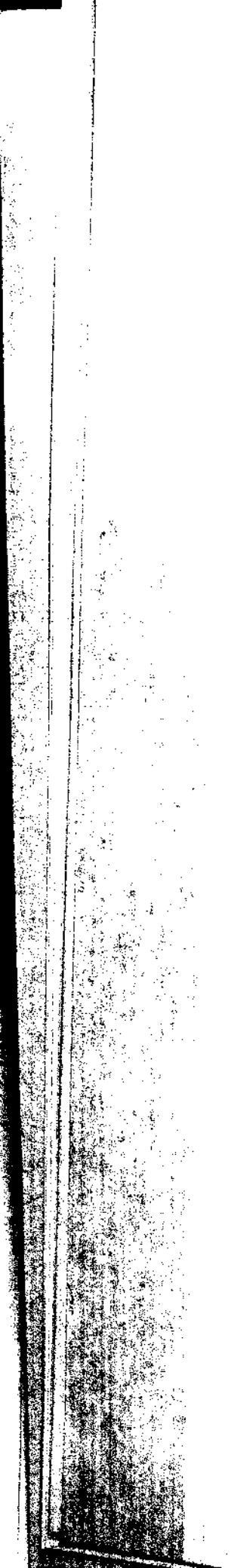


CHAPTER

The Scope of Protectable Works

KEY POINTS

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

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

Originality

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

Based upon this principle, the content and layout of most websites are certainly copyrightable. The text, images, and other elements in them are often original works. Decisions about the placement of text and photos, the selection of information on the website, and how users will access the site could easily be "original," rendering the website protectable under the law.

Similarly, Homer's epic poems may never have had any legal protection under the laws of ancient Greece, but a new translation is an "original" work subject to new copyright protection as a "derivative." A derivative work takes the original work, for example *The Iliad*, and creates a new work from it—such as a translation into a different language, a motion picture, a stage play, a musical, an interactive website, or numerous other possibilities. Hollywood studios can create *Troy* and hold rights to it, while the original book remains in the public domain.

Creativity and Originality

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

> "There is nothing remotely creative abo
> arranging names alphabetically in a wh
> pages directory."
>
> —U.S. Supreme Court Justice Sandra D
> O'Connor in *Feist Publications, I*
> *v. Rural Telephone Service C*

Long ago, the Supreme Court faced similar questions about a photograph of Oscar Wilde. The Supreme Court held that the picture met the standard of creativity because the photographer chose the camera, equipment, lighting, angles, and placement of the subject when shooting the picture.[4] More recently, however, a federal court has ruled that a direct, accurate photographic reproduction of a two-dimensional artwork lacks sufficient creativity to be original.[5] The work of art may still be creative and protected by copyright, but not the simple and direct photographic reproduction of it. As in the Oscar Wilde case, should the photograph of the artwork include creative lighting, coloring, or angles, or capture more than just the work of art itself, then the photograph could easily qualify for copyright protection.

> "[The photograph is] entirely from [the photographer's] own original mental conception . . . by posing . . . Wilde . . ., selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression."
>
> —U.S. Supreme Court Justice Samuel Miller
> in *Burrow-Giles Lithographic Co. v. Sarony*

Photograph of Oscar Wilde by Napoleon Sarony, 1882

Courtesy of University of California, Los Angeles

> Copyright protection is based on a recognition of creativity, not hard work. A court recently denied copyright protection for photographic copies of art. Although acknowledging that the photography required great technical skill, the court still called it "slavish copying."
>
> —*Bridgeman Art Library, Ltd. v. Corel Corp.*,
> 36 F. Supp. 2d 191 (S.D.N.Y. 1999)

Fixed in a Tangible Medium

For an "original work of authorship" to be eligible for copyright protection, it must also be "fixed" in some physical form capable of identification that exists for more than a "transitory duration."[6] Examples of "fixed" works might include scribbles on paper, recordings of music, paintings on canvas, and documents on web servers.

The fixed form does not have to be readable by the human eye, as long as the work can be perceived either directly or by a machine or device, such as a computer or projector.[7] Therefore, programming and substantive content stored on floppy disks or CDs are "fixed," as long as the works can be read with the use of a machine.

Expansion of Copyrightability

The "tangible medium" requirement expands copyright from traditional writings and pictures into the realm of video, sound recordings, computer disks, and Internet communications—any format now known or to be later developed.[8] If you can see it, read it, watch it, or hear it—with or without the use of a computer, projector, or other machine—the work is likely eligible for copyright protection. Harder questions surround whether materials stored only in the random-access memory (RAM) of a computer are sufficiently "fixed" to be eligible for protection. A fleeting appearance in RAM may not be enough, but once you hit the print or save key, that work is easily within the purview of copyright.

> An important court case held that software programming loaded into RAM was sufficiently stable to qualify as a "copy" for purposes of establishing an infringement. The concept of a work in a stable medium for purposes of copying is similar to the standard used to determine if the work is "fixed" in the first place to establish copyright protection.
>
> —*MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993)

Given the wide range of media and nearly boundless scope of "originality," the result is a vast array of works brought under copyright protection. In addition, the statutes list various categories of works that are generally protectable. Section 102(a) of the Copyright Act specifies that copyrightable works can include these categories:[9]

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

These categories are illustrative and are not exhaustive of all possibilities. Because the categories are construed liberally, "literary works" can range from novels to computer programs. The category of "pictorial" or "graphic" works can include maps, charts, and other visual imagery.[10]

Because of the law's vast reach, the important question may not be what is copyrightable, but what is *not* copyrightable. The next chapter will identify various types of works that are without copyright protection.

Notes

1. *U.S. Copyright Act*, 17 U.S.C. § 102(a) (2005).
2. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).
3. *Bellsouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.*, 999 F.2d 1436 (11th Cir. 1993).
4. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).
5. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
6. The word *fixed*, as well as many other terms, is defined in the copyright statutes. *U.S. Copyright Act*, 17 U.S.C. § 101 (2005).
7. *U.S. Copyright Act*, 17 U.S.C. § 102(a) (2005).
8. *U.S. Copyright Act*, 17 U.S.C. § 102(a).
9. *U.S. Copyright Act*, 17 U.S.C. § 102(a).
10. *U.S. Copyright Act*, 17 U.S.C. § 101.

CHAPTER

Works without Copyright Protection

KEY POINTS

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

While copyright protection applies broadly to expressions that are "original" and "fixed," several categories of works are specifically outside the boundaries of the law. These works are wholly without copyright protection, are in the public domain, and are freely available for use without copyright restrictions. For example, ideas are not protectable.[1] If you tell a friend your great idea for a book or scientific breakthrough, and she uses only the idea in her own work, you have no copyright claim. You may certainly find an ethical violation, or possibly a breach of other legal rights, but copyright simply does not protect ideas alone.[2]

Many works are without copyright protection for good reason. The law grants rights for many reasons, perhaps most notably to encourage creativity and the dissemination of new works. Sometimes limiting or denying rights also serves an important purpose. If ideas were protectable, we might be left with only one version of a story, one software package for each need, or only one work of art that expresses beauty or angst. Sometimes denying rights can better foster creativity and render the greatest benefit for individuals and for society in general.

> **Recall from chapter 1 that for works to be afforded copyright protection, they must be "original" works of authorship and "fixed" in a tangible medium of expression.**
>
> —*U.S. Copyright Act*, 17 U.S.C. § 102(a) (2005)

Facts and Discoveries

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

On the other hand, you may have copyright protection for your original *compilations of facts* or your *writings about the facts and discoveries*.[4] For example, after years of research to find facts, you write a journal article about your research findings. The sentences and paragraphs are most surely creative, original, and protectable. Suppose your article also includes several tables that organize the facts in a manner that is meaningful to your readers. For example, you might chart the boiling point of water, the rate of urban crime, or the election of presidents. To the extent that you have selected, arranged, or coordinated the facts in some original manner, you can claim a "compilation copyright" in the presentation. Still, the facts are not your intellectual property. Another writer can extract the facts and include them in a new study.

> The U.S. Supreme Court has made clear that copyright protection depends on creativity, but the measure of creativity is modest at best. According to the Court, the "requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."
>
> —*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)

Compilations and Databases

Copyright law may not protect everything, but the law can protect original "compilations" of otherwise unprotected material. Real examples of compilation copyrights are common. For example, many companies create and publish bibliographies and other compilations of information. Individual author names, article titles, and the like are not protected, but the original arrangement of them into useful research resources can be protected.[5] Similarly, an editor may select your article for publication and arrange it with other selections into a new journal issue. You may still hold the copyright for your individual work, but the editor can hold a copyright in the compilation of the overall journal issue.[6]

> You might write poetry in your spare time. You can have copyright protection for each poem. After some years of writing, you gather the poems, arrange them into a logical or interesting order, and publish the collection as a book. You can have an additional copyright in the original compilation. You can even have a "compilation copyright" if you collect the poems of other authors.

Not all compilations of information are protected. Databases have copyright protection only if they are original in their selection, arrangement, or coordination of data elements. Selecting and organizing articles in a journal usually involve considerable originality. Gathering data and listing it alphabetically or chronologically, or just uploading it in no order into a computer, often involve no creativity. Without creativity, there can be no copyright protection. The lack of protection for many databases causes great concern for companies that invest significantly to develop and market such works. In recent years, Congress has considered new legislation that would establish a new form of legal protection for data compilations. Many educators and librarians have cautioned against these bills, arguing that such a law would further restrain access to information.

Revealing the split in Congress over the wisdom of database protection, two bills on this topic were recently introduced into Congress. The bills represent sharply divergent views about the appropriate means of protection, the strength of owner rights, and the scope of exceptions. These bills are the *Consumer Access to Information Act*, HR 3872, 108th Cong., 2d sess. (2004); and the *Database and Collections of Information Misappropriation Act*, HR 3261, 108th Cong., 1st sess. (2003).

All of these examples underscore the need to distinguish between the various elements of a total work, and to establish carefully whether each element is copyrightable. Some elements may be in the public domain. Some elements may be separately copyrighted and held by different owners. Sometimes the distinction between them is easy to see, such as the difference between the article and the journal. In other instances, the distinction between uncopyrightable materials and protectable creativity is less clear.

A biography of Benjamin Franklin is easily protectable, but the facts stated in the text are not. A book about rare coins is also protectable, but the stated value of each coin may be a "fact" about market prices—or not. If the price is simply a recent actual selling price, it is likely a "fact." On the other hand, one court has ruled that wholesale prices for collectible coins based on multivariable judgment calls and the appraiser's "best guess" are creative works protectable under copyright.[7]

Works of the U.S. Government

The United States government produces numerous works that may be "original" and "fixed," but that are still not copyrightable. Section 105 of the U.S. Copyright Act specifically prohibits copyright protection for works of the federal government.[8] Therefore, reports written by members of Congress and employees of federal agencies, as part of their official duties, are not copyrightable. Decisions from federal courts and statutes from Congress are not protected. The same holds true for presidential speeches, pamphlets from the National Park Service, and websites developed by federal agencies.[9]

Even this broad rule of copyright is not as simple as it seems. Projects written by nongovernment officials with federal funding may be copyrightable. For example, your research may be funded by government grants; that fact does not by itself put your work in the public domain. A government-funded project is not necessarily a "work of the United States Government."

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

A bill recently introduced in the state legislature of California would have prohibited the state from asserting rights to intellectual property, and it would have dedicated to the public domain most copyrights that might have been held by the state. The bill is 2003 *California Assembly Bill No. 1616* (2003–2004, introduced on February 21, 2003, amended on February 2, 2004).

Keep in mind that this exemption applies only to works of the United States federal government. Works created by state and local governments are protected by copyright unless those governments have expressly waived their claims of copyright by statute. Some states have gone in the other direction. The Idaho legislature has provided a blunt and direct declaration about copyright

for its statutes: "The Idaho Code is the property of the state of Idaho, and the state of Idaho and the taxpayers shall be deemed to have a copyright on the Idaho Code."[10] Inquire with the appropriate state agency about possible copyright protection for its materials.

> Additional works may be in the public domain for a variety of reasons. An author may voluntarily choose to dedicate a work to the public domain. The law has in the past recognized a concept of "abandonment" of a copyright. Sometimes Congress has simply chosen not to extend copyright to all works. For example, sound recordings are protectable today, but U.S. recordings made before Congress changed the law, effective February 15, 1972, are without copyright protection. Chapter 14 offers much more information about copyright and sound recordings.

Outside the Reach of Copyright

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

- Works that have not been fixed in a tangible form of expression. Examples include choreographic works that have not been noted or recorded, and improvisational speeches or performances that have not been written or recorded.
- Titles, names, short phrases, and slogans, as well as familiar symbols or designs—although the law of trademark may offer some protection[11]
- Mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients, as in recipes, or contents[12]
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices.[13] On the other hand, patent or trade secret law may offer protection for some of these works.
- Works consisting entirely of information that is common property and containing no original authorship. Examples include standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources.

Expired Copyrights

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

Notes

1. *U.S. Copyright Act*, 17 *U.S.C.* § 102(b) (2005).
2. An example of a legal doctrine that might come into play in such a situation could be "misappropriation." See *NXIVM Corp. v. Ross Institute*, 364 F.3d 471 (2d Cir. 2004); *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004); *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000).

3. *U.S. Copyright Act*, 17 *U.S.C.* § 102(b).
4. *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77 (2d Cir. 2005); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).
5. *Code of Federal Regulations*, title 37, vol.1, sec. 202.1 (2005).
6. Section 201(c) of the U.S. Copyright Act states: "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole."
7. *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999).
8. *U.S. Copyright Act*, 17 *U.S.C.* § 105 (2005).
9. The U.S. Copyright Act defines a "work of the United States Government" as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." *U.S. Copyright Act*, 17 *U.S.C.* § 101 (2005). For an example of the application of this rule to court opinions, see *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998).
10. *Idaho Code*, sec. 9-350 (Matthew Bender, 2004).
11. *Code of Federal Regulations*, title 37, vol. 1, sec. 202.1.
12. *Code of Federal Regulations*, title 37, vol. 1, sec. 202.1.
13. *U.S. Copyright Act*, 17 *U.S.C.* § 102(b) (2005).

CHAPTER

Duration and Formalities: How Long Do Copyrights Last?

KEY POINTS

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

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

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

Elimination of Formalities

American copyright law has changed in many respects through recent decades, but one of the most important changes has been the elimination of "formalities." Under current law, the formalities of notice and registration are no longer a prerequisite to legal protection. Copyright vests automatically at the moment you create an "original" work that is "fixed" in a tangible medium.[3] You receive the protection whether you want it or not. You need not "do" anything more to "get" copyright for a new work—other than create an eligible work. This state of the law imposes instant copyright protection on the vast range of materials in libraries, on the Internet, in file drawers, and in museums. Consequently, nearly every person in the country today is a copyright owner.

> The requirements that a work be an "original" work of authorship and "fixed" in a tangible medium of expression are detailed in chapter 1. While a great many works will easily meet those standards and have automatic copyright protection, chapter 1 demonstrates that even these broad and general legal requirements have their own limits and nuances.

The law before 1978 was altogether different. Congress at that time required formalities as a prerequisite to protection. In incremental steps, Congress changed and ultimately dropped those requirements. The earliest law, in 1790, required registration of new works with the federal government.[4] That provision disappeared early the next century.[5] Surviving through much of American history was the requirement that publications must bear a formal copyright notice. With the 1976 Copyright Act, however, Congress began allowing authors to fix or remedy a missing or defective notice.[6] In 1989 Congress finally dropped the notice requirement altogether. Today, omitting the notice or using an incorrect notice no longer places the work in the public domain.

Copyrights in works published before 1978 also had to be "renewed" twenty-eight years after first publication. Renewal does not apply to post-1978 works at all, and in 1992 Congress even abandoned the need to seek renewal for earlier works.[7] The older copyrights are now renewed automatically. These historical developments have profound implications for evaluating today whether a work is protected by copyright—and determining the years of copyright duration each work receives.

> Why did Congress deliberately remove all formalities? The answer lies in international law. In March 1989 the United States officially joined the Berne Convention, a multinational agreement on copyright law. The Berne Convention was already more than a century old and it prohibits "formalities" as a condition for copyright protection. To join Berne, U.S. law had to drop formalities for new works—as most countries already had done. *Berne Convention for the Protection of Literary and Artistic Works Implementation Act*, Public Law 100-568, *U.S. Statutes at Large* 102 (1988): 2853, 2858

> What exactly is a "copyright notice"? Here are some familiar forms:
>
> © 2005, Jane Smith
>
> Copyright 1890, Mark Twain
>
> Copyr. 1928, Walt Disney Co.

This chapter organizes the discussion of formalities and duration in a chronological and pragmatic context, centering especially on the momentous changes in the law that took effect in 1978. This chapter also focuses on published works. Special rules apply to unpublished works, and they are addressed more fully in chapter 16.

Works Created in or after 1978

The modern rule of copyright protection is relatively simple, at least for most common needs: copyright protection applies automatically, and the basic term of protection is for the life of the author, plus seventy years.[8] Registering the work and placing a copyright notice on it are no longer required to receive copyright protection for the full term.

Works that are made "for hire" also receive automatic protection, but the duration of copyright is sharply different. A "work made for hire" has protection for the shorter of either 120 years from creation of the work, or 95 years from its publication.[9] As examined more fully in chapter 4, the "author" of these works is the employer, which may be a corporation or other legal entity. Such an "author" may never die, so a duration based on a life makes little sense. The law instead applies a set term of years.

> Even though the copyright notice is not required, the Digital Millennium Copyright Act (DMCA) creates a new federal offense for the removal under some circumstances of "copyright management information," which is defined to include the copyright notice as well as a wide variety of other identifying information. *U.S. Copyright Act*, 17 *U.S.C.* § 1202 (2005). The DMCA and copyright management information are addressed in greater detail in chapter 15.

For creators of new works, these rules are fairly easy to determine, and they are extraordinarily generous; the law automatically gives full protection and broad rights to all eligible works. For users of works, however, the absence of formalities no longer indicates whether a work is or is not protected. Users must simply realize that most modern works are in fact protected with or without notice and registration.

For owners as well as users, notices and registration can still be a good idea and offer some realistic benefits. The copyright notice is a helpful clue for users, indicating the date of origin and the name of the copyright claimant. Similarly, registration records are public, allowing anyone investigating a work to find helpful information about that work and the author. Formalities also provide important legal benefits to copyright owners.[10] The law offers a few critical incentives to take those steps. More information about these points is in chapter 13.

> Looking for more information about registration or searching registration records? The best place to start is the website of the U.S. Copyright Office: http://www.copyright.gov.

Works Published before 1978

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

> Actually, Congress did not entirely drop the notice requirement until 1989. Between 1978 and 1989, Congress continued the old rule, but allowed a copyright owner to remedy an omitted or defective notice. Consequently, the absence of a notice on a 1980s book does not reliably put it in the public domain. *U.S. Copyright Act*, 17 *U.S.C.* § 405 (2005)

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

How long did the clock tick? The law before 1978 granted two sequential terms of copyright protection for publications. Proper use of a copyright notice gave an initial term of twenty-eight years. At the end of that term, the copyright owner was required to file a renewal application with the Copyright Office in order to receive the second and continuous term of protection.[11] Failure to file meant the copyright lapsed at the end of the first term. In the case of that 1940 publication, it could have entered the public domain on at least two occasions: in 1940 if published without notice, and in 1968 if not renewed.

Renewal of Copyrights

How long is the renewal term? The question does not have an easy answer. The renewal term was another twenty-eight years, but in the early 1960s the term was stretched to forty-seven years, for a total of seventy-five years of protection. In 1998, Congress added twenty more years to the protection for early works.[12] So today a work published before 1978 can generally have a total term of protection of ninety-five years.[13]

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

In 1992 Congress eliminated the renewal requirement for all existing copyrights.[14] Consider the simple example of a book published in 1970. The published copies needed to include a copyright notice to secure the initial twenty-eight years of protection. By the time the copyright was slated for renewal in 1998, Congress dropped the renewal requirement. The 1970 book received an automatic continuation of protection to the full ninety-five years available under today's law. By contrast, the book published in 1940 had to be renewed in 1968, otherwise the copyright expired at that time.

Foreign Works and Restoration

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

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

The eventual response was a complex twist of international law that "restored" copyright protection for many foreign works that had entered the public domain inside the United States for lack of formalities.[15] This outcome is yet another dose of confusion in the law. Many foreign and domestic publications from before 1978 entered the public domain for failure to comply with the formalities of notice and renewal. Domestic works remain in the public domain, while many foreign works were brought back under copyright protection.

The "restoration" requirement was initially a limited provision adopted by Congress as part of the *North American Free Trade Agreement Act*, Public Law 103-182, *U.S. Statutes at Large* 107 (1993): 2057. Restoration later became more comprehensive under the agreement of the World Trade Organization, *Uruguay Round Agreements Act*, Public Law 103-465, *U.S. Statutes at Large* 108 (1994): 4809, 4976

Which foreign countries have had their works "restored" under U.S. law? Almost all of them, starting with the 148 countries that are members of the World Trade Organization. For the latest listing, see http://www.wto.int.

The "restoration" became effective at the beginning of 1996. Copyrights gaining new life at that time continued through the end of the term they otherwise would have received.[16] For example, a Swiss publication from 1940 that was not renewed entered the public domain in the United States in 1968. In 1996 it once again became protected by copyright. Had the law not required formalities, American copyright law would have given ninety-five years of protection to the Swiss publication—until the year 2035. Therefore, once restored in 1996, the copyright continues to that same expiration in 2035.

"Restoration" can apply to works that have entered the public domain for other reasons, too. For example, U.S. copyright did not apply to sound recordings until 1972. In 1996, foreign sound recordings from before 1972 were for the first time given copyright protection in the *Uruguay Round Agreements Act*, Public Law 103-465, *U.S. Statutes at Large* 108 (1994): 4809.

Practical Lessons for Users

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

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

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

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

Important Lessons for Owners

Do not overlook the benefits of formalities for your new works. Placing the copyright notice on your work offers valuable information to readers who might need to locate you for permission or further information. The simple copyright notice can streamline searches for copyright owners and

help assure that their interests will be respected. A proper copyright notice also has the legal effect of barring an infringer from claiming to be an "innocent infringer." This limited defense could apply if the user believed the activities were not infringing.[17]

Registering your work with the U.S. Copyright Office offers the practical benefit of creating a public pronouncement of your claim to the copyright, as well as an address for contacting you. Registration additionally grants important legal benefits in the unlikely event of a lawsuit.[18] These aspects of the law are covered in chapter 13, and they will in turn have some surprising and critical implications for librarians and educators who are struggling with "fair use" and thorny questions of infringement liability.

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

Notes

1. *U.S. Copyright Act*, 17 *U.S.C.* § 302 (2005).
2. For works created on or after January 1, 1978, copyright vests automatically at the time the work is "fixed." *U.S. Copyright Act*, 17 *U.S.C.* § 102 (2005).
3. *U.S. Copyright Act*, 17 *U.S.C.* § 102.
4. *Act of May 31, 1790*, ch. 15, sec. 1, *U.S. Statutes at Large* 1 (1790): 124 (repealed 1802).
5. The history of American copyright law is recounted in many articles and books, including Tyler T. Ochoa, "Patent and Copyright Term Extension and the Constitution: A Historical Perspective," *Journal of the Copyright Society of the U.S.A.* 49 (Fall 2001): 19–125; and Robert L. Bard and Lewis Rutherfurd, *Copyright Duration: Duration, Term Extension, the European Union and the Making of Copyright Policy* (San Francisco: Austin and Winfield, 1998).
6. *U.S. Copyright Act*, 17 *U.S.C.* §§ 405–406 (2005).
7. *U.S. Copyright Act*, 17 *U.S.C.* § 304 (2005).
8. *U.S. Copyright Act*, 17 *U.S.C.* § 302(a) (2005).
9. The same term applies to anonymous and pseudonymous works. *U.S. Copyright Act*, 17 *U.S.C.* § 302(c) (2005).
10. For specific legal benefits afforded by the law, see *U.S. Copyright Act*, 17 *U.S.C.* §§ 411–412 (2005).
11. *Act of March 4, 1909*, ch. 320, sec. 23–24, *U.S. Statutes at Large* 35 (1909): 1075, 1080.
12. *Sonny Bono Copyright Term Extension Act*, Public Law 105-298, *U.S. Statutes at Large* 112 (1998): 2827, codified in scattered sections of 17 *U.S.C.* (2005). See also *Eldred v. Ashcroft*, 537 U.S. 186 (2003).
13. *U.S. Copyright Act*, 17 *U.S.C.* § 304 (2005).
14. *Copyright Amendments Act of 1992*, Public Law 102-307, *U.S. Statutes at Large* 106 (1992): 264, codified at 17 *U.S.C.* § 304 (2005).
15. *U.S. Copyright Act*, 17 *U.S.C.* § 104A (2005).
16. *U.S. Copyright Act*, 17 *U.S.C.* § 104A.
17. *U.S. Copyright Act*, 17 *U.S.C.* § 401(d) (2005).
18. See generally *U.S. Copyright Act*, 17 *U.S.C.* §§ 411–412 (2005).

CHAPTER

Who Owns the Copyright?

KEY POINTS

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

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

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

Joint Copyright Ownership

Many copyrights are the result of two or more authors working together. Two scientists may write a journal article. Three designers might work on a website over a period of months or years. An

entering class of students might contribute to a mural in the school hall. These works may be "jointly" owned.

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

A joint work generally must meet two requirements. First, each coauthor must contribute copyrightable expression to the joint project. If one party gives only an idea for the project, that person has not provided copyrightable expression and therefore is not a joint author under the law.[3] Second, each contributor must have had the intent to create a joint work at the time the work was created. This "intent" refers to the authors' expectation that their contributions would be combined into a unified whole, not necessarily the specific requirement that the authors thought about ownership of their work in strictly legal terms.[4]

Copyright protection for a jointly owned work usually lasts throughout the life of the last of the authors to die, plus seventy more years. *U.S. Copyright Act*, 17 *U.S.C.* § 302(b) (2005). Clever writers could involve youthful coauthors in order to boost the likelihood of prolonging legal rights. Keep in mind that if you are one of the joint owners, you may well outlive your coauthor and find yourself sharing legal rights with his or her children, grandchildren, or other heirs.

Problems with Joint Ownership

Joint ownership is astonishingly common. It is also a serious management headache. Each joint owner of a work holds an undivided share in the copyright.[5] Each co-owner can use or license the entire work as he or she wishes, but must account for profits to the other joint owners. On the other hand, each co-owner acting alone cannot transfer the copyright to another party or grant an exclusive right to use the work without the consent of the other co-owners.

Consider this simple example. You and a colleague jointly own the copyright to a research article. Each of you may individually post the paper to your websites. Each of you can permit other scholars and teachers to make and share copies of it. You can even collect a fee for giving permission, but you are liable to your co-owner for a share of the money. Acting alone, however, you cannot transfer the copyright to a publisher or anyone else, whether gratis or for payment. In fact, a joint owner acting alone cannot grant an exclusive license to use the work. For those transactions, all joint owners must participate together.[6]

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

Works Made for Hire

An important exception to the basic rule of copyright ownership is the doctrine of "work made for hire" (WMFH). For these works, the employer of the person who does the creative work is considered the author and the copyright owner.[7] The employer may be a firm, an organization, or an individual.

In addition to affecting ownership, the WMFH doctrine changes the term of copyright protection. Ordinarily a work is protected for the life of the author plus 70 years. By contrast, a WMFH is protected for the shorter of either 95 years from first publication or 120 years from creation. Chapter 3 provides a detailed look at copyright duration.

Two basic situations can give rise to a work made for hire. The most common situation occurs when a work is prepared by an employee within the scope of his or her employment.[8] If the copyrighted work is created under these conditions, the work is deemed to be "for hire," and the copyright belongs from the outset to the employer.[9] No further agreement is required.

Some of the examples and information about WMFH in this chapter also appear in one of the helpful publications from the U.S. Copyright Office. The Copyright Office issues a long list of "circulars" addressing many issues in the law in clear language. For the full list, see http://www.copyright.gov/circs/.

Examples of possible "works made for hire" created in an employment relationship are:

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

A second WMFH situation involves "independent contractors" (as opposed to employees). Here the statute becomes more exacting. The new work is "for hire" only if it is "specially ordered or commissioned" and is among the types of works itemized in the statute.[10] Even meeting those requirements is not enough for this version of WMFH; the parties must further expressly agree in a written instrument—signed by *both* parties—that the work shall be considered a WMFH. Only then will the new work be deemed "for hire" with all rights belonging to the hiring party.

What works are listed in the WMFH statute? With respect to independent contractors, the statute can apply to works made "for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas."

—*U.S. Copyright Act*, 17 U.S.C. § 101 (2005)

Who Is an Employee?

One of the most important and sometimes difficult issues surrounding the WMFH doctrine centers on whether the project was created by an "employee" or an "independent contractor." Common understandings of these terms may not necessarily be the law, and the result can have profound implications for copyright ownership. For example, you may pay a computer programmer a vast fortune to rework your business systems, or you may pay a tidy sum for photos of your children, but paying money does not make the work "for hire." The freelance programmer and the photography studio are most likely "independent contractors" and hold the copyrights—and get to keep the money.

Newspaper articles are *not* on the list of eligible works in the WMFH statute, so how can they qualify as works made for hire? First, keep in mind that this list is relevant only in the case of independent contractors. Second, news articles may not be specified on the list, but the statute does encompass contributions to "collective" works. A news article can be a contribution to a newspaper, which is a "collective" work. The WMFH statute can consequently apply more broadly than might first appear.

A freelance contractor and an employee may work side by side on similar projects, only to have radically diverging ownership results. A newspaper may have staff reporters, and as employees, their articles are WMFH. A reporter at the next desk, however, may be an independent contractor. Her articles are WMFH only if they are on the list in the statute, and if she and the employer have entered into a written agreement that the articles will be regarded as "for hire."

Academic institutions and libraries often find themselves in a predicament with independent contractors. They pay thousands of dollars for the services of a photographer, a video producer, or a public relations firm to prepare publications, websites, and glossy brochures, only to discover later that the contractor retains the copyright and can control the use of the materials. The photographer can therefore ask for more money with each use of the pictures; the public relations firm can object when the images and words of a brochure are later restructured for the university website.

The law offers at least one practical solution to this dilemma: copyrights may be transferred. If the law resolves that the photographer or programmer owns the copyright, but this is not the desired result, the parties may agree to move the ownership to the other party.

The most important legal effect of work's being "for hire" is a vesting rights with the employer. In fact, th employer is legally defined to be th "author" of the new work, even thoug someone else actually did the creativ work. Calling a work "for hire" ha other important consequences. "Mora rights" cannot apply (see chapter 5) and a transfer of the copyright cannot b "terminated," as is sometimes allowe many decades after a transfer occurs.

Short of a transfer, the parties could enter into a license agreemen that anticipates future needs and clarifies rights of use. Some contrac tors instinctively object to transferring copyrights. The parties may be satisfied with allowing the contractor to hold the copyrights, but agreeing to permit the hiring party to have specific rights to use the work. An "exclusive" license must be in writing and signed by the licensor. A "non-exclusive" license need not be in writing, but documenting the transaction is always a wise move.

Transfers of Copyright

Copyrights can be bought, sold, or simply given away. A transfer of the copyright or an exclusive grant or license to use the work is a transaction that must be in writing and must be signed by the copyright owner making the transfer.[11] Let's assume you write a song or create a painting and hold the copyright. You could give away or sell the copyright to these works, but the transfer is legally valid only if the terms of the transfer are in writing and are signed by you.

Transferring the object itself is distinct from transferring the copyright. For example, you may create a painting and sell it to an appreciative collector at a hefty price. But selling the painting does not include a sale of the copyright, unless you specifically document the copyright transfer in a signed writing. Neither a high price nor an oral statement of transfer will substitute for the statutory requirements. We actually experience this rule on a daily basis. We go to the bookstore and buy a book. We have purchased the book, but we have not acquired the copyright.

The Stanford Law School serves as home to an exciting new project called Creative Commons, at http://creativecommons.org. Users are free to mold a license that allows others who find their content on the Internet to use it under the conditions the copyright owner has specified in the license.

In the academic world, we also routinely transfer our copyrights. A professor writes an article and, as the author, likely owns the copyright. Some journal publishers, however, upon accepting the article for publication, require that the author transfer the copyright to the publisher as one of the terms of the written and signed publication agreement. But not all journal publishers require assignment of the copyright. Whether the author or the publisher owns the copyright to a particular article is a factual matter that needs to be investigated with each work.

Authors who are faced with a publication contract that seeks transfer of the copyright should not hesitate to negotiate new terms or at least reserve rights to use their own work in future teaching and writing, or they should find a different publisher. Project RoMEO offers a wealth of information and alternative language for publication agreements. See http://www.lboro.ac.uk/departments/ls/disresearch/romeo/.

Institutional Policies

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

The custom at most colleges and universities is to leave most copyrights with faculty authors, and this tradition may not change drastically in the near future. Yet, careful and meticulous rethinking of institutional policies is gaining pace. Some policymakers are reckoning with the changing nature of academic work and are pursuing policies that shift to the institution some ownership rights in faculty works. The growth of distance education and the considerable financial consequences of creating and marketing new works have stirred the need to reexamine the feasibility of traditional and simplistic concepts of intellectual property at educational institutions.

Moreover, recent court rulings have drawn into question the tradition of faculty ownership of copyright and the effectiveness of institutional policies. These courts have found that many works created at colleges and universities are in fact "for hire," vesting the copyright with the employer. The courts have also concluded that general policy statements may be insufficient to effect a transfer of the copyright to the employee. The Copyright Act specifies that a WMFH belongs to the employer "unless the parties have expressly agreed otherwise in a written instrument signed by them."[12] A general policy, however, is ordinarily not signed by the parties to each individual transfer of rights.

"The Policy is patently inadequate to overcome the presumption of Brown's ownership under the work made for hire doctrine."

—District Judge William E. Smith in *Forasté v. Brown University*

An international initiative encouraging innovative policymaking at universities is the Zwolle Group, based in the Netherlands. For more information, see http://www.surf.nl/copyright/.

Recent Cases and New Possibilities

A few recent cases have raised new questions about WMFH in higher education and have drawn new attention to the importance of effective and creative policies. Consider the following cases:

Forasté v. Brown University, 248 F. Supp. 2d 71 (D.R.I. 2003). The court in Rhode Island held that photographs taken by a university employee belonged to the university as a WMFH. The university policy that purported to grant copyrights to employees was insufficient to meet the statutory requirements for a transfer.[13]

Vanderhurst v. Colorado Mountain College Dist., 16 F. Supp. 2d 1297 (D. Colo. 1998). A professor developed teaching materials for instruction at the college, but disputed their ownership after leaving his faculty position. The Colorado court ruled that a professor's instructional materials were WMFH and belonged to the college.[14]

These cases do not necessarily undermine the value of universities' copyright policies. Instead, they make clear that such policies must be developed and implemented in strict accord with the law—perhaps paired with detailed, written agreements that faculty and university officials will need to sign individually. Most of all, the cases emphasize the critical importance of having a policy in order to shape the outcome of ownership questions, rather than relying solely on the defaults of the law.

The concept of "unbundling" the rights of copyright ownership has its roots in a project involving the present author for the California State University (CSU). The outcome was a pamphlet titled *Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning* (1997). Portions of this document were revised in 2003 and became part of a position paper from the CSU that is available at http://www.calstate.edu/AcadSen/Records/Reports/Intellectual_Prop_Final.pdf.

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

Notes

1. "Copyright in a work protected under this title vests initially in the author or authors of the work." *U.S. Copyright Act*, 17 U.S.C. § 201 (2005).
2. *U.S. Copyright Act*, 17 U.S.C. § 101 (2005).
3. *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

4. *Erickson v. Trinity Theatre, Inc.*, 202 F.3d 1227 (7th Cir. 1994).
5. *U.S. Copyright Act*, 17 U.S.C. § 201(a) (2005).
6. *U.S. Copyright Act*, 17 U.S.C. § 204(a) (2005).
7. *U.S. Copyright Act*, 17 U.S.C. § 201(b) (2005).
8. For examples of how courts interpret "scope of employment" under the work-made-for-hire doctrine, see *Avtec Systems, Inc. v. Peiffer*, 21 F.3d 568 (4th Cir. 1994); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).
9. *U.S. Copyright Act*, 17 U.S.C. § 201(b) (2005).
10. See the definition of "work made for hire" at *U.S. Copyright Act*, 17 U.S.C. § 101 (2005).
11. *U.S. Copyright Act*, 17 U.S.C. § 204 (2005).
12. *U.S. Copyright Act*, 17 U.S.C. § 201(b).
13. Another recent case reached essentially the same conclusion based on remarkably similar facts. *Manning v. Parkland College*, 109 F. Supp. 2d 976 (C.D. Ill. 2000).
14. The same Colorado court, in an unrelated case, ruled that a professor's research article could also be a WMFH. *University of Colorado Foundation, Inc. v. American Cyanamid*, 880 F. Supp. 1387 (D. Colo. 1995).

CHAPTER

The Rights of Copyright Owners

KEY POINTS

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

The owner of the copyright to a specific work has certain "exclusive rights" with respect to the work. In this context, "exclusive" means that the copyright owner may exercise those rights and other individuals may not—unless authorized by the owner. For example, owners hold the right to make copies of the work. If someone else makes an unauthorized copy, it may be an infringement.

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

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

The rights of owners are fundamental to the concept of copyright law. By defining these rights, the law is also defining the range of possible infringements. You can violate the law only by infringing

rights held by the owner. A copyright owner does not control all activities with respect to the work—only those activities specifically encompassed by the law.

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

The first U.S. copyright statute, in 1790, granted only rights to make copies of works. Congress added performance rights in 1831, permitting musicians and playwrights to control live performances and not merely sales of copies of their works. The act of 1909 expanded basic rights to something similar to the current list.

Reproduction and Distribution Rights

The right of reproduction of a work means just what it says. Reproducing a work can occur in many circumstances and by means of a vast range of technological tools. We reproduce works when we photocopy pages from a text, when we quote a sentence into a new article, and even when we take verbatim notes from research materials. We reproduce works when we make a transparency of a cartoon to show in class, when we make a videotape that captures images of paintings on the wall, and when we digitize images for our websites or multimedia works. We reproduce works when we print a page or download an MP3 from the Internet.

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

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

The distribution of works is also surprisingly common. We raise the possibility of distributing copyrighted works when we hand out photocopies in class, make documents available on our website, send e-mail attachments, or even allow people to borrow books from our personal or library collections. A bookstore's survival depends on successful distribution—through sales—of copyrighted works to its customers.

This right extends only to distributions made "to the public." Privately lending a book to a friend is not "to the public," but a library open for general use, or a store looking for maximum sales, is most certainly distribution to the public.

Derivative Works

Of all the rights of the copyright owner, the right to make derivative works may be the most difficult to explain, yet examples are also common. A "derivative work" is a work based upon one or more preexisting works.[2] A common example of a derivative work is a motion picture made from a novel. An author writes the novel and owns the copyright to it. The motion picture studio needs to secure permission from the novelist before preparing a screenplay and shooting the film. Derivatives can be as simple as the toy in a McDonald's Happy Meal that is based on a Disney movie character. Scholarly works rarely generate lucrative movie deals.

A digital version of a photograph showing a cityscape, significantly altered, is a derivative work.

—*Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113 (D. Nev. 1999)

Nevertheless, the routine activities of academics and librarians often involve derivative works. Some examples include a digitized version of an analog recording, image, or text; a teacher's manual and other works to support a textbook; artwork from or inspired by an existing picture or image; and the production of a new ballet or play from an existing story.

The range of possible derivative works is extensive:

- An index to a book
- A sound recording of a musical composition
- An abridgement of a novel
- A translation

Derivative works sometimes create conundrums. Consider a simple example. Ancient Greek poems may have no legal protection in their original version, but a new translation is a derivative. The translation, however, is an "original" work entitled to independent copyright protection. Thus, a movie based on the translation is a derivative of that copyrighted work; permission from the translator is in order. But if the filmmaker turns instead to the original (which is presumably in the public domain), the movie may still be a derivative, but not a violation of either the original or the translation.

Whether the movie is a derivative of the original or is a derivative of a derivative (i.e., the translation), the filmmaker can have copyright protection for the new movie. But be careful. A derivative work made without permission of the owner of the original work (if still under copyright) can be an infringement and may be denied legal protection. The lesson is fairly simple. Be sure to check with the copyright owner before investing time and energy to make a derivative work.

Public Performance and Display

Performances and displays are common occurrences in higher education. A "display" can be the simple showing of a page of text or a picture. A work can be "performed" in many ways: when text is read aloud; when lines of a play are recited or acted; when a videotape or a film is shown on a screen or monitor; or when a song is played or sung aloud. The performance or display can become a possible infringement only when it is "public."[3] A "public" performance or display occurs, among other circumstances, when it is made to a substantial number of persons beyond the usual circle of friends, family, and social acquaintances.[4]

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

The answer to these questions lies in the exceptions to the rights of owners. Understanding the rights of owners requires an appreciation that the law establishes rights, but then tempers them with exceptions or "limitations" that are detailed later in this book. The U.S. Copyright Act includes several important exceptions to the performance and display rights of the copyright owner. Most saliently, a specific exception to the display right of the copyright owner allows the owner of an original work or a lawfully made copy of the work, such as a painting, a poster, or a photograph, to display that work where it is physically located. Thus, the museum can hang art on the walls, teachers can put posters in the classroom, the library can place books in display cases, and you can project slides onto a screen.[5]

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

No similarly broad exception, however, applies to performances. Consequently, no statutory exception covers the prospect of showing a movie in an auditorium or acting out a play on a school stage. On the other hand, a more specific provision of the law permits displays and performances in the context of "face-to-face" classroom instruction.[6] Therefore, teachers and students in the traditional classroom setting may read text, recite poetry, play videos, sing songs, and even show full sets of art slides.

> The generous provision for performances and displays of copyrighted works in the classroom does not apply to distance learning. The TEACH Act restructured the law in 2002 and is examined in detail in chapter 11. A roster of various other exceptions is surveyed in chapter 6.

Moral Rights

A relatively recent addition to owners' rights in the United States is the concept of "moral rights." Moral rights apply only to a narrow class of works.[7] In 1990 Congress amended the Copyright Act by granting "moral rights" with respect to certain "works of visual art."[8] Moral rights in general apply only to original works of art, sculpture, and other works of visual art that are produced in 200 copies or fewer.[9] For example, moral rights may apply to a limited-series lithograph, but likely do not apply to a photograph used in a mass-market magazine.

Moral rights grant to an artist the right to have his or her name kept on the work or to have the artist's name removed from it if the work has been altered in a way objectionable to the artist. Moral rights also give artists limited abilities to prevent their works from being defaced or destroyed.[10]

> Moral rights in the United States apply narrowly and only to some works of art. The concept applies much more broadly under the laws of many other countries. The protection of moral rights is required under the Berne Convention, and the United States adopted the concept with considerable reluctance.

A leading case on the issue of moral rights awarded monetary damages to an artist whose work was intentionally destroyed. The federal district court ruled that the city of Indianapolis violated the moral rights of a sculptor when the city demolished his large, metal work that had been installed on city property.[11]

Digital Audio Transmissions

Music receives peculiar treatment under the U.S. Copyright Act in many respects—including distinctly different rights of public performance. Compositions, or "musical works," long have received copyright protection and the benefit of all fundamental rights. However, sound recordings first gained federal copyright protection only in 1972.[12]

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

The development of the Internet as a medium for delivering music has threatened sales of CDs and other copies of recordings. If a user can receive transmitted performances of selected recordings on demand, the user has little need to buy CDs.[13] To protect the interests of copyright owners

of the recordings, Congress in 1995 granted performance rights to them, but only in the context of "digital audio performances."[14] The statute is enormously complex and runs for pages of convoluted conditions and exceptions.[15] In general, an "interactive" digital system—including a website—that transmits recordings on demand may now implicate the performance rights of both the composer and the performer.

Digital Millennium Copyright Act

The Digital Millennium Copyright Act (DMCA) added two new rights to the arsenal of copyright owners. The law now prohibits the "circumvention" of technological protection systems. That is, if you crack the protective code on a disk or bypass the password interface to access data, you may have violated this new right. The DMCA also barred the removal of "copyright management information" from a copyrighted work. Under some conditions, removing the author's name or stripping away technological conditions for using materials may amount to a new form of copyright violation.

These new provisions added by the DMCA have proven to be more complicated than expected, and they have been used to constrain activity in some most unlikely ways. The DMCA receives a more detailed examination in chapter 15.

Notes

1. *U.S. Copyright Act*, 17 *U.S.C.* § 106 (2005).
2. The statute defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." *U.S. Copyright Act*, 17 *U.S.C.* § 101 (2005).
3. *U.S. Copyright Act*, 17 *U.S.C.* §§ 106(4), 106(5) (2005).
4. *U.S. Copyright Act*, 17 *U.S.C.* § 101.
5. *U.S. Copyright Act*, 17 *U.S.C.* § 109(c) (2005).
6. *U.S. Copyright Act*, 17 *U.S.C.* § 110(1) (2005).
7. Moral rights are provided to a "work of visual art." A "work of visual art" is narrowly defined under the statute. See *U.S. Copyright Act*, 17 *U.S.C.* §§ 101, 106A (2005).
8. *Visual Artists Rights Act of 1990*, Public Law 101-650, *U.S. Statutes at Large* 104 (1990): 5089, 5128–5133, codified at *U.S. Copyright Act*, 17 *U.S.C.* §§ 101, 106A (2005).
9. *U.S. Copyright Act*, 17 *U.S.C.* § 101.
10. *U.S. Copyright Act*, 17 *U.S.C.* § 106A (2005).
11. *Martin v. Indianapolis*, 982 F. Supp. 625 (S.D. Ind. 1997), *aff'd*, 192 F.3d 608 (7th Cir. 1999).
12. *Act of October 15, 1971*, Public Law 92-140, *U.S. Statutes at Large* 85 (1971): 391.
13. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).
14. *Digital Performance Right in Sound Recordings Act of 1995*, Public Law 104-39, *U.S. Statutes at Large* 109 (1995): 336.
15. *U.S. Copyright Act*, 17 *U.S.C.* § 114(d) (2005).

CHAPTER

Exceptions to the Rights of Owners

KEY POINTS

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

One of the most important aspects of copyright ownership is that the rights of owners are not complete. The law grants a broad set of rights to a broad range of materials, then proceeds to carve out exceptions to those rights. The U.S. Copyright Act includes no fewer than sixteen statutory provisions that establish exceptions to the rights of the copyright owner. The broadest and best known of these exceptions is "fair use." Most of the other statutory exceptions are relevant only to certain industries and require careful legal guidance to comprehend and apply. Some exceptions apply only to the needs of the music, cable television, and other commercial industries. These statutes can stretch over many pages of convoluted text.

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

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

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

Section 107: Fair use. This provision may be thought of as the "umbrella" exception. It is broad and flexible in its scope, and it can apply to a potentially unlimited variety of unpredictable situations where someone uses copyrighted works, ranging from simple quotations to complex cutting and pasting of pieces of works into a new collage, multimedia work, or website.[1] Fair use is also an "umbrella" in another sense. It is the exception that one looks to for protection when the other statutes do not apply. For example, if your library is seeking to make copies, but your plans do not fit the required conditions of the next statute, Section 108, you can look to fair use as a possible alternative.

Fair use is the subject of more detailed examination in chapters 7, 8, and 9. Fair use is much debated and maligned, but it is crucial for the daily success of our teaching, learning, and research.

Section 108: Library copying. Unlike the flexibility and general nature of fair use, this statute is more detailed in its application. Section 108 provides that most academic and public libraries, as well as many other libraries, may make copies of certain types of works for specific purposes. Section 108 permits preservation copying, copying of individual works for research and study, and copying for interlibrary loans.[2] Chapter 12 examines this statute in detail and shows that its benefits do not always apply to all copies of all types of works.

The Digital Millennium Copyright Act of 1998 amended Section 108 to clarify when libraries may use digital technology to preserve works in the collection and to reproduce works when their technological format has become obsolete. This point and all of Section 108 are detailed in chapter 12.

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

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

Section 110(1): Displays and performances in face-to-face teaching. This exception is crucial for the functioning and survival of basic teaching methods. It sweepingly allows performances and displays of all types of works in the setting of a classroom or similar place at most educational institu-

Section 110(1) is generous in its application for classroom uses, but always keep in mind that it only permits "displays and performances." It does not authorize making copies of materials, even in the classroom setting. This statute, and the following provision for distance education, are examined in detail in chapter 11.

tions, from preschool to graduate school. It allows instructors and students to recite poetry, read plays, show videos, play music, project slides, and engage in many other performances and displays of protected works in the classroom setting. This exception benefits multitudes of educators and students every day. Its rather simple language includes few restrictions or burdensome conditions.

Section 110(2): Displays and performances in distance learning. Once we turn on the cameras or upload instruction onto websites—transmitting the classroom experience through distance learning—the law makes an abrupt shift. Section 110(2) was fully revised in 2002 with passage of the TEACH Act.[5] While the new law offers many new opportunities, it is also replete with restrictions and conditions. The ability to make displays and performances in distance education is remarkably more constrained than the allowed uses in the classroom. For more detailed information about the TEACH Act, see chapter 11.

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

The Digital Millennium Copyright Act amended Section 117 to clarify that computer software may be reproduced in order to repair the computer on which the program was originally loaded.

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

Section 121: Special formats for persons who are blind or have other disabilities. Congress added this provision in 1996 to allow certain types of organizations to make specific types of formats of published, nondramatic literary works so that they may be useful to persons who are blind or have other disabilities. Educational institutions and libraries may be able to take advantage of this provision by making large-print or Braille versions of some works in their collections. Like so many statutory exceptions in the Copyright Act, this law grants rights only to certain qualified organizations and applies only to a defined class of works.

Section 110(8) is yet another exception for the benefit of blind persons. It allows a performance of a nondramatic literary work to be transmitted by a special transmission device directed to blind or other handicapped persons, if the transmission is made through a governmental body, a noncommercial educational broadcast station, or an authorized radio subcarrier.

—*U.S. Copyright Act*, 17 U.S.C. § 110(8) (2005)

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

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

> Permission may come from the author, publisher, or other party that holds the rights to the work you want to use. You may secure permission directly from the rights holder, or through a licensing agent, such as the Copyright Clearance Center. More information about these possibilities appears in chapter 17 of this book.

Notes

1. See *NXIVM Corp. v. Ross Institute*, 364 F.3d 471 (2d Cir. 2004).
2. *U.S. Copyright Act*, 17 U.S.C. § 108 (2005).
3. *U.S. Copyright Act*, 17 U.S.C. § 109(a) (2005).
4. *U.S. Copyright Act*, 17 U.S.C. § 109(c) (2005).
5. *Technology, Education, and Copyright Harmonization Act of 2002*, Public Law 107-273, *U.S. Statutes at Large* 116 (2002): 1910, codified at 17 U.S.C. § 110(2) (2005).
6. *U.S. Copyright Act*, 17 U.S.C. § 117 (2005).
7. *U.S. Copyright Act*, 17 U.S.C. § 110(6) (2005).
8. *U.S. Copyright Act*, 17 U.S.C. § 111 (2005).

CHAPTER

Fair Use: Getting Started

KEY POINTS

- Fair use is vital to the growth of knowledge.
- Fair use is based on a balancing of four factors set forth in the statute.
- Fair use can apply to a full range of materials and activities.
- Fair use has no definite boundaries.

Fair use has many descriptions and definitions. It can be defined as a limited right to use copyrighted works—normally under confined circumstances—especially for purposes that have social benefits. The statute itself indicates that fair use typically applies to activities such as education, research, news reporting, criticism, and commentary. By fostering these pursuits, the law of fair use can be important for advancing knowledge and communicating ideas. Yet fair use does not allow everything. This chapter offers insights into the meaning and the limits of fair use.

Fair use is both an extraordinary opportunity and a source of constant confusion. Fair use has been the target of steady challenge, and it is the object of enormous praise. Fair use is, for education and research, the most important of the many exceptions to the rights of copyright owners. It is flexible and adaptable to the many unpredictable situations and needs that occur as we pursue diverse projects and apply innovative technologies. Fair use can possess meaning for all types of media and all types of works. The most extraordinary difficulty of fair use, however, is that it often has a new scope and meaning for each set of circumstances.

Fair use can be a bit of a bother, but understanding and applying the law can be vital for the growth of knowledge. Fair use is an essential balance to the widening range of rights that copyright law grants to owners. At various times, fair use has been called a "right" and a "privilege," but whatever the label, the doctrine is a legally sanctioned opportunity. It allows the public to make limited

uses of copyrighted works—uses that might otherwise be infringement—especially for advancing knowledge or to serve some other important social objective.

Fair use can rescue many would-be infringements and turn them into lawful uses, but only within limits. Consider some of the most common uses of copyrighted works. A short quotation from an existing paper into a new report could constitute an unlawful "reproduction" of the quoted portions of the work. Hitting the print key for a paper copy of a web page can also be a reproduction. When a TV news crew broadcasts a downtown festival, the program may include images of outdoor art and clips of music in the background. The broadcast could be a "public performance" or "public display" or other infringement of the art or music. The right of fair use may well rescue many of these activities from legal perdition.

While the flexibility of fair use is one of its greatest strengths, it is also the source of uncertainty. Reasonable people disagree on what is "fair," and no one has a definitive, legally binding "answer" to most fair-use questions. Congress deliberately created a flexible fair-use statute that gives no exact parameters.[1] Fair use depends on the circumstances of each case.[2]

Section 107 of the U.S. Copyright Act sets forth the fundamental law of fair use, and it articulates four factors to evaluate and to balance in the analysis:[3]

- The purpose of the use, including a nonprofit educational purpose
- The nature of the copyrighted work
- The amount of the work used
- The effect of the use on the potential market for, or value of, the original work

These concepts are rooted in a series of judicial rulings stretching back to 1841.[4] Courts examined and refined the doctrine of fair use for more than a century until, in 1976, Congress for the first time enacted a statute securing an explicit place for fair use in the larger equation of American copyright law.[5]

The case of *Folsom v. Marsh* is commonly cited a the wellspring of American fair use. In his elaborat opinion from 1841, Justice Joseph Story isolate variables that impinge on the determination of fai use, and those variables are remarkably similar t the four factors of the current law.

In applying the statutory factors, most of us might agree that short quotations from published works in a scholarly publication are fair use. On the other hand, the greater the excerpt quoted, for example, the less likely it will be "fair." These examples are relatively easy to grasp, but difficult questions surround more complex challenges involving innovative uses of distinctive materials, such as standardized survey instruments, videotapes, or computer software. In recent years, courts have ruled on fair use as applied to rap versions of pop songs, thumbnail images of photographs on the Internet, and contorted Barbie dolls in modern art.[6]

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

Possible "fair use" examples are innumerable. Although fair use can apply to a vast range of situations yet to be imagined, not all uses will be "fair." Moreover, each new situation requires fresh application of the four factors, and—short of an authoritative court ruling—the analysis may never produce easy or absolute answers. For librarians and educators, the state of the law can be even more frustrating. Through nearly two centuries of fair-use jurisprudence, courts have provided little direct guidance about fair use in the library or educational setting. The fair use of materials in scholarly endeavors is rarely the subject of judicial decisions, due probably to high litigation costs and attorney fees. Yet courts are not insensitive to academic needs, and the fair-use statute acknowledges explicitly the importance of educational

needs. The next two chapters of this book examine the court rulings of particular importance to education and librarianship.

> Fair use has an important connection to the registration of copyrighted works. Recall from chapter 3 that registration of a work with the U.S. Copyright Office is not required for copyright protection. Chapter 13, nevertheless, explains how timely registration can allow an owner to obtain greater damages against an infringer. However, educators and librarians can have the benefit of eliminating the additional liabilities if they understand and apply fair use in a good-faith manner.

The Fair-Use Statute

Fair use is the subject of numerous misconceptions and myths. The best place to obtain a clear understanding of fair use is the statute itself—the real source of fair-use law in the United States. You might be surprised to learn that the fair-use statute takes hardly a minute to read and is remarkably simple and clear by comparison to many other federal statutes:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

That is it. That is the statute on fair use. The statute establishes the framework for answering the extensive variety of questions you might have about clipping materials for websites, quoting from articles, making handouts for teaching, or sampling other music in a rap-music recording. Numerous court cases apply that framework to the facts at issue in order to determine whether an activity is fair use or infringement.

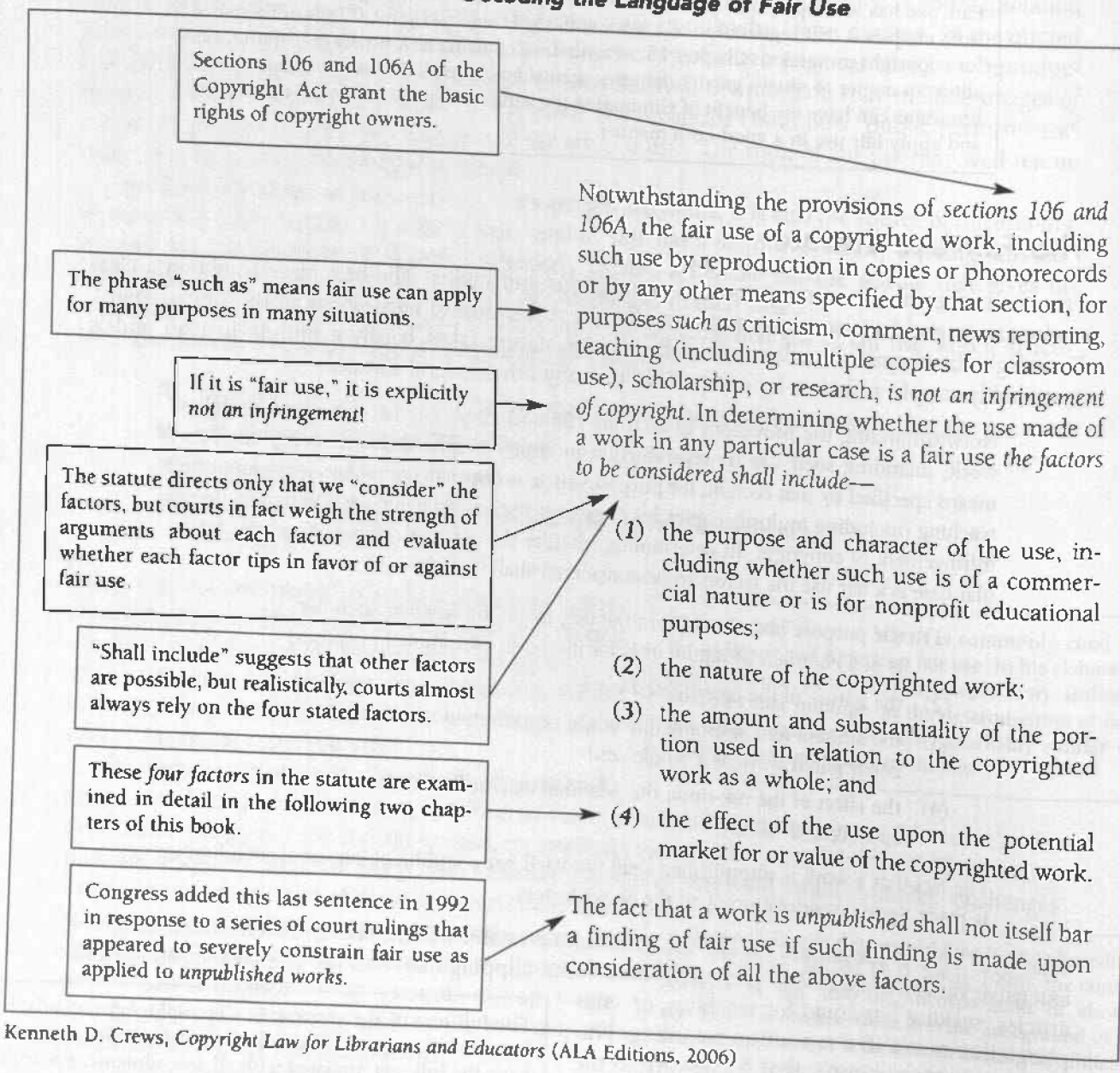
> The full text of the entire U.S. Copyright Act is available from many sources. The U.S. Copyright Office seeks to keep the full text, updated with all amendments, available on its website at http://www.copyright.gov/title17/.

A Closer Look at the Statute

Of course, the law is never so simple. Fair use is the subject of numerous books, thousands of articles, and a growing cascade of court opinions. The following chapters offer detailed insights, but for now, figure 7.1 offers a closer look at the language of the statute itself. Understanding fair use

in any particular setting best begins with an overview of the language from Congress. The words of the statute may be relatively simple, but they are rich with meaning.

FIGURE 7.1 *Decoding the Language of Fair Use*



Kenneth D. Crews, *Copyright Law for Librarians and Educators* (ALA Editions, 2006)

Principles for Working with Fair Use

The following chapters tell more about the meaning of fair use, but always keep in mind the following practical principles for working with this important copyright doctrine.

Fair use is a balancing test. You need to evaluate and apply the four factors, but you do not need to satisfy all of them.[7] The pivotal question is whether the factors overall lean in favor of or against fair use.

Fair use is highly fact-sensitive. The meaning and application of the factors will depend on the specific facts of each situation. If you change the facts, you need to evaluate the factors anew.

Don't reach hasty conclusions. The question of fair use requires evaluation of all four factors. Do not conclude that you are within fair use merely because your use is for nonprofit education.[8] Similarly, a commercial use can also be within fair use after examining all factors.[9]

> Chapter 6 summarizes some of the other statutory exceptions of importance to education and librarianship. A few of them are examined in detail elsewhere in this book.

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

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

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

> A work may be in the public domain for many reasons. Two common reasons are that the copyright has expired, or the work was produced by the U.S. government. Much more about the public domain appears in chapters 2, 3, and 16.

Notes

1. *Copyright Law Revision*, 94th Cong., 2d sess., 1976, H. Doc. 1476.
2. The U.S. Supreme Court has stated clearly that fair use is a case-by-case determination. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985).
3. *U.S. Copyright Act*, 17 U.S.C. § 107 (2005).
4. *Folsom v. Marsh*, 9 F. Cas. 171 (C.C. Mass. 1841).
5. *U.S. Copyright Act of 1976*, Public Law 94-553, *U.S. Statutes at Large* 90 (1976): 2541, codified at 17 U.S.C. § 107 (2005).
6. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2004).
7. "Because this is not a mechanical determination, a party need not 'shut-out' her opponent on the four factor tally to prevail." *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991).
8. *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982).
9. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569.

CHAPTER

Fair Use: Understanding the Four Factors

KEY POINTS

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

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

This chapter offers a general overview of the meaning and significance of the factors. Along the way, the focus will be on issues of special importance to educators and librarians. This overview will demonstrate that educational uses may be more favored by the fair-use doctrine, but "transformative" uses may be better—and they are increasingly common in education and research. The overview will also show that "less is more," but not always. The less you use of a work, the more likely it will be fair use, but using a limited amount still may be an infringement.

Confused? Don't be. You are beginning to discover the flexibility of the law, which is exactly the value of fair use as we seek to extend it to new needs and innovative situations.

Factor One: The Purpose and Character of the Use

The first factor examines whether the use of a copyrighted work "is of a commercial nature or is for nonprofit educational purposes."[3] With that crucial language, Congress explicitly signaled a favoring of nonprofit, educational uses over commercial uses. Photocopying for classroom handouts is more likely to be fair use than are copies for a professional meeting. Posting artwork on a website in connection with a research study is more likely to be fair use than is making the same copies for a commercial art catalog.

> One court found that a "thumbnail" image of a copyrighted photograph on the Internet constituted a "transformative" use because the image could not be enlarged and further reproduced by Internet users.
>
> —*Kelly v. Arriba Soft Corp.*, 336 F3d 811 (9th Cir. 2003)

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

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

Avoid jumping to conclusions. Your wonderful education or research use may still not be fair use. You may have an irrefutable argument on the first factor, but it might be outweighed by your application of the remaining three factors. Similarly, commercial needs are certainly not barred from the benefits of fair use.[4] Many for-profit entities have argued successfully for fair use. They may find that the first factor weighs against them, but the remaining three factors could yet tip the balance.

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

> Consider the critical case of *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987). Although the court ruled that the particular use in question was not fair use, the court did conclude that the first factor, on balance, weighed in favor of fair use. The use was, in one respect, for the commercial purpose of selling books for profit. But the court also found that the quotations from J. D. Salinger's correspondence were for the "research" purpose of writing biographical works. Overall, the first factor tipped in favor of fair use.

Transformative Uses

Courts also favor uses that are "transformative" or that are not mere reproductions.[6] Fair use is more likely when the copyrighted work is "transformed" into something new or of new utility. Examples might be quotations incorporated into a paper, or perhaps pieces of a work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original. The notion of a "transformative" use is increasingly important to education and library work. As we develop multimedia tools and innovative online courses, we will be cutting and pasting, adding commentary, and exploring possibilities with images, text, and sound. Many of these uses may well be "transformative."

Multiple Copies

A teaching purpose gets one more important benefit in the law of fair use. Teaching is, of course, one of the favored purposes stated in the statute.[7] Along with that mention comes this specific language: "including multiple copies for classroom use."[8] For teaching purposes, multiple copies of some works are therefore specifically allowed, even if they are not "transformative." But be careful! This law does not mean that all copies for classroom handouts are fair use. You still need to evaluate and balance the three additional factors. You may, for example, conclude that photocopied handouts of a newspaper article are within the law, while also concluding that copies of book chapters in a coursepack are not fair use.

> In a 1994 decision, the U.S. Supreme Court emphasized the importance of "transformative" uses, but the Court pointedly noted that "the obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution."
>
> —*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)

Factor Two: The Nature of the Copyrighted Work

This factor examines the characteristics and qualities of the copyrighted work being used. The underlying concept is that some works are more appropriate for fair use, while fair use applies more narrowly to other types of works.[9] The "nature of the work" requires an examination of the qualities and attributes of the copyrighted work you are using, and inferring whether the work is of a type that merits greater protection and less fair use—or is the kind of work that fair use is meant for us to build upon to expand the growth and dissemination of knowledge.

Courts have had occasion to draw some lines demonstrating this point. For example, several court decisions have concluded that the unpublished "nature" of historical correspondence can weigh against fair use.[10] The courts have reasoned that copyright owners should have the right to determine the circumstances of "first publication" and whether, when, and how to make the works publicly available. When courts find that a work has been published, they tend to be more lenient with fair use.

Other examples of judicial line drawing with regard to the second factor can be helpful and have proved important for the work of educators and librarians.

> In 1985 the U.S. Supreme Court ruled in *Ha*
> *& Row Publishers, Inc. v. Nation Enterprises*
> fair use applied narrowly to an unpublished b
> manuscript, in order to preserve the "right of
> publication" for the copyright owner. Where
> this "right" come from, and what does it me
> Chapter 16 offers some insights. That cha
> also traces the series of rulings about histor
> manuscripts that the *Harper & Row* decis
> spawned. Confusion about this issue eventu
> led Congress to modify the fair-use statute.

Fiction and Nonfiction

Fair use generally applies more generously to published works of nonfiction. Articles, books, and other works of nonfiction—whether about mathematics, biology, politics, or any other subject—are exactly the types of works for which fair use can have the most meaning. Why? Because the central purpose of copyright law, including fair use, is to allow for the growth of knowledge.[11] To accomplish that goal, we regularly need to use and build upon earlier works. Most often, these efforts depend on using the nonfiction works of earlier scholarship. Courts have recognized this reality.

By contrast, the law gives greater protection—and allows less fair use—for works of fiction.[12] Fair use will be relatively constrained for clips of novels, poetry, and stage plays. You will likely find a similar outcome for uses of other more creative materials, such as art, photography, music, and motion pictures. This rule does not mean that fair use vaporizes. It simply means that the second factor will be more easily construed against a finding of fair use for such works. To compensate in the overall balance, you may need to strengthen the arguments for fair use on the other factors.

Consumable and "Out of Print"

Other principles can help bring practical meaning to the "nature" factor. For example, this factor may weigh against fair use when applied to copies of workbook pages and excerpts from other "consumable" materials. Publishers often produce and sell workbooks with the expectation that they will be fully consumed and repurchased with each use. Copies can undermine the copyright owner's expectations.[13]

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

A more complicated, but common, circumstance has split the authorities. Many copyrighted works go "out of print," even though the copyright may live on for decades. A U.S. Senate report from 1975, and one early case, asserted that if a work is out of print, copying may not harm the market.[14] After all, the copyright owner is not actively claiming a market and seeking sales.

A well-known ruling against the Kinko's photocopying chain in 1991 picked up on a nuance of this principle, finding that the copyright owners of out-of-print materials in that case were in fact offering a license to make copies. That court reasoned that even though a work is out of print, copies of it can still interfere with the marketing of a license to make copies.[15] The court further found that licensing is the primary remaining market for such a work, so the copies may cause a more profound economic harm.[16]

What can you conclude from these cases? Perhaps the main point is that you may often need to investigate the realistic and current marketing of the work you want to use. If it is actively licensed, you might be affecting that market. If the copyright owner has not made reasonable arrangements for licensing, "out of print" may lead to broader fair use.

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

Factor Three: The Amount and Substantiality of the Portion Used

The "amount" factor perhaps sounds like it should be reasonably straightforward. No such luck. The "amount" used of a work is measured both quantitatively and qualitatively.[17] No exact measures of allowable quantity exist in the law. Furthermore, rules about word counts and percentages have no place in the law of fair use. At best, they are interpretations intended to streamline fair use;

at worst, they erode the flexibility that makes fair use meaningful in new situations. Quantity must be evaluated relative to the length of the entire original work and the amount needed to serve a proper "purpose." Amount must also be viewed in light of the "nature" of the work being used.

> One court cautioned that even fleeting image artistic works in a television production might no the "amount" factor sufficiently toward fair use to weigh other factors.
>
> —*Ringgold v. Black Entertainment Television*, 126 F.3d 70 (2d Cir. 1

Some works are appropriate only for more extensive uses. One court has ruled that a journal article alone is an entire work, and copying an entire work, at least in a commercial setting, usually weighs heavily against fair use.[18] The next chapter offers a closer look at that ruling and other cases struggling with the copying of book chapters and other significant portions of textual works. Pictures generate serious controversies in regard to this factor, because a user nearly always wants the full image or the entire "amount." Yet courts have reckoned with copies that are of the full image, but are "thumbnail" size or are of low resolution.[19] The copying may be "quantitatively" large, but may be "qualitatively" limited.

> Chapter 9 summarizes court cases holding that full articles and sizable excerpts from books are beyond the limits of the allowed "amount." Those cases were brought against for-profit companies that could not convince the courts that they had a favored "purpose." The outcome of the analysis can shift greatly if the purpose is for nonprofit education or research.

Quantity and Quality

The tension between "quantitative" and "qualitative" measures is most vividly demonstrated by the concept of using the "heart of the work." In the *Harper & Row* case in 1985, the Supreme Court analyzed whether *The Nation* magazine had exceeded fair use when it quoted some 300 words from Pres. Gerald Ford's then-unpublished memoir into a news article. The Court ruled that while the quotations might be quantitatively small, they were the pieces of the book that a reader would likely find most interesting and were therefore the "heart" of the manuscript. The Court reasoned that the "amount" factor thus weighed against fair use.[20]

> Sometimes copying the full work can be within fair use. A com pany copied an entire software program made for a Son Playstation in order to reverse engineer it and create an emu lator. The court ruled that the "amount" factor weighed only slightly against fair use, because the Sony program never became part of the new emulator.
>
> —*Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000)

Motion pictures are also problematic because even short clips may borrow the most extraordinary or creative elements in them. One may reproduce only a small portion of any work but still take "the heart of the work." The "substantiality" concept represents such a qualitative measure that may weigh against fair use.

Practical Sense

How do you make reliable and practical sense of the "amount" factor? Indeed, shorter excerpts from works are more likely than longer pieces to be within fair use. Frankly, in most situations, that one simple rule is likely to be the most important one. Yet sometimes even the briefest slice may constitute the "heart of the work." You can strengthen your claim of fair use by tying the "amount" to the educational or research "purpose" identified with respect to the first factor. If you can meet

your needs with only excerpts of the article or movie, you are best advised to clip and share only those elements. But if you absolutely have to have the entire work, be sure you have a strong "purpose" argument and are ready to relate the use of the full work to meeting clear needs.

Bear in mind that even if you are copying the "whole article" or digitizing the crucial chariot race from *Ben Hur* (perhaps the "heart" of the film), this factor is only one of four factors that must be balanced together to reach a conclusion. Even if this factor weighs against fair use, your use may still be fair.

Factor Four: The Effect of the Use on the Market

Effect on the market is perhaps even more complicated than the other three factors. Some courts have called it the most important factor, although that statement is difficult to justify.[21] This factor fundamentally means that if you make a use for which a purchase of an original theoretically should have occurred—regardless of your personal willingness or ability to pay for such purchase—this factor may weigh against fair use. Occasional quotations or photocopies may pose little significant market harm, but full reproductions of software and videotapes can make direct inroads on the potential market for those works.

> The U.S. Supreme Court, in the *Harper & Row* case, called the "effect" factor "most important." Realistically, though, one can see that in applying fair use narrowly to an unpublished book manuscript, the Court put at least comparable weight on the unpublished "nature" of the work (i.e., the second factor). Many other cases have cited that language from the Supreme Court, but a close reading suggests that those courts are also just giving added weight to the factors that have greatest prominence under the given facts.

The easy cases occur when the use directly replaces a potential sale of the copyrighted work. One court has ruled that downloading music from the original, free version of Napster substituted for sales of CDs, and so found demonstrable market harm.[22] In the lawsuit against Kinko's, another court ruled that when Kinko's made and sold copies of book chapters, the company eliminated any realistic likelihood that students would ever buy those books.[23] Harder cases involve uses that do not interfere with simple sales, but might undercut licensing. The photocopying of isolated articles might not replace subscriptions to the entire journal, but the copying might interfere with the system of permissions and collection of fees put in place by the publisher or other rights holders.[24]

> Chapter 9 includes a summary of *American Geophysical Union v. Texaco Inc.* The court ruled that the existence of systems for the relatively easy licensing of rights to make copies of journal articles established a market that the user was harming. This case, and the licensing system, are examined more fully in chapter 9.

Consider the many ways that market "effect" can vary greatly. You find a document properly made available on the Internet. The copyright owner clearly has imposed no restrictions or conditions on access and is asserting no claim to payment for use. You copy, download, or print the materials in full. You have probably done nothing to harm any realistic market. In another situation, you are creating a document that you want to post on a website. You want to include in your document sizable quotations and copies of various charts and images from other sources. The "effect" factor may again support the application of fair use, because moving those pieces into a new project and embedding them in the context of an analytical study are not likely to interfere with a realistic market. The more you alter the context of use and surround the works with original criticism or comment, the less you are likely impeding a market that the copyright owner can control.

Chapter 11 examines the TEACH Act for distance learning. While that law is not at all the same as "fair use," it does include some analogous concepts. For example, the TEACH Act explicitly does not allow uses of materials that are marketed for digital distance education. Fair use has no such bar. On the other hand, the fact that the owners are targeting a specialized market means that such a use is more likely to harm the defined market—and hence less likely to be within fair use.

These issues are challenging for courts, too, and they have devised some shortcuts for applying the "effect" factor. For example, this factor is closely linked to "purpose." If your purpose is research or scholarship, market harm may be difficult to prove, and courts will generally apply the factor somewhat generously. If your purpose is commercial, however, some harm to the market is presumed.[25] Still, one can imagine that the rules become blurred when you have an "educational" purpose, but the work you are using is one that is created and marketed especially for the academic community. The hard reality is that even some educational uses have direct and adverse market consequences.

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

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

Like almost all matters of applying fair use, this fourth factor depends on an array of facts. Those facts may be the circumstances of your use, and they are most certainly about the active or likely marketing of the work you plan to use. You clearly need to have a firm grasp of your situation, and you must investigate facts about the work in question. You might also find that markets change. A work may have no market today, but find a new market tomorrow. A work may be a best seller this year, but be out of print in the near future. Testing the market might also mean retesting it again in future applications of fair use.

Notes

1. *U.S. Copyright Act of 1976*, Public Law 94-553, *U.S. Statutes at Large* 90 (1976): 2541, codified at 17 *U.S.C.* § 107 (2005).
2. The use of the word "include" when listing factors of fair use in the statute denotes that the factors listed are not an exclusive list. *U.S. Copyright Act*, 17 *U.S.C.* § 107 (2005).
3. *U.S. Copyright Act*, 17 *U.S.C.* § 107.
4. "A commercial use weighs against a finding of fair use but is not conclusive on the issue." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).
5. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994).
6. Under this factor, courts often ask whether the new work merely replaces the object of the original creation "or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message, it asks, in other words, whether and to what extent the new work is 'transformative.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579.
7. *U.S. Copyright Act*, 17 *U.S.C.* § 107.
8. *U.S. Copyright Act*, 17 *U.S.C.* § 107.

9. This factor calls for recognition that some works are closer to the "core of intended copyright protection" than others, with the consequence that fair use is more difficult to establish when the former works are copied. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586.
10. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 480 (2d Cir. 2004).
11. U.S. Constitution, art. I, sec. 8, cl. 8.
12. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586.
13. *Copyright Law Revision*, 94th Cong., 2d sess., 1976. H. Doc. 1476.
14. *Copyright Law Revision*, 94th Cong., 1st sess., 1975. S. Doc. 473; *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986)
15. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).
16. *Basic Books, Inc., v. Kinko's Graphics Corp.*, 758 F. Supp. 1522.
17. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587; *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 630 (9th Cir. 2003).
18. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).
19. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).
20. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564–566 (1985).
21. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566.
22. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).
23. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).
24. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).
25. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539.

CHAPTER

Getting Comfortable with Fair Use: Applying the Four Factors

KEY POINTS

- Few court rulings about fair use are directly applicable to education and libraries.
- A variety of other court rulings concerning fair use offer important guidance for teaching and research.
- Fair use ultimately depends on a balancing of the four factors in the statute as applied to specific facts.
- We can begin to discern the meaning of fair use for many common needs.

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

Whatever the reason, the matter is resolved long before a judge has a chance to tell us what the law really is. Consequently, those of us working in the field of education and librarianship are left to infer what we can from the few cases that have some relevance. Courts have expounded on fair use in several cases that offer analogous situations.

A prime example involves Kinko's, which was sued years ago for making photocopied course-packs without permission.[1] The court rejected the defense of fair use, in large part because Kinko's was a for-profit entity, photocopying for a commercial purpose. Imagine a similar case, not against Kinko's, but against a university. Copying for nonprofit, educational purposes may sway the first factor in the opposite direction. A court may well find that some copying in the hands of the educational institution could be fair use. But we do not have that case. We can only use our best judgment and infer the law's possible meaning.

The author of this book has written on several other occasions about the significance of the *Kinko's* case. For his opinion about the meaning of the case in the educational setting, written shortly after the court handed down its ruling, see Kenneth D. Crews, "Federal Court's Ruling against Photocopying Chain Will Not Destroy 'Fair Use,'" *Chronicle of Higher Education*, April 17, 1991, A48.

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

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

- The full text of newspaper articles posted to an unrestricted website—even to further a social cause—is not fair use.[3]
- Playing music in the background while phone callers are placed "on hold" is not fair use.[4]
- Glimpses of photographs in the background of a movie or television production have left courts seemingly divided. One court ruled that if the images are fairly prominent in the set for a cable TV show, they are not fair use.[5] Another court ruled that fuzzy images in a motion picture scene are fair use.[6]
- Uploading and downloading music files through the original Napster is not within fair use.[7]

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

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

Quoting in Publications

SCENARIO

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

Of course, whether or not Professor Tran is staying within the boundaries of the law will depend on a multitude of variables, but start with the most familiar situation and move to the more complex. Begin with simply quoting from one work into her new historical study. To help us through the four factors, we can find some relevant cases, such as *Penelope v. Brown*.[8]

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

Purpose: The court found that the second book greatly expanded on pieces borrowed from the first, making the use "productive." The court also found little commercial character in the use of the small excerpts, and it found no improper conduct by Brown. This factor favors fair use.

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

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

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

The notion of a "productive" a breed of the "transformativ examined in chapter 8. Cou more generous with fair use the new work "transforms original and gives it a new pu or function—or if the use buil the original in some "produ manner. In either instance court is allowing greater fair u order to "promote the progres knowledge and creativity.

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

The case of *Maxtone-Graham v. Burtchaell* suggests how Professor Tran might test the limits of the law with lengthy quotations.[9] In 1973 an author wrote a book based on interviews with women about their own pregnancies and abortions. Sometime later, another author prepared his own book on the same subject and sought permission to use lengthy excerpts from the first work. The first author, the plaintiff in this case, refused permission, and the defendant proceeded to publish his work with the unpermitted excerpts. The borrowed material encompassed more than 4.3 percent of the plaintiff's work, including many insightful passages from the interviews. The court relied on the four factors to determine whether the lengthy quoting was fair use.

Notice that the user of the origi work first sought permission often a good approach. But t request was also denied—often common result. Even so, fair u was possible. Sometimes the deni of permission can mean that fa use is the only means for using th work, and courts seem to be espe cially sympathetic if the use ha some social good, such as exam ining important issues.

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

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

Amount: Quoting 4.3 percent of the plaintiff's work was not excessive, and the verbatim passages were not necessarily central to the plaintiff's book. Again, this factor supports fair use.

Effect: The court found no significant threat to the plaintiff's market. Indeed, the court noted that the plaintiff's work was out of print and not likely to appeal to the same readers.

If lengthy quotations can be within fair use, then would using large portions of copyrighted works in the context of teaching materials also be okay? Consider the case of *Marcus v. Rowley*.[10] A schoolteacher prepared a 24-page pamphlet on cake decorating for her adult education classes. Eleven of those pages were taken directly from a copyrighted pamphlet prepared by another teacher. Even though both pamphlets were of limited circulation and were for teaching purposes only, the court held that the copying was not fair use. Important factors in this case were that the copying was a substantial part of the original pamphlet; that the copying embraced the original pamphlet's most significant portions; and that the second pamphlet competed directly with the original pamphlet's educational purpose. Our fictitious Professor Tran could be in trouble if she copies extensive materials that are created specifically to serve a competing educational market.

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

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

Copying for Coursepacks

SCENARIO

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

American courts have yet to rule on the question of fair use for paper or electronic copies made for educational purposes. But two cases from the 1990s examined fair use for commercial photocopying, and they offer some analogous insights. The first case is the landmark ruling in *Basic Books, Inc. v. Kinko's Graphics Corp.*[11]

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

Kinko's was held to be infringing copyrights when it photocopied book chapters for sale to students as "coursepacks" for their university classes.

Purpose: When conducted by Kinko's, the copying was for commercial purposes, and not for educational purposes. Therefore, this factor weighs against fair use.

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

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

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

Three of the four factors leaned against fair use. The court held that Kinko's therefore had committed infringement

The second case is *Princeton University Press v. Michigan Document Services, Inc.*[12] A private copy shop created and sold "coursepacks" under circumstances similar to those in *Kinko's*, and the copy shop was also found to have acted outside the limits of fair use. This case sharply divided the panel of appellate judges who ruled on it. Nevertheless, the court's reasoning was similar to the *Kinko's* decision, with at least one important difference: the court gave most of its attention to the question of market harm. The court was particularly persuaded by the availability of options for licensing the materials—or securing permission from the copyright owners—before making the copies. The court also noted that securing permissions had become standard procedure among commercial shops making photocopied coursepacks.

The *Princeton* case attracted strong attention from the academic community when the court of appeals first ruled that the copying indeed was within fair use. The publishers promptly appealed to the full panel of thirteen judges of the Sixth Circuit Court of Appeals. Even on that final review, only eight judges concluded that the copying was not fair use. Five judges dissented, finding that the copying should be allowed. If experienced judges disagree about the law, we should not be surprised when educators and librarians also debate the scope and application of fair use.

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

What if Professor Tran wants to post the materials to a secured website or distribute them to students on a CD-ROM? Fundamentally, fair use applies to electronic uses just as it does to paper copies. However, digital copies are easily copied, uploaded, and shared without realistic limits. To help her case for fair use, Professor Tran should restrict access to the materials by means of password protections or other controls, and she should take the occasion to help her students understand the copyright implications of any misuse.

Single Copies for Research

SCENARIO

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

In general, single, isolated copies of brief items should easily fall within fair use. In the context of nonprofit education and research, they are probably within the law. The case of *American Geophysical Union v. Texaco Inc.*, however, is a reminder that the limits of fair use can arise in the seemingly most innocuous circumstances.[13] The case involved the photocopying of individual journal articles by a Texaco scientist for his own research needs. The court held that the copying was not within fair use.

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

Purpose: While research is generally a favored purpose, the ultimate purpose was to strengthen Texaco's corporate profits. Moreover, exact photocopies are not "transformative"; they do not build on the existing work in a productive manner.

Nature: The articles were factual, which weighs in favor of fair use.

Amount: An article is an independent work, so copying the article is copying the entire copyrighted work. This factor weighs against fair use.

Effect: The court found no evidence that Texaco reasonably would have purchased more subscriptions to the relevant journals if it had not copied them, but the court did conclude that unpermitted photocopying directly competes with the ability of publishers to collect license fees. According to the court, the Copyright Clearance Center (CCC) provides a practical method for paying fees and securing permissions, so the copying directly undercut the ability to pursue the market for licensing through the CCC.

> Chapter 17 provides guidance and insight about seeking permissions, and it includes additional information about the role and function of the Copyright Clearance Center.

Despite an impassioned dissent from one judge who argued for the realistic needs of researchers, the court found three of the four factors weighing against fair use in the corporate context. This case was a clear signal to many for-profit entities that they ought to consider securing licenses that cover their copying and other uses of many copyrighted works. This is especially true because the CCC offers a "blanket license" at one annual fee for many corporate clients.

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

Cutting and Pasting for Multimedia Projects

SCENARIO

Professor Tran wants to create an innovative teaching tool by cutting and pasting a variety of works into a single cohesive set of materials for the students enrolled in her classes. She might place a CD-ROM of her project in the library collection for the local students, and she might post her project to a secured website for students enrolled in her course through distance education.

If the "multimedia" tool that Professor Tran is creating is little more than copies of reading and other materials, then her analysis of fair use may be much like the scenarios involving coursepacks. She is generally just making a digital version of the familiar print materials. Similarly, if she is clipping pieces and excerpts of materials, arranging them in an innovative manner, and enveloping them with original commentary and instructional content, then she may be making a high-tech version of a book or teaching materials.

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

wrapping the use in commentary and criticism, she is on safer ground than she would be with straight copying.

Perhaps most significant for Professor Tran, she can strengthen her claim of fair use by tightly limiting access to the students enrolled in her course. Her options for controlling access are limited only by imagination and opportunity. Professor Tran has many high-tech and low-tech options for restricting access. Among the possibilities:

- The CD-ROM may be available in the library, but only students in the course are allowed to check it out.
- She might make a few copies of the CD-ROM and distribute them directly to students, but admonish them against additional copies or other misuse.
- She might install the content on a network server that has password controls, allowing only enrolled students to retrieve the materials.

As the scenario unfolds, Professor Tran is de oping a multimedia teaching tool that students be able to access on the Internet or other deli system. The scenario is starting to have the loo a modern distance-learning course. Fair use allow instructors to copy, upload, and trans materials in distance education. The TEACH A a new law that does not replace fair use, but inst offers an alternative set of rules for using co righted works in distance education. For m about the TEACH Act, see chapter 11.

A few recent court cases remind us that one can still face limits on fair use, even in a controlled, academic setting.

In *Los Angeles Times v. Free Republic*, the court ruled that posting the full text of newspaper articles to a website is not fair use.[14] Professor Tran, by contrast, is proposing to use materials for nonprofit education and only with restricted access. She can strengthen the possibilities of fair use by using only excerpts of articles. She can avoid issues of fair use entirely by linking to databases that might be available from her library and that include the materials she wants her students to read.

In *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, the court ruled that digital cutting and pasting of photographic elements into an innovative montage of the Las Vegas skyline was not fair use.[15] The purpose was to create a commercial product for sale to the public. Professor Tran, by contrast, is producing teaching materials only to serve her instructional needs. Notice that should she decide to publish her creative materials as a commercial product, she likely needs to anticipate a contraction of fair use.

In *NXIVM Corp. v. Ross Institute*, the court ruled that fair use could allow someone to produce a critical analysis of copyrighted materials used in business seminars.[16] Fair use allowed the defendant to make a critical analysis of the materials and to post that critique on the Internet—even if it included approximately seventeen pages from the 500 pages in the original materials. The court was especially inclined to allow substantial copying and public accessibility when the use was in the context of original criticism and analysis. This case is important reassurance to Professor Tran, if she is not simply making straight copies, but is including selected excerpts amidst original teaching materials.

Flexibility of Fair Use

As Professor Tran pursues a range of activities, from simple quoting to creating innovative teaching materials, she is steadily encountering questions about fair use. The answer is always: "it depends." The most important good news is that fair use is flexible. Fair use can apply in all of these situations and more. It can apply to a full range of materials, from text and software to music and art. Fair use has enormous potential to support Professor Tran's work.

When Congress enacted the fair-use statute in 1976, it recognized that educators and librarians would need to make difficult judgments about fair use. The Copyright Act therefore includes some important protection for these users who act in good faith as they strive to learn about and apply fair use. Chapter 13 provides the details.

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

Acting in Good Faith

Should Professor Tran actually work with the factors of fair use and make a well-reasoned decision, the law will give her an important reward. As she works through the issues, Professor Tran is likely to feel a burden of responsibility and an accompanying risk of legal liability. Indeed, chapter 13 of this book will tell of the severe consequences that may befall an infringer of someone's copyrighted work. Congress recognized that educators and libraries face this dilemma. The law therefore includes an important provision that eliminates much of the financial liability Professor Tran could face, but she will have that advantage only if she applies the law of fair use in a reasonable and good-faith manner.

Chapter 13 will offer more details, but for now the message is clear: if Professor Tran learns and applies the factors of fair use, she can have the benefit of greatly reduced liability. But do not overlook the better and more direct message: if Professor Tran learns and applies the factors of fair use, she is also very likely acting within the law and may face no liability at all.

Notes

1. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).
2. *Higgins v. Detroit Educational Broadcasting Foundation*, 4 F. Supp. 2d 701 (E.D. Mich. 1998).
3. *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1862 (C.D. Cal. 2000).
4. *Infinity Broadcasting Corp. v. Kirkwood*, 63 F. Supp. 2d 420 (S.D.N.Y. 1999).
5. *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).
6. *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998).
7. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).
8. *Penelope v. Brown*, 792 F. Supp. 132 (D. Mass. 1992).
9. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987).
10. *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983).
11. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).
12. *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997).
13. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).
14. *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1862 (C.D. Cal. 2000).
15. *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113 (D. Nev. 1999).
16. *NXIVM Corp. v. Ross Institute*, 364 F.3d 471 (2d Cir. 2004).

CHAPTER

10

The Meaning of Fair-Use Guidelines

KEY POINTS

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

When courts developed the law of fair use, and when Congress enacted the first fair-use statute in 1976, they made clear that the law of fair use was never intended to anticipate specific answers for individual situations. Indeed, Congress acted deliberately to assure that it would not "freeze" the doctrine of fair use by giving it a narrowly defined meaning. As a result, the law calls on each of us to apply a set of factors to each situation. Because of the variability of the law, reasonable people can and will disagree about the meaning of fair use in even the most common applications.

Evolution of Guidelines

Educators, librarians, and others had expressed great concern about the possible ambiguity of fair use even before Congress enacted the first fair-use statute in 1976. Congress made clear that it would not make the law more specific, and it urged interested parties to meet privately and to negotiate shared understandings of fair use. The result was a series of guidelines that attempt to define fair use as applied to common situations. The first of these guidelines emerged in 1976 on the issues of photocopying for classroom handouts and the copying of music.

Through the years, various groups have devised guidelines on other issues, from off-air videotaping to library copies. In the 1990s, such guidelines gained renewed prominence with the formation of the Conference on Fair Use (CONFU). CONFU was an outgrowth of the National Information Infrastructure initiative under the Clinton administration, and it involved participation from a broad range of interests: teachers, librarians, industry and government officials, and many others. The final report from CONFU proposed three more guidelines for newer technological issues.

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

Major Guidelines, 1976–1998

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

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

Guidelines for Educational Uses of Music, April 1976. (U.S. Congress. House. *Copyright Law Revision*, 94th Cong., 2d sess. [1976]. H. Doc. 1476: 70–71.)

Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes, October 1981. (U.S. Congress. *Congressional Record*, vol. 127, no. 18, pp. 24,048–49 [1981]. Reprinted soon after at U.S. Congress. House. *Report on Piracy and Counterfeiting Amendments*, 97th Cong., 1st sess. [1982]. H. Doc. 495: 8–9.)

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

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

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

Fair-Use Guidelines for Electronic Reserve Systems, March 1996. (Originally developed by participants in CONFU but not included in the final report. Available at http://www.mville.edu/Administration/staff/Jeff_Rosedale/guidelines.htm.)

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

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

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

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

These guidelines are reprinted in host of different books and other publications. Many of them, especia the earliest guidelines, are availa on the website of the Music Libr Association at http://www.lib.j .edu/org/ mla/Guidelines/.

Yet another set of copyright guideli focuses on making copies for inte brary loans. These guidelines are about fair use, but instead are an int pretation of a provision of Section 1 They are examined in chapter 12.

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

The Example of Electronic Reserves

Among the guidelines listed above is a document from 1996 that attempts to articulate the meaning of fair use for electronic reserve systems. In some respects, these systems might be seen as a variation on the library service of making and delivering copies of items. Section 108 of the Copyright Act, as detailed in chapter 12 of this book, allows such copying. But Section 108 is generally limited to single copies, and it does not apply to delivery systems that involve multiple users and multiple copies.

One might wonder if allowing students to access materials from outside the library building might be a form of distance learning. The TEACH Act, summarized in chapter 11, offers new terms on which educational institutions can copy and transmit copyrighted materials to students. E-reserves systems typically include copies of articles and book chapters that students access from campus or from afar in connection with course requirements. But the TEACH Act allows such "displays" only in an amount comparable to that which would be used in the classroom. In other words, if students would conventionally read the assigned text outside the classroom, the TEACH Act does not allow it in distance education.

Once again, we are faced with a common situation in the law. None of the specific statutory exceptions covers our particular needs. We may consequently turn to fair use. Across the country, different libraries, publishers, and copyright experts have reached widely differing conclusions

about the meaning of fair use for electronic reserves. These issues were a priority during the CONFU proceedings. A subgroup of CONFU, including the present author, drafted the 1996 guidelines mentioned above. Due to a sharply divided membership, however, the final report did not include the guidelines.

What does the absence of guidelines on e-reserves mean? The lack of formal guidelines can be a blessing. Libraries should return to the four factors of fair use. Some of the scenarios in chapter 9, particularly as related to classroom copies and coursepacks, suggest much about the meaning of the factors as applied to copies of articles and chapters and other works that are digitized and delivered to students on library systems.

> Jeff Rosedale of Manhattanville College Library has prepared the Electronic Reserves Clearinghouse. His valuable website has links to systems, policies, and information from numerous libraries and other organizations on the subject of electronic reserves. See http://www.mville.edu/Administration/staff/ Jeff_Rosedale/.

The lack of guidelines on e-reserves actually opens new possibilities for librarians to implement their own policies or procedures. Libraries might explore password restrictions on access, limit copies to only brief excerpts, or perhaps allow only works that are already in the library collections. Libraries can design other limits into the system, tying those parameters to the statutory factors, in order to create local "guidelines." In fact, that is exactly what libraries have done. The standards of fair use for e-reserves vary greatly across the country. As a result, we are able to experiment with possibilities and to learn from one another's efforts.

What to Do with the Guidelines?

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

Whatever the possible benefits of guidelines, the author of this book has written at length about their shortcomings. Among the deficiencies:

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

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

of detailed conditions in them. Implementing standards from the guidelines is often more demanding than struggling with the flexibility of fair use.

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

> Chapter 13 includes more details about the liabilities that can arise in a copyright infringement lawsuit, as well as the reduction of liabilities in the event of a good-faith application of fair use.

CHAPTER

12

Libraries and the Special Provisions of Section 108

KEY POINTS

- Section 108 allows many libraries to make copies of materials for preservation, private study, and interlibrary loan.
- The opportunities under Section 108 do not extend equally to all types of works.
- Section 108 requires compliance with various requirements, but most libraries should be able to meet them and enjoy the benefits of the law.

American copyright law includes numerous specific provisions limiting the rights of copyright owners, including a provision specifically applicable to libraries. Section 108 of the Copyright Act allows libraries to make and distribute copies of materials for specified purposes under specified conditions. Although meticulous, it can offer important support for library services.[1]

Section 108 allows libraries, within limits, to make copies of many works for the following three purposes: copies for the preservation of library collections; copies for private study by users; and copies to send pursuant to interlibrary loan (ILL) arrangements. Once it has determined that the copying is for one of those purposes, the library must then resolve these questions:

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

Eligibility Requirements of Section 108

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

- The library must be open to the public or to outside researchers. Nearly every public and academic library will meet this standard.
- The copying must be made "without any purpose of direct or indirect commercial advantage." This requirement may exclude copies that are made by a public library, but that are for a commercial document-delivery service. It may also mean that a corporate library may be eligible to use this law, if the copies themselves are not specifically for commercial uses.
- The library may make only single copies on "isolated and unrelated" occasions and may not under most circumstances make multiple copies or engage in "systematic reproduction or distribution of single or multiple copies."[2]
- Each copy made must include a notice of copyright.

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

Although Section 108 generally permits only single copies, the provisions that apply to preservation copies allow up to three copies of a single work. This chapter details the preservation requirements.

Since the passage of Section 108 in 1976, libraries and publishers have debated whether the "notice" on the copy must be the formal copyright notice found on the original (such as the notice near the beginning of this book) or some general indication that copyright law may apply (such as "use of this material is governed by copyright law").

The Digital Millennium Copyright Act, enacted in late 1998, resolved this dilemma.[3] All copies made under Section 108 must now include the copyright notice as it appears on the original. If no notice appears on the original, then the copy must only include "a legend stating that the work may be protected by copyright."

Works That May Be Copied

Section 108 sets specific limits on the types of materials that libraries may copy. The types of materials vary, depending on whether the copies are for preservation or private study. If the library is making the copies for a patron's private study or for sending in interlibrary loan, copies of the following materials are *not* allowed:

- Musical works
- Pictorial, graphic, or sculptural works
- Motion pictures or audiovisual works

Be careful to distinguish between "musical works" and "sound recordings." Under copyright law, these are two different types of works. A "musical work" is the musical composition. A musical work can be in the form of a printed score or a recording of a performance. Under Section 108, copying a sound recording of music may not be permitted. But a "sound recording" of spoken words is a version of a literary work. Copying that recording may be allowed under Section 108. Chapter 14 gives much more insight into issues of music and sound recordings.

The law then allows libraries to make copies of a wide range of other materials in accordan with Section 108:

- Other types of works that are not specifically excluded by the preceding list. Such works may include the contents of journals, newspapers, books, and other textual works, regardless of whether they are in analog or digital formats. The scope of allowed works could also extend to computer software, sound recordings, dance notations, and a wide range of copyrightable materials.
- Audiovisual works "dealing with news."
- Pictures and graphics "published as illustrations, diagrams, or similar adjuncts" to works that may otherwise be copied. In other words, if you can copy the article, you can also copy the picture or chart that is in the article.

By contrast, if the copies are made for the preservation of library materials, the scope of materials is not limited. Thus, for example, while most audiovisual works may not be reproduced for a patron's study, they may be reproduced for preservation.

Copies for Preservation

Once the library is qualified to use Section 108, and proper materials are identified, the library must next meet the various conditions for each use. Under what conditions may the library make copies for preservation?

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

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

If the work was previously published, preservation copies are permitted upon meeting both of these conditions:

- The copies are solely for replacement of works that are damaged, deteriorating, lost or stolen, or if the format of a work has become obsolete.
- The library conducts a reasonable investigation to conclude that an unused replacement cannot be obtained at a fair price.

What is an "obsolete" format? The statute def the notion to mean that the machine or de necessary for that format "is no longer manu tured or is no longer reasonably available in commercial marketplace." In other words, if y cannot find newly made or sold players, you n be able to make preservation copies of your c lection of eight-track disco music.

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

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

Copies for Private Study

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

If the copy is of an article, book chapter, or other short work, these conditions apply:

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

Does the library have to actually know that the copy is for private study and not for a business or other purpose? No. The librarian taking the order for the copy is probably best to know nothing about the purpose of the use. Once the librarian has reason to know that the copy is for some purpose other than private study, the library's copying under Section 108 may need to end.

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

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

The notice on order forms is usually a simple warning statement about copyright protection. By contrast, the notice that libraries must display at the place where orders are received is detailed in regulations issued by the U.S. Copyright Office. See *Code of Federal Regulations*, title 37, vol. 1, sec. 201.14 (2005).

Copies for Interlibrary Loan

Section 108 also allows libraries to make copies and to receive copies of materials in the name of interlibrary loan services. For the library that is making and sending the copies, the rule for ILL is fairly straightforward. In general, the copy must be made pursuant to the standards already detailed in this chapter. The copies requested through ILL are generally articles, chapters, and other short works that are copied for purposes of private study and research. Section 108 outlines the circum-

stances when a library may make such copies, whether the end user is present at the library or is making the request through ILL.

The rules for the library receiving the copy, however, are a little different. That library must adhere to this standard: the interlibrary arrangements cannot have, as their purpose or effect, that the library receiving the copies on behalf of requesting patrons "does so in such aggregate quantities as to substitute for a subscription to or purchase of such work." The point of this language is to remind libraries that when the demand for a journal or other work reaches a sufficient amount, the library ought to consider buying its own instead of relying on ILL. The problem, of course, is that the law does not specifically define the limit.

To help clarify the limit on a library's ability to receive copies, Congress established the National Commission on New Technological Uses of Copyrighted Works (CONTU) shortly after enacting Section 108. CONTU issued its final report in 1979, and proposed guidelines that bring specificity to the quantity limits of the law. The CONTU standards generally allow a library, during one calendar year, to receive up to five copies of articles from the most recent five years of a journal title.

> The CONTU guidelines are hardly complete. They encon only copies of recent journal articles. Libraries are left to own good judgment about the limits of the law as applie older materials, book chapters, and other works. For the full of the CONTU final report, see http://digital-law-online. CONTU/contu1.html.

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

Copier Machines in the Library

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

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

> A form of notice common posted on "reproducing equi ment" in libraries states: "Noti The copyright law of the Unit States (Title 17, U.S. Code) go erns the making of photocopi or other reproductions of cop righted material. The perso using this equipment is liable fo any infringement."

Notes

1. *U.S. Copyright Act*, 17 *U.S.C.* § 108 (2005).
2. *U.S. Copyright Act*, 17 *U.S.C.* § 108(g) (2005).
3. *Digital Millennium Copyright Act*, Public Law 105-304, *U.S. Statutes at Large* 112 (1998): 2860.

CHAPTER

13

Responsibilities, Liabilities, and Doing the Right Thing

KEY POINTS

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

So far, this book has generally avoided the topic of liability for copyright infringement. This sidestepping of liability is no accident. The fundamental objective of this book is to educate readers and prepare them to handle copyright situations in an informed and good-faith manner, thus helping to avoid liability.

Yet the time may come when you might have infringed the rights of a copyright owner. For example, you "reproduced" a protected work without permission and in a manner that is not within fair use or another exception. You may in another situation be on the other side of the scenario; perhaps you are the copyright owner, asserting a claim against a purported infringer.

What Are the Legal Risks?

What is at stake in an infringement action? In the unlikely event of a court's finding that you have committed an infringement, the consequences can be staggering. An injunction can bar further unlawful uses; the court can impound the copies and your equipment; and you can be ordered to reimburse losses that the copyright owner incurred or pay the profits you gained from the wrongdoing.[1]

The copyright owner who successfully makes an infringement claim may also be entitled to receive two other remedies that involve significant dollars. First, the owner can seek "statutory damages" of up to $30,000 per work infringed, in lieu of actual damages or profits.[2] Second, the owner may also ask for reimbursement of attorney fees and the costs of bringing the litigation.[3] These amounts are not to be underestimated. Recall the case of *Basic Books, Inc. v. Kinko's Graphics Corp.* from chapter 9.[4] The court ruled that Kinko's had infringed the copyrights and ordered it to pay $510,000 in statutory damages. Kinko's also had to pay the publishers' attorney fees and costs, in the total amount of $1,395,000.[5]

The dollar amounts may be overwhelming, but statutory damages and attorney fees are generally available to the copyright owner only if the owner registered the work with the U.S. Copyright Office before the infringement occurred.[6] Recall from chapter 3 that registration and other formalities are no longer required. You may well be the copyright owner without registering the work, and you may still be able to win your case and obtain damages and other remedies. But only after timely registration are you entitled to what are often the most lucrative remedies in an infringement case—statutory damages and attorney fees. The lesson to copyright owners is clear: if you are serious about protecting your copyrights, you ought to consider registering the claim. Moreover, you should register early before any infringement has occurred.

To be eligible for statutory da and attorney fees, the work ger must have been registered befo infringement occurred. In the c a published work, the Copyrigh allows a grace period of three m after first publication to mak registration. *U.S. Copyright Ac U.S.C.* § 412(2) (2005). Registr can occur long after publication the owner will only qualify for added rights with respect to infri ments occurring after the registra date.

If the infringement is "willful," the consequences skyrocket. The statutory damages can jump from $30,000 to $150,000 per work infringed. Criminal liability may also apply to willful copying, and Congress has recently toughened criminal liabilities, applying the penalties more explicitly to infringements by electronic means.[7] (Generally, an infringement is "willful" if the user knew or had reason to know that the actions were unlawful.)

Good Faith and Good News

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

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

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

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

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

Who Is Liable for the Infringement?

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

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

In reality, in the setting of a business, library, or educational institution, liability often flows upstream to the supervisors who oversee the project and to the company or organization itself. Recall from chapter 9 the summaries of cases about fair use. The liable parties were the corporations—such as Kinko's and Texaco—and not merely the individuals. The truth is that all of the implicated individuals and organizations may share in any liability exposure.

As a practical matter, however, the supervisors and the organization are at greater risk. Not only do they more likely have "deep pockets," but a successful lawsuit at the highest level is more likely to have the greatest influence on shaping future behaviors. Suing Kinko's, for example, led to changes in photocopy practices at Kinko's shops around the country. In fact, holding the company liable helped persuade competing photocopy shops to reassess their similar practices and legal risks.

A "Safe Harbor" for Service Providers

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

The new Section 512 of the Copyright Act, creating the "safe harbor," was part of the Digital Millennium Copyright Act of 1998. That bill addressed a wide range of issues, from liability for circumvention of "technological protection systems" to a new form of legal protection for boat hulls. *Digital Millennium Copyright Act*, Public Law 105-304, *U.S. Statutes at Large* 112 (1998): 2860. Chapter 15 of this book focuses on the most important provisions of the DMCA.

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

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

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

For educational institutions, fitting into the safe harbor may prove highly problematic. In addition to the foregoing conditions, the "safe harbor" might apply to a faculty website only if the infringing materials on the site were not "required or recommended" course materials within the last three years, and the institution has received no more than two notifications of claimed infringements committed by that faculty member. The institution must also provide all users of its system with materials that "accurately describe, and promote compliance with" copyright law.[11]

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

Does your college, university, library, or other C have a registered agent? The full list is posted the website of the U.S. Copyright Office at htt www.copyright.gov/onlinesp/.

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

Note on Sovereign Immunity

Some copyright infringers may escape liability altogether under a sweeping constitutional doctrine. The Eleventh Amendment to the U.S. Constitution provides one more means for possibly bringing an end to all monetary risks from copyright infringement. The Eleventh Amendment provides that a state or state agency may not be sued in a federal court for dollar damages. A series of recent cases from the U.S. Supreme Court has brought renewed meaning to the provision, which is intended to protect the "sovereignty" of the states from being held accountable by a federal judiciary.[12]

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

By an act of Congress, all copyright cases must be brought in federal court.[13] In recent years, a few federal courts accordingly have dismissed cases that were brought against states and state agencies. Of notable consequence, one court has ruled that a unit of the University of Houston (a public university) could not be sued for copyright infringement.[14]

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

Do the Right Thing

This chapter begins with a litany of legal risks and some disturbing dollar amounts that a copyright infringer might face. Much of this chapter, however, is about the limits of possible liability. Educators and librarians who exercise fair use in good faith may avoid statutory damages. Online service providers may find a safe harbor from infringements committed by individual users. The "sovereign immunity" provision of the U.S. Constitution may allow state agencies to avoid liability altogether. Just as important, the simple historical record is that common activities of educators and librarians have not been the target of copyright lawsuits. They are also not likely to become frequent targets in the near future.

> One of the greatest virtues of American copyright law is that it allows owners and users to seek creative definitions of their rights, rather than relying solely on legal conventions. One of the best examples is Creative Commons, an initiative that encourages copyright owners to assert less than all possible legal rights, and in the process grant to the public broader rights of use. Copyright owners can select from a set of "license" terms that lay down creative rights of ownership and use. See http://creativecommons.org.

If the chances of being sued appear slim, why should we bother paying attention to the complications of copyright at all? The answer is simple: because we live in a cooperative society, and the law is the intermediary. The law may be quirky and sometimes a little baffling, but it has an important role in shaping the terms on which we relate to one another in a civilized world. We need to give respect to the copyrights of others, if we are to gain respect for our claims of fair use.

If we do not like the law, we should demand change, and we should press the law's meaning. Meanwhile, we must remind ourselves steadily that the law we challenge today may be the law that protects us in the future. Educators and librarians live in two copyright worlds at the same time. We are users of copyrighted materials, questioning the limits of fair use and seeking new exemptions for distance learning and other pursuits. Simultaneously, members of the academic community are

increasingly concerned about protecting their own intellectual property. Fairness and good ethical practices demand mutual respect for the diverse interests within our own communities. In the end, we are probably best served by reasonable terms for using works as well as claiming rights.

Notes

1. The statutes governing the "remedies" or liabilities under copyright law are *U.S. Copyright Act*, 17 U.S.C. §§ 502–511 (2005).
2. *U.S. Copyright Act*, 17 U.S.C. § 504(c)(1) (2005).
3. *U.S. Copyright Act*, 17 U.S.C. § 505 (2005).
4. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 522 (S.D.N.Y. 1991).
5. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 21 U.S.P.Q.2d 1639 (1991).
6. *U.S. Copyright Act*, 17 U.S.C. § 411 (2005).
7. *U.S. Copyright Act*, 17 U.S.C. § 506(a) (2005).
8. *U.S. Copyright Act*, 17 U.S.C. § 504(c)(2) (2005). As an important clarification, this statute explicitly encompasses not only educators and librarians, but also archivists.
9. See *Playboy v. Hardenburgh*, 982 F. Supp. 503 (N.D. Ohio 1997); *Religious Technology Center v. NETCOM*, 907 F. Supp. 1361 (N.D. Cal. 1995). As this book went to press, the U.S. Supreme Court handed down its ruling in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 75 U.S.P.Q.2d 1001 (U.S. 2005). The Court held that a provider of file-sharing software could be liable for infringements committed by users under some circumstances. While the Court may have added some additional clarity to the law, the issues will continue to be disputed and debated with each new development.
10. *U.S. Copyright Act*, 17 U.S.C. § 512 (2005).
11. For the specific provisions of the statute that apply to faculty websites, see *U.S. Copyright Act*, 17 U.S.C. § 512(e) (2005).
12. U.S. Constitution, amend. XI.
13. *U.S. Copyright Act*, 17 U.S.C. § 1338(a) (2005).
14. *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

APPENDIX

Checklist for Fair Use

Prepared by the Copyright Management Center
Indiana University–Purdue University Indianapolis

We are pleased to offer the following "Checklist for Fair Use" as a helpful tool for the academic community. We hope that it will serve two purposes. First, it should help educators, librarians, and others to focus on factual circumstances that are important to the evaluation of a contemplated fair use of copyrighted works. A reasonable fair-use analysis is based on four factors set forth in the fair-use provision of copyright law, Section 107 of the Copyright Act of 1976. The application of those factors depends on the particular facts of your situation, and changing one or more facts may alter the outcome of the analysis. The "Checklist for Fair Use" derives from those four factors and from the judicial decisions interpreting copyright law.

A second purpose of the checklist is to provide an important means for recording your decision-making process. Maintaining a record of your fair-use analysis is critical to establishing your "reasonable and good-faith" attempts to apply fair use to meet your educational objectives. Section 504(c)(2) of the Copyright Act offers some protection for educators and librarians who act in good faith. Once you have completed your application of fair use to a particular need, keep your completed checklist in your files for future reference.

As you use the checklist and apply it to your situation, you are likely to check more than one box in each column and even check boxes across columns. Some checked boxes will "favor fair use," and others may "oppose fair use." A key concern is whether you are acting reasonably in checking any given box; the ultimate concern is whether the cumulative "weight" of the factors favors or opposes fair use. Because you are most familiar with your project, you are probably best positioned to make that decision. To learn more about fair use and other aspects of copyright law, visit the Copyright Management Center website at http://www.copyright.iupui.edu.

Checklist for Fair Use

Name: _____ Date: _____ Project: _____

Institution: _____ Prepared by: _____

1

Favoring Fair Use

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

Opposing Fair Use

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

2

Favoring Fair Use

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

Opposing Fair Use

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

3

Favoring Fair Use

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

Opposing Fair Use

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

4

Favoring Fair Use

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

Opposing Fair Use

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

in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

[The definition of a "work made for hire" includes some additional language emphasizing that paragraph (2) of the definition shall not be interpreted with reference to a congressional bill from 1999 that added "sound recordings" to the list, but was quickly repealed in 2000. The law develops in some peculiar ways.]

Section 102. Subject Matter of Copyright: In General

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Section 103. Subject Matter of Copyright: Compilations and Derivative Works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

Section 105. Subject Matter of Copyright: United States Government Works

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

Section 106. Exclusive Rights in Copyrighted Works

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

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Section 107. Limitations on Exclusive Rights: Fair Use

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

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

Section 108. Limitations on Exclusive Rights: Reproduction by Libraries and Archives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Nothing in this section—

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

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

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

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

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

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

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

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

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

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

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

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

(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.

(i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no

such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

Section 109. Limitations on Exclusive Rights: Effect of Transfer of Particular Copy or Phonorecord

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

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

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

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

(B) This subsection does not apply to—

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

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

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

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

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

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