

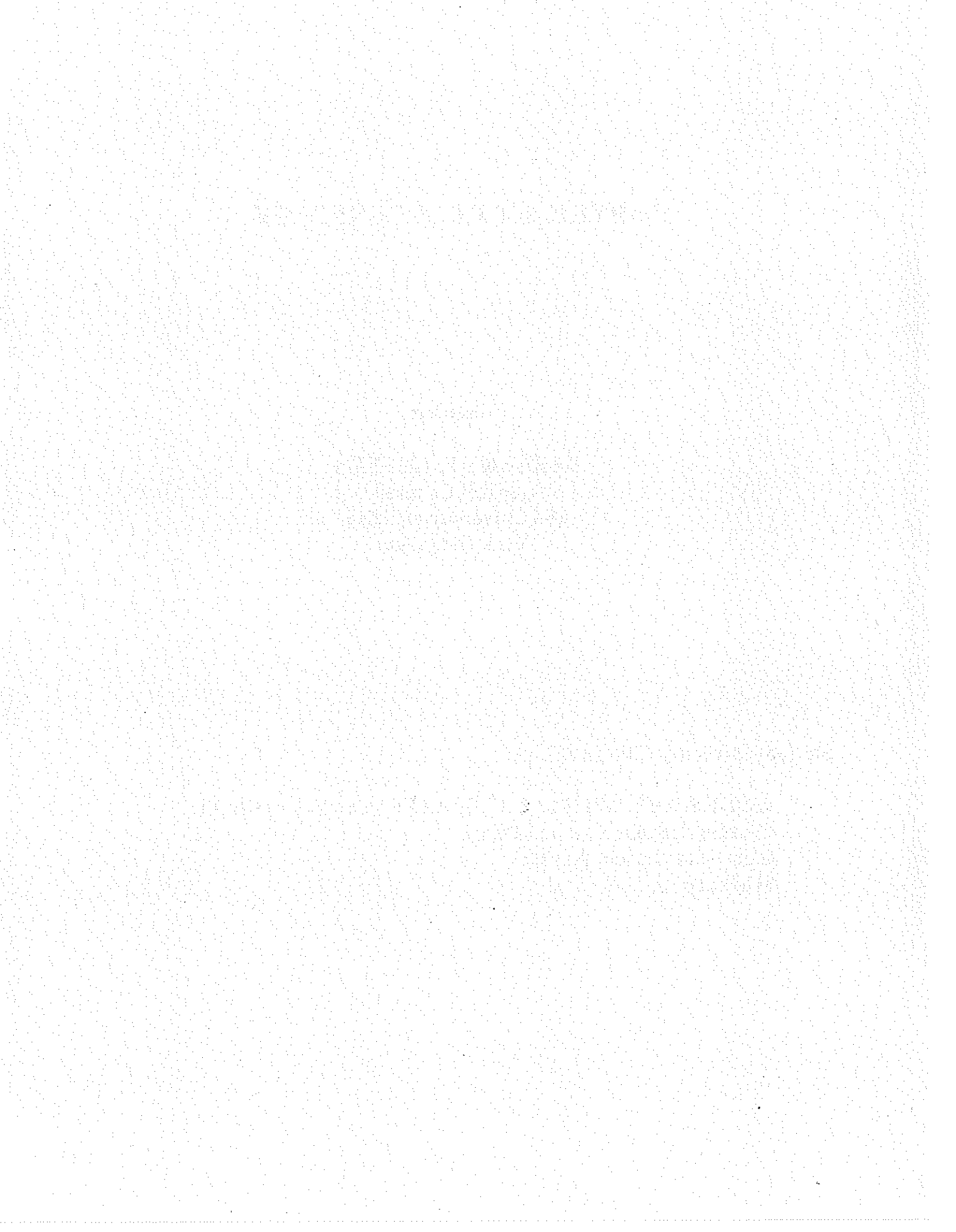
# **COPYRIGHT IN CYBERSPACE**

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## Copyright in Cyberspace

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### Overview

The U.S. Copyright Act, 17 U.S.C. §§101-810 (the Act), is Federal legislation enacted by Congress under its Constitutional grant of authority to protect the writings of authors. See U.S. Constitution, Article 1, Section 8: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Legal interpretations over time expanded due to the needs of society's understanding of the word "writings." The Act now applies to architectural design, software, the graphic arts (including maps, paintings, sculptures) motion pictures and sound recordings. See §106 of Act. The scope of the Federal legislation is broad, and it contains provisions precluding inconsistent state law; therefore the field is almost exclusively a Federal one. See §301 of the Act.

A copyright gives the owner the exclusive right to reproduce, distribute, perform, display or license his/her work. See §106 of the Act. The owner also receives the exclusive right to produce or license the production of derivatives of his/her work. Limited exceptions to this exclusivity exist for types of "fair use", such as book reviews or certain educational uses. See §107 of the Act. To be covered by copyright a work must be original and in a concrete "medium of expression." See §102 of the Act. Under current law, works are covered whether or not a copyright notice is attached and whether or not the work is registered.

The federal agency charged with administering the Act is the Copyright Office of the Library of Congress. See §701 of the Act. Its regulations are found in Parts 201-204 of Title 37 of the Code of Federal Regulations.



In 1989 the U.S. joined the Berne Convention for the Protection of Literary and Artistic Works. Various other international agreements and court interpretation in the U.S. and other countries also affect ownership rights.

Recent court rulings emphasize the need for significant clarification of the Act as it pertains to on-line dissemination of information. It's exciting but also frustrating to try to fashion useful guidance for a very grey area of the law.

### The Basics of Copyright Law for The University Administrator:

(Mainly On-line Concerns)

- I. It is written? If so, it's probably copyrighted
  - A. To obtain a copyright:
    1. Write it down - there, it's copyrighted!
    2. You may send it to the Library of Congress, but you don't have to (well, you did have to before May 1, 1989, but not now)
    3. You may put a copyright notice in it ("Copyright" or "Copr." or that c in a circle: © plus the year and your name, such as: © 1996 Jane Doe) whether you send it to the Library of Congress or not, but you don't have to
  - B. Your personal correspondence is copyrighted, INCLUDING E-MAIL.
    1. So is your web page
    2. So are the memos you write at work -  
But these may be subject to the "work made for hire" doctrine, meaning your employer is the copyright owner because writing memos is within the scope of your employment or if you were hired to do a specific writing (drawing, recording, etc.) (possible exception applies to independent contractors)
    3. There are exceptions to when a writing is copyrightable.
      - a. If it's really a short writing (just a few words) or drawing, it may not have copyright protection.
      - b. If it's only the exact same words (or lines if drawn) as something already done, than it's a copy and you don't own the copyright
      - c. If it's not written, or otherwise fixed in a tangible



form, it's not considered "published", which is required to come under Federal copyright protection.

- d. You can assign or otherwise transfer ownership, such as to a publisher

II. Can anyone else own the copyright of a writing I own?

- A. Well, it's not yours if all you own is the printed book, manuscript, painting, etc., because the copyright is owned by the author, artist, etc. (unless you "hired" the work)
- B. A co-writer can and does co-own the copyright, unless you've reached an agreement otherwise (put it in writing and everybody sign!)
- C. A minor can own a copyright sometimes; it depends on several factors, including your state's law on the rights of minors.
- D. You can assign or otherwise transfer ownership, such as to a publisher.

III. How long will copyright protection last?

- A. Until it is transferred or
- B. For a work created on or after 1/1/78, from the moment of its creation until the end of the author's life plus 50 years.
  - a. Or, if joint authors, 50 years after the death of the last one;
  - b. Or, for works made for hire, anonymous and pseudonymous, for the shorter of 75 years from publication or 100 years from creation.

IV. How can I find out how to register my copyright and answers to other questions?

Copyright Office

LM 455

Library of Congress

Washington, D.C. 20559-6000

(202) 707-3000

Worldwide Web URL: <http://lcweb.loc.gov/copyright>

(See also attached brochures and forms)

V. Internet Infringement - the rules are pretty much the same on-line and off-line, and you may be infringing:

- A. If you forward an e-mail you received, or even save it to archive;
- B. If you download an article and forward it to a newsgroup;





- C. If you quote something that is copyright protected (from a book, a magazine, or a newsgroup posting)
- D. But these potential infringements may be allowed
  - 1. If the on-line source gives permission (after being asked, or if **EXPLICITLY ALLOWED** in the text of the writing) or
  - 2. It's a **FAIR USE** (more about that later) or
  - 3. There's an **IMPLIED LICENSE** (more on that later, too)
- E. It's okay to copy facts, but maybe not necessarily that way they're presented.
  - 1. It's also okay to copy ideas, like a concept for a story you share on-line and then someone else writes the story before you do and claims copyright
  - 2. So, write yours before sharing.
- F. Copies of even a portion may be deemed an infringement:
  - 1. a few paragraphs;
  - 2. even if paraphrased, if close to the original (even a translation!);
  - 3. electronic, printed out, or handwritten-all may be infringements;
  - 4. personal, business, for no financial profit - makes no difference
- G. When is there an implied license?
  - 1. when a reasonable person would assume permission is given,
    - a. when you invite a response (letter to the editor, question on-line),
    - b. when you post a message on a bulletin board (on-line or off-line)
    - c. So, **EXPRESSLY DENY** permission if you don't want your message quoted, forwarded, copied, or used in any way.

VI. **FAIR USE** - It's a very large grey area of the law. Here's an excerpt (copying allowed under the Fair Use Doctrine!) from the opinion in Judge Whyte's decision of 9/22/95 in RTC & Bridge v. Erlich, Netcom & Klemesrud (N.D. Cal.):



A. Fair Use Defense

"Infringement" consists of violating the author's exclusive rights. 17 U.S.C. section 501. Although the author has the exclusive rights to reproduce, distribute, and display a copyrighted work under section 106, these rights are limited by the defense [12] of "fair use"

Notwithstanding the provisions of section 106A, the \*fair use of a copyrighted work,\* including such use by reproduction in copies. . .or by any other means specified in that section, \*for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, \*is not an infringement\* of copyright.

section 107 (emphasis added). The defense "permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164, 1170 (1994) (citation omitted)

Congress has set out four non-exclusive factors to be considered in determining the availability of the fair use defense:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.



17 U.S.C. section 107. The fair use doctrine calls for a case-by-case analysis. Campbell, 114 S.Ct. at 1170. All of the factors "are to be explored, and the results weighed together, in light of the purposes of copyright." Id. at 1170-71.

#### B. Fair Use Guidelines

Because "fair use" was a vague and ill-defined exemption, soon after Congress passed the Copyright Act in 1976, a group of publishers, authors and educators created guidelines they agreed were reasonable. These guidelines were made a part of the Congressional Record and have been relied on since in many court interpretations. You can obtain a copy from any college librarian. Similarly, in recent months a new group, the Consortium of College and University Media Centers, developed a new set of guidelines on the application of the fair use exemption in creating multimedia projects that include portions of copyrighted works, for their use in non commercial educational activities (attached). These guidelines caution against downloading material from the Internet without appropriate attention to copyright issues. In September, 1996, these guidelines were endorsed by every imaginable group, with hopes that courts will defer to them as they have the prior guidelines, though their widespread acceptance is by no means certain. In fact, in recent days, some of the original supporters have begun to waiver in their approval. On January 3, 1997, the American Library Association issued a statement that such guidelines were not needed "at this time."

Generally, fair use is usually found where:

1. You copy only a little part of the text (how much? who knows?!);
2. Your copy is for SYSTEMATIC NEWS REPORTING, POSITIVE OR NEGATIVE CRITICAL COMMENTARY (book review), or PARODY (hey, we like our humor);
3. You aren't copying an UNPUBLISHED work (private e-mail);
4. Your copy isn't made for COMMERCIAL USE (don't sell it, even if you plan to donate the proceeds to your favorite charity);
5. Your copy for non-commercial use doesn't deprive a legitimate commercial copier of its profits (don't give away what they have a right to sell);
6. You only forward that e-mail to one person (tricky, here-what if your recipient forwards it to 6000 readers-well, then s/he is



the one who has infringed);

7. You quoted a small portion and added a lot of your own original writing before forwarding to others.

VII. Infringement on the Internet - The University Administrator's Responsibility. The Copyright Act does not address on-line activity. Case law is sparse, but we are beginning to get a feel for what's allowed and what isn't.

A. Direct infringement and strict liability will be found when the college or university itself is the publisher.

1. Playboy Enterprises, Inc. v. Frena, 839 F.Supp. 1552 (M.D.Fl.1993). A small Bulletin Board Service (BBS) operator maintained a system containing files of erotic pictures. A subscriber uploaded on to the BBS system copyrighted photos from the plaintiff's magazine; they remained on the BBS for other subscribers to download. The court concluded that the BBS operator was liable not for the unauthorized "reproduction" of the copyrighted material, but for violating the plaintiff's right to "publicly distribute and display" copies of its work (at 1555-57).
2. Sega Enterprises Ltd. v. MAPHIA, 857 F.Supp. 679 Cal. 1994). The BBS solicited uploading of programs onto its system and received consideration for the right to download. Subscribers paid a fee to access and download the programs. The Court found that copies were made by unknown users when files were uploaded and downloaded, constituting infringement, and that the defendant BBS knew of, encouraged, directed and provided the facilities by which this infringement occurred and thereby the BBS was a contributing infringer even though it didn't know exactly when the files were uploaded or downloaded.
3. Administrative distribution of information. Assume that the same rules apply on-line as off-line. If permission to use copyrighted material is needed for a hard copy course pack, distance learning (by snail mail or e-mail),





etc., then get permission for the on-line distribution as well.

B. Contributory infringement: Service Provider Liability

Religious Technology Center v. Netcom On-Line Communication Services, Inc., No. C-95-20091 RMW (N.D. Cal.1995). In this case, the plaintiffs were holders of copyrights of the works of the founder of the Church of Scientology (L. Ron Hubbard). The BBS operator allowed a subscriber to upload portions of these copyrighted works and the Internet access provider did nothing to stop the BBS operator from posting the illegally uploaded works. The court addressed whether a BBS operator and its Internet access provider (Netcom) should be liable for copyright infringement committed by a subscriber of the BBS. The court analyzed supplying the means to infringe and looked at conduct by the BBS and Netcom to determine for each its (1) right and ability to control the conduct of subscribers, (2) whether it gained direct financial benefit from the infringing conduct and (3) the role of its employees or others it controlled in placing materials on the BBS and web servers provided by the system. The court also analyzed the role of each in participating in the infringement, assessing whether each acted (1) with knowledge of the infringement, inducing, causing or materially contributing to the infringement and (2) the applicability of the defense of fair use regarding what constitutes "knowledge" and the materiality or substantiality of participation. The court ultimately ruled against plaintiffs, who sought preliminary injunctive relief to keep each of the defendants from further infringing activity pending trial on the merits.

C. How to address complaints of infringement brought against your institution.

1. Have a written policy.
2. Distribute the policy and educate your campus about it.
3. Undertake prompt investigation of all complaints.
  - a. A mere unsupported allegation of infringement should not by itself warrant removal of the material.
  - b. Public institutions must consider First Amendment concerns (Is there an overriding free speech right? Test by asking about same conduct off-line - does it infringe the copyright or represent a First Amendment freedom?)
  - c. Err on the side of caution, absent some



- compelling reason to risk being charged with infringement.
- d. Try to balance a claim of infringement against any "fair use" defense asserted by the user (faculty, student).
  - e. For non-lawyers, if any doubt, check with your institution's attorney (get appropriate approval to use outside counsel if cost will be incurred).
4. Treat complaint about someone on your campus as misconduct subject to whatever policy would apply otherwise (student conduct code; faculty contract code; employee policy).

## CONCLUSION

Copyright on the Internet poses new legal issues, but they may be more of form than of substance. Old solutions may apply to new problems. Copyright protection is something we want when we are the author, on or off-line. We should all recognize and respect the same rights of others for which we expect recognition ourselves (that sounds vaguely familiar - is it a fair use paraphrase of the Golden Rule? Ah, yes, but I do believe that well known statement has been around so long that it's in the public domain. So, even if the fair use exception were not available, I may freely quote or paraphrase).



## ATTACHMENT

### FAIR USE GUIDELINES FOR EDUCATIONAL MULTIMEDIA (Selected Provisions)

#### TABLE OF CONTENTS (includes even omitted provisions)

1. Introduction
  2. Preparation of Educational Multimedia Projects Under These Guidelines
  3. Permitted Educational Uses for Multimedia Projects Under These Guidelines
  4. Limitations
  5. Examples of When Permission is Required
  6. Important Reminders
- Appendix A: Organizations Endorsing These Guidelines  
Appendix B: Organizations Participating in Development of These Guidelines

#### 1. INTRODUCTION

##### 1.1 Preamble

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

There is no simple test to determine what is fair use. Section 107 of the Copyright Act\*\*\* sets forth the four fair use factors which should be considered in each instance, based on particular facts of a given case, to determine whether a use is a "fair use": (1) the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

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

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

The participants who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is a dynamic phase, there may come a time when it is necessary to review the



guidelines. Nothing in these guidelines shall be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of educational multimedia projects.

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

\*These guidelines shall not be read to supersede other preexisting education fair use guidelines that deal with the Copyright Act of 1976.

\*\*See Section 106 of the Copyright Act.

\*\*\*The Copyright Act of 1976, as amended, is codified at 17 U.S.C. Sec. 101 et seq.

\*\*\*\*The names of the various organizations participating in this dialog appear at the end of these guidelines and clearly indicate the variety of interest groups involved, both from the standpoint of the users of copyrighted material and also from the standpoint of the copyright owners.

## **1.2 Background**

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

## **6. IMPORTANT REMINDERS**

### **6.1 Caution in Downloading Material from the Internet**

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

### **6.2 Attribution and Acknowledgment**

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

### **6.4 Future Uses Beyond Fair Use**





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

#### **6.5 Integrity of Copyrighted Works: Alterations**

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

#### **6.6 Reproduction or Decompilation of Copyrighted Computer Programs**

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

