

# The Copyright Law and the Health Sciences Librarian

Revised edition

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This document is written to help health sciences librarians and educators interpret the copyright law in their libraries. It is not intended, and cannot be legally, any form of legal advice to the librarian. Only the individual librarian's or institution's legal counsel can offer legal advice to the librarian with respect to possible infringement of the copyright law in any given situation.

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## **Preface**

Knowledge of copyright is essential for health sciences librarians, faculty, and those who use the library and its resources. Information is available in many formats, and librarians must be able to guide and inform students, faculty, researchers, authors, and others about their responsibilities in the use of resources.

This document, *The Copyright Law and the Health Sciences Librarian*, is the third edition published by the Medical Library Association (MLA). The first edition was published in 1978 following the passage of the [1976 Copyright Act](#) that updated the 1909 Copyright Act. A subcommittee of MLA's Legislation Committee that included Nina W. Matheson, AHIP, FMLA, Steven L. Sowell, and Martha S. Young prepared the first edition. Albert M. Berkowitz, AHIP, FMLA, then chief of the Reference Services Division, [National Library of Medicine](#), served as consultant to the committee. More than a decade passed before the 1978 edition was revised. The second edition was revised and updated by Lucretia W. McClure, AHIP, FMLA, in 1989. A number of new appendixes were added.

Eighteen years have passed since the 1989 edition was published. The library world has experienced the joys and challenges brought about by the advent of computers and the Internet. The changes in copyright have also been dramatic. Changes in technology have brought about far more sweeping issues than did photocopying issues, a primary concern when the 1976 law was passed.

Among the additions to the copyright law that impact libraries and educational institutions are the following:

- [The Sonny Bono Copyright Term Extension Act of 1998](#)
- [The Digital Millennium Copyright Act of 1998](#)
- [The Technology, Education and Copyright Harmonization Act of 2002](#) (TEACH)

All of these are relevant to the work of libraries and educational institutions. Librarians face questions every day concerning digitization, scanning, downloading, Web page building, linking, electronic distribution, and more.

This edition is designed to be a practical guide to these common issues. Readers will note that its style and format are different from the earlier versions. The style is informal using questions and answers to define each topic. This revision is made available on the Internet, thus making it possible to incorporate changes at any time the law is changed or a new technology creates a need for clarification.

Appreciation is expressed to members of the working group who prepared the document: Marianne Comegys, Governmental Relations Committee (GRC) chair, Marcus Banks, AHIP, Joy Harriman, AHIP, Alexa Mayo, AHIP, Lucretia McClure, AHIP, FMLA, Patricia Thibodeau, AHIP. Appreciation is also expressed to Diana Cunningham, AHIP, former GRC board liaison, who recommended revising the document and Logan Ludwig, AHIP, former GRC chair, who organized the first meeting of the working group. The working group also acknowledges the substantive work and guidance received from Mary M. Langman, coordinator, Information Issues and Policy, MLA.

Lucretia W. McClure, AHIP, FMLA  
MLA Copyright Referent

## I. Introduction

This document has been written to assist health sciences librarians with applying the copyright law in their libraries. It also provides information that may be helpful for health sciences faculty and other library users, particularly in the section on Copyright in the Educational Setting. It is not intended as legal advice and does not serve as a set of rules or procedures. It cannot replace the use of judgment and the application of the test of reason to individual situations. Nor is it the last and final word. The Medical Library Association (MLA) and other library associations will issue additional advisory statements from time to time. Watch the [MLA News](#), [MLA-FOCUS](#), [MLANET](#) (MLA's Website), and *American Libraries* for current, updated information. Further reading and resources are listed in Copyright Websites and Resources.

The [1976 Copyright Act](#) became effective January 1, 1978. Some provisions are ambiguous; they are open to various interpretations about many practices and silent altogether about others. Librarians must be familiar with the law and its implications to serve the best interests of the medical community who both use and create knowledge.

This document is organized to make the law as accessible as possible to the reader. The first section addresses the guidelines for five service areas:

1. Collection Maintenance
2. Copyright in the Educational Setting
3. Interlibrary Loan
4. Copy Services
5. Reserves

The guidelines for each service define the service, identify the sections of the law relevant to the service, and comment on issues to consider in practical applications of the law.

Following the Guidelines for Service are Infringement Remedies, Permissions, and Copyright Websites and Additional Resources. Links to key resources and tools (e.g., TEACH checklist, sample institutional policies) are also provided.

The document concludes with three appendixes: Agreement on Guidelines for Classroom Copying in Not-for-profit Educational Institutions with Respect to Books and Periodicals (Appendix A), the (CONTU) Guidelines for the Proviso of Subsection 108(g)(2) (Appendix B), and the Pertinent Sections of the Law (Appendix C). Remember that the guidelines were intended to help interpret the law. They do not carry the force of law. It is not necessarily a violation of the law to exceed their recommendations. Appendix C includes sections of the original copyright law of most interest to librarians and updates to the law including the [Copyright Revision Act of 1976](#), P.L. 94-553 (1976 Act); the [Digital Millennium Copyright Act of 1998](#), P.L. 105-304 (DMCA); and the [Technology, Education and Copyright Harmonization Act of 2002](#), P.L. 107-56 (TEACH).

Much of the information contained in this document was excerpted and extracted from the copyright law, including the many changes since 1978 and the supporting documents and links. This document is intended to supplement them and the documents and resources cited throughout and in the section on Copyright Websites and Resources.

## **II. The Library's Responsibilities Within the Institution**

Librarians have the professional responsibility to inform their parent institution and clients of copyright law provisions. In addition to informing the institution of the general provisions of the law, each library must establish clear written policies describing the steps taken to comply with copyright law.

Changes to the copyright law under the Digital Millennium Copyright Act of 1998 have expanded the library's responsibilities concerning copyright. All of the traditional responsibilities concerning copyright remain equally important.

Librarians should become knowledgeable about the subtleties of copyright law to serve as a resource for users and to negotiate quality electronic licensing contracts to serve user needs.

### **A. Traditional Responsibilities**

In common library service areas, libraries must:

- post a copyright notice at the library photocopier
- post a warning of copyright at the physical location where interlibrary loan or photocopy requests are received by library staff
- reproduce the copyright notice on paper and/or electronic interlibrary loan request forms and indicate conformance with the law or provide guidelines on these forms
- include a copyright notice on material photocopied by the library
- maintain records of filed interlibrary loan requests

### **B. Digital Responsibilities**

Digital responsibilities call for libraries to:

- include a copyright notice on all digital copies of materials
- educate users and train staff about the copyright implications of large-scale file sharing
- help users understand why they usually cannot distribute multiple copyrighted materials to other individuals and groups
- comply with the terms of electronic license agreements, which can be different from what is allowed under copyright law
- negotiate license agreements that support the needs of users and the institution
- identify the designated institutional agent to receive a notice of alleged copyright infringement
- be aware of institutional policies regarding copyright law and infringements
- work together with legal counsel and institutional administration to develop copyright policies

Just as a library must comply with the requirements of this law, it is equally as important to be no more restrictive than the law requires.

Some sections of the law represent compromises and are open to interpretation. Much, if not most, of the copying done by the majority of health sciences libraries is legal under the copyright law and requires neither permission from the copyright holder nor the payment of license fees or royalties. Unless librarians exercise their full rights under the law, fair use and the law may become more restrictive than intended.

### **III. Guidelines for Service**

#### **A. Collection Maintenance**

##### **1. Definition**

This section applies to the librarian's responsibility to maintain the integrity of the library's collection and covers copying works for preservation, security, or replacement.

##### **2. Pertinent Sections of the Law**

Subsections 108(a), (b), (c), and (h) are relevant to collection maintenance. Detailed information on these sections of the law is located in Appendix C. Pertinent Sections of the Law: Section 108.

##### **3. Issues to Consider**

**3.a. Does the copyright law allow a library to copy an entire published work for collection maintenance?** There are certain conditions under which it is legal to make three copies of a published work for collection maintenance under subsection 108(c). The reproduction is permitted if:

- The reproduction is made for the purpose of replacing a damaged, deteriorating, lost, or stolen copy or if the copy is stored in a format that has become obsolete.
- The library first made a reasonable, but unsuccessful, effort to find an unused replacement at a fair price. The meaning of "reasonable effort" or "fair price" will vary from situation to situation.
- The reproduction or distribution is made without any direct or indirect commercial advantage.
- The collections of the library or archives are open to the public, available to researchers affiliated with the library or archives or with the institution of which it is a part, and available to other persons doing research in a specialized field.
- A copy produced in digital format is not made available to the public in that format outside of the premises of the library or archives.
- The reproduction includes a notice of copyright that appears on the copy.

##### **Suggested Practices**

- Contact the publisher for availability of a work at a reasonable price before making a copy to maintain the collection.
- Confirm that the machine or device necessary to use a work is no longer manufactured or reasonably available in the commercial marketplace before copying.

- Request permission to create a link to a digitized work from the library’s Website if a print copy cannot be located.

**3.b. How many copies may a library reproduce of an unpublished work for preservation and security or for deposit for research use into another library or archives? Does this include digital copies?** Three copies of an unpublished work are permitted under subsection 108(b), if:

- the copy is currently in the collections of the library or archives
- the copy produced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside of the premises of the library or archives
- the reproduction or distribution is made without any direct or indirect commercial advantage
- the collections of the library or archives are open to the public, available to researchers affiliated with the library or archives or with the institution of which it is a part, and available to other persons doing research in a specialized field
- the reproduction includes a notice of copyright protection

**Suggested Practices**

- Recognize that facsimile copies may include reproducing a work by microfilm or by photocopying;
- Display a notice that use of the digital copy is restricted to the library or archives building.

**3.c. Is it legal to reproduce a work in anticipation of loss or damage?** Not under subsections 108(b) or (c). A library may not routinely copy a work just because it may become lost or damaged. The law permits three copies of a published work (including audiovisual works) to be duplicated only to replace a copy that is already damaged, deteriorating, lost, or stolen or in a format that has become obsolete. This means that a library cannot duplicate its only copy of a book in good condition until after the book is lost or stolen, in which case it will not possess a copy to duplicate. This is obviously is a “Catch-22.” However, as discussed below, a library may conclude that the fair use doctrine permits preemptive preservation.

**Suggested Practices**

- Seek alternatives to copying by buying second copies, securing permission from the copyright holder, or by using various clearinghouses or authorized reproduction services.

**3.d. Do these exceptions apply to audiovisual works and phonorecords?** Yes, they do.

**Suggested Practices**

- Seek alternative ways to obtain a copy of an audiovisual work if the reasons for reproduction do not meet the standards of preservation or replacement.

**3.e. If the library has a contract permitting or forbidding copying, does that contract override the exceptions provided under section 108?** Subsection 108(f)(4) provides that nothing in section 108 affects any contractual obligations assumed by the library when it obtained a copy of a work. Thus, contractual obligations assumed by the library appear to take precedence over the section 108 exceptions. At the same time, a license can provide a library with broader collection maintenance rights than those contained in section 108.

However, some courts have ruled that non-negotiated licenses may not be enforceable contracts in some situations. Also, courts occasionally invalidate specific license terms as unconscionable or against public policy. Thus, if a license prohibits the duplication of a deteriorating copy of a valuable work, it may be worth consulting legal counsel to determine available options.

#### **Suggested Practices**

- Before signing a contract or license, confirm that the rights granted under the license give the library permission to make the best use of the resource.
- Remember that if a library agrees that it will not make any copies, the section 108 exceptions do not override this contract or license.
- Make sure that all contracts retain library fair use rights provided under the law.

**3.f. What is the relationship between fair use and section 108?** Subsection 108(f)(4) specifically provides that it does not “in any way affect the right of fair use provided by section 107.” Thus, a library may determine that fair use permits collection maintenance activities above and beyond those specifically authorized by section 108.

**3.g. Do special rules apply during the final twenty years of the copyright term?** When Congress extended the term of copyright protection by twenty years, it provided special relief to libraries, archives, “and nonprofit educational institution[s] that function as such.” They may make an unlimited number of reproductions, distributions, performances, and displays of a work during the last twenty years of its term for purposes of preservation, scholarship, or research if they first determine that the work is not subject to normal commercial exploitation, a copy cannot be obtained at a reasonable price, and the copyright owner has not filed a notice with the Copyright Office that the first two conditions apply. This exemption does not extend to a library’s users.

**3.h. Does the library need to retain the correspondence and records of permission?** Yes, these records should be kept routinely.

#### **Suggested Practices**

- A logbook or system organized by the name of the manufacturer or producer should record the date permissions were requested, the materials involved, the date of response, and the nature of the response.
- Documenting permissions is important to establish “reasonable effort.”
- Permissions should include all relevant information.
- Where a purchase order specifies an agreement to copy or reformat, a permanent record should be retained.

See PART V. Permissions for additional information.

## **B. Copyright in the Educational Setting**

US copyright law is designed to protect the intellectual property rights of the copyright holder. It gives the copyright holder the exclusive right to copy and distribute their work and to collect royalties that are paid for the use of their work.

The law also built in some provisions to ensure that information can be used for educational purposes. Through the concept of fair use, educational institutions may use materials for teaching and training without paying royalties or permission fees. However, fair use is not a clear-cut statutory guideline for what is or is not permitted educational use, but instead is a nonexclusive set of criteria—also referred to as the four fair use factors—that must be considered when claiming fair use. In addition, the Copyright Act contains several specific exceptions for educational uses.

This section addresses reproduction, performance, and display of copyrighted materials for face-to-face instruction and distance education. It is intended to help health sciences librarians and faculty consider the issues surrounding fair use and other educational exceptions and identifies some suggested practices to ensure compliance with the copyright law. It assumes that readers are working in the health care field using factual or scientific information and are not using literary or creative works.

Because health sciences librarians often are involved in sharing information about the law and supporting the needs of faculty to use copyrighted materials for educational uses, this section provides information that will be helpful to both librarians and faculty.

### **1. Specific Exceptions**

[Subsection 110](#) contains two educational use exceptions. Subsection 110(1) authorizes instructors or students in nonprofit educational institutions to display or perform copyrighted materials during face-to-face classroom instruction.

Subsection 110(2), passed by Congress in 2002 as the [Technology, Education and Copyright Harmonization Act](#) (TEACH Act), permits instructors to display or perform copyrighted works in the course of distance education. The limitations contained in the TEACH Act are extraordinarily complex and are discussed below in great detail.

### **2. Copyright Ownership and Rights**

#### **2.a. Who owns copyright?**

The author of a work automatically owns the copyright as soon as the author fixes it in a tangible medium of expression (i.e., as soon as the author draws it on a piece of paper or types it into a computer) However, a publisher typically requires an author to assign it the copyright as part of the agreement to publish the work.

If a person creates a work in the course of employment, the employer, not the employee, owns the copyright. However, if the person is an independent contractor and not an employee, then the person owns the copyright, not the entity that hired the author to prepare the work. An institution that retains an independent contractor to prepare a work on its behalf needs to make sure that contractor has assigned the copyright to the institution. Otherwise, the contractor will still own the copyright and will be able to limit the institution's use of the work, even though the institution paid for the work's creation.

A further wrinkle in this area is that a professor who writes a book or an article usually owns the copyright in the work, even though the professor is an employee of a university.

Many publishers do allow authors to use and share their works for educational and nonprofit uses. Several publishers have recently given retroactive permission to authors to post their work on an institutional repository or their own faculty Websites. Check the agreement you signed with your publisher or the publisher's Website.

For articles written by other faculty or colleagues, asking the author for permission may not be enough. You may need to find out who is the true copyright holder to seek permission. To determine the true copyright holder:

- check the bottom of the journal article; which often has a copyright statement
- check the front pages of the journal near the table of contents, which often have statements about copyright
- visit the journal publishers' Website
- look at the back of the title page of the book
- ask the librarian for assistance

Lack of a copyright statement does not mean it is not copyrighted. Works published after 1978 are not required to publish a statement of copyright or include the copyright symbol.

#### **Suggested Practices**

- Review your contract or agreement with the publisher to see what copyrights you hold.
- Create a link from your Web page to the publisher's version of the article.
- Use the five points above to find the true copyright holder.
- Write the copyright holder for permission.
- Decide whether your use fits under fair use (see Appendix A, Classroom Guidelines) or if you should pay a permission fee.
- Use US government materials that have no copyright restrictions (materials in the public domain).

[Creative Commons](#) is an alternative to traditional copyright, designed to facilitate the sharing of materials, especially those on the Internet. The Creative Commons contracts allow the author to retain copyright while giving permission to others to use the materials for nonprofit purposes. If authors place materials on the Internet, they may want to select one of the Creative Commons contracts. By placing a Creative Commons symbol on a Web page, authors alert others that they permit use of their materials.

When using materials, you may also want to check to see if the Creative Commons symbol appears on the Web page or document. This may permit you to freely use the work for educational but not commercial purposes. Read the terms of the license to see what restrictions, if any, the author has placed on the work. Usually you must, at a minimum, provide attribution to the author.

#### **Suggested Practices**

- Learn more about [Creative Commons](#).
- Use a Creative Commons license for content on the Web.
- Encourage other faculty to support Creative Commons.

### **2.b. What materials typically are protected by copyright?**

**2.b.i. What is copyrighted?** Ideas are not copyrighted, but the copyright law protects the expression of those ideas captured in writing, video, audio, or other formats. The old rule of copyrighted materials containing a copyright symbol is gone. Since January 1, 1978, anything set into a physical format is protected under the copyright law.

Physical formats include slides, handouts, illustrations, video and audio recordings, Web pages, computer memory, electronic presentations, photos, artwork, books, journals, and personal notes.

#### **Suggested Practices**

- Anything published before 1923 is in the public domain and can be used without permission.
- For works published after 1923, use this chart, [“When U.S. Works Pass into the Public Domain”](#), prepared by Lolly Gasaway of the University of North Carolina, to determine if the material is protected.

**2.b.ii. Are materials on the Web or Internet publicly available for free use?** Like other materials, Web pages and their content are protected under the copyright law. Many people who have Web content expect others will use it but not for commercial purposes.

#### **Suggested Practices**

- Check the Website for statements about restrictions on use.
- Give attribution—state the source of information (Website name and URL).
- Check to see if state has a Creative Commons license ([www.creativecommons.org](http://www.creativecommons.org)).
- Link to the site instead of copying the content or placing the content on your Website.

### **2.c. What materials are typically not protected by copyright?**

**2.c.i. What does it mean when something is in the public domain? May I freely use it?** The copyright law does not protect material in the public domain. The kind of materials found in the public domain includes US government documents and works whose copyright terms have expired.

US government documents are not covered by the copyright law. Therefore, government documents are usually in the public domain, unless they specifically state restrictions on their use. Documents created by state governments and the governments of other countries, however, may be copyrighted.

While information in the public domain is freely available, user fees may be charged to recover the costs of reproducing information and making it available.

When copyrights expire, the works pass into the public domain and are freely available for use. However, for works published after 1923, but created before 1978, convoluted rules concerning copyright term apply.

- As noted above, assume that everything published before 1923 is in the public domain.
- If published in 1923 or later, check the chart by Gasaway, [“When U.S. Works Pass into the Public Domain”](#).
- Use US government materials that have no copyright restrictions (in the public domain).

### **3. The General Fair Use Provision**

Educational uses that do not fall within the specific exceptions of [subsections 110\(1\) and \(2\)](#) are controlled by the fair use doctrine. [Section 107](#) permits the fair use of a copyrighted work “for purposes such as criticism, comments, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”

Section 107 contains four factors to consider whether fair use applies in a particular case:

1. the purpose and character of the use, including whether it is for commercial or nonprofit educational purposes
2. the nature of the copyrighted work
3. the amount and substantiality of the copied portion in relation to the work as a whole
4. the effect of the use on the potential market for or value of the work. The four factors do not always provide a clear-cut definitive yes or no answer to the question of whether fair use applies in specific situations

To assist instructors in applying the fair use criteria in education, the “Agreement on Guidelines for Classroom Copying in Not-for-profit Institutions with Respect to Books and Periodicals” (Appendix A) (hereafter called, The Classroom Guidelines) was created in 1976 by associations representing publishers, authors, and educators. The Classroom Guidelines were published on page 7 of [Circular 21, Reproduction of Copyrighted Works by Educators and Librarians](#), and accompanied the [Copyright Revision Act of 1976](#), P.L. 94-553. As discussed below in greater detail, the Classroom Guidelines are not law, and they represent the minimum, not the maximum, of what might be allowable under fair use. In a specific situation, a court might be more generous than the Classroom Guidelines. Each institution must make its own risk assessment. If an institution complies with the Classroom Guidelines, it will be relatively safe from copyright infringement claims relating to uses covered by the Guidelines.

### **4. Educational Uses**

#### **4.a. Fair Use Criteria**

The first two criteria are:

- The purpose of the use: nonprofit educational use is the easiest to be covered under fair use; most universities and nonprofit educational institutions can easily claim fair use for this reason. However, educational uses by a for-profit hospital may also be fair—the analysis just might be more complex.
- The type of material: factual or scientific materials tend to fit under fair use better than more expressive works such as fiction, poetry, plays, etc. The materials used in the health sciences environment tend to meet this criterion well.

After these two criteria, the factors become less clear:

- Substantiality: How much of a work is being used? An entire journal issue, a large portion of the book, or just a single chart from an article?
- Market impact: Can copies be easily purchased? Is this a consumable item such as a study guide? Is the material being repeatedly used or used just once? Does the use harm the intended market for the material?

The concept of fair use is complex. “It all depends” is the most frequent comment you hear from copyright attorneys when asked whether something does or does not constitute fair use. A for-profit could claim fair use in some instances, and a nonprofit entity should pay royalties at some times. It all depends...

**4.a.i. What are the general steps to determine if your use of materials is fair use?** If you answer yes to the following questions, you may be covered under fair use; but if you answer no to one of them, you will need to carefully weigh the fair use criteria:

- Are you using the material for nonprofit educational purposes?
- Are you teaching or presenting for a nonprofit group?
- Is this the first time you have used the materials?
- Are you using selected images and portions of the text and not substantial amounts of one article?
- Is the material you seek to copy not a commercial “consumable” item designed specifically for the course, such as a workbook, exam questions, or a study guide?

If you answered no, then you may need to consider seeking permission or paying the royalty fee for using the copyrighted materials.

If your use is covered under fair use, then you do not need to seek permission or pay a royalty fee for using the material the first time. However, under the Classroom Guidelines repeated use for the same class or program may not be covered and you may need to seek permission to use the materials and pay a royalty fee. For additional information on seeking permission, see Part V: Permissions.

**4.a.ii. Is there a formula for determining the amount covered by fair use?** Is 10% or 25% of a work too much or too little? The Classroom Guidelines have precise formulas for prose, but no similar guidelines for fact works like databases exist. As a general rule, the less you use, the better.

**4.a.iii. Can I use the same material repeatedly?** Under the Classroom Guidelines, repeated use of a copyrighted work probably exceeds fair use. Restating the information in your own words or creating your own table of data is not a violation of copyright, but you should cite the source of the information to avoid charges of plagiarism.

If you use an online article that is part of your library's electronic subscriptions, you can repeatedly link to it without seeking permission or paying fees. Your license may also permit reproduction of the article.

If you give out a photocopy of an online article or book chapter, you fall under the same constraints as a paper copy under the fair use guidelines.

**4.a.iv. What may I use for educational programs?** In many cases, your work as a teacher or presenter while at an educational or nonprofit institution is covered under fair use. Nonprofit educational activities include teaching residents, students, and fellow clinicians.

The same is true for continuing educational activities sponsored by the educational institution for its staff and physicians. Follow suggested practices for using materials under fair use. If the continuing medical education (CME) or continuing education (CE) program looks like a commercial event or large revenue generator, you may need to seek permission and pay a royalty fee.

#### **4.b. The Classroom Guidelines**

It is important to remember that the Classroom Guidelines were developed to provide further clarification to the law but are not considered to be the law or regulation. They are simply guidelines to help librarians and faculty decide how to apply fair use in teaching. The Classroom Guidelines:

- were designed for not-for-profit educational institutions for books and journals; they do not apply to for-profit educational institutions or non educational settings
- represent the minimum, not the maximum, standards of educational fair use and are not intended to limit the types of copying permitted under the standards of fair use under section 107 of the copyright revision bill; in some instances copying may fall outside of the guidelines that are permitted under the criteria of fair use
- intend to provide a safe harbor for instructors wishing to make a single copy of works for their own scholarly research or classroom instruction; they also outline three factors to consider when making and distributing multiple copies of works without seeking copyright permission or paying royalties, including brevity, spontaneity and cumulative effect

**4.b.i. When may an instructor make a single copy?** The Classroom Guidelines allow librarians and teachers to make a single copy of a chapter from a book; an article from a journal or newspaper; a short essay, story, or poem; or a chart, graph, diagram, drawing, or picture from a book or periodical. The single copy is to be used by the instructor for research, use in teaching, or preparation to teach a class.

**4.b.ii. When is it permissible to make multiple copies for classroom use?** The Classroom Guidelines also permit making multiple copies for classroom use or discussion, if the use meets certain tests:

- The copy is brief and spontaneous and has limited cumulative effect, as discussed below.
- A copyright notice appears on the copy so that students realize the work is protected under the copyright law.
- The copying should not replace a textbook, anthology, collective works, or the purchase of books, reprints, or journals.
- Consumable works—such as workbooks, exercises, and study guides—may not be reproduced.
- Copying of the same item by the same teacher should not be repeated from term to term.
- If students are asked to pay for the copies, the fee cannot be higher than the actual cost of copying the material.

**4.b.iii. What does brevity in the classroom guidelines mean?** The Classroom Guidelines have precise definitions for brevity for poetry, prose, and illustrations but not for fact works like databases. For example:

- Poetry: A complete poem is considered brief if it is fewer than 250 words and if it is printed on not more than 2 pages. An excerpt of not more than 250 words is recommended for a longer poem.
- Prose: A complete article, story, or essay is considered brief if it is fewer than 2,500 words. For longer works of prose, the guidelines recommend that an excerpt not exceed 1,000 words or 10% of the work, whichever is less.
- Illustrations: One chart, graph, diagram, drawing, cartoon, or picture per book or journal issue is considered brief.
- Special Works: Certain special works combine language and illustrations and fall short of 2,500. Such special works may not be reproduced in their entirety. However, an excerpt comprising not more than 2 of the published pages of such special work and containing not more than 10% of the words found in the text may be copied.

**4.b.iv. What is spontaneity?** The Classroom Guidelines define spontaneity as when the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

**4.b.v. What is cumulative effect?** The Classroom Guidelines define cumulative effect as:

- the copying of the material is for a specific course during one class term
- not more than one short poem, article, story, or essay or two excerpts may be copied from the same author and not more than three from the same collective work or periodical volume during one class term
- no more than nine instances of multiple copying for one course during one class term

Newspaper articles and news sections of journals are exempted from the last two requirements.

**4.b.vi. What is the easiest or suggested way to use materials for teaching?** Assigning online materials available through your library is the easiest and safest path through copyright issues. The library licenses for electronic journals usually include the right to repeatedly access these materials online and make personal copies. Also, you can repeatedly use the online articles from semester to semester.

However, e-journal licenses often prevent you from making copies of the portable document format (PDF) or other digital files that contain the articles, sending those files to students or colleagues, or placing them on Blackboard, an Internet site, or database.

But once you find the need to print a copy and make multiple copies for students, you should review the Classroom Guidelines.

**4.b.vii. Do the Classroom Guidelines apply to continuing education, in-service training, and patient education?** The Classroom Guidelines apply to not-for-profit educational institutions and do not apply to other types of institutions, even though they may be not-for-profit and may be offering other types of educational uses. However, if you are involved in not-for-profit educational activities, you may apply the four factors of fair use (i.e., the fair use criteria) to see if your educational use of materials fits under those tests. See also the section on Continuing Education, In-Service Training, and Patient Education.

**4.b.viii. Should an institution adhere to the Classroom Guidelines?** The Classroom Guidelines are controversial among many libraries and educational institutions because they are perceived as too constrained. While they are intended to set minimum standards for fair use, in practice in some institutions they have evolved into maximum standards. In particular, the Classroom Guidelines have caused some librarians and educators to believe that fair use permits only the initial use of a work, and any subsequent use requires permission. While seeking permission after the first use will certainly avoid litigation with publishers, it may result in a library making unnecessary payments. Every institution must make its own risk assessment when it establishes its policies.

While the Classroom Guidelines allow instructors to spontaneously select an article and chapter of a book, at times instructors want to make copies of all the assigned readings in advance and hand them out or have students pay for them as a packet of readings. These copies are referred to as course-packs. Instead of making copies of selected articles or book chapters throughout the course, the instructor collects all of the readings and has them photocopied as a course-pack. Course-packs do not meet the Classroom Guidelines' test for spontaneity because they are compiled at the beginning of the course and often do not meet the tests of brevity or cumulative effect because a large amount of material is involved and systematically copied. Whether in paper or digital format, instructors may carefully consider the issues involved in creating a course-pack.

#### **Suggested Practices**

- To use several book chapters, place the book on reserve in the library.
- Select material from a journal supplement and do not use the entire publication.
- Choose articles available from your institution's electronic journal subscriptions.

- Set up links from password protected Web pages or learning system sites to your institutional subscriptions.
- Send the links to articles from the electronic subscriptions to students via email.
- Ask the instructor to restate the information in their own words.
- Use selected materials occasionally, not every semester or over several years.
- Make copies of required readings only but share a list of optional readings.
- Instead of making copies, create a Web page with links to the electronic versions, if they are available.
- Ask the instructor to decide to make copies for classroom use.
- Seek permission or pay royalty fees for using the entire work, large portions of it, or repeated use.
- Pay permission fees for creating a course-pack of readings that can be used by your students from term to term and may be distributed electronically.
- Check the publisher's agreement for your own work to determine how you can use your own material.
- When in doubt, seek permission.

#### **4.c. Continuing Education, In-service Training, and Patient Education**

**4.c.i. How does fair use apply to situations where I am providing continuing education, in-service training, and patient education, particularly in a hospital or academic health sciences setting?** If you are involved in nonprofit educational activities, you may apply the fair use criteria to see if your educational use of materials fits under those tests.

In terms of the purpose of the use, most nonprofit institutions (e.g., hospitals, health care agencies, etc.) fit under the first criteria for fair use. Given the specific circumstances, for-profit institutions may also be able to use materials under fair use. For example, training a for-profit hospital's personnel to respond to a public health emergency might tip the first factor in favor of the use. In any event, as noted above, for-profit institutions will need to carefully weigh the other factors. On the other hand, if your nonprofit institution holds a large educational event to generate profit, you may have crossed the threshold of what is permitted under fair use.

The type of material is the next fair use test. Most health care materials fall in the category of scientific or factual information as opposed to literary or expressive works that have greater restrictions on fair use. If you decide to use poetry or a section from a novel, your use will be subject to that stricter interpretation of fair use. A scientific article may be easier to defend as being covered under fair use.

Substantiality and market impact are the two factors likely to affect whether the use of works will fall under fair use.

- How much of the work are you using? Several articles from the same journal or several chapters from the same book might not be fair use. Are you using many pictures or tables from the same article or book? If yes, this may also exceed fair use.
- How many copies are you using? Making a reasonable number of copies for one class and only one class could fall under fair use, but making copies for every nurse in the hospital or multiple classes is not likely to be fair use.

- How often do you plan on using the article? Repeated use might not be fair use, even if it is for the same presentation that you are giving over and over again.
- Is it possible to purchase reprints or a textbook? Have you replaced a textbook with photocopies of articles?

You must balance all of these factors to determine whether something is fair use for CE, in-service training, or patient education. Unfortunately, clear-cut measures do not exist to indicate when you have crossed the line and are no longer able to use the fair use privilege. No one answer is right, because every situation may be different.

4.c.ii. What are some examples of fair use for continuing education, in-service training, and patient education? The following examples provide more guidance on this issue:

- If you take an entire journal article and give it to a nursing in-service class of twenty students, it probably would be fine. However, if you teach the class twenty times to any number of nurses and use the same article, this would probably not be fair use.
- The same applies for patient education. The use of one article for one reasonably sized patient class probably is fair use. However, giving every patient the same article over several weeks, months, or a year would likely exceed fair use.
- The same scenario applies for continuing education. One class probably is fair use, but repeatedly using the same article might not be fair use. You might be able to justify a one-time use for a large conference, but not for a second use or repeated use of the same article.
- Creating a handout using most of the tables and illustrations from one book or journal is probably not fair use.
- Including a cartoon in an electronic presentation probably is a fair use, even if the presentation is given many times. However, if the participants of each session are given copies of the presentation, including the cartoon, then the fair use exception probably will have been exceeded.

### **Suggested Practices**

- Check to see if the materials are available in your institutional library and send people to the library to use them.
- Determine if your institution's library has online access to the materials and send out the link or post the link to the item on an intranet or private Web page for internal CE and in-service training programs.
- Always check with your institutional library before providing external participants, including patients, with links to electronic resources, because license and contract terms may prohibit sharing resources outside of the institution.
- You usually will need to seek permission or pay royalty fees if you plan to place copyrighted materials on a public Website.
- For patient handouts, check to see if your institution subscribes to a service that allows copying for patients.
- Use an article, chapter, or other works only once per training session or class, but make sure that the size of the class is within reason.
- Seek permission from the copyright owner (author or publisher) to see if they will allow free use, especially for in-service programs or patient education.

- Create your own handouts; restate the content and facts in articles and chapters in your own words and give credit (attribution) to the original authors of the materials.
- Use only one or two figures, illustrations, or images from the same work in presentations and handouts.

**4.c.iii. Does fair use apply to continuing education programs not sponsored by my institution? It all depends... Ask yourself the following questions:**

- Is the program sponsored by a commercial or nonprofit entity?
- Are you being hired to provide training by a commercial group?
- Is a large part of your income coming from speaking engagements?
- Does the commercial entity have a blanket license that covers copyright?

When in doubt, seek permission to use materials.

**4.d. Electronic Materials and Technologies**

**4.d.i. How may I use the portable document format (PDF) and hypertext markup language (HTML) files from electronic journals?** The user of a journal distributed in hard copy typically needs to comply only with the copyright laws, but the user of a journal made available electronically needs to comply both with the copyright law and with license terms imposed by the journal publisher. While many publishers allow the downloading of article files for personal use, most prohibit creating databases of these files, placing them on public or internal Web pages, and forwarding them to email distribution lists or numerous colleagues. Policies vary from journal to journal and from publisher to publisher, so do not assume that all policies are the same.

Most publishers do not allow:

- distributing a copy of the journal article file to students in class
- mounting the PDF or HTML file on a public or private Website
- creating databases of journal articles for more than one person to use
- distributing the files through Internet discussion groups
- creating a CD-ROM or DVD of digital files for distribution to students or colleagues

Library and institutional subscriptions to e-journals have already paid for the right for faculty, staff, and students to have access to the articles and make personal copies for them. Most e-journal licenses allow:

- individual copies for personal use by anyone in the institution
- links to the journal articles for electronic reserves and class Web pages
- repeated use of the articles from class to class and semester to semester

**Suggested Practices**

- Visit the publisher's site to determine their restrictions.
- Make a copy for personal use only.

- Place a link to the article at the publisher’s site on your learning system course or Web page.
- Send the link to the article to students and colleagues via email, but not the actual file.
- Include only the link in a database that you keep for personal use.
- Seek permission to create a CD-ROM course-pack from the Copyright Clearance Center.
- Never download or distribute e-journal files unless you have determined the publisher will allow it.
- Check your license agreement for restrictions on electronic journals.

**4.d.ii. May I scan a paper copy and distribute it?** If you can make a photocopy for personal use, you may also scan a copy of an article or book chapter for personal use. Copyright restrictions, and fair use, apply in the digital world in the same manner as they apply in the analog world. Thus, under fair use, you might be able to scan an article for a class and post it on a password-protected Website for your class one time. As a practical matter, this would be equivalent to handing out a hard copy of the article to every class member. However, you should not post the article to a publicly accessible Website, because this could lead to much wider distribution. Also you should not use the scanned item repeatedly if you would not use a hard copy repeatedly.

#### **Suggested Practices**

- Scan one copy for your personal use.
- Post the file for students on a password-protected Website for first-time use.
- Ask the library about its reserve (electronic or paper) services.
- Consider seeking permission if you want to use the article repeatedly on the class Website.

**4.d.iii. May I create a database of articles to share with students and colleagues?** You may create a collection or database of articles for your own personal use, but you should not make copies of this collection available to students and colleagues. However, you may create a database of links to electronic journals and books and share those links with colleagues and students.

#### **Suggested Practices**

- Keep databases or collections of articles only for personal use.
- Seek permission to make your database or collection available to others.
- Create a list of links to electronic journal articles or books for use by others.

**4.d.iv. Are the restrictions on sharing files the same if the journal is an open access journal?** Open access journals—those that provide free access immediately or after a certain period of time—are still copyrighted materials that are either owned by the publisher or the author. Treat them the same as other materials. The advantage of these journals is that they are free to everyone, so placing a link to the Website gives everyone access.

#### **Suggested Practices**

- Visit the publisher’s Website to determine policies and restrictions on downloading or distributing files of journal articles.
- Instead of making copies in paper or digital format, give students and colleagues the uniform resource locator (URL) link.
- Put links to articles on your course site for others to use.

#### **4.e. Course-packs**

##### **4.e.i. May I create a packet of photocopied articles for students? Is this a course-pack?**

Course-packs occur when an instructor selects numerous articles for the students to read and provides them with copies of those articles at the beginning of the class. The students are given a “pack” of the readings assigned for the course. Because instructors often use course-packs instead of textbooks or anthologies and the selection of the articles is not spontaneous, they fall outside the Classroom Guidelines. Publishers generally do not consider course-packs to be a fair use because they harm the market for published materials. After several major court cases involving commercial copy services that prepared course-packs, most nonprofit educational institutions require permissions and the payment of royalty fees.

First use of copyrighted material may still be permitted under fair use for educational purposes, and permissions or royalty fees may not be required. However, keeping track of this can be difficult, and many institutions require that royalty fees be paid for all articles.

A course-pack is a course-pack whether in paper (photocopies) or digital format. Saving many e-journal articles in a file on a diskette and distributing it to every student is not considered fair use.

##### **Suggested Practices**

- Be judicious about what materials to include in a course-pack; do not include unnecessary materials that may trigger permission requests and payment of fees.
- When possible, provide links to materials on the Internet or licensed library resources rather than incorporate copies in a course-pack.
- Determine your institution’s policy governing the creation of course-packs.
- Contact your library or copy shop to learn about permission services for electronic and paper course-packs.  
Use a copyright management service for paying permission fees. Also, see Part V: Permissions.

#### **4.f. Distributing and Reproducing Your Own Materials**

**4.f.i. May I post my own article to the Web?** If you are sure that you own the copyright, then you are free to put the article on a Website—public or private.

But many authors do not own the copyright because they assigned it to their publisher and need to check their agreements with the publishers. While many publishers allow authors to “self-post” articles on an institutional or personal Website, they may have restrictions. Some require that you post only your original manuscript or your version of the edited manuscript. Most do not

allow posting of the publisher's version of the final article. Many also require links back to the publisher's version.

#### **Suggested Practices**

- Check your agreement with the publisher and abide by those terms.
- If permitted, post and share your work. Put your work on your Website, your course site, or on an institutional Web site, such as one often maintained by libraries.
- Make sure that future agreements with publishers allow you to post your articles.

**4.f.ii. May I make as many copies as I want of my own article?** When authors sign an agreement with a publisher to have their article published, many turn over all their copyright rights, including the right to distribute (photocopy) their articles.

However, some publishers, especially societies, allow the authors to make copies for educational purposes and to share these with other colleagues. Your agreement with the publisher will state whether there are any restrictions about this.

#### **Suggested Practices**

- Check your agreement with the publisher and abide by those terms.
- Make sure that future agreements with publishers allow you to make and distribute copies of your work.

### **4.g. Images and Illustrations**

**4.g.i. Where can I find good images or illustrations for presentations or handouts?** Still images in books, journals, and multimedia programs as well as images on the Internet, are copyrighted. Search engines allow you to find many kinds of images, but you must remember that most of these are copyrighted. Apply the same fair use guidelines that apply to other print materials and make sure that you cite where you obtained the information. Because a single image can be a copyrighted work, the third fair use factor, the amount of the portion used in relation to the work as a whole, will often weigh against fair use.

In addition, there are special guidelines and considerations for using moving images, such as those found in videos and motion pictures. Anyone choosing to use these formats should refer to those specific guidelines. Baruch College of the City University of New York has a free interactive guide to help faculty to determine the appropriate copyright guidelines they must follow to use different types of copyright protected media in their courses. While designed for Baruch faculty, the [Copyright Metro](#) walks users through the basic decisions when considering the use of media and whether it can be taken for classroom use or need to use alternate routes to using media.

To assist users with images, libraries often subscribe to image sets that can be used by students and faculty in their institution. However, these images may still come with restrictions, such as extra fees for use in publications or including them in multimedia programs. Be sure to check with the library about how you can use them.

Recently, faculty members in the health sciences have been sharing teaching materials, especially clinical images. Two groups have begun creating databases of materials that can be used for educational purposes. These projects are called [HEAL](#) and [MedEdPortal](#).

#### **Suggested Practices**

- Determine if the use is educational fair use.
- Check to see what image databases may be available through your library.
- Seek permission to use images found on the Internet.
- Link to Internet images instead of downloading them.
- Use only one or two images from a single source.
- Seek permission for extensive or repeated use.
- Explore databases designed for faculty to share images and multimedia.
- Seek permission or pay the fees to use images from large commercial image sets, such as the Netter series.

**4.g.ii. May I use images in the online teaching modules that I develop?** Fair use does allow you to use images in digital format for internal online courses and posting on a learning system. The same issues apply: how many images are being used from one source, how many students will be able to access the images, and how often the same images are used.

Most publishers will not permit the use of images or other materials for courses that can be accessed by the general public. Access to materials needs to be restricted to students registered for the course or curriculum. The same is true for CME or CE credit courses offered to groups outside of the institution.

#### **Suggested Practices**

- Restrict access to online modules and materials to students registered for the course or curriculum. This usually requires access by an individual ID and password.
- Use only a few images or materials from one source.
- Consider seeking permission for repeated use over more than one semester or year.
- Link to images and other materials on the Internet and do not download them.
- Link to journal articles.
- Check to see what licensed images are available through you library.
- Pay the royalty fees if you plan to make this publicly or commercially available.

**4.g.iii. Do I have to obtain permission to link to something on the Internet?** Materials on the Internet are freely accessible. Linking to another Website that is authorized to display content is not a violation of copyright. Nothing prevents you from creating links, even links to items deep within the Website, often referred to as “deep linking.” However, one danger of deep linking is that content on the Web often changes location and the link that worked yesterday may not work tomorrow. Also, some sites prefer that users enter through the home page where they are forced to see advertisements.

If you plan to have a permanent link or repeatedly use the Internet content, you may want to contact the author or Web manager and let them know you plan to put in links and why.

Why do this? Creators of online content often want to know how their content is being used and by whom. It helps them assess the value of the content. They may provide you with additional information about the site or what changes may be made in the future. They may ask you to help them evaluate their content or provide general feedback. They may also warn you if they are planning to make major changes to the site or restrict its use. Finally, they may take the position that deep links is an unauthorized form of access that violates the Website's terms of service and other legal principles.

It does not take a lot of time to ask for permission or to contact people, and it might result in a new collaborative relationship. Additional information about copyright permissions and copyright management guidelines can be found in Part V: Permissions.

#### **4.h. Technology, Education and Copyright Harmonization Act (TEACH Act)**

**4.h.i. What is the TEACH Act and where can I learn more about it?** Distance education over the Internet often involves the transmission of copyrighted materials such as images or text. This transmission implicates copyright's performance and display rights. Additionally, before an institution can transmit a copyrighted work, it must store the work in its computers. The 1976 Copyright Act contained an exception for distance education, subsection 110(2), but that provision was oriented toward television broadcast transmission, rather than digital network transmission. In 2002, Congress enacted the TEACH Act to update subsection 110(2) for the digital age.

A number of criteria need to be met, and many complex issues and definitions must be considered. Individuals relying on the [TEACH Act](#) should read the law or visit other Websites that provide faculty information and checklists to see if your institution is eligible to use the exemptions provided under the TEACH Act. MLA recommends a site maintained by [North Carolina State University](#).

**4.h.ii. What TEACH Act requirements must be considered by the institution?** The TEACH Act applies only to accredited not-for-profit educational institutions. The educational institution must:

- establish a policy that governs the use of copyrighted materials
- distribute accurate information to faculty and students on copyright
- promote compliance with the copyright law
- provide the students with the notice that materials may be covered under copyright

If an institution meets all of these criteria, then faculty can use the TEACH Act for distance education courses.

**4.h.iii. What types of materials can be transmitted under the TEACH Act?** Once it is determined that an institution meets the criteria for using materials under the TEACH Act, faculty members need to determine if the types of materials they wish to transmit are covered by the TEACH Act. The following materials are permitted:

- non dramatic literary or musical works, including poetry, short story readings, and all music other than opera

- still images, as long as they are transmitted in amounts of time similar to that used during a face-to-face classroom setting
- reasonable portions of other works; reasonable portions are defined as those amounts that would be used in a normal classroom setting

**4.h.iv. What types of materials cannot be used under the TEACH Act?** The following materials are not permitted under the TEACH Act:

- digital educational materials that are designed and sold for use in a classroom setting through mediated instruction; for example, works such as textbooks and course-packs that are primarily produced or marketed for in-class use in the digital distance education market are not covered under TEACH
- digital delivery of supplemental materials, such as electronic-reserve readings, are not covered under the TEACH Act
- copies not acquired lawfully (e.g., by purchasing an item such as a copy of a videotape owned by another institution)

**4.h.v. Are there other criteria for faculty and institutions to consider before planning distance education courses under the TEACH Act?** Even if the use of materials is permitted, the following additional criteria must be met:

- The use of materials must be under the direct supervision of the teacher.
- The material must be part of the class session and be part of a mediated instructional activity, it may not be something to be viewed before or after the class session.
- The material must be directly related to and be of importance to the teaching of the course content.
- Transmission of the materials must be directly sent to and limited to the students in the class.
- Technological measures, such as software, must be taken to limit access to copyrighted works to students enrolled in the course and to ensure that the material is not accessible once the class ends; as a practical matter, this means that technological measures must be employed to prevent students from printing out hard copies of the materials.
- Copies of materials may be stored on the institution's server for the duration of its use in one or more courses, even though the length of time that students may access materials is limited to the particular class session in which they are enrolled.
- Instructors should make use of password protection or authentication technology provided by the institution.
- The copyright holder's technological measures for preventing retention and redistribution are not tampered with.
- Unless using non dramatic literary or musical works (which can be used in their entirety), digital performances and displays must be presented in reasonable or limited amounts of time or amounts of time similar to that which would be used during a face-to-face classroom.

**4.h.vi. Does the TEACH Act allow for the digitization of print and other works?** Analog versions (i.e., paper, film, and video) may be converted to digital formats if:

- a digital version is not available for purchase or lease

- the available digital version has technological measures that protect it from being used under the provisions of the TEACH Act

Works may be digitized in the amounts outlined in [subsection 110\(2\) of the copyright law](#). The TEACH Act is complex, but it does allow the use of materials for distance education not covered under the original copyright law. However, faculty who wish to use the provisions under the act must ensure that their institutional policies are in place and that all other criteria are met.

Because the TEACH ACT is so cumbersome and the uses it permits are so limited, many institutions prefer to rely on fair use rather than the TEACH Act.

### **Suggested Practices**

- Before using the provisions of the TEACH Act, faculty should ensure that their institutional policies are in place and that the criteria outlined above are met.
- Consider relying on fair use rather than the TEACH Act when providing distance education.

## **C. Interlibrary Loan**

### **1. Definition**

The copyright law does not provide definitions for the following terms: interlibrary loan, library, library system, or consortium. The [National Interlibrary Loan Code of 1980](#), adopted by the American Library Association, defines an interlibrary loan as “a transaction in which library material, or a copy of the material is made available by one library to another upon request.” Where interpretations of the law appear difficult in the absence of definitions, librarians are urged to act based on their understanding of the spirit and intent of the law and the purpose of the practice in question.

When one library actually loans its copy of a work to another library, the lending library is making a distribution of the copy. This distribution is permitted by copyright’s first sale doctrine, 17 United States Code 109(a), which provides that the owner of a particular copy is entitled to sell or otherwise dispose of the possession of that copy.

Interlibrary loans also refer to situations where a library makes a copy of a work in its collection for the use of another library’s patron. [Subsections 108\(d\), \(e\), and \(g\)](#) control the making and distribution of these copies for libraries that meet the criteria of section [108\(a\)](#).

Subsection 108(d) permits the supplying library to make, at the request of another library, a copy of one article or other contribution to a copyrighted collection or a copy of a small part of any other copyrighted work and for the requesting library to provide the copy to its user, if:

- the copy becomes the property of the user of the requesting library
- neither library has notice that the copy is for any purpose other than private study, scholarship, or research
- the requesting library displays a [copyright warning notice](#) where requests for copies are placed and on all order forms.

Subsection 108(e) expands the exception in 108(d) to permit the supplying library to copy an entire work, or a substantial part of the work, if the library determines on the basis of reasonable effort that a copy cannot be found at a fair price.

Subsection 108(g)(2) provides that a library may engage in the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions but may not engage in the systematic reproduction or distribution of single or multiple copies. However, the statute adds a proviso that nothing in this clause prevents interlibrary arrangements that do not have the purpose or effect of a library receiving copies in such aggregate quantities as to substitute for a subscription or purchase of a work.

The [Conference Report for the 1976 Copyright Act](#) (94-1733, 94th Congress, 2nd Session, September 29, 1976), as adopted, provides guidelines for interpreting this proviso. These Guidelines for the Proviso of Subsection 108(g)(2) are commonly referred to as the Commission on New Technological Uses (CONTU) Guidelines” (Appendix B). The CONTU Guidelines recommend that a library, during one calendar year, not request more than five articles from the same journal published within the past five years. Similarly, for other material under subsection 108(d), the requesting library should not request more than five copies from the same work during any one calendar year. The CONTU Guidelines also impose recordkeeping requirements on the receiving library, discussed below. Although the CONTU Guidelines appear in the Conference Report for the 1976 Act, they do not have the force of law. Thus, a library may choose to adopt a more liberal interpretation of this proviso. Additionally, fair use may permit copying for interlibrary loans in excess of that allowed under section 108.

On some occasions, libraries are borrowers and, on others, they are lenders. Their obligations under the law will differ, depending on the role they play. Therefore, the relevant sections of the law area dealt with under each role.

## **2. Requesting Library**

### **2.a. Pertinent Sections of the Law**

[Subsections 108\(d\), \(e\), and \(g\)\(2\)](#) are relevant to interlibrary loan, specific to the interests of the requesting library. Detailed information on this section of the law also is located in Appendix C: Pertinent Sections of the Law, Section 108.

#### **Suggested Practices**

- Consider using an automated interlibrary loan software system such as [OCLC’s ILLiad](#) or [clio](#) to help manage interlibrary loan functions including borrowing, lending, and document delivery and enabling library users to submit and track their own requests via the Web.
- Use the [American Library Association Interlibrary Loan Request Form](#) for requesting interlibrary loans by mail.
- When requesting copies, two abbreviations are to be used by the requesting library:
  - Confirms to Copyright Guidelines (CCG) is checked when the quantitative recommendations in the CONTU Guidelines for subsection 108(g)(2) (Appendix B) are followed.

- Conforms to Copyright Law (CCL) is checked when the borrowing library applied to its request section 107 or subsections of 108, other than 108(d) as qualified by 108(g)(2). In the case of an electronic transmission, the name of the person authorizing the request must appear along with proper abbreviation indicating adherence to the law or the guidelines.

The use of these abbreviations will be accepted by lending libraries as certification that the request is in compliance with the provisions of the law or guidelines.

- Maintain records of interlibrary loan requests by following the “CONTU Guidelines, which require that the requesting library retain records of requests for copies for three full years following the end of the calendar year in which the requests were made. The requirement can be met easily if the library files the completed [American Library Association Interlibrary Loan Request Forms](#). Libraries also may choose to maintain electronic records of interlibrary loan requests using current software technologies.
- Copyright Warning. The requesting library must also prominently display at the place where orders are accepted and include on its order forms a warning of copyright as prescribed by the Register of Copyrights. The language of the warning of copyright for both the display and order forms shall read:

#### **NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS**

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

The display warning must be printed on heavy paper or other durable material in type at least eighteen points in size and displayed prominently in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer in the immediate vicinity of the place where photocopy orders are placed.

If the library uses photocopy request order forms, each form must carry the order form warning printed in a box located on the order form itself, either on the front side of the form or adjacent to the space calling for the name or signature of the person using the form. The notice must be printed in type size no smaller than eight points. The notice must be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.

### **3. Supplying library**

#### **3.a. Pertinent Sections of the Law**

[Subsections 108\(a\)\(3\), \(d\), \(e\), \(f\)\(4\), and \(g\)](#) are relevant to interlibrary loan, specific to the interests of the supplying library. Detailed information on this section of the law is located in Appendix C: Pertinent Sections of the Law, Section 108.

A library normally assumes no legal obligations for copyright infringement liabilities when it supplies a photocopy in response to a requesting library's certified interlibrary loan request, as long as it complies with subsection 108(g). A supplier need not enter into a contractual agreement with a publisher to make photocopies for interlibrary loan purposes. The supplier's rights to participate in interlibrary loan arrangements are assured under section 108. However, subsection 108(f)(4) says in part that the reproduction rights granted by section 108 do not override contractual obligations incurred when material is obtained. A library should take care not to enter into agreements or contracts that restrict its rights under section 108.

Under subsection 108(a)(3), the photocopy supplied must include a notice of copyright. The [Council of National Library and Information Associations](#), formerly the Council of National Library Associations (CNLA), recommends the following language for the copyright notice:

**NOTICE: THIS MATERIAL MAY BE PROTECTED BY COPYRIGHT LAW (TITLE 17, UNITED STATES CODE)**

Although the law does not prescribe the format, the notice of copyright should be included on all print and digital copies.

### **3.b. Issues to Consider**

**3.b.i. How do license agreements or contracts affect the library's ability to lend materials from its collections to another library?** Despite the rights provided under the copyright law, those rights may be relinquished when signing a license agreement or contract for the use of electronic materials. When a signed contract limits the use of materials for interlibrary loan, then the library is required to abide by the terms of the contract. Librarians negotiating contracts or license agreements should pay attention to the following issues:

- Use of the digital file for filling an interlibrary loan: Most contracts do not allow sending a copy of the original file to another library or user. This means the library must make a print copy, scan it, and then deliver it digitally.
- Ability to fill requests from individuals: This has an impact on local and regional networks established to serve unaffiliated health professionals who use Loansome Doc and have an agreement with your library.
- Ability to fill requests from for-profit libraries: If the contract language limits interlibrary loans to nonprofit institutions, the library cannot lend to a for-profit hospital, pharmaceutical, company, or other for-profit group; this may affect the ability to work with local companies and fulfill institutional agreements or contracts with other organizations.
- Ability to fill requests from foreign libraries: Contracts sometimes limit interlibrary loans to libraries in the same country. This means that foreign requests cannot be filled, even those from Canada or from sister libraries. Librarians should request that these types of clauses be removed from the contract and that they be allowed the rights granted under the copyright law.

- **Special circumstances:** In some instances, such as biomedical emergencies and disasters (e.g., 9/11, Hurricane Katrina), libraries may be called on to assist other libraries that cannot provide ready access to their collection or information resources. Publishers and subscription agents often understand these circumstances and may work with libraries to ensure that information services go uninterrupted in times of crisis. These extenuating circumstances may also provide a valid reason for not following the terms of the license agreement and complying with the interlibrary loan requests.

Librarians are encouraged to work with publishers and subscription agents to negotiate license agreements that support user needs. If a compromise can be achieved, the library must decide how important it is to subscribe to the electronic version with these restrictions.

#### **Suggested Practices**

- Read contracts and licenses carefully to determine how interlibrary loans are handled.
- Ask for contract terms that preserve all interlibrary loan rights under the Copyright Act.
- Ask that clauses regarding loans to individuals or corporate entities be removed.
- Ask that the clause about foreign libraries be removed or ask for exceptions for sister library agreements.
- Ask for permission to use the electronic file for interlibrary loan; if that is not possible be sure to follow the terms of the contract.
- Request that clauses holding your library responsible for the use of materials by patrons or the lending library be removed or modified to state that you will instruct the lending library to destroy the digital files.
- Make staff aware of contract restrictions required by publishers or individual journals.
- Establish procedures or policies that reflect the terms of the contract, such as printing a copy of the electronic article, scanning it, and then delivering a digital file to the lending library.

**3.b.ii. Can libraries distribute digital copies of materials to users and retain library copies of digital files for the library?** Digital technologies that are used to fill interlibrary loans have raised copyright issues for publishers and libraries. Many publishers view the digital image as yet one more copy of the file that potentially could be distributed. Some contracts stipulate that the electronic file cannot be given to an individual. Libraries should not retain copies of digital files or create a database of scanned articles. Both the lending and receiving library should set up a process for routinely deleting scanned copies of articles.

#### **Suggested Practices**

- Delete digital files the library sends and receives on a regular basis.
- Do not give users a copy of the digital interlibrary loan file unless you know this is permitted under the license.

**3.b.iii. Is it necessary for the library to keep a record of interlibrary loan requests received?** The law and guidelines do not require recordkeeping, but supplying libraries often record statistics for routine management purposes.

## **D. Copy Services**

This section addresses unsupervised copy services and supervised copy services.

There is no ‘hard and fast’ line between permitted uses and copyright infringement. Library copy services do not infringe if they adhere to fair use or the provision under [section 108 of the copyright law](#) that permits the library to make single copies of articles or small portions of books upon requests by library users. Due to the continuing development of the information culture, laws representing that culture, and the evolving library profession, library staff members should understand the concept of fair use and be able to make informed decisions before copying a resource upon request.

## **1. Unsupervised Copy Services**

This section applies to the librarian’s responsibility to ensure that the library’s copy equipment (typically but not exclusively photocopiers) displays a notice that making a copy may be subject to the copyright law.

### **1.a. Definition**

An unsupervised copy service is one in which the library provides coin, key, or other self-service operated machines on its premises but does not exercise control over the materials copied. The library staff is only responsible for maintaining the equipment and collecting fees for the number of pages copied, as long as the photocopy machine displays a notice that the making of a copy may be subject to the copyright law.

### **1.b. Pertinent Sections of the Law**

[Subsection 108\(f\)\(1\)](#) protects the library and its employees from liability for copyright infringement that results from the unsupervised use of reproducing equipment located in the library, if the equipment displays a notice that the making of a copy may be subject to the copyright law. This is the extent of the library’s responsibility.

### **1.c. Issues to Consider**

**1.c.i. Under Section 108, what may a library user copy?** Individuals may make copies in accordance with fair use. As a practical matter, for works not in the public domain, this typically means single copies of articles or small portions of books from the library’s collections for their own study or research. However, as noted above, a library does not have to police its patrons’ use of the copy machine.

## **2. Supervised Copy Services**

### **2.a. Definition**

A supervised copy service is one in which library employees produce copies of library materials on library equipment at the request of individual users. Under certain conditions described below, librarians are authorized to make a copy. One of these specified conditions is that the copy is not to be “used for any purpose other than private study, scholarship, or research.” If a

library user makes a request for or later uses a copy for purposes in excess of fair use, that user may be liable for copyright infringement.

## **2.b. Pertinent Sections of the Law**

[Subsections 108\(a\), \(d\), \(e\), and 108\(g\) \(1\) and \(2\)](#) are relevant to supervised copy services, as well as [Section 107](#). These provisions are the same as those regarding reproduction for interlibrary loan purposes.

Section 108(a) establishes the threshold requirements for the exception for supervised copy services. (These are the same threshold requirements as for the other exceptions for libraries.) These requirements are:

- (1) The reproduction is made without any purpose of direct or indirect commercial advantage;
- (2) The collections of the library are open to the public or at least to researchers not affiliated with the institution of which the library is a part; and
- (3) The reproduction of the work includes a notice of copyright.

Section 108(d) permits the library, at the request of the user, to make a single copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or of a small part of any other copyrighted work. Copies made under section 108(d) must become the property of the user, and the library should have no notice that it will be used for any purpose other than private study, scholarship, or research.

The library must also prominently display at the place where orders are accepted, and include on its order forms, a warning of copyright as prescribed by the Register of Copyrights.

The language of the warning of copyright for both the display and order forms shall read:

### **NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS**

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

The Display Warning must be printed on heavy paper or other durable material in type at least eighteen points in size, and displayed prominently in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer within the immediate vicinity of the place where photocopy orders are placed.

If the library uses copy request order forms, each form must carry the Order Form Warning printed within a box located on the order form itself, either on the front side of the form or adjacent to the space calling for the name or signature of the person using the form. The notice must be printed in type size no smaller than eight points. The notice must be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.

Section 108(e) allows the library to copy an entire work in its collection at the request of a user after the library determines on the basis of a reasonable investigation that a copy of the work cannot be obtained at a fair price. These efforts may include searching common trade sources. As with Section 108(d), the copy must become the property of the user, and the library should have no notice that the copy will be used for any purpose other than private study, scholarship, or research.

Section 108(g) limits the photocopy exceptions to prevent them from having an adverse cumulative effect on publishers. It provides that the library may engage in the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions. However, under section 108(g)(1), the library may not make a copy if it is aware or has substantial reason to believe that it is engaged in the related or concerted reproduction of multiple copies 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 individuals of a group. Similarly, under section 108 (g)(2), libraries may not engage in the systematic reproduction or distribution of single or multiple copies, but nothing in this clause prevents interlibrary loan arrangements. See Part III. C. regarding interlibrary loans.

## **2.c. Issues to Consider**

**2.c.i. What is the difference between Sections 107 and 108 of the copyright law?** Fair use under Section 107 may in certain cases permit copying not expressly permitted under Sections 108(d), (e) and (g).

### **Suggested Practices**

- Stamp each requested article with a notice of copyright;
- Provide clear, straightforward language (written and verbal) about the use of resources according to fair use clauses of the United States Copyright Law.

**2.c.ii. Under what conditions may the library make copies for users to study and keep?** If the copy is of an article, or a small part of a work, the following apply:

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

If the copy is of an entire work, or of a substantial part of a work, the following apply:

- The library first makes a reasonable effort to determine if a copy can not be found at a fair price;
- The copy becomes the property of the user;
- The library has no notice that the copy is for any purpose other than private study, scholarship, or research; and

The library displays a warning notice where requests for copies are placed and on all order forms.

The library may not systematically copy or distribute single or multiple copies, but nothing prevents interlibrary loan arrangements.

#### **Suggested Practices**

- Seek alternatives to copying by buying second copies: For example, contact the publisher for availability of a work at a reasonable price before making a copy to meet the request of a user.
- Include copyright policy in faculty, student, and staff orientations.

**2.c.iii. What if the copying requested by the user exceeds what is permitted under Section 108(d), (e), and (g)?** In that event, the library should first determine whether the copying might still be a fair use. If not, the library may need to seek permission from the publisher.

#### **Suggested Practices**

- Get permission from the publisher or copyright holder to make the copies;
- Purchase copies through the publisher or a document delivery service;
- Pay royalties directly to the publisher;
- Establish a transactional agreement with a rights holder company; or
- Distribute bibliographies rather than providing materials in full text format.

**2.c.iv. Where should the Notice of Copyright and the Notice Warning Concerning Copyright Restrictions be displayed?** Under section 108(a)(3), the copy supplied by the library must include a notice of copyright. The Council of National Library Associations (CNLA) recommends the following language:

**NOTICE: THIS MATERIAL MAY BE PROTECTED BY COPYRIGHT LAW (TITLE 17, U.S. CODE)**

In addition to the Notice of Copyright, libraries must prominently display at the location where copy request forms are available to patrons, and on each photocopy request form, the Notice Warning Concerning Copyright Restrictions, described above.

#### **Suggested Practices**

- Make certain that copies of the Notice Warning Concerning Copyright Restrictions, in the format required by the law, is located above each photocopy machine and in the

location where photocopy request forms are made available to library users as well as in locations where digital copies are made;

- Make certain that all print and digital copies include the Notice of Copyright;
- Within the printed request forms and on the photocopy request form on the Web, place the Notice Warning of Copyright Restrictions according to the standards of the law; and
- Ensure that each staff person is aware of the need to use both Notices and the use of a copyright stamp by incorporating copyright law requirements into staff training.
- Compile data on the uses made of library copy services.

## **E. Reserves**

### **1. Definition**

This section applies to the librarian's responsibility to provide reserve materials in compliance with current copyright law. Reserve collections include materials selected by faculty to support course instruction. The materials can be required or recommended course readings and usually are owned by the library or by the faculty member. The materials are available to students for a limited period of time.

Some educational institutions provide electronic reserve (e-reserves) collections. E-reserve processes include making a digital version of text, distribution and displaying that version at workstations on campus or through remote access, and downloading and printing copies. Because e-reserves arguably subject an institution to greater risk, they will be discussed separately from traditional reserves.

### **2. Pertinent Sections of the Law**

Copyright policies for reserve collections are based on the fair use provisions of the copyright law, [section 107](#). Detailed information on this section of the law is located in Appendix C: Pertinent Sections of the Law, Section 107.

### **3. Traditional Reserves**

In traditional reserves, a faculty member asks a library to keep a copy of a book or article on reserve for students in a course, thereby limiting general access to the copy. If the copy on reserve belongs to the library or the faculty member, no copyright issues arise because the first sale doctrine, 17 United States Code [109\(a\)](#), permits the distribution of a lawfully made copy.

The copyright issues become more complex when the faculty member asks the library to photocopy materials and make the photocopies available to the students in the class. There has been some debate in library circles whether these photocopies fall under the Classroom Guidelines interpreting section 107 or the general provisions of section 107.

#### **3.a. Issues to Consider**

**3.a.i. How do fair use criteria apply to a request to place an item in reserve?** To determine whether placing an item on reserve qualifies as fair use, the request must be analyzed in terms of

the four factors addressed in Part III. Copyright in the Educational Setting. The law does not require that all of these factors must be present and does not assign a relative level of importance to each factor. Because the number of copies of a particular work on reserve typically is far fewer than the number of students enrolled in the course, traditional reserves are unlikely to harm the market for textbooks or the kind of books instructors usually require students to purchase.

#### **Suggested Practices**

- Materials should be placed on reserve at the request of faculty for educational use of students.
- There should be no charge for access to reserve materials.
- The number of copies of a particular work should be fewer than the number of students enrolled in the course.
- For any work copied for inclusion in reserves, a fair use or section 108 analysis must be performed.
- When guidelines cannot be met, the library may (1) ask for permission to copy from the copyright holder, (2) request reprints from the author, and (3) purchase extra copies of the item.

**3.a.ii. Is there a limit on the amount of material from one resource that may be placed on reserve?** The amount that can be copied turns on the fair use analysis. In general, the amount copied should be as little as necessary to fulfill the educational purpose.

#### **Suggested Practices**

- Try to copy only one article from a journal issue.
- Try to copy no more than 10%–15% of a book.
- Consider seeking copyright permission to use more material.

**3.a.iii. Is there a limit on the number of semesters that an item may remain on reserve?** Some institutions apply the Classroom Guidelines to reserve materials and seek permission from the copyright holder if the item is to be reused in a subsequent semester for the same class offered by the same instructor or if the item is a standard reading for an individual course taught in multiple sections by more than one instructor. Other institutions believe that once a copy is made for reserve purposes, that copy can be reused when the course is subsequently offered.

#### **Suggested Practices**

- If a library adopts a policy of seeking permission when a work is included in reserves more than once, it may need to implement an appropriate recordkeeping system to track use of specific works.

**3.a.iv. Can a faculty member place a course-pack on reserve?** Yes, if the course-pack itself is non-infringing, then inclusion of a copy of the course-pack in a traditional reserve should not be a problem. A hard copy of the course-pack in traditional reserves is unlikely to displace the sale of course-packs (and the license fees generated by such sales). However, as discussed below, placement of a course-pack in e-reserves may be more problematic.

## 4. Electronic Reserves

Electronic reserves are more problematic for publishers than traditional reserves in two respects. First, because the e-reserves often consist of works made available electronically through a Website, publishers fear that the works will be accessed by a large number of people and widely distributed over the Internet. Second, even if the course reserves are available only to students enrolled in the course, the reserves could function as an electronic course-pack and could thereby displace sales of real course-packs or textbooks. In this manner, electronic reserves could significantly cut into the revenues of publishers of academic books.

Neither of these problems are insurmountable, and indeed the American Association of Publishers and Cornell University in September 2006, agreed on copyright guidelines for electronic course content. As with the other guidelines agreed to by the copyright owners, these guidelines do not have the force of law, but they do set a minimum threshold for tolerance of e-reserves by copyright owners. Libraries are encouraged to consult the statement concerning [Applying Fair Use in the Development of the Electronic Reserves Systems](#) signed by major US library associations including MLA.

### 4.a. Issues to Consider

#### 4.a.i. Should electronic reserve systems be structured to limit access? Yes.

##### Suggested Practices

- Methods of limiting access will depend on available technologies. These methods may include:
  - individual password controls or verification of a student's registration status
  - password system for each class
  - retrieval of works by course number or instructor name
  - access limited to workstations that are available only to appropriate faculty and students
- Libraries generally terminate student access after the student has completed the course.

**4.a.ii. What materials can be included in e-reserve?** If all or substantially all of a course's required readings are in e-reserve, a student can easily print out the readings instead of purchasing textbooks or hard-copy course-packs on which permissions have been obtained and fees paid. Accordingly, the fair use calculus for e-reserves might be different from that for traditional reserves, particularly with respect to overall quantity of material on reserve.

##### Suggested Practices

- Do not put a copy of the course-pack on electronic reserve unless appropriate permissions and licenses have been obtained (e.g., the license fee is based on the numbers of students enrolled in the class rather than the number of student who purchase the course-pack.)
- Link to materials legally on the Internet rather than making a digital copy for e-reserves.
- Whenever possible, use materials already licensed by the library.

- When acquiring digital resources, the library should be certain that the license agreements do not preclude the right to make materials available through e-reserves systems.
- On a preliminary or introductory screen, electronic reserve systems should display a notice, consistent with the notice described in subsection 108(f)(1) of the copyright act. The notice should include additional language cautioning against further electronic distribution of digital work.
- If a notice of copyright appears on the copy of a work that is included in an electronic reserve system, the following statement should appear at some place where users will likely see it in connection with access to the particular work: “The work from which this copy is made includes the notice: (restate the elements of the statutory copyright notice. e.g., Copyright 1996, XXX Corp.)”

**4.a.iii. Do e-reserve practices vary from institution to institution?** Yes. Practices are influenced by institutional organizational structures, the information and technology infrastructure, manpower, demand, and interpretation of copyright law.

## **IV. Infringement Remedies**

To violate the rights of the copyright owner as defined in the law is to infringe copyright. The copyright owner may recover actual or statutory damages, court costs, and attorney's fees. Statutory damages normally range from \$750 to \$30,000 for each work infringed, in an amount the court determines is just. The court can adjust statutory damages to \$150,000 per work for willful infringement and down to \$200 per work for innocent infringement. Statutory damages (but not actual monetary damages or court cost and attorneys' fees) are to be waived entirely for a library or nonprofit educational institution when the institution or one of its employees acting within the scope of employment “believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107.” The copyright owner may also obtain an injunction prohibiting the infringer from continuing to engage in infringing conduct. In addition, the copyright owner may secure an order that the infringing copies be destroyed. Criminal infringement—a willful infringement (1) for commercial advantage or private financial gain or (2) by reproduction or distribution of copies with a retail value over \$1,000—is subject to a fine and/or imprisonment as mandated by [sections 504 and 506\(a\)](#) of the law.

## **V. Permissions**

### **A. Copyright Permissions and Management Guidelines**

There will be occasions when permission for reproduction, distribution, performance, or display should be sought. The owner of reproduction rights is not always the author or the current publisher. Check the verso of the title page of books, the front matter of journals, the first page of the article in some journals, or the label on audiovisual works to determine the copyright holder.

In writing for permission to duplicate, be certain that the following facts are provided:

Title:

- exact title
- author and/or editor of the item to be duplicated

Precise description of the material to be used:

- for text materials, page numbers, chapter numbers, and possibly a photocopy of the beginning of the portion to be used
- for visuals, specify frame numbers

Type of reproduction:

- if transferring material into another format, the reason for the change
- if text materials, whether photocopy, offset, typeset, etc.

Number of copies to be made

Use to be made:

- whether limited use for specific time periods
- form of distribution and disposal (reverse collection, classroom)

## **B. Issues to Consider**

### **1. What does it mean to seek permission for use of copyrighted works?**

Seeking permission means contacting the copyright owner to receive authorization to reproduce, distribute, perform, or display the work. Once you explain to the copyright owner how you plan to use the work, the copyright owner may very well permit you to use the work without payment. Many individual authors and some scholarly societies will allow you to make hard copies, post digital copies on an internal Website, or even repeatedly use the material for free.

The biggest problem is finding the real copyright owner. Most authors listed on an article or in a book do not own their materials and cannot give you the right to make copies or distribute them, even for educational purposes. Publishers of books and journals often hold the copyright.

To seek permission, you must identify the correct copyright holder by checking the back of the title page or looking at the journal issue to locate a statement. Then you must contact the copyright holder for each item you plan to use. It sounds simple, but contacting and waiting for responses from authors or publishers can be time consuming. Possible scenarios include: the publisher may have merged with another publisher; some publishers do not have easy systems for seeking permission; and some publishers refuse almost all requests.

Seeking permissions can save you money (no royalty fees or litigation costs) but may cost you a lot of time and effort.

Another source for seeking permissions, and usually paying royalty fees, is to work through a licensing agency. The advantage of such a service is that it provides a process for requesting use from several different publishers that is more efficient than seeking permissions and provides easy systems for paying the royalty fees. It is also faster than contacting individual publishers and authors. However, there are usually fees for using the service in addition to the royalty fees.

Remember that if your use of an item meets the fair use criteria, you do not need to seek permission or pay a fee. Only uses not considered fair use (for example, some repeated uses under some circumstances) need to involve contact with the copyright owner.

### **Suggested Practices**

- For any use determined not to be fair, determine the copyright owner.
- Look on the back of the title page of a book or in the journal issue for the copyright statement.
- Obtain written permission from the copyright owner.
- Use a copyright management service to streamline the process.

## **2. What kind of services does a copyright management center provide?**

A copyright management service works with numerous publishers to help authors, educators, and others seek and usually pay for the right to use copyrighted materials. By representing numerous publishers, it provides a centralized service for seeking permissions to use the materials for classes; creating paper or electronic course packs, including materials in books or other published materials; and placing items on library reserves (paper or electronic). Individuals or institutions may set up accounts and requests may be made online.

The advantages of using a copyright management service are:

- It is a central point for contacting multiple publishers for permissions.
- You can place requests for materials from several different publishers.
- It is usually faster than directly contacting individual publishers.
- You can obtain a price quote on the royalty or permission fees before using the material.
- Online order and payment services are easy to use.

A list of organizations that can support your need to secure permissions to use copyrighted works can be found at the [Copyright Management Center](#) at Indiana University.

### **Suggested Practices**

- Use a copyright management service or a similar service if your use does not fall under fair use.
- Use a copyright management service to seek permissions to create digital or paper course packs.
- Contact a copyright management service if you are authoring a book or other material that is using copyrighted materials.
- Refer to MLA's Governmental Relations Committee statements on [Copyright Management Guidelines](#) and [Guidelines for Selecting Copyright Management Options](#).

## **VI. Copyright Websites and Resources**

Following are several Websites for additional information and resources on the copyright law.

### **A. Where to Go for Medical Library Association Resources**

- [Medical Library Association \(MLA\) Position Statements](#): a portal to MLA position statements about many issues, including a statement on copyright law and fair use, copyright management guidelines, and distance education; also contains five frequently asked questions (FAQ) pages about various aspects of copyright law.
- [MLA Information Issues and Policies](#): a portal to MLA resources, statements, and letters on intellectual property and copyright law, including links to helpful Websites.

## B. Where to Go for Background Information

The following Websites provide helpful information about the copyright law and access to supporting documentation.

- [US Copyright Office Website](#): includes a “copyright basics” section and links to numerous publications, circulars, brochures, fact sheets, reports, and studies by the Copyright Office; it also explains how to register works for copyright, and allows visitors to search copyright records.
- [Legal Information Institute of the Cornell Law School](#): contains a brief overview of copyright law, including links to relevant sections of the United States Code; also links to relevant federal regulations and international conventions and treaties; a “Googlify” feature links from this page to a manageable list of Google links about copyright law.
- [Stanford University Libraries](#): Web page: includes overviews of many copyright concepts, such as fair use and the public domain, highlights resources for librarians, and allows visitors to sign up for a free monthly newsletter.

## C. Where to Go for Copyright Permission

- [Copyright Management Center](#): **leading clearinghouse for arranging copyright permissions, both for service providers such as libraries and for copyright holders such as authors and publishers.**

## D. Where to Go for Expert Information

The following Websites are maintained by experts in copyright law.

- [Copyright Corner](#): a collection of columns about various topics originally published in Information Outlook by the Special Libraries Association; author Laura Gassaway is the director of the Kathrine R. Everett Law Library at the University of North Carolina–Chapel Hill and has been an intellectual property scholar at the University of Maryland’s Center for Intellectual Property.
- [Copyright Management Center of Indiana University-Purdue University](#): created in 1994 as the first university-based center for copyright management; the center’s director is Kenneth D. Crews, a frequent lecturer and author about all aspects of copyright law; highlights issues that libraries need to consider.
- [Crash Course in Copyright](#): developed by Georgia K. Harper, manager of the Intellectual Property Section for the University of Texas Office of General Counsel, includes background information, detailed application of that information, and resources for further information; users can also work through a guided tutorial about how to apply copyright law, particularly in the context of distance learning.

## E. Where to Learn About Alternative Approaches to Copyright

Many librarians believe that contemporary interpretations of copyright law unreasonably limit the distribution of creative works, particularly in an era of rapid electronic communications. The following organizations seek to build an alternative understanding of copyright law.

- [Copyleft](#): a general method for making a program or other work free and requiring all modified and extended versions of the program to be free as well; sponsored by the Free Software Foundation to ensure that software originally developed to be open source remains open source, no matter how many times it is redistributed; similar to the spirit of Creative Commons but with a tight focus on software; includes an extensive Web bibliography.
- [Creative Commons](#): provides creators with flexibility to decide how people can reuse their work; the effort began in the United States and is now international; Website allows visitors to identify work established under various Creative Commons licenses.

## F. Links and Resources Found in this Publication

- Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals (Appendix A)
- [American Library Association Interlibrary Loan Request Form of 2002](#): for requesting interlibrary loans by mail
- [Campus Copyright Rights and Responsibilities: A Basic Guide to Policy Considerations, Association of Research Libraries, 2005.](#)
- [The Copyright Law of the United States of America, title 17 of the United States Code](#)
- [Copyright Management Center at Indiana University](#): A list of organizations that can support your need to secure permissions to use copyrighted works
- [Copyright Metro](#): an interactive guide to using copyrighted media in educational settings
- [The Copyright Revision Act of 1976](#), Public Law 94-553; 90 Stat. 2541 (for the general revision of copyright law, title 17 of the United States Code, and for other purposes), enacted October 19, 1976
- The Copyright Revision Act of 1976, Public Law 94-553, [House Report 94-1733](#)
- [Creative Commons](#)
- [The Digital Millennium Copyright Act of 1998](#) (DMCA), Public Law 105-304, 112 Stat. 2860, 2887 (title IV amending sections 108, 112, 114, chapter 7 and chapter 7, title 17, United States Code); contains four separate acts within titles I, II, III, and V that amended title 17 of the United States Code titles I and II are most relevant to health sciences libraries and so only these are addressed:
- [Title I of the DMCA: WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998](#), Public Law 105-304, 112 Stat. 2860, 2861 (amending title 17 of the United States Code, *inter alia*, to add a new [chapter 12](#) that prohibits circumvention of copyright protection systems and provides protection for copyright management information) enacted October 28, 1998
- [Title II of the DMCA: the Online Copyright Infringement Liability Limitation Act](#), Public Law 105-304, 112 Stat. 2860, 2877 (amending title 17 of the *United States Code* to add a new [section 512](#)), enacted October 28, 1998
- Guidelines for the Proviso of Subsection 108 (g)(2), often called the CONTU Guidelines (Appendix B)

- [The Health Education Assets Library \(HEAL\)](#): a digital library that provides freely accessible digital teaching resources of the highest quality that meet the needs of today's health sciences educators and learners
- [MedEdPortal](#): an online publication that offers peer review for teaching resources, including referenced tutorials, cases, lab manuals, evaluation forms, faculty development materials, and virtual patients
- [The National Interlibrary Loan Code of 1980](#): provides guidelines for borrowing and lending of library materials
- Notice Warning Concerning Copyright Restrictions (Section III: Guidelines for Service, Subsection D: Copy Service)
- Notice of Copyright (Section III: Guidelines for Service, Subsection D: Copy Service)
- [OCLC ILLiad](#) and [Clio](#): for managing interlibrary loan functions via the Web
- [The Sonny Bono Copyright Term Extension Act of 1998](#), Public Law 105-298; 112 Stat. 2827 (amending chapter 3, title 17, United States Code, to extend the term of copyright protection for most works to life plus 70 years), enacted October 27, 1998
- [The Technology, Education, and Copyright Harmonization Act of 2002 \(TEACH\)](#), division C, title III, subtitle C of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758, 1910 (amending chapter 1, title 17, United States Code, to incorporate provisions relating to the use of copyrighted works for distance education), enacted November 2, 2002
- [Teach Act Toolkit](#): an online resource for understanding copyright and distance education, including tools for implanting the law (e.g., checklists and best practices), North Carolina State University
- [When U.S. Works Pass into the Public Domain](#), Laura Gasaway, University of North Carolina.

## **Appendix A: Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals\***

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2233. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

### **GUIDELINES**

#### **I. SINGLE COPYING FOR TEACHERS:**

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

#### **II. MULTIPLE COPIES FOR CLASSROOM USE:**

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that*:

- A. The copying meets the tests of brevity and spontaneity as defined below: *and*,
- B. Meets the cumulative effect test as defined below; *and*,
- C. Each copy includes a notice of copyright.

### **DEFINITIONS**

#### **Brevity:**

- i. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or (b) from a longer poem, an excerpt of not more than 250 words.
- ii. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.  
*[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]*

- iii. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- iv. "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

**Spontaneity:**

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

**Cumulative Effect:**

- i. The copying of the material is for only one course in the school in which the copies are made.
- ii. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- iii. There shall not be more than nine instances of such multiple copying for one course during one class term.  
*[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]*

**III. PROHIBITIONS AS TO I AND II ABOVE:**

Notwithstanding any of the above, the following shall be prohibited:

- A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts there from are accumulated or are reproduced and used separately.
- B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include work- books, exercises, standardized tests and test booklets and answer sheets and like consumable material.
- C. Copying shall not:
  - a. substitute for the purchase of books, publisher's reprints or periodicals;
  - b. be directed by higher authority;
  - c. be repeated with respect to the same item by the same teacher from term to term.
- D. No charge shall be made to the student beyond the actual cost of the photocopying.

AGREED

March 19, 1976

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

By Sheldon Elliott Steinbach ASSOCIATION OF AMERICAN PUBLISHERS, INC.

AUTHOR-PUBLISHER GROUP

AUTHOR'S LEAGUE OF AMERICA

By Irwin Karp, Counsel

ASSOCIATION OF AMERICAN PUBLISHERS, INC.

By Alexander C. Hoffman, Chairman, Copyright Committee

\* [These Guidelines](#) were published in Conference Report 94-1733, 94th Congress, 2nd Session, September 29, 1976, as adopted.

## **Appendix B: CONTU Guidelines for the Proviso of Subsection (g)(2)\***

**CONFERENCE SUBSTITUTE**<http://www.copyright.gov/circs/circ21.pdf>

The conference substitute adopts the provisions of section 108 as amended by the House bill. In doing so, the conferees have noted two letters dated September 22, 1976, sent respectively to John L. McClellan, Chairman of the Senate Judiciary Subcommittee on Patents, Trademarks, and Copy- rights, and to Robert W. Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The letters, from the Chairman of the National Commission on New Technological Uses of Copyrighted Works (CONTU), Stanley H. Fuld, transmitted a document consisting of "guidelines interpreting the provision in subsection 108(g)(2) of S. 22, as approved by the House Committee on the Judiciary!" Chairman Fuld's letters explain that, following lengthy consultations with the parties concerned, the Commission adopted these guidelines as fair and workable and with the hope that the conferees on S. 22 may find that they merit inclusion in the conference report. The letters add that, although time did not permit securing signatures of the representatives of the principal library organizations or of the organizations representing publishers and authors on these guidelines, the Commission had received oral assurances from these representatives that the guidelines are acceptable to their organizations.

The conference committee understands that the guidelines are not intended as, and cannot be considered, explicit rules or directions governing any and all cases, now or in the future. It is recognized that their purpose is to provide guidance in the most commonly-encountered interlibrary photocopying situations, that they are not intended to be limiting or determinative in themselves or with respect to other situations, and that they deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment. With these qualifications, the conference committee agrees that the guidelines are a reasonable interpretation of the proviso of section 108(g) (2) in the most common situations to which they apply today.

The text of the guidelines follows:

### **PHOTOCOPYING-INTERLIBRARY ARRANGEMENTS INTRODUCTION**

Subsection 108(g)(2) of the bill deals, among other things, with limits on interlibrary arrangements for photocopying. It prohibits systematic photo- copying of copyrighted materials but permits 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!"

The National Commission on New Technological Uses of Copyrighted Works offered its good offices to the House and Senate subcommittees in bringing the interested parties together to see if agreement could be reached on what a realistic definition would be of "such aggregate quantities!" The Commission consulted with the parties and suggested the interpretation which follows, on which there has been substantial agreement by the principal library, publisher, and author organizations. The Commission considers the guidelines which follow to be a workable and fair interpretation of the intent of the proviso portion of subsection 108(g)(2).

These guidelines are intended to provide guidance in the application of section 108 to the most frequently encountered interlibrary case: a library's obtaining from another library, in lieu of interlibrary loan, copies of articles from relatively recent issues of periodicals—those published within five years prior to the date of the request. The guidelines do not specify what aggregate quantity of copies of an article or articles published in a periodical, the issue date of which is more than five years prior to the date when the request for the copy thereof is made, constitutes a substitute for a subscription to such periodical. The meaning of the proviso to subsection 108(g)(2) in such case is left to future interpretation.

The point has been made that the present practice on interlibrary loans and use of photocopies in lieu of loans may be supplemented or even largely replaced by a system in which one or more agencies or institutions, public or private, exist for the specific purpose of providing a central source for photocopies. Of course, these guidelines would not apply to such a situation.

### **GUIDELINES FOR THE PROVISOR OF SUBSECTION 108(G)(2)**

1. As used in the proviso of the subsection 108(g)(2), the words “...such aggregate quantities as to substitute for a subscription to or purchase of such work” shall mean:
  - (a) with respect to any given periodical (as opposed to any given issue of a periodical), filled request of a library or archives (“requesting entity”) within any calendar year for a total of six or more copies of an article or articles published in such periodical within five years prior to the date of the request. These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical, the publication date of which is more than five years prior to the date when request is made. These guidelines do not define the meaning, with respect to such a request, of “...such aggregate quantities as to substitute for a subscription to [such periodical].”
  - (b) With respect to any other material described in subsection 108 (d), (including fiction and poetry), filled requesting entity within any calendar year for a total of six months or more copies or phonorecords of or from any given work (including a collective work) during the entire period when such material shall be protected by copyright.
2. In the event that a requesting entity
  - (a) shall have in force or shall have entered an order for a subscription to a periodical, or
  - (b) has within its collection, or shall have entered an order for, a copy or phonorecord of any other copyrighted work, material from either category of which it desires to obtain by copy from another library or archives (the “supplying entity), because the material to be copied is not reasonably available for use by the requesting entity itself, then the fulfillment of such request shall be treated as though the requesting entity made such copy from its own collection. A library or archives may request a copy or phonorecord from a supplying entity only under those circumstances where the requesting entity would have been able, under the other provisions of section 108, to supply such copies from materials in its own collection.
3. No request for a copy or phonorecord of any material to which these guidelines apply may be fulfilled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines.
4. The requesting entity shall maintain records of all requests made by it for copies or phonorecords of any materials to which these guidelines apply and shall maintain records

of the fulfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.

5. As part of the review provided for in subsection 108(i), these guidelines shall be reviewed no later than five years from the effective date of this bill.

\* [These Guidelines](#) were published in Conference Report 94-1733, 94th Congress, 2nd Session, September 29, 1976, as adopted.

## Appendix C. Pertinent Sections of the Law

### 1. Overview

This section of the Copyright Law and the Health Sciences Librarian addresses portions of [The Copyright Law of the United States of America, title 17 of the United States Code](#), including enactments through the second session of the 107th Congress, that relate to the interests of health sciences librarians, educators, and students. Specifically, it addresses relevant provisions of:

- [The Copyright Revision Act of 1976](#), Public Law 94-553; 90 Stat. 2541 (for the general revision of copyright law, title 17 of the *United States Code*, and for other purposes), enacted October 19, 1976
- [The Sonny Bono Copyright Term Extension Act of 1998](#), Public Law 105-298; 112 Stat. 2827 ([amending chapter 3, title 17](#), United States Code, to extend the term of copyright protection for most works to life plus seventy years), enacted October 27, 1998
- [The Digital Millennium Copyright Act of 1998](#) (DMCA), Public Law 105-304, 112 Stat. 2860, 2887 (title IV amending sections 108, 112, 114, chapter 7 and chapter 7, title 17, United States Code), contains four separate acts within titles I, II, III, and V that amend title 17 of the United States Code; titles I and II are most relevant to health sciences libraries, and so only these are addressed below. These are:
  - [Title I of the DMCA](#) is the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Public Law 105-304, 112 Stat. 2860, 2861 (amending title 17 of the United States Code, *inter alia*, to add a new [chapter 12](#), prohibits circumvention of copyright protection systems and provides protection for copyright management information) enacted October 28, 1998.
  - [Title II of the DMCA](#) is the Online Copyright Infringement Liability Limitation Act, Public Law 105-304, 112 Stat. 2860, 2877 (amending title 17 of the United States Code to add a [new section 512](#)), enacted October 28, 1998.
- [The Technology, Education, and Copyright Harmonization Act of 2002](#) (TEACH), Division C, Title III, Subtitle C of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758, 1910 (amending [chapter 1](#), title 17, United States Code, to incorporate provisions relating to the use of copyrighted works for distance education), enacted November 2, 2002.

The copyright Law is a compilation of several laws enacted by Congress over time. For purposes of this document, only sections of the law relevant to health sciences libraries and educational institutions are addressed. A complete listing of laws is available on the US Copyright Office Website ([www.copyright.gov/title17/](http://www.copyright.gov/title17/)).

### 2. The Pertinent Sections of the Law

The sections of the copyright law most relevant to librarians and educators are 105, 106, 107, 108, 110, 112, 301–305, 504, and 506(a). General information about these sections of the law is provided below along with links to the relevant section of the law and practical applications for use by libraries and educators contained in other parts of this document.

### [Section 105](#)

**Subject matter of copyright: United States Government works** states that copyright protection is not available for any work of the US government, which is defined as a work prepared by an officer or employee of the US government as a part of that person's official duties. The US government, however, is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

### [Section 106](#)

**Exclusive rights in copyrighted works** states the five exclusive rights of copyright owners: to reproduce the work, to prepare derivative works (adaptations), and to distribute, perform, and display the work publicly. Limitations on these exclusive rights are stated in sections 107 through 122. Sections 109, 111, and 113 through 118 are not considered in this document.

### [Section 107](#)

**Limitations on exclusive rights: fair use** recognizes the doctrine of fair use and specifies the four factors to be considered in determining whether a use is a fair use. [The Senate Committee Report](#) that accompanied the Copyright Revision Act of 1976 states:

“Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. ...The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in a particular case precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, as outlined earlier in this report, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. *Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way.*

*[Editorial emphasis]*

Also see, The General Fair Use Provision, found in Section III: Guidelines for Service, Subsection B: Copyright in the Education Setting.

**Provisions relevant to copy services and reserve collections:** [Section 107](#) is relevant to supervised and unsupervised photocopy services and the development of copyright policies for classroom uses and reserve collections.

Practical applications of section 107 relevant to copy services and reserves can be found in Section III: Guidelines for Service, Subsection B: Copyright in the Educational Setting, Subsection D: Copy Services, and Subsection E: Reserves.

## [Section 108](#)

**Limitations on exclusive rights: reproductions by libraries and archives** authorizes libraries to engage in certain types of copying in situations other than fair use. The DMCA amended section 108 to permit preservation and storage in a digital format and to describe a mechanism for handling preservation of works originating in outmoded formats.

**Provisions relevant to collection maintenance:** [Subsections 108\(a\), \(b\), \(c\), and \(h\)](#) are relevant to collection maintenance.

**Provisions relevant to interlibrary loan:** [Subsections 108\(d\), \(e\), and \(g\)](#) are relevant for libraries making interlibrary loan requests.

[Subsections 108\(a\)\(3\), \(d\), \(e\), \(f\) \(4\), and \(g\)\(2\)](#) are relevant for libraries fulfilling interlibrary loan requests.

Provisions relevant to photocopy services: [Subsection 108\(f\)\(1\)](#) is relevant to unsupervised photocopy services and protects the library and its employees from liability for copyright infringement that results from the unsupervised use of reproducing equipment located in the library, if the equipment displays the Notice Warning Concerning Copyright Restrictions. This is the extent of the library's responsibility.

[Subsections 108\(a\), \(d\), \(e\), and \(g\)\(1\) and \(2\)](#) are relevant to supervised photocopying services.

For practical applications of section 108, see Section III: Guidelines for Service, Subsection A: Collection Maintenance, Subsection C: Interlibrary Loan, and Subsection D: Copy Services.

## [Section 110](#)

**Limitations on exclusive rights: exemption of certain performances and displays** authorizes certain performances and displays in nonprofit educational institutions. In 2002, Congress enacted the [TEACH Act](#) to update section 110 to incorporate new provisions that allow educators to use copyrighted works for distance education without danger of infringement.

For practical applications of section 110, see Section III: Guidelines for Service, Subsection B: Copyright in the Educational Setting.

## [Sections 301–305](#)

These sections make provisions for the duration of copyright. [The Sonny Bono Copyright Term Extension Act of 1998](#), Public Law 105-298; 112 Stat. 2827, made several amendments to these sections to extend the term of copyright protection for most works to the life of the author plus seventy years. After this time, works pass into the public domain.

Practical applications of sections 301–305, including a link to a [chart](#) prepared by Lolly Gassaway of the University of North Carolina for understanding when copyrighted works pass into the public domain, in Copyright Ownership and Rights found in Section III: Guidelines for Service, Subsection B: Copyright in the Educational Setting.

## [Section 504](#)

**Remedies for infringement: damages and profits, [section 506\(a\)](#), criminal Infringement,**

and [section 1204](#), **criminal offenses and penalties**, spell out the liabilities of copyright infringements.

In general, the copyright law with respect to library operations is civil, not criminal, law. Section 504(c)(2)(i) says that library employees, acting within the scope of their employment and believing that their use of the copyrighted work was a fair use under section 107, shall not be liable for statutory damages. However, infringement can still result in collection of actual monetary damages and recovery of court costs and attorney's fees.

Under sections 506(a) and 1204, willful infringement for purposes of commercial advantage or private financial gain is criminal and can result in a fine or imprisonment.

Before discussing the application of sections of the law to particular library service areas, a final reminder is in order: nothing can replace the exercise of judgment and reason. With the application of judgment and reason, all that is necessary is adherence to the requirements of the law; no less and no more.

### **[Section 512](#)**

**Limitations on liability relating to material online** is Title II of the DMCA, [The Online Copyright Infringement Liability Limitation Act](#), Public Law 105–304, 112 Stat. 2860, 2877, that amends title 17 of the United States Code to add a new section 512. This provision provides certain limitations on the liability of online service providers for copyright infringements.

Institutions and organizations that provide Internet services, such as accounts for email or Web servers, may be subject to liability if people using their systems violate the copyright law. Section 512 of the DMCA provides a “safe harbor” for certain functions performed by “online service providers.” Educational institutions are eligible for protection from liability but must meet a number of conditions including:

- appointing a registered institutional agent to receive notification of possible copyright infringements
- providing system users with materials that describe and promote compliance with copyright law
- quickly removing or “taking down” material hosted or linked to by the institution when the institution is notified of an alleged infringement

Institutions are not required to meet these criteria, but, if they do not, they are not eligible for the DMCA’s safe harbors. The DMCA includes special rules for faculty and graduate students performing a research or teaching function. In essence, the knowledge of the faculty member or the graduate student concerning infringing content will not be attributed to the institution in a manner that might cause the institution to lose the safe harbor.

The US Copyright Office Website has [additional information for online service providers](#) about complying with this section of the law. Additional background information on section 512 is available on in the [Primer for the Digital Millennium](#) and in the Association of Research Libraries document, [Campus Copyright Rights and Responsibilities: A Basic Guide to Policy Considerations](#).

## Section 1201

**Circumvention of copyright protection systems** makes provisions for violations regarding circumvention of technological protection measures.

Section 1201 is title I of the DMCA, Public Law 105-304, 112 Stat. 2860, 2861, that amends title 17 of the United States Code, *inter alia*, to add a new chapter 12. This provision prohibits circumvention of a technological measure that controls access to a work protected by copyright. It also prohibits the distribution of devices that circumvent access control technologies, as well as devices that circumvent copy control technologies.

Under the law, there is an exemption for nonprofit libraries, archives, and educational institutions that are considering the purchase of an item and wish to review it before purchase. However, this purchase must be done with an intention of good faith. There are several criteria that must be met not to be in violation of section 1201. Librarians wishing to invoke this exemption should carefully review the criteria under which the circumvention can be done, including:

- The copy may not be retained longer than it is needed to make a decision.
- The copy may not be used for any other purpose.
- The copy can only be applied if another identical copy is not reasonably available.
- The library must be open to the public or 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.

This section does not give permission to the nonprofit library to “manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service...which circumvents a technological measure.” Therefore, most libraries will not find this exemption very useful unless they have technical staff that can circumvent the protection mechanism.

The library can be subject to civil remedies if any of these criteria are violated.

This section of the DMCA also requires the US Copyright Office to seek public comments every three years and to make recommendations to the librarian of Congress regarding classes of works that must be exempt from the law and outlines the criteria that must be considered. The librarian of Congress announced exemptions in 2000, 2003, and 2006.

The exemptions include:

- Audiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.
- Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

- Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.
- Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.
- Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.
- Sound recordings, and audiovisual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.

These exemptions went into effect upon publication in the [Federal Register](#) on November 27, 2006, and will remain in effect through October 27, 2009.

Additional information about the Digital Millennium Copyright Act of 1998 can be found in the [Primer for the Digital Millennium](#), prepared by Arnold P. Lutzker, 1998.