Copyright Boot Camp 2015

Session 1 January 13, 2015 and Session 2 January 14, 2015
University of Massachusetts Libraries

AGENDA

9:30 – 10:00 Coffee

10:00 – 12:00 Copyright Basics

- Pre-Assessment Quiz Hypotheticals
- Copyright: "Original works of authorship fixed in any tangible medium"
- Idea/Expression Dichotomy
- How to Read a Case
    - EXERCISE: Read and discuss *Ho v. Taflove*
- Structure of Copyright Act
- 6 Exclusive Rights
- Infringement & Extraordinary Remedies
- Defenses: Fair Use, First Sale, Etc. [Example 17 USC 114]
- Fair Use in Detail

12:00 – 1:00 Lunch

- EXERCISE : Read and discuss *Authors Guild v. HathiTrust*

1:00 – 2:45 Copyright in Higher Education

- Higher Ed Defenses: 107, 108, 109, 110, 121, and 504
    - 109 generally; 109(b)(1)(A); 109(b)(2); 602(a)(3)(C)

Fair Use Checklists

- EXERCISE: Compare "Fair Use Checklist" materials from Columbia, Copyright Clearance Center, and one other source.

Licensing

- How Licenses Work
- Read & Evaluate Licenses: Licensed Resources or Creative Commons
- Open Access Policies on Campus, and Non-Exclusive Licenses

Quiz Hypotheticals

2:45 pm - Evaluation

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Participant List

Facilitators:

- Laura Quilter, Copyright & Information Policy Librarian (J.D., M.L.S.), UMass Amherst Libraries
- Charlotte Roh, Scholarly Communication Resident Librarian, UMass Amherst Libraries
- Sam Anderson, Instructional Design & Faculty Support Coordinator, UMass Information Technology

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UMass Amherst Copyright Boot Camp 2015
Copyright Hypotheticals

1. Can linking to content on YouTube or another website get an instructor or the institution in trouble for copyright infringement?
   YES, this could be copyright infringement.
   NO, linking is not copyright infringement.
   IT DEPENDS _____

2. Does fair use permit use of up to (but no more than) 30 seconds of a video or 10% of a text in an educational context?
   YES, this is always fair use.
   NO, this is never fair use.
   IT DEPENDS _____

3. Author A plagiarizes a short but distinctive phrase from Author B. Copyright infringement?
   YES.
   NO.
   IT DEPENDS _____

4. Professor I. Jones shows a documentary about archaeology techniques in class, from a personal copy purchased overseas. Copyright infringement?
   YES.
   NO.
   IT DEPENDS _____

5. Novelist Dana Black has written a best-seller significantly based on a detailed and incredible historical theory that is almost certainly not true. Copyright infringement?
   YES.
   NO.
   IT DEPENDS _____

6. Graduate student Hyde has spent many hours compiling a list of the residents of a small community in Massachusetts, from settlement through the 1950s, and organizing it in a comprehensive database by birth date, death date, and address. Hyde inadvertently left the data in an unprotected file on a website, and fellow graduate student Jekyll gathered it and posted it to the Internet Archive and to Wikisource, a Wikipedia-associated site of free texts. Hyde wants to have this material removed; is there a copyright claim to be made?
   YES.
   NO.
   IT DEPENDS _____

7. An undergraduate student in the CS department has somehow captured the entire database of federal legislation (THOMAS), and has published search scripts for her downloaded database. Copyright infringement? (Check all that apply.)

   For copying the set of materials:
   - YES
   - NO
   - IT DEPENDS_____

   For hacking into a database:
   - YES
   - NO
   - IT DEPENDS_____

   For publishing search scripts to search hacked materials:
   - YES
   - NO
   - IT DEPENDS_____

8. An adjunct faculty member in the media studies department wants to assign students a "vidding" activity – pick one or more TV series, develop a critical thesis about it, then capture clips from the show, and arrange the clips to demonstrate the thesis. Copyright infringement?
   - YES
   - NO
   - IT DEPENDS_____

9. A political science researcher has found evidence of fraud by searching a proprietary, licensed database of business information. The researcher is about to publish a paper with materials quoted, but the publisher is worried that the data is proprietary and licensed. The license says no quoting is permitted, and the content can only be viewed but not quoted. Can the researcher argue fair use given the important public purpose of demonstrating fraud?
   - YES
   - NO
   - IT DEPENDS_____

10. A professor wants to teach a film studies MOOC, and include short clips of films to illustrate her points. The MOOC will be open to the world and already has 75,000 people from around the world enrolled, three months in advance. The clips will be posted in an open format, and viewable by all students, as well as members of the public, and will be annotated extensively by the professor with voiceovers and moving graphics super-imposed on the clips. Which of these defenses & limitations might help the professor? (check all that apply)
    - 17 USC 107, "fair use"
    - 17 USC 110(1), "classroom performance"
    - 17 USC 110(2), the "TEACH Act" for distance education

UMass Amherst Copyright Boot Camp 2015

ASSESSMENT

1. **Which session did you attend?**
   Tuesday, Jan. 13, 2015
   Wednesday, Jan. 14, 2016

2. **Would you recommend this workshop to colleagues?**

DEFINITELY YES	PROBABLY YES	MAYBE	PROBABLY NOT	DEFINITELY NOT

3. **What additions, subtractions, or changes in approach / content would you suggest to make this workshop more useful / better?**

4. **Would you be interested in workshops on these topics? (please rank from 1 "DEFINITELY YES" to 5 "DEFINITELY NOT")**

   Train the Trainer: Helping Faculty Learn About Author Agreements

   1 (YES) 2 3 4 5 (NO)

   Creative Commons Licensing in Depth

   1 (YES) 2 3 4 5 (NO)

   Fair Use in Depth

   1 (YES) 2 3 4 5 (NO)

   Copyrightability in Depth

   1 (YES) 2 3 4 5 (NO)

   YouTube in the Classroom

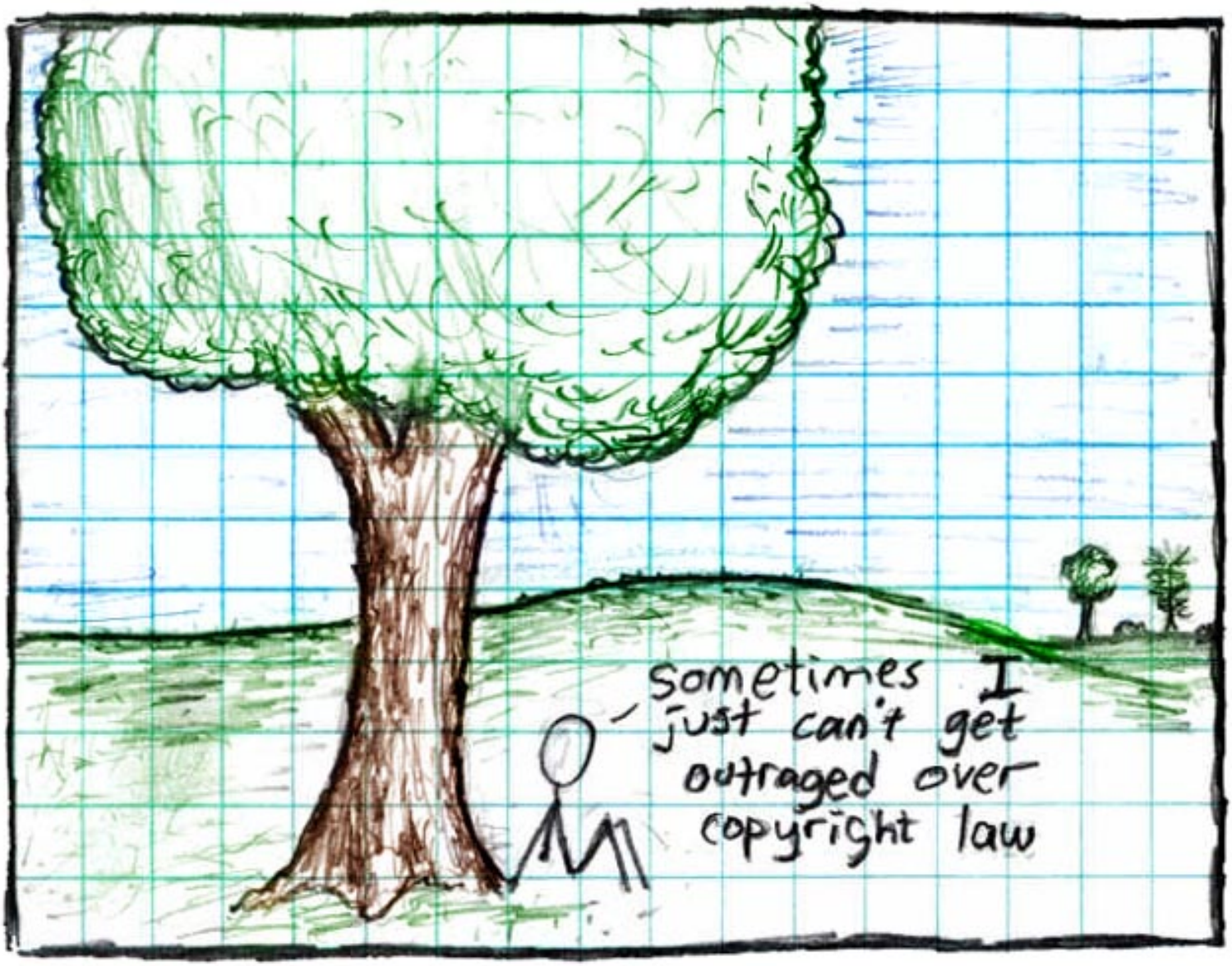
   1 (YES) 2 3 4 5 (NO)

5. **Workshop Mechanics: Was the space comfortable? Was the time period okay? (longer, shorter, more breaks) Any other comments?**

6. **Instructor Specifics: What advice or suggestions would you give to our instructor(s) and facilitators to help them improve their teaching?**

7. **Any other thoughts?**

Thank you for your feedback!


sometimes I just can't get outraged over copyright law

U.S. Copyright Law: An Index

Laura Quilter, Jan. 11, 2015

Important Materials

- US Code, Title 17
- Code of Federal Regulations, Title 37, Subchapter A
- Court opinions (virtually all federal but occasional important state decision)
- Copyright Office – An agency within the Library of Congress, so an odd hybrid of regulatory and legislative.
    - Copyright Office Compendium of Practices, Third Edition (2014) – Lots of practices that effectively delineate what is and is not copyrightable, who is and is not an author, etc.
    - Copyright Office website registration, searches http://copyright.gov/
    - Copyright Office Rulemakings & Procedures, such as the triennial DMCA rulemaking.
    - Copyright Office Circulars
    - Copyright Office hearings and reports
- International treaties, administered by WIPO (World Intellectual Property Office), http://wipo.int/
- Berne Convention for the Protection of Literary and Artistic Works. Expanded or supplemented by:
    - Universal Copyright Convention (Geneva, 1952, and Paris, 1971)
    - TRIPS (1994) – Added trade authorities & sanctions to IP violations
    - WIPO Copyright Treaty (1996). Notable particularly for establishing anticircumvention, for requiring that computer software be treated as a "literary work", and that databases have protections.

US Code, Title 17 – Highlight

Chapter 1 (17 USC 101, 17 USC 102, etc.) – Subject Matter & Scope

101 Definitions

102 Subject matter – The classes of works (literary works, sound recordings, etc.; and exclusions for facts, formulas, etc.)

103 Subject matter – compilations & derivative works

104 Subject matter – national origin

104A – Copyright in restored works

105 – US government works not copyrighted

106 – Exclusive rights in copyrighted works

106A Visual Artists Rights Act (VARA) – Moral rights for limited or unique works of visual art.

107 – 122: Limitations on exclusive rights

107 – Fair use
108 – Reproduction by libraries & archives
109 – First sale
110 – Exemption of certain performances & displays
111 – Cable secondary transmissions
112 – Broadcaster temporary recordings; disability & religious exemptions
113 – Exemptions in pictorial, graphic, & sculptural works — ads; buildings
114 – No public performance rights for sound recordings; public broadcasting
115 – Compulsory license – the "cover license"
116 – Compulsory license – jukebox license
117 – Computer user backups for RAM copies, backups, and repair copies
118 – Voluntary licensing organizations & public broadcasters [college radio]
119 – Secondary transmissions by satellite carriers
120 – Architectural work exceptions
121 – Disability rights
122 – Secondary transmissions of TV broadcasts

Chapter 2 – Copyright Ownership & Transfer

201 – Ownership vests in the "author". Unless it's a work made for hire. Collective works and contribution to collective works are separately copyrightable. Copyright rights are separately transferable, and heritable by will or other transfers of personal property. Copyrights may never be seized by the government except for bootlegs.
202 – Ownership of copyright is distinct from ownership of the material object; see 109
203 – Original authors can terminate assignments [see also 304]
204 – Transfers of copyright ownership must be in writing.
205 – Copyright Office recordation rules.

Chapter 3 – Preemption & Duration

301 – State copyrights are preempted, if they would have been covered by copyright. Pre–1972 sound recordings are only preempted if fixed before Feb. 15, 1972. Preemption shall apply to all sound recordings as of Feb. 15, 2067 (95 years). Moral rights established by VARA
302 – Term is life plus 70 for works created on or after Jan. 1, 1978. For works made for hire, or anonymous/pseudonymous, copyright is the FIRST to expire of 95 years after publication or 120 years after creation.
303 – Pre–1978 copyrighted works. Phonorecord distribution prior to 1978 does not constitute publication of embodied works.
304 – Pre–1978 copyrighted works terms & renewal. [see also 203]
305 – If it expires in a year, it doesn't expire until the end of that year.

Chapter 4 – Copyright notices, registrations, etc. NOTE, If copyright notice is applied, then innocent infringer defense is not available.

Chapter 5 – Remedies

501 – Who can sue and for what.
502 – Injunctive relief available.
503 – Impoundments and destruction available.
504 – Actual or statutory damages.
504(c)(1) Statutory damages: $750 – $30,000
504(c)(2) Willful infringement statutory damages: Up to $150,000
Innocent infringement : May be reduced to $200.
Educational institutions & libraries, or public broadcasters : Statutory damages shall be remitted if reasonably believed the use was a fair use.
505 – Legal costs and attorney's fees available.
506 – Criminal infringement. 18 USC 2319.
507 – Statute of limitations. 5 years for criminal; 3 years for civil.
508 – Courts must notify Copyright Office of litigation & judgments.
509 – Seizure & forfeiture.
510 – Secondary transmission remedies can include 30–day loss of license.
511 – States not immune [struck down as unconstitutional].
512 – Safe harbors, and notice & takedown procedures for ISPs.
513 – Individual small proprietors remedies for unlicensed performances.

Chapter 6 – Importations. [at issue in the *Kirtsaeng v. Wiley* case]

602 – Importation of works is an infringement of 106 distribution right.
- Importation of bootlegs/unlawful copies is infringement of 106 distribution.
- Archives and other government agency uses, but not for use in schools, exempted.
- Personal imports exempted.
- **Scholarly, educational, & religious exemptions, including libraries & archives.**
- Customs can seize.

603 – Treasury & Post rules for seizure, forfeiture, & destruction.

Chapter 7 – Copyright Office rules.

Chapter 8 – Copyright Royalty Board rules.

Chapter 9 – Sui generis protection for semiconductor chip masks.

Chapter 10 – Digital audio recording device rules.

Chapter 11 – Bootlegs ["unauthorized fixation and trafficking in sound recordings & music videos"]

Chapter 12 – Anticircumvention provisions, including triennial rulemaking for exemptions.

Chapter 13 – Sui generis protection for boat hulls

TITLE 17 - COPYRIGHTS
CHAPTER 1 - SUBJECT MATTER AND SCOPE OF COPYRIGHT

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A "Copyright Royalty Judge" is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

A “device”, “machine”, or “process” is one now known or later developed.

A “digital transmission” is a transmission in whole or in part in a digital or other non-analog format.

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An “establishment” is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The term “financial gain” includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A “food service or drinking establishment” is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The “Geneva Phonograms Convention” is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The “gross square feet of space” of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms “including” and “such as” are illustrative and not limitative.

An “international agreement” is—

(1) the Universal Copyright Convention;

(2) the Geneva Phonograms Convention;

(3) the Berne Convention;

(4) the WTO Agreement;

(5) the WIPO Copyright Treaty;

(6) the WIPO Performances and Phonograms Treaty; and

(7) any other copyright treaty to which the United States is a party.

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

“Literary works” are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

The term “motion picture exhibition facility” means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.

“Motion pictures” are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A “performing rights society” is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

“Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

For purposes of section 513, a “proprietor” is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.

A “pseudonymous work” is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Registration", for purposes of sections 205 (c)(2), 405, 406, 410 (d), 411, 412, and 506 (e), means a registration of a claim in the original or the renewed and extended term of copyright.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

For purposes of section 411, a work is a "United States work" only if—

(1) in the case of a published work, the work is first published—

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

The "WIPO Copyright Treaty" is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

The "WIPO Performances and Phonograms Treaty" is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A) **(i)** any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional

text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106–113, nor the deletion of the words added by that amendment—

(A) shall be considered or otherwise given any legal significance, or

(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,

by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106–113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2541; Pub. L. 96–517, § 10(a), Dec. 12, 1980, 94 Stat. 3028; Pub. L. 100–568, § 4(a)(1), Oct. 31, 1988, 102 Stat. 2854; Pub. L. 101–650, title VI, § 602, title VII, § 702, Dec. 1, 1990, 104 Stat. 5128, 5133; Pub. L. 102–307, title I, § 102(b)(2), June 26, 1992, 106 Stat. 266; Pub. L. 102–563, § 3(b), Oct. 28, 1992, 106 Stat. 4248; Pub. L. 104–39, § 5(a), Nov. 1, 1995, 109 Stat. 348; Pub. L. 105–80, § 12(a)(3), Nov. 13, 1997, 111 Stat. 1534; Pub. L. 105–147, § 2(a), Dec. 16, 1997, 111 Stat. 2678; Pub. L. 105–298, title II, § 205, Oct. 27, 1998, 112 Stat. 2833; Pub. L. 105–304, title I, § 102(a), Oct. 28, 1998, 112 Stat. 2861; Pub. L. 106–44, § 1(g)(1), Aug. 5, 1999, 113 Stat. 222; Pub. L. 106–113, div. B, § 1000(a)(9) [title I, § 1011(d)], Nov. 29, 1999, 113 Stat. 1536, 1501A–544; Pub. L. 106–379, § 2(a), Oct. 27, 2000, 114 Stat. 1444; Pub. L. 107–273, div. C, title III, § 13210(5), Nov. 2, 2002, 116 Stat. 1909; Pub. L. 108–419, § 4, Nov. 30, 2004, 118 Stat. 2361; Pub. L. 109–9, title I, § 102(c), Apr. 27, 2005, 119 Stat. 220; Pub. L. 111–295, § 6(a), Dec. 9, 2010, 124 Stat. 3181.)

TITLE 17 - COPYRIGHTS
CHAPTER 1 - SUBJECT MATTER AND SCOPE OF COPYRIGHT

§ 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.

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2544; Pub. L. 101–650, title VII, § 703, Dec. 1, 1990, 104 Stat. 5133.)

TITLE 17 - COPYRIGHTS
CHAPTER 1 - SUBJECT MATTER AND SCOPE OF COPYRIGHT

§ 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.

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546; Pub. L. 101–318, § 3(d), July 3, 1990, 104 Stat. 288; Pub. L. 101–650, title VII, § 704(b)(2), Dec. 1, 1990, 104 Stat. 5134; Pub. L. 104–39, § 2, Nov. 1, 1995, 109 Stat. 336; Pub. L. 106–44, § 1(g)(2), Aug. 5, 1999, 113 Stat. 222; Pub. L. 107–273, div. C, title III, § 13210(4)(A), Nov. 2, 2002, 116 Stat. 1909.)

TITLE 17 - COPYRIGHTS
CHAPTER 1 - SUBJECT MATTER AND SCOPE OF COPYRIGHT

§ 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.

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546; Pub. L. 101–650, title VI, § 607, Dec. 1, 1990, 104 Stat. 5132; Pub. L. 102–492, Oct. 24, 1992, 106 Stat. 3145.)

TITLE 17 - COPYRIGHTS
CHAPTER 1 - SUBJECT MATTER AND SCOPE OF COPYRIGHT

§ 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).

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546; Pub. L. 102–307, title III, § 301, June 26, 1992, 106 Stat. 272; Pub. L. 105–80, § 12(a)(4), Nov. 13, 1997, 111 Stat. 1534; Pub. L. 105–298, title I, § 104, Oct. 27, 1998, 112 Stat. 2829; Pub. L. 105–304, title IV, § 404, Oct. 28, 1998, 112 Stat. 2889; Pub. L. 109–9, title IV, § 402, Apr. 27, 2005, 119 Stat. 227.)

TITLE 17 - COPYRIGHTS
CHAPTER 1 - SUBJECT MATTER AND SCOPE OF COPYRIGHT

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

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

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

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

whichever occurs first.

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

(B) This subsection does not apply to—

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

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

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

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

(B) Not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990, and at such times thereafter as the Register of Copyrights considers appropriate, the Register of Copyrights, after consultation with representatives of copyright owners and librarians, shall submit to the Congress a report stating whether this paragraph has achieved its intended purpose of maintaining the integrity of the copyright system while

providing nonprofit libraries the capability to fulfill their function. Such report shall advise the Congress as to any information or recommendations that the Register of Copyrights considers necessary to carry out the purposes of this subsection.

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

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

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

(d) The privileges prescribed by subsections (a) and (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

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

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2548; Pub. L. 98–450, § 2, Oct. 4, 1984, 98 Stat. 1727; Pub. L. 100–617, § 2, Nov. 5, 1988, 102 Stat. 3194; Pub. L. 101–650, title VIII, §§ 802, 803, Dec. 1, 1990, 104 Stat. 5134, 5135; Pub. L. 103–465, title V, § 514(b), Dec. 8, 1994, 108 Stat. 4981; Pub. L. 105–80, § 12(a)(5), Nov. 13, 1997, 111 Stat. 1534; Pub. L. 110–403, title II, § 209(a)(1), Oct. 13, 2008, 122 Stat. 4264.)

TITLE 17 - COPYRIGHTS
CHAPTER 1 - SUBJECT MATTER AND SCOPE OF COPYRIGHT

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

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

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

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

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

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

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

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

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

(D) the transmitting body or institution—

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

(ii) in the case of digital transmissions—

(I) applies technological measures that reasonably prevent—

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

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

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

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—

(A) there is no direct or indirect admission charge; or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions:

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) **(A)** except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(i) a direct charge is made to see or hear the transmission; or

(ii) the transmission thus received is further transmitted to the public;

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total

of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed;

(6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization; the exemption provided by this clause shall extend to any liability for copyright infringement that would otherwise be imposed on such body or organization, under doctrines of vicarious liability or related infringement, for a performance by a concessionnaire,[1] business establishment, or other person at such fair or exhibition, but shall not excuse any such person from liability for the performance;

(7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, or of the audiovisual or other devices utilized in such performance, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring;

(8) performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission of visual signals, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of:

(i) a governmental body; or

(ii) a noncommercial educational broadcast station (as defined in section 397 of title 47); or

(iii) a radio subcarrier authorization (as defined in 47 CFR 73.293–73.295 and 73.593–73.595); or

(iv) a cable system (as defined in section 111 (f));

(9) performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8)(iii), Provided, That the provisions of this clause shall not be applicable to more than one performance of the same work by the same performers or under the auspices of the same organization;

(10) notwithstanding paragraph (4), the following is not an infringement of copyright: performance of a nondramatic literary or musical work in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited, but not including the invitees of the organizations, if the proceeds from the performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. For purposes of this section the social functions of any college or university fraternity or sorority shall not be included unless the social function is held solely to raise funds for a specific charitable purpose; and

(11) the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation

or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.

The exemptions provided under paragraph (5) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners for the public performance or display of their works. Royalties payable to copyright owners for any public performance or display of their works other than such performances or displays as are exempted under paragraph (5) shall not be diminished in any respect as a result of such exemption.

In paragraph (2), the term "mediated instructional activities" with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use.

For purposes of paragraph (2), accreditation—

(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and

(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

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

For purposes of paragraph (11), the term "making imperceptible" does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture.

Nothing in paragraph (11) shall be construed to imply further rights under section 106 of this title, or to have any effect on defenses or limitations on rights granted under any other section of this title or under any other paragraph of this section.

Footnotes

[1] So in original. Probably should be "concessionaire".

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2549; Pub. L. 97–366, § 3, Oct. 25, 1982, 96 Stat. 1759; Pub. L. 105–80, § 12(a)(6), Nov. 13, 1997, 111 Stat. 1534; Pub. L. 105–298, title II, § 202, Oct. 27, 1998, 112 Stat. 2830; Pub. L. 106–44, § 1(a), Aug. 5, 1999, 113 Stat. 221; Pub. L. 107–273, div. C, title III, §§ 13210(6), 13301 (b), Nov. 2, 2002, 116 Stat. 1909, 1910; Pub. L. 109–9, title II, § 202(a), Apr. 27, 2005, 119 Stat. 223.)

TITLE 17 - COPYRIGHTS
CHAPTER 1 - SUBJECT MATTER AND SCOPE OF COPYRIGHT

§ 121. Limitations on exclusive rights: Reproduction for blind or other people with disabilities

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

(b) **(1)** Copies or phonorecords to which this section applies shall—

(A) not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities;

(B) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and

(C) include a copyright notice identifying the copyright owner and the date of the original publication.

(2) The provisions of this subsection shall not apply to standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a publisher of print instructional materials for use in elementary or secondary schools to create and distribute to the National Instructional Materials Access Center copies of the electronic files described in sections 612 (a)(23)(C), 613 (a)(6), and section 674(e) of the Individuals with Disabilities Education Act that contain the contents of print instructional materials using the National Instructional Material Accessibility Standard (as defined in section 674(e)(3) of that Act), if—

(1) the inclusion of the contents of such print instructional materials is required by any State educational agency or local educational agency;

(2) the publisher had the right to publish such print instructional materials in print formats; and

(3) such copies are used solely for reproduction or distribution of the contents of such print instructional materials in specialized formats.

(d) For purposes of this section, the term—

(1) "authorized entity" means a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities;

(2) "blind or other persons with disabilities" means individuals who are eligible or who may qualify in accordance with the Act entitled "An Act to provide books for the adult blind", approved March 3, 1931 (2 U.S.C. 135a; 46 Stat. 1487) to receive books and other publications produced in specialized formats;

(3) "print instructional materials" has the meaning given under section 674(e)(3)(C) of the Individuals with Disabilities Education Act; and

(4) "specialized formats" means—

(A) braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities; and

(B) with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.

(Added Pub. L. 104–197, title III, § 316(a), Sept. 16, 1996, 110 Stat. 2416; amended Pub. L. 106–379, § 3(b), Oct. 27, 2000, 114 Stat. 1445; Pub. L. 107–273, div. C, title III, § 13210(3)(A), Nov. 2, 2002, 116 Stat. 1909; Pub. L. 108–446, title III, § 306, Dec. 3, 2004, 118 Stat. 2807.)

References in Text

Sections 612, 613, and 674 of the Individuals with Disabilities Education Act, referred to in subsecs. (c) and (d)(3), are classified to sections 1412, 1413, and 1474, respectively, of Title 20, Education.

The Act approved March 3, 1931, referred to in subsec. (d)(2), is act Mar. 3, 1931, ch. 400, 46 Stat. 1487, as amended, which is classified generally to sections 135a and 135b of Title 2, The Congress. For complete classification of this Act to the Code, see Tables.

Amendments

2004—Subsec. (c). Pub. L. 108–446, § 306(2), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 108–446, § 306(1), redesignated subsec. (c) as (d).

Subsec. (d)(3), (4). Pub. L. 108–446, § 306(3), added pars. (3) and (4) and struck out former par. (3) which read as follows: " 'specialized formats' means braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities."

2002—Pub. L. 107–273 substituted "Reproduction" for "reproduction" in section catchline.

2000—Subsec. (a). Pub. L. 106–379 substituted "section 106" for "sections 106 and 710".

TITLE 17 - COPYRIGHTS
CHAPTER 5 - COPYRIGHT INFRINGEMENT AND REMEDIES

§ 504. Remedies for infringement: Damages and profits

(a) In General.— Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.— The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was:

(i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or

(ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118 (f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(3)

(A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term "domain name" has the meaning given that term in section 45 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions,

and for other purposes" approved July 5, 1946 (commonly referred to as the "Trademark Act of 1946"; 15 U.S.C. 1127).

(d) Additional Damages in Certain Cases.— In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110 (5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2585; Pub. L. 100–568, § 10(b), Oct. 31, 1988, 102 Stat. 2860; Pub. L. 105–80, § 12(a)(13), Nov. 13, 1997, 111 Stat. 1535; Pub. L. 105–298, title II, § 204, Oct. 27, 1998, 112 Stat. 2833; Pub. L. 106–160, § 2, Dec. 9, 1999, 113 Stat. 1774; Pub. L. 108–482, title II, § 203, Dec. 23, 2004, 118 Stat. 3916; Pub. L. 111–295, § 6(f)(2), Dec. 9, 2010, 124 Stat. 3181.)

Copyright
United States Copyright Office

Copyright Basics

What Is Copyright?

Copyright is a form of protection provided by the laws of the United States (title 17, *U.S. Code*) to the authors of "original works of authorship," including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the 1976 Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

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

In addition, certain authors of works of visual art have the rights of attribution and integrity as described in section 106A of the 1976 Copyright Act. For further information, see Circular 40, *Copyright Registration for Works of the Visual Arts*.

It is illegal for anyone to violate any of the rights provided by the copyright law to the owner of copyright. These rights, however, are not unlimited in scope. Sections 107 through 122 of the 1976 Copyright Act establish limitations on these rights. In some cases, these limitations are specified exemptions from copyright liability. One major limitation is the doctrine of "fair use," which is given a statutory basis in section 107 of the 1976 Copyright Act. In other instances, the limitation takes the form of a "compulsory license" under which certain limited uses of copyrighted works are permitted upon payment of specified royalties and compliance with statutory conditions. For further information about the limitations of any of these rights, consult the copyright law or write to the Copyright Office.

***NOTE:** Sound recordings are defined in the law as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." Common

examples include recordings of music, drama, or lectures. A sound recording is not the same as a phonorecord. A phonorecord is the physical object in which works of authorship are embodied. The word "phonorecord" includes cassette tapes, CDs, and vinyl disks as well as other formats.

Who Can Claim Copyright?

Copyright protection subsists from the time the work is created in fixed form. The copyright in the work of authorship immediately becomes the property of the author who created the work. Only the author or those deriving their rights through the author can rightfully claim copyright.

In the case of works made for hire, the employer and not the employee is considered to be the author. Section 101 of the copyright law defines a "work made for hire" as:

1 a work prepared by an employee within the scope of his or her employment; *or*

2 a work specially ordered or commissioned for use as:
- a contribution to a collective work
- a part of a motion picture or other audiovisual work
- a translation
- a supplementary work
- a compilation
- an instructional text
- a test
- answer material for a test
- an atlas

if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary.

Copyright in each separate contribution to a periodical or other collective work is distinct from copyright in the collective work as a whole and vests initially with the author of the contribution.

Two General Principles

- Mere ownership of a book, manuscript, painting, or any other copy or phonorecord does not give the possessor the copyright. The law provides that transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright.
- Minors may claim copyright, but state laws may regulate the business dealings involving copyrights owned by minors. For information on relevant state laws, consult an attorney.

Copyright and National Origin of the Work

Copyright protection is available for all unpublished works, regardless of the nationality or domicile of the author.

Published works are eligible for copyright protection in the United States if any one of the following conditions is met:

- On the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party,* or is a stateless person wherever that person may be domiciled; *or*
- The work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party. For purposes of this condition, a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be; *or*
- The work is a sound recording that was first fixed in a treaty party; *or*
- The work is a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party; *or*
- The work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; *or*
- The work is a foreign work that was in the public domain in the United States prior to 1996 and its copyright was restored under the Uruguay Round Agreements Act (URAA). See Circular 38b, *Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act* (*URAA-GATT*), for further information.
- The work comes within the scope of a presidential proclamation.

***A treaty party is a country or intergovernmental organization other than the United States that is a party to an international agreement.**

What Works Are Protected?

Copyright protects "original works of authorship" that are fixed in a tangible form of expression. The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device. Copyrightable works 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
8 architectural works

These categories should be viewed broadly. For example, computer programs and most "compilations" may be registered as "literary works"; maps and architectural plans may be registered as "pictorial, graphic, and sculptural works."

What Is Not Protected by Copyright?

Several categories of material are generally not eligible for federal copyright protection. These include among others:

- works that have not been fixed in a tangible form of expression (for example, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded)
- titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents
- ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration
- works consisting entirely of information that is common property and containing no original authorship (for example: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources)

How to Secure a Copyright

Copyright Secured Automatically upon Creation

The way in which copyright protection is secured is frequently misunderstood. No publication or registration or other action in the Copyright Office is required to secure copyright. See the following note. There are, however, certain definite advantages to registration. See *Copyright Registration* on page 7.

Copyright is secured automatically when the work is created, and a work is "created" when it is fixed in a copy or phonorecord for the first time. "Copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm. "Phonorecords" are material objects embodying fixations of sounds (excluding, by statutory definition, motion picture soundtracks), such as cassette tapes, CDs, or vinyl disks. Thus, for example, a song (the "work") can be fixed in sheet music ("copies") or in phonograph disks ("phonorecords"), or both. If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date.

Publication

Publication is no longer the key to obtaining federal copyright as it was under the Copyright Act of 1909. However, publication remains important to copyright owners.

The 1976 Copyright Act defines publication as follows:

> *"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication.*

NOTE: Before 1978, federal copyright was generally secured by the act of publication with notice of copyright, assuming compliance with all other relevant statutory conditions. U.S. works in the public domain on January 1, 1978, (for example, works published without satisfying all conditions for securing federal copyright under the Copyright Act of 1909) remain in the public domain under the 1976 Copyright Act.

Certain foreign works originally published without notice had their copyrights restored under the Uruguay Round Agreements Act (URAA). See Circular 38B and see *Notice of Copyright* section on page 4 for further information.

Federal copyright could also be secured before 1978 by the act of registration in the case of certain unpublished works and works eligible for ad interim copyright. The 1976 Copyright Act automatically extended copyright protection to full term for all works that, as of January 1, 1978, were subject to statutory protection.

A further discussion of the definition of "publication" can be found in the legislative history of the 1976 Copyright Act. The legislative reports define "to the public" as distribution to persons under no explicit or implicit restrictions with respect to disclosure of the contents. The reports state that the definition makes it clear that the sale of phonorecords constitutes publication of the underlying work, for example, the musical, dramatic, or literary work embodied in a phonorecord. The reports also state that it is clear that any form of dissemination in which the material object does not change hands, for example, performances or displays on television, is not a publication no matter how many people are exposed to the work. However, when copies or phonorecords are offered for sale or lease to a group of wholesalers, broadcasters, or motion picture theaters, publication does take place if the purpose is further distribution, public performance, or public display.

Publication is an important concept in the copyright law for several reasons:

- Works that are published in the United States are subject to mandatory deposit with the Library of Congress. See discussion on "Mandatory Deposit for Works Published in the United States" on page 10.
- Publication of a work can affect the limitations on the exclusive rights of the copyright owner that are set forth in sections 107 through 122 of the law.
- The year of publication may determine the duration of copyright protection for anonymous and pseudonymous works (when the author's identity is not revealed in the records of the Copyright Office) and for works made for hire.
- Deposit requirements for registration of published works differ from those for registration of unpublished works. See discussion on "Registration Procedures" on page 7.
- When a work is published, it may bear a notice of copyright to identify the year of publication and the name of the copyright owner and to inform the public that the work is protected by copyright. Copies of works published before March 1, 1989, must bear the notice or risk loss of copyright protection. See discussion on "Notice of Copyright" below.

Notice of Copyright

The use of a copyright notice is no longer required under U.S. law, although it is often beneficial. Because prior law did contain such a requirement, however, the use of notice is still relevant to the copyright status of older works.

Notice was required under the 1976 Copyright Act. This requirement was eliminated when the United States adhered to the Berne Convention, effective March 1, 1989. Although works published without notice before that date could have entered the public domain in the United States, the Uruguay Round Agreements Act (URAA) restores copyright in certain foreign works originally published without notice. For further information about copyright amendments in the URAA, see Circular 38b.

The Copyright Office does not take a position on whether copies of works first published with notice before March 1, 1989, which are distributed on or after March 1, 1989, must bear the copyright notice.

Use of the notice may be important because it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication. Furthermore, in the event that a work is infringed, if a proper notice of copyright appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in section 504(c)(2) of the copyright law. Innocent infringement occurs when the infringer did not realize that the work was protected.

The use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office.

Form of Notice for Visually Perceptible Copies

The notice for visually perceptible copies should contain all the following three elements:

1 The symbol © (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr."; *and*

2 The year of first publication of the work. In the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying textual matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful article; *and*

3 The name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

Example: © *2011 John Doe*

The "C in a circle" notice is used only on "visually perceptible copies." Certain kinds of works—for example, musical, dramatic, and literary works—may be fixed not in "copies" but by means of sound in an audio recording. Since audio recordings such as audio tapes and phonograph disks are "phonorecords" and not "copies," the "C in a circle" notice is not used to indicate protection of the underlying musical, dramatic, or literary work that is recorded.

Form of Notice for Phonorecords of Sound Recordings

The notice for phonorecords embodying a sound recording should contain all the following three elements:

1 The symbol ℗ (the letter P in a circle); *and*

2 The year of first publication of the sound recording; *and*

3 The name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. If the producer of the sound recording is named on the phonorecord label or container and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.

Example: ℗ *2011 A.B.C. Records Inc.*

NOTE: Since questions may arise from the use of variant forms of the notice, you may wish to seek legal advice before using any form of the notice other than those given here.

Position of Notice

The copyright notice should be affixed to copies or phonorecords in such a way as to "give reasonable notice of the claim of copyright." The three elements of the notice should ordinarily appear together on the copies or phonorecords or on the phonorecord label or container. The Copyright Office has issued regulations concerning the form and position of the copyright notice in the *Code of Federal Regulations* (37 *CFR* 201.20). For more information, see Circular 3, *Copyright Notice*.

Publications Incorporating U.S. Government Works

Works by the U.S. government are not eligible for U.S. copyright protection. For works published on and after March 1, 1989, the previous notice requirement for works consisting primarily of one or more U.S. government works has been eliminated. However, use of a notice on such a work will defeat a claim of innocent infringement as previously described provided the notice also includes a statement that identifies either those portions of the work in which copyright is claimed or those portions that constitute U.S. government material.

Example: © *2011 Jane Brown*
Copyright claimed in chapters 7–10, exclusive of U.S. government maps

Copies of works published before March 1, 1989, that consist primarily of one or more works of the U.S. government should have a notice and the identifying statement.

Unpublished Works

The author or copyright owner may wish to place a copyright notice on any unpublished copies or phonorecords that leave his or her control.

Example: Unpublished work © *2011 Jane Doe*

Omission of Notice and Errors in Notice

The 1976 Copyright Act attempted to ameliorate the strict consequences of failure to include notice under prior law. It contained provisions that set out specific corrective steps to cure omissions or certain errors in notice. Under these provisions, an applicant had five years after publication to cure omission of notice or certain errors. Although these provisions are technically still in the law, their impact has been limited by the amendment making notice optional for all works published on and after March 1, 1989. For further information, see Circular 3.

How Long Copyright Protection Endures

Works Originally Created on or after January 1, 1978

A work that was created (fixed in tangible form for the first time) on or after January 1, 1978, is automatically protected from the moment of its creation and is ordinarily given a term enduring for the author's life plus an additional 70 years after the author's death. In the case of "a joint work prepared by two or more authors who did not work for hire," the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.

Works Originally Created Before January 1, 1978, But Not Published or Registered by That Date

These works have been automatically brought under the statute and are now given federal copyright protection. The duration of copyright in these works is generally computed in the same way as for works created on or after January 1, 1978:

the life-plus-70 or 95/120-year terms apply to them as well. The law provides that in no case would the term of copyright for works in this category expire before December 31, 2002, and for works published on or before December 31, 2002, the term of copyright will not expire before December 31, 2047.

Works Originally Created and Published or Registered before January 1, 1978

Under the law in effect before 1978, copyright was secured either on the date a work was published with a copyright notice or on the date of registration if the work was registered in unpublished form. In either case, the copyright endured for a first term of 28 years from the date it was secured. During the last (28th) year of the first term, the copyright was eligible for renewal. The Copyright Act of 1976 extended the renewal term from 28 to 47 years for copyrights that were subsisting on January 1, 1978, or for pre-1978 copyrights restored under the Uruguay Round Agreements Act (URAA), making these works eligible for a total term of protection of 75 years. Public Law 105-298, enacted on October 27, 1998, further extended the renewal term of copyrights still subsisting on that date by an additional 20 years, providing for a renewal term of 67 years and a total term of protection of 95 years.

Public Law 102-307, enacted on June 26, 1992, amended the 1976 Copyright Act to provide for automatic renewal of the term of copyrights secured between January 1, 1964, and December 31, 1977. Although the renewal term is automatically provided, the Copyright Office does not issue a renewal certificate for these works unless a renewal application and fee are received and registered in the Copyright Office.

Public Law 102-307 makes renewal registration optional. Thus, filing for renewal registration is no longer required to extend the original 28-year copyright term to the full 95 years. However, some benefits accrue to renewal registrations that were made during the 28th year.

For more detailed information on renewal of copyright and the copyright term, see Circular 15, *Renewal of Copyright*; Circular 15a, *Duration of Copyright*; and Circular 15t, *Extension of Copyright Terms*.

Transfer of Copyright

Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred, but the transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. Transfer of a right on a nonexclusive basis does not require a written agreement.

A copyright may also be conveyed by operation of law and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

Copyright is a personal property right, and it is subject to the various state laws and regulations that govern the ownership, inheritance, or transfer of personal property as well as terms of contracts or conduct of business. For information about relevant state laws, consult an attorney.

Transfers of copyright are normally made by contract. The Copyright Office does not have any forms for such transfers. The law does provide for the recordation in the Copyright Office of transfers of copyright ownership. Although recordation is not required to make a valid transfer between the parties, it does provide certain legal advantages and may be required to validate the transfer as against third parties. For information on recordation of transfers and other documents related to copyright, see Circular 12, *Recordation of Transfers and Other Documents*.

Termination of Transfers

Under the previous law, the copyright in a work reverted to the author, if living, or if the author was not living, to other specified beneficiaries, provided a renewal claim was registered in the 28th year of the original term.* The present law drops the renewal feature except for works already in the first term of statutory protection when the present law took effect. Instead, the present law permits termination of a grant of rights after 35 years under certain conditions by serving written notice on the transferee within specified time limits.

For works already under statutory copyright protection before 1978, the present law provides a similar right of termination covering the newly added years that extended the former maximum term of the copyright from 56 to 95 years. For further information, see circulars 15a and 15t.

***Note:** The copyright in works eligible for renewal on or after June 26, 1992, will vest in the name of the renewal claimant on the effective date of any renewal registration made during the 28th year of the original term. Otherwise, the renewal copyright will vest in the party entitled to claim renewal as of December 31st of the 28th year.*

International Copyright Protection

There is no such thing as an "international copyright" that will automatically protect an author's writings throughout the entire world. Protection against unauthorized use in a particular country depends, basically, on the national laws of that country. However, most countries do offer protection to

foreign works under certain conditions, and these conditions have been greatly simplified by international copyright treaties and conventions. For further information and a list of countries that maintain copyright relations with the United States, see Circular 38A, *International Copyright Relations of the United States*.

Copyright Registration

In general, copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. However, registration is not a condition of copyright protection. Even though registration is not a requirement for protection, the copyright law provides several inducements or advantages to encourage copyright owners to make registration. Among these advantages are the following:

- Registration establishes a public record of the copyright claim.
- Before an infringement suit may be filed in court, registration is necessary for works of U.S. origin.
- If made before or within five years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate.
- If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.
- Registration allows the owner of the copyright to record the registration with the U.S. Customs Service for protection against the importation of infringing copies. For additional information, go to the U.S. Customs and Border Protection website at *www.cbp.gov/*.

Registration may be made at any time within the life of the copyright. Unlike the law before 1978, when a work has been registered in unpublished form, it is not necessary to make another registration when the work becomes published, although the copyright owner may register the published edition, if desired.

Registration Procedures

Filing an Original Claim to Copyright with the U.S. Copyright Office

An application for copyright registration contains three essential elements: a completed application form, a nonrefundable filing fee, and a nonreturnable deposit—that is, a copy or copies of the work being registered and "deposited" with the Copyright Office.

If you apply online for copyright registration, you will receive an email saying that your application was received. If you apply for copyright registration using a paper application, you will not receive an acknowledgment that your application has been received (the Office receives more than 600,000 applications annually). With either online or paper applications, you can expect:

- a letter, telephone call or email from a Copyright Office staff member if further information is needed *or*
- a certificate of registration indicating that the work has been registered, or if the application cannot be accepted, a letter explaining why it has been rejected

Requests to have certificates available for pickup in the Public Information Office or to have certificates sent by Federal Express or another mail service cannot be honored.

If you apply using a paper application and you want to know the date that the Copyright Office receives your material, send it by registered or certified mail and request a return receipt.

You can apply to register your copyright in one of two ways.

Online Application

Online registration through the electronic Copyright Office (eCO) is the preferred way to register basic claims for literary works; visual arts works; performing arts works, including motion pictures; sound recordings; and single serials. Advantages of online filing include:

- a lower filing fee
- the fastest processing time
- online status tracking
- secure payment by credit or debit card, electronic check, or Copyright Office deposit account
- the ability to upload certain categories of deposits directly into eCO as electronic files

NOTE: You can still register using eCO and save money even if you will submit a hard-copy deposit, which is required under the mandatory deposit requirements for certain published works. The system will prompt you to specify whether you intend to submit an electronic or a hard-copy deposit, and it will provide instructions accordingly.

Basic claims include (1) a single work; (2) multiple unpublished works if the elements are assembled in an orderly form; the combined elements bear a single title identifying the collection as a whole; the copyright claimant in all the elements and in the collection as a whole is the same; and all the elements are by the same author or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element; and (3) multiple published works if they are all first published together in the same publication on the same date and owned by the same claimant.

Online submissions of groups of published photographs and automated databases consisting predominantly of photographs may be permitted if the applicant first calls the Visual Arts Division (202) 707-8202) for approval and special instructions. See the Copyright Office website at *www.copyright.gov* for further information. To access eCO, go to the Copyright Office website and click on *electronic Copyright Office.*

Paper Application

You can also register your copyright using forms TX (literary works); VA (visual arts works); PA (performing arts works, including motion pictures); SR (sound recordings); and SE (single serials). To access all forms, go to the Copyright Office website and click on *Forms.* On your personal computer, complete the form for the type of work you are registering, print it out, and mail it with a check or money order and your deposit. Blank forms can also be printed out and completed by hand, or they may be requested by postal mail or by calling the Forms and Publications Hotline at (202) 707-9100 (limit of two copies of each form by mail). Informational circulars about the types of applications and current registration fees are available on the Copyright Office website at *www.copyright.gov* or by phone.

Applications That Must Be Completed on Paper

Certain applications must be completed on paper and mailed to the Copyright Office with the appropriate fee and deposit. Forms for these applications include the following:

- Form D-VH for registration of vessel hull designs
- Form MW for registration of mask works
- Form CA to correct an error or to amplify the information given in a registration
- Form GATT for registration of works in which the U.S. copyright was restored under the 1994 Uruguay Round Agreements Act
- Form RE for renewal of copyright claims
- Applications for group registration, including group registration of automated databases consisting predominantly of photographs and Form GR/PPh (published photographs), unless permission to enter the online pilot project mentioned above in "Online Application" is approved by the Visual Arts Division; Form GR/CP (contributions to periodicals); Form SE/Group (serials); and Form G/DN (daily newspapers and newsletters).

NOTE: If you complete the application form by hand, use black ink pen or type. You may photocopy blank application forms. However, photocopied forms submitted to the Copyright Office must be clear and legible on a good grade of 8½" × 11" white paper. Forms not meeting these requirements may be returned, resulting in delayed registration. You must have Adobe Acrobat Reader® installed on your computer to view and print the forms accessed on the Internet. Adobe Acrobat Reader may be downloaded free from *www.copyright.gov*.

Mailing Addresses for Applications Filed on Paper and for Hard-copy Deposits

Library of Congress
U.S. Copyright Office
101 Independence Avenue SE
Washington, DC 20559

Filing a Renewal Registration

To register a renewal, send the following:

1 a properly completed application Form RE and, if necessary, Form RE Addendum, *and*

2 a nonrefundable filing fee* for each application and each Addendum. Each Addendum form must be accompanied by a deposit representing the work being renewed. See Circular 15, *Renewal of Copyright*.

***NOTE: For current fee information, check the Copyright Office website at *www.copyright.gov*, write the Copyright Office, or call (202) 707-3000 or 1-877-476-0778.**

Deposit Requirements

If you file an application for copyright registration online using eCO, you may in some cases attach an electronic copy

of your deposit. If you do not have an electronic copy or if you must send a hard copy or copies of your deposit to comply with the "best edition" requirements for published works, you must print out a shipping slip, attach it to your deposit, and mail the deposit to the Copyright Office. Send the deposit, fee, and paper registration form packaged together to:

Library of Congress
U.S. Copyright Office
101 Independence Avenue SE
Washington, DC 20559

The hard-copy deposit of the work being registered will not be returned to you.

The deposit requirements vary in particular situations. The general requirements follow. Also note the information under "Special Deposit Requirements" in the next column.

- if the work is unpublished, one complete copy or phonorecord
- if the work was first published in the United States on or after January 1, 1978, two complete copies or phonorecords of the best edition
- if the work was first published in the United States before January 1, 1978, two complete copies or phonorecords of the work as first published
- if the work was first published outside the United States, one complete copy or phonorecord of the work as first published

When registering with eCO, you will receive via your printer a shipping slip that you must include with your deposit that you send to the Copyright Office. This shipping slip is unique to your claim to copyright and will link your deposit to your application. Do not reuse the shipping slip.

NOTE: It is imperative when sending multiple works that you place all applications, deposits, and fees in the same package. If it is not possible to fit everything in one package, number each package (e.g., 1 of 3; 2 of 4) to facilitate processing and, where possible, attach applications to the appropriate deposits.

Special Deposit Requirements

Special deposit requirements exist for many types of works. The following are prominent examples of exceptions to the general deposit requirements:

- If the work is a motion picture, the deposit requirement is one complete copy of the unpublished or published motion picture and a separate written description of its contents, such as a continuity, press book, or synopsis.
- If the work is a literary, dramatic, or musical work published only in a phonorecord, the deposit requirement is one complete phonorecord.
- If the work is an unpublished or published computer program, the deposit requirement is one visually perceptible copy in source code of the first 25 and last 25 pages of the program. For a program of fewer than 50 pages, the deposit is a copy of the entire program. For more information on computer program registration, including deposits for revised programs and provisions for trade secrets, see Circular 61, *Copyright Registration for Computer Programs.*
- If the work is in a CD-ROM format, the deposit requirement is one complete copy of the material, that is, the CD-ROM, the operating software, and any manual(s) accompanying it. If registration is sought for the computer program on the CD-ROM, the deposit should also include a printout of the first 25 and last 25 pages of source code for the program.

In the case of works reproduced in three-dimensional copies, identifying material such as photographs or drawings is ordinarily required. Other examples of special deposit requirements (but by no means an exhaustive list) include many works of the visual arts such as greeting cards, toys, fabrics, and oversized materials (see Circular 40A, *Deposit Requirements for Registration of Claims to Copyright in Visual Arts Material*); computer programs, video games, and other machine-readable audiovisual works (see Circular 61); automated databases (see Circular 65, *Copyright Registration for Automated Databases*); and contributions to collective works. For information about deposit requirements for group registration of serials, see Circular 62, *Copyright Registration for Serials*.

If you are unsure of the deposit requirement for your work, write or call the Copyright Office and describe the work you wish to register.

Unpublished Collections

Under the following conditions, a work may be registered in unpublished form as a "collection," with one application form and one fee:

- The elements of the collection are assembled in an orderly form;
- The combined elements bear a single title identifying the collection as a whole;
- The copyright claimant in all the elements and in the collection as a whole is the same; *and*

- All the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.

NOTE: A Library of Congress Control Number is different from a copyright registration number. The Cataloging in Publication (CIP) Division of the Library of Congress is responsible for assigning LC Control Numbers and is operationally separate from the Copyright Office. A book may be registered in or deposited with the Copyright Office but not necessarily cataloged and added to the Library's collections. For information about obtaining an LC Control Number, see the following website: *http://pcn.loc.gov/pcn*. For information on International Standard Book Numbering (ISBN), write to: *ISBN, R.R. Bowker, 630 Central Ave., New Providence, NJ 07974*. Call (800) 269-5372. For further information and to apply online, see *www.isbn.org*. For information on International Standard Serial Numbering (ISSN), write to: *Library of Congress, National Serials Data Program, Serial Record Division, Washington, DC 20540-4160*. Call (202) 707-6452. Or obtain information from *www.loc.gov/issn*.

An unpublished collection is not indexed under the individual titles of the contents but under the title of the collection.

Filing a Preregistration

Preregistration is a service intended for works that have had a history of prerelease infringement. To be eligible for preregistration, a work must be unpublished and must be in the process of being prepared for commercial distribution. It must also fall within a class of works determined by the Register of Copyrights to have had a history of infringement prior to authorized commercial distribution. Preregistration is not a substitute for registration. The preregistration application Form PRE is only available online. For further information, go to the Copyright Office website at *www.copyright.gov*.

Effective Date of Registration

When the Copyright Office issues a registration certificate, it assigns as the effective date of registration the date it received all required elements—an application, a nonrefundable filing fee, and a nonreturnable deposit—in acceptable form, regardless of how long it took to process the application and mail the certificate. You do not have to receive your certificate before you publish or produce your work, nor do you need permission from the Copyright Office to place a copyright notice on your work. However, the Copyright Office must have acted on your application before you can file a suit for copyright infringement, and certain remedies, such as statutory damages and attorney's fees, are available only for acts of infringement that occurred after the effective date of registration. If a published work was infringed before the effective date of registration, those remedies may also be available if the effective date of registration is no later than three months after the first publication of the work.

Corrections and Amplifications of Existing Registrations

To correct an error in a copyright registration or to amplify the information given in a registration, file with the Copyright Office a supplementary registration Form CA. File Form CA in the same manner as described above under *Registration Procedures.* The information in a supplementary registration augments but does not supersede that contained in the earlier registration. Note also that a supplementary registration is not a substitute for original registration, for renewal registration, or for recordation of a transfer of ownership. For further information about supplementary registration, see Circular 8, *Supplementary Copyright Registration*.

Mandatory Deposit for Works Published in the United States

Although a copyright registration is not required, the Copyright Act establishes a mandatory deposit requirement for works published in the United States. See the definition of "publication" on page 3. In general, the owner of copyright or the owner of the exclusive right of publication in the work has a legal obligation to deposit in the Copyright Office, within three months of publication in the United States, two copies (or in the case of sound recordings, two phonorecords) for the use of the Library of Congress. Failure to make the deposit can result in fines and other penalties but does not affect copyright protection.

If a registration for a claim to copyright in a published work is filed online and the deposit is submitted online, the actual physical deposit must still be submitted to satisfy mandatory deposit requirements.

Certain categories of works are exempt entirely from the mandatory deposit requirements, and the obligation is reduced for certain other categories. For further information about mandatory deposit, see Circular 7D, *Mandatory Deposit of Copies or Phonorecords for the Library of Congress*.

Use of Mandatory Deposit to Satisfy Registration Requirements

For works published in the United States, the copyright law contains a provision under which a single deposit can be made to satisfy both the deposit requirements for the Library and the registration requirements. To have this dual effect, the copies or phonorecords must be accompanied by the prescribed application form and filing fee. If applicable, a copy of the mandatory deposit notice must also be included with the submission.

Who May File an Application Form?

The following persons are legally entitled to submit an application form:

- **The author.** This is either the person who actually created the work or, if the work was made for hire, the employer or other person for whom the work was prepared.
- **The copyright claimant.** The copyright claimant is defined in Copyright Office regulations as either the author of the work or a person or organization that has obtained ownership of all the rights under the copyright initially belonging to the author. This category includes a person or organization who has obtained by contract the right to claim legal title to the copyright in an application for copyright registration.
- **The owner of exclusive right(s).** Under the law, any of the exclusive rights that make up a copyright and any subdivision of them can be transferred and owned separately, even though the transfer may be limited in time or place of effect. The term "copyright owner" with respect to any one of the exclusive rights contained in a copyright refers to the owner of that particular right. Any owner of an exclusive right may apply for registration of a claim in the work.
- **The duly authorized agent of such author, other copyright claimant, or owner of exclusive right(s).** Any person authorized to act on behalf of the author, other copyright claimant, or owner of exclusive rights may apply for registration.

There is no requirement that applications be prepared or filed by an attorney.

Fees*

All remittances that are not made online or by deposit account should be in the form of drafts, that is, checks, money orders, or bank drafts, payable to *Register of Copyrights*. Do not send cash. Drafts must be redeemable without service or exchange fee through a U.S. institution, must be payable in U.S. dollars, and must be imprinted with American Banking Association routing numbers. International Money Orders and Postal Money Orders that are negotiable only at a post office are not acceptable.

If a check received in payment of the filing fee is returned to the Copyright Office as uncollectible, the Copyright Office will cancel the registration and will notify the remitter.

The filing fee for processing an original, supplementary, or renewal claim is nonrefundable, whether or not copyright registration is ultimately made. Do not send cash. The Copyright Office cannot assume any responsibility for the loss of currency sent in payment of copyright fees. For further information, read Circular 4, *Copyright Fees.*

***NOTE:** Copyright Office fees are subject to change. For current fees, check the Copyright Office website at *www.copyright.gov*, write the Copyright Office, or call (202) 707-3000 or 1-877-476-0778.

Certain Fees and Services May Be Charged to a Credit Card

If an application is submitted online, payment may be made by credit card or Copyright Office deposit account. If an application is submitted on a paper application form, the fee may not be charged to a credit card.

Some fees may be charged by telephone and in person in the office. Others may only be charged in person in the office. Fees related to items that are hand-carried into the Public Information Office may be charged to a credit card.

- **Records Research and Certification Section:** Fees for the following can be charged in person in the Office or by phone: additional certificates; copies of documents and deposits; search and retrieval of deposits; certifications; and expedited processing. In addition, fees for estimates of the cost of searching Copyright Office records and for searches of the copyright facts of registrations and recordations on a regular or expedited basis may be charged to a credit card by phone.
- **Public Information Office:** These fees may only be charged in person in the office, not by phone: standard registration request forms; special handling requests for all standard registrations; requests for services provided by the Records, Research, and Certification Section when the

request is accompanied by a request for special handling; additional fee for each claim using the same deposit; full term retention fees; appeal fees; secure test processing fee; short fee payments when accompanied by a remittance due notice; and online service providers fees.

- **Public Records Reading Room:** On-site use of Copyright Office computers, printers, or photocopiers can be charged in person in the office.
- **Accounts Section:** Deposit accounts maintained by the Accounts Section may be replenished by credit card. See Circular 5, *How to Open and Maintain a Deposit Account in the Copyright Office*.

NIE recordations and claims filed on Form GATT may be paid by credit card if the card number is included in a separate letter that accompanies the form.

Search of Copyright Office Records

The records of the Copyright Office are open for inspection and searching by the public. Upon request and payment of a fee,* the Copyright Office will search its records for you. For information on searching the Office records concerning the copyright status or ownership of a work, see Circular 22, *How to Investigate the Copyright Status of a Work*, and Circular 23, *The Copyright Card Catalog and the Online Files of the Copyright Office*.

Copyright Office records in machine-readable form cataloged from January 1, 1978, to the present, including registration and renewal information and recorded documents, are available for searching on the Copyright Office website at *www.copyright.gov*.

For Further Information

By Internet

Circulars, announcements, regulations, all application forms, and other materials are available from the Copyright Office website at *www.copyright.gov*. To send an email communication, click on *Contact Us* at the bottom of the homepage.

By Telephone

For general information about copyright, call the Copyright Public Information Office at (202) 707-3000 or 1-877-476-0778 (toll free). Staff members are on duty from 8:30 AM to 5:00 PM, eastern time, Monday through Friday, except federal holidays. Recorded information is available 24 hours a day. If you want to request paper application forms or circulars, call the Forms and Publications Hotline at (202) 707-9100 and leave a recorded message.

By Regular Mail

Write to:

Library of Congress
Copyright Office-COPUBS
101 Independence Avenue SE
Washington, DC 20559

The Copyright Public Information Office is open to the public 8:30 AM to 5:00 PM Monday through Friday, eastern time, except federal holidays. The office is located in the Library of Congress, James Madison Memorial Building, 101 Independence Avenue SE, Washington, DC, near the Capitol South Metro stop. Staff members are available to answer questions, provide circulars, and accept paper applications for registration. Access for disabled individuals is at the front door on Independence Avenue SE.

The Copyright Office may not give legal advice. If you need information or guidance on matters such as disputes over copyright ownership, suits against possible infringers, procedures for publishing a work, or methods of obtaining royalty payments, you may need to consult an attorney.

NOTE: The Copyright Office provides *NewsNet*, a free electronic mailing list that issues periodic email messages on the subject of copyright. The messages alert subscribers to hearings, deadlines for comments, new and proposed regulations, updates on eService, and other copyright-related subjects. *NewsNet* is not an interactive discussion group. Subscribe to *NewsNet* on the Copyright Office website at *www.copyright.gov*. Click on *News*. You will receive a standard welcoming message indicating that your subscription to *NewsNet* has been accepted.

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PDF Version 

Copyright Term and the Public Domain in the United States
1 January 2014[1]

Never Published, Never Registered Works[2]

Type of Work	*Copyright Term*	*What was in the public domain in the U.S. as of 1 January 2014*[3]
Unpublished works	Life of the author + 70 years	Works from authors who died before 1944
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1894
Unpublished works when the death date of the author is not known[4]	120 years from date of creation[5]	Works created before 1894[5]

Works Registered or First Published in the U.S.

Date of Publication[6]	*Conditions*[7]	*Copyright Term*[3]
Before 1923	None	None. In the public domain due to copyright expiration
1923 through 1977	Published without a copyright notice	None. In the public domain due to failure to comply with required formalities
1978 to 1 March 1989	Published without notice, and without subsequent registration within 5 years	None. In the public domain due to failure to comply with required formalities

1978 to 1 March 1989	Published without notice, but with subsequent registration within 5 years	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1923 through 1963	Published with notice but copyright was not renewed[8]	None. In the public domain due to copyright expiration
1923 through 1963	Published with notice and the copyright was renewed[8]	95 years after publication date
1964 through 1977	Published with notice	95 years after publication date
1978 to 1 March 1989	Created after 1977 and published with notice	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1978 to 1 March 1989	Created before 1978 and first published with notice in the specified period	The greater of the term specified in the previous entry or 31 December 2047
From 1 March 1989 through 2002	Created after 1977	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
From 1 March 1989 through 2002	Created before 1978 and first published in this period	The greater of the term specified in the previous entry or 31 December 2047
After 2002	None	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
Anytime	Works prepared by an officer or employee of the United States Government as part of that person's official duties. [21]	None. In the public domain in the United States (17 U.S.C. §

		105)

Works First Published Outside the U.S. by Foreign Nationals or U.S. Citizens Living Abroad[9]

Date of Publication	*Conditions*	*Copyright Term in the United States*
Before 1923	None	In the public domain (But see first special case below)
Works Published Abroad Before 1978[10]		
1923 through 1977	Published without compliance with US formalities, and in the public domain in its source country as of 1 January 1996 (but see special cases) [20]	In the public domain
1923 through 1977	Published in compliance with all US formalities (i.e., notice, renewal)[11]	95 years after publication date
1923 through 1977	Solely published abroad, without compliance with US formalities or republication in the US, and not in the public domain in its home country as of 1 January 1996 (but see special cases)	95 years after publication date
1923 through 1977	Published in the US less than 30 days after publication abroad	Use the US publication chart to determine duration
1923 through 1977	Published in the US more than 30 days after publication abroad, without compliance with US formalities, and not in the public domain in its home country as of 1 January 1996 (but see special cases)	95 years after publication date
Works Published Abroad After 1 January 1978		
1 January 1978 - 1 March 1989	Published without copyright notice, and in the public domain in its source country as of 1 January 1996 (but see special cases)[20]	In the public domain
1 January 1978 - 1 March 1989	Published without copyright notice in a country that is a signatory to the Berne Convention and is **not** in the public domain in its source country as of 1 January 1996 (but see special cases) [20]	70 years after the death of author, or if work of corporate authorship, 95 years from publication
1 January 1978 - 1 March 1989	Published with copyright notice by a non-US citizen in a country that was party to the Universal Copyright Convention (UCC)	70 years after the death of author, or if work of corporate authorship, 95 years from publication
After 1 March 1989	Published in a country that is a signatory to the Berne Convention	70 years after the death of author, or if work of corporate authorship, 95 years from

		publication
After 1 March 1989	Published in a country with which the United States does not have copyright relations under a treaty	In the public domain

Special Cases

1 July 1909 through 1978	In Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands ONLY. Published in a language other than English, and without subsequent republication with a copyright notice[12]	Treat as an unpublished work until such date as first US-compliant publication occurred
Prior to 27 May 1973	Published by a national of Turkmenistan or Uzbekistan in either country[19]	In the public domain
After 26 May 1973	Published by a national of Turkmenistan or Uzbekistan in either country[19]	May be protected under the UCC
Anytime	Created by a resident of Afghanistan, Eritrea, Ethiopia, Iran, Iraq, or San Marino, and published in one of these countries[13]	Not protected by US copyright law until they become party to bilateral or international copyright agreements
Anytime	Works whose copyright was once owned or administered by the Alien Property Custodian, and whose copyright, if restored, would as of January 1, 1996, be owned by a government[14]	Not protected by US copyright law
Anytime	If published in one of the following countries, the 1 January 1996 date given above is replaced by the date of the country's membership in the Berne Convention or the World Trade Organization, whichever is earlier: Andorra, Angola, Armenia, Bhutan, Cambodia, Comoros, Jordan, Democratic People's Republic of Korea, Laos, Malaysia, Micronesia, Montenegro, Nepal, Oman, Papua New Guinea, Qatar, Samoa, Saudi Arabia, Solomon Islands, Sudan, Syria, Tajikistan, Tonga, United Arab Emirates, Uzbekistan, Vanuatu, Vietnam, Yemen	

Sound Recordings

(Note: The following information applies only to the sound recording itself, and not to any copyrights in underlying compositions or texts.)

Date of Fixation/Publication	***Conditions***	***What was in the public domain in the U.S. as of 1 January 2014***[3]

Unpublished Sound Recordings, Domestic and Foreign

Prior to 15 Feb. 1972	Indeterminate	Subject to state common law protection. Enters the public domain on 15 Feb. 2067
After 15 Feb. 1972	Life of the author + 70 years. For unpublished anonymous and pseudonymous works and works made for hire (corporate authorship), 120 years from the date of fixation	Nothing. The soonest anything enters the public domain is 15 Feb. 2067

Sound Recordings Published in the United States

Date of Fixation/Publication	***Conditions***	***What was in the public domain in the U.S. as of 1 January 2014***[3]
Fixed prior to 15 Feb. 1972	None	Subject to state statutory and/or common law protection. Fully enters the public domain on 15 Feb. 2067
15 Feb 1972 to 1978	Published without notice (i.e, ℗, year of publication, and name of copyright owner)[15]	In the public domain
15 Feb. 1972 to 1978	Published with notice	95 years from publication. 2068 at the earliest
1978 to 1 March 1989	Published without notice, and without subsequent registration	In the public domain
1978 to 1 March 1989	Published with notice	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation. 2049 at the earliest
After 1 March 1989	None	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation. 2049 at the earliest

Sound Recordings Published Outside the United States

Prior to 1923	None	Subject to state statutory and/or common law protection. Fully enters the public domain on 15 Feb. 2067
1923 to 1 March 1989	In the public domain in its home country as of 1 Jan. 1996 or there was US publication within 30 days of the foreign publication (but see special cases)	Subject to state common law protection. Enters the public domain on 15 Feb. 2067
1923 to 15 Feb. 1972	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication (but see special cases)	Enters public domain on 15 Feb. 2067
15 Feb. 1972 to 1978	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication (but see special cases)	95 years from date of publication. 2068 at the earliest
1978 to 1 March 1989	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication (but see special cases)	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation
After 1 March 1989	None	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation

Special Cases

Fixed at any time	Created by a resident of Afghanistan, Eritrea, Ethiopia, Iran, Iraq, or San Marino, and published in one of these countries[13]	Not protected by US copyright law because they are not party to international copyright agreements
Fixed prior to 1996	Works whose copyright was once owned or administered by the Alien Property Custodian, and whose copyright, if restored, would as of 1	Not protected by US copyright law

	January 1996 be owned by a government[14]	
Fixed at any time	If fixed or solely published in one of the following countries, the 1 January 1996 date given above is replaced by the date of the country's membership in the Berne Convention or the World Trade Organization, whichever is earlier: Algeria, Andorra, Angola, Armenia, Bhutan, Cambodia, Comoros, Jersey, Jordan, Democratic People's Republic of Korea, Laos, Malaysia, Micronesia, Montenegro, Nepal, Oman, Papua New Guinea, Qatar, Samoa, Saudi Arabia, Solomon Islands, Sudan, Syria, Tajikistan, Tonga, United Arab Emirates, Uzbekistan, Vanuatu, Vietnam, Yemen	

Architectural Works[16]

(Note: Architectural plans and drawings may also be protected as textual/graphics works)

Date of Design	***Date of Construction***	***Copyright Status***
Prior to 1 Dec. 1990	Not constructed by 31 Dec. 2002	Protected only as plans or drawings
Prior to 1 Dec. 1990	Constructed by 1 Dec. 1990	Protected only as plans or drawings
Prior to 1 Dec. 1990	Constructed between 30 Nov. 1990 and 31 Dec. 2002	Building is protected for 70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation[17]
From 1 Dec. 1990	Immaterial	Building is protected for 70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation[17]

Notes

1. This chart was first published in Peter B. Hirtle, "Recent Changes To The Copyright Law: Copyright Term Extension," *Archival Outlook,* January/February 1999. This version is current as of 1 January 2014 . The most recent version is found at http://www.copyright.cornell.edu/resources/publicdomain.cfm. For some explanation on how to use the chart and complications hidden in it, see Peter B. Hirtle, "When is 1923 Going to Arrive and Other Complications of the U.S. Public Domain," *Searcher* (Sept 2012).
The chart is based in part on Laura N. Gasaway's chart, "When Works Pass Into the Public Domain," at <http://www.unc.edu/~unclng/public-d.htm>, and similar charts found in Marie C. Malaro, *A Legal Primer On Managing Museum Collections* (Washington, D.C.: Smithsonian Institution Press, 1998): 155-156. A useful copyright duration chart by Mary Minow, organized by year, is found at <http://www.librarylaw.com/DigitizationTable.htm>. A "flow chart" for copyright duration is found at <http://sunsteinlaw.com/practices/copyright-

portfolio-development/copyright-pointers/copyright-flowchart/>, and a “tree-view” chart on copyright is at <http://chart.copyrightdata.com>. Several U.S. copyright duration calculators are available online, including the Public Domain Sherpa (http://www.publicdomainsherpa.com/calculator.html) and the Durationator (in beta at http://www.durationator.com/). Europeana’s public domain calculators for 30 different countries outside of the U.S. (at http://www.outofcopyright.eu/). The Open Knowledge Foundation has been encouraging the development of public domain calculators for many countries: see http://publicdomain.okfn.org/calculators/. See also Library of Congress Copyright Office. Circular 15a, *Duration of Copyright: Provisions of the Law Dealing with the Length of Copyright Protection* (Washington, D.C. : Library of Congress, 2004) <http://www.copyright.gov/circs/circ15a.pdf>. Further information on copyright duration is found in Chapter 3, "Duration and Ownership of Copyright," in *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums*, by Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon (Ithaca, NY: Cornell University Library, 2009) available for purchase at http://bookstore.library.cornell.edu/ and as a free download at http://ecommons.cornell.edu/handle/1813/14142 .

2. Treat unpublished works registered for copyright prior to 1978 as if they had been published in the US (though note that the only formality that applied was the requirement to renew copyright after 28 years). Unpublished works registered for copyright since 1978 can be considered as if they were an "Unpublished, Unregistered Work."
3. All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on the first of the year following the expiration of its copyright term. For example, a book published on 15 March 1923 will enter the public domain on 1 January 2019, not 16 March 2018 (1923+95=2018).
4. Unpublished works when the death date of the author is not known may still be copyrighted after 120 years, but certification from the Copyright Office that it has no record to indicate whether the person is living or died less than 70 years before is a complete defense to any action for infringement. See 17 U.S.C. § 302(e).
5. Presumption as to the author's death requires a certified report from the Copyright Office that its records disclose nothing to indicate that the author of the work is living or died less than seventy years before.
6. "Publication" was not explicitly defined in the Copyright Law before 1976, but the 1909 Act indirectly indicated that publication was when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority.
7. Not all published works are copyrighted. Works prepared by an officer or employee of the United States Government as part of that person's official duties receive no copyright protection in the US. For much of the twentieth century, certain formalities had to be followed to secure copyright protection. For example, some books had to be printed in the United States to receive copyright protection, and failure to deposit copies of works with the Register of Copyright could result in the loss of copyright. The requirements that copies include a formal notice of copyright and that the copyright be renewed after twenty eight years were the most common conditions, and are specified in the chart.
8. A 1961 Copyright Office study found that fewer than 15% of all registered copyrights were renewed. For books, the figure was even lower: 7%. See Barbara Ringer, "Study No. 31: Renewal of Copyright" (1960), reprinted in Library of Congress Copyright Office. *Copyright law revision: Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, first [-second] session*. (Washington: U. S. Govt. Print. Off, 1961), p. 220. A good guide to investigating the copyright and renewal status of published work is Samuel Demas and Jennie L. Brogdon, "Determining Copyright Status for Preservation and Access: Defining Reasonable Effort," *Library Resources and Technical Services* 41:4 (October, 1997): 323-334. See also Library of Congress Copyright Office, How to investigate the copyright status of a work. Circular 22. [Washington, D.C.: Library of Congress, Copyright Office, 2004]. The Online Books Page FAQ, especially "How Can I Tell Whether a Book Can Go Online?" and "How Can I Tell Whether a Copyright Was Renewed?", is also very helpful.
9. The following section on foreign publications draws extensively on Stephen Fishman, The Public Domain: How to Find Copyright-free Writings, Music, Art & More. (Berkeley : Nolo.com, 2012). It applies to works first published abroad and not subsequently published in the US within 30

days of the original foreign publication. Works that were simultaneously published abroad and in the US are treated as if they are American publications.

10. Foreign works published after 1923 are likely to be still under copyright in the US because of the Uruguay Round Agreements Act (URAA) modifying the General Agreement on Tariffs and Trade (GATT). The URAA restored copyright in foreign works that as of 1 January 1996 had fallen into the public domain in the US because of a failure to comply with US formalities. One of the authors of the work had to be a non-US citizen or resident, the work could not have been published in the US within 30 days after its publication abroad, and the work needed to still be in copyright in the country of publication. Such works have a copyright term equivalent to that of an American work that had followed all of the formalities. For more information, see Library of Congress Copyright Office, Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act (URAA). Circular 38b. [Washington, D.C.: Library of Congress, Copyright Office, 2004].
11. US formalities include the requirement that a formal notice of copyright be included in the work; registration, renewal, and deposit of copies in the Copyright Office; and the manufacture of the work in the US.
12. The differing dates is a product of the question of controversial Twin Books v. Walt Disney Co. decision by the 9th Circuit Court of Appeals in 1996. The question at issue is the copyright status of a work only published in a foreign language outside of the United States and without a copyright notice. It had long been assumed that failure to comply with US formalities placed these works in the public domain in the US and, as such, were subject to copyright restoration under URAA (see note 10). The court in *Twin Books*, however, concluded "publication without a copyright notice in a foreign country did not put the work in the public domain in the United States." According to the court, these foreign publications were in effect "unpublished" in the US, and hence have the same copyright term as unpublished works. The decision has been harshly criticized in *Nimmer on Copyright*, the leading treatise on copyright, as being incompatible with previous decisions and the intent of Congress when it restored foreign copyrights. The Copyright Office as well ignores the *Twin Books* decision in its circular on restored copyrights. Nevertheless, the decision is currently applicable in all of the 9th Judicial Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam and the Northern Mariana Islands), and it may apply in the rest of the country.
13. See Library of Congress Copyright Office, International Copyright Relations of the United States. Circular 38a. [Washington, D.C. : Library of Congress, Copyright Office, 2011].
14. See 63 Fed. Reg.19,287 (1998), Library of Congress Copyright Office, Copyright Restoration of Works in Accordance With the Uruguay Round Agreements Act; List Identifying Copyrights Restored Under the Uruguay Round Agreements Act for Which Notices of Intent To Enforce Restored Copyrights Were Filed in the Copyright Office.
15. Copyright notice requirements for sound recordings are spelled out in the Copyright Office's Circular 3, "Copyright Notice," available at http://www.copyright.gov/circs/circ03.pdf. Here is the exact text:

    The copyright notice for phonorecords embodying a sound recording is different from that for other works. Sound recordings are defined as "works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." Copyright in a sound recording protects the particular series of sounds fixed in the recording against unauthorized reproduction, revision, and distribution. This copyright is distinct from copyright of the musical, literary, or dramatic work that may be recorded on the phonorecord. Phonorecords may be records (such as LPs and 45s), audio tapes, cassettes, or disks. The notice should contain the following three elements appearing together on the phonorecord:

    1. The symbol ℗; and
    2. The year of first publication of the sound recording; and
    3. The name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. If the producer of the sound recording is named on the phonorecord label or container and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.

4. Example: ℗ 2004 X.Y.Z. Records, Inc.

16. Architectural works are defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." Architectural works were expressly included in copyright by Title VII of Pub. L. 101-650.

17. What constitutes "publication" of a building is a very interesting question. As the Copyright Office has noted, "A work is considered published when underlying copies of the building design are distributed or made available public by sale or other transfer of ownership, or by rental. Construction of a building does not itself constitute publication registration, unless multiple copies are constructed." See its Circular 41, "Copyright Claims in Architectural Works," available at http://www.copyright.gov/circs/circ41.pdf.

19. Turkmenistan and Uzbekistan may have inherited UCC obligations and protections from the USSR , which joined the UCC on 27 May 1973 . See Peter B. Maggs, "Post-Soviet Law: The Case of Intellectual Property Law," The Harriman Institute Forum 5, no. 3 (November 1991). They have not as yet, however, filed a "Notification of Succession" with the UCC. See http://portal.unesco.org/culture/en/ev.php-URL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html for signatories to the two UCC treaties.

20. If the source country's first adhered to either the Berne Treaty or the WTO after 1 January 1996, then the relevant date is the earliest date of membership. Date of membership is tracked at http://en.wikipedia.org/wiki/list_of_parties_to_international_copyright_agreements

21. Contractors and grantees are not considered government empoyees. Generaly they create works with copyright (though the government may own that copyright). See CENDI Frequently asked Questions about Copyright: Issues Affecting the U.S. Government . The public domain status of U.S. government works applies only in the U.S.

Index of Copyright Cases for Educators

Laura Quilter, Jan. 11, 2015

Copyrightability

- *Baker v. Selden*, 101 U.S. 99 (1879) – US Supreme Court case: Ideas, as expressed in forms, were non-copyrightable; established the idea-expression dichotomy in copyright law.
- ***Feist Publications, Inc. v. Rural Telephone Service Co*., 499 U.S. 340 (1991) – US Supreme Court case: Compilation of facts was not copyrightable, although original organization or selection could be.**
- Situation Management Systems, Inc. v. ASP Consulting LLC, 560 F.3d 53 (1st Cir. 2009) – Management training materials were infringed by substantially similar materials; the bar for originality is low, and "vapid" content may still meet it.
- *Ho v. Taflove*, 648 F.3d 489 (7th Cir. 2011) – Engineering researchers at Northwestern University copied figures and text from colleagues' mathematical model of how electrons behave in certain circumstances. Graduate student Shi-Hui Chang switched from Professor Seng-Tieng Ho's lab to Professor Allen Taflove's lab; graduate student Yingyan Huang joined Ho's lab afterwards. Chang & Taflove published materials from Ho and Huang's work without attribution. The equations, figures, and text were unprotectable because of limited ways of expressing the scientific model (the "merger doctrine").

First Sale

- *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) – US Supreme Court case that recognized the first sale doctrine, later codified in the Copyright Act as 17 USC 109.
- *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. ____ (2013) – US Supreme Court said that first sale doctrine applies to import rights.

Term & Duration

- *Dastar v. Fox*, 539 U.S. 23 (2003) – You can't extend a copyright term with a trademark.
- *Eldred v. Ashcroft*, 537 U.S. 186 (2003) – US Supreme Court said that Congress could extend term of copyright for finite durations. First Amendment conceivably could apply to some expansions of copyright.
- *Golan v. Holder*, 565 U.S. ___ (2012) – Retroactive plucking of foreign works from public domain was not unconstitutional.
- Pre-1972 sound recordings. Numerous cases are being litigated right now regarding pre-1972 sound recordings. It's too early to determine how these will ultimately end up, but they will be important for music collections. *Flo & Eddie v. Sirius*; *Capitol Records v. Sirius*; *SoundExchange v. Sirius*; *Escape Media Group (Grooveshark) v. Universal Music Group. See previous case, Capitol Records v. Naxos*, 803 N.E.2d 250 (NY 2005).

Fair Use

- *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417 (1984) (aka "Sony Betamax") – time-shifting can be fair use; personal recording for time-shifting can be fair use; video tape recording technology that was capable of substantial non-infringing uses was not liable for contributory infringement
- *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) – *The Nation's* "scoop" of former President Gerald Ford's memoirs, quoting a small excerpt, was not fair use because it caused a significant market effort (cancellation of publication contract), preempted Ford's right to control the first publication of his unpublished work, and captured the "heart of the work" of his memoir.

- Pierre Leval, "Toward a Fair Use Standard", 103 *Harv. L. Rev.* 1105 (1990) – This is not a case, but a highly influential law review article by Judge Pierre Leval (then a District Court judge in the Southern District of N.Y., which heard many copyright cases; now on the Second Circuit).
- *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) – 2 Live Crew's parody of Roy Orbison's "Oh Pretty Woman" was fair use.

Iterative Copying for Search Uses

- *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) – Indexing images to create a search engine was a fair use.
- ***Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007) – Indexing images to create a search engine was a fair use.**
- ***A.V. v. iParadigms*, 562 F.3d 630 (4th Cir. 2009) – Indexing student papers for a plagiarism-detection database was fair use.**
- ***Authors Guild v. Google*, 954 F.Supp.2d 282 (SDNY Nov. 14, 2013, on appeal to the 2d Cir.)**
- ***Authors Guild v. HathiTrust*, 2014 WL 2219162 (2d Cir. 2014) – Library scanning of digitized books for search indexing and disability access was a fair use.**
- *Fox News v. TVEyes* (SDNY 2014) – Indexing of video was a fair use.

Iterative Copying for Teaching Uses

- *Encyclopeaedia Britannica Educational Corp. v. Crooks*, 558 F. Supp. 1247 (WDNY 1983) – Systematic copying of off-air recordings of television broadcasts, for reproduction and distribution in public school system, were not fair use.
- *Basic Books Inc. v. Kinko's Graphics, Co.*, 758 F. Supp. 1522 (SDNY 1991) – For-profit copy shop's creation of coursepacks was not fair use.
- ***Princeton University Press v. Michigan Document Services*, 74 F.3d 1528 (6th Cir. 1996), *cert. denied*. Suit brought by Princeton University Press, Macmillan, and St. Martin's Press. Divided 6th Circuit *en banc* determined that copy shop coursepacks were not fair use.**
- *Ass'n for Information Media and Equipment v. The Regents of the University of California [AIME v. UCLA]*, Decisions not reported; 2011 WL 7447148 (C.D. Cal. Oct. 3, 2011) and 2012 WL 7683452 (CD Cal. Nov. 20, 2012) – Video streaming for course reserves was licensed. Use was discussed as a probable fair use.
- ***Cambridge University Press v. Patton* [aka *v. Becker*] (11th Cir. Oct. 17, 2014) – Electronic reserves in university. Lower court's fair use analysis needs to be tweaked, but educational purpose and lack of available licenses both tilt towards fair use.**

Iterative Copying for Historical & Reference Uses

- *Sega Enterprises Ltd. V. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1993) – Reverse engineering software code to examine the functional aspects of the code was fair use.
- *Sundeman v. Seajay Society*, 142 F.3d 194 (4th Cir. 1998) - Quotes from deceased author's unpublished manuscript in scholarly work were fair use.
- ***Bill Graham Archives v. Dorling Kindersley*, 448 F.3d 605 (2d Cir. 2006) – Use of Grateful Dead concert poster images in a "coffee table" book as part of timelines and collages was fair use, notwithstanding commercial purpose.**
- *Warner Bros. Entertainment Inc. & J. K. Rowling v. RDR Books*, 575 F.Supp.2d 513 (SDNY 2008) – Harry Potter encyclopedia entries with lengthy quotes were not fair use.
- *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*, 709 F.3d 1273 (9th Cir. March 11, 2013) – Use of a short clip from "The Ed Sullivan Show" to introduce a live performance in the musical "Jersey Boys" was fair use to establish historical context.

Critical & Parodic Uses

- *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), cert. denied. Lengthy quotes taken from a pro-choice book and used in an anti-abortion book were fair use.

- *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) – Advertisement for "Naked Gun 33 1/3: The Final Insult" that superimposed Leslie Nielsen's photograph over Annie Leibovitz' famous photograph of a naked, pregnant Demi Moore for the cover of *Vanity Fair*, was fair use despite its commercial purpose.
- *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 165 (11th Cir. 2001) – Critical rewriting of *Gone with the Wind* was fair use, despite commerciality.
- *NXIVM Corp. v. Ross Institute*, 364 F.3d 471 (2d Cir. 2004) – News reporting on a website about an alleged cult's seminar manual was fair use, notwithstanding violation of non-disclosure agreements.

Library Reproduction / Circulation

- *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. of Claims 1973), affirmed by an equally divided Supreme Ct., 420 U.S. 376 (1975).
- ***American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1994) – A corporation's internal distribution of multiple copies of scientific articles was not fair use.**
- *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) – Placement of unlawful copies in library catalog and on library shelves could violate copyright.
- *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013) – Library access to an unauthorized copy of a dissertation could violate copyright.
- ***Authors Guild v. HathiTrust* (2d Cir. June 10, 2014)** – see above
- ***Cambridge University Press v. Patton* [aka *v. Becker*] (11th Cir. Oct. 17, 2014)** – see above

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How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

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How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. What's in a Legal Opinion?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an "opinion." The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

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section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the "caption." Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the "parties" or as the "litigants" in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe*, *People v. Doe*, or *Commonwealth v. Doe*, depending on the practices of that state.[1]

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, "U.S. Supreme Court, 485 U.S. 759 (1988)" refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

[1] English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren't the victims: the words are Latin for "King" and "Queen." During the reign of a King, English courts use "Rex"; during the reign of a Queen, they switch to "Regina."

with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial "J." No, judges don't all have the first initial "J." The letter stands for "Judge" or "Justice," depending on the court. On occasion, the opinion will use the Latin phrase "per curiam" instead of a judge's name. Per curiam means "by the court." It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let's move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the "procedural history" of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as "precedents") that are related to the case the court is de-

ciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are "majority" opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called "concurring opinions" or "dissenting opinions," and they appear after the majority opinion. A "concurring opinion" (sometimes just called a "concurrence") explains a vote in favor of the winning side but based on a different legal rationale. A "dissenting opinion" (sometimes just called a "dissent") explains a vote in favor of the losing side.

II. Common Legal Terms Found in Opinions

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called "damages" and an order to do something or to refrain from doing something is called an "injunction." The person bringing the lawsuit is known as the "plaintiff" and the person sued is called the "defendant."

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, "suing" someone), the prosecutor files criminal "charges." Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as "the state," "the prosecution," or simply "the government." The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-

ing "attorney" and "counsel." There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as "your honor," just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as "the Court."

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An "appeal" is a legal proceeding that considers whether another court's legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that's where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one "Chief Justice" and the other eight are just plain "Justices" (technically they are "Associate Justices," but everyone just calls them "Justices").

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the "appellant." The party that won in the lower court and must defend the lower court's decision is known as the "appellee" (accent on the last syllable). Some older opinions may refer to the appellant as the "plaintiff in error" and the appellee as the "defendant

in error." Finally, some courts label an appeal as a "petition," and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the "petitioner." The party that won before the lower court and is responding to the petition in the higher court is called the "respondent."

Confused yet? You probably are, but don't worry. You'll read so many cases in the next few weeks that you'll get used to all of this very soon.

III. What You Need to Learn from Reading a Case

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law.

Most law students don't appreciate the importance of the facts when they read a case. Students think, "I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case." But trust me: the facts are really important.[2]

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[2] If you don't believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to "spot" and analyze the legal issues presented by those facts. These exam questions are known as "issue-spotters," as they test the student's ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court though the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

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spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

interpret "statutes," which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret "the common law," which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.[3]

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court's role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of "stare decisis," an abbreviation of a Latin phrase meaning "That which has been already decided should remain settled."

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

[3] The phrase "common law" started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word "common" in the phrase "common law" means common in the sense of "shared by all," not common in the sense of "not very special." The "common law" was announced in judicial opinions. As a result, you will sometimes hear the phrase "common law" used to refer to areas of judge-made law as opposed to legislatively-made law.

their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. Why Do Law Professors Use the Case Method?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell

you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers

need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

Good luck!

In the
United States Court of Appeals
For the Seventh Circuit

No. 10-2144

SENG-TIONG HO, et al.,

Plaintiffs-Appellants,

v.

ALLEN TAFLOVE, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 1:07-cv-04305—**Elaine E. Bucklo**, *Judge*.

ARGUED JANUARY 20, 2011—DECIDED JUNE 6, 2011

Before RIPPLE and HAMILTON, *Circuit Judges*, and MURPHY, *District Judge*.*

RIPPLE, *Circuit Judge*. Seng-Tiong Ho and Yingyan Huang brought this action against Allen Taflove and Shi-Hui Chang in the United States District Court for the Northern District of Illinois. They alleged that the defen-

* The Honorable G. Patrick Murphy, United States District Judge for the Southern District of Illinois, is sitting by designation.

dants, members of another research team at the same university, violated the Copyright Act by publishing equations, figures and text copied from the plaintiffs' work. The plaintiffs also raised several state law claims against the defendants based on the alleged copying. The defendants filed a motion for summary judgment and a motion to dismiss. The district court granted the defendants' motion for summary judgment as to all claims and therefore declined to address the motion to dismiss.

We conclude that the district court correctly granted summary judgment in favor of the defendants. Professor Ho and Ms. Huang fail to show a genuine dispute of material fact that, if resolved in their favor, would give the allegedly copied equations, figures and text the protection of the Copyright Act. Moreover, the Copyright Act preempts two of the three state law claims raised on appeal; the third state law claim fails to survive summary judgment on the merits. Accordingly, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

Professors Ho and Taflove are both engineering professors at Northwestern University, and, during the relevant period, Ms. Huang and Mr. Chang were engi-

neering graduate students at Northwestern University.[1]

Starting in 1997, Mr. Chang worked as a graduate student with Professor Ho. In 1998, Professor Ho conceived of and first formulated a "4-level 2-electron atomic model with Pauli Exclusion Principle for simulating the dynamics of active media in a photonic device ('the Model')." Appellants' Br. 4. It is not contested that the Model significantly advanced previous models. By 1999, Professor Ho had completed mathematical derivations of the Model, which comprised sixty-nine pages of notes and equations. The Model currently has no known commercial use.

Professor Ho then tasked Mr. Chang with creating a computer program code, using the derived equations, for the purpose of running Model simulations. The computer program code was based on an earlier program that Mr. Chang had helped create. Mr. Chang, however, was unsuccessful in this task because of programming errors.

In June 2002, Mr. Chang switched to Professor Taflove's research group. When Mr. Chang switched groups, he was warned by the head of the department not to continue any work previously done in Professor Ho's group and to avoid misappropriating Professor Ho's

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[1] Ms. Huang is currently an employee of Professor Ho. Mr. Chang is now a professor at National Cheng Kung University in Taiwan. For the purposes of this opinion, we use the titles the parties had during the relevant time period (i.e., Mr. Chang, not Professor Chang).

work. Mr. Chang returned several of Professor Ho's notebooks, but he failed to return an original copy of one of Professor Ho's notebooks previously issued to him in early 2002 to record his work.

Ms. Huang began to work for Professor Ho in September 2000. Until 2001, Ms. Huang's work focused on applying the Model to different mediums. With permission from Professor Ho, some results from the plaintiffs' research were mentioned briefly in a conference paper published in 2001[2] and then were published in full in 2002 in Ms. Huang's master's thesis. Mr. Chang, who already had switched to Professor Taflove's research group, asked Ms. Huang to provide him with two figures from her work and copies of her master's thesis.

Professor Taflove and Mr. Chang submitted a symposium paper to the IEEE Antennas and Propagation Society ("APS paper") and an article to the journal *Optics Express* ("OE article"). These submissions described the Model and its applications: The APS paper provided a brief summary, and the OE article described the Model in detail. Some of the figures in Ms. Huang's master's thesis also were included in these submissions. The APS paper was published in 2003, and the OE article was published in 2004. Professor Taflove and Mr. Chang did not attribute any of the contents of the OE article or the APS paper to Professor Ho or Ms. Huang.

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[2] The conference paper was prepared by Seongsik Chang, a postdoctoral fellow in Professor Ho's group, and listed Professor Ho, Mr. Chang (the defendant) and Ms. Huang as co-authors.

Professor Ho first became aware of the alleged wrongdoing in 2004, when he submitted his project for publication in *Optics Communications*, and it was rejected because of a previously published paper on the same topic, namely Professor Taflove and Mr. Chang's APS paper. In 2007, the plaintiffs received certificates of copyright in Professor Ho's 1998 and 1999 notebooks, Ms. Huang's master's thesis, two figures used within Ms. Huang's master's thesis and a visual presentation given by Ms. Huang that discussed the Model.

Professor Ho and Ms. Huang allege that Professor Taflove and Mr. Chang infringed upon their copyrights six times, by using the copyrighted materials without permission in the following documents, listed chronologically: (1) the APS paper; (2) Mr. Chang's Ph.D. thesis; (3) the OE article; (4) Professor Taflove and Mr. Chang's book chapter, published by Artech House in 2005; (5) Professor Taflove's presentation in 2006; and (6) Professor Taflove's presentation in 2007. "[T]he two main infringing documents" are the APS symposium paper and the OE article, as the other incidents of infringement involve parts of these two documents. Appellants' Br. 7.

Professor Ho and Ms. Huang assert that the OE article has twenty-one items copied from their work and that the APS symposium paper has twelve, creating thirty-three infringements in total. Professor Ho and Ms. Huang calculate that, from that list of copied items, fifty-five percent are text, thirty percent are equations and fifteen percent are figures.

B. District Court Proceedings

Professor Ho and Ms. Huang brought this action against Professor Taflove and Mr. Chang, alleging copyright infringement and state law claims of false designation of origin, unfair competition, conversion, fraud and misappropriation of trade secrets. The district court granted summary judgment in favor of the defendants for all claims, *see Ho v. Taflove*, 696 F. Supp. 2d 950 (N.D. Ill. 2010), and subsequently denied the plaintiffs' motion for reconsideration, *see* R.139.

1. Summary Judgment Motion

The district court addressed separately each of the plaintiffs' five claims. On appeal, Professor Ho and Ms. Huang challenge only the district court's summary judgment ruling on their claims of copyright infringement, conversion, fraud and trade secrets misappropriation. We therefore shall examine the district court's rulings only on those claims.

With respect to copyright infringement, the district court held that the equations, figures and text were "unprotectable concepts, ideas, methods, procedures, processes, systems, and/or discoveries" and that the merger doctrine is applicable because there are limited ways of mathematically expressing the Model. *Ho*, 696 F. Supp. 2d at 954. The district court rejected the plaintiffs' analogy that, just as Mickey Mouse is a particular expression of a mouse, the Model is a creative expression of a scientific phenomenon. In the district court's

view, Mickey Mouse is entirely fictitious, but the Model mimics reality. The district court remained unpersuaded by the plaintiffs' contention that "unique assumptions" indicate that the Model is fictional because the plaintiffs were unable to identify what unique assumptions existed. *Id.*

With respect to the conversion claim, the district court first dismissed any claim that the defendants converted physical copies of the plaintiffs' work because, based on the presented evidence, the plaintiffs had access to such items at all times.[3] As for conversion of the intangible ideas claim, the court noted that there was no evidence that the defendants prevented Professor Ho and Ms. Huang "from conducting, controlling, accessing, using, or publishing their research." *Id.* at 957.

The district court also found insufficient evidence to support a claim of fraud: "By taking credit for plaintiffs' work, defendants may have misled publishers or readers as to proper authorship, but they clearly did not mislead plaintiffs." *Id.*

In the district court's view, no trade secrets misappropriation occurred because the Model was not kept secret. It reasoned that the Model was published by Professor Ho and Ms. Huang in 2001 and 2002. Moreover,

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[3] Before the district court, the plaintiffs made no specific claim that Professor Ho's 2002 notebook was given to Mr. Chang and never returned. In fact, Professor Ho admitted in his deposition that, to his knowledge, the defendants never physically had taken anything of his. R.82, Ex. E (Ho Dep.) at 471-72.

a trade secret is not dependent on whether proper attribution is given in later publications.

In support of a trade secrets misappropriation claim, Professor Ho also had asserted that Professor Taflove and Mr. Chang's article and book chapter contained some materials from the notebooks that were not previously published. The district court, however, found this statement "unsupported" and "nebulous." *Id.* at 958. Thus, the assertion by Professor Ho was insufficient to support a claim of trade secrets misappropriation.

In the alternative, the district court found all the state law claims preempted by the Copyright Act. The court noted that preemption can apply even when the allegedly copied material is not subject to protection under the Copyright Act. Otherwise, the district court noted, the state could give copyright-like protection to material that Congress had decided not to protect by copyright. Accordingly, the district court granted summary judgment in favor of Professor Taflove and Mr. Chang for all claims.

2. Motion for Reconsideration

Following the court's ruling, the plaintiffs filed a motion for reconsideration. Although the filing was labeled as a Rule 60(b) motion, *see* Fed. R. Civ. P. 60(b),[4] the

[4] Federal Rule of Civil Procedure 60(b) states: "On motion and just terms, the court may relieve a party or its legal representa-
(continued...)

district court held that the motion was, in substance, a Rule 59(e) motion to alter or amend its previous summary judgment decision, *see* Fed. R. Civ. P. 59(e).[5] The

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[4] (...continued)
tive from a final judgment, order, or proceeding for the following reasons." The reasons listed in Rule 60(b) include:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

[5] Federal Rule of Civil Procedure 59(e) provides: "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."

The plaintiffs' motion for reconsideration states that it is brought under Rule 60(b). A motion under Rule 60(b) seeks relief from a judgment. The plaintiffs' motion, however, reiter-
(continued...)

motion maintained that the grant of summary judgment for copyright infringement and conversion was a manifest error of fact and law.

The district court denied the motion for reconsideration. Regarding the copyright infringement claim, the district court ruled that the plaintiffs improperly introduced new arguments in their motion and relied on previously available authority. The district court refused to consider these additional materials and found that the plaintiffs' remaining arguments were duplicative of those that already had been raised and rejected.

Regarding the conversion claim, the district court would not consider the "new" evidence proffered by the plaintiffs to show conversion of tangible and intangible property; these items had not been mentioned in the summary judgment briefing nor had they been included in the prior evidentiary submission. Additionally, Professor Ho had stated, in his deposition, that no items had

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[5] (...continued)
ates that it seeks "reconsideration" from the district court in part because of errors of law. An error of law is a basis for altering or amending the judgment under Rule 59(e), but it is not explicitly recognized as a basis for relief under Rule 60(b). *See Obriecht v. Raemisch*, 517 F.3d 489, 493-94 (7th Cir. 2008). The plaintiffs also filed their motion for reconsideration within the time allowed under Rule 59(e). Accordingly, we agree with the district court that the substance of the motion reveals that it is a Rule 59(e) motion to alter or amend a judgment. On appeal, neither party contests the characterization of the motion as a motion under Rule 59(e).

been physically taken from him. The district court also observed no error in its alternative holding that the Copyright Act preempted the conversion claim.

Professor Ho and Ms. Huang timely appealed the district court's decision.

II

DISCUSSION

Professor Ho and Ms. Huang submit that the district court erred in granting summary judgment on their claims of copyright infringement, conversion, fraud and trade secrets misappropriation and also that it erred in denying their motion for reconsideration.

A. Summary Judgment

"We review a grant of summary judgment de novo, construing all facts in the light most favorable" to Professor Ho and Ms. Huang and "drawing all reasonable inferences in [their] favor." *Ogden v. Atterholt*, 606 F.3d 355, 358 (7th Cir. 2010). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a).

The party moving for summary judgment "always bears the initial responsibility" of showing "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once "a properly supported motion for summary judgment is made," the nonmoving party bears the burden to "set forth specific facts showing

that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (internal quotation marks and citation omitted). Notably, any party asserting that a fact is or is not genuinely disputed must cite "to particular parts of materials in the record," or show that "an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Thus, "a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading." *Anderson*, 477 U.S. at 256; *see also Cleveland v. Porca Co.*, 38 F.3d 289, 295 (7th Cir. 1994). Additionally, a "court need consider only the cited materials." Fed. R. Civ. P. 56(c)(3).

Professor Ho and Ms. Huang challenge the district court's grant of summary judgment in favor of the defendant on their copyright infringement, conversion, fraud and trade secrets misappropriation claims. We address each claim in turn.

1. Copyright Infringement Claim

In granting summary judgment, the district court accepted Professor Taflove and Mr. Chang's view that the allegedly copied materials were not protected by the Copyright Act because the Model is an idea. Specifically, according to the defendants, the Model is "a new mathematical model of how electrons behave under certain circumstances." R.81 at 7. Moreover, the equation, figures and text are the only ways to express this idea, and so, under the merger doctrine, these expressions are not copyrightable.

Professor Ho and Ms. Huang counter, in their response to the summary judgment motion and now on appeal, that the nature of the Model is fictitious because it describes reality under *hypothetical* conditions; accordingly, all of the Model's expressions are protected. In their summary judgment filings, however, they failed to address whether the equations, figures and text are the only possible expressions of the Model.

Protection under the Copyright Act is subject to statutory exceptions. Section 102(b) of the Copyright Act provides that:

> 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.

17 U.S.C. § 102(b). We have described § 102(b) of the Copyright Act as codifying a "fact-expression dichotomy." *American Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977, 981 (7th Cir. 1997). In essence, "the Copyright Act protects the expression of ideas, but exempts the ideas themselves from protection." *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 507 (7th Cir. 1994). This limitation on copyright protection promotes the purpose of the Copyright Act by assuring "authors the right to their original expression," but also by "encourag[ing] others to build freely upon the ideas and information conveyed by a work." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991); *see also*

Wildlife Express Corp., 18 F.3d at 507; *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069 (7th Cir. 1994). Under the merger doctrine, when "there is only one feasible way of expressing an idea, so that if the expression were copyrightable it would mean that the idea was copyrightable," the expression is not protected. *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 928 (7th Cir. 2003). Thus, even though an individual can have a valid copyright in a document, facts and ideas contained in the document are not subject to copyright. *See American Dental Ass'n*, 126 F.3d at 979.[6]

The fact-expression distinction in copyright protection has roots in the Nation's jurisprudence that go back long before the Copyright Act of 1976. *See Mazer v. Stein*, 347 U.S. 201, 217-18 (1954) (stating that "[copyright] protection is given only to the expression of the idea—not the idea itself" and discussing pre-Copyright Act cases). Indeed, the Supreme Court recognized this dichotomy in *Baker v. Selden*, 101 U.S. 99, 103 (1879), and explained

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[6] Professor Ho and Ms. Huang maintain that the infringed work enjoys a presumption of protectability because they obtained certificates of copyright for that work. They can own valid copyrights in a work, but that work may contain facts and ideas that are not subject to copyright. Moreover, they misunderstand the presumption: Ownership of a copyright creates a presumption of *validity* of the copyright, not that an infringement of that copyright occurred. *See JCW Inv., Inc. v. Novelty, Inc.*, 482 F.3d 910, 914-15 (7th Cir. 2007) ("The owner of a copyright may obtain a certificate of copyright, which is 'prima facie evidence' of its validity.").

the rationale for limiting copyright protection in certain areas:

> The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.

We have recognized that the Court's explanation in *Baker* is reflected in § 102(b) of the Copyright Act. *See American Dental Ass'n*, 126 F.3d at 981.

Although the line between an expression and an idea can be difficult to determine at times,[7] we do not believe

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[7] *See Nash v. CBS, Inc.*, 899 F.2d 1537, 1540-41 (7th Cir. 1990) (discussing the fact-expression dichotomy).

that the record in this case presents a particularly difficult situation. The Model is an idea. In Professor Ho and Ms. Huang's own words, the Model "mimic[s] . . . certain behaviors of millions of particles in a photonic device." Appellants' Br. 4. That is, the Model attempts to represent and describe reality for scientific purposes. This scientific reality was not created by the plaintiffs. Rather, the Model embodies certain newly discovered scientific principles. Granted, as the plaintiffs note, the Model makes certain hypothetical assumptions, but those hypothetical assumptions do not render the Model fictitious. Rather, the Model strives to describe reality, and, as conceded at oral arguments, the value of the Model is its ability to accurately mimic nature. *See Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 842-43 (10th Cir. 1993) ("The constants in the Design Flex program represent scientific observations of physical relationships concerning the load that a particular belt can carry around certain sized gears at certain speeds given a number of other variables. These relationships are not invented or created; they already exist and are merely observed, discovered and recorded. Such a discovery does not give rise to copyright protection."). As the Supreme Court put it in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 347 (1991), "facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."

Professor Ho and Ms. Huang rely on two cases that are not relevant to this appeal because they involve alleged

copying of the creative presentation, not the substance, of facts or ideas. In *Flick-Reedy Corp. v. Hydro-Line Manufacturing Co.*, 351 F.2d 546, 548 (7th Cir. 1965), the plaintiff claimed that the defendant had copied the "expression and presentation of the computations, formulae and explanations." We concluded that the "arrangement, expression and manner of presentation" of the mathematical data could be protected by copyright, even if the equations and formulae themselves were in the public domain. *Id.* Specifically, we commented on the coloring, wording and location of titles and type of shading used by the parties. In short, the issue in *Flick-Reedy* centered around the creative arrangement, expression and manner of presentation, and we were not concerned with whether the substance of the mathematical data was copyrightable.

Similarly, in *Situation Management Systems, Inc. v. ASP Consulting LLC*, 560 F.3d 53 (1st Cir. 2009), our colleagues in the First Circuit concluded that materials used to train employees in communication and negotiation skills were subject to the Copyright Act as expressions of a process or system. The court observed that the plaintiff made "creative choices in describing those processes and systems, including the works' overall arrangement and structure." *Id.* at 61.

In this case, by contrast, Professor Ho and Ms. Huang do not contend that the defendants appropriated their creative presentation of the Model through copying such aspects as the color or font employed by the plaintiffs. Rather, the plaintiffs contend that the de-

fendants copied the *substance* of the equations, figures and text. *See* R.82, Ex. D (Huang Dep.) at 265-67 (Ms. Huang affirming that the copying of the substance of the Model, not its presentation, was what mattered). Unlike the plaintiffs in *Flick-Reedy* and *Situation Management Systems, Inc.*, Professor Ho and Ms. Huang claim a copyright interest in the *substance*—not presentation—of the equations, figures and text.

On appeal, Professor Ho and Ms. Huang maintain that there are numerous ways to express the Model and therefore that, as a consequence, the merger doctrine does not apply. The plaintiffs, however, failed to support sufficiently this argument before the district court in their summary judgment filings. In their summary judgment papers, the plaintiffs offered no evidence of how the Model could be expressed through other equations or figures. Equations and figures are common components of mathematical science used to depict ideas. Although equations can be rearranged through the laws of mathematics, the substance of the equation nevertheless remains the same. Without any evidence that the Model could be expressed by equations and figures other than those used by the plaintiffs, we conclude that these equations and figures are "*required* by" the Model, *see Wildlife Express Corp.*, 18 F.3d at 508 (emphasis in original), and as such, are not subject to copyright.

Whether text, as opposed to equations and figures, is required by the Model or has other possible expressions is a more difficult question. We have recognized that text describing scientific ideas may be subject to copyright.

See American Dental Ass'n, 126 F.3d at 979 ("Einstein's articles laying out the special and general theories of relativity were original works even though many of the core equations, such as the famous $E=mc^2$, express 'facts' and therefore are not copyrightable."). Here as well, however, the plaintiffs did not raise adequately this argument *in their summary judgment papers*.[8] Professor Taflove and Mr. Chang maintained in their summary judgment motion that the allegedly copied text was "one of only a few ways . . . to express" the Model. R.81 at 8. Professor Ho and Ms. Huang failed to refute that assertion in their response to the summary judgment motion. In fact, before the district court, the plaintiffs observed that "[i]t is irrelevant to copyright rights whether the expression is in words or mathematical symbols, just as an author's choice of the English or German language is irrelevant to copyrightability." R.91 at 6. Exactly how the text, defining the variables and offering technical explanations, could have been expressed differently is unclear.

Thus, in their summary judgment motions, the plaintiffs failed to show that the text at issue is one of

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[8] In their summary judgment papers and on appeal, the plaintiffs maintained that there are multiple ways of expressing the Model. This blanket statement seems to cover the expressions of the Model whether in equations, figures, or text. In their summary judgment papers, however, the plaintiffs offered no examples of alternative expressions or any other further elaboration. In their motion for reconsideration and on appeal, the plaintiffs offer several examples of how the text could have been written differently. *See* R.126, Ex. 1K.

many possible expressions. Based on the nature of the Model and the plaintiffs' failure to raise arguments adequately and to provide specific evidence in their summary judgment filings, the district court did not err in concluding that the equations, figures and text were not subject to copyright.

2. State Law Claims

Professor Ho and Ms. Huang also seek review of the district court's disposition of three state law claims for conversion, fraud and trade secrets misappropriation. The district court held that all of the plaintiffs' state law claims are preempted under the Copyright Act, and in the alternative, that each state law claim fails on the merits. We shall consider first the extent to which the Copyright Act preempts the plaintiffs' state law claims; we then shall examine the merits of any state law claim not preempted by the Copyright Act.

a. Preemption

We review de novo whether the Copyright Act preempts any of the plaintiffs' state law claims. *See Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 907-08 (7th Cir. 2005). The Copyright Act preempts "all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106" and are "in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103." 17 U.S.C. § 301(a). We have

distilled from the language of § 301 two elements: "First, the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in § 102. Second, the right must be equivalent to any of the rights specified in § 106." *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 674 (7th Cir. 1986).

(1) Tangible Medium

Regarding the first element, we note that the material in which the plaintiffs assert rights—the Model and its manifestations in equations, figures and text—are expressions in a tangible form. These expressions even originate in tangible works that are copyrighted—namely, Ms. Huang's master's thesis and Professor Ho's notebooks. Because the expressions of the Model are in tangible materials, the first element is satisfied.

(2) Equivalent Right

The second element for preemption is that the rights in the state law claims be equivalent to the exclusive rights under the Copyright Act. We summarized the rights of a copyright owner, detailed in § 106 of the Copyright Act, to be "reproduction, adaptation, publication, performance, and display" of the copyrighted work. *Toney*, 406 F.3d at 909. A well-respected treatise has elaborated on this concept along the same lines, noting that equivalent rights exist "if under state law the act of reproduction, performance, distribution, or display, no

matter whether the law includes all such acts or only some, will *in itself* infringe the state-created right." 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.01[B][1] (2010) (emphasis in original). "[T]o avoid preemption, a state law must regulate conduct that is qualitatively distinguishable from that governed by federal copyright law—i.e., conduct other than reproduction, adaptation, publication, performance, and display." *Toney*, 406 F.3d at 910.

We have concluded that the material in dispute—the equations, figures and text—are not copyrightable. However, the Copyright Act can preempt state law even when the rights are claimed in uncopyrighted or uncopyrightable materials. We accepted this possibility in *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, 805 F.2d 663, 676 (7th Cir. 1986), when we determined that preemption applied even though the rights were asserted in work that was uncopyrightable. Again, in *Toney*, we noted that "state laws that intrude on the domain of copyright are preempted even if the particular expression is neither copyrighted nor copyrightable." 406 F.3d at 911. In the Copyright Act, Congress sought to ensure that a state will not provide "copyright-like protections in materials" that should remain uncopyrighted or uncopyrightable. *Id.*[9]

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[9] Other circuits have come to a similar conclusion that when rights are asserted in uncopyrighted expressions in a copyrighted work, the Copyright Act still can preempt state law. (continued...)

In their motion for summary judgment, the defendants assert that all of the plaintiffs' state law claims are "alternative legal theories for recovery" based on the alleged copying, R.81 at 13, and the defendants cite extensively to the plaintiffs' complaint as evidence. We consider separately whether each state law claim challenged on appeal is based on a right equivalent to those under the Copyright Act.

(a) Conversion

The complaint, with respect to conversion, states that the "Defendants *misappropriated* the works by *publishing* said works and texts . . . and Defendants passed off said works and text as their own without giving credit to Plaintiffs." R.1 at 14 (emphasis added). In their response to the summary judgment motion, the plaintiffs elaborate that "[b]y passing off the works as their own in numerous scientific publications, Defendants wrongfully and without authorization assumed control over them, which is actionable conversion." R.91 at 12. The conversion claim, then, is focused on the defendants' unauthorized publishing, not possession, of the

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[9] (...continued)
Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 849 (2d Cir. 1997) ("Copyrightable material often contains uncopyrightable elements within it, but Section 301 preemption bars state law . . . claims with respect to uncopyrightable as well as copyrightable elements."); *R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1146-47 (10th Cir. 2009) (same).

protected work. Because publishing is a right under the Copyright Act, the conversion claim is preempted.

The plaintiffs rely on *Bilut v. Northwestern University*, 692 N.E.2d 1327 (Ill. App. Ct. 1998), as support for their contention that a conversion claim is not preempted by the Copyright Act. We cannot accept this argument. In *Bilut*, the plaintiff alleged "loss of physical control over her research project," *id.* at 1335, claiming that her professor "usurped" her ideas and then prohibited her from conducting a study, *id.* at 1333. The plaintiff's claim of conversion in *Bilut* went beyond the publication of an idea. In this case, however, the plaintiffs have alleged conversion based *solely* on the defendants' publishing the information without attribution. The present case is much more like the situation that confronted our colleagues in the Fourth Circuit in *United States ex. rel Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453 (4th Cir. 1997). There, the court held that a claim of conversion was preempted because a "charge of plagiarism and lack of attribution can only amount to, indeed, are tantamount to, a claim of copyright infringement, for [the plaintiff] has certainly not been prevented from using her own ideas and methods." *Id.* at 1464.

On appeal, Professor Ho and Ms. Huang also rest their conversion claim on Mr. Chang's failure to return Professor Ho's 2002 notebook. Yet, the plaintiffs failed to raise sufficiently this argument in their summary judgment papers. In their response to the summary judgment motion, the plaintiffs simply made a general assertion

that tangible property was taken without permission, followed by a citation to their statement of additional facts. The statement of additional facts, however, does not identify what tangible property was taken without permission and makes no mention of the 2002 notebook in particular. It was incumbent on the plaintiffs to identify with particularity the factual basis for their claim. *See Anderson*, 477 U.S. at 250. They failed to do so. We therefore must conclude that, based on the plaintiffs' summary judgment filings, the rights asserted in the conversion claim concerned the misappropriation of their work through publication, which is equivalent to the right to control publication under the Copyright Act.

(b) Fraud

As a general proposition, a claim of common law fraud is not preempted by the Copyright Act "so long as the causes of action concerning them contain elements that are different from copyright infringement." *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 444 (S.D. Ohio 1980), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982); *see also Valente-Kritzer Video v. Pinckney*, 881 F.2d 772, 776 (9th Cir. 1989). A claim of fraud can be, however, a "disguised copyright infringement claim," if the sole basis of the fraud claim is that a defendant represented materials as his own. Nimmer & Nimmer, *supra*, § 1.01[B][1][e].

Here, the complaint alleges that the defendants knowingly published material taken from the plaintiffs and that defendants "fraudulently represented" that they

were the originators of the work. R.1 at 14. Additionally, in their response to the summary judgment motion, the plaintiffs asserted that "Defendants have, in essence, 'passed off'[10] Plaintiffs' works as their own by using and representing Plaintiffs' copyrighted materials as their own work," R.91 at 13, and that "plagiarism is a type of fraud that is actionable." R.91 at 12. Professor Ho and Ms. Huang's allegations of fraud therefore amount to a claim that the defendants have published without attribution, thereby misrepresenting the true origins of the work. The plaintiffs do not allege in their summary judgment filings any other misrepresentation by the defendants. Because the fraud claim is based on the defendants' improper publishing alone, it is preempted

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[10] True "passing off" claims are not preempted by the Copyright Act, but the "passing off" claim alleged by the plaintiffs is not of that variety. As Nimmer on Copyright explains:

> [T]here is no pre-emption of the state law of fraud, nor of the state law of unfair competition of the "passing off" variety. If *A* claims that *B* is selling *B*'s products and representing to the public that they are *A*'s, that is passing off. If, by contrast, *B* is selling *B*'s products and representing to the public that they are *B*'s, that is not passing off. A claim that the latter activity is actionable because *B*'s product replicates *A*'s, even if denominated "passing off," is in fact a disguised copyright infringement claim, and hence pre-empted.

1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.01[B][1][e] (2010); *see also R.W. Beck, Inc.*, 577 F.3d at 1148 (quoting *Nimmer on Copyright*).

by the Copyright Act. *See R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1148 (10th Cir. 2009) (finding the plaintiff's fraud claim was preempted because "[t]he crux of the allegations is that [the defendant] represented to the public that the reports it distributed were its own when, in fact, they were copies of [the plaintiff's] reports").[11]

(c) Trade Secrets Misappropriation

In their complaint, Professor Ho and Ms. Huang allege that the "Defendants misappropriated Plaintiffs' trade secrets." R.1 at 15. In their response to summary judgment, they note that they "took steps to keep their works secret." R.91 at 13.

Under Illinois law, the definition of a trade secret requires that the information "is sufficiently secret to derive economic value" and is subject to efforts "to maintain its secrecy or confidentiality." 765 ILCS 1065/2(d). A trade secret misappropriation involves the acquisition of a trade secret through improper means, which requires the breach of a confidential relationship or other duty to maintain secrecy. *See* 765 ILCS 1065/2(a), (b). A

[11] On appeal, Professor Ho and Ms. Huang allege promissory fraud based on Mr. Chang's promise, when he left Professor Ho's group, not to use any of Professor Ho's research. This allegation of promissory fraud, however, was not mentioned by the plaintiffs in their summary judgment papers. Accordingly, we conclude that the Copyright Act preempts the plaintiffs' claim of fraud.

claim of trade secret misappropriation, then, requires that the information have a status of secrecy and that a confidential relationship be breached. Both of these elements go beyond the rights regulated under the Copyright Act.[12] The act of publishing the allegedly copied materials would not itself establish a trade secrets misappropriation claim. Because a claim for trade secrets misappropriation regulates conduct beyond the rights under the Copyright Act, it is not preempted.

In sum, Professor Ho and Ms. Huang's claims of conversion and fraud assert the same interests as those under the Copyright Act: to control the publication of the copyrighted work.[13] Accordingly, the plaintiffs' claims of conversion and fraud are preempted under the Copyright Act, and we affirm the district court's grant of summary judgment on that basis. By contrast, the trade secrets claim asserts a right very different from the rights protected by the Copyright Act, and, therefore, with respect to that allegation, we cannot rest our decision

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[12] *See Stromback v. New Line Cinema*, 384 F.3d 283, 303-04 (6th Cir. 2004) (citing cases, across circuits, which "have held that claims brought under state trade secret statutes . . . survive preemption because the required proof of the existence and breach of a confidential relationship provides the extra element necessary to survive preemption").

[13] *See also Daboub v. Gibbons*, 42 F.3d 285, 289 (5th Cir. 1995) (finding all of the plaintiffs' state law claims preempted because "[t]he core of each of these state law theories of recovery in this case . . . is the same: the wrongful copying, distribution, and performance of the lyrics of [a song]").

on preemption, but must reach the substantive merits of that state claim.

b. Merits of the Trade Secrets Misappropriation Claim

Turning to the merits of the trade secrets misappropriation claim, the plaintiffs have failed to show a genuine dispute of material fact that, if resolved, would establish misappropriation of trade secrets. Illinois law provides the following definition of "trade secret":

> (d) "Trade secret" means information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that:
>
> (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.

765 ILCS 1065/2.

In their response to the summary judgment motion, Professor Ho and Ms. Huang maintained that they had a valid trade secrets misappropriation claim because the

expressions of the Model had "'actual or potential' economic value" and because "they took steps to keep their works secret." R.91 at 13.

We need not decide whether the expressions of the Model had economic value because the plaintiffs did not show, in their summary judgment papers, that the expressions of the Model had the status of secrecy. Professor Ho and Ms. Huang concede that "Professor Ho's research results were partially published in a conference paper in 2001 and then published in more detail in 2002" in Ms. Huang's master's thesis. R.92 at 15.

The plaintiffs, nevertheless, offer two reasons why the Model had the status of secrecy; both of these contentions fail. The plaintiffs first submit that "it is expected that anyone reading that thesis and using the Model would at least cite the thesis as the source of the expression of the Model." R.91 at 13-14. Such an expectation of attribution, however, is not part of a trade secrets misappropriation claim. Once the possessor of information intentionally releases that information, the possessor can no longer make a successful trade secrets misappropriation claim because the information is not subject to reasonable efforts to maintain secrecy.

Professor Ho and Ms. Huang also contend that the defendants used "materials from Ho's copyrighted notebook that were not published." *Id.* at 14. As support for this assertion, the plaintiffs point to their statement of material facts, which refers, in turn, to Professor Ho's affidavit, submitted as Exhibit A to the plaintiffs' response to the summary judgment motion. In his affidavit, Profes-

sor Ho generally asserts that the defendants' publications included materials from one of his copyrighted, but unpublished, notebooks. *See* R.91, Ex. A at 9. The affidavit, however, does not specify what material allegedly was copied from Professor Ho's unpublished notebook, as opposed to that taken from Ms. Huang's published master's thesis or from other published sources. *See Anderson*, 477 U.S. at 256 ("[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." (internal quotation marks omitted)); *Porca Co.*, 38 F.3d at 295 (finding the assertion of bad faith alleged in an affidavit and stated in the form of "opinion and beliefs" was insufficient to show a genuine issue for trial). The plaintiffs claim that the defendants used material from Professor Ho's copyrighted notebook, but they provide no specific evidence linking the material in papers published by the defendant to that found exclusively in Professor Ho's unpublished notebook.

Because the plaintiffs fail to show that the expressions of the Model have a status of secrecy, their trade secrets misappropriation claim cannot survive summary judgment on the merits.

B. Motion for Reconsideration

We review a district court's denial of a motion for reconsideration for abuse of discretion. *Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 763 (7th Cir. 2010).

The plaintiffs submit that the district court abused its discretion because it failed to consider the additional evidence they provided at this stage of the proceedings, including support for their assertion that there are many different ways to express the Model whether as sentences, paragraphs or even full articles. The defendants reply that the district court properly denied the plaintiffs' motion for reconsideration because the motion failed to explain what copying occurred and why it was actionable. Additionally, the defendants note that the plaintiffs did not show that the additional evidence previously was unavailable.

Federal Rule of Civil Procedure 59(e)[14] "allows a court to alter or amend a judgment only if the petitioner can demonstrate a manifest error of law or present newly discovered evidence." *Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008). The plaintiffs, in their motion for reconsideration, proffered a great deal of additional evidence. Yet, as the district court and defendants note, the plaintiffs made no showing that this evidence was newly discovered or previously unavailable. Furthermore, as our previous discussion has made clear, the district court made no error of law that could have served as a basis for granting the Rule 59(e) motion. In their motion, the plaintiffs explicitly noted their disagreement with the legal reasoning of the court, but they presented no new argument that would expose an error in that reasoning. The district court nevertheless reex-

[14] *See supra* note 5.

amined the issue of copyright infringement and conversion based on the motion, but it reached the same conclusion, a conclusion that we affirm today. Accordingly, the district court did not abuse its discretion in denying the plaintiffs' motion for reconsideration.

Conclusion

We conclude that the district court properly granted summary judgment on all claims in favor of Professor Taflove and Mr. Chang and that the district court did not abuse its discretion in denying Professor Ho and Ms. Huang's motion for reconsideration. Accordingly, its judgment is affirmed.

AFFIRMED

In the
United States Court of Appeals
For the Second Circuit

August Term, 2013

No. 12-4547-cv

AUTHORS GUILD, INC., AUSTRALIAN SOCIETY OF AUTHORS LIMITED, UNION DES ECRIVAINES ET DES ECRIVAINS QUEBECOIS, ANGELO LOUKAKIS, ROXANA ROBINSON, ANDRE ROY, JAMES SHAPIRO, DANIELE SIMPSON, T.J. STILES, FAY WELDON, AUTHORS LEAGUE FUND, INC., AUTHORS' LICENSING AND COLLECTING SOCIETY, SVERIGES FORFATTARFORBUND, NORSK FAGLITTERAER FORFATTER-OG OVERSETTERFORENING, WRITERS' UNION OF CANADA, PAT CUMMINGS, ERIK GRUNDSTROM, HELGE RONNING, JACK R. SALAMANCA,
Plaintiffs-Appellants,

v.

HATHITRUST, CORNELL UNIVERSITY, MARY SUE COLEMAN, President, University of Michigan, JANET NAPOLITANO, President, University of California, RAYMOND W. CROSS, President, University of Wisconsin System, MICHAEL MCROBBIE, President, Indiana University,
Defendants-Appellees,[1]

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), we automatically substitute the current president of the University of California, Janet Napolitano, and the current president of the University of Wisconsin System, Raymond W. Cross, in place of their predecessors-in-office.

NATIONAL FEDERATION OF THE BLIND, GEORGINA KLEEGE, BLAIR SEIDLITZ, COURTNEY WHEELER, ELLEN HOLLOMAN,
Intervenor Defendants-Appellees.[2]

Appeal from the United States District Court
for the Southern District of New York.
No. 11 CV 6351(HB) — Harold Baer, Jr., *Judge*.

Argued: October 30, 2013
Decided: June 10, 2014

Before: WALKER, CABRANES, and PARKER, *Circuit Judges*.

Plaintiff-appellant authors and authors' associations appeal a judgment of the United States District Court for the Southern District of New York (Harold Baer, Jr., *Judge*) granting summary judgment to defendants-appellees and dismissing claims of copyright infringement. In addition, the court dismissed the claims of certain plaintiffs-appellants for lack of standing and dismissed other copyright claims as unripe. We hold, as a threshold matter, that certain plaintiffs-appellants lack associational standing. We also hold that the doctrine of "fair use" allows defendants-appellees to create a full-text searchable database of copyrighted works and to provide those works in formats accessible to those with disabilities, and that the claims predicated upon the Orphan Works Project are not ripe for adjudication. We vacate so much of the judgment as is

[2] The Clerk of Court is directed to amend the caption as set forth above.

based on the district court's holding related to the claim of infringement predicated upon defendants-appellees' preservation of copyrighted works, and we remand for further proceedings on that issue. Affirmed, in part; vacated, in part.

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University of Illinois, Board of Trustees of Michigan State University, et al.

Jason Schultz, Berkeley, CA; Matthew Sag, Chicago, IL, *for Amici Curiae Digital Humanities and Law Scholars.*

Michael Waterstone, Los Angeles, CA; Robert Dinerstein, Washington, DC; Christopher H. Knauf, Knauf Associates, Santa Monica, CA; Michael Stein, Cambridge, MA, *for Amici Curiae Disability Law Professors.*

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BARRINGTON D. PARKER, *Circuit Judge*:

Beginning in 2004, several research universities including the University of Michigan, the University of California at Berkeley, Cornell University, and the University of Indiana agreed to allow Google to electronically scan the books in their collections. In October 2008, thirteen universities announced plans to create a repository for the digital copies and founded an organization called HathiTrust to set up and operate the HathiTrust Digital Library (or "HDL"). Colleges, universities, and other nonprofit institutions became members of HathiTrust and made the books in their collections available for inclusion in the HDL. HathiTrust currently has 80 member institutions and the HDL contains digital copies of more than ten million works, published over many centuries, written in a multitude of languages, covering almost every subject imaginable. This appeal requires us to decide whether the HDL's use of copyrighted material is protected against a claim of copyright infringement under the doctrine of fair use. *See* 18 U.S.C. § 107.

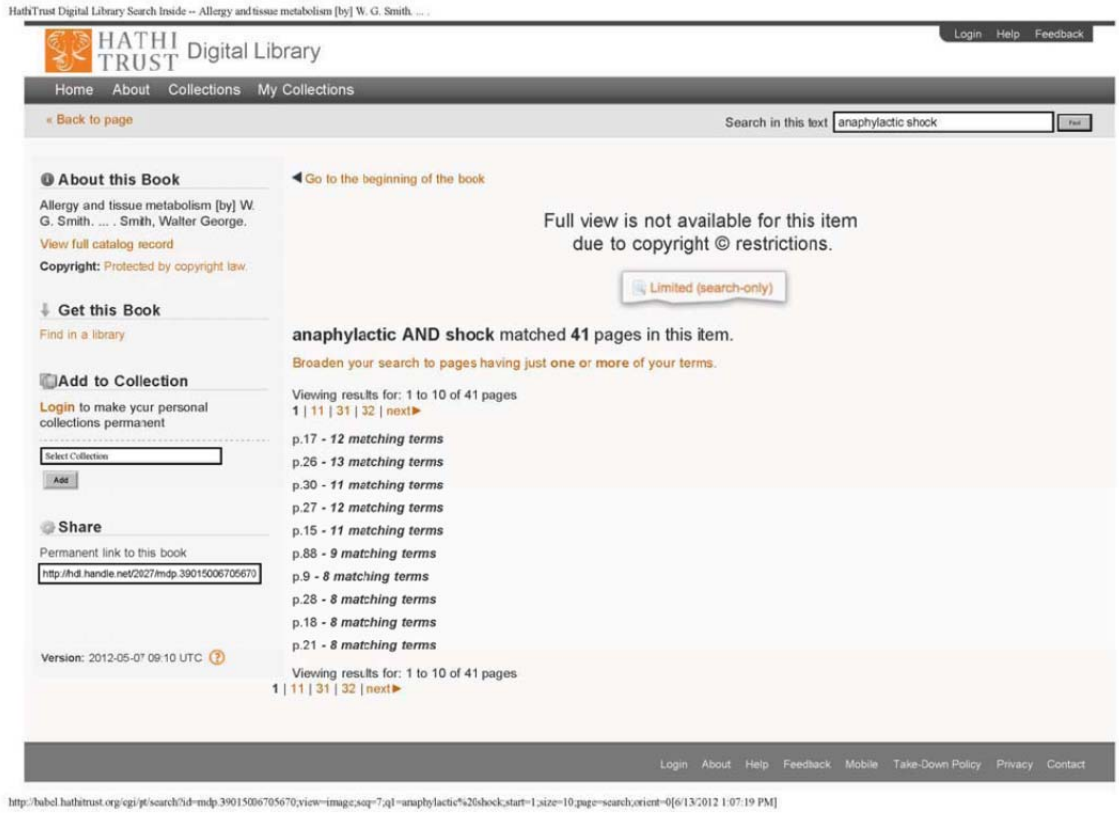
BACKGROUND

A. The HathiTrust Digital Library

HathiTrust permits three uses of the copyrighted works in the HDL repository. First, HathiTrust allows the general public to search for particular terms across all digital copies in the repository. Unless the copyright holder authorizes broader use, the search results show only the page numbers on which the search term is found within the

work and the number of times the term appears on each page. The HDL does not display to the user any text from the underlying copyrighted work (either in "snippet" form or otherwise). Consequently, the user is not able to view either the page on which the term appears or any other portion of the book.

Below is an example of the results a user might see after running an HDL full-text search:



J.A. 681 ¶ 80 (Wilkin Decl.).

Second, the HDL allows member libraries to provide patrons with certified print disabilities access to the full text of copyrighted works. A "print disability" is any disability that prevents a person from effectively reading printed material. Blindness is one example,

but print disabilities also include those that prevent a person from physically holding a book or turning pages. To use this service, a patron must obtain certification of his disability from a qualified expert. Through the HDL, a print-disabled user can obtain access to the contents of works in the digital library using adaptive technologies such as software that converts the text into spoken words, or that magnifies the text. Currently, the University of Michigan's library is the only HDL member that permits such access, although other member libraries intend to provide it in the future.

Third, by preserving the copyrighted books in digital form, the HDL permits members to create a replacement copy of the work, if the member already owned an original copy, the member's original copy is lost, destroyed, or stolen, and a replacement copy is unobtainable at a "fair" price elsewhere.

The HDL stores digital copies of the works in four different locations. One copy is stored on its primary server in Michigan, one on its secondary server in Indiana, and two on separate backup tapes at the University of Michigan.[3] Each copy contains the full text of the work, in a machine readable format, as well as the *images* of each page in the work as they appear in the print version.

B. The Orphan Works Project

Separate and apart from the HDL, in May 2011, the University of Michigan developed a project known as the Orphan Works Project (or "OWP"). An "orphan work" is an out-of-print work that

[3] Separate from the HDL, one copy is also kept by Google. Google's use of its copy is the subject of a separate lawsuit currently pending in this Court. *See Authors Guild, Inc. v. Google, Inc.*, 721 F.3d 132 (2d Cir. 2013), *on remand*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *appeal docketed*, No. 13-4829 (2d Cir. Dec. 23, 2013).

is still in copyright, but whose copyright holder cannot be readily identified or located. *See* U.S. Copyright Office, Notice of Inquiry, Orphan Works and Mass Digitization, 77 Fed. Reg. 64555 (Oct. 22, 2012).

The University of Michigan conceived of the OWP in two stages: First, the project would attempt to identify out-of-print works, try to find their copyright holders, and, if no copyright holder could be found, publish a list of orphan works candidates to enable the copyright holders to come forward or be otherwise located. If no copyright holder came forward, the work was to be designated as an orphan work. Second, those works identified as orphan works would be made accessible in digital format to the OWP's library patrons (with simultaneous viewers limited to the number of hard copies owned by the library).

The University evidently became concerned that its screening process was not adequately distinguishing between orphan works (which were to be included in the OWP) and in-print works (which were not). As a result, before the OWP was brought online, but after the complaint was filed in this case, the University indefinitely suspended the project. No copyrighted work has been distributed or displayed through the project and it remains suspended as of this writing.

C. Proceedings in the District Court

This case began when twenty authors and authors' associations (collectively, the "Authors") sued HathiTrust, one of its member universities, and the presidents of four other member universities (collectively, the "Libraries") for copyright infringement seeking declaratory and injunctive relief. The National Federation of the Blind and three print-disabled students (the "Intervenors") were

permitted to intervene to defend their ability to continue using the HDL.

The Libraries initially moved for partial judgment on the pleadings on the ground that the authors' associations lacked standing to assert claims on behalf of their members and that the claims related to the OWP were not ripe. *See* Fed. R. Civ. P. 12(c). The Libraries then moved for summary judgment on the remaining claims on the ground that their uses of copyrighted material were protected by the doctrine of fair use, *see* 17 U.S.C. § 107, and also by the Chafee Amendment, *see id.* § 121. The Intervenors moved for summary judgment on substantially the same grounds as the Libraries and, finally, the Authors cross-moved for summary judgment.

D. The District Court's Opinion

The district court granted the Libraries' and Intervenors' motions for summary judgment on the infringement claims on the basis that the three uses permitted by the HDL were fair uses. In this assessment, the district court gave considerable weight to what it found to be the "transformative" nature of the three uses and to what it described as the HDL's "invaluable" contribution to the advancement of knowledge, *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 460-64 (S.D.N.Y. 2012). The district court explained:

> Although I recognize that the facts here may on some levels be without precedent, I am convinced that they fall safely within the protection of fair use such that there is no genuine issue of material fact. I cannot imagine a definition of fair use that would not encompass the transformative uses made by [the HDL] and would require that I terminate this invaluable contribution to the progress of science and cultivation of

> the arts that at the same time effectuates the ideals espoused by the [Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101, *et seq.*)].

Id. at 464.

Next, the district court addressed the Libraries' Chafee Amendment defense. Under the Amendment, "authorized entities" are permitted to reproduce or distribute copies of a previously published, nondramatic literary work in specialized formats exclusively for use by the blind or other persons with disabilities. *See* 17 U.S.C. § 121; *HathiTrust*, 902 F. Supp. 2d at 465. Under § 121, an "'authorized entity' means a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities." 17 U.S.C. § 121(d)(1).

The district court stated that the ADA requires that libraries of educational institutions, such as the Libraries in this case, "have a primary mission to reproduce and distribute their collections to print-disabled individuals," which, according to Judge Baer, made "each library a potential 'authorized entity' under the Chafee Amendment." *HathiTrust*, 902 F. Supp. 2d at 465. As a result, the district court concluded that "[t]he provision of access to previously published non-dramatic literary works within the HDL fits squarely within the Chafee Amendment, although Defendants may certainly rely on fair use . . . to justify copies made outside of these categories or in the event that they are not authorized entities." *Id.*

The district court held that certain associational plaintiffs lacked standing under the Copyright Act and dismissed them from the suit. *Id.* at 450-55. The district court also held that the OWP

claims were unripe for judicial review in the absence of crucial information about what the program would look like and whom it would affect should it be implemented, and because the Authors would suffer no hardship by deferring litigation until such time as the Libraries released the details of a new OWP and a revised list of orphan work candidates. *Id.* at 455-56. The court entered judgment against the Authors, and this appeal followed.

DISCUSSION

We review *de novo* under well-established standards the district court's decisions granting summary judgment and judgment on the pleadings. *See Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 92 (2d Cir. 2013) (summary judgment); *LaFaro v. N.Y. Cardiothoracic Grp., PLLC*, 570 F. 3d 471, 475 (2d Cir. 2009) (judgment on the pleadings).

As a threshold matter, we consider whether the authors' associations have standing to assert infringement claims on behalf of their members.

Three of these authors' associations—Authors Guild, Inc., Australian Society of Authors Limited, and Writers' Union of Canada—claim to have standing, solely as a matter of U.S. law, to seek an injunction for copyright infringement on their members' behalf. But, as we have previously explained, § 501 of "the Copyright Act does not permit copyright holders to choose third parties to bring suits on their behalf." *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991); *see also Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998) ("United States law permits suit only by owners of 'an exclusive right under a copyright' . . . ." (quoting 17 U.S.C. § 501(b))). Accordingly, we agree with the district court that these associations

lack standing to bring suit on behalf of their members, and they were properly dismissed from the suit.

The remaining four authors' associations—Union des Écrivaines et des Écrivains Québécois, Authors' Licensing and Collecting Society, Sveriges Författarförbund, and Norsk faglitterær forfattero og oversetterforening—assert that foreign law confers upon them certain exclusive rights to enforce the copyrights of their foreign members (an assertion that the Libraries do not contest on this appeal). These four associations do have standing to bring suit on behalf of their members. *See Itar-Tass*, 153 F.3d at 93-94 (recognizing that an association authorized by foreign law to administer its foreign members' copyrights has standing to seek injunctive relief on behalf of those members in U.S. court).

I. Fair Use[4]

A.

As the Supreme Court has explained, the overriding purpose of copyright is "'[t]o promote the Progress of Science and useful Arts . . . .'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994) (quoting U.S. CONST. art. I, § 8, cl. 8); *see also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). This goal has animated copyright law in Anglo-American history, beginning with the first copyright statute, the Statute of Anne of 1709, which declared itself to be "[a]n Act for the Encouragement of Learning, by Vesting the

[4] Plaintiffs argue that the fair use defense is inapplicable to the activities at issue here, because the Copyright Act includes another section, 108, which governs "Reproduction [of copyrighted works] by Libraries . . ." 17 U.S.C. § 108. However, section 108 also includes a "savings clause," which states, "Nothing in this section in any way affects the right of fair use as provided by section 107 . . . ." § 108(f)(4). Thus, we do not construe § 108 as foreclosing our analysis of the Libraries' activities under fair use, and we proceed with that analysis.

Copies of Printed Books in the Authors . . . during the Times therein mentioned." Act for the Encouragement of Learning, 8 Anne, ch. 19. In short, our law recognizes that copyright is "not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public." Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

The Copyright Act furthers this core purpose by granting authors a limited monopoly over (and thus the opportunity to profit from) the dissemination of their original works of authorship. *See* 17 U.S.C. §§ 102, 106, 302-305. The Copyright Act confers upon authors certain enumerated exclusive rights over their works during the term of the copyright, including the rights to reproduce the copyrighted work and to distribute those copies to the public. *Id.* § 106(1), (3). The Act also gives authors the exclusive right to prepare certain new works—called "derivative works"—that are based upon the copyrighted work. *Id.* § 106(2). Paradigmatic examples of derivative works include the translation of a novel into another language, the adaptation of a novel into a movie or a play, or the recasting of a novel as an e-book or an audiobook. *See id.* § 101. As a general rule, for works created after January 1, 1978, copyright protection lasts for the life of the author plus an additional 70 years. *Id.* § 302.

At the same time, there are important limits to an author's rights to control original and derivative works. One such limit is the doctrine of "fair use," which allows the public to draw upon copyrighted materials without the permission of the copyright holder in certain circumstances. *See id.* § 107 ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright."). "From the infancy of copyright protection, some opportunity for fair use of

copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . . .'" *Campbell*, 510 U.S. at 574.

Under the fair-use doctrine, a book reviewer may, for example, quote from an original work in order to illustrate a point and substantiate criticisms, *see Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901), and a biographer may quote from unpublished journals and letters for similar purposes, *see Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991). An artist may employ copyrighted photographs in a new work that uses a fundamentally different artistic approach, aesthetic, and character from the original. *See Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). An internet search engine can display low-resolution versions of copyrighted images in order to direct the user to the website where the original could be found. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-22 (9th Cir. 2002). A newspaper can publish a copyrighted photograph (taken for a modeling portfolio) in order to inform and entertain the newspaper's readership about a news story. *See Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000). A viewer can create a recording of a broadcast television show in order to view it at a later time. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-450 (1984). And a competitor may create copies of copyrighted software for the purpose of analyzing that software and discovering how it functions (a process called "reverse engineering"). *See Sony Comp. Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 599-601 (9th Cir. 2000).

The doctrine is generally subject to an important proviso: A fair use must not excessively damage the market for the original by providing the public with a substitute for that original work. Thus, a book review may fairly quote a copyrighted book "for the purposes

of fair and reasonable criticism," *Folsom*, 9 F. Cas. at 344, but the review may not quote extensively from the "heart" of a forthcoming memoir in a manner that usurps the right of first publication and serves as a substitute for purchasing the memoir, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

In 1976, as part of a wholesale revision of the Copyright Act, Congress codified the judicially created fair-use doctrine at 17 U.S.C. § 107. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (1976) (codified as amended at 17 U.S.C. § 107). Section 107 requires a court to consider four nonexclusive factors which are to be weighed together to assess whether a particular use is fair:

> (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.

17 U.S.C. § 107.

An important focus of the first factor is whether the use is "transformative." A use is transformative if it does something more than repackage or republish the original copyrighted work. The inquiry is whether the work "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message . . . ." *Campbell*, 510 U.S. at 579 (citing Leval, 103 HARV. L. REV. at 1111). "[T]he more transformative the new work, the less will be the significance of other factors . . .

that may weigh against a finding of fair use." *Id.* Contrary to what the district court implied, a use does not become transformative by making an "invaluable contribution to the progress of science and cultivation of the arts." *HathiTrust*, 902 F. Supp. 2d at 464. Added value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it.

The second factor considers whether the copyrighted work is "of the creative or instructive type that the copyright laws value and seek to foster." Leval, 103 HARV. L. REV. at 1117; *see also Folsom*, 9 F. Cas. at 348 ("[W]e must often . . . look to the nature and objects of the selections made . . . ."). For example, the law of fair use "recognizes a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row*, 471 U.S. at 563.

The third factor asks whether the secondary use employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purposes asserted under the first factor. *Campbell*, 510 U.S. at 586-87. In weighing this factor, we assess the quantity and value of the materials used and whether the amount copied is reasonable in relation to the purported justifications for the use under the first factor. Leval, 103 HARV. L. REV. at 1123.

Finally, the fourth factor requires us to assess the impact of the use on the traditional market for the copyrighted work. This is the "single most important element of fair use." *Harper & Row*, 471 U.S. at 566. To defeat a claim of fair use, the copyright holder must point to market harm that results because the secondary use serves as a substitute for the original work. *See Campbell*, 510 U.S. at 591 ("cognizable market harm" is limited to "market substitution"); *see also NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481-82 (2d Cir. 2004).

B.

As discussed above, the Libraries permit three uses of the digital copies deposited in the HDL. We now consider whether these uses are "fair" within the meaning of our copyright law.

1. Full-Text Search

It is not disputed that, in order to perform a full-text search of books, the Libraries must first create digital copies of the entire books. Importantly, as we have seen, the HDL does not allow users to view any portion of the books they are searching. Consequently, in providing this service, the HDL does not add into circulation any new, human-readable copies of any books. Instead, the HDL simply permits users to "word search"—that is, to locate where specific words or phrases appear in the digitized books. Applying the relevant factors, we conclude that this use is a fair use.

i.

Turning to the first factor, we conclude that the creation of a full-text searchable database is a quintessentially transformative use. As the example on page 7, *supra*, demonstrates, the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn. Indeed, we can discern little or no resemblance between the original text and the results of the HDL full-text search.

There is no evidence that the Authors write with the purpose of enabling text searches of their books. Consequently, the full-text search function does not "supersede[] the objects [or purposes] of the original creation," *Campbell*, 510 U.S. at 579 (internal quotation marks omitted). The HDL does not "merely repackage[] or republish[] the original[s]," Leval, 103 HARV. L. REV. at 1111, or

merely recast "an original work into a new mode of presentation," *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir. 1998). Instead, by enabling full-text search, the HDL adds to the original something new with a different purpose and a different character.

Full-text search adds a great deal more to the copyrighted works at issue than did the transformative uses we approved in several other cases. For example, in *Cariou v. Prince*, we found that certain photograph collages were transformative, even though the collages were cast in the same medium as the copyrighted photographs. 714 F.3d at 706. Similarly, in *Bill Graham Archives v. Dorling Kindersley Ltd.*, we held that it was a transformative use to include in a biography copyrighted concert photos, even though the photos were unaltered (except for being reduced in size). 448 F.3d 605, 609-11 (2d Cir. 2006); *see also Blanch v. Koons*, 467 F.3d 244, 252-53 (2d Cir. 2006) (transformative use of copyrighted photographs in collage painting); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998) (transformative use of copyrighted photograph in advertisement).

Cases from other Circuits reinforce this conclusion. In *Perfect 10, Inc.*, the Ninth Circuit held that the use of copyrighted thumbnail images in internet search results was transformative because the thumbnail copies served a different function from the original copyrighted images. 508 F.3d at 1165; *accord Arriba Soft Corp.*, 336 F.3d at 819. And in *A.V. ex rel. Vanderhye v. iParadigms, LLC*, a company created electronic copies of unaltered student papers for use in connection with a computer program that detects plagiarism. Even though the electronic copies made no "substantive alteration to" the copyrighted student essays, the Fourth Circuit held that plagiarism detection constituted a transformative use of the copyrighted works. 562 F.3d 630, 639-40.

ii.

The second fair-use factor—the nature of the copyrighted work—is not dispositive. The HDL permits the full-text search of every type of work imaginable. Consequently, there is no dispute that the works at issue are of the type that the copyright laws value and seek to protect. However, "this factor 'may be of limited usefulness where,' as here, 'the creative work . . . is being used for a transformative purpose." *Cariou*, 714 F.3d at 710 (quoting *Bill Graham Archives*, 448 F.3d at 612). Accordingly, our fair-use analysis hinges on the other three factors.

iii.

The third factor asks whether the copying used more of the copyrighted work than necessary and whether the copying was excessive. As we have noted, "[t]here are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use." *Maxtone-Graham v. Burtchaell,* 803 F.2d 1253, 1263 (2d Cir. 1986). "[T]he extent of permissible copying varies with the purpose and character of the use." *Campbell*, 510 U.S. at 586-87. The crux of the inquiry is whether "no more was taken than necessary." *Id.* at 589. For some purposes, it may be necessary to copy the entire copyrighted work, in which case Factor Three does not weigh against a finding of fair use. *See Bill Graham Archives*, 448 F.3d at 613 (entire image copied); *Arriba Soft*, 336 F.3d at 821 ("If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine.").

In order to enable the full-text search function, the Libraries, as we have seen, created digital copies of all the books in their

collections.[5] Because it was reasonably necessary for the HDL to make use of the entirety of the works in order to enable the full-text search function, we do not believe the copying was excessive.

The Authors also contend that the copying is excessive because the HDL creates and maintains copies of the works at four different locations Appellants' Br. 27-28. But the record demonstrates that these copies are also reasonably necessary in order to facilitate the HDL's legitimate uses. In particular, the HDL's services are offered to patrons through two servers, one at the University of Michigan (the primary server) and an identical one at the University of Indiana (the "mirror" server). Both servers contain copies of the digital works at issue. According to the HDL executive director, the "existence of a[n] [identical] mirror site allows for balancing the load of user web traffic to avoid overburdening a single site, and each site acts as a back-up of the HDL collection in the event that one site were to cease operation (for example, due to failure caused by a disaster, or even as a result of routine maintenance)." J.A. 682-83 ¶ 88-89 (Wilkin Decl.). To further guard against the risk of data loss, the HDL stores copies of the works on two encrypted backup tapes, which are disconnected from the internet and are placed in separate secure locations on the University of Michigan campus. *Id.* at 683 ¶ 90. The HDL creates these backup tapes so that the data could be restored in "the event of a disaster causing large-scale data loss" to the primary and mirror servers. *Id*.

[5] The HDL also creates digital copies of the images of each page of the books. As the Libraries acknowledge, the HDL does not need to retain these copies to enable the full-text search use. We discuss the fair-use justification for these copies in the context of the disability-access use, *see infra* pp. 29-30.

We have no reason to think that these copies are excessive or unreasonable in relation to the purposes identified by the Libraries and permitted by the law of copyright. In sum, even viewing the evidence in the light most favorable to the Authors, the record demonstrates that these copies are reasonably necessary to facilitate the services HDL provides to the public and to mitigate the risk of disaster or data loss. Accordingly, we conclude that this factor favors the Libraries.

iv.

The fourth factor requires us to consider "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4), and, in particular, whether the secondary use "usurps the market of the original work," *NXIVM Corp.*, 364 F.3d at 482.

The Libraries contend that the full-text-search use poses no harm to any existing or potential traditional market and point to the fact that, in discovery, the Authors admitted that they were unable to identify "any specific, quantifiable past harm, or any documents relating to any such past harm," resulting from any of the Libraries' uses of their works (including full-text search). Defs.-Appellees' Br. 38 (citing Pls.' Resps. to Interrogs.). The district court agreed with this contention, as do we.

At the outset, it is important to recall that the Factor Four analysis is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original work. *See Campbell*, 510 U.S. at 591 ("cognizable market harm" is limited to "market substitution"). In other words, under Factor Four, any economic "harm" caused by transformative uses does not count because such uses, by definition,

do not serve as substitutes for the original work. *See Bill Graham Archives*, 448 F.3d at 614.

To illustrate why this is so, consider how copyright law treats book reviews. Book reviews often contain quotations of copyrighted material to illustrate the reviewer's points and substantiate his criticisms; this is a paradigmatic fair use. And a negative book review can cause a degree of economic injury to the author by dissuading readers from purchasing copies of her book, even when the review does not serve as a substitute for the original. But, obviously, in that case, the author has no cause for complaint under Factor Four: The only market harms that count are the ones that are caused because the secondary use serves as a substitute for the original, not when the secondary use is transformative (as in quotations in a book review). *See Campbell*, 510 U.S. at 591-92 ("[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.").

The Authors assert two reasons why the full-text-search function harms their traditional markets. The first is a "lost sale" theory which posits that a market for licensing books for digital search could possibly develop in the future, and the HDL impairs the emergence of such a market because it allows patrons to search books without any need for a license. Thus, according to the Authors, every copy employed by the HDL in generating full-text searches represents a lost opportunity to license the book for search. Appellants' Br. 43.

This theory of market harm does not work under Factor Four, because the full-text search function does not serve as a substitute for the books that are being searched. *See Campbell*, 510 U.S. at 591-92; *Bill Graham Archives*, 448 F.3d at 614. Thus, it is irrelevant that the

Libraries might be willing to purchase licenses in order to engage in this transformative use (if the use were deemed unfair). Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original and the full-text-search use does not.

Next, the Authors assert that the HDL creates the risk of a security breach which might impose irreparable damage on the Authors and their works. In particular, the Authors speculate that, if hackers were able to obtain unauthorized access to the books stored at the HDL, the full text of these tens of millions of books might be distributed worldwide without restriction, "decimat[ing]" the traditional market for those works. Appellants' Br. 40.

The record before us documents the extensive security measures the Libraries have undertaken to safeguard against the risk of a data breach. Some of those measures were described by the HDL executive director as follows:

> First, [HDL] maintains . . . rigorous physical security controls. HDL servers, storage, and networking equipment at Michigan and Indiana University are mounted in locked racks, and only six individuals at Michigan and three at Indiana University have keys. The data centers housing HDL servers, storage, and networking equipment at each site location are monitored by video surveillance, and entry requires use of both a keycard and a biometric sensor.
>
> Second, network access to the HDL corpus is highly restricted, even for the staff of the data centers housing HDL equipment at Michigan and Indiana University. For example, two levels of network firewalls are in place at each site, and Indiana University data

> center staff do not have network access to the HDL corpus, only access to the physical equipment. For the backup tapes, network access is limited to the administrators of the backup system, and these individuals are not provided the encryption key that would be required to access the encrypted files on the backup tapes.
>
> Web access to the HDL corpus is also highly restricted. Access by users of the HDL service is governed by primarily by [*sic*] the HDL rights database, which classifies each work by presumed copyright status, and also by a user's authentication to the system (e.g., as an individual certified to have a print disability by Michigan's Office of Services for Students with Disabilities).
>
> . . .
>
> Even where we do permit a work to be read online, such as a work in the public domain, we make efforts to ensure that inappropriate levels of access do not take place. For example, a mass download prevention system called "choke" is used to measure the rate of activity (such as the rate a user is reading pages) by each individual user. If a user's rate of activity exceeds certain thresholds, the system assumes that the user is mechanized (e.g., a web robot) and blocks that user's access for a set period of time.

J.A. 683-85 ¶¶ 94-96, 98 (Wilkins Decl.).

This showing of the security measures taken by the Libraries is essentially unrebutted. Consequently, we see no basis in the

record on which to conclude that a security breach is likely to occur, much less one that would result in the public release of the specific copyrighted works belonging to any of the plaintiffs in this case. *Cf. Clapper v. Amnesty Int'l USA*, --- U.S. ---, ---, 133 S. Ct. 1138, 1143, 1149 (2013) (risk of future harm must be "certainly impending," rather than merely "conjectural" or "hypothetical," to constitute a cognizable injury-in-fact); *Sony Corp.*, 464 U.S. at 453-54 (concluding that time-shifting using a Betamax is fair use because the copyright owners' "prediction that live television or movie audiences will decrease" was merely "speculative"). Factor Four thus favors a finding of fair use.

Without foreclosing a future claim based on circumstances not now predictable, and based on a different record, we hold that the balance of relevant factors in this case favors the Libraries. In sum, we conclude that the doctrine of fair use allows the Libraries to digitize copyrighted works for the purpose of permitting full-text searches.

2. Access to the Print-Disabled

The HDL also provides print-disabled patrons with versions of all of the works contained in its digital archive in formats accessible to them. In order to obtain access to the works, a patron must submit documentation from a qualified expert verifying that the disability prevents him or her from reading printed materials, and the patron must be affiliated with an HDL member that has opted-into the program. Currently, the University of Michigan is the only HDL member institution that has opted-in. We conclude that this use is also protected by the doctrine of fair use.

i.

In applying the Factor One analysis, the district court concluded that "[t]he use of digital copies to facilitate access for print-disabled persons is [a] transformative" use. *HathiTrust*, 902 F. Supp. 2d at 461. This is a misapprehension; providing expanded access to the print disabled is not "transformative."

As discussed above, a transformative use adds something new to the copyrighted work and does not merely supersede the purposes of the original creation. *See Campbell*, 510 U.S. at 579. The Authors state that they "write books to be read (or listened to)." Appellants' Br. 34-35. By making copyrighted works available in formats accessible to the disabled, the HDL enables a larger audience to read those works, but the underlying purpose of the HDL's use is the same as the author's original purpose.

Indeed, when the HDL recasts copyrighted works into new formats to be read by the disabled, it appears, at first glance, to be creating derivative works over which the author ordinarily maintains control. *See* 17 U.S.C. § 106(2). As previously noted, paradigmatic examples of derivative works include translations of the original into a different language, or adaptations of the original into different forms or media. *See id.* § 101 (defining "derivative work"). The Authors contend that by converting their works into a different, accessible format, the HDL is simply creating a derivative work.

It is true that, oftentimes, the print-disabled audience has no means of obtaining access to the copyrighted works included in the HDL. But, similarly, the non-English-speaking audience cannot gain access to untranslated books written in English and an unauthorized translation is not transformative simply because it enables a new audience to read a work.

This observation does not end the analysis. "While a transformative use generally is more likely to qualify as fair use, 'transformative use is not absolutely necessary for a finding of fair use.'" *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, --- F.3d ---, ---, 2014 WL 2219162, at *7 (2d Cir. 2014) (quoting *Campbell*, 510 U.S. at 579). We conclude that providing access to the print-disabled is still a valid purpose under Factor One even though it is not transformative. We reach that conclusion for several reasons.

First, the Supreme Court has already said so. As Justice Stevens wrote for the Court: "Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying." *Sony Corp. of Am.*, 464 U.S. at 455 n.40.

Our conclusion is reinforced by the legislative history on which he relied. The House Committee Report that accompanied codification of the fair use doctrine in the Copyright Act of 1976 expressly stated that making copies accessible "for the use of blind persons" posed a "special instance illustrating the application of the fair use doctrine . . . ." H.R. REP. NO. 94-1476, at 73 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5686. The Committee noted that "special [blind-accessible formats] . . . are not usually made by the publishers for commercial distribution." *Id.* In light of its understanding of the market (or lack thereof) for books accessible to the blind, the Committee explained that "the making of a single copy or phonorecord by an individual as a free service for a blind persons [*sic*] would properly be considered a fair use under section 107." *Id.* We believe this guidance supports a finding of fair use in the unique circumstances presented by print-disabled readers.

Since the passage of the 1976 Copyright Act, Congress has reaffirmed its commitment to ameliorating the hardships faced by the blind and the print disabled. In the Americans with Disabilities Act, Congress declared that our "Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(7). Similarly, the Chafee Amendment illustrates Congress's intent that copyright law make appropriate accommodations for the blind and print disabled. *See* 17 U.S.C. § 121.

ii.

Through the HDL, the disabled can obtain access to copyrighted works of all kinds, and there is no dispute that those works are of the sort that merit protection under the Copyright Act. As a result, Factor Two weighs against fair use. This does not preclude a finding of fair use, however, given our analysis of the other factors. *Cf. Davis v. Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) ("The second statutory factor, the nature of the copyrighted work . . . , is rarely found to be determinative.").

iii.

Regarding Factor Three, as previously noted, the HDL retains copies as digital image files and as text-only files, which are then stored in four separate locations. The Authors contend that this amount of copying is excessive because the Libraries have not demonstrated their need to retain the digital *image* files in addition to the text files.

We are unconvinced. The text files are required for text searching and to create text–to-speech capabilities for the blind and disabled. But the image files will provide an additional and often

more useful method by which many disabled patrons, especially students and scholars, can obtain access to these works. These image files contain information, such as pictures, charts, diagrams, and the layout of the text on the printed page that cannot be converted to text or speech. None of this is captured by the HDL's text-only copies. Many legally blind patrons are capable of viewing these images if they are sufficiently magnified or if the color contrasts are increased. And other disabled patrons, whose physical impairments prevent them from turning pages or from holding books, may also be able to use assistive devices to view all of the content contained in the image files for a book. For those individuals, gaining access to the HDL's image files—in addition to the text-only files—is necessary to perceive the books fully. Consequently, it is reasonable for the Libraries to retain both the text and image copies.[6]

iv.

The fourth factor also weighs in favor of a finding of fair use. It is undisputed that the present-day market for books accessible to the handicapped is so insignificant that "it is common practice in the publishing industry for authors to forgo royalties that are generated through the sale of books manufactured in specialized formats for the blind . . . ." Appellants' Br. 34. "[T]he number of accessible books currently available to the blind for borrowing is a mere few hundred thousand titles, a minute percentage of the world's books. In contrast, the HDL contains more than ten million accessible volumes." J.A. 173 ¶ 10 (Maurer Decl.). When considering the 1976 Act, Congress was well aware of this problem. The House

[6] The Authors also complain that the HDL creates and maintains four separate copies of the copyrighted works at issue. Appellants' Br. 27-28. For reasons discussed in the full-text search section, this does not preclude a finding of fair use. *See supra* pp. 20-22.

Committee Report observed that publishers did not "usually ma[ke]" their books available in specialized formats for the blind. H.R. REP. NO. 94-1476, at 73, 1976 U.S.C.C.A.N. at 5686. That observation remains true today.

Weighing the factors together, we conclude that the doctrine of fair use allows the Libraries to provide full digital access to copyrighted works to their print-disabled patrons.[7]

3. Preservation

By storing digital copies of the books, the HDL preserves them for generations to come, and ensures that they will still exist when their copyright terms lapse. Under certain circumstances, the HDL also proposes to make one additional use of the digitized works while they remain under copyright: The HDL will permit member libraries to create a replacement copy of a book, to be read and consumed by patrons, if (1) the member already owned an original copy, (2) the member's original copy is lost, destroyed, or stolen, and (3) a replacement copy is unobtainable at a fair price. The Authors claim that this use infringes their copyrights.

Even though the parties assume that this issue is appropriate for our determination, we are not convinced that this is so. The record before the district court does not reflect whether the plaintiffs own copyrights in any works that would be effectively irreplaceable at a fair price by the Libraries and, thus, would be potentially subject to being copied by the Libraries in case of the loss or destruction of an original. The Authors are not entitled to make this argument on behalf of others, because § 501 of "the Copyright Act does not permit copyright holders to choose third parties to bring suits on

[7] In light of our holding, we need not consider whether the disability-access use is protected under the Chafee Amendment, 17 U.S.C. § 121.

their behalf." *ABKCO Music*, 944 F.2d at 980; *see also* our discussion of standing, *supra* pp. 12-13.

Because the record before us does not reflect the existence of a non-speculative risk that the HDL might create replacement copies of the *plaintiffs'* copyrighted work, we do not believe plaintiffs have standing to bring this claim, and this concern does not present a live controversy for adjudication. *See Clapper*, --- U.S. at ---, 133 S. Ct. at 1147; *Jennifer Matthew Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 607 F.3d 951, 955 (2d Cir. 2010) (noting that we have an "independent obligation" to evaluate subject matter jurisdiction, including whether there is "a live controversy"). Accordingly, we vacate the district court's judgment insofar as it adjudicated this issue without first considering whether plaintiffs have standing to challenge the preservation use of the HDL, and we remand for the district court to so determine.

II. Ripeness of Claims Relating to the Orphan Works Project

The district court also held that the infringement claims asserted in connection with the OWP were not ripe for adjudication because the project has been abandoned and the record contained no information about whether the program will be revived and, if so, what it would look like or whom it would affect. *HathiTrust*, 902 F. Supp. 2d at 455-56. We agree.

In considering whether a claim is ripe, we consider (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

The fitness analysis is concerned with whether the issues sought to be adjudicated are contingent on unknowable future

events. *N.Y. Civil Liberties Union v. Grandeau*, 528 F. 3d 122, 132 (2d Cir. 2008). The Authors assert that their OWP claim is fit for judicial decision because it "will not change based upon the particular procedures that [the University of Michigan] ultimately employs to identify orphan works." Appellants' Br. 13. According to the Authors, the legality of the OWP does not depend upon the specific means the Libraries ultimately employ to identify orphan candidates or the time the Libraries wait before making works available. Rather, the Authors believe that any iteration of the OWP that results in the publication of complete copyrighted works is an infringement of copyright.

We are not persuaded that these concerns create a ripe dispute. Even assuming, *arguendo*, that "[a]ny iteration of the OWP under which copyrighted works are made available for public view and download" would infringe *someone's* copyright, *id.*, it does not follow that the OWP will inevitably infringe the copyrights held by the remaining plaintiffs in this case.[8] It is conceivable that, should the University of Michigan ever revive the OWP, the procedures it ultimately implements to identify orphan works would successfully identify and exclude works to which a plaintiff in this suit holds a copyright. Consequently, we cannot say that any of the plaintiffs face a "certainly impending" harm under our ripeness analysis, *Clapper*, --- U.S. at ---, 133 S. Ct. at 1147; *see also Grandeau*, 528 F.3d at 130 n.8.

Nor do we perceive any hardship if decision is withheld. *See Grandeau*, 528 F.3d at 134. The Authors argue that they would suffer hardship because "there is nothing to stop the Libraries from

[8] We note that, in addition to our conclusion about ripeness, the same reasoning leads us to conclude that the remaining plaintiffs lack standing to bring this claim, *see* our discussion of standing, *supra* pp. 12-13.

reinstituting the OWP and then, if owners of the listed works come forward, suspending it again." Appellants' Br. 16.

We disagree. As indicated above, it is far from clear that the University of Michigan or HathiTrust will reinstitute the OWP in a manner that would infringe the copyrights of any proper plaintiffs. If that occurs, the Authors may always return to court. Suffice it to say that "[t]he mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship." *Grandeau*, 528 F.3d at 134 (internal quotation marks omitted). For these reasons, we conclude that the OWP claims are not ripe for adjudication.

CONCLUSION

The judgment of the district court is AFFIRMED, in part, insofar as the district court concluded that certain plaintiffs-appellants lack associational standing; that the doctrine of "fair use" allows defendants-appellees to create a full-text searchable database of copyrighted works and to provide those works in formats accessible to those with disabilities; and that claims predicated upon the Orphan Works Project are not ripe for adjudication. We VACATE the judgment, in part, insofar as it rests on the district court's holding related to the claim of infringement predicated upon defendants-appellees' preservation of copyrighted works, and we REMAND for further proceedings consistent with this opinion.

Fair Use Checklist
Copyright Advisory Office
Columbia University Libraries
Kenneth D. Crews, Director
http://copyright.columbia.edu

Name: _____

Institution: _____

Project: _____

Date: _____

Prepared by: _____

Purpose

Favoring Fair Use

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

Opposing Fair Use

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

Nature

Favoring Fair Use

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

Opposing Fair Use

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

Amount

Favoring Fair Use

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

Opposing Fair Use

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

Effect

Favoring Fair Use

- ☐ User owns lawfully purchased or acquired 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 Web or in other public forum
- ☐ Repeated or long-term use

CHECKLIST FOR FAIR USE

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

Name:_____ Date:_____ Project:_____

Item Description: _____

Institution:_____ Prepared by:_____

PURPOSE

Favoring Fair Use

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

Opposing Fair Use

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

NATURE

Favoring Fair Use

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

Opposing Fair Use

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

AMOUNT

Favoring Fair Use

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

Opposing Fair Use

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

EFFECT

Favoring Fair Use

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

Opposing Fair Use

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

This document is provided by University Libraries, Dwayne K. Buttler, Endowed Chair for Scholarly Communication, Uof Louisville. It is based upon a work created by D. Buttler & Prof. K. D. Crews at the Copyright Management Center, IUPUI. Version UL 2/23/05.

THE CAMPUS GUIDE TO COPYRIGHT COMPLIANCE

COPYRIGHT BASICS: FAIR USE

Fair Use Check List

The following Checklist for Fair Use is based on a document created by Professor Kenneth Crews and the staff of the Copyright Management Center at Indiana University-Purdue University Indianapolis. Based on the four factors of fair use—purpose, nature, amount and effect—the checklist was created to help educators, librarians and others evaluate content uses to determine if fair use applies. This tool provides an important means for recording your fair use analysis, which is critical to establishing "reasonable and good-faith" attempts to apply fair use. Click here for more information on the Copyright Management Center at Indiana University-Purdue University Indianapolis.

Test Your Copyright Knowledge

What You Need to Know

Purpose

Favoring Fair Use

- [ ] Directly related to classroom use
- [ ] Research
- [ ] Scholarship
- [ ] Nonprofit Educational Institution
- [ ] Criticism
- [ ] Comment
- [ ] News reporting
- [ ] Transformative or Productive use (changes the work for new utility)
- [ ] Restricted access (to students or other appropriate group)
- [ ] Parody

Opposing Fair Use

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

Nature

Favoring Fair Use

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

Opposing Fair Use

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

Amount

Favoring Fair Use

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

Opposing Fair Use

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

Effect

Favoring Fair Use

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

Opposing Fair Use

- [ ] Could replace sale of copyrighted work
- [ ] Impairs market or potential market for copyrighted work or derivative
- [ ] Available licensing mechanism for use of the copyrighted work
- [ ] Permission available for using work
- [ ] Numerous copies made
- [ ] You made it accessible on Web or in other public forum
- [ ] Repeated or long term use

Copyright Information and Resources

Thinking Through Fair Use

Even **after you've fully educated yourself about fair use** (the information on our site is just a start), it can be difficult to remember all the relevant issues when you're looking at a potential use you'd like to make. We've developed one tool that may assist you in your thought process. The Office for Information Technology Policy of the American Library Association also steps you through the process with a similar interactive tool.

How to Use This Tool

Fair use is very context-dependent, so **only you can determine if your use is fair**. You may find it helpful to consult with an attorney or other specialist for further input. This form does not substitute for such consultation.

This tool can help you organize your thoughts around the issues, although it **does NOT tell you whether a proposed use is fair or not**, and **does NOT provide any kind of legal advice**. It simply helps you **structure your own reflections** about the fair use factors, and **provides a record** that you did consider relevant issues. **No computer processes your form** - the end result is only a printable record of what you entered.

Remember that **no single factor is decisive of fair use**, and on any given factor, you may find that some aspects of your proposed use fall in the "favors fair use" column, while others simultaneously "weigh against" fair use. **There also may be other relevant considerations that do not appear in this general-purpose tool!** Many considerations are relevant, and only by looking at the whole picture, across all the issues, can you make a reasonable guess about whether your use is fair or not.

Many elements of this tool adapted with permission from the Columbia University Libraries Copyright Advisory Office Fair Use Checklist

Thinking Through Fair Use - My Analysis

Name/title of document or item to be used

Factor #1: Purpose and character of the use (more info)

Favors Fair Use
- ☐ Educational, scholarly, and research uses, and/or news reporting
- ☐ Criticism or commentary
- ☐ Non-profit use, including personal uses
- ☐ Transformative use (creates a new work with a new purpose), including parody and transformative technologies

Weighs Against Fair Use
- ☐ Commercial activity
- ☐ Profiting from use
- ☐ Decorative or other non-critical, non-commentary use

Notes: Enter additional thoughts regarding the purpose of your proposed use.

Overall thoughts on your *purpose*

strongly favors fair use	somewhat favors fair use	neutral	somewhat weighs against fair use	strongly weighs against fair use
○	○	○	○	○

Factor #2: The nature of the copyrighted work (more info)

Favors Fair Use
- ☐ Published source
- ☐ Factual or non-fiction source

Weighs Against Fair Use
- ☐ Unpublished source
- ☐ Creative, artistic, or fiction source

Notes: Enter additional thoughts regarding the nature of the work you'd like to use.

Overall thoughts on the *nature of the original*

○	○	○	○	○

strongly favors fair use	somewhat favors fair use	neutral	somewhat weighs against fair use	strongly weighs against fair use

---

Factor #3: Amount and substantiality of the portion used (more info)

Favors Fair Use

- ☐ Proportionally small excerpt, extract, or clip
- ☐ Portion used is peripheral or not significant to the entire work
- ☐ Only as much as absolutely necessary for a favored "purpose"

Weighs Against Fair Use

- ☐ Entire work, or proportionally large extract
- ☐ Portion used is "heart of the work"

Notes: Enter additional thoughts regarding the amount and substantiality of your proposed use..

Overall thoughts on the *amount and substantiality* of your use

strongly favors fair use	somewhat favors fair use	neutral	somewhat weighs against fair use	strongly weighs against fair use
○	○	○	○	○

Factor #4: Effect on the potential market for or value of the work (more info)

Favors Fair Use

- ☐ User owns lawful copy of the work (bought or otherwise legitimately acquired
- ☐ Only one or a few copies made
- ☐ One-time use
- ☐ Difficult to redistribute, or to make additional copies of the product of your use
- ☐ Use stimulates market for original work
- ☐ No impact on market for original work
- ☐ No product marketed by copyright holder similar to your use
- ☐ No way to pay or seek permission for your use

Weighs Against Fair Use

- ☐ Use directly substitutes for a sale that would otherwise have been made
- ☐ Many copies made
- ☐ Repeated or long-term use
- ☐ Easy to redistribute, or to make additional copies of the product of your use (i.e. digital file, online use)
- ☐ Impairs market for original work
- ☐ Easily-obtained and affordable license or permission

Notes: Enter additional thoughts regarding the market effect of your proposed use.

Overall thoughts about the *effect of your use on the market for the original*

strongly favors fair use	somewhat favors fair use	neutral	somewhat weighs against fair use	strongly weighs against fair use
○	○	○	○	○

○ Please send a copy of this report to my email address:

Get Summary

For your personal use. No other copy is retained here.

Fair Use Worksheet - Guide

This worksheet is a tool to assist you in conducting a fair use analysis before using, copying and/or distributing materials protected by copyright. Please keep in mind that there is no simple yes or no test to determine if a use is fair and only a court can ultimately make this determination. This worksheet will help assist you in determining the commonly accepted understanding of what constitutes "fair use." Please complete and retain a copy of this form in connection with each possible "fair use" instance of a copyrighted work for your project(s).

Step One: Check any defined best practices that apply

Some disciplines have developed documents that describe standard "fair use" practices in their fields. Following one of these guides (if applicable) is a much easier way to work; these guides have been carefully reviewed so that there is less guesswork about what is and is not fair in a specific context. Many of these have been developed by the Center for Social Media at American University (*http://www.centerforsocialmedia.org/*), but some disciplines may have created documents of their own.

If you are following the standards provided in a "best practices" document, check it off. The rest of this form is optional.

Step Two: Check any items in the "favoring" and "opposing" columns that apply

There are a few common items that favor or oppose fair use listed in the right column. Checking them off (if applicable) is a simple way to indicate how your use is fair. Note that simply comparing the number of checks in each column won't definitively indicate "fair" or "not-fair" because some items are weighted more than others. For example: if you check both "commercial use" and "entire work copied" it would be would be very difficult to then argue that the use is fair, no matter how many checks appear in the "Favoring" column.

If what you check indicates a clear case of "fair use" you are likely dealing with a low-risk use. However, if there is a balance of checked items, or you wish to make your case more clearly, be sure to fill out step three.

Step Three: Describe in your own words how this use is "fair"

The clearest way to make your fair use case is to describe your use in your own words. Fill out the box under each of the four "fair use" tests, summarizing how you are applying the standards for each test. For example: under "Amount and substantiality of the original used", you can describe how the length of a specific clip is short enough, relative to the entire work, that it should be considered a "fair" amount because it doesn't use enough to affect demand for the original.

If you need help interpreting these tests, see our handout "Copyright and Fair Use" at *http://www.oit.umass.edu/academic/workshops/copyrights.html*, or refer to one of the many online resources that cover fair use (such as the fair use resources posted by Stanford University Libraries: *http://fairuse.stanford.edu/*).

Note: be sure to address any "red flag" issues

There may be additional issues to take into account when analyzing the risk of whether a specific use may be challenged. If any of these are applicable to your use, review your "fair use" arguments. You may need to consider how you can adjust your use, reassess your personal risk-tolerance, and/or consult a lawyer before proceeding.

- Use is high-profile and/or controversial
- Use involves a financial transaction
- Use features trademarked properties
- Original media used to make this copy is not owned by you (rather, it has been borrowed, rented, taped from broadcast, etc.)
- Copying requires the circumvention of anti-copying features (DRM) (such circumvention is legal only under very specific conditions)

Before using copyrighted work, please obtain permission from the rights holder, or declare (via this form) how you have determined that your use of this material meets the definition of "fair use" as described in Sec.107 of U.S. Copyright Law. Note that a copyright holder can challenge any unpermitted use; this form merely assists in determining the chances that a use could be challenged and how likely it would be found to be "unfair". OIT requires that this form be filled out prior to accessing equipment, but does not evaluate the assessment. The individual filling out this form and making the copies is assuming all risks related to this activity.

Name:	Email:	Dept:	Date:
Course(s) or Research to Be Used For:			
Title of Copyrighted Work:		Portion Used (pg/min):	

Attach detailed description if needed.

Following Defined Best Practices - *check here if you are following a set of discipline-specific best practices, such as those from American University's Center for Social Media (http://www.centerforsocialmedia.org/resources/fair_use/):*

- ❑ Code of Best Practices in Fair Use for OpenCourseWare
- ❑ Code of Best Practices in Fair Use for Online Video
- ❑ Code of Best Practices in Fair Use for Media Literacy Education
- ❑ Other (Title and URL):

Fair Use Evaluation - *please describe how your use fits within the limits of the four "fair use" tests. Details about the four tests are available online and in our "Copyright and Fair Use" handout. See reverse for detailed instructions.*

The four "fair use" tests	Favoring Fair Use	Opposing Fair Use
1. Purpose and character of this use:	❑ Educational use ❑ Transformative use, creates something new ❑ Nonprofit use ❑ Commentary added (analysis, review, satire)	❑ Commercial use ❑ Non-transformative use, same as original intent ❑ Profit-generating use ❑ No commentary
2. Nature of the original work:	❑ Published work ❑ Facts & Ideas	❑ Unpublished work ❑ Creative expression ❑ Consumable (e.g. worksheets)
3. Amount and substantiality of the original used:	❑ Small portion copied ❑ Portion copied Is not central to the work ❑ Portion used is just enough to accomplish the goal.	❑ Entire work copied ❑ Large portion copied ❑ Central portion copied ("Heart of the work") ❑ Portion used Is more than is necessary to accomplish the goal.
4. Effect on potential market or future use of the original:	❑ No significant effect on market or future use. ❑ One or few copies made and/or distributed ❑ Original not available for purchase, licensing, or viewing online. ❑ Access limited to students in a class or other appropriate group ❑ One-time use, spontaneous use (no time to obtain permission)	❑ Use could substitute for purchase of original ❑ Many or unlimited copies made and/or distributed ❑ Original available for purchase, licensing, or viewing online. ❑ Copies will be available to the public via Web or other means of broad dissemination ❑ Repeated or long-term use

building on others' creative expression

Fair use of copyrighted materials

Intro | First steps | Quick guides to fair use in context | Four-factor test | Permission

What is fair use?

For those of us who would appreciate a clear, crisp answer to that one, we're in luck. The Center for Social Media and Washington School of Law at American University are sponsoring development of a growing number of Fair Use Best Practices statements that inform a fresh approach to the subject and make it easier than ever to know what's fair. The Best Practices statements follow recent trends in court decisions in collapsing the Fair Use Statute's four factors into two questions: ***Is the use you want to make of another's work transformative -- that is, does it add value to and repurpose the work for a new audience -- and is the amount of material you want to use appropriate to achieve your transformative purpose?*** Transformative uses that repurpose no more of a work than is needed to make the point, or achieve the purpose, are generally fair use.

But what if your purpose is not transformative? For example, what if you want to copy several chapters from a textbook for your students to read? Textbooks are created for an educational audience. When we are the intended audience for materials, or when we use a work in the same way that the author intended it to be used when she created it, we are not "repurposing" the work for a new audience. Or what if you are repurposing the work for a new audience and adding value to it by comparing it, critiquing it or otherwise commenting on it, but you want to use a lot more than is really necessary to make your point?

In cases like these we also look at whether the copyright owner makes licenses to use her work available on the open market -- whether there is an efficient and effective way to get a license that lets us do what we want to do. If not, the lack of the kind of license we need to use the materials supports our relying on fair use due to the market's failure to meet our needs. If you would like to know more about a case on the subject of nonprofit educational non-transformative uses, please read Georgia State Electronic Course Materials Case.

Don't forget, however, that fair use exists within a larger context. When we create materials in an educational setting, fair use is part of a web of authority we rely on to use others' works. No one strategy is enough today. Our libraries license millions of dollars' worth of academic resources for our use every year. And there are millions of Creative Commons licensed works available online. We rely on implied licenses to make reasonable academic uses of the works we find freely available on the open Web. And we rely on fair use. If you can't find what you want to use among your libraries' offerings, or on the Web or through Creative Commons, and your use doesn't qualify as fair use, getting permission is becoming easier every day. The Copyright Clearance Center now offers both transactional (item-by-item) licenses and subscription licenses to colleges and universities. And if you conclude that your use is not fair, but you can't license access to the work, circle back around to fair use again, because the lack of availability of a license weights in favor of fair use.

There are many other excellent resources online providing guidance for the use of the four fair use factors. See, for example, IUPUI's Fair Use Checklist, UMUC's Copyright and Fair Use in the Classroom, on the Internet and the World Wide Web, University of Minnesota Libraries' Fair Use Analysis Tool, and the many wonderful statements of Fair Use Best Practices published by or with the Center for Social Media and Washington School of Law, just to name a few.

Please keep in mind that the information presented here is only general information. True legal advice must be provided in the course of an attorney-client relationship specifically with reference to all the facts of a particular situation. Such is not the case here, so this information must not be relied on as a substitute for obtaining legal advice from a licensed attorney.

First steps

You may not need to worry about copyright at all! Many works are not protected, or are already licensed to you or your institution for the uses you wish to make.

1. Unprotected works

Copyright does not protect, and anyone may freely use:

- Works that lack originality
    - logical, comprehensive compilations (like the phone book)
    - unoriginal reprints of public domain works
- Works in the public domain
- US Government works
- Facts
- Ideas, processes, methods, and systems described in copyrighted works

The presence or absence of a copyright notice no longer carries the significance it once did because the law no longer requires a notice. Older works published without a notice may be in the public domain, but for works created after March 1, 1989, absence of a notice means virtually nothing.

Lolly Gasaway and by Peter Hirtle explain the rules for determining whether a protected work is in the public domain in two excellent resources. These rules are complex and somewhat hard to describe, partly because they changed many, many times during the 20th century. At their most basic, excluding anonymous works and works for hire, the rules can be sumarized as follows:

- Any work **published** on or before December 31, 1922 is now in the public domain.
- Works **published** between January 1, 1923 and December 31, 1978, inclusive, are protected for a term of 95 years from the date of publication, with the proper notice.
    - But, if the work was published between 1923 and December 31, 1963, when there was a non-automatic "renewal term," the copyright owner may not have renewed the work. If he or she did not renew, the original term of protection (28 years) will have expired and these works will be in the public domain. Check the Stanford "Determinator" to determine renewal status for books published during these years.
- After 1978, the way we measure the term of protection changes. It no longer begins on the date of publication, rather, it runs for 70 years from the date the author dies (called, "life of the author" plus 70 years). Further, publication is irrelevant. Works are protected whether they are published or not.
- Finally, those works that were created before December 31, 1978, but **never published**, are now protected for the life of the author plus 70 years.

2. Library-licensed works

Check your library's databases and catalogs. They may already have just what you need.

3. Creative Commons licensed works

Learn to do effective Creative Commons searches! You may find exactly what you need with the rights you need to use it, available online for free.

4. Is the work available freely on the open Web without an express permissions statement, and therefor covered by an implied license?

All of us who place materials on the open Web do so knowing that people will use our works in certain ways (downloading, making personal copies, sending copies to friends, etc.). This is the essence of an implied license. I put my materials out there and even though I don't "expressly" give you the right to do these things, the law assumes that I must have intended to give you the right to do what a reasonable copyright owner would expect the public to do. Most nonprofit, educational uses would likely be within the scope of what people expect when they place materials on the open Web. The scope of this license might be the same as or different from fair use, but it's good to know that we have both. Providing attribution should become automatic for you, whenever you use others' works.

Fair use exemption

As described above, courts today tend to collapse the four fair use factors into two questions: **Is the use you want to make of another's work transformative -- that is, does it add value to and repurpose the work for a new audience -- and is the amount of material you want to use appropriate to achieve your transformative purpose?** If a use is not transformative, or if the amount you want to use goes beyond what you need to make your point, look at market availability. We can start with a few quick suggestions regarding the types of uses that we most commonly make of others' work on campus to implement that approach. Then, we can look more closely at the fair use statute's four factors to see how they can help you for more difficult cases.

- Coursepacks, reserves, learning management systems and other platforms for distributing course content, such as iTunes U
- Image, audio and audiovisual archives such as an Art History slide collection or audio or audiovisual collection
- Creative uses
- Research copies

Coursepacks, reserves, learning management systems, iTunes U and other platforms for distributing course content

For transformative uses, use no more than you need to achieve your transformative purpose.

If you need to use materials in essentially the same way or for the same audience as the author intended, or you use more than necessary to achieve a transformative purpose, limit materials distributed in coursepacks, through reserves, learning management systems and iTunes U to:

- **single articles or chapters from longer works (works of 10 or more chapters total), or other small parts of shorter works or those with 9 or fewer chapters (10% of less); several charts, graphs or illustrations; small parts of works such as performances (audio, video)**
- **copies of materials that a faculty member or the library already possesses legally (i.e., by purchase, license, fair use, interlibrary loan, etc.)**

Always include

- any copyright notice on the original
- appropriate citations and attributions to the source
- a Section 108(f)(1) notice, because these materials are distributed most often through digital media

Limit access to the appropriate groups, such as students enrolled in a class and administrative staff, as needed

Terminate access at the end of the class term when appropriate

Digitizing and providing access to images and audiovisual resources for educational purposes

If the use of the resources is transformative and the amount used is appropriate for the transformative purpose, digitize them and make them available as needed, in accordance with the limitations below. In some cases where a use is transformative and the institution's materials are unique, fair use will support digitizing them and providing *public* access. But in other cases, digitized materials should be made available in accordance with the limitations below.

If the use is not transformative, for example, in the case of analog slide sets produced and marketed for an educstional audience, assess the scope and relevance of licensed digital resources available to meet educator's needs.

- **If your needs and the content of licensed digital resources significantly overlap: Acquire licenses to use the commercially availalble digital collections and digitize institutional holdings in accordance with the limitations below.**
- **If there is little overlap in your needs and readily available digital collections, for example, if your materials are no longer available or are rare: Digitize and use institutional works in accordance with the following limitations:**

Limit access to all images, audio and audiovusual resources, except low resolution small images or short clips, to appropriate audiences such as students enrolled in a class and administrative staff as needed. Terminate access at the end of the class term when appropriate.

Faculty members also may use these works at peer conferences.

Students may download, print when needed and transmit digitized works for personal study and for use in the preparation of academic course assignments and other requirements for degrees, may publicly display images and perform audio and audiovisual works in works prepared for course assignments etc., and may keep works containing them in their portfolios.

Digitizing and using other's works creatively

Students, faculty and staff who wish to use others' works in creative, transformative ways, may incorporate others' works into their own original creations and display and perform the resulting work in connection with or creation of --

- **class assignments**
- **curriculum materials**
- **remote instruction**
- **examinations**
- **student portfolios**
- **professional symposia**

While creative uses tend to be transformative, we still must be careful to use no more than needed to achieve the transformative purpose

Limit copies and distribution

Research copies

Making copies as part of the research process may or may not be transformative.

Limit research copies to

- **single chapters from works of 10 or more total chapters, or 10% of shorter works (works having 9 or fewer chapters total, or works that are not divided into chapters)**
- **single articles from a journal issue**
- **several charts, graphs, illustrations**
- **other similarly small parts of a work (10%)**

Using the four factor fair use test

If the quick guides above are insufficient for your needs, and there is no Best Practices statement that you feel you can reasonably adapt to your situation, you can try your hand at using the fair use test directly.

With a particular use in mind,

- Read about each factor
- Answer each factor's question about your use
- See how the balance tips with each answer
- Make a judgment about the final balance: overall does the balance tip in favor of fair use or in favor of getting permission?

The four fair use factors:

1. **What is the character of the use?**
2. **What is the nature of the work to be used?**
3. **How much of the work will you use?**
4. **What effect would this use have on the market for the original or for permissions if the use were widespread?**

FACTOR 1: What is the character of the use?

- Criticism
- Commentary
- Newsreporting
- Parody
- Repurposing a work, providing a new context, or otherwise adding value to the work

- Nonprofit
- Educational
- Personal

- Commercial

Uses on the left are examples of transformative purposes that tip the balance in favor of fair use. The use on the right tends to tip the balance in favor of the copyright owner - in favor of seeking permission. The uses in the middle support a determination of fair use, even if there is no transformative purpose. They also add weight to a transformative fair use claim. But even commercial uses can be fair when they involve repurposing of content, or adding value to it, such as but not limited to parody, criticism and commentary.

The uses on the left are strongly transformative when they use a work in a new way *and* serve a new market from the one the original was intended to serve. For example, using a small image of a poster to illustrate a timeline is transformative; creating a parody of a song is transformative; scholarly criticism that quotes to illustrate a point is transformative; a model's glossy photo used in a news report is transformative. All of these are examples of cases where commercial uses of an appropriate amount of another's work were found to be fair uses.

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

- Fact
- Published

- A mixture of factual and imaginative

- Imaginative
- Unpublished

Again, uses on the left tip the balance in favor of fair use. Uses on the right tip the balance in favor of seeking permission. But here, uses described in the middle tend to have little effect on the balance, more or less cancelling out this factor entirely.

Which way is your balance tipping after assessing the first two factors?

FACTOR 3: How much of the work will you use?

- Small amount (ex: 1 chapter; 10%)
- An appropriate amount for a transformative purpose

- More than a small amount or the amount needed to accomplish a transformative purpose

This factor has its own peculiarities. The general rule holds true (uses on the left tip the balance in favor of fair use; uses on the right tip the balance in favor of asking for permission), but *if you conclude under the first factor that your purpose is transformative, you can use an amount of the work that is appropriate to accomplish that purpose*. Notice how nuanced the interaction of these factors can be: A nonprofit transformative use of a whole work might weigh in favor of fair use if the amount is appropriate for the purpose. A commercial use of a whole work would normally weigh significantly against fair use, *unless the whole work were the appropriate amount to accomplish that purpose*. The examples provided under factor one above illustrate this.

Typically, a nonprofit educational institution may copy an entire article from a journal for students in a class as a fair use; but a commercial copyshop would need permission for the same copying. Similarly, commercial publishers normally have stringent limitations on the length of quotations, while a student writing a paper for a class assignment could reasonably expect to include lengthier quotes.

Which way does your balance tip after assessing the first three factors? The answer to this question may be important in the analysis of the fourth factor!

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

- Proposed use is transformative and not merely duplicative (first factor) and amount used is appropriate for the transformative purpose (third factor)
- Proposed use is not transformative, but amount is small (10%/1 chapter)
- Original is out of print or otherwise unavailable
- Copyright owner is unidentifiable
- No license of the type you want

- Password protection; technological protection

- Use is not transformative
- Competes with (takes away sales from) the original
- Avoids payment for permission (royalties) in an established market for licenses of the type that you desire

The first three factors affect the analysis of this factor. In most cases, three things come together here: whether your use is transformative; whether the amount you used is appropriate for the transformative purpose; and whether there is an efficient and effective market offering a license to use the work in the way you want to use it.

As always, uses on the left weigh in favor of fair use; those on the right weigh in favor of getting permisison. In the middle, uses will reduce the risk associated with relying on fair use when there is a market for that work by protecting the work from possible negative effects of exposure.

In the last 15 years we have seen that courts will tend not to take the availability of licenses into account if the proposed use is transformative and uses an appropriate amount. But if the use is not transformative, the market matters a lot. In a case (Georgia State) that applied fair use to creating digital copies for use as online course materials in a nonprofit educational setting, digitizing and distributing others' works for a similar purpose and for a similar audience to those the original author and publisher intended was only fair when either 1) the amount used was limited to 10% of shorter works (9 or fewer chapters, total, and works not divided into chapters) or 1 chapter from longer works (those containing 10 or more chapters) or 2) there was no license available for the type of use desired. If a license was available, the amounts had to be kept within the limits described, in nearly every case. Please see Georgia State Electronic Course Materials Case for more detailed discussion.

In summary, transformative uses of appropriate amounts tend to be fair even if there is a license available. Non-transformative uses of materials for which there is a license of the type you need, readily available, require that you use only small parts (the 10%/1 chapter amounts the Georgia State Court utilized), and employ protections described in the center of the paradigm above to reduce the risk of harm

to the copyright owner.

How do you feel about the balance for your use after consideration of all four factors?

Need another source of authority to use a work?

Getting rights to use a work is becoming easier in many cases. For pointers to collective rights agencies, information about transactional and subscription licenses, and important considerations in the process of obtaining permissions, please see, Getting Permission. If you have a choice about what materials you use for a particular purpose, consider also that you can eliminate the need for item-by-item- permission to use others' works if you choose works that are already licensed for the use you plan to make. For example, there may be appropriate materials for your purposes already licensed by your library; appropriate materials may be available with Creative Commons licenses that allow nonprofit educational uses without permission; or materials may be freely available online that carry implied rights to make uses as you plan. Information about these choices is available in Accessing and using library resources, at the Creative Commons, and in Content on the Web and Managing your copyrights.

More information

If you are associated with the University of Texas System as faculty, staff or student and have questions about the application of the four factor fair use test, please let me know.

Need more information? The Copyright Crash Course contains detailed materials on many other copyright issues.

Liblicense Model License Agreement with Commentary

INTRODUCTION

This *Liblicense* Model License Agreement ("LMLA") has been prepared to assist information professionals, executives, and others who regularly acquire digital content in a library or similar setting. The intent of this LMLA is to present a sound and realistic template of the key issues involved in negotiating a license to acquire or use digital content.

The LMLA may be used as a template for a license or as a reference document that assists professionals in negotiating (or preparing to negotiate) digital content license agreements. While the LMLA may be used in most digital content licensing situations, it has been drafted with a particular focus on licensing issues in higher education. The language is optimized for digital content received on a subscription basis. The LMLA's terms and conditions are based on United States common and statutory law, and references to U.S. law should be changed if used in other jurisdictions.

Several LMLA provisions (including the jurisdiction and warranty provisions) will require modification in order to serve your organization's purposes. If you plan to use the LMLA as the basis for your institution's license agreement, *Liblicense* editors strongly recommend that you review and amend this model agreement with the assistance of a capable attorney or other licensing professional who has experience in dealing with commercial contracts, licensing, and institutional policy. This LMLA does not constitute legal advice.

A previous iteration of the LMLA included a Short Form Agreement. With the emergence of the Shared E-Resource Understanding ("SERU")[1] as a NISO recommended best practice, *Liblicense* editors have discontinued the Short Form Agreement.

This LMLA is Version 5.0 and is effective November 2014. It supersedes previous LMLA versions. For comments, contact the *Liblicense* editors.[2]

[1] http://www.niso.org/workrooms/seru

[2] http://liblicense.crl.edu/about-liblicense/contact-us/

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1. Editorial notes are enclosed in curly brackets and italicized like this: *{editorial notes in italics between curly brackets}*. These comments should not appear in an actual license agreement.
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{Liblicense editors suggest that the above issues be negotiated and addressed in a separate Schedule attached to the main Agreement. Like pricing models, access and authentication specifications vary widely in licensing contracts. The options include the following:

- *IP addresses (both authenticated and non-authenticated);*
- *Proxy servers;*
- *Passwords;*
- *Public keys or certificates;*
- *Shibboleth; and*
- *Developing protocols not yet developed or tested at the time of Agreement signing.*

These access and authentication specifications may require the expertise of networking professionals, information security specialists, and/or the institution's chief information officer. For these and other reasons, the LMLA includes a template for Schedule 3, which should be edited to meet your specific needs.}

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d. *Commercial Purposes*. Other than as specifically permitted in this Agreement, Licensee may not use the Licensed Materials for commercial purposes. This restriction expressly prohibits the Licensee from selling Licensed Materials. For the avoidance of doubt, research conducted by Licensee and Authorized Users that is supported by a commercial entity shall not be considered use for commercial purposes.

5. PERFORMANCE OBLIGATIONS

5.1 **Licensor Performance Obligations**. The Licensor will use reasonable efforts to ensure that its performance will meet or exceed industry standards and practices. Additionally, the Licensor agrees to the following performance standards.

a. *Availability of Licensed Materials*. The Licensor will make the Licensed Materials available to the Licensee and Authorized Users within **[enter time period**] of the Effective Date.

b. *Discovery of Licensed Materials*. Licensor shall make the Licensed Materials available through Licensee's Discovery Service System(s) for indexing and discovery purposes. Licensor shall provide to Licensee's discovery service vendors on an ongoing basis the

citation and complete descriptive metadata (including all subject headings, abstracts, and keywords), and full-text content necessary to facilitate optimal discovery and accessibility of the content for the benefit of Licensee and Authorized Users. Discovery Service Systems are defined as user interface and search systems for discovering and displaying content from local, database and web-based sources.

c. *Persistent Linking*. Licensor will comply with the most current version of the OpenURL standard (ANSI/NISO Z39.88),[3] and will provide a mechanism for persistent links to content.

d. *Online Terms and Conditions*. In the event that Licensor requires Authorized Users to agree to additional terms relating to the use of the Licensed Materials (commonly referred to as "click-through" or "clickwrap" licenses), or otherwise attempts to impose terms on Authorized Users through online terms and conditions invoked by the mere use or viewing of the Licensed Materials, such terms shall not materially differ from the provisions of this Agreement. In the event of any conflict between the click-through terms or online terms and conditions and this Agreement, the terms of this Agreement shall prevail. For the avoidance of doubt, Authorized Users are not a party to this Agreement.

e. *Disabilities Compliance*. Licensor shall comply with the Americans with Disabilities Act (ADA), by supporting assistive software or devices such as large print interfaces, text-to-speech output, voice-activated input, refreshable braille displays, and alternate keyboard or pointer interfaces, in a manner consistent with the Web Accessibility Initiative Web Content Accessibility Guidelines.[4] Licensor shall provide to Licensee a current completed Voluntary Product Accessibility Template (VPAT)[5] to demonstrate compliance with the federal Section 508 standards. If the product does not comply, the Licensee has the right to adapt the Licensed Materials in order to comply with federal and state law.

f. *Documentation.* Licensor will provide full, complete, and up-to-date help and operational documentation for Licensee and Authorized Users in an electronic format. Additionally, Licensor will make this documentation available in a manner that does not require Authorized Users to log in, use, or otherwise access the Licensed Materials.

g. *Support.* Licensor will provide activation and installation support, including assisting Licensee and Authorized Users with the implementation of any Licensor software. Licensor will offer reasonable levels of continuing support to assist Licensee and Authorized Users in use of the Licensed Materials. Licensor will make its personnel available by email and/or phone during Licensee's regular business hours, Monday – Friday, **[or enter another set of dates and times]** for feedback, problem-solving, or general questions and will respond in a timely manner **[or enter a specific time period]**.

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[3] http://www.niso.org/apps/group_public/project/details.php?project_id=82

[4] http://www.w3.org/WAI/guid-tech.html

[5] http://go.usa.gov/UjFA

h. *Training*. Licensor will provide to Licensee's staff appropriate training relating to the use of the Licensed Materials and any Licensor software. Licensor also will provide additional training to Licensee staff if made necessary by any updates or modifications to the Licensed Materials or any Licensor software.

i. *Updates*. Licensor will provide regular system and project updates to Licensee as they become available.

j. *Quality of Service*. Licensor shall use reasonable efforts to ensure that the Licensor's server or servers have sufficient capacity and rate of connectivity to provide the Licensee and its Authorized Users with a quality of service comparable to current standards in the online information industry in the Licensee's locale. Licensor shall use reasonable efforts to provide continuous service with an average of **[fill in time percentage as appropriate, e.g., 99%]** up-time per month. This **[fill in time percentage as appropriate]** up-time includes periodic unavailability due to server maintenance; software installation or testing; loading or making available additional Licensed Materials as they become available; and unavailability because of service or equipment failure outside the Licensor's control (including problems with public or private telecommunications services, or Internet nodes or facilities). Licensor may schedule brief unavailability periods, but will do so only where (1) it has given at least forty-eight (48) hour notice to Licensee, and (2) in ways and at times that minimize inconvenience to Licensee and its Authorized Users, regardless of when notice has been given.

k. *Problems with Licensed Materials*. If the Licensed Materials fail to operate, display, load, or render in conformance with the terms of this Agreement, Licensee shall immediately notify Licensor, and Licensor shall promptly use best efforts to restore access to the Licensed Materials as soon as possible. In the event that the non-conformity materially affects the Licensee's or Authorized Users' use of the Licensed Materials, and Licensor fails to repair the nonconformity within five (5) business days, Licensor shall reimburse Licensee for such problems in an amount that is proportional to the total fees Licensor owes pursuant to Section 2 and Schedule 2 of this Agreement.

l. *Transfer or Acquisition of Titles.* If any portion of the Licensed Materials is transferred to or acquired from another party, Licensor shall use best efforts to ensure that Licensee does not lose access to content subject to this Agreement as a result of the transfer or acquisition. Any archival and perpetual access rights that have been granted shall be honored, whether the Licensor is acting as the transferring or acquiring party. If Licensor is transferring any portion of the Licensed Materials to another party, Licensor will use best efforts to assign all rights and obligations to the assignee. If Licensor is acquiring works that become subject to this Agreement, Licensor will use best efforts to acquire the rights to perform under this Agreement, including but not limited to perpetual access rights. Licensor agrees to communicate with the party from which it is acquiring works to exchange such relevant payment and rights information. For journal titles, Licensor will comply with the Transfer Code of Practice.[6]

[6] http://www.uksg.org/transfer

m. *Completeness of Content*. Licensor will inform Licensee of instances where online content differs from print versions of the Licensed Materials. Where applicable, Licensor will cooperate with Licensee to identify and correct content errors or omissions, and when necessary, the Licensor shall use reasonable efforts to ensure that the online content: (1) is at least as complete as print and other physical format versions of the Licensed Materials; and (2) represents complete, accurate, and timely replications of the corresponding content contained within the print and other physical format versions of such Materials.

In order to facilitate the assessment of completeness of content, Licensor will provide upon request of Licensee a report of the content in the Licensed Materials at the title, issue, chapter, or item level. Licensor will disclose to Licensee content known or found to be missing from the Licensed Materials, including but not limited to images, pages, issues, and chapters.

If online content is a digitized version of print content and differs from the print or other physical format versions of Licensed Materials so as to be substantially less useful to the Licensee or its Authorized Users, the Licensee may seek to terminate this Agreement for breach pursuant to the termination provisions of this Agreement in Section 6, below.

n. *Notification of Modifications of Licensed Materials*. From time to time, Licensor may add, change, or modify portions of the Licensed Materials, or migrate the Licensed Materials to other formats. When such changes, modifications, or migrations occur, the Licensor shall give notice of any such changes to Licensee as soon as is practicable, but in no event less than thirty (30) days in advance of modification. If any of the changes, modifications, or migrations renders the Licensed Materials substantially less useful to the Licensee or its Authorized Users, the Licensee may seek to terminate this Agreement for breach pursuant to the termination provisions of this Agreement in Section 6, below.

o. *Withdrawal of Licensed Materials*. Licensor reserves the right to withdraw from the Licensed Materials any item or part of an item for which it no longer retains the right to publish, or which it has reasonable grounds to believe infringes copyright or is defamatory, obscene, unlawful or otherwise objectionable. Licensor shall give written notice of the withdrawal to the Licensee as soon as is practicable, but in no event less than thirty (30) days in advance of withdrawal, specifying the item or items to be withdrawn.

If any such withdrawal renders the Licensed Materials less useful to Licensee or its Authorized Users, Licensor shall reimburse Licensee for the withdrawal in an amount proportional to the total Fees owed by Licensee for the Licensed Materials under this Agreement. If any such withdrawal renders the Licensed Materials substantially less useful to Licensee or its Authorized Users, Licensee may seek to terminate this Agreement for breach pursuant to the termination provisions in Section 6, below.

p. *Itemized Holdings List*. The Licensor will provide to the Licensee, prior to the beginning of the calendar year within the current term, an itemized holdings report that specifies the titles included in the Licensed Materials for the next subscription term.

Licensor will use reasonable efforts to update itemized holdings reports as soon as is practicable when holdings information changes, and will provide this information to Discovery Service Systems in a timely manner and to Licensee on request. If the Licensed Materials include content covered by the Knowledge Bases And Related Tools (KBART) Recommended Practice,[7] itemized holdings lists for the Licensee will be reported in KBART-compliant format.

q. *Usage Statistics*. Licensor shall provide to Licensee **[monthly]** usage statistics for the Licensed Materials. Statistics shall meet or exceed the most recent project Counting Online Usage of NeTworked Electronic Resources (COUNTER) Code of Practice Release,[8] including but not limited to its provisions on customer confidentiality. When a release of a new COUNTER Codes of Practice is issued, Licensor shall comply with the implementation time frame specified by COUNTER to provide use statistics in the new standard format.

Licensor shall not provide Licensee's usage statistics in any form to any third party without the Licensee's written authorization, unless the third party owns rights in the Licensed Materials. In all cases, the disclosure of such data shall fully protect the anonymity of individual users and the confidentiality of their searches, and will comply with all applicable privacy laws. The Licensor shall not disclose or sell to other parties usage data or information about the Licensee or its Authorized Users without the Licensee's express written permission or as required by law.

r. *Confidentiality of Personally Identifiable Information*. The Licensor agrees that no personally identifiable information, including but not limited to log-ins recorded in system logs, IP addresses of patrons accessing the system, saved searches, usernames and passwords, will be shared with third parties, except in response to a subpoena, court order, or other legal requirement. If Licensor is compelled by law or court order to disclose personally identifiable information of Authorized Users or patterns of use, Licensor shall provide the Licensee with adequate prior written notice as soon as is practicable, so that Licensee or Authorized Users may seek protective orders or other remedies. Licensor will notify Licensee and Authorized Users as soon as is practicable if the Licensor's systems are breached and the confidentiality of personally identifiable information is compromised.

s. *Notice of the Use of Digital Rights Management Technology*. In the event that Licensor utilizes or implements any type of digital rights management (DRM) technology to control access to or usage of the Licensed Materials, Licensor will provide to Licensee a description of the technical specifications of the DRM and how it impacts access to or usage of the Licensed Materials. If the use of DRM renders the Licensed Materials substantially less useful to the Licensee or its Authorized Users, the Licensee may seek to terminate this Agreement for breach pursuant to the termination provisions of this Agreement in Section 6, below.

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[7] http://www.niso.org/workrooms/kbart

[8] http://www.projectcounter.org/code_practice.html

t. *Use of Watermarking Technology*. In the event that Licensor utilizes any type of watermarking technology for any element of the Licensed Materials, Licensor agrees that watermarks will not reduce readability of content and will not degrade image quality. These watermarks shall not contain user-related information, including but not limited to an account number, IP address, and usernames. If digital watermarking technology is implemented, Licensor will notify Licensee at least thirty (30) days in advance of implementation, and Licensor will provide the technical specifications for the technology used. If the use of the watermarking technology renders the Licensed Materials substantially less useful to the Licensee or its Authorized Users, the Licensee may seek to terminate this Agreement for breach pursuant to the termination provisions of this Agreement in Section 6, below.

u. *Open Access Option.* In the event that Licensor offers an open access option to its authors, Licensor will report to Licensee **[annually**] the number of works (such as articles) published under the open access option by all authors, and the number and list of the works by title with full citation by authors at Licensee's institution.

Licensor will enter into good faith discussions with Licensee concerning mechanisms by which the open access publication fees received by Licensor can offset the fees paid by Licensee and other subscribers of Licensed Materials, with a goal of reducing such fees in proportion to the revenue received through such open access publication fees.

5.2 **Licensee Performance Obligations**. The Licensee agrees to the following performance standards.

a. *License Terms Notice*. Licensee will use reasonable efforts to provide Authorized Users with appropriate notice of the terms and conditions under which access to the Licensed Materials is granted under this Agreement.

b. *Protection from Unauthorized Use*. Licensee will use reasonable efforts to restrict access to the Licensed Materials to Authorized Users.

c. *Maintaining Confidentiality of Access Passwords.* Where access to the Licensed Materials is to be controlled by use of passwords, Licensee will use reasonable efforts to inform Authorized Users that they should not divulge their numbers and passwords to any third party. Licensee will also use reasonable efforts to maintain the confidentiality of any institutional passwords provided by Licensor.

5.3. **Mutual Performance Obligations**. In addition to their respective, specific performance obligations, the Licensor and Licensee agree to be bound by the following performance standards.

a. *Notification of Unauthorized Use*. In the event the Licensee has notice of an unauthorized use of the Licensed Materials and cannot promptly remedy it, the Licensee shall immediately notify the Licensor.

In the event the Licensor has notice of unauthorized use of the Licensed Materials, the Licensor will immediately notify Licensee, and Licensee will cooperate with the Licensor to address the unauthorized use and avoid a recurrence.

Any unauthorized use that is considered a breach of obligations under this Agreement shall be subject to Section 6.4, below, including the cure period.

6. TERM, RENEWAL AND TERMINATION

6.1 **Agreement Term**. This Agreement shall be in effect from the Effective Date until **[enter specific time and time zone]** on **[enter date]**.

6.2 **Renewal**. This Agreement shall be renewable at the end of the current term for a successive **[one (1) year]** term unless either party gives written notice of its intention to cancel **[thirty (30) days]** before expiration of the current term. In the event of a price increase for a subsequent term as provided for in Section 2.2, Licensee shall have no less than **[sixty (60) days]** from the date of notification of the price increase to notify Licensor of Licensee's intent to cancel or renegotiate. *{Liblicense editors suggest including this clause for a term with automatic renewal, and using the same number of days here in 6.2 as specified in 2.2. If your institution does not permit automatic renewal, strike this clause and renegotiate a new Agreement prior to the expiration of the current Agreement.}*

6.3 **Early Termination for Financial Hardship**. The Licensee may terminate this Agreement without penalty if sufficient content acquisitions funds are not allocated to enable the Licensee, in the exercise of its reasonable administrative discretion, to continue this Agreement. In the event of such financial circumstances, Licensee agrees to notify Licensor of the intent to terminate the Agreement as soon as is reasonably possible, but in any case, no less than **[enter a mutually agreeable number of days]** prior to next payment date. *{Liblicense editors suggest that this clause may be most appropriate for multiple year Agreements.}*

6.4 **Termination for Breach**. If either party believes that the other has materially breached any obligations under this Agreement, such party shall notify the other party of the alleged breach in writing following the notice provisions in Section 10.8.

If a material breach has occurred, the breaching party shall have **[thirty (30) days]** from the receipt of notice to use all reasonable means to cure the alleged breach and to notify the non-breaching party in writing that cure has been effected. If the breach is not cured within **[thirty (30) days]**, the non-breaching party shall have the right to terminate the Agreement without further notice. Once this Agreement ends, by early termination or otherwise, the Licensor may terminate (or cause termination of) access to the Licensed Materials by Licensee and Authorized Users subject to Section 8, below. In addition, authorized copies of Licensed Materials made by Authorized Users may be retained for educational purposes and used subject to the terms of this Agreement.

6.5 **Refunds**. In the event of early termination, except for termination for a material breach by the Licensee, Licensee shall be entitled to a refund of any fees or pro-rata portion thereof paid by Licensee for any remaining period of the Agreement.

7. DISPUTE RESOLUTION

7.1 **Dispute Resolution**. In the event of any dispute or controversy arising out of or relating to this Agreement, the parties agree to exercise their best efforts to resolve the

dispute as soon as possible. The parties shall, without delay, continue to perform their respective obligations under this Agreement that are not affected by the dispute.

{Liblicense editors have provided a more robust dispute resolution clause that includes mediation and arbitration options in an endnote for the LMLA. Since many academic institutions cannot agree to mediation and arbitration, the editors choose to provide these options in the endnote rather than as a part of the main body of the document.}

8. PERPETUAL LICENSE AND ARCHIVES

{If the Agreement does not include perpetual rights to the Licensed Materials in Section 1.2, Section 8 should be omitted and subsequent sections renumbered. If perpetual rights are granted, clarify in Section 1.2 and 8.1 whether perpetual rights apply to all content accessible during the term of the Agreement, or only content subscribed to during the term of the Agreement.}

8.1 **Perpetual License**. Notwithstanding anything else in the Agreement, Licensor grants to Licensee a nonexclusive, royalty-free, perpetual license to use any Licensed Materials that were **[accessible** *or* **subscribed to]** during the term of this Agreement. Such use shall be in accordance with the provisions of this Agreement, which provisions shall survive any termination of this Agreement. The means by which Licensee shall have access to such Licensed Materials shall be in a manner and form substantially equivalent to the means by which access is provided under this Agreement. If the Licensor's means of access is not available, the Licensee may provide substantially equivalent access to the Licensed Materials in accordance with Sections 8.2 and 8.3, below.

8.2 **Archival Copy**. Licensor shall provide to Licensee upon request, or Licensee may create, one (1) copy of the entire set of Licensed Materials to be maintained as an archival copy. The archival copy from the Licensor shall be provided without any DRM in a mutually agreeable medium suitable to the content, and any fees for provision of copies will be on a time and materials basis only.

In the event the Licensor discontinues or suspends selling or licensing the Licensed Materials, the Licensee may use such archived Licensed Materials under the same terms as this Agreement. If Licensee has a backup copy of the Licensed Materials as defined in Section 3.2(l) *Backup Copy*, the backup copy may be used as an archival copy.

8.3 **Third Party Archiving Services**. Licensor and Licensee acknowledge that either party may engage the services of third-party trusted archives and/or participate in collaborative archiving endeavors to exercise Licensee's rights under this section of the Agreement. Licensor agrees to cooperate with such archiving entities and/or initiatives as reasonably necessary to make the Licensed Materials available for archiving purposes. Licensee may perpetually use a third-party trusted system or collaborative archive to access or store the Licensed Materials, so long as Licensee's use is under the same terms as this Agreement.

In the event the Licensor discontinues or changes the terms of its participation in a third-party archiving service, the Licensor shall notify the Licensee in advance, and shall in good faith seek to establish alternative arrangements for trusted archiving and perpetual access to the Licensed Materials.

9. WARRANTIES AND INDEMNIFICATION

9.1 **Warranties.** The Licensor warrants it has all necessary legal and equitable rights, permissions, and clearances to license the Licensed Materials to the Licensee for the purposes outlined in this Agreement, and that use of the Licensed Materials by Authorized Users in accordance with the terms of this Agreement shall not infringe the copyright or other rights of any third party.

Licensor shall indemnify and hold harmless the Licensee and any Authorized Users for any losses, claims, damages, awards, penalties, or injuries they incur (including reasonable attorney's fees) which arise from any third party claim that alleges contract breach, copyright infringement, or other intellectual property infringement arising from the Licensee's or an Authorized User's use of or access to the Licensed Materials in accordance with the terms of this Agreement. Additionally, Licensor agrees that no liability limitation that may appear elsewhere in this Agreement applies to, overrides, or cancels this indemnification.

Licensor warrants that any physical object or medium that contains the Licensed Materials will be free from defects for a period of **[enter time period]** from delivery.

9.2 **Warranty Disclaimers.** Notwithstanding anything else in this Agreement, neither party shall be liable for any indirect, special, incidental, punitive, or consequential damages, including loss of data, business interruption, or loss of profits that arises from the use of the Licensed Materials, or inability to use the Licensed Materials.

Except for the express warranties stated elsewhere in this Agreement, Licensor disclaims any and all other warranties, conditions, or representations (express, implied, oral, or written), relating to the Licensed Materials or any part thereof, including, without limitation, any and all implied warranties of quality, performance, merchantability, or fitness for a particular purpose.

9.3 **Indemnities.** Licensor shall indemnify and hold harmless the Licensee for any losses, claims, damages, awards, penalties, or injuries (including reasonable attorneys fees) that arise from any alleged breach of the Licensor's representations and warranties made under this Agreement. This indemnity shall survive the termination of this Agreement.

10. MISCELLANEOUS PROVISIONS

10.1 **Assignment and Transfer.** Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party except as otherwise provided in Section 5.1(l) *Transfer or Acquisition of Titles*. Neither party to this Agreement may unreasonably withhold or delay such written consent.

10.2 **Governing Law**. This Agreement shall be interpreted and construed according to, and governed by, the laws of **[enter venue convenient to Licensor and Licensee**], without regard to its conflict of laws rules. The federal or state courts located in **[enter venue convenient to Licensor and Licensee]** shall have jurisdiction to hear any dispute under this Agreement. *{For state institutions, the governing law and venue may be*

determined by policy, statute or the state's constitution. Liblicense editors recommend discussing governing law and venue requirements with your general counsel or an appropriate administrator.}

10.3 **Force Majeure**. Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control, including Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections, labor strikes, and/or any other cause beyond the reasonable control of the party whose performance is affected.

10.4 **Entire Agreement**. This Agreement constitutes the entire agreement of the parties and supersedes all prior communications, understandings, and agreements relating to the subject matter hereof, whether oral or written. For the avoidance of doubt, online terms and conditions as defined in Section 5.1(d) *Online Terms and Conditions* shall not modify the terms of this Agreement.

10.5 **Amendment.** No modification or claimed waiver of any provision of this Agreement shall be valid except by written amendment signed by authorized representatives of Licensor and Licensee.

10.6 **Severability.** If any provision or provisions of this Agreement shall be held to be invalid, illegal, unenforceable, or in conflict with the law of any jurisdiction, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

10.7 **Waiver of Contractual Right**. Waiver of any provision herein shall not be deemed a waiver of any other provision herein, nor shall waiver of any breach of this Agreement be construed as a continuing waiver of other breaches of the same or other provisions of this Agreement.

10.8 **Notices.** All notices given pursuant to this Agreement shall be in writing and shall be sent to the person who is the signatory to the Agreement at the contract addresses noted in the signature section of this Agreement. All notices may be hand delivered, or shall be deemed received within **[enter time period]** after mailing if sent by registered or certified mail, return receipt requested. If any notice is sent by facsimile or electronic mail, confirmation copies must be sent by mail or by hand delivery to the specified address. Either party may from time to time change its Notice Address by written notice to the other party.

10.9 **Survivability**. Sections 1, 3, 4.3, 7, 8, 9, 10.1, and 10.2 hereof, all indemnification obligations and perpetual license rights shall survive the expiration or termination of the Agreement.

SIGNATURES

IN WITNESS WHEREOF, the parties have executed this Agreement by their respective, duly authorized representatives as of the Effective Date.

Licensor:

By: _____ _____

Signature of Authorized Signatory for Licensor *Date*

[Printed Name]

[Title]

[Address]

[Telephone Number]

[Email Address]

Licensee:

By: _____ _____

Signature of Authorized Signatory for Licensee *Date*

[Printed Name]

[Title]

[Address]

[Telephone Number]

[Email Address]

MODEL AGREEMENT

Schedule 1: Licensed Materials

A schedule dated **[enter date]** to the Agreement entered into on **[enter date]** between **[enter name of Licensor]** and **[enter name of Licensee]**.

{Liblicense editors suggest that some collections may need to be described at the title level, such as subscriptions to journals, where others may be described more generally. If perpetual rights are being negotiated, Liblicense editors recommend particular attention be given to clarifying content for which perpetual rights are granted and content that is made accessible during the term of the agreement, but for which no perpetual rights are included.}

The Licensed Materials that are the subject of this Agreement are:

[Describe licensed materials with reasonable specificity, including distinguishing between purchased content, content under subscription, and content that is merely made accessible, particularly as these distinctions relate to perpetual rights in Section 8. For example, list titles and dates, subscription periods, titles and content types included in an aggregated database, etc.]

SIGNATURES

IN WITNESS WHEREOF, the parties have executed this Schedule by their respective, duly authorized representatives as of the Schedule Date.

Licensor:

By: _____ _____

Signature of Authorized Signatory for Licensor *Date*

[Printed Name]

[Title]

[Address]

[Telephone Number]

[Email Address]

Licensee:

By: _____ _____

Signature of Authorized Signatory for Licensee *Date*

[Printed Name]

[Title]

[Address]

[Telephone Number]

[Email Address]

MODEL AGREEMENT

Schedule 2: Fees and Payment

A schedule dated **[enter date]** to the Agreement entered into on [**enter date**] between **[enter name of Licensor]** and **[enter name of Licensee]**.

{Liblicense editors suggest that fees and payment terms be negotiated and addressed in this Schedule and attached to the main Agreement. Liblicense editors recommend that both the applicable price and the basis on which the pricing is developed be described in this schedule. Pricing models vary widely and continue to evolve, including fees based on the number of Authorized Users or geographic Sites, periodic subscription fees or one-time purchase fees with or without annual maintenance charges, etc. Additionally, the payment term may be for less than one year, one calendar year, one fiscal year (typically July 1 through June 30) or for multiple years. Examples of all pricing models are beyond the scope of the LMLA.}

TOTAL FEE: **[enter fee information]**

TERM COVERED BY PAYMENT: **[enter term]** *{The payment term may be for less than one year, one calendar year, one fiscal year (typically July 1 through June 30) or for multiple years.}*

PAYMENT SCHEDULE: **[enter invoice schedule]** All invoices will be paid within **[enter time period]** of receipt. *{Liblicense editors suggest thirty, forty-five, or sixty-day time periods may be appropriate depending on circumstances.}*

SIGNATURES

IN WITNESS WHEREOF, the parties have executed this Schedule by their respective, duly authorized representatives as of the Schedule Date.

Licensor:

By: _____ _____

Signature of Authorized Signatory for Licensor *Date*

[Printed Name]

[Title]

[Address]

[Telephone Number]

[Email Address]

Licensee:

By: _____ _____

Signature of Authorized Signatory for Licensee *Date*

[Printed Name]

[Title]

[Address]

[Telephone Number]

[Email Address]

MODEL AGREEMENT

Schedule 3: Access and Authentication

A schedule dated **[enter date]** to the Agreement entered into on **[enter date]** between **[enter name of Licensor]** and **[enter name of Licensee]**.

{Liblicense editors suggest that the above issues be negotiated and addressed in a separate Schedule attached to the main Agreement. Like pricing models, access and authentication specifications vary widely in licensing contracts. The options include the following:

- *IP addresses (both authenticated and non-authenticated);*
- *Proxy servers;*
- *Passwords;*
- *Public keys or certificates;*
- *Shibboleth; and*
- *Developing protocols not yet developed or tested at the time of Agreement signing.*

These access and authentication specifications may require the expertise of networking professionals, information security specialists, and/or the institution's chief information officer.}

ACCESS METHOD: *{An example: Unlimited use of the Licensed Materials on the Licensor's server via the World Wide Web.}*

AUTHENTICATION: *{An example: IP addresses for Licensee are: 0.0.0.0 – 0.0.0.0 and Proxy IP is: 0.0.0.0.}*

During the term of this Agreement, Licensee and Licensor shall cooperate in the evaluation and implementation of newly developed security and control protocols and procedures as they are developed.

SIGNATURES

IN WITNESS WHEREOF, the parties have executed this Schedule by their respective, duly authorized representatives as of the Schedule Date.

Licensor:

By: _____ _____

Signature of Authorized Signatory for Licensor *Date*

[Printed Name]

[Title]

[Address]

[Telephone Number]

[Email Address]

Licensee:

By: _____ _____

Signature of Authorized Signatory for Licensee *Date*

[Printed Name]

[Title]

[Address]

[Telephone Number]

[Email Address]

[iiii] **Dispute Resolution alternative approach**

{Liblicense editors have provided a more robust dispute resolution clause that includes mediation and arbitration options here. Since many academic institutions cannot agree to mediation and arbitration, the editors choose to provide these options in the endnote rather than as a part of the main body of the LMLA. If you choose to use this more robust dispute resolution section, please substitute this 7.1 for the 7.1 found in the model license.}

7.1 **Dispute Resolution**. In the event any dispute or controversy arising out of or relating to this Agreement, the parties agree to exercise their best efforts to resolve the dispute as soon as possible. The parties shall, without delay, continue to perform their respective obligations under this Agreement that are not affected by the dispute. If the Licensor and Licensee cannot resolve their dispute after reasonable effort and a reasonable period of time, the parties agree to resolve the dispute using one of the following methods in lieu of litigation. *{The mediation clause and arbitration clauses may be chosen together, or the arbitration clause may be chosen by itself.}*

a. *Mediation*. The Licensor and Licensee may submit their dispute to a neutral, non-binding mediation prior to the commencement of arbitration, litigation, or any other proceeding before a trier of fact. The parties to the dispute or claim agree to act in good faith to participate in mediation, and to identify a mutually acceptable mediator. If a mediator cannot be agreed upon by the parties, each party shall designate a mediator and those mediators shall select a third mediator who shall act as the neutral mediator, assisting the parties in attempting to reach a resolution. The Licensor and Licensee will

share equally in the cost of the mediator(s), and commit to completing at least four hours of mediation before seeking any other dispute resolution method, legal remedy, or equitable remedy. If the mediation is successful, its resolution will be documented by a written agreement executed by all parties. If the mediation does not successfully resolve the dispute or claim, the mediator shall provide written notice to both parties. At this point, the Licensee and Licensor may seek another alternative form of resolution of the dispute or claim, consistent with the remaining terms of this agreement and other legal rights and remedies, or commence litigation.

b. *Arbitration*. If mediation does not resolve a controversy or dispute between the Licensor and Licensee, the parties shall resolve the dispute by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties shall select a mutually acceptable arbitrator knowledgeable about issues relating to the subject matter of this Agreement. In the event the parties are unable to agree to such a selection, each party will select an arbitrator and the arbitrators in turn shall select a third arbitrator. The arbitration shall take place at a location that is reasonably centrally located between the parties, or otherwise mutually agreed upon by the parties. All documents, materials, and information in the possession of each party that are in any way relevant to the claim(s) or dispute(s) shall be made available to the other party for review and copying no later than **[enter time period]** after the notice of arbitration is served.

The arbitrator(s) shall not have the authority, power, or right to alter, change, amend, modify, add, or subtract from any provision of this Agreement or to award punitive damages. The arbitrator(s) shall have the power to issue mandatory orders and restraining orders in connection with the arbitration. The award rendered by the arbitrator(s) shall be final and binding on the parties, and judgment may be entered thereon in any court having jurisdiction. The agreement to arbitration shall be specifically enforceable under prevailing arbitration law. During the continuance of any arbitration proceeding, the parties shall continue to perform their respective obligations under this Agreement.

STANDARD LICENSE AGREEMENT

PUBLISHER
AND
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

[Note: Information that will often vary from case to case is in *italics*.]

This License Agreement (this "Agreement") is made effective as of *date* (the "Effective Date") between *Publisher of Address of Publisher, City of Publisher, State of Publisher, Country of Publisher Postal Code of Publisher ("Licensor")* and The Regents of the University of California, a non-profit academic institution, with its principal offices at The California Digital Library, University of California Office of the President, 415 20th Street, 4th floor, Oakland, CA 94612, USA ("Licensee").

In consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

I. CONTENT OF LICENSED MATERIALS; GRANT OF LICENSE

The materials that are the subject of this Agreement shall consist of *electronic information published by Licensor* (hereinafter referred to as the "Licensed Materials").

Licensee and its Authorized Users acknowledge that the copyright and title to the Licensed Materials and any trademarks or service marks relating thereto remain with Licensor. Neither Licensee nor its Authorized Users shall have right, title or interest in the Licensed Materials except as expressly set forth in this Agreement.

Licensor hereby grants to Licensee non-exclusive, non-transferable, worldwide, perpetual right to the Licensed Materials and to provide the Licensed Materials to Authorized Users in accordance with this Agreement.

II. DELIVERY/ACCESS OF LICENSED MATERIALS TO LICENSEE

Licensor will provide the Licensed Materials to the Licensee in the following manner:

Network Access. The Licensed Materials will be stored at one or more Licensor locations in digital form accessible by telecommunications links between such locations and authorized locations of Licensee.

III. FEES

Licensee shall make payment to Licensor for use of the Licensed Materials as follows:

To be negotiated.
All fees are due and payable by Licensee sixty (60) days after the date of invoice from Licensor, but no earlier than thirty (30) days before renewal.

IV. AUTHORIZED USE OF LICENSED MATERIALS

Authorized Users. "Authorized Users" are:

Persons Affiliated with the University of California. Full and part time employees (including faculty, staff, and independent contractors) and students of Licensee and the institution of which it is a part, regardless of the physical location of such persons. For campus locations see Appendix B.

Walk-ins. Patrons not affiliated with Licensee who are physically present at Licensee's site(s) ("walk-ins").

Access by and Authentication of Authorized Users. Licensee and its Authorized Users shall be granted access to the Licensed Materials pursuant to the following:

IP Addresses. Authorized Users shall be identified and authenticated by the use of Internet Protocol ("IP") addresses provided by Licensee to Licensor. The use of proxy servers is permitted as long as any proxy server IP addresses provided limit remote or off-campus access to Authorized Users.

Authorized Uses. Licensee and Authorized Users may make all use of the Licensed Materials as is consistent with the Fair Use Provisions of United States and international copyright laws. In addition, the Licensed Materials may be used for purposes of research, education or other non-commercial use as follows:

Display. Licensee and Authorized Users shall have the right to electronically display the Licensed Materials.

Digitally Copy. Licensee and Authorized Users may download and digitally copy a reasonable portion of the Licensed Materials.

Print Copy. Licensee and Authorized Users may print a reasonable portion of the Licensed Materials.

Recover Copying Costs. Licensee may charge a reasonable fee to cover costs of copying or printing portions of Licensed Materials for Authorized Users.

Archival/Backup Copy. Upon request of Licensee, Licensee may receive from Licensor and/or create one (1) copy of the entire set of Licensed Materials to be maintained as a backup or archival copy during the term of this Agreement, or as required to exercise Licensee's rights under section XII, 'Perpetual License', of this Agreement.

Licensor acknowledges that Licensee may engage the services of third-party trusted archives and/or participate in collaborative archiving endeavors to exercise Licensee's rights under section XII, 'Perpetual License', of this Agreement. Licensor agrees to cooperate with such archiving entities and/or initiatives as reasonably necessary to make the Licensed Materials available for archiving purposes. Licensee may perpetually use the third-party trusted system to access or store the Licensed Materials, so long as Licensee's use is otherwise consistent with this Agreement. Licensor further acknowledges and agrees that, in using the third-party archival system, Licensed Materials may be made available to other system participants who indicate a right to those Licensed Materials.

Caching. Licensee and Authorized Users may make local digital copies of the Licensed materials in order to ensure efficient use by Authorized Users by appropriate browser or other software.

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Course Packs. Licensee and Authorized Users may use a reasonable portion of the Licensed Materials in the preparation of Course Packs or other educational materials.

Course Reserves (Print and Electronic). Licensee and Authorized Users may use a reasonable portion of the Licensed Materials for use in connection with specific courses of instruction offered by the University of California.

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Interlibrary Loan. Using electronic, paper, or intermediated means, Licensee at its discretion may fulfill occasional requests from other institutions, a practice commonly called Interlibrary Loan. Licensee agrees to fulfill such requests in compliance with Section 108 of the United States Copyright Law (17 USC §108, "Limitations on exclusive rights: Reproduction by libraries and archives") and the Guidelines for the Proviso of Subsection 108(2g)(2) prepared by the National Commission on New Technological Uses of Copyrighted Works.

Amount of Authorized Use.

Unlimited Access. Subject to the terms of this Agreement, Licensee and its Authorized Users shall have unlimited access to the Licensed Materials.

V. SPECIFIC RESTRICTIONS ON USE OF LICENSED MATERIALS

Unauthorized Use. Licensee shall not knowingly permit anyone other than Authorized Users to use the Licensed Materials.

Modification of Licensed Materials. Licensee shall not modify, manipulate, or create a derivative work of the Licensed Materials without the prior written permission of Licensor.

Removal of Copyright Notice. Licensee may not remove, obscure or modify any copyright or other notices included in the Licensed Materials.

Commercial Purposes. Licensee may not use the Licensed Materials for commercial purposes, including but not limited to the sale of the Licensed Materials, fee-for-service use of the Licensed Materials, or bulk reproduction or distribution of the Licensed Materials in any form; nor may Licensee impose special charges on Authorized Users for use of the Licensed Materials beyond reasonable printing or administrative costs.

VI. MUTUAL PERFORMANCE OBLIGATIONS

User Surveys. Licensee and Licensor shall cooperate on the preparation and provision of user surveys to solicit feedback on the Licensed Materials from Authorized Users.

Confidentiality of User Data. Licensor and Licensee agree to maintain the confidentiality of Authorized Users relating to the usage of the Licensed Materials. Such data may be used solely for purposes directly related to the Licensed Materials and may only be provided to third parties in aggregate form. Raw usage data relating to the identity of specific users and/or uses, shall not be provided to any third party.

Implementation of Developing Security Protocols. Licensee and Licensor shall cooperate in the implementation of security and control protocols and procedures as they are developed during the term of this Agreement.

VII. LICENSOR PERFORMANCE OBLIGATIONS

Availability of Licensed Materials. Upon the Effective Date of this Agreement, Licensor shall make the Licensed Materials available to Licensee and Authorized Users.

Documentation. Licensor will provide and maintain help files and other appropriate user documentation.

Training and Support. Licensor will offer installation support, including assisting with the implementation of any Licensor software. Licensor will provide appropriate training to Licensee staff relating to the use of the Licensed Materials and any Licensor software. Licensor will offer reasonable levels of continuing support to assist Licensee and Authorized Users in use of the Licensed Materials. Licensor will make its personnel available by email, phone or fax during regular business hours, Monday through Friday for feedback, problem-solving, or general questions.

Quality of Service. Licensor shall use reasonable efforts to ensure that the Licensor's server or servers have sufficient capacity and rate of connectivity to provide the Licensee and its Authorized Users with a quality of service comparable to current standards in the on-line information provision industry in the Licensee's locale.

Licensor shall use reasonable efforts to provide continuous service seven (7) days a week with an average of 98% up-time per month. The 2% down-time includes periodic unavailability due to maintenance of the server(s), the installation or testing of software, the loading of additional Licensed Materials as they become available, and downtime related to the failure of equipment or services outside the control of Licensor,

including but not limited to public or private telecommunications services or internet nodes or facilities. Scheduled down-time will be performed at a time to minimize inconvenience to Licensee and its Authorized Users.

If the Licensed Materials fail to operate in conformance with the terms of this Agreement, Licensee shall immediately notify Licensor, and Licensor shall promptly use reasonable efforts to restore access to the Licensed Materials as soon as possible. In the event that Licensor fails to repair the nonconformity in a reasonable time, Licensor shall reimburse Licensee in an amount that the nonconformity is proportional to the total Fees owed by Licensee under this Agreement.

Notification of Modifications of Licensed Materials. Licensee understands that from time to time the Licensed Materials may be added to, modified, or deleted from by Licensor and/or that portions of the Licensed Materials may migrate to other formats. Licensor shall give a ninety (90) day notice of any such changes to Licensee. Failure by Licensor to provide such notice shall be grounds for immediate termination of the Agreement by Licensee.

Completeness of Content. Licensor shall use reasonable efforts to ensure that the online content is at least equivalent to print versions of the Licensed Materials, represents complete, faithful and timely replications of the print versions of such Materials, and will cooperate with Licensee to identify and correct errors or omissions.

Continued Training. Licensor will provide regular system and project updates to Licensee as they become available. Licensor will provide additional training to Licensee staff made necessary by any updates or modifications to the Licensed Materials or any Licensor software.

Notice of Terms of "Click-Through" License Terms. In the event that Licensor requires Authorized Users to agree to terms relating to the use of the Licensed Materials before permitting Authorized Users to gain access to the Licensed Materials (commonly referred to as "click-through" licenses), Licensor shall provide Licensee with notice of and an opportunity to comment on such terms prior to their implementation. In no event shall the terms of such "click-through" licenses materially differ from the provisions of this Agreement. In the event of any conflict between the terms of such "click-through" licenses and this Agreement, the terms of this Agreement shall prevail.

Usage Statistics. Licensor must provide both composite use data for the system-wide CDL and itemized data for individual campuses, on a monthly basis. Use data should be at the level of detail required for objective evaluation of both product performance and satisfaction of user needs, including title-by-title use of journals. Providers should follow the International Coalition of Library Consortia (ICOLC) "Guidelines for Statistical Measures of Usage of Web-Based Information Resources " or provide information in compliance with COUNTER or other recognized international standard.

Compliance with Americans with Disabilities Act. Licensor shall make reasonable efforts to comply with the Americans with Disabilities Act (ADA) requirements, Section 508 of the Rehabilitation Act Amendments, and provide Licensee current completed Voluntary Product Accessibility Template (VPAT).

VIII. LICENSEE PERFORMANCE OBLIGATIONS

Provision of Notice of License Terms to Authorized Users. Licensee shall make reasonable efforts to provide Authorized Users with appropriate notice of the terms and conditions under which access to the Licensed

Materials is granted under this Agreement including, in particular, any limitations on access or use of the Licensed Materials as set forth in this Agreement.

Provision of Notice of Intellectual Property Right to Authorized Users. Licensee shall make reasonable efforts to provide Authorized Users with notice of any applicable Intellectual Property or other rights applicable to the Licensed Materials. Licensee shall make reasonable efforts to prevent the infringement of any Intellectual Property or other rights of the Licensor in the Licensed Materials. Licensee shall promptly notify Licensor of any infringement that comes to Licensee's attention, and take appropriate steps to avoid its recurrence.

Protection from Unauthorized Use. Licensee shall use reasonable efforts to protect the Licensed Materials from any use that is not permitted under this Agreement. In the event of any unauthorized use of the Licensed Materials by an Authorized User, (a) Licensor may terminate such offending Authorized User's access to the Licensed Materials, (b) Licensor may terminate the access of the Internet Protocol ("IP") address(es) from which such unauthorized use occurred, and/or (c) Licensee shall terminate such Authorized User's access to the Licensed Materials upon Licensor's request.

Maintaining Confidentiality of Access Passwords. Where access to the Licensed Materials is to be controlled by use of passwords, Licensee shall issue log-on identification numbers and passwords to each Authorized User and use reasonable efforts to ensure that Authorized Users do not divulge their numbers and passwords to any third party.

IX. TERM

This Agreement shall continue in effect for *length of time* commencing on the Effective Date.

X. RENEWAL

This agreement shall be renewable at the end of the current term for a successive *length of time* term unless either party gives written notice of its intention not to renew thirty (30) days before expiration of the current term.

XI. EARLY TERMINATION

In the event that either party believes that the other materially has breached any obligations under this Agreement, or if Licensor believes that Licensee has exceeded the scope of the License, such party shall so notify the breaching party in writing. The breaching party shall have sixty (60) days from the receipt of notice to cure the alleged breach and to notify the non-breaching party in writing that cure has been effected. If the breach is not cured within the sixty (60) day period, the non-breaching party shall have the right to terminate the Agreement without further notice.

Upon Termination of this Agreement for cause online access to the Licensed Materials by Licensee and Authorized Users shall be terminated. Authorized copies of Licensed Materials may be retained by Licensee or Authorized Users and used subject to the terms of this Agreement.

In the event of early termination permitted by this Agreement, Licensee shall be entitled to a refund of any fees or pro-rata portion thereof paid by Licensee for any remaining period of the Agreement from the date of

termination.

XII. PERPETUAL RIGHTS

Notwithstanding anything else in this Agreement, Licensor hereby grants to Licensee a nonexclusive, royalty-free, perpetual license to use any Licensed Materials that were accessible during the term of this Agreement. Such use shall be in accordance with the provisions of this Agreement, which provisions shall survive any termination of this Agreement. The means by which Licensee shall have access to such Licensed Materials shall be in a manner and form substantially equivalent to the means by which access is provided under this Agreement.

XIII. WARRANTIES

Subject to the Limitations set forth elsewhere in this Agreement:

Licensor warrants that it has the right to license the rights granted under this Agreement to use Licensed Materials, that it has obtained any and all necessary permissions from third parties to license the Licensed Materials, and that use of the Licensed Materials by Authorized Users in accordance with the terms of this Agreement shall not infringe the copyright of any third party.

Licensor warrants that the physical medium, if any, on which the Licensed Materials is provided to Licensee will be free from defects for a period of ninety (90) days from delivery.

XIV. LIMITATIONS ON WARRANTIES

Notwithstanding anything else in this Agreement:

Neither party shall be liable for any indirect, special, incidental, punitive or consequential damages, including but not limited to loss of data, business interruption, or loss of profits, arising out of the use of or the inability to use the Licensed Materials.

Licensor makes no representation or warranty, and expressly disclaims any liability with respect to the content of any Licensed Materials, including but not limited to errors or omissions contained therein, libel, infringement of rights of publicity, privacy, trademark rights, moral rights, or the disclosure of confidential information.

Except for the express warranties stated herein, the Licensed Materials are provided on an "as is" basis, and Licensor disclaims any and all other warranties, conditions, or representations (express, implied, oral or written), relating to the Licensed Materials or any part thereof, including, without limitation, any and all implied warranties of quality, performance, merchantability or fitness for a particular purpose. Licensor makes no warranties respecting any harm that may be caused by the transmission of a computer virus, worm, time bomb, logic bomb or other such computer program. Licensor further expressly disclaims any warranty or representation to Authorized Users, or to any third party.

XV. INDEMNITIES

The Licensor shall indemnify and hold Licensee and Authorized Users harmless for any losses, claims,

damages, awards, penalties, or injuries incurred, including reasonable attorney's fees, which arise from any claim by any third party of an alleged infringement of copyright or any other property right arising out of the use of the Licensed Materials by the Licensee or any Authorized User. NO LIMITATION OF LIABILITY SET FORTH ELSEWHERE IN THIS AGREEMENT IS APPLICABLE TO THIS INDEMNIFICATION.

Each party shall indemnify and hold the other harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable attorney's fees, which arise from any alleged breach of such indemnifying party's representations and warranties made under this Agreement, provided that the indemnifying party is promptly notified of any such claims.

The indemnifying party shall have the right to defend such claims at its own expense. The other party shall provide assistance in investigating and defending such claims as the indemnifying party may reasonably request and have the right to participate in the defense at its own expense.

XVI. Assignment and Transfer

Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

XVII. Governing Law

This Agreement shall be interpreted and construed according to, and governed by, the laws of California, excluding any such laws that might direct the application of the laws of another jurisdiction. The federal or state courts located in California shall have jurisdiction to hear any dispute under this Agreement.

XVIII. Dispute Resolution

In the event of any dispute or controversy arising out of or relating to this Agreement, the parties agree to exercise their best efforts to resolve the dispute as soon as possible. The parties shall, without delay, continue to perform their respective obligations under this Agreement which are not affected by the dispute.

Mediation. In the event that the parties cannot by exercise of their best efforts resolve the dispute, they shall submit the dispute to Mediation. The parties shall, without delay, continue to perform their respective obligations under this Agreement which are not affected by the dispute. The invoking party shall give to the other party written notice of its decision to do so, including a description of the issues subject to the dispute and a proposed resolution thereof. Designated representatives of both parties shall attempt to resolve the dispute within five (5) working days after such notice. If those designated representatives cannot resolve the dispute, the parties shall meet at a mutually agreeable location and describe the dispute and their respective proposals for resolution to responsible executives of the disputing parties, who shall act in good faith to resolve the dispute. If the dispute is not resolved within thirty (30) calendar days after such meeting, the dispute shall be submitted to binding arbitration in accordance with the Arbitration provision of this Agreement.

Arbitration. Any controversies or disputes arising out of or relating to this Agreement shall be resolved by binding arbitration in accordance with the then current Commercial Arbitration Rules of the American Arbitration Association. The parties shall endeavor to select a mutually acceptable arbitrator knowledgeable about issues relating to the subject matter of this Agreement. In the event the parties are unable to agree to such

a selection, each party will select an arbitrator and the arbitrators in turn shall select a third arbitrator. The arbitration shall take place at a location that is reasonably centrally located between the parties, or otherwise mutually agreed upon by the parties.

All documents, materials, and information in the possession of each party that are in any way relevant to the claim(s) or dispute(s) shall be made available to the other party for review and copying no later than sixty (60) days after the notice of arbitration is served.

The arbitrator(s) shall not have the authority, power, or right to alter, change, amend, modify, add, or subtract from any provision of this Agreement or to award punitive damages. The arbitrator shall have the power to issue mandatory orders and restraining orders in connection with the arbitration. The award rendered by the arbitrator shall be final and binding on the parties, and judgment may be entered thereon in any court having jurisdiction. The agreement to arbitration shall be specifically enforceable under prevailing arbitration law. During the continuance of any arbitration proceeding, the parties shall continue to perform their respective obligations under this Agreement.

XIX. FORCE MAJEURE

Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections, strikes or other work stoppages, and/or any other cause beyond the reasonable control of the party whose performance is affected.

XX. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement of the parties and supersedes all prior communications, understandings and agreements relating to the subject matter hereof, whether oral or written.

XXI. AMENDMENT

No modification or claimed waiver of any provision of this Agreement shall be valid except by written amendment signed by authorized representatives of Licensor and Licensee.

XXII. SEVERABILITY

If any provision or provisions of this Agreement shall be held to be invalid, illegal, unenforceable or in conflict with the law of any jurisdiction, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

XXIII. WAIVER OF CONTRACTUAL RIGHT

Waiver of any provision herein shall not be deemed a waiver of any other provision herein, nor shall waiver of any breach of this Agreement be construed as a continuing waiver of other breaches of the same or other

provisions of this Agreement.

XXIV. NOTICES

All notices given pursuant to this Agreement shall be in writing and may be hand delivered, or shall be deemed received within five (5) business days after mailing if sent by registered or certified mail, return receipt requested. If any notice is sent by facsimile, confirmation copies must be sent by U.S. Mail or hand delivery to the specified address. Either party may from time to time change its Notice Address by written notice to the other party.

If to Licensor:
Publisher
Address of Publisher
City of Publisher
State of Publisher
Country of Publisher
Postal Code of Publisher

If to Licensee:
University of California Office of the President
California Digital Library
415 20th Street, 4th Floor
Oakland, CA 94612
USA
Attn: Licensing Dept.

XXV. Notice of the Use of Digital Rights Management Technology

In the event that Licensor utilizes any type of digital rights management technology to control the access or the usage of Licensed Product, Licensor agrees to notify Licensee of the name, contact information and any technical specifications for the digital rights management technology utilized.

XXVI. Notice of the Use of Digital Watermarking Technology

If Licensor utilizes any type of digital watermarking technology for any element of the Licensed Product, Licensor agrees that watermarks will not be visible to the human eye and will not degrade image quality. These watermarks shall not contain user-related information such as account number or IP address. If digital watermarking technology is used, Licensor agrees to notify Licensee, in advance, of the name, contact information, and any technical specifications for the technology used.

XXVII. Funding Contingency (multi-year agreements)

The University of California reasonably believes that funds can be obtained sufficient to pay all monies due during the term of this Agreement and hereby covenants that it will do all things lawfully within it power to obtain, maintain, and properly request and pursue funds from which payments for this transaction may be made, including making provisions for such payments to the extent necessary in each budget submitted for the purpose of obtaining funding, using its bona fide best efforts to have such portion of the budget approved and exhausting all available administrative review and appeals in the event such portion of the budget is not approved. It is the University of California's intent to make payments for the full term of this transaction. The University of California represents that the use of the materials under this transaction are essential to its proper, efficient and economic operation.

In the event no funds or insufficient funds are appropriated and budgeted and are not otherwise legally available by any means whatsoever in any fiscal period for payments due under this transaction, the University of California will immediately notify Licensor of such occurrence and this transaction shall terminate on the last day of the subscription period for which payment has been made without penalty of expense to the University of California of any kind whatsoever, except as to the portions of payments herein agreed for which funds shall have been appropriated and budgeted or otherwise available. In the event of such termination the University of California shall maintain its perpetual right to materials licensed under the subscription periods for which it has fully paid.

XXVIII. Open Access Option

In the event that Licensor offers an open access option to its authors, Licensor agrees to annually review the number of open access articles published in the Licensed Materials under the open access option. For all Licensed Materials in which such articles are published, Licensor will share with Licensee the following information:

- the number of articles published under the open access option by University of California authors, listed by journal title and campus.
- the number of articles published under the open access option by all authors, listed by journal title.

Licensor will enter into good faith discussions with Licensee concerning open access business models and how these may influence future business models, including the potential impact on institutional subscription pricing.

Licensor has signed an Expression of Interest to fund the Sponsoring Consortium for Open Access Publishing in Particle Physics (SCOAP3), an initiative that would convert certain journals in high energy physics to open access. Licensor agrees that should SCOAP3 proceed to the tender stage, the subscription value of Licensor's journals contained within the Licensed Materials and any associated fees (e.g. cross-access fees) will be deducted from the license fees due to Licensor so that these funds can be redirected to SCOAP3.

XXIX. AUTHOR RIGHTS TO USE THEIR OWN WORK

Notwithstanding any terms or conditions to the contrary in any author agreement between authors and Licensor, authors who are Authorized Users of Licensee ("Authors") whose work ("Content") is accepted for publication by Licensor during the Term shall retain the non-exclusive, irrevocable, worldwide, royalty-free right to use their Content for scholarly and educational purposes, including self-archiving or depositing the Content in institutional, subject-based, national or other open repositories or archives (including the author's own web pages or departmental servers), and to comply with all grant or institutional requirements associated with the Content.

For the avoidance of doubt, it is the intent of the parties to this License Agreement that Licensee's Authors are third party beneficiaries of this provision of the Agreement. Nothing in this section shall eliminate or limit any other rights that Licensee or any Author may have to deposit, host or make available Content published by Licensor.

Definitions:

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Repositories or archives: Open-access digital repository services such as those provided by the Author's employing institution, an academic consortium, a discipline-based entity, or a governmental funding agency.

XXX. SHARED PRINT ARCHIVE

At Licensee's request, Licensor will provide to Licensee a single print archival copy of the titles selected from the Licensed Materials, on a mutually agreed upon schedule, shipped to a single ship-to address of Licensee or third party agent, at no additional cost . This term does not apply if Licensor ceases to produce paper editions of such titles.

IN WITNESS WHEREOF, the parties have executed this Agreement by their respective, duly authorized representatives as of the date first above written.

LICENSOR:

BY: _____ DATE:_____
Signature of Authorized Signatory of Publisher

Print Name:
Title:
Address:
Telephone No.:
E-mail:

LICENSEE:

BY: _____ DATE:_____
Signature of Authorized Signatory of Licensee

Print Name:
Title:
Address:
Telephone No.:
E-mail:

Appendix A

Business Terms

Appendix B

Campuses of the University of California

University of California, Berkeley (including Lawrence Berkeley Lab)

University of California, Davis

University of California, Irvine

University of California, Los Angeles

University of California, Merced

University of California, Riverside

University of California, San Diego

University of California, San Francisco

University of California, Santa Barbara

University of California, Santa Cruz

University of California Office of the President

[redacted]

ELSEVIER SUBSCRIPTION AGREEMENT

This agreement ("Agreement") is entered into as of 01 May 2009 by and between **University of Massachusetts,** Amherst, MA 01003 USA (the "Subscriber"), and **Elsevier Information Systems GmbH**, Theodor-Heuss-Allee 108, 60486 Frankfurt, Germany ("Elsevier").

The parties hereto agree as follows:

SECTION 1. SUBSCRIPTION.

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Elsevier hereby grants to the Subscriber the non-exclusive, non-transferable right to access and use the products and services identified on Schedule 1 ("Subscribed Products") and provide the Subscribed Products to its Authorized Users (as defined herein) subject to the terms and conditions of this Agreement.

1.2 *Authorized Users/Sites.*
Authorized Users are the full-time and part-time students, faculty, staff, researchers, and independent contractors of the Subscriber affiliated with the Subscriber's locations listed on Schedule 2 (the "Sites") and individuals using computer terminals within the library facilities at the Sites permitted by the Subscriber to access the Subscribed Products.

1.3 *Authorized Uses.*
The Subscriber and its Authorized Users may:

1.3.1 access, search, browse and view the Subscribed Products;

1.3.2 print and download a reasonable portion of the Subscribed Products; and

1.3.3 incorporate links to the Subscribed Products on the Subscriber's intranet and internet websites, provided that the appearance of such links and/or statements accompanying such links shall be changed as reasonably requested by Elsevier.

1.4 *Restrictions on Use of Subscribed Products.*
Except as may be expressly permitted in this Agreement, the Subscriber and its Authorized Users may not:

1.4.1 abridge, modify, translate or create any derivative work based on the Subscribed Products without the prior written permission of Elsevier, except to the extent necessary to make them perceptible on a computer screen to Authorized Users;

1.4.2 remove, obscure or modify in any way any copyright notices, other notices or disclaimers as they appear in the Subscribed Products; or

1.4.3 substantially or systematically reproduce, retain or redistribute the Subscribed Products.

1.5 *Intellectual Property Ownership.*
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Elsevier shall deliver the Subscribed Products to the Subscriber and/or make the Subscribed Products accessible to the Subscriber and its Authorized Users as set forth on Schedule 1.

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Elsevier reserves the right to withdraw from the Subscribed Products content that it no longer retains the right to provide or that it has reasonable grounds to believe is unlawful, harmful, false or infringing.

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Access to the Subscribed Products shall be authenticated by the use of Internet Protocol ("IP") address(es) indicated by the Subscriber on Schedule 2 and/or usernames and passwords and/or a delegated authentication mechanism, identified on Schedule 2, requiring at least two different credentials.

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The Subscriber shall use reasonable efforts to:

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SECTION 5. TERM.

5.1 *Term.*
The term of this Agreement shall commence on 01 May 2009 and continue until 31 August 2010.

5.2 *Renewal.*
This Agreement will be automatically renewed for successive one-year terms, subject to appropriate adjustments to Schedule 1, unless either party gives notice to the other no later than ninety (90) days prior to the end of the then current term that it does not intend to renew.

5.3 *Early Termination Due To Insufficient Budgetary Allotment From Government.*
The Subscriber may terminate this Agreement if sufficient funds are not provided or allotted in future government-approved budgets of the Subscriber (or reasonably available or expected to become available from other sources at the time the Subscriber's payment obligation attaches) to permit the Subscriber, in the exercise of its reasonable administrative discretion, to continue this Agreement.

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Neither party's delay or failure to perform any provision of this Agreement as a result of circumstances beyond its control (including, but not limited to, war, strikes, fires, floods, governmental restrictions, power failures, telecommunications or Internet failures or damage to or destruction of any network facilities or servers) shall be deemed a breach of this Agreement.

7.2 *Severability.*
The invalidity or unenforceability of any provision of this Agreement shall not affect any other provisions of this Agreement.

7.3 *Entire Agreement.*
This Agreement contains the entire understanding and agreement of the parties and merges and supersedes any and all prior and contemporaneous agreements, communications, proposals and purchase orders, written or oral, between the parties with respect to the subject matter contained herein.

7.4 *Modification.*
No modification or waiver of any provision of this Agreement shall be valid unless in writing and signed by the parties.

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7.7 *Notices.*
All notices given pursuant to this Agreement shall be in writing and delivered to the party to whom such notice is directed at the address specified above or the facsimile number or electronic mail address as such party shall have designated by notice hereunder.

7.8 *Execution.*
This Agreement may be executed in counterparts, and signatures exchanged by facsimile or other electronic means are effective for all purposes hereunder to the same extent as original signatures.

IN WITNESS WHEREOF, the parties have executed this Agreement by their respective, duly authorized representatives as of the date first above written.

UNIVERSITY OF MASSACHUSETTS

[redacted]

Name: [redacted]
Title: Assistant Vice President For CAS & Associate Treasurer

ELSEVIER INFORMATION SYSTEMS GMBH
(Elsevier)

[redacted]

Name: [redacted]
Title: Financial Controller Europe

[redacted]

Name: [redacted]
Title: Manager, Contract Management & Licensing

Contract No. [redacted]

[redacted]

ELSEVIER SUBSCRIPTION AGREEMENT
Schedule 1
Subscribed Products/Access/Fees

Subscriber: University of Massachusetts

Subscribed Products	Term	Fees (USD):
Reaxys *(successor product to CrossFire) at no further charge for the Term specified herein*	01 May 2009 – 31 Aug 2009	$0.00
Reaxys	01 Sept 2009 – 31 Aug 2010	$31,181.00
CrossFire Beilstein via Minerva (*at no further charge during the above term, thereafter product will be retired*)		
Reaxys	01 Sept 2010 – 31 Aug 2011	$34,299.00
Reaxys	01 Sept 2011 – 31 Aug 2012	$37,729.00

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2. Should the Subscribed Products become, or in either party's opinion be likely to become, the subject of a claim of infringement of any intellectual property right, Elsevier shall have the option to either (i) modify the Subscribed Products to render them non-infringing while maintaining substantial equivalence, (ii) procure a license which permits the Subscriber at no additional cost to continue to use the Subscribed Products, or (iii) terminate the Agreement and refund to the Subscriber a portion of the Fees paid for the Subscribed Products, prorated to the end of the then-current annual term.

3. Unless enforcement is prohibited by applicable law, the Subscriber and its Authorized Users shall not modify, decompile or reverse engineer the Software.

4. The Subscriber agrees to comply strictly with all relevant export control laws and regulations and acknowledges its responsibility to obtain licenses to export, re-export, or import as may be required.

5. The above noted Fees have been fixed until 31 August 2012. For the subsequent Term(s) Elsevier shall give written notification of any changes to price at least 120 days prior to end of term.

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Schedule 2
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University of Massachusetts. Amherst. MA 01003 USA	1000	[redacted]

Estimated total number of Authorized Users at all Sites: **1000**

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Title:
Name/Address (if different from Section 7.7):
E-mail: [redacted]
Phone: [redacted]
Fax:

Billing Contact
Name: [redacted]
Title:
Name/Address (if different from Section 7.7):
E-mail: [redacted]
Phone: [redacted]
Fax:

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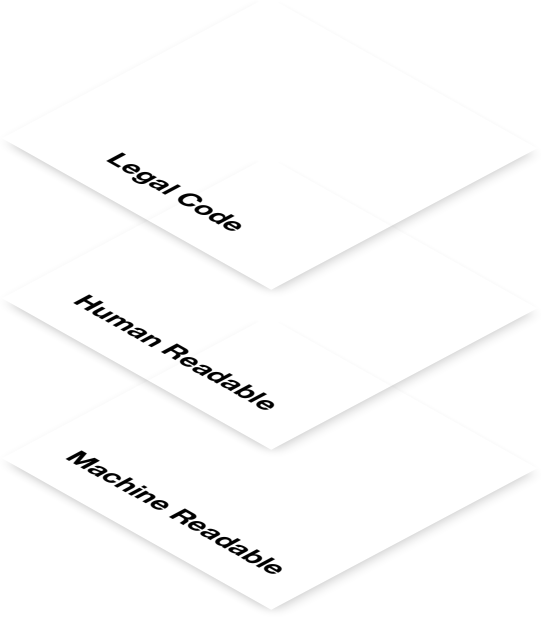

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