

# **COPYRIGHT LAW IN THE CLASSROOM: A CRASH COURSE FOR LAWYERS NEW TO HIGHER EDUCATION<sup>1</sup>**

June, 2012

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June 2006

**Purpose of Crash Course:** These materials explain copyright basics: the law's purpose and how it achieves it; what it protects and for how long, the copyright holder's exclusive rights and the rights of the public that limit the copyright holder's monopoly. They further explore the fair use limitation and its implementation in typical contexts, as well as the TEACH Act's provisions authorizing classroom performances and displays, and library's special rights to copy and distribute others' works. Finally, they address the issues we encounter most often in higher education related to who holds copyright, institutional intellectual property policies and management, and liability for and defenses to infringement.

**When you have a copyright question:** When your clients have copyright questions, or if you are asked to take part in policy deliberations on the subject, you will want to consult more detailed resources. These materials should help you to identify the general nature of the issue and direct you to major cases, relevant statutes, and probably most importantly, the best secondary resources that will help you to properly interpret what you've read. Copyright law is notoriously flexible. It mediates the boundary between law and technology in the realm of expressive arts, so it has to be flexible. But this is what makes interpretation tricky for the courts and for lawyers trying to make sense of court decisions. So get help. **NACUANET** is an excellent resource. Really good information is available online today, and your institution's digital library no doubt subscribes to all the legal references you could ever wish to own, so take full advantage of that wonderful resource. Also, NACUA publishes *Copyright Issues in Higher Education*, which you should find useful.

## **Why do we have copyright law?**

Until recently, most people did not have to know anything about copyright law. Today, even cartoon characters on television and in the Sunday comics refer to copyright and the need to understand it. Once people begin to look at the law seriously, however, especially at how it

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<sup>1</sup> This outline is a derivative work of Georgia Harper's 2006 outline. I—and others—have made incremental changes to Georgia's outline over the years and appreciate her magnanimity in continuing to encourage us to build off her outstanding work.

works in the digital environment, many conclude that it just doesn't seem to make much sense. Copyright is often counterintuitive because it was designed to achieve ends that are distinct from ordinary commerce and from how we think about the chattels that embody the expression copyright protects.

But, if you go back to the beginning, copyright law certainly started out making sense. In fact, it has a **very important purpose**, important enough to be **stated in the U.S. Constitution. Article I, Section 8, Clause 8** gives Congress the power to create a copyright statute to **improve our society by increasing access to knowledge**. Copyright law **achieves this purpose by balancing the interests of copyright holders with the interests of the public**. Copyright law encourages authors give others access to their works by establish limited exclusive rights, for a limited period of time, to encourage them to create and share; the more shared knowledge the better for a young nation. This makes sense. But, in order for the public to derive its benefit, increased knowledge, the works have to be distributed and available for use. So, providing a source of revenue for creators provides an incentive to create and thus is a means to an end, *but that revenue stream is not the reason we have a copyright law*. The interplay between the incentive to authors and the public's access to and use of the works so created is reflected throughout the entire Copyright Act, with each section having an important role in the way copyright promotes the growth of knowledge. As you explore some of these sections—the copyright basics—you will observe this interplay and see how the law achieves its purpose.

### **What does copyright protect?**

While it may seem that copyright protects everything these days, in truth it only protects **limited ways of expressing ideas** once the expressions are **fixed in a tangible medium of expression. 17 U.S.C. 102(a)**. (Hereafter, all citations to the Copyright Act, 1976, as amended, will be stated as Section numbers only.) Protection only requires a minimum amount of creativity. *Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991)*. Just as importantly, copyright **does not protect the facts** included in a work **or the ideas, processes, or systems** that may be described in a work. **Section 102(b)**. Anyone can use facts and ideas in a work at any time, if they have access to the work. Ah, but interpreting where that boundary is, between facts and ideas and expression, that is one of the most perplexing questions in all of copyright law. **Paul Goldstein's four-volume treatise, *Goldstein on Copyright*, provides an excellent discussion of this area of the law.**

By the way, this is our first example of how copyright law achieves its purpose. It's easy to see how **excluding ideas and facts from protection—and thus only protecting original expression—promotes the growth of knowledge**. (Also, imagine the infelicities of a world in which facts or ideas—the basic building blocks of all colloquy, discourse, and communication—were encumbered by someone's rights.) Even the limits within the definition of copyrightable work are an important part of the way copyright fulfills its constitutional mandate.

### **When does copyright protection begin and end?**

Today, copyright **protection begins at the moment that a work is fixed** in a tangible medium. **Sections 102 and 302(a)**. For example, the information that you are reading now was protected

the moment I hit the "save" key for the first time. This protection is **automatic**. I didn't need to do anything to secure it—there is no registration or notice (“c-in-a-circle”) requirement.

This comes as a surprise to most people, because it wasn't always like this. **The law changed dramatically in 1978** when the 1976 Act went into effect. Until then, the term of protection began when a work was published with the proper copyright notice. Works published between 1923 and 1978 are protected for 95 years. **Section 304.**

Works published **after 1978** have a different kind of term: works are protected during the author's lifetime, *plus* 70 years. The term is referred to as, “**life of the author plus 70 years.**” **Section 302.** “**Works for hire**” (we'll get to what these are in just a moment) **are protected for the shorter of 120 years after creation, or 95 years after publication. Section 302.**

Finally, **unpublished works created before 1978**, when such works would not have been protected at all, came under protection in 1978 **for the longer of the life of the author plus 70 years or until December 31, 2002. Section 303.**

Once a work reaches the end of its term of protection, it becomes a part of the rich, shared resource available to all people to use however they wish, in effect, a creative cornucopia: the public domain. All **works published before 1923** and **works published between 1923 and 1978 without the proper copyright notice** are in the public domain. Further, all **works published between 1923 and 1964**, when the initial term of protection was only 28 years, may be in the public domain **if the copyright was not renewed**. By some estimates, 90-95% of all copyright registrations during that time were not renewed. Check the Copyright Office's ([.copyright.gov](http://copyright.gov)) records to determine whether a copyright was renewed. But, also, be aware that in the recent decision, **Golan v. Holder**, 565 U.S. \_\_\_ (Jan. 18, 2012), the Supreme Court held that it is within the authority of congress to put even works that are in the public domain, back into copyright. I have only touched the surface of the complicated rules that govern when works enter the public domain. Peter Hirtle and Lolly Gasaway each have excellent resources available online that detail the complexities of this subject.

**Peter's chart** is at <http://copyright.cornell.edu/resources/publicdomain.cfm>

**Lolly's chart** is at [.unc.edu/~uncnlg/public-d.htm](http://unc.edu/~uncnlg/public-d.htm).

Do our current terms of protection seem really long? They used to be much shorter: as indicated above, for **most of the 20<sup>th</sup> century the term was 28 years from the date of publication plus an optional 28 year renewal term**. (At one time it was 14 years, with the opportunity to renew for another 14.) When copyright terms were shorter and it required some deliberate act to claim copyright protection (publication with a proper notice), copyright's balance favored public access and use more than it does today. Works entered the public domain after a much shorter period of protection. The changes in this area are strong evidence of a shift in the balance, away from public use and towards commercial interests.

### **What are the rights of authors?**

An author's exclusive rights include the right to **make copies, create derivative works, distribute works, display and perform works publicly**, and give others permission to exercise

the author's rights. **Section 106.** Certain artists have statutory “moral rights”, as set forth in **Section 106A.** Infringements are identified in terms of which exclusive right is violated, that is, exercised by someone without permission or legal authorization.

In our higher education environment, **typical uses of others’ works that would infringe** these rights, if performed without authorization of the copyright holder or statutory authority (see below), **include** such things as making and distributing copies of **course-related educational materials, displaying and performing works in classrooms, digitizing** our massive archival holdings, including others’ works in Web pages, student projects, and **institutional development or recruiting materials. Peer-to-peer file sharing** of works whose copyright holders do not authorize such sharing **is another example...**

Clearly, this set of exclusive rights is an important aspect of the complex way copyright achieves its purpose. **These rights constitute the “incentive”** the law gives to authors to encourage them to create works and to make those works accessible: for the entire term of protection, an author has the exclusive right to authorize some important uses others may make of her works.

### **What are the rights of users that limit the rights of copyright holders?**

The rights of copyright holders are **exclusive**, meaning that only they may exercise them, **but** they are **not absolute**. There are many provisions of the Copyright Act that place important limits on the copyright holder’s rights. The law has to do this to achieve its purpose. Here we can clearly see that **the purpose matters**. If the purpose of copyright law were merely to maximize the profits of copyright holders, we wouldn’t need any limits. We could let copyright holders control every single use of their works (which congress would have been able to regulate freely under the commerce clause: article 1, section 8, clause 3). But, **because the purpose is to maximize the growth of knowledge, we need limits on the author’s power to control** all uses of a work.

The limits of special importance to your higher education client include **Section 107**, permitting **fair uses of works** without the copyright holder’s permission; **Section 108**, permitting **libraries** to archive works, to **make copies for patrons** and to participate in interlibrary loan operations, to make preservation copies, to copy and distribute works that are not commercially available, among other things; and **Section 109**, permitting **all of us to lend, give away, even sell our copies of a work** without regard to the wishes or the pocketbook of the copyright holder. This last provision, which codified the “first sale” doctrine, is the backbone of our public and research library systems and one of the principle ways that copyright law achieves its purpose to facilitate public access to the ideas contained in copyrighted works. **Section 110** permits **certain educational performances and displays in face-to-face teaching, web-enhanced face-to-face teaching and in distance learning**. **Section 121** permits “authorized entities”, such services for the blind and visually impaired, to make **adapted copies** without permission. And, these are not mutually exclusive limits—the fact that you can or cannot a use under one of these sections does not affect whether you can or cannot make a use under another section.

It is important to understand that all of the **limitations**, individually, and taken together, **are critical to the achievement of copyright's purpose**, to improve our society by increasing

knowledge and promoting progress. They are just as important as the exclusive rights that the law gives to authors. Together the exclusive rights and the limits on those rights provide a balanced approach.

### **The role of fair use.**

Just as the Copyright Act in general works by balancing interests, with some provisions providing rights to copyright holders and some providing rights and/or defenses to the public, **fair use** also **balances interests**: it balances the interests of copyright holders to control the use of their works so that they can take full advantage of their incentive, and the interests of the public for access to the works and the ideas in them. Fair use is often described in this regard as **addressing First Amendment concerns**. One can imagine that copyrights could easily be used to interfere with speaking and listening, were the exclusive rights also absolute. Fair use gives us some "breathing room." **One of the best examples** of this is reliance on **fair use to quote** from a work in order to take issue with it or criticize or otherwise comment upon it. No copyright holder can prevent such use, because it is a fair use and does not require the copyright holder's authorization; **it falls outside the ambit of the author's authority**.

Fair use **also addresses the failure of our markets** at times **to facilitate important uses of works that just do not make economic sense**. For example, in many cases, the cost to locate, contact and negotiate with a copyright holder is many, many times more than the price that the author would ultimately charge for the use of his work. When it does not make sense for the copyright holder and buyer of rights to do business, fair use can "step in" and bridge the gap by making it lawful for the buyer to make the use of the copyrighted work without having to carry out the uneconomic transaction. **A good example** of this kind of use is including **a few images or short audio or audiovisual clips** in an educational multimedia work for classroom use **where getting permission might be practically impossible**.

**So, fair use supports the achievement of copyright's purpose by letting people use works, that is, letting them make copies, modify a work, distribute, display and perform works publicly, when those uses further copyright's goals, just so long as those uses do not significantly affect the copyright holder's incentive.**

### **Fair Use Is The Law: Section 107**

"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
4. The effect of the use upon the potential market for or value of the copyrighted work

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

This is the fair use statute as set out in Section 107 of the Copyright Act. The first part describes typical fair uses. This list is not exhaustive, however, and even a use that is listed may not be a fair use. That's because each proposed fair use must satisfy the second part of the statute where the four factors are set out.

We use this test to assess whether a court would agree with our determinations of fair use. Unfortunately, the statute employs a "weighing and balancing" technique that introduces many opportunities for judgment. It is quite possible for two people to consider the same use and come to different conclusions about whether it is fair. Georgia Harper summarized her knowledge about how the fair use test works in the article, *Fair Use of Copyrighted Materials*, and it is available at the **Copyright Crash Course online** (<http://copyright.lib.utexas.edu/copypol2.html>) for later review. Further, there are excellent Websites devoted to this rather esoteric aspect of copyright law, and I encourage you to become familiar with the resources available. Kenny Crews has a **handy checklist** (<http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>); **Stanford's fair use site is excellent** ([http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter9/](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/)); literally hundreds of law review articles have been written on the subject and many of the most important are posted to public access archives such as the **Social Science Research Network** ([.ssrn.com](http://ssrn.com)) so that they are fully accessible through your favorite Web-based search engine. All the others are no doubt available through **your digital library's extensive database holdings**. You may also find helpful information in *Goldstein on Copyright*.

The important thing to see at this point is that fair use is not a blanket permission for educators or their students to do whatever they'd like. It's a right that serves as a limitation on the copyright holder's rights and that permits certain uses of certain works for certain purposes, taking into consideration the interests of the copyright holder.

Here's how it works:

### Factor 1: What is the character of the use?

#### Fair Use

#### Ask for Permission

- 
- |   |   |
|---|---|
| <ul style="list-style-type: none"><li>• Nonprofit</li><li>• Educational</li><li>• Personal</li><li>• Restricted access</li><li>• One of the listed uses<ul style="list-style-type: none"><li>○ News reporting</li><li>○ Commentary</li><li>○ Criticism</li><li>○ Teaching</li><li>○ Research</li></ul></li><li>• Otherwise "transformative" use</li></ul> | <ul style="list-style-type: none"><li>• Commercial</li><li>• For profit</li></ul> |
|---|---|

The first factor is the character of the use. Here courts look at **whether a use is nonprofit and educational or commercial and for profit**, as well as other indicators of how important the use is to the achievement of copyright's purpose and whether it undermines the incentive to authors. Several Supreme Court decisions are notable for their guidance on how to evaluate this factor: *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

A use that is nonprofit and educational weighs in favor of fair use; a use that is commercial tends to weigh against fair use, unless the use is creative and transformational. See, for example, the *Campbell* decision, above, *Bill Graham Archives v. Dorling Kindersly Ltd.* 448 F.3d 605 (2nd Cir. 2006), or *Suntrust v. Houghton Mifflin Co.*, 252 F.3d 1165 (11<sup>th</sup> Cir. 2001), which is a beautifully written and moving decision.

### Factor 2: What is the nature of the work to be used?

#### Fair Use

#### Ask for Permission

- 
- |  |  |   |
|--|--|---|
| <ul style="list-style-type: none"><li>• Fact</li><li>• Published</li></ul> | <ul style="list-style-type: none"><li>• A mixture of fact and imaginative work</li></ul> | <ul style="list-style-type: none"><li>• Imaginative</li><li>• Unpublished</li></ul> |
|--|--|---|

The second factor is the nature of the material used. Here the courts look at **whether the work used is published or unpublished; factual or highly creative; non-fiction or fiction**. We have a wider scope of fair use in works that are more factually based, because as I indicated earlier, facts are not protected at all. The law implements this wider scope by having this factor weigh in

favor of fair use for factual works and weigh against fair use for highly creative works. Many works are of course, a mixture of fact and fancy. In these cases, this factor can be more or less "neutral." In fact, **this factor is oftentimes, “glossed over” by the courts.** It doesn't usually figure prominently in the analysis, except when the context is infringement of computer software. Computer software is utilitarian and presents unique challenges in all areas of copyright law. Fair use is no exception.

**Factor 3: How much of the work will you use?**

**Fair Use**

**Ask for Permission**

- Small amount
- Not the heart of the work
- Appropriate in light of purpose

- More than a small amount
- Heart of the work

**The third factor evaluates the amount and substantiality of the part used.** Small amounts favor fair use; large amounts favor getting permission. Again, it's fairly easy to see how this factor balances the interests of the copyright holder with the interests of the public for use of the work. But **this factor is not rigidly applied:** a small use that is the heart of a work might weigh against fair use. Similarly, in some contexts using all of a work is appropriate. For example **art history is usually taught using images of entire works of art** and it would not be appropriate to expect educators to use some portion of a work. **On the other hand, the *Nation* case, cited above, illustrates circumstances where taking even a small part of a work** (less than 300 words) **was deemed excessive, because the defendant took the heart of the work** (Ford's description of his pardoning of Richard Nixon).

Both of these examples of the flexibility of fair use show how sensitive it is to the interests of copyright holders on the one hand, and to uses that further the goal of copyright on the other.

**Factor 4: If this kind of use were widespread, what effect would it have on the market for the original or for permissions?**

**Fair Use**

**Ask for Permission**

- Owning a copy
- Few copies made
- After evaluation of the first three factors, the proposed use is tipping

- Competes with (takes away sales from) the original
- Avoids payment for permission (royalties)



- towards fair use
- Original is out of print or otherwise unavailable
- No ready market for permission
- Copyright holder is unidentifiable

- in an established permissions market
- Many copies made
- Wide distribution
- Repeated use

This factor asks, "If the use were widespread, would the copyright holder be losing money?" Well, actually, it asks, "**If the use were widespread, and the use were not fair, would the copyright holder be losing money?**" After all, if the use were fair, the copyright holder would not be entitled to any money at all, so he couldn't "lose" what he never would have had to begin with. (This is because, **statutorily, fair uses are not within the scope of the copyright holders' Section 106 rights; Congress carved out fair uses as "not an infringement of copyright".**)

As lawyers, however, you no doubt recognize that when you include in your assumptions the very conclusion that you are trying to reach (i.e., you *assume* a use is not fair in the process of trying to figure out *whether it is* fair), you violate a principle of logic – you engage in "circular reasoning."

Many courts deal with this propensity of the fourth factor to encourage circular reasoning by looking at the first three factors before evaluating the fourth. See examples of this delicate maneuver in *American Geophysical Union v. Texaco, Inc.*, C.A.2 (N.Y.) 1994, 37 F.3d 881, **amended and superseded 60 F.3d 913, certiorari dismissed 116 S.Ct. 592, rehearing denied**, and *Princeton University Press v. Michigan Document Services, Inc.*, C.A.6 (Mich.) 1996, 99 F.3d 1381, **certiorari denied 17 S.Ct. 1336**. If the first three factors indicate that the use is likely fair, many courts will not permit the fourth factor to convert an otherwise fair use to an infringing one. On the other hand, if the first three factors indicate that the use is likely not fair, courts are willing to consider lost revenues under the fourth factor. In this case they do not have to assume the conclusion in order to reach it. They reach the conclusion based on good evidence that the use is not fair.

This aspect of the fair use test touches upon **one of the most significant changes in fair use analysis in decades: the evolution of the analysis towards the micro-economic principles of market failure**. Wendy Gordon wrote a seminal law review article on the subject in 1982 (*Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*," 82 *Columbia Law Review* 1600 (1982)) and courts have embraced her reasoning since then, with the notable exception of the case about which she wrote. The Supreme Court's *Sony* majority did not adhere to her principles or her micro-economic jargon – you'll see them instead in the dissent. *Sony* citation above. Nevertheless, the case has been explained *ex post facto* in market failure terms, and as I indicated, market failure analysis appears in just about every other fair use case of any significance since that time. See the decisions cited above, *Texaco, Princeton University Press, and Basic Books v. Kinko's Graphics*, 758 F.Supp. 1522

(S.D.N.Y. 1991). So, understanding this trend is important to your ability to provide sound guidance to your client.

Looking again at the balance the law tries to strike, note how this factor adjusts to various circumstances to yield reasonable results – results that permit important uses but not at the expense of the copyright holder’s incentive.

### **Fair use guidelines.**

Because the fair use test is a bit ambiguous, copyright holders and users have worked together to try to identify **some concrete examples of fair uses in various educational contexts**. The agreements reached are referred to as “guidelines.” See for example, *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to Books and Periodicals*, reprinted in *Reproduction of Copyrighted Works by Educators and Librarians* (available at [http://zsr.wfu.edu/documents/copyright-circular21\\_CopyingForEducatorsAndLibraries.pdf](http://zsr.wfu.edu/documents/copyright-circular21_CopyingForEducatorsAndLibraries.pdf)). None of these guidelines applies to any commercial for-profit use; only nonprofit educational uses are covered. Most of the guidelines were created at the urging of government officials, but **none has the force of law**. In every case, they do not define the limits of fair use, but rather the minimum of fair use, a safe harbor, so to speak. The **guidelines are much more specific** than the statute, giving actual amounts of works that can be used in many cases. The trouble is that the amounts are pretty small. That and other limits imposed on the uses can make the guidelines less useful than they might otherwise be. This doesn't mean that they should not be used as a starting point, because if a use fits within them, your client can be more confident that the use is fair. If a use exceeds them, your client may still use the statute’s four-factor fair use test. Thus, **using both the guidelines and the statute gives higher education clients the maximum flexibility**. Just remember, the guidelines are NOT the law and sometimes even a purported safe harbor will not prevent a plaintiff from emerging.

### **Guidelines are situation-specific.**

Guidelines have been established for research copies, educational course materials (the *Classroom Guidelines* referenced above), digitizing image archives and incorporating others’ works into multimedia works, among others. The document I referenced above, *Fair Use of Copyrighted Materials* (on the Copyright Crash Course) contains links to all existing guidelines. But the University of Texas System has further adapted these guidelines for use at our campuses and we call them, “*Rules of Thumb*.” As usual, we attempt to **strike a balance between permitting a use that furthers the goals of copyright, which educational uses usually do, and preserving the copyright holder’s incentive**. Making small amounts of a work available to others electronically for a short time does little to undermine the incentive to authors. Making large parts or all of a work available to others for long periods of time, especially to the whole world on the Internet, could have an adverse effect.

If a use is not a fair use under the guidelines or the statute, your client still has choices: educators and students may be able to change a use so it is fair, use a public domain alternative, or get permission. The article referred to earlier, *Fair Use of Copyrighted Materials*, contains very detailed information about how to get permission.

### **Performance rights.**

Copyright law provides educators **a separate set of rights in addition to fair use, to display (show) and perform (play) others' works in the classroom.** These rights are in **Sections 110(1) and (2)** of the statute and **apply to any work**, regardless of the medium.

**The TEACH Act**, which **addresses educators' needs** in the online environment, expands the scope of their rights to perform and display works and to make the copies integral to such performances and displays for digital distance education. **But there is a considerable gap between what the statute authorizes for face-to-face teaching and for distance education.** For example, under **Section 110(1)**, an **educator may show** or perform **any work** related to the curriculum, regardless of the medium, face-to-face in the classroom – still images, music of every kind, even movies. There are **no limits** and permission is not required. **Under the TEACH Act (Section 110(2))**, however, some of those materials will have to be pared down for digital distribution. The **audiovisual works and dramatic musical works may only be shown as clips** – **“reasonable and limited portions,”** the Act says.

This disparity, coupled with the considerable number of additional limits and conditions imposed by the statute (**see, *The Teach Act***, at <http://copyright.lib.utexas.edu/teachact.html> **for more information**), may lead some educators to conclude that it's more trouble than it's worth to rely on Section 110(2). This statute's complexity provides a new context within which to think about fair use: compared to the myriad conditions and limits contained in Section 110(2), the four factor fair use test seems, well, simple and elegant. That's a good thing, because even to those who find Section 110(2) helpful, **fair use will still figure heavily in performance rights for distance educators**, or any educators who want to enhance their classroom teaching with online materials **because putting anything online requires making a copy of it.** The TEACH Act authorizes educators to digitize works for use in digital distance education, but only to the extent they are authorized to use those works in Section 110(2), and so long as they are not available digitally in a format free from technological protection. So, for example, where Section 110(2) authorizes the use of parts of a movie and the available DVDs don't permit ripping (copying the content to a format where one can extract only those parts one wants to use), educators can digitize those parts using an analog tape; but they are not authorized by the TEACH Act to digitize the whole movie. On the other hand, educators are authorized to copy works that are already available in digital form for use in accordance with the TEACH Act - Section 112(f) permits educators to copy digital works to a server and Section 110(2) lets them perform the musical works by transmissions to their students. The two sections together, Sections 112 and 110, permit those in higher education to make this reasonable use.

**For digitizing, however, fair use is almost always going to be the best source of authority for making copies especially in conjunction with statutes like Section 110(2) that provide specific authorization that may not be sufficient in a particular case.** Recall that the fair use test is

sensitive to harm to markets. This means that in general, where there is an established market for permissions, there will often be a narrower scope for fair use. In practical terms, this means that where it's easy to get permission, for example, for text materials to put on reserve, reliance on fair use should be moderate; on the other hand, where it's near impossible to get permission, for example, for music and movie materials where those industries are not yet very responsive to the needs of distance educators, the scope of fair use expands to permit reasonable uses of such materials for all (local and remote) students.

The North Carolina State University has established a very good public resource on this subject, *The TEACH Act Toolkit*, at <http://www.provost.ncsu.edu/copyright/toolkit/>.

### **Liability for infringement.**

Copyright law's liability provisions also support achievement of its purpose. By providing **strong penalties for infringement**, the law **encourages compliance** with its overall scheme of protection. **Section 504. But** even here we see evidence of the balance that makes copyright law work: **there are important defenses** available to educators who make good faith judgments about fair use and to universities functioning as Internet Service Providers (ISPs). **Sections 504 and 512.**

Copyright law uses a **strict liability rule**: if you infringe, you are liable. It is very simple actually. The mere exercise of any of the copyright holder's exclusive rights without permission, or without the action being authorized by the statute (for example, as a fair use) is an infringement. **Ignorance of the law is no excuse.** So individual faculty members, and even students, will be liable for their infringements, with the person who infringes being called a direct infringer.

The penalties are stiff: **\$150,000.00 per act of willful infringement** and a range of between **\$750.00 and \$30,000.00 per work infringed innocently**. Willful infringement means you knew it was wrong and you did it anyway, for example, after you were warned to stop. **Section 504(c).**

But individual liability is just the first step in the liability chain. An individual's actions can cause others to be liable for his or her infringement. There are three ways this can happen:

1. **Agency liability**: An institution can be liable along with the individual where the direct infringement is committed by an **employee working within the scope of employment**, for the most part at work and during work hours, on projects that serve the university's interests.
2. **Vicarious liability**: An institution can be liable when there is no employment relationship with the direct infringer, but it has hired the infringer (in other words, the infringer is a "contractor") and has the **ability to control the contractor and benefits from the contractor's performance**. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9<sup>th</sup> Cir. 1996).
3. **Contributory liability**: An institution can even be liable where there's no agency relationship and no contractor relationship with the direct infringer, but the university **knows** what the infringer is doing **and participates** in the

infringement in a significant way. *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005).

There are many examples of activities for which a university might be held liable along with the direct infringer.

- A faculty member creates infringing class Web pages (agency liability)
- Students make directories filled with infringing music files publicly available over the internet (contributory liability)
- Professors assign infringing activities to their students (contributory liability)
- A hired Web designer (contractor) designs infringing official pages (vicarious liability)

So, universities have a big stake in individuals' responsible use of others' works. Universities may try to shift liability to individuals. For example, they may require that individuals take responsibility for obtaining permission and require that they sign a statement that they have done so. Under agency principles, courts have been unwilling to accept that arrangement as a matter of public policy. **If individual employees infringe while doing their jobs, the institution will be liable along with the individual.** Thus, providing resources to help individuals get needed permissions is the best defense for the institution.

**Any university can lower its risk of liability tremendously if it provides more support to faculty members to get permission.** There should be a centralized resource on each campus charged with this responsibility. Further, that office and the digital library need to coordinate. Today, many materials a faculty member might wish to include as readings for a course are already licensed for institutional use, so there's no need to get permission, but rarely do the people planning a course and putting materials online, or the people charged with getting permission, know what's licensed and what isn't. There is a big need for improvement in this area.

### **Rights and Defenses: Fair use.**

As mentioned earlier, there are important rights and defenses for which individuals and institutions may qualify. You will recall that fair use is one of the limitations that copyright law places on the copyright holder's right to control the use of his work. The law implements this limit by making **fair use a complete defense to any claim of infringement.** It doesn't matter whether the right allegedly violated was the right to make copies, to make a derivative work, to display, perform or distribute a work publicly. It doesn't matter whether the allegation is direct, vicarious or contributory infringement. It's not just for nonprofit educational uses. It also applies in commercial contexts, although the scope is more limited there.

### **The good faith fair use defense.**

Even though **individuals can be held individually liable** for their infringements, if they have a reasonable basis for believing that the action they took was a fair use, **they can take advantage of the "good faith fair use defense." Section 504 (c)(2)(i).** This will direct any court hearing a case against an individual to toss out the damage award (which can be up to \$30,000 per act of innocent infringement), even if the court determines that the action was **not** a fair use. But what

is a reasonable basis for believing that a use of another's work is a fair use? Certainly, **following established guidelines and institutional policies will provide the best basis for claiming this defense.** On the other hand, if your clients ignore policies and guidelines, they significantly undermine their ability to claim the defense.

### **Internet Service Provider (ISP) liability limitations.**

Universities have a special defense against vicarious and contributory liability when operating as ISPs. **When a university is merely a conduit** providing connections (for example, to your institution's residential network in its dormitories), **it has no liability** for what passes through those connections. **Section 512(a).** **But for content on university servers, the protection is much more limited. Section 512(c).** This is important: when it is the institution itself putting materials online, administrative materials, electronic reserves, assigned readings, online courses, etc. it is not "merely" an ISP. It is a content provider. With one narrow exception, these limitations only apply when your client is an ISP and NOT a content provider. The exception is for faculty and graduate student research materials unrelated to class work.

So, for the most part, this defense only helps the institution avoid liability for the infringements of students. For example, **these provisions protect your clients from liability for student use of peer-to-peer software** to trade copyrighted materials whose holders do not authorize such trading, so long as your clients follow the law's complex procedures.

### **Holding, managing, and using works created on your campuses.**

The complement to concerns about the use of others' works is that set of issues associated with the copyrighted works *your clients* create and hold. In fact, as copyright holder themselves, they should find it easier to appreciate the two sides of copyright: the rights provided for holders and the rights provided for users. The central theme of copyright is balance; you will recognize here how the balance between concerns as users of others' works and concerns as holders of their own works mirrors the balance in the law generally. Recognizing the duality of institutional interests in copyright encourages compliance with the law's provisions.

### **Who holds the work?**

There is only one place to start to understand who holds the work: **The copyright act places initial copyright in works with their authors. Section 201(a).** That's where the law starts. It does not, however, end there. Many circumstances can affect an author's copyright in a particular work, such as:

Whether more than one person or entity qualifies as an author;

Whether the work made for hire doctrine applies, making an employer the author of the creator's work;

Whether an institutional policy affects who holds copyright; or

Whether any signed contracts affect who holds copyright.

**Holding copyright jointly is not automatic.** Merely contributing copyrightable expression to a work to which others are contributors too is not enough to cause the copyright in the work to be jointly held. **It takes a shared intention** on the part of all of the contributors of copyrightable expression **to be joint authors** to effect joint authorship and jointly held works. **Section 201(a); see also, *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991); *Erickson v. Trinity Theatre Inc.*, 13 F.3d 1061 (7<sup>th</sup> Cir. 1994); *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998).** Relying on individuals' subjective states of mind at some point in the past is not the best way to figure out, after the fact, who holds a collaborative work. **It is much better to make everyone's expectations explicit so that no one is surprised by who may claim or dispute a claim of jointly held work based on his or her contributions.**

Under special circumstances, an employer of a creator will be the author of a work, rather than the creator.

- **Persons who hire someone** to create something for them **will be the author and copyright holder of the creation** *if* they have a **signed contract** with the creator that identifies the work as **work for hire** and the **work actually fits within one of the nine statutory categories** for contractual works for hire. *Committee for Creative Nonviolence v. Reid*, 490 U.S. 730 (1989); **Section 201(b) and 101's definition of work made for hire.**
- **Employers will hold the work of their employees within the scope of employment.** **Section 101's definition of work made for hire.** Under agency principles, work is considered within the scope of employment if it is done mostly at work, during work hours, using the employer's facilities and equipment, and with at least a partial purpose of serving the employer's needs.

Many universities seem still to honor the **tradition of permitting faculty members to hold** works that might otherwise reasonably be characterized as within the scope of their employment (**books, lecture notes, scholarly articles**). **This tradition appears to many to conflict directly with** the plain language of the work for hire **statute**. The cases in which this tradition has been explored are all over the map, but probably indicate that policy is a good way to resolve the ambiguity. *The University of Colorado Foundation, Inc. v. American Cyanamid*, 880 F.Supp. 1387 (D.Colo. 1995); *Vanderhurst v. Colorado Mountain College District*, 16 F.Supp. 2d 1297 (D.Colo.1998); *Hays v. Sony Corporation of America*, 847 F.2d 412 (7th Cir. 1988); *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir 1987); *Manning v. Board of Trustees of Community College District No. 505 (Parkland College)*, 109 F.Supp.2d 976 (C.D. Ill. 2000). For example, **an institution's policy can clarify what it considers work made for hire** by specifying within reason that certain works are within or outside the scope of employment. Note, however, that **because the work made for hire statute requires a signed written agreement if the employer and employee want the employee to hold a work that the statute would allocate to the employer, the best strategy is for institutional employment contracts to be signed by both parties and to include a reference to the relevant policies**, if the policy says that employees will hold works that would otherwise be works for hire.

A copyright **policy may also recommend or even require the use of contracts to further clarify or vary who controls or holds copyright** and to address many other issues that are important in the distance learning context, such as rights to revise, commercialize and create derivatives from a work.

### **Management.**

University copyrighted works are far too numerous and, increasingly, too complex, for a simple policy that allocates all rights to either a faculty member or the institution. Rarely is an institution or a faculty member the sole author of educational materials created on campus today. These works need a more nuanced treatment. Even where one contributor may be the nominal copyright holder, **other contributors may need rights such as a non-exclusive license to use, to revise, and perhaps to commercialize the work and share in revenues** from commercialization. Sometimes jointly held works are most appropriate. In those cases, the copyright holders thoughtfully should determine who is best able to manage the work. **A policy that recognizes and focuses upon the parties' interests in a work, rather than just on who holds a work, will better serve everyone's needs.** This is perhaps one of the most important aspects of a good policy – it can go beyond the “winner take all” approach of the law and allocate rights according to reasonable needs.

### **Sample Policy.**

Appendix A has an example of the University of Michigan's copyright policy designed to be short, clear, and responsive to the complexities of postsecondary institutions. Each institution must determine for itself how to address the competing interests provoked by modern copyright law. This is just one approach.

### **Summary.**

We have copyright law for one reason only: to encourage the growth of knowledge. We achieve that goal by providing an economic incentive to authors to get them to create; but we put limits on their power to control their works in order to provide the public benefit the Constitution mandates. Neither **the incentive** nor the **limits on an copyright holder's ability to control** and exploit his work is a problem to be gotten around: together they **are the fundamental way the law achieves its purpose.**

As legal counsel to educational institutions, your challenge against this backdrop is to learn about your client's rights and responsibilities and to **understand the purpose of this law and the ultimate good it promotes.** By encouraging the use of others' works responsibly, you help to create an atmosphere of **respect for the creative endeavors** your client is in fact undertaking and encouraging in its students. But just as importantly, lawyers need to **encourage respect for the rights of users** of others' works: fair use and other users' rights are there for a reason: when exercised responsibly, in a way that doesn't undermine the incentive to authors, they too further the goals of copyright. It's all a matter of balance.



**Appendix A: A sample copyright policy.**

**Who Holds Copyright in Works Authored At or In Association with the University of Michigan**

This policy promotes the University of Michigan’s scholarly, academic, and service missions by establishing a framework for who holds copyright at the University. Because the University is committed to academic freedom, it strives—despite the legal default—to place copyright with the creators of scholarly, academic, and artistic works. Moreover, this policy encourages and does not limit the rights and abilities of people to make “fair uses” or other lawful uses of copyrighted works.

*[Words appearing in SMALL CAPS are to be read as defined in Section H of this policy.]*

**A. The Default:** Under U.S. copyright law, the University holds the copyright (as “works made for hire”) in copyrighted works authored by its EMPLOYEES who are acting within the scope of their employment. Otherwise, the University does *not* hold copyright in a work, unless the copyright has been transferred legally to it by written assignment or other process of law.

**B. Transfer of SCHOLARLY WORKS:** In light of the default, the University, hereby, transfers any copyright it holds in SCHOLARLY WORKS to the FACULTY who authored those works—with the following conditions and exceptions.

1. **Conditions**—When the University transfers copyright in SCHOLARLY WORKS to FACULTY, under this policy, it reserves the nonexclusive right to:

- a. use SCHOLARLY WORKS for educational or administrative purposes consistent with its educational mission and academic norms and
- b. preserve, archive, and host SCHOLARLY WORKS in its institutional repositories, such as Deep Blue, where FACULTY can control the timing and scope of access to their copyrighted works.

2. **Exceptions**—The University does *not*, under this policy, transfer its copyright in SCHOLARLY WORKS:

- a. that are authored as required DELIVERABLES under a sponsored activity agreement;
- b. when that would put the University in violation of or conflict with an applicable contract or law;
- c. that are specifically commissioned by the University or are created as part of an administrative assignment to, for, or on behalf of the University;
- d. that are software under Regents Bylaw 3.10; or
- e. that are or have been transferred to the University in a writing (other than the Regents Bylaw 3.10 acknowledgment, which FACULTY sign as a condition of employment).

**C. Students:** Students hold the copyright in works they author, unless they have authored works as EMPLOYEES or transferred their copyright in writing to the University or other entity.

**D. INDEPENDENT CONTRACTORS:** It is the general practice of the University to have INDEPENDENT CONTRACTORS transfer to the University, in writing, the copyright in works they create for, in conjunction with, or on behalf of the University.

**E. Collaborative and Joint Works:** When people collaborate to author a copyrighted work, it often results in a “joint work” in which all the rights holders jointly hold nonexclusive rights to use the work. EMPLOYEES and students who collaborate with each other or with non-University third-parties

(e.g., volunteers, visitors, and collaborators) are encouraged to describe or determine, in writing, the disposition of copyright prior to authoring the work.

**F. University Held Works:** Officially, the Regents of the University of Michigan hold the copyright to all copyrighted works held by the University.

1. **Disposition:** Ordinarily, the University units most closely associated with the creation of specific University held works may authorize uses of those works (e.g., they may authorize a third-party to copy, adapt, or distribute a University held work). The disposition of the following University held works, however, shall be managed by the Office of Technology Transfer: software intended to be revenue generating; software funded under a sponsored activity agreement; and any DELIVERABLES funded under a sponsored activity agreement.
2. **Notice and Registration:** University held works that are registered with the U.S. Copyright Office or that include a copyright notice should identify the “Regents of the University of Michigan” as the copyright holder.
3. **Freedom to Contract:** The University is free to contract with EMPLOYEES, students, or others to license uses of or to transfer or acquire the copyright in works.

**G. Policy Interpretation and Dispute Resolution:** This policy and its implementation may require interpretation and review. University constituents should make every attempt to resolve disputes informally with the assistance of one or more of the following: the Office of the Provost on each campus (for policy clarification), the Office of the General Counsel (for legal clarification), the Office of Technology Transfer (for matters regarding computer programs, patents, and commercialization of intellectual property), or the Division of Research Development and Administration (for matters regarding sponsored activity). If informal procedures and consultation do not provide resolution of a dispute or policy issue, University constituents may file a request for formal dispute resolution or policy interpretation with the Office of the Provost at any campus.

#### **H. Definitions:**

**DELIVERABLES** means copyrighted works that must be authored and delivered in order to comply with the obligations of a sponsored activity agreement.

**EMPLOYEES** means any people employed by the University of Michigan in any capacity, whether they are faculty, staff, administration, or students and whether they are employed full-time, part-time, or in a temporary capacity.

**FACULTY** means full-time and part-time tenured, tenure-track, research, lecturer, clinical, and adjunct faculty, as well as librarians, archivists, and curators.

**INDEPENDENT CONTRACTORS** means non-EMPLOYEES retained by the University to provide goods or services.

**SCHOLARLY WORKS** means works authored by FACULTY within the scope of their employment as part of or in connection with their teaching, research, or scholarship. Common examples of SCHOLARLY WORKS include: lecture notes, case examples, course materials, textbooks, works of nonfiction, novels, lyrics, musical compositions/arrangements and recordings, journal articles, scholarly papers, poems, architectural drawings, software, visual works of art, sculpture, and other artistic creations, among others, regardless of the medium in which those works are fixed or disseminated.