available through circumvention would be sufficient for criticism and commentary.²¹³

Based on these findings the Register recommended four classes, which when combined, create a general exception for motion pictures available “on DVDs... protected by the Content Scrambling

²⁰⁴ *Id.* at 127

²⁰⁵ *Id.* at 127-128

²⁰⁶ *Id.* at 128

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 128-129

²⁰⁹ *Id.* at 129

²¹⁰ *Id.* at 131

²¹¹ *Id.*

²¹² *Id.* at 132-134

²¹³ *Id.*

system,”²¹⁴ or acquired “via online distribution services... protected by various technological protection measures.”²¹⁵ The exception applies when “the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to achieve the desired criticism or comment...,”²¹⁶ and “where the circumvention is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment...,”²¹⁷ in certain enumerated instances.

Direct circumvention is allowed only where the person believes circumvention is necessary “because reasonably available alternatives, such as noncircumventing methods or using screen capture software as provided for in alternative exemptions, are not able to produce the level of high-quality content required.”²¹⁸ In such instances, the exception applies to noncommercial videos, documentary films, nonfiction multimedia ebooks offering film analysis, and educational use “*in film studies or other courses requiring close analysis of film and media excerpts*, by college and university faculty, college and university students, and kindergarten through twelfth grade educators.”²¹⁹ The second of the two exceptions listed above is a limited exception allowing circumvention of protection on motion pictures and audiovisual works “when circumvention is accomplished solely to access the playhead and/or related time code information embedded in copies of such works and solely for the purpose of conducting research and development for the purpose of creating players capable of rendering visual representations of the audible portions of such works and/or audible representations or descriptions of the visual portions of such works... provided however, that the resulting player does not require circumvention of technological measures to operate.”²²⁰

5.0 Current Practices of Educational Institutions

We did two informal surveys of the practices of educational institutions. The first focused specifically on use of the Off-Air Guidelines and is described in section 5.1 below. The second focused on schools’ copyright policies and guidelines more generally, and is described in section 5.2.²²¹

5.1 Guidelines for Off-Air Recording of Broadcast Programs for Use in Educational Institutions

As demonstrated below and in section 5.2, there is evidence that Off-Air Guidelines have been incorporated into the copyright policies of educational institutions and endorsed by the industry.

Content Providers

²¹⁴ 37 C.F.R. § 201.40 (b)(4), (6)

²¹⁵ § 201.40 (b)(5), (7)

²¹⁶ § 201.40 (b)(4)-(7)

²¹⁷ § 201.40 (b)(4)-(7)

²¹⁸ § 201.40 (b)(4), (6)

²¹⁹ *Id.*

²²⁰ § 201.40 (b)(8)

²²¹ We also did a third informal survey that focused on the practices of libraries and archives. It is described in Appendix C.

As noted above, not all content providers immediately endorsed the guidelines. While the Motion Picture Association of America, Inc. took “no position,” several of its member companies “assent[ed] to the guidelines.”²²² With time, the MPAA developed a more favorable view of the Guidelines. Despite MPAA’s initial refusal to take an official position, MPAA’s Senior Vice President, Fritz E. Attaway, wrote on February 10, 1999,

After passage of the 1976 Copyright Act MPAA and other copyright owner interests participated in extensive negotiations with the educational and library communities on voluntary guidelines for off-air video taping for educational uses. These negotiations were successfully concluded in 1981 To the best knowledge of this writer, *these guidelines have worked well, balancing the needs of both owners and users without necessitating changes in the basic fabric of the Copyright Law*. Most importantly, these guidelines have served the needs of educators and have contributed to our national educational objectives.²²³

Other producers of broadcast materials have also been willing to work with the Guidelines. For example, PBS publishes the Guidelines on its website and explains, “[a]lthough not laws, the federal Fair Use Guidelines for Off-Air Recording have been considered a ‘safe harbor’ for permissible use when an instance of off-air recording by a nonprofit educational institution is not covered by a specific negotiated agreement with the copyright holder.”²²⁴ For elucidation, PBS refers teachers to the Copyright Office’s Circular 21 “Reproduction of Copyrighted Works by Educators and Librarians” (attached as Appendix B). PBS further describes its common practice of “negotiat[ing] with the producers of public television programming to allow for recording rights that extend this standard federal guideline for some programs.” Extended recording rights are “negotiated rights to use off-air recordings in the classroom beyond the typical 10-day period granted under federal fair use guidelines. PBS pioneered agreements for such rights and has obtained them for a significant amount of PBS primetime and children’s programming.”²²⁵ Extended rights “are negotiated on an individual basis” and generally allow educators to use off-air recordings for an extended time: generally one year but occasionally for the “life of the recording (in perpetuity).”²²⁶

Nonprofit Educational Users - Primary and Secondary Schools

²²² H.R. REP. NO. 97-495 at 9-10. The assenting member companies were Avco Embassy Pictures Corp., Columbia Pictures Industries, Inc., Filmways Pictures, Inc., Metro-Goldwyn-Mayer Film Co., Paramount Pictures Corp., Twentieth Century-Fox Film Corp., and Universal Pictures, a division of Universal City Studios, Inc.

²²³ Comments of Motion Picture Association [sic] of America: Promotion of Distance Education Through Digital Technologies Copyright Office Docket No. 98-12A (1999), *available at* <http://www.copyright.gov/disted/comments/init022.pdf> (emphasis added).

²²⁴ *Guidelines for Off-Air Recording for Educational Purposes*, PBS TEACHERS, <http://www.pbs.org/teachers/copyright/guidelines.html> (last visited Apr. 24, 2013).

²²⁵ *PBS and Extended Recording Rights*, PBS TEACHERS, http://www.pbs.org/teachers/copyright/extended_recording.html (last visited Apr. 24, 2013).

²²⁶ *Id.*

Primary and secondary schools also circulate the Guidelines. For example, Groton Public Schools issued a proposed policy on August 18, 1997 that called upon the superintendent of schools to adopt consistent regulations. The school district's proposed policy synthesizes both the Congressional guidelines and the 1994 guidelines from the Conference on Fair Use ("CONFU"), which generated guidance related to the use of electronic media in education.²²⁷ Groton Public Schools' proposal emphasizes that the Guidelines are not law but provide a "safe harbor" to educators. It also highlights that copyright can be a "vague and confusing area of law" and points out one particular area of uncertainty: "The off-air standards were developed before cable was in general use. Opinion on whether or not cable is covered under these rules developed for broadcast television varies. However, *All About Copyright: Fair Use in the Multimedia Age*, distributed by Cable in the Classroom, states that 'most authorities agree that the guidelines do apply' for cable."²²⁸

The Rochester Public School District also adopted a variation of the Guidelines. This version seems modeled after the Guidelines, but it also adds some additional prohibitions such as, "Teachers may record off-air video programs at home and bring them into the school as long as all copyright guidelines are followed since the teacher is now operating under guidelines for education and not the guidelines for home videotaping."²²⁹

However, some schools perpetuate policies that are different from, or possibly misunderstand, the Guidelines. For example, Albuquerque Public Schools describes a truncated version of the Guidelines that requires recordings to be retained "for less than a year" and not to be used "repetitively," without reference to the other aspects of the Off-Air Guidelines, such as the ten-day limit.²³⁰

Nonprofit Educational Users - Universities

Nonprofit institutions of higher learning perpetuate the Off-Air Guidelines, with some explicitly adopting them as institutional policy. Washington and Lee University lists the guidelines as part of its Provost-approved university copyright policy, which was issued in 1994, revised in May 2007, and "applies to all members of the University community."²³¹ The school's official stance is that "[e]ach member of the University community must take some individual responsibility for copyright compliance" and members who "willfully disregard the copyright policy do so at their own risk and assume all liability." The policy

²²⁷ *Policy: Instruction Copyright Protection*, GROTON PUBLIC SCHOOLS, Groton, Connecticut, http://www.groton.k12.ct.us/cms/lib2/CT01001200/Centricity/Domain/10/P_6162.6.pdf (last visited Apr. 24, 2013).

²²⁸ *Id.*

²²⁹ *Copyright Policy*, ROCHESTER PUBLIC SCHOOLS, <http://www.rochester.k12.mn.us/page/2924> (last visited Apr. 24, 2013).

²³⁰ *Copyright Compliance*, ALBUQUERQUE PUBLIC SCHOOLS, www.aps.edu/about-us/policies-and-procedural-directives/procedural-directives/e.-support-services/copyright-compliance (last visited Apr. 24, 2013).

²³¹ *Policy for the Use of Copyrighted Works*, WASHINGTON AND LEE UNIVERSITY, <http://www.wlu.edu/x30754.xml> (last visited Apr. 24, 2013).

states, “[a]bsent a formal agreement, [the Off-Air Guidelines], an official part of the Copyright Act’s legislative history, appl[y] to most off-air recording.”²³²

Skidmore College also adopts the Guidelines as part of its copyright policy.²³³ On a website last updated November 8, 2012, Piedmont Technical College listed the Guidelines under the heading “PTC’s Copyright Policy.”²³⁴

Other universities also perpetuate the Guidelines, without explicitly labeling them as official policy. See, for example, the survey of copyright policies in section 5.2. On its Libraries website, Stanford University indicates, “If you’re a teacher, you should know if and when you may legally tape educational TV programs and use them in your classroom.” The website explains,

[To] help educators determine when off-air taping is and is not a fair use, a set of very concrete guidelines was created by a committee comprising representatives from educational organizations and copyright owners. These guidelines . . . do not have the force of law and have never been tested in the courts. Many producers do not agree with them, and many teachers aren’t thrilled either, because they offer only limited, temporary access to broadcast materials. However, most copyright experts believe that taping that falls within the guidelines is permissible and would be upheld as a fair use if challenged in court.²³⁵

Berkeley also posts the Guidelines on its library website, though it provides no explanation of them, and the last update to the page was on May 17, 1995.²³⁶ Brown University,²³⁷ Carson-Newman University,²³⁸ and Suffolk University all post the Guidelines as well.²³⁹ In sum, primary and secondary schools and

²³² *Id.*

²³³ *Copyright Policy*, SKIDMORE COLLEGE, <http://cms.skidmore.edu/it/policies/copyright.cfm?RenderForPrint=1> (last visited Apr. 24, 2013).

²³⁴ *Off-Air Recording of Broadcasts for Classroom Use*, PIEDMONT TECHNICAL COLLEGE, <http://ptc.libguides.com/content.php?pid=382241&sid=3224021> (last visited Apr. 24, 2013).

²³⁵ *Copyright and Fair Use, Stanford University Libraries*, SULAIR, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter0/0-e.html (last visited Apr. 24, 2013).

²³⁶ *Guidelines for Off-Air Taping for Educational Purposes (Kastenmeier Guidelines)*, UC Berkeley Library, <http://www.lib.berkeley.edu/MRC/Kastenmeier.html> (last visited Apr. 24, 2013).

²³⁷ *Rules and Permissions for Audio-Visual Media Copyright law and audio-visual materials*, BROWN UNIVERSITY COPYRIGHT AND FAIR USE, <http://www.brown.edu/Administration/Copyright/media.html>.

²³⁸ *Guidelines for Off-Air Recording of Broadcast Programming for Educational Use*, CARSON-NEWMAN UNIVERSITY, <http://www.cn.edu/undergraduate/resources/library/library-services/about-the-library/policies/media-center/guidelines-for-off-air-recording-of-broadcast-programming-for-educational-use> (last visited Apr. 24, 2013).

²³⁹ The University Committee on Copyright Policy, Midge Wilcke, Chairperson, *On Matters of Copyright: An Informational Bulletin for the Suffolk University Community*, available at www.suffolk.edu/documents/policies/copyright_policy.pdf. Northeastern University, http://www.lib.neu.edu/services/for_faculty/information_about/offair_recording/; Nazareth College, <http://www.naz.edu/library/services/faculty/media-center-services-for-faculty/federal-guidelines-for-off-air-recording-of-broadcast-programming-for-educational-purposes>, and the University of California community, <http://copyright.universityofcalifornia.edu/systemwide/porbpep2.html>, all promote the guidelines as well.

universities circulate the Off-Air Guidelines. Many simply republish them with little further explanation; some indicate that there are still areas of confusion in the law. Others, such as the Albuquerque School District, perpetuate slightly incomplete versions of the Guidelines. Of course, in instances where a school sets forth a policy, it is not certain whether teachers and staff actually follow it in practice.

Though courts have been persuaded by guidelines in other areas of fair use, they have not yet been called upon to apply the Off-Air Guidelines.

5.2 General Policies re Use of Copyrighted Materials in Educational Institutions

We have investigated various educational institutions' policies regarding the use of copyrighted materials in the classroom and for other instructional purposes. We searched for a broad variety of institutions and will describe some of their policies below. We use a narrative form for reporting our findings because the data we have found does not lend itself to a spreadsheet format.

Following is a list of the institutions whose policies regarding the use of copyrighted materials in the classroom and by instructors and students we reviewed. We chose a range of institutions: small, midsize and large public schools and small, midsize and large colleges and universities.²⁴⁰ The public elementary and secondary school districts selected were: Los Angeles Unified School District; East Penn School District; Suring School District; Prince George's County Board of Education; Millbury Public School District; and the Pasco County School District. The universities and colleges included: The University of Texas system; Reed College; Brown University; Drury University; and Harvard University. Because there are thousands of public school districts, colleges and universities across the country, this list is far from a complete look at copyright policy in America's educational system but it represents a sample of policies from a variety of schools.

Before turning to individual school policies, we note some trends we have observed. Many elementary and secondary school districts do not have policies as detailed as those of higher education institutions. Elementary and secondary schools are often more concerned about student privacy and the age-appropriateness of any visual, audio or audiovisual materials used in the classroom than in copyright issues. Many schools (including some not discussed in this report) follow the Cable in the Classroom guidelines regarding the use of off-air recording of cable television broadcasts²⁴¹ and the policy regarding off-air taping of broadcast television adopted by the Los Angeles Unified School District (see below). Colleges and universities often defer to outside resources to guide faculty and students in how to determine if material is copyrighted and whether it needs to be licensed.

Public Elementary and Secondary School Districts

²⁴⁰ We could not find any private elementary and secondary schools that posted their policies online.

²⁴¹ *Frequently Asked Questions, CABLE IN THE CLASSROOM*, <http://www.ciconline.org/AboutUs/FAQ> (last visited Apr. 24, 2013).

East Penn School District²⁴²

The East Penn School District (EPSD) is located in Lehigh County, Pennsylvania and serves over 8,000 students. A reading of its policy would indicate the District's primary concerns are the use of age-appropriate materials in the classroom, the security of the internet system used in the schools, and the protection of children's privacy. Copyright is only mentioned briefly. The policy reads: "Federal laws, cases and guidelines pertaining to copyright will govern the use of material accessed through School District resources. Employees will instruct students to respect copyrights, request permission when appropriate, and comply with license agreements." The policy also states that copyrighted material is not to be placed on any District website without the author's permission. There are no specific policies for the use of audiovisual materials in the classroom.

Los Angeles Unified School District (LAUSD)²⁴³

The LAUSD has a detailed policy regarding use of copyrighted materials (and audiovisual works in particular) in its schools (which number over 1000 in the greater Los Angeles area, serving over 650,000 students in grades K-12 and an additional 300,000 adults in its adult education programs). The policy begins with a statement that the District does not sanction illegal uses or duplications in any form. Employees who violate the District's copyright policies "[d]o so at their own risk and may be required to remunerate the District in the event of a loss due to litigation." Principals are to establish photocopying policies in their schools and photocopying personnel in libraries and archives must be advised of the copyright law. The policy also goes into a detailed analysis of when fair use may be an appropriate defense. In many respects the policy follows the Classroom Photocopy Guidelines (see section 3.3.1). Teachers, for instance, may make one copy of a book chapter, article, chart or items that fall into one of ten other categories without risk of penalty. There is a long discussion on classroom use, including how much of a poem can be used (a maximum of 250 words), how many works by one author can be used per term (one), and the requirement that materials be used for only one course. There are outright prohibitions, too: no copying to substitute for purchase of books, reprints or periodicals; no copying because a higher authority requested it; and no copying of consumables such as workbooks, standardized tests or answer sheets. There are other policies regarding reproduction of materials for the visually impaired or other people with disabilities.

The LAUSD does have a portion of its copyright policy devoted to the use of audiovisual materials in the classroom, including fair use guidelines for off-air taping which appear to be based on the Off-Air Guidelines. Permissible instances of off-air copying include any program broadcast by a non pay-TV service (such as HBO). Videotaped recordings cannot be kept for more than 45 calendar days, at which time the tapes must be erased. These recordings may only be shown to students within the first ten days of this 45 day period. After, they may be used for evaluation purposes only. Recordings may not

²⁴² *Acceptable use of Technology Resources, Electronic Communications and Information Systems*, EAST PENN SCHOOL DISTRICT, http://www.eastpennsd.org/Technology/_pdf/aup.pdf.

²⁴³ *Bul -714, Compliance with the 1976 United States Copyright Law (2004)*, LOS ANGELES UNIFIED SCHOOL DISTRICT, http://notebook.lausd.net/portal/page?_dad=ptl&_pageid=33,75995&_schema=PTL_EP (last visited Apr. 24, 2013).

be altered from their original content or combined to create compilations. No program may be recorded off-air more than once at the request of the same teacher. The District does have a special agreement for longer retention rights with public television station KLCS-TV. Cable television programming guidelines are governed by the cable industry's group Cable in the Classroom.²⁴⁴ All audiovisual material must be shown for educational purposes and not for recreation or fundraising. Educational off-air taping guidelines described above apply to any recordings done at home and used for classroom instruction. Any audiovisual materials borrowed from the District's AV Library may not be copied or transmitted from one format to another. There are separate guidelines for the use of works used in student or teacher multimedia presentations. They are as follows: (a) Motion media: 10% or three minutes, whichever is less. (b) Text material: 10% or 1000 words, whichever is less; entire poem of less than 250 words but no more than three poems by one poet or five poems by different poets from any anthology; for longer poems, 250 words may be used, but only three excerpts by a poet or five excerpts by different poets from a single anthology. (c) Music, lyrics, and music video: Up to 10%, but no more than 30 seconds from an individual musical work or the total extracts from an individual work; any alterations to the musical work should not change the basic melody or the fundamental character of the work. (d) Illustrations and photographs: No more than five images by an artist or photographer; when from a published collective work, not more than 10% or 15 images, whichever is less.

Millbury (MA) Public School District²⁴⁵

The Millbury Public School District (MPD) in Massachusetts serves 1800 students in grades K-12. Its "Staff Technology Acceptable Use Policy (Revised)," dated 2012, provides, "Under no circumstances does the MPD condone the use of copyrighted material without attribution and the express permission of the copyright holder..."²⁴⁶ It goes on to say that staff may not duplicate copyrighted materials, including software, without permission from the copyright owner unless the use falls under the parameters of fair use. It does not, however, list any of the factors to be considered nor does it discuss how they are to be evaluated. There are no specific policies for the use of broadcast materials in the classroom.

Pasco County District School Board²⁴⁷

Pasco County School District (PCSD), located in Land O' Lakes, Florida, serves over 67,000 students in 84 schools. PCSD has a very complete copyright policy. It addresses the use of videotapes in the classroom and instructional use of off-air recordings, and it forbids the at-home taping of programs off-air for use in the classroom. It details the permitted classroom uses for audio, visual and audiovisual works.

²⁴⁴ *Frequently Asked Questions, CABLE IN THE CLASSROOM*, (APR. 24, 2013), <http://www.ciconline.org/AboutUs/FAQ>.

²⁴⁵ *MILLBURY SCHOOL DISTRICT STAFF TECHNOLOGY ACCEPTABLE USE POLICY (REVISED)*, available at http://www.millburyschools.org/sites/millburysd/files/file/file/staff_technology_acceptable_use_policy_-_adopted_2.15.12.pdf.

²⁴⁶ *Id.* at 2.

²⁴⁷ *Copyright Information, DISTRICT SCHOOL BOARD OF PASCO COUNTY*, <http://www.pasco.k12.fl.us/media/copyright/> (last visited Apr. 24, 2013).

Audio Works

Teachers may make an individual copy of copyrighted music solely for the sake of creating aural examinations. The policy says that this pertains to the copyright of the music itself and not to any copyright that may exist in the sound recording, but it does not clarify what that means.

Audiovisual Works

Permitted uses include making a single overhead transparency of one page of a workbook; creating a series of slides from multiple sources of printed materials as long as no more than 10% of any one source is used; excerpting sections from a film to create slides as long as one doesn't exceed 10% of the entire work and retains the "creative essence" of the work; reproducing selective slides from a slide series provided one does not exceed 10% of the entire work, retains the "creative essence" of the work and does not violate a specific prohibition on this type of reproduction; and duplicating visual or audio materials of a non-dramatic literary work in order to provide materials for the blind or deaf. In addition, teachers or administrators may transmit these materials to the blind or deaf via cable systems. Musical works may not be duplicated, nor can the format be changed (i.e. they may not convert cassette tape to CD or slides to video). No audiovisual work may be duplicated in its entirety. No programs may be recorded off-air and kept in the school's collection unless a licensing fee is paid or the original broadcast was cleared for instructional use. Off-air recordings can be made, however, as long as they are erased within 45 calendar days and may only be used in the classroom within 10 school days of the recording. All off-air recordings must retain the copyright notices attached at initial broadcast. They may not be used in the classroom in their entirety nor may they be altered in any way.

*Prince George's County Board of Education*²⁴⁸

Prince George's County, Maryland, encompasses many suburbs of Washington D.C. and serves approximately 124,000 students in grades K-12.²⁴⁹ Recently, the County's Board of Education drafted a new policy on copyrighted materials. The policy, entitled "Use and Creation of Copyrighted Materials," recognizes that "[i]n the course of providing education and related services, the use and reproduction of materials protected by copyright may be necessary."²⁵⁰ The intention is to "provide guidelines for the legal and permitted fair use of copyrighted materials" that arise in the classroom.²⁵¹ The policy is, however, very broad. It merely says that employees and students are strictly prohibited from duplicating any copyrighted materials which would "not be allowed by copyright law, 'fair use' guidelines, licenses or contractual agreements. Where there is reason to believe a use does not fall

²⁴⁸ Prince George's County Public Schools, *Board of Education Policy: Use and Creation of Copyrighted Materials*, [http://www.boarddocs.com/MABE/pgcps/Board.nsf/files/943N845D5399/\\$file/Copyright Policy Revised%5B1%5D2%5B1%5D.pdf](http://www.boarddocs.com/MABE/pgcps/Board.nsf/files/943N845D5399/$file/Copyright%20Policy%20Revised%5B1%5D2%5B1%5D.pdf).

²⁴⁹ Note that in February 2013, Prince George's County introduced an addition to its copyright policy that would allow the school district to own all copyrights of works created by students or teachers in the context of the school curriculum. This met with great opposition. The measure has not yet been approved.

²⁵⁰ *Use and Creation of Copyrighted Materials*, *supra* note 248, at 1.

²⁵¹ *Id.*

within one of the foregoing permitted uses, prior written permission shall be obtained.”²⁵² Any copying of workbooks is strictly forbidden. Teachers or school administrators must be able to provide written permission or proof of purchase from the copyright holder to reproduce any copyrighted materials. If the policy is violated, disciplinary action against offending students and employees will be taken. There are no specific policies for the use of audiovisual materials in the classroom.

Suring School District²⁵³

Suring School District is very small district located in Wisconsin that serves approximately 350 students in grades K-12. Its copyright policy, adopted in 2009, “recognizes the importance of using copyrighted material in enhancing curriculum.”²⁵⁴ The policy, however, is quite broad and sometimes contradictory: all uses of copyrighted material must follow copyright law; staff members must follow fair use guidelines; and staff members should acquire licenses or other written permission to use material. The policy goes on to list rules designed to “discourage violation of copyright laws and to prevent such illegal activities,” but all of these rules only apply to use of computer software.²⁵⁵ There are no specific policies for the use of audiovisual materials in the classroom.

Colleges and Universities

Brown University²⁵⁶

Brown University is a private university in Providence, Rhode Island with 8,500 graduate and undergraduate students.

General Information

Brown has an extensive website dedicated to explaining its copyright and fair use policies. On its main copyright and fair use page, the University explains the purpose of the fair use doctrine and the underlying considerations in the four-factor fair use test. Brown provides a link to Columbia University’s fair use checklist to help end-users analyze whether their use is within the scope of fair use. There are posted policies for the use of music, audiovisual works, digital resources, images and documents. On many of these pages, the university provides links to resources that might assist those seeking to license a work. For instance, the “images” page features a link to the Digital Image Rights Computator, which is a program that end-users can use to check whether a certain image is protected under copyright. Brown also provides a resources page with links to various copyright related subjects, including topics on legislation, educational instructions’ guidelines, current events, and Creative Commons.

Licenses and Permissions

²⁵² *Id.* at 2.

²⁵³ SURING SCHOOL DISTRICT COPYRIGHT POLICY available at <http://www.suring.k12.wi.us/district/copyright.pdf>.

²⁵⁴ *Id.* at 1.

²⁵⁵ *Id.* at 2.

²⁵⁶ *Copyright and Fair Use*, BROWN UNIVERSITY (<http://www.brown.edu/Administration/Copyright/>) (last visited Apr. 24, 2013).

Brown also explains that end-users may need to acquire licenses or permission, if either the work is not in the public domain or their use goes beyond the scope of the licenses that Brown has obtained for certain material.²⁵⁷ The webpage succinctly explains the public domain and copyright terms. Additionally, the webpage explains the scope of rights that end-users have under the institution's license for five types of works. The five categories are (1) digital publications; (2) musical performances; (3) published materials (including online materials) for which Brown does not have a license; (4) course packs; and (5) audiovisual materials. Furthermore, the website generally explains shrink-wrap and click-through licensing that is between the end-user and the content provider.

Digital Publications

Brown explains some of the conditions and limitations of the licenses that govern digital publications.²⁵⁸ For example, the University indicates that authorized users include faculty, students, staff, and walk-in users. However, for instances where access is restricted by the license agreement, the University uses sign-on procedures or limits access to certain locations on campus. In terms of interlibrary loan, the way the University transmits or delivers the material may be limited. Some licenses prohibit electronic transfers, while other licenses comply with the section 108 interlibrary loan provisions. Brown also uses licenses that govern course reserves and course pack material. Some of these licenses require that the institution make such material accessible through secure electronic means. Brown explains that almost all licenses detail the types of permissible copying. Some of these limitations include restricting copying to a reasonable portion, prohibiting digital copying, allowing copying consistent with fair use or permitting copying for scholarly research, educational and personal use. The University also explains that reuse of licensed material is typically prohibited, unless permission is received. Further, the site explains that reuse is generally limited to noncommercial purposes, and systematic copying is usually prohibited.

Musical Works

For performance of musical works,²⁵⁹ the University has license agreements with the three major performing rights societies: ASCAP, BMI, and SESAC. The webpage notes that these licenses permit public performance of copyrighted material—not reproduction or distribution rights. A description of each license is provided on the website.

Content not Licensed to Brown

The University informs users that, unless their use is within the scope of fair use or the content is in the public domain, they will have to obtain permission from copyright holders for materials for which Brown does not have a license. The website lists several uses that will always require permission (e.g.

²⁵⁷ *Copyright and Fair Use*, BROWN UNIVERSITY, <http://www.brown.edu/Administration/Copyright/permission.html> (last visited Apr. 24, 2013),

²⁵⁸ *Copyright and Fair Use*, BROWN UNIVERSITY, <http://www.brown.edu/Administration/Copyright/licenses.html> (last visited Apr. 24, 2013).

²⁵⁹ *Copyright and Fair Use*, BROWN UNIVERSITY (Apr. 24, 2013), http://www.brown.edu/Administration/Copyright/music_licenses.html (last visited Apr. 24, 2013).

repetitive copying, course packs sold to students for Brown courses, etc.). Faculty using materials for faculty projects are responsible for obtaining copyright permission and paying royalty fees, when applicable.²⁶⁰ Also, the University explains some important features related to acquiring permission and lists resources users can use to obtain permission (e.g. Copyright Clearance Center, US Copyright Office, and a standard permission letter provided by University of Texas²⁶¹). The University's printing center may also help end-users acquire permission.

Course Packs

For course packs, the institution's printing center, Graphic Services,²⁶² is responsible for obtaining copyright permission to publish and distribute copyrighted material. Graphic Services sells the course packs at the Brown Bookstore.

Audiovisual Materials

Brown discusses the limits on educators using audiovisual works and lists explicit conditions that educators can follow to comply with copyright laws.²⁶³ The webpage also lists uses that are prohibited unless copyright holders grant permission. The University discusses the meaning of the "For Home Use Only" warning, informing users that this warning does not preclude in-classroom use. In terms of libraries, the website mentions that viewings at libraries are limited to instructional purposes, unless the library obtains copyright permission. However, libraries are informed that they are able to dispose of their copies of audiovisual works, including loaning videotapes to faculty or selling videotapes. Libraries are informed that section 108 governs reproduction of videotapes, and thus reproduction of audiovisual works is limited to replacing lost, stolen, or damaged works that cannot otherwise be replaced at a fair price. The University provides guidelines for taping broadcast programming that seem to track the Off-Air Guidelines. For instance, educational institutions are advised neither to keep videotaped recordings for more than 45 calendar days nor to show students videotaped recordings after 10 school days of the 45-day retention period. Concerning videotape distributions and duplications, Brown warns that the rules vary and that educational institutions should learn what the specific rules and conditions are.

Drury University ("DU")²⁶⁴

Drury University is a private university in Springfield, Missouri serving approximately 5,000 students.

Copyright Law and Guidelines

²⁶⁰ *Copyright and Fair Use*, BROWN UNIVERSITY, <http://www.brown.edu/Administration/Copyright/licenses.html> (last visited Apr. 24, 2013).

²⁶¹ *Sample of Permission Letter*, BROWN UNIVERSITY, http://www.brown.edu/Administration/Copyright/permission_letter.html.

²⁶² BROWN UNIVERSITY GRAPHIC SERVICES, http://brown.edu/Facilities/Graphic_Services/ (last visited Apr. 24, 2013).

²⁶³ *Copyright and Fair Use*, BROWN UNIVERSITY, <http://www.brown.edu/Administration/Copyright/media.html> (last visited Apr. 24, 2013).

²⁶⁴ *DU Guidelines on Use of Copyrighted Materials for Web-based Course Pages*, DRURY UNIVERSITY (Apr. 24, 2013), <http://www.drury.edu/multinl/story.cfm?ID=1562&NLID=98> (last visited Apr. 24, 2013).

DU explains copyright law, fair use, orphan works, and lists materials that are non-copyrightable (e.g. personal materials such as syllabi, PowerPoint presentations, lecture notes, homework solutions, etc.). Additionally, DU lists practices that end-users can follow to increase the likelihood that their use would qualify as a fair use. DU recommends that users use ALA's Fair Use Evaluator²⁶⁵ to help users determine whether their use will be exempt. The Fair Use Evaluator is an electronic service that attempts to assess the degree of fairness of a user's use. DU also provides The Conference on Fair Use ("CONFU") guidelines to help educators and students working in the digital educational environment (e.g. podcasting). CONFU guidelines recommend specific practices that users can employ to avoid obtaining copyright permission. For instance, the CONFU guidelines state, among other things, that users can use up to 10% or 1000 words of text material without permission, provided certain conditions are met.

University Policies

The website also discusses some university policies.²⁶⁶ For example, DU states that faculty can make digital copies of student work, if the course syllabus states that digital copies of student work are required. Further, faculty is not allowed to post student work that is unrelated to the course to faculty web pages without permission.

Course Websites

For course webpages, the University states that faculty may post copyrighted material on course pages, provided the use is within the scope of fair use (to be determined by the faculty member) or the instructor obtained permission. DU provides additional guidelines²⁶⁷ and a link to Columbia University's Copyright Advisory Office Website, to help users evaluate whether their use is fair use.

Resources

DU also provides a list of links to royalty-free images and royalty-free music.²⁶⁸

Harvard University²⁶⁹

Harvard University in Cambridge, Massachusetts has about 20,000 students.

University Policy and Guidelines

²⁶⁵ Fair Use Evaluator, COPYRIGHT ADVISORY NETWORK <http://librarycopyright.net/resources/fairuse/> (last visited Apr. 24, 2013). The Calculator does not specifically address audiovisual works. It lays out the fair use defense in terms understandable to nonlawyers and provides external links to other resources.

²⁶⁶ DU Guidelines on Use of Copyrighted Materials for Web-based Course Pages, DRURY UNIVERSITY (Apr. 24, 2013), <http://www.drury.edu/multinl/story.cfm?ID=1562&NLID=98>.

²⁶⁷ Copyright, DRURY UNIVERSITY LIBRARY (Apr. 24, 2013) <http://duguides.drury.edu/copyright>.

²⁶⁸ Resources – Copyright, DRURY UNIVERSITY (Apr. 24, 2013), <http://duguides.drury.edu/content.php?pid=134347&sid=1153848>.

²⁶⁹ Copyright and Fair Use, HARVARD UNIVERSITY OFFICE OF THE GENERAL COUNSEL (Apr. 24, 2013) <http://ogc.harvard.edu/pages/copyright-and-fair-use>.

The Office of the General Counsel dedicates many web pages to an exploration of copyright, from the philosophical (why do we have copyright?) to the practical (how do I avoid copyright infringement?). It provides a rather detailed overview of American copyright law. In addition to explaining the fair use doctrine, the four factor analysis, and related case law, the University mentions and provides a link to the Guidelines for Classroom Copying.²⁷⁰ Harvard explains that these guidelines—critiqued for being overly narrow—outline certain uses that are within the scope of fair use. Because it is complicated to determine whether a use is fair use, Harvard has specific procedures with which certain departments must comply (e.g. Sourcebook Publication Office). Harvard policy states that end users using copyrighted material within these departments should also adhere to these specific procedures.

Licenses

Harvard recommends that instructors either provide links to materials on the web or use materials licensed by Harvard to avoid conducting a fair use analysis. Instructors are able to link course websites to digital materials licensed by Harvard so students can access content online and print the material. The institution provides a link to a database of material licensed by Harvard, so instructors can identify the works for which Harvard has a license.²⁷¹

Course Websites

For course websites, Harvard recommends the CONFU guidelines,²⁷² which are tailored to digital educational environments. CONFU guidelines address fair use in three major topics: (1) digital images; (2) educational multimedia; and (3) distance learning. The guidelines are intended to offer practices that at a minimum fall within the scope of fair use. For example, CONFU guidelines limit the number of days an institution can provide digitized images to students, and the guidelines recommend using password-protected networks when distributing content over the web. Additionally, the University recommends that users follow specific procedures concerning copyrighted material posted on course websites (e.g. using a minor amount of content, and only content that is integral to the curriculum).

Performing and Displaying Content in Class

Harvard explains that the section 110(1) exception allows instructors to perform musical or literary works and show films in face-to-face teaching situations. The website informs instructors that provided a few conditions are met, they can perform or show certain copyrighted content without permission. However, to record classes where copyrighted material is performed or displayed, instructors have to comply with certain conditions (e.g. section 110(2)) to transmit the video (e.g. via streaming) to remote students.

²⁷⁰ AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS, available at www.unc.edu/~unc/ncg/classroom-guidelines.htm.

²⁷¹ *Linking to Harvard Library E-Resources*, HARVARD LIBRARY (Apr. 24, 2013), <http://guides.hcl.harvard.edu/links>.

²⁷² THE CONFERENCE ON FAIR USE: THE FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE, available at www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf.

Reed College²⁷³

Reed College is a private college in Portland, Oregon with 1,400 students.

Copyright Issues for End-Users

The college provides guidelines for end-users using digital (audio, audiovisual, text or image) material for classes. The college recommends that end-users use content that does not require special permission, such as materials that are in the public domain, created by the government, licensed to the end-user through the institution, and materials that are disseminated under open licenses (e.g. Creative Commons, MIT Open Courseware initiative).

The College briefly discusses the fair use doctrine and the considerations under the four factor fair use analysis. For more information, the site provides links to Columbia University's Fair Use Checklist and the University of Texas' Four Factor Fair Use Test.²⁷⁴

The site informs readers that if fair use is unavailable, they will have to obtain permission to use copyrighted material. Because Reed does not have a dedicated staff that obtains copyright permissions, the faculty must acquire permissions themselves. All written permissions are retained with the college's Visual Resources Collection,²⁷⁵ a department that, among other things, collects analog and digital images that may be used for learning purposes by faculty and students. For access to licenses or information about how to acquire permission, the college provides links to the Copyright Clearance Center and the University of Texas, respectively.

The college provides several links for general information about copyright, including myths about and guidelines for observing copyright law. There are guidelines for students' private use of copyright materials (regarding practices such as file sharing), guidelines for students wishing to use copyrighted materials in their theses, and guidelines for those wishing to use or post materials to the Reed website.

*Placing Material on Electronic Reserves*²⁷⁶

Unless the specific requirements of the college are met or fair use applies, copyright permission must be obtained before instructors can place materials on electronic reserve. For example, Reed's policy is that if more than 10% of a book is desired, copyright permission is required. The library will seek copyright permission on behalf of the instructor. Certain material, such as syllabi, quizzes, answer sheets, etc. do not need copyright permission, according to the institution's policy.

²⁷³ *Visual Resources Collection*, REED COLLEGE (Apr. 24, 2013), <http://academic.reed.edu/vrc/>.

²⁷⁴ *Using the Four Factor Fair Use Test*, UNIVERSITY OF TEXAS LIBRARIES (Apr. 24, 2013), <http://copyright.lib.utexas.edu/copypol2.html#test>.

²⁷⁵ *Visual Resources Collection*, REED COLLEGE (Apr. 24, 2013), <http://academic.reed.edu/vrc/>.

²⁷⁶ *Faculty Reserves Policy*, REED COLLEGE LIBRARY (Apr. 24, 2013), <http://library.reed.edu/using/facultyinfo/reserves.html>.

The items on electronic reserve are password protected and limited to the members of the instructor's class. Thus, students will have to log in to access the reserved material. At the end of the semester, all material in the electronic reserve will be deleted.

University of Texas²⁷⁷

The University of Texas system is one of the largest in the country, serving over 200,000 students at its 15 campuses. Its website explains in detail materials that are not copyrightable and goes over the four factors of a fair use analysis, providing advice on various types of classroom use. The website also explains the public domain, including the copyright terms for various types of works.²⁷⁸ External links are provided to best practices and fair use guidelines such as the statements of Fair Use Best Practices published by the Center for Social Media and Washington School of Law, and The University of Maryland's Copyright and Fair Use in the Classroom.

The University of Texas website provides guidelines for four specific types of uses of copyrighted content: (1) course packs, reserves, learning management systems and other platforms for distributing course content, such as iTunes U; (2) image, audio and audiovisual archives such as an Art History slide collection or audio or audiovisual collection; (3) creative uses; and (4) research copies. To illustrate a nonprofit non-transformative fair use claim, the site provides a link to a page about the Georgia State Electronic Course Materials case.

Additionally, the website briefly discusses market failure as a potential situation that favors a fair use finding.

Practices To Comply with Copyright Laws

The university site explains various avenues through which end-users can obtain licenses and permissions to use copyrighted material.²⁷⁹ The page provides resources with respect to different types of works. Some of the resources recommended include foreign and domestic collective rights organizations, performing rights organizations, and image archives. Additionally, the page discusses how end users can contact owners of copyrighted material directly to obtain permission.

The website also discusses alternatives to copyright regimes. For instance, the website explains that using material protected under a Creative Commons license may be an alternative to fair use, and provides a link to a Creative Commons search database. The webpage notes that end users may also have an implied license. Specifically, the cite states that nonprofit or educational use is often within the scope of implied licenses that copyright holders give to end users who access their content from the web.

²⁷⁷ *Fair Use of Copyrighted Materials*, UNIVERSITY OF TEXAS LIBRARIES (Apr. 24, 2013), <http://copyright.lib.utexas.edu/copypol2.html>.

²⁷⁸ *Copyright Term and the Public Domain in the United States*, CORNELL COPYRIGHT INFORMATION CENTER (Apr. 24, 2013), <http://copyright.cornell.edu/resources/publicdomain.cfm>.

²⁷⁹ *Getting Permission*, UNIVERSITY OF TEXAS LIBRARIES (Apr. 24, 2013), <http://copyright.lib.utexas.edu/permisn.html>.

Copyright Issues for Libraries²⁸⁰

In addition to providing guidelines for end users, the university discusses some of the major copyright issues for libraries: (1) making copies of written material placed on reserve in a library; (2) making copies of images, audio, and audiovisual works that are placed on reserve; (3) providing electronic copies; and (4) making copies for patrons and library collections. For each of the four issues, the website identifies the type of exclusive rights that are implicated by the use and conducts a fair use analysis on a hypothetical situation related to the issue. The analysis sheds light on how a court might adjudicate the situation, and the website provides corresponding case law to support the analysis. For some issues, the webpage recommends additional procedures that favor a fair use finding or allow alternative safe harbors, such as the DMCA safe harbor.

In addition to fair use, the website details section 108 library reproduction and distribution exceptions. The major topics discussed are: archiving, patron request, interlibrary loan, unsupervised copying, copying of audiovisual news programs by library personnel, contractual limitations to copying, and providing digital content to patrons.

6.0 Additional Consideration: State Sovereign Immunity in the US

The Eleventh Amendment to the United States Constitution provides that: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."²⁸¹ Although the terms of the Amendment do not appear to apply to suits by citizens against their own states, case law has extended the Amendment's applicability to all private individuals.²⁸² Subject to three major exceptions, the Amendment bars private individuals from bringing suit against states in federal court. This effectively immunizes states from federal copyright suits because federal courts have exclusive jurisdiction over "any claim for relief arising under any Act of Congress relating to... copyrights."²⁸³

The three major exceptions to Eleventh Amendment immunity are state consent, congressional abrogation, and the *Ex parte Young* doctrine. The state consent exception allows a state to explicitly waive Eleventh Amendment immunity. However, for obvious reasons consent is rarely forthcoming. The congressional abrogation exception allows Congress to abrogate the States' Eleventh Amendment immunity "when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'"²⁸⁴ While Congress explicitly attempted to abrogate state immunity through

²⁸⁰ *Copyright in the Library – Introduction*, UNIVERSITY OF TEXAS LIBRARIES (Apr. 24, 2013), <http://copyright.lib.utexas.edu/l-intro.html> <http://copyright.lib.utexas.edu/l-intro.html>.

²⁸¹ U.S. Const. amend. XI.

²⁸² *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001) (citing *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

²⁸³ 28 U.S.C § 1338 (2006).

²⁸⁴ *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. at 363 (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)).

the Copyright Remedy Clarification Act,²⁸⁵ U.S. courts have found that abrogation invalid, as it was not made pursuant to a valid grant of constitutional authority.²⁸⁶ Finally, the *Ex parte Young* exception allows federal courts to grant prospective injunctive relief against state officials to prevent a continuing violation of federal law.²⁸⁷ The exception is based on the notion that “when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes.”²⁸⁸ This exception does not include suits where, “the state is the real, substantial party in interest,”²⁸⁹ or where there is not a causal connection between the state officer and the violation of federal law.²⁹⁰ As a result of the Eleventh Amendment, when a state violates a copyright holder’s rights, the only effectively available remedy is injunctive relief against state officials responsible for that violation.

Eleventh Amendment immunity may have an influence on the development of the fair use doctrine in the educational context. It permits state educational institutions to progressively push their policies to the outer limits of fair use without financial risk. That is a likely reason why, for example, the University of Michigan was the lead library in the Google book scanning project, and HathiTrust operates out of the University of Michigan.

7.0 Proposals for Change in US Copyright Law and Policy

The U.S. Copyright Office is working on a number of interrelated initiatives that could ultimately have some effect on exceptions for libraries and educational institutions. Among the Office’s priorities are the following copyright policy matters:²⁹¹

- *Orphan Works and Mass Digitization*
- *A Copyright “Small Claims” Remedy*
- *Copyright Exceptions for Libraries and Archives*

²⁸⁵ Pub. L. 101-553, 104 Stat. 2749.

²⁸⁶ See, e.g., *Nat’l Ass’n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297 (11th Cir. 2011) (CRCA did not validly abrogate the States sovereign immunity under either the Patent and Copyright Clause of Article I of the Constitution or § 5 of the Fourteenth Amendment). See also, *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding that authority to abrogate state sovereign immunity from patent infringement claims cannot be found in Commerce Clause, Patent Clause, or the Fourteenth Amendment).

²⁸⁷ *Nat’l Ass’n of Boards of Pharmacy*, 633 F.3d at 1308.

²⁸⁸ *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011).

²⁸⁹ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (citing *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 464 (1945)).

²⁹⁰ *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334 (Fed. Cir. 2006) (Patentees failed to allege causal connection between alleged infringement and university officials required to establish jurisdiction). Cf. *Cambridge Univ. Press v. Becker*, 2012 WL 1835696 (N.D. Ga. 2012) (injunctive relief available under *Ex parte Young* because defendants were responsible for the creation and implementation of a copyright policy).

²⁹¹ Priorities and Special Projects of the United States Copyright Office 2011-2013, available at www.copyright.gov/docs/priorities.pdf.

Each will be discussed briefly in turn.

Orphan Works and Mass Digitization. In 2006 the Copyright Office issued a report on Orphan Works, recommending legislation that, in broad brush, would limit the liability of someone who used a copyrighted work after making a diligent search for the right holder without success, to “reasonable compensation.” Legislation was introduced in Congress in 2006 and again in 2008, but ultimately did not pass both houses of Congress. In the years since the 2006 report, the issue of mass digitization has further complicated the debate. In October 2011 the Office issued *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* that set out the issues and possible approaches.²⁹² Subsequently, in October 2012, the Office issued a Notice of Inquiry requesting comments on both orphan works and mass digitization, as a step in moving forward on these issues.²⁹³ Reply comments were due in March 2013. Both comments and reply comments are currently being studied by the Copyright Office, and it is possible that the Office will make legislative recommendations.

A Copyright “Small Claims” Remedy. The possibility of a copyright “small claims” solution arose in the context of the orphan works initiative. Some right holders – photographers in particular – objected to the proposed orphan works legislation, and in particular the provision limiting recovery by owners of “orphan works” to reasonable compensation. They argued that if “reasonable compensation” was the most that they could recover in a suit, then in many cases it would make no sense to pursue users of their works since in many cases the typical license fee would be less than the filing fee for an action in federal court. In 2011 the Copyright Office was requested by the House of Representatives Judiciary Committee to study and report on this issue. It has issued three notices of inquiry (resulting in three rounds of stakeholder comments), and held public meetings on this issue in New York and Los Angeles.²⁹⁴ Its study is expected before the end of the year.

Copyright Exceptions for Libraries and Archives. Finally, the Office has indicated that it wants to move forward on amending section 108 (exceptions for libraries and archives) for the digital age, picking up on the work of the Section 108 Study Group (discussed in section 2.3, above).²⁹⁵

The Office recognizes that legislation is developed over time and it may be some years before final resolution is reached on these issues. Even if the Copyright Office were to recommend, or certain

²⁹² The document is available at <http://www.copyright.gov/docs/massdigitization/>. In this discussion document the Office lists four possible approaches to mass digitization: direct licensing and three alternatives for collective licensing. The Office critiqued each of the approaches. It characterized statutory licensing as a “mechanism of last resort” in this context, noting that none of the current US statutory licenses addresses either literary works or mass digitization. It did not foreclose that option, but noted complaints that statutory licenses do not provide right holders with compensation commensurate with the value of the use, and expressed concern that such a license could potentially interfere with the market for digital books. *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document*, at 38.

²⁹³ 77 F.R. 64555 (Oct. 12, 2012), available at <http://www.copyright.gov/orphan/>.

²⁹⁴ See Remedies for Copyright Small Claims, <http://www.copyright.gov/docs/smallclaims/>.

²⁹⁵ On February 8, 2013, Columbia Law School in cooperation with the U.S. Copyright Office held a symposium entitled “Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform.”

stakeholders to actively pursue, legislation in one or more of these areas, there is no certainty about whether or when Congress would act. Many stakeholders are concerned about copyright legislation because they believe they will be required to make compromises in any such legislation, and it is often difficult to predict what the final legislative package will be.

These ongoing initiatives illustrate that US law is not static, and whatever exceptions currently exist with respect to library or educational use could change over time, particularly if one or more of these projects comes to fruition.

8.0 The CAG Schools' Proposal and How It Compares to US Law

8.1 Description of the CAG Schools' Proposal

The Copyright Advisory Group of the Standing Council on School Education and Early Childhood (CAG Schools), in its November 2012 submission, argued that the current regime for educational exceptions and statutory licenses in Australia is "completely broken."²⁹⁶ It advocated two alternative exceptions to address educational uses of copyrighted material.²⁹⁷

First (and CAG Schools' preferred alternative), a broadly applicable open-ended exception that would include but not be limited to educational uses (arguably akin to fair use in the United States).

Second, a new open-ended exception that relates specifically to educational uses.

In both alternatives, the new exception would be coupled with a repeal of the statutory licenses in VA and VB. CAG Schools states that it understands that educational uses will not all be free in the new regime, but urges reliance on voluntary collective or individual licensing with right holders.

According to CAG Schools, the current educational exceptions and statutory licenses are broken because, *inter alia*, they are technology specific and don't reflect "reality of teaching and learning in the digital age," are overly complex, and provide little flexibility for future technological development. In addition, they maintain that the statutory licenses are expensive and economically inefficient.²⁹⁸ CAG Schools asserts that Australia requires payment for uses that would be fair use in the US²⁹⁹ and

²⁹⁶ COPYRIGHT ADVISORY GROUP – SCHOOLS OF THE STANDING COUNCIL ON SCHOOL EDUCATION AND EARLY CHILDHOOD, Submission to the Australian Law Reform Commission, Issues Paper 42: Copyright and the Digital Economy 6 (Nov. 2012), available at www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc [hereinafter, CAG Schools' Submission].

²⁹⁷ *Id.* at 103-05. The filing mentioned two other alternatives – a new purpose-based closed exception, or an amendment to s. 200AB. Although it did not advocate either of those approaches, it said they still may be an improvement on the status quo. *Id.*

²⁹⁸ *Id.* at 83.

²⁹⁹ *Id.* at 70.

contends that the US rejected a statutory license for education.³⁰⁰ They also cite “multiple copies for classroom use” as permissible within fair use limits in the US.³⁰¹

CAG Schools’ preference is for an open-ended exception “flexible enough to accommodate new uses that may emerge with future technological developments, but also provides enough detail to provide valuable guidance to both copyright owners and users.”³⁰² It suggests that in adopting a fair-use type exception, Australia could draw on a number of models in determining the factors appropriate for consideration.

It begins with the set of factors proposed by the CLRC:

- The purpose and character of the dealing;
- The nature of the work or adaptation;
- The possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- The effect of the dealing upon the potential market for, or value of, the work or adaptation;
- In a case where only part of the work or adaptation is [reproduced] the amount and substantiality of the part copied taken in relation to the whole work or adaptation.³⁰³

CAG Schools compares these factors with those in the US. It observes that the US does not recognize as a separate factor “the possibility of obtaining a work. . .” and expresses concern that including this as a separate factor may lead a court to take a “market failure” approach to fair use, which they reject.³⁰⁴

CAG Schools prefers an open, flexible exception in order to “future proof” the copyright law. One of its criticisms of the current regime in Australia is that different rules exist for different types of educational uses, which they contend does not make sense in the digital age.³⁰⁵

Based on the district court decision in *Cambridge University Press v. Becker*, discussed in section 3.4 and currently on appeal, CAG Schools suggests that in the US, copying 10% of a work for e-reserves does not meet the “amount and substantiality” part of the fair use factors.³⁰⁶ They also cite *Cambridge University Press* for the proposition that availability of a license fee for excerpts is not dispositive, where factors one and three favored a finding of fair use.³⁰⁷

CAG Schools concede that an open-ended regime would lead to some initial uncertainty but argue that there’s a trade-off between uncertainty and flexibility.³⁰⁸ They maintain that jurisprudence and guidelines have developed over time in the US to provide significant guidance, and suggest that “it may

³⁰⁰ *Id.* at 54, 88.

³⁰¹ *Id.* at 80. Of course, there is considerable ambiguity in the US as to “fair use limits,” as discussed above.

³⁰² *Id.* at 105, quoting CLRC Simplification Report at para. 6.10.

³⁰³ CAG Schools’ Submission, *supra* note 296 at 106, citing CLRC Simplification Report.

³⁰⁴ CAG Schools’ Submission, *supra* note 296 at 108.

³⁰⁵ *Id.* at 4, 120.

³⁰⁶ *Id.* at 106.

³⁰⁷ *Id.* at 109-110.

³⁰⁸ *Id.* at 117.

be preferable to adopt factors similar to the United States fair use factors” to provide “a larger range of sources of guidance.”³⁰⁹ They advocate a broader “fair use” exception applicable to all types of uses and users, rather than an exception specifically aimed at educational uses, because many of the concerns that CAG Schools have are also applicable to institutions other than educational institutions,³¹⁰ and because users may not be strictly limited to students in schools but also their families and communities, and this broader use might not be embraced by an exception for educational uses.³¹¹

CAG Schools also urges that this legislative change should provide (1) that educational institutions be legally entitled to circumvent technological protection mechanisms that prevent them from exercising their rights under the new exception,³¹² and (2) that the law be amended to provide that the new exception would override any contracts to the contrary.³¹³

8.2 How the CAG Schools’ Proposal Compares to US Law

We have been asked to consider how the fair use regime proposed by CAG Schools would compare with US law. This task is complicated by several issues, including the extent to which Australia would choose to use US law as a resource, at least at the outset; what specific exceptions would remain included in Australian copyright law, and their relationship to the fair use exception; and the constantly evolving nature of fair use jurisprudence in the United States.

There would undoubtedly be differences between the two regimes: fair use is a uniquely factual determination that depends on all of the circumstances. Because the economic, social and legal environments can differ, ultimately the law of fair use would likely do so as well.

There are many positive aspects of the US fair use doctrine: It is flexible; it has the ability to accommodate new uses and new technologies; and it accommodates freedom of expression concerns. But these attributes come at a cost.

Uncertainty

The flip side of flexibility is, of course, uncertainty, and there can be no doubt that were Australia to adopt a fair use doctrine, in many instances it could diminish the certainty with which educational uses may be undertaken there. The uncertainty to be expected is more than initial uncertainty. The US fair use doctrine has existed for almost two centuries, and most copyright practitioners in the US would tell you that the doctrine is often difficult to apply.

Using US Law as a Resource

³⁰⁹ *Id.* at 110.

³¹⁰ *Id.* at 103.

³¹¹ *Id.* at 114-15.

³¹² *Id.* at 129-30.

³¹³ *Id.* at 130.

The CAG Schools Submission suggests that using US law as a resource could mitigate the initial uncertainty that would be caused by introducing a fair use provision into Australian copyright law. Even if Australia were to adopt identical factors, and refer to US case law, very soon the bodies of fair use law would likely diverge. First, given how close some of the US cases have been, it is likely that US and Australian courts would sometimes reach different conclusions even on similar issues. Second, fair use is evaluated based on the facts of each case, and as noted above, the factual circumstances in the two countries may differ in material respects. For example, to the extent that the lack of an available licensing mechanism contributes to a finding of fair use of educational materials, that may be considerably more relevant in the US, which has relatively few collective rights management organizations.

Guidelines

Relying on US guidelines could also be problematic. The existing guidelines based on multilateral agreement of the stakeholders are decades old. One of the reasons for this is that the development of new guidelines for fair use by users and right holders working together can be a long and painstaking process. This process also flounders if copyright owners or users perceive that current fair use case law is giving them the upper hand. They may be less inclined to attempt an accord than to rely on favorable case law . . . until the case law shifts, for example if appellate courts reverse district court rulings favorable to them. In any event, the sets of *unilaterally* developed “best practice guidelines” currently circulating in the US are of relatively little legal significance (having never been tested in the courts or endorsed by right holders) and can be misleading.

Time and Expense of Litigation

In the US the fair use doctrine is developed through litigation, so it can sometimes be several years before an issue is resolved. Because of the expense of litigation, the more aggressive players – both content owners and users – can be at a significant advantage. While we do not assume that Australia is completely analogous to the US, it is likely that adoption of a fair use doctrine would result in more time and money expended on litigation.

Practice

In practice, adopting the US system is not a panacea for some of the problems that CAG Schools perceives in the current regime in Australia. For example, instructors in the US may be required to perform fair use evaluations individually and submit evaluation forms before their institutions will permit reproduction of copyrighted works. This is the regime that exists at Georgia State (and at other schools). It is an oversimplification to say that teachers in the U.S. can “just focus on whether a use is a fair use.” Moreover, it is quite possible that the fair use doctrine will yield different rules for different works. For example, the second factor – the nature of the copyrighted work – distinguishes between factual and fanciful works. The fourth factor – the effect of the use on the potential market for or value of the works – may take into account the format of the original and that of the challenged copy in determining the potential market effect.

Fair Use is a Mixed Bag

In supporting the adoption of a fair use defense in Australian law, CAG Schools cites many aspects of US fair use law, including decisions in cases still under consideration, that in its view increase the desirability of adopting such a doctrine. However, CAG Schools' assessment is sometimes inaccurate or overstated. While the US statute recognizes "multiple copies for classroom use" and other uses mentioned in the preamble as possible fair uses, there is no guarantee that those uses will qualify as fair use, and the statute clearly instructs that the four factors must be applied in every case. Similarly, it is not established in US law that others in addition to students (e.g., their families) could take advantage of educational fair use by virtue of their relationship with the student.

Moreover there is no automatic right to copy "freely available online content" from the internet. Recently, in *Associated Press v. Meltwater*, a federal district court rejected Meltwater's argument that Associated Press, by failing to require its licensees to employ the robots.txt protocol to prevent web crawlers on their websites, impliedly granted Meltwater a license to use its content.³¹⁴ The court refused to shift the burden to the copyright holder "to prevent unauthorized use instead of placing the burden on the infringing party to show it had properly taken and used content."³¹⁵

"Freely available" seems to presume that if a website owner allows material to be accessed for free, copying it will not have an economic impact. However, websites benefit from their content in different ways – some derive advertising revenue based on the number of page views; other allow the material to be accessed for a short period, and then put it in an archive where it can only be accessed with registration and/or payment. Still others derive value from information provided by registrants.

Some of the activities currently encompassed by the statutory license in Australia may well be deemed permissible, but others not. But the more organized and systematic the endeavor to copy broadcast materials, retain and share them among instructors and among schools, the more likely it is (at least under US law) that the use will not be deemed a fair use.

Circumvention of Access Controls

Under US law, there is no automatic fair use exception to circumvent access controls on copyrighted works. Such an exception is achieved, if at all, by participating in the triennial rulemaking proceeding held by the US Copyright Office and providing evidence that a particular fair use requires an exception from the anti-circumvention provision in section 1201 (a)(1) for the ensuing three years. Each rulemaking is *de novo*. Thus, US law is significantly different from the regime proposed by CAG Schools.

Contracts

It is fundamental to US copyright law that the provisions of the law are "default rules" that can be varied by contract. Contracts almost invariably supersede statutory exceptions. (One notable exception to this rule is 17 USC section 203(a)(5), which allows an author or her heirs to terminate, after 35 years, an

³¹⁴ *Associated Press v. Meltwater U.S. Holdings, Inc.*, 2013 U.S. Dist. Lexis 39573 (S.D.N.Y. Mar. 21, 2013).

³¹⁵ *Id.* at *70.

author's grant of rights made on or after January 1, 1978, regardless of whether the author signed an agreement to the contrary.) Thus, the regime that CAG Schools envisions, in which contract provisions that contravene "fair use rights" would be invalid, differs significantly from US law.

9.0 Source Licensing for Educational Uses

We investigated how the major motion picture and television studios license their works. There are different procedures depending on whether the licensee wants to license an entire motion picture or a television or motion picture clip. We have found no set policies for licensing entire episodes of television shows. PBS does license episodes of its programs, as discussed in section 5.1.

Requests for use of entire films are referred to Swank USA, the industry's main licensor for motion picture use in educational institutions (both K-12 and higher education), museums, parks and other places which would require a public performance license.³¹⁶ Because section 110(1) permits teachers to show a movie, in its entirety, in a classroom as part of their class activities, Swank's licenses for events held in schools are usually for evening movie nights or after-school activities. Swank issues licenses on a one-time basis, or a school can ask for a license to cover multiple showings during the school year.³¹⁷

Swank does not handle requests for use of film or television clips. Presumably this issue rarely arises with respect to educational institutions, since in-classroom performance is permitted and clips are unlikely to be used for other events like a school's "movie night." Studios handle requests for clips on a case-by-case basis. Warner Brothers' official policy for clip licensing can be found online.³¹⁸ They have a form that can be submitted electronically. This form requests the details of how the clip is going to be used and the purpose of the use. There are no policies online, however, for educational institutions.

As discussed above, PBS does license its programming to educational institutions.

Overall, we have found no reliable way to quantify the amount of licensing of movies or television episodes to educational institutions.

10.0 Conclusion

The US has several exceptions for educational uses of copyrighted works. Fair use is the broadest but its contours are the least well-defined. The factors in section 107 of the Copyright Act, together with cases decided over the years, provide guidance on the application of the fair use doctrine to educational materials. Still, whether or not a use is a fair use can be difficult to predict, and even experienced copyright lawyers often disagree. Guidelines can be helpful, but developing multilateral guidelines can be a contentious process, and unilaterally developed guidelines are of questionable legal significance. If Australia adopted a fair use exception, differences between US law and the fair use regime envisioned by CAG Schools would likely ensue, because many fair use cases are close, and relevant factors may differ in the two countries. Moreover, the CAG Schools' proposed regime has some very fundamental

³¹⁶ Swank represents over 15 motion picture studios including Disney, Warner Brothers, Paramount and Sony. Their website is www.swank.com.

³¹⁷ A one-time showing license is \$100. Prices vary for longer-term licenses.

³¹⁸ <http://www.warnerbros.com/studio/services/clip-and-still-licensing.html>.

differences from US law, first, in that it proposes to remove the ability of contract to trump copyright law, and second, in providing an automatic exception from anti-circumvention laws for "fair use."

Any analysis of the similarities and differences between US law and a proposed fair use exception in Australia is necessarily tentative, because US fair use law continues to develop and certain cases addressing fair use in the educational context are still in their early stages.

New York, New York

April 29, 2013

APPENDIX A
To Kernochan Center Report

Excerpts from Title 17, United States Code

§ 107 Limitations on exclusive rights: Fair use

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

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

§ 108 Limitations on exclusive rights: Reproduction by libraries and archives

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if—

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

(b) The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if—

(1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and

(2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.

(c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if—

(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

(2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

(3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended

for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

(h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

(2) No reproduction, distribution, display, or performance is authorized under this subsection if—

(A) the work is subject to normal commercial exploitation;

(B) a copy or phonorecord of the work can be obtained at a reasonable price;
or

(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.

(i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

§ 110 Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if—

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution—

(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions—

(I) applies technological measures that reasonably prevent—

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

[Balance of § 110 omitted]

**§ 121 Limitations on exclusive rights:
Reproduction for blind or other people with disabilities**

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

(b)(1) Copies or phonorecords to which this section applies shall—

(A) not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities;

(B) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and

(C) include a copyright notice identifying the copyright owner and the date of the original publication.

(2) The provisions of this subsection shall not apply to standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a publisher of print instructional materials for use in elementary or secondary schools to create and distribute to the National Instructional Materials Access Center copies of the electronic files described in sections 612(a)(23)(C), 613(a)(6), and section 674(e) of the Individuals with Disabilities Education Act that contain the contents of print instructional materials using the National Instructional Material Accessibility Standard (as defined in section 674(e)(3) of that Act), if—

(1) the inclusion of the contents of such print instructional materials is required by any State educational agency or local educational agency;

(2) the publisher had the right to publish such print instructional materials in print formats; and

(3) such copies are used solely for reproduction or distribution of the contents of such print instructional materials in specialized formats.

(d) For purposes of this section, the term—

(1) “authorized entity” means a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities;

(2) “blind or other persons with disabilities” means individuals who are eligible or who may qualify in accordance with the Act entitled “An Act to provide books for the adult blind”, approved March 3, 1931 (2 U.S.C. 135a; 46 Stat. 1487) to receive books and other publications produced in specialized formats;

(3) “print instructional materials” has the meaning given under section 674(e)(3)(C) of the Individuals with Disabilities Education Act; and

(4) “specialized formats” means—

(A) braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities; and

(B) with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.

§ 1201 Circumvention of copyright protection systems

(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL MEASURES. — (1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine —

(i) the availability for use of copyrighted works;

(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;

(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

(v) such other factors as the Librarian considers appropriate.

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that —

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection —

(A) to “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure “effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) ADDITIONAL VIOLATIONS. — (1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that —

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection —

(A) to “circumvent protection afforded by a technological measure” means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

(B) a technological measure “effectively protects a right of a copyright owner under this title” if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

(c) OTHER RIGHTS, ETC., NOT AFFECTED. — (1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

(d) EXEMPTION FOR NONPROFIT LIBRARIES, ARCHIVES, AND EDUCATIONAL INSTITUTIONS. —

(1) A nonprofit library, archives, or educational institution which gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in conduct permitted under this title shall not be in violation of subsection (a)(1)(A). A copy of a work to which access has been gained under this paragraph —

(A) may not be retained longer than necessary to make such good faith determination; and

(B) may not be used for any other purpose.

(2) The exemption made available under paragraph (1) shall only apply with respect to a work when an identical copy of that work is not reasonably available in another form.

(3) A nonprofit library, archives, or educational institution that willfully for the purpose of commercial advantage or financial gain violates paragraph (1) —

(A) shall, for the first offense, be subject to the civil remedies under section 1203; and

(B) shall, for repeated or subsequent offenses, in addition to the civil remedies under section 1203, forfeit the exemption provided under paragraph (1).

(4) This subsection may not be used as a defense to a claim under subsection (a)(2) or (b), nor may this subsection permit a nonprofit library, archives, or educational institution to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, component, or part thereof, which circumvents a technological measure.

(5) In order for a library or archives to qualify for the exemption under this subsection, the collections of that library or archives shall be —

(A) open to the public; or

(B) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.

[Sections 1201 (e)–(k) (re exceptions for law enforcement activities, reverse engineering, encryption research, protection of minors, personally identifying information, etc.) have been omitted.]

APPENDIX B
To Kernochan Center Report

Copyright
United States Copyright Office

Reproduction of Copyrighted Works by Educators and Librarians

Many educators and librarians ask about the fair use and photocopying provisions of the copyright law. The Copyright Office cannot give legal advice or offer opinions on what is permitted or prohibited. However, we have published in this circular basic information on some of the most important legislative provisions and other documents dealing with reproduction by librarians and educators.

Also available is the 1983 Report of the Register of Copyrights on Library Reproduction of Copyrighted Works (17 U.S.C. 108). The Report, seven appendices, and other related materials can be purchased from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161. Go to the NTIS website at www.ntis.gov. For further information, call NTIS at 1-800-553-6847 or (703) 605-6000.

The 1988 five-year Report of the Register of Copyrights on Library Reproduction of Copyrighted Works is also available from NTIS.

A. Introductory Note

The Subjects Covered in This Booklet

The documentary materials collected in this circular deal with reproduction of copyrighted works by educators, librarians, and archivists for a variety of uses, including:

- Reproduction for teaching in educational institutions at all levels and
- Reproduction by libraries and archives for purposes of study, research, interlibrary exchanges, and archival preservation.

The documents reprinted here are limited to materials dealing with reproduction. Under the copyright law, reproduction can take either of two forms:

- The making of *copies*: by photocopying, making microform reproductions, videotaping, or any other method of duplicating visually-perceptible material and
- The making of *phonorecords*: by duplicating sound recordings, taping off the air, or any other method of recapturing sounds.

The copyright law also contains various provisions dealing with importations, performances, and displays of copyrighted works for educational and other noncommercial purposes, but they are outside the scope of this circular. You can view and download the statute from the Copyright Office website at

www.loc.gov. To purchase a copy, go to <http://bookstore.gpo.gov> and search for Circular 92. For information about specific provisions, write to:

Library of Congress
Copyright Office-COPUBS
101 Independence Avenue SE
Washington, DC 20559-6304

A Note on the Documents Reprinted

The documentary materials in this booklet are reprints or excerpts from six sources:

- 1 **The Copyright Act of October 19, 1976.** This is the copyright law of the United States, effective January 1, 1978 (title 17 of the *United States Code*, Public Law 94-553, 90 Stat. 2541).
- 2 **The Senate Report.** This is the 1975 report of the Senate Judiciary Committee on S. 22, the Senate version of the bill that became the Copyright Act of 1976 (S. Rep. No. 94-473, 94th Cong., 1st Sess., November 20 (legislative day November 18, 1975)).
- 3 **The House Report.** This is the 1976 report of the House of Representatives Judiciary Committee on the House amendments to the bill that became the Copyright Act of 1976 (H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., September 3, 1976).
- 4 **The Conference Report.** This is the 1976 report of the "committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 22) for the general revision of the Copyright Law" (H.R. Rep. No. 94-1733, 94th Cong., 2d Sess., September 29, 1976).
- 5 **The Congressional Debates.** This booklet contains excerpts from the *Congressional Record* of September 22, 1976, reflecting statements on the floor of Congress at the time the bill was passed by the House of Representatives (122 *Cong. Rec.* H 10874-76, daily edition, September 22, 1976).
- 6 **Copyright Office Regulations.** These are regulations issued by the Copyright Office under section 108 dealing with warnings of copyright for use by libraries and archives (37 *Code of Federal Regulations* §201.14).

Items 2 and 3 on this list—the 1975 Senate Report and the 1976 House Report—present special problems. On many points the language of these two reports is identical or closely similar. However, the two reports were written at different times, by committees of different Houses of Congress, on

somewhat different bills. As a result, the discussions on some provisions of the bills vary widely, and on certain points they disagree.

The disagreements between the Senate and House versions of the bill itself were resolved when the Act of 1976 was finally passed. However, many of the disagreements as to matters of interpretation between statements in the 1975 Senate Report and in the 1976 House Report were left partly or wholly unresolved. It is therefore difficult in compiling a booklet such as this to decide in some cases what to include and what to leave out.

The House Report was written later than the Senate Report, and in many cases it adopted the language of the Senate Report, updating it and conforming it to the version of the bill that was finally enacted into law. Thus, where the differences between the two Reports are relatively minor, or where the discussion in the House Report appears to have superseded the discussion of the same point in the Senate Report, we have used the House Report as the source of our documentation. In other cases we have included excerpts from both discussions in an effort to present the legislative history as fully and fairly as possible. Anyone making a thorough study of the Act of 1976 as it affects librarians and educators should not rely exclusively on the excerpts reprinted here but should go back to the primary documentary sources.

B. Exclusive Rights in Copyrighted Works

1. Text of Section 106

NOTE: The following is a reprint of the entire text of section 106 of title 17, *United States Code*, as amended in 1995 and 2002.

§ 106 · Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and

other audiovisual works, to perform the copyrighted work publicly;

- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

2. Excerpts from House Report on Section 106

NOTE: The following excerpts are reprinted from the House Report on the new copyright law (H.R. Rep. No. 94-1476, pages 61-62). The text of the corresponding Senate Report (S. Rep. No. 94-473, pages 57-58) is substantially the same.

Section 106. Exclusive Rights in Copyrighted Works

General scope of copyright

The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called “bundle of rights” that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201, each subdivision of an exclusive right may be owned and enforced separately.

The approach of the bill is to set forth the copyright owner’s exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made “subject to sections 107 through 118,” and must be read in conjunction with those provisions.

Rights of reproduction, adaptation, and publication

The first three clauses of section 106, which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights

at once, as where a publisher reproduces, adapts, and sells copies of a person’s copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to “copies or phonorecords,” although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. §1).

Reproduction.—Read together with the relevant definitions in section 101, the right “to reproduce the copyrighted work in copies or phonorecords” means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be “perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author’s “expression” rather than merely the author’s “ideas” are taken. An exception to this general principle, applicable to the reproduction of copyrighted sound recordings, is specified in section 114.

“Reproduction” under clause (1) of section 106 is to be distinguished from “display” under clause (5). For a work to be “reproduced,” its fixation in tangible form must be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).

C. Fair Use

1. Text of Section 107

NOTE: The following is a reprint of the entire text of section 107 of title 17, *United States Code* as amended in 1990 and 1992.

§ 107 · Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use

made of a work in any particular case is a fair use the factors to be considered shall include —

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

2. Excerpts from House Report on Section 107

NOTE: The following excerpts are reprinted from the House Report on the new copyright law (H.R. Rep. No. 94-1476, pages 65-74). The discussion of section 107 appears at pages 61-67 of the Senate Report (S. Rep. No. 94-473). The text of this section of the Senate Report is not reprinted in this booklet, but similarities and differences between the House and Senate Reports on particular points will be noted below.

a. House Report: Introductory Discussion on Section 107

NOTE: The first two paragraphs in this portion of the House Report are closely similar to the Senate Report. The remainder of the passage differs substantially in the two Reports.

Section 107. Fair Use

General background of the problem

The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: "quotation of excerpts in a review or criticism

for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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 criteria are relevant in determining whether the basic doctrine of fair use, as stated in the first sentence of section 107, applies in a particular case: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

The specific wording of section 107 as it now stands is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes. For example, the reference to fair use "by reproduction in copies or phonorecords or by any other means" is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.

Similarly, the newly-added reference to “multiple copies for classroom use” is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of a class.

The Committee has amended the first of the criteria to be considered—“the purpose and character of the use”—to state explicitly that this factor includes a consideration of “whether such use is of a commercial nature or is for non-profit educational purposes.” This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.

General intention behind the provision

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

b. House Report: Statement of Intention as to Classroom Reproduction

NOTE: The House Report differs substantially from the Senate Report on this point.

(i) Introductory Statement

Intention as to classroom reproduction

Although the works and uses to which the doctrine of fair use is applicable are as broad as the copyright law itself, most of the discussion of section 107 has centered around questions of classroom reproduction, particularly photocopying. The arguments on the question are summarized at pp. 30–31 of this Committee’s 1967 report (H.R. Rep. No. 83, 90th Cong., 1st Sess.), and have not changed materially in the intervening years.

The Committee also adheres to its earlier conclusion, that “a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified.” At the same time the Committee recognizes, as it did in 1967, that there is a “need for greater certainty and protection for teachers.” In an effort to meet this need the Committee has not only adopted further amendments to section 107, but has also amended section 504(c) to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement. The latter amendments are discussed below in connection with Chapter 5 of the bill.

In 1967 the Committee also sought to approach this problem by including, in its report, a very thorough discussion of “the considerations lying behind the four criteria listed in the amended section 107, in the context of typical classroom situations arising today.” This discussion appeared on pp. 32–35 of the 1967 report, and with some changes has been retained in the Senate report on S. 22 (S. Rep. No. 94-473, pp. 63–65). The Committee has reviewed this discussion, and considers that it still has value as an analysis of various aspects of the problem.

At the Judiciary Subcommittee hearings in June 1975, Chairman Kastenmeier and other members urged the parties to meet together independently in an effort to achieve a meeting of the minds as to permissible educational uses of copyrighted material. The response to these suggestions was positive, and a number of meetings of three groups, dealing respectively with classroom, reproduction of printed material, music, and audio-visual material, were held beginning in September 1975.

(ii) Guidelines with Respect to Books and Periodicals

In a joint letter to Chairman Kastenmeier, dated March 19, 1976, the representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, and of the Authors League of America, Inc., and the Association of American Publishers, Inc., stated:

You may remember that in our letter of March 8, 1976 we told you that the negotiating teams representing authors and publishers and the Ad Hoc Group had reached tentative agreement on guidelines to insert in the Committee Report covering educational copying from books and periodicals under Section 107 of H.R. 2223 and S. 22, and that as part of that tentative agreement each side would accept the amendments to Sections 107 and 504 which were adopted by your Subcommittee on March 3, 1976.

We are now happy to tell you that the agreement has been approved by the principals and we enclose a copy herewith. We had originally intended to translate the agreement into language suitable for inclusion in the legislative report dealing with Section 107, but we have since been advised by committee staff that this will not be necessary.

As stated above, the agreement refers only to copying from books and periodicals, and it is not intended to apply to musical or audiovisual works.

The full text of the agreement is as follows:

Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to books and periodicals

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

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

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 and,
- B Meets the cumulative effect test as defined below and,
- C Each copy includes a notice of copyright

Definitions

Brevity

- i Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.
- ii Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt 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 ten percent 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, nor more than three from the same collective work or periodical volume during one class term.
- iii There shall not be more than nine instances of such multiple copying for one course during one class term.
[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II Above

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

- A Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.
- B There shall be no copying of or from works intended to be "consumable" in the course of study or 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 higher authority;
 - c be repeated with respect to the same item by the same teacher from term to term.
- D No charge shall be made to the student beyond the actual cost of 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.

(iii) Guidelines with Respect to Music

In a joint letter dated April 30, 1976, representatives of the Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision, wrote to Chairman Kastenmeier as follows:

During the hearings on H.R. 2223 in June 1975, you and several of your subcommittee members suggested that concerned groups should work together in developing guidelines which would be helpful to clarify Section 107 of the bill.

Representatives of music educators and music publishers delayed their meetings until guidelines had been developed relative to books and periodicals. Shortly after that work was completed and those guidelines were forwarded to your subcommittee, representatives of the undersigned music organizations met together with representatives of the Ad Hoc Committee on Copyright Law Revision to draft guidelines relative to music.

We are very pleased to inform you that the discussions thus have been fruitful on the guidelines which have been developed. Since private music teachers are an important factor in music education, due consideration has been given to the concerns of that group.

We trust that this will be helpful in the report on the bill to clarify Fair Use as it applies to music.

The text of the guidelines accompanying this letter is as follows:

Guidelines for Educational Uses of Music

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

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

A Permissible Uses

- 1 Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.
- 2 For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section¹, movement or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.²
- 3 Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.
- 4 A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.
- 5 A single copy of a sound recording (such as a tape, disc, or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B Prohibitions

- 1 Copying to create or replace or substitute for anthologies, compilations or collective works.
- 2 Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.
- 3 Copying for the purpose of performance, except as in A(1) above.
- 4 Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.
- 5 Copying without inclusion of the copyright notice which appears on the printed copy.

(iv) Discussion of Guidelines

The Committee appreciates and commends the efforts and the cooperative and reasonable spirit of the parties who achieved the agreed guidelines on books and periodicals and on music. Representatives of the American Association of University Professors and of the Association of American Law Schools have written to the Committee strongly criticizing the guidelines, particularly with respect to multiple copying, as being too restrictive with respect to classroom situations at the university and graduate level. However, the Committee notes that the Ad Hoc group did include representatives of higher education, that the stated "purpose of the ... guidelines is to state the minimum and not the maximum standards of educational fair use" and that the agreement acknowledges "there may be instances in which copying which does not fall within the guidelines ... may nonetheless be permitted under the criteria of fair use."

The Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of fulfilling the need for greater certainty and protection for teachers. The Committee expresses the hope that if there are areas where standards other than these guidelines may be appropriate, the parties will continue their efforts to provide additional specific guidelines in the same spirit of good will and give and take that has marked the discussion of this subject in recent months.

c. House Report: Additional Excerpts

NOTE: Under the heading "Reproduction and uses for other purposes," the House Report, at pages 72-74, parallels much of the material appearing at pages 65-67 of the Senate Report under the same heading, but with some differences.

The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

A problem of particular urgency is that of preserving for posterity prints of motion pictures made before 1942. Aside from the deplorable fact that in a great many cases the only existing copy of a film has been deliberately destroyed, those

that remain are in immediate danger of disintegration; they were printed on film stock with a nitrate base that will inevitably decompose in time. The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of "fair use."

During the consideration of the revision bill in the 94th Congress it was proposed that independent newsletters, as distinguished from house organs and publicity or advertising publications, be given separate treatment. It is argued that newsletters are particularly vulnerable to mass photocopying, and that most newsletters have fairly modest circulations. Whether the copying of portions of a newsletter is an act of infringement or a fair use will necessarily turn on the facts of the individual case. However, as a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals. The commercial nature of the user is a significant factor in such cases: Copying by a profit-making user of even a small portion of a newsletter may have a significant impact on the commercial market for the work.

The Committee has examined the use of excerpts from copyrighted works in the art work of calligraphers. The committee believes that a single copy reproduction of an excerpt from a copyrighted work by a calligrapher for a single client does not represent an infringement of copyright. Likewise, a single reproduction of excerpts from a copyrighted work by a student calligrapher or teacher in a learning situation would be a fair use of the copyrighted work.

The Register of Copyrights has recommended that the committee report describe the relationship between this section and the provisions of section 108 relating to reproduction by libraries and archives. The doctrine of fair use applies to library photocopying, and nothing contained in section 108 "in any way affects the right of fair use." No provision of section 108 is intended to take away any rights existing under the fair use doctrine. To the contrary, section 108 authorizes certain photocopying practices which may not qualify as a fair use.

The criteria of fair use are necessarily set forth in general terms. In the application of the criteria of fair use to specific photocopying practices of libraries, it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users.

3. Excerpts from Conference Report on Section 107

NOTE: The following excerpt is reprinted from the Report of the Conference Committee on the new copyright law (H.R. Rep. No. 94-1733, page 70).

Fair Use

Senate bill

The Senate bill, in section 107, embodied express statutory recognition of the judicial doctrine that the fair use of a copyrighted work is not an infringement of copyright. It set forth the fair use doctrine, including four criteria for determining its applicability in particular cases, in general terms.

House bill

The House bill amended section 107 in two respects: in the general statement of the fair use doctrine it added a specific reference to multiple copies for classroom use, and it amplified the statement of the first of the criteria to be used in judging fair use (the purpose and character of the use) by referring to the commercial nature or nonprofit educational purpose of the use.

Conference substitute

The conference substitute adopts the House amendments. The conferees accept as part of their understanding of fair use the "Guidelines for Classroom Copying in Not-for-Profit Educational Institutions" with respect to books and periodicals appearing at pp. 68-70 of the House Report (H. Rept. No. 94-1476, as corrected at p. H 10727 of the *Congressional Record* for September 21, 1976), and for educational uses of music appearing at pp. 70-71 of the House report, as amended in the statement appearing at p. H 10875 of the *Congressional Record* of September 22, 1976. The conferees also endorse the statement concerning the meaning of the word "teacher" in the guidelines for books and periodicals, and the application of fair use in the case of use of television programs within the confines of a nonprofit educational institution for the deaf and hearing impaired, both of which appear on p. H 10875 of the *Congressional Record* of September 22, 1976.

4. Excerpts from Congressional Debates

NOTE: The following excerpts are reprinted from the *Congressional Record* of September 22, 1976, including statements by Mr. Kastenmeier (Chairman of the House Judiciary Subco

mittee responsible for the bill) on the floor of the House of Representatives.

Mr. KASTENMEIER ... Mr. Chairman, before concluding my remarks I would like to discuss several questions which have been raised concerning the meaning of several provisions of S. 22 as reported by the House Judiciary Committee and of statements in the committee's report, No. 94-1476.

Another question involves the reference to "teacher" in the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions" reproduced at pages 68-70 of the committee's report No. 94-1476 in connection with section 107. It has been pointed out that, in planning his or her teaching on a day-to-day basis in a variety of educational situations, an individual teacher will commonly consult with instructional specialists on the staff of the school, such as reading specialists, curriculum specialists, audio-visual directors, guidance counselors, and the like. As long as the copying meets all of the other criteria laid out in the guidelines, including the requirements for spontaneity and the prohibition against the copying being directed by higher authority, the committee regards the concept of "teacher" as broad enough to include instructional specialists working in consultation with actual instructors.

Also in consultation with section 107, the committee's attention has been directed to the unique educational needs and problems of the approximately 50,000 deaf and hearing-impaired students in the United States, and the inadequacy of both public and commercial television to serve their educational needs. It has been suggested that, as long as clear-cut constraints are imposed and enforced, the doctrine of fair use is broad enough to permit the making of an off-the-air fixation of a television program within a nonprofit educational institution for the deaf and hearing impaired, the reproduction of a master and a work copy of a captioned version of the original fixation, and the performance of the program from the work copy within the confines of the institution. In identifying the constraints that would have to be imposed within an institution in order for these activities to be considered as fair use, it has been suggested that the purpose of the use would have to be noncommercial in every respect, and educational in the sense that it serves as part of a deaf or hearing-impaired student's learning environment within the institution, and that the institution would have to insure that the master and work copy would remain in the hands of a limited number of authorized personnel within the institution, would be responsible for assuring against

its unauthorized reproduction or distribution, or its performance or retention for other than educational purposes within the institution. Work copies of captioned programs could be shared among institutions for the deaf abiding by the constraints specified. Assuming that these constraints are both imposed and enforced, and that no other factors intervene to render the use unfair, the committee believes that the activities described could reasonably be considered fair use under section 107.

Mr. Chairman, because of the complexity of this bill and the delicate balances which it creates among competing economic interests, the committee will resist extensive amendment of this bill. On behalf of the committee I would urge all of my colleagues to vote favorably on S. 22.

Mr. SKUBITZ. Mr. Chairman, will the gentleman yield?

Mr. KASTENMEIER. I am happy to yield to my friend, the gentleman from Kansas.

Mr. SKUBITZ. Mr. Chairman, I thank my friend, the gentleman from Wisconsin, for yielding.

Mr. Chairman, I have received a great deal of mail from the schoolteachers in my district who are particularly concerned about section 107—fair use—the fair use of copyrighted material. Having been a former schoolteacher myself, I believe they make a good point and there is a sincere fear on their part that, because of the vagueness or ambiguity in the bill's treatment of the doctrine of fair use, they may subject themselves to liability for an unintentional infringement of copyright when all they were trying to do was the job for which they were trained.

The vast majority of teachers in this country would not knowingly infringe upon a person's copyright, but, as any teacher can appreciate, there are times when information is needed and is available, but it may be literally impossible to locate the right person to approve the use of that material and the purchase of such would not be feasible and, in the meantime, the teacher may have lost that "teachable moment."

Did the subcommittee take these problems into consideration and did they do anything to try and help the teachers to better understand section 107?

Have the teachers been protected by this section 107?

Mr. KASTENMEIER. Mr. Chairman, in response to the gentleman's question and his observations preceding the question, I would say, indeed they have.

Over the years this has been one of the most difficult questions. It is a problem that I believe has been very successfully resolved.

Section 107 on "Fair Use" has, of course, restated four standards, and these standards are, namely: The purpose and character of the use of the material; 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 upon the potential market for or value of the copyrighted work.

These are the four "Fair Use" criteria. These alone were not adequate to guide teachers, and I am sure the gentleman from Kansas (Mr. Skubitz) understands that as a school-teacher himself.

Therefore, the educators, the proprietors, and the publishers of educational materials did, at the committee's long insistence, get together. While there were many fruitless meetings, they did finally get together.

Mr. Chairman, I will draw the gentleman's attention to pages 65 through 74 in the report which contain extensive guidelines for teachers. I am very happy to say that there was an agreement reached between teachers and publishers of educational material, and that today the National Education Association supports the bill, and it has, in fact, sent a telegram which at the appropriate time I will make a part of the Record and which requests support for the bill in its present form, believing that it has satisfied the needs of the teachers:

NATIONAL EDUCATION ASSOCIATION
Washington, D.C., September 10, 1976.

National Education Association urgently requests your support of the Copyright Revision bill, H.R. 2223, as reported by the Judiciary Committee. This compromise effort represents a major breakthrough in establishing equitable legal guidelines for the use of copyright materials for instructional and research purposes. We ask your support of the committee bill without amendments.

JAMES W. GREEN
Assistant Director for Legislation.

Mr. SKUBITZ. Mr. Chairman, if the gentleman will yield further, then the NEA is satisfied with the language in the bill as it now stands; is that correct?

Mr. KASTENMEIER. The gentleman is correct.

Mr. SKUBITZ. Mr. Chairman, I thank the gentleman.

D. Reproduction by Libraries and Archives

1. Text of Section 108

NOTE: The following is a reprint of the entire text of section 108 of title 17, *United States Code* as amended in 1992, 1998, and 2005.

§ 108 · Limitations on exclusive rights: Reproduction by libraries and archives

- (a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if —
- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
 - (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
 - (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.
- (b) The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if —
- (1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and
 - (2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.
- (c) The right of reproduction under this section applies to three copies or phonorecords of a published work

duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if —

- (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and
- (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

- (d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if —
 - (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
 - (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.
- (e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if —
 - (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

- (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.¹

(f) Nothing in this section —

- (1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: Provided, That such equipment displays a notice that the making of a copy may be subject to the copyright law;
 - (2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;
 - (3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or
 - (4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.
- (g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee —
- (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
 - (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): Provided, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for

distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

- (h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.
- (2) No reproduction, distribution, display, or performance is authorized under this subsection if —
- (A) the work is subject to normal commercial exploitation;
 - (B) a copy or phonorecord of the work can be obtained at a reasonable price; or
 - (C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.
- (3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.
- (i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

2. Excerpts from Senate Report on Section 108

NOTE: The following excerpts are reprinted from the 1975 Senate Report on the new copyright law (S. Rep. No. 94-473, pages 67–71). Where the discussions of particular points are generally similar in the two Reports, the passages from the later House Report are reprinted in this booklet. Where the discussion of particular points is substantially different, passages from both Reports are reprinted.

a. Senate Report: Discussion of Libraries and Archives in Profit-Making Institutions

The limitation of section 108 to reproduction and distribution by libraries and archives “without any purpose of direct or indirect commercial advantage” is intended to preclude a library or archives in a profit-making organization from providing photocopies of copyrighted materials to employees engaged in furtherance of the organization’s commercial enterprise, unless such copying qualifies as a fair use, or the organization has obtained the necessary copyright licenses. A commercial organization should purchase the number of copies of a work that it requires, or obtain the consent of the copyright owner to the making of the photocopies.

b. Senate Report: Discussion of Multiple Copies and Systematic Reproduction

Multiple copies and systematic reproduction

Subsection (g) provides that the rights granted by this section extend only to the “isolated and unrelated reproduction of a single copy,” but this section does not authorize the related or concerted reproduction of multiple copies of the same material whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group. For example, if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted, under subsection (g), to reproduce copies of the article for the members of the class.

Subsection (g) also provides that section 108 does not authorize the systematic reproduction or distribution of copies or phonorecords of articles or other contributions to copyrighted collections or periodicals or of small parts of other copyrighted works whether or not multiple copies are reproduced or distributed. Systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies.

While it is not possible to formulate specific definitions of “systematic copying,” the following examples serve to illustrate some of the copying prohibited by subsection (g).

- 1 A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library.
- 2 A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.
- 3 Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.

The committee believes that section 108 provides an appropriate statutory balancing of the rights of creators and the needs of users. However, neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies" as distinguished from "systematic reproduction." Isolated single spontaneous requests must be distinguished from "systematic reproduction." The photocopying needs of such operations as multi-county regional systems must be met. The committee therefore recommends that representatives of authors, book and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees. Concerning library photocopying practices not authorized by this legislation, the committee recommends that workable clearance and licensing procedures be developed.

It is still uncertain how far a library may go under the Copyright Act of 1909 in supplying a photocopy of copyrighted material in its collection. The recent case of *The Williams and Wilkins Company v. The United States* failed to significantly illuminate the application of the fair use doctrine to library photocopying practices. Indeed, the opinion of the Court of Claims said the Court was engaged in "a 'holding operation' in the interim period before Congress enacted its preferred solution."

While the several opinions in the *Wilkins* case have given the Congress little guidance as to the current state of the law on fair use, these opinions provide additional support for

the balanced resolution of the photocopying issue adopted by the Senate last year in S. 1361 and preserved in section 108 of this legislation. As the Court of Claims opinion succinctly stated "there is much to be said on all sides."

In adopting these provisions on library photocopying, the committee is aware that through such programs as those of the National Commission on Libraries and Information Science there will be a significant evolution in the functioning and services of libraries. To consider the possible need for changes in copyright law and procedures as a result of new technology, a National Commission on New Technological Uses of Copyrighted Works (CONTU) has been established (Public Law 93-573).

3. Excerpts from House Report on Section 108

NOTE: The following excerpts are reprinted from the House Report on the new copyright law (H.R. Rep. No. 94-1476, pages 74-79). All of the House Report's discussion of section 108 is reprinted here; similarities and differences between the House and Senate Reports on particular points will be noted below.

a. House Report: Introductory Statement

NOTE: This paragraph is substantially the same in the Senate and House Reports.

Notwithstanding the exclusive rights of the owners of copyright, section 108 provides that under certain conditions it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce or distribute not more than one copy or phonorecord of a work, provided (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage and (2) the collections of the library or archives are open to the public or available not only to researchers affiliated with the library or archives, but also to other persons doing research in a specialized field, and (3) the reproduction or distribution of the work includes a notice of copyright.

b. House Report: Discussion of Libraries and Archives in Profit-Making Institutions

NOTE: The Senate and House Reports differ substantially on this point. The Senate Report's discussion is reprinted at page 13.

Under this provision, a purely commercial enterprise could not establish a collection of copyrighted works, call itself

a library or archive, and engage in for-profit reproduction and distribution of photocopies. Similarly, it would not be possible for a nonprofit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.

The reference to "indirect commercial advantage" has raised questions as to the status of photocopying done by or for libraries or archival collections within industrial, profit-making, or proprietary institutions (such as the research and development departments of chemical, pharmaceutical, automobile, and oil corporations, the library of a proprietary hospital, the collections owned by a law or medical partnership, etc.).

There is a direct interrelationship between this problem and the prohibitions against "multiple" and "systematic" photocopying in section 108(g)(1) and (2). Under section 108, a library in a profit-making organization would not be authorized to:

- A use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or
- B use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is "systematic" in the sense of deliberately substituting photocopying for subscription or purchase; or
- C use "interlibrary loan" arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscriptions or purchase of material needed by employees in their work.

Moreover, a library in a profit-making organization could not evade these obligations by installing reproducing equipment on its premises for unsupervised use by the organization's staff.

Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108, even though the copies are furnished to the employees of the organization for use in their work. Similarly, for-profit libraries could participate in interlibrary arrangements for exchange of photocopies, as long as the reproduction or distribution was not "systematic." These activities, by themselves, would ordinarily not be considered "for direct or indirect commercial advantage," since the "advantage" referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the

ultimate profit-making motivation behind the enterprise in which the library is located. On the other hand, section 108 would not excuse reproduction or distribution if there were a commercial motive behind the actual making or distributing of the copies, if multiple copies were made or distributed, or if the photocopying activities were "systematic" in the sense that their aim was to substitute for subscriptions or purchases.

C. House Report: Rights of Reproduction and Distribution Under Section 108

NOTE: The following paragraphs are closely similar in the Senate and House Reports.

The rights of reproduction and distribution under section 108 apply in the following circumstances:

Archival reproductions

Subsection (b) authorizes the reproduction and distribution of a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security, or for deposit for research use in another library or archives, if the copy or phonorecord reproduced is currently in the collections of the first library or archives. Only unpublished works could be reproduced under this exemption, but the right would extend to any type of work, including photographs, motion pictures and sound recordings. Under this exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in "machine-readable" language for storage in an information system.

Replacement of damaged copy

Subsection (c) authorizes the reproduction of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price. The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.

Articles and small excerpts

Subsection (d) authorizes the reproduction and distribution of a copy of not more than one article or other contribution to a copyrighted collection or periodical issue, or of a copy or phonorecord of a small part of any other copyrighted work. The copy or phonorecord may be made by the library where the user makes his request or by another library pursuant to an interlibrary loan. It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purposes other than private study, scholarship or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and includes in its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

Out-of-print works

Subsection (e) authorizes the reproduction and distribution of a copy or phonorecord of an entire work under certain circumstances, if it has been established that a copy cannot be obtained at a fair price. The copy may be made by the library where the user makes his request or by another library pursuant to an interlibrary loan. The scope and nature of a reasonable investigation to determine that an unused copy cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if the owner can be located at the address listed in the copyright registration), or an authorized reproducing service. It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purpose other than private study, scholarship, or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and include on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

d. House Report: General Exemptions for Libraries and Archives

NOTE: Parts of the following paragraphs are substantially similar in the Senate and House Reports. Differences in the House Report on certain points reflect certain amendments in section 108(f) and elsewhere in the Copyright Act.

General exemptions

Clause (1) of subsection (f) specifically exempts a library or archives or its employees from liability for the unsupervised use of reproducing equipment located on its premises, provided that the reproducing equipment displays a notice that the making of a copy may be subject to the copyright law. Clause (2) of subsection (f) makes clear that this exemption of the library or archives does not extend to the person using such equipment or requesting such copy if the use exceeds fair use. Insofar as such person is concerned the copy or phonorecord made is not considered "lawfully" made for purposes of sections 109, 110 or other provisions of the title.

Clause (3) provides that nothing in section 108 is intended to limit the reproduction and distribution by lending of a limited number of copies and excerpts of an audiovisual news program. This exemption is intended to apply to the daily newscasts of the national television networks, which report the major events of the day. It does not apply to documentary (except documentary programs involving news reporting as that term is used in section 107), magazine-format or other public affairs broadcasts dealing with subjects of general interest to the viewing public.

The clause was first added to the revision bill in 1974 by the adoption of an amendment proposed by Senator Baker. It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes. As such, it is an adjunct to the American Television and Radio Archive established in Section 113 of the Act which will be the principal repository for television broadcast material, including news broadcasts. The inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a copy of a television broadcast taped off-the-air pursuant to this clause.

Clause (4), in addition to asserting that nothing contained in section 108 "affects the right of fair use as provided by section 107," also provides that the right of reproduction granted by this section does not override any contractual arrangements assumed by a library or archives when it obtained a work for its collections. For example, if there is an express contractual prohibition against reproduction for any purpose, this legislation shall not be construed as justifying a violation of the contract. This clause is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced.

It is the intent of this legislation that a subsequent unlawful use by a user of a copy or phonorecord of a work lawfully made by a library, shall not make the library liable for such improper use.

e. House Report: Discussion of Multiple Copies and Systematic Reproduction

NOTE: The Senate and House Reports differ substantially on this point. The Senate Report's discussion is reprinted at page 13.

Multiple copies and systematic reproduction

Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy or phonorecord of the same material on separate occasions." However, this section does not authorize the related or concerted reproduction of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group.

With respect to material described in subsection (d)—articles or other contributions to periodicals or collections, and small parts of other copyrighted works—subsection (g) (2) provides that the exemptions of section 108 do not apply if the library or archive engages in "systematic reproduction or distribution of single or multiple copies or phonorecords." This provision in S.22 provoked a storm of controversy, centering around the extent to which the restrictions on "systematic" activities would prevent the continuation and development of interlibrary networks and other arrangements involving the exchange of photocopies. After thorough consideration, the Committee amended section 108(g)(2) to add the following proviso: Provided, that nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

In addition, the Committee added a new subsection (i) to section 108, requiring the Register of Copyrights, five years from the effective date of the new Act and at five year intervals thereafter, to report to Congress upon "the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users," and to make appropriate legislative or other recommendations. As noted in connection with section 107, the Committee also

amended section 504(c) in a way that would insulate librarians from unwarranted liability for copyright infringement; this amendment is discussed below.

The key phrases in the Committee's amendment of section 108(g)(2) are "aggregate quantities" and "substitute for a subscription to or purchase of" a work. To be implemented effectively in practice, these provisions will require the development and implementation of more-or-less specific guidelines establishing criteria to govern various situations.

The National Commission on New Technological Uses of Copyrighted Works (CONTU) offered to provide good offices in helping to develop these guidelines. This offer was accepted and, although the final text of guidelines has not yet been achieved, the Committee has reason to hope that, within the next month, some agreement can be reached on an initial set of guidelines covering practices under section 108(g)(2).

f. House Report: Discussion of Works Excluded

NOTE: The House Report's discussion of section 108(h) is longer than the corresponding paragraph in the Senate Report, and reflects certain amendments in the subsection.

Works excluded

Subsection (h) provides that the rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than "an audiovisual work dealing with news." The latter term is intended as the equivalent in meaning of the phrase "audiovisual news program" in section 108(f)(3). The exclusions under subsection (h) do not apply to archival reproduction under subsection (b), to replacement of damaged or lost copies or phonorecords under subsection (c), or to "pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e)."

Although subsection (h) generally removes musical, graphic, and audiovisual works from the specific exemptions of section 108, it is important to recognize that the doctrine of fair use under section 107 remains fully applicable to the photocopying or other reproduction of such works. In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work. Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a

library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes.

4. Excerpts from Conference Report

NOTE: The following excerpt is reprinted from the Report of the Conference Committee on the new copyright law (H.R. Rep. No. 94-1733, pages 70-74).

a. Conference Report: Introductory Discussion of Section 108

Reproduction by Libraries and Archives

Senate bill

Section 108 of the Senate bill dealt with a variety of situations involving photocopying and other forms of reproduction by libraries and archives. It specified the conditions under which single copies of copyrighted material can be noncommercially reproduced and distributed, but made clear that the privileges of a library or archives under the section do not apply where the reproduction or distribution is of multiple copies or is "systematic." Under subsection (f), the section was not to be construed as limiting the reproduction and distribution, by a library or archive meeting the basic criteria of the section, of a limited number of copies and excerpts of an audiovisual news program.

House bill

The House bill amended section 108 to make clear that, in cases involving interlibrary arrangements for the exchange of photocopies, the activity would not be considered "systematic" as long as the library or archives receiving the reproductions for distribution does not do so in such aggregate quantities as to substitute for a subscription to or purchase of the work. A new subsection (i) directed the Register of Copyrights, by the end of 1982 and at five-year intervals thereafter, to report on the practical success of the section in balancing the various interests, and to make recommendations for any needed changes. With respect to audiovisual news programs, the House bill limited the scope of the distribution privilege confirmed by section 108(f)(3) to cases where the distribution takes the form of a loan.

b. Conference Report: Conference Committee Discussion of CONTU Guidelines on Photocopying and Interlibrary Arrangements

Conference substitute

The conference substitute adopts the provisions of section 108 as amended by the House bill. In doing so, the conferees have noted two letters dated September 22, 1976, sent respectively to John L. McClellan, Chairman of the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights, and to Robert W. Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The letters, from the Chairman of the National Commission on New Technological Uses of Copyrighted Works (CONTU), Stanley H. Fuld, transmitted a document consisting of "guidelines interpreting the provision in subsection 108(g)(2) of S. 22, as approved by the House Committee on the Judiciary." Chairman Fuld's letters explain that, following lengthy consultations with the parties concerned, the Commission adopted these guidelines as fair and workable and with the hope that the conferees on S. 22 may find that they merit inclusion in the conference report. The letters add that, although time did not permit securing signatures of the representatives of the principal library organizations or of the organizations representing publishers and authors on these guidelines, the Commission had received oral assurances from these representatives that the guidelines are acceptable to their organizations,

The conference committee understands that the guidelines are not intended as, and cannot be considered, explicit rules or directions governing any and all cases, now or in the future. It is recognized that their purpose is to provide guidance in the most commonly-encountered interlibrary photocopying situations, that they are not intended to be limiting or determinative in themselves or with respect to other situations, and that they deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment. With these qualifications, the conference committee agrees that the guidelines are a reasonable interpretation of the proviso of section 108(g)(2) in the most common situations to which they apply today.

c. Conference Report: Reprint of CONTU Guidelines on Photocopying and Interlibrary Arrangements

The text of the guidelines follows:

Photocopying—Interlibrary Arrangements Introduction

Subsection 108(g)(2) of the bill deals, among other things, with limits on interlibrary arrangements for photocopying.

It prohibits systematic photocopying of copyrighted materials but permits interlibrary arrangements “that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.”

The National Commission on New Technological Uses of Copyrighted Works offered its good offices to the House and Senate subcommittees in bringing the interested parties together to see if agreement could be reached on what a realistic definition would be of “such aggregate quantities.” The Commission consulted with the parties and suggested the interpretation which follows, on which there has been substantial agreement by the principal library, publisher, and author organizations. The Commission considers the guidelines which follow to be a workable and fair interpretation of the intent of the proviso portion of subsection 108(g)(2).

These guidelines are intended to provide guidance in the application of section 108 to the most frequently encountered interlibrary case: a library’s obtaining from another library, in lieu of interlibrary loan, copies of articles from relatively recent issues of periodicals—those published within five years prior to the date of the request. The guidelines do not specify what aggregate quantity of copies of an article or articles published in a periodical, the issue date of which is more than five years prior to the date when the request for the copy thereof is made, constitutes a substitute for a subscription to such periodical. The meaning of the proviso to subsection 108(g)(2) in such case is left to future interpretation.

The point has been made that the present practice on interlibrary loans and use of photocopies in lieu of loans may be supplemented or even largely replaced by a system in which one or more agencies or institutions, public or private, exist for the specific purpose of providing a central source for photocopies. Of course, these guidelines would not apply to such a situation.

Guidelines for the Proviso of Subsection 108(g)(2)

- 1 As used in the proviso of subsection 108(g)(2), the words “... such aggregate quantities as to substitute for a subscription to or purchase of such work” shall mean:
 - A with respect to any given periodical (as opposed to any given issue of a periodical), filled requests of a library or archives (a “requesting entity”) within any calendar year for a total of six or more copies of an article or articles published in such periodical within five years prior to the date of the request. These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical, the publication date of which is more than five years prior to the date when the request is made. These guidelines do not define the meaning, with respect to such a request, of “... such aggregate quantities as to substitute for a subscription to [such periodical]”.
 - B With respect to any other material described in subsection 108(d), (including fiction and poetry), filled requests of a requesting entity within any calendar year for a total of six or more copies or phonorecords of or from any given work (including a collective work) during the entire period when such material shall be protected by copyright.
- 2 In the event that a requesting entity—
 - A shall have in force or shall have entered an order for a subscription to a periodical, or
 - B has within its collection, or shall have entered an order for, a copy or phonorecord of any other copyrighted work, material from either category of which it desires to obtain by copy from another library or archives (the “supplying entity”), because the material to be copied is not reasonably available for use by the requesting entity itself, then the fulfillment of such request shall be treated as though the requesting entity made such copy from its own collection. A library or archives may request a copy or phonorecord from a supplying entity only under those circumstances where the requesting entity would have been able, under the other provisions of section 108, to supply such copy from materials in its own collection.
- 3 No request for a copy or phonorecord of any material to which these guidelines apply may be fulfilled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines.
- 4 The requesting entity shall maintain records of all requests made by it for copies or phonorecords of any materials to which these guidelines apply and shall maintain records of the fulfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.
- 5 As part of the review provided for in subsection 108(i), these guidelines shall be reviewed not later than five years from the effective date of this bill.

d. Conference Report: Discussion of "Audiovisual News Program"

The conference committee is aware that an issue has arisen as to the meaning of the phrase "audiovisual news program" in section 108(f)(3). The conferees believe that, under the provision as adopted in the conference substitute, a library or archives qualifying under section 108(a) would be free, without regard to the archival activities of the Library of Congress or any other organization, to reproduce, on videotape or any other medium of fixation or reproduction, local, regional, or network newscasts, interviews concerning current news events, and on-the-spot coverage of news events, and to distribute a limited number of reproductions of such a program on a loan basis.

e. Conference Report: Discussion of Libraries and Archives in Profit-Making Institutions

Another point of interpretation involves the meaning of "indirect commercial advantage," as used in section 108(a)(1), in the case of libraries or archival collections within industrial, profit-making, or proprietary institutions. As long as the library or archives meets the criteria in section 108(a) and the other requirements of the section, including the prohibitions against multiple and systematic copying in subsection (g), the conferees consider that the isolated, spontaneous making of single photocopies by a library or archives in a for-profit organization without any commercial motivation, or participation by such a library or archives in interlibrary arrangements, would come within the scope of section 108.

5. Copyright Office Regulations Under Section 108

NOTE: The following is the text of regulations adopted by the Copyright Office to implement sections 108(d)(2) and 108(e) of the new copyright law (37 *Code of Federal Regulations* §201.14).

§ 201.14 · Warnings of copyright for use by certain libraries and archives.

(a) *Definitions.*

- (1) A *Display Warning of Copyright* is a notice under paragraphs (d)(2) and (e)(2) of section 108 of title 17 of the United States Code as amended by Pub. L. 94-553. As required by those sections the "Display Warning of Copyright" is to be displayed at the place where orders for copies or phonorecords are accepted by certain libraries and archives.

- (2) An *Order Warning of Copyright* is a notice under paragraphs (d)(2) and (e)(2) of section 108 of title 17 of the United States Code as amended by Pub. L. 94-553. As required by those sections the "Order Warning of Copyright" is to be included on printed forms supplied by certain libraries and archives and used by their patrons for ordering copies or phonorecords.

- (b) *Contents.* A Display Warning of Copyright and an Order Warning of Copyright shall consist of a verbatim reproduction of the following notice, printed in such size and form and displayed in such manner as to comply with paragraph (c) of this section:

NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

(c) *Form and Manner of Use.*

- (1) A Display Warning of Copyright shall be printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently, in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer within the immediate vicinity of the place where orders are accepted.
- (2) An Order Warning of Copyright shall be printed within a box located prominently on the order form itself, either on the front side of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than 8 points. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.

E. Liability for Infringement

1. Text of Section 504

NOTE: The following is a reprint of the entire text of section 504 of title 17, *United States Code*, as amended in 1982, 1988, 1990, 1997, 1998, 1999, 2002, 2004, and 2005. The special provisions affecting librarians and educators are in subsection (c)(2).

§ 504 · Remedies for infringement: Damages and profits.

- (a) **IN GENERAL.**—Except as otherwise provided by this title, an infringer of copyright is liable for either—
- (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
 - (2) statutory damages, as provided by subsection (c).
- (b) **ACTUAL DAMAGES AND PROFITS.**—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.
- (c) **STATUTORY DAMAGES.**—
- (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
 - (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and

the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

- (3)(A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.
- (B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.
- (C) For purposes of this paragraph, the term "domain name" has the meaning given that term in section 45 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes" approved July 5, 1946 (commonly referred to as the "Trademark Act of 1946"; 15 U.S.C. 1127).
- (d) **ADDITIONAL DAMAGES IN CERTAIN CASES.**—In any case in which the court finds that a defendant

proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

2. Excerpts from House Report on Section 504

NOTE: The following excerpts are reprinted from the House Report on the new copyright law (H.R. Rep. No. 94-1476, pages 161-163). Material not of immediate interest to librarians and educators has been omitted. Much of the corresponding discussion in the Senate Report (S. Rep. No. 94-473, pages 143-145) is substantially the same; the House Report's discussion of statutory damages applicable to librarians and educators is new.

In general

A cornerstone of the remedies sections and of the bill as a whole is section 504, the provision dealing with recovery of actual damages, profits, and statutory damages. The two basic aims of this section are reciprocal and correlative:

- 1 to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time,
- 2 to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute.

Subsection (a) lays the groundwork for the more detailed provisions of the section by establishing the liability of a copyright infringer for either "the copyright owner's actual damages and any additional profits of the infringer," or statutory damages. Recovery of actual damages and profits under section 504(b) or of statutory damages under section 504(c) is alternative and for the copyright owner to elect; as under the present law, the plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for minimum statutory damages. However, there is nothing in section 504 to prevent a court from taking account of evidence concerning actual

damages and profits in making an award of statutory damages within the range set out in subsection (c).

Actual damages and profits

In allowing the plaintiff to recover "the actual damages suffered by him or her as a result of the infringement," plus any of the infringer's profits "that are attributable to the infringement and are not taken into account in computing the actual damages," section 504(b) recognizes the different purposes served by awards of damages and profits. Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act.⁴

Statutory damages

Subsection (c) of section 504 makes clear that the plaintiff's election to recover statutory damages may take place at any time during the trial before the court has rendered its final judgment. The remainder of clause (1) of the subsection represents a statement of the general rates applicable to awards of statutory damages.

Clause (2) of section 504(c) provides for exceptional cases in which the maximum award of statutory damages could be raised from \$10,000 to \$50,000, and in which the minimum recovery could be reduced from \$250 to \$100. The basic principle underlying this provision is that the courts should be given discretion to increase statutory damages in cases of willful infringement and to lower the minimum where the infringer is innocent. The language of the clause makes clear that in these situations the burden of proving willfulness rests on the copyright owner and that of proving innocence rests on the infringer, and that the court must make a finding of either willfulness or innocence in order to award the exceptional amounts.

The "innocent infringer" provision of section 504(c)(2) has been the subject of extensive discussion. The exception, which would allow reduction of minimum statutory damages to \$100 where the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," is sufficient to protect against unwarranted liability in cases of occasional or isolated innocent infringement, and it offers adequate insulation to users, such as broadcasters and newspaper publishers, who are particularly vulnerable to this type of infringement suit. On the other hand, by establishing a realistic floor for liability, the provision preserves its intended deterrent effect; and it would not allow an infringer to escape simply because the plaintiff failed to disprove the defendant's claim of innocence.

In addition to the general “innocent infringer” provision clause (2) deals with the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part. Section 504(c)(2) provides that, where such a person or institution infringes copyrighted material in the honest belief that what they were doing constituted fair use, the court is precluded from awarding any statutory damages. It is intended that, in cases involving this provision, the burden of proof with respect to the defendant’s good faith should rest on the plaintiff.

3. Excerpts from Conference Report on Section 504

NOTE: The following excerpts are reprinted from the Report of the Conference Committee on the new copyright law (H.R. Rep. No. 94-1733, pages 79–80).

Remedies for Copyright Infringement

Senate bill

Chapter 5 of the Senate bill dealt with civil and criminal infringement of copyright and the remedies for both. Subsection (c) of section 504 allowed statutory damages within a stated dollar range, and clause (2) of that subsection provided for situations in which the maximum could be exceeded and the minimum lowered; the court was given discretion to reduce or remit statutory damages entirely where a teacher, librarian, or archivist believed that the infringing activity constituted fair use.⁵

House bill

Section 504(c)(2) of the House bill required the court to remit statutory damages entirely in cases where a teacher, librarian, archivist, or public broadcaster, or the institution to which they belong, infringed in the honest belief that what they were doing constituted fair use.⁶

Conference substitute

The conference substitute adopts the House amendments with respect to statutory damages in section 504(c)(2).⁷

F. Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes

NOTE: The following excerpts are reprinted from the House Report on piracy and counterfeiting amendments (H.R. 97-495, pages 8–9).

In March 1979, Congressman Robert Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties and Administration of Justice, appointed a Negotiating Committee consisting of representatives of educational organizations, copyright proprietors, and creative guilds and unions. The following guidelines reflect the Negotiating Committee’s consensus as to the application of “fair use” to the recording, retention, and use of television broadcast programs for educational purposes. They specify periods of retention and use of such off-air recordings in classrooms and similar places devoted to instruction and for homebound instruction. The purpose of establishing these guidelines is to provide standards for both owners and users of copyrighted television programs.

- 1 The guidelines were developed to apply only to off-air recording by non-profit educational institutions.
- 2 A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable transmission) and retained by a non-profit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. “Broadcast programs” are television programs transmitted by television stations for reception by the general public without charge.
- 3 Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster, or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period. “School days” are school session days—not counting weekends, holidays, vacations, examination periods, or other scheduled interruptions—within the forty-five (45) calendar day retention period.
- 4 Off-air recordings may be made only at the request of, and used by, individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.
- 5 A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

- 6 After the first ten (10) consecutive school days, off-air recording may be used up to the end of the forty-five (45) calendar day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other non-evaluation purpose without authorization.
- 7 Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.
- 8 All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.
- 9 Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

For Further Information

By Internet

Circulars, announcements, regulations, other related materials, and certain copyright application forms are available from the Copyright Office website at www.copyright.gov. To send an email communication, click on *Contact Us* at the bottom of the homepage.

By Telephone

For general information about copyright, call the Copyright Public Information Office at (202) 707-3000. Staff members are on duty from 8:30 AM to 5:00 PM, Monday through Friday, eastern time, except federal holidays. Recorded information is available 24 hours a day. Or, if you know which application forms and circulars you want, request them from the Forms and Publications Hotline at (202) 707-9100 24 hours a day. Leave a recorded message.

By Regular Mail

Write to:

Library of Congress
 Copyright Office-COPUBS
 101 Independence Avenue SE
 Washington, DC 20559-6304

Endnotes

- 1 Corrected from *Congressional Record*.
- 2 As reprinted in the House Report, subsection A.2 of the Music Guidelines had consisted of two separate paragraphs, one dealing with multiple copies and a second dealing with single copies. In his introductory remarks during the House debates on S.22, the Chairman of the House Judiciary Subcommittee, Mr. Kastenmeier, announced that "the report, as printed, does not reflect a subsequent change in the joint guidelines which was described in a subsequent letter to me from a representative of [the signatory organizations]," and provided the revised text of subsection A.2. (122 Cong. Rec. H 10875, Sept. 22, 1976). The text reprinted here is the revised text.
- 3-7 Section 504 was amended by the Act of October 31, 1988, Pub. L. 100-568, 102 Stat. 2853, 2860; by the Act of 1999, Pub. L. 106-160, 113 Stat. 1774; and by the Act of December 23, 2004, Pub. L. 108-482, 118 Stat. 3912, 3916.

APPENDIX C
To Kernochan Center Report

Policies Concerning Audiovisual Works in Libraries and Archives

This memorandum summarizes our informal review of publicly available audiovisual works policies in libraries and archives in the US. It is based on informal interviews with library and archives staff, as well as on online research.¹

Availability of Formal Policies

Our review found that while many libraries, archives, and educational institutions own a collection of audiovisual works, formal policies as to the use of these works are often not publicly available on the internet. In some cases, even those institutions dedicated to preservation of audiovisual works do not have a formal set of use guidelines that are widely accessible to potential users. In many instances, accessible formal policies did not involve copyright *per se*, and dealt mostly with operational and practical matters of use, access, and the making of excerpts/reproductions/derivatives without harming preserved originals.

Internal Copyright Policies for the Use of Audiovisual Works

In institutions working mostly or exclusively with audiovisual material (e.g., film archives) the available information on the institution's website usually summarizes the general policies. Some institutions also hand out a document describing the terms of use for researchers who are using the materials on-site. Those terms explain some copyright law basics or repeat the information that is available online. In some libraries and educational institutions we reviewed for this project, where audiovisual works are offered for research or other use, there was no separate set of guidelines for the use of audiovisual content, and decisions were made on a case-by-case basis. While there is apparently a demand among university and library employees for copyright instructions, institutions prefer not to expose themselves to legal liability by drafting policies that would involve line drawing for issues like fair use and other copyright exceptions.

Access to Audiovisual Works On-Site

Most of the institutions offer on-site access to audiovisual works, but some require scheduling an appointment in advance and specifying the requested material.² In some of the institutions access to

¹ This informal survey is not intended to provide statistics or empirically analyzed data. A number of librarians were reluctant to speak with us in the context of a written study on library practices. Those that were willing to discuss practices of their institutions or others usually did so to provide us with general information, but not for attribution.

² For example, the rules of the Academy Film Archive specify "Viewing appointments must be made a minimum of 36 hours in advance. Significantly longer lead times may apply for some requests. No walk-in visitors will be accommodated. All collection materials require a minimum of 24 hours for climatization before they may be made available for viewing in room-temperature viewing environments; in addition, most film materials require a general physical inspection and other preparations before they may be viewed." *Archive Rules*, THE ACADEMY OF

materials is not guaranteed and is contingent upon obtaining a written authorization from donors or depositors.³ Preservation considerations may also limit access to materials.⁴

In most archives, only qualified researchers may access materials. For instance, the Motion Picture and Television Reading Room at the Library of Congress offers access and viewing facilities without charge “for individuals doing research that will lead to publicly available works, such as dissertations, publications, or film/television productions.”⁵ Similarly, the Film Preservation Center at the Museum of Modern Art (MoMA) is not open to the general public, and makes its films and documentation available only to qualified scholars, researchers and students.⁶ Nevertheless, in some cases this requirement is flexible and designed primarily to ensure that the public does not use the archive solely for entertainment purposes.

Delivery of Content Off-Site

Most archives do not provide remote access to their materials. The National Archives, however, has entered a partnership agreement with Google to make 101 historical videos available for viewing and download in the Archival Research Catalog and on the National Archives' YouTube Channel.⁷ Almost all the archives and film centers surveyed for this study have some form of cooperation with YouTube, where they usually stream either public domain works, or works that were copyright cleared for this purpose.

Under certain conditions, the TEACH Act allows qualified educational institutions to stream audiovisual works to students enrolled in an online course. The Center for Online Learning, Research and Service at the University of Illinois Springfield, for example, guides instructors to check whether a video they wish to include in a class is available through one of the film collections to which the university subscribes. In such a case, the instructor can link to the film in the course site.⁸ Interestingly, educational institutions

MOTION PICTURE ARTS AND SCIENCES, <http://www.oscars.org/filmarchive/using/rules.html> (last visited Apr. 25, 2013). [hereinafter “Academy Archive Rules”]. The Rockefeller Archive Center also requires research appointments, which “must be made with, and confirmed by, a staff member in advance of a research visit.” *Overview of The Rockefeller Archive Center*, THE ROCKEFELLER ARCHIVE CENTER, <http://www.rockarch.org/about/> (last visited Apr. 25, 2013).

³ According to the rules of the Academy Film Archive, “Access to materials held by the Archive is not guaranteed. Researchers may need to obtain advance written permission from donors or depositors for access to restricted collections.” Academy Archive Rules, *supra* note 2.

⁴ “The Archive may also restrict access to materials at its discretion on the basis of physical condition, preservation status, or other considerations.” *Id.*

⁵ *Motion Picture and Television Reading Room*, LIBRARY OF CONGRESS, <http://www.loc.gov/rr/mopic/mpguide.html> (last visited Apr. 25, 2013).

⁶ *The Celeste Bartos Film Preservation Center*, MOMA, at <http://www.moma.org/learn/resources/filmpreservation#filmpreservcenter>.

⁷ *Archival Research Catalog*, NATIONAL ARCHIVES (ARC), <http://www.archives.gov/research/arc/videos.html> (last visited Apr. 25, 2013).

⁸ *Center for Online Learning, Research and Service*, UNIVERSITY OF ILLINOIS SPRINGFIELD, <http://www.uis.edu/colrs/learning/how/video.html> (last visited Apr. 25, 2013).

also rely on free online streaming services such as TED or YouTube to stream relevant content, through including an embed code in the course website.⁹

Other institutions, such as Bethel University, direct teachers to clear all audiovisual materials before use unless the university already has a license to the material, stating that “once we have permissions then we will link the media to your course.”¹⁰ The only exception to that policy would be using 20% or less of a video clip.¹¹ In a flowchart to aide in deciding how much of a video can be used in an online course by Minnesota State University, instructors are warned not to play an entire video or a significant amount of it under a claim of fair use if a streaming license is available.¹²

In cases where policies refer to the TEACH Act, the statutory requirements often appear to act as ceiling. As the Cleveland State University Guidelines state when discussing the imprecision of the TEACH Act: “As with most issues, it is safer to stay on the conservative side.”¹³

The Making of Copies

As a general matter, archives do not provide reproductions of the materials in their collections. The Library of Congress’ policies, for example, explain “researchers may view copyrighted works at the Library, but the copyright owner is usually the appropriate source for obtaining duplicate footage.”¹⁴ The rules of the UCLA Film and Television Archives similarly state, “the Archive cannot provide copies of items in our collection. Due to copyright laws and contractual agreements with our donors and depositors, Archive holdings (including public domain titles) are available for on-site research viewing only.”¹⁵ Some archives, however, do offer licenses for purchase, as well as sale and rental of certain titles in their collections. One such archive is the Academy Film Archive, which in some circumstances makes “collection materials available for licensing or reuse in new projects,”¹⁶ and the Circulating Film and Video Library at the MoMa, where “titles are available for rental or purchase in various film or video

⁹ *Id.* (“Free videos from the Web, YouTube and Ted.com are just two of many great sites for free video on the Web. The embed codes provided by sites like these make it easy to add the videos to Blackboard.”)

¹⁰ *Video Use as an Online Course Component*, BETHEL UNIVERSITY at <http://www.bethel.edu/its/policies/online-video-policy> (last visited Apr. 25, 2013).

¹¹ *Id.* Even such uses, however, must be pre-approved through submitting a Copyrighted Media Request Form with information about “the timeline (from to) of the clip and an explanation of start and stop points.”

¹² *Online Courses*, MINNESOTA STATE UNIVERSITY, http://www.mnsu.edu/acadaf/TEACH_Act_Pages/Online_Film_Video_Guidelines.pdf (last visited Apr. 25, 2013).

¹³ *Copyright and Video Policies for Online and Blended Courses*, CLEVELAND STATE UNIVERSITY, <http://askelearning.csuohio.edu/kb/?View=entry&EntryID=213> (last visited Apr. 25, 2013).

¹⁴ *Archival Stock/Footage, Motion Picture and Television Reading Room*, LIBRARY OF CONGRESS, <http://www.loc.gov/rr/mopic/stock.html> (last visited Apr. 25, 2013).

¹⁵ *ARSC Frequently Asked Questions*, UCLA FILM AND TELEVISION ARCHIVE, <http://www.cinema.ucla.edu/education/arsc-frequently-asked-questions> (last visited Apr. 25, 2013). The Academy Film Archive goes by the same rule: “Moving image materials in the Archive’s collection are available for on-site viewing only at the Pickford Center facility. The Archive does not distribute reference copies of materials in the collection.” Academy Archive Rules, *supra* note 2.

¹⁶ UCLA Film and Television Archive, *supra* note 15.

formats.”¹⁷ The Northeast Historic Film Archive has chosen a Netflix-like model, under which Members of Northeast Historic Film can borrow up to three videos at a time from its free loan collection and pay only \$5 per shipment for postage.¹⁸

Libraries generally do not allow visitors to make copies of video content but the librarians we interviewed conceded that they cannot monitor all on-site uses. But libraries do post warnings in the library facilities to explain copyright restrictions. When a visitor wishes to purchase a license to make a copy of the work or otherwise use it, she will be asked to contact the rightholder and negotiate a license.

When it comes to orphan works, some institutions will not allow reproduction unless the user signs a letter of indemnification, and conducts a search with due diligence to locate the rightholder.

Fair Use

The online research yielded no results as to the effect of fair use on the general practices of libraries, educational institutions, and archives. The interviews affirmed that it was not a coincidence, and that fair use considerations are in fact not generally a part of the institutions’ routine. Librarians and archivists alike expressed confusion with regard to fair use issues, and admit that while they would ideally prefer to allow more uses, the vagueness of the fair use defense, as well as the need for an individualized review, hinder the possibility of accommodating fair use considerations in the institutions’ practices.

¹⁷ *Contacting the Circulating Film and Video Library*, MoMA, <http://www.moma.org/learn/resources/circulatingfilm#aboutcircfilm> (last visited Apr. 25, 2013).

¹⁸ *Video Loan Catalog*, NORTHEAST HISTORIC FILM ARCHIVE, <http://oldfilm.org/content/video-loan-catalog> (last visited Apr. 25, 2013).