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Copyright Essentials

Dear Copyright Friends and Colleagues:
At about the end of 2007, this website will be either reworked substantially or removed. The time has come to wind down the Copyright Management Center. It was the first office of its type at any university, and I have had the pleasure of serving as its director since inception of the CMC in 1994. I have been honored anytime anyone has used the site. But change is afoot. I will be relocating to Columbia University, where we are laying plans for a new website that should be ready for service in early 2008. I thank you, I thank everyone at IU and IUPUI, and I look forward to a productive future.
Kenny Crews

[Announcement from Columbia University](#)

Copyright Quickguide!

Learn basic copyright information quickly, such as: Protection, Registration, Ownership, Rights, Duration, Fair Use, Permissions, and more.

[Go Now](#)

Fair-Use Issues

How to appropriately and lawfully use existing copyrighted materials in teaching, research, and other activities.

Including: The "[Fair Use Checklist](#)"!

[Go Now](#)

Permissions Information

How to obtain permission to use existing copyrighted materials.

[Go Now](#)

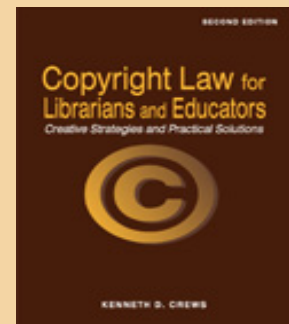
Featured Developments

[Copyright Programs](#)

Local, Regional, and National Copyright Events

[Copyright Book - NEW](#)

Learn more about Copyright from the CMC Director



[TEACH Act](#)

Use of Copyrighted Works in Distance Education

[Managing Ownership of Copyrighted Works](#)

Using the MOU to address issues of ownership at the University

[Filesharing and Copyright](#)

Learn about Filesharing, Uploading, Downloading, MP3s, and more

[IU Digital Music Library Project](#)

Variations2 (NSF Project)

Copyright Ownership

How to get copyright protection and who holds legal rights to new works created at the university.
Including: Guidance for Authors and Publishers of Scholarly Works

Go Now

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Indiana University - Purdue University - Indianapolis

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About the Copyright Management Center

Mission of the CMC

The Copyright Management Center (CMC) serves the [Indiana University-Purdue University Indianapolis \(IUPUI\)](#) and larger [Indiana University](#) community with the management of copyright issues arising in the creation of original works and in the use of existing copyrighted works for teaching, research, and service. Indiana University is a complex organization with ambitious programs for the creation and dissemination of new knowledge. IUPUI, in particular, provides a broad mix of academic programs with a rich agenda for creative teaching and ambitious research. The CMC originated at IUPUI in 1994 specifically in response to those needs; it was the first office of its kind at any college or university in the United States.

In the pursuit of those programs, university activities frequently raise questions about the relationship of copyright to the university's research, teaching, and service mission. A principal objective of the Copyright Management Center is to facilitate a constructive relationship between higher education and our legal rights and responsibilities.

The CMC meets that objective by several means, including: Conducting presentations and workshops on copyright issues; preparing handouts and other explanatory material; disseminating announcements of current developments; developing instructional programs for the university community; leading efforts to establish policy standards; and creating a public website and other means for sharing information.

Objective of the CMC Website

This website provides access to a wide variety of resources about copyright in general and its importance to higher education, including a variety of other pages dealing with the subject of copyright. You can learn more about the Copyright Management Center and what the CMC can do for you, about copyright policies and standards, and about copyright interpretations as applied to particular situations that a professor, librarian, or student may encounter. Topics of particular interest include fair use and distance learning.

If you are already knowledgeable about copyright, you should find this site to hold a useful inventory of primary and secondary source materials for probing an issue more fully. We hope that members of the university community will find the resources necessary to help them begin to answer questions and resolve copyright concerns. Newcomers to the world of copyright will benefit by studying the ["Quick Guide"](#) available on this site and other relevant documents.

For more information, see:

["The Copyright Management Center at IUPUI: Brief History, Dynamic Changes, and Future Demands"](#), Kenneth D. Crews, (originally published in the Journal of the Indiana Library Federation & the Indiana State Library, Vol. 19, No. 1, 2000).

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Copyright Management Center Staff

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[CMC Director, Kenneth D. Crews, Ph.D](#)

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CMC News

- [Professor Crews](#) is a co-investigator for intellectual property issues under a major grant from the [National Science Foundation](#) regarding the development of a [Digital Music Library](#). Watch for the public posting of background studies on issues such as [Copyright Expiration](#), Fair Use, Napster, and many other [critical issues](#).
- Announcing New [Center for Intellectual Property Law and Innovation](#) at the Indiana University School of Law - Indianapolis.
- Professor Crews is an [Intellectual Property Scholar](#) for the Center for Intellectual Property and Copyright in the Digital Environment, University of Maryland University College.
- [Copyright Law for Librarians and Educators](#), revised second edition (2006). Attorney, librarian, professor, and author Kenneth D. Crews presents a concise overview of copyright in this up-to-date reference written especially for faculty members and information professionals. This book is based on the "Online Copyright Tutorials" that reached more than 11,000 readers in the preceding two years.
- 2000 edition of: [Copyright Law & Graduate Research: New Media, New Rights, and Your New Dissertation](#), Kenneth D. Crews.
 - General guidance for dissertations, research articles, and many other projects
 - Recent fair-use cases
 - New legislation
 - Extended term of copyright protection
 - International Issues
- [The Copyright Permissions Office](#) is a service based at IUPUI with a central objective of providing information to the members of the IUPUI community seeking to secure permission of the use of copyrighted works for educational purposes.
- [Electronic Reserves and Copyright at IUPUI](#) (revised policy in 2002)
- [Fair Use Checklist](#) (revised 2002)
- [TEACH Act Checklist](#) - (created in 2003)

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Documents

Agreements

○ [Memorandum of Understanding](#) - Assuring rights of use of instructional materials for distance education. ([pdf version](#))

■ [Summary and Overview](#) of the Memorandum of Understanding

○ [Copyright and Publishing Agreement with the Indiana Law Review](#) - Agreement transferring copyrights in articles to be published by the Indiana Law Review to the Trustees of IU. ([pdf version](#))

○ [Permission to Use Student Work](#) - Release to be signed by the student granting IU permission to use their work. ([pdf version](#))

○ [Appearance Release](#) - Release allowing the videotaping of the undersigned and assigning copyrights to the production to IU. ([pdf version](#))

○ [Research Assistant Copyright](#) - Agreement to be signed by the student stating that all works created within the scope of employment shall be considered "works made for hire." ([pdf version](#))

Checklists

○ [Fair Use Checklist](#) - See if you comply with the law of fair use using this popular checklist created by the CMC. ([pdf version](#))

○ [Teach ACT Checklist](#) - *New from the CMC!* - See if you comply with the new law enacted by Congress in 2002. ([pdf version](#))

Other Documents

○ [Sample Permission Letters](#)

○ [IUPUI Online Intake Form](#) - To assist in copyright analysis request

○

[Intellectual Property Primer](#) a brief overview of copyright, patent, trade secret, and trademark law prepared by Todd G. Vare, partner in Barnes & Thornburg's Intellectual Property Department Indianapolis, Indiana and Professor Kenneth D. Crews, Associate Dean of the Faculties for Copyright Management, IUPUI.

[CETUS Discussion Series](#): This series of four booklet was created in 1995 to addresses; the benefits higher education can derive from a better understanding of the fair-use doctrine, the copyright issues that libraries are likely to face in the evovling information age, and ownership of intellectual property



Page updated 10/11/2004

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University Policies

Updated: November 29, 2004

Indiana University

- [Indiana University Intellectual Property Policy](#)
 - [Indiana University Office of Research and the University Graduate School](#)

• [Indiana University Policy on Fair Use of Copyrighted Works for Education and Research and accompanying:](#)

◦ [Statement of Supporting Principles](#)

◦ [Frequently Asked Questions](#)

• [Indiana University Patent Procedure](#)

(Note: the Patent Policy is superseded by the Intellectual Property Policy above.)

Indiana University-Purdue University Indianapolis (IUPUI)

• [Guidance for Faculty on Copyright, Publication, and General Research Dissemination](#) - IU Academic Handbook: IUPUI Supplement (1997-1999), Appendix E, p. 157.

University Policy Development Guidance

• [Intellectual Property, Fair Use, and the Unbundling of Ownership Rights](#) - California State University. Guidance for Policies in the area of Intellectual Property

• [Outline of Issues for University Policies Regarding the Ownership and Management of Scholarship and other Creative Works](#) - Surf Foundation.
Issues for policymakers to consider when creating policy

[Policy Development Flow Chart](#) - University of Illinois

•
[Guide to Writing University Policy](#) - University of Minnesota

Course Management Systems (CMS) and Fair Use Policies

Policies Concerning University Library Issues

- Electronic Reserves Policies
 - [IUPUI University Library Course Reserve Policies](#)
 - [Copyright Management Center Model Policy](#) (currently not being used at IUPUI)
 - Others
- Public Performances at the Library
 - [Indiana University Purdue University](#)
 - Others
 - Others

Course Management Systems (CMS) and Fair Use Policies

- [IUPUI: CMS and Fair Use](#)
- [IUPUI: Posting Materials Online](#)

Distance Education and Fair Use

- [Indiana University CMC Copyright and Distance Education](#)
- [The TEACH Act Toolkit North Carolina State University](#)

Fair Use

- [Indiana University CMC Fair Use Issues](#)
- [Other Fair Use Guidelines](#)

Ownership

- [University Policies and the Management of Copyrights](#)
- [Ownership and the Rights of Use of Works Created at the University: A Survey of American University Copyright Policies](#)

Professional and Trade Associations

- [ACM Interim Copyright Policies \(Electronic Publishing\)](#)
- [ACM Copyright Form](#)
- [ARL—Copyright and Universities: WWW and Gopher Sites](#)
- [EDUCOM Code: Software and Intellectual Rights](#)
- [IFLA Library & Information Science: Policy Statements](#)
- [SURF Foundation: Outline of Issues for University Policies](#)

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Law Resources

Overview: This page will take you to various websites where you can find the full text of Intellectual Property laws and many related materials. You will also find links to some individual statutes that are on the CMC website. We will do our best to address current developments. Finally, you will find links to various other documents and sites related to certain provisions of Intellectual Property laws of greatest interest to higher education.

[Copyright Law](#)

- [U.S. Copyright Act](#)
- [Selected Statutory Provisions](#)
- [More Information about U.S. Copyright Statutes](#)
- [More Information about U.S. Copyright Law](#)
- [Copyright Legislation](#)
- [International Copyright Law](#)

[Trademark Law](#)

- [U.S. Trademark Law](#)
- [More Information about U.S. Trademark Law](#)
- [International Trademark Law](#)

[Patent Law](#)

- [U.S. Patent Law and Rules](#)
- [More Information about U.S. Patent Law](#)
- [International Patent Law](#)

[Other Intellectual Property](#)

- [Intellectual Property Primer](#) a brief overview of copyright, patent, trade secret, and trademark law prepared by Todd G. Vare, partner in Barnes & Thornburg's Intellectual Property Department Indianapolis, Indiana and Professor Kenneth D. Crews., Associate Dean of the Faculties for Copyright Management, IUPUI.
- Right of Publicity
- Unfair Competition
- UCITA

Copyright Law

Full Text of the U.S. Copyright Act

- [U.S. Copyright Office](#)
- [The Hypertext Annotated Title 17](#)

Selected Statutory Provisions on the CMC Website

- [Section 106](#) (rights of the copyright owner)
- [Section 106A](#) (moral rights for some works of art)
- [Section 107](#) (fair use)
- [Section 108](#) (library copying)
- [Section 109](#) (includes the "first-sale" doctrine)
- [Section 110\(1\)](#) (performances and displays for education)
- [Section 110\(2\)](#) (as revised by the TEACH Act)
- [Section 112\(b\)](#) (ephemeral recordings)
- [Section 112\(f\)](#) (as revised by the TEACH Act)
- [Section 117](#) (uses of computer software)
- [Section 504](#) ("statutory damages" for infringement)
- [Work-Made-For-Hire Statute](#)

More Information about U.S. Copyright Statutes

- [Congress Enacts the TEACH Act \(more information about the TEACH Act\)](#), October 2002)

- [Congress Enacts the Digital Millennium Copyright Act](#) (summary of DMCA, December 1998)
- [When Works Pass into the Public Domain](#) (updated with Term Extension Act, 1998)
- [President Signs New Criminal Copyright Bill: Raising the Stakes For Electronic Copyright Responsibilities](#)
(December 1997)

More Information about U.S. Copyright Law

- [Overview of Copyright Law](#), Legal Information Institute
- [U. S. Supreme Court Copyright Decisions](#), Legal Information Institute
- [BitLaw](#) - A Resource on Technology Law
- [Copyright Law in the Electronic Environment](#)
- [Copyright Law in Cyberspace](#)

Information about Copyright Legislation

[TEACH Act Information](#)

-

[Copyright Related Issues from the ALA](#)

Information about International Copyright Law

[WIPO Treaty](#)

[Berne Convention](#)

[Geneva Convention](#)

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Trademark Law

Full text of U.S. Trademark Law

- [United States Patent and Trademark Office](#)

More Information about U.S. Trademark Law

- [Trademark Law Overview](#), Legal Information Institute

- [BitLaw](#) - A Resource on Technology Law

- [Primer on Trademark and Internet Addresses](#)

- [Overview of Trademark Law](#)

Information about International Trademark Law

- [International Trademark Association](#)

- [International Trademark Law Treaty](#)

- [Nairobi Treaty on the Protection of the Olympic Symbol](#)

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Patent Law

Full Text of U.S. Patent Law and Rules

- [U.S. Patent Law](#), U.S. Patent and Trademark Office

- [U.S. Patent Rules](#), U.S. Patent and Trademark Office

More Information about U.S. Patent Law

- [U.S. Supreme Court Patent Decisions](#), Legal Information Institute

- [Overview of Patent Law](#), Legal Information Institute

[BitLaw](#) - A Resource on Technology Law

- [Patent Law at MIT](#)

Information about International Patent Law

- [Patent Law Treaty](#)

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Other Intellectual Property

- [U.S. Supreme Court Intellectual Property Decisions](#), Legal Information Institute

- [Right of Publicity and Privacy](#), Legal Information Institute

- [The Right of Publicity: Going to the Dogs?](#), UCLA Online Institute for Cyberspace Law & Policy

- [Right of Publicity Online Resource Center](#), UNC-Chapel Hill School of Law

- [Unfair Competition Overview](#), Legal Information Institute

- [What is UCITA?](#), American Library Association

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Copyright and Distance Education

Distance Education gives rise to complex copyright issues related to both the question of ownership of the newly created work, as well as the question of "fair use" of existing materials. The links below can guide you to some helpful resources on both points. Please note that with respect to the proper use of copyrighted works in distance education, you may turn either to the general law of [fair use](#), or you may also turn to the specifically applicable statute, Section 110(2) of the U.S. Copyright Act.

New Legislation for Distance Education as of 2002

On October 3, 2002 Congress enacted the "TEACH Act," fully revising [Section 110\(2\)](#) of the U.S. Copyright Act governing the lawful uses of existing copyrighted materials in distance education. President Bush signed the Act into law on November 2, 2002 and it became effective immediately on that day. This is a detailed statute, with specific requirements and conditions, outlining the terms on which educators may clip pieces of text, images, sound, and other works and include them in "distance education." If a particular use does not fit these conditions, one may still consider whether the use is a "fair use," but the copyright analysis should now begin with an evaluation of [Section 110\(2\)](#) of the law, as revised by the TEACH Act.

TEACH Act and Distance Education

TEACH Act legislation, Congressional Reports and other Official Documents

- [Section 110 \(2\) of the U.S. Copyright Act](#) Limitations on exclusive rights: Exemption of certain performances and displays.
- [Senate Report](#)
- [House Report](#)
- [Technological Protection Systems for Digitized Copyrighted Works: A Report to Congress](#) (Issued May 20, 2003).

Analysis and Commentary

- [Summary of the TEACH Act](#), Kenneth D. Crews
- [Statement of Marybeth Peters](#) the Registrar of Copyrights before the Senate Committee on the Judiciary
- [Slow Start for Long-Awaited Easing of Copyright Restriction](#) , The Chronicle of Higher Education (article about the Teach Act)
- [Balancing Copyright Concerns: The TEACH Act of 2001](#), by Laura Gasaway

Tools for Implementing the TEACH Act

- [CMC TEACH Act Checklist](#)
- [The TEACH Act Toolkit](#) North Carolina State University
- [Teach Act at the University of Texas](#)

Implementing the TEACH Act at IUPUI

- [Using the TEACH Act Checklist at IUPUI](#) This document identifies the TEACH Act requirements and summarizes how each requirement may be addressed in the context of the IUPUI Jumpstart Program
- [Complying with the TEACH Act- Recommendations from the CMC to the IUPUI Jumpstart Program](#)
- [Distance Education and Copyright at Indiana University: Suggested standards for practice and procedure at IU](#)

TEACH Act: Additional Resources

- [Guiding Principles for Faculty in Distance Learning](#), Indiana Higher Education Telecommunication System (IHETS)
- [TEACH Act Comparison Chart](#), by Laura Gasaway, UNC. The chart compares Section 110(1) and the old version of 110(2) with the new version of 110(2)

The Law Before the TEACH Act

- [Old Text of Section 110\(2\)](#) of the U.S. Copyright Act (version as superseded by the TEACH Act, October 2002)

Fair Use and Distance Education

- [Fair Use at the University](#) (fair use remains a viable alternative means for properly using copyrighted works in distance education)
- [Course Management Systems and Copyright](#)
Oncourse, Angel, and Other Electronic Information Delivery Systems at IUPUI

Distance Education and Copyright Ownership

• [Copyright Ownership at the University](#)

Memorandum of Understanding: Assuring Rights of Use of Instructional Materials

- [Summary and Overview of the Memorandum of Understanding](#)
- [Memorandum of Understanding](#)

•

[IUPUI Online Intellectual Property Management](#)

Content Updated: Nov. 12, 2004

Links Updated: March 21, 2006

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Libraries and Copyright

Overview: Libraries are deeply involved with copyright issues as they acquire new works and as they make library collections available for research and study. Many of the issues of greatest interest are questions of "fair use." Some library activities are governed by Section 108 of the U.S. Copyright Act, which may apply when the library is making copies of materials for preservation, for a patron's private study, or for sending or receiving in the name of interlibrary loans. Librarians also need to understand copyright law when they negotiate and enter into agreements for the acquisition of new materials for the library collection.

Libraries and Fair Use

- [Fair Use Page](#)
- Fair Use and Electronic Reserves (ERROL)
 - [IUPUI University Library Course Reserve Policies](#)
 - [Copyright Management Center Model Policy](#) (currently not being used at IUPUI)
 - [CONFU Policy Proposal \(1996\)](#)

Libraries and Section 108

- [Digital Libraries and the Application of Section 108 of the U.S. Copyright Act](#)
(Report prepared by Kenneth Crews in furtherance of the Digital Music Library Project funded by the NSF. Although the title and text refer to digital libraries, much of the content is applicable to a wide variety of situations.)
- [Full Text of Section 108 of the U.S. Copyright Act](#)
- [Copyright Notices for Supervised Library Copying:
Updated Information for Library Services](#)
- [Preservation of Library Materials](#)

Libraries and Public Performances and Displays

- [Viewing Movies and Other Audio-Visual Works at the University: Educational Needs and Copyright Law](#)

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- [Independent Contractors](#)
- [Logo Designs](#)
- [Student Works](#)
- [Use of Images of Famous People](#)
- [Use of Photographs](#)
- [Videotapes of Guest Speakers](#)
- [World Wide Web Links](#)

Other Copyright FAQ Websites

- [Frequently Asked Questions About Copyright](#) - U.S. Copyright Office
- [Copyright Law: Frequently Asked Questions](#) - Stanford University Libraries
- [Copyright for Educators](#) - Internet School Library Media Center
- [Copyright FAQ](#) - Terry Carroll, Santa Clara University School of Law

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Favorite Links of the CMC

Government Links

[The Library of Congress](#)

[US Copyright Office](#)

[Copyright Basics](#)

[Copyright Registration](#)

[Thomas](#) - Legislative Information on the Internet

[US Patent and Trademark Office](#)

CONFU - The Conference on Fair Use

- [White Paper Report](#) - The Report of the Working Group on Intellectual Property Rights - November 1995
- [Interim Report](#) - December 1996
- [First Phase Report](#) - September 1997
- [Final Report](#) - November 1998

University Links

[Indiana University-Purdue University Indianapolis](#) (IUPUI)

[IU Knowledge Base](#)

[What is the Digital Millennium Copyright Act?](#)

[Copyright Violations and the IU Network](#)

[Digital Media and Copyright Law Infringement](#)

[What are MP3 files, and are they legal?](#)

[What is IU Policy on "warez" and Software Piracy?](#)

[What is the No Electronic Theft Act?](#)

[IU School of Library and Information Science](#)

[IU School of Law - Indianapolis](#)

[University Library](#)

[Ruth Lilly Law Library](#)

[**CETUS**: Consortium for Educational Technology in University Systems](#) (California State University, City University of New York, State University of New York)

[**Cornell University** - Copyright Overview](#)

[**Kansas State University** - Copyright Basics Online Tutorial](#)

[**Stanford University Libraries** - Copyright and Fair Use](#)

[**University of Texas** - Copyright Crash Course](#)

Organizational Links

[American Library Association](#)

[American Society of Composers, Authors and Publishers \(ASCAP\)](#)

[Association of American Publishers](#)

[Association of Research Libraries](#)

[Coalition for Networked Information](#)

[Copyright Clearance Center](#)

[Visual Resources Association](#)

[World Intellectual Property Organization](#)

Copyright Links

[A Visit to Copyright Bay](#) - University of St. Francis

[Copyright for Educators](#) - James Madison University

[Copyright Resources on the Internet](#) - Groton Public Schools

•
[CopyOwn](#) - University of Maryland & ARL

•
[Creative Commons Licensing Project](#)

•
[Digital Law Online](#) - University of Utah

•
[History of Copyright](#) - Association of Research Libraries

•
[TEACH Act Comparison Chart](#) - Laura Gasaway, University of North Carolina

•
[The TEACH Act Toolkit](#) - North Carolina State University Libraries

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[When Works Pass Into the Public Domain](#) - Laura Gasaway, University of North Carolina

Patent Links

•
[Delphion Intellectual Property Network](#) - Search patents online

•
[US Patent and Trademark Office](#) - Conduct patent and patent application searches

•
[University of Texas](#) - Patent Searching Tutorial

•
[Univesity of Texas](#) - Patent Application Search Tutorial

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ARCHIVE

•
[Old text of Section 110\(2\)](#) (before the TEACH Act was enacted)

•
[Draft Agreement for the Production of Instructional Materials \(2000\)](#) (superseded by the Memorandum of Understanding: Assuring Rights of Use of Instructional Materials (2002)).

•
[Summary and Overview of Draft Agreement for the Production of Instructional Materials \(2000\)](#) (superseded by the Summary and Overview of the Memorandum of Understanding (2002)).

•
[New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act](#) (Summary of Teach ACT as it originally appeared on the ALA website).

•
[Electronic Reserves and Copyright at IUPUI](#) (superseded by Errol and Copyright at IUPUI).

•
[Default terms of the Instructor's Addendum for May Jumpstart program only](#)

Page last updated: August 15, 2003

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Updated, November 27, 2007

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[Do You Have a Question About Permission to Use Copyrighted Works?](#)

[Do You Have a Question About Fair Use?](#)

[Are You Requesting Permission to Use Materials Found on the CMC Website?](#)

[Are You Requesting Permission to Link to the CMC Website or Upload CMC Documents to Your Website?](#)

[Are You Requesting Permission to Use Other Materials Originating From IU or IUPUI?](#)

Do You Have a Copyright Question?

The Copyright Management Center works hard to provide comprehensive up-to-date copyright information on this website for your educational needs. Before you ask specific copyright questions, please search this website for guidance. For more information about copyright, consider buying the book: [Copyright Law for Librarians and Educators](#).

The CMC is preparing to close operations at Indiana University. For questions originating at IU, please contact the Office of University Counsel.

Are You Looking for Professor Crews?

Effective January 1, 2008:

Columbia University
Butler Library, Room 507D
535 West 114th Street
New York, NY 10027

Telephone: (212) 854-2271
Email: kcrews@columbia.edu

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Copyright Quickguide

What You Need To Know About Copyright

Prepared by the Copyright Management Center
Indiana University Purdue University Indianapolis
[Kenneth D. Crews, Director](#)

You might have a question about fair use, or you might be struggling with determining the ownership of a copyrighted work. Whatever your question, a little background about copyright law will allow you to focus your question and have a better understanding of the answer. Take a few minutes to learn these important fundamentals of copyright:

Copyright Protects a Vast Range of Materials

Examples: Books, articles, photographs, paintings, sculpture, software, websites, architecture, pantomimes, ballets, music, sound recordings, and even doodles, scribbles, and graffiti.

Scope: Copyright can apply to any “original work of authorship” that is “fixed in any tangible medium of expression.” Protection automatically extends to any qualifying work, whether published or not, and whether created in the U. S. or in almost any country of the world.

Exceptions: Copyright does not apply to facts, slogans, titles, and simple phrases. Also exempt from protection are works of the U.S. government (be careful: the exemption does not apply to works created by state, local, or foreign governments).

Works are Protected Automatically

[Automatic Protection:](#) As soon as you create an “original” work that is “fixed,” you get copyright protection automatically.

[Copyright Notice:](#) No longer is a copyright notice on the work required for protection, but a notice does provide some legal and practical benefits.

[Copyright Registration:](#) No longer must the work be registered with the U.S. Copyright Office to be protected, but registration does provide some [legal](#)

[and practical benefits.](#)

The Author is Generally the Copyright Owner

General Rule: The person who actually creates the new work is the original copyright owner.

Exception: In the case of a “[work made for hire](#)” the copyright belongs to the employer of the person who creates it.

Exception: You may [transfer](#) your copyright, but a valid transfer requires a signed writing.

More Information: See, [Copyright Management Center: Who Is the Copyright Owner?](#)

Copyright Owners Hold the Fundamental Rights

Rights of Owners: (1) reproduction of the work; (2) distribution of copies of the work; (3) making of “derivative” works; (4) public performance; and (5) public display.

Infringement: Occurs when someone other than the copyright owner exercises any of these rights.

Possible Infringements: Photocopying; uploading to websites; copying software; sharing MP3 files; musical performances; public film exhibitions.

More Information: See, [Copyright Management Center: How Do I Secure My Copyrights?](#)

You Can Use Copyrighted Works Without Infringement

Uses in Education: The law includes numerous exceptions to the rights of copyright owners, and many allow certain uses education and research. To read the law, see: [Copyright Management Center: Copyright Law.](#)

Fair Use: This is the best known of all exceptions, but not all “educational” uses are allowed under fair use. For more information, see: [Copyright Management Center: Fair-Use Issues.](#)

Permission: If your plans are not within an exception, you can secure permission from the copyright owner. For more information, see: [Copyright Management Center: How to Secure Permission to Use Copyrighted Works.](#)

Copyright Protection Lasts Many Years

Duration of Protection: Most copyrights today last through the life of the author, plus 70 years. See, [When Works Pass Into the Public Domain](#) and Kenneth Crews's [Identifying the Public Domain](#).

Before 1978: Works published before 1978 can have copyright protection for a maximum term of 95 years.

Unpublished Works: Most recent and ancient works that have remained unpublished are (or soon will be) subject to the basic protection of "life plus 70 years."

Need More Information?

Your questions might well reach beyond these basics, and each of these points is filled with turns and twists. Explore the rest of this website for more guidance and information about copyright.

Read this Book: Kenneth D. Crews, [Copyright Law for Librarians and Educators](#), Second Edition. (Chicago: American Library Association, 2006).

Read the [Intellectual Property Primer](#) , a brief overview of copyright, patent, trade secret, and trademark law prepared by Todd G. Vare, partner in Barnes & Thornburg's Intellectual Property Department Indianapolis, Indiana and Professor Kenneth D. Crews, Associate Dean of the Faculties for Copyright Management, IUPUI.

For an introduction to copyright and fair use in the academic setting, read ["New Media, New Rights, and Your Dissertation."](#)

Links Updated: February 28, 2006

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Checklist for Fair Use



[Adobe Acrobat pdf version now available!](#)

[Introduction to Checklist for Fair Use pdf version](#)

Please complete and retain a copy of this form in connection with each possible "fair use" of a copyrighted work for your project.

[Introduction to Checklist for Fair Use](#)

Name:

Institution:

Project:

Date:

Prepared by:

PURPOSE

Favoring Fair Use

Opposing Fair Use

Teaching (including multiple copies for classroom use)

Research

Scholarship

Nonprofit Educational Institution

Criticism

Comment

Commercial activity

Profiting from the use

Entertainment

Bad-faith behavior

Denying credit to original author

News reporting
 Transformative or Productive use (changes the work for new utility)
 Restricted access (to students or other appropriate group)
 Parody

NATURE	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
Published work	Unpublished work
Factual or nonfiction based	Highly creative work (art, music, novels, films, plays)
Important to favored educational objectives	Fiction
AMOUNT	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
Small quantity	Large portion or whole work used
Portion used is not central or significant to entire work	Portion used is central to work or "heart of the work"
Amount is appropriate for favored educational purpose	
EFFECT	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
User owns lawfully acquired or purchased copy of original work	Could replace sale of copyrighted work
One or few copies made	Significantly impairs market or potential market for copyrighted work or derivative
No significant effect on the market or potential market for copyrighted work	Reasonably available licensing mechanism for use of the copyrighted work
No similar product marketed by the copyright holder	Affordable permission available for using work
Lack of licensing mechanism	Numerous copies made
	You made it accessible on Web or in other public forum
	Repeated or long term use

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What is Fair Use?

- [Framework of Owners' Rights and Statutory Exceptions](#)

- [Section 107 of the U.S. Copyright Act](#)

- [Fair Use Guidelines](#)

When do I need Fair Use?

- [Classroom Handouts and Copyright](#)

- [Library Copying and Electronic Reserves](#)

- Multimedia Projects (**under development**)

- [Posting Materials on the Internet](#)

- [Course Management Systems](#) (Oncourse, Angel, etc.)

- [Common Scenarios](#)

- [Distance Education](#)

- [TEACH Act](#)

Am I Within the Limits of Fair Use?

- [Meaning of the Four Factors](#)

- [Factor 1: Purpose of the Use](#)

- [Factor 2: Nature of the Work Used](#)

- [Factor 3: Amount of the Work Used](#)

- [Factor 4: Effect of the Use on the Market](#)

-

Understanding and Applying Fair Use

- [Summary of Key Court Cases](#)

- [Classroom Handout Common Scenarios](#)

- [Indiana University Policy](#)

Activities and Exemptions Beyond Fair Use

- [Showing Videos and Movies at the University](#)
- [Transmitting Materials in Distance Education](#)
- [Library Copying And Section 108](#)
- [General Framework of Statutory Exceptions](#)
- [List of Statutory Exceptions](#)

What if I am Outside the Limits of Fair Use?

- Obtain Permission to Use the Copyrighted Work

- [IUPUI Copyright Permissions Home](#)
- [How to Secure Permission to Use Copyrighted Works](#)

- [Overview of Copyright Permissions](#)

- [Sample Permission Letter Forms](#)

- Making Alternative Plans

- [Replace the materials with alternative works.](#)

- [Alter your planned use of the copyrighted works.](#)

- [Conduct a risk-benefit analysis.](#)

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Obtaining Permission to Use Copyrighted Works for Educational Use

The Copyright Management Center is pleased to provide several informational web pages that are designed to aid members of the IUPUI educational community with several common issues that arise when considering the use of copyrighted works for educational purposes:

[How To Secure Permission to Use Copyrighted Works](#)

- A step-by-step guide to aid in your quest in obtaining permission.

[Securing Permission for Copyrighted Works: Expediting the Process with the Aid of Collective Rights Organizations](#)

- Organizations that can expedite the process of obtaining permission to use copyrighted works.

Information on securing permission for the educational use of:

Works in Print	Online Works	Musical Works
Images/Pictures	Motion Pictures	Software
Syndicated Cartoons	Syndicated Editorials	Religious Works

Last updated: September 10, 2004

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Copyright Programs

Local, Regional, and National Copyright Events

The following events are either sponsored by the Copyright Management Center or include the participation of Prof. Crews or other CMC staff members

IU and IUPUI Programs

Watch for updates!

Indiana Regional Programs

April 12, 2006 - Ball State University

Copyright Challenges and Opportunities: Practical Advice for the Digital Age

Professor Crews will be a featured speaker and give a presentation entitled, "The Google Challenge: Revocation or Renaissance of Fair Use, Libraries, and Learning?"

Click here for more [information](#) or to [register](#) for the event.

More Programs Around the Country

March 23-24, 2006 - Albany, NY

Academic Integrity: A New Look at Law, Policy and Practice

Professor Crews will give a presentation on March 23 entitled, "Copyright and Academic Integrity: The BIG Picture."

Click here for more [information](#).

May 3-5, 2006 - Chicago, IL

**American Intellectual Property Law Association:
2006 Spring Annual Meeting**

Professor Crews is scheduled to moderate a plenary session on May 5, 2006.

Click here for more [information](#).

Past Events

***"Managing Copyright Ownership and Rights of Use of Works
Created at the University"***

Presented: Wednesday, February 09, 2005

Facilitators:

Kenneth D. Crews, Director of the Copyright Management Center;

David Wong, Senior Copyright Analyst;

Jacque Ramos, Law Clerk

Faculty, staff, and others will learn how they may better manage ownership and rights of use of works that they have created through their work at the university. This workshop will help instructors negotiate their publishing contracts so that they may continue to use their published works online, in the classroom, in other publications, and more. This workshop will also address the issue of ownership of works created at the university by explaining the "Memorandum of Understanding: Assuring Rights of Use of Instructional Materials." This innovative development assures to both the university and the instructor rights to use online instructional materials created by the instructor.

[Click here to view this presentation](#) (*RealPlayer required*)

[Click here to view the PowerPoint from this presentation](#)

Last Updated: February 28, 2006

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Ownership**[Go Now](#)**Managing the Rights to Use Works Created at the University:****Frequently Asked Questions Concerning Ownership, Rights of Use and the Memorandum of Understanding**

Prepared by the
COPYRIGHT MANAGEMENT CENTER

The Following are FAQs regarding Ownership and the Memorandum of Understanding - "MOU".

[Click here to read the "MOU".](#)

[Click here to read a Summary and Overview of the "MOU".](#)

Kenneth D. Crews, Samuel R. Rosen II Professor of Law
Associate Dean of the Faculties for Copyright Management
David Wong, Senior Copyright Analyst

Indiana University-Purdue University Indianapolis
530 West New York Street
Indianapolis, Indiana 46202-3225
Voice: 317-274-4400 Fax: 317-278-3326
<http://www.copyright.iupui.edu>

[Introduction](#)[Who owns works created at the university?](#)[Can the university's IP policy grant copyright ownership to the creator?](#)[Can both the university and an instructor be assured rights to use the instructor's works?](#)[How does the MOU work?](#)[Which schools at IUPUI have adopted the MOU?](#)[Click here for information about negotiating publishing agreements](#)**Introduction**

The "Memorandum of Understanding" is offered for adoption by the university community as a tool for addressing one of the most perplexing issues surrounding the management of our own intellectual works: How can the university community hold and manage the rights to instructional materials in a manner that best promotes quality teaching and scholarship? The MOU preserves the basic principle that faculty hold rights to their instructional works,

while allowing a sharing of rights to assure the continuation of university programs. The law of copyright is simply inadequate to meet the wide range of interests that diverse parties have in collaborative projects, especially in the academic setting. The law also embodies tremendous risk. Recent court rulings have indicated that much faculty work product may well be “work made for hire” under copyright law, with all rights belonging to the employer university. Such a sweeping grant of all rights to any one party conflicts with the more cooperative nature of academic work. The “Memorandum of Understanding” is an attempt to establish a more mutually beneficial model for sharing rights to use instructional materials.

Who owns works created at the university?

The General Rule for Copyright Ownership:

The general rule of copyright ownership is the creator of a work owns the copyright to that work. Copyright protection vests automatically upon the creation an original work of authorship fixed in a tangible medium.

The Exception to the Rule:

An exception to the general rule is the “work made for hire” doctrine. If the work is deemed a work for hire, the employer of the creator is considered the author, and copyright ownership vests automatically with the employer.

The Possible Exception to the Exception:

In the past, courts had suggested a possible “teacher’s exception” to the work-made-for-hire doctrine for traditional works of scholarship and creativity. Instructors employed by universities that created works within the scope of their teaching responsibilities were believed to be the copyright owners of their works. Recent court rulings give little credibility to this rule.

Result:

The law in this area is uncertain, but the possibility is great that much faculty work will be regarded as “for hire.” The federal law of copyright was overhauled in 1976, and the new law made no mention of the “teacher’s exception” that had been recognized by some courts. Some copyright experts argue that this exception survives, but the most recent cases make no mention of it, and it is not mentioned in relevant statutes passed since the revision of the Copyright Act in 1976. Therefore, universities may well be the owners of many of the works created by instructors at the universities.

Can the university’s IP policy grant copyright ownership to the creator?

Many university intellectual property policies purport to “allow” instructors to retain most, if not all, rights to many of their works. However, the typical university IP policy, by itself, may not be legally sufficient to grant the copyright ownership of works made for hire back to the faculty creator. If a work is deemed by a court to be a work-made-for-hire, the university will be considered the author (and therefore, the copyright owner), unless both the university and the creator have expressly agreed otherwise in a written instrument signed by both parties. Since most university IP policies are not supplemented with the signatures of both

the university and the instructor, any grant of ownership made under such a policy may not be legally valid.

Can both the university and an instructor be assured rights to use the instructor's works?

The law allows copyright owners to permit or license to others the right to use their works, with or without limitation, exclusively or non-exclusively, for a set amount of time, for certain purposes, in certain geographical locations, etc. Therefore, regardless of whether the university or the instructor holds the copyright, these parties may agree to give one another specified rights of use. A properly drafted and adopted agreement can produce the result and certainty that the law does not currently provide.

The Memorandum of Understanding: Assuring Rights of Use of Instructional Materials (MOU) seeks to meet that objective. The MOU is an agreement between the university (represented by the school) and the instructor. It assures to both the university and the instructor certain rights to use the instructional materials. The MOU creates a "window of opportunity" for the university to use a set of the instructor's materials, while the instructor may concurrently use the same materials in ways that do not directly compete with the university's use. For example, the university may wish to use an instructor's materials in conjunction with a distance education course for a limited period of time. At the same time, the instructor may wish to use the materials for teaching courses on related topics, preparing textbooks, journal articles, conference presentations, consulting projects, and other scholarly works or professional activities. The MOU protects both parties in their endeavors.

How does the MOU work?

Generally, each school at Indiana University is asked to lead the management of the relevant instructional materials created within that school. The MOU becomes the terms of an agreement between an instructor and the university (through the instructor's school) regarding the use of specified instructional materials.

First, the school must formally adopt the MOU. The procedure for each school's adoption of the MOU is left up to each particular school and the adoption is finalized with the signature of the dean of that school.

Once the MOU is adopted by a school, the school and its instructors may desire to use the MOU to assure their rights of use to specifically identified works created by the instructor. The MOU is not general policy. It applies only to identified works, and only by voluntary agreement between the school and the faculty author. Application of the MOU to certain materials is documented by completion of the Instructor's Addendum to the MOU (the last page of the MOU).

The Instructor's Addendum requires that the parties reach agreement on a few matters, which generally include:

- (1) the scope of materials included in the agreement and the schedule for their delivery;

- (2) the funding and other support provided to the instructor;
- (3) the termination date, if any, of the university's rights;
- (4) the agreement, if any, regarding division of revenue between joint contributors; and
- (5) the agreement, if any, regarding exercise of management rights between joint contributors.

The agreement between the school and instructor for the terms of use of the specified instructional materials is finalized with the signing of the Instructor's Addendum by both parties. Both parties should keep signed copies.

Example:

A professor of Computer Science is asked by her dean to contribute instructional materials to a distance education course that the School is developing. She wants to assure her right to use her contributed materials in a textbook that she is preparing. The professor should advocate that the School adopt the MOU, if it has not done so already, and then negotiate the details of the agreement in her Instructor's Addendum to the MOU. The MOU would assure to the School that it would be able to use the instructor's materials for the distance education course, and at the same time assure to the instructor the right to use her materials for her textbook.

Which schools at IUPUI have adopted the MOU?

[Click here for a list of schools at IUPUI that have adopted the MOU.](#)

[Click here to view the Copyright Management Center's presentation on the MOU](#)

(*RealPlayer required*)

[Click here to view the PowerPoint from this presentation](#)

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Filesharing and Copyright

A Project of the IUPUI Copyright Management Center

Kenneth D. Crews, Samuel R. Rosen II Professor of Law
Associate Dean of the Faculties for Copyright Management
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<http://www.copyright.iupui.edu>

Filesharing is the process of sending or accessing stored files from one computer to another, by means of networked connections and software known as a "filesharing applications." The process of filesharing raises copyright issues of reproduction and distribution of protected works.

Distributing copyrighted material without explicit permission from the copyright owner is often against the law. While filesharing applications such as KaZaA, Gnutella, and Morpheus may not themselves be illegal, the use of these systems to share files may create an infringement of the rights of the copyright owner. Anyone who sends or receives files is incurring the risk of a legal violation. . When you download a copy of one of an illegally distributed file(s) to your own machine – even if you download just one song, movie, or software application – you may be committing an illegal action. In addition, when you install many of the applications used to download such files, the software is automatically set to share the files you download with others, whenever your computer is connected to the Internet. You could therefore be distributing copyrighted material without necessarily realizing it.

Filesharing of copyrighted works is legal only if:

1. You are the copyright owner of the material, or
2. The copyright owner of the material grants permission, or
3. The material is in the public domain, or
4. The use of the material is a "fair use" under the law, or
5. The material falls within another statutory exception.

Fair use plays a key role in the online world just it has done with other forms of traditional communication. Fair use is a legal doctrine that allows the public to make limited uses of copyrighted works without permission. Fair use may not be what you expect. Therefore, do not assume that a nonprofit, educational use or giving credit for the source of the work, or

that because you are merely sampling a movie or music clip while using other peoples copyrighted materials creates an inherent fair use. In addition, purchasing a music CD generally does not give you the right to distribute or share the songs on it. For information about fair use, see: Copyright Management Center: Fair-Use Issues.

Some actions you can take to avoid copyright law infringement are:

- Ensure that your file sharing application is not set to share the files you have on your computer. If it is set to share files, ensure that you have explicit permission from the copyright holders for sharing ALL of the files stored using this application.
- Ensure that the distributor of a file you are interested in downloading has permission from the copyright holder to be distributing it. Give yourself the benefit of doubt and assume that you do not have permission to download or distribute a file unless you have proof to the contrary.
- When you purchase music, movies, games, software, and other multi-media files, READ THE LICENSE carefully. It will tell you if you have permission to convert the material to other formats for your own use, and whether or not you can share the material with others.
- Educate yourself on what you can legally download and what you can legally share with others.
- Monitor the popular news and press to keep up-to-date on the efforts of the music and movie industries to propose legislation to safeguard their intellectual property rights, and ensure that your voice is heard by your local legislators when you have an opinion on these proposed measures.

Napster and the Filesharing

“Napster” has been a name synonymous with Filesharing. Napster used a P2P system to organize and make available to web music users vast selections of music and movie files. The Ninth Circuit Court of Appeals ruled on 12 February 2001 that the music Filesharing system known as “Napster” committed repeated infringements of copyright law as millions of users uploaded and downloaded copyrighted protected sound recordings. Recent news reports have focused on the practical implications of the computer-based music and movie filesharing applications/systems. For more information on Fair Use and Napster, see: [A & M Records, Inc. v. Napster, Inc.: Implications for the Digital Music Library http://dml.indiana.edu/pdf/AnalysisOfNapsterDecision.pdf](http://dml.indiana.edu/pdf/AnalysisOfNapsterDecision.pdf)

Created: August 9, 2004

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THE COPYRIGHT MANAGEMENT CENTER AT IUPUI: BRIEF HISTORY, DYNAMIC CHANGES, AND FUTURE DEMANDS

by Kenneth D. Crews
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From its base at Indiana University Purdue University Indianapolis (IUPUI), the Copyright Management Center has completed five years of innovative and diverse service for the campus, for Indiana University and for a larger academic community that finds itself increasingly caught in a tangled web of copyright concerns. Since its establishment in August 1994, the Copyright Management Center has had a central objective of helping the university community pursue innovations in teaching, research, and service by addressing the complex issues of copyright and the law's relationship to the needs of higher education. These issues sweep a broad spectrum, from the legal ownership of new works to the lawful uses of protected works under "fair use" and other opportunities.

The Copyright Management Center grew out of recognition that the relationship between university activities and copyright law was becoming more convoluted and in need of creative solutions. First, copyright law itself has been changing in ways that have direct consequences for higher education and library services. Second, new technologies at the university have given rise to new methods for creating and using copyrighted works. Third, innovations in teaching and research, such as the rapid expansion of distance learning, have generated a vast array of formidable copyright questions.

On this foundation, plans to establish the Copyright Management Center took shape in mid-1993. While many colleges, universities and libraries around the country were beginning to recognize that copyright posed concerns, key leaders at IUPUI took the initiative to establish an office that would guide the academy to a more constructive understanding of the issues and their possible solutions. Individuals such as Chancellor Gerald Bepko, Executive Vice Chancellor William Plater, and Barbara Fischler, former Director of IUPUI University Libraries, brought the idea to reality with their combined vision, support, and the all-important

funding that made the new office possible. They also made the strategic decision that the Copyright Management Center should be closely aligned with the faculty. The office might have been formulated as an administrative unit, perhaps as part of the Office of University Counsel, or it could have been established within the University Library so that it could focus specifically on library concerns. However, aligning the office most closely with the faculty served multiple purposes. This positioning helped to allay some concerns that the Copyright Management Center would hinder faculty objectives and not respond to the needs of teaching and research. Appointing a faculty member to direct the office would also allow it to be a service unit, as well as a research center for copyright issues.

At this point, the story becomes more personal. The recruitment and hiring process from my perspective began with a telephone call in November 1993 from Tom Allington, the Associate Dean of the IU School of Law - Indianapolis. The School of Law and the IU School of Library and Information Science (SLIS) expressed early interest in having the director of the Copyright Management Center join their faculties, depending upon background and qualifications. In 1993, I was an Associate Professor of Business Law at San Jose State University and interested in the exact issues of central importance to the Copyright Management Center. I had practiced law in Los Angeles from 1980 to 1990, and in 1990, I earned a Ph.D. from the UCLA School of Library and Information Science. My dissertation analyzed copyright policies at research universities around the United States. That dissertation later became the foundation of my book, *Copyright, Fair Use, and the Challenge for Universities* (The University of Chicago Press, 1993).

After a few conversations, I was persuaded to apply for the position, and in March 1994, I visited Indianapolis and Bloomington for interviews. In August of that year, I arrived in Indianapolis with my family to assume a complex roster of duties. Not only was I

appointed as Director of the Copyright Management Center, but I was also named Associate Professor in both the School of Law and SLIS. Any one of these appointments alone could be a full-time job.

Throughout the past five years, I have attended to a host of responsibilities, including teaching courses in two programs and participating in faculty meetings and committee duties. But the activities of the Copyright Management Center have expanded enormously in a relentless chase to understand the relationship between copyright law and higher education. Here is a brief summary of some of the Copyright Management Center's major activities:

- Participation in the Conference on Fair Use. CONFU was an effort lasting from 1994 to 1998 to convene participants with diverse perspectives on the interpretation of fair use by educators and librarians. I attended to articulate the views of higher education and to advance a balanced understanding of fair use.

- Development of new policy for Indiana University. In particular, the Copyright Management Center led the task of developing the new policy for IU. This office also has developed policies and procedures related to reserve systems in the library, ownership of distance education courses, and many other critical subjects.

- Hosted guest speakers on campus. Our visitors have included David Post from Temple University, Raymond Nimmer from the University of Houston, and Peter Jaszi of American University.

- Organized and hosted a "Town Meeting on Fair Use, Education, and Libraries". We held this national conference in April 1997, with nearly 100 attendees and several speakers from throughout the country.

- Ongoing workshops and discussion sessions. We have conducted open sessions on issues ranging from ownership of websites to the specialized use of visual images by artists and art historians.

- Online Copyright Tutorial. During two recent semesters, Spring and Fall 1998, the Copyright Management Center offered an Online Copyright Tutorial. This tutorial provided an overview of copyright law, particularly as it applies to higher education and libraries, by means of a series of brief and readable email messages distributed on a listserv by subscription. We were able to provide this service at no charge to subscribers. Each semester brought approximately 2,500 subscribers from around Indiana University, the state and the world.

- Copyright Management Center Website. Our website at <http://www.iupui.edu/~copyinfo> provides access to a wealth of materials organized according to the subtopics in copyright law of greatest interest to our constituents. The original site was largely the work of Judy Homer of the Copyright Management Center

and Cindy Hollingsworth of IUPUI's Center for Teaching and Learning. Major developments in the law and in the scope of the Copyright Management Center's activities led to a need for to overhaul the website. A new version, prepared with the talents of Allison Kopczynski of the IUPUI University Library, was launched in March 1999. Since that time, the new site often has received 100 visits per day.

- Copyright publications. The Copyright Management Center and its staff members have prepared numerous brief publications and announcements about recent developments and commonly occurring problems related to copyright and education. Most of those publications are available on the Copyright Management Center website. Original publications range from summaries of the newly enacted Digital Millennium Copyright Act to the meaning of fair use when mounting readings on a website for classroom instruction.

- Federal Government Relations. The Copyright Management Center works closely the IU Office of Public Affairs and Government Relations to help communicate the concerns of Indiana University with respect to pending legislation in Congress and other federal-policy developments. We have met with members of Congress to communicate our views and concerns, and we have worked with the President of Indiana University and others to advance those concerns.

- Coordination with state and national organizations. The creation of the Copyright Management Center in 1994 was instrumental in the formation of a Copyright Committee of the Indiana Partnership for Statewide Education. With members from several colleges and universities around Indiana, this committee is examining and advancing the understanding of copyright issues, especially as applied to distance learning. I also serve on the Task Force on Copyright and Intellectual Property for the Association of American Universities, the National Association of State Universities and Land-Grant Colleges, and the American Council on Education.

- Organization of a statewide meeting on distance learning and copyright. In January 1999, the Copyright Management Center organized a meeting, in association with the Indiana Commission on Higher Education. The purpose of the meeting was to discuss the pending effort by the U.S. Copyright Office to recommend changes in the copyright statute addressing the use of works in distance learning. Attending the meeting were participants from all colleges and universities within Indiana. An outcome of the meeting was a report encompassing the views and perspectives of Indiana educators. That report was delivered to the U.S. Copyright Office and made a part of the official study.

- Participation in public hearings on distance learning legislative proposals. In February 1999, I testified in

public hearings before the U.S. Copyright Office to discuss experiences addressing copyright issues and to present a proposal developed by the AAU, NASULGC, and ACE. Dwayne K. Buttler of this office also testified that day on behalf of the Indiana statewide effort and the report that resulted from the January conference.

- Numerous individual inquiries. The Copyright Management Center has fielded hundreds of individual inquiries from faculty, librarians, and many other members of the university community, as well as from interested and concerned individuals around the country. Handling these inquiries can be enormously rewarding and at the same time challenging and perplexing. They can also be a severe test of the limits of our service. An inquiry may be of tremendous importance to the particular person who brings it forward, but responding to it may not be the most efficient use of our scarce staff time and resources. Moreover, the Copyright Management Center is not a law office, and thus we cannot give legal advice. Consequently, the practical realities are that we sometimes need to decline politely many individual requests for support and assistance.

In 1996 the Copyright Management Center was fortunate to receive a three-year grant from the Indiana University Strategic Directions Charter, under the direction of President Myles Brand. That grant enabled the Copyright Management Center to expand its staff and services. Current members of the Copyright Management Center staff accompanying me on this copyright journey include Dwayne K. Buttler, Senior Copyright Analyst, and Becky Parman, Administrative Secretary. Mr. Buttler is a graduate of IUPUI and the IU School of Law-Indianapolis. Ms. Parman is a graduate of the University of Evansville. Part-time staff members assisting with special projects include Barbara Gushrowski and Noemí Rivera-Morales. Both are graduates of SLIS.

The Copyright Management Center continues its work with committed support from IUPUI and operates from offices in the IUPUI University Library. With variable university funding and swift changes in the complexity and magnitude of copyright issues, we unfortunately cannot address all issues and serve all needs. Therefore, we have identified these priorities for the current year:

- The copyright complexities of distance education. Distance education raises formidable concerns related to the fair use of existing works, along with identifying and establishing rights of ownership associated with websites, videotapes, and other instructional materials created at the university.
- Electronic reserves and "Oncourse." Electronic reserves in the library and the university's web-based

instructional delivery system, known as "Oncourse," allow instructors to make the full text of selected works available to students enrolled in particular classes. These systems raise thorny issues of fair use and of the need to secure permissions from copyright owners under certain circumstances.

- Community education. The Copyright Management Center continues to offer information resources on its website and in public instructional programs. This year we have offered a series of programs open to the public and geared specifically for the university community on a range of major issues, such as fair use in the web environment, ownership of faculty scholarly works, and copyright issues for distance education.
- Online Copyright Tutorial. During 1998, the Copyright Management Center twice offered the Online Copyright Tutorial. We hope to offer some variation of the tutorial in the near future.
- Licensing of library resources. The University Library is increasingly acquiring journals and other resources in electronic form under the terms of detailed license agreements that govern the permissible uses of the materials. The Copyright Management Center is addressing alternatives for license agreements and identifying issues of major interest or concern.

Through all of its services and activities, the Copyright Management Center continues to keep its focus on the needs of higher education and librarianship. While the Copyright Management Center may well address the law and be immersed in questions of statutory interpretation and liability risks, we address these issues with an eye toward understanding and applying the principles of copyright law for the benefit of higher education and research. For example, copyright law may fundamentally establish an ownership right in new works, but the creative and insightful management of that ownership can further the educational goal of making new works widely available to advance learning. Moreover, the ownership rights that are granted by copyright law may often prevent or limit some constructive uses of protected works, but fair use and other exceptions allow the university community to build on existing materials, within limits, for the advancement of teaching, scholarship, and research.

The central mission of the Copyright Management Center in all of its activities is to promote new understanding of copyright law and its relationship to the university. Senior officials at IUPUI and IU deserve enormous credit for their early recognition of these important issues and for establishing the Copyright Management Center to address the complexities of copyright law for the benefit of the broader academic community.



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Copyright Management Center Director

About the CMC Director, Kenneth D. Crews

*Effective 2008, Kenneth Crews will be relocating to Columbia University. Click [HERE](#) for more information

Kenneth Crews is the Samuel R. Rosen II Professor in the [Indiana University School of Law-Indianapolis](#) and in the [IU School of Library and Information Science](#). He is also Associate Dean of the Faculties for Copyright Management, and in that capacity he directs the [Copyright Management Center](#) based at [Indiana University-Purdue University Indianapolis \(IUPUI\)](#). Professor Crews brings a variety of academic and professional experiences to his duties at the university. He earned his undergraduate degree in history from Northwestern University and received his law degree from Washington University in St. Louis. He practiced general business and corporate law in Los Angeles from 1980 to 1990, primarily for the entertainment industry. During those years, Crews returned to graduate school and he earned his M.L.S. and Ph.D. degrees from UCLA's School of Library and Information Science.

His principal research interest has been the relationship of copyright law to the needs of higher education. His first copyright book, [Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education](#), was published by The University of Chicago Press in October 1993, and it reevaluated understandings of copyright in the context of teaching and research at the university. A more recent book, [Copyright Law for Librarians and Educators](#), published in a fully revised second edition by the American Library Association in 2006, is an instructive overview of copyright law. Crews has been an invited speaker on college and university campuses and at conferences in 39 states, D.C., and 7 foreign countries. During 2003, Crews was the [Intellectual Property Scholar for the Center for Intellectual Property and Copyright in the Digital Environment](#), University of Maryland University College, and he currently serves as a faculty member for the [Munich Intellectual Property Law Center](#).

Professor Crews was the first recipient of a major award from the American Library Association in 2005. Named for a leading advocate of public rights, the [L. Ray Patterson Copyright Award](#) was granted in a festive ceremony at the ALA Annual Meeting.

Crews brings a wide range of experience to the task. He has been a faculty member in three disciplines: law, business, and library and information science. His publications encompass the fields of copyright, constitutional law, political history, and library science. He has worked in a university archives and conducted historical research on windmills and tide mills on Long Island, NY for



the National Park Service. In rare moments of recreation Crews enjoys bicycling, hiking, astronomy, archeology, art, and early rock and roll. He has a splendid and supportive wife (who looks back fondly on six years in UCLA family housing pressed against the San Diego Freeway) and two growing children (who are slowly discovering the joys of copyright law).



"My philosophy about copyright is the same as about a hobby: If I cannot reveal that it is intriguing, fun, relevant, and filled with surprises, I am not doing my job."

—Kenneth D. Crews

Select Publications by Kenneth D. Crews

Books

- [*Copyright Law for Librarians and Educators*](#). Second Edition. Chicago, IL: American Library Association, 2006.
- [*Copyright Essentials for Librarians and Educators*](#). Chicago, IL: American Library Association, 2000.
- [*Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education*](#). Chicago, IL: The University of Chicago Press, October 1993.
- [*Corwin's Constitution: Essays and Insights of Edward S. Corwin*](#). New York; Greenwood Press, 1986.
- [*Edward S. Corwin and the American Constitution: A Bibliographical Analysis*](#). Foreword by Alpheus Thomas Mason. Westport, CT: Greenwood Press, 1985.

Technical Monographs

- [*Intellectual Property, Fair Use, and the Unbundling of Rights*](#). Long Beach, CA: The Academic Senate of the California State University, 2003. [Kenneth Crews drafted substantial portions of this document; served as a consultant to CSU; and expanded upon earlier projects and policies.]
- [*Copyright Law and Graduate Research: New Media, New Rights, and Your New Dissertation*](#). Ann Arbor, MI: Bell & Howell Information and Learning, 2000.
- [*Fair Use of Copyrighted Works: A Crucial Element in Educating America*](#). Seal Beach, CA: CSU Chancellor's Office, 1995. [Prepared while serving as a consultant to a consortium of California State University, State University of New York, and City University of New York.]
- *University Copyright Policies*. SPEC Kit No. 138. Washington, D.C.: Association of Research Libraries, October 1987

Journal Articles

- "Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine." [*Syracuse Law Review*](#) 55 (2005): 189-250.
- "The Law of Fair Use and the Illusion of Fair-Use Guidelines." [*The Ohio State Law Journal*](#) 62 (2001): 602-700.
- "Distance Education and Copyright Law: The Limits and Meaning of Copyright Policy." [*Journal of College and University Law*](#) 27 (Summer 2000): 15-51.
- "Perspectives on Fair-Use Guidelines for Education and Libraries." Edited by Kenneth D. Crews and Dwayne K. Buttler. [*Journal of the American Society for Information Science*](#) 50 (December 1999): 1303-1357 [series of nine articles; three written by Prof. Crews].
- "Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright." [*Arizona State Law Journal*](#) 31 (Spring 1999): 1-93.
- "Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?" [*Indiana Journal of Global Legal Studies*](#) 6 (Fall 1998): 117-138.
- "Copyright and Distance Education: Displays, Performances and the Limitations of Current Law." In [*Growing Pains: Adapting Copyright for Libraries, Education, and Society*](#), pp. 369-385. Edited by Laura N. Gasaway. Littleton, CO: Fred B. Rothman Co., 1997.
- "Copyright at a Turning Point: Corporate Responses to the Changing Environment." [*Journal of Intellectual Property Law*](#) 3 (Spring 1996): 277-316.
- "What Qualifies as 'Fair Use'?" [*Chronicle of Higher Education*](#), May 17, 1996, pp. B1 & B2.
- "Copyright Law and Information Policy Planning: Public Rights of Use in the 1990's and Beyond." [*Journal of Government Information*](#) 22 (1995): 87-99.

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ERROL and Copyright at IUPUI

A Project of the IUPUI Copyright Management Center & IUPUI University Library

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Introduction

Placing articles and other materials on ERROL, the electronic-reserve system of the IUPUI University Library, raises challenging questions about copyright.¹ ERROL was created in furtherance of the university's commitment to actively seek making a wide range of

materials readily available to students enrolled in classes at IUPUI, but the materials must be provided within the context and limits of copyright law.

Current copyright law gives legal protection to nearly all readings and other course materials that an instructor might place on an electronic delivery system.² Materials may be offered on such systems only if:

1. The instructor is the copyright owner of the material,³ or
2. The copyright owner of the material grants permission, or
3. The use of the material is a "fair use" under the law, or
4. The material is in the public domain,⁴ or
5. The material falls within another statutory exception.⁵

This document is a guide to understanding concepts of fair use as they may apply to electronic reserves. From these principles, the IUPUI University Library has developed the IUPUI University Library Course Reserve Policies.

What is "Fair Use"?

Fair use is a legal doctrine that allows the public to make limited uses of copyrighted works without permission. For information about fair use at IUPUI and Indiana University, see: [Copyright Management Center: Fair-Use Issues](#).

Fair use may not be what you expect. Simple, clean, concise rules do not exist in the law of fair use. For example: Do not assume that a nonprofit, educational use is inherently fair use. Do not assume that giving credit for the source of the work inherently creates a fair use. Do not assume that limiting access to materials to students in the class inherently creates a fair use. On the other hand, proper application of fair use can prove to be extremely beneficial to the instructor, the students, and the educational process as a whole.

How Does Fair Use Apply to ERROL?

The following are general standards suggested by the IUPUI Copyright Management Center to give fair use some practical application. Instructors and others at IUPUI who are using methods of electronic delivery of materials other than ERROL should also consider these standards when evaluating whether their activities are within fair use.

Fair use depends on a balancing of four factors outlined in the copyright statutes. These factors may be addressed by a variety of means. Listed below with each factor are some suggestions that may be helpful in conducting fair-use analyses. Because each situation will be different, instructors must also consider other possibilities and weigh them in the balance for each fair-use determination. One need not necessarily take every possible precaution and satisfy all four of the statutory factors; hence, some adjusting of the implementation of the following procedure may still keep your activities within the boundaries of permitted use. For a set of scenarios applying the factors of fair use, see: [Common Scenarios of Fair Use Issues: Posting Materials on Learning Management Systems](#).

1. Purpose of the Use

- Materials should be placed on ERROL only for the purpose of serving the needs of specified educational programs.

- Materials should be placed on ERROL only at the specific request of the instructor.
- Access to materials should be limited by password or other means to deter unauthorized access beyond students enrolled in the specific course for which the materials are needed.
- Students should not be charged specifically or directly for access to materials placed on ERROL, and no person or unit at the university should benefit monetarily from the use of the material.

2. Nature of the Work

- Only those portions of the work relevant to the educational objectives of the course should be placed on ERROL.
- The law of fair use applies more narrowly to highly creative works; accordingly, the library may choose not to accept for ERROL substantial excerpts from novels, short stories, poetry, modern art images, and other such materials.
- Instructors should carefully review uses of “consumable” materials such as test forms and workbook pages.

3. Amount of the Work

- Materials placed on ERROL will generally be limited to brief works or brief excerpts from longer works. Examples: a single chapter from a book, individual articles from a journal, and individual news articles.
- The amount of the work placed on ERROL should be related directly to the educational objectives of the course.

4. Effect of the Use on the Market for the Original

- Materials placed on ERROL should include a citation to the original source of publication and a form of a copyright notice. For suggested forms of the notice, see: [Copyright Management Center: Copyright Notices for Supervised Library Copying](#). The electronic reserve system should also advise users that the materials are made available exclusively for use by students enrolled in the course and must not be distributed beyond that limited group.
- Access to materials should be limited by password or other means to deter unauthorized access beyond students enrolled in the specific course for which the specific materials are needed.⁶
- ERROL should not include any material unless the instructor, the library, or another unit of the educational institution possesses a lawfully obtained copy.
- Materials on reserve should not include works that are reasonably available and affordable for students to purchase—whether as a book, coursepack, or other format.

Fair use may apply more liberally to works that are “out of Print.”

The Library will make reasonable efforts to purchase any materials required for teaching needs.

Permission to Post Material

The University Library will ordinarily not seek permissions for the use of copyrighted works in Errol. Instructors at IUPUI are ultimately responsible for securing permission to place material on Oncourse as needed. For more information about permissions, see: <http://copyright.iupui.edu/permsec.htm>

Alternative Methods of Information Delivery

Instructors may want to consider alternative methods of providing students with materials for various reasons. For instance, some copyright owners may routinely deny permission for their works to be accessible in electronic form, or it may be more effective, both in terms of time and money, to use an alternative delivery system.

1. Providing Links to Materials for Students. Linking to materials already lawfully posted on the internet is often the most efficient method of providing materials to students.

2. [Oncourse](#). . Oncourse gives instructors considerable control over the selection and delivery of materials to students. For more information about applying copyright law to Oncourse, see: (future address of Oncourse and Copyright webpage).

3. Traditional Coursepacks. Coursepacks remain a viable option for some instructional needs. They may also be useful if permission to make electronic copies is not available, but permission to make print copies is possible.

4. Requiring Students to Purchase Materials. Don't overlook the simple option of requiring student to purchase books and other materials that include the reading you need for your courses.

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1 Copyright law provides the owner of the copyright with the exclusive right to reproduce, distribute, perform, display or make derivative works of their materials subject to certain statutory exceptions. In most cases, posting copyrighted materials on electronic reserves implicates one or more of these rights. [Return to text](#).

2 Copyright law generally gives automatic protection to "original" works that are "fixed" in any medium. Consequently, the law protects articles, books, photographs, software, music, and an enormous range of new works that are stored on paper, on disk, or in almost any medium. [Return to text](#).

3 In general, the instructor will be the copyright owner of materials created by that individual, and only then if the instructor has not assigned the copyright to another party. Faculty authors frequently assign their copyrights to publishers, most often under the terms of a publication agreement for a journal article or other work. Read the fine print in the contracts carefully to determine who may be the copyright owner of your own work. For further information, see "[Guidance for Faculty on Copyright, Publication and General Research Dissemination](#)", Indiana University Purdue University at Indianapolis, Circular 96-

23, April 23, 1996. [Return to text.](#)

4 Some works are in the public domain and lack copyright protection typically because the copyright has expired or because the work is a "work of the U.S. Government." For more information about these possibilities, see: [Copyright Management Center: Copyright Quickguide](#). Professor Laura N. Gasaway of the University of North Carolina has prepared a chart that succinctly summarizes when copyrights expire, "[When Works Pass Into the Public Domain](#)". [Return to text.](#)

5 The Copyright Act enumerates several exceptions to the exclusive rights held by the copyright owner. Many of the exceptions are narrowly constructed and compliance with the law will involve meticulous planning. For more information, see: [Copyright Management Center: Statutory Exceptions](#). [Return to text.](#)

6 This condition is identical to the condition stated with respect to the "purpose" factor. This one fact—limiting access—can be important to at least two of the four factors in fair-use law. [Return to text.](#)

Links Updated: January 5, 2006

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Checklist for Compliance with the TEACH Act

[Introduction](#) / [pdf version](#)

Please complete and retain a copy of this form in connection with each copyrighted work considered for your distance education course.

Name:

Institution:

Project:

Date:

Prepared by:

All requirements must be satisfied in order to comply with the law.

TEACH Act requirements that will likely fall within the duty of the *Instructor*:

1 [The work to be transmitted may be any of the following:](#)

A performance of a non-dramatic literary work; or

A performance of a non-dramatic musical work; or

A performance of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions"; or

A display in an amount comparable to that which is typically displayed in the course of a live classroom session.

2 The work to be transmitted may not be any of the following:

[Marketed primarily for performance or display as part of a digitally transmitted mediated instructional activity](#); or

[A textbook, coursepack, or other material in any media which is typically purchased or acquired by students for their independent use and retention.](#)

3 [Any permitted performance or display must be both:](#)

Made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities of the educational institution; and

Directly related and of material assistance to the teaching content of the transmission.

4 [The institution does not know or have reason to believe that the copy of the work to be transmitted was not lawfully made or acquired.](#)

5 [If the work to be used has to be converted from print or another analog version to digital format, then both:](#)

The amount of the work converted is no greater than the amount that can lawfully be used for the course; and

There is no digital version of the work available to the institution or the digital version available to the institution has technological protection that prevents its lawful use for the course.

TEACH ACT requirements that will likely fall within the duty of the *Institution*:

6 [The institution for which the work is transmitted is an accredited nonprofit educational institution.](#)

7 [The institution has instituted policies regarding copyright.](#)

8 [The institution has provided information materials to faculty, students, and relevant staff members that describe and promote US copyright laws.](#)

9 [The institution has provided notice to students that materials used in connection with the course may be subject to copyright protection.](#)

10 [The transmission of the content is made solely for students officially enrolled in the course for which the transmission is made.](#)

TEACH Act requirements that will likely fall within the duty of the *Information Technology Officials*:

11 [Technological measures have been taken to reasonably prevent both:](#)

Retention of the work in accessible form by students for longer than the class session; and

Unauthorized further dissemination of the work in accessible form by such recipients to others.

12 [The institution has not engaged in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent retention or dissemination of their works.](#)

13 [The work is stored on a system or network in a manner that is ordinarily not accessible to anyone other than anticipated recipients.](#)

14 [The copy of the work will only be maintained on the system or network in a manner ordinarily accessible for a period that is reasonably necessary to facilitate the transmissions for which it was made.](#)

15 [Any copies made for the purpose of transmitting the work are retained and solely used by the institution.](#)

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Revision Date: February 17, 2005

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Copyright Ownership

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Memorandum of Understanding Assuring Rights of Use of Instructional Materials

This Memorandum of Understanding ("Agreement") is adopted by the following school or department or other unit (the "School") within Indiana University Purdue University Indianapolis ("IUPUI") or Indiana University (IU):

A. The School desires to encourage members of its faculty to provide their best quality services for the production of course materials (the "Course Materials") that may be used in conjunction with one or more courses (the "Course") to be offered by Indiana University ("IU") and transmitted to students by various means and at various locations.

B. The parties desire to assure to faculty authors (collectively the "Instructors") and to IU the ability to use the Course Materials as specified in this Agreement for the advancement of their mutual interests in the best quality education, research, publication, and other scholarly endeavors. This Agreement is especially intended to apply to the work of full-time faculty members; the School may desire other terms applicable to the work of part-time faculty, staff, or contractors.

C. The parties recognize the need to be consistent with the Indiana University Intellectual Property Policy (the "IP Policy"), adopted by the IU Board of Trustees on May 9, 1997, and with any duly adopted amendments to that policy and other appropriate policies of IU that are binding with respect to the Course Materials. To the extent that the Course Materials are "Applicable Intellectual Property" as defined under the IP Policy, this Agreement makes no change in the applicability of the IP Policy to such works. This Agreement applies only to those portions of the Course Materials that are not "Applicable Intellectual Property."

D. The School recognizes that it is a unit of IU and may hold, manage, and exercise any rights accorded to IU under this Agreement, with recognition that it is acting on behalf of the Trustees of IU, and is subject to appropriate actions of the Trustees. The School also recognizes that it should exercise its authority under this Agreement in cooperation with the Instructors, and with the recognition that decisions may directly affect the interests of the Instructors and the integrity of the Course Materials.

E. With respect to rights to the Course Materials held by the Instructors as individuals, they are assenting to the terms of this Agreement, as between the Instructors and IU, including any assignment or license of their rights as described in this Agreement. To that end, each participating Instructor shall execute an "Instructor's Addendum" indicating assent and providing the additional information as specified in this Agreement.

The parties hereby agree as follows:

I. Production of Course Materials

1.1 Description and Purpose. Each participating Instructor shall produce Course Materials as described, and according to the schedule, specified in the Instructor's Addendum. For purposes of this Agreement, the Course Materials shall include only those contributions created by the Instructor. This Agreement does not address rights with respect to elements of the Course created by anyone other than the Instructor, including, without limitation, elements created by other staff members of IU or third parties. Rights to such elements of the Course may be governed by applicable law, policy, or other agreement.

1.2 Funding and Other Support. The School shall provide the financial, equipment, staff support, and other resources and benefits, as described in the Instructor's Addendum, to assist the Instructor in preparing the Course Materials.

II. Rights of Use of the Course Materials

2.1 Instructor's Rights of Use. The parties to this Agreement anticipate that the Course Materials may be "instructional materials" as defined in the IP Policy, and thus most rights of use will reside with the Instructor; in the alternative, the Course Materials may be "institutional works" as defined in the IP Policy, and thus most rights of use will reside with IU.* Regardless of the policy status of the Course Materials, the parties hereby agree that the Instructors reserve the right to use their individual contributions to such instructional materials, without further consent or approval from IU, in any scholarly or creative works that do not compete directly with IU's actual or planned use of the Course Materials, subject to any IU policies and procedures as may be in effect from time to time related to such materials and uses. In particular, the Instructors have the right to use their individual contributions in teaching courses on related topics and in preparing textbooks, journal articles, conference presentations, consulting projects, and other scholarly works or professional activities. In furtherance of such permitted uses, the Instructors may authorize third parties, including publishers, to act on the Instructors' behalf.

2.2 University Rights of Use. Subject to the restrictions set forth in this Agreement, IU may use the Course Materials in connection with courses offered by IU (whether credit or non-credit) with enrolled students, and for independent study by enrolled students, whether those students are located at an IU campus or are accessing the Course Materials at another location or through distance education. IU's rights include the right to reproduce, distribute, perform, display, and transmit the Course Materials and to prepare derivative works based on the Course Materials in furtherance of IU's allowed uses. In furtherance of such permitted uses, IU may authorize third parties to use the Course Materials on IU's behalf.

2.2.1 Archival Copies. IU may retain copies of the Course Materials for archival purposes and make them available to students for their study and reinforcement. IU may also make archival copies of the Course Materials available to any persons who have access to the library or other facility at IU where access to such copies will be maintained. IU has no obligation under this Agreement to restrict access to such archival materials. The ability of

persons to borrow or to make copies of the Course Materials will be subject to the customary standards of the library or other facility at IU with respect to similar materials.

2.2.2 Time Limit on University Use. Other than rights with respect to archival copies pursuant to Section 2.2.1, the right of IU to use the Course Materials pursuant to this Agreement shall terminate on the date specified in the Instructor's Addendum. The right of IU to use the materials shall continue until that date, regardless of whether or not the Instructor has remained employed with IU. The parties understand that this termination is based on the parties' best effort to project the likely viability of the Course Materials for future instruction. The parties may agree in writing at a future date to extend the termination date based on the continuing viability of the Course Materials and the availability of revisions or updates.

III. Instructor's Rights of Control and Credit

3.1 Quality, Clarity, Currency. The Instructors shall have primary control of the substantive and intellectual content of their respective Course Materials, at the time of their production and during their use by IU, in a manner consistent with standards and traditions of academic freedom. As with the preparation of any other scholarly or creative works, the Instructors shall be expected to deliver accurate and current information. The Instructors are responsible for the clarity and precision and the method of communicating information contained in the Course Materials. IU has no obligation to continue to use any of the Course Materials that do not meet IU's appropriate standards of quality.

3.2 Procedure for Updates.

3.2.1 In the event that an Instructor becomes aware of the need to produce a supplemental update to the Course Materials, the Instructor shall deliver written notification of such need to the School. Upon delivery of that written notice, the parties shall determine in good faith within forty-five (45) calendar days the extent to which the Instructor may create the supplemental materials and the extent of any funding or other resources that will be provided by IU to meet the stated need.

3.2.2 In the event that an Instructor has not sent such notice, but the School recognizes a need to prepare such a supplemental update, then the School may initiate the process by delivering a written notification of such need to the Instructor. Upon delivery of that written notice, the parties shall determine in good faith within forty-five (45) calendar days the extent to which the Instructor may create the supplemental materials and the extent of any funding or other resources that will be provided by IU to meet the stated need.

3.2.3 If the updates provided for in this Section are not completed within the designated time period or do not meet standards of quality and accuracy consistent with the Course Materials overall and the standards of instructional works at IU, then IU may in its discretion and at its expense make such updates as IU deems appropriate. IU may in its discretion continue to use the Course Materials while any updates are pending.

3.2.4 Any and all updates prepared by an Instructor consistent with this Agreement are for purposes of this Agreement deemed to be part of the Course Materials.

3.3 Named Credit. The Instructors shall receive named credit as an author or developer on all copies of their respective Course Materials prepared by or authorized by IU. Each Instructor has the right to require removal of his or her name from any copies of the Course Materials made or authorized by IU following receipt of written request by the Instructor.

3.4 No Indemnification by the Instructor. The Instructors shall not include in the content of the Course Materials any content which the Instructors know to, or have reason to believe may, constitute libel, invasion of privacy, infringement of copyright or other literary rights, or otherwise violate the legal rights of any persons or entities who are not a party to this Agreement. Any responsibility or liability for such violations shall be treated in a manner consistent with the customary treatment of similar violations as they may occur in the context of teaching at IU. To that end, each Instructor has read and agrees to adhere to IU policies with respect to copyright, fair use, and other relevant issues. Otherwise, the Instructors make no warranty to IU with respect to the appropriateness of including any content in the Course Materials. Should either an Instructor or the School reasonably conclude that any of the content of the Course Materials may violate such rights of third parties, the procedure and the right to make revisions shall be consistent with the procedures set forth in Section 3.2 above. Pending such revisions, IU shall have the right to remove or revise the portions of the Course Materials that create the potential violations before making any further use of the Course Materials pursuant to this Agreement.

3.5 Credit for Teaching Workload, Promotion, and Tenure. This Agreement does not address any compensation or set any standards or make any adjustments with respect to the Instructor's workload, course enrollments, teaching evaluations, and teaching credit for purposes of review, promotion, tenure, and other employment duties at IU. These issues must be examined outside the context of this Agreement and may require participation by other members of the IU community.

IV. Allocation of Revenues and Responsibilities

4.1 Allocation Between IU and an Instructor. Should IU receive any revenues from the broadcast, sale, or other distribution or use of the Course Materials, the parties shall allocate the revenue between IU and the Instructor in proportion to the Instructor's contribution to the finished work and in accordance with the schedule of "revenue distribution" provided in the IP Policy. For purposes of this allocation, the Instructor shall receive the portion of revenue allocated to the "Creator" under the IP Policy. Allocable revenues shall exclude tuition and fees paid by students to take a course based on the Course Materials. This formula shall also allow IU to recoup its expenses associated with production and update of the Course Materials before allocating revenues to the Instructor.

4.2 Allocations Among Multiple Instructors.

4.2.1 Should multiple Instructors contribute to the Course Materials for a single Course, but their contributions are distinct and identifiably separate, each of the Instructors should enter into a separate Instructor's Addendum, and each contribution shall be treated separately from the others.

4.2.2 Should multiple Instructors contribute to the Course Materials for a single Course, but their contributions are intermingled and not identifiably separate, all of the Instructors should enter into a single Instructor's Addendum with respect to the Course Materials

collectively. That Instructor's Addendum shall set forth the agreement, if any, among the Instructors for the allocation of their collective share of revenue among themselves. In the event that the Instructors should not agree otherwise, their collective share of revenue shall be divided among the Instructors in equal shares. The Instructor's Addendum shall further specify the agreement, if any, among the Instructors with respect to identifying which of them shall have authority to exercise rights given to the Instructors collectively under this Agreement, such as the general rights of use pursuant to Section 2.1 or the right to make updates pursuant to Section 3.1. In the event that the multiple Instructors should not agree otherwise, such authority shall be exercised by a majority decision of them.

V. Copyright Ownership

5.1 Ownership of the Copyright. With respect to any works, projects, or other materials based on the Course Materials and prepared by an Instructor pursuant to the Instructor's rights of use consistent with this Agreement, the Instructor shall have the right to claim and exercise the rights of the copyright owner. With respect to any works, projects, or other materials based on the Course Materials and prepared by IU pursuant to IU's rights of use consistent with this Agreement, IU shall have the right to claim and exercise the rights of the copyright owner of the Course Materials. As of the date of termination of IU's rights of use, as set forth in Section 2.2.2 above, IU's rights with respect to the Course Materials shall terminate, and effective as of that date, IU hereby transfers and assigns to the Instructor all copyright interest that IU holds in the Course Materials. IU shall prepare at its expense all appropriate documents of assignment or transfer, as may be requested by the Instructor. The Instructor and IU understand that their respective copyright interests as set forth in this Agreement are subject to the rights of use held by one another; the parties accordingly understand that they may need to inform publishers and other third parties of the terms of this Agreement, and that neither the Instructor nor IU may hold all rights with respect to any work incorporating any portion of the Course Materials.

5.2 Not "Work Made For Hire." In order to avoid undesirable consequences under the law, the parties agree that the Course Materials will not be treated as a "work made for hire" under the U.S. Copyright Act, to the extent that they may make such agreement under the law.

5.3 Copyright Held by Instructor. In the event that the Course Materials are deemed by a court of competent jurisdiction to be "work made for hire," notwithstanding Section 5.2, IU agrees that it will hold any rights associated with the Course Materials only in a manner consistent with the terms of Section 5.1 above, including, without limitation, the rights of use and the reversion or transfer of title reserved to the Instructor.

VI. General Provisions

6.1 Entire Agreement. This Agreement contains the entire agreement among the parties with respect to the matters explicitly addressed in this Agreement, and there are no agreements, representations, or warranties that are not set forth. All prior negotiations, agreements, and understandings are superseded. This Agreement may not be amended or revised except by a writing signed by all the parties.

6.2 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the

heirs, legal representatives, and successors of the respective parties; provided however, that this Agreement and all its rights may not be assigned by any party except by or with the written consent of the other parties, other than as explicitly stated elsewhere in this agreement. Except as otherwise explicitly provided, this Agreement is not intended and shall not be construed or deemed to create or confer any right or benefit to any person not a party hereto.

6.3 Counterparts. This Agreement may be executed in any number of counterparts, each of which, when bearing original signatures, shall be deemed to be a duplicate original.

6.4 Severability. The provisions of this Agreement are severable and, if part of it is ever found to be invalid or unenforceable, in whole or in part, as to any particular type of claim or any particular circumstance, it shall remain fully valid and enforceable as to all other claims and circumstances.

6.5 Choice of Forum and Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Indiana, and the courts of the State of Indiana shall have exclusive jurisdiction over all disputes arising hereunder or in connection with the subject matter hereof.

Adopted by the School as of the _____ day of _____, 20____.

For the School:
Dean, Chair, or Director

Signed: _____

Printed Name: _____

Title: _____

Instructor's Addendum

Memorandum of Understanding Assuring Rights of Use of Instructional Materials

The Instructor named below enters into this addendum to the Memorandum of Understanding Assuring Rights of Use of Instructional Materials (the "Agreement"), previously adopted by the named School, and hereby assents to be bound by the terms of the Agreement as an "Instructor." In furtherance of the terms of the Agreement, the parties have agreed to the information below:

(See Section 1.1) Description of the "Course Materials" and the Schedule for Delivery:

(See Section 1.2) Funding and Other Support provided to the Instructor:

(See Section 2.2.2) Termination Date, if any, of IU's Rights:

(See Section 4.2.2) Agreement, if any, Regarding Division of Revenue:

(See Section 4.2.2) Agreement, if any, Regarding Exercise of Management Rights:

Instructor:

Signature: _____

Printed Name: _____

Date: _____

Approved and Accepted by the School:

Signature: _____

Name & Title: _____

Date: _____

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*The current IP Policy provides this definition: "Instructional materials' are defined as works, other than institutional works, the primary use of which is for the instruction of students. Such works include textbooks, syllabi, and study guides." Section 2.a. of the IP Policy provides that IU has no rights to instructional materials "unless such rights are voluntarily transferred by the Creator." This Agreement is a means of voluntarily transferring some rights to IU. The IP Policy further provides: "Institutional works' are defined as works created at the instigation of the University, under the specific direction of the University, for the University's use, by a person acting within the scope of his or her employment or subject to a written contract." Section 2.c. of the IP Policy provides that IU "shall own intellectual property rights in institutional works, except as provided in prior written agreements between the University and the persons who create those works." The IP Policy further specifies that Creators shall have no rights to any revenue from institutional works. This Agreement is a means for the parties to make an alternative agreement with respect to rights and revenues as anticipated by the IP Policy. [Return to Text.](#)

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Copyright © 2002-2006 Indiana University

**Memorandum of Understanding
Assuring Rights of Use of Instructional Materials**

Revision: November 26, 2002

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any assignment or license of their rights as described in this Agreement. To that end, each participating Instructor shall execute an “Instructor’s Addendum” indicating assent and providing the additional information as specified in this Agreement.

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II. Rights of Use of the Course Materials

2.1 Instructor’s Rights of Use. The parties to this Agreement anticipate that the Course Materials may be “instructional materials” as defined in the IP Policy, and thus most rights of use will reside with the Instructor; in the alternative, the Course Materials may be “institutional works” as defined in the IP Policy, and thus most rights of use will reside with IU.* Regardless of the policy status of the Course Materials, the parties hereby agree that the Instructors reserve the right to use their individual contributions to such instructional materials, without further consent or approval from IU, in any scholarly or creative works that do not compete directly with IU’s actual or planned use of the Course Materials, subject to any IU policies and procedures as may be in effect from time to time related to such materials and uses. In particular, the Instructors have the right to use their individual contributions in teaching courses on related topics and in preparing textbooks, journal articles, conference presentations, consulting projects, and other scholarly works or professional activities. In furtherance of such permitted uses, the Instructors may authorize third parties, including publishers, to act on the

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Instructors' behalf.

2.2 University Rights of Use. Subject to the restrictions set forth in this Agreement, IU may use the Course Materials in connection with courses offered by IU (whether credit or non-credit) with enrolled students, and for independent study by enrolled students, whether those students are located at an IU campus or are accessing the Course Materials at another location or through distance education. IU's rights include the right to reproduce, distribute, perform, display, and transmit the Course Materials and to prepare derivative works based on the Course Materials in furtherance of IU's allowed uses. In furtherance of such permitted uses, IU may authorize third parties to use the Course Materials on IU's behalf.

2.2.1 Archival Copies. IU may retain copies of the Course Materials for archival purposes and make them available to students for their study and reinforcement. IU may also make archival copies of the Course Materials available to any persons who have access to the library or other facility at IU where access to such copies will be maintained. IU has no obligation under this Agreement to restrict access to such archival materials. The ability of persons to borrow or to make copies of the Course Materials will be subject to the customary standards of the library or other facility at IU with respect to similar materials.

2.2.2 Time Limit on University Use. Other than rights with respect to archival copies pursuant to Section 2.2.1, the right of IU to use the Course Materials pursuant to this Agreement shall terminate on the date specified in the Instructor's Addendum. The right of IU to use the materials shall continue until that date, regardless of whether or not the Instructor has remained employed with IU. The parties understand that this termination is based on the parties' best effort to project the likely viability of the Course Materials for future instruction. The parties may agree in writing at a future date to extend the termination date based on the continuing viability of the Course Materials and the availability of revisions or updates.

III. Instructor's Rights of Control and Credit

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3.2 Procedure for Updates.

3.2.1 In the event that an Instructor becomes aware of the need to produce a supplemental update to the Course Materials, the Instructor shall deliver written notification of such need to the School. Upon delivery of that written notice, the parties shall determine in good faith within forty-five (45) calendar days the extent to which the Instructor may create the

supplemental materials and the extent of any funding or other resources that will be provided by IU to meet the stated need.

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IV. Allocation of Revenues and Responsibilities

4.1 Allocation Between IU and an Instructor. Should IU receive any revenues from the broadcast, sale, or other distribution or use of the Course Materials, the parties shall allocate the revenue between IU and the Instructor in proportion to the Instructor's contribution to the finished work and in accordance with the schedule of "revenue distribution" provided in the IP Policy. For purposes of this allocation, the Instructor shall receive the portion of revenue allocated to the "Creator" under the IP Policy. Allocable revenues shall exclude tuition and fees paid by students to take a course based on the Course Materials. This formula shall also allow IU to recoup its expenses associated with production and update of the Course Materials before allocating revenues to the Instructor.

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V. Copyright Ownership

5.1 Ownership of the Copyright. With respect to any works, projects, or other materials based on the Course Materials and prepared by an Instructor pursuant to the Instructor's rights of use consistent with this Agreement, the Instructor shall have the right to claim and exercise the rights of the copyright owner. With respect to any works, projects, or other materials based on the Course Materials and prepared by IU pursuant to IU's rights of use consistent with this Agreement, IU shall have the right to claim and exercise the rights of the copyright owner of the Course Materials. As of the date of termination of IU's rights of use, as set forth in Section 2.2.2 above, IU's rights with respect to the Course Materials shall terminate, and effective as of that date, IU hereby transfers and assigns to the Instructor all copyright

interest that IU holds in the Course Materials. IU shall prepare at its expense all appropriate documents of assignment or transfer, as may be requested by the Instructor. The Instructor and IU understand that their respective copyright interests as set forth in this Agreement are subject to the rights of use held by one another; the parties accordingly understand that they may need to inform publishers and other third parties of the terms of this Agreement, and that neither the Instructor nor IU may hold all rights with respect to any work incorporating any portion of the Course Materials.

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6.3 Counterparts. This Agreement may be executed in any number of counterparts, each of which, when bearing original signatures, shall be deemed to be a duplicate original.

6.4 Severability. The provisions of this Agreement are severable and, if part of it is ever found to be invalid or unenforceable, in whole or in part, as to any particular type of claim or any particular circumstance, it shall remain fully valid and enforceable as to all other claims and circumstances.

6.5 Choice of Forum and Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Indiana, and the courts of the State of Indiana shall have exclusive jurisdiction over all disputes arising hereunder or in connection with the subject matter hereof.

Adopted by the School as of the _____ day of _____, 20____.

For the School:
Dean, Chair, or Director

Signed: _____

Printed Name: _____

Title: _____

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Instructor's Addendum

Memorandum of Understanding Assuring Rights of Use of Instructional Materials

The Instructor named below enters into this addendum to the Memorandum of Understanding Assuring Rights of Use of Instructional Materials (the "Agreement"), previously adopted by the named School, and hereby assents to be bound by the terms of the Agreement as an "Instructor." In furtherance of the terms of the Agreement, the parties have agreed to the information below:

(See Section 1.1) Description of the "Course Materials" and the Schedule for Delivery:

(See Section 1.2) Funding and Other Support provided to the Instructor:

(See Section 2.2.2) Termination Date, if any, of IU's Rights:

(See Section 4.2.2) Agreement, if any, Regarding Division of Revenue:

(See Section 4.2.2) Agreement, if any, Regarding Exercise of Management Rights:

Instructor:

Approved and Accepted by the School:

Signature: _____

Signature: _____

Printed Name: _____

Name & Title: _____

Date: _____

Date: _____

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Memorandum of Understanding Assuring Rights of Use of Instructional Materials: Summary and Overview

Prepared by the
COPYRIGHT MANAGEMENT CENTER

The Following is a Summary and Overview of the Memorandum of Understanding - "MOU".
[Click here to read the "MOU".](#)
[Click here to read FAQs about the "MOU".](#)

Kenneth D. Crews, Associate Dean of the Faculties for Copyright Management
Indiana University-Purdue University Indianapolis
755 West Michigan Street
Indianapolis, IN 46202-5195
Voice: 317-274-4400 Fax: 317-278-3326
<http://www.copyright.iupui.edu>

November 26, 2002

The "Memorandum of Understanding" is offered for adoption by the university community as a tool for addressing one of the most perplexing issues surrounding the management of our own intellectual works: How can the university community hold and manage the rights to instructional materials in a manner that best promotes quality teaching and scholarship? This instrument has the fundamental purpose of clarifying the rights of faculty, staff, and the university to use and benefit from instructional works developed in a collaborative environment. The document preserves the basic principle that faculty hold rights to their instructional works, while allowing a sharing of rights to assure the continuation of university programs. While no agreement or policy is perfect, this project takes a major step toward addressing and resolving much of the tension surrounding the unavoidable legal issues affecting scholarly work.

The law of copyright is simply inadequate to meet the wide range of interests that diverse parties have in collaborative projects, especially in the academic setting. The law also embodies tremendous risk. Recent court rulings have indicated that much faculty work product may well be "work made for hire" under copyright law, with all rights belonging to the employer university. Such a sweeping grant of all rights to any one party is an affront to the more cooperative nature of academic work. The "Memorandum of Understanding" is an attempt to establish a more mutually beneficial model for sharing rights to use instructional materials.

The agreement is the result of extensive collaboration among faculty, staff, and administrators, with guidance from the Copyright Management Center, to identify major issues and to create a framework for balancing the needs and expectations of the parties. To that end, the agreement prevents any one party from having all rights to control the finished work. The agreement also carefully assures faculty authors and the institution that they may pursue future programs of teaching and scholarship based on the instructional materials.

We are pleased to highlight the following key provisions, and we welcome your insights and comments about the agreement.

- Faculty retain rights to use their works in almost any scholarly or creative works that they later develop. From Section 2.1: “In particular, the Instructors will have the right to use their individual contributions in teaching courses on related topics and in preparing textbooks, journal articles, conference presentations, consulting projects, and other scholarly works or professional activities.”
- The university will have the authority to use the works in connection with teaching activities on campus, through distance education, and in other instructional efforts. The university will share with the developers any income from its use of the works. The university’s rights will terminate at an agreed time, and all rights will at that time revert to the faculty member or other creator of the work. While the university may place its copyright notice on the materials that it distributes, that right as well terminates on the agreed date.
- The faculty member who creates the instructional work has control of the content, and has the authority to make updates and corrections.
- The faculty member has the right to have his or her name on the finished work, or to remove the name if so desired.
- Perhaps the only significant limit on faculty member’s rights to future uses of the materials would arise if the instructor desires to pursue distance education programs sponsored by another institution that would reach the same students who might enroll in a program sponsored by IU using the same materials. Otherwise, the agreement does not prevent faculty from using their materials at another educational institution, should the opportunity arise.

Faculty members at IU are subject to this Memorandum of Understanding only voluntarily and with respect to specific course materials. Should any instructor choose not to accept these terms, other results under policy or applicable law may define the rights of the parties.

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COPYRIGHT AND PUBLISHING AGREEMENT

The Indiana Law Review is pleased to accept for publication your article entitled:

(hereinafter "the Article").

We look forward to working with you to prepare the Article for publication.

The publishing industry has grown increasingly complex in recent years, particularly with the expansion of new technologies for the delivery of information. In order to better manage the rights associated with your Article, and to provide optimal access to it, we believe you, the Author, should hold the copyright to your Article, but that you should grant us, the *Indiana Law Review*, appropriate rights to use your Article for the benefit of the scholarly community. We believe that this arrangement will properly serve our shared interest in reaching the largest readership possible. We also believe that by securing certain in the Article, we will be better able to disseminate your Article through research databases, on the Internet or CD-ROM, and by other means that will exist in the years to come.

To that end, the parties to this Agreement agree as follows:

1. You shall retain the copyright and all other literary rights in and to the Article. This Agreement shall in no way limit your right to:

- a. Reproduce, distribute, display, and transmit copies of the Article for your own personal, professional, or educational purposes, provided that each copy includes appropriate credit to the *Indiana Law Review* as the original published source of the Article.
- b. Publish all or part of the Article in subsequent works of your own, such as a new article on the same subject or a book of which you are an author, provided that you credit the *Indiana Law Review* as the original published source of the relevant material.

For a period of one year after the date of first publication in the *Indiana Law Review*, any publication of the article in a collective work prepared by others shall require our permission.

2. You represent and warrant that the Article is your original work, that you own the copyright in its entirety, that it contains no material that infringes the copyright of any other person, that it has not been published previously, and that you have the full power and authority to enter into and perform this Agreement.

3. Although you will remain the copyright owner, you grant to the Indiana Law Review acting on behalf of the Trustees of Indiana University the irrevocable, nonexclusive rights to:

a. Reproduce, publicly distribute and display, and transmit the Article or portions thereof in any manner, including but not limited to journals, as part of collective works, as reprints, and through any medium now in existence or developed in the future including but not limited to print, electronic and digital media, computerized retrieval systems, and other formats. The Indiana Law Review may exercise these rights directly or by means of third-party information providers, including but not limited to Lexis and Westlaw or third-party publishers and printers.

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c. Grant permission to third parties to reproduce and distribute the Article for educational or research uses, provided that the Indiana Law Review requests of the third party that: (i) the author and Indiana Law Review are identified on each copy; and (ii) proper notice of copyright is affixed to each copy.

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Due to changing circumstances in the publishing industry and in copyright law, we must reserve the right to revise or delete this notice on future publications that include your Article. This copyright notice in the name of the university on the journal issue does not preclude your adding a copyright notice to your individual Article.

Executed as of the _____ day of _____, 20_____.

Author's signature

Indiana Law Review
on behalf of the Trustees of Indiana University

By: _____

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To that end, the parties to this Agreement agree as follows:

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 - b. Publish all or part of the Article in subsequent works of your own, such as a new article on the same subject or a book of which you are an author, provided that you credit the *Indiana Law Review* as the original published source of the relevant material.
2. You represent and warrant that the Article is your original work, that you own the copyright in its entirety, that it contains no material that infringes the copyright of any other person, that it has not been published previously, and that you have the full power and authority to enter into and perform this Agreement.
3. Although you will remain the copyright owner, you grant to the *Indiana Law Review* acting on behalf of the Trustees of Indiana University the irrevocable, nonexclusive rights to:
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Due to changing circumstances in the publishing industry and in copyright law, we must reserve the right to revise or delete this notice on future publications that include your Article. This copyright notice in the name of the university on the journal issue does not preclude your adding a copyright notice to your individual Article.

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1. Grant of Permission. I, the undersigned, am a student at Indiana University ("IU"), and I hereby give to IU my permission to use the following work (the "Work"):
[Insert description of the Work prepared by the student.]

2. Scope of Permission. This permission extends to the use of the Work as described below:

[Insert specific description of the permitted use of the Work, e.g., "Inclusion of the Work on a website based at IU operated by Professor Smith, accessible without restriction, in connection with History 101, for a period of two years from the date below."]

3. Certification of Authorship. I am the owner of the copyright to the Work, and the Work is not now subject to any grant or restriction that would prevent its use consistent with this permission. Except as explicitly indicated on the Work, all aspects of the Work are original to me and have not been copied or adapted from other sources.

4. Privacy Release. I hereby authorize and consent to the release, maintenance and display of my name, status as a student at IU, and any other personal information I have provided in connection with the Work and its use by IU. This authorization also includes the disclosure of the content of the Work itself and any associated information. I hereby release The Trustees of Indiana University, its member trustees, officers, employees and agents, and any other person who may be legally liable, from any and all claims, demands, causes of action, and suits, including but not limited to claims for invasion of privacy, defamation, breach of contract or other breach of duty (including, e.g., the Family Educational Rights and Privacy Act, the Indiana Rights of Publicity Act, the Indiana Access to Public Records Act, etc.), arising out of or in connection with the maintenance, use or release of any personal information as described above.

Signature of Student: _____

Printed Name: _____

Date: _____

Address or other Contact Information: _____

Notes:

The student and the individual responsible for the project in question should retain signed copies of this document for their records. This document was developed by the Copyright Management Center and the Office of University Counsel at IUPUI (www.iupui.edu).

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[Insert description of the Work prepared by the student.]

2. Scope of Permission. This permission extends to the use of the Work as described below:

[Insert specific description of the permitted use of the Work, e.g., "Inclusion of the Work on a website based at IU operated by Professor Smith, accessible without restriction, in connection with History 101, for a period of two years from the date below."]

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4. Privacy Release. I hereby authorize and consent to the release, maintenance and display of my name, status as a student at IU, and any other personal information I have provided in connection with the Work and its use by IU. This authorization also includes the disclosure of the content of the Work itself and any associated information. I hereby release The Trustees of Indiana University, its member trustees, officers, employees and agents, and any other person who may be legally liable, from any and all claims, demands, causes of action, and suits, including but not limited to claims for invasion of privacy, defamation, breach of contract or other breach of duty (including, e.g., the Family Educational Rights and Privacy Act, the Indiana Rights of Publicity Act, the Indiana Access to Public Records Act, etc.), arising out of or in connection with the maintenance, use or release of any personal information as described above.

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I hereby assign and license to the Trustees of Indiana University ("IU") any and all copyright or other literary rights that I may have in and to said production. I will receive no remuneration for my participation in this production.

I hereby agree that IU and its assigns, agents, employees, licensors, and successors (collectively the "IU parties") may, by any media whatsoever, produce, distribute, exhibit, broadcast, and promote scenes of me in connection with said production, and may sell or license the same for distribution, exhibition, or broadcast to any other person or entity and that the IU parties may make reference to and use my name, voice, and likeness. I further agree that the IU parties may edit scenes and my appearance in the production, and may use or authorize others to use such scenes in other formats. I waive all personal or proprietary rights with respect to the production.

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I hereby agree that IU and its assigns, agents, employees, licensors, and successors (collectively the "IU parties") may, by any media whatsoever, produce, distribute, exhibit, broadcast, and promote scenes of me in connection with said production, and may sell or license the same for distribution, exhibition, or broadcast to any other person or entity and that the IU parties may make reference to and use my name, voice, and likeness. I further agree that the IU parties may edit scenes and my appearance in the production, and may use or authorize others to use such scenes in other formats. I waive all personal or proprietary rights with respect to the production.

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Research Assistant Copyright Agreement

I, the undersigned, am employed by, or otherwise providing services to, Indiana University in connection with the following project or tasks:

I agree that any copyrightable works that I may create within the scope of my service as shall be regarded as "works made for hire" under the U.S. Copyright Act. Should any such works not qualify as works made for hire under the law, I hereby assign or transfer any copyright interest that I may have in and to such works to the Trustees of Indiana University ("IU"). This agreement and the management of the works within the scope of this agreement will be subject to policies and procedures of IU as may be in force from time to time regarding the ownership and management of intellectual property. I agree to cooperate with my supervisors and other directors of the projects and with other officers of IU to execute assignments, registrations, and other documents related to the ownership of specific works created by me.

Except as I explicitly inform my supervisors and other directors of relevant projects, I represent and warrant that all works that I create and deliver the scope of my service to IU are my original work, have been not been copied or adapted from any other source. To the best of my knowledge, no such work shall infringe on the rights of any other person.

I understand that I should discuss with my supervisors any proposals for my use of the works, including such uses as: authorizing creation of scholarly publications and other products based on such works, retaining such works in my personal or professional portfolio, or utilizing such works in other projects, academic assignments, or employment duties. Some uses may be allowed by university policy, but I understand that I should discuss all uses of the works with my supervisor and should confirm any agreements in writing.

SIGNED: _____

Type or Print Name: _____

Date: _____

AGREED TO AND APPROVED:

Instructor's signature: _____

Type or Print Name: _____

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RESEARCH ASSISTANT COPYRIGHT AGREEMENT

I, the undersigned, am employed by, or otherwise providing services to, Indiana University in connection with the following project or tasks:

I agree that any copyrightable works that I may create within the scope of my service as shall be regarded as “works made for hire” under the U.S. Copyright Act. Should any such works not qualify as works made for hire under the law, I hereby assign or transfer any copyright interest that I may have in and to such works to the Trustees of Indiana University (“IU”). This agreement and the management of the works within the scope of this agreement will be subject to policies and procedures of IU as may be in force from time to time regarding the ownership and management of intellectual property. I agree to cooperate with my supervisors and other directors of the projects and with other officers of IU to execute assignments, registrations, and other documents related to the ownership of specific works created by me.

Except as I explicitly inform my supervisors and other directors of relevant projects, I represent and warrant that all works that I create and deliver the scope of my service to IU are my original work, have been not been copied or adapted from any other source. To the best of my knowledge, no such work shall infringe on the rights of any other person.

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SIGNED: _____

Type or Print Name: _____

Date: _____

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CHECKLIST FOR FAIR USE

Please complete and retain a copy of this form in connection with each possible "fair use" of a copyrighted work for your project

Name: _____

Date: _____

Project: _____

Institution: _____

Prepared by: _____

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Favoring Fair Use

- ☐ Teaching (including multiple copies for classroom use)
- ☐ Research
- ☐ Scholarship
- ☐ Nonprofit Educational Institution
- ☐ Criticism
- ☐ Comment
- ☐ News reporting
- ☐ Transformative or Productive use (changes the work for new utility)
- ☐ Restricted access (to students or other appropriate group)
- ☐ Parody

Opposing Fair Use

- ☐ Commercial activity
- ☐ Profiting from the use
- ☐ Entertainment
- ☐ Bad-faith behavior
- ☐ Denying credit to original author

NATURE

Favoring Fair Use

- ☐ Published work
- ☐ Factual or nonfiction based
- ☐ Important to favored educational objectives

Opposing Fair Use

- ☐ Unpublished work
- ☐ Highly creative work (art, music, novels, films, plays)
- ☐ Fiction

AMOUNT

Favoring Fair Use

- ☐ Small quantity
- ☐ Portion used is not central or significant to entire work
- ☐ Amount is appropriate for favored educational purpose

Opposing Fair Use

- ☐ Large portion or whole work used
- ☐ Portion used is central to work or "heart of the work"

EFFECT

Favoring Fair Use

- ☐ User owns lawfully acquired or purchased copy of original work
- ☐ One or few copies made
- ☐ No significant effect on the market or potential market for copyrighted work
- ☐ No similar product marketed by the copyright holder
- ☐ Lack of licensing mechanism

Opposing Fair Use

- ☐ Could replace sale of copyrighted work
 - ☐ Significantly impairs market or potential market for copyrighted work or derivative
 - ☐ Reasonably available licensing mechanism for use of the copyrighted work
 - ☐ Affordable permission available for using work
 - ☐ Numerous copies made
 - ☐ You made it accessible on Web or in other public forum
 - ☐ Repeated or long-term use
-
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Introduction to Permission Letters

Prepared by the:

Copyright Management Center
Indiana University-Purdue University at Indianapolis
530 West New York Street
Indianapolis, Indiana 46202-3225
(317) 274-4400

July 26, 2000

The following letters are to be used as sample model letters and not form letters. While some of these letters may apply to your individual situation, they should also be examined and modified to fit the specifics of your request. Merely copying one of these letters word for word is not recommended. Take the time to look these over and feel free to modify them to fit your needs. *Please note-items in brackets "[]" are indicators that you should provide the proper information as suggested by the text within the brackets.

The letters also suggest that you send two copies to the rightsholder. One to be sent back and one to be kept for the rightsholder's records. Additionally, it is suggested that you send a self-addressed stamped envelope (SASE) with your request. If you choose not to include a copy of the request and/or a SASE, then you will need to change your letter accordingly.

The following are the types of model letters included:

- [General letter requesting permission](#)

Specific requests for permission for:

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- [Electronic course reserves \("e-reserves"\)](#)

- [Website for teaching](#)

- [Electronic mailing list for teaching](#)

- [IUPUI Online](#)

- Distance education

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An Intellectual Property Primer:

Protecting Your Investment with Copyright, Patent, Trade Secret, and Trademark

What exactly is “intellectual property” or “IP”? Pick up the morning paper and you might find some clues:

Trump Wants Trademark On “You’re Fired”

Court Orders Napster To Shut Down; Music Industry Threatens To Sue Individuals

Profits For Drug Manufacturer Drastically Down After Claritin Goes Generic

Court Rules ‘Redskins’ Not Offensive; Team Keeps Trademark

But the headlines tell only part of the story. Intellectual property extends far beyond providing interesting dinner conversation about the latest lawsuit over music downloading. Owning, creating and leveraging your intellectual property is rapidly becoming an integral part of any business – especially those in life sciences tasked with creating and bringing to market new and better ways to improve our health and well-being. From copyright and trademark to patents and trade secret, intellectual property rights encourage innovation and promote stability.

Indeed, intellectual property protection is part of the very framework of our society and country. The United States Constitution first granted Congress the power to protect intellectual property in Article I, Section 8, otherwise known as the “patent and copyright clause,” (or sometimes just the “copyright clause”):

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

This primer is designed to introduce you to the basic forms and theories of intellectual property. IP law is constantly changing, with new theories and defenses proposed by courts, legislators, and commentators. This primer will explain the mechanics of the various types of intellectual property within the context of the goals of an intellectual property system and what lawmakers aim to balance when debating new IP rights and remedies.

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The Goal of Intellectual Property: Promoting Innovation



School children learn early that plagiarism is wrong. This simple premise provides the foundation for much of intellectual property law. Society generally believes that it is *not right* for Bob to take, for his own, an invention, a poem or business goodwill that Mary worked hard to create. The belief is that if Bob could appropriate with impunity Mary's goodwill and reap the rewards, why would Mary ever work hard to create something new in the future?

Intellectual property law steps in to protect Mary's legitimate and reasonable rights in her inventions, ideas and goodwill by, for example, giving her a limited monopoly on her creation. Mary can prohibit others from using her creation or license the use of it. These rights aim to *promote future innovation* by allowing Mary and other creators to recoup their investments in the creative process. Judges, legislators and intellectual property theorists often debate the proper balance of IP, as intellectual property rights may also *limit* future creation by reducing the raw materials that creators can use. In other words, in some cases, monopolies are discouraged and plagiarism is *encouraged* because it benefits society. Indeed, many creations are cumulative: that is, the current inventor or author borrows heavily from previous attempts and successful creations. As Sir Isaac Newton said, "If I have seen further, it is by standing on the shoulders of giants." Many famous novels, movies and songs borrow characters, plots or rhythms from earlier creations. Material that is not granted intellectual property protection, or for which the IP right has expired, is known as the *public domain*.

IP thus seeks the optimal balance between preserving a large public domain from which future creators can draw, and incentivizing current creation. This balance takes the form of limitations on the property right an IP holder has. For example, the *duration* of an IP right is limited in time (patents, for example, expire after 20 years). Conversely, a property right in land generally lasts forever, or until the owner decides to transfer the property. We'll discuss these limits more in depth as we explain the specifics of various types of intellectual property rights.

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Copyright

Copyright is easy to get: once you have created a protectable work, you generally own the copyright without any effort on your part. Copyright is also less powerful than other IP rights, because others can use your copyrighted material if their use qualifies as “fair.” In this section, we’ll explain what qualifies as copyright, the formalities of copyright protection, and what rights you as a copyright holder do have.



The Subject Matter of Copyright: Is My Work Copyrightable?

To be protectable, a work must be an original, fixed, non-functional expression. Books, articles, plays, movies, sound recordings, and art are copyrightable. So is the doodle you scribble on a pad of paper, as well as:

- e-mail messages;
- computer programs (whether in source or object code);
- video games;
- recorded staged professional wrestling matches (and other choreographed performances); and
- architectural design.

These are all examples of fixed, non-functional expressions. To receive copyright protection, the work must also be original.

The *originality* requirement is two-fold: First, the work must be independently created by the author (as opposed to copied from other works); and Second, the work must possess at least a minimal degree of creativity. The discoverer of a lost Emily Dickinson poem would not hold copyright to it, because he did not create it. The second requirement does not impose a merit test on the potential copyright holder, but rather denies protection to works with no creativity. Telephone books provide the best example. In a famous case, Company A copied listings from Company B’s directory. B’s directory was arranged in the standard alphabetical order, and used phone numbers and street addresses available to anyone. To save time in gathering this data, A copied B’s listings verbatim -- including some dummy listings B put in its directory as a ploy to catch copiers. The Supreme Court held B’s listing uncopyrightable, but explained that the originality requirement will be found in all but “a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” Later courts have held yellow pages copyrightable because there is some creativity in what categories to use.

Related to the originality requirement is the notion that only *expressions* are protected. Ideas, facts, processes, and discoveries are not eligible for copyright, but the manner in which ideas are expressed or facts compiled may be copyrightable. In 1879, the Supreme Court held that when an idea is taught by a work of authorship that cannot be used without copying some aspect of the work, that particular aspect of the work is not copyrightable. Thus, a particular method of bookkeeping and the blank forms used to illustrate it could not be copyrighted. More

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than a hundred years later, courts are still trying to find that right balance when faced with litigation over baseball box score forms, legal databases and classifications, and computer operating systems. The *functional* aspects of a work are also not copyrightable. An ornamental bicycle rack shaped similar to a ribbon, for example, is functional when its aesthetic design is influenced by pragmatic concerns, and thus the ribbon rack is not protected as copyright.

Because facts, ideas and discoveries are not necessarily protected, various groups have asked Congress to enact specific legislation to provide relief against outright copying of that material. For example, several database protection bills have been introduced and debated in Congress, but none has yet to pass. This debate – whether uncopyrightable compilations of facts should be protected – illustrates the tension at the heart of IP law. Under the “sweat of the brow” theory, people who have worked hard at gathering the information and facts deserve the reward of the right to stop others from copying their efforts. This theory hopes to encourage investment in fact and data collection. Other theorists argue that without the originality and expression requirements of copyright, the public domain would shrink drastically, leaving future creators without ideas to build upon.

Finally, to be copyrightable, a work must be *fixed*. The work must be on paper, saved to a computer drive, sculpted in clay, or otherwise stored in some medium. Therefore, spoken words that are not recorded are not copyrightable. Fixation is not as difficult to achieve as you might think: making a copy into RAM (a computer’s memory), even if only briefly, qualifies as work as *fixed*. Further, some non-fixed works, such as non-recorded musical performances, receive protection from bootlegging through a specific statutory scheme enacted outside the rubric of the Copyright Act. This type of protection, like the proposed database bills, offers what’s called *sui generis* protection: the IP right that attaches is not copyright, but rather stands alone.

Copyright Formalities: How Do I Get Protection?

Once a work meets the above qualifications and is eligible for protection, the law grants copyright protection automatically. No longer is a copyright owner required to register the work with the U.S. Copyright Office or place any kind of notice or statement on the work. You may want to register some works anyway, as registration 1) is required before bringing a lawsuit for infringement against someone; 2) establishes *prima facie* (or conclusive unless rebutted) evidence in court of the validity of the copyright and of the facts stated in the certificate, if done within five years of creation; and 3) allows a court to award you punitive damages and attorney’s fees, if done within three months of creation or prior to any infringing action. Otherwise only *actual damages* are available.

Short Form TX
For a Non-dramatic Literary Work
UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER

You can register copy-righted material easily, without the assistance of a lawyer. Detailed instructions are available at www.copyright.gov/register. Basically, all you need to do is fill out the form reproduced on the left and send it, a copy of your work, and \$30 to the government.

Works made for hire or authored by more than a single individual, or works that include elements of works that have been published before, use a slightly longer form.

Copyright law grants to owners a set of exclusive rights for a limited, but lengthy, time period. These exclusive rights include the right to make and distribute copies of the work, the right to make derivatives, and the right to make public performances and displays. If someone else exercises these rights without the copyright owner's permission, they may be liable for infringement. A copyright owner must prove 1) ownership of a valid copyright; and 2) copying of the constituent elements of the work that are original. Additionally, the copyright owner must rebut or defend against any defenses the potential infringer has.

Just because a work is registered with the Copyright Office does not mean a court will hold the copyright valid. If a copyright holder brings an infringement suit, the court first decides whether the copyright is valid; that is, whether it is an original, non-functional, fixed, expression.

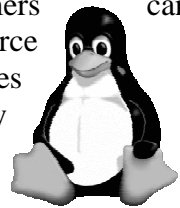
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contractors can own works made for hire if another party pays for the work and takes the economic risk involved. First, if an employee creates a work as part of his employment, then the work is a work for hire. Second, a commissioning party may own a work created by an independent contractor if they have a written, signed agreement that the work will be considered a work for hire, and the work falls into one of several broad categories.

Independent contractors may prefer to own the copyright initially and then *assign* it to a person commissioning the work immediately as a term of the contract. Different rights attach, depending on whether the work is a work for hire or merely assigned to the commissioning party. Assignment gives the new owner most of the rights the creator would have had. Copyright owners can also *license* the work. Licensing allows the creator to keep all rights except for the limited rights sold in the licensing contract.

Licensing agreements can be powerful tools. The open-source software movement has flourished with strong licensing agreements that typically prevent users of the first work from taking any modifications private. The idea of open-source software is that programmers should have free access to the source code used in software. With this access, programmers can fix bugs, share ideas, or adapt the software to individual needs. Open-source software is licensed under a number of different arrangements, but most licenses require the user of the original source code to make any modifications publicly available, in exchange for use of the previously developed work. Open source success stories such as LINUX give fodder to those who argue that copyright protection is not necessary for economic success.



Some researchers are trying to implement a similar model in life sciences research to develop new drugs for use in undeveloped countries, a traditionally unprofitable enterprise. For more information on the idea of open science, you can download a paper from Stephen Maurer's website that provides an overview of the proposals and links to further studies, at www.merit.unimaas.nl/epip/papers/maurer_paper.pdf.

Copying of the Constituent Elements

After establishing that you own a valid copyright that is not made for hire, assigned or licensed with restrictions, the next step to proving infringement is to show unlawful copying of the constituent elements. If two people make the exact same work, without ever having access to the other's work, each is entitled to copyright protection. That is, independent production of the same material is not infringement; there must be copying of the constituent elements. To prove infringement, however, circumstantial evidence generally suffices. For example, if the infringer has access to the material and the works are similar, a court may infer that the infringer copied the material. Sometimes the similarity between the two works is so striking that a court will infer copying, even without specific evidence of access.

The infringer must have done more than copy the material – the copying must amount to an *unlawful appropriation*. Courts have struggled to articulate tests to determine whether a defendant has improperly appropriated copyrighted elements of a plaintiff's work. In many litigated cases, a defendant copies the plaintiff's uncopyrightable idea, and the court must thus determine whether the defendant also appropriated the plaintiff's protected expression of that

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idea. Courts do not use bright-line rules to make these decisions, but rather compare facts of the case before them to previous decisions and precedents.

Fair Use

The exclusive rights granted to a copyright owner are subject to numerous statutory exceptions or “limitations.” The best known of those exceptions is “fair use,” which generally allows the public to make limited uses of a copyrighted work, most often in the context of education, research, or news reporting. Economically-driven uses will likely be deemed not fair, as courts consider both the purpose of use and the potential effect of the use on the market for or value of the copyrighted work. Among the uses courts have deemed fair include: a rap parody of “Pretty Woman”; a parody of “Gone with the Wind” told from the perspective of a slave; and a newspaper’s publication of an article containing parts of works owned by a religious leader.

Duration of the Copyright

In general, copyrighted works created today have protection for the life of the author plus seventy years. In the case of a “work made for hire,” the copyright lasts for ninety-five years from publication of the work, or one hundred twenty years from its creation, whichever expires first. Congress can also extend the copyright of works already registered. In 1998, Congress passed the Sonny Bono Copyright Term Extension Act to extend copyright terms by twenty years. The Act, often dubbed the Mickey Mouse Act because it was passed just before many Disney creations were set to enter to the public domain, set off a firestorm of controversy. Without this protection, classics such as *The Great Gatsby*, *The Wizard of Oz*, and George Gershwin’s “Rhapsody in Blue” would have soon entered the public domain. Now, these works have another twenty years of a legally-protected monopoly right. Critics charged that the Constitution’s requirement that copyright exist only for “limited times” was a nullity if Congress could continually extend copyright terms. In 2000, however, the Supreme Court narrowly ruled the Act constitutional and deferred to Congress’ judgment.

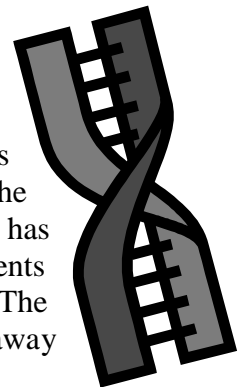
Patent Law

Patent law gives certain inventors powerful rights and a limited legal monopoly. In part, these rights serve to reward effort and promote invention. Our patent system also functions, thus, as a *prospecting system*. Because the scope of the patent right is often larger than a simple reward for invention, and because a reward system need not have such competition, patent law allows firms to “prospect” certain ideas and coordinate development efforts accordingly. In short, patent law is not as simple as “build a new invention, patent it, and sell it.” A single pharmaceutical drug may be the product of hundreds, even thousands, of patents. Companies today use patents as leverage in negotiations, as a defense against a potential infringement action, or simply as a signaling device.

So I’ve got this living thing. Does patent law cover that type of subject matter?

Nearly 25 years ago, the Chief Justice Burger of the United States Supreme Court famously noted that patentable subject matter includes “anything under the sun that is made by man.” Since then, patents have covered a wide range of subject matter, including live organisms, genes and proteins. Similarly, business methods and mathematical algorithms are now patentable. Only recently have courts held these types of patents valid. Thus, your method of doing business, performing surgery, or implementing data may not only give you a competitive advantage in the marketplace, but also give you the ability to earn licensing revenues if you patent the idea. Conversely, laws of nature (such as Einstein’s $E=mc^2$ equation), abstract ideas, and physical phenomena are not patentable. A new mineral discovered from in the ground is not patentable, but a synthetic process to make a new mineral, bacteria or other living thing would be.

Controversy erupted in the 1990s when scientists started filing applications for bits of human DNA gene sequences, often without knowing the gene’s function. Critics argued that allowing DNA sequences to be patented would hinder further gene research, while others charged that it was wrong to allow private ownership of tiny fragments of a human body. Since the early ‘90s, the USPTO (the United States Patent and Trademark Office) has tightened its requirements for patentability, but more than a thousand gene patents have issued and hundreds of thousands of applications have been filed. The debates over DNA patentability, testing and screening are not likely to go away any time soon.



So how does this affect you? First, recognize that a naturally-occurring phenomena may indeed be patentable. If you discover or slightly modify something in nature, you may be able to patent it. Also, specialized provisions in the U.S. Patent Act apply to plant varieties and designs, so working on genetic mutations of plants may entitle you to own a new species. Your best bet if you have found, created or worked on something valuable in nature is to contact a patent attorney who can do specialized research on the type of organism, product or method you’ve discovered, and advise you of its patentability.

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So I've created this thing that is of patentable subject matter. Can I patent it?

For a work to be patentable, it must meet these three qualifications:

- The work must be “novel.” This requirement generally means that the creation must be new, not only to the inventor but also the larger world. If an investigation of prior art reveals that someone else already had created the same or a similar work, the patent may be denied.
- The invention must be “useful.” Patents are not allowed for fanciful creativity, but instead for creativity that has some practicable application. In the biotechnology area, some courts have interpreted this provision of the patent code to require a process to have a beneficial pharmacological effect. This area of the law is constantly changing, so again, contact an attorney for specific advice on what is deemed useful.
- The invention must be “non-obvious.” A patent may be denied if the invention was of such a low order of creativity that it would have been obvious to someone skilled in the relevant trade.

So it meets the requirements. What do I do now?

Again, contact a patent attorney, who will guide you through the patent application process. The process of applying for a patent can be enormously complicated, routinely costs thousands of dollars, and typically takes up to three years or more. If the U.S. Patent and Trademark Office (USPTO) approves the patent, protection generally lasts for a term of twenty years from the date of the original application.

Patent applications consist of *claims*, or what the inventor seeks to protect, and a written description of the invention. Often, drawings, models or specimens of ingredients will also be required to submit to the USPTO for inspection. Finally, the USPTO requires an inventor submit a preferred embodiment, or best mode, to the invention. Below we've included the first page of an issued patent so you can see what a fairly simple one looks like.



The written description requirement shows the patent office that you did indeed invent what you have claimed. Courts also allow deposits of biological samples to meet this requirement. An example of what will not suffice comes from a company who described a single genus, which could include thousands of chemical compounds, to claim one of those thousand compounds. Within the written description and the drawings provided, an application must also *enable* others skilled in the art to make or utilize the invention. In exchange for monopoly protection for twenty years, patent holders must disclose the ins, outs and other features of their inventions. After the patent expires, anyone is free to take the specification and make a *generic* replica of the invention. The enablement requirement also prevents inventors from claiming too broadly.

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What an inventor *claims* is the heart of the patent. The invention is not what is patented; the claims are. Patent drafters try to claim as much as possible, as broader claims give the owner more rights and prevent others from designing around a patent. Broad claims, however, also face more obstacles in getting patented, as they may not be novel or non-obvious. Many patents start with broader claims, and then use dependent claims to narrow previous claims.

So now I've got a patent. What do I do with it?

Only individuals can be an “inventor” and be issued a patent, but anyone can *own* a patent. Thus, most patents are issued to the individual inventor(s), and simultaneously assigned to a company, usually the inventor’s employer. Patents may also be assigned after issued. For example, an part-time inventor working in his garage may discover a great invention, but not be able to market or produce large quantities of the product. He may thus prefer to assign his invention to a large company for a one-time fee, plus a percentage of profits known as a *royalty*.

Companies use patents for numerous purposes. The most obvious example comes when a competitor *infringes* the patent. Suppose Matt and his company, ACME Biotech Inc., create a novel and non-obvious medical device, obtain a patent on the device, and manufacture the device. If another company, Biotech ‘R Us, makes, uses or sells a medical device just like the one patented by ACME Biotech Inc., Matt’s company can sue this other company for patent infringement. Assuming the patent is valid and Biotech ‘R Us does not have any defenses to its use, a court may *enjoin* her from using the patented technology in the future. This is also known as an *injunction*. A court may also award ACME Biotech Inc. damages, such as lost profits, or, at a minimum, a reasonable royalty. If Biotech ‘R Us’s infringement is found to be willful, it may also be forced to pay *treble damages*, or three times the amount of damages ACME Biotech Inc. suffered as a result of the infringement, as well as ACME’s *attorney’s fees*. A word to wise, therefore: To avoid the potential for patent infringement, the best tactic is to consult a patent attorney early in the process of your development of the competitive product and obtain a clearance opinion (or “freedom to operate”) that provides that your manufacture, use or sale of the competitive product is not likely to infringe another’s patent.

Of course, Biotech ‘R Us can avoid infringing the ACME Biotech patent altogether by licensing it from ACME. A patent license allows the licensee to use the patent for a fee. Firms such as Qualcomm, the inventors of standards for wireless telephones, make nearly all of their profits from patent licenses, without producing any tangible products.

Companies also use patents defensively. Because so many products are the result of so many patents, one company may patent a process it has created solely to use it as leverage if it is ever sued by another company for infringement. Research tools and methods can be patented, so this firm may use its own patented process as a negotiating tool to be able to use another firm’s patented process. Many industries use *patent pools* as a way to avoid these lawsuits or complex licensing negotiations. In a patent pool, a group of companies agree to pool their patents to make an end-product. Suppose Curt and his company own patents A, B, and C; Lauren and her company own D, E and F; and Ken and his company own G, H, and I. If patents A-I are all necessary to make a new audio-visual device, no one could make the device without infringing someone else’s patent. Thus, in a patent pool, Curt, Lauren and Ken agree either not to sue each

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other for infringement (and pursue the product independently of each other), or license their patents together to a separate company. These arrangements must be carefully drafted so as to avoid violating antitrust laws, so remember to consult an attorney before pursuing a patent pool.

You can search patent applications and issued patents for subject matter, inventor locale, and other criteria online at <http://www.uspto.gov/patft/index.html>. For example, a search for inventors from Indiana turns up 39,130 patents issued since 1976!



Trade Secrets

A trade secret is information that has economic value *because it is kept secret*. Common examples include customer lists, manufacturing methods, and chemical formulas. The recipe to make Coca-Cola is a trade secret, for example. By keeping its formula secret, Coke has avoided disclosing its recipe, something it would have been forced to do had it patented the formula.

Trade secret law does *not* grant the holder of the secret an exclusive right to use the information. Rather, trade secret law protects against *wrongful access* to that information. The trade secret owner must take reasonable precautions to keep the information secret and private, and his only remedy comes against those who improperly acquire, use or disclose the information, such as a former employee.

Basic Requirements

For information to be protectable as a trade secret, it meet the following criteria:

- the information must be used in one's business (some courts require continuous use)
- the information must have economic value or give the holder a competitive advantage
- the economic value must stem from the information's "not being generally known"
- the information must not be "readily ascertainable" by others

Use In Business

Some courts require the secret information be continuously used in business. In a jurisdiction following this view, *one shot* information does not qualify for trade secret protection. Examples of one shot information include: rollout dates for new products; and terms of secret contracts or bids. Examples of continuously used information include: manufacturing processes and customer lists.

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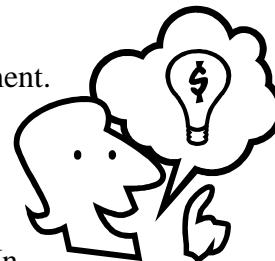
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Many states, including Indiana, have adopted a version of the Uniform Trade Secrets Act (UTSA), a model code aimed at unifying the legal principles of trade secret. The UTSA only requires that the information have “economic value,” and thus one shot information can be protected as a trade secret.

Economic Value or a Competitive Advantage

Again, different jurisdictions have different rules about this requirement. The UTSA’s requirement of “economic value” gives substantial room to include nearly any type of business-related information as a trade secret. Other courts, however, have required that the secret information give the business an “opportunity to obtain an advantage over competitors who do not know or use” the information. This is known as the Restatement view. In jurisdictions following the USTA, information that *any* class of users could exploit, or even information that is negative (for example, expensive research finding that a process does not work), may be protected. Jurisdictions following the Restatement view would not take such an expansive view of what is a protectable trade secret.



Value Stems From Being Not Generally Known

Information is valuable. Information about legal concepts, for instance, can help businesses know how to protect their assets. This type of information, however, is *generally known* to people in the legal profession. Thus, it is not protectable as a trade secret. Similarly, the standard method to manufacture steel is economically valuable, because a steelmaker uses it every day. This method is not protectable as a trade secret if others know it. Likewise, customer lists that are taken out of the phone book are not trade secrets. Only the specialized, secret knowledge that went into making a list of specific contacts will qualify the list for protection.

Not Readily Ascertainable: How Reasonable Are The Security Measures?



To be protected as a trade secret, the information must not be readily ascertainable by others. The law thus requires the owner of a trade secret to undertake reasonable efforts to maintain the information’s secrecy. The USTA advises that reasonable efforts could include: “advising employees of the existence of a trade secret, limiting access to a trade secret on ‘need to know basis,’ and controlling plant access.” Similarly, information on computer networks must be protected by physical and coded barriers to access. On a grander level, businesses implementing an overall security program designed to keep information secret receive more favorable treatment from many courts. Of course, these programs impose costs on the business, and may even foster a negative attitude among workers. These costs should be taken into account when deciding whether to pursue trade secret or patent protection of information.



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Common Lawsuits

Many trade secret lawsuits involve former employees. A business may sue an employee after the employee left to work for a competitor, for example. To win, the business must prove that the employee took valuable information that was protected as a trade secret and that the employee had a duty of confidentiality. Other times the business may sue the competitor directly for “stealing” its employees, who then disclose a trade secret. A business may also sue a competitor for obtaining information through improper means such as deceit or unauthorized access to a computer network.

Remedies

As in patent cases, a victor in a trade secret lawsuit may be awarded damages or injunctive relief. Unlike patent cases, a trade secret holder does not sue for infringement. The cause of action is called *misappropriation*, and requires improper gaining or exploiting the trade secret. Bribing an employee to tell a trade secret is a flagrant violation, but a company may also be liable for misappropriation for simply using information it knows is protected as a trade secret, if it was disclosed to them improperly.

In 1996, Congress enacted the Economic Espionage Act. This legislation does not give individuals a private cause of action, but it does allow the federal government to prosecute people for stealing or utilizing certain types of trade secrets. This Act criminalizes this type of activity, and also authorizes the U.S. government to institute civil proceedings to enjoin any violations of the statute.

Businesses may often have a choice between keeping information private and getting trade secret protection, or receiving the broader protections of the patent system by filing a patent application. The differences are charted below:

Patents	Trade Secrets
Exclusive right to use, license, or make patented good for 20 years.	Indefinite protection: as long as information remains secret. Will cease to exist if information is reverse engineered, discovered by mistake, or developed by a third party.
Must be nonobvious, novel.	Can include compilations, lists, other obvious ideas. Does not include info that would be observable by others, such as product design.
Patent application.	No registration or deadlines, but must institute measures to keep the information secret.
Infringement.	Misappropriation.
Injunction and damages.	Injunction, damages, and possible criminal prosecution.

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For more information about the strategic choice of using patent protection versus trade secret, your best bet (again) is to contact an IP attorney. Another good source of information is Andrew Beckerman-Rodau's article, *The Choice between Patent Protection & Trade Secret Protection: A Legal and Business Decision*, which can be found online at <http://www.law.suffolk.edu/arodau/articles/jptos.htm>. Among the factors to analyze are the market life of the subject matter; the likelihood of reverse engineering or independent development of the subject matter; the difficulty of maintaining the secret; and the effect of educating competitors as to methods and research.

TM

Trademarks

®

Trademark law helps identify the source of a product, in part to prevent consumer confusion. Trademarks quickly and easily assure customers that the products are what the consumer believes. Consumers can rely on past experiences with the product, and need not test the product anew. Trademark law also aims to promote quality products, by allowing producers to benefit from the reputational rewards of a desirable product.



Trademark law encompasses much more than famous symbols and slogans that are registered with the United States Patent and Trademark Office (USPTO). The USPTO will register many types of marks, and other marks can be registered in state agencies. Further, state *common law* provides a cause of action for even more protection. Product packaging, a recognizable color, or even the “look and feel” of something can all qualify for protection. To a certain extent, you have limited rights merely by placing a mark in commerce. Before you invest a substantial amount of money in a new product launch, however, you may wish to file for registration with the USPTO, which requires only *intent to use* in commerce. Filing a trademark application does require serious attention to legal and business concerns, but it is ordinarily neither as complicated nor as expensive as filing a patent application. The symbol TM actually does not signify registration with the USPTO and confers no extra rights or privileges. Registration with the PTO confers substantial protection in all 50 states, and allows trademark owners to place the ® symbol near the mark. As long as a trademark owner *renews* the right, the trademark will last as long as the mark is used to identify the source of the good.

Trademarks bring powerful rights. At a minimum, trademark owners have the right to prevent other persons and businesses from using similar marks in a manner that might be confusing to consumers. Say Hilary owns the mark “Pouring Rain Window Cleaners,” and Lauren opens “Pouring Rain Car Washes.” Consumers may associate Pouring Rain Car Washes with Hilary’s store, so Hilary can likely *enjoin* Lauren’s use of the mark and seek damages. Similarly, if Brad starts a service called “Pounding Rain Window Cleaners,” Hilary can likely

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prove that consumers are likely to confuse her service with Brad's, despite their different names, and enjoin his use and win damages.

The rights of owners are also sometimes limited to the market in which the owner is doing business; that market may be defined both geographically and with respect to the product market. Therefore, despite obvious similarity of names, Lexus automobiles and the Lexis database may co-exist, as can V8 car engines and V8 vegetable juice. Consumers are unlikely to confuse the car engine with the vegetable juice or attribute the legal database's goodwill with the car maker. Some products, however, are so famous that a similar mark, even without consumer confusion, may *dilute* the famous mark. If "Rolex" chewing gum became available, it would dilute the strength of the "Rolex" watch mark. Federal law thus provides a cause of action to protect these famous marks, even without consumer confusion. This burgeoning field of trademark law – called *dilution* – is hotly debated and frequently litigated.

The USPTO will only protect *distinctive* marks, measured by the mark's ability to identify the source of the product. Choosing an *arbitrary* or *fanciful* mark is the easiest way for a mark to be distinctive and get trademark protection. Arbitrary marks have no relation to the product, such as "Apple" for computers or "Blue Diamond" for almonds. Consumers looking at the can of nuts at the right will not think the almonds are blue or shaped like a diamond; they will associate "Blue Diamond" with the source of the almonds, rather than a characteristic of the product. Fanciful marks are made-up or archaic words and also serve only a source-indicating function.



Suggestive marks *suggest*, but do not *describe* characteristics of a product. Unlike an arbitrary mark, there is a link between the product and the symbol. A suggestive mark requires the consumer to infer something about the product. This inference distinguishes suggestive marks from descriptive ones. Courts weigh several factors in deciding whether a mark is suggestive or descriptive, and there is no bright-line rule. A few examples may help explain the difference. "Liquid Paper" is suggestive of correction fluid. Likewise, "Coppertone" suggests suntan lotion, and "Roach Motel" suggests an insect trap. Even "Greyhound" is a suggestive mark, as a consumer may think about speed and racing dogs, but not bus transportation. These marks require some consumer imagination.

Descriptive marks differ from suggestive marks in that they merely describe the product or a characteristic of it. Descriptive marks are not protected unless the mark acquires *secondary meaning*, or consumers identify the *source* of the product rather than the product itself when they hear the mark. Coca-Cola is an example of a descriptive mark that has acquired secondary meaning. In the 19th century, Coca-Cola was descriptive of a drink that derived from a coca plant and cola nuts. After advertising and product development, Coca-Cola acquired a secondary meaning: Coca-Cola served to represent the source of the beverage, or who made it.



Merely descriptive marks are not eligible for trademark protection. These are marks that describe the good and have not acquired secondary meaning. It does

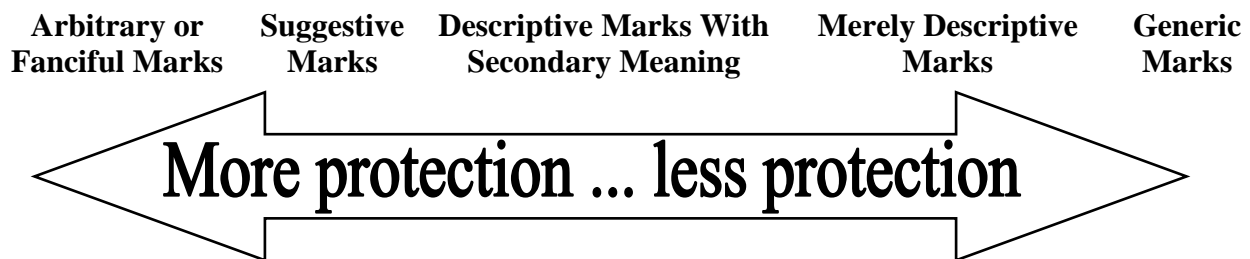
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not matter what the mark describes to disqualify it for protection without secondary meaning: it can be an ingredient, quality, characteristic, function, feature, purpose or use of the specified good. The USPTO cautions that each case presents different factual situations, so it may be worth trying to register a mark you think is merely descriptive. You can *disclaim* part of the mark if part of it is unregistrable, and register only the mark as a whole. For example, Union Federal Bank registered the trademark “Union Federal” but disclaimed the use of “federal” apart from its use as part of Union Federal Bank.

Finally, *generic* marks are ineligible for protection. Some products have more than one generic term (pop or soda, car or auto), but generally speaking a generic term is one, without which, you would have a hard time describing the product. When a name brand becomes so common it represents the only way to discuss a particular thing, it loses its trademark. Lawyers call this *genericide*. Aspirin, cellophane, zipper and lineoleum used to have trademarks before they lost their marks to genericide. Often, companies with products on the verge of losing a trademark will undertake massive efforts to avoid this fate. Thus, Xerox tells you to make a photocopy, Kleenex urges you to grab a tissue, and Vaseline explains that you are using its petroleum jelly.



Trademark law protects more than just brand names, logos and slogans. Federal law provides a cause of action for *trade dress*, which need not be registered to receive protection. Trade dress protects the “look and feel” of a product, but does not protect functional aspects of a product. In other words, it protects the arrangement of the identifying characteristic or decoration. For example, a Mexican restaurant’s exterior may be protectable as trade dress if it is distinctive and serves to identify the restaurant.

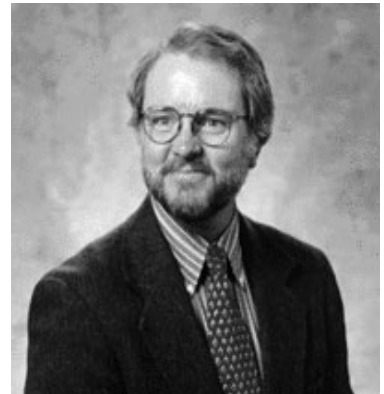
Trade dress may also be useful in protecting an item that was once patented. The Supreme Court has recently clamped down on this type of trade dress, but it is important to remember that you do have other possible avenues of intellectual property after a patent expires. IP rights often intertwine, and an attorney can give you more detailed advice about how the variations work in your particular situation.

~ ABOUT THE AUTHORS ~



Todd G. Vare is a partner in Barnes & Thornburg's Intellectual Property Department where he concentrates his practice in the litigation of patent disputes involving a variety of sciences and technologies. Mr. Vare also counsels clients in other aspects of intellectual property protection and has litigated matters involving software performance and software licenses, trade secrets, employee non-compete and non-disclosure agreements, and rights of publicity. Mr. Vare is a member of the firm's Business and Technology Group (BTech), in which he counsels clients on technology-related matters, including e-commerce, internet security, electronic signatures, copyright, trademark, computer and software protection. Mr. Vare may be contacted at todd.vare@btlaw.com.^{*}

Kenneth Crews is a Professor in the Indiana University School of Law-Indianapolis and in the IU School of Library and Information Science. He is also Associate Dean of the Faculties for Copyright Management, and in that capacity he directs the Copyright Management Center based at Indiana University-Purdue University Indianapolis (IUPUI). His principal research interest has been the relationship of copyright law to the needs of higher education. Professor Crews has been an invited speaker on college and university campuses and at conferences in 37 states, D.C., and 5 foreign countries. Crews is also an Intellectual Property Scholar for the Center for Intellectual Property and Copyright in the Digital Environment, University of Maryland University College and serves as a faculty member for the Munich Intellectual Property Law Center.



^{*} Mr. Vare wishes to thank Kara Moorcroft for her contributions and invaluable assistance in creating this *Intellectual Property Primer*. Ms. Moorcroft is a 2005 J.D. candidate at Duke University.



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These publications come from the Consortium for Educational Technology for University Systems (CETUS), joint effort of California State University, State University of New York, and the City University of New York. The consortium explores a variety of initiatives in technology-assisted teaching, learning, and research.

[CETUS- Intellectual Property, Fair Use, and the Unbundling of Ownership Rights:](#)

This document was created in 2001. It incorporates and updates much of the CETUS Discussions Series booklets.

CETUS Discussions Series Booklets (Published 1995)

- **Fair Use:** This booklet addresses the benefits higher education can derive from a better understanding of the fair-use doctrine. For more information about fair use, please see CMC [Fair-Use Issues](#)

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- **Ownership:** This booklet discusses issues surrounding the ownership of intellectual property. For more information about Ownership, please see CMC [Copyright Ownership Issues](#)

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- **Library:** This booklet discusses the copyright issues that libraries are likely to face in the evolving information age. The booklet also provides suggestions as to how these issues should be addressed. For more information about library issues, please see CMC [Libraries and Copyright](#)

[Wayback archive version of booklet](#)

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- **Distance Education:** This booklet was created before the TEACH Act was passed

into law. The TEACH Act revised the copyright law pertaining to distance education and so while many of the concepts in the booklet are still relevant, much of the discussion concerning the application of the law is no longer germane. For more information concerning the TEACH Act, please visit the CMC [Copyright and Distance Education](#)

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Original: November 23, 2004

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UFC Circular U7-98 Indiana University

Policy on Fair Use of Copyrighted Works for Education and Research

Approved by the Indiana University Board of Trustees: December 5, 1997

As an institution devoted to the creation, discovery, and dissemination of knowledge to serve the public, Indiana University is committed to complying with all applicable laws regarding intellectual property. That commitment includes the full exercise of the rights accorded to users of copyrighted works under the "Fair-Use" provision of federal copyright law.

It therefore is the policy of Indiana University to facilitate the exercise in good faith of full Fair-Use rights by faculty, librarians, and staff, in furtherance of their teaching, research, and service activities. To that end, the University shall:

1.

inform and educate its faculty, librarians, and staff about their Fair-Use rights and the application of the four factors for determining those rights set forth in 17 U.S.C. Section 107;

2.

develop and make available through the office of the University Counsel, the Copyright Management Center, and other appropriate units, effective resources concerning Fair-Use and intellectual property laws generally and the application of Fair Use in specific situations;

3.

avoid, whenever possible, adopting or supporting policies or agreements that would restrict Fair-Use rights; and

4.

defend and indemnify faculty, librarians, and staff in accordance with provisions of the Officers Liability Insurance resolution, dated May 22, 1971, or any successor indemnification policy.

For an explanation of the underlying principles of the policy and answers to some common questions, see

[Statement of Supporting Principles](#)

[Frequently Asked Questions About the Policy](#)

For additional information to help you understand and apply fair use, see:

[Fair Use: Overview and Meaning for Higher Education](#)

[Fair Use of Copyrighted Works: A Crucial Element in Educating America](#)

[Copyright Law and Graduate Research: New Media, New Rights, and Your New Dissertation](#)

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Indiana University Policy on Fair Use of Copyrighted Works for Education and Research Statement of Supporting Principles

Prepared by the Institute for the Study of Intellectual Property and Education
IUPUI Copyright Management Center
530 West New York Street
Indianapolis, IN 46202-3225
(317) 274-4400

November 21, 1997

Accompanying this document is a proposal for a new "[Policy on Fair Use of Copyrighted Works for Education and Research](#)" for Indiana University. This proposal is the work of the [Advisory Board](#) of the Institute for the Study of Intellectual Property and Education. The Institute was funded pursuant to the [IU Strategic Directions Charter](#), and in December 1996 President Myles Brand charged the Institute and its Board with developing a new fair-use policy for Indiana University. The Advisory Board has met regularly beginning in early 1997, and the accompanying proposal is the result of those efforts.

This document explains the underlying principles of this proposed policy, and it will answer some common questions about it. Please note, however, that this document is not intended to be a tutorial about copyright and fair use. Preparing and disseminating such materials will be an important part of implementing the proposed policy, and a comprehensive educational program should follow adoption of this policy.

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Principle 1: An appropriate exercise of fair use depends on a case-by-case application and balancing of four factors as set forth in a statute enacted by Congress.

A proper determination of fair use in daily practice and in the courts requires applying these four factors to the specific circumstances of the use: the purpose or character of the use; the nature of the copyrighted work being used; the amount and substantiality of the work being used; and the effect of the use on the market for or value of the original. These factors must be evaluated to determine whether most of them weigh in favor of or against fair use. For an explanation of the meaning of these factors, see: [Copyright Management Center: The Meaning of the Four Factors](#).

•
Principle 2: Nonprofit educational purposes are generally favored in the application of the four factors, and a robust concept of fair use is crucial for advancing education and research. The educational purpose will usually weigh the first factor strongly in favor of fair use. Keep in mind, however, that a nonprofit educational purpose does not by itself make the use "fair." One must always consider and weigh all four factors together. [Click here for the Fair Use Checklist](#).

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Principle 3: *Responsible decision making means that individuals within the university must know the fundamentals of fair use and understand how to apply them in typical situations.* To that end, the Copyright Management Center and other university offices will provide information, answer questions, and conduct seminars in an effort to prepare IU faculty, staff, and librarians to resolve fair-use questions in a good-faith and well-informed manner.

•

Principle 4: *The university is confident that its faculty, staff, and librarians are able to make good-faith decisions about fair use, and that their decisions will best reflect the particular circumstances relevant to the decision.* Fair use depends on the facts and circumstances of the given situation. Therefore, the person closest to those facts is likely best suited to determine the law's application. The proposed policy consequently does not mandate a particular decision, but instead calls on each member of the university to be responsible for the fair-use determinations with respect to the projects within their authority. The Copyright Management Center and other offices will be available to assist with decisions.

•

Principle 5: *Reasonable people-including judges and legislators-can and will differ in their understanding of fair use.* Copyright law rarely offers a definitive meaning of fair use for any specific application. Thus, the real meaning of fair use depends on a reasoned and responsible application of the four factors. One person's judgment and situation may not match the next, and the differences may be based on variations in facts and circumstances.

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Principle 6: *Because of the flexible and interpretive nature of fair use, Congress provided significant protection for educators.* Not only does the law apply particularly to educational purposes, but it also limits the monetary liability that educators may potentially face, as long they hold a reasonable and good-faith belief that their activities are fair use in light of the four factors.

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Principle 7: *Through educational efforts, the university should move over time toward common understandings of fair use for local needs, but such detailed interpretations ought not be part of a formal policy statement.* By keeping the policy itself concise, the university preserves the flexibility inherent in fair-use law and preserves the opportunity to respond to a changing law and the changing demands of education and research.

•

Principle 8: *Fair use is not determined by "guidelines" that purport to quantify the boundaries of fair use.* In an attempt to clarify the meaning of fair use for common situations, various private parties have negotiated "guidelines," but those externally developed guidelines are often inappropriate for the realistic application of fair use to higher education. Such guidelines are too often an unduly narrow or rigid definition of fair use, and they usually impose additional restrictions and conditions that are not part of the law. No such guideline has been read into the law by Congress or the courts, and the guidelines are not binding. Fair use must be determined according to the circumstances of each situation.

•

Principle 9: *If a member of the IU community acts in good faith and consistent with his or her university duties, the IU indemnification policy can offer protection in the event of an infringement allegation.* Good faith increases the likelihood that activities are in fact fair use. Good faith reduces the risks of liability in the event of infringement. Good faith is also important for securing the benefit of

university assistance and support in the event that its faculty, staff, and librarians may face infringement allegations, in accordance with the Officers Liability Insurance resolution, dated May 22, 1971. Ultimately, good faith is best manifested through knowledge of, and reasonable application of, the four factors.

Prepared by: Indiana University Institute for the Study of Intellectual Property and Education

Advisory Board:

Fred H. Cate, Professor of Law

Kenneth D. Crews, Associate Professor and Institute Director

Jeremy Dunning, Professor of Geological Sciences

William Farquhar, Assistant Vice President for Research

JT. Forbes, Coordinator of Federal and Community Relations

Michael Klein, Associate University Counsel

Arlen Langvardt, Associate Professor of Business Law

Christopher Peebles, Information Technology

Suzanne Thorin, University Dean of University Libraries

Julie Watson, Vice President of Technology Transfer

Coordinator of the Institute: Dwayne K. Buttler, J.D.

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[Indiana University](#) Policy on Fair Use of Copyrighted Works for Education and Research

"Frequently Asked Questions About the Policy"

Revised: December 18, 1997

Prepared by the Institute for the Study of Intellectual Property and Education
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Why do we need a fair-use policy?

Copyright law increasingly affects scholarly pursuits. Not only are members of the university community creating new works that have copyright protection, but the routine conduct of research and teaching regularly touches the set of rights that the law grants to the copyright owners of a vast range of protected works. The range of protected works encompasses text, images, software, video, Internet sites, and other media that instructors and researchers commonly deploy in furtherance of their academic objectives. The set of rights belonging to the copyright owner of each of those works includes the right to make copies, to distribute copies, to make "derivative works," and to perform or display the work publicly. Such uses of protected works are common in the university setting, but they will not be unlawful "infringements" if they are fair use. Some of those uses also will be allowed under highly specific exemptions in the copyright law, but those exemptions are not technically "fair use" and will be addressed outside this policy.

What are the origins of this policy?

The genesis of this policy occurred in a meeting of various officials of Indiana University with President Myles Brand on December 19, 1996, in which President Brand expressed a desire for a fair-use policy for Indiana University and a standard of fair use that was not unduly restrictive on the university's essential teaching and research activities. He assigned the task of drafting the policy to the Institute for the Study of Intellectual Property and Education and its [Advisory Board](#), which comprises diverse members of the IU community who share a strong interest in and knowledge of copyright. The Institute had been recently established pursuant to the [Strategic Directions Charter](#) of Indiana University.

What are the purposes and effects of this policy?

The central purpose of this policy is to assist members of the IU community with the use of copyrighted materials in furtherance of the institution's education and research mission and in accordance with a good-faith understanding of the principles of copyright and fair use.

The intended effects of this policy are multifold. Readers should be able to make a more informed and responsible exercise of fair use, and they should be able to meet teaching and research needs without infringing the rights of copyright owners. While the policy calls on individuals to learn about copyright and to reach informed conclusions, one purpose of the policy is to motivate decisions that allow faculty and others to keep their focus on serving the university mission.

If I do everything that this policy directs, will the university defend me?

If faculty, librarians, and staff act in good faith and consistent with their university duties, the general indemnification policy at IU can offer protection in the event of an infringement allegation. Good faith increases the likelihood that activities are in fact fair use. Good faith reduces the risks of liability in the event of infringement. Good faith is also important for securing the benefit of university assistance and support in the event that its faculty, staff, and librarians may face infringement allegations, in accordance with the Officers Liability Insurance resolution, dated May 22, 1971. Ultimately, good faith is best manifested through knowledge of, and reasonable application of, fair use.

Who is subject to this policy?

This policy explicitly applies to all faculty, librarians, and staff of Indiana University. While the policy does not address the activities of students who are not also employed by the university, the advice and guidance about fair use will be available to students as well. While the university does not offer indemnification for students and is not legally responsible for the independent fair-use activities of students in pursuit of their study or projects, the university does expect its students to act responsibly and ethically, in a manner consistent with this policy.

What do I need to know about fair use?

First and foremost, an underlying philosophy of this policy is that you will learn about fair use and help yourself reach responsible decisions. To begin your education, see: [Copyright Management Center: Fair-Use Issues](#).

Why not put explanations about fair use in the text of the policy?

While the supporting and explanatory materials are important for assisting members of the university community to meet their responsibilities under this policy, elaborations on fair use ought not be included in the policy itself. Fair use is an area of the law that changes with court rulings, and that is adaptable to changing needs, technologies, and objectives. To put details into the policy itself would tend to freeze the doctrine of fair use at a time when it is in continuous transition. Thus, the policy remains flexible to reflect changing needs and the dynamic nature of fair-use law. The policy also remains flexible to address the growing innovations of our teaching and research.

Who can help me with copyright decisions?

The university recognizes that innovative research and instruction give rise to the need for additional insight or support for rethinking fair use. In addition, various officials at the

university have developed experience with addressing certain matters and may be able to help you respond to the circumstances more efficiently. For assistance with understanding or applying this policy, offices at Indiana University that you may contact include:

1.

Your department chair, dean, director, or other supervisor.

2.

For library matters, the library director or designated copyright liaison in the library.

3.

The Copyright Management Center, which you may contact:

By telephone: (317) 274-4400

By fax: (317) 278-3326

By e-mail: [copyinfo @ indiana.edu](mailto:copyinfo@indiana.edu)

On the World Wide Web: www.copyright.iupui.edu

4.

The University Counsel's Office.

Who is responsible for making fair-use decisions?

This policy makes no change in the designation of authority within the university. The primary responsibility for decisions about fair use belongs to the individual with authority to oversee the relevant project or activity. That responsibility is subject to customary review by and oversight from supervisors or senior officials at the university. Thus, if you are responsible for the activity or project, you are responsible for learning about the applicable fair use and reaching the appropriate conclusion.

Why does the policy resist adoption of "guidelines" that explain fair use?

Fair use is not determined by "guidelines" that purport to quantify the boundaries of fair use. In an attempt to clarify the meaning of fair use for common situations, various private parties have negotiated "guidelines," but those externally developed guidelines are often inappropriate for the realistic application of fair use to higher education. Such guidelines are too often an unduly narrow or rigid definition of fair use, and they usually impose additional restrictions and conditions that are not part of the law. No such guidelines have been read into the law by Congress or the courts, and the guidelines are not binding. Fair use must be determined according to the circumstances of each situation.

Who are the members of the Advisory Board that developed this policy?

Members of the Advisory Board of the IU Institute for the Study of Intellectual Property and Education are:

Fred H. Cate, Professor of Law

Kenneth D. Crews, Associate Professor and Institute Director

Jeremy Dunning, Professor of Geological Sciences

William Farquhar, Assistant Vice President for Research
JT. Forbes, Coordinator of Federal and Community Relations
Michael Klein, Associate University Counsel
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Guidance for Faculty on Copyright, Publication, and General Research Dissemination

Indiana University Purdue University at Indianapolis Circular 96-23
April 23, 1996
(Adopted by the IUPUI Faculty Council, September 5, 1996)

The increasing complexity of research and publishing places a growing burden on all faculty members to conduct research responsibly and to make critical decisions about the best means for dissemination of findings. Each of us must keep in mind that the sharing of research results is the highest priority in the publication process, but that process is often burdened with procedural and legal pitfalls. The following guidelines are intended to help faculty avoid those pitfalls as they seek the best means for publishing articles, books, and other creative works.

These guidelines are the work of the Ad Hoc Committee on Copyrights, Publication and General Research Dissemination, which comprises faculty from diverse departments of [IUPUI](#), a representative of the Indiana University Press, and the [Director of the Copyright Management Center](#).

For further information about these guidelines, and to share your observations about them and about your research needs, please contact the Office of Faculty Development or the Center for Teaching and Learning.

This guidance is presented in two parts. First are general guidelines to advise faculty of how to avoid potential procedural and ethical dilemmas. Second is an outline of applicable copyright law provisions pertaining to issues of dissemination and republication of personal research and writing.

A. Guidelines for Faculty Regarding Dissemination and Republication of One's Own Research Findings and Writing

1. In publishing in academic journals, obtain and follow the journal's printed guidance to authors. If there is a provision with which you cannot comply, discuss the matter with the responsible authority at the journal.
2. Many academic journals will not publish an article on findings of empirical research if the findings have been announced in any media source, including any discussion of your findings on the Internet. Consult the policies of the journals in which you plan to submit your research papers to determine whether the journal has such a policy.
3. If you present empirical research findings as an abstract or poster at an academic conference and they are published in a copyrighted conference proceeding, attribute that

presentation with a footnote or reference in later papers submitted for publication. Be aware that advance dissemination of findings may preclude publication in some academic journals.

4. If you quote or paraphrase substantial portions of your own writing published elsewhere, cite that source.

5. If you quote or paraphrase portions of writing of students working under your direction, be sure to appropriately credit the student work.

6. Many research findings are patentable, and premature disclosure may jeopardize your ability to secure a patent. If you suspect that your work may be patentable, consult with the Office of Technology Transfer at Indiana University before making any disclosure in publications, on the Internet, or at conferences. Please keep in mind that patents can include a wide range of novel and useful works, including designs and computer software. For more information about patents, see: [Copyright Management Center: Patent Law](#).

7. Many academic disciplines or scholarly societies have developed ethical standards regarding the publication and use of research findings. Consult with your colleagues and with your professional societies for appropriate standards.

B. Applicable Principles of Copyright Law Regarding Dissemination and Republication of One's Own Research Findings and Writing

To facilitate the more orderly management and control of a faculty member's publication of intellectual works, please keep the following points of copyright law in mind:

1. Copyright law protects the original expression as embodied in diverse works, including books, articles, software, visual works, art, and world wide web pages.

2. Copyright does not protect facts and data, although it may protect an original arrangement or organization of data, such as a table or graph.

3. Copyright protection is automatic for predictable works, from books and artwork to software and Internet messages. Registration and the use of the copyright notice on copies are no longer required, although they are good practice. Registration and the copyright notice can provide some additional legal benefits in the unlikely event of a lawsuit to protect your work. For more information about registration, access the U.S. Copyright Office home page at <http://www.copyright.gov>.

4. Authors generally own the copyrights to their works, although an employer may be the lawful copyright owner under the work-made-for-hire doctrine. For more information about about works-made-for-hire, see: [Copyright Management Center: What is a Work-Made-for-Hire?](#)

5. Works created by hired researchers and student assistants may not automatically qualify as "work-made-for-hire." The copyrights to their works may continue to belong to the students or hired researchers. Therefore, you should have all such persons sign a [copyright agreement](#), preferably before beginning work.

6. Some publishers require that the author assign to the publisher the copyright to articles and other works.
7. A copyright assignment must be in writing and signed by the transferor. An oral assignment, or a copyright notice placed on the publication, does not have the effect of transferring the copyright from the author to anyone else. For more information about transfers, see: [Copyright Management Center: Can I Transfer My Copyrights to Someone Else?](#)
8. The written publishing agreement for publication of your work is the most important instrument for determining the copyright owner.
9. The written agreement is also the best instrument for reserving specific rights of future use of your own work, if you need to assign the copyright to the publisher. Read your publishing contracts carefully! Feel free to ask questions and to negotiate terms that may be important to you.
10. If you need to assign the copyright to the publisher, you should consider the range of possible future uses you might seek to reserve, e.g., making copies for your teaching and research; copies for teaching and research by others at the same university; revising and republishing the work as an article, a book chapter, a conference paper; or putting the work on your World Wide Web home page.
11. If you assign the copyright to the publisher and you did not reserve specific rights, you could be infringing copyright when you use your own work, even if you cite the source and give full credit. "[Fair use](#)" allows limited uses of a copyrighted work, but not all uses, even for nonprofit education purposes, are allowed without [permission](#) from the copyright owner.
12. In addition to avoiding infringements of copyrights that may be held by publishers, you should consult with your colleagues and supervisors about the ethical appropriateness of re-using your own writings and research findings.
13. For further information about copyright, you will find a variety of materials available on the Copyright Management Center home page at: <http://www.copyright.iupui.edu>.

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Viewing Movies and Other Audio-Visual Works at the University: Public Performances to Meet Educational Needs

A Project of the IUPUI Copyright Management Center

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Showing or “performing” a motion picture at the university can be important for teaching and other university activities. In many situations, it is also perfectly appropriate under copyright law, but not all “public performances” are lawful. The law of copyright attempts to balance the interests of the public with the interests of authors in their creative works. The law gives copyright owners several exclusive rights, including the exclusive right to give public performances of their copyrighted works, but the law also permits some performances of these works by others as summarized below. These principles are generally true, whether the work is a feature film, an educational video, downloaded from the web, recorded off-air, or stored on VHS or DVD.

Allowed: A showing or performance that is private and not a public performance.

A performance can be “public” if it is at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered. Therefore:

- The smaller the viewing group, the less likely it will be a public performance.
- Open invitations and advertisements to the public can make the performance “public.”

Allowed: The showing of the video is in the course of teaching activities of a nonprofit educational institution.

IU and IUPUI qualify as a nonprofit educational institution and a performance is most likely to fit within the exception if:

- The performance is in a classroom or similar location for instruction (Note: this exception applies only in the face-to-face setting and not to a broadcast or transmission).
- The performance is part of a teaching activity, however it does not have to be part of a regular course; therefore, host a related discussion forum or arrange for a student or instructor to lead an educational program related to the film.
- For more information see: [Section 110\(1\) of the Copyright law](#).

Allowed: The copyright owner has granted permission for the performance.

The copyright owner is typically the creator of the work. For example, most movie studios hold the copyright to their works.

- Obtain permission in writing if possible. While an oral agreement may suffice, written agreements always are preferable.
- Some film rental companies offer a “public performance license” for a fee.
- For more information concerning how to obtain permission, please visit: <http://copyright.iupui.edu/permsec.htm>.

Allowed: The performance is of a film that is in the public domain.

Copyright protection does not last forever. However, the rules for determining the duration of protection can be extremely complicated and may depend on facts that are simply undiscoverable without many hours of research. One bright line rule does exist: any work published in the U.S. before 1923 is in the public domain. For more information concerning determining whether a work is in the public domain, please visit:

- <http://dml.indiana.edu/pdf/dml-copyright-duration-report.pdf>
- http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

Also, many copyright owners offer their works to the public with few or no restrictions. To use these works, make sure that the owner has given explicit permission to the public and heed any restrictions that may prohibit your planned use. For more information concerning these types of works, please visit:

- Copyright Alternative Mechanisms (**coming soon!**)

For more information concerning which films are in the public domain or have been offered to the public and how to obtain them, please visit:

- <http://www.fesfilms.com/masters.html>
- <http://www.desertislandfilms.com/>
- <http://www.reelmediainternational.com/>
- <http://www.buyoutfootage.com/>
- <http://www.openflix.com/>
- <http://www.archive.org/details/movies>
- <http://www.creativecommons.org/>

Allowed: The performance is of a work created by the U.S. government.

Works created by the federal government are not protected by copyright and in the public domain. However, works commissioned by the federal government may have copyright protection. Also, state government works may very likely receive copyright protection. Federal government works in the public domain include:

- [Military Films](#)
- [Space Exploration](#)

Allowed: Fair uses of the copyrighted work.

The law of fair use provides an exception to the exclusive rights of the copyright owner. If the facts surrounding the viewing of the video fit within fair use, there is no infringement. There are many common misconceptions concerning the law of fair use and you should review the law before making any conclusions. You will have to consider the four factors of fair use:

1. the purpose of your use
2. the nature of the video
3. amount of the video shown

4. the effect of your showing of the video on the market for the video

For more information concerning the law of fair use and conducting fair-use analyses, please visit: <http://www.copyright.iupui.edu/fairuse.htm>.

For more information concerning copyright, visit the Copyright Management Center website at: www.copyright.iupui.edu.

Links Updated: February 7, 2006

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Course Management Systems and Copyright at IUPUI

A Project of the IUPUI Copyright Management Center

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Introduction

Placing articles and other materials on any university-supported Course Management System (CMS)¹ such as Oncourse or Angel raises challenging questions about copyright. These systems must provide material within the context and limits of copyright law. ²

Current copyright law gives legal protection to nearly all readings and other course

materials that an instructor might place on an electronic delivery system.³
Materials may be offered on such systems only if:

- 1 The instructor is the copyright owner of the material,⁴ or
- 2 The copyright owner of the material grants permission, or
- 3 The use of the material is a "fair use" under the law, or
- 4 The material is in the public domain,⁵ or
- 5 The material falls within another statutory exception.⁶

What is "Fair Use"?

Fair use is a legal doctrine that allows the public to make limited uses of copyrighted works without permission. For information about fair use at IUPUI and Indiana University, see: [Copyright Management Center: Fair-Use Issues](#).

Fair use may not be what you expect. Simple, clean, concise rules do not exist in the law of fair use. For example: Do not assume that a nonprofit, educational use is inherently fair use. Do not assume that giving credit for the source of the work inherently creates a fair use. Do not assume that limiting access to materials to students in the class inherently creates a fair use. On the other hand, proper application of fair use can prove to be extremely beneficial to the instructor, the students, and the educational process as a whole.

How Does Fair Use Apply to Oncourse, Angel, and other CMS?

The following are general standards suggested by the IUPUI Copyright Management Center to give fair use some practical application. Instructors and others at IUPUI who are using methods of electronic delivery of materials other than Oncourse and Angel should also consider these standards when evaluating whether their activities are within fair use.

Fair use depends on a balancing of four factors outlined in the copyright statutes. These factors may be addressed by a variety of means. Listed below with each factor are some suggestions that may be helpful in conducting fair-use analyses. Because each situation will be different, instructors must also consider other possibilities and weigh them in the balance for each fair-use determination. One need not necessarily take every possible precaution and satisfy all four of the statutory factors; hence, some adjusting of the implementation of the following procedure may still keep your activities within the boundaries of permitted use. For scenarios applying the factors of fair use, see: [Common Scenarios of Fair Use Issues: Posting Materials on Course Management Systems](#).

To establish the strongest basis for fair use, consider and apply the four factors along the lines of these suggestions:

1. Purpose of the Use

- Materials should be placed or posted on the CMS only for the purpose of serving the needs of specified educational programs.
- Materials should be placed or posted on the CMS only at the specific request of the instructor.
- Access to materials should be limited by password or other means to deter unauthorized access beyond students enrolled in the specific course for which the materials are needed.
- Students should not be charged a fee specifically or directly for access to materials placed on the CMS, and no person or unit at the university should benefit monetarily from

the use of the material.

2. Nature of the Work

- Only those portions of the work relevant to the educational objectives of the course should be placed on the CMS.
- The law of fair use applies more narrowly to highly creative works; accordingly, avoid substantial excerpts from novels, short stories, poetry, modern art images, and other such materials.
- Instructors should carefully review uses of “consumable” materials such, as test forms and workbook pages that are meant to be used and repurchased.

3. Amount of the Work

- Materials placed or posted on CMS will generally be limited to brief works or brief excerpts from longer works. Examples: a single chapter from a book, a single article from a journal, and individual news articles.
- The amount of the work placed on should be related directly to the educational objectives of the course.

4. Effect of the Use on the Market for the Original

- Try to avoid repeat use of the same materials by the same instructor for the same course.
- Materials posted on a CMS should include a citation to the original source of publication and a form of a copyright notice. For suggested forms of the notice, see: [Copyright Management Center: Copyright Notices for Supervised Library Copying](#). The instructor should also advise students that the materials are made available exclusively for use by students enrolled in the course and must not be distributed beyond that limited group. Access to materials should be limited by password or other means to deter unauthorized access beyond students enrolled in the specific course for which the specific materials are needed. ⁷
- The CMS should not include any material unless the instructor, the library, or another unit of the educational institution possesses a lawfully obtained copy.
- Materials on the CMS should not include works that are reasonably available and affordable for students to purchase—whether as a book, coursepack, or other format.

Permission to Post Materials

Permission from the copyright owner is an important option for posting materials on Oncourse. Instructors at IUPUI are ultimately responsible for securing permission to place material on Oncourse as needed. Consider your alternatives. The easiest is simply to link from Oncourse to any of the IU and IUPUI University Libraries licensed databases. A link may be made directly from Oncourse to the database that includes the desired material. The IU and IUPUI University Libraries can help you locate and make those links. Simple links to other Internet sites also generally do not raise copyright concerns. For more information about permissions, see: [Copyright Management Center: How to Secure Permission to Use Copyrighted Works](#).

Alternative Methods of Information Delivery

Instructors may want to consider alternative methods of providing students with materials for various reasons. Some alternatives may avoid copyright problems; other choices may be best suited for your educational objectives.

1. Providing Links to Materials for Students. Linking to materials already lawfully posted on the Internet or available through library databases is often the most efficient method of providing materials to students. Consult with the librarians about the online availability of many journals and other full-text.

2. Traditional Coursepacks. Consider using coursepacks if permission to post materials electronically is denied by the copyright owner but permission is available for creating hardcopies of the same materials.

3. Requiring Students to Purchase Materials. Encourage students to purchase materials if available at reasonable cost. Simple purchases seldom raise copyright issues.

4. ERROL is the electronic reserve system operated by the IUPUI University Library. The University Library's Reserves Team can assist you with using this electronic-reserve system, but it does raise significant copyright issues. For more information about applying copyright law to ERROL, see: <http://errol.iupui.edu/>

1 Course Management Systems include: Oncourse, Angel, and other electronic information delivery systems.

2 Copyright law provides the owner of the copyright with the exclusive right to reproduce, distribute, perform, display or make derivative works of their materials subject to certain statutory exceptions. In most cases, posting copyrighted materials on a CMS implicates one or more of these rights. [Return to text.](#)

3 Copyright law generally gives automatic protection to "original" works that are "fixed" in any medium. Consequently, the law protects articles, books, photographs, software, music, and an enormous range of new works that are stored on paper, on disk, or in almost any medium. [Return to text.](#)

4 In general, the instructor will only be the copyright owner of materials created by that individual, and only then if the instructor has not assigned the copyright to another party. Faculty authors frequently assign their copyrights to publishers, most often under the terms of a publication agreement for a journal article or other work. Read the fine print in the contracts carefully to determine who may be the copyright owner of your own work. For further information, see "[Guidance for Faculty on Copyright, Publication and General Research Dissemination,](#)" Indiana University Purdue University at Indianapolis, Circular 96-23, April 23, 1996. [Return to text.](#)

5 Some works are in the public domain and lack copyright protection typically because the copyright has expired or because the work is a "work of the U.S. Government." For more information about these possibilities, see: [Copyright Management Center: Copyright Quickguide.](#) Professor Laura N. Gasaway of the University of North Carolina has prepared a [chart](#) that succinctly summarizes when copyrights expire. [Return to text.](#)

6 The Copyright Act enumerates several exceptions to the exclusive rights held by the

copyright owner. Many of the exceptions are narrowly constructed and compliance with the law will involve meticulous planning. For more information, see: [Statutory Exceptions to the Exclusive Rights of Copyright Owners](#). [Return to text](#).

7 This condition is identical to the condition stated with respect to the "purpose" factor. This one fact—limiting access—can be important to at least two of the four factors in fair-use law. [Return to text](#).

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Content Updated: June 30, 2004

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Posting Materials on the Internet

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The new Internet technologies available to computer users have tremendous networking, programming, and other user-specific capabilities. Music copying, DVD, video, movie making, research preparations and many other activities have been made easily accessible to the regular computer user. With the click of a computer "mouse", you can cut, copy, and paste materials to a website. You must be aware that certain kinds of behavior, while using personal computing resources, can lead to copyrights infringement. An infringement can occur when you use a copyright owner's work or materials in an unauthorized manner. The possible copyright infringements an IUPUI computer user may encounter can be: photocopying; uploading to and downloading from websites; copying software; and sharing music, movie and data files. For more information on sharing files, see: [CMC Filesharing and Copyright](#) and [File Sharing @ IU: What you need to know](#) <http://filesharing.iu.edu>

Please realize that copyright owners hold certain exclusive rights in a work such as:

- reproduction of the work;
- distribution of copies of the work;
- making of "derivative" works;
- public performance; and
- public display.

Many people mistakenly assume that everything posted on the Internet is in the public domain. It is vital for you to know that, current copyright law gives legal protection to nearly all text, images, audiovisual recordings, and other materials that are posted on the Internet, even if the original works do not include any statement about copyright.

You may post materials on your websites only if:

1. You are the copyright owner of the material, or

2. The copyright owner of the material grants permission, or
3. The material is in the public domain, or
4. The use of the material is a "fair use" under the law, or
5. The material falls within another statutory exception.

Fair use plays a key role in the online world; just it has done with other forms of traditional media. Fair use is a legal doctrine that allows the public to make limited uses of copyrighted works without permission. Do not assume that a nonprofit, educational use or giving credit for the source of the work, or because you are merely building a family or personal website creates an inherent fair use. Limiting the amount of material you post on your website, and restricting access to the material are creative ways of strengthening your claim of fair use. For information about fair use, see: Copyright Management Center: Fair-Use Issues.

Obtaining permission from the copyright owner is an important option for posting materials on the World Wide Web. For more information about permissions, see: Copyright Management Center: How to Secure Permission to Use Copyrighted Works

Original: August 9, 2004

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§ 106. Exclusive rights in copyrighted works

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

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Courtesy of the Copyright Management Center at Indiana University. This statute is also available on-line at the U.S. Copyright Office, <http://lcweb.loc.gov/copyright/title17/>.

Last Updated: March 6, 2006

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§ 106A. Rights of certain authors to attribution and integrity

(a) Rights of Attribution and Integrity. — Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art —

(1) shall have the right —

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right —

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) Scope and Exercise of Rights. — Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

(c) Exceptions. —

(1) The modification of a work of visual art which is the result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement,

of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of “work of visual art” in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) Duration of Rights. —

(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) Transfer and Waiver. —

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not

constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

Courtesy of the Copyright Management Center at Indiana University. This statute is also available on-line at the U.S. Copyright Office, <http://lcweb.loc.gov/copyright/title17/>.

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§ 107. Limitations on exclusive rights: Fair use ¹

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

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

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

¹ Section 107 was amended by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5128, 5132, which struck out "section 106" and inserted in lieu thereof "sections 106 and 106A". Section 107 was also amended by the Act of Oct. 24, 1992, Pub. L. 102-492, 106 Stat. 3145, which added the last sentence.

Courtesy of the Copyright Management Center at Indiana University. This statute is also available on-line at the U.S. Copyright Office, <http://lcweb.loc.gov/copyright/title17/>.

To read more about Fair Use, see: [Fair-Use: Overview and Meaning for Higher Education](#) by Kenneth D. Crews.

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

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

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Nothing in this section —

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

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

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

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

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

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

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

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

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

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

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

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

(3) The exemption provided in this subsection does not apply to any

subsequent uses by users other than such library or archives.

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

NOTE: Section 108 was amended in late 1998 by the Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860, and the Sonny Bono Term Extension Act, Pub.L. 105-298, 112 Stat. 2827. Those revisions have been incorporated into this document courtesy of the Copyright Management Center at Indiana University [<http://www.copyright.iupui.edu>].

To read more about Section 108, see: [Digital Libraries and the Application of Section 108 of the U.S. Copyright Act](#) (Report prepared by Kenneth Crews in furtherance of the Digital Music Library Project funded by the NSF. Although the title and text refer to digital libraries, much of the content is applicable to a wide variety of situations.)

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§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord ¹

(a)² Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on —

(1) the date of the publication in the Federal Register of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or

(2) the date of the receipt of actual notice served under section 104A(d)(2)(B), whichever occurs first.

(b)(1)(A)³ Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection.

(B) This subsection does not apply to —

(i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or

(ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.

(C) Nothing in this subsection affects any provision of chapter 9 of this title.

(2)(A) Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(B) Not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990, and at such times thereafter as the Register of Copyrights considers appropriate, the Register of Copyrights, after consultation with representatives of copyright owners and librarians, shall submit to the Congress a report stating whether this paragraph has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function. Such report shall advise the Congress as to any information or recommendations that the Register of Copyrights considers necessary to carry out the purposes of this subsection.

(3) Nothing in this subsection shall affect any provision of the antitrust laws. For purposes of the preceding sentence, "antitrust laws" has the meaning given that term in the first section of the Clayton Act and includes section 5 of the Federal Trade Commission Act to the extent that section relates to unfair methods of competition.

(4) Any person who distributes a phonorecord or a copy of a computer program (including any tape, disk, or other medium embodying such program) in violation of paragraph (1) is an infringer of copyright under section 501 of this title and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509. Such violation shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.

(c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(d)⁴ The privileges prescribed by subsections (a) and (c) do not, unless authorized by the

copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

(e) Notwithstanding the provisions of sections 106(4) and 106(5), in the case of an electronic audiovisual game intended for use in coin-operated equipment, the owner of a particular copy of such a game lawfully made under this title, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment, except that this subsection shall not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship.

1 Section 109 was amended by the Act of October 4, 1984, Pub. L. 98-450, 98 Stat. 1727, and the Act of November 5, 1988, Pub. L. 100-617, 102 Stat. 3194. The 1984 Act redesignated subsections (b) and (c) as subsections (c) and (d), respectively, and inserted after subsection (a) a new subsection (b).

The earlier amendatory Act states that the provisions of section 109(b) "shall not affect the right of an owner of a particular phonorecord of a sound recording, who acquired such ownership before . . . [October 4, 1984], to dispose of the possession of that particular phonorecord on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before the date of the enactment of this Act." It also states, as modified by the 1988 amendatory Act, that the amendments "shall not apply to rentals, leaseings, lendings (or acts or practices in the nature of rentals, leaseings, or lendings) occurring after the date which is 13 years after . . . [October 4, 1984]."

Section 109 was also amended by the Computer Software Rental Amendments Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5134, 5135, which added at the end thereof subsection (e). The amendatory Act states that the provisions contained in the new subsection (e) shall take effect one year after the date of enactment of such Act, that is, one year after December 1, 1990. The Act also states that such amendments so made "shall not apply to public performances or displays that occur on or after October 1, 1995."

2 Section 109(a) was amended by the Uruguay Round Agreements Act of December 8, 1994, Pub. L. 103-465, 108 Stat. 4809, 4981, which added the second sentence.

3 Section 109(b) was amended by the Computer Software Rental Amendments Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5134, in the following particulars: a) paragraphs (2) and (3) were redesignated as paragraphs (3) and (4), respectively; b) paragraph (1) was struck out and new paragraphs (1) and (2) were inserted in lieu thereof; and c) paragraph (4), as redesignated by the amendatory Act, was struck out and a new paragraph (4) was inserted in lieu thereof.

The amendatory Act states that section 109(b), as amended, "shall not affect the right of a person in possession of a particular copy of a computer program, who acquired such copy before the date of the enactment of this Act, to dispose of the possession of that copy on or

after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before such date of enactment."

The amendatory Act also states that the amendments made to section 109(b) "shall not apply to rentals, leaseings, or lendings (or acts or practices in the nature of rentals, leaseings, or lendings) occurring on or after October 1, 1997." However, this limitation, set forth in the first sentence of section 804(c) of the amendatory Act [104 Stat. 5136], was subsequently deleted by the Uruguay Round Agreements Act of December 8, 1994, section 511 of which struck the above mentioned first sentence in its entirety. See Pub. L. 103-465, 108 Stat. 4809, 4974. See also footnote 1.

4 The Act of November 5, 1988, Pub. L. 100-617, 102 Stat. 3194, made technical amendments to section 109(d), by striking out "(b)" and inserting in lieu thereof "(c)" and by striking out "copyright" and inserting in lieu thereof "copyright".

Courtesy of the Copyright Management Center at Indiana University. This statute is also available on-line at the U.S. Copyright Office, <http://lcweb.loc.gov/copyright/title17/>.

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§ 110. Limitations on exclusive rights: Exemption of certain performances and displays¹

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

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

¹ Section 110 of the U.S. Copyright Act has 10 subsections, but this document includes only subsections (1) and (2), which are of greatest significance to higher education. [Click here to go to subsection \(2\).](#)

[Click here for more information about Section 110\(1\).](#)

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§ 110. Limitations on exclusive rights: Exemption of certain performances and displays¹

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

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

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

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

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

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

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

(D) the transmitting body or institution —

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

(ii) in the case of digital transmissions —

(I) applies technological measures that reasonably prevent —

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

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

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

For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.

¹ Section 110 of the U.S. Copyright Act has 10 subsections, but this document includes only subsections (1) and (2) which are of greatest significance to higher education. [Click here to go to subsection \(1\).](#)

² This new text was signed into law on November 2, 2002, by President Bush when he signed the 21st Century Department of Justice

Appropriations Authorization Act (H.R. 2215), which included the Technology, Education, and Copyright Harmonization (TEACH) Act.

Courtesy of the Copyright Management Center at Indiana University. This statute is also available on-line at the U.S. Copyright Office, <http://lcweb.loc.gov/copyright/title17/>.

To read more about Section 110(2), see: [Summary of the TEACH Act](#),
Kenneth D. Crews

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§ 112. Limitations on exclusive rights: Ephemeral recordings¹

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if —

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

* * *

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if —

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if —

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

¹Section 112 of the U.S. Copyright Act has 7 subsections, but this document includes only subsections (b) and (f) which are of greatest significance to higher education.

Courtesy of the Copyright Management Center at Indiana University. This statute is also available on-line at the U.S. Copyright Office, <http://lcweb.loc.gov/copyright/title17/>.

[Click here for more information about Section 112\(b\).](#)

[Click here for more information about Section 112\(f\).](#)

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§ 112. Limitations on exclusive rights: Ephemeral recordings¹

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if--

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if--

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

¹Section 112 of the U.S. Copyright Act has 7 subsections, but this document includes only subsections (b) and (f) which are of greatest significance to higher education. [Click here to go to subsection \(b\).](#)

Courtesy of the Copyright Management Center at Indiana University. This statute is also available on-line at the U.S. Copyright Office, <http://lcweb.loc.gov/copyright/title17/>.

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§117. Limitations on exclusive rights: Computer programs

NOTE: Section 117 was amended in late 1998 by the Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860. Those revisions have been incorporated into this document courtesy of the Copyright Management Center at Indiana University <http://www.copyright.iupui.edu>.

(a) Making of Additional Copy or Adaptation by Owner of Copy. — Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

(b) Lease, Sale, or Other Transfer of Additional Copy or Adaptation. — Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

(c) Machine Maintenance or Repair. — Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if —

(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and

(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

(d) Definitions. — For purposes of this section —

(1) the “maintenance” of a machine is the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

(2) the “repair” of a machine is the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.

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§ 504. Remedies for infringement: Damages and profits¹

(a) In General. - Except as otherwise provided by this title, an infringer of copyright is liable for either -

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits. - The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages. -

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the

nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(d) Additional Damages in Certain Cases. - In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

1 Section 504 was amended in subsection (c) by the Act of October 31, 1988, Pub. L. 100-568, 102 Stat. 2853, 2860, in the following particulars: 1) in paragraph (1), by striking out "\$250", and inserting in lieu thereof "\$500", and by striking out "\$10,000", and inserting in lieu thereof "\$20,000"; and 2) in paragraph (2), by striking out "\$50,000.", and inserting in lieu thereof "\$100,000.", and by striking out "\$100.", and inserting in lieu thereof "\$200.".

Courtesy of the Copyright Management Center at Indiana University. This statute is also available on-line at the U.S. Copyright Office, <http://lcweb.loc.gov/copyright/title17/>.

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The Law of "Work-Made-For-Hire" **Select Statutes and Cases**

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Revised: September 14, 2001

Part I: Selected Statutes

Provisions of the U.S. Copyright Act
Title 17, United States Code

Section 101 (excerpt):

A "work made for hire" is--

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Section 201:

§ 201. Ownership of copyright

(a) Initial ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) Works made for hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to collective works. Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of ownership.

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of interstate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary transfer. When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

Part II: Selected Court Rulings

The University of Colorado Foundation, Inc. v. American Cyanamid, 880 F. Supp. 1387 (D. Colo. 1995) (finding summarily that a research article is a work-made-for-hire, and the copyright belongs to the university that employed the professors).

Hays v. Sony Corporation of America, 847 F.2d 412 (7th Cir. 1988) (suggesting the

possibility of a teacher's exception to the doctrine).

Weinstein v. University of Illinois, 811 F.2d 1091 (7th Cir. 1987) (holding that the faculty members retain the copyright to a research article, but as a matter of university policy interpretation).

Manning v. Board of Trustees of Community College District No. 505 (Parkland College), 109 F.Supp.2d 976 (C.D. Ill. 2000) (holding that the work of a staff photographer belongs to the college under the work-made-for-hire doctrine, and that general statements in policy manuals and collective-bargaining agreements are insufficient to meet the requirement of a signed writing to shift ownership back to the photographer).

Vanderhurst v. Colorado Mountain College District, 16 F. Supp. 2d 1297 (D.Colo. 1998).

The college employed Vanderhurst "for over 22 years pursuant to a series of annually renewable employment contracts" as a professor and clinician in Veterinary Technology. In 1995 he published a "Veterinary Technology Outline," and ownership of it became part of the dispute between the instructor and the institution. According to the court:

The question, then, is whether the Outline is a "work prepared by an employee within the scope of his or her employment" under § 101(1). The Act does not define these terms. However, in Reid, the Court applied agency law to the Act. Id. at 751. (agency principles applicable to determine employment [**30] status and whether disputed work within scope of employment).

The term "scope of employment" has been defined as:

those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods . . . of carrying out the objectives of the employment.

Restatement (Second) Agency §§ 228-229; United States v. Smith, 810 F.2d 996 (10th Cir. 1987). Other factors which may be considered are whether: 1) it is the kind of work the person is employed to perform; 2) the work occurs substantially within work hours; and 3) the work is actuated, at least in part, by a purpose to serve the employer. Restatement (Second) Agency, § 228; Nimmer on Copyright p. 5-33 (1997).

Here, Vanderhurst alleges that the outlines were created "in the course of teaching at CMC." Second Amended Complaint, P69. Further, CMC policy § 110.1 states that a faculty member's duties include "professional service activities [including], but not limited to, course, program and curriculum development [and] course preparations. . . ." Def. Ex. 20.

It is undisputed that Vanderhurst prepared the Outline on his own time with his own materials. However, there is no genuine dispute that Vanderhurst's creation of the Outline was connected directly with the work for which was employed to do and was fairly and reasonably incidental to his employment. Further, creation of the Outline may be regarded fairly as one method of carrying out the objectives of his employment. See, Restatement (Second) Agency, § 228. I conclude, therefore, that pursuant to the "work for hire" doctrine, as of 1995, any copyright remaining in the Outline did not belong to Vanderhurst. Thus, I will grant defendants' motion for summary judgment on claim eight.

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Copyright and Higher Education: *Announcement of Recent Development*

New Copyright Legislation Directly Affects Teaching and Research *Congress Enacts the Digital Millennium Copyright Act*

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In the waning days of the 105th Congress, both the Senate and the House of Representatives overwhelmingly accepted a final version of the Digital Millennium Copyright Act (DMCA); the President signed it into law on October 28, 1998. The DMCA is lengthy and complex legislation that could revise the terms on which faculty, librarians, students, and staff may use email, websites, and other technology at the university. The new law could alter fundamental activities such as library services, research, website development, distance education, and Internet access. Much of this legislation has been highly controversial in academic circles. Many educators had sought to prevent passage of the DMCA or had argued for revising many of its provisions to better foster innovative teaching and research. Some of those efforts were successful, leaving the final bill more acceptable to higher education than it might otherwise have been. In the final analysis, the DMCA affords some benefits for teaching and research, but overall it imposes enormous challenges for higher education at Indiana University and throughout the United States.

This report summarizes the most salient provisions of the DMCA affecting higher education, and suggests how the Act may require changes in common university practices. The Act is divided into "titles," and the organization of this summary reflects those title numbers.

Title I: WIPO Copyright Treaties Implementation

1. New Prohibitions on Using Copyrighted Works. This provision prohibits anyone from circumventing a "technological measure" that controls access to copyrighted works and prohibits removal of "copyright management information" from any work under many circumstances. For example, any action that bypasses computer restrictions on access to databases could become a violation of federal law. Moreover, removing a copyright notice or removing the names of authors from any work also could be a violation if the removal concealed or allowed an infringement of copyright to that work. Fundamentally, these provisions allow copyright owners to impose technological controls and other restrictions on the use of their works, and in the process, to constrain the use of materials for research and teaching in a manner more restrictive than may be established under existing copyright law. The copyright owner could conceivably impose conditions or fees for each use of any "technologically protected" works acquired by the Copyright Management Center or others in the university community.

2. Exceptions for the Benefit of Education and Libraries. These new restrictions are subject to several complex exceptions, many of which are specifically for the benefit of higher education. First, the prohibition on circumventing technological restrictions does not take effect for two years. Second, once taking effect, the restrictions may not apply to particular classes of works and to particular persons, if the restrictions would "adversely affect" the ability to make "noninfringing uses" of those works, as determined by the U.S. Copyright Office. Further, libraries will be allowed to circumvent protections if they are reviewing the work in good faith for purposes of determining whether to purchase it. Moreover, the DMCA specifies that nothing in it will affect rights of fair use. Thus, while this new law imposes a heightened responsibility on educators and librarians to respect the rights of copyright owners, it would, in an awkward twist, allow breaking restrictive codes that may block otherwise lawful uses of copyrighted works. In order to implement such exceptions, individuals may need to review and determine the appropriateness of potentially technical activity; in order to manage the implications of this new law, the university may need to negotiate more aggressively with copyright owners to obtain more workable terms and fewer restrictions on protected materials.

3. Three-Year Review of the Law. During the initial two years after enactment, and every three years thereafter, the Librarian of Congress, upon recommendation of the Register of Copyrights, is required to conduct proceedings to examine and review the effect of the restrictions on the availability and use of copyrighted works, especially for education and libraries. These reviews are an opportunity for the university to collect and present data and examples of these effects; they could also be the foundation of a major research study that could have national implications.

4. Encryption Research and Reverse Engineering. Researchers in these areas often need to circumvent technological controls in order to reverse engineer software or to undertake encryption research for the purpose of testing and improving the effectiveness of such controls. The DMCA allows continuance of those activities, but only under tightly defined circumstances. Accordingly, the university may need to monitor the reverse engineering of software, perhaps by prior approval from University Information Technology Services. The university may also need to subject any encryption research to advance review and approval, perhaps through the Office of Research and Sponsored Programs in a manner similar to current review of human subjects studies.

Title II: Online Service Provider Liability

Reduced Risk of Infringement Liability for University Computer Networks. In an important development for all universities that provide Internet access, the DMCA potentially eliminates some risks of copyright infringement liability for an online-service provider ("OSP"), subject to numerous conditions specified in the Act. An OSP is defined broadly as "an entity offering the transmission, routing, or providing of connections for digital online communications." Indiana University routinely offers these services to faculty, librarians, staff, and the broader university community. Possible infringements may occur when a user of the network or system transmits copyrighted works, caches works in computer memory, includes a work on a website, or possibly even links to an infringing work on another site. The university may be able to escape liability for infringements committed by faculty and other users, generally if the university is acting solely as a conduit for the transmission of information. The liability, however, remains with the individual who committed the infringement.

The DMCA might provide a welcome degree of legal certainty about the university's potential OSP liability, but that benefit comes at a significant price. The new law requires implementation of numerous operational procedures that, if not carefully applied and monitored, could sharply limit the use of technologies for teaching and research, and that could raise serious problems of academic freedom and appropriate oversight of faculty activities and discipline for malfeasance.

In general, the university may escape liability upon meeting elaborate, technical conditions related to the structure of the network system. In addition, the university must meet numerous procedural conditions, such as the following:

- Designating a university agent who would receive notifications of claimed infringements submitted by third parties. The U.S. Copyright Office would record this information and provide a publicly available directory of such agents, assessing a fee for this service.

- Implementing, administering, and tracking notifications of claimed infringements committed by users of the system and expeditiously removing or disabling access to material.

- Adopting a policy and informing subscribers and account holders of the policy that would provide for termination of service if that subscriber or account holder repeatedly infringes the copyrights of third parties.

- Removing or disabling access to materials if the university obtains knowledge of infringing activity or becomes aware of facts that suggest infringement.

- Adhering to numerous and extensive technical requirements for the storage and transmission of the infringing materials and all materials that may be communicated on the OSP's system or network.

Under well-established law, an employer is ordinarily likely to be liable for the unlawful activities of employees acting within their duties at the workplace. Thus, if the university provides email and website services to faculty members for their teaching and research, the university may not be acting as a "mere conduit" for the communication, as would a typical OSP. Instead, the university may be liable as would any other employer. The DMCA

extends the OSP protection to the university, even in the context of faculty activities, but subject to additional conditions:

- The OSP is a public or nonprofit educational institution, such as Indiana University.

- The claimed infringements are made by a "faculty member or graduate student who is an employee" of the university and who is "performing a teaching or research function."

- The infringing activities do not involve providing online access to "required or recommended" instructional materials.

- The university has not received more than two formal notices of claimed infringement during the preceding three years with respect to that faculty member or graduate student. While the statute disqualifies notices that make "intentionally" false claims, the law does not deal with the problem of notices that may inadvertently prove to be false, incorrect, or otherwise not claiming an actual infringement due to fair use or other legal exception.

- The university provides "all users of its system or network" information about copyright, and that information must "accurately describe, and promote compliance with, the laws of the United States relating to copyright."

Needless to say, these additional requirements are onerous. Together with a requirement to remove or disable access to the materials "expeditiously" upon notification, these conditions on the use of technology for teaching and research pose serious practical and legal problems for the university that may be seeking to enjoy the limited benefits of the OSP protection. Logistically, the university is expected to implement numerous administrative processes, beginning with appointment of a "designated agent" to receive claims of infringement and to institute the process of removing materials from the university network. Further, the process of notification of claimed infringements, the rigid opportunity for the individual to justify the activity as fair use or as otherwise permitted under the law, the university's commitment to remove the material, and the university's obligation to terminate email and website privileges for some faculty, may also result in violations of academic freedom and constitutional principles of due process and free speech, if they are not handled in a cautious manner.

In exchange for meeting these conditions, the university receives limited protection. It is protected from liability arising only from the copyright infringements, but not arising from other legal claims that may even arise from the same activity, such as breach of contract, trademark infringement, or defamation.

Title IVB: Additional Provisions of Importance to the University

1. Possible Revision of the Law for Distance Education. The DMCA charges the Copyright Office with the duty to recommend to Congress any changes in the law with respect to the use of copyrighted works in distance education. Given the growth of these activities at IU, this provision is of tremendous importance. Existing "distance-education" law, Section 110(2) of the Copyright Act, sets sharp restrictions on the use of materials in distance education. The potential magnitude of the Copyright Office study is enormous,

because "distance education" today encompasses multiple forms of transmission, from television to Websites, and includes the vast range of copyrighted materials, from text to software, that enhance the educational experience. This DMCA calls into consideration the teaching content permitted in distance education, the likely need for consistent controls on access and delivery, and the availability of licensing for the use of copyrighted works. Despite this broad scope, however, the Copyright Office is required to report its findings and recommendations to Congress in April 1999. Those findings and recommendations will likely have momentous consequences for IU and all colleges and universities. The process of review and recommendation, however, gives IU an opportunity to participate in those recommendations and to express its concerns about this issue to the Copyright Office and to members of Congress. The Copyright Management Center, in coordination with the Indiana Partnership for Statewide Education and the Indiana Commission for Higher Education, is taking immediate steps to address these issues. The CMC is organizing a meeting of Indiana's public and private institutions of higher education, to be held on January 21, 1999, for the purpose of gathering data with respect to distance education and preparing a report for the U.S. Copyright Office and Indiana's delegation to Congress.

2. Copies of Transmissions. Notwithstanding all of the various limits on the use of materials in transmissions, the DMCA sets new conditions and restrictions under which the university may be able to make copies of our own transmissions made for distance education, public television, and other purposes.

3. Library Copying and Preservation. The amendments to Section 108 of the Copyright Act offer good and bad news for libraries. First, they clarify and assure that preservation copies of unique or deteriorating works may be made in digital formats; however, the digital version may be used only on the library premises. Second, they allow the library to copy works if the works are currently in formats that have become technologically obsolete. Finally, the amendments address a long-standing controversy in Section 108 by specifying that all copies made by the library under Section 108 must include the formal copyright notice, if available, or a specified statement about the applicability of copyright to the work. The Copyright Management Center has circulated to IU libraries detailed summaries of these developments. Those summaries are available on the CMC website, at the address noted above.

This document was prepared for the Indiana University community by the Copyright Management Center. It is the work of Dwayne Buttler, Coordinator of the CMC; Noemi Rivera-Morales, doctoral student in the IU School of Library and Information Science; and Prof. Kenneth Crews.

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Copyright and Higher Education: Announcement of Recent Development

December 18, 1997

An Announcement from:
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President Signs New Criminal Copyright Bill: Raising The Stakes For Electronic Copyright Responsibilities

President Clinton signed into law on December 17, 1997 the "No Electronic Theft Act." It is a tough new law which severely tightens the circumstances under which an individual may face criminal liability for "willful" copyright infringements. This new law had strong support from the software and entertainment industries, and was generally opposed by academic and scientific organizations.

While this law raises anew the consequences of copyright infringement, it also underscores the need for faculty, librarians, students and others at the university to learn enough about copyright in order to reasonably conclude in good faith that their copying and distribution of materials for teaching, research, multimedia development, and Internet applications do not constitute infringement.

What is the New Law?

The "No Electronic Theft Act" would impose criminal liabilities on any individual who infringes copyright for purposes of "commercial advantage or private financial gain." In a more complicated but perhaps more important provision, the law would also impose criminal liability on any person who reproduces or distributes one or more copies of one or more works during a 180-day period, if such works have "total retail value of more than \$1,000." Hence, a faculty member loading materials onto a website or even making photocopies for classroom distribution, if the value of the copies totals more than \$1,000, may now actually face the prospect of a criminal violation of copyright.

These infringements, however, must be made "willfully."

No one is fully certain what a "willful infringement" really means. According to reports and hearings from the House of Representatives, willfulness means "something more than the mere reproduction or distribution of copyrighted works." While criminal liability does not depend on proving the "defendant's state of mind," liability may be established if "the defendant acted with reckless disregard of the rights of the copyright holder." Willfulness may be established by circumstantial evidence, and ignorance of the law does not allow someone to escape criminal liability.

The new law is hardly a stellar piece of legislation, and it is singularly unfriendly to experimentation for teaching and research. According to David Post, Associate Professor of Law at Temple University and Co-director of the Cyberspace Law Institute: "This is a dreadful piece of legislation. Congress is . . . reacting in a panic and saying there's so much copyright infringement we need to throw people in jail."*

What does the New Law Mean for Educators?

What was Congress seeking to accomplish? This new law is in reaction to a case involving a student at the Massachusetts Institute of Technology who escaped criminal liability for large-scale distribution of software on the Internet. Under previous law he could not be held criminally liable if he sought no financial gain. He could, however, still face civil liability to the copyright owners of the software. That civil liability still remains under the new law.

What is the likely practical effect of this new law? While we are not likely to see widespread criminal prosecution against faculty and others at colleges and universities around the country, the mere possibility of such prosecution may be used in a dramatic way to invoke inappropriate restrictions on new technologies. Universities should not overreact.

How May an Educator Pursue Teaching and Avoid Liability?

Faculty and others may employ several means to reduce the likelihood of prosecution. One means is simply to avoid financial gain and to avoid making copies with a total retail value of more than \$1,000. Perhaps the best means to avoid liability is to learn about fair use and other public rights of use of copyrighted materials and to reach reasonable and good-faith conclusions that your activities are within those exemptions. If you can conclude with reasonable grounds that you are within fair use or other specific exemptions, not only can you likely demonstrate no "willfulness" to infringe, but you may also demonstrate that your activities are no infringement at all.

What is the Policy at Indiana University?

The approach of learning about fair use and other rights of use is consistent with the new fair-use policy for Indiana University. That policy was adopted by IU Board of Trustees on December 5, 1997, and it calls on each of us in the IU community to know the fundamentals of copyright and fair use and to apply that knowledge in a reasonable, good-faith manner as we pursue our innovative teaching, research, and service. For more information, visit the [CMC's website](#)

*Professor Post visited the IUPUI campus in February 1997 as part of the "Cyberspace Law Lecture Series." The quotation originally appeared in an article about the same legislation on the "netlynewsnetwork" and it appears here with the kind approval of Professor Post. [Return to text.](#)

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New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act

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Prepared for:
the American Library Association
in furtherance of a project to develop and disseminate
information resources related to copyright and
distance education.

Introduction: The New Legislation

Of great importance to the use of new technologies in innovative education, on October 4, 2002 Congress enacted the "Technology, Education and Copyright Harmonization Act," commonly known as the "TEACH Act." Long anticipated by educators and librarians, the new law will demand a full reconsideration of the ability to use existing copyright-protected materials in distance education. The law is a complete revision of the current Section 110 (2) of the U.S. Copyright Act, and one of its fundamental objectives is to strike a balance between protecting copyrighted works, while permitting educators to use those materials in distance education. If educators remain within the boundaries of the law, they may use certain copyrighted works without permission from, or payment of royalties to, the copyright owner—and without copyright infringement.

The new law offers many improvements over the previous version of Section 110(2), but in order to enjoy its advantages, colleges, universities, and other qualified educational institutions will need to meet the law's rigorous requirements. Educators will not be able to comply by either accidental circumstances or well-meaning intention. Instead, the law calls on each educational institution to undertake numerous procedures and involve the active participation of many individuals.

This paper principally summarizes the new standards and requirement established by the TEACH Act. The statutory language itself is often convoluted and does not necessarily flow gracefully. This paper accordingly isolates the various requirements and benefits of the new law and organizes them in a manner that may be helpful to educators and others seeking to understand and comply with the law. This paper will also suggest strategies and implementation methods that an educational institution may choose to follow. In general, this paper will outline the benefits of the TEACH Act and organize the law's requirements

into three groups of duties that may be assigned to three divisions within a college or university for implementation: duties of institutional policymakers; duties of information technology officials; and duties of faculty members or other instructional staff. In this multifaceted process, librarians will also find an important role.

Background of Copyright Law

To understand the magnitude of the issues at stake, one needs to comprehend not only the growth of distance education, but also the expansion of copyright protection. Much of the material used in educational programs—in the classroom or through “transmission”—is protected under copyright law. Copyright protection vests automatically in nearly all works that are “original works of authorship” and “fixed in any tangible medium of expression” (Section 102(a)). Hence, most writings, images, artworks, videotapes, musical works, sound recordings, motion pictures, computer programs, and other works are protected by copyright law. That protection applies even if the work lacks any form of “copyright notice” and is not registered with the U.S. Copyright Office. Some works are in the “public domain” and do not have copyright protection. For example, works of the U.S. government are generally barred from copyright protection, and the copyrights on other works eventually expire. Copyrights today usually last through the life of the author, plus seventy years. Quite simply, the law protects vast quantities of works for many, many years.

When educators use any of these works in their teaching, they are using copyright-protected materials. Among the rights of copyright owners are rights to make copies and rights to make public performances and public displays of the works. An assembled—or even dispersed—group of students may well constitute the “public” under the law. Consequently, educators frequently incur possible violations of owners’ rights whenever they copy materials as handouts, upload works to websites, “display” slides or other still images, or “perform” music, videos, and other works. In the context of traditional, face-to-face teaching, educators long have debated the application of “fair use” to making copies, and the Copyright Act since 1976 has included a relatively simple and broad provision allowing “performances” and “displays” in the face-to-face classroom setting (Section 110 (1)). The rules for distance education, however, are significantly different. Both the meaning of fair use and the details of the specific statute (Section 110(2)) become much more rigorous when the materials are uploaded to websites, transmitted anywhere in the world, and are easily downloaded, altered, or further transmitted by students and other users—all posing possible threats to the interests of copyright owners.

Context of Distance Education

Comprehending the practical implications of the new legislation also requires understanding the congressional vision of “distance education” and the relationship between educators and the institution. The TEACH Act is a clear signal that Congress recognizes the importance of distance education, the significance of digital media, and the need to resolve copyright clashes. The new law is, nevertheless, built around a vision that distance education should occur in discrete installments, each within a confined span of time, and with all elements integrated into a cohesive lecture-like package.

In other words, much of the law is built around permitting uses of copyrighted works in the context of “mediated instructional activities” that are akin in many respects to the conduct of traditional classroom sessions. The law anticipates that students will access each “session” within a prescribed time period and will not necessarily be able to store the materials or

review them later in the academic term; faculty will be able to include copyrighted materials, but usually only in portions or under conditions that are analogous to conventional teaching and lecture formats. Stated more bluntly, this law is not intended to permit scanning and uploading of full or lengthy works, stored on a website, for students to access throughout the semester—even for private study in connection with a formal course.

The TEACH Act suggests another general observation: Many provisions focus entirely on the behavior of educational institutions, rather than the actions of instructors. Consequently, the institution must impose restrictions on access, develop new policy, and disseminate copyright information. The institution is allowed to retain limited copies for limited purposes, but the statute indicates nothing about whether the individual instructor may keep a copy of his or her own instructional program. Most important, educational institutions are probably at greater risk than are individuals of facing infringement liability, and individual instructors will most likely turn to their institutions for guidance about the law. These circumstances will probably motivate institutions to become more involved with oversight of educational programs and the selection and use of educational materials. This substantive oversight may raise sensitive and important issues of academic freedom.

One consequence of these developments is apparent: The pursuit and regulation of distance-education programs will become increasingly centralized within our educational institutions. Because the law calls for institutional policymaking, implementation of technological systems, and meaningful distribution of copyright information, colleges and universities may well require that all programs be transmitted solely on centralized systems that meet the prescribed standard. Because the law permits uses of only certain copyrighted materials, institutions will feel compelled to assure that faculty are apprised of the limits, and some colleges and universities will struggle with whether to monitor the content of the educational programming.

Some news announcements anticipating the TEACH Act have suggested that the use of materials in distance education will be on a par with the broad rights of performance and display allowed in the face-to-face classroom. This characterization of the law neglects the many differences between the relevant statutes. In the traditional classroom, the Copyright Act long has allowed instructors to “perform” or “display” copyrighted works with few restrictions (Section 110(1)). By contrast, both the previous and the new versions of the statute applicable to distance education are replete with conditions, limits, and restrictions. Make no mistake: While the TEACH Act is a major improvement over the previous version of Section 110(2), the law still imposes numerous requirements for distance education that reach far beyond the modest limits in the traditional classroom.

Benefits of the TEACH Act

The primary benefit of the TEACH Act for educators is its repeal of the earlier version of Section 110(2), which was drafted principally in the context of closed-circuit television. That law permitted educators to “perform” only certain types of works and generally allowed transmissions to be received only in classrooms and similar locations. These restrictions, and others, usually meant that the law could seldom apply to the context of modern, digital transmissions that might utilize a range of materials and need to reach students at home, at work, and elsewhere. The new version of Section 110(2) offers these explicit improvements:

Expanded range of allowed works. The new law permits the display and performance of nearly all types of works. The law no longer sweepingly excludes broad categories of

works, as did the former law. However, a few narrow classes of works remain excluded, and uses of some types of works are subject to quantity limitations.

Expansion of receiving locations. The former law limited the transmission of content to classrooms and other similar location. The new law has no such constraint. Educational institutions may now reach students through distance education at any location.

Storage of transmitted content. The former law often permitted educational institutions to record and retain copies of the distance-education transmission, even if it included copyrighted content owned by others. The new law continues that possibility. The law also explicitly allows retention of the content and student access for a brief period of time, and it permits copying and storage that is incidental or necessary to the technical aspects of digital transmission systems.

Digitizing of analog works. In order to facilitate digital transmissions, the law permits digitization of some analog works, but in most cases only if the work is not already available in digital form.

None of these benefits, however, is available to educators unless they comply with the many and diverse requirements of the law. The rights of use are also often limited to certain works, in limited portions, and only under rigorously defined conditions. The remainder of this paper examines those requirements.

Requirements of the TEACH Act

This paper groups the law's many new requirements according to the unit within the institution that will likely be responsible for addressing or complying with each.

Duties of Institutional Policymakers

1. *Accredited nonprofit institution.* The benefits of the TEACH Act apply only to a "government body or an accredited nonprofit educational institution." In the case of post-secondary education, an "accredited" institution is "as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education." Elementary and secondary schools "shall be as recognized by the applicable state certification or licensing procedures." Most familiar educational institutions will meet this requirement, but many private entities—such as for-profit subsidiaries of nonprofit institutions—may not be duly "accredited."

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

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

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

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

Duties of Information Technology Officials

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

2. *Technological controls on storage and dissemination.* While the transmission of distance education content may be conducted by diverse technological means, an institution deploying “digital transmissions” must apply technical measures to prevent “retention of the work in accessible form by recipients of the transmission . . . for longer than the class session.” The statute offers no clarification about the meaning of a “class session,” but language throughout the statute suggests that any given transmission would require a finite amount of time, and students would be unable to access it after a designated time. Also, in the case of “digital transmissions,” the institution must apply “technological measures” to prevent recipients of the content from engaging in “unauthorized further dissemination of the work in accessible form.” Both of these restrictions address concerns from copyright owners that students might receive, store, and share the copyrighted content. Both of these provisions of the statute call upon the institution to implement technological controls on

methods for delivery, terms of accessibility, and realistic abilities for students to download or share copyrighted content. The controls, however, need not be perfect. Indeed, some experts have questioned whether any controls might work in all situations. The law accordingly requires that the technological controls be "reasonable." In other words, do your best, and keep checking for the latest innovations.

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

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

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

Duties of Instructors

Thus far, most duties and restrictions surveyed in this examination of the TEACH Act have focused on responsibilities of the institution and its policymakers and technology supervisors. None of the details surveyed so far, however, begins to address any parameters on the substantive content of the distance-education program. Under traditions of academic freedom, most such decisions are left to faculty members who are responsible for their own courses at colleges and universities. Consequently, to the extent that the TEACH Act places restrictions on substantive content and the choice of curricular materials, those decisions are probably best left to the instructional faculty. Faculty members are best positioned to optimize academic freedom and to determine course content. Indeed, the TEACH Act does establish numerous detailed limits on the choice of content for distance education. Again, the issue here is the selection of content from among

copyrighted works that an instructor is seeking to use without permission from the copyright owner.

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

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

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

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

The first of these limitations is clearly intended to protect the market for commercially available educational materials. For example, specific materials are available through an online database, or marketed in a format that may be delivered for educational purposes through “digital” systems, the TEACH Act generally steers users to those sources, rather than allowing educators to digitize the upload their own copies.

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

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

The requirements share a common objective: to assure that the instructor is ultimately in charge of the uses of copyrighted works and that the materials serve educational pursuits and are not for entertainment or any other purpose. A narrow reading of these requirements may also raise questions about the use of copyrighted works in distance-

education programs aimed at community service or continuing education. While that reading of the statute might be rational, it would also be a serious hindrance on the social mission of educational institutions.

4. *Mediated instructional activities.* In perhaps the most convoluted language of the bill, the statute directs that performances and displays, involving a “digital transmission,” must be in the context of “mediated instructional activities.” This language means that the uses of materials in the program must be “an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting.” In the same provision, the statute specifies that “mediated instructional activities” do not encompass uses of textbooks and other materials “which are typically purchased or acquired by the students.” The point of this language is to prevent an instructor from including, in a digital transmission, copies of materials that are specifically marketed for and meant to be used by students outside of the classroom in the traditional teaching model. For example, the law is attempting to prevent an instructor from scanning and uploading chapters from a textbook in lieu of having the students purchase that material for their own use. The provision is clearly intended to protect the market for materials designed to serve the educational marketplace. Not entirely clear is the treatment of other materials that might ordinarily constitute handouts in class or reserves in the library. However, the general provision allowing displays of materials in a quantity similar to that which would be displayed in the live classroom setting (“mediated instructional activity”) would suggest that occasional, brief handouts—perhaps including entire short works—may be permitted in distance education, while reserves and other outside reading may not be proper materials to scan and display under the auspices of the new law.

5. *Converting analog materials to digital formats.* Troublesome to many copyright owners was the prospect that their analog materials would be converted to digital formats, and hence made susceptible to easy downloading and dissemination. Some copyright owners have held steadfast against permitting digitization in order to control uses of their copyrighted materials. The TEACH Act includes a prohibition against the conversion of materials from analog into digital formats, except under the following circumstances:

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

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

Role for Librarians

Nothing in the TEACH Act mentions duties of librarians, but the growth and complexity of distance education throughout the country have escalated the need for innovative library

services. Fundamentally, librarians have a mission centered on the management and dissemination of information resources. Distance education is simply another form of exactly that pursuit. More pragmatically, distance education has stirred greater need for reserve services and interlibrary loans in order to deliver information to students in scattered locations. Librarians are also often the principal negotiators of licenses for databases and other materials; those licenses may grant or deny the opportunity to permit access to students located across campus or around the world.

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

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

Conclusion

The TEACH Act is an opportunity, but it is also a responsibility. The new law is a benefit, but also a burden. Implementing the law and enjoying its benefits will be possible only with concerted action by many parties within the educational institution. Because of the

numerous conditions, and the limitations on permitted activities, many uses of copyrighted works that may be desirable or essential for distance education may simply be barred under the terms of the TEACH Act. Educators should seek to implement the TEACH Act, but they should also be prepared for exploring alternatives when the new law does not yield a satisfactory result. Among those alternatives:

- Employing alternative methods for delivering materials to students, including the expansion of diverse library services, as noted above.
- Securing permission from the copyright owners for the use of materials beyond the limits of the law.
- Applying the law of fair use, which may allow uses beyond those detailed in the TEACH Act.

One objective of the TEACH Act is to offer a right of use with relative clarity and certainty. Like many other such specific provisions in the Copyright Act, the new statutory language is tightly limited. An ironic result is that fair use—with all of its uncertainty and flexibility—becomes of growing importance. Indeed, reports and studies leading to the drafting and passage of the new law have made clear that fair use continues to apply to the scanning, uploading, and transmission of copyrighted materials for distance education, even after enactment of the TEACH Act. A close examination of fair use is outside the scope of this particular paper, but fair use as applied to distance education will be the subject of further studies supported by the American Library Association

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Note: The following Section 110(2) was superceded by the enactment of the "TEACH Act." To view the revised text, click [here](#). For more information about the "TEACH Act", click [here](#).

The text of Section 110(1) as provided below remains unchanged.

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays¹

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

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

(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if—

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

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

(C) the transmission is made primarily for—

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of

governmental bodies as a part of their official duties or employment;

¹ Section 110 of the U.S. Copyright Act has 10 subsections, but this document includes only subsections (1) and (2) which are of greatest significance to higher education.

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Creating Distance Education Courses at IUPUI: Managing Copyright Issues

Prepared by the
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www.copyright.iupui.edu
Revision Date: May 7, 2004

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I. Introduction

Creating distance education courses often involve many copyright issues. Ownership of contributed materials by instructors, rights of use to these contributed materials, licensing the use of materials created by others, using materials created by others without permission: these are but a few of the concerns that may be implicated. The following information has been compiled to assist instructors and course designers at IUPUI in the management of these copyright issues.

II. Copyright Basics

[Copyright Quickguide](#) : Learn basic copyright information quickly. This site includes information about copyright protection, registration, ownership, rights, duration, fair use, permissions, and more.

III. Assuring the Right to Use Instructor's Materials

The law of copyright is simply inadequate to meet the wide range of interests that diverse parties have in collaborative projects, especially in the academic setting. The law also embodies tremendous risk. Recent court rulings have indicated that much faculty work product may well be "work made for hire" under copyright law, with all rights belonging to the employer university. Such a sweeping grant of all rights to any one party is an affront to

the more cooperative nature of academic work. The “Memorandum of Understanding” is an attempt to establish a more mutually beneficial model for sharing rights to use instructional materials.

Memorandum of Understanding: Assuring Rights of Use of Instructional Materials :

The MOU is an agreement between the university (represented by the school) and the instructor. It assures to both the university and the instructor certain rights to use the instructional materials. The MOU creates a “window of opportunity” for the university to use a set of the instructor's materials, while the instructor may concurrently use the same materials in ways that do not directly compete with the university's use.

Frequently Asked Questions Concerning Ownership, Rights of Use and the Memorandum of Understanding : This document answers many of the questions that instructors often have concerning the Memorandum of Understanding including which Schools at IUPUI have adopted the MOU.

IV. Using Works Created By Others

A good rule of thumb is to assume all works are protected by copyright (for more information in determining whether a work is protected by copyright, visit: [Copyright Quickguide](#)). Therefore, to use works created by anyone other than the instructor, it is essential to request permission from the copyright owner, use materials in a manner that constitutes a fair use as defined by law, or comply with another statutory exception to the copyright owner's exclusive rights in their materials.

A. Securing Permission

Copyright owners have the exclusive right to reproduce, distribute, perform, display, and create derivatives of their works. Unless your use falls within a statutory exception to these rights (e.g. fair use), you must obtain permission from the copyright owner to lawfully engage in any of these activities.

Has the University Already Secured the Right for Students to Access the Work? Instructors are encouraged to investigate whether the materials they wish to use are available through one of the many full-text databases licensed to the IUPUI libraries. Permission to access these databases already has been secured by the libraries and it may be possible to link directly from within the shell of the distance education courses to the databases that include the desired material or to the material itself. Linking raises few, if any, copyright issues as opposed to posting materials in the course, which involves reproduction and distribution. For further information concerning which journal articles are currently available through these databases, please contact: Bill Orme 274-0485, orme @ iupui.edu.

How to Secure Permission to Use Copyrighted Works : This guide will aid in your quest to secure the right to use copyrighted works.

Frequently Used Forms for Securing Permission: The following documents

are standard form letters. They should be read carefully and adapted to fit your particular needs.

[Model Permission Request Forms](#)
[Permission to Use Student Work](#)
[Research Assistant Copyright Agreement](#)
[Appearance Release Form](#)

B. Fair Use

Fair use is a legal doctrine that allows the public to make limited uses of copyrighted works without permission. Fair use may not be what you expect. Simple, clean, concise rules do not exist in the law of fair use. For example: Do not assume that a nonprofit, educational use creates an inherently fair use. Do not assume that giving credit for the source of the work inherently creates a fair use. Do not assume that limiting access to materials to students in the class creates an inherent fair use. On the other hand, proper application of fair use can prove to be extremely beneficial to the instructor, the students, and the educational process as a whole.

[Fair Use Issues](#) : A compilation of information concerning fair use in general.

[Checklist for Fair Use](#) : A tool for conducting fair-use analyses. You should save completed fair-use checklists in your records.

[Course Management Systems and Copyright: Oncourse, Angel, and Other Electronic Information Delivery Systems at IUPUI](#) : This document focuses on conducting fair-use balancing tests in conjunction with Course Management Systems, a form of distance education. Much of the discussion will be relevant to all of distance education.

[Common Scenarios of Fair Use Issues: Posting Materials on Course Management Systems](#) : This document provides sample scenarios that will assist you in determining whether your use of copyrighted materials will be considered a fair use.

C. The TEACH Act

The TEACH Act amended the U.S. Copyright law in 2002 on the issue of the use of copyrighted works in distance education. The new law is a statutory exception to the exclusive rights of copyright owners. The TEACH Act is one possible means for lawful uses of works, and the law imposes several requirements for compliance.

[Checklist for Compliance with the TEACH Act](#) : This document identifies the steps that must be taken in order to comply with the requirements of the TEACH Act.

For more information concerning the TEACH Act, please visit, [http://
copyright.iupui.edu/teachhome.htm](http://copyright.iupui.edu/teachhome.htm) .

V. Forms

[Submission Form for Copyrighted Works](#) : Only IUPUI Jumpstart program instructors should submit this form. These instructors should put all copyrighted works that they wish to use on the form for assessment concerning access, fair-use, Teach Act, and permissions. Others may use the form as a template for keeping track of copyrighted works that they wish to use for their distance education courses.

[Submission Form for Copyrighted Works: Instructions](#) : These instructions are for IUPUI Online Jumpstart program instructors. However, they may provide helpful information to others as how to use the submission form efficiently.

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Fair-Use Guidelines for Electronic Reserve Systems

Note: The following guidelines are not the policy of Indiana University or of IUPUI. They are offered here for discussion and consideration only. They are the outcome of an effort under the auspices of the Conference on Fair Use ("CONFU") and were issued on March 5, 1996.

For more information about the development of the CONFU guidelines, see:

Kenneth D. Crews, "Electronic Reserves and Fair Use: The Outer Limits of CONFU," *Journal of the American Society for Information Science* 50 (December 1999): 1343-1345. [Read Abstract.](#)

Introduction

Many college, university, and school libraries have established reserve operations for readings and other materials that support the instructional requirements of specific courses. Some educational institutions are now providing electronic reserve systems that allow storage of electronic versions of materials that students may retrieve on a computer screen, and from which they may print a copy for their personal study. When materials are included as a matter of fair use, electronic reserve systems should constitute an *ad hoc* or supplemental source of information for students, beyond a textbook or other materials. If included with permission from the copyright owner, however, the scope and range of materials is potentially unlimited, depending upon the permission granted. Although fair use is determined on a case-by-case basis, the following guidelines identify an understanding of fair use for the reproduction, distribution, display, and performance of materials in the context of creating and using an electronic reserve system.

Making materials accessible through electronic reserve systems raises significant copyright issues. Electronic reserve operations include the making of a digital version of text, the distribution and display of that version at workstations, and downloading and printing of copies. The complexities of the electronic environment, and the growing potential for implicating copyright infringements, raise the need for a fresh understanding of fair use. These guidelines are not intended to burden the facilitation of reserves unduly, but instead offer a workable path that educators and librarians may follow in order to exercise a meaningful application of fair use, while also acknowledging and respecting the interests of copyright owners.

These guidelines focus generally on the traditional domain of reserve rooms, particularly copies of journal articles and book chapters, and their accompanying graphics. Nevertheless, they are not meant to apply exclusively to textual materials and may be instructive for the fair use of other media. The guidelines also focus on the use of the complete article or the entire book chapter. Using only brief excerpts from such works

would most likely also be fair use, possibly without all of the restrictions or conditions set forth in these guidelines. Operators of reserve systems should also provide safeguards for the integrity of the text and the author's reputation, including verification that the text is correctly scanned.

The guidelines address only those materials protected by copyright and for which the institution has not obtained permission before including them in an electronic reserve system. The limitations and conditions set forth in these guidelines need not apply to materials in the public domain--such as works of the U.S. government or works on which copyright has expired--or to works for which the institution has obtained permission for inclusion in the electronic reserve system. License agreements may govern the uses of some materials. Persons responsible for electronic reserve systems should refer to applicable license terms for guidance. If an instructor arranges for students to acquire a work by some means that includes permission from the copyright owner, the instructor should not include that same work on an electronic reserve system as a matter of fair use.

These guidelines are the outgrowth of negotiations among diverse parties attending the Conference on Fair Use ("CONFU") meetings sponsored by the Information Infrastructure Task Force's Working Group on Intellectual Property Rights. While endorsements of any guidelines by all conference participants is unlikely, these guidelines have been endorsed by the organizations whose names appear at the end. These guidelines are in furtherance of the Working Group's objective of encouraging negotiated guidelines of fair use.

This introduction is an integral part of these guidelines and should be included with the guidelines wherever they may be reprinted or adopted by a library, academic institution, or other organization or association. No copyright protection of these guidelines is claimed by any person or entity, and anyone is free to reproduce and distribute this document without permission.

A. Scope of Material

1. In accordance with fair use ([Section 107](#) of the U.S. Copyright Act), electronic reserve systems may include copyrighted materials at the request of a course instructor.
2. Electronic reserve systems may include short items (such as an article from a journal, a chapter from a book or conference proceedings, or a poem from a collected work) or excerpts from longer items. "Longer items" may include articles, chapters, poems, and other works that are of such length as to constitute a substantial portion of a book, journal, or other work of which they may be a part. "Short items" may include articles, chapters, poems, and other works of a customary length and structure as to be a small part of a book, journal, or other work, even if that work may be marketed individually.
3. Electronic reserve systems should not include any material unless the instructor, the library, or another unit of the educational institution possesses a lawfully obtained copy.
4. The total amount of material included in electronic reserve systems for a specific course as a matter of fair use should be a small proportion of the total assigned

reading for a particular course.

B. Notices and Attributions

1. On a preliminary or introductory screen, electronic reserve systems should display a notice, consistent with the notice described in Section 108(f)(1) of the Copyright Act. The notice should include additional language cautioning against further electronic distribution of the digital work.
2. If a notice of copyright appears on the copy of a work that is included in an electronic reserve system, the following statement shall appear at some place where users will likely see it in connection with access to the particular work:

"The work from which this copy is made includes this notice: [restate the elements of the statutory copyright notice: e.g., Copyright 1996, XXX Corp.]"

3. Materials included in electronic reserve systems should include appropriate citations or attributions to their sources.

C. Access and Use

- 1.

Electronic reserve systems should be structured to limit access to students registered in the course for which the items have been placed on reserve, and to instructors and staff responsible for the course or the electronic system.

- 2.

The appropriate methods for limiting access will depend on available technology. Solely to suggest and not to prescribe options for implementation, possible methods for limiting access may include one or more of the following or other appropriate methods:

(a) individual password controls or verification of a student's registration status; or

(b) password system for each class; or

(c) retrieval of works by course number or instructor name, but not by author or title of the work; or

(d) access limited to workstations that are ordinarily used by, or are accessible to, only enrolled students or appropriate staff or faculty.

- 3.

Students should not be charged specifically or directly for access to electronic reserve systems.

D. Storage and Reuse

1. Permission from the copyright holder is required if the item is to be reused in a subsequent academic term for the same course offered by the same instructor, or if the item is a standard assigned or optional reading for an individual course taught in multiple sections by many instructors.
2. Material may be retained in electronic form while permission is being sought or until the next academic term in which the material might be used, but in no event for more than three calendar years, including the year in which the materials are last used.
3. Short-term access to materials included on electronic reserve systems in previous academic terms may be provided to students who have not completed the course.

Revised March 5, 1996

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Copyright Notices for Supervised Library Copying: Updated Information for Library Services

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September 9, 1999

[Section 108](#) of the U.S. Copyright Act allows qualifying libraries to make limited copies of materials under specific conditions. In general, libraries may make copies for preservation, for replacement of lost, damaged, or stolen works, for upgrading to some new formats, for private research and study by library users, and for delivery to other libraries through interlibrary loan.¹ This overview focuses on the notices that libraries are required to post whenever staff members make copies for library patrons. Portions of this overview reflect procedures that have been part of the law since its most recent full revision in 1976; other portions reflect changes in the law made by the *Digital Millennium Copyright Act*, passed by Congress in October 1998.

Section 108 requires that supervised copying services in libraries employ two notices: (1) an advisory notice posted at the place where requests are made and on order forms that patrons may fill out to request copies; and (2) a notice of copyright on the copies themselves.

Notice at Order Desk and on Order Forms

The law prescribes the form of notice that must be posted at the desk where orders for copies are accepted and on order forms:

NOTICE WARNING CONCERNING COPYRIGHT RESTRICTIONS

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

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user

makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

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

According to regulations from the U.S. Copyright Office (Code of Federal Regulations, Title 37, Section 201.14), this warning must be displayed verbatim and "printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer within the immediate vicinity of the place where orders are accepted."

When printing this notice on order forms, the regulations specify that it:

[S]hall be printed within a box located prominently on the order form itself, either on the front side of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than 8 points. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.

Notices on Copies

The law also requires that the copies themselves include a notice, but the law does not specify the exact form of that notice. For more than twenty years, librarians and publishers debated whether the "notice" on the copy should be the formal copyright notice as found on the original (for example, "Copyright 1999, XYZ Publishing Company"), or whether it need only be some general indication that copyright applied to the work (for example, "use of this material is governed by copyright law"). The *Digital Millennium Copyright Act* resolved that debate. All copies made under Section 108 now must include the notice of copyright as it appears on the original work. If no notice appears on the original, then the copy must include "a legend stating that the work may be protected by copyright."

Accordingly, the Copyright Management Center suggests that libraries making copies pursuant to Section 108 adopt and implement the following procedures with respect to all copies:

1. If the original work includes a formal copyright notice, the copy should include the following statement:

"The work from which this copy was made included the following copyright notice: _____."

The librarian making the copy should transcribe the original copyright notice into the blank space. When making a copy of a work, many librarians instead routinely photocopy the page from the book or journal on which the copyright notice appears. Attaching a photocopy of the original notice to the copied article ought to be

satisfactory.²

2.

If the version of the work available to the librarian making the copy does not include a formal copyright notice, the librarian must place on the copy "a legend stating that the work may be protected by copyright." Such a "legend" may take many forms , but the following form may be helpful to librarians and patrons:³

"The work from which this copy was made did not include a formal copyright notice. This work may be protected under U.S. Copyright Law (Title 17, U.S. Code), which governs reproduction, distribution, public display, and certain other uses of protected works. Uses may be allowed with permission from the rightsholder, or if the copyright on the work has expired, or if the use is "fair use" or within another exemption. The user of this work is responsible for determining lawful uses."

If the user of the copy may need to trace the copy to the originating library (as may be the case with manuscripts secured from the collections of archives or special collections), the library may want to include with that notice a simple statement such as: "IUPUI Copyright Management Center, Special Collections and Archives (317) 274-0464."

¹ The nature of the limits in Section 108 is not the subject of this document. The text of Section 108 and other related materials are available on the Copyright Management Center website: <http://www.copyright.iupui.edu>. [Return to text.](#)

² Some members of the library community disagree whether a librarian is required to locate the copyright notice at the front of a journal and to reprint it with an individual article. See, particularly, the analysis at <http://www.arl.org/info/frn/copy/notice.html>. While that analysis may be strictly within the law, finding and copying the notice at the front of the journal is ordinarily not a difficult task, and using that notice may in fact be easier than applying a general "legend." Reprinting that notice is also not likely to do any harm. [Return to text.](#)

³ In an effort to be helpful, this suggested form of notice includes more information than the law actually requires. If your objective is only to comply with the law, consider using this statement: "This material may be protected by copyright." [Return to text.](#)

making any distribution of this work, please contact the Copyright Management Center to ascertain whether you have the current version.

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Copyright and Higher Education: *Announcement of Recent Development*

New Law for Preservation of Library Materials: *Copyright Legislation Clarifies Digital Preservation Activities*

November 24, 1998

An Announcement from:

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A major copyright bill passed by Congress and signed by the President during October 1998 included in part a revision of the terms by which Indiana University libraries may make copies of certain works in their collections for preservation of those materials. [Section 108](#) of the U.S. Copyright Act allows many libraries, particularly academic and public libraries, to make copies of copyrighted works for specific purposes and under defined circumstances. One of those purposes is the preservation of materials that may be at risk.

The new copyright legislation, the *Digital Millennium Copyright Act*, revises the law of preservation copying in two important respects. First, it expands the list of permissible circumstances for making preservation copies by allowing the library to preserve the work if its "format" has become obsolete. As new media proliferate and existing media fade from use, the library may find itself with whole collections of unusable materials. Remember 78s, vinyl 45s and 33s, eight-track tapes, Beta videocassettes, and 5 1/2 inch floppies? A format is "obsolete" under the law "if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer available in the commercial marketplace."

Another major development is the clarification of the right to use digital media to make and store preservation copies. In general, libraries may use digital media for making preservation copies, but the digital version may be made available to users only on location at the library.

The following summary lists the basic requirements for making preservation copies of published and unpublished works under the law as now revised. These requirements are in addition to the general requirements for making any copies under [Section 108](#), such as the revised form of the notice now required on all copies made.*

If the library is making a preservation copy of an unpublished work in its collection, such as archival documents and photographs, a preservation copy is permitted if:

1. The copy is solely for preservation or security or for deposit at another library;
2. The work is currently in the collection of the library making the copy; and

3. "Any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available in that format outside the premises of the library or archives."

If the library is making a preservation copy of a previously published work, that copy is permissible if:

1. The copy is solely for "the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete";
2. The library conducts a reasonable investigation to conclude that an unused replacement cannot be obtained at a fair price; and
3. "Any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy."

In addition to these important changes, the new legislation also provides that the library making a preservation copy in any medium may make up to three copies of that work, instead of just the single copy previously allowed. Generally, any copies made under [Section 108](#) are limited to single, isolated instances, but Congress recognized that the practical reality of preservation copying usually necessitates the making of backup or intermediate copies.

* A separate announcement from the Indiana University Copyright Management Center describes another provision of the same legislation that revises the form of the notice that must be placed on all copies made under Section 108, including copies made for purposes of preservation of library materials. [Click here to read this announcement.](#) [Return to text.](#)

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Frequently Asked Questions

AUTHORING JOURNAL ARTICLES

Q: An article of which I am the author is about to appear in a national journal. In that article, I describe a method I developed related to medical or biological processes. Of course, the publisher is asking that I sign a transfer of copyright. I established a website so that interested scientists could learn about the model and download the model and program for free. I held the copyright to the model and program; the website is copyrighted by the IU Board of Trustees. The actual model and the program do not appear in the article that will be published. If I sign the transfer of copyright to the publisher, am I interfering with the copyrights in place on the website?

A: Determining whether you own or the university owns the copyright is a complicated question, largely addressed by the [IU Intellectual Property Policy](#). Assuming you hold the copyright to a new work developed through your research, placing that work on a website that is part of an IU program or hosted on an IU server does not change the copyright ownership. When you [transfer](#) the copyright to the journal publisher, you are only able to transfer any copyrights you actually hold, which presumably include the model you mention. If the model is not part of the article that is the subject of the copyright transfer, then the model does not change hands. You continue to hold the copyright. Be careful: Your article probably includes some important and useful descriptions of the model. If you transfer that copyright to the publisher, technically, you may not be able to use those explanations and descriptions in another context. Be careful what you give away. Retain rights to use materials as you might reasonably expect to need them in the future. Negotiate and rewrite your publisher agreement to meet your needs!

INDEPENDENT CONTRACTOR / LOGO DESIGN

Q: A graphic designer hired as an independent contractor has prepared a logo for a graphic design program. We want to use that logo in a brochure, but a different designer will be doing the design. May we use it or does the logo design belong to the independent contractor?

A: Generally, logos do not fall under copyright at all, but are protected by trademark law. Some designs, however, may be copyrightable. Assuming that the logo is copyrightable, the work of the independent contractor (IC) generally belongs to the IC, no matter how much you pay him or her. You may have an implied license to use the work in certain ways, but you are stretching your luck when you make new versions of it. You should arrange for the IC to transfer the copyright to the Trustees of IU by written, signed instrument. A handshake will not suffice. The work of an IC may also be "for hire," but that possibility also requires a signed agreement.

INDEPENDENT CONTRACTOR / PHOTOGRAPHS

Q: A photographer has been hired as an independent contractor to take photos of a special event at the school. May these photos be used in a brochure advertising the school?

A: The copyrights of works prepared by photographers hired as independent contractors belong to the photographer. Unless there is a written, signed agreement to the contrary, the copyrights to class portraits, photos of special events, photos of new buildings, all belong to the photographer. Our recommendation is to have the photographer (or any other independent contractor preparing potentially copyrightable works) assign the copyrights to the university in a written, signed instrument.

USE OF PHOTOGRAPHS

Q: Our department is publishing an article in a regional newsletter about a new product with adverse health consequences. We would like to use a photo of the product that we found on the internet. Would this be legal? If not, would it be legal to take our own picture of the product for use in the article?

A: There are two levels of copyright issues in your question. (1) The company presumably holds a copyright in the design of the package itself. Photographing and reproducing and distributing that photograph could be a copyright infringement. (2) Once someone takes a picture, that person presumably holds the copyright in the photograph. If you copy that picture, you may be violating the rights of the photographer along with the rights of the owner of the package design.

What can you do? One option is to get permission, but that may be difficult to get from the company you are apparently critiquing. Another option is to make your own photo, but that only takes care of problem #2. You may be within one or more of the exceptions to the rights of copyright owners. You can consider whether your use is within fair use. You will find assistance in making this determination in the [Fair Use](#) section of this website. You need to reach your own conclusion about fair use.

Section 113(c) of the Copyright Act might apply if you are making a picture of a “useful article” in some contexts, but that analysis also needs more information about your situation. Read [Section 113\(c\)](#) to make this determination.

[Read More About Use of Photographs](#)

IMAGES OF FAMOUS PEOPLE IN COMMERCIAL PRODUCT

Q: I am a student at IUPUI working on a project for a campus office. We are creating a product that is a personal portfolio page for students and faculty at IUPUI, but will also be sold to other universities as well. The students would like to name the project after a famous scientist and include his picture on the website and product packaging. Is the use of his persona within the confines of Fair Use, and are there any other copyright issues in using his image?

A: In some respects you have an issue of [Fair Use](#). But you are also using the image and name of a real person, perhaps for commercial purposes, and to that extent you may need to clear the so-called “[right of publicity](#)” associated with his name and face for commercial uses. But most important, you mention that you are creating a project not merely for local use, but for marketing to other universities. I urge you to contact the Office of Technology Transfer, a unit of [ARTI](#), to help with the licensing and marketing.

STUDENT WORKS

Q: As a professor, I frequently use works prepared in the past by my students in presentations and publications regarding curriculum development. I assumed under the umbrella of educational use, I could use these pieces freely. But I have never received permission in writing from these students, though most have given verbal permission. Should I be concerned about using these student works?

A: In general response to your inquiry, I would urge you to be highly respectful when using student work. In general, they own the copyrights to their works. Your use may be within [Fair Use](#), but you mention that you do secure permission from them. Oral permission is sufficient, but a writing is better. In the future, you may want to use a form of the release available on our website, “[Permission to Use Student Work](#).” Be sure also to give credit in the papers and presentations for the works of students, just as you would cite the source for a quotation or other insight from another author. Finally, some student works are “educational records” and are given significant privacy protections under federal law. There, too, you need permission to disclose them to others.

VIDEOTAPES OF GUEST SPEAKERS

Q: Our department videotaped a guest lecturer with his consent. May we make copies of this videotape for deposit in other libraries?

A: In general, the textual content of their lectures belongs to the speakers. You can use the tapes within the limits of the consent. But the consent you obtained probably stated nothing about making copies for deposit in other libraries. You may have rights under [fair use](#) and under [Section 108](#) of the Copyright Act. But I see a more serious issue. You might well find that you have the legal right to make the copies, but should you? Your guests allowed you to videotape the lectures for your library. They may not be pleased to have more copies in broader circulation. I would give a courtesy call to the speakers before I distributed copies of the tapes. For future guest lecturers, you may want to consider having them sign a copy of the “[Appearance Release](#)” available on our website to help prevent further problems in this area.

WORLD WIDE WEB LINKS

Q: It is my understanding that faculty may link to any publicly accessible website from within their courses without considering issues of fair use or obtaining permission. This is assuming that it's a “nice” link, not forcing an external site into a frameset or trying to confuse the user in any way, etc. A large grant project on which we are working has a non-university web designer who is actually doing the design of the new course. During our weekly phone meetings this week, he mentioned that one of our faculty has been linking to

someone else's site to have students have access to useful information. Our designer contends that since the site's use policy states that it is for personal, non-commercial use and that we have a course for which students will pay an enrollment or registration fee, that we must negotiate with the site's owner and pay a license fee in order to link to the site from within our course. If he is accurate, this certainly changes the way most faculty set up and deliver a course. Is he correct?

A: The kind of linking you mention is usually perfectly legal under copyright law. If you are still concerned, I would just send a glowing complimentary letter to the website owner letting him or her know that the site is great and useful and implicitly inviting any objections. Besides, the owner would like to know that the site is useful. More important: When you pay an outsider to develop the website, that person may well own the copyright to your site under the current law. Be sure to have him or her sign an explicit agreement transferring all of the work to the university.

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Agreement for the Production of Instructional Materials

INDIANA UNIVERSITY
MODEL DRAFT: March 27, 2000

This Agreement is entered into as of the day of , 20__ by and between [insert name of school or department]: _____ ("IU Unit"), acting on behalf of the Trustees of Indiana University (collectively "IU"), and those persons whose names and positions at IU are listed on the attached Developers List (collectively the "Developers"). That list and all other specified exhibits are hereby incorporated into this Agreement by reference.

A. The IU Unit desires to encourage the Developers to provide their best quality services for the production of course materials that may be used in conjunction with one or more courses (the "Course") to be taught by the IU Unit and transmitted to students by various means and at various locations. The Course is further described on Exhibit A.

B. IU desires the flexibility to use the course materials in a variety of different contexts, whether through distance learning or in face-to-face classroom education, for purposes of educating students in an efficient and meaningful manner.

C. The Developers desire to produce such course materials and make them available to students in a variety of different formats and to allow IU to utilize the course materials in many different contexts and through many different arrangements.

D. The Developers desire to allow IU to make such uses of the course materials as may be allowed under this Agreement, and the Developers desire to retain rights to make other specified uses of their contributions to the course materials for the production of other scholarly and educational works.

E. The parties to this Agreement recognize the need to be consistent with the Indiana University Intellectual Property Policy (the "IP Policy"), adopted by the IU Board of Trustees on May 9, 1997, and with any duly adopted amendments to that policy and other appropriate policies of IU. To the extent that the course materials are "Applicable Intellectual Property" as defined under the IP Policy, the parties understand that the IP Policy applies to such works. This Agreement applies only to those portions of the course materials that are not "Applicable Intellectual Property."

The parties hereby agree as follows:

I. Production of Course Materials

1.1 Description and Purpose. The Developers shall produce materials (the "Course

Materials"), appropriate for teaching the Course. The Course Materials are described on Exhibit 1.1.

1.2 Funding and Other Support. IU shall provide the financial, equipment, staff support, and other resources and benefits, as described on Exhibit 1.2, to assist the Developers in preparing the Course Materials.

1.3 Deadline. The Developers shall deliver to IU the Course Materials in a completed state and suitable for use in connection with teaching the Course on or before the following date: .

II. Rights of Use of the Course Materials

2.1 University Rights of Use. Subject to the restrictions set forth in this Agreement, IU shall have the right to use the Course Materials at the local campus where the Developers are based, throughout all IU campuses, and outside of the IU campuses. IU's rights include the right to reproduce, distribute, perform, display, and transmit the Course Materials and to prepare derivative works based on the Course Materials in furtherance of IU's allowed uses.

2.1.1 Scheduled Courses. The Course Materials shall be used only in connection with courses (whether credit or non-credit) with enrolled students, and for independent study by enrolled students.

2.1.2 Outreach Programs. IU may authorize use of parts of the full set of the Course Materials in various formats and media for non-credit outreach programs.

2.1.3 Sales to Other Parties. IU shall have the right to sell or to authorize others to sell or make other distributions of the Course Materials for instructional purposes.

2.1.4 Archival Collection. IU may retain copies of the Course Materials for archival purposes and make them available to students for their study and reinforcement. IU may also make archival copies of the Course Materials available to any persons who have access to the library or other facility at IU where such copies will be retained. IU has no obligation under this Agreement to restrict access to such archival materials. The ability of such persons to borrow or to make copies of the Course Materials will be subject to the customary standards of the library or other facility at IU with respect to similar materials.

2.1.5 Time Limit on University Use. The right of IU to use the Course Materials pursuant to this Agreement shall terminate on _____. The right of IU to use the materials shall continue until that date, regardless of whether or not the Developers have remained employed with IU. The parties understand that this termination is based on the parties' best effort to project the likely viability of the Course Materials for future instruction. The parties may agree in writing at a future date to extend the termination date based on the continuing viability of the Course Materials and the availability of revisions or updates.

2.2 Developers' Rights of Use. The parties to this Agreement anticipate that elements of the Course Materials will be "instructional materials" as defined in the IP Policy. Each of the Developers reserves the right to use his or her individual contributions to such instructional materials, without further consent or approval from IU, in any scholarly or creative works

that do not compete with IU's actual or planned use of the Course Materials, subject to any IU policies and procedures as may be in effect from time to time related to such materials and uses. In particular, each of the Developers will have the right to use his or her individual contributions to such instructional materials in teaching courses on related topics and in preparing textbooks, journal articles, conference presentations, consulting projects, and other scholarly works or professional activities. Each of the Developers may also allow or arrange for the reproduction, packaging, and distribution of his or her individual contributions to such instructional materials for use in connection with a textbook or other teaching materials developed by that person for the general education market.

III. Developers' Rights of Control and Credit

3.1 Quality, Clarity, Currency. The Developers shall have control of the substantive and intellectual content of the Course Materials, at the time of their production and during their use by IU, in a manner consistent with standards and traditions of academic freedom. As with the preparation of any other scholarly or creative works, the Developers shall be expected to deliver accurate and current information. The Developers are responsible for the clarity and precision and the method of communicating information contained in the Course Materials.

3.1.1 Supplemental Updates. The Developers are authorized to produce any revised or supplemental materials in order to reflect developments or insights that come to the Developer's attention following completion of the Course Materials.

3.1.2 Procedure for Updates.

3.1.2a In the event that the Developers become aware of the need or desire to produce a supplemental update to the Course Materials, the Developers shall notify [insert appropriate official] _____ in writing of such a need. Upon delivery of that written notice, the Developers shall thereby have the authority to create the supplemental materials at IU's expense during the period of forty-five (45) calendar days after delivery of the written notice.

3.1.2b In the event that the Developers have not sent such notice, but the [insert appropriate official] _____ recognizes a need to prepare such a supplemental update, the [insert appropriate official] _____ may initiate the process by delivering a written notice to the Developers, which will also authorize the Developers to make such updates at IU's expense during the subsequent forty-five (45) calendar days.

3.1.2c If the updates provided for in this paragraph are not completed within the designated time period or do not meet standards of quality and accuracy consistent with the Course Materials overall and the standards of instructional works at IU, then IU may in its discretion and at its expense make such updates as IU deems appropriate. IU may in its discretion continue to use the Course Materials while any updates are pending.

3.1.2d Any and all updates prepared consistent with this Agreement are for purposes of this Agreement deemed to be part of the Course Materials.

3.2 Named Credit. The Developers shall receive full credit as an author or developer on all copies of the Course Materials prepared by or authorized by IU. The Developers have the right to remove the Developers' names from any copies of the Course Materials made or authorized by IU.

3.3 No Indemnification by the Developers. The Developers shall not include in the content of the Course Materials any content which the Developers know to, or have reason to believe may, constitute libel, invasion of privacy, infringement of copyright or other literary rights, or otherwise violate the legal rights of any persons who are not a party to this Agreement. Any responsibility or liability for such violations shall be treated in a manner consistent with the customary treatment of similar violations as they may occur in the context of traditional teaching at IU. To that end, the Developers have read and agree to adhere to IU policies with respect to copyright, fair use, and other relevant issues. Otherwise, the Developers make no indemnification and no warranty to IU with respect to the appropriateness of including any content in the Course Materials. Should either the Developers or the [insert appropriate official] _____ reasonably conclude that any of the content of the Course Materials may violate such rights of third parties, the procedure and the right to make revisions shall be consistent with the procedures set forth in Paragraph 3.1.2 above. Pending such revisions, IU shall have the right to remove the portions of the Course Materials that create the potential violations before making any further use of the Course Materials pursuant to this Agreement.

3.4 Credit for Teaching Workload, Promotion, and Tenure. This Agreement does not address any compensation or set any standards or make any adjustments with respect to the Developers' workload, course enrollments, teaching evaluations, and teaching credit for purposes of review, promotion, tenure, and other employment duties at IU. These issues must be examined outside the context of this Agreement and may require consideration by other members of the IU community.

IV. Allocation of Revenues and Responsibilities

4.1 Allocation Between IU and the Developers. Should IU receive any revenues from the broadcast, sale, or other distribution or use of the Course Materials, the parties shall allocate the revenue between IU and the Developers according to the schedule of "revenue distribution" provided in the IP Policy. For purposes of this allocation, the Developers shall collectively receive the portion of revenue allocated to the "creator" under the IP Policy. Allocable revenues shall exclude tuition and fees paid by students to take a course based on the Course Materials. This formula shall also allow IU to recoup its expenses associated with production and update of the Course Materials before allocating revenues to the Developers.

4.2 Allocations Among the Developers. Exhibit 4.2 shall set forth the agreement, if any, among the Developers for the allocation of their collective share of revenue among themselves. In the event that the Developers should not agree otherwise, their collective share of revenue shall be divided among the Developers in equal shares. Exhibit 4.2 shall further specify the agreement, if any, among the Developers with respect to identifying which of them shall have authority to exercise rights given to the Developers collectively under this Agreement, such as the right to make updates pursuant to Paragraph 3.1. In the event that the Developers should not agree otherwise, such authority shall be exercised by a majority decision of the Developers.

V. Copyright Ownership

5.1 Ownership of the Copyright. Subject to the rights granted to the Developers and subject to the time limits on IU rights pursuant to this Agreement, IU shall hold copyright ownership of the Course Materials. As of the date of termination of IU's rights of use, as set forth in Paragraph 2.1.5 above, IU's ownership of the copyright to the Course Materials shall terminate, and effective as of that date, IU hereby transfers and assigns to the Developers collectively all copyright interest that IU holds in the Course Materials. IU shall prepare at its expense all necessary documents of assignment or transfer. The Developers may by mutual agreement among themselves agree to further assign to each of the Developers the rights to his or her individual contributions to the Course Materials.

5.2 Not "Work-Made-For-Hire." In order to avoid undesirable consequences under the law, the parties agree that the Course Materials will not be treated as a "work-made-for-hire" under the U.S. Copyright Act.

5.3 Copyright Held by Developers. In the event that the Course Materials are deemed by a court of competent jurisdiction that in fact they are "work-made-for-hire," IU agrees that it will hold any rights associated with the Course Materials only in a manner consistent with the terms of Paragraph 5.1 above, including, without limitation, the rights of use and the reversion of title reserved to the Developers.

The Copyright Management Center is not part of University Counsel and is not legal counsel to the university or to any members of the university community. A mission of the CMC is to provide information and education services to help members of the community better address their needs. The information received from the CMC is not legal advice. Individuals and organizations should consult their own attorneys.

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Agreement for the Production of Instructional Materials: Summary and Overview

Prepared by the
COPYRIGHT MANAGEMENT CENTER
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March 27, 2000

The "Agreement for the Production of Instructional Materials" is offered for consideration by the university community as a tool for addressing one of the most perplexing issues surrounding the management of our own intellectual works: How can the university community hold the rights to instructional materials in a manner that best promotes quality teaching and scholarship? This agreement has the fundamental purpose of clarifying the rights of faculty, staff, and the university to use and benefit from instructional works developed in a collaborative environment. The document preserves the basic principle that faculty hold rights to their instructional works, while allowing a sharing of rights to assure the continuation of university programs. While no agreement is perfect, this project takes a major step toward addressing and resolving much of the tension surrounding the inevitable legal issues affecting scholarly work.

The law of copyright is simply inadequate to meet the wide range of interests that diverse parties have in collaborative projects, especially in the academic setting. The law does, however, permit the parties, by mutual agreement, to set their own terms for holding and managing rights to their works. There is nearly no limit on the possibilities for how to manage and share those rights. The accompanying agreement is the result of extensive collaboration among faculty, staff, and administrators, with guidance from the Copyright Management Center, to identify major issues and to create a framework for balancing the needs and expectations of the parties. To that end, the agreement prevents any one party from having all rights to control the finished work. The agreement also carefully assures faculty authors and the institution that they may pursue future programs of teaching and scholarship based on the instructional materials.

We are pleased to highlight the following key provisions, and we welcome your thoughts and suggestions about the agreement.

Faculty retain rights to use their works in almost any scholarly or creative works that they later develop. "In particular, each of the Developers will have the right to use his or her individual contributions to such instructional materials in teaching courses on related topics and in preparing textbooks, journal articles, conference presentations, consulting projects, and other scholarly works or professional activities."

The university will have the authority to use the works in connection with teaching activities on campus, through distance education, and in other instructional efforts. The university will share with the developers any income from its use of the works. The university's rights will terminate at an agreed time, and all rights will at that time revert to the faculty member or other creator of the work. While the university may place its copyright notice on the materials that it distributes, that right as well terminates on the agreed date.

The faculty member who creates the instructional work has full control of the content, and has the authority to make updates and corrections at the university's expense.

The faculty member has the right to have his or her name on the finished work, or to remove the name if so desired.

Perhaps the most significant limit on faculty member's rights to future uses of the materials would arise if the instructor desires to pursue distance education programs sponsored by another institution that would reach the same students who might enroll in a program sponsored by IU using the same materials.

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The information received from the CMC is not legal advice. Individuals and organizations should consult their own attorneys.



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Electronic Reserves and Copyright at IUPUI

A Joint Project of the IUPUI Copyright Management Center and the Copyright Management Center

Kenneth D. Crews, Associate Dean of the Faculties for Copyright Management

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Updated: April 24, 2000

Introduction

Placing articles and other materials on "electronic reserves"—whether in the library, on your own website, or on a centralized university system—raises challenging questions about copyright. The university is actively seeking to make a wide range of materials readily available to students enrolled in classes at IUPUI, but must provide them within the context and limits of copyright law. "Electronic reserves" at IUPUI or any educational institution may take various forms. The Copyright Management Center operates a centralized system known as "ERROL." The campus supports a network system known as "Oncourse." An instructor might use alternative systems available through a school, department, or independent service provider. Current copyright law gives legal protection to nearly all readings and other course materials that an instructor might place on "electronic reserves."¹ If the instructor is not the copyright owner of the work,² that material may be placed on reserve only if:

- (1) the copyright owner grants permission, or
- (2) the use is a "fair use" under the law.

You may also place the work on reserve if it is in the public domain. Some works are in the public domain and lack copyright protection either because the copyright has expired or because the work is a "work of the U.S. Government." For more information about those possibilities, see:

Kenneth D. Crews, [Copyright Law & Graduate Research: New Media, New Rights, and Your New Dissertation](#) (Ann Arbor, MI: Bell & Howell Information and Learning, 2000).

Please note, however, that in October 1998 Congress extended the term of protection for copyrighted works. Works created today enjoy protection for the life of

the author plus seventy years. Works that were published before 1978 are generally now protected for a term of ninety-five years. In a complicated twist, the only published works that are reliably in the public domain due to expiration of the copyright are those works that were published before 1923.³

How Do I Get Permission?

If you are asking to place materials on ERROL in the Copyright Management Center, the library staff will help you with securing permission. If you are using Oncourse or any other system, the instructor is responsible for securing permission.

For information about how to obtain permission from copyright owners and to find model letters, visit the Copyright Management Center website at: <http://www.copyright.iupui.edu>.

What is "Fair Use"?

Fair use is a legal doctrine that allows the public to make limited uses of copyrighted works without permission. For information about fair use at IUPUI and Indiana University, see:

["Indiana University Policy on Fair Use of Copyrighted Works for Education and Research,"](#) approved by the Indiana University Board of Trustees, December 5, 1997.

Fair use may not be what you expect. Fair use depends on a balancing of four factors outlined in the copyright statutes: (1) the purpose of your use; (2) the nature of the work you are using; (3) the amount of the work that you are using; and (4) the effect of your use on the value of or market for the original work.

Simple, clean, concise rules do not exist in the law of fair use. For example: Do not assume that a nonprofit, educational use is therefore fair use. Do not assume that giving credit for the source of the work is therefore fair use. Do not assume that limiting access to students in the class will therefore put electronic reserves safely within fair use.

To learn more about what fair use really is and how to work with it, see: [Copyright Management Center: Fair-Use Issues](#).

How Does Fair Use Apply to Electronic Reserves?

The following are general standards that are instituted at IUPUI Copyright Management Center to give fair use some practical application. Instructors and others at IUPUI who are using Oncourse or other means for electronic delivery of materials to students should also consider these standards when evaluating whether your activities are within fair use.⁴

Purpose of the Use

1.

Materials may be placed on electronic reserve only for the purpose of serving the needs of specified educational programs.

2.

Materials may be placed on electronic reserve only at the specific request of the instructor.

3.

Access to materials will be limited by password or other means to deter unauthorized access beyond students enrolled in the specific course for which the specific materials are needed.

4.

Students should not be charged specifically or directly for access to electronic reserve systems, and no person or unit at the university should benefit monetarily from the use of the material.

Nature of the Work

1.

Materials placed on reserve must be related directly to the educational objectives of a specific course.

2.

Only those portions of the work relevant to the objectives of the course may be placed on reserve.

3.

The law of fair use applies more narrowly to highly creative works; accordingly, the library will generally not accept for reserve substantial excerpts from novels, short stories, poetry, and modern art images.

Amount of the Work

1.

Materials placed on reserve will generally be limited to brief works or brief excerpts from longer works. Examples: a single chapter from a book, a single article from a journal, and unrelated news articles.

2.

The amount of the work placed on electronic reserve must be related directly to the educational objectives of the course.

Effect of the Use on the Market for the Original

1.

Repeat use of the same material by the same instructor for the same course will require permission from the copyright owner.

2.

Materials on reserve will include a citation to the original source of publication and a form of a copyright notice. For suggested forms of the notice, see: [Copyright Management Center: Copyright Notices for Supervised Library](#)

Copying. The electronic reserve system should also advise users that the materials are made available exclusively for use by students enrolled in the course and must not be distributed beyond that limited group.

3.

Access to materials will be limited by password or other means to deter unauthorized access beyond students enrolled in the specific course for which the specific materials are needed. ⁵

4.

Electronic reserve systems should not include any material unless the instructor, the library, or another unit of the educational institution possesses a lawfully obtained copy.

5.

Materials on reserve may not include any works that are available for students to purchase—whether as a book, coursepack, or other work—in the campus bookstore or other customary outlet.

For Additional Information

Jeff Rosedale, "[Electronic Reserves Clearinghouse: Links and Materials on the Web](#)".

George Soete, "[Issues And Innovations In Electronic Reserves](#)," Issue 1 of Transforming Libraries (Washington, DC: Association of Research Libraries, October 1996).

1 Copyright law generally gives automatic protection to "original" works that are "fixed" in any medium. Consequently, the law protects articles, books, photographs, software, music, and an enormous range of new works that are stored on paper, on disk, or in almost any medium. [Return to text.](#)

2 In general, the instructor will only be the copyright owner of materials created by that individual, and only then if the instructor has not assigned the copyright to another party. Faculty authors frequently assign their copyrights to publishers, most often under the terms of a publication agreement for a journal article or other work. Read the fine print in the contracts carefully to determine who may be the copyright owner of your own work. For further information, see "Guidance for Faculty on Copyright, Publication and General Research Dissemination," Indiana University Purdue University at Indianapolis, Circular 96-23, April 23, 1996 [available at: http://www.copyright.iupui.edu/_circ9623.htm]. [Return to text.](#)

3 Professor Laura N. Gasaway of the University of North Carolina has prepared a chart that succinctly summarizes when copyrights expire. That chart is available at <http://www.unc.edu/~uncclng/public-d.htm>. [Return to text.](#)

4 One need not necessarily take every possible precaution and satisfy all four of the statutory factors; hence, some adjusting of the implementation of the following procedure may still keep your activities within the boundaries of permitted use. [Return to text.](#)

5 This condition is identical to the condition stated with respect to the "purpose" factor. This one

fact—limiting access—can be important to at least two of the four factors in fair-use law. [Return to text.](#)

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Instructor's Addendum

Memorandum of Understanding Assuring Rights of Use of Instructional Materials

The Instructor named below enters into this addendum to the Memorandum of Understanding Assuring Rights of Use of Instructional Materials (the "Agreement"), previously adopted by the named School, and hereby assents to be bound by the terms of the Agreement as an "Instructor." In furtherance of the terms of the Agreement, the parties have agreed to the information below:

(See Section 1.1) Description of the "Course Materials" and the Schedule for Delivery:

Materials as delivered to and accepted by the Office for Professional Development (OPD) in furtherance of preparing a "Jump Start" course, commenced during Summer 2003. Schedule per requirements of program.

(See Section 1.2) Funding and Other Support provided to the Instructor:

Per "Jump Start" program, overseen by OPD, beginning Summer 2003.

(See Section 2.2.2) Termination Date, if any, of IU's Rights:

August 1, 2008.

(See Section 4.2.2) Agreement, if any, Regarding Division of Revenue:

Not applicable.

(See Section 4.2.2) Agreement, if any, Regarding Exercise of Management Rights:

Not applicable.

Instructor:

Signature: _____

Printed Name: _____

Date: _____

Approved and Accepted by the School:

Signature: _____

Name & Title: _____

Date: _____

This document is provided as a courtesy of the Copyright Management Center, IUPUI, 530 W. New York St., Indianapolis, IN 46202. For further information and updates please visit <http://www.copyright.iupui.edu/>. This document last updated June 2, 2003.



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You and Your Copyrights: Securing, Managing, and Sharing the Legal Rights

Kenneth D. Crews

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Library and Information Science
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Revised: December 26, 2002

Who is the Copyright Owner?

How Do I Become a Copyright Owner?

Each member of the Indiana University community-indeed, probably each citizen and resident of the United States-is the creator and owner of copyright protected works. Copyright law in the United States is today extremely generous toward the creators and owners of new works. Legal copyright protection vests immediately and automatically upon the creation of an "original work of authorship" that is "fixed in any tangible medium of expression." An "original work" needs to have a minimal amount of creativity. For example, alphabetical listings in the phone book are not original, but advertising layouts, photographs, software, and many other works are likely "original." To be "fixed in a tangible medium of expression" is defined as the work being sufficiently permanent or stable to allow it to be perceived, reproduced, or otherwise communicated. For example, scribbles on paper or documents saved to disk are clearly "fixed."

As a result, each one of us creates new protected works when we write journal articles, produce videotapes, create works of art, or write computer software. In fact, under today's law, copyright also applies to notes that we dash off at meetings, letters home to family, and photographs that we take on vacation.

What is a Work-Made-For-Hire?

Some works that we create will not belong to us. For example, some works created on the job may belong to our employer under the "work-made-for-hire" doctrine. If the work is a

"work-made-for-hire," then all rights in that work belong to the employer.

The most common type of work-made-for-hire is a work prepared by an employee within the scope of his or her employment. Some factors to look at to determine whether an employee is acting within the scope of employment when creating a work are: Control over the work, ownership of the tools used, location of the work, benefits, and tax treatment of the compensation earned.

Another type of work that may be deemed a work-made-for-hire is a work prepared by an independent contractor. The same types of factors used to determine an employee/ employer relationship are used to determine independent contractor status. Once the author is found to be an independent contractor, the work may still be deemed a work-made-for-hire only if it is specially ordered or commissioned and the parties expressly agree in a written instrument signed by both of them that the work shall be considered a work-made-for-hire. This rule applies only to certain types of works. Read the [work-made-for-hire statutes](#) for more information.

Most universities have policies in place to deal with the work-made-for-hire issue. The Copyright Management Center has prepared a [Memorandum of Understanding, Summary and Overview Memo](#), and [FAQs about the MOU](#) which may be utilized to develop policies within each department. Some works created at IU should be managed in cooperation with the Office of Technology Transfer, particularly software and multimedia projects prepared for commercial markets.

For more information: [Copy-Own](#) - Online Resource to Copyright Ownership for Higher Education

Can I Transfer My Copyrights to Someone Else?

Copyrights may be transferred in part or in whole. If you want to retain most of your rights, but transfer the right to reproduce, for example, this may be done by any method you prefer, including the use of licensing. Remember, all transfers must be in writing and signed by the transferor. In addition to the right to reproduce, you may also transfer the right to prepare derivatives of your work, the right to distribute copies, or the right to perform or display the work publicly. Of course, you may also transfer all of these rights if you choose. Copyrights may also be bequeathed by will or transferred as personal property by intestate succession.

Other copyrights may be subject to the terms of an agreement funding the research or the project. We might also own our copyrights, only to later give them away pursuant to a publication agreement. Nevertheless, each of us is the owner of copyrights to many newly created works, and this paper addresses some of the questions about securing and managing those copyrights.

Many publishers require the assignment of copyrights in publishing agreements. As a faculty author, you generally are responsible for deciding if transfer is appropriate. In reality, publishers usually do not need all rights. In fact, as the author you may need to explicitly retain certain rights to use your publication in future teaching and research. Be sure your contract addresses your specific needs.

How Do I Secure My Copyrights?

What Copyright Notice Should I Put on My Works?

Under current law, the formal copyright notice is no longer required to secure copyright protection. Nevertheless, use of the notice is still good practice for many practical reasons and for some possible legal benefits that may later arise. The Copyright Management Center recommends that you include the statutory and conventional copyright notice, consisting of three elements: the word "copyright" or the copyright symbol, the year, and the name of the copyright owner. A typical notice may appear as follows: "Copyright 2002, [your name]."

What About "All Rights Reserved"?

You no doubt will often see that simple statement added after the formal copyright notice on many works. It is a requirement that once had great importance for securing rights in some foreign countries pursuant to the Buenos Aires Convention of 1914. Most of those countries since have signed the Berne Convention, which provides for mutual copyright protection of works from many foreign countries, regardless of any copyright notice whatsoever on the work. Thus, the phrase "All Rights Reserved" may grant additional protection in only a few countries. If you are concerned, feel free to add it.

How Do I Register My Copyrights?

As with the formal copyright notice, copyright registration is also no longer required under current law. But it also provides some important practical and legal benefits. In particular, if you anticipate the need to rigorously enforce protection of the work, or if you plan to publish it, this office recommends registration of the work with the U.S. Copyright Office. You may obtain copyright forms and instructions by calling (202) 707-9100. The form is simple and the registration fee is modest. Also check the [Copyright Registration](#) page at the U.S. Copyright Office for helpful insights and instructions.

How Do I Manage My Copyrights?

How Do I Grant Permission to Others?

Third parties desiring to use someone else's copyrighted work beyond fair use or other rights allowed under the law must contact the copyright owner for permission. That copyright owner may be you. In order to ease the ability of your users to find you and to secure the desired permission, we recommend that you add a statement following the formal copyright notice, such as: "For information about this work, please contact _____." You may add a personal name, department name, address, telephone number, or any other information helpful to your users. As the copyright owner you have the privilege of granting or denying the intended use. You may also put reasonable restrictions on the use, and you may charge an appropriate fee. Granting or

denying permission or charging any fee is largely within your discretion. The Copyright Management Center urges that generally you make your scholarly works available to others with few impediments, if any. If you are marketing works that belong to Indiana University, you should contact the [Advanced Research & Technology Institute](#).

Can I Use a Statement on the Work Granting Permission?

Yes, you can, as long as you hold the rights. Many of our scholarly copyrighted works will not likely become the object of aggressive protectionist efforts and may not be the appropriate works for securing royalty fees. Instead, we will likely encourage users to reproduce and to share some of our creative works. Nevertheless, they are still protected under copyright law, and we recommend that you maintain that protection and not put works in the public domain. Copyright allows protection of your original expression, and it also allows you to protect the integrity of your work and possibly your credit for having produced it. You might consider placing on your work a statement clearly granting permission for certain uses ([see the statement at the end of this paper](#)). You should evaluate carefully the language you use in such a grant, and consider whether or not it is appropriate for the particular work. The scope and details of such a provision are not set forth in any law, and you should feel free to alter them as appropriate for your needs.

Can I Put a Statement on the Work Restricting Uses?

You may state restrictions on further copying or other activities, but they may or may not be enforceable depending on a variety of complex factors and unresolved legal principles. When sending a manuscript to a publisher or editor, you might state on the cover page that it is for "editorial review only" and that "readers should contact the author before copying or quoting from" the manuscript. You should also feel free to reference any license agreements or other contracts that may be relevant or applicable to the work.

Do I Have Rights to My Published Works?

Your right to exercise any control or to make any use of your published works will generally depend upon the terms of your agreement with the publisher. Some publishers, including scholarly journal publishers, ask only for a first right of publication. Other publishers commonly insist on an assignment of the copyright. If your agreement allows you to retain the copyright, you may still have the authority to control many uses of the work. On the other hand, if you assign the copyright to the publisher, you generally have given up your rights to manage the work. If a third-party user comes to you for permission to use the work, you may no longer have the authority to grant that permission. In fact, if you want to use your own article as part of a later publication, or simply to copy it for a class or conference, you may also have given up that right as well. You should consider carefully the scope of rights that you are assigning to the publisher when you sign your publication agreements. Reading and understanding the agreement may be the most important part of the publication process, and it may directly define your future scholarly efforts. Do not hesitate to anticipate your future needs and to negotiate a contract that best serves your interests.

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How to Secure Permission to Use Copyrighted Works

Copyright owners have the exclusive right to reproduce, distribute, perform, display, and create derivatives of their works. Most others must obtain permission from the copyright owner to lawfully engage in any of these activities. This guide will aid in your quest to secure the right to use copyrighted works.

[Step One: Select the work to be used.](#)

Choose more than one work that will satisfy your needs if possible.

[Step Two: Is permission required in order to use the work?](#)

Securing permission is unnecessary if you determine a work is not protected by copyright.

- [1. Is the work to be used protected by copyright law?](#)
- [2. Is your use of the work a fair use?](#)
- [3. Are there any other statutory exceptions that negate the need for permission for the use of the work?](#)

[Step Three: Obtaining permission to use a copyrighted work.](#)

Securing permission can be made less problematic by following this detailed approach:

- [1. Identify the copyright owner\(s\).](#)
- [2. Contact the copyright owner\(s\).](#)
- [3. Securing permission.](#)
- [4. Keep a detailed record of your quest for obtaining permission.](#)

[Step Four: What can you do if you come to a “dead end” in your quest for obtaining permission for the use of a particular work?](#)

There are strategies for dealing with the frustrating dead-end quests for permissions.

Step One: Select the work to be used. If possible, consider several works that will satisfy your particular needs. There are many reasons why getting permission to use a particular work may not be possible. These include: The licensing fee for the use of a work may be more than you are willing to pay, the copyright owner may outright refuse to allow you to use their work, you may have trouble identifying the copyright owner, and so on. Therefore, it is important to consider comparable alternatives when selecting a work in case securing permission for your first choice becomes an impossibility.

Step Two: Is permission required in order to use the work? It may be that you will not need permission in order to use a work. Sometimes this will depend on the work you choose, other times it may depend on your intended use of the work.

1. Is the work to be used protected by copyright law?

- As a practical note, assume all works are copyrighted. After careful investigation, if you cannot determine whether a work is copyrighted, secure permission to use that work.

- *General Rule* - There are many misconceptions that exist when determining whether a work has been copyrighted. The general rule is that all original works of authorship fixed in a tangible medium of expression are given automatic copyright. A work need not be registered with the Copyright office for it to receive copyright protection and not all works must display a copyright notice in order to receive copyright protection.

- *Exceptions to the rule* - Some works, by law, are not copyrightable:

- Federal government works. However, works that derive from federally funded projects and state government works may be copyrightable.

- Works that employ less than “minimal creativity” (i.e. lists of facts and discoveries). However, lists of facts that are ordered in a way that employs minimal creativity are copyrightable. The U.S. Supreme Court addressed this issue in [Feist Publications, Inc. v. Rural Telephone Service Company, Inc.](#)

- Works that have not been fixed in a tangible medium of expression. Ideas and thoughts that have not been recorded in any way are not copyrightable.

- Names, titles, slogans. Although these things are not copyrightable, they may be protected under trademark law. See: [Copyright Management Center: Trademark Law.](#)

- Procedures, processes, systems, methods

of operation, concepts, principles. Although these things are not copyrightable, they may be protected under patent law. See: [Copyright Management Center: Patent Law](#).

- *Duration* - All copyrights have a limited duration. Once a copyright expires, the work falls into the public domain and anyone may use it freely and without permission. The duration period of a copyright will depend on one of many factors and may take a great deal of investigation to ascertain. These factors may include, but are not limited to: Date of creation of the work, date of the death of the author, whether the work has been registered with the copyright office, etc. For assistance with determining copyright durations, see:

- [When Works Pass into the Public Domain](#)

- [U.S. Copyright Office's Circular 15a: Duration of Copyright](#)

- [Identifying the Public Domain](#), prepared by Kenneth D. Crews for the Variations2 project

- *Assistance* - You may want to search the U.S. Copyright Office catalogs and other records to aid in the determination whether a work is copyrighted. These catalogs are available at several libraries across the country. For a fee, the U.S. Copyright Office will do a search on your behalf. The current rate for a search is \$80 an hour. For more information about searching the U.S. Copyright Office catalogs and records see the [U.S. Copyright Office's Circular 22: How to Investigate the Copyright Status of a Work](#). It is important to remember that a work does not need to be registered with the office to receive copyright protection. Therefore searching the office is just one step in determining whether a work is copyrighted.

2. Is your use of the work a fair use? The law allows the use of a work by others without permission of the copyright owner if the use of the work falls within the definition of “fair use”. For more information on fair use, see: [Copyright Management Center: Fair Use Issues](#). After evaluating your use of the work, if you are still unsure whether it is a fair use, you may want to secure permission in order to insure protection from liability of infringement.

3. Are there any other statutory exceptions that negate the need for permission for the use of the work? The Copyright Act enumerates several exceptions to the exclusive rights held by the copyright owner. Other

than the exceptions involving educational purposes, many of the exceptions are narrowly constructed and compliance with the law will involve meticulous planning.

- [Statutory Exceptions to the Exclusive Rights of Copyright Owners](#)

- Educational exceptions:

1. [Face-to-face teaching activities of nonprofit educational institutions](#)
2. [Distance Learning-TEACH Act](#)
3. [Framework of Rights and Exceptions](#), prepared by Kenneth D. Crews for the Variations2 project

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Step Three: Obtaining permission to use a copyrighted work. If you determine that: (1) the work you have selected to use is protected by copyright, (2) your use is not a fair use, and (3) no statutory exceptions apply to your use of the work, you must secure permission to use the work. There are three main steps in the permission securing process. Each step may take more time than expected, or even worse, may turn out to be a “dead end” in the quest for securing permission. Therefore, start the process for obtaining permission well before you will need to use the work.

1. Identify the copyright owner(s). There are several methods for determining who owns the rights to a work. Unfortunately, none of these methods are foolproof. Also, some works encapsulate multiple rights, each of which must be accounted for when obtaining permission.

- Examine a copy of the work. Look for the copyright notice (copyright by. . ., ©, copr.) and the name of the author and publisher to help determine the copyright owner. This method for determining the copyright owner is not always accurate. Copyrights may be transferred after the copyright notice has been published. Remember, the absence of a copyright notice does not mean that the work is in the public domain. For more information see the [U.S Copyright Office's Circular 3: Copyright Notice](#).
- Conduct a search on the internet. Conducting a search for titles, authors' names, publishers, parts of the text, a transcript, or lyrics of the work may help to discover the identity of the copyright owner. There are also many online organizations that can help identify the owner of a copyright. Often, these organizations can also contact the copyright

owner or grant permission on behalf of the owner. For a list of these organizations and more information, see: [Copyright Management Center: Collective Rights Organizations](#).

- The U.S. Copyright Office keeps a record of all copyright registrations and documents submitted to them. However, this method of identifying the copyright owner will not cover all works because authors do not have to register their works in order for them to qualify for copyright protection. Also, transfers of copyright since registration may not have been recorded with the U.S. copyright office. To search the U.S. Copyright Office's records of registrations and ownership documents since 1978, see: [Copyright Records](#). For more information about access to the U.S. Copyright Office's records, see: [Obtaining Access](#).

2. Contact the copyright owner(s). After identifying the copyright owner, you will need to contact them in order to secure permission.

- Many times the copyright owner may prefer or require permission requests be made using a certain medium (i.e. fax, mail, etc.). Often, the use of an undesired medium will result in a non-response to your request. Telephone calls may be the quickest method for getting a response from the owner, but usually must be followed up with a fax, e-mail, or letter in order to convey the information that the owner will need to make decisions concerning the request.
- Publishers often have websites that prescribe a method for contacting the copyright owner. Search the website for a permissions department or other contact person.
- There are many collective rights organizations that provide efficient methods of contacting copyright owners. By providing services online, most of these organizations are able to expedite the process even more quickly. These organizations are sometimes capable of contacting the rights owner with your request or granting permission for use of the work on their behalf. For a list of these organizations and more information, see: [Copyright Management Center: Collective Rights Organization](#).

3. Securing permission.

- Collective rights organizations offer an efficient method for securing permission to use copyrighted works and sometimes provide the only avenue by which permission can be sought. By acting as agents of copyright owners, these

organizations may be able to grant permission to use copyrighted works on behalf of the owner, or in other cases, they can contact the owner on your behalf. Because many collective rights organizations offer their services online, some permission requests for using copyrighted works can be granted instantaneously. For a list of these organizations, see: [Copyright Management Center: Collective Rights Organizations](#).

- Some copyright owners furnish their own permission agreement form that can be downloaded from their website.
- Drafting a permission request letter. For sample permission letters see the [Copyright Management Center: Permission Letters](#).
- The copyright owner may need certain, specific information concerning your request for permission to use their work. Any pertinent information left out of the original request may result in the process taking longer than needed. Be sure to include the following pertinent information:

– *Who*: Permission fees are often calculated by copyright owners according to the number of people who will view their work or the number of copies that are made of their work. Always include the number of copies that you wish to make or the number of uses intended (estimate the number if you have to). If the work is to be put on a website, include the estimated “hits” that the website will receive. If, in the end, more people view or receive copies of the work than you stated in your initial request, you will need to contact the owner with that information. When possible, provide assurance that the work will only be viewed by the number of people stated in your request. Because it is so easy to share information in today’s world, copyright owners are more likely to grant permission if they know their work can only be accessed by the limited number of people that you have requested permission for. Any sort of password protection for online distribution, monitored use in lectures, or other possible methods of limiting access to the copyrighted work should be stated in your request.

– *What*: Be as specific as possible when you cite the work you wish to use. If you plan to use only part of a work, the fee may be less if you request permission for only that portion

instead of for the entire work. For text works, if you do not intend to use a whole work, include page numbers, sections, chapters, etc. For recorded works, include starting times and ending times.

– *When*: The copyright owner will want to know when you plan on using the work and for how long. Permission fees are often based on the amount of time the work is to be used. Some owners may be wary of granting permission for extended periods of time or for dates far in the future.

– *Why*: The purpose of your use of the work may also affect whether permission is granted and/or the amount of the fee assessed. Be sure to include the nature of the use, such as: commercial, classroom learning, distance education, non-profit, research, etc. If copies are to be sold in some manner, include the selling price.

– *Where and How*: Include information about how and where the work will be used. Such information may involve: Classroom copies, overheads, reserves, course pack, password protected online displays, websites, etc.

- Make the process easy for the copyright owner. The less effort the owner has to put forth, the more likely you will get permission to use their work quickly (or at all). To assist the copyright owner, include a second copy of your request for the owner's records. Also, enclose a stamped self-addressed envelope for the owner's convenience.

4. Keep a detailed record of your quest for obtaining permission. There are two main reasons you will want to keep a detailed record of your permission. First, you may need to refer to the terms and scope of the permission (i.e. duration, purpose, etc.). Second, you may want to secure permission in the future, either of the same work, or another work controlled by the same copyright owner. These records will supply not only the contact information, but also assist you in gauging the amount of time needed to get permission from a particular copyright owner. Possible information you will want to keep in your records may include:

- Citation & Name of work
- Author/Creator
- Type of media
- Type of use/# of copies

- Copyright owner & contact person
- Contact information
- Date permission requested
- Date permission granted
- Amount Due
- Due Date
- Expiration of permission

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Step Four: What can you do if you come to a “dead end” in your quest for obtaining permission for the use of a particular work?

This is a common problem which can be extremely frustrating.

Kenneth D. Crews’s paper, [When You Cannot Get Permission: Dealing with the “Dead End” of a Copyright Quest](#), contemplates strategies for dealing with dead ends:

- [1. Return to fair use.](#)
- [2. Replace the materials with alternative works.](#)
- [3. Alter your planned use of the copyrighted works.](#)
- [4. Conduct a risk-benefit analysis.](#)

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Last Updated: March 6, 2006

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Checklist for Fair Use:

Introduction

Prepared by the
COPYRIGHT MANAGEMENT CENTER

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We are pleased to offer the following "Checklist for Fair Use" as a helpful tool for the academic community. We hope that it will serve two purposes. First, it should help educators, librarians, and others to focus on factual circumstances that are important to the evaluation of a contemplated fair use of copyrighted works. A reasonable fair-use analysis is based on four factors set forth in the fair-use provision of copyright law, Section 107 of the Copyright Act of 1976. The application of those factors depends on the particular facts of your situation, and changing one or more facts may alter the outcome of the analysis. The "Checklist for Fair Use" derives from those four factors and from the judicial decisions interpreting copyright law.

A second purpose of the checklist is to provide an important means for recording your decision-making process. Maintaining a record of your fair-use analysis is critical to establishing your "reasonable and good-faith" attempts to apply fair use to meet your educational objectives. Section 504 (c)(2) of the Copyright Act offers some protection for educators and librarians who act in good faith. Once you have completed your application of fair use to a particular need, keep your completed checklist in your files for future reference.

As you use the checklist and apply it to your situation, you are likely to check more than one box in each column and even check boxes across columns. Some checked boxes will "favor fair use," and others may "oppose fair use." A key concern is whether you are acting reasonably in checking any given box; the ultimate concern is whether the cumulative "weight" of the factors favors or opposes fair use. Because you are most familiar with your project, you are probably best positioned to make that decision.

To learn more about fair use and other aspects of copyright law, visit the Copyright Management Center website at <http://www.copyright.iupui.edu>.

Revised: April 1, 2004
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Thanks to Dwayne K. Buttler, now at the University of Louisville, for his assistance with creating the checklist.



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Checklist for Fair Use:

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Added to Website: January 21, 2005

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Fair-Use: Overview and Meaning for Higher Education

By Kenneth D. Crews

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Copyright law begins with the premise that the copyright owner has exclusive rights to many uses of a protected work, notably rights to reproduce, distribute, make derivative works, and publicly display or perform the work. But the Copyright Act also sets forth several important exceptions to those rights. Individual statutes make specific allowance for such concerns as distance learning, backup copies of software, and some reproductions made by libraries. The best known and most important exception to the owners' rights is fair use. The entire fair-use statute, as enacted by Congress, is as follows:

The Fair-Use Statute Section 107 of the Copyright Act of 1976. 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 in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

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

The Meaning of the Four Factors

While fair use is intended to apply to teaching, research, and other such activities, a crucial point is that an educational purpose alone does not make a use fair. The purpose of the use is in fact only one of four factors that users must analyze in order to conclude whether or not an activity is lawful.

Moreover, each of the factors is subject to interpretation as courts struggle to make sense of the law. Some interpretations, and their subsequent reconstruction by policy-makers and interest groups, have been especially problematic. For example, some copyright analysts have concluded that if a work is a commercial product, the "nature" factor weighs against fair use. By that measure, no clip from a feature film or copy from a trade book could survive at least that fair-use factor. Similarly, some commentators argue that if a license for the intended use is available from the copyright owner, the action will directly conflict with the market for licensing the original. Thus, the availability of a license will itself tip the "effect" factor against fair use. Neither of these simplistic constructions of fair use is a valid generalization, yet they are rooted in some truths under limited circumstances. Only one conclusion about the four factors is reliable: Each must be evaluated in light of the specific facts presented.

A central tenet of this analysis is that fair use is a flexible doctrine that Congress wanted us to test and adapt for changing needs and circumstances. The law provides no clear and direct answers about the scope of fair use and its meaning in specific situations. Instead, we are compelled to return to the four factors and to reach creative and responsible conclusions about the lawfulness of our activities. Reasonable people will always differ widely on the applicability of fair use, but any reliable evaluation of fair use must depend upon a reasoned analysis of the four factors of fair use. The four factors also need not lean in one direction. If most factors lean in favor of fair use, the activity is allowed; if most lean the opposite direction, the action will not fit the fair-use exception and may require permission from the copyright owner.

The following is a brief explanation of the four factors from the fair-use statute. Keep in mind that fair use requires weighing and balancing all four factors before reaching a conclusion.

I. Purpose

Congress favored nonprofit educational uses over commercial uses. Copies used in education, but made or sold at a monetary profit, may not be favored. Courts also favor uses that are "transformative," or that are not mere reproductions. Fair use is more likely when the copyrighted work is "transformed" into something new or of new utility, such as quotations incorporated into a paper, and perhaps pieces of a work

mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original. For teaching purposes, however, multiple copies of some works are specifically allowed, even if not "transformative." The Supreme Court underscored that conclusion by focusing on these key words in the statute: "including multiple copies for classroom use."

II. Nature

This factor examines characteristics of the work being used. It does not refer to attributes of the work that one creates by exercising fair use. Many characteristics of a work can affect the application of fair use. For example, several recent court decisions have concluded that the unpublished "nature" of historical correspondence can weigh against fair use. The courts reasoned that copyright owners should have the right to determine the circumstances of "first publication." The authorities are split, however, on whether a published work that is currently out-of-print should receive special treatment. Fair use of a commercial work meant for the educational market is generally disfavored. Courts more readily favor the fair use of nonfiction, rather than fiction. Commercial audiovisual works generally receive less fair use than do printed works. A consumable workbook will most certainly be subject to less fair use than would a printed social science text.

III. Amount

Amount is measured both quantitatively and qualitatively. No exact measures of allowable quantity exist in the law. Quantity must be evaluated relative to the length of the entire original and in light of the amount needed to serve a proper objective. One court has ruled that a journal article alone is an entire work; any copying of an entire work usually weighs heavily against fair use. Pictures generate serious controversies, because a user nearly always wants the full image, or the full "amount." On the other hand, a "thumbnail," low-resolution version of the image might be an acceptable "amount" to serve an education or research purpose. Motion pictures are also problematic, because even short clips may borrow the most extraordinary or creative elements. One may also reproduce only a small portion of any work, but still take "the heart of the work." This concept is a qualitative measure that may weigh against fair use.

IV. Effect

Effect on the market is perhaps even more complicated than the other three factors. Some courts also have called it the most important factor, although such rhetoric is often difficult to validate. This factor means fundamentally that if you make a use for which a purchase of an original theoretically should have occurred—regardless of your personal willingness or ability to pay for such purchase—then this factor may weigh against fair use. "Effect" is closely linked to "purpose." If your purpose is research or scholarship, market effect may be difficult to prove. If your purpose is commercial, then adverse market effect is often presumed. Occasional quotations or photocopies may have no adverse market effects, but reproductions of software and videotapes can make direct inroads on the potential markets for those works.

[See Examples of Fair-Use Cases](#)

[Go to the Fair Use Checklist](#)

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Portions of an earlier version of this paper appear, with permission of course, in the publication *Fair Use of Copyrighted Works: A Crucial Element in Educating America*. Seal Beach, CA: CSU Chancellor's Office, 1995 [a joint project of California State University, State University of New York, City University of New York]. For more information about copyright and fair use, see [CETUS Fair Use of Copyrighted Works](#).

Content Revised: May 2000

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Fair-Use Guidelines

Given the relative uncertainty about the meaning of fair use as applied to various situations, especially in the educational setting, various interested parties have proposed the creation of "guidelines" that attempt to interpret and apply the law to common circumstances. The earliest of these guidelines emerged in 1976, and the most recent resulted from the Conference on Fair Use ("Confu") in the 1990s. Please note: None of these guidelines were developed at Indiana University; none has the force of law; policies at IU do not require members of the community to adhere to any of these standards.

Examples of Existing Guidelines

- [Classroom Photocopying](#)
- [Uses of Music](#)
- [Off-Air recording of Television Broadcasts](#)
- [ALA Guidelines for Classroom, Research and Reserves Uses](#)
- [ALA Guidelines for Videotapes and Software](#)
- [Software Uses](#)
- [Electronic Reserves](#)
- [Interlibrary Loans](#)
- CONFU Report
 - [Digital Images](#)
 - [Distance Learning](#)
 - [Multimedia Development](#)

Are Guidelines the Right Choice for Understanding Fair Use?

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Crews, Kenneth D. [Fair Use and Higher Education: Are Guidelines the Answer?](#) As published in *Academe: Bulletin of the American Association of University Professors*, Vol. 83, No. 6 (November/December 1997).

•
Crews, Kenneth D. ["The Law of Fair Use and the Illusion of Fair-Use Guidelines."](#) *Ohio State Law Journal* 62 (2001): 599-702.

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Read also the series of [related articles](#) published in the December 1999 issue of the *Journal of American Society for Information Science*.

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Classroom Handouts and Copyright at IUPUI

A Project of the IUPUI Copyright Management Center

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Introduction

Making use of other people's original works for classroom handouts can raise questions of fair use. The most common issues surround the copying of articles from journals or excerpts from books. The following information will help faculty and students evaluate "fair use" and other means for properly using copyrighted works in the classroom setting. Current copyright law gives legal protection to nearly all text, images, audiovisual recordings, and other course materials that instructors or students might desire to use in the classroom, even if the original works do not include any statement about copyright. Materials may be copied only if:

1. The instructor is the copyright owner of the material, or
2. The copyright owner of the material grants permission, or
3. The material is in the public domain, or
4. The use of the material is a "fair use" under the law, or
5. The material falls within another statutory exception.

How Does Fair Use Apply to the Classroom Activities?

Fair use is a legal doctrine that allows the public to make limited uses of copyrighted works without permission. Fair use may not be what you expect. Therefore, do not assume that a nonprofit, educational use or giving credit for the source of the work, or that limiting access to materials to students in the class creates an inherent fair use. Fair use depends on a balancing of four factors, which may be addressed by a variety of means. The four factors are:

1. [Purpose of the Use](#)

2. [Nature of the Work](#)
3. [Amount of the Work Used](#)
4. [Effect of the Use on the Market for the Original](#)

Applying Fair Use

The following are general standards suggested by the IUPUI Copyright Management Center to give fair use some practical application. Instructors and others at IUPUI should also consider these standards when evaluating whether their activities are within fair use. Listed below with each factor are some suggestions that may be helpful in conducting fair-use analyses. Because each situation will be different, instructors must also consider other possibilities and weigh them in the balance for each fair-use determination. One need not necessarily take every possible precaution and satisfy all four of the statutory factors; hence, some adjusting of the implementation of the following procedure may still keep your activities within the boundaries of permitted use.

To establish the strongest basis for fair use, consider and apply the four factors along the lines of these suggestions:

1. Purpose of the Use

- Materials should be used in class only for the purpose of serving the needs of specified educational programs.
- Students should not be charged a fee specifically or directly for the materials.

2. Nature of the Work

- Only those portions of the work relevant to the educational objectives of the course should be used in the classroom.
- The law of fair use applies more narrowly to highly creative works; accordingly, avoid substantial excerpts from novels, short stories, poetry, modern art images, and other such materials.
- Instructors should carefully review uses of “consumable” materials such, as test forms and workbook pages that are meant to be used and repurchased.

3. Amount of the Work

- Materials used in the classroom will generally be limited to brief works or brief excerpts from longer works. Examples: a single chapter from a book, individual articles from a journal, and individual news articles.
- The amount of the work used should be related directly to the educational objectives of the course.

4. Effect of the Use on the Market for the Original

- The instructor should consider whether the photocopying harms the market or sale of the copyrighted material.
- Materials used in the class should include a citation to the original source of publication

and a form of a copyright notice.

- Instructor should consider whether materials are reasonably available and affordable for students to purchase—whether as a book, coursepack, or other format.

For More Information and Assistance

For scenarios applying the factors of fair use, see: Common Scenarios of Fair Use Issues:

For scenarios applying the factors of fair use, see: <http://www.copyright.iupui.edu/fuscenarios.htm>

Permission from the copyright owner is an important option for using copyrighted materials in classrooms. Instructors at IUPUI are ultimately responsible for securing permission as

needed. For more information about permissions, see: <http://www.copyright.iupui.edu/permsec.htm>

For more information about fair use at IUPUI and Indiana University, see: <http://www.copyright.iupui.edu/fairuse.htm>

Links Updated: January 5, 2006

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Common Scenarios of Fair Use Issues: Posting Materials on Course Management Systems

A Project of the
IUPUI Copyright Management Center

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The following scenarios encompass common examples of the application of fair use when instructors post materials on Oncourse, Angel, or other course management system (CMS). Because fair use seldom offers simple, clean, concise rules--and every situation will have its own set of facts--these scenarios should help instructors make fair-use determinations. Fair use is based on an application of four factors set forth in the Copyright Act. For a further discussion of fair use, see: [Copyright Management Center: Fair Use Issues](#).

Scenario: Journal Articles

Professor would like to post on Oncourse a single fact-based journal article which is relevant to the course he teaches. Professor used the same article last year for the same course.

Purpose: The purpose of the use of the journal article is educational, which weighs in favor of fair use.

Nature: The nature of the work is factual, which weighs in favor of fair use.

Amount: A single article from a journal may be considered an entire work by itself, which can tip this factor against fair use. If use of the entire work is necessary for the educational purpose, the amount may be appropriate.

Market Effect: Use in one semester may have only minimal market effects, but repeat use

can begin to compound the market harm. At some point, ongoing uses may begin to tip this factor more strongly against fair use. On the other hand, if the particular article is not licensed or marketed for such uses, the harm here will likely be slight at most.

Alternatives: Professor should investigate whether the university library subscribes to a database which includes the desired articles. If so, students should be able to access the articles by linking to the database from Oncourse.

Scenario: Newspaper Articles

Professor would like to post on Oncourse multiple newspaper articles spanning several weeks from a local paper. The articles are news items and are relevant to the subject of the course. Professor subscribes to the newspaper.

Purpose: The purpose of the use of the news articles is educational, which weighs in favor of fair use.

Nature: The news articles are fact based, which weighs in favor of fair use.

Amount: Posting only single news articles and not the entire newspaper probably weighs in favor of fair use.

Market Effect: Limiting access to the articles to only the students enrolled in the course should tip this factor in favor of fair use. However, the continued use of the same newspaper may begin to tip this factor against fair use.

Alternatives: In this scenario, Professor should investigate whether the university library subscribes to the newspaper or a database which includes the desired articles. If so, students should be able to access the articles by linking to the database from Oncourse.

Scenario: Chapters from Novels

Professor would like to post on Oncourse several single chapters (some being quite lengthy) from multiple novels for a literature course. Each chapter is relevant to the course. The library owns each novel. Because the chapters are from separate works, the instructor needs to evaluate fair use with respect to each one individually; most often the analysis will be the same.

Purpose: The purpose of the use of the book chapters is educational, which weighs in favor of fair use.

Nature: The law of fair use applies more narrowly to highly creative works, such as novels. The creative nature of novels often weighs against fair use.

Amount: Posting brief excerpts of an entire work may weigh in favor of fair use. Isolated, individual, and short chapters may be satisfactorily brief. However, because of the highly creative nature of novels, and the fact that some chapters are quite lengthy, the professor should consider choosing shorter excerpts if the educational goal for using the material can

still be achieved.

Market Effect: Limiting access to the articles to only the students enrolled in the course may tip this factor in favor of fair use.

Alternatives: Professor may want to consider creating either a hardcopy or electronic coursepack by seeking permission from the copyright owners of the materials. If the materials are used semester after semester, Professor or the library should consider purchasing multiple copies of the books to make them available to students each semester. Another possible option would be for Professor to require each student buy a copy of each book, if reasonably available.

Scenario: Workbooks

Professor would like to post on Oncourse a copy of an unused, commercially-printed workbook he owns which corresponds to the course he teaches. The workbook is relevant to the course.

Purpose: The purpose of the use of the materials is educational, which weighs in favor of fair use.

Nature: Workbooks are “consumable” materials, which may weigh heavily against fair use. These types of materials are marketed specifically for students such as those enrolled in the course. These materials are meant to be used and replaced regularly and not routinely copied.

Amount: Providing significant excerpts or the entire workbook would weigh against fair use.

Market Effect: Workbooks are created for the educational market and students are the main purchaser of such materials. Providing students with these materials may deeply affect the market for them and therefore may weigh heavily against fair use.

Alternatives: Permission from the copyright owner should be sought for “consumable” materials used. Instructors should also consider having students purchase the workbooks.

Scenario: Poetry

Professor would like to post on Oncourse portions of a book of poems he owns that has been out of print for five years. Professor plans only to use portions of the book which are relevant to the course. Professor believes this book to be the best tool for teaching the course.

Purpose: The purpose of the use of the poetry is educational, which weighs in favor of fair use.

Nature: Fair use applies more narrowly to highly creative works such as poems. The nature of these works probably weighs against fair use.

Amount: Limiting the amount of material used to brief excerpts of an entire work weighs in favor of fair use. On the other hand, each poem will probably be treated as an entire work, and excerpts of a single poem may or may not be adequate for educational purposes.

Market Effect: Although the book is out of print (and therefore there is no current market), the copyright owner of the collection or of each poem may decide in the future to re-offer the material for commercial purposes. Also, the copyright owner may be prepared to license the material for copying. These possibilities are “potential” markets. However, limiting access to the articles to only the students enrolled in the course may tip this factor in favor of fair use.

Alternatives: When dealing with out-of-print materials, Professor should keep in mind that the materials may possibly be obtained through other sources available for purchase. The one book in question may not be the only source for the desired poetry.

Scenario: Videotapes

Professor would like to post on Oncourse a video recording of a recent television broadcast which is relevant to the course. The show is part of a series aired on network television and broadcast to the public at no charge.

Purpose: The purpose of the use of the television show is educational, which weighs in favor of fair use.

Nature: The law of fair use applies more narrowly to highly creative works such as television shows. This may tip this factor against fair use. On the other hand, if the program is more “factual,” such as a news or current affairs program, this factor may tip towards fair use.

Amount: Professor should limit the portion of the video recording to the amount needed to satisfy the educational purpose.

Market Effect: Limiting access to only the students enrolled in the course may tip this factor in favor of fair use. If the program is available for purchase, this factor will tip more strongly against fair use. Using network television programs which are available to the public at no charge will more likely fall within fair use than the use of a program only available on a cable network for paid subscribers.

Alternatives: Providing one copy of the video recording in the library reserves for students to check out will more likely be a fair use than posting the recording on Oncourse. If the program is available for purchase, Professor X should consider placing purchased copies on reserve in the library. Assuming that taping one copy off-air is fair use (which is often true), sharing that one copy of the tape with students should also be lawful.

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CMC and the TEACH Act

This page highlights documents prepared by the CMC in the pursuit of understanding and applying the TEACH Act. For more information about distance education and the TEACH Act visit the CMC's [Distance Education](#) webpage.

[Summary of the TEACH Act](#)

[TEACH Act Checklist](#) - Use this tool to assist in the determination of whether your use of a copyrighted work in distance education complies with the TEACH Act.

[Requirements of the TEACH Act](#) - Identifies the TEACH Act requirements and summarizes how each requirement may be addressed in the context of the IUPUI Online Initiative.

[Complying with the TEACH Act](#) - Recommendations for the IUPUI Online Initiative for complying with the TEACH Act.

[Distance Education and Copyright at Indiana University](#) - Suggested standards for practice and procedure at IU.

[Click here for more TEACH Act info!](#)

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Categories of Key Court Case Summaries on Fair Use

[Copying for Education](#)

- [Basic Books, Inc. v. Kinko's Graphics Corp.](#) – Copying material from books for use in coursepacks
- [Princeton University Press v. Michigan Document Services, Inc.](#) – Copying material from books for use in coursepacks
- [Encyclopaedia Britannica Educational Corp. v. Crooks](#) – Recording television programs for use in classroom

[Copying for Research](#)

- [American Geophysical Union v. Texaco Inc.](#) – Photocopying of scholarly articles by corporation for use in research (holding does not extend to independent researchers)
- [Sundeman v. The Seajay Society, Inc.](#) – Use of quoted material in oral presentation

[Copying for Websites & Public Dissemination](#)

- [Los Angeles Times v. Free Republic](#) – Full newspaper articles posted on internet
- [Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.](#) – Newspaper translated Japanese articles into English and disseminated abstracts
- [Nunez v. Caribbean International News, Corp.](#) – Newspaper published controversial photograph

[Internet & Website Development](#)

- [Kelly v. Arriba Soft Corp.](#) – Internet search engine copied photographs from the web for use as thumbnails
- [Los Angeles Times v. Free Republic](#) – Posting full newspaper articles on bulletin board website

[Multimedia Production](#)

- [Higgins v. Detroit Educational Television Foundation](#) – Use of music in educational video for public television

[Preparation of Publications](#)

- [Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.](#) – Trivia book created based on popular television show
- [Maxtone-Graham v. Burtchaell](#) – Use of excerpts from out-of-print book in new work
- [Worldwide Church of God v. Philadelphia Church of God](#) – Re-printing entire copy of out-of-print work

[Uses of Photographs](#)

- [Kelly v. Arriba Soft Corp.](#) – Photos copied off web for use as thumbnails

- [Nunez v. Caribbean International News, Corp.](#) – Controversial photos published by newspaper without permission
- [Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.](#) – Photograph digitally scanned and elements inserted into new photograph

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Common Scenarios of Fair Use Issues: Copying Works for Classroom Handouts

A Project of the
IUPUI Copyright Management Center

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The following scenarios encompass common examples of the application of fair use when instructors make reproduction of copyrighted materials for handouts in the classroom. Because fair use seldom offers simple, clean, concise rules--and every situation will have its own set of facts--these scenarios should help instructors make fair-use determinations. Fair use is based on an application of four factors set forth in the Copyright Act. For a further discussion of fair use, see: [Copyright Management Center: Fair Use Issues](#).

Scenario: Journal Articles

Professor would like to make a copies of a single fact-based journal article for handout in her classroom. The article is relevant to the course, she teaches. Professor made a copy of the same article last year for the same course.

Purpose: The purpose of copying the journal article is educational, which weighs in favor of fair use.

Nature: The nature of the work is factual, which weighs in favor of fair use.

Amount: A single article from a journal may be considered an entire work by itself, which can tip this factor against fair use. If use of the entire work is necessary for the educational purpose, the amount may be appropriate.

Market Effect: Copying for use in one semester may have only minimal market effect, but repeated copying can begin to compound the market harm. At some point, ongoing copying may begin to tip this factor more strongly against fair use. On the other hand, if the particular article is not licensed or marketed for such uses, the harm here will likely be slight at most.

Alternatives: Professor should investigate whether the university library subscribes to a database, which includes the desired articles. If so, students should be able to make use of the articles by accessing the university library website.

Scenario: Newspaper Articles

Professor would like to make copies of multiple newspaper articles spanning several weeks from a local paper for use in her classroom. The articles are news items and are relevant to the subject of the course. Professor subscribes to the newspaper.

Purpose: The purpose of copying the news articles for classroom use is educational, which weighs in favor of fair use.

Nature: The news articles are fact based, which weighs in favor of fair use.

Amount: Copying only a single news article and not the entire newspaper probably weighs in favor of fair use.

Market Effect: A one-time use of this article for the benefit of the students enrolled in the course probably creates little or no harm to the market. Traditionally, the market for news was limited to just a few days. Today, however, some news articles are marketed indefinitely through databases. Continuous use of an article may therefore tip against fair use.

Alternatives: In this scenario, Professor should investigate whether the university library subscribes to a database, which includes the desired articles. If so, students should be able to make use of the articles by accessing the university library website. If the course requires steady copies of articles from one newspaper, student subscription at favorable rates may be a good alternative.

Scenario: Chapters from Novels

Professor would like to make copies of several single chapters (some being quite lengthy) from multiple novels for a literature course, to distribute as handouts to students in her class. Each chapter is relevant to the course. The library owns each novel. Because the chapters are from separate works, the instructor needs to evaluate fair use with respect to each one individually; most often the analysis will be the same.

Purpose: The purpose of copying the book chapters is educational, which weighs in favor of fair use.

Nature: The law of fair use applies more narrowly to highly creative works, such as novels. The creative nature of novels often weighs against fair use.

Amount: Copying brief excerpts of an entire work may weigh in favor of fair use. Isolated, individual, and short chapters may be satisfactorily brief. However, because of the highly creative nature of novels, and the fact that some chapters are quite lengthy, the professor should consider copying shorter excerpts if the educational goal for using the material can

still be achieved.

Market Effect: Limiting the distribution of copied materials to only the students enrolled in the course may tip this factor in favor of fair use.

Alternatives: Professor may want to consider creating either a hardcopy or electronic coursepack by seeking permission from the copyright owners of the materials. If the materials are used semester after semester, Professor or the library should consider purchasing multiple copies of the books to make them available to students each semester. If the novels are available at a reasonable price for Professor should require each student to buy a copy of each book.

Scenario: Workbooks

Professor would like to make copies of an unused, commercially printed workbook he owns which corresponds to the course he teaches. The workbook is relevant to the course.

Purpose: The purpose of copying in this scenario is educational, which weighs in favor of fair use.

Nature: Workbooks are “consumable” materials, which may weigh against fair use. These types of materials are marketed specifically for students such as those enrolled in the course. These materials are meant to be used and replaced regularly and not routinely copied.

Amount: Copying significant excerpts or the entire workbook would weigh against fair use.

Market Effect: Workbooks are created for the educational market and students are the main purchasers of such materials. Providing students with these materials may deeply affect the market for them and therefore may weigh heavily against fair use.

Alternatives: Permission from the copyright owner should be obtained before copying significant portions from “consumable” materials. Instructors should also consider having students purchase the workbooks.

Scenario: Poetry

Professor would like to make copies of portions of a book of poems he owns that has been out of print for five years. Professor plans only to copy portions of the book, which are relevant to the course. Professor believes this book to be the best tool for teaching the course.

Purpose: The purpose of the use of the poetry is educational, which weighs in favor of fair use.

Nature: Fair use applies more narrowly to highly creative works such as poems. The nature of these works probably weighs against fair use.

Amount: Limiting the amount of material used to brief excerpts of an entire work weighs in favor of fair use. On the other hand, each poem will probably be treated as an entire work, and excerpts of a single poem may or may not be adequate for educational purposes.

Market Effect: Although the book is out of print (and therefore there is no current market), the copyright owner of the collection or of each poem may decide in the future to re-offer the material for commercial purposes. Also, the copyright owner may be prepared to license the material for copying. These possibilities are “potential” markets.

Alternatives: When dealing with out-of-print materials, Professor should keep in mind that the materials may possibly be obtained through other sources available for purchase. The one book in question may not be the only source for the desired poetry.

Created: August 9, 2004

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Statutory Exceptions to the Exclusive Rights of Copyright Owners

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[Section 109](#). Limitations on exclusive rights: **Effect of transfer of particular copy or phonorecord**

[Section 110](#). Limitations on exclusive rights: **Exemption of certain performances and displays**

[Section 111](#). Limitations on exclusive rights: **Secondary transmissions**

[Section 112](#). Limitations on exclusive rights: **Ephemeral recordings**

[Section 113](#). Scope of exclusive rights in **pictorial, graphic, and sculptural works**

[Section 114](#). Scope of exclusive rights in **sound recordings**

[Section 115](#). Scope of exclusive rights in **nondramatic musical works**:
Compulsory license for **making and distributing phonorecords**

[Section 116](#). Negotiated licenses for **public performances by means of coin-operated phonorecord players**

[Section 117](#). Limitations on exclusive rights: **Computer programs**

[Section 118](#). Scope of exclusive rights: Use of certain works in connection with **noncommercial broadcasting**

[Section 119](#). Limitations on exclusive rights: **Secondary transmissions of superstations and network stations for private home viewing**

[Section 120](#). Scope of exclusive rights in **architectural works**

[Section 121](#). Limitations on exclusive rights: **reproduction for blind or other people with disabilities**

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Last Updated: March 6, 2006

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Copyright Permissions: A Brief Overview

Prepared by the:

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July 26, 2000

COPYRIGHTS AND PERMISSIONS

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For example, if you paraphrase a portion of a book, you most likely do not need permission—the idea is not protected by copyright. However, a particular expression of that idea can be protected under copyright law. Thus, if you make direct quotations from another book to include in your publication, you are likely reproducing copyrighted expression. In this case you may need permission to use that quotation in order to avoid copyright infringement.

Reproducing part or all of a copyrighted work without permission is just one example of possible copyright infringement. You may need permission whenever your use of a work implicates any of the exclusive rights granted to a copyright holder:

- Reproducing,
- Adapting or modifying (the creation of "derivative" works),
- Distributing to the public,
- Publicly performing, or
-

WHAT WORKS ARE PROTECTED BY COPYRIGHT?

Be aware that under current law copyright is automatic. The author or creator does not have to ask for copyright or formally apply for it. Therefore, almost all recent works are protected by copyright. Copyright law protects more than just text sources—artwork, sound recordings, video recordings, and other works can also be protected by copyright.

There are some items that are NOT protected by copyright. These works may be used freely without obtaining permission. Examples are:

Works by the United States Government

Facts

Ideas

Works that lack originality (for example, the phone book)

Works for which copyright has expired (works in the public domain)

WHEN MIGHT I USE A COPYRIGHTED WORK WITHOUT PERMISSION?

Certain exceptions in the copyright law allow you to use certain works under certain conditions without obtaining permission. These exceptions often apply in educational settings. The most widely used exception is fair use, based on the United States Code, Title 17, Section 107.

Fair use is based on four factors:

- What is the purpose of the use?
- What is the nature of the work to be used?
- How much of the work will you use?
- What effect could using this work have on the market for the original work?

If your use of a work is within fair use, you do not need permission.

HOW DO I SECURE PERMISSION TO USE A COPYRIGHTED WORK?

Copyright permissions are often needed for many different projects. A few examples are:

- Coursepacks
- Course reserves and course handouts (print or electronic)
- Faculty or graduate websites and electronic mailing lists for teaching or research
- Distance learning (via video, websites, or electronic mailing lists)
- Multimedia projects
- Research copies
- Reproduction of materials in publications (print or electronic)

If you have determined that the work you want to use is protected under copyright law, and that your use is not within fair use or any other exception, the next step is to obtain permission. You need to identify the copyright holder and obtain permission from that person or organization. Note that a copyright holder may be an individual, or individuals, an organization, or a company. The copyright owner may require conditions with the permission—as to how an excerpt can be used, how acknowledgements should be specified, or even a fee to use a part of, or a whole, work. It is also important to document the steps of your permission quest. These records may be helpful if any legal complications arise from your use of a work.

For further explanations about how to find copyright holders and for [sample permission letters](#) to send to copyright holders, visit the Copyright Management Center website.

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When You Cannot Get Permission: Dealing with the “Dead End” of a Copyright Quest

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The situation is common: You want to use a work that you have concluded is protected by copyright, and your use is not within fair use or one of the other exceptions to the rights of copyright owners. You have attempted to seek permission, but the effort simply has produced no conclusion. Perhaps you did receive permission, but with burdensome conditions or a high price. Or, perhaps you wrote for permission, and the permission was flatly denied. In those situations, you likely have little choice but to absorb the bad news and change your plans. Much more complex and frustrating, however, is when you exert an honest effort, but you simply cannot find a copyright owner or your efforts go unanswered. What do you do when you reach that mysterious “dead end”?

This dead end usually arises in one of the following situations:

You cannot identify a copyright owner. The work itself does not have a name, and you have searched through various different catalogs, databases, and other sources, according to the title or description of the work. Under American copyright law, anonymous and pseudonymous works are still fully protected. Simply because you cannot find the name of the copyright owner does not mean that it is not under copyright. Nevertheless, you are left to wonder about whom to ask for permission. Similarly, you may well be able to identify the original author or copyright owner, but that individual has died, or the company has gone out of business. You have not been able to track any heirs or successors.

You cannot locate the copyright owner. You have concluded that the work is protected, and you have been able to identify the likely copyright owner, but you simply cannot find that person or entity. No listing appears in any of the usual reference guides or directories. You also have conducted a search of the records of the U.S. Copyright Office, and you have found no

current registration of a copyright claimant or any documentation assigning the copyright to a new owner. Perhaps the original copyright owner was a company or organization that ceased doing business years ago, and you have not been able to find any person or entities who succeeded to the interests. Perhaps the copyright owner died, but the heirs are untraceable. The copyright, nevertheless, lives on.

You have contacted the copyright owner, but received no response.

The copyright owner seems to really exist and to have an address or telephone number, but all of your efforts to obtain permission have been in vain. Your telephone calls go unanswered, and your letters drop into a bottomless pit. You even write a letter to the copyright owner declaring, “I will assume you are giving me permission unless you send me an explicit denial.” That creative effort might be helpful motivation, but as in all similar situations, “no answer” is not a “yes.”

The diligence with which you pursue and explore the possibilities for identifying, locating, and contacting the copyright owner may vary under the circumstances of each project. You might only invest extensive effort when the project is of great importance or the use of that particular copyrighted work is essential to achieving your goals. Regardless, after little or much effort, you may simply find yourself reaching this dead end far too often.

What are your choices when you reach that dead end? Here are some alternatives:

Return to fair use. When you originally evaluated fair use, you may have focused on an assumption about the “potential market” for the work in question, and the possible harm to that market caused by your use of the work. Remember that “market effect” is one of the four factors to analyze in fair use. Now that you have immersed yourself into the quest for permission, you may have discovered that no permission seems to be forthcoming at all. If you really are at this “dead end”, you may very well have found that there is no realistic market asserted for this work. You may accordingly be able to reevaluate fair use a bit more generously than you had expected.

For more information see: [Copyright Management Center: Fair Use Issues](#)

Replace the materials with alternative works. You may have indulged in your project with firm commitment to using particular images, specific paragraphs, or exact selections of music. You need to ask yourself whether those specific copyrighted works are the only materials that will satisfy your goals. In many cases, you can achieve your desired end results with a selection of copyrighted works that come from more cooperative copyright owners or that may be in the public domain and available for general use.

Alter your planned use of the copyrighted works. Your ambitious plans may have involved scanning, digitizing, uploading, dissemination, Internet access, and multiple copies for students and colleagues. Requests for broad or variable rights of use often scare copyright owners or leave them unable to respond optimistically. As a result, your inquiries can get tossed into the bottomless pit. On the other hand, if you have placed multiple calls and sent multiple requests for permission without any response whatsoever, you are

not likely to get a response under any other circumstances. Changing your ambitious plans to something more modest and controllable may also create a more favorable outcome of the fair-use analysis. When you reign in the number of copies or the scope of access, or the potential for rapid digital duplication and dissemination, you may very well find that you have strengthened your claim to fair use under both the “purpose” factor and the “market effect” factor.

Conduct a risk-benefit analysis. You have diligently investigated your alternatives. You do not want to change your project, and you remain in need of the elusive copyright permission. The remaining alternative is to explore a risk-benefit analysis. You need to balance the benefits of using that particular material in your given project against the risks that a copyright owner may see your project, identify the materials, and assert the owner’s legal claims against you. Numerous factual circumstances may be important in this evaluation. The “benefit” may depend upon the importance of your project and the importance of using that particular material. The “risks” may depend upon whether your project will be published or available on the Internet for widespread access. You need to investigate whether the work is registered with the U.S. Copyright Office and weigh the thoroughness of your search for the copyright owner and your quest for appropriate permission. Undertaking this analysis can be sensitive and must be advanced with caution and with careful documentation. You may be acting

to reduce the risk of liability, but you have not eliminated liability.¹ A copyright owner may still hold rights to the material and may still bring a legal action against you, based on copyright infringement. Your good faith can be helpful, but it is not protection from liability. Members of the Indiana University community may want to consult with their supervisors or with University Counsel for assistance with this decision.

¹ The laws of some other countries have addressed this problem of “orphaned works.” For example, Canada has established a system whereby users may contribute a prescribed royalty payment to a government fund in exchange for permission to use works when the copyright owners cannot be identified or are not forthcoming. Unfortunately, the law in the United States includes no such alternative. Consequently, copyright owners are neither required nor encouraged to respond to requests for permission, and users are left to explore a range of alternatives for accomplishing their goals.

Contact information: <http://www.copyright.iupui.edu/contact.htm>

Design revision date: 8/29/2002

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Securing Permission for Copyrighted Works: Expediting the Process with the Aid of Collective Rights Organizations

There are many organizations that can aid you in your quest for securing permission to use copyrighted works. These organizations, by acting as agents for multiple copyright owners, can expedite the process of securing permission either by putting you in contact with the proper copyright owner, or by granting permission on behalf of the copyright owner. Many of these organizations can even grant "instant" permission online. By contacting the appropriate organization, you may be able to secure permission without having to identify, locate, or contact an individual creator of any particular work. Therefore, when starting from scratch, contacting the appropriate collective rights organization will likely be the best place to start your search.

Securing Rights for the use of:

[Works in print](#)

[Online works](#) (*websites*)

Musical works (*including any accompanying words and sound recordings*)

[Dramatic works](#) (*including any accompanying music*)

[Pictorial, graphic, and sculptural works](#)

[Motion pictures and other audio-visual works](#)

[Software](#)

[Syndicated comics, cartoons, and editorials](#)

[Religious works](#)

Works in print

Books, magazines, newspaper articles, newsletters, brochures, pamphlets, dissertations, journal articles, etc.

- [Copyright Clearance Center \(CCC\)](#)

o CCC can grant permission for use of thousands of text-based works. As a general rule, start here when desiring permission to use a text-based work. CCC is able to provide a simple and cost-effective method of securing permissions for the use of many text-based forms of copyrighted materials. Although some permissions are granted instantly at CCC online, others may take much longer. The service recommends entering your application four to six weeks before the start of the term for which the materials will be needed.

- [Authors Registry](#)

- o Based in the UK

- [Access Copyright](#)

- o Based in Canada

- [Authors' Licensing and Collecting Society Limited](#)

- o Representing mostly British authors.

[*Return to List*](#)

Online works (*websites*)

The most efficient way to get permission to use a copyrighted work from a webpage is to contact the owner or author of the webpage. In some cases, you may be directed to an organization such as the CCC or Icopyright.com in order to get permission.

- [Copyright Clearance Center \(CCC\)](#)
- [iCopyright.com](#)

[*Return to List*](#)

Musical works (*including any accompanying words and sound recordings*)

Coming Soon!

[*Return to List*](#)

Dramatic works (*including any accompanying music*)

Stage plays, musical plays, opera, ballet, etc.

- Dramatic works may not be publicly performed without permission, either in their entirety or in smaller portions, such as: excerpts, acts, scenes, monologues, etc. The rights that are needed to publicly perform a dramatic work that combines a musical work together with staging, dialogue, costuming, special lighting, choreography, etc. are referred to as *grand performing rights*. Grand performing rights are typically obtained from the creator of the work or their publisher. The rights to publicly perform a single piece of music from a musical play in a non-dramatic fashion are often referred to as *small performing rights*. Small performing rights are typically obtained from organizations such as ASCAP, BMI, and SESAC. To qualify as a non-dramatic performance, a piece of music taken from a musical play may not make use of any form of staging, choreography, etc., even if the use of any of these elements is not intended to represent any part of the original musical play. For example, creating your own dance steps to a piece of music from a musical play disqualifies the use as a non-dramatic use and permission for the grand performing rights must be sought.

- These organizations license rights to plays and musical theater works:

- o [Baker's Plays](#)
- o [Broadway Play Publishing, Inc.](#)
- o [Dramatists Play Service, Inc.](#)
- o [Dramatic Publishing Co.](#)
- o [Music Theatre International](#)
- o [Pioneer Drama Service](#)
- o [Popular Play Service](#)
- o [The Rodgers & Hammerstein Organization](#)
- o [Samuel French, Inc.](#)
- o [Tams-Witmark Music Library](#)

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Pictorial, graphic, fine art, and sculptural works

There are many organizations that license the use of still images. Many of these organizations are set up online to allow you to search their databases by category or keyword. Some of these agencies specialize in royalty-free pictures and only a charge a fee for stocking and sending the picture. Other organizations license the rights to use some of the more well-known still images. For a list of almost 400 such organizations see <http://www.mindspring.com/~frankn/photo/stock.html>.

[*Return to List*](#)

Motion pictures and other audiovisual works

Any public performance or the display of any part of a motion picture or other audiovisual work must be approved by the copyright owner. Purchasing a copy of a movie does not give the owner of the copy the right to display it publicly. These organizations will help identify who holds the public display rights of movies:

- The [Internet Movie Database](#) has a searchable database of films and television shows which can be useful in determining which organization holds the rights to a particular work.

Licensing Organizations:

- [Motion Picture Licensing Corporation](#)
- [Swank Motion Pictures, Inc.](#)
- [Criterion Pictures USA, Inc.](#)
- [Kino International Corp.](#)
- [Milestone Film & Video](#)

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Software

Permission must be secured to reproduce, distribute, perform, display, or make derivative works of software. Nearly all software publishers may be contacted through their homepage on the internet.

[Links to Software Publishers](#)

Other helpful sites:

- [Licensing Basics from Microsoft](#)
- [Amazon.com's Licensing Center](#)

o This site provides licensing agreements with many of the top software producers.

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Comic/cartoon syndicates

These organizations license the use of cartoons. Some of these organizations license the use of editorials from several famous editorial columnists as well.

- [Cartoonbank.com](#)
- [CartoonStock](#)
- [Creators.com](#)
- [King Features Syndicate](#)
- [Los Angeles Times Syndicate](#)
- [Tribune Media Syndicate \(ComicsPage.com\)](#)
- [UExpress](#)
- [United Media \(comic zone\)](#)
- [Universal Press Syndicate](#)
- [The Washington Post Writers Group](#)

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Religious works

These organizations specialize in Christian works:

- [Christian Copyright Licensing International \(CCLI\)](#)
- [Christian Video Licensing International \(CVLI\)](#)

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Last Updated: February 7, 2006

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Reserving Rights of Use in Works Submitted for Publication: Negotiating Publishing Agreements

A Project of the
IUPUI Copyright Management Center

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Prepared: January 5, 2004

Creators are . . . encouraged to seek from publishers and other persons to whom Creators assign rights in their intellectual property, a non-exclusive, royalty-free license for their own non-commercial research and teaching and, where possible for anyone within the University to use that intellectual property for non-commercial research and teaching.

-Indiana University Intellectual Property Policy

Despite efforts to encourage faculty to retain rights in their own works, creators too often forfeit rights that may be reserved for even the author's own future scholarship and education. Many publishing agreements for journal articles and books are standard forms that ask the creator to transfer the copyright and all rights in the work to the publisher. As a result, even the author is barred from making many uses of his or her own work, including sharing with students and colleagues, without the publisher's permission (unless the use qualifies as a fair use or is otherwise statutorily exempted).

In order to avoid these serious consequences, the creator should negotiate with the publisher for terms that allow the continued academic use of the work by the creator and their home University.

What should a faculty author do? Follow these simple steps to *protect your rights* through better contracts with publishers:

- **Step One: Anticipate your future needs to use the materials.**

- o Most license agreements are standard forms which

predictably grant most, if not all, rights in the work to the publisher. Publishers are unlikely ever to need all the rights they are seeking in these standard agreements. Instructors are encouraged to “carve out” reasonable rights for themselves and their educational institutions.

o At a minimum, professors should attempt to reserve the right to use the work for their classroom, distance teaching, lectures, seminars, other scholarly works, and professional activities. For more ideas, see the model amending language proposed in Step Three.

- Step Two: Understand the terms of the agreement.

o You may not want to wade through the fine print of your contract, but you need to appreciate that your future scholarship may be at stake. Understanding the rights that you, as the creator of the work, may be giving away to another party and may be keeping can prove essential. Authors are encouraged to spend as much time as needed to understand the proposed agreement.

- Step Three: Negotiate!

o Do not be afraid to negotiate. Publishers are interested in your work, otherwise they would not have asked to publish it. As stated before, instructors have found much success reserving reasonable terms of use of the work for themselves through negotiations.

o If the publisher refuses to negotiate, investigate the reason. Perhaps you have asked to reserve the right to do something that legitimately threatens the viability of the publisher’s use of the work. At this point, weigh your options: consider negotiating fewer rights for yourself, consider another publisher, or accept the agreement as it stands—if you must.

o Amendments to the publisher’s agreement may take place in two ways. One way to amend the agreement is to strike through unfavorable language and replace it with, or add, new language directly in the proposed agreement. Perhaps easier is to supplement the agreement with a separate document that includes terms superseding any contradicting terms within the proposed agreement.

o Model language for amending publisher agreements. Addendum A is specific, and individual items may be added or dropped in the negotiations. Addendum B is more general and does not attempt to specify exact activities. Use the version that best meets the needs of your situation.

- Step Four: Execute the agreement.

o Be sure to obtain confirmation that your amendments to the agreement are received and accepted. Many times, publisher agreements are sent to the creator already signed by a representative of the publisher. Changes made to the agreement after it has been signed by the publisher must be approved by the publisher. Otherwise, there is no “meeting of the minds,” and therefore, no valid agreement. Be sure to get approval from the publisher to any such changes in writing.

o Keep a copy for your records. Too often authors need to prove who really holds rights to early publications, but the records have since been lost.

- Step Five: Protect and Use Your Rights!

o If you remain the copyright owner, consider registering your copyright claim. For more information, see www.copyright.gov/register.

o If you hold onto rights to use the work for education and future research, make the most of those rights for your benefit and the benefit of your readers.

Addendum A (Specific Uses):

Addendum to Publishing Agreement

Publisher:

Author:

Work:

This addendum modifies the terms of the publishing agreement referenced above. Notwithstanding any term in that agreement to contrary, the parties hereby agree that the Author shall, without limitation, have the following rights with respect to the Work:

1. To reproduce and distribute the Work in copies in connection with the Author's teaching, conference presentations, and lectures.
2. To make an electronic version of the Work available on a website that the Author may control.
3. To make an electronic version of the Work available on course management systems or electronic reserve systems that have access generally limited to students enrolled in specific courses.
4. To contribute and make available an electronic version of the Work on a digital repository of works created at the Author's home institution, which repository is maintained by said institution.
5. To use all or part of the Work as a contribution to scholarly works used within the Author's home institution.

6. To create and publish revisions or updates of the Work as deemed appropriate by the Author.
7. To make available by any means to any person any updates or corrections with respect to the Work as deemed necessary by the Author.
8. To make derivatives of the Work

Signatures:

Author _____

Publisher's Representative _____

Addendum B (General Rights of Use):

Addendum to Publishing Agreement

Publisher:

Author:

Work:

This addendum modifies the terms of the publishing agreement referenced above. Notwithstanding any term in that agreement to contrary, the parties hereby agree that with respect to the work that:

- The Author shall, without limitation, have the right to use, reproduce, distribute, update, create derivatives, and make copies of the work (electronically or in print) in connection with the Author's teaching, conference presentations, lectures, other scholarly works, and professional activities.
- The Author's home institution shall, without limitation, have the right to use, reproduce, distribute, and make copies of the work (electronically or in print) in connection with teaching, digital repositories, conference presentations, lectures, other scholarly works, and professional activities conducted at the Author's home institution with the Author's written permission.

Signatures:

Author _____

Publisher's Representative _____

[Click here to view the Copyright Management Center's presentation on Negotiating Licensing Agreements](#) (*RealPlayer required*)

[Click here to view the PowerPoint from this presentation](#)

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Schools at IUPUI that have adopted the MOU as of 1/21/04:

- Business, Kelly School of
- Engineering and Technology
- Health and Rehabilitation Sciences
- Labor Studies
- Law, Indiana University—Indianapolis
- Liberal Arts
- Nursing
- Public and Environmental Affairs
- Social Work
- Science

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Checklist for the TEACH Act:

Introduction

Prepared by the
COPYRIGHT MANAGEMENT CENTER

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Revised: February 23, 2005

Background of the Law

Congress enacted the TEACH Act in 2002 to address issues surrounding lawful uses of copyrighted works in distance education. The act is a full revision of Section 110(2) of the U.S. Copyright Act, and it allows educators to use certain copyrighted works in distance education without permission from, or payment of royalties to, the copyright owner. By complying with the law, users can be protected from copyright infringements. The TEACH Act improves upon previous law by allowing uses of an expanded range of works in distance education. In particular, educators may now make performances of nondramatic literary or musical works in full and performances of portions of any other works; educators may also make displays of works in an amount comparable to that which is typically displayed in the course of a live classroom session. The challenge of the TEACH Act is the numerous conditions and requirements for compliance. Educators must satisfy all requirements of the law in order to enjoy its benefits.

Purpose of the Checklist

The primary purpose of this checklist is to help document your compliance with the TEACH Act. The checklist enumerates the law's many requirements and groups them according to the unit within the educational institution that will likely be responsible for each step. We suggest that educators complete and keep a copy of this document in connection with each distance-education course. Maintaining such records may be critical for demonstrating your compliance. This checklist may also be an effective planning or teaching tool, fostering an understanding of the law's detailed requirements.

For More Information

For more information about the TEACH Act and about fair use, permissions, and other copyright issues applicable to distance education, please visit the website of the Copyright Management Center at www.copyright.iupui.edu.

Checklist for Compliance with the TEACH Act

Name: _____ Date: _____ Project: _____

Institution: _____ Prepared by: _____

TEACH Act requirements that will likely fall within the duty of the *Instructor*:

- ☐ 1 The work to be transmitted may be any of the following:
 - ☐ A performance of a non-dramatic literary work; or
 - ☐ A performance of a non-dramatic musical work; or
 - ☐ A performance of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions"; or
 - ☐ A display in an amount comparable to that which is typically displayed in the course of a live classroom session.

- ☐ 2 The work to be transmitted may not be any of the following:
 - ☐ Marketed primarily for performance or display as part of a digitally transmitted mediated instructional activity; or
 - ☐ A textbook, coursepack, or other material in any media which is typically purchased or acquired by students for their independent use and retention.

- ☐ 3 Any permitted performance or display must be both:
 - ☐ Made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities of the educational institution; and
 - ☐ Directly related and of material assistance to the teaching content of the transmission.

- ☐ 4 The institution does not know or have reason to believe that the copy of the work to be transmitted was not lawfully made or acquired.

- ☐ 5 If the work to be used has to be converted from print or another analog version to digital format, then both:
 - ☐ The amount of the work converted is no greater than the amount that can lawfully be used for the course; and
 - ☐ There is no digital version of the work available to the institution or the digital version available to the institution has technological protection that prevents its lawful use for the course.

TEACH ACT requirements that will likely fall within the duty of the Institution:

- ☐ 6 The institution for which the work is transmitted is an accredited nonprofit educational institution.
- ☐ 7 The institution has instituted policies regarding copyright.
- ☐ 8 The institution has provided information materials to faculty, students, and relevant staff members that describe and promote US copyright laws.
- ☐ 9 The institution has provided notice to students that materials used in connection with the course may be subject to copyright protection.
- ☐ 10 The transmission of the content is made solely for students officially enrolled in the course for which the transmission is made.

TEACH Act requirements that will likely fall within the duty of the Information Technology Officials:

- ☐ 11 Technological measures have been taken to reasonably prevent both:
 - ☐ Retention of the work in accessible form by students for longer than the class session; and
 - ☐ Unauthorized further dissemination of the work in accessible form by such recipients to others.
- ☐ 12 The institution has not engaged in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent retention or dissemination of their works.
- ☐ 13 The work is stored on a system or network in a manner that is ordinarily not accessible to anyone other than anticipated recipients.
- ☐ 14 The copy of the work will only be maintained on the system or network in a manner ordinarily accessible for a period that is reasonably necessary to facilitate the transmissions for which it was made.
- ☐ 15 Any copies made for the purpose of transmitting the work are retained and solely used by the institution.

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

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

2a. The prohibition on the use of works that are marketed "primarily for performance or display as part of mediated instructional activities transmitted via digital networks" is clearly intended to protect the market for commercially available educational materials. For example, if specific materials are available through an online database, or marketed in a format that may be delivered for educational purposes through "digital" systems, the TEACH Act generally steers users to those sources, rather than allowing educators to digitize and upload their own copies.

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

2b. One purpose of the law is to prevent an instructor from including, in a digital transmission, copies of materials that are specifically marketed for and meant to be used by students outside of the classroom in the traditional teaching model. For example, the law is attempting to prevent an instructor from scanning and uploading chapters from a textbook in lieu of having the students purchase that material for their own use. The provision is clearly intended to protect the market for materials designed to serve the educational marketplace. Not entirely clear is the treatment of other materials that might ordinarily constitute handouts in class or reserves in the library. However, the general provision allowing displays of materials in a quantity similar to that which would be displayed in the live classroom setting ("mediated instructional activity") would suggest that occasional, brief handouts-perhaps including entire short works-may be permitted in distance education, while reserves and other outside reading may not be proper materials to scan and display under the auspices of the new law.

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

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

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

4. Performances or displays given by means of copies "not lawfully made and acquired" under the U.S. Copyright Act are prohibited if the educational institution "knew or had reason to believe" that they were not lawfully made and acquired.

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

5. The TEACH Act includes a prohibition against the conversion of materials from analog into digital formats, except under the following circumstances: the amount that may be converted is limited to the amount of appropriate works that may be performed or displayed and a digital version of the work is not "available to the institution," or a digital version is available, but it is secured behind technological protection measures that prevent its availability for performing or displaying in the distance-education program. These requirements generally mean that educators must take two steps before digitizing an analog work. First, they need to confirm that the exact material converted to digital format is within the scope of materials and "portion" limitations permitted under the new law. Second, educators need to check for digital versions of the work available from alternative sources and assess the implications of access restrictions, if any.

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

6. The benefits of the TEACH Act apply only to a "government body or an accredited nonprofit educational institution." In the case of post-secondary education, an "accredited" institution is "as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education." Elementary and secondary schools "shall be as recognized by the applicable state certification or licensing procedures." Most familiar educational institutions will meet this requirement, but many private entities-such as for-profit subsidiaries of nonprofit institutions-may not be duly "accredited."

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

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

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

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

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

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

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

10. The law requires that the transmission be “solely for . . . students officially enrolled in the course for which the transmission is made.” Thus, it should not be broadcast for other purposes, such as promoting the college or university, generally edifying the public, or sharing the materials with colleagues at other institutions. Educators might address this requirement through technological restrictions on access.

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

11. While the transmission of distance education content may be conducted by diverse technological means, an institution deploying "digital transmissions" must apply technical measures to prevent "retention of the work in accessible form by recipients of the transmission . . . for longer than the class session." The statute offers no clarification about the meaning of a "class session," but language throughout the statute suggests that any given transmission would require a finite amount of time, and students would be unable to access it after a designated time. Also, in the case of "digital transmissions," the institution must apply "technological measures" to prevent recipients of the content from engaging in "unauthorized further dissemination of the work in accessible form." Both of these restrictions address concerns from copyright owners that students might receive, store, and share the copyrighted content. Both of these provisions of the statute call upon the institution to implement technological controls on methods for delivery, terms of accessibility, and realistic abilities for students to download or share copyrighted content. These provisions specifically demand application of "technological measures" that would restrict uses of the content "in the ordinary course of their operations." In other words, when the restrictive controls are used in an "ordinary" manner, they will safeguard against unauthorized reproduction and dissemination. This language apparently protects the institution, should someone "hack" the controls and circumvent imperfect technology.

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

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

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

13. The transmission of content must be made "solely for . . . students officially enrolled in the course for which the transmission is made." In addition, the law also requires that the transmission be "for" only these specific students. Thus, it should not be broadcast for other purposes, such as promoting the college or university, generally edifying the public, or sharing the materials with colleagues at other institutions. Educators might address this requirement through technological restrictions on access, as mentioned in the following section. The new law also calls upon the institution to limit the transmission to students enrolled in the particular course "to the extent technologically feasible." Therefore, the institution may need to create a system that permits access only by students registered for that specific class. As a practical matter, the statute may lead educational institutions to implement technological access controls that are linked to enrollment records available from the registrar's office.

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

14. The statute explicitly exonerates educational institutions from liability that may result from most "transient or temporary storage of material." On the other hand, the statute does not allow anyone to maintain the copyrighted content "on the system or network" for availability to the students "for a longer period than is reasonably necessary to facilitate the transmissions for which it was made."

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)

15. Congress seems to have envisioned distance education as a process of installments, each requiring a specified time period, and the content may thereafter be placed in storage and outside the reach of students. The institution may, however, retrieve that content for future uses consistent with the new law.

Source: [Crews, Kenneth D. New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act.](#)



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General Permission Letter - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Letterhead or Return address]

[Rights holder name and address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

I am in the process of creating [Describe project]. I would like your permission to include the following material with this [Project]:

[Citation with source information]

The [Project] will be used [Describe how the project and material will be used]. It will be accessible by [Describe users].

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

Permission includes non-exclusive world rights in all languages to use the material and will not limit any future publications-including future editions and revisions-by you or others authorized by you.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

Permission granted for the use of the material as described above:

Agreed to: _____ Name & Title: _____
Company/Affiliation: _____ Date: _____

The Copyright Management Center is not part of University Counsel and is not legal counsel to the university or to any members of the university community. A mission of the CMC is to provide information and education services to help members of the community better address their needs. The information received from the CMC is not legal advice. Individuals and organizations should consult their own attorneys.

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Permission Letter for Photocopying - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Letterhead or Return address]

[Rights holder name and address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

In conjunction with a course I am teaching at [where you work], I would like to photocopy the following material(s) and pass it/them out to the students in my class.

[Citation with source information]

This request is for the [fall, spring, etc.] semester/term, [year], and for the following course:

[Department]

[Course number and title]

[Section number, if applicable]

[Number of students in the class]

Any use in future semesters/terms will be renegotiated. If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

Permission granted for the use of the material as described above:

Agreed to: _____ Name & Title: _____

Company/Affiliation: _____ Date: _____

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Permission Letter for Electronic Reserve - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Letterhead or Return address]

[Rights holder name and address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

In conjunction with a course I am teaching [where you work], I would like to place the following material(s) on the library's electronic reserve system:

[Citation with source information]

This request is for the [fall, spring, etc.] semester/term, [year], and for the following course:

[Department]

[Course number and title]

[Section number, if applicable]

[Number of students in the class]

At the end of the above-mentioned semester/term, the course reserve will be removed from the system and any further use will be renegotiated.

[Description of your electronic course reserve system. Is it password or IP address protected? Can it be accessed on and/or off-campus? Can students download and/or print the reserves?]

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

Permission granted for the use of the material as described above:

Agreed to: _____

Name & Title: _____

Company/Affiliation: _____

Date: _____

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Permission Letter for Website for Teaching - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Rights holder name and address]

[Letterhead or Return address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

In conjunction with a course I am teaching at [where you work], I would like to use the following material on a class web site to supplement my instruction of this class:

[Citation with source information]

This request is for the [fall, spring, etc.] semester/term, [year], and for the following course:

[Department]

[Course number and title]

[Section number, if applicable]

[Number of students in the class]

Any use in future semesters/terms will be renegotiated.

[Description of the web site. Include any special features such as passwords and who hosts the web site. Include the format, such as sound or movie files. (*.WAVs, *.PDFs, RealAudio, *.AVIs, etc.)]

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

Permission granted for the use of the material as described above:

Agreed to: _____ Name & Title: _____
Company/Affiliation: _____ Date: _____

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Permission Letter for Listserv for Teaching - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Letterhead or Return address]

[Rights holder name and address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

In conjunction with a course I am teaching at [where you work], I would like to post the following material to a class electronic mailing list (LISTSERV) to supplement my instruction of this class:

[Citation with source information]

This request is for the [fall, spring, etc.,] semester/term, [year], and for the following course:

[Department]

[Course number and title]

[Section number, if applicable]

[Number of students in the class]

Any use in future semesters/terms will be renegotiated.

[Description of the electronic mailing list. Include any special features such as moderation, passwords, who hosts the mailing list and if archives are kept. Include the format, such as sound or movie files. (*.WAVs, *.PDFs, RealAudio, *.AVIs, etc.)]

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

Permission granted for the use of the material as described above:

Agreed to: _____ Name & Title: _____
Company/Affiliation: _____ Date: _____

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Permission Letter for IUPUI Online - Model

[Date]

[Letterhead or Return Address]

[Rights holder Name and Address]

Dear _____:

The Office of Professional Development at Indiana University Purdue University at Indianapolis (IUPUI) and faculty member _____, professor _____, would like to use the following material on a class web site to supplement my instruction of this class:

[Citation with source information]

This request is for the following course:

[Course Name]

This is an online course that can only be accessed only by IUPUI students enrolled in the class. All students will be required to purchase your textbook. We would like to post selected materials from the [source] onto the password-protected server available only to the students that have enrolled in the class and have purchased the textbook. Each use of such work will be properly cited to its source.

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

While the use of the material described above may be a fair use, we would greatly appreciate your consent to our request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Your typed name]

Permission granted for the use of the material as described above:

Agreed to: _____

Name & Title: _____

Company/Affiliation: _____

Date: _____

Page Last Updated: August 15, 2003

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Permission Letter for Audiovisual Uses in Distance Education - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Letterhead or Return address]

[Rights holder name and address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

In conjunction with a distance education course I am teaching at [where you work], I would like to use the following material on a class web site to supplement my instruction of this class:

[Citation with source information]

This request is for the [fall, spring, etc.] semester/term, [year], and for the following course:

[Department]

[Course number and title]

[Section number, if applicable]

[Number of students in the class]

Any use in future semesters/terms will be renegotiated.

[Description of the web site. Include any special features such as passwords and who hosts the web site. Include the format, such as sound or movie files. (*.WAVs, *.PDFs, RealAudio, *.AVIs, etc.)]

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

Permission granted for the use of the material as described above:

Agreed to: _____

Name & Title: _____

Company/Affiliation: _____

Date: _____

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Permission Letter for Website in Distance Education - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Letterhead or Return address]

[Rights holder name and address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

In conjunction with a distance education course I am teaching at [where you work], I would like to use the following material on a class web site to supplement my instruction of this class:

[Citation with source information]

This request is for the [fall, spring, etc.] semester/term, [year], and for the following course:

[Department]

[Course number and title]

[Section number, if applicable]

[Number of students in the class]

Any use in future semesters/terms will be renegotiated.

[Description of the web site. Include any special features such as passwords and who hosts the web site. Include the format, such as sound or movie files. (*.WAVs, *.PDFs, RealAudio, *.AVIs, etc.)]

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

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Permission Letter for Listserv in Distance Education - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Letterhead or Return address]

[Rights holder name and address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

In conjunction with a distance education course I am teaching at [where you work], I would like to post the following material to a class electronic mailing list (LISTSERV) to supplement my instruction of this class:

[Citation with source information]

This request is for the [fall, spring, etc.,] semester/term, [year], and for the following course:

[Department]

[Course number and title]

[Section number, if applicable]

[Number of students in the class]

Any use in future semesters/terms will be renegotiated.

[Description of the electronic mailing list. Include any special features such as moderation, passwords, who hosts the mailing list and if archives are kept. Include the format, such as sound or movie files. (*.WAVs, *.PDFs, RealAudio, *.AVIs, etc.)]

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

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Permission Letter for Research Copies - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Letterhead or Return address]

[Rights holder name and address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

I am currently an employee of [Place of employment] and I am conducting research on [General nature of your research]. I would like your permission to photocopy the following material in order to distribute this information to my colleagues:

[Citation with source information]

These photocopies will be used in the following manner:

[Include the number of copies to be made. Discuss the nature of the audience to which you are distributing the copies. Are they only people within your research "group" or are there other people who will be receiving this information? Are all the recipients employees of YOUR employer?]

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

Permission granted for the use of the material as described above:

Agreed to: _____ Name & Title: _____
Company/Affiliation: _____ Date: _____

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Permission Letter for Planned Publication - Model

The following letter is a model, not a form letter. You must carefully examine your specific needs and modify the letter accordingly. It is also important to document your steps in the permission process. Keep good files!

[Date]

[Letterhead or Return address]

[Rights holder name and address]

Dear [Sir or Madam] [Permissions Editor] [Personal name, if known]:

I am currently putting together a manuscript for publication. I would like your permission to include the following material with this publication:

[Citation with source information]

This excerpt will be used in the following manner:

[Tell how it will be used/presented—such as tables, illustrations, photos, including your captions, etc. Also include why you are using this excerpt—what point(s) are you trying to make by using it?]

[It may be necessary to include another paragraph if your publication will also be electronically published—as is the case with many academic journals which publish online versions of their issues, either free to the public or password protected for use only by subscribers.]

The publication information is as follows:

[Title of publication]

[Document type-article, book, pamphlet, etc.]

[Publisher]

[Number of documents to be published in first printing]

[Intended audience]

Permission includes non-exclusive world rights in all languages to use the material and will not limit any future publications—including future editions and revisions—by you or others authorized by you.

If you do not control the copyright on all of the above mentioned material, I would appreciate any contact information you can give me regarding the proper rights holder(s), including current address(es). Otherwise, your permission confirms that you hold the right to grant the permission requested here.

I would greatly appreciate your consent to my request. If you require any additional information, please do not hesitate to contact me. I can be reached at:

[Your contact information]

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the release form below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

[Signature]

[Typed name]

Permission granted for the use of the material as described above:

Agreed to: _____ Name & Title: _____
Company/Affiliation: _____ Date: _____

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Ms. Bonnie Dunn
CSU Chancellor's Office
P.O. Box 3842, Seal Beach, CA 90740-7842
E-mail: bonnie@calstate.edu

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- *The Academic Library in the Information Age: Changing Roles*
- *Fair Use of Copyrighted Works: A Crucial Element in Educating America*
- *Information Resources and Library Services for Distance Learners: A Framework for Quality*
- *Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning*

The Intellectual Property Guidelines and Fair-Use Principles contained in this pamphlet have been endorsed by:

California State University

- Commission on Learning Resources and Instructional Technology
- Council of Library Directors
- Statewide Academic Senate Technology Task Force
- Information Resources Management Council
- Vice-Presidents for Academic Affairs

State University of New York

- Council on Educational Technology
- Council of Library Directors
- Council of Chief Academic Officers, Executive Committee

City University of New York

- Council of Chief Librarians
- Council of Educational Communications and Technology (CECT)
- The Academic Council of the City University of New York

The Intellectual Property Guidelines and Fair-Use Principles have been received by:

California Faculty Association (NEA, AAUP, SEIU, AFL/CIO)

The overall effort, of which this pamphlet is a part, is being advanced by:

C.E.T.U.S.

(Consortium for Educational
Technology for University Systems)

which is comprised of:

California State University
State University of New York
City University of New York

Introduction

The Chief Executives of the California State University (CSU), the State University of New York (SUNY), and the City University of New York (CUNY) have identified copyright and intellectual property as central issues which will increasingly affect the future of American public higher education. Further, they have agreed to work together on these important educational issues in an effort to assist higher education across the nation. This pamphlet summarizes the initial results of the CSU-SUNY-CUNY Work Group on Ownership, Legal Rights of Use and Fair Use.

Three-Fold Purpose

This pamphlet addresses three important points. First, higher education will benefit by the formation of a national alliance focused on fair use. Second, the effectiveness of higher education requires a thorough understanding of the fair-use doctrine. Finally, faculty, in particular, necessarily apply the fair-use doctrine as they perform their work.

Call to Action

The CSU-SUNY-CUNY systems of higher education actively seek alliances with other colleges, universities, professional associations, government agencies, and private companies engaged in advancing the educational opportunity to further an understanding of intellectual property rights and the critical role of fair use in teaching, learning, and scholarship. Primarily, we must uphold the principles of fair use for the long-term vitality of our nation.

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SECTION I

The Imperative for University Action on Copyright

A series of court rulings have eroded the application of fair use to such common pursuits as photocopying for research, teaching, learning, scholarship, and even quoting from historical manuscripts.

Copyright is at a critical juncture, and universities have an extraordinary opportunity to influence the development of the law and related practices as they affect higher education. If universities fail to provide initiative on copyright issues, other parties will exert their influence to shape the law for purposes which do not necessarily advance teaching, learning, and scholarship.

The latest developments in copyright law are a direct response to changing educational needs and innovative technologies. New technology allows digital conversion of images and text, creation of multimedia composite works, transmission of data to remote locations, and teaching students far beyond the campus bounds. These activities are often central to innovative and effective scholarship; they also are imperative to the exchange of ideas and to the success of America's commitment to mass higher education in a democratic society.

Several recent events dramatize the fluid state of copyright law, the opportunity for change, and the fragility of the university's interest in safeguarding fair use for the innovative deployment of essential information resources.

Erosion of Fair Use

A series of court rulings threatens the application of fair use to such common pursuits as photocopying for research, teaching, learning, scholarship, and even quoting from historical manuscripts. The reasoning in these cases will no doubt extend to newer technologies. More materials are farther from the reach of faculty, librarians, and students, and the availability of those materials for study increasingly will be subject to payment of a license fee.

Universities

must support

legislation which

helps meet the

needs of education

for the fair use of

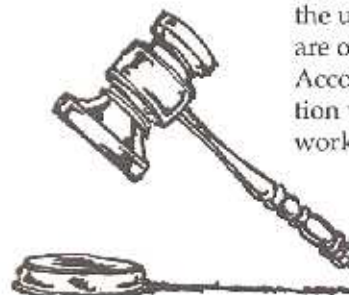
copyrighted works.

The NII Task Force

The federal government has established the National Information Infrastructure (NII) Task Force, which has examined the application of copyright law to digital storage and communication of information resources. The Task Force issued a report in September 1995 which includes proposals for revision of the Copyright Act as applied to the "information superhighway." On the whole, those proposals would likely strengthen the rights of copyright owners without commensurate allowance of fair use.

Copyright Revision Bills

Other interest groups are expected to submit independent proposals for copyright revision. When these proposals do not further the university's academic mission, universities are obliged to actively oppose such bills. Accordingly, universities must support legislation which promotes the fair use of copyrighted works.



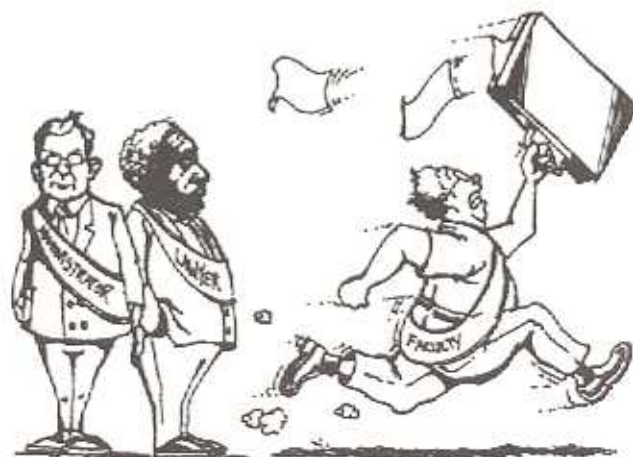
*Universities must
be prepared to
negotiate license
and contract
terms which
are in the best
interests of
the educational
process.*

License Agreements

Based on recent court rulings and on the common means for marketing electronic information resources, universities will acquire an increasing amount of material pursuant to license agreements. Our successful use of these new resources will depend on a thorough grasp of the law as well as the ability to negotiate fair contracts. Universities must be prepared to negotiate license and contract terms which are in the best interests of the educational process.

Redefining Ownership

Universities today face the need to redefine the ownership of copyrighted works created by faculty and staff. Too often, this issue can become mired in conflict and rooted in simplistic all-or-nothing proposals. By refocusing this pattern of debate and by bringing a fresh perspective to these issues, universities have the opportunity to creatively address ownership. Creative approaches are more likely to serve the interests of all the parties who are associated with the educational process.



SECTION 2

University Guidelines for Intellectual Property

The management and administration of matters related to university contracts, policies, and guidelines which bear on the creation, ownership, storage, and use of intellectual properties should:

- Foster the creation of the best possible quality new intellectual properties so as to further the academic mission of higher education.
- Foster the dissemination of new knowledge and the maintenance of high academic standards.
- Provide incentive for university faculty, staff, and students to fully participate in the use and creation of intellectual properties.
- Recognize that newly created intellectual properties in a university setting come in a wide variety of old and new types and arise in a wide variety of specific contexts. Nonetheless, strong mutual interests are shared among the university, the faculty, the staff, and the students in the appropriate allocation of the ownership rights associated with such intellectual properties.
- Support the concept that the ownership of intellectual property rights is not necessarily an "all-or-nothing" proposition. Rather, the set of rights that belongs to the owners of intellectual properties may be allocated so as to optimally support the mutual interests of the university, faculty, staff, and students.

- Foster within the university community the continued collective and individual ability to access, acquire, and store information and works, to help scholars and students in the proper use and citation of the works of others, and to maintain coordination and contact with the world of publishers and other information providers.
- Appropriately adapt university contracts, policies, and guidelines so as to address the challenges and opportunities presented as technologies and cultures continue to evolve and affect the practices of higher education.



WE CAN PULL TOGETHER!

SECTION 3

Fair Use and the Pursuit of Higher Education: A Statement of Principle

The Need to Address Fair Use

It is urgent, timely, and in the best interests of higher education that our universities raise a coordinated voice to address the topic that is known as the "fair use" of copyrighted works. The fair-use doctrine is under debate now in several different forums – locally, nationally, and internationally. The debate involves both public and proprietary interests. It arises because of the changing dynamic between the broad sweep of "intellectual properties" and the deployment of powerful and rapidly evolving communications techniques and infrastructures. These developments already have demonstrated their significant consequences for higher education and will have more pervasive effects in the future. Thus, we advance this statement of educational principle.

*The law offers
virtually no
details for
determining
which activities
may be safely
allowed.*

The Legal Framework of Fair Use

Fair use today is embodied in Section 107 of the U.S. Copyright Act and it exempts limited uses of materials from infringement liabilities. As detailed in Section 4 of this pamphlet, the full text of the fair-use statute makes clear that the right of fair use is specifically applicable to teaching, research, and scholarship, and that its scope depends on the four statutory factors. These four factors are open to diverse interpretations; the law offers virtually no details for determining which activities may be safely allowed.



The mission of higher education is realized through the use of various information formats, learning environments, and modes of delivery without unreasonable copyright restrictions.

The Statement of Principle

The law's flexibility is an opportunity and a challenge. It is an opportunity to expand and apply the fair-use doctrine to diverse and changing requirements in an effort to be fair to all parties. It is also a challenge to apply fair use amidst relative uncertainty, and new interpretations often do not favor educational needs. The four principles stated below serve to focus attention on these needs.

Higher education's legitimate right to use copyrighted works must be protected.

The fundamental mission of higher education is to advance and disseminate knowledge. This mission is realized through the use of various information formats, learning environments, and modes of delivery without unreasonable copyright restrictions. The goals and objectives that we set in order to accomplish our mission require the ability to explore, analyze, and exchange information. The effectiveness of our work depends on our right to make creative and balanced fair use of copyrighted works.

To succeed, all members of the college and university community must have reliable access to a wide variety of materials for teaching, learning, scholarship, and personal study. The materials also need to be stored and retrieved across the full range of the ever-richer diversity of useful electronic and traditional formats.

Fair use in the electronic era must allow those processes when and where they are needed, without burden of myriad negotiated transactions, and consistent with the constitutional objective that copyright "promote the progress of science."

Fair use allows all members of the university community to build new works upon the old.



Freedom of access to information, regardless of its format, is essential for the creative and learning processes.

Higher education must make use of the full range of means for accessing and utilizing various works which are protected by copyright law in both electronic environments and in traditional environments. Fair use is a historically important doctrine which is essential to fulfilling our higher education objectives. Fair use allows the academy to respond to the dynamic nature of the educational process and to the evolving formats of information resources. Fair use allows an otherwise rigid copyright system to respond to the fluctuating volume of available information and to the changing demands for its use. Fair use allows all members of the university community to sample the broadest possible range of ideas, to build new works upon the old, and to facilitate equal access to copyrighted works within the reasonable limits of the law.

Higher education's right of fair use in the electronic era must continue unencumbered by terms of licenses or transaction fees.

Fair use is the crucial legal provision that allows our educational system to be assured of enriching the student experience and of realizing its research objectives with the widest array of knowledge and insights. It provides the necessary educational opportunity that enables our institutions of higher education to prepare students for success in the world economy.

*Higher education
must support
an expansive and
flexible view of
fair use.*

Colleges and universities have supported, and will continue to support, the economic and creative incentives of copyright owners. But higher education also must support an expansive and flexible view of fair use in order to assure the fullest possible sharing of knowledge and to meet the unpredictable demands of teaching, learning, and scholarship, regardless of information format, learning environment, or mode of delivery.

Higher education has an obligation to educate its constituencies about intellectual properties and about the lawful uses of copyrighted material.

The remainder of this pamphlet is presented as a first step in the discharge of this educational obligation among the constituencies of higher education. In this regard, it is important for higher education to take the initiative in an effort to achieve the appropriate balance in matters related to the evolving interpretation of the fair-use doctrine.



SECTION 4

Fair Use: Overview and Meaning for Higher Education

Copyright law begins with the premise that the copyright owner has exclusive rights to many uses of a protected work, notably rights to reproduce, distribute, make derivative works, and publicly display or perform the work. But the Copyright Act also sets forth several important exceptions to those rights. Key statutes make specific allowance for concerns such as distance learning, backup copies of software, and some reproductions made by libraries. The best known and most important exception to owners' rights is fair use.

*The best
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most important
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owners' rights
is fair use.*

The Fair-Use Statute

The following is the full text of the fair-use statute from the U.S. Copyright Act.

Section 107 of the Copyright Act of 1976. 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 in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.



THE FOUR FACTORS:

Purpose

Nature

Amount

Effect

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.

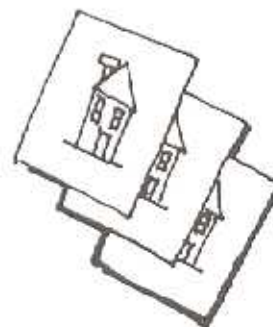
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
(Emphasis added)

The Meaning of the Four Factors

While fair use is intended to apply to teaching, research, and other such activities, a crucial point is that an educational purpose alone does not make a use fair. The purpose of the use is, in fact, only one of four factors that users must analyze in order to conclude whether or not an activity is lawful.

Moreover, each of the factors is subject to interpretation as courts struggle to make sense of the law. Some interpretations, and their subsequent reconstruction by policy-makers and interest groups, have been especially problematic. For example, some copyright analysts have concluded that if a work being used is a commercial product, the "nature" factor weighs against fair use. By that measure, no clip from a feature film or copy from a trade book could survive that fair-use factor. Simi-

**Fair use requires
evaluation of all
four factors in light
of the specific facts
before reaching
a conclusion.**



larly, some commentators argue that if a license for the intended use is available from the copyright owner, the action will directly conflict with the market for licensing the original. Thus, the availability of a license will itself tip the "effect" factor against fair use. Neither of these simplistic constructions of fair use is a valid generalization, yet they are rooted in some truths under limited circumstances. Only one conclusion about the four factors is reliable: each situation must be evaluated in light of the specific facts presented.

The following are brief explanations of the four factors from the fair-use statute. All four factors which affect fair use must be taken into account before reaching a conclusion.

Purpose

Congress favored nonprofit educational uses over commercial uses. Copies used in education, but made or sold at monetary profit, may not be favored. Courts also favor uses that are "transformative," or that are not mere reproductions. Fair use is more likely when the copyrighted work is "transformed" into something new or of new utility, such as quotations incorporated into a paper, and perhaps pieces of a work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original. For teaching purposes, however, multiple copies of some works are specifically allowed, even if not "transformative." The Supreme Court underscored that conclusion by focusing on these key words in the statute: "including multiple copies for classroom use."

*No exact
measures of
allowable
quantity exist
in the law.*



Nature

This factor examines characteristics of the work being used. It does not refer to attributes of the work that one creates by exercising fair use. Many characteristics of a work can affect the application of fair use. For example, several recent court decisions have concluded that the unpublished "nature" of historical correspondence can weigh against fair use. The courts reasoned that copyright owners should have the right to determine the circumstances of "first publication." The authorities are split, however, on whether a published work that is currently out of print should receive special treatment. Courts more readily favor the fair use of nonfiction rather than fiction. Commercial audiovisual works generally receive less fair use than do printed works. A consumable workbook will most certainly be subject to less fair use than a printed social science text.

Amount

Amount is both quantitatively and qualitatively measured. No exact measures of allowable quantity exist in the law. Quantity must be evaluated relative to the length of the entire original and the amount needed to serve a proper objective. One court has ruled that a journal article alone is an entire work; any copying of an entire work usually weighs heavily against fair use. Pictures generate serious controversies, because a user nearly always wants the full image or the full "amount." Motion pictures are also problematic because even short clips may borrow the most extraordinary or creative elements. One may also reproduce only a small portion of any work but still take "the heart of the work." The "substantiality" concept is a qualitative measure that may weigh against fair use.

*Visual materials
generate serious
controversies.*



*Fair use is,
purposely, a
flexible doctrine.*

Effect

Effect on the market is perhaps even more complicated than the other three factors. Some courts have called it the most important factor, although such rhetoric is often difficult to validate. This factor fundamentally means that if you make a use for which a purchase of an original theoretically should have occurred—regardless of your personal willingness or ability to pay for such purchase—then this factor may weigh against fair use. "Effect" is closely linked to "purpose." If your purpose is research or scholarship, market effect may be difficult to prove. If your purpose is commercial, then effect is presumed. Occasional quotations or photocopies may have no adverse market effects, but reproductions of software and videotapes can make direct inroads on the potential markets for those works.

Weighing and Balancing the Factors

A central tenet of this analysis is that fair use is a flexible doctrine that Congress wanted us to test and adapt for changing needs and circumstances. The law provides no clear and direct answers about the scope of fair use and its meaning in specific situations. Instead, we are compelled to return to the four factors and reach creative and responsible conclusions about the lawfulness of our activities. People will always differ widely on the applicability of fair use, but any reliable evaluation of fair use must depend upon a reasoned analysis of the four factors of fair use. The four factors also need not lean in one direction. If most factors lean in favor of fair use, the activity is allowed; if most lean in the opposite direction, the action will not fit the fair-use exception and may require permission from the copyright owner.

Examples of Fair-Use Cases

While courts have ruled on many fair-use cases, few are directly related to higher education. Nevertheless, many cases do offer valuable guidance for the meaning of fair use at colleges and universities. Here is a sample of such cases, with an indication of how courts apply the four factors of fair use.

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

Kinko's was held to be infringing copyrights when it photocopied book chapters for sale to students as "coursepacks" for their university classes.

Purpose: When conducted by Kinko's, the copying was for commercial purposes and not for educational purposes.

Nature: Most of the works were factual – history, sociology, and other fields of study – a factor which weighed in favor of fair use.

Amount: The court analyzed the percentage of each work, finding that five to 25 percent of the original full book was excessive.

Effect: The court found a direct effect on the market for the books because the coursepacks directly competed with the potential sales of the original books as assigned reading for the students.

Three of the four factors leaned against fair use. The court specifically refused to rule that all coursepacks are infringements, requiring instead that each item in the "anthology" be individually subject to fair-use scrutiny.

Use of factual
works weighed
in favor of
fair use.

Fair use became
the only effective
means to build
on the scholarly
works of others.

Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986), cert. denied, 481 U.S. 1059 (1987)

In 1973, the plaintiff wrote a book based on interviews with women about their own pregnancies and abortions. The defendant wrote his own book on the same subject and sought permission to use lengthy excerpts from the plaintiff's work. The plaintiff refused permission, and the defendant proceeded to publish his work with the unpermitted excerpts.

Purpose: Although defendant's book was published by a commercial press with the possibility of monetary success, the main purpose of the book was to educate the public about abortion and about the author's views.

Nature: The interviews were largely factual.

Amount: Quoting 4.3 percent of the plaintiff's work was not excessive, and the verbatim passages were not necessarily central to the plaintiff's market.

Effect: The court noted that the plaintiff's work was out of print and not likely to appeal to the same readers. This case affirms that quotations in a subsequent work are permissible, sometimes even when they are lengthy. Implicit throughout the case is the fact that the plaintiff was unwilling to allow limited quotations in a book that argued an opposing view of abortion; thus, fair use became the only effective means for the second author to meaningfully build on the scholarly works of others.

The films were commercial products intended for sale to educational institutions.

Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982)

For-profit producers of educational motion pictures and videos sued a consortium of public school districts, which was systematically recording programs as they were broadcast on public television stations and providing copies of the recordings to member schools.

Purpose: The court was largely sympathetic with the educational purpose.

Nature: Although the films had educational content, they were commercial products intended for sale to educational institutions.

Amount: The defendant was copying the entire work and retaining copies for as long as 10 years.

Effect: The copying directly competed with the plaintiff's market for selling or licensing copies to schools. The court had little trouble concluding that the activities were not fair use.

American Geophysical Union v. Texaco Inc., 37 F.2d 881 (2d Cir. 1994), modified, 60 F.3d 913 (1995)

The court ruled that photocopying of individual journal articles by a Texaco scientist for his own research needs was not fair use. The court amended its opinion to limit the ruling to "systematic" copying that may advance the profit goals of the larger organization.

Purpose: While research is generally a favored purpose, the ultimate purpose was to strengthen Texaco's corporate profits. Moreover, exact photocopies are not "transformative"; they do not build on the existing work in a productive manner.

The copying was found to directly undercut the ability to pursue the market for licensing.

Nature: The articles were factual, which weighs in favor of fair use.

Amount: An article is an independent work, so copying the article is copying the entire copyrighted work.

Effect: The court found no evidence that Texaco reasonably would have purchased more subscriptions to the relevant journals, but the court did conclude that unpermitted photocopying directly competes with the ability of publishers to collect license fees. According to the court, the Copyright Clearance Center (CCC) provides a practical method for paying fees and securing permissions, so the copying directly undercuts the ability to pursue the market for licensing through the CCC.

Despite an impassioned dissent from one judge who argued for the realistic needs of researchers, the court found three of the four factors weighing against fair use in the corporate context.



SECTION 5

Illustrative Scenarios

Faculty will
have to consider
and balance the
four factors in
situations such
as these.

A REVIEW:

Purpose
Nature
Amount
Effect

Faculty increasingly find themselves in situations which may involve the legitimate fair use of copyrighted works. The examples below were selected from current practices in higher education and, depending on the facts, may or may not pass scrutiny under the fair-use test.

The future undoubtedly will expand on the need for appropriate fair use as a part of education. Faculty will have to consider and balance the four factors in situations such as the ones that follow.

Fair use is a flexible concept intended to be used. In any situation, the careful evaluation of the four factors will tell you whether your use is "fair" or whether you ought to seek permission from the copyright owner (see pages 28 – 31).

The following scenarios are intended to emphasize the growing range and escalating complexity of copyright and fair-use issues on campuses. Many readers may hope that these scenarios will give them "the clear answer to the fair-use dilemma." However, such readers will experience some inevitable degree of frustration: rarely does the law provide a clear answer that fits all cases. A fresh balancing of the four factors of fair use is the most reliable and defensible decision-making method (see also page 32).

Electronic Reserves



A professor has been told by students that it is difficult to obtain reserve materials because of the large number of students enrolled. As an alternative, he scans several journal articles onto the campus network and instructs the students on how to access them so that they may complete the class assignments.

ANALYSIS: Access restrictions can have the greatest influence on tipping the factors in favor of fair use. A problem with making text available on any network is that it can be accessible by readers far beyond the intended audience of students registered in the class. Thus, restrictions on access through passwords or other systems can enable the professor to argue that the purpose is solely to benefit the students and not to provide access for others.

Access restrictions
can have the
greatest influence
on tipping the
factors in favor
of fair use.

Restrictions can also limit the potential adverse effect on the market for the original. By limiting the range of users who may find the document, the professor can minimize or eliminate any possibility that someone will retrieve the work from the network instead of purchasing a copy. Some critics of electronic reserves have argued that the educational purpose and the minimal market effects cannot be controlled because the electronic medium allows users to print, download, and transmit copies at little cost or effort and thereby undermine the restricted access.

The professor also must watch closely the nature of the material posted on reserves and the amount of material from the original source put on reserves.

Multimedia Production/Faculty

A professor teaches a course in which she occasionally uses a piece of music, shows a picture, or plays a piece of videotape. She has lawfully obtained all of these materials and clearly may use them in face-to-face teaching under the Copyright Act. But the professor would like to reproduce these short items onto one compact disk in order to prevent their loss or deterioration, keep them organized, and show them in the class by using a single piece of equipment.



ANALYSIS: Guidelines for such uses are currently the subject of negotiations among diverse interest groups under sponsorship of the Consortium of College and University Media Centers. In general, those guidelines would allow the creation of such a multimedia work in the name of fair use and allow its retention and use in the classroom for up to two years without permission.

Some materials
may be of a factual
or scholarly nature
and thus more
amenable to
fair use.

One of the complex fair-use issues for multimedia production has been an understanding of its potential effect on the market for the originals. Even brief excerpts, reproduced into digital format, are sometimes said to directly undermine the ability of the creator or publisher to market or license such excerpts. Thus, making the copies would directly erode that potential market.

Also problematic is the "nature" of the different works. Some materials may be of a factual or scholarly nature and thus more amenable to fair use. Other materials used in multimedia are often professional photography, music, or motion pictures which may have a significant public market.

Multimedia Production/Student

Students in the Twentieth Century U.S. History course are asked to create an "electronic term paper" using lawfully acquired resources from the institution's library and media center. While doing research, he finds a book with just the information he needs and photocopies the bibliography and several pages of images and text. He takes the photocopies to the student computer lab and scans the material into his electronic term paper.

ANALYSIS: Multimedia production in the hands of students solely for an individual term project will more easily pass fair-use scrutiny. If the use is limited to the one-time project, the student can easily argue that the purpose is solely educational. Short clips of non-fiction works may also receive favorable treatment under the "nature" and "amount" factors.

Moreover, because the work is for one-time use only, and not for further reproduction, broadcast, or other dissemination, the copyright owners of the materials are not likely to find a market for licensing under these circumstances. Thus, the isolated individual uses may have no significant adverse effect on the market.

Because the work
is for one-time use
only, and not for
further reproduc-
tion, broadcast, or
other dissemination,
the copyright
owners of the
materials are not
likely to find
a market for
licensing.



Downloading or Printing a Document From the Internet

A professor is conducting research by finding materials on the Internet and locates a report that is directly relevant to his current study. The document was made available on the Internet with the copyright owner's permission, and the professor had lawful access to it. For research purposes only, the professor wants to download a copy of the document to a computer disk or print a copy on the attached printer.

ANALYSIS: The Internet provides access to a wealth of original material and, although it is freely and easily accessible, we must assume that original materials on the Internet are protected by copyright until we learn explicitly that the copyright owner has dedicated the materials to the public domain, or the copyrights have expired. Therefore, the fair-use limits for materials found on the Internet are essentially the same as the fair use of materials

The fair-use limits for materials found on the Internet are essentially the same as the fair use of materials disseminated by any other means.



Single copies of short items for a person's own study may fall within fair use.



Fair use seldom allows the reproduction of an entire copyrighted work.

disseminated by any other means.

Single copies of short items for a person's own study may fall within fair use. If a work is freely available on the Internet, making a copy will have little or no effect on its market simply because no commercial market for the work has been established or claimed. Nevertheless, some publishers have argued that the potential market for charging Internet users for each copy means that any copying hinders the market. In the meantime, copying of works that are freely accessible to the public for personal uses only will likely satisfy the "purpose" and the "effect" factors of fair use.

As with photocopying, one might reasonably conclude that the "nature" factor would favor uses of non-fiction rather than fiction, and that the "amount" factor might reasonably favor copying excerpts of longer works or copying short essays or articles rather than copying an entire book or other longer piece.

Developing a Slide Collection

A professor photographs and makes slides of a number of reproductions of artworks in a book on Italian painting and sculpture. She plans to show the slides to the students enrolled in her course.

ANALYSIS: This scenario is much more problematic than it appears. The purpose may be clearly educational, but when a professor copies a photograph, he or she is reproducing the entire work of the copyright owner. Fair use seldom allows the reproduction of an entire copyrighted work. Further, art is highly creative, so under the "nature" factor a court may not conclude that it is the type of work meant to be reproduced to serve the purposes of fair use.

When a professor
copies a photo-
graph, he or she is
reproducing the
entire work of the
copyright owner.

Further complicating the scenario is the contention that a photograph of a work of art actually embodies two copyrights: the first is the copyright to the original art; and the second is the copyright to the photograph of the work of art. By that standard, even if the original painting is now in the public domain, the photograph of it may still be under copyright protection.

A textbook with multiple art images is likely based on the work of many different photographers. Perhaps the most feasible method for arguing that the "amount" and "effect" factors may weigh in favor of fair use is by reproducing only a small number of images from any one textbook. Adverse effect on the market may also be minimized if the publisher does not sell either select slides or a set of slides from the textbook.

Adapting Materials for Students With Disabilities

Some of these
adapted materials
might be electroni-
cally delivered to
disabled students
in their homes.

A university serves many students with various disabilities. Certain works need to be adapted to serve their needs, perhaps by creating large print copies of some materials or by creating a closed-captioned version of a commercial educational videotape. The copyright owners have not authorized anyone to make such versions available for purchase. In addition, some of these adapted materials might be electronically delivered to disabled students in their homes.

The students
generally will need
the entire work, so
the "amount" factor
will often weigh
against fair use.

ANALYSIS: Adapting materials for students with disabilities raises several problems under traditional fair-use analysis. First, the students generally need the entire work, so the "amount" factor will often weigh against fair use. Students also need a wide range of materials, often including works of fiction and feature release motion pictures.

In some such instances, the "nature" of the material can weigh against fair use. Although the copyright owner may not currently market a version of the work adapted for students with disabilities, the owner may nevertheless argue that making and providing any copy under any circumstances will deprive the owner of a potential sale and create an adverse effect on the market. The making of a single copy for one-time use may have at best a limited effect on the market, but anytime such a work is disseminated in copies or otherwise distributed or broadcast to the students, the effects on the market will be compounded.

Fair-use law may ultimately protect the adaptation of short works or excerpts from longer works as may be needed to serve the requirements of specific students enrolled in specific courses. Fair use is less likely to encompass the adaptation of a full textbook or full motion picture for long-term retention in anticipation of unspecified needs.



SECTION 6

Obtaining Permissions

*Each of us
will encounter
situations where
we need to obtain
permission from
the copyright
owner.*

The complexities of fair use require that each member of the university community learn to apply the four factors and make a sound judgment about the permissibility of quoting, photocopying, downloading, and making other uses of protected works. Invariably, however, each of us will encounter situations where we need to obtain permission from the copyright owner. Common examples where permission is ordinarily required include photocopying an entire article or entire book chapter into a course reader that students will purchase, or mounting substantial text or graphic work onto a publicly accessible World Wide Web page.

When permission is necessary, you must contact the copyright owner or the owner's authorized agent. Often the copyright owner will be named in the formal copyright notice accompanying the original work. Such notices are no longer required to obtain copyright protection, so many works often lack the notice or include the name of someone who is not the actual or current copyright owner. Nevertheless, you should logically begin your search for the copyright owner by directly contacting the author or publisher. Reference librarians can be extremely helpful for finding names and addresses. You will also find that the quest for the copyright owner can be simplified by using your telephone to call the parties and to ask direct questions about ownership and rights of use.

*The Copyright
Clearance Center
can often simplify
the process of
obtaining
permission.*

The Copyright Clearance Center (CCC) can also simplify the process by acting as the agent on behalf of thousands of publishers and authors to grant permission. You can learn more about the CCC by reviewing the World Wide Web home page at the following address:
<http://www.copyright.com>

Please keep in mind that copyright owners have wide discretion when responding to your request for permission. Your permission may be granted or it may be denied. It may be granted, but only on condition of paying a fee. The fee may be modest or it may be exorbitant. Copyright owners also have no obligation to respond at all. For most common uses of materials for educational and research purposes, you will often find that copyright owners will be cooperative and will understand your needs.

The following is a sample letter, with instructions, that you may adapt when requesting permission. Please remember that a telephone call before sending the letter can give you the exact name and address of the person to contact and might even give you an immediate answer to your request. Oral permission granted over the telephone is legally valid, but good practice requires that you document the permission with a letter that the grantor will sign and return to you.



Sample Permission Letter

[letterhead stationery or return address]

[Date]

[Name & address of addressee]

Dear _____:

[If you called first, begin your letter: This letter will confirm our recent telephone conversation.] I am [describe your position] at _____ University. I would like your permission to [explain your intended use in detail, e.g., reprint the following article in a coursepack for my course].

[Insert full citation to the original work.]

Please indicate your approval of this permission by signing the letter where indicated below and returning it to me as soon as possible. My fax number is set forth above. Your signing of this letter will also confirm that you own [or your company owns] the copyright to the above described material.

Thank you very much.

Sincerely,

[Your name and signature]

Permission granted for the use requested above:

[Type name of addressee below signature line]

Date: _____

Instructions for Permission Letters

1. Be sure to include your return address, telephone number, fax number, and the date at the top of the letter.
2. Spare no effort in confirming the exact name and address of the addressee. Call the person to confirm the copyright ownership.
3. Clearly state the name of your university and your position.
4. Precisely describe the proposed use of the copyrighted material. If necessary or appropriate, attach a copy of the article, quotations, diagrams, pictures, and other materials. If the proposed use is extensive, such as the general use of an archival or manuscript collection, describe it in broad and sweeping terms. Your objectives are to eliminate any ambiguities and to be sure the permission encompasses the full scope of your needs.
5. The signature form at the end of the sample letter is appropriate when an individual grants the permission. When a company (such as a publishing house) is granting the permission, use the following signature format:

Permission granted for
the use requested above:

[Type name of company]

By: _____

Title: _____

Date: _____

**Eliminate
ambiguity and
be sure the
permission
encompasses
the full scope
of your needs.**

SECTION 7

A Listserve Opportunity

*A possible
means for
mutual
assistance.*

To facilitate an open discussion and to help track developments and points-of-view regarding fair-use scenarios, we invite your thoughts. Specifically, we invite you to join the fair-use scenarios listserve, located at fairuse-talk@calstate.edu, with related information available at <http://www.cetus.org>. To sign on to the listserve, send an e-mail message to fairuse-talk-request@calstate.edu with the single word "subscribe" as the body of the message. In the beginning, for economic reasons, the listserve will not be monitored. Please contribute messages with your thoughts about the evolving meaning and circumstances which are associated with various scenarios such as those presented in Section 5.

Some might suggest that the inevitable ambiguity in scenarios can be resolved by simply deciding against fair use. While that course might reduce lawsuit potential, it is an extremely expensive choice for higher education. If such a choice reduces access to information and reduces the ability of faculty and staff to produce high-quality instructional materials, then the impact on higher education will be negative. Thus, time and effort expended on learning more about the nuances of fair use is a worthwhile investment. Please share your experiences.



Working Group on Ownership, Legal Rights of Use and Fair Use of the CSU-SUNY-CUNY Joint Committee

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More Information About § 110. Limitations on exclusive rights: Exemption of certain performances and displays

This statute is relevant whenever copies are displayed, or works are performed in a face-to-face classroom setting. To display something includes the simple showing of a work, whether it is a picture, a page of text, a book cover, a chart, or other work. To perform something includes to recite, play, or act the work, or to show sequential images from an audiovisual work, or to make audible the accompanying sounds.

Begin with the premise that in the traditional face-to-face teaching, nearly all displays and performances are allowed. Section 110(1) allows almost any "performance" or "display" in the nonprofit educational context, when the activities are in the classroom or other similar location.

The "face-to-face" language apparently does not have to be read literally. The report from the House of Representatives, which accompanied passage of the 1976 Act, states:

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

This explanation may mean that we can display and perform works through some closed-circuit system that delivers them to other locations on campus—a common need for popular classes, where all students are unable to meet in one room. That capability is crucial for campuses that lack large auditoriums for basic and popular courses.

Distance learning makes such uses of works whenever a professor shows a chart or picture or a video clip and the images are transmitted to students at other locations. Section 110(2) of the Copyright Act deals with the transmission of performances and displays in distance education. [Click here to read Section 110\(2\).](#)

See also: Libraries and Public Performances and Displays
[Viewing Movies and Other Audio-Visual Works at the University:](#)
[Educational Needs and Copyright Law](#)

Last Updated March 6, 2006

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More Information About § 112. Limitations on exclusive rights: Ephemeral recordings

Section 112(b) expressly allows a nonprofit institution that makes a transmission containing a display or performance allowed under 110(2) to make no more than thirty copies of such transmission, if: (1) no further copies are made from those copies, and (2) those copies are destroyed within seven years after the date of the first transmission, except one copy may be preserved for archival purposes.

Keep in mind that this provision applies only to Section 110(2) situations: transmissions that include only displays of works or performances of non-dramatic literary or musical works.

If the transmission does not include anyone else's copyrighted materials, then the right to duplicate the tapes will be determined solely by the university and the individual faculty member. If the transmission includes works beyond those allowed under Section 110(2), the right to make copies will depend on either a fair use analysis or a license agreement with the owner of the copyright to the included works.

If Section 112(b) applies, the House Report details that the thirty copies may be used for future transmissions by the original source, or they may be exchanged with other broadcasters for their transmission.

A practical procedure for implementing this provision would be to number the copies of the tapes in succession from 1 to 30. Each tape should be labeled to indicate its place of origin and date of first transmission. The label should, of course, include other information about the tape's content and copyright status.

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More Information About § 112. Limitations on exclusive rights: Ephemeral recordings

The TEACH Act amended Section 112 of the Copyright Act, addressing the issue of so-called "ephemeral recordings." The new Section 112(f)(1) explicitly allows educational institutions to retain copies of their digital transmissions that include copyrighted materials pursuant to [Section 110\(2\)](#), provided that no further copies are made from those works, except as allowed under Section 110(2), and such copies are used "solely" for transmissions pursuant to Section 110(2).

As a practical matter, Congress seems to have envisioned distance education as a process of installments, each requiring a specified time period, and the content may thereafter be placed in storage and outside the reach of students. The institution may, however, retrieve that content for future uses consistent with the new law. Incidentally, the TEACH Act did not repeal the earlier language of Section 112 that generally allowed educational institutions to keep some copies, such as videotapes, of educational transmissions for a limited period of time.

Page Updated 11/25/02

Contact information: <http://www.copyright.iupui.edu/contact.htm>

Design revision date: 8/29/2002

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Copyright Management Staff

Senior Copyright Analyst, David Wong, J.D.

David Wong is the Senior Copyright Analyst at the Copyright Management Center of Indiana University Purdue University Indianapolis. David provides information to the university community at IUPUI as well as other educational institutions throughout the world through his work found at the Copyright Management Center website. David regularly gives seminars to faculty, staff, and students on campus concerning the law of copyright. Recently, David gave a presentation to the Zwolle Group in Zwolle, Netherlands discussing Copyright Management in higher Education. Among his several duties at the university, David works closely with IUPUI Online Jumpstart program, drafting and implementing copyright policies and procedures and addressing copyright issues for distance education at the University. He also works closely with the Variations2 Digital Music Library. Additionally, David researches, drafts and implements documents concerning copyright issues such as licensing, permissions, fair use, the TEACH Act, etc.

He earned his Bachelor of Arts degree from Indiana State University majoring in Music and spent two years teaching instrumental music in the public schools. David is a recent graduate of the Indiana University School of Law-Indianapolis and is currently working towards his Master of Laws degree in Intellectual Property.

In his spare time, David enjoys many outdoor sports including: rock climbing, hiking, mountain biking, running, and camping. David also takes pleasure in studying and playing ethnic percussion instruments from around the world, such as: Australian didgeridoo, soprano steel drum from Trinidad & Tobago, Yoruban and Senegalese-style djembe, Brazilian berimbau, Korean changgo, and the Cuban conga drum.

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Copyright and Higher Education: Announcement of Recent Development Photocopies and Other Reproductions by Libraries: New Requirements for Copyright Notices on All Copies

Copyright Management Center
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New legislation from Congress has revised the requirement for the form of notices that libraries must place on all copies of works that libraries make under [Section 108](#) of the U.S. Copyright Act. These changes in the form of notice took effect immediately, and Indiana University libraries ought to revise their procedures and documentation without delay.

Since 1976, the Copyright Act has included [Section 108](#), which allows many libraries, particularly most public and academic libraries, to make copies of copyrighted works for specific purposes under tightly defined circumstances. In general, under this provision, libraries may make copies for preservation, for giving to library users for their private research and study, and for delivery to other libraries pursuant to interlibrary loan arrangements. The ability of a library to make these copies depends upon complying with the detailed conditions listed in [Section 108](#).

One of the general requirements for all copies made under this provision has been the mandate that the copy include "a notice of copyright."

For more than twenty years, librarians and publishers have debated whether the "notice" on the copy must be the formal copyright notice as found on the original (for example, "Copyright 1998, XYZ Publishing Company") or may consist of some general indication that copyright applies to the work (for example, "use of this material is governed by copyright law"). The *Digital Millennium Copyright Act* passed by Congress and signed by the President during October 1998 resolves this debate. All copies made under [Section 108](#) now must include the notice of copyright as it appears on the original. If no notice appears on the original, then the copy must include "a legend stating that the work may be protected by copyright."

Accordingly, the Copyright Management Center recommends to all Indiana University libraries that they immediately adopt and implement the following procedures with respect to all copies made for preservation, for a user's private research, and for interlibrary loan.

1.

If the original work includes a formal copyright notice, the copy should include the following statement:

"The work from which this copy was made included the following copyright notice:
_____. "The librarian making the copy should transcribe the original copyright notice into that blank space.

If the version of the work available to the librarian making the copy does not include a formal copyright notice, the librarian should place the following statement on the copy:

"The work from which this copy was made did not include a formal copyright notice. This work may be protected by copyright law. Uses may be allowed with permission from the rightsholder, or if the copyright on the work has expired, or if the use is "fair use" or within another exemption. The user of this work is responsible for determining lawful uses."

Please contact the Copyright Management Center if you have any questions about this development, or if you would like general guidance with respect to the conditions under which a library at Indiana University may make copies of works for preservation, private study, interlibrary loan, or under "fair use."

Return to: Copyright Management Center: [Preservation & Patron Uses](#)

Created: November 24, 1998

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Copyright Warning Notice for Unsupervised Library Copying Machines: Updated Information for Library Services

Prepared by the COPYRIGHT MANAGEMENT CENTER

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Draft: October 16, 2001

[Section 108](#) of the U.S. Copyright Act (Title 17, United States Code) gives protection to qualifying libraries from some activities taking place in the library that might otherwise constitute copyright infringement. This statute is also the source of the familiar copyright "warning notices" that commonly appear on photocopiers and other equipment in the library.

Protection for Libraries

Section 108(f)(2) gives protection to libraries, archives, and their employees from liability that may arise from the "unsupervised use" of photocopy machines and other equipment at the library, provided that the "equipment displays a notice that the making of a copy may be subject to the copyright law. . . ."

The function of the law is actually remarkably simple. If the library places the notice on the machine, the library avoids potential legal liability for infringements that a user may commit by the use of that equipment. The law does not create immunity. The library may not be legally responsible, but the user of the machine remains liable for his or her activities.

Conventional Form of Notices

The law does not specify any required content, placement, layout, or other details regarding the notices. Through the years, libraries generally have used language such as the following form recommended by the [American Library Association](#):

"Notice: The copyright law of the United States (Title 17, U.S. Code) governs the making of photocopies or other reproductions of copyrighted material; the person using this

equipment is liable for any infringement."

Libraries generally print the notice in a bold font and affix the paper or other placard to each photocopy machine where a user is likely to see it. The cost of compliance is low, and the benefits are potentially enormous. Libraries should not hesitate to comply and secure the benefits.

Expanded Protection for Libraries

While the statute is perhaps most often considered in the context of photocopiers, the language of the law is actually much broader. The statute applies to any "reproducing equipment" located on the "premises" of the library or archives. Therefore, librarians should affix an appropriate notice on any machine or equipment in the library, that is available for use without staff supervision, and that is capable of making a copy of any existing work.

Notices may be affixed to computers, printers, separate drives, scanners, tape decks, microfilm readers, cameras, and any other device. Because the burden of compliance is low, the library should ordinarily resolve any doubt in favor of simply attaching the notice.

Innovative Notices

Because of the changing nature of equipment, copyrighted materials, and intended uses, the library may also consider innovative forms and placements of the notices. In order to give more helpful information about the copyright, libraries at IUPUI and affiliated campuses might revise the notice to read as follows:

Notice: The copyright law of the United States (Title 17, U.S. Code) governs the making of photocopies or other reproductions of copyrighted material; the person using this equipment is liable for any infringement. For more information about copyright law, the rights of copyright owners, and the right of fair use to make limited copies for teaching, research, and study at the university, visit the website of the Copyright Management Center, at <http://www.copyright.iupui.edu>.

In all cases, the notice should be placed prominently where a user of the equipment has a certain opportunity to see and read the notice. In most instances, the notice will be on paper or other tangible format and posted on the hardware. In the case of computer equipment, the notice may also be added to the desktop screen display, where a user will not be able to remove or delete it, and where the notice is not transitory, as on a screensaver.

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please contact the Copyright Management Center to ascertain whether you have the current version.

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Fair Use and Higher Education: Are Guidelines the Answer?

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In *Academe* 83 (November/December 1997): pp. 38-40

[Copyright](#) 1997, [American Association of University Professors](#)

More than twenty years ago, Congress included in the statutes for the first time a provision on the fair use of copyright-protected works. ¹ The years of hearings, testimony, and debate leading to the Copyright Act of 1976 helped to make the university community aware that copyright law would affect activities of increasing importance to modern teaching. Two decades ago, the main concern centered on photocopying classroom handouts, course packets, and research materials. Today we face increasing numbers of fair-use questions having to do with digital works and electronic access.

In 1977 the *AAUP Bulletin*, the predecessor to *Academe*, carried an influential article on fair use by John C. Stedman of the University of Wisconsin Law School. ² Stedman's article became an early primer on copyright and fair use for a broad audience of faculty members. Stedman also worked with the American Association of University Professors (AAUP) to take a step that seemed small at the time but that proved later to be of enormous importance.

Stedman led the AAUP and the [Association of American Law Schools](#) (AALS) in public opposition to the so-called "Classroom Guidelines." ³ The guidelines, which attempted to define fair use in the context of photocopying for classroom handouts and research, were the product of negotiations among representatives of publishers, authors, and educators. The needs of higher education were not well represented or articulated in those guidelines. Stedman recognized that the guidelines were neither an accurate interpretation of the law nor a workable measure of fair use for higher education. When the guidelines appeared in congressional reports accompanying passage of the 1976 Copyright Act, expressions of concern from the AAUP and the AALS tempered the generally favorable discussion. ⁴

The AAUP's public opposition to the guidelines caught the attention of educators who slowly discovered that the meticulous and restraining standard in the guidelines further clouded and inhibited fair use. The AAUP's opposition did not suppress the guidelines or prevent their perpetuation. But it did help educators to recognize that fair use ought not be burdened with rigid and inflexible standards. Educators began to understand that they must scrutinize measures of fair use offered for their acceptance.

Today, the academic community is once again called on to look closely at the appropriateness of new guidelines for the next generation of technologies: digital imaging, multimedia production, and transmissions for distance learning. These guidelines are the work of the Conference on Fair Use, also known as Confu. Confu negotiators representing diverse points of view met for more than two years before proposing guidelines in an interim report issued in December 1996. ⁵

The report invited interested parties to indicate by June 1997 whether they would support or oppose the proposed guidelines. Twenty years ago, only two educational organizations publicly opposed the Classroom Guidelines. But the AAUP's almost isolated action two decades ago set an example. This year, dozens of educational organizations expressed their concern about the Confu guidelines.

The response has not been uniform. Many organizations support the new guidelines. But some leading organizations, such as the [Association of American Universities](#), the [American Council on Education](#), the [American Library Association](#), and the [Association of Research Libraries](#), oppose all of the Confu guidelines. Strangely, the AAUP, the model of critical reflection twenty years ago, was not present at the negotiating table during the Confu meetings. Nor did the AAUP respond to the invitation for comments on the proposed guidelines. ⁶

Organizations may choose not to participate in Confu or to put their reflections on the public record for many reasons. Regardless of whether they take a public stand, nearly every educational institution, professional society, and individual member of the academic community will eventually need to address fair use and consequently decide whether to accept or reject various guidelines. In making those decisions, they will have to grapple with the principles of fair use and the relative merits of any guideline for understanding and implementing fair-use law.

The Quest for Interpretive Certainty

The struggle over the acceptability of fair-use guidelines is a struggle over the acceptability of fair-use law itself. The central purpose of fair-use guidelines is to provide some interpretive certainty for the meaning of the broad and flexible law of fair use as applied to specific circumstances. The law of fair use established in the 1976 Copyright Act is a sweeping and general provision declaring at the outset that certain activities that might otherwise be infringements are not unlawful. The law is explicitly applicable to general pursuits of social value or pursuits that are closely aligned with the constitutional objective of copyright: "promoting the progress of science and the useful arts." The statute specifically gives the following activities the benefit of fair use: "criticism, comment, news reporting, teaching . . . scholarship, or research." The law does not, however, make all activities undertaken in connection with education, scholarship, and research fair use.

Whether an action is fair use depends on a balanced application of four factors: the purpose and character of the use, the nature of the copyrighted work being used, the amount and substantiality of the work used, and the effect of the use on the market for or value of that work. The statute gives nearly no elaboration on the meaning of these factors. Individuals seeking to abide by the law, and courts applying the law, must therefore determine what these factors mean in specific situations. Reasonable people can and do differ about that meaning and whether even the simplest activities are fair use. Reasonable people can debate whether photocopying, the making of transparencies, downloading from a World Wide Web site, or clipping for a multimedia work is fair use.

Recognizing the potential for differing interpretations of fair use, Congress provided important protection for librarians and educators who make a reasonable interpretation of fair use. The Copyright Act reduces the exposure of individuals to monetary damages in the event of an infringement, provided that the individual is part of a nonprofit educational institution and acted with a reasonable belief that his or her copying was fair use. ⁷

Nonetheless, many educators and librarians find the quest for a responsible position to be a burden. The desire for greater specificity and easier application of fair use motivated the creation of guidelines. Supporters and opponents of guidelines will vigorously debate their advantages and disadvantages. Consideration of any set of guidelines, however, ultimately begs this direct question: Why not just follow the law itself? The following reflections and principles can help to answer that question.

The Force of Law: Flexibility, Protection, and Balance

None of the fair-use guidelines has the force of law; only statutes and court rulings have that authority. None of the fair-use guidelines from the past or the present has been read into the law. Congress has never voted to make them law. Their appearance in congressional reports does not make them law. None of the few court cases that have looked at guidelines has read them into the law. ⁸ Professors seeking the standard to which they must adhere can look only to the law. Guidelines cannot offer a binding standard. Guidelines interpret the law, but they do not offer the only interpretation possible. They are also not necessarily the most appropriate interpretation for educators.

The law is a less complex measure of fair use than are most guidelines. The law of fair use depends chiefly on the four factors mentioned above; these factors are summarized and described in many different publications. Guidelines often depend on many more variables and include requirements and prohibitions that are not found in the law. For example, the Confu guidelines on production of multimedia works (a) restrict the length of time that a professor may keep and use the multimedia work, and (b) require professors to give notice that they are exercising fair use. No such obligations exist in the law, and these two requirements are in addition to a long list of conditions related to quantity, purpose of use, and market effects.

The law of fair use is flexible to meet changing needs and circumstances, while fair-use guidelines are rigid. Congress meant for the law to be flexible, and court rulings have affirmed that generalizations about fair use are simply not valid.

For example, the measure of the amount of a work that may be copied is highly fluid. But guidelines usually include rigorous quantity limits that do not reflect the robust character of fair use. One court has ruled that reprinting three hundred words from a work was too much, while another case allowed several thousand words. ⁹ These decisions are not inconsistent; they show that fair use depends on the circumstances of each use.

Staying within fair-use law prevents infringement, but the guidelines do not offer even a "safe harbor." Most guidelines, including the Confu guidelines, are by their own description "minimal" measures of fair use, implying that they will protect compliant users from infringement liability. But many copyright owners have refused to call some guidelines a safe harbor, reserving the right to bring infringement actions even against an individual or institution that stays carefully within the limits. If even minimal guidelines are not a safe harbor, they are not a useful measure of fair use.

Copyright law provides important protection for well-meaning faculty and others who apply fair use, but guidelines offer no protection. When members of university and library communities can show that they had "reasonable grounds" to believe that their use of materials was fair, the Copyright Act will exonerate the individual and the institution from some of the monetary liability that may result if the copying is found to be an infringement. ¹⁰ Congress structured the law to encourage professors, librarians, and others in the non-profit educational arena to pursue fair use in good faith. The reduction of damages should motivate positive and constructive application of fair use and discourage most realistic threats of litigation; it should also offer peace of mind. In granting the reduction of damages, Congress recognized the education community's lingering uneasiness and acknowledged the importance of advancing knowledge through a reasonable, balanced, and good-faith understanding of rights and responsibilities. No set of guidelines can offer the same protection.

Each member of the higher education community has a duty to learn the fundamentals of fair use and apply them in a reasonable manner for the advancement of teaching and research. Congress created the law of fair use. Congress provided flexibility and balance. Congress also offered important, but often overlooked, protection for academics seeking to apply the law to educational objectives.

While the lure of guidelines is compelling, they lack many of the legal and practical advantages of the law. The AAUP's letter to Congress criticizing the Classroom Guidelines remains a valid commentary on the continuing need for flexible standards:

[T]hese [Classroom] Guidelines . . . have caused us deep dismay. They would seriously interfere with the basic mission and effective operation of higher education and with the purpose of the Constitutional grant of copyright protection, which is designed to promote, not hinder, the discovery and dissemination of knowledge. These proposed Guidelines, notwithstanding the insistence that they represent only minimum standards, and despite other disclaimers, ultimately resort to the language of prohibition . . . In so doing, they contradict the basic concept of fair use and threaten the responsible discharge of the functions of teaching and learning. ¹¹

A return to the law, rather than reliance on guidelines, is a more reasonable avenue for understanding fair use. The law provides benefits and even certainty that no guidelines thus far have been able to offer. The acceptance of rigid guidelines is a rejection of those attributes of fair use that were meant to benefit teaching and learning. The AAUP and all of its members must act to protect fair use; neglect of fair use is an erosion of higher education.

NOTES

1. [Copyright Act of 1976, 17 U.S.C. Section 107. Return to text.](#)

2. John C. Stedman, "The New Copyright Law: Photocopying for Educational Use," *AAUP Bulletin* 63 (February 1977): 5-16. He also wrote two related articles of interest: John C. Stedman, "Academic Library Reserves: Photocopying and the Copyright Law," *AAUP Bulletin* 64 (September 1978): 142-149; and John C. Stedman, "Copyright Developments in the United States," *AAUP Bulletin* 62 (Autumn 1976): 308-319. [Return to text.](#)

3. The original guidelines, entitled "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions," along with mention of opposition to them from the AAUP and AALS, appear at *Copyright Law Revision*, H.Rep. 94-1476, 94th Cong., 2d Sess., 1976, pp. 68-72. [Return to text.](#)

4. This author has recounted events leading to the creation and promotion of the Classroom Guidelines: Kenneth D. Crews, [Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education](#) (Chicago: The University of Chicago Press, 1993): 30-36. [Return to text.](#)

5. [Conference on Fair Use: An Interim Report to the Commissioner](#) (Washington, D.C.: U.S. Patent and Trademark Office, 1996). [Return to text.](#)
6. An appendix to the *Interim Report* includes a list of participating organizations. For the responses of various organizations to the guidelines—favorable or not—see the [appendix](#). [Return to text.](#)
7. [Copyright Act of 1976, 17 U.S.C. Section 504 \(C\)\(2\)](#). [Return to text.](#)
8. For example, a court ruling against Kinko's Copies from 1991 applied the Classroom Guidelines to the facts, but only after the court applied the four factors and reached its conclusion. [Basic Books, Inc. v. Kinko's Graphics Corp.](#), 758 F.Supp. 1522 (S.D.N.Y. 1991). [Return to text.](#)
9. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); [Maxtone-Graham v. Burtchaell](#), 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987). [Return to text.](#)
10. See [note 7](#). [Return to text.](#)
11. From the AAUP letter to Congressman Robert W. Kastenmeier, May 25, 1976, reprinted at Appendix C to Stedman's 1977 article cited in [note 2](#). [Return to text.](#)

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Using the TEACH Act Checklist at IUPUI

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The TEACH Act amended the U.S. Copyright law in 2002 on the issue of the use of copyrighted works in distance education. More information about the TEACH Act is available from the website of the Copyright Management Center. The new law is one possible means for lawful uses of works, and the law imposes several requirements for compliance. This document identifies those requirements and summarizes how each requirement may be addressed in the context of the IUPUI Jumpstart Program.

Currently, the following steps taken at IUPUI only address the use of materials that are capable of being delivered to students using streaming technology. These materials include mostly sound recordings and audiovisual works. While the TEACH Act allows for the use of other types of materials in conjunction with distance education, the following steps may not adequately address the requirements of the TEACH Act for these materials.

TEACH Act requirements that will likely fall within the duty of the Instructor:

Requirements 1 through 5 below are likely to be the responsibility of the course instructor. Instructors are likely to be left to make these decisions as a matter of academic freedom.

Coming Soon An Instructor's Guide to Implementing the TEACH Act

1. The work to be transmitted may be any of the following:

- a. A performance of a non-dramatic literary work; or
 - b. A performance of a non-dramatic musical work; or
 - c. A performance of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions"; or
 - d. A display of any work in an amount comparable to that which is typically displayed in the course of a live classroom session.
2. The work to be transmitted may not be any of the following:
- a. Marketed primarily for performance or display as part of a digitally transmitted mediated instructional activity; or
 - b. a textbook, course pack, or other material in any media which is typically purchased or acquired by students for their independent use and retention.
3. Any permitted performance or display must be both:
- a. Made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities of the educational institution; and
 - b. Directly related and of material assistance to the teaching content of the transmission.
4. The institution does not know or have reason to believe that the copy of the work to be transmitted was not lawfully made or acquired.
- 5 . If the work to be used has to be converted from print or another analog version to digital format, then both:
- a. The amount of the work converted is no greater than the amount that can lawfully be used for the course; and
 - b. There is no digital version of the work available to the institution or the digital version available to the institution has technological protection that prevents its lawful use for the course.

TEACH ACT requirements that will likely fall within the duty of the Institution:

6. The institution for which the work is transmitted is an accredited nonprofit educational institution.

All Indiana University campuses, including IUPUI, are accredited nonprofit educational institutions. Instructors should make course materials available only to students enrolled in the IUPUI course.

7. The institution has instituted policies regarding copyright.

Indiana University has a general policy on the issue of fair use. Until a formal policy specifically related to distance education is adopted at IU or IUPUI, the Copyright Management Center has developed a suggested policy statement specifically applicable to the use of copyrighted works in distance education (see "Distance Education and Copyright at Indiana University," available at http://www.copyright.iupui.edu/teach_policy.htm).

8 . The institution has provided information materials to faculty, students, and relevant staff members that describe and promote compliance with U.S. copyright laws.

[The Copyright Management Center's website](#) provides members of the IUPUI community, including faculty, students, staff members, and instructors valuable insight and information describing and promoting U.S. copyright laws.

9. The institution has provided notice to students that materials used in connection with the course may be subject to copyright protection.

Appropriate notice of copyright should be given to students within the online course alerting them to copyright implications affecting the works. At IUPUI, this responsibility will most likely fall upon the instructor of the course. Accordingly, the instuctor should include the notice, "Materials used in connection with this course may be subject to copyright protection," prominently within the online course.

10. The transmission of the content is made solely for students officially enrolled in the course for which the transmission is made.

Instructors should limit access to the online course to enrolled students and not allow public access to the course. At IUPUI, the course management system, Oncourse, provides this capability.

TEACH Act requirements that will likely fall within the duty of the Information Technology Officials:

11. Technological measures have been taken to reasonably prevent both:

- a. Retention of the work in accessible form by students for longer than the class session; and
- b. Unauthorized further dissemination of the work in accessible form by such recipients to others.

Instructors should make sure that relevant copyrighted works reside on the Helix server administered by Digital Media Network Services (DMNS). This server employs RealNetwork's "secret handshake" technology and requires password authentication to access works residing on it. Student access to the copyrighted works will terminate at the end of each semester.

12. The institution has not engaged in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent retention or dissemination of their works.

No entity at IUPUI should interfere with such technological measures for purposes of the TEACH Act.

13. The work is stored on a system or network in a manner that is ordinarily not accessible to anyone other than anticipated recipients.

The Helix server on which the works are stored is not directly accessible by the public. Password protection restricts access to the course and to each individual copyrighted work residing upon the server to enrolled students only.

14. The copy of the work will only be maintained on the system or network in a manner ordinarily accessible for a period that is reasonably necessary to facilitate the transmissions for which it was made.

The steps taken to fulfill Requirement 11 (above) also satisfy this requirement.

15. Any copies made for the purpose of transmitting the work are retained and used solely by the institution.

All copies of the works made should be retained by the instructor or on the Helix server and used only for purposes of transmission for the course or backup copies.

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Complying with the TEACH Act: Recommendations for the IUPUI Jumpstart Program

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Revised September 16, 2003

Background

On November, 2, 2002, the TEACH Act (Act) became law, fully revising Section 110(2) of the U.S. Copyright Act, governing lawful uses of works protected by copyright in distance education. By complying with the TEACH Act, certain copyrighted works may be used for distance education without permission from, or payment of royalties to, the copyright owner—and without copyright infringement. One important improvement of the TEACH Act over previous law is that the Act allows for the use of an expanded range of works in distance education. These works include: the performances of non-dramatic literary or musical works; reasonable and limited portions of any other works; and the display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session.

Beyond Fair Use

The TEACH Act is in addition to the “fair use” exception to the copyright owner’s exclusive rights to their materials. In many instances, the Act allows the use of a wider range of works than the law of fair use. The TEACH Act may allow for the use of larger portions of certain works than the law of fair use. Also, the TEACH Act may provide educators with a broader capability to use the same works in repeated semesters without incurring “new” permission fees. In some circumstances, fair use may be broader than the Teach Act, so if a particular use does not fit the conditions set out by the Act, one may still apply fair use. For more information about fair use, visit the Copyright Management Center’s web site at: www.copyright.iupui.edu.

Potential Benefits of the TEACH Act to the Jumpstart Program

- Permissions fees for the use of qualifying works would be eliminated, saving the University and students money.
- Course designers and instructors would have use of works that would otherwise be unavailable due to prohibitively high permission costs and permission denials.
- Online courses would be enhanced and improved due to the increased availability of multiple types of media.
- In many cases, complying with the TEACH Act could make particular online courses, such as music or film studies courses financially feasible to create and maintain.
- The burden of identifying copyright owners, obtaining permission, renewing permission, and paying royalties for the use of qualifying works would be eliminated.

Responsibilities Under the TEACH Act.

With the added benefits of the TEACH Act come added responsibilities. Compliance with the TEACH Act is not automatic and does not happen by accident. In order to comply with the TEACH Act, several requirements imposed by the Act must be addressed.

Accompanying this document is the Using the TEACH Act at IUPUI document, identifying requirements for compliance with the TEACH Act, and including a summary of steps suggested by the Copyright Management Center to address these matters.

Recommendations for the Jumpstart Program

The Copyright Management Center recommends that IUPUI Online consider adopting policies and procedures that comply with the TEACH Act in order to take advantage of the law's benefits. Many instructors working with IUPUI Online have expressed interest in applying the law and have suggested that some uses of copyrighted works would otherwise be impractical or impossible. The Copyright Management Center offers its assistance in the endeavor to make IUPUI Online courses compliant with the TEACH Act.

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Distance Education and Copyright at Indiana University: Suggested Standards for Practice and Procedure

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Consistent with Paragraph 2 of the [Policy on Fair Use of Copyrighted Works for Education and Research](#), dated December 5, 1997, the Copyright Management Center suggests to any unit of Indiana University engaged in distance education that it address the proper and lawful use of copyrighted works as follows:

- o All members of the Indiana University community must demonstrate appropriate respect for rights of authors and creators of intellectual property.
- o All members of the Indiana University community must adhere to the law of copyright, including the law that grants rights to owners and that allows certain rights of use for distance education and other purposes.
- o All faculty, staff, and others at Indiana University engaged in distance education should consider applying [section 110\(2\) of the Copyright Act \(the TEACH Act\)](#) to the fullest extent possible, bearing in mind technological issues, criteria for qualifying works, and access restrictions.
- o All faculty, staff, and others at Indiana University engaged in distance education should consider applying the law of [fair use](#) where appropriate, in addition to applying the TEACH Act.
- o For uses that fall outside the scope of the TEACH Act and the law of fair

use, faculty, staff, and others should consider [securing permission](#) or altering delivery plans to comply with the law of copyright.

For more information about the details and substantive requirements of the TEACH Act and fair use, visit: www.copyright.iupui.edu/dist_learning.htm

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Key Court Case Summaries on Fair Use

COPYING FOR EDUCATION

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

Kinko's was held to be infringing copyrights when it photocopied book chapters for sale to students as "coursepacks" for their university classes.

Purpose: When conducted by Kinko's, the copying was for commercial purposes, and not for educational purposes.

Nature: Most of the works were factual—history, sociology, and other fields of study—a factor which weighed in favor of fair use.

Amount: The court analyzed the percentage of each work, finding that five to twenty-five percent of the original full book was excessive.

Effect: The court found a direct effect on the market for the books, because the coursepacks competed directly with the potential sales of the original books as assigned reading for the students.

Conclusion: Three of the four factors leaned against fair use. The court specifically refused to rule that all coursepacks are infringements, requiring instead that each item in the "anthology" be subject individually to fair-use scrutiny.

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Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996).

A private copy shop created and sold "coursepacks" under circumstances similar to Kinko's, and the copy shop was also found to have acted outside the limits of fair use.

Purpose: When performed by commercial shop, copying is infringement even if professors select the coursepack materials.

Nature: Copied excerpts contained some degree of creative expression.

Amount: Defendant used more than five percent in all instances of copying.

Effect: Licensing or potential licensing opportunities existed for all copied works, and other commercial copy shops routinely requested permission to reproduce copyrighted works. This court held that the effect on the market is the most important factor of a fair-use determination; accordingly, the court provided relatively little analysis of the other three factors. The decision is built on market effect and particularly emphasizes (1) that an

existing licensing system will weigh heavily against fair use, and (2) that "coursepack" production by a commercial copy shop does not constitute fair use even if professors select the copied materials.

Conclusion: As in the Kinko's case, this court did not address the question of whether "coursepack" production may be fair use if conducted by a university or nonprofit copy shop. This appeal was heard by all judges of the Court of Appeals for the Sixth Circuit. Eight judges ruled against fair use, and five judges dissented, finding that the copying should be fair use.

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Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982).

For-profit producers of educational motion pictures and videos sued a consortium of public school districts, which was systematically recording programs as they were broadcast on public television stations and providing copies of the recordings to member schools.

Purpose: The court was largely sympathetic with the educational purpose.

Nature: Although the films had educational content, they were commercial products intended for sale to educational institutions.

Amount: The defendant was copying the entire work and retaining copies for as long as ten years.

Effect: The copying directly competed with the plaintiff's market for selling or licensing copies to the schools.

Conclusion: The court had little trouble concluding that the activities were not fair use.

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COPYING FOR RESEARCH

American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994).

The court ruled that photocopying of individual journal articles by a Texaco scientist for his own research needs was not fair use.

Purpose: While research is generally a favored purpose, the ultimate purpose was to strengthen Texaco's corporate profits. Moreover, exact photocopies are not "transformative;" they do not build on the existing work in a productive manner.

Nature: The articles were factual, which weighs in favor of fair use.

Amount: An article is an independent work, so copying the article is copying the entire copyrighted work.

Effect: The court found no evidence that Texaco reasonably would have purchased more

subscriptions to the relevant journals, but the court did conclude that unpermitted photocopying directly competes with the ability of publishers to collect license fees.

Conclusion: According to the court, the Copyright Clearance Center provides a practical method for paying fees and securing permissions, so the copying directly undercut the ability to pursue the market for licensing through the CCC. Despite an impassioned dissent from one judge who argued for the realistic needs of researchers, the court found three of the four factors weighing against fair use in the corporate context. The Second Circuit later amended its decision to clarify that it applies only to "systematic, institutional" copying, and that the ruling does not reach the isolated copying of independent researchers. While this case is likely to have significant practical effects on private companies, its application to teaching and research is far from clear.

[More Information](#)

Sundeman v. The Seajay Society, Inc., 142 F.3d 194 (4th Cir. 1998).

This case is remarkable for having gone to court at all; isolated scholarly uses of materials are seldom the subject of litigation. It is also a reminder that reasonable, limited, scholarly uses of materials are most likely to be fair use. A researcher at a nonprofit foundation selected quotations from an unpublished literary manuscript of historical and cultural interest, and she included those quotations in an analytical, oral presentation that she delivered to a scholarly society.

Purpose: Her use was scholarly, transformative, and provided criticism and comment on the original manuscript.

Nature: The court relied on a long series of cases to resolve that the "unpublished" nature of the work "militates against" fair use.

Amount: The amount used was consistent with the purpose of scholarly criticism and commentary, and there was no evidence of taking "the heart of the work."

Effect: The court found no evidence that the presentation displaced any market for publishing the original work, and a presentation at a scholarly conference may in fact have increased demand for the full work.

Conclusion: The court ruled that she was acting within fair use.

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COPYING FOR WEBSITES & PUBLIC DISSEMINATION

Los Angeles Times v. Free Republic, 54 U.S.P.Q.2D 1453 (C.D. Cal. 2000)

A bulletin board website allowed members to post full articles from newspapers in order to generate awareness and discussion of various subjects. Access to the site was unrestricted. The defendant was a for-profit corporation, but was in the process of seeking nonprofit tax status and did not charge for access to materials on its website.

Purpose: The articles were copied directly from the news sources and were not “transformative.” The judge was also not persuaded that a link to the news source would not be sufficient. While the court generally favored the claim of a “nonprofit” use, the court still found that posting the articles was drawing readers away from the commercial websites where the articles originated.

Nature: The articles are predominately factual, tipping the factor in favor of fair use.

Amount: The website included the full text of the articles, and the court found that the copying was more extensive than necessary to accomplish the defendant’s objectives.

Effect: The newspapers were seeking to exploit the market for the articles and draw traffic to their websites; the defendant was “usurping” the copyright owner’s potential markets.

Conclusion: The bulletin board’s use of the newspaper articles was deemed to not be fair use.

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

Comline translated Japanese articles into English and prepared abstracts of the information.

Purpose: The abstracts were for news reporting. However, there was nothing transformative in the translation process because nothing new was added. Therefore, this factor leans against fair use.

Nature: Because the works were factual news articles, this factor is neutral on fair use.

Amount: The abstracts copied the crucial facts and ideas. Because it would have been possible to copy this information in a way that did not infringe, this factor leans against fair use.

Effect: The abstracts directly compete with and supersede the original articles.

Conclusion: The finding of three factors against fair use results in a defeat of the fair use defense.

[Read Full Opinion](#)

Nunez v. Caribbean International News, Corp., 235 F.3d 18 (1st Cir. 2000).

A newspaper published three of Nunez’s photographs. The photos were of a beauty pageant winner taken for her portfolio but a controversy surrounded the photos.

Purpose: The newspaper is a commercial enterprise and the use of the photos impacted sales of the paper. However, the paper transformed the use of the photos by using them to inform the public about the controversy surrounding the photos. The court deemed the informative use, good faith of the newspaper in obtaining the photos, and difficulty in reporting the news without the photos favored fair use.

Nature: The difficulty in calling the photos either factual or creative leans toward a neutral finding of fair use. In addition, the court emphasized the reproduction did not threaten Nunez's right of first publication and the photos had already been shown on the evening news.

Amount: The entire pictures were copied, yet to copy less than the whole would render the photo useless to the purpose of news reporting.

Effect: There is little to no impact on the market for these pictures because a newspaper reproduction is not a market substitute for an 8" x 10" glossy.

Conclusion: The court emphasized that generally reproduction by newspapers of professional photographs is infringement. However, if the photo itself is newsworthy, the photo was acquired in good faith, and the photo had already been disseminated, fair use exists.

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INTERNET & WEBSITE DEVELOPMENT

Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002).

An internet search engine website copied Kelly's photos off the internet. The photos were converted to small-scale "thumbnail" images. Clicking on the "thumbnail" would open a page that took the user to a full-size copy of the photo.

Purpose: Taking images and converting them into "thumbnails" (smaller, lower-resolution images), which serve a different purpose, is transformative. But placing the full-sized image on the website is not transformative. Therefore, this factor leans toward fair use for the "thumbnails" but against fair use for the full-sized image.

Nature: The works used are creative works of art, which leans against fair use in both cases.

Amount: This factor is neutral in the case of the "thumbnails" because it was necessary to copy the whole work for the intended use. However, it was not reasonable to copy the entire full-sized image, hence this factor leans against fair use.

Effect: The use of the "thumbnails" does not harm the market for the original images because there would be no way to obtain the original without visiting the creator's website. But placing the full-sized images on the website harms all of the creator's markets by giving

users access to the works without requiring them to visit the original website.

Conclusion: Conversion of internet photos to "thumbnails" is fair use. However, copying full-size images onto a website is not fair use.

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[Los Angeles Times v. Free Republic](#), 54 U.S.P.Q.2D 1453 (C.D. Cal. 2000)

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MULTIMEDIA PRODUCTION

Higgins v. Detroit Educational Television Foundation, 4 F. Supp. 2d 701 (E.D. Mich. 1998).

Higgins was a composer and copyright owner of a short song. Forty-five seconds of it were used as background music during the introductory and ending sequences of a program about drugs and youth that was broadcast on a PBS affiliate in Michigan. The broadcaster also sold videotape copies of the program to educational institutions "for educational use only." The court ruled that the station acted within fair use.

Purpose: The court noted that the defendant sold only a modest number of copies of the tapes and did not earn a profit; the use of the music faintly in the background was also "transformative."

Nature: As a musical composition, the court found the work to be creative, thus tipping this factor against fair use.

Amount: The amount used was neither "qualitatively" nor "quantitatively" excessive. The use did not include any lyrics of the original song and only a portion of the original music, and then only as background.

Effect: The court looked to whether the particular use by the defendant harmed a realistic market for the song. The plaintiff presented no evidence of lost sales, and the court concluded that the brief excerpts as background music "cannot be said to be a substitution for the musical composition." The court acknowledged that any use is a "potential" loss of a sale or revenue, but the only market important in this analysis is the market that the copyright owner is realistically exploiting: "The market niche that the Defendants have filled is the educational videotape niche. Clearly, Plaintiff has no interest in occupying this niche."

Conclusion: The Higgins decision suggests that use of clips of music and other creative works in nonprofit research and education can be lawful, especially when integrated into a project with generally limited circulation.

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PREPARATION OF PUBLICATIONS

Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132 (2nd Cir.

1998).

Carol Publishing Group published a trivia book based on the popular television show Seinfeld.

Purpose: The preparation of trivia questions about a television show is not a transformative use. Additionally, because the book was created for commercial gain, this factor leans against fair use.

Nature: The television show is fictional which leans against fair use.

Amount: Examining this factor in context, while the wrong answers are original, the questions were based directly from the television episodes. The creation of 643 trivia questions leans against fair use.

Effect: While there was no proof of actual market harm, the court found this book harmed a future market niche, which the copyright holders may develop in the future.

Conclusion: Creating a trivia book based on a television series is not fair use.

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Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986), cert. denied, 481 U.S. 1059 (1987).

In 1973, the plaintiff wrote a book based on interviews with women about their own pregnancies and abortions. The defendant wrote his own book on the same subject and sought permission to use lengthy excerpts from the plaintiff's work. The plaintiff refused permission, and the defendant proceeded to publish his work with the unpermitted excerpts.

Purpose: Although defendant's book was published by a commercial press with the possibility of monetary success, the main purpose of the book was to educate the public about abortion and about the author's views.

Nature: The interviews were largely factual.

Amount: Quoting 4.3 percent of the plaintiff's work was not excessive, and the verbatim passages were not necessarily central to the plaintiff's book.

Effect: The court found no significant threat to the plaintiff's market. Indeed, the court noted that the plaintiff's work was out-of-print and not likely to appeal to the same readers.

Conclusion: This case affirms that quotations in a subsequent work are permissible, sometimes even when they are lengthy. Implicit throughout the case is the fact that the plaintiff was unwilling to allow limited quotations in a book that argued an opposing view of abortion; thus fair use became the only effective means for the second author to build meaningfully on the scholarly work of others.

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Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110 (9thCir. 2000).

Philadelphia Church of God (PCG) reproduced and distributed an out-of-print publication owned by Worldwide Church of God (WCG). The publication was the foundation of PCG's religious beliefs.

Purpose: The court found that the copying and distribution of the work had a direct correlation with the increase in church membership at PCG (the infringer). Therefore, the court found this factor leaned against fair use.

Nature: The creativity of the work leans this factor against fair use.

Amount: The entire work was copied and the court determined that a reasonable person would expect PCG to pay WCG for the right to copy and distribute the work. Hence, this factor also leans against fair use.

Effect: The verbatim copying and distribution of the work has a harmful effect on WCG's ability to prepare an annotation and market the work in the future.

Conclusion: The court found the fair use defense failed in all factors and ordered a permanent injunction against PCG. It is not fair use for a non-profit religious organization to copy verbatim a religious publication of another non-profit religious organization even though the work is no longer available.

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USES OF PHOTOGRAPHS

Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F.Supp.2d 1113 (D. Nev. 1999).

Tiffany Design (TD) created a digitally altered photographic image of the Las Vegas strip. Reno-Tahoe Speciality (RTS) admitted to scanning and inserting into their own image, at least six architectural works from TD's design.

Purpose: It was conceded that the use of the copyrighted material in its finished product was for a commercial purpose.

Nature: The image copied was a computer-enhanced photograph, with numerous original elements of lighting, perspective, shading, and subject orientation.

Amount: The entire image was scanned.

Effect: Incorporation of components of the scanned image may have a great effect upon commercial demand for TD's depictions of the Las Vegas Strip.

Conclusion: Scanning an image in order to copy creative elements and insert them into a

new work is not fair use.

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[Kelly v. Arriba Soft Corp.](#), 280 F.3d 934 (9th Cir. 2002).

[Nunez v. Caribbean International News, Corp.](#), 235 F.3d 18 (1st Cir. 2000).

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