

Copyright: Basic Information & Guidelines

[Faculty Handbook Category #1]

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I. INTRODUCTION

Part II of this document explains the basic concepts of copyright law, including what works are protected and what uses of those works are not permitted. You should familiarize yourself with this section to understand when copyright issues may arise.

Part III explains the concept of “fair use” and provides examples of the four-part analysis to determine whether a use is “fair.” You should analyze your proposed use under the four fair use factors to determine whether you may use the work without permission or a license. If you are uncertain how to apply the fair use factors, or want more explicit guidance on a specific type of use, you should consult the guidelines set forth in Parts IV, V, VI, or VII.

In the 1970’s, and again in the 1990’s, various stakeholders assembled to create more specific guidelines for fair use by educational institutions. In addition to the Classroom Guidelines drafted by Congress and set forth in Section IV, the Conference on Fair Use (CONFU) proposed four sets of guidelines. The CONFU Guidelines for Fair Use of Educational Multimedia and Digital Images are set forth in Part V, the CONFU Guidelines on Distance Learning are set forth in Part VI, and the CONFU Guidelines on Electronic Regimes are set forth in Part VII.

Another helpful resource are the Rules of Thumb for fair use developed by the University of Texas at Austin. While these Rules are based on the best determination of the UT General Counsel’s office and do not offer “safe harbor” protection, the Rules offer shorthand answers to common fair use questions. The UT Rules of Thumb can be found online at:

<http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm>

Faculty, staff and students are encouraged to consult this document before using the work of a third party. For assistance in complying with copyright law, please consult either Janet Collrin of IIT at x3613, or Sarah Leake at x3713.

II. COPYRIGHT LAW BASICS

What Works are Protected by Copyright?

Copyright protects “original works of authorship” that are fixed in a tangible form of expression. Copyrightable works include the following categories:

- 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; and
- architectural works.

These categories should be viewed broadly. For example, computer programs and most compilations are protected as “literary works”; maps and architectural plans are protected as “pictorial, graphic, and sculptural works.”

What Works are *Not* Protected by Copyright?

There are some materials that are not subject to copyright protection, including:

- Works in the public domain (generally limited to works created before 1923);

- Most works created by the U.S. federal government;
- Works that lack sufficient creativity or originality for copyright protection; and
- Facts and ideas (ideas can be extremely creative but they still aren't copyrightable).

No permission is required to use these types of works, but your use is permissible only if the entire work falls into one or more of these categories. For example, a sound recording of a Beethoven sonata is protected by copyright even though the underlying work is in the public domain. Similarly, a compilation or specific organization of facts may be protected even though the underlying facts are not themselves protected.

What Rights are Granted by Copyright Law?

Copyright law protects these creative works for a limited term, during which the owner of the copyright in a creative work has the exclusive rights:

- *To reproduce* the work in copies or phonorecords;
- *To prepare derivative works* based upon the work;
- *To distribute copies or phonorecords* of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- *To perform the work publicly*, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- *To display the copyrighted work publicly*, 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; and

- In the case of sound recordings, *to perform the work publicly* by means of a *digital audio transmission*.

How is Copyright Protection Obtained?

The way in which copyright protection is secured is frequently misunderstood. No publication or registration or other action in the Copyright Office is required to secure copyright. Copyright is secured *automatically* when the work is created. A work is “created” when it is fixed in a tangible form of expression, such as in a book, manuscript, sheet music, film, videotape, microfilm, cassette tapes, CDs, or LPs.

What is Copyright Infringement?

Exercising any of the exclusive rights (reproduction, display, performance, etc.) without permission from the copyright owner generally constitutes copyright infringement, unless the use is allowed under fair use or another defense.

The penalties for copyright infringement can be severe—up to \$150,000 per work infringed—but complying with the college’s Copyright guidelines may limit your liability. The Copyright Act provides that a court may decide not to award any damages where the infringer reasonably believed the use was permitted. One way to show that you reasonably believed the use was permitted is to familiarize yourself with this document and apply the analyses set forth below before using a copyright-protected work.

How Do I Comply With the Copyright Law?

If you want to reproduce, distribute, display or publicly perform a

copyright-protected work, you need to have the right to do so. There are only two ways to establish that you are permitted to use a copyright-protected work:

- (1) You have obtained permission from the copyright owner; or
- (2) Your use is “fair use” as defined in the Copyright Act.

The safest course of action is to obtain permission from the copyright owner. Permission may be obtained directly from the owner or through collective rights organizations, such as the Copyright Clearance Center (for text materials), BMI and ASCAP (for music rights), various theatrical agencies for performance rights for dramatic works, etc.

Permission is not always required, as the Copyright Act provides that certain “fair uses” do not constitute infringements. Part III of this document explains the doctrine of “fair use” and how to apply the four factors to determine if your proposed use is “fair.” As an alternative to a “fair use” analysis, you can also review the Classroom Guidelines or the CONFU Guidelines in Parts IV and V to determine if your use fits within those guidelines. Finally, if you are using material for distance learning, you should consult Section VI of the document to determine if your proposed use is permissible under the TEACH Act or the CONFU Guidelines for Distance Learning. This document should help you determine when permission should be sought.

III. FAIR USE

What is Fair Use?

Assuming that the work in question is protected by copyright law, and you would like to avoid asking permission of the copyright

owner, the only way to avoid infringement is if your proposed use would be considered a “fair use” under the law. “Fair use” was codified in the Copyright Act of 1976. Section 107 of the Copyright Act states that “the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

The Four Factors

Section 107 sets forth the factors to be considered in determining whether the use made of a work in any particular case is a fair use:

- (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 Act provides only factors to consider in determining whether a use is fair; it does not offer definitive guidance as to whether a specific type of use is non-infringing, even in a non-profit, educational context. Each situation must be analyzed in light of all the factors.

How Do I Apply the Fair Use Factors?

Factor #1: Purpose and Character of Use

- Is the use transformative (commentary, criticism or

parody) or a mere reproduction/display/performance?

- Is the use non-profit, educational or commercial?

Factor #2: Nature of the Copyrighted Work

- Is the work published or unpublished?
- Is the work factual (e.g., a textbook) or fictional (e.g., a novel)?

Factor #3: Amount and Substantiality

- The less of a work used, the better (a few lines from a book vs. a reproduction of a painting). Note that even a small amount may be problematic if the portion used is the “heart” of the work.

Factor #4: Effect of Use on Potential Market

- Does the use deprive copyright owner of income or undermine the owner’s potential market for the work?

Examples

The more factors that favor a finding of fair use, the more likely that a court would also consider the use to be fair. A few examples for illustration:

Situation #1: A professor would like to share an article from a news magazine with her students to discuss the article in next week’s sociology class. She would like to scan the article and send it in an e-mail to her 30 students. Scanning a document is equivalent to reproducing the article, an exclusive right held by the copyright

owner. If the professor does this, is she infringing or is it fair use?

Factor #1: Purpose and Character of Use

The purpose and character of the use is nonprofit educational and she plans to discuss the article in class (teaching/commentary), so this factor weighs in favor of finding fair use.

Factor #2: Nature of the Copyrighted Work

The work is published and the fact that it is a news article, rather than a short story or poem, weighs in favor of finding fair use.

Factor #3: Amount and Substantiality

Although the article is only one of several in the magazine, the professor is reproducing the entire article, so this factor weighs more heavily against a finding of fair use.

Factor #4: Effect of Use on Potential Market

If the owner of the copyright licenses reproduction rights and the professor could easily contact the owner and pay the royalty rate, it could be argued that the use has a negative market effect for the owner. On the other hand, the magazine's market is primarily selling subscriptions; even if there were lots of articles published in this magazine that lots of professors were reproducing for classroom use, that might have a positive market effect for the magazine as more subscriptions would be purchased for the initial access to the article. Given these facts, this factor weighs in favor of fair use.

With three factors in favor, and only one against, the professor's plan to scan and send the article to 30 students would likely be considered a fair use.

Situation #2: A professor would like to create an "electronic

coursepack” with a selection of excerpts from various sources to use in his political science class for the next few years. Rather than make photocopies of the materials through the College Bookstore, the professor would prefer to save some trees and provide the relevant chapters on a weekly basis by e-mail to his students. If the professor does this, is he infringing or is it fair use?

Factor #1: Purpose and Character of Use

The purpose and character of the use is nonprofit educational and the professor plans to discuss the material in class (teaching/commentary), so this factor weighs in favor of finding fair use.

Factor #2: Nature of the Copyrighted Work

The works are all published and, although the material is not as creative as a poem or short story, the excerpts discussing political issues and theory are more creative than math or science material. This factor weighs against a finding of fair use.

Factor #3: Amount and Substantiality

The professor is only reproducing one chapter from each source. Assuming that the chapters copied are not the “heart” of the works, this factor weighs in favor of finding fair use.

Factor #4: Effect of Use on Potential Market

If the professor collected the excerpts into a paper coursepack for reproduction through the College Bookstore, the Bookstore would contact the owners of the copyright to obtain permission, and likely would pay a small license fee for many of the works. The use of an “electronic coursepack” has a negative market effect on the copyright owners who are not receiving any license fees. Creation of a custom anthology also hurts the market for other anthologies, which are

subject to license fees and also must be purchased by students. This factor weighs heavily against a finding of fair use.

The fourth factor weighs heavily against a finding of fair use, and when that is the case, that factor is usually given a lot of weight in the overall fair use analysis. So with two factors “for” and two factors “against” (and one of those factors being the commercial effects factor), the conclusion is that this is not a fair use.

Situation #3: As an assignment for an art history class, a student created a multi-media project incorporating Renaissance paintings and rap music. The student used short portions of the songs with lyrics that relate to, and comment upon, the subject matter of paintings. Now that class is over, the student would like to post the project on his web site for his friends and family to view.

First, the Renaissance paintings are not subject to copyright protection, because they were created prior to 1923. Although photographs are subject to copyright protection, a photograph that merely reflects the painting lacks sufficient creativity to be protected by copyright. Thus, the only copyright protected material at issue in this example is the rap music.

Factor #1: Purpose and Character of Use

The use of the music for the class project is educational, and limited display within the class is likely a fair use. While the proposed public display of the project on the student’s web site is no longer for an educational purpose, the use of the rap music is transformative, as the lyrics relate to and comment upon the subject matter of the works of art. This factor weighs in favor of a finding of fair use.

Factor #2: Nature of the Copyrighted Work

The rap music is published and highly creative, thus this factor

weighs against a finding of fair use.

Factor #3: Amount and Substantiality

The student only used short snippets (less than one minute) of each song. This factor weighs for a finding of fair use.

Factor #4: Effect of Use on Potential Market

The use of small portions of songs will not negatively impact the market for the entire works. This factor weighs in favor of a finding of fair use.

With three factors in favor, and only one against, the student's display of the multi-media project is likely a "fair use" under the Copyright Act.

IV. CLASSROOM GUIDELINES

Determining whether a use is fair can be a difficult and frustrating process. Even with an understanding of the nuances of various court cases analyzing fair use, one may still not be confident that a use is non-infringing.

To provide more certainty to educators who often reproduce materials for classroom use, in 1976, Congress, together with the Copyright Office, convened with authors, publishers and educators to develop a set of "fair use" guidelines for classroom use. The resulting report, "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals" is a published House Report, but is not an actual law.

Most judges consider the report to be persuasive authority, therefore, complying with these guidelines is generally a safe course of action. However, many educators consider the guidelines overly restrictive, as many uses of copyrighted works that would exceed the scope of

the guidelines could still be considered fair use.

The guidelines offer general guidance and specific rules for printed text materials, music, videotapes and multimedia projects.

Classroom Guidelines: General Guidelines

1. Copying may not:
 - a. Be used to create, replace or substitute for anthologies, compilations or collective works;
 - b. Substitute for the purchase of books, publisher's reprints or periodicals; or
 - c. Be repeated with respect to the same item by the same educator from term to term.
2. It is not permissible to copy works intended to be "consumable" in the course of study or teaching, such as workbooks, exercises, standardized tests, test booklets or answer sheets.
3. Students may not be charged for copied material beyond the actual cost of duplication.
4. All copies that are used in the classroom must include:
 - a. The copyright notice that appears on the original work;
 - b. Proper attribution (the source of the copyrighted work, such as author, title, publisher and place and date of publication); and
 - c. A notice that the material is copied under the

fair use exemption of U.S. Copyright Law and is restricted from further use.

5. The number of copies should be limited to one copy per student.

Classroom Guidelines: Copying of Printed Text Materials

Single copy: A single copy of printed text material may be made by or for an educator for the purposes of teaching, preparation for teaching, or scholarly research, as long as the material is limited to:

- One chapter from a book;
- One article from a periodical or newspaper;
- One short story, short essay, or short poem (whether or not from a collective work); or
- One chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

Multiple copies: Multiple copies of printed text material may be made for one-time distribution to a single credit-bearing class of students if the copying meets the brevity, spontaneity and cumulative effect tests.

Brevity Test: The following materials meet the test for brevity:

Poetry

- A complete poem if less than 250 words and if printed on not more than two pages, or
- An excerpt of not more than 250 words from a longer poem.

Prose

- The complete work or an excerpt of an article, story or essay if the work is 2,500 words or less, or
- An excerpt from any prose work that is more than 2,500 words, not to exceed 10% of the work or 1000 words, whichever is less.

Illustrations

- One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

“Special” works

- An excerpt comprising not more than two of the published pages of a “special work” and containing not more than 10% of the words found in the text. (A “special work” is a work in poetry or prose or in “poetic prose” that may combine language with illustrations and falls short of 2,500 words.)

Spontaneity Test: The following circumstances meet the test for spontaneity:

- The copying is at the instance and inspiration of the individual educator, *and*
- The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect Test: The following facts are required for the cumulative effect test:

- The copying of the material is for only one course.
- Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, and not more than three from the same collective work or periodical volume during one class term.
- There are not more than nine instances of such multiple copying for one course during one class term.

Note: The last two limitations do not apply to current news periodicals and newspapers or current news sections of other periodicals.

Example

Situation #1: A professor would like to share an article from a news magazine with her students to discuss the article in next week's class. She would like to scan the article and send it in an e-mail to her 30 students.

Scanning a document is equivalent to reproducing the article, an exclusive right held by the copyright owner. Is this permitted under the Classroom Guidelines?

Under the Classroom Guidelines, multiple copies of printed text material may be made for one-time distribution to a single credit-bearing class of students if the copying meets the brevity, spontaneity and cumulative effect tests. The "Brevity Test" is met if the article is less than 2500 words. The "Spontaneity Test" is met because the professor decided to use the article only a week before the class. The "Cumulative Effects Test" is met if the copying is only for one course. There are no limits with regard to other articles copied from

the same author, from the same news magazine, or total instances of copying, as the article is within the exception for news periodicals and newspapers. The professor's plan to scan the article and e-mail it to 30 students is permitted under the Classroom Guidelines.

Classroom Guidelines: Copying of Music

Multiple Copies for Performance: Making multiple copies of music for performances is prohibited, except for the emergency purpose of replacing purchased copies that are not available for an imminent performance. The purchased replacement copies must be substituted in due course.

Multiple Copies for Academic Purposes: Multiple copies of excerpts of musical works may be made for academic purposes other than performance if:

- The excerpts constitute less than 10% of the whole work, *and*
- The excerpts do not comprise a part of the whole that would constitute a performable unit such as a section, movement or aria.

Single Copy for Academic Purposes: A single copy of an entire performable unit (section, movement, aria, etc.) may be made for academic purposes other than performance if either:

- The work is confirmed by the copyright proprietor to be out of print, *or*
- The work is unavailable except in a larger work and the copy is made by or for an educator solely for the purpose of scholarly research or preparation for teaching.

Editing or Simplifying Copies: Printed copies that have been purchased may be edited or simplified, provided that the fundamental character of the work is not distorted, that the lyrics (if any) are not altered, and that no lyrics are added, if none exist.

Recordings of Student Performances: A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by St. Olaf or an individual educator.

Recordings of Copyrighted Music: A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by St. Olaf or an individual educator for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual educator.

Classroom Guidelines: Copying and Use of Videotapes and DVDs

Copying generally prohibited: Copying copyright-protected audio or video material is not allowed unless written permission is obtained in advance from the copyright owner.

Pre-recorded Videotapes or DVDs: In general, public performance or display of videotapes or DVDs is an exclusive right of the copyright owner. Videotapes and DVDs are licensed for “home use only,” which is not applicable to display to groups of students in a public place, such as a library or classroom.

Section 110(1) of the 1976 Copyright Act creates an exception that permits the showing of copyright-protected work *in a classroom setting in connection with face-to-face teaching activities* of a non-profit educational institution, as long as in the case of motion pictures or audiovisual works, the copy used was lawfully obtained.

While the videotape or DVD needs to be lawfully obtained, it does

not need to be owned by the college. An instructor may show a personal or rental copy as long as the other requirements of Section 110(1) are met.

Videotapes or DVDs on Reserve: While libraries can rent lawfully obtained videotapes or DVDs for students to check out and watch at home (as permitted under the “home use only” license on commercial videotapes), libraries may not show movies to groups within the library without a license or other exception. Videotapes and DVDs may be placed on reserve for students to view in personal viewing carrels or private rooms in very small groups, on the grounds that this is akin to “home use.”

Recordings of Television Programs: Television programs may be recorded for classroom use under the following circumstances:

- The television program was broadcast for viewing by the general public. Use of pay-per-view programs is not permitted.
- An educator may show a television recording once, in the classroom, within 10 school days from the date of recording.
- A television recording may be retained for no more than 45 calendar days immediately following the date of recording. At the end of this period, the recording must be erased or destroyed.
- Television recordings may not be altered from their original content, and may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.

Classroom Guidelines: Creation and Use of Multimedia

Projects

Educational multimedia projects may incorporate students' or educators' original material, such as course notes or commentary, together with various copyrighted media formats, such as motion media, text, graphics, music, photographs, and software, combined into an integrated presentation.

Creation for Academic Purposes: In general, educators may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia programs, subject to the time, portion and distribution limitations listed below:

Time Limitation: Educators may use multimedia projects for only two years after the initial use. Use beyond that time period requires permission for each copyrighted portion incorporated into the project.

Portion Limitation:

- *Motion media:* up to 10% or 3 minutes, whichever is less
- *Text material:* up to 10% or 1000 words, whichever is less
- *Music, lyrics, music video:* up to 10% but in no event more than 30 seconds of an individual work
- *Illustrations and photographs:* no more than 5 images by an artist or photographer, or when using images from a collective work, no more than 10% or 15 images, whichever is less
- *Data sets:* up to 10% or 2500 fields or cell entries, whichever is less

Note: Educators should exercise caution in downloading digital material from the internet, as much of the material on the internet is copyright protected.

Distribution Limitation: Only *two* use copies may exist for a multimedia project. Of the two use copies, only *one* copy may be placed on reserve. An additional copy may be made for archival or backup purposes, such as retention by educators for later personal use in their own professional portfolios.

Performance and Display: The performance and display of educator-created multimedia projects is limited to:

- Face-to-face instruction (such as a classroom setting);
- Directed self-study by students; or
- Over a secure electronic network, for distance learning, after-class review, or directed self-study, *if the network has adequate technological protections* that limits access and prevents copying of the copyrighted material.

Note: If the technology cannot prevent copying, the multimedia project may only be made available on a network for a period of 15 days, after which time the project may be placed on reserve at a library for on-site use by students. Students should be advised that they are not permitted to make copies of the project.

V. CONFU GUIDELINES

The Conference on Fair Use (CONFU) met in the late 1990's to try to develop guidelines around fair use in several areas, including distance learning, multimedia, electronic reserves, interlibrary loan and image collections. Although guidelines were prepared in each of these areas, the copyright stakeholders involved could not reach

consensus. Thus, the guidelines are not only not law, they do not provide a safe harbor of any kind, as they were never adopted. It may still be a useful exercise, however, to look to the guidelines in considering whether a particular use would be considered “fair.”

A. CONFU Fair Use Guidelines for Educational Multimedia

1. Introduction

1.1 Preamble. Fair use is a legal principle that defines the limitations on the exclusive rights of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educators, scholars and students who develop multimedia projects using portions of copyrighted works under fair use rather than by seeking authorization for non-commercial educational uses. These guidelines apply only to fair use in the context of copyright and to no other rights.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act sets forth the four fair use factors which should be considered in each instance, based on particular facts of a given case, to determine whether a use is a “fair use”: (1) the purpose and character of 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.

While only the courts can authoritatively determine

whether a particular use is fair use, these guidelines represent the participants consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may nor may not be fair use. The participants also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain--such as U.S. Government works or works on which copyright has expired for which there are no copyright restrictions--or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works and users should refer to the applicable license terms for guidance.

The participants who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase, there may come a time when it is necessary to review the guidelines. Nothing in these guidelines shall be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of educational multimedia projects.

This Preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright protection of these guidelines is claimed by any person or entity.

1.2 Background. These guidelines clarify the application of fair use of copyrighted works as teaching methods are adapted to new learning environments. Educators have traditionally brought copyrighted books, videos, slides, sound recordings and other media into the classroom, along with accompanying projection and playback equipment. Multimedia creators integrated these individual instructional resources with their own original works in a meaningful way, providing compact educational tools that allow great flexibility in teaching and learning. Material is stored so that it may be retrieved in a nonlinear fashion, depending on the needs or interests of learners. Educators can use multimedia projects to respond spontaneously to students' questions by referring quickly to relevant portions. In addition, students can use multimedia projects to pursue independent study according to their needs or at a pace appropriate to their capabilities. Educators and students want guidance about the application of fair use principles when creating their own multimedia projects to meet specific instructional objectives.

1.3 Applicability of These Guidelines.

(Certain basic terms used throughout these guidelines are identified in bold and defined in this section.)

These guidelines apply to the use, without permission, of portions of lawfully acquired copyrighted works in educational multimedia projects which are created by educators or students as part of a systematic learning activity by nonprofit educational institutions.

Educational multimedia projects created under these guidelines incorporate students' or educators'

original material, such as course notes or commentary, together with various copyrighted media formats including but not limited to, motion media, music, text material, graphics, illustrations, photographs and digital software which are combined into an integrated presentation. **Educational institutions** are defined as nonprofit organizations whose primary focus is supporting research and instructional activities of educators and students for noncommercial purposes.

For the purposes of the guidelines, **educators** include faculty, teachers, instructors, and others who engage in scholarly, research and instructional activities for educational institutions. The copyrighted works used under these guidelines are **lawfully acquired** if obtained by the institution or individual through lawful means such as purchase, gift or license agreement but not pirated copies. Educational multimedia projects which incorporate portions of copyrighted works under these guidelines may be used only for educational purposes in systematic learning activities including use in connection with non-commercial curriculum-based learning and teaching activities by educators to students enrolled in courses at nonprofit educational institutions or otherwise permitted under Section 3. While these guidelines refer to the creation and use of educational multimedia projects, readers are advised that in some instances other fair use guidelines such as those for off-air taping may be relevant.

2. **Preparation of Educational Multimedia Projects Using Portions of Copyrighted Works**

These uses are subject to the Portion Limitations listed in Section 4. They should include proper attribution and citation as defined in Sections 6.2.

2.1 By Students. Students may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for a specific course.

2.2 By Educators for Curriculum-Based Instruction. Educators may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia programs for their own teaching tools in support of curriculum-based instructional activities at educational institutions.

3. Permitted Uses of Educational Multimedia Programs Created Under These Guidelines

Uses of educational multimedia projects created under these guidelines are subject to the Time, Portion, Copying and Distribution Limitations listed in Section 4.

3.1 Student Use. Students may perform and display their own educational multimedia projects created under Section 2 of these guidelines for educational uses in the course for which they were created and may use them in their own portfolios as examples of their academic work for later personal uses such as job and graduate school interviews

3.2 Educator Use for Curriculum-Based Instruction. Educators may perform and display their own educational multimedia projects created

under Section 2 for curriculum-based instruction to students in the following situations:

- 3.2.1** For face-to-face instruction,
- 3.2.2** Assigned to students for directed self-study,
- 3.2.3** For remote instruction to students enrolled in curriculum-based courses and located at remote sites, provided over the educational institution's secure electronic network in real-time, or for after class review or directed self-study, provided there are technological limitations on access to the network and educational multimedia project (such as a password or PIN) and provided further that the technology prevents the making of copies of copyrighted material.

If the educational institution's network or technology used to access the educational multimedia project created under Section 2 of these guidelines cannot prevent duplication of copyrighted material, students or educators may use the multimedia educational projects over an otherwise secure network for a period of only 15 days after its initial real-time remote use in the course of instruction or 15 days after its assignment for directed self-study. After that period, one of the two use copies of the educational multimedia project may be placed on reserve in a learning resource center, library or similar facility for on-site use by students enrolled in the course. Students shall be advised that they are not permitted to make their own copies of the multimedia project.

3.3 Educator Use for Peer Conferences.

Educators may perform or display their own multimedia projects created under Section 2 of these guidelines in presentations to their peers, for example, at workshops and conferences.

3.4 Educator Use for Professional Portfolio.

Educators may retain educational multimedia projects created under Section 2 of these guidelines in their personal portfolios for later personal uses such as tenure review or job interviews.

4. Limitations--Time, Portion, Copying and Distribution

The preparation of educational multimedia projects incorporating copyrighted works under Section 2, and the use of such projects under Section 3, are subject to the limitations noted below.

4.1 Time Limitations. Educators may use their educational multimedia projects created for educational purposes under Section 2 of these guidelines for teaching courses, for a period of up to two years after the first instructional use with a class. Use beyond that time period, even for educational purposes, requires permission for each copyrighted portion incorporated in the production. Students may use their educational multimedia projects as noted in Section 3.1.

4.2 Portion Limitations. Portion limitations mean the amount of a copyrighted work that can reasonably be used in educational multimedia projects under these guidelines regardless of the original medium from which the copyrighted works are

taken. In the aggregate means the total amount of copyrighted material from a single copyrighted work that is permitted to be used in an educational multimedia project without permission under these guidelines. These limits apply cumulatively to each educator's or student's multimedia project(s) for the same academic semester, cycle or term. All students should be instructed about the reasons for copyright protection and the need to follow these guidelines. It is understood, however, that students in kindergarten through grade six may not be able to adhere rigidly to the portion limitations in this section in their independent development of educational multimedia projects. In any event, each such project retained under Sections 3.1 and 4.3 should comply with the portion limitations in this section.

4.2.1 Motion Media. Up to 10% or 3 minutes, whichever is less, in the aggregate of a copyrighted motion media work may be reproduced or otherwise incorporated as part of a multimedia project created under Section 2 of these guidelines.

4.2.2 Text Material. Up to 10% or 1000 words, whichever is less, in the aggregate of a copyrighted work consisting of text material may be reproduced or otherwise incorporated as part of a multimedia project created under Section 2 of these guidelines. An entire poem of less than 250 words may be used, but no more than three poems by one poet, or five poems by different poets from any anthology may be used. For poems of greater length, 250 words may be used but no more than three excerpts by a poet, or five excerpts by

different poets from a single anthology may be used.

4.2.3 Music, Lyrics, and Music Video.

Up to 10%, but in no event more than 30 seconds, of the music and lyrics from an individual musical work (or in the aggregate of extracts from an individual work), whether the musical work is embodied in copies, or audio or audiovisual works, may be reproduced or otherwise incorporated as a part of a multimedia project created under Section 2. Any alterations to a musical work shall not change the basic melody or the fundamental character of the work.

4.2.4 Illustrations and Photographs.

The reproduction or incorporation of photographs and illustrations is more difficult to define with regard to fair use because fair use usually precludes the use of an entire work. Under these guidelines a photograph or illustration may be used in its entirety but no more than 5 images by an artist or photographer may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2. When using photographs and illustrations from a published collective work, not more than 10% or 15 images, whichever is less, may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2.

4.2.5 Numerical Data Sets. Up to 10% or 2500 fields or cell entries,

whichever is less, from a copyrighted database or data table may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines. A field entry is defined as a specific item of information, such as a name or Social Security number, in a record of a database file. A cell entry is defined as the intersection where a row and a column meet on a spreadsheet.

4.3 Copying and Distribution Limitations.

Only a limited number of copies, including the original, may be made of an educator's educational multimedia project. For all of the uses permitted by Section 3, there may be no more than two use copies only one of which may be placed on reserve as described in Section 3.2.3.

An additional copy may be made for preservation purposes but may only be used or copied to replace a use copy that has been lost, stolen, or damaged. In the case of a jointly created educational multimedia project, each principal creator may retain one copy but only for the purposes described in Sections 3.3 and 3.4 for educators and Section 3.1 for students.

5. Examples of When Permission is Required

5.1 Using Multimedia Projects for Non-Educational or Commercial Purposes.

Educators and students must seek individual permissions (licenses) before using copyrighted works in

educational multimedia projects for commercial reproduction and distribution.

5.2 Duplication of Multimedia Projects Beyond Limitations Listed in These Guidelines.

Even for educational uses, educators and students must seek individual permissions for all copyrighted works incorporated in their personally created educational multimedia projects before replicating or distributing beyond the limitations listed in Section 4.3.

5.3 Distribution of Multimedia Projects Beyond Limitations Listed in These Guidelines.

Educators and students may not use their personally created educational multimedia projects over electronic networks, except for uses as described in Section 3.2.3, without obtaining permissions for all copyrighted works incorporated in the program.

6. Important Reminders

6.1 Caution in Downloading Material from the Internet. Educators and students are advised to exercise caution in using digital material downloaded from the Internet in producing their own educational multimedia projects, because there is a mix of works protected by copyright and works in the public domain on the network. Access to works on the Internet does not automatically mean that these can be reproduced and reused without permission or royalty payment and, furthermore, some copyrighted works may have been posted to the Internet without authorization of the copyright holder.

6.2 Attribution and Acknowledgement.

Educators and students are reminded to credit the sources and display the copyright notice © and copyright ownership information if this is shown in the original source, for all works incorporated as part of the educational multimedia projects prepared by educators and students, including those prepared under fair use. Crediting the source must adequately identify the source of the work, giving a full bibliographic description where available (including author, title, publisher, and place and date of publication). The copyright ownership information includes the copyright notice (©, year of first publication and name of the copyright holder).

The credit and copyright notice information may be combined and shown in a separate section of the educational multimedia project (e.g. credit section) except for images incorporated into the project for the uses described in Section 3.2.3. In such cases, the copyright notice and the name of the creator of the image must be incorporated into the image when, and to the extent, such information is reasonably available; credit and copyright notice information is considered “incorporated” if it is attached to the image file and appears on the screen when the image is viewed. In those cases when displaying source credits and copyright ownership information on the screen with the image would be mutually exclusive with an instructional objective (e.g. during examinations in which the source credits and/or copyright information would be relevant to the examination questions), those images may be displayed without such information being simultaneously displayed on the screen. In such cases, this information should be linked to the image in a manner compatible with such instructional objectives.

6.3 Notice of Use Restrictions. Educators and students are advised that they must include on the opening screen of their multimedia program and any accompanying print material a notice that certain materials are included under the fair use exemption of the U.S. Copyright Law and have been prepared according to the multimedia fair use guidelines and are restricted from further use.

6.4 Future Uses Beyond Fair Use. Educators and students are advised to note that if there is a possibility that their own educational multimedia project incorporating copyrighted works under fair use could later result in broader dissemination, whether or not as commercial product, it is strongly recommended that they take steps to obtain permissions during the development process for all copyrighted portions rather than waiting until after completion of the project.

6.5 Integrity of Copyrighted Works: Alterations. Educators and students may make alterations in the portions of the copyrighted works they incorporate as part of an educational multimedia project only if the alterations support specific instructional objectives. Educators and students are advised to note that alterations have been made.

6.6 Reproduction or Decompilation of Copyrighted Computer Programs. Educators and students should be aware that reproduction or decompilation of copyrighted computer programs and portions thereof, for example the transfer of underlying code or control mechanisms, even for educational uses, are outside the scope of these guidelines.

6.7 Licenses and Contracts. Educators and students should determine whether specific copyrighted works, or other data or information are subject to a license or contract. Fair use and these guidelines shall not preempt or supersede licenses and contractual obligations.

B. CONFU Proposal for Educational Fair Use Guidelines for Digital Images

The Committee on Fair Use (CONFU) also proposed a draft of Educational Fair Use Guidelines for Digital Images. If you are planning to digitize analog images, whether newly acquired or pre-existing, you should review these guidelines to see if your use fits within these proposed rules. While the guidelines are not law, they do reflect the concerns and thoughts of various copyright stakeholders, and may be helpful in your own fair use analysis. The Guidelines are reprinted in their entirety below.

1. Introduction

1.1 Preamble. Fair use is a legal principle that provides certain limitations on the exclusive rights of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educational institutions, educators, scholars, and students who wish to digitize copyrighted visual images under fair use rather than by seeking authorization from the copyright owners for non-commercial educational purposes. These guidelines apply to fair use only in the context of copyright.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act sets forth the four

fair use factors which should be assessed in each instance, based on the particular facts of a given case, to determine whether a use is a “fair use”: (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.

While only the courts can authoritatively determine whether a particular use is fair use, these guidelines represent the endorsers’ consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The participants also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain - such as U.S. government works or works on which copyright has expired for which there are no copyright restrictions - or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works and users should refer to the applicable license terms for guidance.

Those who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase,

there may come a time when it is necessary to review the guidelines. Nothing in these guidelines should be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of digital images. These guidelines do not cover non-educational or commercial digitization or use at any time, even by non-profit educational institutions. These guidelines are not intended to cover fair use of copyrighted works in other educational contexts such as educational multimedia projects, [distance education, or electronic reserves,] which may be addressed in other fair use guidelines.

This Preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright protection of these guidelines is claimed by any person or entity.

1.2 Background: Rights in Visual Images.

As photographic and electronic technology has advanced, the making of high-quality reproductions of visual images has become easier, cheaper and more widely accessible. However, the fact that images may be easily available does not automatically mean they can be reproduced and reused without permission. Confusion regarding intellectual property rights in visual images arises from the many ways that images are created and the many sources that may be related to any particular image. Clearing permission, when necessary, requires identifying the holder of the applicable rights. Determining all the holders of the rights connected with an image requires an understanding of the source of the image, the content

portrayed, and the creation of the image, both for original visual images and for reproductions of images.

Visual images can be original works or reproductions of other works; in some cases, original works may incorporate reproductions of other works as well. Often, a digital image is several generations removed from the visual image it reproduces. For example, a digital image of a painting may have been scanned from a slide, which was copied from a published book that contained a printed reproduction of the work of art; this reproduction may have been made from a color transparency photographed directly from the original painting. There may be intellectual property rights in the original painting, and each additional stage of reproduction in this chain may involve another layer of rights.

A digital image can be an original visual image, a reproduction, a published reproduction, or a copy of a published reproduction. An original visual image is a work of art or an original work of authorship (or a part of a work), fixed in digital or analog form and expressed in a visual medium. Examples include graphic, sculptural, and architectural works, as well as stills from motion pictures or other audio-visual works. A reproduction is a copy of an original visual image in digital or analog form. The most common forms of reproductions are photographic, including prints, 35mm slides, and color transparencies. The original visual image shown in a reproduction is often referred to as the “underlying work.” Digital images can be reproductions of either original visual images or of other reproductions. A published reproduction is a reproduction of an original visual image appearing

in a work distributed in copies and made available to the public by sale or other transfer of ownership, or by rental, lease, or lending. Examples include a plate in an exhibition catalog that reproduces a work of art, and a digital image appearing in a CD-ROM or online. A copy of a published reproduction is a subsequent copy made of a published reproduction of an original visual image, for example, a 35 mm slide which is a copy of an image in a book.

The rights in images in each of these layers may be held by different rightsholders; obtaining rights to one does not automatically grant rights to use another, and therefore all must be considered when analyzing the rights connected with an image. Rights to use images will vary depending not only on the identities of the layers of rightsholders, but also on other factors such as the terms of any bequest or applicable license.

1.3 Applicability of These Guidelines. These guidelines apply to the creation of digital images and their use for educational purposes. The guidelines cover (1) pre-existing analog image collections and (2) newly acquired analog visual images. These guidelines do not apply to images acquired in digital form, or to images in the public domain, or to works for which the user has obtained the relevant and necessary rights for the particular use.

Only lawfully acquired copyrighted analog images (including original visual images, reproductions, published reproductions, and copies of published reproductions) may be digitized pursuant to these guidelines. These guidelines apply only to educational institutions, educators, scholars, students, and image

collection curators engaging in instructional, research, or scholarly activities at educational institutions for educational purposes.

1.4 Definitions. Educational institutions are defined as nonprofit organizations whose primary purpose is supporting the nonprofit instructional, research, and scholarly activities of educators, scholars, and students. Examples of educational institutions include K-12 schools, colleges, and universities; libraries, museums, hospitals, and other nonprofit institutions also are considered educational institutions under this definition when they engage in nonprofit instructional, research, or scholarly activities for educational purposes. **Educational purposes** are defined as non-commercial instruction or curriculum-based teaching by educators to students at nonprofit educational institutions, and **research and scholarly activities**, defined as planned non-commercial study or investigation directed toward making a contribution to a field of knowledge and non-commercial presentation of research findings at peer conferences, workshops, or seminars.

Educators are faculty, teachers, instructors, curators, librarians, archivists, or professional staff who engage in instructional, research, or scholarly activities for educational purposes as their assigned responsibilities at educational institutions; independent scholars also are considered educators under this definition when they offer courses at educational institutions.

Students are participants in instructional, research, or scholarly activities for educational purposes at educational institutions.

A **digital image** is a visual work stored in binary

code (bits and bytes). Examples include bitmapped images (encoded as a series of bits and bytes each representing a particular pixel or part of the image) and vector graphics (encoded as equations and/or algorithms representing lines and curves). An **analog image collection** is an assemblage of analog visual images systematically maintained by an educational institution for educational purposes in the form of slides, photographs, or other stand-alone visual media. A **pre-existing analog image collection** is one in existence as of [December 31, 1996]. A **newly acquired analog visual image** is one added to an institution's collection after [December 31, 1996].

A visual online catalog is a database consisting of thumbnail images of an institution's lawfully acquired image collection, together with any descriptive text including, for example, provenance and rights information that is searchable by a number of fields, such as source. A thumbnail image, as used in a visual online catalog or image browsing display to enable visual identification of records in an educational institution's image collection, is a small scale, typically low resolution, digital reproduction which has no intrinsic commercial or reproductive value.

2. Image Digitization and Use By Educational Institutions

This Section covers digitization by educational institutions of newly acquired analog visual images and Section 6 covers digitization of pre-existing analog image collections. Refer to the applicable section depending on whether you are digitizing newly acquired or pre-existing analog visual works.

2.1 Digitizing by Institutions: Newly Acquired Analog Visual Images. An educational institution may digitize newly, lawfully, acquired analog visual images to support the permitted educational uses under these guidelines unless such images are readily available in usable digital form for purchase or license at a fair price. Images that are readily available in usable digital form for purchase or license at a fair price should not be digitized for addition to an institutional image collection without permission.

2.2 Creating Thumbnail Images. An educational institution may create thumbnail images of lawfully acquired images for inclusion in a visual catalog for use at the institution. These thumbnail images may be combined with descriptive text in a visual catalog that is searchable by a number of fields, such as the source.

2.3 Access, Display, and Distribution on an Institution's Secure Electronic Network. Subject to the time limitations in Section 2.4, an educational institution may display and provide access to images digitized under these guidelines through its own secure electronic network. When displaying digital images on such networks, an educational institution should implement technological controls and institutional policies to protect the rights of copyright owners, and use best efforts to make users aware of those rights. In addition, the educational institution must provide notice stating that digital images on its secure electronic network shall not be downloaded, copied, retained, printed, shared, modified, or otherwise used, except as provided for in the permitted educational uses under these guidelines.

2.3.1 Visual online catalog. An educational institution may display a visual online catalog, which includes the thumbnail images created as part of the institution's digitization process, on the institution's secure electronic network, and may provide access to such catalog by educators, scholars, and students affiliated with the educational institution.

2.3.2 Course compilations of digital images. An educational institution may display an educator's compilation of digital images (see also Section 3.1.2) on the institution's secure electronic network for classroom use, after-class review, or directed study, provided that there are technological limitations (such as a password or PIN) restricting access only to students enrolled in the course. The institution may display such images on its secure electronic network only during the semester or term in which that academic course is given.

2.3.3 Access, display, and distribution beyond the institution's secure electronic network. Electronic access to, or display or distribution of, images digitized under these guidelines, including the thumbnail images in the institution's visual online catalog, is not permitted beyond the institution's own electronic network, even for educational purposes. However, those portions of the visual online catalog which do not contain images digitized under these guidelines, such as public domain images and text, may be

accessed, displayed, distributed beyond the institution's own secure electronic network.

2.4 Time Limitations for Use of Images Digitized by Institutions from Newly Acquired Analog Visual Images. An educational institution may use and retain in digital image collections images which are digitized from newly acquired analog visual images under these guidelines, as long as the retention and use comply with the following conditions:

2.4.1 Images digitized from a known source and not readily available in usable digital form for purchase or license at a fair price may be used for one academic term and may be retained in digital form while permission is being sought. Permission is required for uses beyond the initial use; if permission is not received, any use is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1).

2.4.2 Where the rightsholder of an image is unknown, a digitized image may be used for up to 3 years from first use, provided that a reasonable inquiry (see Section 5.2) is conducted by the institution seeking permission to digitize, retain, and reuse the digitized image. If, after 3 years, the educational institution is unable to identify sufficient information to seek permission, any further use of the image is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1).

3. Use By Educators, Scholars, And

Students

Subject to the time limitations in Section 2.4, images digitized under these guidelines may be used by educators, scholars, and students as follows:

3.1 Educator Use of Images Digitized Under These Guidelines.

3.1.1 An educator may display digital images for educational purposes, including face-to-face teaching of curriculum-based courses, and research and scholarly activities at a non-profit educational institution.

3.1.2 An educator may compile digital images for display on the institution's secure electronic network (see also Section 2.3.2) to students enrolled in a course given by that educator for classroom use, after-class review, or directed study, during the semester or term in which the educator's related course is given.

3.2 Use of Images for Peer Conferences.

Educators, scholars, and students may use or display digital images in connection with lectures or presentations in their fields, including uses at non-commercial professional development seminars, workshops, and conferences where educators meet to discuss issues relevant to their disciplines or present works they created for educational purposes in the course of research, study, or teaching.

3.3 Use of Images for Publications. These guidelines do not cover reproducing and publishing images in publications, including scholarly

publications in print or digital form, for which permission is generally required. Before publishing any images under fair use, even for scholarly and critical purposes, scholars and scholarly publishers should conduct the four-factor fair use analysis (see Section 1.1).

3.4 Student Use of Images Digitized Under These Guidelines.

Students may:

- Use digital images in an academic course assignment such as a term paper or thesis, or in fulfillment of degree requirements.
- Publicly display their academic work incorporating digital images in courses for which they are registered and during formal critiques at a nonprofit educational institution.
- Retain their academic work in their personal portfolios for later uses such as graduate school and employment applications.

Other student uses are outside the scope of these guidelines and are subject to the four-factor fair use analysis (see Section 1.1).

4. Image Digitization by Educators, Scholars, and Students for Spontaneous Use

Educators, scholars, and students may digitize

lawfully acquired images to support the permitted educational uses under these guidelines if the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission. Images digitized for spontaneous use do not automatically become part of the institution's image collection. Permission must be sought for any reuse of such digitized images or their addition to the institution's image collection.

5. Important Reminders and Fair Use Limitations Under These Guidelines

5.1 Creation of Digital Image Collections.

When digitizing copyrighted images, as permitted under these guidelines, an educational institution should simultaneously conduct the process of seeking permission to retain and use the digital images.

Where the rightsholder is unknown, the institution should pursue and is encouraged to keep records of its reasonable inquiry (see Section 5.2). Rightsholders and others who are contacted are encouraged to respond promptly to inquiries.

5.2 Reasonable Inquiry. A reasonable inquiry by an institution for the purpose of clearing rights to digitize and use digital images includes, but is not limited to, conducting each of the following steps: (1) checking any information within the control of the educational institution, including slide catalogs and logs, regarding the source of the image; (2) asking relevant faculty, departmental staff, and librarians, including visual resource collections administrators, for any information regarding the source of the

image; (3) consulting standard reference publications and databases for information regarding the source of the image; and (4) consulting rights reproduction collectives and/or major professional associations representing image creators in the appropriate medium.

5.3 Attribution and Acknowledgment.

Educators, scholars, and students should credit the sources and display the copyright notice(s) with any copyright ownership information shown in the original source, for all images digitized by educators, scholars, and students, including those digitized under fair use. Crediting the source means adequately identifying the source of the work, giving a full bibliographic description where available (including the creator/author, title, publisher, and place and date of publication) or citing the electronic address if the work is from a network source. Educators, scholars, and students should retain any copyright notice or other proprietary rights notice placed by the copyright owner or image archive or collection on the digital image, unless they know that the work has entered the public domain or that the copyright ownership has changed. In those cases when source credits and copyright ownership information cannot be displayed on the screen with the image for educational reasons (e.g., during examinations), this information should still be linked to the image.

5.4 Licenses and Contracts. Institutions should determine whether specific images are subject to a license or contract; a license or contract may limit the uses of those images.

5.5 Portions from Single Sources Such as

Published Compilations or Motion Pictures.

When digitizing and using individual images from a single source such as a published compilation (including but not limited to books, slide sets, and digital image collections), or individual frames from motion pictures or other audiovisual works, institutions and individuals should be aware that fair use limits the number and substantiality of the images that may be used from a single source. In addition, a separate copyright in a compilation may exist. Further, fair use requires consideration of the effect of the use on the potential market for or value of the copyrighted work. The greater the number and substantiality of images taken from a single source, the greater the risk that the use will not be fair use.

5.6 Portions of Individual Images. Although the use of entire works is usually not permitted under fair use, it is generally appropriate to use images in their entirety in order to respect the integrity of the original visual image, as long as the limitations on use under these guidelines are in place. For purposes of electronic display, however, portions of an image may be used to highlight certain details of the work for educational purposes as long as the full image is displayed with or linked to the portion.

5.7 Integrity of Images: Alterations. In order to maintain the integrity of copyrighted works, educators, scholars, and students are advised to exercise care when making any alterations in a work under fair use for educational purposes such as criticism, comment, teaching, scholarship, and research. Furthermore, educators, scholars, and students should note the nature of any changes they make to original visual images when producing their

own digital images.

5.8 Caution in Downloading Images from Other Electronic Sources. Educators, scholars, and students are advised to exercise caution in using digital images downloaded from other sources, such as the Internet. Such digital environments contain a mix of works protected by copyright and works in the public domain, and some copyrighted works may have been posted to the Internet without authorization of the copyright holder.

6. Transition Period for Pre-Existing Analog Image Collections

6.1 Context. Pre-existing visual resource collections in educational institutions (referred to in these guidelines as “pre-existing analog image collections”) often consist of tens of thousands of images, which have been acquired from a wide variety of sources over a period of many years. Many pre-existing collections lack adequate source information for older images and standards for accession practices are still evolving. In addition, publishers and vendors may no longer be in business, and information about specific images may no longer be available. For many images there may also be several layers of rightsholders: the rights in an original visual image are separate from rights in a reproduction of that image and may be held by different rightsholders. All these factors complicate the process of locating rightsholders, and seeking permissions for pre-existing collections will be painstaking and time consuming.

However, there are significant educational benefits to

be gained if pre-existing analog image collections can be digitized uniformly and systematically. Digitization will allow educators to employ new technologies using the varied and numerous images necessary in their current curricula. At the same time, rightsholders and educational institutions have concerns that images in some collections may have been acquired without permission or may be subject to restricted uses. In either case, there may be rightsholders whose rights and interests are affected by digitization and other uses.

The approach agreed upon by the representatives who developed these guidelines is to permit educational institutions to digitize lawfully acquired images as a collection and to begin using such images for educational purposes. At the same time, educational institutions should begin to identify the rightsholders and seek permission to retain and use the digitized images for future educational purposes. Continued use depends on the institutions' making a reasonable inquiry (see Section 5.2) to clear the rights in the digitized image. This approach seeks to strike a reasonable balance and workable solution for copyright holders and users who otherwise may not agree on precisely what constitutes fair use in the digital era.

6.2 Digitizing by Institutions: Images in Pre-Existing Analog Image Collections.

6.2.1. Educational institutions may digitize images from pre-existing analog image collections during a reasonable transition period of 7 years (the approximate useful life of a slide) from [December 31, 1996]. In

addition, educators, scholars, and students may begin to use those digitized images during the transition period to support the educational uses under these guidelines. When digitizing images during the transition period, institutions should simultaneously begin seeking the permission to digitize, retain and reuse all such digitized images.

6.2.2 Digitization from pre-existing analog image collections is subject to limitations on portions from single sources such as published compilations or motion pictures (see Section 5.5). Section 6 of these guidelines should not be interpreted to permit the systematic digitization of images from an educational institution's collections of books, films, or periodicals as part of any methodical process of digitizing images from the institution's pre-existing analog image collection during the transition period.

6.2.3 If, after a reasonable inquiry (see Section 5.2), an educational institution is unable to identify sufficient information to seek appropriate permission during the transition period, continued retention and use is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1). Similarly, digitization and use of such collections after the expiration of the transition period is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1).

VI. DISTANCE LEARNING

Prior to the passage of the Technology, Education & Copyright Harmonization Act (TEACH Act) in 2002, the use of materials in distance education was constrained by the narrow provision of Sections 110(2) and 112 of the Copyright Act. The transmission of performances and displays in connection with distance education was much more limited than what was allowed in face-to-face classroom teaching.

A. **The TEACH Act**

The TEACH Act attempts to update the treatment of distance education under the Copyright Act. The Act basically allows the transmission of copyrighted materials in distance education, without permission from the copyright owner, IF numerous conditions are met.

The amended Section 110(2) now permits the following activities, previously prohibited:

- (a) Transmission of *all* of a non-dramatic literary or musical works;
- (b) Transmission of reasonable portions of other performances (e.g., audiovisual works); and
- (c) Transmission of displays of works in amounts comparable to face-to-face displays (e.g. slideshow of still images).

The TEACH Act applies to works that the instructor would show or play during a regular face-to-face class, but applies to the distance transmission. The Act does not cover works that an instructor would like students to watch or listen to on their own time.

The TEACH Act only applies to nonprofit educational institutions that have a policy on use of copyrighted materials and provide accurate information to faculty, staff and students about copyright. The following checklist summarizes the other numerous conditions required to transmit copyrighted works under the Act:

The materials to be used are specifically for students in a given course

Access will be limited to the students in the course

The materials are provided by the instructor as part of a relevant lesson

The materials are directly related to the content of the course

The material includes a notice that it is protected by copyright

A technology is used that reasonably limits student's ability to retain or distribute the materials

The availability of the materials is limited to the time necessary in the course

The material will be stored on a secure server

Only the amount necessary for transmission is copied

The materials are the type and amount authorized under the Act (non-dramatic literary or musical works, portions of audiovisual works, still images)

The materials are not excluded from the Act (materials marketed for distance education, textbooks, course packs, electronic reserves)

If digitizing an analog original, only the amount to be transmitted is copied and there is no digital copy of the work otherwise available

B. The CONFU Educational Fair Use Guidelines for Distance Learning

The Committee on Fair Use (CONFU) also drafted Fair Use Guidelines for Distance Learning. If your proposed use does not meet all of the requirements of the TEACH Act, you may still be able to use the material if the use is acceptable under the four-factor analysis for fair use. If you are not certain if the use is “fair” you may consult these CONFU guidelines for more specific guidance for fair use in distance learning. Although the CONFU Guidelines are not law, they do reflect the thoughts and concerns of various copyright stakeholders, and may be helpful in your own fair use analysis. The Guidelines are reprinted in their entirety below.

1. Introduction

1.1 Preamble. Fair use is a legal principle that provides certain limitations on the exclusive rights of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educational institutions, educators, scholars and students who wish to use copyrighted works for distance education under fair use rather than by seeking authorization from the copyright owners for non-commercial purposes. The guidelines apply to fair use only in the context of copyright.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act sets forth the four fair use factors which should be considered in each instance, based on the particular facts of a given case, to determine whether a use is a fair use: (1) the purpose and character of the use, including whether 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.

While only the courts can authoritatively determine whether a particular use is a fair use, these guidelines represent the participants' consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The participants also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply. The limitations and conditions set forth in

these guidelines do not apply to works in the public domain -- such as U.S. government works or works on which the copyright has expired for which there are no copyright restrictions -- or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works and users should refer to the applicable license terms for guidance.

The participants who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase, there may come a time when it is necessary to revise these guidelines. Nothing in these guidelines should be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of distance education. The guidelines do not cover non-educational or commercial digitization or use at any time, even by nonprofit educational institutions. The guidelines are not intended to cover fair use of copyrighted works in other educational contexts such as educational multimedia projects, electronic reserves or digital images which may be addressed in other fair use guidelines.

This Preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright protection of these guidelines is claimed by any person or entity.

1.2 Background. Section 106 of the Copyright

Act defines the right to perform or display a work as an exclusive right of the copyright holder. The Act also provides, however, some exceptions under which it is not necessary to ask the copyright holder's permission to perform or display a work. One is the fair use exception contained in Section 107, which is summarized in the preamble. Another set of exceptions, contained in Sections 110(1)-(2), permit instructors and students to perform or display copyrighted materials without permission from the copyright holder under certain carefully defined conditions.

Section 110(1) permits teachers and students in a nonprofit educational institution to perform or display any copyrighted work in the course of face-to-face teaching activities. In face-to-face instruction, such teachers and students may act out a play, read aloud a poem, display a cartoon or a slide, or play a videotape so long as the copy of the videotape was lawfully obtained. In essence, Section 110(1) permits performance and display of any kind of copyrighted work, and even a complete work, as a part of face-to-face instruction.

Section 110(2) permits performance of a nondramatic literary or musical work or display of any work as a part of a transmission in some distance learning contexts, under the specific conditions set out in that Section. Section 110(2) does not permit performance of dramatic or audiovisual works as a part of a transmission. The statute further requires that the transmission be directly related and of material assistance to the teaching content of the transmission and that the transmission be received in a classroom or other place normally devoted to instruction or by

persons whose disabilities or special circumstances prevent attendance at a classroom or other place normally devoted to instruction.

The purpose of these guidelines is to provide guidance for the performance and display of copyrighted works in some of the distance learning environments that have developed since the enactment of Section 110 and that may not meet the specific conditions of Section 110(2). They permit instructors who meet the conditions of these guidelines to perform and display copyrighted works as if they were engaged in face-to-face instruction. They may, for example, perform an audiovisual work, even a complete one, in a one-time transmission to students so long as they meet the other conditions of these guidelines. They may not, however, allow such transmissions to result in copies for students unless they have permission to do so, any more than face-to-face instructors may make copies of audiovisual works for their students without permission.

The developers of these guidelines agree that these guidelines reflect the principles of fair use in combination with the specific provisions of Sections 110(1)-(2). In most respects, they expand the provisions of Section 110(2).

In some cases students and teachers in distance learning situations may want to perform and display only small portions of copyrighted works that may be permissible under the fair use doctrine even in the absence of these guidelines. Given the specific limitations set out in Section 110(2), however, the participants believe that there may be a higher burden of demonstrating that fair use under Section 107

permits performance or display of more than a small portion of a copyrighted work under circumstances not specifically authorized by Section 110(2).

1.3 Distance Learning In General. Broadly viewed, distance learning is an educational process that occurs when instruction is delivered to students physically remote from the location or campus of program origin, the main campus, or the primary resources that support instruction. In this process, the requirements for a course or program may be completed through remote communications with instructional and support staff including either one-way or two-way written, electronic or other media forms.

Distance education involves teaching through the use of telecommunications technologies to transmit and receive various materials through voice, video and data. These avenues of teaching often constitute instruction on a closed system limited to students who are pursuing educational opportunities as part of a systematic teaching activity or curriculum and are officially enrolled in the course. Examples of such analog and digital technologies include telecourses, audio and video teleconferences, closed broadcast and cable television systems, microwave and ITFS, compressed and full-motion video, fiber optic networks, audiographic systems, interactive videodisk, satellite-based and computer networks.

2. Applicability and Eligibility

2.1 Applicability of The Guidelines. These guidelines apply to the performance of lawfully acquired copyrighted works not included under

section 110(2) (such as a dramatic work or an audiovisual work) as well as to uses not covered for works that are included in Section 110(2). The covered uses are (1) live interactive distance learning classes (i.e., a teacher in a live class with all or some of the students at remote locations) and (2) faculty instruction recorded without students present for later transmission. They apply to delivery via satellite, closed circuit television or a secure computer network. They do not permit circumventing anti-copying mechanisms embedded in copyrighted works.

These guidelines do not cover asynchronous delivery of distance learning over a computer network, even one that is secure and capable of limiting access to students enrolled in the course through PIN or other identification system. Although the participants believe fair use of copyrighted works applies in some aspects of such instruction, they did not develop fair use guidelines to cover these situations because the area is so unsettled. The technology is rapidly developing, educational institutions are just beginning to experiment with these courses, and publishers and other creators of copyrighted works are in the early stages of developing materials and experimenting with marketing strategies for computer network delivery of distance learning materials. Thus, consideration of whether fair use guidelines are needed for asynchronous computer network delivery of distance learning courses perhaps should be revisited in three to five years.

In some cases, the guidelines do not apply to specific materials because no permission is required, either because the material to be performed or displayed is in the public domain, or because the instructor or the

institution controls all relevant copyrights. In other cases, the guidelines do not apply because the copyrighted material is already subject to a specific agreement. For example, if the material was obtained pursuant to a license, the terms of the license apply. If the institution has received permission to use copyrighted material specifically for distance learning, the terms of that permission apply.

2.2 Eligibility.

2.2.1 Eligible Educational Institution.

These guidelines apply to nonprofit educational institutions at all levels of instruction whose primary focus is supporting research and instructional activities of educators and students but only to their nonprofit activities. They also apply to government agencies that offer instruction to their employees.

2.2.2 Eligible Students. Only students officially enrolled for the course at an eligible institution may view the transmission that contains works covered by these guidelines. This may include students enrolled in the course who are currently matriculated at another eligible institution. These guidelines are also applicable to government agency employees who take the course or program offered by the agency as a part of their official duties.

3. Works Performed for Instruction

3.1 Relation To Instruction. Works performed

must be integrated into the course, must be part of systematic instruction and must be directly related and of material assistance to the teaching content of the transmission. The performance may not be for entertainment purposes.

4. Transmission and Reception

4.1 Transmission (Delivery). Transmission must be over a secure system with technological limitations on access to the class or program such as a PIN number, password, smartcard or other means of identification of the eligible student.

4.2 Reception. Reception must be in a classroom or other similar place normally devoted to instruction or any other site where the reception can be controlled by the eligible institution. In all such locations, the institution must utilize technological means to prevent copying of the portion of the class session that contains performance of the copyrighted work.

5. Limitations

5.1 One Time Use. Performance of an entire copyrighted work or a large portion thereof may be transmitted only once for a distance learning course. For subsequent performances, displays or access, permission must be obtained.

5.2 Reproduction And Access To Copies

5.2.1 Receiving Institution. The institution receiving the transmission may record or copy classes that include the

performance of an entire copyrighted work, or a large portion thereof, and retain the recording or copy for up to 15 consecutive class days (i.e., days in which the institution is open for regular instruction) for viewing by students enrolled in the course. Access to the recording or copy for such viewing must be in a controlled environment such as a classroom, library or media center, and the institution must prevent copying by students of the portion of the class session that contains the performance of the copyrighted work. If the institution wants to retain the recording or copy of the transmission for a longer period of time, it must obtain permission from the rightsholder or delete the portion which contains the performance of the copyrighted work.

5.2.2 Transmitting Institution. The transmitting institution may, under the same terms, reproduce and provide access to copies of the transmission containing the performance of a copyrighted work; in addition, it can exercise reproduction rights provided in Section 112(b).

6. Multimedia

6.1 Commercially Produced Multimedia. If the copyrighted multimedia work was obtained pursuant to a license agreement, the terms of the license apply. If, however, there is no license, the performance of the copyrighted elements of the multimedia works may be transmitted in accordance with the provisions of these guidelines.

7. Examples Of When Permission Is Required

7.1 Commercial uses. Any commercial use including the situation where a nonprofit educational institution is conducting courses for a for-profit corporation for a fee such as supervisory training courses or safety training for the corporation's employees.

7.2 Dissemination of Recorded Courses. An institution offering instruction via distance learning under these guidelines wants to further disseminate the recordings of the course or portions that contain performance of a copyrighted work.

7.3 Uncontrolled Access to Classes. An institution (agency) wants to offer a course or program that contains the performance of copyrighted works to non-employees.

7.4 Use Beyond the 15-day Limitation. An institution wishes to retain the recorded or copied class session that contains the performance of a copyrighted work not covered in Section 110(2). (It also could delete the portion of the recorded class session that contains the performance.)

VII. LIBRARY COPYING

Special Rules for Libraries

Section 108 of the Copyright Act authorizes libraries to exercise special rights in addition to fair use rights. Section 108 provides that it is not an infringement of a copyright for a library to reproduce and

distribute no more than one copy of a work if:

- (1) The reproduction and distribution is not for commercial advantage,
- (2) The collections of the library are open to the public or at least unaffiliated persons doing research in a particular field, *and*
- (3) The reproduction or distribution includes a copyright notice or a legend stating that the work may be protected by copyright.

This section only applies to:

- (a) Copies of unpublished works made for archival purposes,
- (b) Copies of published works made to replace a lost, stolen or damaged copy where no replacement can be obtained at a fair price; or
- (c) Interlibrary requests for copies of no more than one article or other contribution to a collective work, or a small part of a copyrighted work, IF the conditions for photocopying for patrons (set forth below) are also met.

The rights for libraries under Section 108 extend to the “isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions,” but do not extend to related reproduction or distribution of multiple copies of the same material.

Photocopying FOR Patrons

Libraries may also make copies (electronic or paper) at the request of

library patrons only for single articles or small portions of a book or other work, as long as: (1) the copy becomes the property of the patron, (2) the library has no notice that the copy will be used for a purpose other than study, scholarship or research, and (3) the library has a display and order form that includes a warning of copyright (see below).

Warning of Copyright

Regulations issued by the Copyright Office require a specific Notice and Warning be used by libraries exercising their rights under Section 108. The notice must be a verbatim reproduction of the language below, in a type size as set forth below, on display in the library and on the order forms requesting reproductions.

NOTICE WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be “used for any purpose other than private study, scholarship, or research.” If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of “fair use,” that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

Form and Manner of Use:

(1) A Display Warning of Copyright shall be printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently, in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer within the immediate vicinity of the place where orders are accepted.

(2) An Order Warning of Copyright shall be printed within a box located prominently on the order form itself, either on the front side of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than 8 points. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.

Photocopying BY Patrons

Libraries may allow patrons to make unsupervised reproductions of copyright-protected material, so long as the library displays a notice that making copies is subject to copyright law. St. Olaf College requires that the notice state the following:

Copyright Notice

Copying, displaying and distributing copyrighted works may infringe the owner's copyrights. The information on copyright in the *Faculty Handbook* can help you determine whether your use of a copyrighted work may be infringing. Use of computer or reproduction equipment by students, faculty or staff for the infringing use of copyrighted works is subject to disciplinary action, as well as those

civil remedies and criminal penalties provided by federal law.

This notice should be displayed near all photocopiers or scanners available for patron use.

Interlibrary Loan

Section 108 of the Copyright Act permits library participation in interlibrary arrangements that do not have, as their purpose or effect, that copies of are received in such aggregate quantities as to substitute for a subscription to or purchase of such work.

CONTU Guidelines

The National Commission on New Technological Uses of Copyrighted Works (CONTU), established in 1976, provided some additional guidance on what constitutes “such aggregate quantities as to substitute for a subscription to or purchase of such work.” The commission issued the “CONTU Guidelines on Photocopying Under Interlibrary Loan Arrangements.” These guidelines are not law, but do set a standard against which behavior will be measured.

Periodicals: The CONTU Guidelines state that with regard to a given periodical (not just an issue of a periodical), six or more copies of articles published in that periodical within five years prior to the date of a request would constitute “such aggregate quantities as to substitute for a subscription to or purchase of such work.”

Books or Recordings: The CONTU Guidelines state that with regard to a copyrighted work, such as books, recordings or collective works, six or more copies from any given work during the term of the copyright would constitute “such aggregate quantities as to substitute for a subscription to or purchase of such work.”

If the requesting library has a subscription itself or owns its own copy of the copyrighted work, but is requesting the material because its

own copy is not available, then such requests will not be counted against the requesting institution.

The requesting institution should include with its request a representation that its request conforms with the CONTU Guidelines. Furthermore, the requesting institution should maintain records of all requests made and fulfilled, and these records should be retained for three years.

Paper and Electronic Reserves

Both paper and electronic reserves implicate the reproduction right under copyright law, and therefore must either be permitted by the copyright owners or be a “fair use.” Both the Classroom Guidelines for Paper Reserves and the CONFU Fair Use Guidelines for Electronic Reserve Systems are set forth below. Again, neither of these Guidelines are law, but they at least provide some guidance in that if your use is within the guidelines, it is more likely that the use maybe fair use.

Classroom Guidelines for Paper Reserves

The Classroom Guidelines recommendation for reserve readings provide that photocopies of an entire article, one chapter from a book, or a short poem may be placed on reserve in a library. Up to *one copy per ten students*, with a maximum of *six copies for any single class*, will be allowed. Educators should seek permission from copyright owners whenever there are questions regarding whether copying for reserve constitutes fair use or if they wish more substantial portions copied for reserve.

CONFU Fair Use Guidelines for Electronic Reserve Systems

The CONFU Fair Use Guidelines for Electronic Reserve Systems are reprinted in their entirety below:

Introduction

Many college, university, and school libraries have established reserve operations for readings and other materials that support the instructional requirements of specific courses. Some educational institutions are now providing electronic reserve systems that allow storage of electronic versions of materials that students may retrieve on a computer screen, and from which they may print a copy for their personal study. When materials are included as a matter of fair use, electronic reserve systems should constitute an ad hoc or supplemental source of information for students, beyond a textbook or other materials. If included with permission from the copyright owner, however, the scope and range of materials is potentially unlimited, depending upon the permission granted. Although fair use is determined on a case-by-case basis, the following guidelines identify an understanding of fair use for the reproduction, distribution, display, and performance of materials in the context of creating and using an electronic reserve system.

Making materials accessible through electronic reserve systems raises significant copyright issues. Electronic reserve operations include the making of a digital version of text, the distribution and display of that version at workstations, and downloading and printing of copies. The complexities of the electronic environment, and the growing potential for implicating copyright infringements, raise the need for a fresh understanding of fair use. These guidelines are not intended to burden the facilitation of reserves unduly, but instead offer a workable path that educators and librarians may follow in order to

exercise a meaningful application of fair use, while also acknowledging and respecting the interests of copyright owners.

These guidelines focus generally on the traditional domain of reserve rooms, particularly copies of journal articles and book chapters, and their accompanying graphics. Nevertheless, they are not meant to apply exclusively to textual materials and may be instructive for the fair use of other media. The guidelines also focus on the use of the complete article or the entire book chapter. Using only brief excerpts from such works would most likely also be fair use, possibly without all of the restrictions or conditions set forth in these guidelines. Operators of reserve systems should also provide safeguards for the integrity of the text and the author's reputation, including verification that the text is correctly scanned.

The guidelines address only those materials protected by copyright and for which the institution has not obtained permission before including them in an electronic reserve system. The limitations and conditions set forth in these guidelines need not apply to materials in the public domain-such as works of the U.S. government or works on which copyright has expired-or to works for which the institution has obtained permission for inclusion in the electronic reserve system. License agreements may govern the use of some materials. Persons responsible for electronic reserve systems should refer to applicable license terms for guidance. If an instructor arranges for students to acquire a work by some means that includes permission from the copyright owner, the instructor should not include that same work on an

electronic reserve system as a matter of fair use.

A. Scope of Material

1. In accordance with fair use (Section 107 of the U.S. Copyright Act), electronic reserve systems may include copyrighted materials at the request of a course instructor.

2. Electronic reserve systems may include short items (such as an article from a journal, a chapter from a book or conference proceedings, or a poem from a collected work) or excerpts from longer items. “Longer items” may include articles, chapters, poems, and other works that are of such length as to constitute a substantial portion of a book, journal, or other work of which they may be a part. “Short items” may include articles, chapters, poems, and other works of a customary length and structure as to be a small part of a book, journal, or other work, even if that work may be marketed individually.

3. Electronic reserve systems should not include any material unless the instructor, the library, or another unit of the educational institution possesses a lawfully obtained copy.

4. The total amount of material included in electronic reserve systems for a specific course as a matter of fair use should be a small proportion of the total assigned reading for a particular course.

B. Notices and Attributions

1. On a preliminary or introductory screen, electronic reserve systems should display a notice,

consistent with the notice described in Section 108(f)(1) of the Copyright Act. The notice should include additional language cautioning against further electronic distribution of the digital work.

2. If a notice of copyright appears on the copy of a work that is included in an electronic reserve system, the following statement shall appear at some place where users will likely see it in connection with access to the particular work:

“The work from which this copy is made includes this notice: [restate the elements of the statutory copyright notice: e.g., Copyright 1996, XXX Corp.]”

3. Materials included in electronic reserve systems should include appropriate citations or attributions to their sources.

C. Access and Use

1. Electronic reserve systems should be structured to limit access to students registered in the course for which the items have been placed on reserve, and to instructors and staff responsible for the course or the electronic system.

2. The appropriate methods for limiting access will depend on available technology. Solely to suggest and not to prescribe options for implementation, possible methods for limiting access may include one or more of the following or other appropriate methods:

(a) individual password controls or verification of a student’s registration status;

or

- (b) password system for each class; or
- (c) retrieval of works by course number or instructor name, but not by author or title of the work; or
- (d) access limited to workstations that are ordinarily used by, or are accessible to, only enrolled students or appropriate staff or faculty.

3. Students should not be charged specifically or directly for access to electronic reserve systems.

D. Storage and Reuse

1. Permission from the copyright holder is required if the item is to be reused in a subsequent academic term for the same course offered by the same instructor, or if the item is a standard assigned or optional reading for an individual course taught in multiple sections by many instructors.
2. Material may be retained in electronic form while permission is being sought or until the next academic term in which the material might be used, but in no event for more than three calendar years, including the year in which the materials are last used.
3. Short-term access to materials included on electronic reserve systems in previous academic terms may be provided to students who have not completed the course.

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