KENNETH D. CREWS

COPYRIGHT LAW

FOR LIBRARIANS AND EDUCATORS

Creative Strategies & Practical Solutions

THIRD EDITION

Copyright Law for Librarians and Educators

ALA Editions purchases fund advocacy, awareness, and accreditation programs for library professionals worldwide.

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Kenneth D. Crews

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KENNETH D. CREWS has specialized in copyright issues as they relate to education, libraries, and research for more than twenty-five years. He directs the Copyright Advisory Office at Columbia University and teaches in the Columbia Law School. After studying history at Northwestern and law at Washington University, he earned a PhD in library and information science at UCLA. Dr. Crews has been a professor of law, library science, and business, and he held a named professorship in law at Indiana University. At Indiana he established the first office in the country specifically addressing copyright policy issues at universities. His services have been called upon by numerous colleges and universities, and by the U.S. State Department and the World Intellectual Property Organization. Kenneth Crews was the first recipient of the Ray Patterson Award from the American Library Association. He enjoys international and outdoor adventure with his family.

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In fond memory of

Mary Jane Frisby,
1966–2010,

superb student, extraordinary friend, outstanding lawyer,
and essential contributor to the original edition of this book

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APPENDIXES

ACKNOWLEDGMENTS

THIS BOOK IS a full reevaluation and update of the second edition. In many places, the law has changed. In other places, the explanations are reconsidered and improved. In yet other instances, I have evaluated anew some of my own views and interpretations of the law. I am grateful to several colleagues and research assistants who contributed importantly to this edition. Dwayne K. Buttler, who holds the scholarly communications chair at the University of Louisville, has been a part of this project since the first edition, and I continue to value his judgment and crucial contributions. I have had the support of some excellent students from Columbia Law School who have worked closely with me to undertake research tasks and to respond critically and constructively to every word I wrote. Meghan Schubmehl and Sarah Burghart (both in the J.D. class of 2010) became the essential support team. Meghan was invaluable in organizing and planning each step of the project through to completion. She and Sarah spent many hours around the table with me scrutinizing each chapter and rethinking every detail.

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This book is dedicated to the memory of Mary Jane Frisby. Mary Jane was one of my best students, and she took an immediate interest in copyright law.

She sat in the front row of the class, rose to the top, and wrote her law review paper on music downloads at a time when those issues were just beginning to surface. Mary Jane was a vital part of the original “Online Copyright Tutorial” way back in the 1990s that evolved into the first edition of this book. She became a star in the Indianapolis legal community. Her passing was abrupt and tragic, but friends and family will always share the memories and love of Mary Jane Frisby.

INTRODUCTION

This Book and the Importance of Copyright

THE ADVANCEMENT OF innovative education, librarianship, and scholarship has become increasingly entangled with copyright law. Creative uses of protected works and new applications of digital technologies have roused complex questions about the appropriate uses of copyrighted works as well as the ownership and management of the legal rights. As we strive to better understand the issues, we are seeing steady transformation of our efforts, as well as incremental change in the law. Since the previous edition of this book, courts have handed down new rulings on many issues, including fair use and digital rights management. Congress, on the other hand, has confronted difficult issues—such as the use of orphan works—but has largely failed to pass major legislation directly centered on the challenges confronted by educators, librarians, researchers, and others. Meanwhile, research and education seem to be routinely reinvented with the creation of new software and technological devices.

This mix of change and inactivity has motivated private parties to take the lead in shaping some implications of copyright law. Creative Commons has become a salient point of rebellion against expanding rights. The open access movement calls for sharing rights of use. Institutional policies and agreements clarify rights of ownership and works made for hire. Educators and librarians steadily grapple with the need to define a standard for fair use. The proposed settlement of the Google Books litigation would establish its own regime of rules for creating a digital collection of copyrighted materials, although the settlement remains as of this writing under ongoing public and judicial scrutiny. Library acquisitions are shifting steadily toward electronic resources that are acquired under license agreements that define the terms of use of the journals, books, and many other works in the licensed collections. Textbooks and other instructional materials are now freely available online and reconceived as wikis and downloads. Such private agreements and pursuits are becoming a dominant force on the shape of legal rights and responsibilities.

Nevertheless, none of these private arrangements would be wise or possible without a solid grounding in copyright law. Parties would be remiss to make policy, negotiate agreements, or enter into licenses without knowing what the law already provides. Copyright is the foundation of licenses and other bargains. Copyright is the starting point for drafting and negotiating effective deals. Without knowing the law, you are at a disadvantage when determining

whether your policy or contract is expanding your rights, giving you something you already have, or taking away opportunities that the law has handed you. Moreover, regardless of the trend toward contracts and licenses, the rapid shifts in materials, demands, creativity, and distribution networks mean that we will always need to return to principles of copyright to determine fundamental rights, responsibilities, and opportunities. What works are protected? Who owns the rights? How does fair use apply? How does the law apply to library services, or to music and recordings, or to distance learning? This book addresses exactly these questions.

We also need to return to the fundamentals of copyright because as educators, researchers, librarians, and students, we continue to engage in new ventures. We steadily digitize and upload diverse materials. We launch websites for every program and project. Libraries obtain federal grants to establish vast digital collections as open resources for any user on the Internet. We download materials from databases and manipulate and incorporate them into online instruction. An understanding of copyright and our ability and willingness to work with the law can help make these important endeavors successful.

OBJECTIVES OF THIS BOOK

The primary purpose of this book is to provide a basis for understanding and working with the copyright issues of central importance to education, librarianship, and scholarship. This book is centered on the law. It is not about licensing, nor does it include more than a general mention of the proposed Google Books settlement. Copyright law bestows automatic protection for printed works, software, art, websites, and nearly everything else we create and use in our teaching and research. The protection lasts for decades, and we can infringe the copyright with simple photocopying or elaborate digitizing and uploading.

Fortunately, copyright law includes a number of exceptions to owners' rights, such as fair use. Several other detailed provisions of the U.S. Copyright Act specifically benefit education and learning. These provisions allow library copying, permit performances and displays in classrooms or in distance learning, and sanction backup copies of computer software. This book will acquaint readers with the vital role that these exceptions play in the functioning of copyright and in the growth of knowledge. This book also offers strategies and techniques for reaping the benefits of these rights of use.

TAKING CONTROL

As professionals in the world of education and librarianship, we can enjoy the law's benefits only if we take control. We need to understand the rules of the copyright world. We must comprehend our rights as owners and as users. We ultimately need to identify alternatives that the law allows and make decisions about copyright that best advance our objectives as teachers, learners, and information professionals. If we do not manage copyright to our advantage, we will lose valuable opportunities for achieving our teaching and research missions. If we do not manage our own needs, someone else will make the decisions for us.

This book demonstrates that much of copyright law is within the reach of professionals with diverse backgrounds. Admittedly, some aspects of the law will be bewildering and occasionally unworkable. But most issues about ownership, publication, library services, and fair use are within our grasp, and we can make practical sense of them. Copyright does not have to be an annoying or threatening nuisance that merely burdens our work. With a fresh understanding of the law, it can actually support teachers and scholars who are striving to meet their goals each day.

PART I

The Reach of Copyright

Creative artworks are easily the stuff of copyright, but not all photographs of paintings are protectable. Nevertheless, the works of Van Gogh are surely in the public domain.

ONE

THE COPYRIGHT PATH

Changing Needs and Copyright Solutions

THE CHAPTERS OF this book are structured to provide a graceful and systematic walk through the principles and functioning of copyright law. Although the journey may be rough at times—thanks to a law that too often does not keep a straight path—the expedition should be intellectually engaging as well as practical. Indeed, working with copyright law in the context of applied situations is less of a quest for answers than it is a path that takes you toward a resolution, or at least a decision, about individual aspects of copyright. Consider one of the most common copyright questions: You, or a colleague, are working on a project that involves the reproduction or other use of a book, film, song, or other work created by someone else. The first copyright question is often simply phrased, "Is this fair use?" If you take the question at face value and go straight to analyzing fair use, you could find yourself on a steep and rutted road, edged with the thistles and thorns of a gray law.

In contrast, by reflecting on the entire copyright trail and planning the trip from the beginning, you might find various stops along the way that give you a better, more direct, and even easier answer than you would find by starting with fair use. You might determine:

- That the work in question is not protected by copyright at all. It may be a governmental work, or the copyright may have expired.
- That the use is not among the protected rights of the copyright owner. You might, for example, be making a private performance of music, while the owner has rights only with respect to public performances.
- That the intended use is within another statutory exception in the Copyright Act. If you can fit your use within one of the detailed provisions for classroom use, library copying, or backing up software, you will probably find a more satisfactory answer than you will with fair use.

Any one of those possibilities is a clearer and more secure answer than you will likely find with fair use. This book should accordingly help you see the issues and possibilities of copyright unfold systematically as they apply to your real needs. You should also see how the issues change with the growing innovation and complexity of education, research, and technology. This book is about law, but the real subject is teaching, research, innovation, and other spirited pursuits of educators and librarians. Yet because these pursuits constantly involve creating and using copyrighted works, legal issues steadily arise. The issues change and grow with each new variation. Change the materials you might be using, or change the method or circumstances of their use, and you may well encounter a different set of issues and possibly different outcomes under the law.

Notice that this book is exploring *issues* and not necessarily *problems*. Not all copyright questions are problems. In fact, some copyright questions are relatively easy, and many lead to good news. For example, copyright broadly permits some uses of work in the classroom, and it provides that all works eventually enter the public domain, where they may be freely used. Other questions are tougher, and not all will lead to a satisfactory conclusion. But anyone seeking to enjoy the benefits of the law will need to take a little time, learn a bit about the law, and make a determination about whether you are working within the terms and boundaries of the rules. Reading this book should be a great stride in that direction.

Let's start the journey. Throughout this book you will find a variety of cases, examples, and scenarios intended to reveal the practical application of copyright law in ways that are relevant to educators, librarians, researchers, and others. Before delving deeply into the chapters and details of the rest of the book, a familiar and evolving scenario can provide a meaningful introduction as well as a map through the upcoming chapters.

Paths present choices and obstacles.

TAKE ME TO THE MOVIES

Begin the scenario with simple and familiar facts. With each additional fact will come new questions about copyright, and the text boxes will highlight key points and lead you to other chapters in this book for more information and guidance.

SCENARIO A

You teach a college course on English literature, and you ask your students to buy and read the book *Pride and Prejudice*.

One of the curses of copyright is that you start to see issues everywhere. In even the simplest situation you have copyright questions—at this stage you only have questions, not problems. You are proposing nothing that will violate the law, but to get to that conclusion systematically and accurately, we have to sort through a few copyright issues.

Is the book protected by copyright?

- Chapter 2 makes clear that most original works are protectable under copyright.
- Chapter 4 surveys the law of *copyright duration,* and a book that was first published in 1813 is surely in the public domain.

If the work were still protected, would buying or reading a copy be a violation of copyright?

- Chapter 6 surveys the *rights of copyright owners,* and simply reading a book is not on the list. On the other hand, a copyright includes the *rights of distribution* of copies, so the bookstore may be infringing with each sale.
- Chapter 7 is an overview of *exceptions to the rights of owners*, and the *first sale doctrine* is a major limit on the distribution rights, enabling bookstores to sell copies and libraries to check out books and more.

SCENARIO B

To give your students a different perspective of the story, you would like to show the recent film version of *Pride and Prejudice* to the entire class.

Is the motion picture protected by copyright?

- Chapter 2 emphasizes that copyright *protects an extensive range of materials*, including text, sound recording, images, software, and movies.
- A version of the movie was released in 2005, and chapter 4 shows that it has *many years of copyright protection* still ahead. On the other hand, the 1940 version is likely still protected, but it could be in the *public domain* if the copyright owner did not comply with the formalities required at that time. Chapter 4 will take you step-by-step through that possibility.

Does showing the motion picture violate copyright?

- Chapter 6 itemizes the *rights of copyright owners*, and you may be making a *public performance* of the movie.

- Chapter 6 includes mention of Section 110(1) of the Copyright Act, a statute that broadly permits showing a film in the traditional classroom. You may find that a *specific copyright exception* is enormously important for your teaching.

Look at what is happening to our scenario. The simplest version is rich with issues and subissues. You are not going to jail and probably will not even get a nasty letter from a Hollywood lawyer. But to know with confidence that you are acting within the law, you need to be astute about copyright. To get the best "answers," you should follow a systematic path, starting at the beginning.

GOING DIGITAL

You do not want to take valuable class time to show the film in class, so you begin to explore new technologies and alternatives for making it available to students to view on their own time. Adding or changing the facts will usually give rise to new questions.

SCENARIO C

You would like to show the film, not in the ordinary classroom but through the course management system (such as Blackboard or Moodle). Students log on and the video is streamed to their computers at any location. Students have the advantage of setting their own schedule and being able to study the film more closely by reviewing and selecting scenes for closer study.

Does copyright law permit you to digitize, clip, and post some or all of a motion picture for your students to study? Actually, you have at least three possibilities for lawfully delivering the video clips.

- Chapter 6 notes the importance of Section 110(1) of the Copyright Act. Although it broadly allows *performances of works in the classroom,* it probably will not apply where you are making copies and posting them to a server.
- Chapter 12 examines Section 110(2), also known as the TEACH Act. If you can meet all of its requirements, this statute *permits use of "reasonable and limited" portions* of audiovisual works.
- *Fair use is a vital option*. Chapters 8 through 11 explore fair use in detail and suggest how it may apply, particularly to portions of works in a limited context.
- You might supplement the film clips with historical works, such as photographs and manuscripts. If these materials are *unpublished archival materials*, chapter 17 summarizes distinctive rules about protection, duration, and fair use.
- You might also focus on the film score and related musical works and recordings. Chapter 15 examines the copyright rules related to musical compositions and sound recordings.

You have studied the TEACH Act and fair use, and you conclude that you are simply not able to fit your use of the copyrighted film into any of these exceptions. Do you still have any choices?

- One obvious choice is to secure permission from the copyright owner. Chapter 18 offers pointers for *locating owners and securing permissions*. Sometimes permission is the most realistic or even necessary alternative.

- Chapter 18 also suggests as a strategy that you might need to *rethink your plans*. You might have an exact plan or project in mind, but in light of copyright considerations, you may need to reconsider the materials you are using and exactly how you are using them.

SCENARIO D

Perhaps you have studied your needs and the applicable copyright law, and you confidently conclude that you are within fair use or the TEACH Act for your use of the film. You put the DVD into your computer in order to copy selected clips, only to discover that the disk is embedded with a copy protection code that prevents making the clips.

You find on the Internet that you can download software that allows you to bypass the protection code and make the copies. If your use of the film is lawful and within fair use, are you allowed to crack the protection code?

- Chapter 16 examines the complex and problematic law barring the *circumvention of technological protection measures*. You may be running afoul of that law.
- Chapter 16 also surveys *exceptions to the anticircumvention law*. Unfortunately, the exceptions are tightly limited, so you should study the details carefully. A new regulatory exception from the Library of Congress opens an important possibility.

THE LIBRARY'S ROLE

The libraries at your college or university, as well as the public library in your neighborhood, provide essential support for your research and instructional planning. The film versions of *Pride and Prejudice* that you plan to use are from the university library's collections. You also find journal articles, photographs, music, and many other works that you would like to make available to your students. For many of these materials, you probably need to revisit all the foregoing questions about copyright protection, the public domain, classroom performance, the TEACH Act, fair use, and permissions. The library is also willing to provide various services that often involve making copies and delivering content to you or to your students. When the library provides services, the librarians need to consider a few additional copyright issues.

SCENARIO E

The librarians would like to make copies of some of the materials that you need for teaching, research, and other academic work.

Is the library allowed to make copies of various works and give them to you for your teaching and research?

- Chapter 13 details the conditions under which a *library may make copies* from the collection pursuant to Section 108 of the Copyright Act. Section 108, however, does not apply to all types of works, so the library may still need to rely on fair use or permissions when it copies some materials.

- Your local library may not have all of the materials you need; they will need to request copies from another library. Chapter 13 specifies the conditions under which the library may receive copies of some materials from another library as part of *interlibrary loan arrangements*.

Some of the materials in question are no longer on the market or are already damaged. One of the films is on a VHS tape; VHS players are hard to find today, and the tape quality degrades with each use. Can the library make copies of these materials?

- Chapter 13 also examines the provisions of Section 108 that allow a library to make copies of *unpublished works for purposes of preservation or security*. This provision generally applies to manuscripts, photographs, and any other work that is not published.
- Section 108 also allows a library to make copies of *published works that may be damaged, deteriorating, lost, or stolen*. These statutes have various conditions and requirements, but they offer important opportunities. If the VHS movie is no longer on the market, the library may be able to make up to three copies of it. Chapter 13 outlines the details.
- Section 108 further permits a library to make copies of works if the *format has become obsolete*. The VHS format may not be obsolete today, but it will be someday soon. Again, chapter 13 specifies the circumstances when a library may make the replacement copies.

BECOMING AN AUTHOR

You have become fascinated by these copyright issues (who couldn't?), and you decide to do some additional research and write a journal article on the quirks and challenges of copyright in the academic setting. You become known as something of a copyright expert around campus and get appointed to chair the policy-making committee for the library and the university. You write a document outlining the policy of your institution on fair use issues.

SCENARIO F

You are the sole author of the journal article, and it has been accepted for publication in your first choice of journals. Congratulations!

But who owns the copyright in the article?

- Chapter 5 lays out the general rule that the author of the original work is the *owner of the copyright*.
- That chapter examines the doctrine of *work made for hire*, its application to academic work, and the importance of university policies.
- Chapter 5 also explores *publication agreements* and the possibility that they may include a transfer of the copyright. The copyright may have been yours initially, but be careful about what you sign.
- That same chapter further raises the prospect of *open access* and alternatives for publication and copyright, such as *Creative Commons*.
- Regardless of who owns the copyright, the publication agreement can *clarify the specific rights of use* that you might retain. Negotiate and draft the agreement carefully!

You chaired the committee and drafted much of the policy on fair use, but several of your colleagues had a hand in writing portions of it. Who owns the copyright in your institutional policy?

- Chapter 2 examines the *broad scope of copyright*. Even a copyright policy issued by a library or college is most likely copyrightable.
- Under the general rule in chapter 5 you and your colleagues may be the copyright owners. Together you may have a *joint copyright in the document*.
- Preparing the policy was likely one of you job assignments, and as such it is likely a *work made for hire*. Chapter 5 explores the significance of that determination.
- Chapter 5 surveys *options for copyright management*, such as Creative Commons, and CC may be a good option for handling and sharing the copyright in an institutional policy or other document.

STRATEGIES FOR COPYRIGHT DECISIONS

Finding the right trail through the law is clearly essential to any successful application of copyright. In addition to learning the law, however, you also need to develop an awareness of strategies and a process of decision making in an environment that is thoroughly affected by copyright. Copyright is, after all, the law. It comes with mandates and opportunities, rights and responsibilities. In the spirit of this book, most of your decisions should be centered on making a proper—and sometimes creative—application of copyright in furtherance of teaching, research, and library services. One cannot deny, however, that copyright decisions also raise risks and can lead to some (potentially) scary penalties.

Think back to some of the scenarios examined above. You want to clip excerpts from a motion picture and post them to your course management system for students. Consider just the question of whether you are acting within fair use. Chapters 8 through 11 provide considerable substance of the law and examples for thinking about the factors of fair use. But in addition to the substance of the law is the process of decision making. You are one person, holding your job and executing your duties, on the staff of a library, college, or university. Is copyright your responsibility? Are you the right person to make the decision about fair use?

One way to think about those questions stems from one basic legal principle about copyright: the person who makes the copies or other uses of a work is the first person responsible for any infringement that might result. In other words, if you are the one who operates the computer and does the clipping and uploading, you have the immediate responsibility and liability. That would tend to place the decision squarely in your hands.

However, if you are taking action as part of your duties as a teacher, librarian, or other members of the institution, then in almost any typical situation, the liability will be shared upstream with the organization. The question then becomes: Who is responsible for making legal decisions for the organization? Put that way, you might start looking up the corporate chart to find the senior officer (or is that already you?) or the connection out to the corporate counsel. You could easily find one of these situations:

No lawyer in sight. In many colleges, universities, libraries, and other organizations, no one is available to help with a lawyer's view of copyright. Either your organization has no attorney on staff, or the lawyer is not well versed in copyright or is not able to handle multitudes of recurring fair use dilemmas.

Legal help today, but not every day. You may be among the fortunate few with direct access to an attorney, but the access is limited and infrequent. Often a good lawyer will in fact not make every decision. A lawyer might shape the general principles and give guidance for different types of situations, but the daily decisions about individual situations often come back to you and your colleagues. The attorney's involvement may give you important reinforcement and protection, but you still need to make the final judgments. Chapter 14 of this book should give you some reassurance about your decisions, if you act responsibly and in good faith.

Building a support team. You are hardly alone in your search for copyright advice. Rather than wait for legal support, you may in the meantime find colleagues who have dealt with similar questions. You may find good help from the insights and experiences of directors, department chairs, deans, or other colleagues who have the authority to oversee business decisions or who have experience working with copyright. You might also simply want the support of colleagues and supervisors, but you might still be the one person who knows and cares the most about copyright. Sometimes you need to take the lead as you educate and build a team.

Regardless of which situation you confront, you cannot entirely avoid having a role in copyright decisions. Even complete deference to others is itself a decision. Moreover, if you are the one pushing the buttons on the machine and making the copies, you need to take good care of your own interests. You are, after all, responsible, even if your library or university shares the responsibility with you. Like a soldier on the front line, you might get orders, but in a calm moment you have to decide if the orders are right.

What goes into your decision about copyright? This book will provide a wide range of insights about that question. Naturally you need to base decisions on an accurate and current understanding of the law. The best decisions about copyright also consider much more than just law. They take into account the risks. Is my project limited to my classroom, or will it be on the Web for all to see? Am I using obscure photos from the 1930s or recent professional works with identified photographers? Multitudes of images are available from Flickr and other sources with generous Creative Commons licensing. A good decision contemplates alternatives. If you want the film clips because they are great scenes of London, then perhaps you should look for other clips that might be in the public domain or easily licensed. If you want all your students to study the entire film and it is easily available to buy or rent, then maybe you should expect all your students to acquire the DVD.

You are not avoiding copyright. You cannot. But mix this fact of life into your strategy: you have only a finite number of hours in the day. You cannot make every decision, review every situation, and evaluate every risk. You need to save your "copyright energy" for the situations that demand attention. Copyright must be addressed to implement programs of library services, digitization of collections, innovative teaching, and the management of our scholarship and publication. These are the kinds of pursuit that merit attention, where a careful, informed, and strategic approach to copyright can ultimately advance the needs of copyright owners as well as the researchers, teachers, students, and members of the public who will benefit from access to a wider range of information resources. This book is intended to send you along that path and toward the goal of constructive stewardship and use of copyrighted works.

THE SCOPE OF PROTECTABLE WORKS

KEY POINTS

- A work must be both "original" and "fixed in any tangible medium of expression" to be copyrightable.
- Originality requires a minimum amount of creativity and that the work originated with the author.
- A work is fixed if it is embodied in some stable form for more than a brief duration.
- A *tangible medium* allows a work to be perceived or communicated.

THE U.S. COPYRIGHT ACT sets forth in Section 102(a) that copyright protection vests immediately and automatically upon the creation of "original works of authorship" that are "fixed in any tangible medium of expression."[1]

ORIGINALITY

The notion of originality in copyright law has two components. Fundamentally, *originality* means that the work came from your inspiration and that you did not copy it from another source. Second, originality implies some degree of creativity. Originality is easily found in new writings, musical works, artwork, photography, and computer programming. You may also find originality in a new arrangement of existing facts or information. Scientific findings or facts may not themselves be copyrightable, but their arrangement on a table or their presentation in text may be protectable expression.

In all these examples, the work is original if you did not copy it from another source, even if your photograph happens to look much like someone else's view of the Grand Canyon. You stood at the same lookout point and snapped a beautiful picture. The similarity is coincidence and circumstance, not copying. Based upon this principle, typically the content and layout of a website is easily copyrightable. So is everyone's Facebook page. A typical Facebook wall is an array of text, images, advertisements, and more. Each piece—from the snarkiest comments to the most elaborate program applications—is someone's creative work and most assuredly copyrightable.

Copyright protection can also apply to a new work that is built on an existing work, but any new copyright protection will apply only to the added

creativity. For example, Homer's epic poems may never have had any legal protection under the laws of ancient Greece, but a new translation is an *original work* subject to new copyright protection as a *derivative work*. A derivative work uses the original work—for example *The Iliad*—and creates a new work from it. In addition to translations, other familiar derivatives include a motion picture made from a novel, a stage play based on a movie, and songs based on poetry. The possibilities are legion. When a motion picture studio produces a film based on a Jane Austen book, the original book remains in the public domain, but the studio holds the copyright for its new dialogue, visuals, score, and other contributions to the movie.

YOUR FACEBOOK WALL may be filled with copyrighted pieces, but sorting out the copyright ownership is another matter. Facts, such as names and birth dates, are not protectable. Facebook Inc. surely holds rights in the layout, standard elements, and programming of each person's site. You may hold rights in your updates and photos, while your FBFs have the rights in their scribbles on your wall. The limits of protection and the rules of joint ownership are in **chapters 5 and 6**.

CREATIVITY AND ORIGINALITY

How much originality is required? A work must embody only some "minimum amount of creativity" to be considered original. Courts have held that almost any spark of creativity beyond the "trivial" will constitute sufficient originality. The U.S. Supreme Court ruled in 1991 that a "garden-variety," alphabetical, white pages telephone book lacks the requisite minimum creativity for copyright protection.[2] Cases since 1991 have affirmed this ruling, but tested its limits. For example, a yellow pages listing may have sufficient originality resulting from its categorization of information into subject headings.[3]

Technology and innovation routinely test the applicability of copyright law. Courts in recent decades have addressed the copyrightability of computer software and bootleg recordings. Long ago, the Supreme Court faced similar questions about a photograph of Oscar Wilde. The Supreme Court held that the picture met the standard of creativity because the photographer chose the camera, equipment, lighting, angles, and placement of the camera when shooting the picture.[4]

IN A SIMPLE but pointed assertion of a standard for copyrightability, the Supreme Court declared, "[T]here is nothing remotely creative about arranging names alphabetically in a white pages directory." The law may not require much creativity, but still, some works will not pass the test.

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 363 (1991).

What if the photograph encompasses little choice about the content and elements? A federal court ruled recently that a direct, accurate photographic reproduction of a two-dimensional artwork lacks sufficient creativity to be original.[5] The work of art may still be creative and protected by copyright, but not the simple and direct photographic reproduction. Unlike the Oscar Wilde case, the photograph of artwork was meant to be a reproduction and did not necessarily include creative lighting, coloring, or angles, or capture more than just the work of art itself. Similarly, another court held that digital models of automobiles that were meant to be exact reproductions were also not copyrightable.[6] These recent cases also stand for the general

THE SUPREME COURT noted that the photograph of Wilde was from the photographer's "own original mental conception" as demonstrated "by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression. . . ."

Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884).

proposition that copyright law protects originality, not hard work. Copyright does not grant protection for the investment of labor, equipment, and know-how—unless the result is an original work with at least a minimum amount of creativity.

FIXED IN A TANGIBLE MEDIUM

For an "original work of authorship" to be eligible for copyright protection, it must also be fixed in some physical form capable of identification that exists for more than a "transitory duration."[7] Examples of fixed works might include scribbles on paper, recordings of music, paintings on canvas, and documents on web servers. A snapshot on film or in a digital camera is fixed. Sand castles, ice sculptures, and spray-painted graffiti all can qualify as fixed in tangible media.

IN HOLDING THAT photographic reproductions of art are not original, the court reiterated the principle that "slavish copying" does not qualify for copyright protection, "although doubtless requiring technical skill and effort."

Bridgeman Art Library, Ltd. v. Corel Corporation, 36 F.Supp.2d 191, 197 (S.D.N.Y. 1999).

The fixed form does not have to be readable by the human eye, as long as the work can be perceived either directly or by a machine or device, such as a computer or projector.[8] Therefore, programming and substantive content stored on floppy disks or CDs are fixed, as long as the works can be read with the use of a machine.

Ancient writings at Newspaper Rock State Historic Monument, Utah. Original and fixed works?

EXPANSION OF COPYRIGHTABILITY

The "tangible medium" requirement expands copyright protection from traditional writings and pictures into the realm of video, sound recordings, computer disks, and Internet communications—any format now known or to be later developed.[9] If you can see it, read it, watch it, or hear it—with or without the use of a computer, projector, or other machine—the work is likely eligible for copyright protection. Harder questions surround works that exist in a particular form for a seemingly transitory duration. For example, are materials stored only in the random-access memory (RAM) of a computer sufficiently fixed? A fleeting appearance in RAM may not be enough. A court recently determined that a work that is perceptible for slightly more than one second is not fixed.[10] By contrast, if that same work were saved, stored, or printed, it easily would fall within the purview of copyright.

Given the wide range of media and nearly boundless scope of originality, a vast array of works is brought under copyright protection. In addition, the statutes list various works that are generally protectable. Section 102(a) of the Copyright Act specifies that copyrightable materials can include

AN IMPORTANT COURT case held that software programming loaded into RAM could be sufficiently stable to qualify as a copy for purposes of establishing an infringement. The concept of a work in a stable medium for purposes of copying is similar to the standard used to determine if the work is fixed in the first place to establish copyright protection. In this case, the work remained in RAM until the system was shut down and was not merely fleeting.

MAI Systems Corporation. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

- Literary works
- Musical works, including any accompanying words
- Dramatic works, including any accompanying music
- Pantomimes and choreographic works
- Pictorial, graphic, and sculptural works
- Motion pictures and other audiovisual works
- Sound recordings
- Architectural works[11]

These categories are illustrative and not exhaustive of all possibilities. Because the categories are construed liberally, literary works can range from novels to computer programs. The category of pictorial or graphic works can include maps, charts, and other visual imagery.[12]

Because of the law's vast reach, the important question may not be what *is* copyrightable, but what is *not* copyrightable. The next chapter identifies various types of works that are outside the reach of copyright protection.

NOTES

1. *U.S. Copyright Act*, 17 *U.S.C.* § 102(a).
2. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991).
3. *BellSouth Advertising & Publishing Corporation v. Donnelley Information Publishing, Inc.*, 999 F.2d 1436 (11th Cir. 1993). Another court upheld the validity of using contracts to license directory content and to create legal restrictions on the use of data. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).
4. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); Photo by Napoleon Sarony. Sarony 18 [1882]. Photo courtesy of University of California, Los Angeles. Available at www.humnet.ucla.edu/humnet/clarklib/wildphot/sarony.htm.
5. *Bridgeman Art Library, Ltd. v. Corel Corporation*, 36 F.Supp.2d 191 (S.D.N.Y. 1999).
6. *Meshwerks, Inc. v. Toyota Motor Sales USA*, 528 F.3d 1258 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 1006 (2009).
7. The word *fixed*, as well as many other terms, is defined in the copyright statutes. *U.S. Copyright Act*, 17 *U.S.C.* § 101.
8. *U.S. Copyright Act*, 17 *U.S.C.* § 102(a).
9. *U.S. Copyright Act*, 17 *U.S.C.* § 102(a).
10. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 2890 (2009).
11. *U.S. Copyright Act*, 17 *U.S.C.* § 102(a).
12. *U.S. Copyright Act*, 17 *U.S.C.* § 101.

THREE

WORKS WITHOUT COPYRIGHT PROTECTION

KEY POINTS

- Ideas and facts are not protected by copyright.
- Works of the U.S. government are not copyrightable, but works created by state or local governments may be protected.
- Other specific types of works, such as databases, may be outside of copyright protection, but they may have limited protection under other laws.
- Once a copyright has expired, the work is no longer protected by copyright law and enters the public domain.

WHILE COPYRIGHT PROTECTION applies broadly to expressions that are original and fixed, several categories of works are specifically outside the boundaries of the law. These works are in the public domain, meaning they are wholly without copyright protection and are freely available for use without copyright restrictions. Sometimes copyright does not apply for practical reasons. For example, an oral presentation, if not fixed or otherwise recorded, may be difficult to prove and protect, so the law does not reach it. Sometimes copyright law does not apply for important policy reasons. For example, ideas and theories are not protectable.[1] Ideas can evolve, earn Nobel Prizes, and change the world, but ideas are also meant to be shared and cultivated. Locking up ideas with legal protection can be harmful to the public interest and the expansion of knowledge.

On the other hand, the law of the public domain can get blurry. If you tell a friend your great idea for a book or scientific breakthrough and she uses only the idea in her own work, you have no copyright claim. If you show that same friend your draft manuscript about the idea and she uses the same words in her own study, she might have tread on your copyright. Copyright does not protect ideas, but it does protect your words or your expression of the ideas. Your friend needs to write her own book, with her own original expression. If we look beyond copyright, things get even fuzzier. Borrowing your ideas may sometimes be ethically unsound. If your ideas are part of your business plan, borrowing them may violate other laws, such as trade secrecy or misappropriation.[2] But copyright protection simply does not extend to ideas.

Ultimately, many works are without copyright protection for good reason. A leading objective of copyright is to encourage creativity and the dissemination of new works. Sometimes limiting or denying rights also serves that same purpose. If ideas were protectable, we might be left with only one version of a

Recall from **chapter 2** that for works to be afforded copyright protection, they must be original works of authorship and fixed in a tangible medium of expression.

U.S. Copyright Act, 17 *U.S.C.* § 102(a)

story, one software package for each need, or only one work of art that expresses beauty or angst. Sometimes denying rights can better foster creativity and render the greatest benefit for individuals and for society in general.

FACTS AND DISCOVERIES

Facts and discoveries are also not protectable by copyright.[3] Facts cannot, by definition, be original as the law requires. You may conduct years of creative scientific study to discover a *fact* about the universe, but the fact itself is not *your* creative work. Denying legal protection for facts also assures that everyone can build on existing knowledge and share information.

On the other hand, you may have copyright protection for your original *compilations of facts* or your *writings about the facts and discoveries*.[4] For example, after years of research to find facts, you write a journal article about your research findings. The sentences and paragraphs are most surely creative, original, and protectable. Suppose your article also includes several tables that organize the facts in a manner that is meaningful to your readers. For example, you might chart the boiling point of water, the rate of urban crime, or the election of presidents. If the chart is merely a presentation of facts, likely no protection is available. If the chart, however, is a creative display of information, with original organization, depiction, and explanation, the chart is likely within the scope of copyright protection.

THE U.S. SUPREME Court made clear that copyright protection depends on creativity, but the measure of creativity is modest at best: "[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."

Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 345 (1991).

What exactly is a *fact*? A book about rare coins is surely protectable, but the stated value of each coin could be a fact about market prices—or not. If the price is simply a recent actual selling price, it is likely a fact. On the other hand, one court has ruled that wholesale prices for collectible coins based on multivariable judgment calls and the appraiser's "best guess" are creative works protectable under copyright.[5] Similarly, historical interpretations may be creative fiction, or they may be presented as fact. The manner in which they are conveyed by the author will likely determine whether the court will treat them as unprotected fact or not.[6]

COMPILATIONS AND DATABASES

Although facts themselves are not protected, a collection of facts may be. To the extent that you have selected, arranged, or coordinated the facts in some original manner, you can claim a *compilation copyright* in the work. Still, the facts are not your intellectual property. Another writer can extract the facts and include them in a new study, but if she copies your original expression of those facts, she is stepping into the realm of copyright.

Real examples of compilation copyrights are common, and the pressure for legal protection is profound. For example, many companies create, publish, and market bibliographies and other compilations of information. Individual author names, article titles, and the like are not protected under copyright,[7] but if the data are arranged in some original manner, the resulting database can have copyright protection. A single issue of a standard academic journal can illustrate the point. An editor may select your article for publication and arrange it with other writings into a new journal issue. You may still hold the copyright for

your individual work, but the editor can hold a copyright in the compilation of the overall journal issue.[8]

The journal—like any other compilation or database—has copyright protection only if it is original in its selection, arrangement, or coordination of data elements. Selecting and organizing articles in a journal may entail some originality; an editor selects articles from multiple submissions and organizes them into a logical sequence within the journal issue. By contrast, gathering data and listing it alphabetically or chronologically, or just uploading it in no order into a computer, often involves no creativity—the author is not making an original arrangement or necessarily selecting certain information for the compilation.

YOU MIGHT WRITE poetry in your spare time. You can have copyright protection for each poem. After some years of writing, you gather the poems, arrange them into a logical or interesting order, and publish the collection as a book. You can have an additional copyright in the original compilation. You can also have a compilation copyright if you gather the poems of other authors and assemble them into one original collection.

WHILE DEDICATED LAW on database protection has not taken hold in the United States, it has become well established in the European Union. Pursuant to a 1996 directive, all twenty-seven countries of the E.U. must enact legal protection for databases that result from a "substantial investment" in their development. The protection is generally limited to E.U. nationals, and it lasts for fifteen years. If the database is substantially changed, the term of protection can begin anew.

Council Directive 96/9/EC, 1996 O.J. (L 77/20).

Without creativity, no copyright protection applies. The lack of protection for many databases is a great concern for companies that invest significantly to develop and market such works. In recent years, Congress considered legislation that would establish a new form of legal protection for data compilations, but none of the bills was enacted.[9] Many educators and librarians cautioned against these bills, arguing that such a law would further restrain access to information. Meanwhile, many developers of databases have relied on licenses and contracts in an effort to impose some level of protection or control over their products.

All these examples underscore the need to distinguish between various elements of a total work, and to establish carefully whether each element is copyrightable. Some pieces may be in the public domain. Some components of a work may be separately copyrighted and held by different owners. Sometimes the distinction is fairly easy, such as the difference between the article and the journal. In other instances, the legal protection for each element is less clear, such as the difference between facts and the compilation of data.

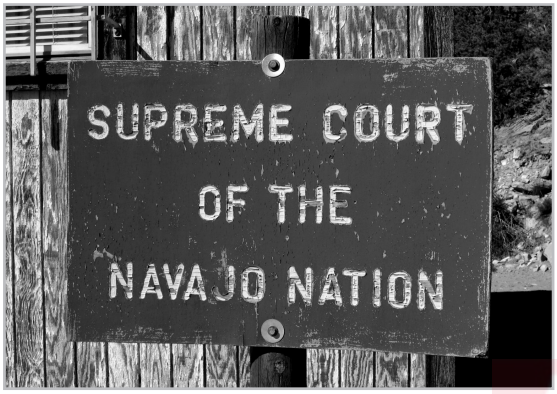
WORKS OF THE U.S. GOVERNMENT

The United States government produces numerous works that may be original and fixed, but that are still not copyrightable. Section 105 of the U.S. Copyright Act specifically prohibits copyright protection for works of the federal government.[10] Therefore, reports written by members of Congress and employees of federal agencies, as part of their official duties, are not copyrightable. Decisions from federal courts and statutes from Congress are not protected. The same holds true for presidential speeches, pamphlets from the National Park Service, and websites developed by federal agencies.[11]

Even this broad rule of copyright is not as simple as it seems. Projects written by non-government officials with federal funding are eligible for copyright. For example, your research may be funded by government grants; that fact does not by itself put your work in

the public domain. A government-funded project is not necessarily a "work of the United States government."

Similarly, just because a work is published by the federal government does not mean that it is a government work and in the public domain. A publication from the Smithsonian Institution, for example, may well have been prepared by non-government authors and is therefore protectable by copyright. A brochure from the National Park Service may include copyrighted photographs licensed from an independent photographer. You need to examine each item closely, and inquire with the author or the issuing agency if you are in doubt.



Works of the U.S. government—but not of all governments—are in the public domain.

A BILL INTRODUCED in California several years ago would have dedicated many state-owned copyrights to the public domain. However, the legislature never enacted the provision. Evidencing the complexity of the issues, a series of amendments to the bill carved out a long list of types of state works that could remain subject to copyright protection.

2003 California Assembly Bill No. 1616 (2003–2004) (introduced on Feb. 21, 2003, amended Feb. 2, 2004).

Keep in mind that this exemption applies only to works of the United States federal government. Works created by state and local governments are protected by copyright unless those governments have expressly waived their claims of copyright by statute. Some states have gone the other direction. The Idaho legislature has provided a blunt and direct declaration about copyright for its statutes: "The Idaho Code is the property of the state of Idaho, and the state of Idaho and the taxpayers shall be deemed to have a copyright on the Idaho Code."[12] Inquire with the appropriate state agency about possible copyright protection for its materials.

DESPITE THE BLUNT assertion in Idaho law, copyright protection for state statutes and court decisions has been disputed for many years. An initiative to post Oregon legal materials online at Public.Resource.Org led to an exchange of frank and confrontational letters with state officials. In June 2008 a committee of the state legislature adopted a resolution agreeing not to assert copyright in the Oregon statutes. A variety of materials about this important development are posted at www.public.resource.org/oregon.gov/.

OUTSIDE THE SCOPE OF COPYRIGHT

Several additional categories of material are generally not eligible for statutory copyright protection:

ADDITIONAL WORKS MAY be in the public domain for a variety of reasons. An author may voluntarily choose to dedicate a work to the public domain. The law previously recognized a concept of "abandonment" of a copyright. In other cases, Congress has simply chosen not to extend copyright to all works. For example, sound recordings are protectable today, but U.S. recordings made before Congress changed the law, effective Feb. 15, 1972, are without copyright protection. Chapter 15 offers much more information about copyright and sound recordings.

- Works that have not been fixed in a tangible form of expression. Examples include: choreographic works that have not been noted or recorded; improvisational speeches or performances that have not been written or recorded.
- Titles, names, short phrases, and slogans, as well as familiar symbols or designs—although the law of trademark may offer some protection.[13]
- Mere variations of typographical design, lettering, or coloring; mere listings of ingredients, as in recipes or contents.[14]
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices.[15] On the other hand, patent or trade secret law may offer protection for some of these works.
- Works consisting entirely of information that is common property and containing no original authorship. Examples include standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources.

THE CONCEPT OF public domain applies to a work that has no copyright protection. The label is often mistakenly applied to works that are publicly available, such as on websites, without any apparent condition on access or use. Most materials that are freely available on the Internet are in fact protected by copyright, but the owners have simply permitted them to be openly available. Even open access works are usually copyrighted, but the owners again have chosen to make them publicly available. They are not necessarily in the public domain.

EXPIRED COPYRIGHTS

Another important source of the public domain is the expiration of copyright for any work. Copyrights may last a long time, but they do eventually expire. Works that were protected in the past may have lost their copyright due to the age of the work. The copyright to works from before 1989 may also have expired due to failure to comply with formalities that copyright law once required. The next chapter of this book takes a close look at the duration of copyright protection and the process of identifying works in the public domain.

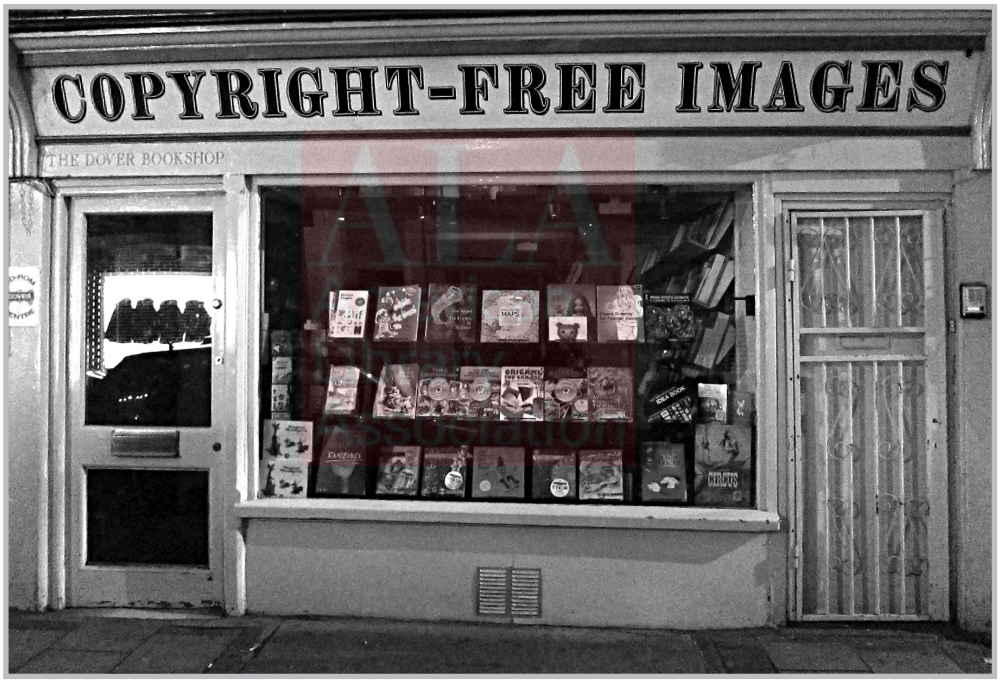
NOTES

1. *U.S. Copyright Act*, 17 *U.S.C.* § 102(b).
2. For general information regarding trade secrets, one of the leading treatises is *Milgrim on Trade Secrets* (New York: Matthew Bender & Co., 2009). For examples of possible misappropriation, see *NXIVM Corporation v. The Ross Institute*, 364 F.3d 471 (2d Cir. 2004); *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004); and *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000).

3. *U.S. Copyright Act*, 17 *U.S.C.* § 102(b).
4. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991); *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77 (2d Cir.), *cert. denied*, 543 U.S. 1039 (2004).
5. *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999).
6. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).
7. *Code of Federal Regulations*, title 37, vol. 1, sec. 202.1.
8. Section 201(c) of the U.S. Copyright Act states: "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole."
9. For a good overview of the various approaches to database legislation in the United States and internationally, see Michael Freno, "Database Protection: Resolving the U.S. Database Dilemma with an Eye Toward International Protection," *Cornell International Law Journal* 34 (2001): 165–225.
10. *U.S. Copyright Act*, 17 *U.S.C.* § 105.
11. The U.S. Copyright Act defines a *work of the United States Government* as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." *U.S. Copyright Act*, 17 *U.S.C.* § 101. For an example of the application of this rule to court opinions, see *Matthew Bender & Company, Inc. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999).
12. *Idaho Code*, sec. 9-350 (Matthew Bender & Company, Inc., 2004).
13. *Code of Federal Regulations*, title 37, vol. 1, sec. 202.1.
14. Ibid.
15. *U.S. Copyright Act*, 17 *U.S.C.* § 102(b).

PART II

Rights of Ownership



Works in the public domain may be used without the limits and restrictions of copyright law. The public domain is a source of information and learning, as well as a source for enterprising businesses.

FOUR

DURATION AND FORMALITIES

How Long Do Copyrights Last?

KEY POINTS

- Current law no longer requires the formalities of notice or registration.
- Most new works are protected for the life of the author plus seventy years.
- Works published before 1978 were required to have a copyright notice in order to gain protection.
- Works published between 1923 and 1978 could have protection for up to ninety-five years.
- Many foreign works that were in the public domain have had copyrights restored.

COPYRIGHTS DO NOT last forever. They may last a long time, or they may expire in relatively short order. Either way, the question of copyright "duration" can be both enormously controversial and unduly complicated. The duration of copyright is important because it signals when a work will enter the public domain and become available for use, free of the limits and restrictions of copyright law. The number of years of protection a work receives under the law can depend on many facts and variables.

Under today's law, copyright duration for current works is relatively uncomplicated. Copyright in most new works lasts throughout the author's life, plus seventy more years.[1] These rights today automatically vest for the full term without the need to undertake any processes or procedures.[2] For works created before 1978, however, copyright duration is inextricably dependent on the *formalities* of copyright notice, registration, and renewal. Without full compliance with these procedures, the copyright in early works may have lapsed and the work entered the public domain. This chapter will summarize and attempt to make practical sense of the law of copyright duration.

ELIMINATION OF FORMALITIES

American copyright law has changed in many respects through recent decades, but one of the most important changes has been the elimination of formalities. Under current law, the formalities of notice and registration are not prerequisites to legal protection. Copyright vests automatically as soon as you create an original work that is fixed in a tangible medium.[3] You receive the protection whether you want it or not. You need not do anything to get copyright for a new

work—other than create an eligible work. This state of the law imposes instant copyright protection on the vast range of materials in libraries, on the Internet, in file drawers, and in museums. Consequently, nearly every person in the country today is a copyright owner.

WHY DID CONGRESS deliberately remove all formalities? The answer lies in international law. In March 1989, the United States officially joined the Berne Convention, a multinational agreement on copyright law. The Berne Convention was already more than a century old, and it prohibits formalities as a condition to copyright protection. To join Berne, U.S. law had to drop formalities for new works—as most countries already had done.

Berne Convention for the Protection of Library & Artistic Works Implementation Act, Public Law 100-568, *U.S. Statutes at Large* 102 (1988): 2853, 2858.

Before 1989 Congress required authors to follow certain formalities as a prerequisite to protection. In incremental steps, Congress changed and ultimately dropped those requirements. The earliest law, in 1790, required registration of new works with the federal government.[4] That provision disappeared early in the next century.[5] Surviving through much of American history was the requirement that publications bear a formal copyright notice. With the 1976 Copyright Act, however, Congress began to loosen that requirement. Although the notice was still required, authors could fix or remedy a missing or defective notice.[6] As of March 1, 1989, Congress finally dropped the notice requirement altogether. Today, omitting the notice or using an incorrect notice no longer places the work in the public domain. Rather, a newly created work—whether published or not—enjoys instant protection.

Even though the notice is not required, the Digital Millennium Copyright Act (DMCA) created a new federal offense for the removal, under some circumstances, of "copyright management information," which is defined to include the copyright notice as well as a wide variety of other identifying information. *U.S. Copyright Act*, 17 *U.S.C.* § 1202. The DMCA and copyright management information are addressed in **chapter 6**.

Although the rules for new works became simpler, the rules for early works remain cumbersome. In addition to the notice requirement, copyrights in works published before 1978 also had to be renewed twenty-eight years after first publication. Renewal does not apply to post-1978 works at all. In 1992 Congress added another wrinkle by dropping the need to seek renewal for earlier works.[7] The older copyrights are now renewed automatically. These historical developments have profound implications for evaluating today whether a work is protected by copyright—and determining the years of copyright duration each work receives.

This chapter will organize the discussion of formalities and duration in a chronological and pragmatic context, centered especially on the momentous change in the law that took effect in 1978. This chapter will also focus on published works. Special rules apply to unpublished works, and they are addressed more fully in chapter 17.

COPYRIGHT DURATION FOR WORKS CREATED IN OR AFTER 1978

The modern rule of copyright protection is relatively simple, at least for most common needs: copyright protection applies automatically when the author fixes his or her original work in a tangible medium; the copyright protection for most works lasts for the life of the author, plus seventy more years.[8] Registering the work and placing a copyright notice on it are no longer required to receive copyright protection for the full term.

Works that are made *for hire* also receive automatic protection, but the duration of copyright is sharply different. A work made for hire has protection for the *shorter* of either 120 years from creation of the work, or ninety-five years from its publication.[9] As examined more fully in chapter 5, the author of these works is the employer, which may be a corporation or other legal entity. Such an author may never die, so duration based on a lifetime makes little sense. The law instead applies a determinate number of years.

For creators of new works, these rules are fairly easy to apply, and they are extraordinarily generous. For users of works, however, the absence of formalities no longer indicates whether a work is or is not protected. Users simply need to realize that most modern works are in fact protected with or without notice and registration. Without full information about the origin of a work, however, a user may not be able to resolve the question of copyright duration with certainty. When exactly was it created? Was it made by someone as an employee acting for hire? The facts may be elusive.

LOOKING FOR MORE information about registration or searching registration records? The best place to start is at the website of the U.S. Copyright Office: www.copyright.gov. Searches of early registrations and renewals are becoming easier as more information goes online. Google has recently digitized the Catalog of Copyright Entries, easing the search of records from 1923 to 1978. See www.books.google.com/googlebooks/copyrightsearch.html.

WHAT EXACTLY IS a *copyright notice*? Here are some familiar forms:

© 2011, Jane Smith

Copyright 1890, Mark Twain

Copyr. 1928, Walt Disney Co.

For owners as well as users, notices and registration can still be a good idea and offer some realistic benefits. The copyright notice is a helpful clue for users, indicating the date of origin and the name of the copyright claimant. Similarly, registration records are public, allowing anyone investigating a work to find helpful information about the work and the author. Formalities also provide important legal benefits to copyright owners.[10] The law offers a few critical incentives for owners to take those steps, even though they are not mandatory. More information about the practical implications of formalities is included at the end of this chapter and in chapter 14.

COPYRIGHT DURATION FOR WORKS PUBLISHED BEFORE 1978

Before 1978, the rigorous rules demanding a precise notice on all publications had the result of placing many works instantly in the public domain. Copyright owners also sometimes overlooked—whether intentionally or accidentally—the need to renew their copyrights after twenty-eight years. This failure to renew meant the copyright could lapse.

These rules can be nettlesome when investigating the copyright status of early works. Consider a researcher wanting to know if a publication from, say, 1940 is in the public domain. The researcher needs to locate and inspect original, published versions of the work for a proper notice. Absent the notice, the work entered into the public domain upon publication. On the other hand, if the work had been published with the proper notice, then the clock started ticking on the duration of copyright protection.[11]

How long did the clock tick? The law before 1978 granted two sequential terms of copyright protection for publications. Proper use of a copyright notice gave an initial term

of twenty-eight years. At the end of that term, the copyright owner was required to file a renewal application with the Copyright Office in order to receive the second and continuous term of protection.[12] Failure to file meant the copyright lapsed at the end of the first term. In the case of that 1940 publication, it could have entered the public domain on at least two occasions: in 1940 if published without notice and in 1968 if not renewed.

CONGRESS DID NOT entirely drop the notice requirement until 1989. Between 1978 and 1989, Congress continued the old rule, but allowed a copyright owner to remedy an omitted or defective notice. Consequently, the absence of a notice on a 1980s book does not reliably put it in the public domain. *U.S. Copyright Act*, 17 *U.S.C.* §§ 405–406. The lack of notice may raise the likelihood of no copyright protection, but to be sure you need to investigate further to see if the lack of a notice was remedied. For example, the lack of notice on a "small number" of copies does not jeopardize the copyright. The owner could have registered the work and added a notice to copies, thus rescuing the copyright. Investigating such facts can be problematic, to say the least.

RENEWAL OF COPYRIGHTS

How long is the renewal term? The question does not have an easy answer. The renewal term was, under the 1909 Act, another twenty-eight years. In the early 1960s the renewal term was stretched to forty-seven years, for a total of seventy-five years of protection. In 1998, Congress added twenty more years to the protection for early works.[13] Today, a work published before 1978 can generally have a maximum term of protection of ninety-five years.[14] Getting initial protection still depended on satisfying the notice requirement.

ALTHOUGH EARLY PUBLICATIONS may generally have ninety-five years of protection, the rule actually reaches back only to 1923. Works published in the United States before 1923 were in the public domain when Congress extended the duration term by twenty years in 1998. Congress left those works outside the reach of copyright protection.

In 1992 Congress jiggled the rules again and eliminated the renewal requirement for all existing copyrights.[15] Consider the simple example of a book published in 1965. The published copies needed to include a copyright notice to secure the initial twenty-eight years of protection. By the time the copyright was slated for renewal in 1993, Congress dropped the renewal requirement. The 1970 book received an automatic continuation of protection to the full ninety-five years available under today's law. By contrast, the book published in 1940 was scheduled for renewal in 1968. The law still required renewals at that time; if not renewed the copyright expired.

FOREIGN WORKS AND RESTORATION

In general, the fundamental rules of American copyright law apply to domestic as well as to most foreign works that enter the jurisdictional boundaries of the United States. One essential rule of law: when in the United States, apply U.S. law. Pre-1978 law in the United States, with its formalities and fixed duration, was an international anomaly. For more than a century, many countries had a system of automatic protection lasting for the life of the author plus at least fifty years.

Early works of art may be in the public domain, but the museum might still assert different forms of control over their use.

The American system was especially troublesome for foreign authors who had the benefit of automatic protection in their home country, but often did not know the compliance procedures of American law. Many works gained full protection in a foreign country, but went into the public domain within U.S. boundaries. The United States faced diplomatic pressures to conform its law to international standards, and to remedy the perceived inequitable treatment foreign works received under American law.

This result is a complex twist of international law that "restored" copyright protection for many foreign works that had entered the public domain inside the United States for lack of formalities.[16] The outcome is yet another dose of confusion in the law. Many foreign and domestic publications from before 1978 entered the public domain for failure to comply with formalities of notice and renewal. Domestic works remain in the public domain, while many foreign works were brought back under copyright protection.

THE "RESTORATION" REQUIREMENT was initially a limited provision adopted by Congress as part of the North American Free Trade Agreement Act, Public Law 103-182, *U.S. Statutes at Large* 107 (1993): 2057. Restoration later became more comprehensive under the agreement of the World Trade Organization. *Uruguay Round Agreements Act*, Public Law 103-465, *U.S. Statutes at Large* 108 (1994): 4809, 4976. Which foreign countries have their works "restored" under U.S. law? Almost all of them, starting with the 153 countries that are members of the WTO. For the latest listing see www.wto.org.

The earliest restoration became effective at the beginning of 1996. Copyrights gaining new life at that time continued through the end of the term they otherwise would have received had the copyright owners complied with all formalities.[17] For example, a Swiss publication from 1940 that was not renewed entered the public domain in the United States in 1968. In 1996 it once again became protected by copyright. Had the law not required formalities, American copyright law would have given ninety-five years of protection to the Swiss publication—until the end of the year 2035. Therefore, once restored in 1996, the copyright continues to that same expiration in 2035.

RESTORATION CAN APPLY to works that have entered the public domain for other reasons, too. For example, U.S. copyright did not apply to sound recordings until 1972. In 1996, many foreign sound recordings from before 1972 were for the first time given copyright protection. Recordings from Abbey Road Studios may now have protection, while early recordings from Sun Records in Memphis may not. Keep in mind that this rule applies only to the recordings; the underlying composition can have a separate copyright.

PRACTICAL LESSONS FOR USERS

What do these rules mean for the user of a pre-1978 work? An early work may well be in the public domain for failure to comply with formalities. To reach that conclusion, however, you may need to investigate the original publication of the work and whether a renewal appears in the records of the Copyright Office. Registration records are public, and the Copyright Office will conduct searches for a fee. Online searches are also available through some database providers.

Even works that lacked the formality of renewal or notice may still be protected, if the work originated from one of the many foreign countries enjoying the benefits of the restoration provision. This twist applies to most, but not all, countries, and as usual the law includes many detailed nuances. A user of an early work clearly has a significant research project to complete before determining whether some publications really are in the public domain.

With respect to works created in or after 1978, users need to face the reality that the lack of a copyright notice or registration is not conclusive. Moreover, given the unusually long period of copyright protection for such newer works, the simple reality is that a user needs to assume that nearly all recent works are fully protected until learning otherwise from the copyright holder.

ANYTIME YOU ARE tracking an owner or tracing a copyright, keep detailed records of your pursuit and findings. Your good faith efforts to apply the law and track down facts can be important should anyone challenge your actions.

IMPORTANT LESSONS FOR OWNERS

Do not overlook the benefits of formalities for your new works. Placing the copyright notice on your work offers valuable information to readers who might need to locate you for permission or further information. The simple copyright notice can streamline searches for copyright owners and help assure that their interests will be respected. A proper copyright notice also has the legal effect of barring an infringer from claiming to be an innocent infringer. This limited defense could apply if the user believed the activities were not infringing.[18]

TO SECURE THE full benefits of registration, it usually must be completed before the alleged infringement occurred. *The simple lesson: register early!* For information about registration, visit the U.S. Copyright Office website: www.copyright.gov.

Registering your work with the U.S. Copyright Office offers the practical benefit of creating a public pronouncement of your claim to the copyright, as well as an address for contacting you. Registration additionally grants important legal benefits in the unlikely event of a lawsuit.[19] Those aspects of the law are covered in chapter 14, and they will in turn have some surprising and critical implications for librarians and educators who are struggling with fair use and thorny questions of infringement liability.

NOTES

1. *U.S. Copyright Act*, 17 *U.S.C.* § 302.
2. For works created on or after January 1, 1978, copyright vests automatically at the time the work is fixed. *U.S. Copyright Act*, 17 *U.S.C.* § 102.
3. *U.S. Copyright Act*, 17 *U.S.C.* § 102.
4. Act of May 31, 1790, ch. 15, sec. 1, *U.S. Statutes at Large* 1 (1790): 124 (repealed 1802).
5. The history of American copyright law is recounted in many articles and books, among them: Tyler T. Ochoa, "Patent and Copyright Term Extension and the Constitution: A Historical Perspective," *Journal of the Copyright Society of the U.S.A.* 49 (Fall 2001): 19–125; and Robert L. Bard and Lewis Kurlantzick, *Copyright Duration: Duration, Term Extension, the European Union and the Making of Copyright Policy* (San Francisco: Austin and Winfield Publishers, 1998).
6. *U.S. Copyright Act*, 17 *U.S.C.* §§ 405–406.
7. *U.S. Copyright Act*, 17 *U.S.C.* § 304.
8. *U.S. Copyright Act*, 17 *U.S.C.* § 302(a).

9. The same term applies to anonymous and pseudonymous works. *U.S. Copyright Act*, 17 *U.S.C.* § 302(c).
10. For specific legal benefits afforded by the law, see *U.S. Copyright Act*, 17 *U.S.C.* §§ 411–412.
11. At least one court has held that the publication must have occurred in the United States to trigger copyright protection. If the publication occurred only in a foreign country, the absence of a copyright notice did not, according to these controversial rulings, place the work in the public domain under U.S. law. Moreover, the work may be published in the United States at a later date and then secure the benefit of U.S. copyright. See., for example, *Societe Civile Succession Richard Guino v. Renoir*, 549 F.3d 1182 (9th Cir. 2008).
12. *Act of March 4, 1909*, ch. 320, sec. 23–24, *U.S. Statutes at Large* 35 (1909): 1075, 1080.
13. *Sonny Bono Copyright Term Extension Act*, Public Law 105-298, *U.S. Statutes at Large* 112 (1998): 2827, codified in scattered sections of the U.S. Copyright Act. See also *Eldred v. Ashcroft*, 537 U.S. 186 (2003).
14. *U.S. Copyright Act*, 17 *U.S.C.* § 304.
15. *Copyright Amendments Act of 1992*, Public Law 102-307, *U.S. Statutes at Large* 106 (1992): 264, 266 (codified at 17 *U.S.C.* § 304).
16. *U.S. Copyright Act*, 17 *U.S.C.* § 104A. A court recently had to address the maze of laws about restoration in order to determine who, if anyone, held a valid U.S. copyright in the ubiquitous troll dolls with rubbery bodies and frenzied hair. *Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150 (2d Cir. 2007).
17. *U.S. Copyright Act*, 17 *U.S.C.* § 104A.
18. *U.S. Copyright Act*, 17 *U.S.C.* § 401(d).
19. See generally *U.S. Copyright Act*, 17 *U.S.C.* §§ 411–412.

WHO OWNS THE COPYRIGHT?

KEY POINTS

- The creator of a new work is the copyright owner.
- Two or more authors working together may be joint copyright owners.
- The copyright owner of a work made for hire is the employer.
- Copyrights may be transferred by means of a written instrument signed by the copyright owner.
- Institutional policies are important for clarifying or sharing rights to new works, but they must conform to legal requirements.

AN ENORMOUS RANGE of works receives automatic copyright protection, and someone owns the legal rights. The general rule is that the person who does the creative work owns the copyright.[1] If you write the book, you own the copyright. If you take the photograph, you own the copyright. If you design the website, it is yours. The list goes on.

Yet some variations on that basic rule are of critical importance. First, two or more authors can own a single copyright jointly. Second, someone might create a new work, but if it is a work made for hire, the copyright belongs to the employer. Finally, regardless of wherever ownership may initially vest, the copyright owner may transfer the copyright to a publisher or anyone else. Sorting and keeping track of ownership is essential for managing copyrights and for tracing rights.

JOINT COPYRIGHT OWNERSHIP

Many copyrights are the result of two or more authors working together. Two scientists may write a journal article. Three designers might work on a website over a period of months or years. An enterprising class of students might contribute to a mural in the school hall. These works may be jointly owned.

The Copyright Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[2] For example, inseparable contributions might be blended into a coauthored textbook or article. Interdependent contributions might be the words and music for one song or the text, images, graphics, and software code that constitute a single website.

A joint work must meet two other requirements. First, each coauthor must contribute copyrightable expression to the joint project. If one party gives only an idea for the project, that person has not provided copyrightable expression and therefore is not a joint author under the law.[3] Second, each contributor must have had the intent to create a joint work at the time the work was created. This intent refers to the authors' expectation to be collaborative authors. It does not necessarily mandate that they thought about ownership of their work in strictly legal terms.[4] As one court recently summarized: "The focus is on the parties' intent to work together in the creation of a single product, not on the legal consequences of that collaboration."[5]

COPYRIGHT PROTECTION FOR a jointly owned work usually lasts throughout the life of the last of the authors to die, plus seventy more years. *U.S. Copyright Act*, 17 *U.S.C.* § 302(b). Clever writers could involve youthful coauthors in order to boost the likelihood of prolonging legal rights. However, keep in mind that if you are one of the joint owners, you may well outlive your coauthor and find yourself sharing legal rights with his or her children, grandchildren, or other heirs.

PROBLEMS WITH JOINT OWNERSHIP

Joint ownership is astonishingly common. It is also a serious management headache. Joint owners of a work each hold an undivided share in the copyright.[6] Each co-owner may use or license the entire work, but must account for profits received from use of the work to the other joint owners. On the other hand, a co-owner acting alone cannot transfer the copyright to another party or grant an exclusive right to use the work without the consent of the other co-owners.

Consider this simple example: You and a colleague jointly own the copyright to a research article. Each of you can individually post the paper to your websites. Each of you can permit other scholars and teachers to make and share copies of it. You can even collect a fee for giving permission, but you are liable to your co-owner for a share of the money. Acting alone, however, you cannot transfer the copyright to a publisher or anyone else, whether gratis or for payment. Nor can a joint owner acting alone grant an exclusive license to use the work. For those transactions, all joint owners must participate together.[7]

Sculpture and artistic decoration by two different artists. Separate copyrights or joint ownership?

DETERMINING THAT A work was made for hire has profound legal consequences:

- The most important legal effect is the vesting of rights with the employer. In fact, the employer is legally defined to be the author of the new work, even though someone else actually did the creative work.
- A work for hire has a different term of protection. Ordinarily copyright lasts for the life of the author plus seventy years. By contrast, a WMFH is protected for the shorter of either ninety-five years from first publication or 120 years from creation. Chapter 4 provides a detailed look at copyright duration.
- Resolving that a work is for hire has other important consequences. *Moral rights* cannot apply (see chapter 6), and a transfer of the copyright in a WMFH cannot be terminated. *Termination of transfer* is a legal right to get your copyright back, ordinarily thirty-five years after having transferred the copyright to a publisher or anyone else.

Joint ownership easily gives rise to many management challenges. Often the best solution is a contract between authors, detailing a variety of concerns: who is able to make decisions about use of the work; who is responsible for finances; who will be able to change or update the work; who can enter into publication agreements. Because one author will almost always outlive the other, joint owners should look ahead. They should plan for the management of their works, anticipating the time when children, grandchildren, and others inherit a share of the copyright.

WORKS MADE FOR HIRE

An important exception to the basic rule of copyright ownership is the doctrine of work made for hire (WMFH). For these works, the employer of the person who does the creative work is considered the author and the copyright owner.[8] The employer may be a firm, an organization, or an individual.

Two basic situations can give rise to a work made for hire. The most common situation occurs when an employee prepares a work within the scope of his or her employment.[9] If the copyrighted work is created under those conditions, the work is deemed to be for hire and the copyright belongs from the outset to the employer.[10] No further agreement is required.

Examples of possible works made for hire created in an employment relationship are[11]

- A software program created by a staff programmer for Creative Computer Corporation
- A newspaper article written by a staff journalist for publication in the *Daily Morning* newspaper
- A musical arrangement written for XYZ Music Company by a salaried arranger on its staff

A second WMFH situation involves independent contractors (as opposed to employees). Here the statute becomes more exacting. Such a work is for hire only if it is "specially ordered or commissioned" and is among the types of works itemized in the statute.[12] Even meeting those requirements is not enough for this version of WMFH; the parties also must expressly agree in a written instrument—signed by *both* parties—that the work shall be considered a WMFH. Only then will the new work be deemed for hire with all rights belonging to the hiring party.

WHO IS AN EMPLOYEE?

One of the most important and sometimes difficult issues surrounding the WMFH doctrine centers on whether an employee or an independent contractor created the work. The law sometimes applies technical definitions of these terms that may not match common perceptions. The result can have profound implications for copyright ownership. For example,

simply because you have paid money for a work does not make it for hire. You might pay a computer programmer a vast fortune to rework your business systems, or give a photographer a tidy sum for shots of your kids, but payment alone does not make the programmer or photographer an employee. The freelance programmer and the photography studio are most likely independent contractors, and they hold the copyrights. They also get to keep the money.

An independent contractor and an employee may work side-by-side on similar projects, only to have radically diverging ownership results. A newspaper may have staff reporters. As employees, their articles are WMFH. A reporter at the next desk, however, may be an independent contractor. Her articles are WMFH only if they are on the list in the statute, and she and the employer have entered into a written agreement that the articles will be regarded as for hire. Remember, too, that a work of an independent contractor can be a WMFH only if it is on the list in the statute. News articles are not on the list, but the statute does encompass a "contribution to a collective work." That could be an article contributed to a newspaper. The statute can therefore apply more broadly than might first appear.

WHAT WORKS ARE listed in the WMFH statute? With respect to independent contractors, the statute can apply to works made "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."

U.S. Copyright Act, 17 U.S.C. § 101.

Academic institutions and libraries often retain independent contractors without necessarily attending to the question of WMFH copyright ownership. The organization may pay substantially for the services of photographers, video producers, or public relations firms to prepare publications, websites, and glossy brochures, only later to discover that the contractors retain the copyrights and can control the use of the materials. A photographer can therefore ask for more money with each use of the pictures; the PR firm can object when the images and words of a brochure are later restructured for the university website.

Leaving rights with the contractor may be perfectly acceptable in many situations, but the parties are usually best served if they resolve the matter carefully and deliberately. The parties have a few good choices. They could agree to make the work for hire. They could leave the copyright with the contractor, but agree to a license of rights to the hiring party. They could also not make the work for hire and instead enter into a transfer of the copyright from the contractor. Each option is best undertaken with attention to details, and each option has distinct consequences.

TRANSFERS OF COPYRIGHT

Transfers of copyrights are common in industry practice and in much academic work as well. Copyrights can be bought, sold, or simply given away. A transfer of the copyright—or an exclusive grant or license to use the work—is a transaction that must be in writing and must be signed by the copyright owner making the transfer.[13] Assume you write a song or create a painting and hold the copyright. You could give away or sell the copyright to those works, but the transfer is legally valid only if the terms of the transfer are in writing and the document is signed by you.

Transferring the object itself is distinct from transferring the copyright. Consider the simple example of buying a book. You can enter the store and pay a price, but you walk out with only the book, not the copyright. The same is true in larger and pricier transactions. You may be a successful artist and sell a painting to an appreciative collector for a hefty price. Selling the painting does not include a sale of the copyright, unless you specifically document the copyright transfer in a signed writing. Neither a high price nor an oral statement of transfer will substitute for the statutory requirements.

In the academic world, many authors routinely transfer copyrights. A professor writes an article and, as the author, likely owns the copyright. Some journal publishers, however, upon accepting the article for publication, require that the author transfer the copyright to the publisher among the terms of the written and signed publication agreement. Not all journal publishers require assignment of the copyright. Publishers are increasingly allowing a license, which usually leaves more rights with authors than a full assignment of the copyright.

AUTHORS WHO ARE faced with a publication contract that seeks transfer of the copyright should not hesitate to negotiate new terms or at least reserve rights to use his or her own work in future teaching and writing, or find a different publisher. The Sherpa-RoMEO Project offers important insight into the language of publication agreements. See www.sherpa.ac.uk/romeo/.

Despite the sweeping nature of some publication agreements, authors need to bear in mind that they have choices. Many publishers will negotiate terms of their agreements, and some even have alternative versions that offer greater rights to authors—but you need to raise questions and open a conversation in order to be successful. In addition, deep in the Copyright Act is a concept of termination of transfers.[14] If you have transferred your copyright or even granted a license to it, you have the right under law to reclaim your copyright. A window of opportunity to make that claim opens in most instances thirty-five years after making the transfer. Many authors, and their heirs, are discovering the value of recovering ownership of their copyrights in early books, music, art, and other works.

Rather than struggling over who holds the legal rights, many authors and publishers are also taking a more creative approach. They are agreeing up front to managing their copyrights by allowing open access or other public rights of use. These possibilities are further explored at the end of this chapter.

INSTITUTIONAL POLICIES

These rules of copyright ownership, notably the rules of WMFH, do not always apply clearly and neatly. Sometimes to resolve doubts and lingering questions, an author and employer may need a contract to specify the allocation of rights to use the work and the distribution of royalties or income. Many academic institutions develop formal policies in an effort to clarify whether new works belong to the institution or to the author.

The custom at most colleges and universities is for faculty authors to retain the copyrights in their scholarly works, or at least for the institution to not assert rights of ownership in such works. That standard practice has served a variety of goals, both managerial and philosophical, and it is usually articulated in institutional policies and sometimes employment agreements.[15] Some rethinking of this standard is taking place around the country as the nature of academic work changes, along with the possibilities for creating and using new works. For example, the growth of distance education and the considerable financial

consequences of creating and marketing some new works have led to reexamination of conventional concepts of intellectual property at educational institutions. Online courses in particular are sometimes best managed through a sharing of rights between the instructor and the institution. In addition, some universities and funding agencies now require some scholarly works to be posted for public access, effectively barring a transfer of all rights to a publisher.

AN INTERNATIONAL INITIATIVE encouraging innovative policy making at universities is the Zwolle Group, based in the Netherlands. For more information, see www.surf.nl/copyright.

Just as the need to manage copyrights is growing, recent court rulings have drawn into question the effectiveness of institutional policies.[16] Some courts also have concluded that general policy statements may not be sufficient to effect a transfer of the copyright to the employee. The Copyright Act specifies that a WMFH belongs to the employer "unless the parties have expressly agreed otherwise in a written instrument signed by them."[17] A general policy, however, is not ordinarily signed by the parties to each individual transfer of rights. Thus, many works created at colleges and universities may in fact be recognized under the law as "for hire," even though customary policy and practice seek to place the copyright with the author of a scholarly book or article.

Thoughtful policies and agreements also offer the opportunity to share or "unbundle" the rights that would normally vest with a single copyright owner. Placing all rights with either the individual author or the employer can give rise to conflicts between the parties. Instead, agreements that detail allocation of rights among the parties may allow a work to be used by the author and the institution simultaneously, effectively, and equitably. Policymakers now often look beyond simple formulas to find creative and desirable solutions to the challenges of copyright ownership.

AT LEAST ONE court has been critical of the ability of a general copyright policy to reverse the legal conclusion that a work was made for hire: "The Policy is patently inadequate to overcome the presumption of Brown's ownership under the work made for hire doctrine."

Forasté v. Brown University, 248 F.Supp.2d 71, 81 (D.R.I. 2003).

CHANGING NEEDS AND INNOVATIVE POSSIBILITIES

This chapter is a general overview of principles of copyright ownership, but it reveals many underlying complications in the law. Sometimes the law's reach is unclear. Is the author an employee or independent contractor? Have the authors properly complied with all steps and procedures to effectively convey ownership or control of rights in the work to another person? Even if we can clearly identify the copyright owner (or owners) under the law, is that the result that makes most sense and seems most fair? Should the owner or other parties share rights with others or even relinquish rights? Faced with these questions, diligent management of copyrights has become increasingly important. Put more bluntly, the rules of law about copyright ownership are often unsatisfactory for the changing needs of education, research, librarianship, and even publishing.

Consequently, many innovations in copyright ownership and management are becoming widely accepted as an alternative to relying on just the law. Consider these developments that are actively evolving today:

Institutional policymaking. In spite of—and maybe because of—court rulings about the effectiveness of general policies, a good institutional policy is a vital part of determining

THE CONCEPT OF "unbundling" the rights of copyright ownership has roots in a project for the California State University. The author of this book contributed substantially to that initiative. One outcome was a pamphlet titled "Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning" (1997). Portions of that document are revised and made a part of this position paper from CSU: www.calstate.edu/AcadSen/Records/Reports/Intellectual_Prop_Final.pdf.

copyright ownership and the possible sharing of rights. It may need to be supplemented by a properly signed agreement in some situations. Nevertheless, a policy can go far to clarify the expectations of the college, university, library, or other organization regarding the ownership of copyrights created by faculty, staff, students, and anyone else.

Creative Commons. Authors are now choosing to make many of their works available to the public under a Creative Commons license. This voluntary system is essentially a grant of permission to the public to use the work for certain purposes. One of the most common options permits any noncommercial uses of the work with attribution to the author or source. A work marked with that CC license may be used by anyone for, say, nonprofit education, provided the copies include the author's name or other identification.

Publication agreements. The terms of agreements for the publication of articles, books, and other works are becoming more nuanced. More publishers are accepting only a license of rights and allowing authors to explicitly retain certain rights to use the publication. Few publishers today require an unconditional assignment of the copyright, and many are willing to negotiate terms.

Open access movement. Internet technologies have facilitated and expanded the alternatives for publishing, and they make a wealth of content available to readers worldwide. Many journals, books, and other publications are now choosing to publish online and to make the content available in full on the Internet, without restriction. Readers may now find a growing roster of publications, openly available for reading and study. Open access is a choice made by the copyright owner—not to relinquish rights, but to use the legal rights in order to make the work easily accessible. Choosing open access may be a decision to give up some subscription revenue, but it is also a decision to boost readership and to promote the availability of scholarship and information resources.

MANY OF THESE innovations for creative management of copyrights are in steady change and expansion. Examples of websites that offer background and some of the latest developments include

- Details about Creative Commons: www.creativecommons.org
- Evaluations of publication agreements with many journals: www.sherpa.ac.uk/romeo/
- An expanding list of open access journals: www.doaj.org
- Universities and colleges adopting mandates for open access: www.eprints.org/openaccess/policysignup/
- Background and developments about open access: oad.simmons.edu/oadwiki/Main_Page

University open access mandates. A growing list of universities, funding agencies, and other organizations now require that many publications be made open access. Harvard University was a prominent leader in requiring many authored articles to be deposited in the university's digital repository for full open access. By act of Congress, versions of peer-reviewed articles that result from funding from the National Institutes for Health must be deposited with PubMed Central, also an open access repository.[18] These initiatives, and other

large-scale developments, have drawn wide attention to the possibilities of open access and have given the notion an important boost of credibility.

These examples are only an indication of the transformation of copyright ownership, particularly in the academic and library communities. Yet each of these possibilities is an innovation built on the foundation of the law. The law becomes a default, and from that starting point copyright owners can determine how they may share or assert rights, or may creatively grant rights for the further use of their works. All these initiatives require care and attention. Without taking deliberate steps, the default principles of copyright ownership will apply, and the benefits of creative stewardship will be lost. Spending a little time considering the implications of being a copyright owner is time well spent.

NOTES

1. "Copyright in a work protected under this title vests initially in the author or authors of the work." *U.S. Copyright Act*, 17 *U.S.C.* § 201.
2. *U.S. Copyright Act*, 17 *U.S.C.* § 101.
3. *Gaiman v. McFarlane*, 360 F.3d 644, 658 (7th Cir. 2004).
4. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994).
5. *Janky v. Lake County Convention & Visitors Bureau*, 576 F.3d 356, 362 (7th Cir. 2009), *cert. Denied*, 130 S.Ct. 1740 (2010).
6. *U.S. Copyright Act*, 17 *U.S.C.* § 201(a).
7. *U.S. Copyright Act*, 17 *U.S.C.* § 204(a).
8. *U.S. Copyright Act*, 17 *U.S.C.* § 201(b).
9. For examples of how courts interpret *scope of employment* under the work made for hire doctrine see *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); and *Avtec Systems, Inc. v. Peiffer*, 21 F.3d 568 (4th Cir. 1994).
10. *U.S. Copyright Act*, 17 *U.S.C.* § 201(b).
11. Some of the examples and information about WMFH in this chapter also appear in one of the helpful publications from the U.S. Copyright Office, Circular 9. The Copyright Office issues a long list of circulars addressing many issues in the law in clear language. For the full list, see www.copyright.gov/circs/.
12. See the definition of *work made for hire* at *U.S. Copyright Act*, 17 *U.S.C.* § 101.
13. *U.S. Copyright Act*, 17 *U.S.C.* § 204.
14. For transfers or licenses executed on or after Jan. 1, 1978, the window of opportunity generally opens after thirty-five years. *U.S. Copyright Act*, 17 *U.S.C.* § 203. For grants made before that date, the opportunity first opens after fifty-six years. *U.S. Copyright Act*, 17 *U.S.C.* § 304(c). In either situation, the law can be enormously important to authors, but the details of the law may require expert counsel.
15. Because many works created by faculty members, including teaching materials and scholarly works, could be WMFH, an agreement may be necessary in order the move the copyright ownership to the individual. See, for example, *Vanderhurst v. Colorado Mountain College Dist.*, 16 F.Supp.2d 1297 (D.Colo. 1998). The same Colorado court, in an unrelated case, ruled that a professor's research article could also be a WMFH. *The University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 880 F.Supp. 1387 (D.Colo. 1995).
16. *Forasté v. Brown University*, 248 F.Supp.2d 71 (D.R.I. 2003) (finding that the university policy did not alter ownership of photographs made by university employee); and *Manning v. Parkland College*, 109 F.Supp.2d 976 (C.D. Ill. 2000) (finding that the university policy did not alter ownership of instructional materials).
17. *U.S. Copyright Act*, 17 *U.S.C.* § 201(b).
18. A bill recently introduced in Congress, known as the Federal Research Public Access Act, would expand the requirement of open access to research funded by other major federal agencies.

SIX

THE RIGHTS OF COPYRIGHT OWNERS

KEY POINTS

- Copyright owners have exclusive rights to
  - Reproduce the work
  - Distribute the work
  - Prepare derivative works
  - Publicly display the work
  - Publicly perform the work
- Some works of visual art also have *moral rights*
- Congress has responded to technological change by granting additional rights with respect to some works

THE OWNER OF the copyright to a specific work has certain exclusive rights with respect to the work. In this context, *exclusive* means that the copyright owner may exercise those rights and other individuals may not—unless authorized by the owner. For example, owners hold the right to make copies of the work. If someone else makes an unauthorized copy, it can be an infringement. On the other hand, copyright owners do not have all possible rights. Congress has defined the reach of an owner's rights.

Section 106 of the Copyright Act itemizes the central rights of a copyright owner:[1]

- The right to reproduce the work in copies
- The right to distribute the work publicly
- The right to make derivative works
- The right to display the work publicly
- The right to perform the work publicly

The rights of owners are fundamental to the concept of copyright law. By defining the rights, the law also defines the range of possible infringements. You can violate the law only by infringing rights held by the owner. For example, a copyright owner has rights of public performance. Private performances of a work are not restricted, and therefore you may play music at a home party or act out a play for a small gathering.

This chapter will demonstrate that these rights are hardly static. Congress has revised the statutes through the years, steadily expanding owners' rights, most recently in 1998. In the meantime, courts have regularly redefined and applied the law for new situations and needs. While this chapter will also demonstrate that tripping over the rights of copyright owners can be easy

and common, not all of these encounters are legal infringements. Many of the common uses of works that appear to be copyright violations may prove to be within fair use or other exceptions to the rights of owners. Those possibilities will be addressed in chapters 7 through 11.

THE FIRST U.S. copyright statute, in 1790, granted rights only to make copies of works. Congress added performance rights in 1831, permitting musicians and playwrights to control live performances and not merely sales of copies. The Act of 1909 expanded the list of owners' rights to something generally similar to the current law.

REPRODUCTION AND DISTRIBUTION RIGHTS

The right of reproduction of a work is fundamental and perhaps the easiest to grasp. Reproducing a work occurs in many circumstances and by means of a vast range of technological tools. You reproduce works when photocopying pages from a text, when quoting a sentence into a new article, and even when taking verbatim notes from research materials. You reproduce works when scanning a cartoon into your computer to show in class, and when digitizing images for a website or downloading works from the Internet. You even reproduce works when you make a video of an urban street scene; the buildings, billboards, public art, and even music blaring in the background may be copyrighted and are now captured in copies by your pocket digital camera.

Distribution of works is also surprisingly common. The possibilities are numerous: materials handed out in the classroom, pictures posted on websites, documents attached to e-mails, and books sold in stores and even checked out of the library. A distribution involves the transfer of possession of a copy of a work. Many distributions could simultaneously be reproductions. Posting a document to a website may be a single reproduction. Each time a user accesses it and downloads it as, say, a PDF, the access is a further reproduction. It may also be an electronic distribution of the copy from the server to the user's computer. By contrast, simply linking to materials found at another site is ordinarily not a violation of either the reproduction or the distribution right. Linking is merely a technological instruction for finding materials.[2]

A CASE OF considerable importance concluded that one makes a copy of computer software when it is loaded into the random-access memory (RAM) of a computer.

MAI Systems Corporation v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

The copyright owner has rights only with respect to distributions of copies made to the public. Privately lending a book to a friend is not "to the public," but a library open for general use, or a store looking for maximum sales, is most certainly distributing to the public. Yet these transactions occur uncountable times each day. Why? Because they are explicitly encompassed by an important exception in the law called the first sale doctrine. It will be mentioned again in chapter 7.

DERIVATIVE WORKS

Of all rights of the copyright owner, the right to make derivative works may be the most difficult to explain, yet examples are also common and familiar. A *derivative work* is a work based upon one or more preexisting works.[3] A motion picture made from a novel is a derivative work. An author writes the novel and owns the copyright to it. The motion picture studio

A DIGITAL VERSION of a photograph showing a cityscape, significantly altered, is a derivative work. *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F.Supp.2d 1113 (D.Nev. 1999). A court recently ruled that an answer manual to accompany a textbook is an infringing derivative work. *Pearson Education, Inc. v. Nugroho*, 2009 U.S. Dist. LEXIS 101600 (S.D.N.Y. 2009).

needs to secure permission from the novelist before preparing a screenplay and shooting the film. Derivatives can also be as simple as the toy in a McDonald's Happy Meal that is based on a Disney movie character.

While scholarly works rarely generate lucrative movie deals, routine activities of academics and librarians often involve derivative works. Some examples: a digitally altered version of a recording, image, or text; a teacher's manual and other works to support a textbook; artwork from or inspired by an existing picture or image; the production of a new ballet or play from an existing story.

The U.S. Copyright Act specifies that a work is derivative if it is in a form in which an existing work "may be recast, transformed, or adapted." The list of possible derivative works is extensive: an index to a book, a sound recording of a musical composition, an abridgement of a novel, or a translation of an existing work. On the other hand, a work is not likely to be a derivative if it merely reproduces the original or changes the medium. Simple digitization of works is probably not derivative, and neither would be a ceramic cast of a bronze statue. Digitizing or recasting a statue might violate a copyright owner's reproduction right, but not the owner's right to create derivative works.

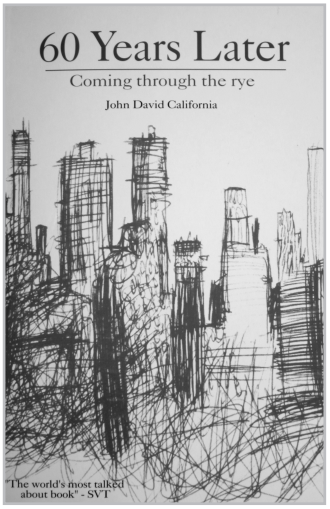
THE MOTION PICTURE *300* is clearly a copyrighted work, released in 2007, but it retells the story of the Battle of Thermopylae in the year 480 B.C. The movie is explicitly a derivative of a graphic novel with the same title from 1998. The novel in turn is apparently derivative of ancient stories that are public domain. However, if the novelist and filmmakers used copyrighted expression from modern translations, they may have infringed copyrights. More complicated, the novelist was reportedly inspired by a movie from 1962. Did he recast, transform, or adapt anything from the 1962 film? Tracing rights and uses can be complicated and intriguing.

Derivative works sometimes create conundrums. Consider a simple example. The original version of an ancient Greek poem may have no legal protection, but a new translation of the poem is a derivative. The translation, however, is an original work entitled to independent copyright protection. Thus, a movie based on the original poem may be derivative, but no permission is needed to make a derivative of a public domain work. However, if the movie is based on a copyrighted translation, permission from the translator is in order. The public domain is actually a rich resource for the movie industry. The novels of Jane Austen and the plays of Shakespeare continue to yield fresh movie versions. Even the *9-11 Commission Report*, a U.S. government work—and thus in the public domain—was turned into a graphic novel as well as a film for ABC Television.

Whether the movie is a derivative of the original or a derivative of a derivative (i.e., the translation), the filmmaker can have copyright protection for the new movie. But be careful. A derivative work made without permission of the owner of the original work (if still under copyright) can be an infringement and may not be eligible for legal protection. The lesson is fairly simple: you might check with the copyright owner before investing time and energy to make or use a derivative work.

PUBLIC PERFORMANCE AND DISPLAY

Performances and displays are common occurrences in higher education. A display can be the simple showing of a page of text or a picture. A work can be performed in many ways: when text is read aloud; when lines of a play are recited or acted; when a videotape or a film is shown on a screen or monitor; or when a song is played or sung aloud. The performance



A book that continued the story of Holden Caufield was accused of being an infringing derivative of *The Catcher in the Rye*.

or display becomes a possible infringement only when it is public.[4] A public performance or display occurs, among other circumstances, when it is made to a substantial number of persons beyond the usual circle of friends, family, and social acquaintances.[5]

We frequently make public displays and performances of copyrighted works. Up and down the halls of libraries, schools, and museums one can find scores of pictures, essays, and books out for public viewing. Why are schools not liable for pinning student essays on the bulletin boards or for hanging pictures on the walls? Why are libraries not liable for placing their collections in public view? Why are museums still in business?

The answer to these questions lies in the exceptions to the rights of owners. Understanding the rights of owners requires an appreciation that the law establishes rights, but then tempers them with exceptions or limitations that will be detailed later in this book. The U.S. Copyright Act includes several important exceptions to the performance and display rights of the copyright owner. A specific exception to the copyright owner's display right allows the owner of an original work or a lawfully made copy of the work—such as a painting, a poster, or a photograph—to display that work where it is physically located. Thus, the museum can hang art on the walls, you can put posters in the classroom, the library can put books in display cases, and you can project slides onto a screen.[6]

NOT ALL RIGHTS apply to all types of works. Only in 1995 did Congress extend the performance right to sound recordings, but only when made "by means of a digital audio transmission." *Digital Performance Right in Sound Recordings Act of 1995*, Public Law 104-39, *U.S. Statutes at Large* 109 (1995): 336. This development is examined later in this chapter.

No similarly broad exception, however, applies to performances. Consequently, no statutory exception covers the prospect of showing a movie in an auditorium or acting out a play on a school stage. On the other hand, a more specific provision of the law permits *displays and performances* in the context of face-to-face classroom instruction.[7] Therefore, teachers and students in the traditional classroom setting may read text, recite poetry, play videos, sing songs, show art slides, project websites on a screen, and show an entire feature film. More about this provision is addressed in chapter 7.

MORAL RIGHTS

A relatively recent addition to owners' rights in the United States is the concept of moral rights.[8] Under the laws of many other countries, moral rights apply to many different types of works and grant extensive rights against alterations or revisions of works, and the right to have the author's name on copies of the work. Moral rights under American law are extraordinarily limited by comparison. Moral rights in the United States grant to an artist the right to have his or her name kept on the work or to have the artist's name removed from it if the work has been altered in a way objection-

The generous provision for performances and displays of copyrighted works in the classroom does not apply to distance learning. The TEACH Act restructured the law in 2002 and is examined in detail in **chapter 12.** A roster of various other exceptions is surveyed in **chapter 7**.

able to the artist. Moral rights also give artists limited abilities to prevent their works from being defaced or destroyed.[9]

Moral rights were explicitly added to American copyright only in 1990, and they apply only to a narrow class of works of visual art.[10] Moral rights generally apply only to original works of art, sculpture, and other works of visual art that are produced in two hundred copies or fewer.[11] For example, moral rights may apply to a limited series lithograph, but likely do not apply to a photograph used in a mass-market magazine. Moral rights under U.S. law also do not apply to any works made for hire.[12]

BECAUSE MORAL RIGHTS under the U.S. Copyright Act apply only to certain artworks, authors of books, articles, and other works do not have the benefit of the law. One court further denied an author's claim of common law moral rights when his scholarly article was published with numerous typographical and factual errors.

Choe v. Fordham University School of Law, 920 F.Supp. 44 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 319 (2d Cir. 1996).

A leading case on the issue of moral rights awarded monetary damages to an artist whose work was intentionally destroyed. The federal district court ruled that the city of Indianapolis violated the moral rights of a sculptor when the city demolished his large metalwork that had been installed on city property.[13]

DIGITAL AUDIO TRANSMISSIONS

Music receives peculiar treatment under the U.S. Copyright Act in many respects—including oddly different rights of public performance. Compositions, or musical works, long have received copyright protection and the benefit of all fundamental rights. However, sound recordings first gained federal copyright protection only in 1972.[14]

Congress at that time granted rights of reproduction and distribution to sound recordings, but not public performance rights. When a radio station played a new song on the air, therefore, the composer had a performance right and received a royalty. By contrast, the owner of the separate copyright to the recording had no performance rights and was not entitled to any payment. That owner could receive money from sales of recordings because the copyright in the sound recording included rights of reproduction and distribution.

The development of the Internet as a medium for delivering music has threatened sales of CDs and other copies of recordings. If a user can receive transmitted performances of selected recordings on demand, the user has little need to buy CDs.[15] To protect the interests of copyright owners of the recordings, in 1995 Congress granted performance rights, but only in the context of digital audio performances.[16] The statute is enormously complex and runs for pages of convoluted conditions and exceptions.[17] In general, an interactive digital system—including a website—that delivers recordings on demand may now implicate the performance rights of both the composer and the performer.

DIGITAL MILLENNIUM COPYRIGHT ACT

The Digital Millennium Copyright Act (DMCA) of 1998 added two new rights to the arsenal of copyright owners. The law now prohibits "circumvention of technological protection systems." That is, if you crack the protective code on a disk or bypass the password interface

THE DMCA WAS a long bill that encompassed a long roster of changes to the Copyright Act. The provisions summarized here are among the most important, and they are codified in the *U.S. Copyright Act*, 17 *U.S.C.* §§ 1201–1202.

to access data, you may have violated this new right. The DMCA also added a prohibition against the removal of copyright management information from a copyrighted work. Under some conditions, removing the author's name or stripping away technological conditions for using materials may amount to a new form of copyright violation. These rights effectively allow authors to control access to those works protected by a technological measure, in addition to the traditional rights of copyright owners under Section 106.

These new provisions, added by the DMCA, have proven to be more complicated than expected, and they have been used to constrain activity in some most unlikely ways. The prohibition on circumventing technological protections has been highly controversial, and it receives a more detailed examination in chapter 16.

NOTES

1. *U.S. Copyright Act*, 17 *U.S.C.* § 106.
2. *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146 (9th Cir. 2007).
3. The statute defines a *derivative work* as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." *U.S. Copyright Act*, 17 *U.S.C.* § 101.
4. *U.S. Copyright Act*, 17 *U.S.C.* §§ 106(4), 106(5).
5. *U.S. Copyright Act*, 17 *U.S.C.* § 101.
6. *U.S. Copyright Act*, 17 *U.S.C.* § 109(c).
7. *U.S. Copyright Act*, *17 U.S.C.* § 110(1).
8. For additional information on moral rights, see 3-8D *Nimmer on Copyright* § 8D.01 et seq. (Matthew Bender & Co., 2009).
9. *U.S. Copyright Act*, 17 *U.S.C.* § 106A.
10. Moral rights apply only to a work of visual art. A *work of visual art* is narrowly defined under the statute. See *U.S. Copyright Act*, *17 U.S.C.* §§ 101, 106A.
11. *U.S. Copyright Act*, 17 *U.S.C.* § 101.
12. For much more information about works made for hire, see chapter 5.
13. *Martin v. Indianapolis*, 982 F.Supp. 625 (S.D. Ind. 1997), *aff'd*, 192 F.3d 608 (7th Cir. 1999).
14. *Act of October 15, 1971*, Public Law 92-140, *U.S. Statutes at Large* 85 (1971): 391.
15. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).
16. *Digital Performance Right in Sound Recordings Act of 1995*, Public Law 104-39, *U.S. Statutes at Large* 109 (1995): 336.
17. *U.S. Copyright Act*, 17 *U.S.C.* § 114(d).

SEVEN

EXCEPTIONS TO THE RIGHTS OF OWNERS

KEY POINTS

- Fair use is the most important and best known of the exceptions to the rights of owners.
- The Copyright Act includes numerous exceptions to owners' rights.
- Many exceptions are vital to education and librarianship.
- Congress continues to enact new exceptions, creating new opportunities to use copyrighted works.

ONE OF THE most important aspects of copyright ownership is that the rights of owners are not complete. The law grants a broad set of rights to an enormous range of materials, then proceeds to carve out exceptions to those rights. The best known of these exceptions is *fair use*. The U.S. Copyright Act, however, includes not fewer than sixteen statutory provisions that establish exceptions to the rights of copyright owners. Unlike fair use, most statutory exceptions are relevant only to certain industries and require careful legal guidance to comprehend and apply. Some exceptions apply only to the needs of the music, cable television, and other commercial industries. The statutes often stretch over many pages of convoluted text.

> Fair use will be the subject of more detailed examination in **chapters 8 through 11**. Fair use is much debated and maligned, but it is crucial for the daily success of our teaching, learning, and research.

A few of the statutory exceptions apply specifically to the needs of educators and librarians. The language of those provisions is also relatively clear and direct—at least in comparison to other acts of Congress. One statutory exception allows libraries to make copies of materials for research or preservation; another exception allows performances and displays of works in the classroom and in distance education.

Seldom are the statutory exceptions as generous as one might hope. The statutes may allow uses that would otherwise be infringements, but most of the exceptions apply only to specifically identified types of works, only under detailed circumstances, and only for the prescribed purposes. By contrast, fair use is unusual in its breadth and flexibility.

Most of the exceptions may also be viewed as a baseline of rights of use. If you want to make uses beyond the limits of a specific exception, you can always seek a license or permission from the copyright owner. On the other hand, licenses may be used to curtail uses. For example, the library may have clear rights to make some copies of works for research or preservation purposes, but if the works were acquired under a license agreement—as is often the case—that agreement may include terms that purport to further define or even retract the library's rights. Similarly, you may have a general right to give your copy of a work to someone, but the agreement you made to acquire an MP3 music file puts a cap on further distributions of the copy. Understanding the starting point of rights established under law is critical for negotiating, drafting, and accepting better license terms.

The ability to exercise fair use or other rights of use may also be hampered by technological protection measures that control access to or use of the work. For example, coding on a DVD may limit the ability to view a movie to certain types of players. The coding may also prevent making copies of the film, even short clips that might clearly be otherwise allowed. This law is examined more fully in **chapter 16**.

The following is a summary of exceptions that are of the greatest importance to educators and librarians. The section numbers indicate where they are codified in the U.S. Copyright Act. Later chapters will offer a closer look at many of these provisions.

Section 107: Fair use. This provision may be thought of as the "umbrella" exception. Fair use as it appears in the Copyright Act is a relatively unspecific provision that includes little more than four general factors for determining its meaning. It is broad and flexible in its scope, and it can apply to a potentially unlimited variety of unpredictable situations, ranging from simple quotations to complex cutting and pasting of pieces of works into a new collage, multimedia project, wiki, or website.[1] Fair use is an "umbrella" in another sense. It is the exception that the user of a copyright work looks to for protection when the other statutes do not apply. For example, if your library is seeking to make copies of a copyrighted work but the plans do not fit the required conditions of the specific exception for libraries, Section 108, the library may look to fair use as a possible alternative.

Section 108: Library copying. Unlike the flexible and general nature of fair use, this statute is more detailed in its application. Section 108 provides that most academic and public libraries, as well as many other libraries, may make copies of certain types of works for specific purposes. Section 108 permits preservation copying, copying of individual works for research and study, and copying for interlibrary loans.[2] Chapter 13 will examine this statute in detail and show that its benefits do not always apply to all copies of all types of works.

The Digital Millennium Copyright Act of 1998 (the DMCA) amended Section 108 to clarify when libraries may use digital technology to preserve works in the collection and to reproduce works when the technological format has become obsolete. This point and all of Section 108 are detailed in **chapter 13**.

Section 109(a): The first sale doctrine. This important exception limits the distribution rights of the copyright holder by providing that once the owner authorizes the release of lawfully made copies of a work, those copies may in turn be passed along to others by sale, rental, loan, gift, or other transfer.[3] Without this important exception, a bookstore could not sell you a book, and the library could not let you check out a book. Similarly, a video store could not rent movies, you could not sell your used DVDs on eBay, and you could not give books and CDs to your friends as birthday presents. Without this statutory provision, all those transactions might be unlawful distributions of someone else's copyrighted works. You can begin to see that the exceptions may be necessary to make daily activity feasible.

Copyrightable sculpture, but Section 109(c) allows the public display.

Section 109(c): Exception for public displays. This provision greatly limits the copyright owner's public display right by allowing the owner of a lawfully made copy of a work to display it to the public at the place where the work is located.[4] Thus, the art museum that owns a painting may hang it on the wall and let the public enter the front door to view it. The bookstore can place books on display in its front windows, and the library may put its rare and valuable works in the display cases for all to see. Without this exception, those activities could be infringements. This exception is so extraordinarily broad that it effectively limits the owner's display right to situations where the image is transmitted by television, Internet signal, or other system to a location beyond where the copyrighted work itself is actually located.

Section 110(1) is generous in its application for classroom uses, but always keep in mind that it permits only displays and performances. It does not authorize making copies of materials, even in the classroom setting. This statute and the following provision for distance education are examined in detail in **chapter 12**.

Section 110(1): Displays and performances in face-to-face teaching. This exception is crucial for the functioning and survival of basic teaching. It sweepingly allows performances and displays of all types of works in the setting of a classroom or similar place at most educational institutions, from preschool to graduate school. It allows instructors and students to recite poetry, read plays, show videos, play music, project slides, and engage in many other performances and displays of protected works in the classroom setting. This exception benefits multitudes of educators and students every day. Its rather simple language includes few limitations or burdensome conditions.

Section 110(2): Displays and performances in distance learning. Once we turn on the cameras or upload instruction onto websites—transmitting the classroom experience through distance learning—the law makes an abrupt shift. Section 110(2) was fully revised in 2002 with the passage of the TEACH Act.[5] While the law offers many additional opportunities, it is also replete with restrictions and conditions. The ability to make displays and performances in distance education is remarkably more constrained than the allowed uses in the classroom. For more detailed information about the TEACH Act, see chapter 12.

THE DMCA OF 1998 amended Section 117 to clarify that computer software may be reproduced in order to repair the computer on which the program is originally loaded.

Section 117: Computer software. This provision generally allows the owner of a copy of a computer program to modify the program to work on his or her computer or computer platform, and to make a back-up copy of the software to use in the event of damage to or destruction of the original copy.[6] For most computer users, however, the ability to load copies of software is usually addressed in the license accompanying the program, minimizing the need to rely on the statute for that right.

Section 120: Architectural works. Architectural designs are protected by copyright, giving architects the right to protect their designs from copying and from construction without permission. But Section 120 makes clear that once a building is constructed at a place visible to the public, anyone may make and use a picture of that building without infringing the copyright in the architectural design. Architectural historians and structural engineers can be spared from infringement when they take pictures of existing structures and use them in teaching and research, or for almost any other purpose. Keep in mind, however, that the photograph itself is a new copyrighted work apart from the copyright in the architectural design.

Architectural works are now protectable, but a statutory exception allows photographs of constructed buildings.

Section 121: Special formats for persons who are blind or have other disabilities. Congress added this provision in 1996 to allow organizations that serve the needs of the disabled to make specially formatted versions of published, nondramatic literary works in order that they may be useful to persons who are blind or have other disabilities. Under this provision, some educational institutions and libraries may be able to make large-print or Braille versions of some works in the collection. However, like so many statutory exceptions in the Copyright Act, this law grants rights only to certain

qualified organizations and applies only to a defined class of works and activities. In addition, Section 110(8) is an exception permitting a performance of a nondramatic literary work to be transmitted by a special transmission device directed to blind or other handicapped persons, if the transmission is made through a governmental body, a noncommercial educational broadcast station, or an authorized radio subcarrier.

THE MATTER OF exceptions for the benefit of blind persons has taken on an international dimension in recent years. A study for the World Intellectual Property Organization initiated wide interest in the topic, and the WIPO delegates have begun consideration of a draft treaty detailing a possible copyright exception. The issues are surprisingly contentious and are certain to be debated for many years. The studies, draft treaties, and other developments may be found by searching the WIPO website, at www.wipo.int.

The U.S. Copyright Act includes many other statutory limitations. Some are brief, such as a grant to horticultural organizations to perform musical works.[7] Some run for pages of technical text, such as the relentlessly detailed statute allowing rebroadcast of cable television programs.[8] A brief summary can hardly reflect the parameters of each law.

Permission may come from the author, publisher, or other party that holds the rights to the work you want to use. You may secure permission directly from the rightsholder, or through a licensing agent, such as the Copyright Clearance Center. More information about these possibilities appears in **chapter 18.**

What happens if you simply cannot meet all the requirements for applying one of the exceptions? You still have choices. You can seek permission. You can rearrange your plans in order to fit within the statute. You can find alternative materials that may not be protected by copyright. You may also turn once again to fair use. At the beginning of this chapter, fair use was described as an "umbrella." Fair use can apply broadly to many uses and many activities that the other more specific statutes may never have contemplated. Fair use can apply to all types of works, and have meaning in situations and with technologies that Congress did not anticipate. These are among the greatest virtues of fair use. Its flexibility gives fair use value when other exceptions fall short. The next four chapters offer a careful and pragmatic understanding of the law of fair use.

NOTES

1. See *NXIVM Corporation v. The Ross Institute*, 364 F.3d 471 (2d Cir. 2004).
2. *U.S. Copyright Act*, 17 *U.S.C.* § 108.
3. *U.S. Copyright Act*, 17 *U.S.C.* § 109(a).
4. *U.S. Copyright Act*, 17 *U.S.C.* § 109(c).
5. *Technology, Education, and Copyright Harmonization Act of 2002*, Public Law 107-273, *U.S. Statutes at Large* 116 (2002): 1910, codified at 17 *U.S.C.* § 110(2).
6. *U.S. Copyright Act*, 17 *U.S.C.* § 117.
7. *U.S. Copyright Act*, 17 *U.S.C.* § 110(6).
8. *U.S. Copyright Act*, 17 *U.S.C.* § 111.

PART III

Fair Use

The famous Obama poster by Shepard Fairey was the object of a dispute over fair use of the underlying photograph. What about the many knockoffs and variations? Can they be a fair use of a fair use? Is their reprinting in a book yet another layer of fair use? These variations are by Oleg Atbashian (Comrade Red Square at ThePeoplesCube.com).

FAIR USE

Getting Started

KEY POINTS

- Fair use is vital to the growth of knowledge.
- Fair use is based on a balancing of four factors set forth in the statute.
- Fair use can apply to a wide range of materials and activities.
- Fair use does not have defined boundaries, but is flexible for changing needs.
- Fair use ensures that copyrights are not overprotected, and that the law allows new creativity based on existing works.

FAIR USE HAS many descriptions and definitions. Functionally, fair use is an exception to the rights of copyright owners, allowing the public to make limited uses of a protected work. It can be defined as a limited right to use copyrighted works without the copyright owner's consent—often under confined circumstances—for purposes such as education, research, news reporting, criticism, and commentary. By specifically supporting these pursuits, the law of fair use is important for the advancement of knowledge and the communication of ideas. Yet fair use does not allow everything. This chapter offers insight into the meaning and the limits of fair use.

WHAT IS FAIR USE?

Fair use is an essential counterbalance to the widening range of rights that copyright law grants to owners. At various times, fair use has been called a right, a privilege, and a defense. Whatever the label, the doctrine is a legally sanctioned opportunity. It allows the public to make limited uses of copyrighted works—uses that might otherwise constitute infringement—especially for advancing knowledge or serving other important social objectives. Applying fair use may be challenging at times, but understanding the law is vital for the growth of knowledge.

Fair use can rescue many would-be infringements and turn them into lawful uses, but only within certain limits. Consider some of the most common uses of copyrighted works. A short quotation from an existing paper into a new report could constitute an unlawful reproduction of the quoted portions of the work. Hitting the print key for a paper copy of a web page can also be

a reproduction. When a TV news crew broadcasts a downtown festival, the program may include images of outdoor art and clips of music in the background. The right of fair use may well rescue many of these activities from legal perdition. Many other uses are less certain, but clearly possible: a picture or song lyrics posted to a blog; a newspaper article posted to a class website; or a brief video clip on YouTube.

THE FLEXIBILITY OF THE LAW

Fair use is both an extraordinary opportunity and a source of recurring confusion. Fair use has been the target of steady challenge, and it is the object of enormous praise. For education and research, fair use is the most important exception to the rights of copyright owners, because it is flexible and adaptable to the many unpredictable situations and needs that occur as we pursue diverse projects and apply innovative technologies in academia. Fair use can apply to all types of media and all types of works. On the other hand, fair use can take on a new scope and meaning for each set of circumstances. The flexibility of the law may demand patience and attention, but that flexibility is one of the prized virtues of fair use.

IN THE CASE OF *Higgins v. Detroit Educational Television Foundation*, 4 F.Supp.2d 701 (E.D. Mich. 1998), the court allowed as fair use the incorporation of short excerpts of a musical work into the background of a production that was broadcasted on a local PBS affiliate and sold in limited copies to educational institutions.

Consider the short quotations that routinely appear in scholarly works. They are often easily within fair use. On the other hand, the longer the quotation, the less likely it will be "fair." The flexibility of the law means that some quotations are allowed, while others are not. Similarly, using the quotations in one context might be fair, but the same quotations in a different project with different purposes may not be within the law. That same flexibility enables the law to encompass creative uses of distinctive materials, such as standardized survey instruments, motion pictures, or computer software. In recent years, courts have ruled on fair use as applied to rap versions of pop songs,[1] thumbnail images of photographs in search engines,[2] and contorted Barbie dolls in modern art.[3]

While the flexibility of fair use is one of its greatest strengths, it is also the source of uncertainty. Reasonable people disagree on what is "fair," and until a court rules on a particular case, the law offers no definitive, legally binding answers to most fair use questions. Congress deliberately created a flexible fair use statute that gives no exact parameters, allowing fair use to take into account the circumstances of each case.[4]

THE FOUR FACTORS

The fair use statute does not attempt to define exact parameters, but instead sets guideposts. Section 107 of the U.S. Copyright Act sets forth the four factors to evaluate and balance in the analysis of fair use:

- The *purpose* and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- The *nature* of the copyrighted work

- The *amount* and substantiality of the portion used in relation to the copyrighted work as a whole
- The *effect* of the use upon the potential market for or value of the copyrighted work[5]

THE CASE OF *Folsom v. Marsh* is commonly cited as the wellspring of American fair use. In his elaborate opinion from 1841, Justice Joseph Story isolated variables that impinge on the determination of fair use, and those variables are remarkably similar to the four factors of current law.

These concepts are rooted in a series of judicial rulings stretching back to 1841.[6] Courts examined and refined the doctrine for more than a century until, in 1976, Congress for the first time enacted a statute securing an explicit place for fair use in the larger equation of American copyright law.[7]

Possible fair use examples are innumerable, but not all uses will be "fair." Each new situation requires fresh application of the four factors, and—short of an authoritative court ruling—the analysis may never produce easy or absolute answers. To date, courts have provided little direct guidance about fair use in the library or education setting. Yet courts are not insensitive to academic needs, and the fair use statute acknowledges explicitly the importance of an educational purpose. The next two chapters of this book examine the court rules of particular importance to education and librarianship.

THE FAIR USE STATUTE

Fair use is the subject of numerous misconceptions and myths. The best place to begin a clear understanding of fair use is the statute itself—the real source of fair use law in the United States. The fair use statute takes hardly a minute to read and is remarkably simple and clear compared to many other federal statutes:

> 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.

Recall from **chapter 4** that timely registration of the copyright with the U.S. Copyright Office can have practical and legal advantages, even if not strictly required. Later in this book, **chapter 14** examines an important provision of the Copyright Act that limits the liabilities that many educators and librarians may face as they seek to understand and apply fair use.

The statute establishes the framework for answering the extensive variety of questions you might have about clipping materials

for websites, quoting from articles, making handouts for teaching, or sampling and remixing a sound recording. Numerous court cases apply that framework to the facts at issue in order to determine whether an activity is fair use or infringement.

THE FULL TEXT of the entire U.S. Copyright Act is available from many sources. The U.S. Copyright Office seeks to keep the full text, updated with all amendments, available on its website at www.copyright.gov/title17.

A CLOSER LOOK AT THE STATUTE

Of course, the law is never so simple. Fair use is the subject of numerous books, thousands of articles, and a growing cascade of court opinions. The following chapters will offer detailed insights, but for now, the graphic on the following page offers a closer look at the language of the statute itself. Understanding fair use in any particular setting best begins with an overview of the language from Congress. The words of the statute may be relatively simple, but they are rich with meaning.

PRINCIPLES FOR WORKING WITH FAIR USE

The following chapters explore more fully the meaning and application of fair use, but always keep in mind these practical principles for working with this important copyright doctrine.

Chapter 7 of this book summarizes some of the other statutory exceptions of importance to education and librarianship. **Chapter 18** offers insights into the quest for copyright permissions.

Fair use is a balancing test. You need to evaluate and apply the four factors, but you do not need to satisfy all of them for a use to be fair.[8] The pivotal question is whether the factors overall lean in favor of or against fair use.

Fair use is highly fact-sensitive. The meaning and application of the factors will depend on the specific facts of each situation. Each time you face a new or changed situation, you need to evaluate the factors anew.

Don't reach hasty conclusions. The question of fair use requires evaluation of all four factors. Do not conclude that you are within fair use merely because your use is for nonprofit education or has important scholarly objectives.[9] You have three more factors to evaluate. Similarly, a commercial use can be within fair use after examining all factors.[10]

If your use is not "fair," don't forget the other statutory exceptions to the rights of owners. Fair use and the other exceptions apply independently of one another. You need to comply with only one of them to make your use lawful.

A work may be in the public domain for many reasons. Two common reasons are that the copyright has expired, or the work was produced by the U.S. government. Much more about the public domain appears in **chapters 3 and 4** of this book.

If your use is not within any of the exceptions, permission from the copyright owner is an important option. Indeed, unless you change your planned use of the copyrighted work, you might have little choice but to seek permission.

Fair use is relevant only if the work is protected by copyright. Do not overlook the possibility that the work you want to use may be in the public domain; if it is not protected by copyright, you do not have to worry about fair use. Similarly, if your use is not within the legal rights of the copyright owner, you are not an infringer, and you also do not have to consider fair use.

THE TEXT AND MEANING OF FAIR USE

U.S. Copyright Act, Section 107

The Fair Use Statute

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.

Sections 106 and 106A of the Copyright Act grant the basic rights of copyright owners.

The phrase **such as** means fair use can apply for many purposes in many situations, beyond those not mentioned here.

If it is fair use, it is explicitly **not an infringement!**

Shall include suggests that other factors are possible, but realistically, courts almost always rely on the four stated factors.

The statute only directs that we **consider** the factors, but courts in fact weigh the strength of arguments about each factor and evaluate whether each factor tips in favor of or against fair use.

These **four factors** in the statute will be examined in detail in the following two chapters of this book.

Congress added this last sentence in 1992 in response to a series of court rulings that appeared to severely constrain fair use as applied to **unpublished** works.

Kenneth D. Crews, *Copyright Law for Librarians and Educators, 3rd ed., Chicago: American Library Association, 2012.*

NOTES

1. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
2. *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003).
3. *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).
4. *Copyright Law Revision*, 94th Cong., 2d sess., 1976, H. Doc. 1476. The U.S. Supreme Court has stated clearly that fair use is a case-by-case determination. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985).
5. *U.S. Copyright Act*, 17 *U.S.C.* § 107.
6. *Folsom v. Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841).
7. *U.S. Copyright Act of 1976*, Public Law 94-553, *U.S. Statutes at Large* 90 (1976): 2541, codified at 17 *U.S.C.* § 107.
8. "Because this is not a mechanical determination, a party need not 'shut-out' her opponent on the four factor tally to prevail." *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991).
9. *Encyclopaedia Britannica Educational Corporation v. Crooks*, 542 F.Supp. 1156 (W.D.N.Y. 1982).
10. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

NINE

FAIR USE

Understanding the Four Factors

KEY POINTS

- *Purpose:* A nonprofit educational purpose can support a claim of fair use. A transformative use can also be highly influential.
- *Nature:* Uses of factual, nonfiction works are more likely to be within fair use, while fair use applies more narrowly to creative works.
- *Amount:* The less the amount of a work used, the more likely it is fair use.
- *Effect:* Uses that do not compete with the market for the copyrighted work are more likely fair use.

DETERMINING WHETHER a use is fair use depends on an application of the four factors in the statute; before making that application, however, a thoughtful definition of each factor is critical. Especially in the years since Congress adopted the first fair use statute in 1976,[1] courts have handed down hundreds of decisions that give some meaning to the factors. The statute anticipates that other factors may enter into the decision about fair use.[2] In reality, however, courts rarely stray beyond the four factors set forth in the statute: *purpose*, *nature*, *amount*, and *effect*.

This chapter offers a general overview of the meaning and significance of the factors. Along the way, the focus will be on issues of special importance to educators and librarians. This overview will demonstrate that educational uses may be more favored than commercial uses, and that transformative uses may have even greater influence on the outcome. The overview will also show that less is more, but not always. The less you use of a work, the more likely it will be a fair use, but sometimes using a limited amount still may be an infringement. Nevertheless, sometimes using 100 percent of a work is still a permitted fair use.

FACTOR ONE
THE PURPOSE AND CHARACTER OF THE USE

The first factor examines whether the use of a copyrighted work "is of a commercial nature or is for nonprofit educational purposes."[3] With that crucial language, Congress signaled that nonprofit, educational uses generally would be favored, while commercial uses would be less favored. Photocopying for

classroom handouts is more likely to be fair use than are copies for a professional meeting. Posting artwork on a website in connection with a research study is more likely to be fair use than making the same copies for a commercial art catalog.

Fair use is common in education and librarianship, and is of growing importance. With the expansion of electronic reserves and course management systems such as Blackboard, Moodle, or Sakai, instructors are creating files of readings and easily posting the full text of articles, chapters, and other materials for students enrolled in various courses. For many of these situations, the key copyright question centers on fair use. At least on this first factor, educators should be able to make a strong argument for fair use. If the materials are directly related to the course, if they are posted only at the direction of the instructor, and if passwords and other restrictions limit access only to students enrolled in that one course, then the claim of an educational purpose should be powerful and convincing.

THE SIMPLE ACT of password restriction will likely be important for the first factor and for the fourth factor. Limiting access can strengthen the argument that the materials are specifically for education; limiting access can also control the number of readers, risks of further duplication, and dissemination of the copyrighted materials, which may help minimize the market harm and therefore strengthen the case for fair use.

Avoid jumping to conclusions. Your well-intentioned education or research activity may still not be within fair use. You may have an irrefutable argument on the first factor, but it might be outweighed by the application of the remaining three factors. Similarly, commercial needs are certainly not barred from the benefits of fair use.[4] Many for-profit entities have argued successfully for fair use. Although the first factor may not weigh in favor of fair use, the remaining three factors could yet tip the balance.

A single factor may also not weigh entirely for or against a finding of fair use. Some situations can create a mixed result on the first factor or any other. For example, when the U.S. Supreme Court considered whether a rap-parody version of a pop song could be fair use, the Court noted that the recording was a commercial product with considerable economic potential, but the use was also criticism or commentary for purposes of fair use.[5]

CONSIDER THE CRITICAL case of *Random House, Inc. v. Salinger*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). Even though the user was Random House, a commercial entity, the court concluded that the first factor weighed in favor of fair use. The use was, in one respect, for the commercial purpose of selling books for profit. At the same time, the quotations from J. D. Salinger's correspondence were for the research purpose of writing a biographical study. Overall, the first factor tipped in favor of fair use. After evaluating all four factors, however, the court concluded that the use was not fair.

Transformative Uses

In addition to considering specific purposes, courts also favor uses that are "transformative." A transformative use may occur when the work is altered or transformed into something new, such as a parody of a song.[6] Transformative uses also occur when the work is used in a new manner or context, distinct from the intended uses of the original. For example, art images in a scholarly study transform the use of the works from aesthetic creations to objects of academic analysis.[7]

The notion of a transformative use is increasingly important to education and librarianship as diverse works become the subject of study and analysis, and as technologies allow clipping, altering, and reworking of materials for research and

teaching. Examples of transformative uses can include quotations incorporated into a paper, or perhaps pieces of a work mixed into a multimedia project for teaching purposes. The deployment of multimedia tools and innovative online courses will give rise to cutting and pasting, adding commentary, and exploring possibilities with images, text, and sound. Many of these uses may well be "transformative."

IN A 1994 decision, *Campbell v. Acuff-Rose Music, Inc.*, the U.S. Supreme Court emphasized the importance of transformative uses. Yet the Court pointedly noted: "The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution."

Multiple Copies

A teaching purpose gets one more important benefit in the law of fair use. Teaching is explicitly one of the favored purposes stated in the statute.[8] The statute also specifically permits "multiple copies for classroom use," subject to the four factors. According to the Supreme Court, multiple copies may therefore be allowed, even if not transformative.[9] But be careful. This language does not mean that all copies for classroom distribution are fair use. You still need to evaluate and balance all factors. You may well conclude that photocopied handouts of a newspaper article are within the law, while also concluding that copies of multiple chapters posted on Blackboard or other system are not fair use.

FACTOR TWO
THE NATURE OF THE COPYRIGHTED WORK

This factor examines characteristics and qualities of the work being used. The underlying concept is that some types of works are more appropriate for fair use than are others.[10] This second factor requires an examination of the qualities and attributes of the copyrighted work, allowing assessment of whether the work is of a type that merits greater protection and less fair use, or is the kind of work that fair use encourages us to build upon in order to expand the growth and dissemination of knowledge.

Courts have had the occasion to draw some lines demonstrating this point. For example, several court decisions have concluded that the unpublished nature of historical correspondence can weigh against fair use.[11] The courts have reasoned that copyright owners should have the right to determine the circumstances of first publication and whether, when, and how to make the works publicly available. As a corollary, when courts find that a work has been published, they tend to be more lenient with fair use.

IN 1985, THE U.S. Supreme Court ruled in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, that fair use applied narrowly to an unpublished book manuscript, in order to preserve the "right of first publication." Where did this right come from, and what does it mean? Chapter 17 of this book offers some insights. That chapter also traces the series of rulings about historical manuscripts that the *Harper & Row* decision spawned. Confusion about the issue eventually led Congress to modify the fair use statute.

Fiction and Nonfiction

Fair use perhaps applies most generously to published works of nonfiction. Articles, books, and other works of nonfiction—whether about

mathematics, sociology, politics, or any other subject—are exactly the types of works for which fair use can have most meaning. Why? Because the central purpose of copyright law, including fair use, is to allow for the growth of knowledge.[12] To accomplish that goal, we regularly need to use and build upon earlier works. Most often, the successful growth of knowledge depends on using the nonfiction works of earlier scholarship. Courts have recognized that reality.

By contrast, copyright law gives greater protection for—and allows less fair use of—works of fiction.[13] Fair use will be relatively constrained for clips of novels, poetry, and stage plays. You will likely find a similar outcome for uses of other more creative materials, such as art, photography, music, and motion pictures. Indeed, an additional purpose of copyright law is to protect and reward creativity. Limiting fair use for the most creative works advances that objective. This rule does not mean that fair use vaporizes. It simply means that the second factor may be construed against a finding of fair use if the original work is of a creative nature. Depending on the strength of the arguments on the other factors, a use of a highly creative work may still be within the law.

Consumable and Out-of-Print Works

Other examples can help bring practical meaning to the nature factor. For example, this factor may weigh against fair use when applied to copies of workbook pages and excerpts from other "consumable" materials. Publishers often produce and sell workbooks with the expectation that they will be fully consumed and repurchased with each use. Copies can undermine the copyright owner's expected market by harming the demand for individual and repeated sales.[14]

THE EXAMPLE OF consumable works is another good demonstration of one *fact* being important to the evaluation of more than one *factor*. In evaluating the fair use of a workbook, for example, you might conclude that the "nature" factor leans against fair use. Because the copies would also interfere with the continuous marketing of the workbook to students, you might find that the fourth factor, the "effect on the market," also weighs against fair use.

A more complicated, but common, circumstance has split legal authorities. Many copyrighted works go out of print, even though the copyright may live on for decades longer. A senate report from 1975, and one early judicial opinion, asserted that if a work is out of print, copying that work may not harm the market.[15] After all, the copyright owner of an out of print book is not actively claiming a market and seeking sales.

At least one court has ruled differently about out-of-print materials. In the well-known decision involving Kinko's and course packs, the court highlighted that owners of out-of-print materials may still offer a license to make copies. The *Kinko's* court reasoned that even though a work is out of print, photocopying can still interfere with the marketing of a license to make copies. The court further found that when licensing is the primary market for an out-of-print work, the copies are especially harmful to the licensing market.[16]

NOTICE AGAIN THAT one fact—in this case the fact that a work is out of print—can become important in the evaluation of two factors: the "nature" factor and the "effect" factor.

What can you conclude from these examples? You may often need to investigate the realistic and current marketing of the work you want to use. If the work is available for purchase or actively licensed, you might be affecting that market. If the copyright owner has not made reasonable arrangements for licensing, "out of print" may not mean tough luck for fair use. On the other hand, "out of print" may become an obsolete concept. It may be uneconomical to keep a book in stock as a printed volume, but it might be feasible to retain the book indefinitely as a digital download. Many publishers and retailers have migrated to digital books, and Google appears ready and willing to digitize,

retain, and deliver any book at any time. These revolutions in publishing are certain to have important consequences for fair use.

FACTOR THREE
THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

On first impression, the "amount" factor perhaps sounds like it should be reasonably straightforward. However, amount is measured both quantitatively and qualitatively, and no exact measure of allowed quantity exists in the law.[17] Rules about word counts and percentages have no place in the law of fair use. At best, such measurements are interpretations intended to streamline fair use; at worst, they distract from the flexibility that makes fair use meaningful and adaptable to new situations. Quantity is best evaluated relative to the length of the entire original work and the amount needed to serve a proper "purpose."

ONE COURT CAUTIONED that even fleeting images of artistic works in a television production might be within fair use, but still not tip the "amount" factor sufficiently to outweigh other factors.

Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70 (2d Cir. 1997).

The appropriate amount can also depend on the nature of the work. Courts have measured amount differently for different types of works. When evaluating the fair use of journal articles, for example, a court has ruled that each article is an independent work. Thus, photocopying an article constitutes copying of the entire work.[18] Pictures and other visual works pose challenges for determining the appropriate amount. A user nearly always wants the full image, and ordinarily copying all of a work will lean strongly against fair use. Courts have found some flexibility by reasoning that copies of full images that are "thumbnail" size or are of low resolution may still constitute fair use.[19] The copying may be quantitatively large but qualitatively limited; low resolution or thumbnail images are unlikely to compete with the full-size originals.

Quantity and Quality: "The Heart of the Work"

The tension between *quantitative* and *qualitative* measures is most vivid with the concept of the "heart of the work." The Supreme Court in 1985 analyzed whether *The Nation* magazine had exceeded fair use when it quoted some three hundred words from President Ford's then-unpublished memoir in a news article. The Court ruled that while the quotations may have been quantitatively small, they were the pieces of the book that a reader would likely find most interesting—President Ford's account of his decision to pardon President Nixon.

THE NEXT CHAPTER of this book examines court rulings about textual materials, and whether sizable excerpts from books are beyond the limits of the allowed amount. Those cases were brought against for-profit companies, and the courts ruled that they did not have a favored purpose. As suggested in other decisions, the amount that may be copied could be greater if the use is for education, research, or other favored purpose.

SOMETIMES COPYING THE full work can be within fair use. A company copied an entire software program made for a Sony PlayStation in order to reverse engineer it and create an emulator. The court ruled that the "amount" factor weighed only slightly against fair use, because the Sony program never became part of the new emulator.

Sony Computer Entertainment, Inc. v. Connectix Corporation, 203 F.3d 596 (9th Cir.), *cert. denied*, 531 U.S. 871 (2000).

Thus, *The Nation* had impermissibly lifted the "heart" of the manuscript. The quotation was quantitatively small, but the "amount" factor nevertheless weighed strongly against fair use.[20]

Practical Sense

How do you make reliable and practical sense of the "amount" factor? One simple rule remains in most situations: Shorter excerpts are more likely than longer pieces to be within fair use. Yet sometimes the briefest slice may constitute the "heart of the work" and be outside fair use. Nevertheless, even if you need a relatively large portion of the copyrighted work, you can strengthen the claim of fair use by tying the amount you borrow to your educational or research purpose. If you can meet your favored objectives only by excerpting the article, movie, or other work, the amount may be appropriate. Perhaps the strongest case for fair use in this context would include an unequivocal educational purpose, combined with a clear demonstration of the importance of the work for achieving the educational needs.

FACTOR FOUR
THE EFFECT OF THE USE ON THE MARKET

The fourth factor, examining market effects, can also raise some subtle issues, and some courts have called it the most important factor.[21] The "effect" factor encompasses whether the use harms the market for the work or its value. In many cases, the question is whether the use is one that replaces what should have been a sale of the work or a license to use it. If your use detrimentally affects the copyright owner's ability to realistically make a sale—regardless of your personal willingness or ability to pay for such a purchase—the court may tip this factor against fair use. Occasional quotations or photocopies may pose little significant market harm, but full reproductions of software and DVDs can make direct inroads on the owner's potential market for those works.

The easy cases occur when the use directly replaces a potential sale of a work that is marketed at realistic prices. In a case from several years ago that has been widely publicized, a court ruled that downloading free music from the original version of Napster superseded likely sales of CDs. Easy access to free downloads demonstrably harmed the copyright owners' market.[22] In a lawsuit against Kinko's, a court ruled that when Kinko's made and sold copies of book chapters, the company eliminated any realistic likelihood that students would ever buy those books.[23]

More difficult cases involve uses that do not interfere with simple sales, but may undercut licensing of the work. Photocopying of isolated articles might not replace subscriptions to the entire journal, but the copying might interfere with the system of permissions and collection of fees put in place by the publisher or other rightsholders.[24]

THE U.S. SUPREME Court, in the *Harper & Row* case, called this factor "most important." Realistically, one can see that the Court put at least comparable weight on the unpublished nature of the work. Many other cases have cited that language from the Supreme Court, but a close reading suggests that those courts are also just giving added weight to the factors that have greatest prominence under the given facts.

Courts also look to potential harm to derivatives and related markets. A court recently ruled on whether a dictionary book, written to accompany the Harry Potter stories, infringed those copyrights. The court concluded that the dictionary would not harm sales of the original books, but it would harm the ability of J. K. Rowling to authorize another dictionary or other accompanying project.[25]

Chapter 10 includes further examination of *American Geophysical Union v. Texaco Inc.* The court ruled that the existence of the Copyright Clearance Center and the relatively easy licensing of rights to make copies of journal articles established a possible market that the user may have affected through its copying activities.

Possible market effects can vary greatly. You may be surfing the Internet and find a document, blog, picture, or other copyrighted work properly posted by the rightful owner. The copyright owner clearly has imposed no restrictions or conditions on access and is asserting no claim to payment for use. You may liberally copy, download, or print the materials in full, and you probably have done nothing to harm any realistic market. In another situation, you are creating original instructional materials that you want to post on a course website. You want to include in your document sizable quotations and excerpts of various charts and images from other sources. The effect factor may again support application of fair use, because moving those pieces into a new context and embedding them in the context of an analytical study for educational purposes is not likely to interfere with a realistic market. The more you alter the context of use and surround the works with original criticism or comment, the less likely you are impeding a market that the copyright owner has the right to control.

Chapter 12 examines the TEACH Act for distance learning. While that law is not at all the same as fair use, it does include some analogous concepts. For example, the TEACH Act explicitly does not allow uses of materials marketed for digital distance education. Fair use has no such bar. On the other hand, that the owners are targeting the specialized market means that such a use is more likely to harm the defined market—and hence more likely not to be within fair use.

Market issues are challenging for courts, too. Once again, courts have addressed this factor in close connection to the purpose of the use. If your purpose is research or scholarship, market harm may be difficult to prove, and courts will generally apply the factor somewhat generously. If your purpose is commercial, however, some harm to the market is presumed.[26] Still, one can imagine how the rules become blurred when you have an educational purpose, but the copyrighted work is one that is created and marketed especially for the academic community. The hard reality is that even some educational uses have direct and adverse market consequences.

Market issues can get complicated, but in the context of fair use they ultimately drive this line of thinking: How is the work actually marketed? What are the realistic potential markets? Is the work realistically marketed for my needs and my uses? Am I harming or inhibiting that market potential? Am I replacing a sale? Are my market effects significant? Would the market effects be significant if uses like mine were widespread?

DO NOT OVERLOOK the possibility that your use might actually *help* the market for the work. References, clips, quotations, images, and other such uses invariably draw attention to the original work. In some cases the uses might take away a market. In other cases, the use might lead someone to want more and to make a purchase. Quotations in a book review are a familiar example of a use that probably helps the market.

Like almost all matters of applying fair use, this fourth factor depends on an array of facts. Those facts may be the circumstances of your use, and they are most certainly about the active or likely marketing of the work you plan to use. You need to

have a firm grasp of your situation and investigate the work in question. You might also find that markets change. A work may have no market today, but find a new market tomorrow. A work may be a best seller this year, but be out of print in the near future. Testing the market might also mean retesting it again for later uses.

NOTES

1. *U.S. Copyright Act of 1976*, Public Law 94-553, *U.S. Statutes at Large* 90 (1976): 2541, codified at 17 *U.S.C.* § 107.
2. The use of the word *include* when listing factors of fair use in the statute denotes that the factors listed do not constitute an exclusive list. *U.S. Copyright Act*, 17 *U.S.C.* § 107.
3. *U.S. Copyright Act*, 17 *U.S.C.* § 107.
4. "A commercial use weighs against a finding of fair use but is not conclusive on the issue." *A & M Records, Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001).
5. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994).
6. *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006). Under this factor courts often ask whether the new work merely replaces the object of the original creation "or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).
7. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006).
8. *U.S. Copyright Act*, 17 *U.S.C.* § 107.
9. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, n.11 (1994).
10. This factor calls for recognition that some works are closer to the "core of intended copyright protection" than others, with the consequence that fair use is more difficult to establish when the former works are copied. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).
11. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Peter Letterese & Associates, Inc. v. World Institute of Scientology Enterprises*, 533 F.3d 1287, 1313 (11th Cir. 2008); *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).
12. U.S. Constitution, art. I, sec. 8, cl. 8.
13. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).
14. *Copyright Law Revision*, 94th Cong., 2d sess., 1976. H. Doc. 1476.
15. *Copyright Law Revision*, 94th Cong., 1st sess., 1975. S. Doc. 473; *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987).
16. *Basic Books, Inc. v. Kinko's Graphics Corporation*, 758 F.Supp. 1522 (S.D.N.Y. 1991).
17. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994); *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 630 (9th Cir. 2003).
18. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).
19. *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003).
20. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564–566 (1985).
21. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).
22. *A & M Records, Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001).
23. *Basic Books, Inc. v. Kinko's Graphics Corporation*, 758 F.Supp. 1522 (S.D.N.Y. 1991).
24. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).
25. After evaluating all factors, the court ruled that the Harry Potter dictionary was not a fair use. *Warner Brothers Entertainment Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D.N.Y. 2008).
26. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

TEN

GETTING COMFORTABLE WITH FAIR USE

Applying the Four Factors

KEY POINTS

- Few court rulings about fair use directly address education and libraries.
- A variety of other court rulings concerning fair use offer important guidance for teaching and research activities.
- Fair use ultimately depends on a balancing of the four factors in the statute as applied to specific facts.
- Appendix B of this book includes a checklist for assisting with decisions about applying fair use.

AMERICAN COURTS HAVE analyzed and applied fair use in hundreds of cases, but rarely have they interpreted fair use for education or library activities. A growing number of colleges, universities, libraries, and other organizations may face accusations of copyright infringement, or may be analyzing and applying fair use to support innovative projects. Seldom do these situations progress—or degenerate—into lawsuits. The parties settle; the questionable activities stop; the project rarely stirs prolonged legal anxieties.

Whatever the reason, copyright dilemmas are usually resolved long before a judge has a chance to tell us what the law really is. Consequently, educators and librarians are left to infer what they can from the few cases that have some relevance to the academic community. Increasingly, educators and administrators must preemptively consider the fair use implications of their projects as innovative activities continue to raise questions regarding the boundaries of fair use law.

A modest number of cases offer some insight into judicial interpretations of fair use law in situations similar to those faced by educators and researchers. A leading example involves Kinko's Graphics, the well-known national chain of photocopy shops, which was sued more than two decades ago for making photocopied course packs without permission.[1] The court rejected Kinko's fair use defense, in large part because Kinko's was a for-profit entity and was photocopying for a commercial purpose. Imagine a similar case, not against Kinko's, but against a university. Copying for nonprofit, educational purposes may sway the first factor in the opposite direction. A court may well find that some copying in the hands of the educational institution could be fair use. Until a court rules on exactly your specific need, we can only use our best judgment to infer the law's possible meaning under any given circumstances.

A MAJOR CASE against a university involving questions of copyright infringement and fair use for educational copies is pending as of this book's publication against various officials of Georgia State University. Filed in 2008, a group of publishers has accused the university of exceeding the limits of fair use when copying excerpts from various books, particularly for posting to electronic reserves. A decision may be forthcoming in 2011 or later. At the least, a ruling from the court will likely motivate educators and librarians to take a fresh look at their internal policies and practices of fair use.

Courts have also addressed the application of fair use to diverse media in education. In *Higgins v. Detroit Educational Broadcasting Foundation*,[2] the court allowed as fair use the incorporation of short pieces of a musical work into the background of a video production broadcast on a local PBS affiliate and sold in limited copies to educational institutions. The court sympathized with the educational and public-service purpose of the production. The defendant used a brief amount—only about thirty-five seconds of a popular song—and only in the background of the opening scenes. A song is generally a creative work, so that its nature tipped in favor of stronger protection and against fair use. The copyright owner did not actively license the song for such uses, so the use had no adverse market effect. Three of the four factors weighed in favor of fair use, and the court allowed this use of music.

Other decisions reveal the limits of fair use. Consider these conclusions from various courts:

- The full text of newspaper articles posted to an unrestricted website—even to further a social cause—is not fair use.[3]
- Playing music in the background while phone callers are placed on hold is not fair use.[4]
- Glimpses of photographs in the background of a movie or television production have left courts seemingly divided. One court ruled that if the images are fairly prominent in the set for a cable TV show, they may not be fair use.[5] Another court ruled that fuzzy images in a motion picture scene are fair use.[6]
- File sharing of music—the uploading and downloading of recordings—through the original Napster and similar services is not within fair use.[7]
- Downloading and caching from the Internet the full text of content from multitudes of websites, for the purpose of facilitating web searching and reliable access to websites, is fair use.[8]

Still, none of these cases exactly addresses the common needs of education, research, and librarianship. Courts have not directly ruled on questions of classroom handouts, library reserves, online courses, and digital libraries. Nevertheless, we often need to decide if these activities are within fair use—even without the benefit of explicit direction from the law.

This chapter offers guidance for thinking about fair use in a variety of situations, ranging from familiar needs to legally unexplored territory. This chapter demonstrates the practical application of fair use to meet important objectives. It offers simple scenarios that are at the core of common practice among educators and librarians. The scenarios begin with the simplest and build to larger-scale projects and newer technologies. The principal point of each scenario is to model the process of thinking through the four factors and moving toward a conclusion about fair use.

QUOTING IN PUBLICATIONS

SCENARIO

Professor Tran is writing a lengthy historical study and wants to include various quotations and clips of other copyrighted materials. Is she protected by fair use?

Whether or not Professor Tran is staying within the boundaries of the law will depend on a multitude of variables, but start with the most familiar situation and move to the more complex. Begin with a simple quotation from one work included in her new historical study. She may be writing about aviation and quote sentences from a biography of Charles Lindbergh, or for a study of historical epidemics she may comment critically on studies of plagues and social structure. Professor Tran needs to consider the four factors, and she can find helpful and relevant cases, such as *Penelope v. Brown*.[9]

WHEN PROFESSOR TRAN prepares her book, assembles her materials for teaching, or makes other uses of existing works, she should almost always be sure to cite her source. She should add footnotes or other references. Citing sources is crucial for academic honesty, but it is not a major variable in fair use. Fair use is about copyright and law. Citing sources goes to issues of ethics and plagiarism.

In that case, a professor, Penelope, wrote a book about English grammar and language usage. Brown, a writer of popular fiction, later wrote a manual for budding authors. Amidst five pages of Brown's 218-page book, she apparently copied sentence examples from Penelope's work. When Penelope sued, the court ruled that Brown's use was fair. Here is how the court addressed the four factors:

Purpose: The court found that the second book greatly expanded on pieces borrowed from the first, making the use productive and not merely superseding the original. The court also found little commercial character in the use of the small excerpts, and it found no improper conduct by Brown. This factor favors fair use.

Nature: The court looked to the nonfiction nature of the work used and its limited availability to the public. This factor favors fair use.

Amount: The excerpts were a small amount of the first work. This factor favors fair use.

Effect: The court found little adverse effect on the market for the original, noting that the two books might appear side-by-side in a store, but a buyer is not likely to see one as a replacement for the other. This factor also favors fair use.

The notion of a productive use is a breed of the transformative use examined in **chapter 9.** Courts are more generous with fair use when the new work transforms the original and gives it a new purpose or function—or if the use builds on the original in some productive manner. In either instance, the court is allowing greater fair use in order to promote the progress of knowledge and creativity.

The *Penelope* case might give Professor Tran considerable peace of mind if she is using short quotations from a published, nonfiction work. The one case, however, does not tell how far Professor Tran can go. What about long quotations? What if she were not copying published text, but instead pictures, poetry, unpublished manuscripts, or other types of works?[10]

The case of *Maxtone-Graham v. Burtchaell* suggests how Professor Tran might test the limits of the law with lengthy quotations.[11] A book about pregnancy and abortion included interviews with women about their own experiences. Sometime later, another author prepared his own book on the same subject and sought permission to use lengthy excerpts from the first work. That author, the plaintiff in this case, refused permission, and the defendant proceeded to publish his work with the unpermitted excerpts. The borrowed material encompassed slightly more than 4 percent of the work, including many insightful passages from the interviews. The court relied on the factors to conclude that the lengthy quoting was fair use.

EVEN THOUGH PERMISSION was denied by the copyright holder, the use may still be within fair use. Sometimes the denial of permission can mean that fair use is the only means for using the work, and courts seem to be especially sympathetic if the use has some social good, such as examining important issues. In the case of *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006), efforts to obtain permission failed, yet the court eventually ruled that the unpermitted publication of artistic posters was fair use in the context of a historical study.

Purpose: The defendant's book was published by a commercial press with the possibility of monetary success, but the main purpose of the book was to educate the public about abortion and about the author's views. This factor favors fair use.

Nature: The interviews were largely factual, which also favors fair use.

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. Again, this factor supports fair use.

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.

This case affirms that quotations in a subsequent work are sometimes permissible, even when they are extensive. This case also suggests much about using materials in an educational setting, where an instructor may be using pieces and clips of various works to prepare teaching materials or an online course. Even large pieces could be within fair use, especially for the favored purpose of education. Fair use is also stronger if the instructor is using the materials in the context of original teaching materials and with accompanying comments and criticism.

What if the user is doing more than merely copying pieces and embedding them in a new original publication? What if Professor Tran is looking to copy materials in full without original commentary? The next cases shed some light on straight copying.

IF LENGTHY QUOTATIONS can be within fair use, then should using large portions of copyrighted works in the context of teaching materials also be okay? Consider the case of *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983). A schoolteacher prepared a twenty-four-page pamphlet on cake decorating for her adult education classes. Eleven of those pages were taken directly from a copyrighted pamphlet prepared by another teacher. Even though both pamphlets were of limited circulation and were for teaching purposes only, the court held that the copying was not fair use. The defendant copied a substantial part of the original pamphlet, the copying embraced the original pamphlet's most significant portions, and the second pamphlet competed directly with the original pamphlet's educational purpose. Our fictitious Professor Tran should be hesitant about extensive copying of materials created specifically to serve the educational market.

COPYING FOR COURSE PACKS

SCENARIO

Professor Tran teaches at a community college and wants to make photocopies of articles and book excerpts as handouts for her students. Is she within fair use?

American courts have yet to rule on the question of fair use for paper or electronic copies made for educational purposes.[12] But two cases from the 1990s examined fair use for commercial photocopying, and they offer some analogous insights. The first case is the landmark ruling in *Basic Books, Inc. v. Kinko's Graphics Corporation*.[13]

Kinko's was found to be infringing copyrights when it photocopied book chapters for sale to students as course packs for their university classes.

THE PUBLISHERS IN the *Kinko's* case urged the court to rule that any anthology or course pack could not be allowed under fair use. The court rejected that contention, concluding instead that one must analyze each article, chapter, or other work separately and determine whether each item in the course pack is within the law.

Purpose: Although the materials were ultimately used in education, they were copied for the commercial benefit of Kinko's. Therefore, this factor weighed against fair use.

Nature: Most of the works were factual—they were works of history, sociology, and other fields of study—which tipped this factor in favor of fair use.

Amount: The court analyzed the percentage used of each work, finding that copying 5 to 25 percent of the original full book was excessive, tipping this factor against fair use.

Effect: The court found a direct adverse effect on the market for the books, because the course packs competed with the potential sales of the original books as assigned reading for the students. The photocopying of select chapters realistically undercuts sales of the books to those students, tipping this factor against fair use.

Three of the four factors leaned against fair use. Although fair use is not strictly a count of factors for and against, the reality of having solid arguments tipping three factors in one direction is usually persuasive. The court held that Kinko's therefore had committed infringement.

The second case is *Princeton University Press v. Michigan Document Services, Inc*.[14] A private copy shop created and sold course packs under circumstances similar to *Kinko's*. The copy shop was also found to have acted outside the limits of fair use. This case sharply divided the panel of judges who ruled on it. Nevertheless, the court's reasoning was similar to the *Kinko's* decision, with at least one important difference: the court gave most of its attention to the question of market harm. The court was particularly persuaded by the

EVEN JUDGES HAVE different views about fair use. The *Princeton* case was decided by a panel of thirteen judges. Eight of them ruled that the use was not fair, but five of them dissented. If experienced judges disagree about the law, no one should be surprised when educators and librarians also debate the scope and application of fair use.

availability of options for licensing the materials—or securing permission from the copyright owners—before making the copies. The court also noted that securing permissions had become standard procedure among commercial shops making photocopied course packs.

What do these cases tell us about Professor Tran's needs? She has a definite advantage when she makes limited copies herself on the college's photocopiers, thereby avoiding the disfavored commercial purpose. She can also help her cause by keeping the materials as brief as possible—that is, limiting her copying to just the amount needed for her educational purpose—and perhaps by checking the market for the reasonable availability of permission from the copyright owner.

What if Professor Tran wants to post the materials to a secured website or course management system? Fundamentally, fair use applies to electronic uses just as it does to paper copies. However, digital copies may be easily copied, uploaded, and shared without the practical limits that constrain hard copies. To help her case for fair use, Professor Tran should restrict access to the materials with password protections or other controls, and she should take the occasion to help her students understand the copyright implications of any misuse. Delivery through a secured system, rather than through e-mail or handouts, gives greater opportunity to inform students and prevent possible misuse of the copyrighted works. Chapter 11 examines similar issues for library electronic reserve systems. Many of the considerations Professor Tran faces for her own work are similar to the issues of fair use that arise in the development and implementation of library reserve systems.

SINGLE COPIES FOR RESEARCH

SCENARIO

Professor Tran needs to make single copies of articles, chapters, and other materials to support her research or to help her prepare for teaching. Are individual copies within fair use?

Generally single, isolated copies of brief items should easily fall within fair use. In the context of nonprofit education and research, they probably are within the law. The case of *American Geophysical Union v. Texaco Inc.*,[15] however, is a reminder that the limits of fair use can arise in seemingly the most innocuous circumstances. The case involved photocopying of individual journal articles by a Texaco scientist for his own research needs. The company circulated lists of new journals and articles, and employees were allowed to make copies for their individual reference. The court held that the copying was not within the limits of fair use.

IN AN UNUSUAL development, the court amended its opinion in the *Texaco* case several months after its original issuance, adding language that limited the ruling to "systematic" copying that may advance the profit goals of the larger organization. Apparently, the judges were still debating the wisdom of the ruling long after issuing it.

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. This factor weighs against fair use.

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 licensing fees. According to the court, the Copyright Clearance Center (CCC) provides a practical method for paying fees and securing permissions, so the copying 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 to weigh against fair use in the corporate context. This case was a clear signal to many for-profit entities that they ought to evaluate the option of securing licenses that cover their copying and other uses of many copyrighted works. That approach may be especially true if a blanket license from the CCC is affordable and actually encompasses many of the works that the user actually needs.[16]

Chapter 18 provides guidance and insight about seeking permissions, and it includes additional information about the role and function of the Copyright Clearance Center.

For nonprofit users, the case is a dose of caution about simple photocopying, although a court is not likely to construe fair use so narrowly in that context. The *Texaco* decision emphasizes that the ruling applies only to systematic commercial copying, and the court explicitly noted that it would not likely extend the ruling to individual researchers acting solely at their own behest for their own research initiatives. Our fictitious Professor Tran is likely to conclude that much of her copying of single, brief items is fair use. She would likely reach the same conclusion about single downloads and printouts from the Internet or from licensed databases.

CUTTING AND PASTING FOR AN EDUCATIONAL WIKI

SCENARIO

Professor Tran wants to create an innovative teaching tool, cutting and pasting a variety of works into a single cohesive set of materials for the students enrolled in her classes. She plans to gather and edit the materials as an evolving wiki, available to her students, and to be further revised and edited with newer materials all semester. Students access the wiki through a password-protected site.

If Professor Tran's wiki is little more than copies of reading and other materials, then her analysis of fair use may be much like the scenarios involving course packs or selected quoting. One could argue that she is just producing a digital version of the familiar print materials and making them available to only the students in her class. Even so, she probably has more flexibility about fair use than Kinko's had for its commercial copying.

Similarly, if she is clipping pieces and excerpts of materials, arranging them to suit her innovative needs, and enveloping them with original commentary and instructional content, then she may be making a high-tech version of a book or other teaching materials. In many respects, her fair use questions and challenges are not unlike the approach she might have applied to more conventional or familiar situations. She may be safely within fair use when she uses brief portions that are incorporated in a transformative manner; she may need to reflect more carefully when using large portions of works as straight reproductions.

In any event, the question of fair use will turn on the circumstances surrounding each individual item. If she is using clips of nonfiction text, fair use should be reasonably flexible. If she is using music, art, poetry, and other more creative works, she should be more

circumspect. If she is wrapping the use in commentary and criticism, her uses may be transformative, and she is on safer ground than she would be with straight copying. A few instructive court cases remind us that one can still face limits on fair use:

In *Los Angeles Times v. Free Republic*, the court ruled that posting the full text of newspaper articles to a website, even for the purpose of allowing readers to comment on those articles through the website, is not fair use.[17] Professor Tran, by contrast, is proposing to use materials for nonprofit education and only with restricted access. She can strengthen the possibilities of fair use by using only excerpts of articles. She can avoid issues of fair use entirely by linking to databases that might be available from her library, or to sources openly available on the Internet.

> One of the advantages of a wiki and many other technologies is the ability to link to other sources and to embed video and other materials from sites such as YouTube. Linking and embedding do not require copying and pasting of the content, and as a result seldom stir serious copyright questions. To the extent that Professor Tran can avoid copying, she also has likely avoided the need to evaluate fair use. Apart from fair use, Professor Tran may also be able to use the TEACH Act, a separate statute that offers an alternative set of rules for using copyrighted works in distance education or "transmissions." **Chapter 12** examines the TEACH Act in detail.

In *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, the court ruled that digital cutting and pasting of photographic elements into a montage of the Las Vegas skyline was not fair use.[18] The purpose was to create a commercial product for sale to the public. Professor Tran, by contrast, is producing teaching materials to serve her instructional needs. In the recent case of *Bill Graham Archives v. Dorling Kindersley Ltd.*,[19] a court ruled that the reproduction of small-size images of artistic posters was fair use, particularly if they are used in the context of a historical study. The reproductions were fair use even in a book produced for sale by a commercial publisher. Should Professor Tran later decide to publish her teaching materials, she will likely need to discuss and even negotiate with her publisher an appropriate standard of fair use.

In *NXIVM Corporation v. The Ross Institute*, the court ruled that fair use could allow someone to produce a critical analysis of copyrighted materials used in business seminars.[20] Fair use allowed the defendant to make a critical analysis of the materials and to post that critique on the Internet—even if it included approximately seventeen pages from the five hundred pages in the original work. The court was especially inclined to allow substantial copying and public accessibility when the use was in the context of original criticism and analysis. This case is important reassurance to Professor Tran if she is not simply making straight copies, but is rather including selected excerpts amidst original teaching materials.

MOVING FORWARD WITH FAIR USE

Most scenarios in this chapter have the advantage of being roughly comparable to situations that have arisen in court decisions. Consequently, Professor Tran has the benefit of learning from relevant interpretations of the four factors. However, the law is a long way from addressing many of her common needs. For example, she would like to post to her course management site video clips for streaming to students. Fair use absolutely allows some uses, but exactly how much of any video can Professor Tran digitize and stream? In thinking about the factors of fair use, she might consider:

Nature: Is she using a feature release film? Is she using an educational video? Is the film marketed specifically for education? Is it highly creative, or is it relatively simple content, such as news events or explanations?

Amount: Is she using brief clips? Does she need the "heart of the work"? Can she post the entire video? Does it matter if the entire work is ten minutes or two hours?

Effect: Is the film reasonably available for students to purchase additional copies at a low price? Is it a foreign film that is not easily available or is only in a different region code? Is the video marketed specifically for education, or is it of more general appeal? Has Professor Tran, or her library or university, purchased the film, thereby contributing to the market for such works?

Professor Tran and many educators throughout the country are struggling with these questions and are reaching different answers about the scope of fair use. Like all applications of fair use to new technologies, the law lags behind. Recently, UCLA was threatened with litigation involving similar uses of video. The university has reevaluated its standard of fair use, and the possible application of the TEACH Act, concluding that it can digitize and stream many videos. We will need to watch these developments and learn from the experiences at UCLA and elsewhere.

As Professor Tran pursues a range of activities, from simple quoting to creating innovative teaching materials, she regularly encounters questions about fair use. The answer to these questions is routinely: "It depends." The most important thing to remember is that fair use is flexible and highly dependent on the specific facts of each situation. Fair use can apply in all of these situations and more. It can apply to a full range of materials, from text and software to music and art. Fair use has enormous potential to support Professor Tran's work, even if it does not always allow everything.

The flexibility of fair use can also make it challenging and at times downright frustrating. The flexibility of fair use means that it often has no clear, firm, or established limits. It is variable in its scope, and its meaning is open to debate. The next chapter examines the guidelines that have attempted to bring some clarity to the law. In the process, however, they also have done considerable harm to the greatest virtues of fair use: its flexibility and adaptability to new situations and new demands.

ACTING IN GOOD FAITH

As she works through fair use, Professor Tran is likely to feel a burden of responsibility and an accompanying risk of legal liability. Indeed, chapter 14 of this book tells of severe consequences that may befall an infringer of someone's copyrighted work. Congress recognized the dilemma, however, that educators and librarians face when applying fair use. The law therefore includes an important provision that eliminates much of the financial liability Professor Tran could otherwise face, but she will have that advantage only if she applies the law of fair use in a reasonable and good faith manner.

> When Congress enacted the fair use statute in 1976, it recognized that educators and librarians would need to make difficult judgments about fair use. The Copyright Act therefore includes some important protection for users who act in good faith as they strive to learn about and apply fair use. **Chapter 14** provides the details.

Chapter 14 of this book offers more details, but for now the message is clear: If Professor Tran takes the initiative to learn and apply the factors of fair use, she likely will have the benefit of greatly reduced liability. Do not overlook the better and more direct message: if Professor Tran learns and applies the factors of fair use, she also stands a good chance of actually being within the law and in full accord with fair use. In the process, Professor Tran should keep notes about her decision, and possibly use the fair use checklist in appendix B to help document her thinking and conclusion. Maintaining records and notes

can go a long way to help confirm her informed and good faith decisions and protect her in the event of legal challenge.

NOTES

1. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991). The author of this book examined the court's ruling shortly after it was handed down. Kenneth D. Crews, "Federal Court's Ruling Against Photocopying Chain Will Not Destroy 'Fair Use'," *Chronicle of Higher Education*, April 17, 1991, p. A48.
2. *Higgins v. Detroit Educational Television Foundation*, 4 F.Supp.2d 701 (E.D. Mich. 1998).
3. *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1453 (C.D. Cal. 2000).
4. *Infinity Broadcasting Corporation v. Kirkwood*, 63 F.Supp.2d 420 (S.D.N.Y. 1999).
5. *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).
6. *Sandoval v. New Line Cinema Corporation*, 147 F.3d 215 (2d Cir. 1998). The district court ruled that the activity was within fair use, but the court of appeals was even more generous and called the use "de minimis."
7. *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).
8. *Field v. Google Inc.*, 412 F.Supp.2d 1106 (D.Nev. 2006).
9. 792 F.Supp. 132 (D.Mass. 1992).
10. A few cases have addressed fair use of such diverse works, and some of them are summarized later in this chapter.
11. 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987).
12. The pending case involving electronic reserves at Georgia State University may become the first case to address squarely these issues. See *Cambridge University Press v. Patton*, No. 1:08cv1425 (N.D. Ga. filed Apr. 15, 2008) (pending).
13. 758 F.Supp. 1522 (S.D.N.Y. 1991).
14. 99 F.3d 1381 (6th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997).
15. 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).
16. The CCC has begun to offer an annual license to educational institutions. The service has not been widely adopted, and experience thus far is limited. Educational institutions may want to follow developments and the debates among bloggers about the merits of and problems with such a license.
17. 54 U.S.P.Q.2d 1453 (C.D. Cal. 2000).
18. 55 F.Supp.2d 1113 (D.Nev. 1999).
19. 448 F.3d 605 (2d Cir. 2006).
20. 364 F.3d 471 (2d Cir. 2004). Another important case allowed, in a scholarly study, the use of lengthy excerpts from an unpublished novel by Marjorie Kinnan Rawlings. *Sundeman v. The Seajay Society, Inc.*, 142 F.3d 194 (4th Cir. 1998).

THE MEANING OF FAIR USE GUIDELINES

KEY POINTS

- Various groups have developed guidelines that apply fair use to diverse situations.
- Even though your use may not fit within these guidelines, your use may still be fair use.
- The guidelines may be helpful for some needs, but users must remember that they are not the law.
- Only by returning to the four factors can one have the full benefit of fair use.

WHEN COURTS DEVELOPED the law of fair use, and when Congress enacted the first fair use statute in 1976, they made clear that the law of fair use was never intended to anticipate specific answers for individual situations. Indeed, Congress acted deliberately to assure that it would not freeze the doctrine of fair use by giving it a narrowly defined meaning. As a result, the law calls on each of us to flexibly apply a set of factors to each situation. Because of the variability of the law, reasonable people can and will disagree about the meaning of fair use in even the most common applications. Given that courts have not addressed many of the fair use needs of education, we are often left to learn, debate, and sometimes simply disagree about the reach of the law.

Chapters 8 through 11 of this book offer a detailed look at the law of fair use. One prominent characteristic of fair use is its flexibility. Flexibility allows fair use to apply to many new needs and situations, but it also requires users to make judgments about the law that are sometimes difficult and discomforting.

EVOLUTION OF GUIDELINES

Educators, librarians, and others expressed great concern about the possible ambiguity of fair use, even before Congress enacted the first fair use statute in 1976. Congress urged interested parties to meet privately and to negotiate shared understandings of fair use. The result was a series of guidelines that attempt to define fair use as applied to common situations. The first of such guidelines emerged in 1976 on the issues of photocopying for classroom handouts and the copying of music.

Through the years, various groups have devised guidelines on other issues, from off-air videotaping to library copies. In the 1990s, guidelines gained renewed prominence with the formation of the Conference on Fair Use (CONFU). CONFU was an outgrowth of the National Information Infrastructure initiative under the Clinton administration, and it involved participation

from a broad range of interests: teachers, librarians, industry and government officials, and many others. The final report from CONFU proposed three more guidelines for newer technological issues.

MAJOR GUIDELINES, 1976–1998

Various groups have issued guidelines since 1976. The following list comprises the most significant of those guidelines, in chronological order. Accompanying each entry is a citation to the report or other publication in which the guidelines originally appeared.

Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals, March 1976. (U.S. Congress. House. *Copyright Law Revision*, 94th Cong., 2d sess. [1976]. H. Doc. 1476: 68–70.)

Guidelines for Educational Uses of Music, April 1976. (U.S. Congress. House. *Copyright Law Revision*, 94th Cong., 2d sess. [1976]. H. Doc. 1476: 70–71.) These guidelines are reprinted in a host of different books and other publications. Many of them are available on the website of the Music Library Association: http://copyright.musiclibraryassoc.org/.

Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes, October 1981. (U.S. Congress. *Congressional Record*, vol. 127, no. 18, pp. 24048–49 [1981]. Reprinted soon after at U.S. Congress. House. *Report on Piracy and Counterfeiting Amendments*, 97th Cong., 1st sess. [1982]. H. Doc. 495: 8–9.)

Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use, American Library Association, March 1982. (Originally published as a separate pamphlet from the American Library Association. Available at www.cni.org/docs/infopols/ALA.html [scroll down the web page to find the correct item].)

Library and Classroom Use of Copyrighted Videotapes and Computer Software, American Library Association, February 1986. (Reed, Mary Hutchings and Debra Stanek, "Library and Classroom Use of Copyrighted Videotapes and Computer Software," *American Libraries* 17 (February 1986): supp., pp. AD. Available at www.ifla.org/documents/infopol/copyright/ala-1.txt.)

Using Software: A Guide to the Ethical and Legal Use of Software for Members of the Academic Community, Educom, January 1992. (Originally published as a separate pamphlet from Educom, a predecessor organization to Educause. Available at www.ifla.org/documents/infopol/copyright/educom.txt.)

Fair-Use Guidelines for Electronic Reserve Systems, March 1996. (These guidelines were originally developed by participants in CONFU but were not included in the final report. This document and many other useful resources are available from the Electronic Reserves Archive developed by Jeff Rosedale at Manhattanville College: www1.mville.edu/administration/staff/jeff_rosedale/. In more recent years, the American Library Association issued a new set of guidelines on "Fair Use and Electronic Reserves." www.ala.org/ala/issuesadvocacy/copyright/fairuse/fairuseandelectronicreserves.)

Proposal for Educational Fair Use Guidelines for Digital Images, Conference on Fair Use, November 1998. (Information Infrastructure Task Force, Working Group on Intellectual Property Rights, *Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use*, November 1998, pp. 33–41.)

Proposal for Educational Fair Use Guidelines for Distance Learning, Conference on Fair Use, November 1998. (Information Infrastructure Task Force, Working Group on Intellectual Property Rights, *Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use*, November 1998, pp. 43–48.)

Proposal for Fair Use Guidelines for Educational Multimedia, Conference on Fair Use, November 1998. (Information Infrastructure Task Force, Working Group on Intellectual Property Rights, *Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use*, November 1998, pp. 49–59.)

THE CONFU FINAL report includes the original publication of the three guidelines on issues of digital images, distance learning, and educational multimedia. That report is available at www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf. The Conference on Fair Use was conducted under the oversight of the U.S. Patent and Trademark Office. It is rooted in a 1995 report on the National Information Infrastructure: www.uspto.gov/web/offices/com/doc/ipnii/

Some guidelines have proven to be enormously influential on our conceptualization of fair use. The earliest document, regarding photocopying for classroom purposes, reinterprets the four factors into such notions as "spontaneous" copying, and it calls on teachers to meticulously count words on the page before making multiple copies of articles as handouts. These standards have appeared often in the literature of the law and in policy documents at colleges, universities, schools, and other institutions throughout the country. However influential the guidelines may be, their role has been a mixed blessing. For many users, guidelines are a source of certainty when fair use seems unsettling. For many other users, guidelines are a constraint on the law's flexibility.

WHAT TO DO WITH THE GUIDELINES?

The main motivation behind most of the guidelines has been to bring some degree of certainty to common fair use applications. Yet none of these guidelines has any force of law. None of the guidelines has been enacted into law by Congress, and none has been adopted as a binding standard of fair use in any court decision. So do they present appropriate answers to some fair use problems?

Whatever the possible benefits of guidelines, the author of this book has written at length about their shortcomings.[1] Deficiencies of the guidelines include the following:

- They often misinterpret fair use, infusing it with variables and conditions that are not part of the law.
- They create rigidity in the application of fair use, sacrificing the flexibility that allows fair use to have meaning for new needs, technologies, and materials.
- They tend to espouse the narrowest interpretations of the law in order to gain support from diverse groups.

Yet another set of copyright guidelines focuses on making copies for interlibrary loans. Those guidelines are not about fair use, but instead are an interpretation of a provision of Section 108. They are examined in **chapter 13** of this book.

DEVELOPMENT OF GUIDELINES has met with widespread resistance following CONFU. An alternative approach gaining considerable support in recent years is the drafting of best practices for fair use as applied to media literacy, online video, open courseware, dance choreography, and more. Leading efforts are from the Center for Social Media of American University. See www.centerforsocialmedia.org/resources/fair_use/.

Whatever the virtues or hazards of the guidelines, each individual or institution must decide whether to adopt or follow any of them. Even the most enthusiastic supporter of the guidelines, however, cannot avoid some of their consequences. The guidelines will never address all needs. Rather, we must steadily turn to the factors in the law to understand each new situation. The guidelines also demand diligent oversight and enforcement if they really are to become the policy standards for educators, librarians, and others. For example, if the guidelines on classroom photocopying constitute the limits of fair use, then the educational institution will need to impose and expect compliance with the full roster of detailed measures of allowable activity. Implementing the standards in the guidelines can at times be more demanding than struggling with the flexibility of fair use.

Chapter 14 of this book includes more details about the liabilities that can arise in a copyright infringement lawsuit, as well as the reduction of liabilities in the event of a good faith application of fair use.

Basing a decision on the four factors in the statute, rather than on the guidelines, can have real advantages. The law's flexibility is important for enabling fair use to meet future needs and to promote progress in the academic setting or elsewhere. Accepting that flexibility also allows some important protections for educators and librarians. The good faith application of fair use can lead a court to cut entirely some of the liabilities that educators or librarians might face in an infringement lawsuit. The only way to apply fair use in good faith is by learning the law and applying it; the only way to apply the law is by working with the four factors in the statute. In the final analysis, the law itself may offer greater security than can the certainty of the fair use guidelines.

NOTE

1. Kenneth D. Crews, "The Law of Fair Use and the Illusion of Fair-Use Guidelines," *Ohio State Law Journal* 62 (2001): 599–702.

PART IV

Focus on Education and Libraries

The Bibliothèque Nationale de France traces its origins to the fourteenth century. New and old libraries around the world are instrumental in preserving and providing access to the cultural record—which often includes copyrighted materials.

DISTANCE EDUCATION AND THE TEACH ACT

KEY POINTS

- The TEACH Act allows uses of copyrighted works in distance learning.
- Implementing the new law requires policies, technological controls, and compliance with other conditions.
- Not all copyrighted works can be used in full under the TEACH Act.
- Fair use continues to be an important means for lawful use of works in distance education.
- Appendix C includes a checklist detailing the many requirements of the TEACH Act.

THE RAPID EXPANSION of distance education and the integration of online components into traditional classroom courses have accelerated the educational uses of copyrighted materials on the Internet and on networked systems.[1] That growth also has led to a proliferation of copyright questions among educators and librarians. Possibilities of infringement arise whenever text, images, sounds, and other works are scanned, uploaded, transmitted, and stored or copied by teachers and their students. As these technologies become a mainstay of modern education, instructors and educational institutions must become attuned to copyright implications of modern teaching. Congress recognized the importance of these innovations when it enacted the TEACH Act in late 2002.[2] The statute established a new exception to the rights of owners by allowing educators to use protected works in distance education without risk of infringement.

GOOD NEWS AND BAD NEWS

The TEACH Act, or more formally the Technology, Education and Copyright Harmonization Act, offers benefits along with limits and responsibilities. As long as educators remain within the boundaries of the law, they can avoid infringements and need not seek permission from, or pay royalties to, the copyright owner. These benefits, however, are not easy to secure. Indeed, complying with the TEACH Act means satisfying a rather lengthy list of conditions in the statute. Even then, the TEACH Act still places limitations on the use of many copyrighted works. If instructors and their educational institutions are to reap the law's benefits, they must take careful steps to implement it.

The TEACH Act attempts to incorporate a balance of rights and limits that reveals the tension between copyright owners and users within the educational setting. Authors and publishers of textbooks, producers of films, composers of music, and other copyright owners often want maximum protection for their works and the ability to generate all possible revenue. For many of these owners, educators are their main users and a source of potential revenue. By contrast, teachers preparing new online courses might want liberal rights of use, especially if their purpose is nonprofit education. The TEACH Act is a compromise between maximum protection and liberal rights of use. It allows some uses in distance education, but not all.

THE TEACH ACT is codified at Section 110(2) of the Copyright Act. It replaced the original Section 110(2) that had been part of the law since 1978, but the prior law had limits and constraints that made it generally unworkable for online education and web-based courses.

While the TEACH Act's purpose is to address the changing landscape of modern education, the statute is largely built around a particular vision of distance education that generally involves performances and displays of works in a manner much like a classroom experience. The TEACH Act permits uses of copyrighted works in the context of "mediated instructional activities"[3] that are akin in many respects to the conduct of traditional instructional sessions. For example, the law anticipates that students will sometimes access materials only within a roughly prescribed time period and may not necessarily store or review them later in the academic term.[4]

Similarly, faculty members will be able to include copyrighted materials, but often only in portions or under conditions analogous to conventional teaching. Stated more bluntly, this law is generally not intended to permit scanning and uploading of lengthy works to a website for unlimited access. Again, these constraints reflect the struggle between the economic interests of copyright owners and the expectations of an educator who is seeking to make progressive use of modern technology.

WHAT ORGANIZATIONS CANNOT use the TEACH Act? The law will not benefit unaccredited start-ups, some trade schools, and various for-profit institutions.

The structure of the TEACH Act suggests another trait: no one person acting alone is able to comply with it. The law requires the adoption of institutional copyright policies, distribution of information to the educational community concerning copyright, implementation of technological controls, and adherence to the portion limits of allowable materials.[5] Most often, compliance with copyright law has typically been the responsibility of each instructor. Under the TEACH Act, however, the educational institution itself must participate actively in the compliance effort.

REQUIREMENTS OF THE TEACH ACT

Unlike the relatively broad and flexible terms of fair use, the limitations in the TEACH Act are detailed and exacting in their definition of allowed uses of copyrighted works. A close reading of the statute reveals a roster of requirements which can be usefully grouped into three categories: institutional and policy requirements; technology requirements; and instructional planning requirements. Keep in mind that the benefits of the law can apply

only upon meeting all the prescribed requirements.

POLICY DEVELOPMENT CAN be a complicated process, involving lengthy deliberations and multiple levels of review and approval. Formal policy making may be preferable, but informal procedural standards that effectively guide relevant activities may well satisfy the TEACH Act requirement.

Institutional and Policy Requirements

The TEACH Act mandates various policies, information resources, and notifications about copyright.[6] These requirements likely involve institutional decision making. They can demand careful interpretation of the law and may have implications beyond online courses. Therefore, these requirements will likely become the responsibility of deans, directors, legal counsel, or other central administrators.

Accredited institutions. The TEACH Act applies only to a "government body or an accredited nonprofit educational institution."[7] In general, colleges and universities accredited by a recognized agency, or elementary and secondary schools recognized under state law, will easily qualify. Programs offered by federal, state, or local government agencies, including public libraries, may also qualify. The application of the TEACH Act to government bodies can be broad, encompassing professional enrichment courses offered by local governments to the full curricula of military academies.

The requirements of the TEACH Act are organized into a checklist included as **appendix C** of this book.

Copyright policy. The new law requires educational institutions to "institute policies regarding copyright."[8] Although the statute does not offer many details, one can surmise that policies should specify standards for incorporating copyrighted works into distance education. Whatever the form or content, policy making usually requires deliberate and concerted action by proper authorities within the educational institution.

Copyright information. The institution must "provide informational materials" regarding copyright.[9] 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." Institutions might consider developing websites, distributing printed materials, or providing information through the distance education program itself.

MANY EDUCATIONAL INSTITUTIONS are developing copyright information resources to help instructors and others. The rich trove of information readily available on the Internet and in publication means that we can borrow and learn from one another. Creating a website with links to available materials can ease the way toward satisfying this requirement.

Notice to students. 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."[10] This notice may be a brief statement simply alerting students 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 or in a pop-up box on the course website.

THE UNDEFINED NOTION of a "class session" is one of the most perplexing aspects of the TEACH Act. It is sometimes understood to mean that the work can be made available for only a limited span of time. Such a rule would defeat a key benefit of distance education—to enable students to work with materials at their own pace and return to earlier readings for reinforcement. A close reading of the statute does not necessarily lead to that conclusion. The language limits the duration of a *student's* retention of the work. Congress apparently did not want students to download and keep the materials; Congress was not necessarily requiring that the materials be removed or blocked after the duration of a class session.

Technology Requirements

New technologies may be driving much of the growth of distance education and the potential for copyright infringements. The TEACH Act also calls upon technological innovation to inhibit abuse of copyrighted materials. The law requires institutions to implement a variety of technological methods for controlling access to and dissemination of the copyrighted works beyond their intended use.

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."[11] This requirement should not be difficult to satisfy. Most educational institutions have course management systems or other tools that implement passwords or other restrictions on access.

Technological controls on retention and further dissemination. The TEACH Act applies to a wide variety of means for delivery of distance education, but a few provisions apply only in the case of "digital transmissions."[12] In such instances, the institution 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 explicit definition of "class session," but language in congressional reports suggests that any digital transmissions of works in a retainable format would be confined to a finite time.

Technological controls on dissemination. Also in the case of digital transmissions, the institution must apply technological measures to prevent students from engaging in "unauthorized further dissemination of the work in accessible form."

These technological requirements need not be airtight. The TEACH Act specifies that the technology must "reasonably prevent" the activity. The technology might not be perfect—and a student might find a way around it—but at least the institution should use its best effort and stay informed about the latest possibilities. Good faith steps to implement these controls should satisfy the legal standard.

Technological Complications

These restrictions on accessing, copying, and further sharing of materials address serious concerns from copyright owners. On the other hand, many technology experts question whether the implementation of *effective* technological measures is even possible. Once content reaches the student's computer, blocking all means of downloading or copying the materials may be impossible. Once stored, little can restrict further duplication and distribution. The U.S. Patent and Trademark Office has collected information concerning effective technological restrictions for further study.[13] Educational institutions will need to continue to find the best available means—even if imperfect—for complying with the law. Revisiting

copyright policies and technological tools on an ongoing basis can be an important aspect of compliance with the TEACH Act.

Various other technological requirements appear in the law. For example, if the copyrighted content has restrictive codes or other embedded protection systems to regulate reproduction or dissemination of the works, the educational institution may not "engage in conduct that could reasonably be expected to interfere with [such] technological measures."[14] Interference with technological control measures may also expose the educational institution to violations of the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA).

Chapter 16 of this book provides an overview of the anticircumvention law and its meaning for access to and use of copyrighted works that may be locked behind technological controls. In general terms, this law creates a form of copyright violation based on the breaking or other circumvention of the controls. A common example would be the code embedded on a DVD that may restrict playing or copying the motion picture.

The TEACH Act also exonerates educational institutions from liability that may result from most "transient or temporary storage of material."[15] Further, the TEACH Act amended Section 112 of the Copyright Act, addressing the issue of so-called "ephemeral recordings."[16] The new Section 112(f)(1) explicitly allows educational institutions to make and retain copies of their digital transmissions that include copyrighted materials used pursuant to the new law. All these provisions of the law create new responsibilities that will most assuredly become the domain of technology experts at educational institutions.

Instructional Requirements

After meeting the many conditions about access, technology, and policy, the TEACH Act further defines limits on the selection of substantive instructional content. Most decisions about course content are usually left to instructors, in part because of traditions of academic freedom, but also because they know their subjects best. Instructors will therefore be instrumental in complying with the law as they make crucial decisions about the selection and quantity of materials to incorporate into distance-learning courses.

The limits in the TEACH Act are best understood by comparison to previous law, which drew sharp distinctions between allowed and disallowed works. These distinctions were built upon the statutory concepts of displays and performances. Previous law allowed displays of any type of work, but allowed performances of only nondramatic literary works and nondramatic musical works. Consequently, many dramatic works were excluded from distance education, as were performances of audiovisual materials and sound recordings. Such narrowly crafted exceptions were problematic at best. The TEACH Act grants somewhat greater latitude for the use of many copyrighted works.

Chapter 6 examines the rights of copyright owners and explains the concepts of displays and performances. *Displays* are generally static images, whether of artwork, text, photographs, or other works; *performances* generally occur with the playing of music or audiovisual works and the recital of text, poetry, or plays. Distance education, as well as classroom instruction, routinely includes many displays and performances.

Works Explicitly Permitted

The TEACH Act permits the following:

- 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"
- Displays of any work "in an amount comparable to that which is typically displayed in the course of a live classroom session"[17]

One of the most troublesome questions about the TEACH Act is the concept of portions of audiovisual works. The law does not give any significant guidance, but a report from the Congressional Research Service suggested that sometimes an entire audiovisual work may be allowed:

> [T]he legislative history of the Act suggests that determining what amount is permissible should take into account the nature of the market for that type of work and the instructional purposes of the performance. For example, the exhibition of an entire film may possibly constitute a "reasonable and limited" demonstration if the film's entire viewing is exceedingly relevant toward achieving [an] educational goal; however, the likelihood of an entire film portrayal being "reasonable and limited" may be rare.[18]

In a situation that has received considerable press attention, leading to the filing of a lawsuit, the University of California, Los Angeles (UCLA) is evidently testing the scope of the TEACH Act and fair use for digitizing and streaming videos.

IN RESPONSE TO the situation at UCLA, a consortium of library associations has offered its analysis of the TEACH Act, fair use, and Section 110(1) as applied to streaming of videos forinstructional purposes: www.librarycopyrightalliance.org/bm~doc/ibstreamingfilms_021810.pdf. For a contrary view by one of the parties involved in the UCLA controversy, see the paper by Arnold Lutzker in the AIME newsletter, Spring 2010.

Works Explicitly Excluded

A few categories of works are specifically left outside the range of permitted materials under the TEACH Act:

- Works that are marketed "primarily for performance or display as part of mediated instructional activities transmitted via digital networks." For example, materials available through online databases, or marketed in a format delivered for educational uses through digital systems may be outside of the TEACH Act. The law generally steers users to those sources directly, rather than allowing educators to digitize and deliver their own copies.
- 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.[19]

Instructor Oversight

The statute mandates the instructor's participation in the planning and conduct of the distance education program 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 must be "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.
- The copyrighted materials are "directly related and of material assistance to the teaching content of the transmission."[20]

These three requirements share some common objectives: to assure that the instructor ultimately supervises uses of copyrighted works, and that the materials serve educational pursuits and are not for entertainment or other purposes.

CONVERTING ANALOG TO DIGITAL

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. The TEACH Act takes a cautious approach and allows conversions only in quantities allowed for performance and display in the course, and only if a digital version of the work is not "available to the institution."[21]

The law also allows conversion of works from analog to digital if the digital version available to the educational institution "is subject to technological protection measures that prevent its use" under the TEACH Act. What does this provision mean? The TEACH Act allows uploading and transmitting video clips, but the source of the clips may be a DVD that is encoded to block any clipping and copying. Breaking that code may be a violation of the provision in the U.S. Copyright Act against the circumvention of technological measures. That provision is mentioned earlier in this chapter and examined in detail in chapter 16 of this book. Unfortunately, the TEACH Act does not relax that prohibition. Instead, it permits the making of digital copies from an analog source, such as a VHS tape or 16 mm film. The DVD, as a digital source, goes back on the shelf. This state of the law is hardly ideal. In fact, it is arguably absurd. If you did not already have reason to write to your member of Congress, you might have one now.

WHAT ARE "MEDIATED instructional activities"? This language means that the uses of materials in the program must be "analogous to the type of performance or display that would take place in a live classroom setting." The concept of mediated instructional activities also does not include uses of textbooks and other materials "which are typically purchased or acquired by the students." *U.S. Copyright Act*, 17 *U.S.C.* § 110(2). The statute again seems to be making a fundamental point: if students would ordinarily buy and keep the materials, that content should not be scanned and uploaded as part of distance education.

MAKING PLANS AND LOOKING AHEAD

The TEACH Act holds out the prospect of allowing a considerable range of copyrighted works in distance education, but only after meeting the rather significant burden of compliance. Perhaps the most significant aspect of compliance is that no one person is likely able to meet the challenge alone. Multiple parties within the college or university will need to participate; central administrators and policy makers will have a role of growing importance; technology experts will need to implement systems and controls; instructors must develop courses with attention to limits on the types and quantity of allowable materials.

Because the TEACH Act has limits, many uses of copyrighted works that may be desirable or essential for effective teaching may simply be outside the

PERHAPS THE FIRST step in implementing the TEACH Act is to assemble a team of leaders and experts. The first question might be: Are we willing and able to do the work? If the group is not motivated to make the law work, it simply may not be right for your institution. After all, the TEACH Act is not mandatory. You may instead rely on fair use or permissions.

scope of the TEACH Act. In anticipation of those limits, educators should also be prepared to explore alternatives. Some possibilities:

- Employing alternative methods for delivering materials to students, including the expansion of innovative library services and access to databases and retrieval systems.
- Applying the law of fair use, which may allow uses beyond those detailed in the TEACH Act. Chapters 8 through 11 of this book examine fair use in detail.
- Securing permission from copyright owners for uses not sanctioned by the TEACH Act, fair use, or other provisions of the law. Chapter 18 of this book includes guidance for seeking permissions.

The TEACH Act is relatively new law, but in its several years of existence it apparently has gained only modest acceptance. The principal reason may be simply that the law is too complicated for casual compliance, and its conditions may appear confusing, foreboding, or perhaps impossible. The TEACH Act may find its greatest potential when applied to courses that are initiated and overseen by a centralized office. Someone with oversight authority may have the best opportunity to be sure that the litany of legal details is addressed, and that the policy makers and technology specialists are enlisted to offer their skills and services.

FAIR USE LONG has applied to distance education. Educators have depended for years on fair use to cover uses in all forms of distance education courses, and reports from Congress issued in connection with passage of the TEACH Act affirm that fair use remains a legally valid alternative when the TEACH Act does not work.

By contrast, the individual instructor who is scanning and uploading materials to a website may not have the resources, talents, or even inclination to address every provision of the TEACH Act. An individual instructor is typically not well positioned to evaluate the detailed law and to make all judgments about legal interpretations, choices, and compliance. Until some level of centralized authority at an educational institution takes the lead, the TEACH Act will probably not be a realistic option, but instructors have the continuing opportunity of turning to fair use and other constructive options.

NOTES

1. This chapter is based in part on the following article by the same author: Kenneth D. Crews, "Copyright and Distance Education: Making Sense of the TEACH Act," *Change* 35 (November-December 2003): 34–39. While the statute has not changed, the passage of time has allowed experimentation with the law and a fresh examination of some of the detailed language. Hence, this chapter makes some significant variations from the earlier article.
2. *Technology, Education and Copyright Harmonization Act*, Public Law 107-273, *U.S. Statutes at Large* 116 (2002): 1910, codified at 17 U.S.C. §§ 110(2) and 112(f).
3. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2).
4. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2).
5. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2)(D).
6. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2)(D).
7. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2).
8. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2)(D).
9. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2)(D).
10. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2)(D).

11. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2)(C).
12. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2)(D)(ii).
13. In 2003, the PTO issued "Technological Protection Systems for Digitized Copyrighted Works: A Report to Congress," available at www.uspto.gov/web/offices/dcom/olia/teachreport.pdf.
14. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2)(D)(ii)(II).
15. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2).
16. *U.S. Copyright Act*, 17 *U.S.C.* § 112(f).
17. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2).
18. Jared Huber et al., *Copyright Exemptions for Distance Education: 17* U.S.C. *§ 110(2), the Technology, Education, and Copyright Harmonization Act of 2002* (Washington, D.C.: Congressional Research Service, 2006): 4. Available at http://assets.opencrs.com/rpts/RL33516_20060706.pdf.
19. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2).
20. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2)(A)–(C).
21. *U.S. Copyright Act*, 17 *U.S.C.* § 112(f)(2).

THIRTEEN

LIBRARIES AND THE SPECIAL PROVISIONS OF SECTION 108

KEY POINTS

- Section 108 allows many libraries to make copies of materials for preservation, private study, and ILL.
- The opportunities under Section 108 do not extend equally to all types of works.
- Section 108 requires compliance with various requirements, but most libraries should be able to meet them and enjoy the benefits of the law.
- Appendixes D and E of this book include two checklists of the requirements under Section 108 for research and for preservation copies.

AMERICAN COPYRIGHT LAW includes numerous specific provisions limiting the rights of copyright owners. These provisions establish rights for the public to use protected works under specified circumstances. Section 108 is one such section. This statute allows libraries to make and distribute copies of protected materials for specified purposes under specified conditions. Although meticulous, it can offer important support for library services.[1]

Section 108 allows libraries, within limits, to make copies of many works for the following three purposes: copies for preservation of library collections; copies for private study by users; and copies to send pursuant to interlibrary loan (ILL) arrangements.

Once the library has determined that the copying is for one of those purposes, it must then resolve the following questions:

- Is the library eligible to enjoy the benefits of the law?
- Is the copyrighted work one of the types of works that may be used pursuant to this statute?
- Has the library adhered to the conditions for making copies for each of the allowed purposes?

ELIGIBILITY REQUIREMENTS OF SECTION 108

Before a library can benefit from Section 108, it must comply with certain general requirements and limits. Most academic and public libraries will have little trouble meeting these requirements. The statute establishes the following ground rules for using Section 108:

- The library must be open to the public or to outside researchers.[2] Nearly every public and academic library will meet this standard.
- The copies must be made "without any purpose of direct or indirect commercial advantage."[3] This requirement may exclude copies that are made by a public library for a commercial document delivery service. It may also mean that a corporate library could be eligible to use this law, but copies that are specifically for commercial purposes are not within Section 108.
- The library may make only single copies on "isolated and unrelated" occasions and may not, under most circumstances, make multiple copies or engage in "systematic reproduction or distribution of single or multiple copies."[4] The request for a single copy seldom raises a question. Multiple requests for the same item from several students in the same course may be systematic.
- Each copy made must include a notice of copyright.[5] The notice on the copy should usually be the same copyright notice that appears on the original work. In fact, some libraries simply copy the page with the notice on it along with the pages of particular interest.

WHAT LIBRARIES WILL not qualify to use Section 108? Private libraries, corporate libraries, and other libraries that are closed to outside users may be outside the scope of Section 108. That exclusion is not sweeping. A library qualifies if it is open to outside users "doing research in a specialized field." In other words, if a specialized corporate library admits outside researchers, even selectively, that library may qualify.

Not all copyrighted materials have a formal copyright notice. If no notice appears on the original, the copy must include "a legend stating that the work may be protected by copyright." Many libraries have simply placed the following statement on all copies when no formal copyright notice is available: "Notice: This material is subject to the copyright law of the United States." The generic notice principally gives any reader a nudge to think about possible copyright implications for further use of the work.

ALTHOUGH SECTION 108 generally permits only single copies, the provisions that apply to preservation copies allow up to three copies of a single work. The details of the preservation requirements are outlined later in this chapter.

TYPES OF WORKS THAT MAY BE COPIED

Section 108 sets specific limits on the types of materials that libraries may copy. Exactly which works may be copied by the library will vary greatly, depending on the purpose for making the reproductions. If the copies are for preservation or replacement of library materials, the scope of materials is unlimited. A library may make preservation copies of manuscripts, pictures, art, and any other works. By contrast, if the copying is for a user's private study, Section 108 imposes tight constraints. While a library may reproduce any type of motion picture or other audiovisual work for preservation or replacement, copies of audiovisual works made for a user's private study are allowed only if they are about news.[6]

The scope of materials that may be reproduced and given to users for their private study is as follows:

- Journals, newspapers, books, and other textual works. The scope of allowed works could also extend to computer software, architectural works, dance notations, and a wide range of copyrightable materials.

- Pictures and graphics, but only if they are "published as illustrations, diagrams, or similar adjuncts" to works that may otherwise be copied.[7] In other words, if you can copy a journal article for the library user, you can also copy the picture or chart that is in the article.
- Audiovisual works, but only if they are works "dealing with news."[8] A library may therefore make a copy of a video clip of the program *Meet the Press*, but not a clip from the movie *Broadcast News*.
- Sound recordings may also be copied, but only recordings of certain works. Because Section 108 specifically excludes musical compositions, the library may copy a recording of a public domain work or a recording of spoken word, such as a speech or a reading of an article, book, or other item that is on the list of allowed works.

THIS BREAKOUT OF different types of works may be detailed and at times constrain library services. Regardless of the type of work, however, the provisions of Section 108 for research copies are silent about whether the original or the copy may be in a digital or analog format, leading to the inference that the law is technologically neutral. Many libraries would probably be comfortable reproducing a digital work, subject to the conditions of the law, and delivering a copy of an article or other work to a user as a digital file. Although not required, the library may append an advisory notice, cautioning the user about further transmissions or sharing of the digital copy.

Outside of these categories of works, Section 108 explicitly bars copying of broad categories of works for purposes of private study. Those categories include musical compositions; motion pictures and other audiovisual works; and pictorial, graphic, and sculptural works. Keep in mind that none of these limits applies when the library is making copies under Section 108 for purposes of preservation or replacement.

COPIES FOR PRESERVATION OR REPLACEMENT

Once the library is qualified to use Section 108 and proper materials are identified, the library must next meet the various conditions for each use. Under what conditions may the library make copies for preservation? The rules are a little different, depending on whether the work is unpublished or published.

If the work is *unpublished*, preservation copies are permitted upon meeting both of these conditions:[9]

- The work is currently in the collection of the library making the copy.
- The copies are solely for preservation or security, or for deposit at another library. The library can therefore make a copy of a manuscript for patron use, and store the original for safekeeping. The library that owns the original may also make and contribute a copy to the collections of another library. The library receiving the copied work must also be eligible under the terms of Section 108.

A sound recording often encompasses two separate copyrights. First, the recording itself is often an original work, and the voices and instruments captured on tape are copyrightable. Second, the underlying text or musical composition has its own copyright. Thus, the copying of a sound recording often implicates rights of two separate owners, and they need to be considered separately. Hence the awkward outcome of the law's permitting reproduction of the recording, but not necessarily the underlying work. The distinctive rules of copyright and music are surveyed in **chapter 15** of this book.

If the work has been *published*, making copies to replace the item in the library's collection is permitted upon meeting both of these conditions:[10]

- The copies are solely for replacement of an item that is damaged, deteriorating, lost, or stolen, or if the format of the work has become obsolete.
- The library conducts a reasonable investigation to conclude that an unused replacement cannot be obtained at a fair price. The law does not offer guidance about what constitutes a reasonable investigation or fair price, but librarians should almost always check customary sources for acquisitions and maintain notes and records of findings.

WHAT IS AN *obsolete* format? The statute defines the notion to mean that the machine or device necessary to read or perceive the work in that format "is no longer manufactured or is no longer reasonably available in the commercial marketplace." In other words, if you cannot find newly made or sold players, you may be able to make preservation copies of your collection of eight-track disco music.

The Digital Millennium Copyright Act of 1998 amended Section 108 to clarify the rights of a library to make digital copies for preservation and replacement. Digital copies may be made of both published and unpublished works under all the conditions set forth above. In addition, "any such copy or phonorecord that is reproduced in digital format" may not be "made available to the public in that format outside the premises of the library or archives."[11] To oversimplify, machine-readable digital formats must generally be confined to the library building or buildings.

WHY DID CONGRESS confine the digital copies to the premises of the library? The principal reason lies in the nature of digital media and networked systems. If a library could make a preservation copy and upload it to a server for wide accessibility, the library would be acting very much like a publisher of that work. The current limit in the law is surely too restrictive, but it is a reminder that copyright owners are concerned about the possible competitive effects of some library services.

Some libraries contend with this restriction by making one digital copy for access online on the premises, and making an analog version of the same work that may be circulated. Unfortunately, Congress did not contemplate many awkward consequences of this law, including the problem of works that are "born digital." A library today will often need to make preservation copies of CDs, DVDs, data files, and other works that were acquired in digital form. The originals were freely available for circulation outside the premises. The digital preservation copy, however, is apparently confined to the building.

COPIES FOR PRIVATE STUDY

Under what conditions may the library make copies for library users to study and keep? Here the law sets two basic standards. One standard applies to copies of articles or other short works. A slightly more demanding standard applies to copies of entire books and other such works.

If the copy is of an *article, book chapter, or other portion* of a larger work, these conditions apply:[12]

- The copy becomes the property of the user.
- The library has no notice that the copy is for any purpose other than private study, scholarship, or research.
- The library displays a warning notice where orders for copies are accepted and on order forms.

If the copy is of an *entire book or other work, or of a substantial part of such a work*, these conditions apply:[13]

DOES THE LIBRARY have to actually know that the copy is for private study and not for business or other purposes? No. The library must only have no notice that the copy is for another purpose. Knowing absolutely nothing about the user's purpose for the copy satisfies the law. Once the librarian has reason to know that the copy is for some purpose other than private study, the library's ability to use Section 108 for that transaction may need to end.

- The library conducts a reasonable investigation to conclude that a copy cannot be obtained at a fair price.
- The copy becomes the property of the user.
- The library has no notice that the copy is for any purpose other than private study, scholarship, or research.
- The library displays a warning notice where orders for copies are accepted and on order forms.

COPIES FOR INTERLIBRARY LOAN

Section 108 also allows libraries to make copies and to receive copies of materials in the name of interlibrary loan (ILL) services. For the library that is making and sending the copies, the rule for ILL can be stated succinctly: in general, the copy must be made pursuant to the standards already detailed in this chapter. The copies requested through ILL are generally articles, chapters, and other short works that are copied for purposes of private study and research. The same requirements outlined above about copies for private study would apply, whether the copy is delivered to a user present at the library or making the request through ILL.

The rules for the library *receiving* the copy, however, are a little different. That library must adhere to this standard: the interlibrary arrangements cannot have "as their purpose or effect" that the library receiving the copies on behalf of requesting patrons "does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."[14]

The point of this language is to remind libraries that when the demand for a journal or other work reaches a sufficient level, the library ought to consider buying its own copy of the work instead of relying on ILL. The problem, of course, is that the law does not specifically define the limit.

THE NOTICE ON order forms is usually a simple warning statement about copyright protection. By contrast, the notice that libraries must display at the place where orders are received is detailed in regulations issued by the U.S. Copyright Office.

Code of Federal Regulations, title 37, vol. 1, sec. 201.14.

To help clarify the limit on a library's ability to receive copies, Congress established the National Commission on New Technological Uses of Copyrighted Works (CONTU) shortly after enacting Section 108. CONTU issued its final report in 1979 and

proposed guidelines that bring specificity to the quantity limits of the law. The CONTU standards generally allow a library, during one calendar year, to receive up to five copies of articles from the most recent five years of a journal title.[15]

After reaching that quota, the general expectation is that the receiving library will evaluate its alternatives. The library may purchase its own subscription to the journal. Some libraries simply choose not to fulfill requests for additional articles from that journal, a strategy that leaves the next user completely unserved. Many libraries instead seek permission from the copyright owner, or they pay a fee to the Copyright Clearance Center for a license to make the additional copies. Other libraries might more directly reconsider the appropriateness of the CONTU guidelines. The standards are not the law, and libraries have the ability to evaluate whether some other interpretation of Section 108 may be appropriate.

THE CONTU GUIDELINES are hardly complete. They encompass only copies of recent journal articles. Libraries are left to their good judgment about the limits of the law as applied to older materials, book chapters, and other works. For the full text of the CONTU final report, see www.digital-law-online.info/CONTU/contu1.html.

COPY MACHINES IN THE LIBRARY

This statute has one more provision that is routinely important to libraries. Section 108(f)(1) gives libraries protection from infringements that a visitor may commit when using unsupervised copy machines in the library. As long as the library displays a notice informing users that making copies may be subject to copyright law, the statute can release the library and its staff from liability.[16] The user of the machine is still responsible for any infringements.

The statute offers protection to libraries that post notices on unsupervised "reproducing equipment" at the library. The statute does not narrowly refer to photocopy machines. The benefit to libraries that post the notices could be considerable, and the cost of compliance is negligible. A library is well advised to post a notice on all unsupervised photocopy machines, as well as on VCRs, tape decks, microfilm readers, computers, printers, and any other equipment that is capable of making copies. The provision applies only to equipment in the library, but many educational institutions post the notice on machines throughout the campus.

A FORM OF notice commonly posted on "reproducing equipment" in libraries states: "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."

THE FUTURE OF SECTION 108

Statutory exceptions for library copying have been the object of considerable attention and scrutiny in recent years, suggesting that some changes in the law may be on the horizon, albeit a distant horizon. In March 2008, the Section 108 Study Group, a task force appointed by the Librarian of Congress, delivered its report after three years of study and negotiation.[17] The group comprised representatives from

THE FINAL REPORT of the Section 108 Study Group, and extensive background materials, may be found on the group's website, www.section108.gov.

The World Intellectual Property Organization project, titled *Study on Copyright Limitations and Exceptions for Libraries and Archives*, was conducted by the author of this book. It collected and examined the relevant statutes from approximately 150 countries and identified trends and patterns among the laws. The study is available in English, French, and Spanish at www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192.

Headquarters of the World Intellectual Property Organization in Geneva, Switzerland

libraries, publishers, and other interested parties. The report recommends numerous revisions of Section 108, including

- Expanding Section 108 beyond libraries and archives by including museums within its scope.
- Replacing the fixed limit on the number of preservation copies to allow for a "reasonable" number of such copies.
- Permitting a library to circulate a digital preservation copy outside the library, if the original was in such a format and was allowed to be circulated.
- Enacting a new provision to permit robust programs for building preservation copies of published works, subject to detailed conditions for security and maintenance of the collection.
- Adopting a new provision to permit preservation copying of websites and other online materials, subject to allowing copyright owners the ability to opt out of preservation programs.

Despite three years of effort and important support for revision of Section 108 from within the federal government, the proposals from the study group have encountered sharp criticism. The current prospect for passage of any such revisions in Congress is meager, although the work of the study group has drawn further attention to the deficiencies of the law and the need for improvements.

Library copyright statutes also have attracted important attention in the international setting. The World Intellectual Property Organization, an agency of the United Nations based in Geneva, Switzerland, commissioned a study of library exceptions in the copyright laws of all member countries.[18] Some members are contemplating the possibility of a treaty to ensure that member countries enact library exceptions meeting the changing needs of libraries and their users. While major developments are not expected in the near future,

the growing attention given to the library statutes in Washington, Geneva, and elsewhere underscores their importance and, just as likely, their need for fresh review.

NOTES

1. *U.S. Copyright Act*, 17 *U.S.C.* § 108. Although this statute regularly refers to "libraries and archives," this chapter will use the term *libraries* as a general and inclusive concept for purposes of clarity.
2. *U.S. Copyright Act*, 17 *U.S.C.* § 108(a)(2).
3. *U.S. Copyright Act*, 17 *U.S.C.* § 108(a)(1).
4. *U.S. Copyright Act*, 17 *U.S.C.* § 108(g).
5. *U.S. Copyright Act*, 17 *U.S.C.* § 108(a)(3).
6. *U.S. Copyright Act*, 17 *U.S.C.* § 108(i).
7. *U.S. Copyright Act*, 17 *U.S.C.* § 108(i).
8. *U.S. Copyright Act*, 17 *U.S.C.* § 108(i).
9. *U.S. Copyright Act*, 17 *U.S.C.* § 108(b).
10. *U.S. Copyright Act*, 17 *U.S.C.* § 108(c).
11. *U.S. Copyright Act*, 17 *U.S.C.* §§ 108(b) and (c).
12. *U.S. Copyright Act*, 17 *U.S.C.* § 108(d).
13. *U.S. Copyright Act*, 17 *U.S.C.* § 108(e).
14. *U.S. Copyright Act*, 17 *U.S.C.* § 108(g)(2).
15. U.S. National Commission on New Technological Uses of Copyrighted Works, *Final Report* (Washington, D.C.: Library of Congress, 1979): 54–55.
16. *U.S. Copyright Act*, 17 *U.S.C.* § 108(f)(1).
17. *The Section 108 Study Group Report* (Washington, D.C., 2008).
18. Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives* (Geneva, Switzerland: World Intellectual Property Organization, 2008).

FOURTEEN

RESPONSIBILITIES, LIABILITIES, AND DOING THE RIGHT THING

KEY POINTS

- An infringer of copyright can face extensive liabilities.
- Educators and librarians who exercise fair use in good faith may avoid some of the most significant liability risks.
- New law offers a "safe harbor" for online service providers.
- State universities and other state agencies may be protected under "sovereign immunity."

SO FAR, THIS book has avoided the topic of liability for copyright infringement. Sidestepping liability is no accident. The fundamental objective of this book is to educate readers in order to prepare them to handle copyright situations in an informed and good faith manner, thus helping to avoid liability.

Yet the time may come when you might need to add up the consequences of a possible copyright infringement. For example, you reproduced a protected work without permission and in a manner that is not within fair use or another exception. You might not be facing allegations at all; you just want to move ahead with your project and assess any legal risks. In yet other circumstances you might be the copyright owner seeking to assert your rights. What legal ammunition do you have to stop an infringement? In each situation you want to know the remedies, costs, and penalties that can come from legal action.

WHAT ARE THE LEGAL RISKS?

What is at stake in an infringement action? If a judge rules that you have committed an infringement, the consequences can be formidable. An injunction can bar further unlawful uses; the court can impound the copies and your equipment; you can be ordered to reimburse losses that the copyright owner incurred, or pay the profits you gained from the wrongdoing.[1] This portion of the chapter will lay out a worst-case litany of liabilities. The remainder of the chapter will offer a more tempered vision of the possible consequences of an infringement allegation.

The copyright owner who successfully makes an infringement claim may also be entitled to receive two more remedies that involve significant dollars.

First, the owner can seek statutory damages of up to $30,000 per work infringed, in lieu of actual damages or profits.[2] Second, the owner may also ask for reimbursement of attorney fees and the costs of litigation.[3] These amounts are not to be underestimated. Recall the case of *Basic Books, Inc. v. Kinko's Graphics Corporation*[4] from chapter 10. The court ruled that Kinko's had infringed the copyrights and ordered it to pay $510,000 in statutory damages. Kinko's also had to pay the publishers' attorney fees and costs, in the total amount of $1,395,000.[5] Of course, Kinko's also had to pay for its own lawyers. That litigation occurred two decades ago; the dollar amounts today would surely be much higher, assuming that the court would again find no fair use.

THE IMPORTANCE OF COPYRIGHT REGISTRATION

The financial consequences may be overwhelming, but statutory damages and attorney fees are generally available to the copyright owner only if the owner registered the work with the U.S. Copyright Office before the infringement occurred.[6] Chapter 4 of this book emphasizes that copyright vests automatically, and that registration and other formalities are not required. Without registration, you can still be the copyright owner, and you may still win your lawsuit and obtain damages and other remedies. But only after timely registration are you entitled to what are often the most lucrative remedies in an infringement case—statutory damages and attorney fees.

The lesson to copyright owners is clear: if you are serious about protecting your copyrights, you ought to consider registering your claim of copyright with the U.S. Copyright Office. You should also register early, before any infringement has occurred. A corollary to this rule is also true: if you are seeking to use a copyrighted work and your investigation reveals that the work is not registered, risks of facing the largest dollar damages may drop sharply.

The decision to move ahead based on research of registration records should be done with great care and professional advice. A lack of registration can mean only a reduction of penalties—not an elimination of them. You do not want to be an infringer, and you should still make the determination that you are reasonably within fair use or other legal authority. At the same time, your research should be thorough and careful to avoid overlooking relevant registration records. If you move ahead without due regard for the rights of owners, you may be accused of willful infringement. In that event, the statutory damages (for registered works) can jump to $150,000 per work infringed.[7] The legal provisions about damages and registration offer important rights and responsibilities, but mistakes can be costly.

TO BE ELIGIBLE for statutory damages and attorney fees, the work generally must be registered before the infringement occurred. In the case of a published work, the Copyright Act allows a grace period of three months after first publication to make the registration. *U.S. Copyright Act*, 17 *U.S.C.* § 412(2). Registration can occur long after publication, but the owner will qualify for the added rights only with respect to infringements occurring after the registration date.

GOOD FAITH AND GOOD NEWS

Confronted with a variety of potential legal liabilities, how can librarians, educators, and others reasonably live amidst the uncertainty that copyright sometimes brings? Fortunately, the Copyright Act offers some important protection in response to exactly this realistic need. The law calls on each of us to act in an informed and good faith manner.

IF YOU HAVE committed a willful infringement, you may also face criminal penalties—including monetary fines and time in the federal prison system. *U.S. Copyright Act*, 17 *U.S.C.* § 506(a). A willful infringement typically arises where you not only know your actions, but you also know that it is a violation of the law. This is one more reminder of the importance of acting in good faith, as explored later in this chapter.

That basic advice may seem trivial, but it is actually of central importance, particularly for educators and librarians working with fair use. Reasonable people can and will disagree about the meaning of fair use. Congress recognized that it was enacting a law open to significant differences of interpretation, so Congress provided an important safety valve for educators and librarians.

Recall that one of the possible remedies for infringement is statutory damages of up to $30,000 per work infringed. Imagine you are in front of a judge, who has just ruled that you are an infringer and is preparing to assess damages. Large dollar figures may be looming. The law of statutory damages, however, proceeds to give an important break for educators and librarians. In fact, the court may be required to cut the statutory damages all the way to zero. This protection applies if you are an employee or agent of a nonprofit educational institution, library, or archives, if you were acting within the scope of your employment, and if you "believed and had reasonable grounds for believing" that the copies you made were fair use. If you can meet those requirements when faced with infringement, the court must remit the statutory damages in full.[8]

How can you demonstrate that you had reasonable grounds to believe that you were within fair use? The best bet may be to do your homework. You might not have to become an expert, but you might have to learn a bit about fair use. You will have to apply the four factors and weigh your evaluation. You need to make a reasoned and reasonable conclusion about whether you are acting within the law. As a result, the court may still disagree with you about fair use, but the court may see your good faith efforts and cut your liabilities accordingly.

EVEN IF STATUTORY damages are eliminated, you are not completely off the hook. You can still be an infringer subject to all other remedies, such as actual damages and injunctions. Further, the exception for librarians and educators does not cover all possible uses of copyrighted materials. It only explicitly addresses reproducing the work in copies or phonorecords. No court yet has had the need to test the meaning or extent of this law.

WHO IS LIABLE FOR THE INFRINGEMENT?

Initially, the person who actually commits the infringement is liable. That person might be the librarian filling orders for copies, the research assistant duplicating materials for a professor, the webmaster creating a cut-and-paste website, or the teenager downloading music files. In general, liability begins with the person who pushes the button to make the copy or actually commits the infringing activity.

In reality, in the setting of a business, library, or educational institution, liability often flows upstream to the supervisors who oversee the project and to the company or organization itself. Chapter 10 of this book includes summaries of cases about fair use. The liable parties were often corporations—such as Kinko's and Texaco—and not the individual employees. The truth is that all the implicated individuals and organizations may share in any liability exposure.

As a practical matter, however, the supervisors and the organization are at greater risk. Not only do they more likely have deep pockets, but a successful lawsuit at the highest level

is more likely to have the greatest influence on shaping future behavior. Suing Kinko's, for example, led to changes in photocopy practices at Kinko's shops around the country. In fact, holding that one company liable helped persuade competing photocopy shops to reassess their similar practices and legal risks.

A "SAFE HARBOR" FOR SERVICE PROVIDERS

Sometimes contributory or vicarious liability can be imposed on an Internet service provider (ISP). Think of AOL, Earthlink, Google, or another commercial provider. Consider the online services provided by your own university or other organization. Can these entities be held liable if they provide an e-mail or web server account, and you use it to commit a copyright infringement? Is AOL liable if you download a music file and send it by e-mail to a thousand close friends? Is the university liable if you scan your favorite book chapters and post them to your website?

A COMPANY OR another party can be held liable for the actions of another person on at least two theories. *Contributory infringement* can occur when someone provides the equipment or other means for creating infringements and knows, or should have known, of the infringing actions. *Vicarious liability* can occur when someone has the right to supervise the activity and stands to benefit from it. Knowledge of the infringing activity is not necessary. Employers are often in exactly that situation, at least with respect to activities that are part of an employee's job.

So far, the answer is maybe. The ISP can be liable, depending on the level of oversight and control, and the knowledge that officials had of the infringing activities. The reach of the law is evolving and murky.[9] Congress confronted this dilemma with new law in 1998. Congress did not exactly settle the law, but instead crafted an opportunity for ISPs to find a safe harbor and avoid the possible liability for copyright infringements committed by the users of their systems.[10]

The statutory protection for service providers is complicated, but it is proving to have profound consequences. To enjoy protection, the ISP must meet a lengthy list of elaborate conditions. Moreover, the safe harbor only protects the educational institution or other ISP itself from liability. The individuals who actually commit the infringement may still be liable. Other legal claims—trademark, privacy, libel—that arise from the same situation remain unaffected.

SECTION 512 OF the Copyright Act, creating the safe harbor, was part of the Digital Millennium Copyright Act of 1998. That bill addressed a wide range of issues, from liability for circumvention of technological protection systems to a new form of legal protection for boat hulls. Digital Millennium Copyright Act (DMCA), Public Law 105-304, *U.S. Statutes at Large* 112 (1998): 2860. Chapter 16 of this book focuses on the anticircumvention provisions of the DMCA.

For educational institutions, fitting into the safe harbor may often prove problematic. In addition to the foregoing conditions, the safe harbor might apply to a faculty website only if the infringing materials on the site were not required or recommended course materials within the last three years, and the institution has received no more than two notifications of claimed infringements committed by that faculty member. The institution also must provide all users of its system materials that

"accurately describe, and promote compliance with" copyright law.[11]

This brief summary only hints at the layers of complication in the statute. The centerpiece of the law, however, is the procedure known as *notice and takedown*. For any ISP to enjoy the safe harbor, it must register an agent with the U.S. Copyright Office. The agent will then receive notices of claimed infringements. For example, suppose a professor has posted materials to her website, and the copyright owner discovers them and objects. Under this statute, the copyright owner can send a proper notice to the designated agent for that ISP.

GENERALLY SPEAKING, THE safe harbor usually applies only in situations where the ISP is truly passive. The statute extends to situations where the infringing materials are merely in transit through the system, cached as an automated and technical requirement of the system, or is resident on the system at the user's discretion and without the ISP's knowledge.

In order for the ISP to have full protection, it must then "expeditiously" remove or "take down" the material from the system. The ISP may later investigate and maybe even restore the materials if they are ultimately not a violation. But the ISP must remove them first and ask questions later. Educational institutions of all types and sizes have discovered the prevalence and power of these legal procedures. With the growth of peer-to-peer networks for posting and sharing files, copyright owners have sometimes inundated university agents with notices about the multitudes of music, movies, and other files posted by students and others on high-speed networks run by the educational institution. The administrative burden alone is leading many organizations to begin educational campaigns and sometimes restrict student use of Internet access. Congress also has joined the effort for stronger oversight by colleges and universities.

DOES YOUR COLLEGE, university, library, or other ISP have a registered agent? The full list is posted on the website of the U.S. Copyright Office: www.copyright.gov/onlinesp/.

Despite these travails, years of experience now have shown that the notice-and-takedown mechanism has many benefits. The law's safe harbor has enabling online enterprises such as YouTube, Flickr, and Facebook to exist. Users post the content; the service is merely the host or conduit. A user can post a video clip to YouTube, and if the copyright owner objects, the owner can send a notice to YouTube's agent. Ordinarily, the ISP must expeditiously remove the item in order to have the benefit of the safe harbor. Without a notice, however, the clip remains on YouTube. Even with a notice from the owner, YouTube can repost the clip if the user makes representations about its lawfulness and consents to the court's jurisdiction.

In this context, an enormous amount of copyrighted content is now on YouTube, Flickr, and elsewhere because it has stirred no objection, or is justified as fair use. The ISP, if it meets the statutory requirements, is in a safe harbor, protected from liability. However, the protection does not apply with respect to materials posted by the ISP itself. Thus, a library digitizing and posting collections, and a professor using third-party materials on an instructional website, will likely not qualify for the benefits of this law. Nevertheless, some organizations that create and share materials online essentially imitate the notice system and respond appropriately to copyright claims. The true safe harbor protection may not apply to initiatives such as the Internet Archive or

THE NOTICES FROM copyright owners typically lead to a takedown of the materials, but they can also lead to money. YouTube has an interest in keeping many copyrighted materials available, and so it has negotiated with some music production companies to secure licenses to maintain online many of the music videos posted by members of the public.

the HathiTrust, yet each organization offers guidance to copyright claimants, and few copyright claims are likely to persist after the claimed materials are removed from public access.[12]

NOTE ON SOVEREIGN IMMUNITY

Some copyright infringers may escape liability altogether under a sweeping constitutional doctrine. The Eleventh Amendment to the U.S. Constitution provides one more means for possibly avoiding monetary risks from copyright infringement. The Eleventh Amendment stipulates that a state or state agency may not be sued in a federal court for dollar damages. A series of recent cases from the U.S. Supreme Court has brought renewed meaning to the provision, which is intended to protect the sovereignty of the states from being held accountable by a federal judiciary.[13]

By an act of Congress, all copyright cases must be brought in federal court.[14] In recent years, a few federal courts accordingly have dismissed cases that were brought against states and state agencies. Of notable consequence, one court has ruled that a unit of the University of Houston (a public university) could not be sued for copyright infringement.[15]

CONGRESS HAS ATTEMPTED to eliminate or at least reduce the application of sovereign immunity. In 1990, Congress added Section 511 to the Copyright Act, explicitly stating that states and state employees are not protected from liability. The question still remains whether Congress has the power to undercut a constitutional protection by enactment of a statute.

While these developments may give some leeway to states and state institutions to consider the appropriateness of their activities—rather than acting out of fear of liability—these cases by no means give public institutions complete protection. They may still be liable for equitable remedies, such as injunctions. Even a successful defense can cost a fortune in attorney fees. More important, if a public university acted in willful disregard of the law, it could still face criminal action.

DO THE RIGHT THING

This chapter begins with a litany of legal risks and some disturbing dollar amounts that a copyright infringer might face. Much of this chapter, however, has been about the limits of possible liability. Educators and librarians who exercise fair use in good faith may avoid statutory damages. Online service providers may find a safe harbor from infringements committed by individual users. The sovereign immunity provision of the U.S. Constitution may allow state agencies to avoid liability altogether. Just as important, the simple historical record is that common activities of educators and librarians have not been the target of copyright lawsuits, although that pattern appears to be shifting. A lawsuit involving electronic reserves at Georgia State University is currently pending, and UCLA is facing a lawsuit over digital delivery of audiovisual works.[16]

If the chances of being sued appear slim, why should we bother paying attention to the complications of copyright at all? The answer is simple: because we live in a cooperative society, and the law is an intermediary for defining many cooperative relationships. The law may be quirky and sometimes a little baffling, but the law has an important role in shaping

the terms on which we relate to one another in a civilized world. Often the law deserves to be challenged and changed. Yet, we need to give respect to the interests of others, if we are to gain respect for our claims of fair use.

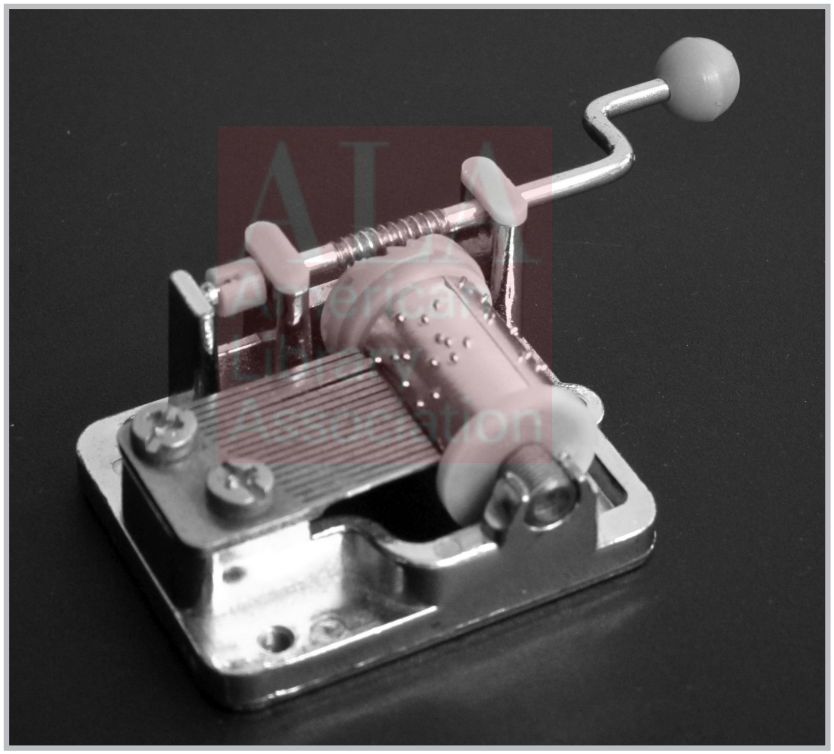
If we do not like the law, we should demand change, and we should press the law's meaning. Meanwhile, we must remind ourselves that the law we challenge today may be the law that protects us in the future. Educators and librarians live in two copyright worlds at the same time. We are users of copyrighted materials, questioning the limits of fair use and seeking new exemptions for distance learning and other pursuits. Simultaneously, members of the academic community are increasingly concerned about rights in intellectual property. Yet that symmetry is shifting steadily. Fairness and good ethical practices still demand mutual respect for the diverse interests within our own communities, but academic authors are increasingly recognizing that the copyright legal system may not serve their objectives as users or as copyright owners. That shift in attitude has given rise to the open access movement and other innovations in copyright management.[17] In the meantime, the reality of the law, with its benefits and liabilities, is an inevitable part of the academic environment.

NOTES

1. The statutes governing the "remedies" or liabilities under copyright law are *U.S. Copyright Act*, 17 *U.S.C.* §§ 502–513.
2. *U.S. Copyright Act*, 17 *U.S.C.* § 504(c)(1).
3. *U.S. Copyright Act*, 17 *U.S.C.* § 505.
4. 758 F.Supp. 1522 (S.D.N.Y. 1991).
5. *Basic Books, Inc. v. Kinko's Graphics Corporation*, 21 U.S.P.Q.2d 1639 (S.D.N.Y. 1991).
6. *U.S. Copyright Act*, 17 *U.S.C.* § 411.
7. *U.S. Copyright Act*, 17 *U.S.C.* § 504(c)(2).
8. *U.S. Copyright Act*, 17 *U.S.C.* § 504(c)(2).
9. *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F.Supp. 503 (N.D. Ohio 1997); *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361 (N.D. Cal. 1995).
10. *U.S. Copyright Act*, 17 *U.S.C.* § 512.
11. For the specific provisions of the statute that apply to faculty websites, see *U.S. Copyright Act*, 17 *U.S.C.* § 512(e).
12. The copyright policy of the Internet Archive is available at www.archive.org/about/terms.php. The takedown policy of the HathiTrust is available at www.hathitrust.org/take_down_policy.
13. U.S. Constitution, amend. XI.
14. 28 *U.S.C.* § 1338(a).
15. *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).
16. These developments are summarized briefly in chapters 10 and 12 of this book.
17. Open access, Creative Commons, and other initiatives are examined in chapter 5 of this book.

PART V

Special Features



A common music box can be a form of fixing a copy of the composition in some material form. Turning the crank can be a performance of the music.

FIFTEEN

MUSIC AND COPYRIGHT

KEY POINTS

- Copyright law often has a distinctive application to musical compositions and sound recordings.
- Many of the exceptions, including the first sale doctrine and the provision for library copying, can apply to music and recordings, subject to detailed rules.
- The TEACH Act allows performances of music in distance learning, subject to important limitations.
- Performing rights societies may be helpful for licensing some educational uses of music, but not all.

MUSIC MAKES THE world go around, gray skies blue, blue eyes brown, and other assorted miracles happen almost daily. Music also can make even the most tranquil librarian or faculty member nearly apoplectic on occasion, particularly when copyright enters the conversation. The music itself is not exactly the source of copyright dismay. More specifically the musical work and the sound recording associated with it often become a knot of copyright connections and a wealth of teaching opportunities.

Like many other works, copyright law ordinarily protects musical compositions and recordings. Unlike most other types of works, however, compositions and recordings are subject to a host of technical and specialized rules under American copyright statutes. These rules can become important in the search for meaningful and lawful ways to use the works in teaching, learning, and scholarship.

Why does the law—and this book—give considerable and distinctive attention to music? Musical works and recordings have given rise to a legal framework that underpins an entire industry—and that principally protects rights of copyright owners and ostensibly meets the market's craving for melody. For music industries, musical works and sound recordings represent economic engines that are increasingly threatened by copyright infringers. For users, musical works and sound recordings have become educational tools of growing importance in library collections and in support of innovative teaching and learning. Music offers a fundamental insight into understanding society and culture. People also simply like music—it can communicate ideas and reveal dreams.

Chapter by Dwayne K. Buttler, Evelyn J. Schneider Endowed Chair for Scholarly Communication, University Libraries, University of Louisville.

DEFINING MUSIC

Amidst these powerful and wondrous aspects of music, copyright law seeks to bring some legal resolve and structure. The law defines a *sound recording* as a work that results "from the fixation of a series of musical, spoken, or other sounds."[1] The law does not specifically define *musical work*, but through decades of legal development, that label has generally come to refer to the written composition. A *musical work* is therefore akin to a *literary work*. It is the author's original creativity, and the owner has a variety of fundamental rights to the work established under copyright law.

Musical compositions and sound recordings are routinely eligible for copyright protection. A new composition is easily original, and it is fixed when noted on paper or played into a recorder. A sound recording of the same musical composition may have originality in the rendition, style, or accompaniment. It, too, is fixed upon making the recording. For more information about these principles, see **chapter 2**.

A sound recording may capture a performance of the composition, regardless of the medium or format. The recording may be on reel-to-reel tape, cassette tape, DAT (anyone remember that format?), MP3, an assorted computer file, such as .wav or a cornucopia of other open or proprietary possibilities, or any other means for capturing sounds in the analog or digital realm. Technology often blurs the distinction between sound recordings and musical works, but a sound recording is not always a recording of music. The recording could instead capture spoken words or other sounds—the lonesome whistle, the hoot of an owl, the roar of a jet, or the cry of a baby.

A composition and the recording of it are distinct and separate copyrightable works, with independent originality and fixation. The recorded performance of the composition becomes a sound recording and enjoys copyright protection independent of the copyright in the underlying the musical work.

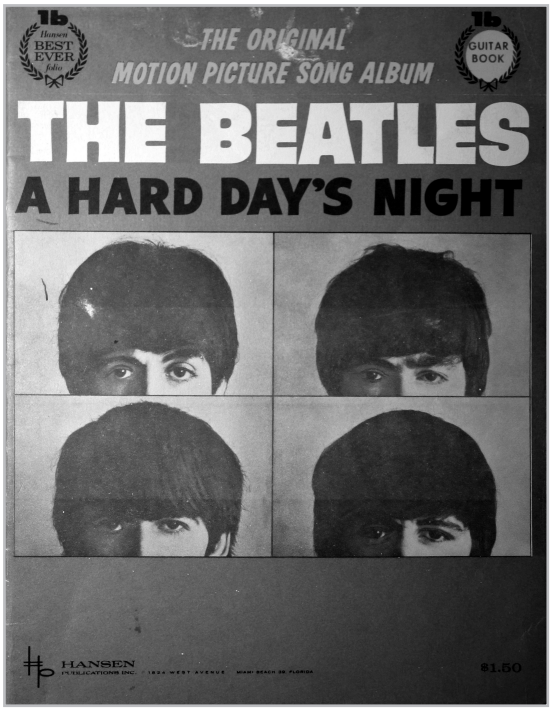
A single recording therefore often comprises two separate copyrighted works. Making use of it could affect the rights of two separate copyright owners. The writer of the song may hold copyright in the musical work. The recording engineer, or more likely the recording company, may hold a copyright in the sound recording. Understanding the relationship between musical works and sound recordings is fundamental to protecting the copyrights in the works, and to making uses of them under important statutory exceptions to the exclusive rights of ownership.

THE FULL DEFINITION states that sound recordings are "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." Thus sound recordings exist independently of technology or format definitions and could include tin rolls, reel-to-reel, cassette, wire recorders, MP3s and as yet unforeseeable means for recording "musical, spoken, or other sounds."

U.S. Copyright Act, 17 *U.S.C.* § 101.

TECHNOLOGICAL EVOLUTION AND LEGAL FRAMEWORKS

Copyright law long has had trouble keeping pace with the changing nature of music. American law did not apply to music at all until 1831.[2] That law extended only to compositions; it did not apply to sound recordings until 1972. A century ago, the Supreme Court struggled with the copyright implications of player piano rolls, which represented a new and frightening technology.[3] Today, the courts are addressing issues of digital file sharing[4] and webcasting on Internet radio stations[5] that involve both musical works and sound recordings.



Copyright protection can extend to compositions, notations, lyrics, sound recordings, and the images and words on the CD liner notes.

Consequently, musical works and sound recordings can raise some of the most complex and frustrating legal quandaries. Some distinctions in the law are unclear, some are artificial, and many are embedded in history and the relationship of new technologies to copyright law. In general, the law today grants the basic set of rights to the copyright owners of musical works and recordings. Owners have rights of reproduction and distribution of their works. The copyright to musical works includes a general right of public performance. The owner of the sound recording has a performance right, but only in the context of a "digital audio transmission."[6]

As with most works, the copyright laws also carve out various exceptions to owners' rights, such as fair use. If the use fits within the various requirements of an exception, the owner cannot legally prevent the use. While the interplay of rights and exceptions is fundamental to understanding copyright protection and rights of use, the rules applied to music are sometimes distinct from general copyright standards. This chapter will summarize several major aspects of copyright law as applied to music, with emphasis on the copyright exceptions of importance to educators and librarians.

UNTIL 1995, THE recording enjoyed no performance right. Thus, when a recorded work of music was performed to a live audience, through broadcast, or any other means, only the owner of the composition had rights—and therefore could demand payment. With the growth of online transmission, Congress granted a limited performance right to the owner of the recording. That owner can now have rights to some digital performances, but still not in other contexts.

U.S. Copyright Act, 17 *U.S.C.* § 106(6).

SECTION 108: LIBRARY COPYING

Recall from chapter 13 that Section 108 of the U.S. Copyright Act permits many libraries to copy protected works for a variety of

important purposes, including preservation, interlibrary loan (ILL), and private study by patrons. This exception is a limit on the copyright owner's exclusive rights of reproduction and distribution. However, Section 108 does not allow libraries to copy *all* works for *all* purposes. In particular, when libraries are making copies of musical works under this statute, the copies may be only for purposes of preservation and replacement.[7] Thus, under Section 108, libraries cannot make copies of musical works for patron study or for delivery through ILL.

The limits of Section 108, however, are not quite as sweeping as they may first seem. A desired use may not fall within the parameters of Section 108, for example, but that use may still fit within fair use under Section 107. More specifically, Section 108 may not allow a library to make and send a copy of a musical composition through ILL, but that same undertaking could constitute fair use. Analyzing the four factors might reveal many opportunities to make use of works beyond the more precise limits of Section 108.

Another possibility for overcoming the boundaries: Section 108 may apply narrowly to musical works, but not so narrowly to the use of sound recordings. Making and sending a copy of a sound recording through ILL could fit neatly within Section 108 if it is a recording of a public domain composition, or of a speech or other text-based work.

Keeping in mind the difference between a musical work and a sound recording, consider these practical implications of Section 108:

- The library wants to make copies of printed sheet music, which is a form of a musical work. The library may make copies only for preservation or replacement.
- The library wants to make copies of a sound recording of a performance of a copyrighted musical work. The library may generally copy a sound recording for any of the allowed purposes, but copying such a recording necessarily creates a copy of the underlying musical work. At least under Section 108, the library is limited to copying the musical work for purposes of replacement or preservation.
- The library would like to copy a sound recording of something other than music, such as a poetry reading, a political speech, or nature sounds. Because the copy does not involve a musical work, the library may copy the recording for any of the purposes, and within the parameters, of Section 108.

As a practical matter, the library can institute preservation programs consistent with Section 108 for all recordings. But when a patron requests copies for private study, the library is limited to recordings of nonmusical works. This awkward distinction is an attempt to balance the rights and interests of copyright owners and copyright users. Musical works enjoy more protection presumably because copying them for patrons might cause market harm to the music industry. Of course, conversely, preventing these uses also might lessen the ability of libraries in some cases to fully serve the needs of some patrons for some purposes, particularly music teachers and scholars.

SECTION 109: THE FIRST SALE DOCTRINE

Section 109 is another exception that sometimes applies differently to musical works. Commonly known as the first sale doctrine, this provision limits the copyright owner's ability to control copies—or physical embodiments—of a copyrighted work. For example, someone may own the copyright in a music CD, but the owner of a copy of that CD generally may dispose of that particular copy through any means, including giving it away, selling it,

lending it, or even renting it.[8] This provision allows libraries to lend materials from their collections.

In the 1980s, however, the music industry became particularly alarmed at the growth of private businesses renting music CDs to the public. The obvious concern was that, unlike renting a book or many other works, a customer could rent a CD for a brief time and simply and quickly copy it. For less than a typical purchase price, someone could have a copy. Worse, the customer would then return the disk, making it available for the next customer to copy.

Without the first sale doctrine, many common activities, such as selling books or lending them from libraries, could be unlawful distributions of copyrighted works. Recall from **chapter 7** that distributing copies to the public is one of the rights of the copyright owner.

Congress accordingly amended the statute to bar the first sale doctrine as it may apply to musical works or sound recordings containing musical works, unless the lending is undertaken for "nonprofit purposes" by a "nonprofit library" or a "nonprofit educational institution."[9] *Nonprofit* is a crucial condition for meeting this exception. While it is not defined in the statute, most academic and public libraries should easily meet this standard. As a result, most nonprofit academic libraries may continue to keep and lend their collections of sound recordings of music and other types of works.

THE LENDING OF a sound recording containing a musical work falls outside Section 109 if the lending or rental is for the purpose of "direct or indirect commercial advantage." *U.S. Copyright Act*, 17 *U.S.C.* § 109(b)(1)(A). Note that the limit on commercial lending applies only to certain works. The law does not bar commercial lending of motion pictures, so your local video store may remain in business.

SECTION 110(2): THE TEACH ACT AND DISTANCE EDUCATION

Chapter 12 of this book offers considerable detail about the TEACH Act, a statutory exception that permits uses of copyrighted works in distance education. An examination of the statute emphasizes that the law applies differently to different types of works. One important distinction in the TEACH Act surrounds the treatment of dramatic and nondramatic musical works.

Section 110(2) allows the performance of entire nondramatic musical works by "transmission" in the course of distance learning.[10] By contrast, the law allows performances of dramatic musical works only in "reasonable and limited portions." The distinction between *dramatic* and *nondramatic* music enjoys a rich and intriguing history in shaping and applying copyright law, but the law has yet to offer an explicit definition of these terms.

Understanding the meaning of *nondramatic musical works* is necessary to applying section 110(2). We can find some

THE HISTORY OF dramatic and nondramatic works is rich with nuance and rationale from copyright owners. Indeed, the Copyright Act of 1909 (which was replaced in full by the revision act of 1976) included a concept of "dramatico-musical" works and addressed "grand performing rights" as distinguished from "small performing rights." Moving to today's law, references in statutes and licenses that allow performances of nondramatic music usually anticipate a simple, unadorned playing of instruments, singing of songs, or performing of the musical work through broadcast on radio or television. The performance often may be live, or it may be made from a preexisting recording.

insight from various sources, but generally a work is *dramatic* if it is meant to be used to perform a story. Dramatic musical works may include opera, Broadway musicals, and ballet.[11] Under that definition, a musical work might be dramatic in one context, but not in another. Many songs are nondramatic popular releases, such as "Pinball Wizard," "American Idiot," and "Mama Mia." Each of these songs has been part of an opera, stage musical, or movie. In that context, the same song may be treated as a dramatic work.

While the TEACH Act expressly refers to performances of musical works, it makes no mention of sound recordings. The omission becomes important, however, because playing a sound recording is a common and sometimes inevitable means of performing a musical work. You might perform a sound recording, for example, by sliding a disk into a CD player, plopping an LP onto a turntable, or mounting an MP3 file on a website. You are simultaneously performing the underlying musical work.

The TEACH Act may not mention sound recordings, but it does allow their performance in distance education. All works are allowed unless specifically limited or proscribed. Thus, the law creates something of a dilemma. For example, performing a nondramatic musical work in full is allowed, but performing most other types of works, including sound recordings, is permissible only in "reasonable and limited portions." Therefore, if you are singing or making another live performance of the composition, you may perform the entire work. However, if you are making the performance from a CD or other sound recording, you will be limited to "reasonable and limited portions." How much is that? The question is addressed in chapter 12 of this book.

PERFORMING RIGHTS SOCIETIES

The performance rights for nondramatic and dramatic musical works has raised other copyright complications. For historical reasons, principally the advent of radio and television broadcasting, the performance of nondramatic musical works has been of growing importance to broadcasters and to copyright owners who ultimately devised licensing collectives to clear permission rights and to allocate requisite royalties to copyright holders.

Today, these performing rights societies include the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music International (BMI), and the Society of European Stage Authors and Composers (SESAC). They enjoy a nonexclusive right to license public performance rights in the numerous nondramatic musical works that each organization represents. Users may now search these song lists on the Internet. If a particular song is on a song list, the quest for permission can then be directed at the appropriate society. If the song is not on a list, then you may return to the customary search for the individual owner of the rights.

While the licensing societies can greatly streamline the process of securing permissions, the societies are generally limited to

UNIVERSITIES OFTEN SECURE blanket licenses with one or all of these licensing societies to cover many public performances of nondramatic musical works on campus. For more information, see the website for each organization.

- ASCAP: www.ascap.com
- BMI: www.bmi.com
- SESAC: www.sesac.com

The three organizations usually license only performances of works. If you are making a new recording of an existing song, you may need to contact the Harry Fox Agency at www.harryfox.com.

granting rights to make public performances of compositions of nondramatic music. As a result, the licenses allow only public performances and do not address reproduction or distribution rights of the musical works and sound recordings. Thus, in order to reproduce and distribute the musical work or sound recording, you may need to seek permission from the copyright owner.

Performing rights societies do not license performance rights in dramatic musical works or performance rights in sound recordings. Users generally will need to secure a license to those works directly from the copyright owner, provided that their uses do not fall under another enumerated exception. Many uses within the library and academic community may fit within one or more exceptions in the U.S. Copyright Act, including fair use.

THE FUTURE OF MUSIC

The copyright law for music continues to be in transition. Recent bills in Congress have proposed to extend the performance right to sound recordings as fully as the rights for musical compositions.[12] Under these proposals, recording artists would share in the payments for broadcasts and other performances of sound recordings. Meanwhile, courts have had occasion to hand down decisions about fair use of music and recordings, creating something of a mixed assortment of cases and generating a good deal of debate and confusion about the law.[13]

Regardless of legal developments, the marketplace for music is changing rapidly. New means for lawfully acquiring music continue to proliferate. Amazon and iTunes are have become leading sellers of affordable downloads. Pandora has become the modern version of request radio. YouTube has become a treasure trove of music. Online music videos include recordings of live performances, high-end productions, and simple covers of favorite and obscure songs. Are they lawfully online? Often the user cannot tell. Some of these innovations in music delivery exist because they fit within the law; others exist only with the authorization and permission of the rightsholders. The Internet today is also rich with illicit copies as well as materials voluntarily posted by rightsholders. The educator, librarian, or other user cannot jump to a sweeping conclusion about the propriety of the material, but should use good sense and watch for warning signs.

> Much more information about permissions and fair use is found in other parts of this book. **Chapter 18** is a general overview of permissions. **Chapters 8 through 11** provide a detailed overview of fair use, particularly as applied to the needs of educators and librarians.

Music may have distinctive law because music has a distinctively important place in our society and culture. We continue to find new importance and, in the process, test the limits of copyright. Politicians rely on campaign songs to embrace their spirit. Sampling remains a fixture of hip hop. A mash-up of Lady Gaga and Nirvana is a new form of aesthetic discovery. The works of DJ Earworm and Danger Mouse allow new understandings of existing music. Girl Talk seems to be living voluntarily on the edge between social movement and copyright infringement. Whether on concert tour or in the classroom, the rules of copyright will steadily collide with the important place that music has in our lives. Composers, performers, producers, lawyers, lawmakers, and consumers are in steady quest for new formulas, new limits, and new possibilities.

NOTES

1. *U.S. Copyright Act*, 17 *U.S.C.* § 101.
2. *Act of February 3, 1831*, ch. 16, *U.S. Statutes at Large* 4 (1831): 436.
3. *White-Smith Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).
4. *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).
5. *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1290 (2010).
6. *U.S. Copyright Act*, 17 *U.S.C.* § 106(6).
7. *U.S. Copyright Act*, 17 *U.S.C.* § 108(i).
8. *U.S. Copyright Act*, 17 *U.S.C.* § 106(3).
9. *U.S. Copyright Act*, 17 *U.S.C.* § 109(b)(1)(A).
10. *U.S. Copyright Act*, 17 *U.S.C.* § 110(2).
11. Melville B. Nimmer and David Nimmer, *Nimmer on Copyright*, 10 vols. § 10.10[E] (New York: Matthew Bender & Co., 2009): 10–98. See also *Robert Stigwood Group, Ltd. v. Sperber*, 457 F.2d 50, 55 n.6 (2d Cir. 1972).
12. *Performance Rights Act*, S. 379, 111th Cong. (2009); H.R. 848, 111th Cong. (2009). As of this writing, none of these bills has been enacted.
13. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005); *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005); *Saregama India Ltd. v. Mosley*, 2009 U.S. Dist. LEXIS 119389 (S.D. Fla. 2009).

SIXTEEN

ANTICIRCUMVENTION AND THE DMCA

KEY POINTS

- The DMCA is a major legislative enactment from 1998 that included a new prohibition against circumvention of technological protection systems.
- Recent court rulings may have tempered some concerns that the prohibition would undercut fair use and other opportunities to make lawful uses of copyrighted works.
- New regulatory exceptions allow some circumvention of protection systems, notably to copy clips from movies on DVDs for educational purposes.
- Still, the DMCA poses tremendous challenges for educators, librarians, and others seeking ongoing access to materials that are increasingly accessible from electronic sources, and that are subject to controls and terms of license agreements.

BEGINNING IN THE late 1990s, many countries added to their copyright laws a new prohibition against bypassing or circumventing technological controls on access to copyrighted works. It is relatively new law and a new concept for copyright protection. The objective is to give additional legal safeguards for copyright owners who distribute digital works behind passwords, software locks, or other controls on access and use. Technological controls can be highly esoteric or simple and familiar. For example, most DVDs have embedded code, allowing a movie to be viewed on only certain equipment. The idea seems simple, but it is also enormously controversial. Viewing a film may be perfectly lawful, but the anticircumvention law means that breaking code just to watch a movie is a potential legal violation.

Anticircumvention law is implicated in increasingly diverse situations, from hacking into a computer or database to "jailbreaking" an iPhone for loading unauthorized apps. The law of anticircumvention is contentious in the marketplace of ideas, in the courts, and in legislatures. Because the concept was included in a multinational treaty from 1996, dozens of countries now have enacted some form of a law prohibiting the circumvention of technological protection measures that block access to copyrighted works.[1] The underlying copyrighted works may be movies, text, images, software code, or anything else.

The U.S. Congress enacted anticircumvention statutes in 1998 as part of the Digital Millennium Copyright Act (DMCA). When crafting the anticircumvention provisions,

The Digital Millennium Copyright Act (DMCA), enacted October 28, 1998, is a lengthy and complex piece of legislation that modified copyright law in several important respects. It included protections for online service providers (see **chapter 14**), granted rights for designs of boat hulls, created limited immunity for computer repair services, and launched initiatives leading to the TEACH Act for distance learning (see **chapter 12**).

Congress made a broad analogy, comparing the act of breaking codes or bypassing controls as the equivalent of "breaking into a locked room in order to obtain a copy of a book."[2] Congress was in large part addressing concerns of widespread piracy of digital works due to "the ease with which digital works can be copied and distributed worldwide virtually instantaneously" through the Internet.[3]

Copyright owners may benefit from the new law, but educators and librarians have wondered whether these provisions will ultimately redefine access to and lawful use of copyrighted works. Debates have provoked questions about the survival of fair use and other long-standing principles of copyright law. Section 1201 of the U.S. Copyright Act sets forth the basic law and may potentially alter fundamental activities, such as library services, research, website development, distance education, and Internet access, thus imposing enormous challenges for higher education.

THE MEANING OF ANTICIRCUMVENTION

Section 1201 creates various new potential legal liabilities. The main provision states simply: "No person shall circumvent a technological measure that effectively controls access to" a copyrighted work.[4] For example, the law would ostensibly prohibit hacking through a password interface on a database, or bypassing encrypted controls on a CD or DVD. The statute further bars circumvention of measures that effectively control the exercise of an owner's rights in his or her copyrighted works, such as reproducing and distributing copyrighted works.[5]

A RELATED PROVISION of the DMCA creates another potential violation. Section 1202 of the Copyright Act now protects the integrity of "copyright management information," such as the title of a work, the name of its author and the copyright owner, and the terms and conditions for using the work. Removing a copyright notice or removing the names of authors from any work could be a violation, if the removal conceals or allows an infringement of the copyright to that work.

U.S. Copyright Act, 17 *U.S.C.* § 1202.

In addition, Section 1201 prohibits the manufacture, distribution, or importation of a "technology, product, service, device, component, or part thereof" that is primarily designed or produced for the purpose of circumventing a technological measure.[6] In other words, not only is circumvention unlawful, but making and distributing software or other means of circumventing controls can also be a violation.

LITIGATION AND ENFORCEMENT OF THE DMCA

In the several years since enactment of the DMCA, the anticircumvention law has developed in perhaps surprising and unexpected directions.

Cases in the News

Section 1201 has given rise to several court cases that suggest potentially disturbing applications of the law. The following two examples were covered prominently in the news and in professional literature, although the courts ultimately did not make extensive rulings on the substantive meaning of the anticircumvention law.[7]

SANCTIONS FOR VIOLATING Sections 1201 or 1202 can be hefty. Civil remedies may include injunctive relief, impoundment and modification or destruction of infringing items, statutory or actual damages, and disgorgement of profits and attorney fees. Willful criminal violations can lead to enormous fines and lengthy prison terms. *U.S. Copyright Act*, 17 *U.S.C.* §§ 1203 and 1204. Libraries, archives, and educational institutions are exempt from criminal liability, and they enjoy some limits on civil penalties if they did not believe that they were violating the law. The law offers some protection, but librarians and educators are still expected to stay within the law.

The Prosecution of Elcomsoft and Dmitry Sklyarov

One of the first cases involving an alleged violation of the DMCA was a criminal case brought against Dmitry Sklyarov, a Russian immigrant, and Elcomsoft, an affiliated company. Sklyarov and Elcomsoft were charged with distributing software that could enable users to bypass the encryption technology used to protect Adobe electronic books. They faced a variety of criminal charges, including conspiracy to traffic in technological systems that were designed and marketed primarily to circumvent measures protecting a right of a copyright owner (pursuant to Section 1201(b)(1)(C)). Sklyarov was released from federal custody after entering into an agreement with the United States Attorney. In late 2002, a jury acquitted Elcomsoft of criminal copyright charges.

Professor Felten and the Music Challenge

Professor Edward Felten of Princeton University responded to a public challenge from the Secure Digital Music Initiative (SDMI), inviting experts to analyze the security of an SDMI "digital watermark" copy-prevention system. Felten and his research team successfully found a means to circumvent the SDMI technological controls. When Felten sought to publish his findings, he faced legal threats from SDMI. The claim was that under the DMCA, his research paper was a circumvention device because it purported to describe how the SDMI technology works. The Electronic Freedom Foundation supported Professor Felten and initiated legal action in federal court, asking the court to declare that publishing a research paper was not a violation of the DMCA. When the music industry dropped its threats against Felten, the court dismissed his case.

The Felten and Sklyarov cases did not result in elaborate rulings about the substantive merits, but other situations have led to litigation and interpretive rulings from various courts. While these cases seem to have little direct relevance to librarians and educators, they do offer important insights into the meaning of the law and its possible application in future situations.

Cases in the Courts

Litigation surrounding the meaning and application of Section 1201 has expanded significantly in recent years. The following cases demonstrate something about the law's evolution and offer some insights about its meaning for educators and librarians.

Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294 (S.D.N.Y. 2000), aff'd sub nom. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001)

A group of movie studios sought an injunction under the DMCA, charging that the defendants were sharing software that could

IN THE *ELCOMSOFT* case, the act of circumvention was specifically intended to allow application of software that could enable a user to transfer the book to another computer, to make a print or backup copy, or to hear or "audibly read" the e-books. In an interesting development, the regulations from the Librarian of Congress, summarized later in this chapter, created an exception from the anticircumvention law for purposes of making an e-book audible. Thus, while the DMCA appeared to have a stringent effect in its early years, later developments have tempered its consequences.

MOTION PICTURE COMPANIES recently brought a case against RealNetworks, the maker of popular software for viewing online films. The court ruled that the product RealDVD violated the law by trafficking in devices that enabled consumers to decrypt antidescrambling software on DVDs. The court found a violation of the law against trafficking, even though the private copying of a film by a consumer may be fair use. The court noted, however, that fair use could apply to circumvention claim asserted against the actual copying.

RealNetworks, Inc. v. DVD Copy Control Association, 641 F.Supp.2d 913 (N.D. Cal. 2009).

enable users to view DVD movies on different operating systems. Each DVD included a content scrambling system (CSS) that permitted the film to be played, but not copied, only on certain players that incorporated the plaintiffs' licensed decryption technology. CSS, therefore, was a means for controlling access to the copyrighted content on the disk. The defendants' website included a link to other sites where users could find and download DeCSS. That program allowed users to circumvent the CSS protective system and to view the film on other DVD players. Once they circumvented CSS, users could also copy the motion picture and not merely view it.

The court found the defendants had violated the anticircumvention law by making DeCSS available on their website. The violation was also rooted in providing software that would enable users to simply watch the movie—a perfectly legal activity. The court may have been influenced by the fact that the DVDs could be copied once they were accessed using DeCSS. Nevertheless, the defendants' use of systems to access, and not necessarily copy, "locked" material was the actual violation. This case demonstrates that the anticircumvention law can prevent even lawful activities if the user must bypass technological controls to reach the needed content.

Chamberlain Group, Inc. v. Skylink Technologies, Inc., 381 F.3d 1178 (Fed. Cir. 2004)

While the *Reimerdes* case appeared to establish a far-reaching right for copyright owners—perhaps allowing them to assert copyright infringement against users who bypass access controls under nearly any circumstance—the *Chamberlain* case tempered that view in important respects. The court made clear that the access right was confined to situations in which access was unauthorized. The court placed the burden on the copyright owner to prove that the user accessed the copyrighted work for a purpose that was not authorized by the owner or by law. That is, in order for a violation of the DMCA to occur, the user's ultimate purpose of circumventing the technological measure must be to gain access to, or make use of, the copyrighted work in some unlawful or unauthorized manner.

The case's factual context reveals much about the new law—and it makes the odd revelation that garage doors have something in common with library research. Skylink manufactured a universal remote control that could operate garage door openers made by various companies, including openers made by Chamberlain. Chamberlain charged that Skylink's device violated Section 1201, asserting that for Skylink's remote to function, it had to circumvent copyrighted computer codes embedded in Chamberlain's equipment. The court disagreed, finding that owners of Chamberlain's openers necessarily have access to

THE RELATIVELY EASY access to the code in the garage door opener also raises the question of whether the technological control "effectively" controls access to the copyrighted work. One court has held that the practical ability of anyone to retrieve the operating code in computer printers meant that the encryption methods did not "effectively" restrict access. *Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004). Similarly, the fact that a software program was accessed without authority is also not a violation if the owner sold or licensed copies, and they could be retrieved without use of the software key. *Storage Technology Corporation v. Custom Hardware Engineering & Consulting, Ltd.*, 2006 WL 1766434 (D.Mass. 2006).

the codes in order for the opener to function properly—through the use of a remote control. Moreover, nothing in the garage door opener itself, or in the customer agreement, barred access. Therefore, when Skylink accessed the codes, it was not engaged in any unlawful use of the copyrighted work.

This case offers an important interpretation of Section 1201 that may have profound and positive consequences for librarians, researchers, and others concerned about the effects of the law. The court in *Chamberlain* turned to the statutory definition of *circumvent* and noted that it included an explicit reference to *unauthorized* access. The court accordingly ruled that a circumvention under Section 1201 can occur only when the ultimate access is one that creates a violation, or is at least "reasonably related" to a violation of the owner's reproduction rights or other rights under the Copyright Act.[8] The court also underscored that the DMCA should not be used to erode fair use or other sanctioned activities; thus, bypassing the technological controls for such lawful ends may not be a violation of Section 1201.

THE U.S. COPYRIGHT Act provides this definition: "To 'circumvent a technological measure' means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."

U.S. Copyright Act, 17 *U.S.C.* § 1201(a)(3)(A).

The *Chamberlain* case goes far to take much of the threat out of Section 1201. The court's fresh reconsideration of the law is built on solid reasoning and good public policy. The court's interpretations also fit nicely with the normal functioning of software in such things as garage door openers. As we use these devices, we deploy the software with the simple click of button. Normal operations pose little realistic opportunity to copy the software or make other improper use of it. The *Chamberlain* case further emphasizes that the situation in *Reimerdes* was quite different. While users of the DVDs in *Reimerdes* might only have watched the movie—a lawful activity—the circumvention of the controls also enabled users to copy the movie. Accordingly, bypassing codes for unlawful ends, such as unauthorized reproduction, could remain a violation of the DMCA under the reasoning of both *Reimerdes* and *Chamberlain*.

EXCEPTIONS FOR LIBRARIES AND EDUCATION

Amidst uncertainties surrounding the effects of the anticircumvention law, Congress sought to alleviate some concerns by creating several complex exceptions to the law. A few of them are specifically for the benefit of higher education. Some exceptions were enacted as part of the original DMCA; other exceptions are created periodically by regulations from the Librarian of Congress.

Statutory Exceptions

Upon enactment of the DMCA, Congress carved out for libraries the authority to circumvent technological protections, if the purpose is to access and review the protected work in good faith for purposes of determining whether or not to purchase it.[9] Like most exceptions to anticircumvention, this one is qualified by multiple detailed conditions. In addition to its narrow and meticulous construction, a library is subject to serious legal penalties if it utilizes the exemption, but is later determined to have misapplied the law.[10] One has to seriously question whether the benefits of attempting to use this exemption will outweigh accompanying risks of possible liability.

Perhaps the biggest drawback of the exception is its practical difficulty. The exception may be used only to review copyrighted works with an eye toward possible purchase; many reputable vendors will allow such a review or sampling without hesitation. Ultimately, anyone using the exception is proposing to hack through the password or other protective system. Few reputable libraries are likely to keep hackers on hand and turn them loose on commercial databases. Many database producers also kindly provide short-term access to prospective buyers, leaving the statute as perhaps little more than a statement of policy.

THE ANTICIRCUMVENTION LAW includes a few additional exceptions for purposes such as accessing information for law enforcement (Section 1201(e)). Of interest to some educators is a provision allowing reverse engineering of programs to create interoperability with other programs (Section 1201(f)). Another provision allows researchers to decrypt security codes, for the purpose of identifying and analyzing "flaws and vulnerabilities" (Section 1201(g)). Each of these statutes is rigorous and narrow and should be used only with meticulous care.

Regulatory Exceptions

The Librarian of Congress has the authority to issue periodic exceptions to the anticircumvention 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 DMCA on the availability and use of copyrighted works, notably for education and libraries. Specifically, the Librarian of Congress is empowered to identify particular classes of works, and to identify particular users who would be "adversely affected" if the restrictions of the law prevented their making "noninfringing uses" of those works.[11]

UNDER THE TERMS of Section 1201(a)(1)(C) of the U.S. Copyright Act, the Librarian of Congress is directed to develop new regulatory exceptions every three years. The first round was issued in 2000, with subsequent regulations in 2003 and 2006. The next round was due in late 2009, but was finally issued in July 2010. Each round is a new opportunity for educators, librarians, and any other interested parties to gather data and to urge the Librarian of Congress to craft new exceptions that meet real and important needs.

Each round of rule making is legally in force only for three years, unless the regulations are renewed. For example, the regulatory exceptions from 2003 expired in 2006, unless the Librarian of Congress renewed them. The regulations are therefore not necessarily cumulative. With each round, the Librarian has renewed some, allowed others to lapse, and added new exceptions. Anyone using these rules needs to check carefully for the current provisions.

The latest round of regulations was issued in July 2010. The following is the full text of the current regulation (17 C.F.R. § 201.40), setting forth six exceptions that will remain in effect until the next rule making, due in October 2012:

(a) General. This section prescribes the classes of copyrighted works for which the Librarian of Congress has determined, pursuant to 17 U.S.C. 1201(a)(1)(C) and (D), that noninfringing uses by persons who are users of such works are, or are likely to be, adversely affected. The prohibition against circumvention of technological measures that control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to such users of the prescribed classes of copyrighted works.

(b) Classes of copyrighted works. Pursuant to the authority set forth in 17 U.S.C. 1201(a)(1)(C) and (D), and upon the recommendation of the

The first exception, about cracking the CSS code on DVDs, is examined more closely later in this chapter for its important application to educational needs. Note, however, that the exception can also apply to making copies of short portions of films for the production of documentaries and noncommercial videos.

Register of Copyrights, the Librarian has determined that the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to persons who engage in noninfringing uses of the following classes of copyrighted works:

(1) Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:

THE TWO EXCEPTIONS that apply to wireless telephone handsets received considerable publicity. They allow owners of cellphones to "jailbreak" them in order to load apps that may be operable on only a designated type of phone, or to connect to an alternative network service (e.g., to switch from AT&T to Verizon).

(i) Educational uses by college and university professors and by college and university film and media studies students;
(ii) Documentary filmmaking;
(iii) Noncommercial videos.

(2) Computer programs that enable wireless telephone handsets to execute software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications, when they have been lawfully obtained, with computer programs on the telephone handset.

(3) Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized by the operator of the network.

(4) Video games accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works, when circumvention is accomplished solely for the purpose of good faith testing for, investigating, or correcting security flaws or vulnerabilities, if:

(i) The information derived from the security testing is used primarily to promote the security of the owner or operator of a computer, computer system, or computer network; and
(ii) The information derived from the security testing is used or maintained in a manner that does not facilitate copyright infringement or a violation of applicable law.

(5) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.

(6) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.

(c) Definition. "Specialized format," "digital text" and "authorized entities" shall have the same meaning as in 17 U.S.C. 121.

Of these new exceptions, the first is of greatest importance to education. Some of the press announcements and web postings about it have been a bit too euphoric. The exception is indeed an extraordinary and important opportunity in the law, but it should not be overestimated. Remember that these are exceptions only to the prohibitions on cracking the protection system. These provisions do not themselves permit other uses of the underlying copyrighted works—although the suggestion of permissible uses is strong.

Looking closely at the details of the first exception, one can see that it applies in a situation such as the following:

Professor Tran, who teaches world history, would like to create a selection of materials that demonstrate historical subjects in popular culture. The exception applies to any college or university professors, so Professor Tran is able to use it, if using the exception is necessary for her teaching. Notice that if she taught classes in K–12, she would be out of luck. Her students also may not use the provision, unless they can realistically claim to be students of media studies.

Professor Tran can use the exception only to gather "short portions" of motion pictures. She cannot use the exception for larger portions, or for accessing and copying any work other than a motion picture. She cannot use it to copy music, software, still images, or other works that might be on a DVD. She further needs to use those excerpts to create a new work. The statement released with the new regulations indicates that a collection of clips might be a new work, but certainly she has a stronger case if she is integrating the clips into her teaching materials. Next, she has to use the excerpts for criticism and comment. The law offers little guidance, but clearly uses in ordinary teaching, and the creation of new critical studies, were anticipated.

Once Professor Tran has met all of these conditions, she may then circumvent the CSS on a DVD. The regulation does not apply to other protection devices on other media.

THE DEFINITIONS IN Subsection (c) of the regulation reference the provision of the U.S. Copyright Act that allows copies of some works to make "specialized formats" for persons who are blind or have other disabilities. Section 121 of the Copyright Act is summarized in chapter 7 of this book. The defined terms are part of the regulatory exception governing certain uses of e-books. The beneficiaries of this exception may not be limited to persons who are visually impaired, but turning on the read-aloud function of an e-book obviously is profoundly important for anyone who cannot read the printed word. In an interesting development, the Copyright Office had recommended against adopting this exception based on insufficient evidence of its need. The Library of Congress rejected that recommendation.

She cannot crack the code on a Blu-ray Disc or disable the Macrovision systems on VCRs. Even at that, the regulation really does not provide that the actual copying and subsequent use of the movie clips is lawful. Only the circumvention is explicitly made lawful. However, the statement from the Library of Congress about the new regulation makes the case that copying short movie clips, for these limited purposes, will most likely be within fair use. Nevertheless, Professor Tran would do well to go back to the four factors of fair use and make a freshly reasoned decision.

WHEN THE REGULATORY exceptions were issued in July 2010, the Library of Congress also released an explanatory statement offering important insights into the new provisions. That statement, or notice, is published in the Federal Register, volume 75, no. 143, at pages 43825–39 (July 27, 2010).

This closer look at the details of the exception is not meant to be discouraging. Quite the contrary. It is a reminder that the details define the scope of the law. In this example, the details do tell Professor Tran that she cannot copy any amount of any work. However, even after working through the specifics, this exception is an enormous benefit for her and her students. She can assemble film clips for study, incorporate them into a class wiki, and use them in a relatively simple manner into her classroom teaching. Without meaningful exceptions, the anticircumvention law would be a barrier to even fair use and other proper uses of copyrighted works.

OUTLOOK FOR LIBRARIES AND EDUCATION

The purpose of the anticircumvention law, Section 1201 of the U.S. Copyright Act, is to impose controls on uses of copyrighted works. The controls may be viewed as essential for protecting copyrighted works, or as constraints on access and common uses. Many copyright owners will allow access, but sometimes only by agreeing to terms of use for the copyrighted content. For example, libraries long have purchased journals, made them widely available to the public, and allowed multiple readers to benefit from the works and to make fair use of them. Those same journals are now widely accessed through online databases, with restricted access. Libraries and their patrons may have online access only on the terms of the license agreement with the publishers.

Under those conditions, copyright owners have the ability to define who may access the databases and to restrict and impose conditions or fees for each use. The practical results of these controls are new constraints on the utility of library resources. Owners can deny access to users who do not assent to all stipulated restrictions, or narrowly limit access to certain users. Owners may set restrictions that attempt to curtail public access, fair use, and other virtues of copyright law. Indeed, licenses commonly define how the materials may be used for such purposes as interlibrary loans, and access is routinely limited to "authorized uses," defined in different ways under different agreements.

BECAUSE ACCESS TO content is increasingly subject to the terms of license agreements, the librarian or other professional responsible for negotiating and approving licenses may become the most important member of the organization. That person will be in a position to determine whether users will have access to content at all and the terms on which the materials may be used.

For some researchers, teachers, and others, the need to access materials may tempt them to crack the protective codes. A teacher may want to post music sound recordings on a server for classroom use, or a researcher may want to check the software code on a secured device. The *Chamberlain*

case infuses some flexibility into the meaning of the law by allowing some circumvention when the end purpose is fair use or other lawful activity. Although the *Chamberlain* decision is an important and good development in the law, it does not do away with many problems of the Section 1201 for librarians and educators. *Chamberlain* may mean that a user can circumvent access controls if ultimately the copyrighted work is used lawfully. Consider these possibilities that might be permitted under the reasoning of *Chamberlain*:

REGION CODES ARE often embedded with DVD movies and computer game disks to restrict use of the work to the designated region of the world. A buyer of a DVD in Europe, for example, would often be blocked from playing that disk in a machine purchased in North America. In *Sony Computer Entertainment America Inc. v. Gamemasters*, 87 F.Supp.2d 976 (N.D. Cal. 1999), the defendant created a game enhancer, which allowed users of a Sony PlayStation to play games on machines that were not from the designated region. The court held that by enabling users to bypass territory codes was a form of circumventing access controls. Because the simple act of using a disk from another country is not a violation of U.S. law, one has to wonder if a court would find a DMCA violation for that reason alone in the aftermath of *Chamberlain*.

- A user may be able to use or adjust the controls of a DVD player in order to watch films from disks that have region code restrictions. Private viewing of copyrighted films is not a copyright violation.
- A user might be able to remove anticopying code on disks storing software or other copyrighted works, if the ultimate purpose is to load the materials onto a computer or even copy it in full, if the copy is deemed to be within fair use or another exception.
- A library may be able to bypass or disable similar controls, if the purpose is to make a preservation copy consistent with Section 108 of the U.S. Copyright Act.
- A university may acquire materials embedded with a digital rights management code (DRM) that can track and control uses, copies, and sharing of the materials. Many customary uses in education may now be monitored or inhibited, and altering or disabling DRM can be a violation.
- An educator may be able to circumvent controls in order to copy and deliver materials in distance education, consistent with the terms and limits of the TEACH Act in Section 110(2) of the U.S. Copyright Act.

Maybe these uses would be allowed. We are a long way from knowing if the law will develop in these directions, but the *Chamberlain* case is an important harbinger of the future. The *Chamberlain* decision suggests that such lawful activities may ultimately not be subverted by copyright owners who impose overburdening restrictions on their works.

Nevertheless, the most serious dilemmas of the anticircumvention law continue, even if the *Chamberlain* reasoning is applied broadly. In order to make any lawful uses of works that are kept behind technological controls, the earnest educator, librarian, or other user still has to make the decision—and have the know-how—to circumvent whatever controls exist. Perhaps more foreboding, that honest user has to be ready to decide that the circumvention is within the law.

NOTES

1. The WIPO Copyright Treaty of 1996, at Article 11, calls for countries to enact "adequate legal protection . . . against the circumvention of effective technological measures." The full text of the treaty and the growing list of signatory parties may be found at www.wipo.int/treaties/en/ip/wct/.

2. *The Digital Millennium Copyright Act*, 105th Cong., 2d sess. (1998). H. Doc. 551: 17–18.
3. *The Digital Millennium Copyright Act*, 105th Cong., 2d sess. (1998). S. Doc. 190: 8.
4. *U.S. Copyright Act*, 17 *U.S.C.* § 1201(a)(1)(A).
5. *U.S. Copyright Act*, 17 *U.S.C.* § 1201(b).
6. *U.S. Copyright Act*, 17 *U.S.C.* §§ 1201(a)(2) and (b).
7. In the *Elcomsoft* case, the court did rule on the constitutionality of the DMCA provisions. *United States v. Elcom Ltd.*, 203 F.Supp.2d 1111 (N.D. Cal. 2002).
8. Another court has stated broadly: "Courts generally have found a violation of the DMCA only when the alleged access was intertwined with a right protected by the Copyright Act." *Storage Technology Corporation v. Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307, 1318 (Fed. Cir. 2005).
9. *U.S. Copyright Act*, 17 *U.S.C.* § 1201(d).
10. *U.S. Copyright Act*, 17 *U.S.C.* § 1201(d)(3).
11. *U.S. Copyright Act*, 17 *U.S.C.* §§ 1201(a)(1)(C)–(D).

SEVENTEEN

COPYRIGHT, ARCHIVES, AND UNPUBLISHED MATERIALS

KEY POINTS

- Unpublished works can include manuscripts, photographs, computer programs, e-mails, business memos, and a wide variety of materials.
- Congress eliminated the perpetual common law copyright protection that previously applied, and unpublished works are today subject to federal copyright protection.
- In general, the duration of protection for unpublished works is the same as for other works, meaning that the copyrights in unpublished works from long ago may have expired.
- Fair use can apply to unpublished works, but it usually applies narrowly as compared to other types of works.
- Some other provisions of the U.S. Copyright Act, notably Section 108, include distinctive rules applicable to unpublished works.

UNPUBLISHED WORKS CAN range from historical manuscripts to modern research findings and computer programming. In many instances, copyright law applies a distinctive set of rules to such works, often resulting in tighter controls on their use. Sometimes the reasons for the law are built on sound policies of confidentiality or privacy. The author of private correspondence and journals may have extraordinary need for greater control over writings that disclose confidences. Memoranda in business files may contain trade secrets. Many computer programs may be selectively utilized or licensed, never meant for wide distribution or publication. Other unpublished works are simply not quite ready for full disclosure. They may be drafts of articles or raw film footage not yet refined into the final published version. Special protection for these works is sometimes easy to justify.

The history of copyright law includes important precedent for distinctive treatment of unpublished materials. Today, the rights of copyright owners include rights of reproduction and more. Some early cases often referenced a "right of publication" or a "right of first publication."[1] Control over when a work would reach the market and be openly disclosed was generally safeguarded for the author's benefit. If the author clearly meant for the drafts to reach a limited group of readers, a court will likely apply a tight construction of fair use.

The logic of these developments is fairly simple. Concerns about confidentiality often lead to greater protection and hence usually a more constrained allowance of fair use or other public rights of use. Whether that explanation is valid or not, it has shaped copyright law in several respects, generally resulting

in greater protection for unpublished works. This chapter will focus on a few aspects of current copyright law specifically applicable to unpublished works, and that are of particular importance to librarians, educators, and researchers.

DURATION OF PROTECTION

Before 1978, unpublished works were not protected under federal copyright law at all. The application of federal statutory copyright protection began to apply only upon publication of the book, music, or other work. If the work was published with a proper copyright notice, then statutory protection would apply for a period of years. If the publication lacked the requisite notice, the work immediately entered the public domain.

Chapter 4 of this book details the rules and terms of copyright duration. Before 1978, statutory copyright protection began with a term of twenty-eight years. It could then be renewed. Under current law, such early works could have protection for as long as ninety-five years.

Up to the time of publication, however, the work enjoyed something known as *common law* copyright protection. This protection was not part of federal law, but the rights were instead generally recognized and enforced under state law. Common law protection applied automatically, and one of its most significant traits was that it lasted indefinitely. More bluntly, it would last in perpetuity—forever—as long as the work remained unpublished. The author might have been dead for centuries, but the copyright lived on.

Common law copyright posed serious challenges for anyone working with unpublished materials, such as the biographer needing to quote from letters and diaries or wanting to reprint a family snapshot. The legal protection was strong, and even letters from centuries ago still had valid copyrights.

To determine the copyright duration of an archival photograph (here the author's grandparents, Reuben and Amanda Anderson), one needs to investigate much about its creation and possible publication.

With the full revision of the U.S. Copyright Act, effective January 1, 1978, Congress brought an end to much of the problem. Congress abolished common law copyright and brought all eligible works—published or not—under federal copyright protection.[2] Moreover, Congress eliminated the perpetual protection and applied the basic terms of protection to new and old works that are unpublished.[3] For the first time in American history, the copyrights to unpublished works could now expire. For the first time, researchers could anticipate that unpublished materials—including diaries, letters, survey responses, e-mail correspondence, manuscripts, photographs, art, or software—would eventually enter the public domain and become available for unrestricted use.

Still, Congress did not make the law easy. To understand the duration rules for unpublished works, we still need to separate works created before and after the beginning of 1978. For unpublished works created since that date, we can apply the general rules of duration:

- For works created by individual authors, the copyright lasts for the life of the author, plus seventy years.[4]
- In the case of works made for hire, the duration for unpublished works is generally 120 years from the date of creation. If the work is eventually published, the copyright duration will be the lesser of either 120 years from creation or ninety-five years from publication.[5]

What about unpublished works from before 1978? Even works from the earliest years of American history? Congress laid down the general proposition that the general, current duration rules apply to those materials as well, although Congress postponed application of those rules until January 1, 2003.[6] As of that date, a wealth of unpublished materials entered the public domain for the first time. For example:

- Your archive may include letters and diaries written by Thomas Jefferson (died in 1826) or Frederick Douglass (died in 1895) or Louisa May Alcott (died in 1888). Because the writers died more than seventy years ago, the copyright for their unpublished works has lapsed. You may reprint the materials in full and upload them into a digital library without copyright restriction.
- You are writing the history of Mega Corporation, and you have files of memos written by company founders in the nineteenth century. If the writings are for hire and are more than 120 years old, they are no longer under copyright protection.
- You are planning to publish a book about the Civil War and want to include a set of photographs from the era, but you cannot identify the photographer. If the work is indeed anonymous, the copyright expired after 120 years.

Again, however, Congress did not make the law quite so simple. One more important twist in this law remains. Congress postponed the new law—as applied to unpublished materials—until 2003 in order to give rightful copyright owners an opportunity to find and benefit from copyright protection. Copyright owners by that time were typically family members or others who received the copyright through transfer or inheritance. In the years leading to 2003, Congress offered an important inducement to owners: find and publish the works before 2003, make them available to the public, and the law will reward you with an additional forty-five years of legal rights.[7]

A WORK MADE for hire is a work prepared by an employee within the scope of his or her employment, and a work by an independent contractor specially commissioned for an employer. The definition of a work made for hire is more complex, and the implications are significant. The details are examined in chapter 5 of this book. The duration rules that apply to works made for hire also apply to anonymous and pseudonymous works. Many unpublished works routinely lack a clear identification of authors. The works might be scribbles, missives, scrapbooks, or other cryptic products.

Consider this actual example: Samuel Clemens, more famous as Mark Twain, died in 1910. A previously unpublished chapter of his novel *Huckleberry Finn* was discovered in the 1990s. A new edition of *Huckleberry Finn* was published in 2001 with the "missing" chapter integrated into the full book.[8] The original portions, published in 1884, entered the public domain decades earlier and remain there. The "unpublished" chapter, however, might have expired in 1980, seventy years after Twain's demise. But that rule did not take effect until 2003, and because the chapter was published before the end 2002, the law gave it an additional forty-five years of copyright protection, to the end of 2047.

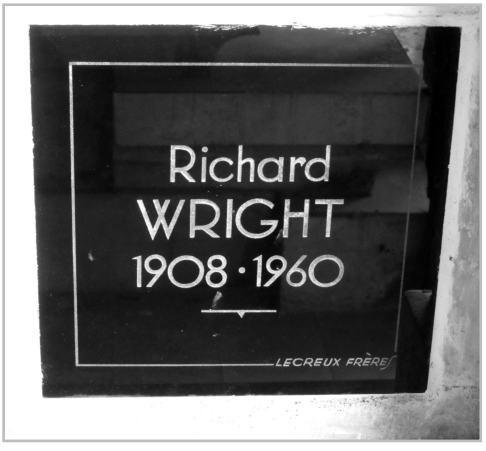
DESPITE A NARROW construction of fair use applied to private letters and similar materials, some interesting examples continue to brush the limits of fair use. For example, when a set of letters written by J. D. Salinger to a former romantic acquaintance were sold at auction, sizable excerpts appeared in the *New York Times*. The newspaper also quoted heavily letters by Thomas Pynchon, another reclusive author, when they were added to the research collections of the Pierpont Morgan Library. For more information these and other examples, see Kenneth D. Crews, "Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright," *Arizona State Law Journal* 31 (Spring 1999): 1–93.

Researchers accordingly must be watchful of two common possibilities. First, you might find a manuscript or other "unpublished" work from the past, but before you can conclude that it is in the public domain, you need to research whether in fact it might have been published in the meantime. Second, you may find a published work, such as a novel from the distant past, but some pieces of it may have been added more recently and enjoy protection under copyright law.

FAIR USE OF UNPUBLISHED WORKS

A series of court rulings through the last two decades have established a relatively narrow application of fair use to unpublished works. The issue has been of enormous importance to the software industry and other parties, whose works are often kept unpublished and are worth enormous amounts of money. Yet most judicial decisions have been about the use of letters, diaries, and other resources central to the writing of history and biography. When courts ruled in the late 1980s that biographers may not be within fair use when making customary quotations from letters written by J. D. Salinger and L. Ron Hubbard, researchers expressed alarm.[9]

Congress responded in 1992 by adding this sentence to the fair use statute: "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."[10] Congress was striving to dissuade the courts from making a complete bar on fair use for unpublished works, and the effort appeared to work. Subsequent cases have allowed authors to make limited quotations from the journal of Richard Wright and the manuscripts of Marjorie Kinnan Rawlins.[11]



The tomb of Richard Wright, Père Lachaise Cemetery in Paris

While fair use has found new meaning in the context of unpublished works, that meaning remains somewhat circumscribed. In all of the cases, courts have tipped the "nature" factor firmly against a finding of fair use, reasoning that the unpublished nature of the materials means that they merit greater protection. Courts have built these principles on a presumption that letters, diaries, and other manuscripts may include private information, and stronger protection allows the copyright owner to choose whether, when, and how to make the works publicly available.

The recent cases were provoked by a decision from the U.S. Supreme Court involving the use of quotations from the

manuscript to President Gerald Ford's memoirs. The Court ruled that the quotations were not within the limits of fair use, in large part because the memoirs were not yet published. The Court articulated a "right of first publication" and held that fair use applies narrowly when it could effectively erode the author's ability to choose when to publish, or even whether to publish the materials at all.[12] Also highly influential to the Court was the fact that the publisher intended to release the work in the near future, and unapproved publication directly affected the market for licensing excerpts to a popular magazine.

The following cases illustrate the recent evolution of the fair use law for unpublished works.

IN 1985, THE U.S. Supreme Court ruled in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), that fair use applied narrowly to an unpublished book manuscript, in order to preserve the right of first publication. Recall from chapter 6 that copyright owners have certain rights set forth in Section 106 of the Copyright Act. The right of first publication is not among them. Where did the Supreme Court find this right? It long had been a feature of the common law of copyright as applied to unpublished materials. The U.S. Copyright Act preempts the common law. Nevertheless, the Court breathed life into what could have been an obsolete doctrine.

Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987).

Random House was preparing to publish a biography of the famous and reclusive author J. D. Salinger. The book was to include quotations from private correspondence available to researchers in various manuscript collections. Salinger wrote the letters, and recipients had donated the materials to libraries at Harvard, Princeton, and other universities. The lower court had ruled that the limited quotations and paraphrases were within fair use, but the Court of Appeals disagreed, circumscribing sharply the application of fair use to unpublished materials. The court seemed particularly moved by the apparent personal or confidential nature of the letters, as well as their literary qualities. These considerations affected all four of the factors.

Purpose: The court agreed that the purpose of the use was criticism, scholarship, or research. Any of these purposes would favor a finding of fair use, even in the context of a book that will likely be published and sold for commercial gain. On the other hand, the court gave no special leniency for biographers who may customarily depend on quoting from private letters to tell an important story.

Nature: On this factor, the court succinctly and firmly leaned against fair use for unpublished materials.

Amount: The court also held the biographer to a highly restrictive standard, finding that many of the quotations used more of Salinger's expression than was "necessary to disseminate the facts." The court appeared to be deeply influenced by the literary qualities of Salinger's letters, finding infringements even when the quotations were limited to just phrases and even paraphrasing of the originals.

Effect: The court relied on testimony about the monetary value of the letters, or the possibility that Salinger or his successors may choose to publish them in the future, to conclude that quotations in a published biography could harm those speculative markets.

Sundeman v. The Seajay Society, Inc., 142 F.3d 194 (4th Cir. 1998).

The *Salinger* case suggested that the unpublished nature of the work could greatly influence the analysis of all the fair use factors. Researchers began to see in *Salinger* nearly a total elimination of fair use for unpublished works. The *Sundeman* case, however, reveals that much had changed in the law by the late 1990s. Today, this case is an important reminder that reasonable, limited, scholarly uses of unpublished materials may well be within fair use.

The *Sundeman* decision involved the use of significant quotations from a manuscript by the author Marjorie Kinnan Rawlins. A researcher at a nonprofit foundation selected quotations from the unpublished manuscript and included those quotations in an analytical presentation delivered to a scholarly society. Turning to the four factors, the court ruled that the researcher was acting within fair use.

Purpose: Her use was scholarly and transformative, and provided criticism and comment on the original manuscript. All these purposes worked in favor of fair use. The court especially noted that moving the excerpts from the original novel to the context of scholarly criticism was a transformative use.

Nature: The court relied on a long series of cases to resolve that the unpublished nature of the work "militates against" fair use. On the other hand, the court pointed to the new language in the fair use statute, and emphasized that the use of unpublished works may still be within the law.

Amount: The amount used was consistent with the purpose of scholarly criticism and commentary, and the use did not take "the heart of the work," as has been important in other cases. The court was also not concerned that the amount copied was between 4 and 6 percent of the original 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.

The Current Trend

These cases reflect the trend away from an apparent per se bar on fair use for unpublished works. When Congress added the language about unpublished works, it was striving to eliminate any notion of a complete bar on fair use. In other rulings, courts have found fair use when a biographer quoted from the personal journals of Richard Wright, and when an author of a critical study printed excerpts from rap lyrics written by Eminem before he found fame.[13] Fair use does apply to unpublished works today, and it often will allow brief or moderate quotations, as are customary for research in history, biography, and many other disciplines.

LIBRARY PRESERVATION AND OTHER STATUTORY EXCEPTIONS

Recall from chapter 7 that the U.S. Copyright Act includes numerous statutory exceptions to the rights of owners. A few of them have some implications for the use of unpublished works. Most notable is Section 108, which allows most libraries to make limited copies of

copyrighted works for specific purposes (see chapter 13 of this book). One of those purposes is preservation programs, and here the statute outlines a distinctive application to preservation copies of unpublished materials. The rules are not necessarily more rigorous than the rules applicable to published works. They are just different.

When librarians make preservation copies of published works, they must search the market for a replacement before making a new copy. The rule is logical: as long as the work is still published, libraries should be ready to buy replacements rather than make their own. By contrast, if the work is unpublished, no such market exists. The unpublished work, however, may be personal or confidential. Consequently, the library may make the copy, but usually only to retain it in the library for research and study—and not for wide dissemination.

By detailing Section 108 as applicable to preservation of unpublished works, Congress was laying out a distinctive scope of user rights. In many other statutory exceptions, however, the law does not specify whether the works used may be published or unpublished. For example, Sections 110(1) and 110(2) address displays and performances of works in the classroom and in distance education. By not stipulating that the work must be published, the law apparently applies equally to the use of unpublished works. For more information about Section 108, see **chapter 13**. For more about Section 110, see **chapter 12**.

PROMOTING PROGRESS

This chapter is an overview of discrete aspects of copyright law applicable to unpublished materials. These examples provide important demonstrations of the underlying principles and functions of copyright. Copyright law serves two pragmatic purposes: to protect creative works and to facilitate beneficial uses of those works by the public. Those purposes are often in conflict with each other. Through the last two centuries, Congress has steadily reevaluated the tension and has struck new legal articulations of a balance.

When applied to unpublished materials, the law sometimes establishes a distinct balance, reflecting the particular interests of copyright owners and the singular importance of unpublished materials for research, education, and other pursuits. When Congress eliminated perpetual copyright protection for manuscripts, or applied a limited fair use to personal diaries, it strove to achieve the overarching goal of copyright law—to promote the progress of science and learning. In that spirit, Congress has moved away from rigid and absolute bars on uses of unpublished works. Instead, the law has migrated toward a bit of flexibility and ultimately a fresh rethinking and rebalancing of owners' and users' rights.

NOTES

1. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999).
2. *U.S. Copyright Act*, 17 *U.S.C.* § 301(a).
3. *U.S. Copyright Act*, 17 *U.S.C.* §§ 302–304.
4. In the case of works created by joint authors, the copyright lasts through the life of the last of the authors to die, plus seventy more years. *U.S. Copyright Act*, 17 *U.S.C.* § 302.
5. *U.S. Copyright Act*, 17 *U.S.C.* § 302(c).
6. *U.S. Copyright Act*, 17 *U.S.C.* § 303.
7. *U.S. Copyright Act*, 17 *U.S.C.* § 303.
8. Mark Twain, *Adventures of Huckleberry Finn*, ed. Victor Fisher and Lin Salamo, with Walter Blair, illus. E. W. Kemble and John Harley (Berkeley: University of California Press, 2001).

9. *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); *New Era Publications International v. Henry Holt & Co., Inc.*, 695 F.Supp. 1493 (S.D.N.Y. 1988), *aff'd* by 873 F.2d 576 (2d Cir. 1989).
10. *Fair Use and Unpublished Works Act*, Public Law 102-492, *U.S. Statutes at Large* 106 (1992): 3145, codified at 17 *U.S.C.* § 107.
11. *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991); *Sundeman v. The Seajay Society, Inc.*, 142 F.3d 194 (4th Cir. 1998).
12. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).
13. *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991); *Shady Records, Inc. v. Source Enterprises, Inc.*, 371 F.Supp.2d 394 (S.D.N.Y. 2005).

EIGHTEEN

PERMISSION FROM COPYRIGHT OWNERS

KEY POINTS

- No permission is needed if your work is in the public domain, or if your use is within fair use or another exception.
- Permission for some works may be available through a collective licensing agency.
- Contacting a copyright owner and drafting a permission letter can involve a careful strategy.
- You still have options after reaching a dead end in your quest for permission.

COPYRIGHT LAW GRANTS broad rights to copyright owners and then carves out exceptions, such as fair use. While these exceptions are extremely valuable for maintaining a balance between owners and the public, not all planned uses of copyrighted works will fit within any of these statutory possibilities. In that event, users may seek a license—or permission—from the copyright owner allowing use of the work.

This chapter offers a step-by-step process for obtaining permission to use copyrighted works. This chapter provides insights for streamlining the process and strategies for dealing with problems that commonly occur when making permission requests.

SPECIFY THE WORK AND THE PLANNED USE

The first step in obtaining permission to use a copyrighted work is to identify precisely the work in question and your planned uses of it. When selecting a work, stay flexible and consider substitutions that may meet your needs. Copyright owners are free to deny permission requests or require a licensing fee that may be outside your budget. Also, finding and eliciting a response from copyright owners can sometimes prove difficult or impossible. Having multiple works to draw upon will improve your chances of success.

In addition, stay flexible about your precise uses of the work. For example, you might have a great plan to digitize photos and make them available on a website. The owner may object to broad access and require limitations. Similarly, the owner may oppose the making of digital copies but will allow print versions of the work. Explore alternatives with the owner as necessary.

DETERMINE WHETHER PERMISSION IS NECESSARY

YOU DO NOT need to seek or secure permission if your use is within fair use or another exception. Study the exceptions summarized in chapter 7 of this book. The fundamental point of the exceptions is that the public may use the works without permission and without incurring liability. Seeking permission may at times be good courtesy. From another perspective, seeking permission for activity within fair use is not only unnecessary, but may be counterproductive.

Permission may not be necessary for many reasons, but a common reason is that the work is not protected by copyright at all. A work may be in the public domain for a myriad of reasons.[1] If it is, you may use it freely and without copyright restriction. Early research concerning the copyright status of a work can save considerable time and money.

Permission is also not necessary if you are within fair use or another exception to the rights of copyright owners. Even so, you might find yourself requesting permission simply as a courtesy, or to find a more comfortable solution to a close call about fair use. Seeking permission when it is not clearly necessary can backfire. The copyright owner is now apprised or your project and may object or set an unaffordable fee. Seeking permission is good and important, but not in every instance.

Finally, permission for your use may already be granted by the copyright owner. The original work may include a statement of permission or a Creative Commons license.[2] Often libraries purchase videos and other works with a license to use them in educational performances. Sometimes colleges and universities acquire full-text databases under contracts that permit a variety of educational uses. A little checking can spare you the burden of tracking down the copyright owner.

IDENTIFY AND CONTACT THE COPYRIGHT OWNER

You can determine the identity of the copyright owner through several methods. You are best to start with the work itself. It may include a copyright notice indicating the original claimant of the copyright. While the copyright notice is a good place to start your investigation, remember that copyright ownership may have been transferred to another person or entity, leaving some notices out of date and inaccurate. Nevertheless, the name on the work is the obvious place to start. Searches of directors, newspapers, and Internet sources will often turn up the publisher, the author, or the author's heirs.

REQUESTING PERMISSION DOES not preclude a later decision to rely instead on fair use. In many fair use cases, permission was initially sought, but not granted. One might think that the denial of permission should weigh against fair use. In fact, courts rule otherwise in order to not discourage users from making an honest effort to seek permission when it may be warranted.

Campbell v. Acuff-Rose Music, 510 U.S. 569, 585 n.18 (1994).

The records at the U.S. Copyright Office may be helpful in determining the copyright owner. Copyright owners seeking the fullest protection of their works will often register claims with the Copyright Office. Registration, however, is not a prerequisite for protection, so the public records are hardly complete. Also, the Copyright Office may list one party as the owner, but that original owner may have since

THE U.S. COPYRIGHT Office's records may be searched to help determine the copyright status of work and the identity of the copyright claimant. Filings made in and after 1978 may be searched for online at www.copyright.gov. The Copyright Office will conduct searches for a fee. For many years the Copyright Office published a printed directory of registrations and renewals, which can also assist with finding the names of copyright claimants. Issues of the *Catalog of Copyright Entries* from 1923 to 1964 are now scanned and available through Google. See www.books.google.com/googlebooks/copyrightsearch.html.

transferred the copyright to a new owner, with no record of the change. Again, documents at the Copyright Office can be incomplete and outdated.

All too often the quest for the copyright owner is akin to a detective venture. The original author may have transferred the copyright to a publisher. That publisher may have sold its assets, including copyrights, to another company. In other cases, the original author may have retained the copyright, but died and left the estate, including copyrights, to an assortment of family members. Sometimes you just have to persevere and indulge in a series of telephone calls to authors, editors, and family members.

Some copyright owners have eased the search. They may act through various collective licensing agencies that serve as agents for multiple copyright owners. Publishers of books and journals often use the Copyright Clearance Center (CCC). Some musical works are licensed through agencies such as ASCAP or BMI. If an organization represents the copyright owner, it may offer a license directly to you. In other instances, the organization may put you in direct contact with the owner. Licenses available through these agencies are often available simply by submitting the request and paying the licensing fee online.

Large publishers and television networks sometimes have their own permission departments to handle requests. These departments may be contacted via an e-mail address available on the company's website. Many of these departments offer standard permission request forms that you may complete and submit through the mail or online.

DRAFT A PERMISSION REQUEST

Ultimately, you often have to contact copyright owners directly, either by e-mail or the postal service. An advance telephone call will often assure that you are writing to the proper owner. That call may also signal whether or not the permission will likely be forthcoming.

As you prepare the permission letter, consider choosing one of two strategies for drafting your request:

The CCC can help expedite some licensing processes. Through its website, you may request permission to make certain uses of thousands of works including books, magazines, journal articles, newsletters, and dissertations. Permission fees are paid directly to the CCC and are then forwarded to the appropriate copyright owners. The center's website is: www.copyright.com. The use of ASCAP, BMI, and other music licensing agencies is examined in **chapter 15**.

Specific request. Many copyright owners insist on a detailed request, and the permission will be limited accordingly. For example, if you request permission to make print copies of a work during the next semester of your course, the permission will not cover digital scans, posting the item to the course website, or using it in subsequent semesters. Copyright owners often require elaborate information to determine fees or whether to grant permission at all. Omitting pertinent information in your request may delay permission.

General request. Sometimes a little flexibility in your permission can be helpful. Open-ended and broad language may offer more flexibility to meet changing needs. For example, if you can anticipate using the work in repeated semesters for various projects, you might ask for broad rights to "use the work in connection with my teaching." Accordingly, you might not specify such matters as:

- A termination date for the permission
- A maximum number of students using the work
- The medium by which you will share the work (e.g., electronic or print)
- The specific nature of the use (i.e., distance education or face-to-face teaching)

One obvious downside of this strategy is that the copyright owner may ask for more information or may insist on adding such limits or conditions to the permission. Any back-and-forth negotiation will lead to delays.

Whenever possible, secure grants of permission in writing. Oral permission may be allowed under the law, but a written and signed document will be important in case of any misunderstandings between you and the copyright owner. A model permission letter is included in **appendix F** of this book.

Whatever method or means you use to secure permission, you ought to be ready to address these important points:

How much: The price that copyright owners will charge for use of their works is difficult, if not impossible, to estimate. Some licensing fees will be exorbitant and cost-prohibitive, yet other copyright owners may be happy to grant permission at little or no cost. You usually just have to ask. Owners may base fees on the type of use or the number of people who may have access to their works. You should be ready to provide the details as best you can.

What: Cite the precise work and the exact portion of the work you wish to use. The fee to use a portion of a work may be less than the fee for the use of an entire work. For text works, include the exact pages, sections, or chapters you plan to use. For sound recordings and audiovisual works, include a detailed description of the portion and length you wish to use.

When: The copyright owner may want to know when and for how long you plan on using the work. 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 may be critical to determining the licensing fee or whether permission is granted at all. Owners tend to be more supportive of nonprofit classroom uses, but if you are planning to include the material in a publication or on an open website, you will likely need to offer those details.

THE TERMS OF your licensing agreement are limited only by your imagination and the willingness of the parties to reach agreement. Contemplate all your possible uses—present and future—and request permission accordingly.

How: The proliferation of alternatives for using copyrighted works has caused many owners to insist on detailed plans. You might have to specify whether you are making classroom handouts or sending the materials to a commercial printer for duplication. Some owners will want to know if you will deliver the works electronically, and if your course management system is password protected.

THE DEAD END OF PERMISSION QUESTS

Too often, your effort to secure permission reaches a dead end. That disappointing conclusion may take many forms: You never find the copyright owner; the copyright owner never responds to your request; the licensing fee is prohibitive; or the copyright owner denies permission altogether. Dead ends are common and can be extremely frustrating. Copyrighted works of indeterminate ownership, or with owners that can no longer be found, are often called *orphans*. Orphan works lead to confusion, and they even have been the subject of proposed legislation in Congress. For now, at least, the law offers no specific solution to the problem of orphan works or other dead ends. Instead, you might consider these strategies:

Return to fair use. The fair use analysis that you conducted before seeking permission should have been based in part on the potential effect that your use would have on the market for the work. Reaching a dead end may suggest that your use will cause little or no harm to the market for licensing the work. Armed with this new information, a new fair use analysis may now have a different result.

> **Chapter 14** includes an overview of the risks and liabilities of copyright infringement. That chapter also describes some important protection for educators and librarians who are acting in good faith. One practical point to emphasize here is that liabilities may be limited if the work is not registered with the Copyright Office. Some users may also have added protections if they conduct a good faith application of fair use.

Replace the planned work with alternative materials. Substitute works may satisfy your needs. Look for works in the public domain or works for which permission is more likely forthcoming. Also, consider creating your own work and avoid having to ask for permission altogether.

Alter your planned use of the work. Some copyright owners will deny certain types of use or permission to copy large portions of a work. Revise your plans to accommodate the owner's requirements. For example, request to use a smaller portion of the work, or deliver the work to students via a password-protected system rather than a public website.

Conduct a risk-benefit analysis. Sometimes you face the difficult need to assess whether using the work is worth the risk of stirring legal claims. Your assessment should carefully weigh a number of variables, including the importance of using a particular work in your project; how openly "exposed" your use of the work will be; and the thoroughness of your investigation and the diligence of your attempts to request permission. Undertaking such an analysis should be done with caution. The effort can pose serious legal and ethical quandaries. Educators and librarians may want to consider notifying supervisors or asking legal counsel to assist in such an analysis. Unfortunately, copyright owners are often elusive, leaving users to face such difficult decisions.

NOTES

1. Some works are not eligible for copyright protection (see chapter 3 of this book), while other works may be in the public domain due to expiration of the copyright (see chapter 4).
2. For a brief discussion of Creative Commons, see chapter 6 of this book.

APPENDIX A
SELECTED PROVISIONS OF THE U.S. COPYRIGHT ACT

CONGRESS OF THE United States has the constitutional power to enact copyright statutes. The earliest federal copyright legislation dates to 1790, and Congress has revised the Copyright Act at various times since then. In 1976, Congress made the most recent complete revision of the federal copyright statutes, which took effect on January 1, 1978. Current law is therefore often referred to as the Copyright Act of 1976. As readers of this book can surmise, Congress has amended the Copyright Act of 1976 on many occasions. In fact, since 1976, Congress has enacted approximately sixty bills that have changed the current Copyright Act. Some of the changes have been minor, while others have been profound and complicated.

This appendix reprints selected provisions from the current U.S. Copyright Act. The statutes are included principally because of their relevance to the issues covered by this book. Consequently, readers will find here the statutes related to the rights of owners and the statutes on fair use and other public rights of use. *The author has added the italicized language that is in brackets.*

The full text of the U.S. Copyright Act is available from many sources. The website of the U.S. Copyright Office includes a link to the full Act as well as links to individual bills (such as the Digital Millennium Copyright Act) and to helpful explanations of copyright law (such as the circulars and other materials). Visit that website at www.copyright.gov.

PROVISIONS FROM THE U.S. COPYRIGHT ACT

SECTION 101. DEFINITIONS

[*The importance of the definitions should not be overlooked. For example, Section 105 states that a work of the U.S. government is not protected by copyright. To determine the reach of that provision, one must look to the definition of a "work of the United States Government" in Section 101. Nothing in Section 105 will tell the reader to look to the definitions, so anyone working with the Copyright Act must be familiar with the words and concepts that are defined in the code. To make the matter more interesting, some provisions of the Copyright Act include their own definitions of selected terms, apart from the definitions in Section 101. For example, this appendix includes Section 110, which includes some definitions. The following definitions are only selected excerpts from Section 101 as may be important to the readers of this book.*]

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work."

A "digital transmission" is a transmission in whole or in part in a digital or other nonanalog format.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A "performing rights society" is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.

Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it 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 is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "work of visual art" is—

(1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

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.

[*The definition of a "work made for hire" includes some additional language emphasizing that paragraph (2) of the definition shall not be interpreted with reference to a congressional bill from 1999 that added "sound recordings" to the list, but was quickly repealed in 2000. The law develops in some peculiar ways.*]

SECTION 102. SUBJECT MATTER OF COPYRIGHT: IN GENERAL

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery,

regardless of the form in which it is described, explained, illustrated, or embodied in such work.

SECTION 103. SUBJECT MATTER OF COPYRIGHT: COMPILATIONS AND DERIVATIVE WORKS

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

SECTION 105. SUBJECT MATTER OF COPYRIGHT: UNITED STATES GOVERNMENT WORKS

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

SECTION 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.

SECTION 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.

SECTION 107. LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE

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

infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

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

SECTION 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), and (h), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

SECTION 109. LIMITATIONS ON EXCLUSIVE RIGHTS: EFFECT OF TRANSFER OF PARTICULAR COPY OR PHONORECORD

(a) 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) 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, and 505. 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) 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.

SECTION 110. LIMITATIONS ON EXCLUSIVE RIGHTS: EXEMPTION OF CERTAIN PERFORMANCES AND DISPLAYS

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

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

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

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

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

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

(i) students officially enrolled in the course for which the transmission is made; or
(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution—

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

(I) applies technological measures that reasonably prevent—

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and
(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

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

[*The remainder of Section 110 creates exceptions, generally allowing performance and displays of works, but only under specific conditions and for specific types of users. Among the users who have the benefit of these provisions are religious organizations, restaurants, horticultural organizations, and blind and handicapped persons. Section 110 continues with the following language, applicable to the Section 110(2) about distance education.*]

In paragraph (2), the term "mediated instructional activities" with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use.

For purposes of paragraph (2), accreditation—

(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and
(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

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.

SECTION 114. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

[*Section 114(d) is an unduly complicated provision, stretching for a dozen or more pages, that sets forth the conditions under which the copyright in a sound recording may have the benefit of a performance right pursuant to Section 106(6).*]

SECTION 504. REMEDIES FOR INFRINGEMENT: DAMAGES AND PROFITS

(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

SECTION 1201. CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS

(a) Violations Regarding Circumvention of Technological Measures.—

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

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

[*Section 1201 continues with details about the authority of the Librarian of Congress to create exceptions to the anticircumvention provision. The statute also includes lengthy and elaborate statutory exceptions, some of which are examined in the text of this book.*]

APPENDIX B
COPYRIGHT CHECKLIST: FAIR USE

THIS CHECKLIST FOR fair use is intended to serve two fundamental purposes. First, it should help educators, librarians, and others to focus on factual circumstances that are important to the evaluation of fair use as it may apply in a given set of circumstances. A reasonable fair use analysis is based on four factors set forth in the fair use provision of copyright law, Section 107 of the U.S. Copyright Act. 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 derives from those four factors and judicial decisions interpreting them.

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 could be critical to establishing your reasonable and good faith attempts to apply fair use to meet your educational objectives. Section 504(c)(2) of the U.S. 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 might often 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. The checklist is a guide; you still need to bring your knowledge and reasonable perspective to the task.

The checklist for fair use originated in 1998 as a task undertaken by Kenneth Crews while then on the faculty of Indiana University, working closely with Dwayne Buttler in the university's Copyright Management Center. Since then, many colleges, universities, libraries, primary and secondary schools, companies, governmental organizations, and others have adopted and used it. Some users have accepted it without change; others have revised and adapted it to distinct needs. As with all advice and information about fair use, one should look closely at whether it serves your particular needs.

COPYRIGHT CHECKLIST: FAIR USE

Name: _____ Date: _____ Project: _____

Institution: _____ Prepared by: _____

Purpose

Favoring Fair Use

- ☐ Teaching (including multiple copies for classroom use)
- ☐ Research
- ☐ Scholarship
- ☐ Nonprofit educational institution
- ☐ Criticism
- ☐ Comment
- ☐ News reporting
- ☐ Transformation 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 to "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

APPENDIX C

COPYRIGHT CHECKLIST: THE TEACH ACT AND DISTANCE EDUCATION

PLEASE COMPLETE AND retain a copy of this form in connection with each copyrighted work considered for your distance education course.

Your name: _____

Educational institution: _____

Course or project: _____

Today's date: _____

Prepared by: _____

The Technology, Education, and Copyright Harmonization Act, better known as the TEACH Act, is designed to provide educators more opportunity for the use of copyrighted works in distance education programs while still offering adequate copyright protection to those works. In order to qualify for these further possibilities, educators must meet several requirements. As the responsibilities of the TEACH Act will most likely fall upon different persons or groups within any one educational institution, this checklist should be used as an aid to organize and ensure complete compliance with the TEACH Act for each copyrighted work. Remember, all requirements must be satisfied in order to fit within this statute. Keep in mind that if your planned copying does not fit the requirements of the TEACH Act, you may still pursue possibilities under fair use or other exceptions in the copyright law, or obtain permission from the copyright owner.

I. TEACH ACT REQUIREMENTS THAT ARE LIKELY THE RESPONSIBILITY OF INSTRUCTORS:

☐ A. The transmission is of one of the following:

- A performance of a nondramatic literary work; or
- A performance of a nondramatic 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.

☐ B. The work is not marketed primarily for performance or display as part of a digitally transmitted mediated instructional activity.

☐ C. The work to be used is not a textbook, course pack, or other material in any media that is typically purchased or acquired by students for their independent use and retention.

☐ D. 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 the educational institution; and
- Directly related and of material assistance to the teaching content of the transmission.

☐ E. 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.

☐ F. If the work to be used is to be converted from print or another analog version to digital format:

- The amount of the work converted is no greater than the amount that can lawfully be used for the course; and
- No digital version of the work is available to the institution, or the digital version available to the institution has technological protection that prevents its lawful use for the course.

II. TEACH ACT REQUIREMENTS THAT ARE LIKELY THE RESPONSIBILITY OF THE INSTITUTION:

☐ A. The institution for which the work is transmitted is an accredited nonprofit educational institution.

☐ B. The institution has instituted policies regarding copyright.

☐ C. The institution has provided information materials to faculty, students, and relevant staff members that describe and promote U.S. copyright laws.

☐ D. The institution has provided notice to students that materials used in connection with the course may be subject to copyright protection.

☐ E. The transmission of the content is made "solely for . . . students officially enrolled in the course for which the transmission is made."

III. TEACH ACT REQUIREMENTS THAT ARE LIKELY THE RESPONSIBILITY OF INFORMATION TECHNOLOGY OFFICIALS:

☐ A. Technological measures have been taken to reasonably prevent:

- 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.

☐ B. 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.

☐ C. The work is stored on a system or network in a manner that is ordinarily not accessible to anyone other than anticipated recipients.

☐ D. The copy of the work will 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.

☐ E. Any copies made for the purpose of transmitting the work are retained and solely used by the institution.

This document is only applicable to copies of copyrighted works made pursuant to the TEACH Act, Section 110(2) of the U.S. Copyright Act. If your copying does not fit the parameters of this statute, you may still consider alternatives, including fair use, as noted in the opening paragraph. You do not need to consider any of these options, however, if the work is in the public domain (e.g., if it was published in the United States before 1923).

Based on a checklist prepared by the Copyright Advisory Office, Columbia University Libraries.
Please visit www.copyright.columbia.edu.

APPENDIX D

COPYRIGHT CHECKLIST FOR LIBRARIES: COPIES FOR PRESERVATION OR REPLACEMENT

Library: _____ Date: _____

Citation or description of materials copied: _____
_____
_____

THE FOLLOWING CHECKLIST applies to the reproduction of a copyrighted work by a library or archives for the purpose of replacement of a published work, or for preservation or security of an unpublished work. Upon meeting the following requirements, the library or archives may make up to three (3) copies or phonorecords of a work. The copies are to become part of the library collection; this checklist therefore does not apply to making copies from the collection for an individual user to keep. The person making the copy at the library or archives should complete and retain this checklist to document compliance with Section 108 of the U.S. Copyright Act. Keep in mind that if your planned copying does not fit the requirements of Section 108, you may still pursue possibilities under fair use or another exception in the copyright law, or obtain permission from the copyright owner.

REQUIREMENTS OF THE LIBRARY OR ARCHIVES

☐ 1. The collection of the library or archives meets one of the following descriptions: (a) it is open to the public; or (b) it is available not only to researchers affiliated with the institution, but also to others doing research in a specialized field.

☐ 2. The reproduction must not be made for any direct or indirect commercial advantage.

☐ 3. The reproduction must include one of the following copyright notices: (a) the copyright notice appearing on the original work to be copied; or (b) if no such notice can be found on the work to be copied, a legend stating that the work may be protected by copyright law.

REQUIREMENTS OF AN UNPUBLISHED WORK TO BE COPIED

☐ 4. The work is reproduced for one of the following purposes: (a) solely for preservation and security; or (b) deposit for research use in another library or archives fitting the description of item 1 of this checklist.

☐ 5. The work to be copied is currently in the collections of the library or archives making the reproduction.

☐ 6. Copies or phonorecords made in digital format are not made available to the public in that format outside the library or archives premises (other than the copy that may be deposited in another library—see item 4(b) of this checklist).

REQUIREMENTS OF A PUBLISHED WORK TO BE COPIED

☐ 7. The work is reproduced in order to replace a work that is:

- Damaged; or
- Deteriorating; or
- Lost; or
- Stolen; or
- In a format that has become obsolete. A format is considered obsolete if the machine or device necessary to view the work stored in that format is no longer manufactured or reasonably available in the commercial marketplace.

☐ 8. The library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

☐ 9. Copies or phonorecords made in digital format are not made available to the public in that format outside the library or archives premises.

This document is applicable only to copies of copyrighted works made pursuant to Section 108 of the U.S. Copyright Act. If your copying does not fit the parameters of this statute, you may still consider alternatives, including fair use, as noted in the opening paragraph. You do not need to consider any of these options, however, if the work is in the public domain (e.g., if it was published in the United States before 1923).

Based on a checklist prepared by the Copyright Advisory Office, Columbia University Libraries. Please visit www.copyright.columbia.edu.

APPENDIX E

COPYRIGHT CHECKLIST FOR LIBRARIES: COPIES FOR PRIVATE STUDY

User request for copy: ☐ Yes _____ ☐ No Date: _____

Library: _____

Citation or description of materials copied: _____
_____
_____

THE FOLLOWING CHECKLIST applies to the reproduction of a copyrighted work by a library or archives for purposes of giving that copy to an individual user. The library or archives may make such copies pursuant to Sections 108(d) and 108(e) of the U.S. Copyright Act, and if all requirements are met, the library or archives may lawfully make one (1) copy or phonorecord of a work to fulfill a user's individual request for the material. The person making the copy at the library or archives should complete and retain this checklist to document compliance with Section 108 of the Copyright Act. Keep in mind that if your planned copying does not fit the requirements of Section 108, you may still pursue possibilities under fair use or another exception in the copyright law, or obtain permission from the copyright owner.

REQUIREMENTS OF THE LIBRARY OR ARCHIVE

☐ 1. The collection of the library or archives meets one of the following descriptions: (a) it is open to the public; or (b) it is available not only to researchers affiliated with the institution, but also to others doing research in a specialized field.

☐ 2. The reproduction must not be made for any direct or indirect commercial advantage.

☐ 3. The reproduction must include one of the following copyright notices: (a) the copyright notice appearing on the original work to be copied; or (b) if no such notice can be found on the work to be copied, a legend stating that the work may be protected by copyright law.

☐ 4. The library or archives prominently displays a copyright warning, in accordance with requirements of the Register of Copyrights, at the place where orders are accepted and on its order form.

REQUIREMENTS OF THE WORK TO BE COPIED

☐ 5. The copied work is made from the collection of the library or archives where the user makes the request or from the collections of another library or archives (such as through interlibrary loan).

☐ 6. The copied work is either: (a) the entire work or a substantial part of a work if, after a reasonable investigation, the library or archives has determined that a copy or phonorecord of the work cannot be obtained at a fair price; or (b) no more than one article or contribution to a collection or periodical issue or a small part of any other work.

☐ 7. The work that is copied may be either published or unpublished, and the work must be one of the following:

- Textual work or sound recording (but not a sound recording of music—see exclusions listed below); or
- Audiovisual works dealing with news; or
- Pictures and graphics published as illustrations, diagrams, or similar adjuncts to an allowed work (e.g., a photograph included in an article).

The work copied may NOT be any of the following:

- Musical works (musical composition, such as sheet music or a recorded version of a song); or
- Pictorial, graphic, or sculptural works (but see allowed “adjunct” pictures); or
- Motion pictures or audiovisual works (but see allowed “news” audiovisual works).

REQUIREMENTS FOR THE COPY

☐ 8. The library or archives has had no notice that the copy or phonorecord will be used for any purpose other than private study, scholarship, or research.

☐ 9. The copy or phonorecord becomes the property of the individual user.

This document is applicable only to copies of copyrighted works made pursuant to Section 108 of the U.S. Copyright Act. If your copying does not fit the parameters of this statute, you may still consider alternatives, including fair use, as noted in the opening paragraph. You do not need to consider any of these options, however, if the work is in the public domain (e.g., if it was published in the United States before 1923).

Based on a checklist prepared by the Copyright Advisory Office, Columbia University Libraries.
Please visit www.copyright.columbia.edu.

APPENDIX F
MODEL LETTER FOR PERMISSION REQUESTS

THE FOLLOWING LETTER is offered as guidance for drafting letters to copyright owners when permission to use the work is necessary. Chapter 18 of this book offers some principles for preparing an effective permissions letter. Naturally, the letter should be revised to meet your particular needs. Be sure to ask for the uses you realistically anticipate, but be ready to be flexible if the copyright owner is not prepared to grant all rights that you might want. Always keep a copy of the letter in your permanent files.

Today's date
Your address and contact information

Name and address of copyright owner

Dear _____:

I am requesting permission to reprint pages 39 through 62 of the following work: *Crunchy Copyright*, by Suzanne Tran, and published by ABC Press in 1995. I believe that your company, XYZ Publishing, is currently the holder of the copyright, because the original book states that copyright is held in the name of the publisher, and my research indicates that XYZ Publishing acquired ABC Press in 2002. If you do not currently hold the legal right to grant this permission, please let me know, and please direct me to the current rightsholder. Otherwise, your permission confirms that you hold the right to grant the permission requested here.

This request is for permission to include the above content as part of a web-based publication. I am developing a website that will include selected materials about copyright law. The purpose of the project is to help readers learn about and better understand copyright law. This request is for a nonexclusive, irrevocable, and royalty-free permission, and it is not intended to interfere with other uses of the same work by you. My project is currently

hosted on my university server, and we expect to make it available indefinitely to the public with no restriction or charge. Because of changing technologies, I am also requesting permission to use the materials in connection with future versions of the project, in any format, including electronic and print media. I hope that you will support this educational project. I would be pleased to include a full citation to the work and other acknowledgment as you might request.

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 the contact information above.

A duplicate copy of this request has been provided for your records. If you agree with the terms as described above, please sign the letter where indicated below and send one copy with the self-addressed return envelope I have provided.

Sincerely,

Wanda W. Wonderproject

Permission is hereby granted for the use of the material as described above:

Signature: _____

Name and title: _____

Company/affiliation: _____

Date: _____

GUIDE TO ADDITIONAL READING

Copyright Resources for Librarians and Educators

THE LITERATURE AND resources about copyright has grown steadily through recent years. Books, articles, websites, videos, and other materials now compete for attention. The following bibliography should provide an effective start for anyone seeking a closer look at copyright law as it relates to the work of libraries and educational institutions. This list includes multivolume standard treatises, books that focus on librarianship and education, and a selection of articles, reports, and other publications that explore essential issues. The bibliography is by no means complete, but it is representative. It is a mix of standard works in the field, as well as specialized articles and recent and provocative studies.

This bibliography is an appendix to the third edition of *Copyright Law for Librarians and Educators*, by Kenneth D. Crews (ALA Editions, 2012). Readers will find citations to many other works throughout that book. The author is the director of the Copyright Advisory Office at Columbia University, where he maintains a website (www.copyright.columbia.edu) with further information about copyright and links to additional resources.

COPYRIGHT FUNDAMENTALS AND PRINCIPLES

Multivolume Treatises

Goldstein, Paul. *Copyright*. 3rd ed. 4 vols. New York: Aspen, 2005.

Nimmer, Melville B., and David Nimmer. *Nimmer on Copyright*. 10 vols. New York: Matthew Bender, 2005.

Patry, William. *Patry on Copyright*. 8 vols. St. Paul, MN: Thomson Reuters/West, 2010.

General Overview and Application

Andorka, Frank H. *What Is a Copyright?* 2nd ed. Chicago: American Bar Association, Section of Intellectual Property Law, 2006.

Elias, Stephen. *Patent, Copyright and Trademark: A Desk Reference to Intellectual Property Law*. 9th ed. Berkeley, CA: Nolo, 2007.

Fishman, Stephen. *The Copyright Handbook: How to Protect and Use Written Works*. 8th ed. Berkeley, CA: Nolo, 2004.

Leaffer, Marshall. *Understanding Copyright Law*. 5th ed. New York: Matthew Bender, 2010.

Samuels, Edward. *The Illustrated Story of Copyright*. New York: Thomas Dunne Books, St. Martin's Press, 2000.

Copyright Policy and Concepts

Goldstein, Paul. *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox*. Rev. ed. Stanford, CA.: Stanford University Press, 2003.

Heins, Marjorie. "The Progress of Science and Useful Arts": Why Copyright Today Threatens Intellectual Freedom. New York: The Free Expression Policy Project, 2003. Available at www.bit.ly/fepsciart.

Kwall, Roberta Rosenthal. *The Soul of Creativity: Forging a Moral Rights Law for the United States*. Stanford, CA: Stanford University Press, 2010.

Lessig, Lawrence. *Code and Other Laws of Cyberspace*. New York: Basic Books, 1999.

———. *The Future of Ideas: The Fact of the Commons in a Connected World*. New York: Random House, 2001.

———. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin Press, 2004.

———. *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. New York: Penguin Press, 2008.

Litman, Jessica. *Digital Copyright*. Amherst, NY: Prometheus Books, 2001.

Musick, Nathan. *Copyright Issues in Digital Media*. Washington, D.C.: Congressional Budget Office, 2004. Available at www.cbo.gov/ftpdocs/57xx/doc5738/08-09-Copyright.pdf.

Patry, William. *Moral Panics and the Copyright Wars*. New York: Oxford University Press, 2009.

Patterson, Lyman Ray. *Copyright in Historical Perspective*. Nashville: Vanderbilt University Press, 1968.

Patterson, L. Ray, and Stanley W. Lindberg. *The Nature of Copyright: A Law of Users' Rights*. Athens, GA: University of Georgia Press, 1991.

Vaidyanathan, Siva. *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*. New York: New York University Press, 2001.

COPYRIGHT AND LIBRARIANSHIP

General Guidance for Libraries

Banis, Robert J., ed. *Copyright Issues for Librarians, Teachers and Authors*. 2nd ed. Chesterfield, MO: Science and Humanities Press, 2001.

Bruwelheide, Janis H. *The Copyright Primer for Librarians and Educators*. 2nd ed. Chicago and Washington, D.C.: American Library Association, National Education Association, 1995.

Gasaway, Laura N., and Sarah K. Wiant. *Libraries and Copyright: A Guide to Copyright Law in the 1990s*. Washington, D.C.: Special Libraries Association, 1994.

Minow, Mary, and Tomas A. Lipinski. *The Library's Legal Answer Book*. Chicago: American Library Association, 2003.

Padfield, Timothy. *Copyright for Archivists and Users of Archives*. 2nd ed. London: Facet Publishing, 2004.

Russell, Carrie. *Complete Copyright: An Everyday Guide for Librarians*. Chicago: American Library Association, 2004.

Wherry, Timothy Lee. *Intellectual Property: Everything the Digital-Age Librarian Needs to Know*. Chicago: American Library Association, 2008.

Specific Needs of Libraries

Besek, June M. *Copyright Issues Relevant to the Creation of a Digital Archive: A Preliminary Assessment*. Washington, D.C.: Council on Library and Information Resources, Library of Congress, 2003.

Croft, Janet Brennan. *Legal Solutions in Electronic Reserves and the Electronic Delivery of Interlibrary Loan*. Binghamton, NY: Haworth Information Press, 2004.

Driscoll, Lori. *Electronic Reserve: A Manual and Guide for Library Staff Members*. Binghamton, NY: Haworth Information Press, 2003.

Harris, Lesley Ellen. *Licensing Digital Content: A Practical Guide for Librarians*. 2nd ed. Chicago: American Library Association, 2009.

Rosedale, Jeff, ed. *Managing Electronic Reserves*. Chicago: American Library Association, 2002.

Tennant, Roy. *Managing the Digital Library*. New York: Reed Press, 2004.

COPYRIGHT AND EDUCATION

Armatas, Steven A. *Distance Learning and Copyright: A Guide to Legal Issues*. Chicago: American Bar Association, 2008.

Butler, Rebecca P. *Copyright for Teachers and Librarians*. New York: Neal-Schuman Publishers, 2004.

Harper, Georgia K. *Copyright Issues in Higher Education*. 2nd ed. Washington, D.C.: National Association of College and University Attorneys, 2001.

Lipinski, Tomas A. *Copyright Law and the Distance Education Classroom*. Lanham, MD: Scarecrow Press, 2005.

Simpson, Carol. *Copyright for Schools: A Practical Guide*. 4th ed. Worthington, OH: Linworth Publishing, 2005.

Westbrook, Steve. *Compositions and Copyright: Perspectives on Teaching, Text-making, and Fair Use*. Albany, NY: State University of New York Press, 2009.

COPYRIGHT OWNERSHIP AND LEGAL RIGHTS

Eligibility for Copyright Protection

Boyd, Steven S. "Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work." *Santa Clara Law Review* 40 (2000): 325–378.

Durham, Alan L. "Speaking of the World: Fact, Opinion and the Originality Standard of Copyright." *Arizona State Law Journal* 33 (Fall 2001): 791–848.

Gervais, Daniel J. "Feist Goes Global: A Comparative Analysis of the Notion of Originality." *Journal of the Copyright Society of the U.S.A.* 49 (Summer 2002): 949–981.

Kasunic, Robert. "Constitutional Challenges to Copyright: Preserving the Traditional Contours of Copyright," *Columbia Journal of Law and Arts* 30 (2007): 397–427.

Copyright Ownership

Crews, Kenneth D. "Instructional Materials and 'Works Made for Hire' at Universities: Policies and the Strategic Management of Copyright Ownership." In *The Center for Intellectual Property Handbook*, pp. 15–38. Edited by Kimberly M. Bonner. New York: Neal-Schuman Publishers, 2006.

Gasaway, Laura N. "Copyright Ownership and the Impact on Academic Libraries." *DePaul-LCA Journal of Art and Entertainment Law* 13 (Fall 2003): 277–311.

Johnson, Andrea L. "Reconciling Copyright Ownership Policies for Faculty-Authors in Distance Education." *Journal of Law and Education* 33 (October 2004): 431–455.

Klein, Michael W. "'The Equitable Rule': Copyright Ownership of Distance Education Courses." *Journal of College and University Law* 31 (2004): 143–192.

McLeod, Kembrew. *Owning Culture: Authorship, Ownership, and Intellectual Property Law*. New York: P. Lang, 2001.

McSherry, Corynne. *Who Owns Academic Works? Battling for Control of Intellectual Property*. Cambridge, MA: Harvard University Press, 2001.

Slaughter, Sheila. *Academic Capitalism and the New Economy: Markets, State, and Higher Education*. Baltimore: Johns Hopkins University Press, 2004.

Townsend, Elizabeth. "Legal and Policy Responses to the Disappearing 'Teacher Exception,' or Copyright Ownership in the 21st Century University." *Minnesota Intellectual Property Review* 4 (2003): 209–283.

Copyright Duration

Bard, Robert L., and Lewis Kurlantzick. *Copyright Duration: Duration, Term Extension, the European Union and the Making of Copyright Policy*. San Francisco: Austin and Winfield, 1999.

Crews, Kenneth D. "Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine." *Syracuse Law Review* 55 (2005): 189–250.

Ochoa, Tyler T. "Patent and Copyright Term Extension and the Constitution: A Historical Perspective." *Journal of the Copyright Society of the U.S.A.* 49 (Fall 2001): 19–125.

Permission from Copyright Owners

Bielstein, Susan M. *Permissions: A Survival Guide, Blunt Talk about Art as Intellectual Property*. Chicago: University of Chicago Press, 2006.

Jassin, Lloyd J. *The Copyright Permission and Libel Handbook: A Step-by-Step Guide for Writers, Editors, and Publishers*. New York: Wiley & Sons, 1998.

Stim, Richard. *Getting Permission: How to License and Clear Copyrighted Materials Online and Off*. 3rd ed. Berkeley, CA: Nolo, 2007.

PUBLIC RIGHTS OF USE

Public Domain

Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. New Haven, CT: Yale University Press, 2008.

Dusollier, Séverine. *Scoping Study on Copyright and Related Rights and the Public Domain*. Geneva, Switzerland: World Intellectual Property Organization, 2010. Available at www.bit.ly/sdwipo2011.

Fishman, Stephen. *The Public Domain: How to Find Copyright-Free Writings, Music, Art and More*. 4th ed. Berkeley, CA: Nolo, 2008.

Martin, Scott M. "The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection." *Loyola of Los Angeles Law Review* 36 (Fall 2002): 253–322.

Exceptions to the Rights of Copyright Owners

Crews, Kenneth D. *Study on Copyright Limitations and Exceptions for Libraries and Archives*. Geneva, Switzerland: World Intellectual Property Organization, 2008. Available at www.bit.ly/kdcwipo2008.

Crews, Kenneth D. "Copyright Law and Unpublished Materials: Fair Use and Strategies for Archival Management." In *College and University Archives: Readings in Theory and Practice*, pp. 227–243. Edited by Christopher J. Prom and Ellen D. Swain. Chicago: Society of American Archivists, 2008.

Harriet Monroe Poetry Institute. *Poetry and New Media: A Users' Guide, Report of the Poetry and New Media Working Group*. Chicago: Poetry Foundation, 2009. Available at www.bit.ly/panmaug.

Hobbs, Renee. *Copyright Clarity: How Fair Use Supports Digital Learning*. Thousand Oaks, CA: Corwin Press, 2010.

Patry, William F. *The Fair Use Privilege in Copyright Law*. 2nd ed. Washington, D.C.: Bureau of National Affairs, 1995.

Rogers, Thomas, and Andrew Szamosszegi. *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*. Washington, D.C.: Computer and Communications Industry Association, 2011. Available at www.bit.ly/ecirfu11.

Seltzer, Leon E. *Exemptions and Fair Use in Copyright*. Cambridge, Mass.: Harvard University Press, 1978.

Senftleben, Martin. *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*. The Hague: Kluwer Law International, 2004.

Fair Use Guidelines

Crews, Kenneth D. "Fair Use and Higher Education: Are Guidelines the Answer?" *Academe* 83 (November-December 1997): 38–40.

———. "The Law of Fair Use and the Illusion of Fair-Use Guidelines." *Ohio State Law Journal* 62 (2001): 599–702.

Crews, Kenneth D., and Dwayne K. Buttler, eds. "Copyright and Fair-Use Guidelines for Education and Libraries." *Journal of the American Society for Information Science* 50 (December 1999): 1303–1357.

TECHNOLOGIES AND APPLICATIONS

Copyright and New Technology

Bielefield, Arlene, and Lawrence Cheeseman. *Technology and Copyright Law: A Guidebook for the Library, Research, and Teaching Professions*. New York: Neal-Schuman Publishers, 2007.

Doctorow, Cory. *Content: Selected Essays on Technology, Creativity, Copyright, and the Future of the Future*. San Francisco: Tachyon Publications, 2008.

Fishman, Stephen. *A Legal Guide to Web and Software Development*. 5th ed. Berkeley, CA: Nolo, 2007.

Gillespie, Tarleton. *Wired Shut: Copyright and the Shape of Digital Culture*. Cambridge, MA: MIT Press, 2007.

Hollaw, Lee A. *Legal Protection of Digital Information*. Washington, D.C.: Bureau of National Affairs, 2002.

Kasdorf, William E. *The Columbia Guide to Digital Publishing*. New York: Columbia University Press, 2003.

National Research Council, Committee on Intellectual Property Rights and the Emerging Information Infrastructure. *The Digital Dilemma: Intellectual Property in the Information Age*. Washington, D.C.: National Academy, 2000.

Rodríguez Pardo, Julián. *Copyright and Multimedia*. The Hague: Kluwer Law International, 2003.

Copyright and the Internet

Fishman, Stephen. *Web and Software Development: A Legal Guide*. 3rd ed. Berkeley, CA: Nolo, 2002.

Hoffmann, Gretchen McCord. *Copyright in Cyberspace 2: Questions and Answers for Librarians*. New York: Neal-Schuman Publishers, 2005.

Rose, Lance. *Netlaw: Your Rights in the Online World*. Berkeley, CA: McGraw-Hill, 1995.

Copyright and Music

Althouse, Jay. *Copyright: The Complete Guide for Music Educators*. 2nd ed. Van Nuys, CA: Alfred, 1997.

Campana, Deborah. *Music Library Instruction*. Lanham, MD: Scarecrow Press, 2004.

Fisher, William W. *Promises to Keep: Technology, Law, and the Future of Entertainment*. Stanford CA: Stanford University Press, 2004.

Frith, Simon, and Lee Marshall, eds. *Music and Copyright*. 2nd ed. New York: Routledge, 2004.

Kohn, Al, and Bob Kohn. *Kohn on Music Licensing*. 4th ed. New York: Aspen Publishers, 2010.

Lupo, Anthony V. *Music on the Internet: Understanding the New Rights and Solving New Problems*. New York: Practising Law Institute, 2001.

Stim, Richard. *Music Law: How to Run Your Band's Business*. 5th ed. Berkeley, CA: Nolo, 2006.

Copyright and Sound Recordings

Besek, June M. *Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Unpublished Pre-1972 Sound Recordings by Libraries and Archives*. Washington, D.C.: Council on Library and Information Resources, Library of Congress, March 2009. Available at www.clir.org/pubs/reports/pub144/pub144.pdf.

Protection for Pre-1972 Sound Recordings Under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis. Washington, D.C.: Council on Library and Information Resources, Library of Congress, September 2009. Available at www.clir.org/pubs/reports/pub146/pub146.pdf.

The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age. Washington, D.C.: Council on Library and Information Resources, Library of Congress, August 2010. Available at www.clir.org/pubs/reports/pub148/pub148.pdf.

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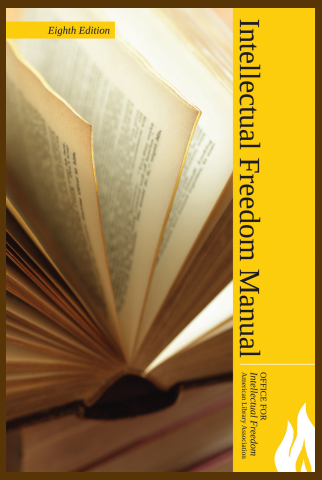

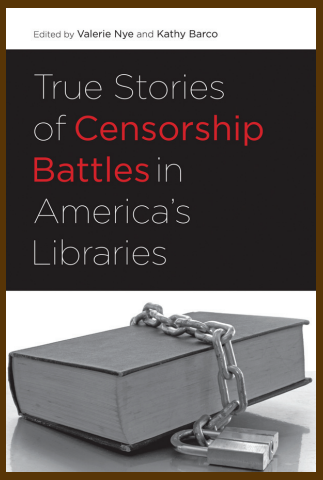

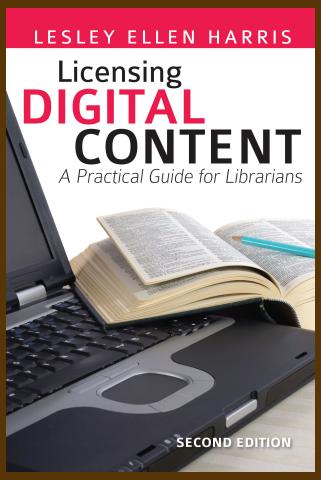

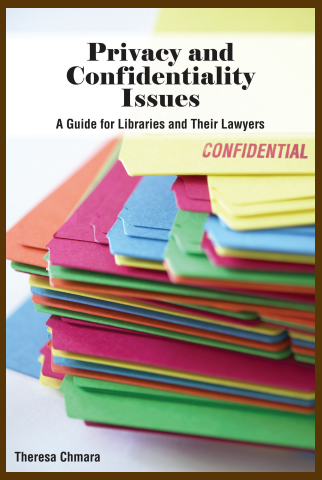

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