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

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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

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[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

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[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]

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[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 notice[65] and knowing use of stolen material[66] 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 Archive*s in section 3.5.

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

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[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 Enterprises[85]

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.

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[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,

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[96] *Id*. at 586.
[97] *Id*. at 588.
[98] American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2nd 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

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[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.

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[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

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[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.

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[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.

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[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.

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[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]

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[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]

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[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.

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[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

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[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 Asociation [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

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[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 broadcasts[241] 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 District[242]

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 District*[245]**

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 Board*[247]**

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.

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[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.

[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 District*[253]**

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 University*[256]**

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 Texas[261]). 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

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[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 Evaluator[265] 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 guidelines[267] 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 University[269]

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.

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

[271] *Linking to Harvard Library E-Resouces,* 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 College*[273]**

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.

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[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 Texas[277]

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.

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[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/permissn.html.

Copyright Issues for Libraries[280]

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 US[299] 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

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[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