

Developing Copyright Policy: A Guide for Liberal Arts Colleges

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Foreword

Copyright law is complex and subject to varying interpretations, so developing a campus-wide copyright policy can seem like a daunting task. This guide is designed to help make the process more manageable for deans, librarians, IT staff, faculty, and anyone else charged with developing a copyright policy guide for their liberal arts college.

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The intent of this guide is not to prescribe exactly what your institutional policy should look like or include, because each college's needs are different. Instead, this guide is intended to guide you through the thinking and decisions required to develop a sound policy.

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Why a Copyright Policy?

There are at least four reasons that an institution of higher education might want to have a copyright policy:

1. Demonstrate Respect for Laws and Intellectual Property

Liberal arts colleges typically want to maintain the highest standards for ethical conduct; one reason for a copyright policy is to demonstrate respect for and compliance with intellectual property laws. Such respect should acknowledge both the legitimate claims of rights holders and the limitations and exceptions of the law that encourage sharing, dissemination and the creation of new knowledge

2. Convey Institutional Decisions

Another reason to adopt a copyright policy is to embody an official institutional choice or decision. Once you have determined your positions on various copyright issues, you should clearly state them via a formal policy that is easily accessible to faculty, staff, students, and the general public.

You also may want to develop a separate or adjunct procedural document, with more detail for various departments on subjects relevant to them.

3. Provide Certain “Safe Harbors” from Liability

A copyright policy allows your institution to take advantage of certain “safe harbors” that are built into the Copyright Act. There are two provisions – designed to insulate the institution from copyright infringement liability in certain defined situations – that require an institutional copyright policy as one condition of their application:

- The TEACH Act, which amended section 110(2) to provide an exception for public performances and displays that are transmitted as part of mediated instruction, contains a general requirement that an institution availing itself of this exception must *“institute policies regarding copyright, provide informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright.”* For more information on the TEACH Act, see [Step 6: Performance & Display Decisions](#).
- Section 512 of the law, added as part of the Digital Millennium Copyright Act (DMCA), also requires that the institution *“provides to all users of its system or network informational materials that*

accurately describe, and promote compliance with, the laws of the United States relating to copyright,” as a requirement for protection from liability for infringing material that resides on its network, when the institution is acting merely as an Internet service provider. For more information on DMCA, see [Step 7: ISP Safe Harbor & File Sharing](#).

4. Define the Scope of Employment Duties

Another reason to adopt a copyright policy is to reduce institutional liability by setting standards for the scope of individual duties of employment. In doing so, your institution also provides guidance for employees as they perform various work-related tasks.

When an employee commits a tort (such as copyright infringement) while carrying out the normal duties of employment, the employer is usually also liable for the damages caused by that tort. Employer liability may be reduced or eliminated, however, if the employee acted outside the scope of their employment.

Because copyright law is complex and often requires the exercise of judgment, you may want to provide instruction and guidance to employees, in addition to the formal policy.

For more information on policies related to employment, see [Step 2: Ownership Decisions](#).

Step 1: Philosophical Decisions

Before launching into copyright policy decisions, your policy committee may want to have a discussion about where your institution stands philosophically and ideologically related to copyright law. That framework can serve as a filter as you explore the various gray areas related to copyright law.

The following questions can help you uncover your institution's philosophical positions:

- **Where does your institution fall on the continuum between limiting institutional risk and altruistic knowledge sharing?**
Some institutions prefer to take a very conservative approach to aggressively limit their liability. Others feel strongly that their primary purpose is to educate and share knowledge, and make policy decisions reflecting that belief. Most institutions fall somewhere in between.
- **Do you want to establish clear-cut guidelines for certain activities, or provide leeway for individual use determinations that would promote flexibility but decrease institutional control?**
While defined guidelines make it easier for faculty, staff, and students to understand what is allowed, they can restrict legitimate educational activities more than necessary. All fair use decisions, for example, including the decision to follow negotiated guidelines, involve an assessment of institutional risk tolerance.
- **To what extent does your institution want to educate and advocate for a more active responsibility on the part of faculty, staff, and students in broadening access to their work through Creative Commons licensing, amendment of their publication agreements, or posting in open repositories?**

Step 2: Ownership Decisions

Introduction

Section 101 of the Copyright Act, which defines “work for hire,” suggests that the default rule for all regular employees working within the scope of their employment is that the employer institution is the initial owner of copyright. In the case of traditional scholarly works by faculty, most courts have been unwilling to enforce work for hire. In any case, most institutions choose to limit work for hire, at least in regard to some categories of employees and some types of works.

Student scholarly works, at least, are clearly owned by the student authors. The institution can do less to vary this rule by policy than it can vis-à-vis employees, but it may be possible to assert limited use rights in certain categories of student works.

The basic decision about who owns copyrighted content created on campus should be asserted in your policy. Will the institution own non-administrative works created by faculty and staff? Or will faculty and staff retain ownership of scholarly works they author, which is by far the most common practice?

This decision has implications for publication contracts and open-access license agreements, to which only the copyright holder may agree. Thus, as matter of administrative efficiency, faculty ownership of, at least, traditional scholarly works is generally desirable.

As you decide who will own these works, consider the following questions:

- To which categories of works will this decision apply? Will the policy cover traditional scholarly works, course content, utilitarian works, new media creations, and administrative works?
- Will your institution claim a permanent right to use course content created by faculty? In such a situation, the institution would have a continuing use right even after the presumptive copyright holder – the faculty author – left the institution.

- How will publication contracts be handled if your institution makes the unusual decision to assert ownership? Will you provide guidance regarding such contracts where faculty, staff and students have ownership?
- How will royalties be handled? Many institutions provide for a division of royalties in regard to patentable discoveries made by faculty, staff, and students. This is most common with lab-based research, because of the large investment made in research facilities and securing patents. While the cost of production and protection is much less with copyrighted works, an institution may decide to assert a division of royalties based on the use of institutional resources such as computers, networks, libraries, and databases for the creation of works.
- Will faculty members be given the right to approve or veto recordings of lectures? Note that the recording of lectures may sometimes be a needed accommodation under the Americans with Disabilities Act. In those cases, a faculty veto cannot be permitted unless a different accommodation is agreed upon. It is also important to consider privacy rules that may apply regarding student contributions.
- What will be your institution's policy on open access? For works owned by faculty, staff, and students, will the institution require or encourage the authors to consider amending their publication agreements to permit open access, or assigning a Creative Commons license? For more, see [Step 3: Open Access Decisions](#).
- **How will conflicts over ownership and use rights be resolved?** Usually a faculty/administrative panel will hear conflicts and recommend a resolution; sometimes these conflicts are adjudicated directly by the Chief Academic Officer or President.

Step 3: Open Access Decisions

Introduction

Authors, artists, composers, and other creators are the owners of the copyright in the academic and creative works they produce unless or until they transfer those rights to another party. Subsequent publication of those works as books, journal articles, recordings, and other products requires agreement in the form of a contract between the creator and the publisher (often called a ‘copyright transfer agreement’).

Traditionally, creators transfer full and exclusive rights to the publisher in exchange for publication and, in some cases, royalties. As a consequence, the terms (including prices) under which readers, viewers, listeners, and other creators will have access to or may use the work can be set entirely by the publisher. These terms may not meet the original creator’s interest in assuring that the work is widely available for use in teaching or research.

However, copyright transfer need not be an all-or-nothing arrangement. Authors may reserve certain rights for themselves while granting other rights to the publisher, or may transfer copyright to the publisher with certain qualifications. Increasingly, scholarly publishers will accommodate their authors’ preferences to share their works with students and colleagues via the Web and in other ways, and will negotiate changes to their standard copyright transfer agreement.

What will be your institution’s policy on open access? For works owned by faculty, staff, and students, will the institution require or encourage the authors to consider amending their publication agreements to permit open access, or assigning a Creative Commons license?

If so, consider the following two options:

A. Contract amendment: Copyright transfer agreements (author contracts) provided by publishers can be amended in writing or by

attaching a simple form:

Add the following language to a contract: "Notwithstanding the above language, I reserve the rights to use this work in my teaching and research, for my colleagues at XYZ College to use this work in their teaching and research, and to place an electronic copy of this work on a publicly accessible Web site.'¹

or:

Attach the following form to a contract:
<http://www.arl.org/sparc/author/addendum.html> or Appendix 6H.

A Note on Open-Access Posting: Many scholarly authors wish to make copies of their published articles freely available via a personal Web site or an institutional or disciplinary repository. *If copyright has been transferred to the publisher, this may not be legal unless the publisher grants permission.* Many scholarly publishers do permit this by policy, and others will grant permission on request. Some will permit the final published version of the article to be posted, and others will permit only an earlier version to be posted. Authors are encouraged to exercise their rights under these policies.

For a list of policies by publisher see:
<http://romeo.eprints.org/publishers.html>.

B. Creative Commons licensing: Creators may release their work to the public – through a Web site, institutional repository, or CD, for example – under a license that defines what users may and may not do with it. Creative Commons is a not-for-profit organization that recommends several models that creators may choose among. Under Creative Commons licenses authors who have retained their copyright may grant advance permission for certain uses.

The Creative Commons scheme distinguishes several rights that authors can exercise in various combinations as they prefer:

- Attribution: The author may permit copying and distribution of the work with the condition that the original authorship is acknowledged, or may waive this requirement.
- Commercial Use: The author may permit copying and distribution

- of the work only for non-commercial purposes, or may allow commercial uses.
- Derivatives: The author may permit transformation of the work into new works, or may forbid transformation of the work.
 - Licensing for Subsequent Uses (“Share Alike” licensing): If Derivatives are permitted, the author may require that the derivative be distributed under the terms of the original license, or may waive this requirement.

Creative Commons licenses include a basic description of the rights of the author and of the user (fair use, first sale, and free expression rights) that can be very helpful.

Examples:

Attribution Required/Non-Commercial Use Only/Derivatives Only Under Identical Terms: Copyright © 2006 by Jane Doe. Some rights reserved. You are free to copy, distribute, display, and perform the work and to make derivative works under the following conditions: Attribution – You must give the original author credit; Noncommercial Use – You may not use this work for commercial purposes; Share Alike – If you alter, transform, or build upon this work, you may distribute the resulting work only under a license identical to this one. For any reuse or distribution, you must make clear to others the license terms of this work. Any of these conditions can be waived if you get permission from the copyright holder. Your fair use rights are not limited by the above.

Additional examples of Creative Commons licenses may be found at <http://creativecommons.org/about/licenses/meet-the-licenses>.

1. Adapted from the University of Kansas,
http://www.copyright.ku.edu/manuscript_contract_lang.shtml

Step 4: Fair Use Decisions

Introduction

Section 107 of the Copyright Act of 1976 covers the fair use of a copyrighted work, including use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.

Fair Use is determined by weighing four factors:

- **Purpose and character of use**
- **Nature of the copyrighted work**
- **Amount and substantiality of the portion used**
- **Effect on the market for the original work.**

This definition provides tremendous flexibility, but also leads to much uncertainty. To make fair use more predictable, representatives of both copyright holders and consumers have often met to develop guidelines that provide the sort of specificity that many find desirable.

The most well known of these negotiated guidelines is the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, often referred to as the "Classroom Guidelines". (See United States Copyright Office, *Reproduction of Copyrighted Works by Educators and Librarians*, Circular 21: <http://www.copyright.gov/circs/circ21.pdf>.) This circular also includes "Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes" (p. 23) and "CONTU Guidelines on Photocopying Under Interlibrary Loan Arrangements" (p. 18). Attempts to create formal guidelines for e-reserves and multimedia have failed to produce agreement.

Because the determination of fair use is highly circumstantial and depends on the facts of each intended use, it is impossible to set a blanket policy about what is or is not fair use. Instead, a policy should describe and explain all four factors described above in order to facilitate decision-making in specific circumstances. Many of the fair use decisions that are most critical are dealt with in Step 5: Reproduction and Distribution

Decisions.

However, a general policy about how aggressively fair use should be asserted on campus is an important aspect of institutional risk management. Thinking back to Step 1: Philosophical Decisions, you may want to employ guidelines that offer a narrow but defined scope for fair use or simply educate users about the fair use factors so that they may make responsible decisions that exploit the full latitude offered under the law. The following list of decisions will help your organization determine the parameters of a general fair use policy.

- **Will your institution adopt negotiated guidelines for fair use in specific situations?** If so, which guidelines will be adopted? Many fair use situations will not be covered by guidelines, so some assistance may be needed even when guidelines are adopted.

Even if guidelines are not adopted wholesale, many policies “cherry-pick” certain parameters from the guideline documents. If your institution decides to do this, consider:

- Will specific portion limits be suggested? For what formats?
 - How will these portion limits be determined?
 - Will repeated use of the same reproduced portion of a copyrighted work be permitted as fair use, or will subsequent uses require permission?
 - If repeated fair use is not sanctioned, what specific situations will be subjected to this rule? Note that it is impossible to apply a “no-repeat-use rule” to all fair use situations.
- **How much guidance will your institution offer employees as they make fair use determinations?** Some policies merely restate the four fair use factors, while others give extensive examples, explain important distinctions within each factor and discuss previous case law.
 - **Will you offer a fair use checklist?** There are two key reasons institutions provide a checklist. 1) It may provide documentation of a good faith effort to determine fair use, which protects a nonprofit educational institution and its employees from the highest levels of damages for infringement if the decision is subsequently found by a court to have been erroneous. 2) In many situations, such as e-reserves and course management systems, staff members without training in copyright law must quickly make fair use determinations for large quantities of content. A checklist provides a tool, albeit an imperfect

one, for guiding these determinations.

Notes of caution:

- A checklist can misrepresent the fair use analysis by treating it as a “scorecard” matter determined mechanically, rather than an equitable balancing intended to weigh all the relevant circumstances in relation to one another.
- The structure of a given checklist can favor or disfavor a finding of fair use.

Sample checklists:

Cornell University:

http://www.copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf

Columbia University:

<http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>

Copyright Clearance Center:

http://www.copyright.com/Services/copyrightoncampus/basics/fairuse_list.html

- **Will documentation of a fair use analysis – either a checklist or some other certification that the fair use factors have been considered – be required of faculty and staff when using content in specified ways?** Some institutional policies require faculty and/or staff to document fair use decisions they make; such documentation may reduce potential liability for infringement. Other policies advise faculty to consider the fair use factors and seek permission if they decide to use content that exceeds the defined limits of fair use.

Step 5: Reproduction and Distribution Decisions

a. Physical Reserves

Introduction

Section 109 of the Copyright Act outlines the “first-sale doctrine,” which allows the purchaser to transfer (*i.e.*, sell, lend or give away) a particular lawfully made copy of the copyrighted work without permission once it has been obtained. This means that the copyright holder's rights to control the lending or resale of a particular physical copy end once that copy is sold, as long as no additional copies are made.

For a discussion of the application of fair use for photocopies being placed on physical reserve, see Step 4: Fair Use Decisions.

Based on the “first-sale rule” in Section 109 of the Copyright Act, books and other lawfully acquired materials such as DVDs or journal issues may be placed on physical reserve. Some locally produced copies (*i.e.* some photocopies) may qualify as “lawfully-made” under the fair use provisions. For clarification, your policy might want to address these issues:

- **How will your institution implement fair use when making decisions about allowable copying for reserves? (For background, see Step 4: Fair Use Decisions.)**
- **Will faculty or the library staff make decisions about what will be considered fair use?**
- **Will you require that copies of a fair use checklist be kept on file?**
- **Will your institution impose limits on the portion of a whole that can be photocopied for physical reserve?**
- **Will your institution impose limits on the number of photocopies that can be used on physical reserves?**
- **When a request exceeds your institutional policy on fair use for**

these systems, will you simply refuse the request or seek to pay a fee and obtain permission? If your institution chooses to obtain permission, you should also consider:

- How will permission fees be funded? Will they come from the library budget or will they be passed through to academic departments?
- Will maximum fee limits be imposed? How will permission costs be controlled?
- Who will be responsible for obtaining permission?
- When quick permission from the Copyright Clearance Center is not available, how much effort and cost will be invested in seeking permission directly from a copyright holder?
- When a request must be refused, what alternatives will be suggested to the faculty member?
- Will the campus consider the Annual Campus License from the Copyright Clearance Center? Note that the Annual Campus License does not cover all publishers, so some transactional permissions may still be needed.

Step 5: Reproduction and Distribution Decisions

b. Electronic Reserves

Introduction

Because electronic reserves necessarily involve scanned copies of original works, the first sale doctrine does not apply in this context, as it does with physical reserves. Providing electronic reserves must be justified as fair use or require permission from the rights holder.

In addition to the following specific application of fair use, see general principles under Step 4: Fair Use Decisions.

When designing your electronic reserves policies, consider how you will address these issues:

- **Will your institution rely on an independent analysis of the four factors of fair use when making decisions about allowable copying for electronic reserves or will it base decisions on aspects of the Classroom Copying Guidelines?**
- **If your institution chooses an independent fair use analysis:**
 - **Will faculty or the library staff make the fair use decision? If this decision is left to the faculty, what types of guidance will be provided?**
 - **Will you require that copies of a fair use checklist be kept on file?**
- **If your institution chooses to apply the Classroom Copying Guidelines, then:**
 - **How much of an original work may be scanned for use in an electronic reserves system without seeking permission?**
The classroom copying guidelines provide for very small portions, usually well less than 10%. Some institutions have settled on the 10% limit. Other institutions have selected somewhat higher portion limits.

- **Will repeat use of a scan be permitted?** Will some lapse of time between uses be required, or will a single use without permission exhaust fair use so that all subsequent uses require permission? Note that the “rule of spontaneity” from the Classroom Copying Guidelines has been interpreted by some as requiring permission for subsequent uses.
- **How will access to an e-reserves system be restricted?** Most institutions choose to limit access to only those students who are registered for the specific course using the e-reserve in question. Some institutions allow campus-wide access, but the argument for fair use is severely weakened in that instance. An institution should never permit unrestricted access.
- **How will permissions for e-reserves be handled?**
 - Your institution may decide to seek permission for every use of electronic course content on a transaction-by-transaction basis, or elect to purchase an “Annual Campus License” from the Copyright Clearance Center. Note that the Annual Campus License does not cover all publishers, so some transactional permissions may still be needed.
 - A common approach is to set a specific definition of fair use and seek permission, on a transactional basis, only where that definition is exceeded. The level of risk in this option depends on the level of aggressiveness regarding fair use.

Step 5: Reproduction and Distribution Decisions

c. Course Packs

Introduction

Prior to 1991, it was not uncommon for print course pack anthologies to be compiled and distributed without the permission of copyright holders, based on fair use. Two court cases, however, *Basics Books Inc. v. Kinko's Graphics Corp.* and *Princeton University Press v. Michigan Document Services*, held that commercially produced course packs do require copyright permission.

For more on fair use, see [Step 4: Fair Use Decisions](#).

Here are issues to consider as you develop your institution's policy around Course Packs:

- **Will the creation of course packs be outsourced to a commercial vendor or created in-house?** Case law clearly establishes that commercially created course packs require permission for each selection. When created by a vendor, you will have to be guided by the vendor's policies.
- **If course packs are created in house, consider:**
 - Who will determine what permissions are needed, based on the fair use policy as well as recognition that some materials may be in the public domain?
 - How will permission fees be funded? Will they come from the library budget or will they be passed through to academic departments?
 - Will maximum fee limits be imposed? How will permission costs be controlled?
 - Who will be responsible for obtaining permission?

- When quick permission from the Copyright Clearance Center is not available, how much effort and cost will be invested in seeking permission directly from a copyright holder?
- Will the campus consider the Annual Campus License from the Copyright Clearance Center? Note that the Annual Campus License does not cover all publishers, so some transactional permissions may still be needed.

Step 5: Reproduction and Distribution Decisions

d. Course Management Systems

Introduction

When faculty members elect to upload textual material to a course management system (CMS), the analysis, based on fair use, is the same as discussed above under electronic reserves. For audio and visual materials, the TEACH Act, discussed below under Performance & Display Exceptions, provides specific authorization for some transmissions via a course management system.

Because of their distributed nature, course management systems present some unique practical challenges for university policy, quite apart from the fundamental legal analysis, that will be discussed below.

Because individual faculty members exercise administrative control over course management systems, your institution should consider the following issues:

- **Will separate policy documents or educational aids be provided to faculty and staff?**
- **How will policy be communicated?**
- **How will policy be enforced?** Some institutions audit a small part of the content in a CMS each year to gauge copyright compliance. Note that the decision to do this may raise concerns about staffing issues and faculty relations.
- Because restricted access greatly strengthens claims of fair use, and is required by the TEACH Act, it is important that “guest access” or similar options in a CMS be used only in very limited situations.
- **When use exceeds the policy of the institution, who will be responsible for seeking permission? How will permission fees be paid? (See discussion of permissions decisions in Step Four and Five).**

Step 5: Reproduction and Distribution Decisions

e. Web Pages

Web pages, unlike course management sites, are generally open to the world, so there not the same latitude for “educational use” that underlies fair use and the TEACH Act. Everything uploaded to a Web page must be analyzed under fair use and the Digital Millennium Copyright Act. For more information on the DMCA, see Step 7: ISP Safe Harbor & File Sharing.

Some factors regarding Web pages that your institution might want to consider in a copyright policy include:

- **The institution will be responsible for materials that are subject to take-down notices and for lawsuits alleging copyright infringement based on any material housed on the institutions servers. For considerations related to such challenges see Step 7: ISP Safe Harbor and Step 8: Legal Counsel.**
- **If permissions are required, who will seek them?**
- **Who will pay for permission when needed?**
- **Will someone at your institution be assigned to regularly review the campus web site to make sure people don't post infringing material, or will you wait for problems to be reported?**

Step 6: Performance & Display Decisions

a. Face-to-Face Teaching

- **How strictly will your institution interpret “face-to-face teaching activities” and “classroom or similar place devoted to instruction” in Section 110(1)?** Some institutions believe this provision restricts performances to regularly scheduled, credit-bearing classes. Others believe there is leeway to allow screenings without public performance rights when a student group with an interest related to the curriculum wants to show a film for members of the campus community with similar interests.
- **Will your institution purchase “blanket” licenses for public performances of musical compositions that are protected by copyright?** Copyright management associations that offer such licenses include ASCAP (<http://www.ascap.com/index.aspx>), BMI (<http://www.bmi.com/>) and SESAC (<http://www.sesac.com/>).
- **Will your institution purchase “blanket” licenses for films or will it let individual groups determine if they require public performance rights and obtain them on a case-by-case basis?**

Step 6: Performance & Display Decisions

b. Transmissions Under the TEACH Act

- **Will your institution take advantage of the provisions of the TEACH Act to permit transmissions of performances and displays over digital networks?**

If so:

- How will the required educational programs and notice to users be delivered?
- How much guidance will be given regarding the portions of works that are authorized for transmission under TEACH?
 - Should a policy decision regarding “reasonable and limited portions” of such works as films be made?
- What technologies will be used to meet the requirement of reasonable technological measures to prevent retention and further dissemination of the work in question? Does the institution feel that streaming (as opposed to allowing direct downloads) is such a reasonable technological measure? Will the institution develop or locate separate software or other technology to secure images to qualify for transmitted display under the TEACH Act?
- Will you incorporate fair use to permit transmissions that might exceed the boundaries of the TEACH Act?

If not:

- How will fair use be applied to transmitted performances and displays?
- How much of a work will be allowed for transmission using fair use?
- Will streaming of entire films for use by registered students in a specific class be permitted as a fair use? Are there situations when assigned film DVDs, like books, should be purchased by students?
- **Will your institution consider licensing alternatives for streamed video that are being developed?**

RESOURCES

A flow chart to evaluate digitization requests under the TEACH Act is

available at <http://library.duke.edu/blogs/scholcomm/wp-content/uploads/2007/12/copyright-review-flow-chart-v3x.pdf>

A “TEACH Act Toolkit” is available at <http://www.provost.ncsu.edu/copyright/toolkit/>

Step 6: Performance & Display Decisions

c. Recorded Classes & Events

- **If course lecture and other on-campus events are recorded for later distribution, will a standard release form be used?** Of whom will it be required? Will professors have the right to refuse having their class lectures recorded for podcast? For other purposes? Will notice to students be required before a class is recorded? Will a release or waiver be required?
- **When performances or displays of copyright content are included as part of a recorded event, what licenses will be required?** Do the public performance licenses for musical compositions permit live streaming over the web? Do they permit recorded streaming? If not, will other licenses (such as so-called “synchronization” licenses) be sought? For other content used during an event, will stricter Fair Use standards be applied than might be to lectures and performances that are not recorded for podcast? See [Step 4 Fair Use Decisions](#) for more information on this topic.
- **Under what conditions, if any, will your institution permit streamed music or video for use by students in specified courses?** Streamed music or video for use *only during face-to-face classroom instruction* is probably allowed under Section 110(1) and, therefore, poses little risk. Streamed portions of a film linked through a Course Management System for use by students *outside of class* may be justified by the TEACH Act. For more information see [Step 6 Transmissions Under the TEACH Act](#). Streaming of an *entire film*, even to an audience restricted to a specific class, is an aggressive approach to fair use.

Step 7: ISP Safe Harbor & File Sharing

Introduction

Section 512 of the Digital Millennium Copyright Act (DMCA) provides limited liability for university networks acting as Internet service providers (ISPs) for students and faculty, provided that certain requirements are met. It also has anti-circumvention provisions that prohibit the unauthorized circumvention of technological measures that control access to a copyright-protected work. Such technological measures may involve a password or encryption; breaking the password or encryption is prohibited, even if the purpose for which access is desired would itself be permitted.

In 2008, Congress passed the Higher Education Reauthorization Act, which includes a provision related to peer-to-peer file sharing. Institutions are required to disseminate an annual disclosure to students that (1) states that unauthorized distribution of copyrighted material, such as through peer-to-peer networks, may subject students to civil and criminal penalties, (2) describes the penalties for such violations, and (3) includes the institution's policies on peer-to-peer file sharing.

Consider the following questions in developing your policies related to digital use:

Internet Service Provision & File Sharing

- **How will your institution comply with DMCA and the Higher Education Reauthorization Act regarding file sharing and the institutional role in providing network access?** To be eligible for the DMCA "safe harbor," you must designate a DMCA Agent to receive notices of alleged infringement. Similarly, some level of policy and service is required by the Higher Education Reauthorization Act. Institutions often have policies in regard to identifying students associated with particular IP addresses when that identification is requested by content owners alleging infringement.
- **How will your institution respond to notices beyond the "takedown" notices for alleged infringement of content on your institution's servers?** Some institutions provide the names associated with specified IP addresses in response to notices regarding alleged

file sharing, while some require a subpoena. Will your institution deliver “pre-settlement letters” to the targeted students? How will your institution respond to allegations of illegal file sharing on the part of employees?

Anti-Circumvention

- **Will your institution take measures to prevent illegal circumvention of technological protection measures of digital content?** Will limits be imposed on the types of technology that can be used to create digital files (i.e. ripping software)?
- **How will your institution implement the exception to anti-circumvention rules that permit groups of faculty to circumvent technological protections to create film clip compilations for performance in a live classroom?** Who will be defined as “film or media studies professors”? Does a film library exist on campus that can meet the definition provided in the Federal Register?

RESOURCES

A presentation from EDUCAUSE on the Higher Education Reauthorization Act is available at

<http://www.educause.edu/Resources/P2PandtheHigherEducationReauth/163156>.

Step 8: Legal Counsel

Before publishing your policy, we strongly recommend you have your work reviewed by a lawyer experienced in copyright law – either in-house counsel if your institution has it or an outside expert. Copyright laws are complex and filled with nuance, so you may not fully understand the implications of all your policy decisions. An expert can help you avoid pitfalls and more accurately represent your positions.

If feasible, you may want to bring an expert into the process earlier, to serve as an advisor when questions arise.