

**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE
INTERNET**

HEARING ON PRESERVATION AND REUSE OF COPYRIGHTED WORKS

**SUPPLEMENTAL TESTIMONY OF JAMES G. NEAL
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I would like to take advantage of the opportunity to respond to questions raised at the April 2 hearing and to amplify on the statements included in my written testimony. This supplemental testimony has been endorsed by the Library Copyright Alliance, which consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries.

I. Collective Licensing

Ranking Member Nadler asked for the panel’s views on collective licensing. Collective licensing does have the potential to reduce transaction costs when a large number of works are licensed to a large number of users, thereby benefiting both rights holders and users. However, the track record of collective rights’ organizations (CROs) reveals that they often fail to live up to that potential. Although there are a wide variety of CROs operating under divergent legal frameworks, many unfortunately share the characteristic of serving their own interests at the expense of artists and the public.

The CROs often are well-organized and highly profitable, and have succeeded in promoting themselves and the collective licensing model.¹ A recent law review article tells the other side of the story, providing balance to any policy discussion that addresses collective licensing and CROs.² Even experts who tout the benefits of collective licensing in the abstract often include the caveat that in practice these bodies require a “well-

¹ See, e.g., the many interventions of the International Federation of Reproduction Rights Organizations in national and international policymaking processes. Position Papers | IFRRO, <http://www.ifrro.org/content/position-papers> (last visited January 4, 2013).

² Jonathan Band and Brandon Butler, “Some Cautionary Tales About Collective Licensing,” 21 MICHIGAN STATE INTERNATIONAL LAW REVIEW 687 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036.

developed structure and culture of collective management.”³ The episodes recounted in the article reveal a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, CROs have often aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system. While properly regulated CROs in some circumstances may enhance efficiency and advance the interests of rights holders and users, the Subcommittee should be aware of CROs’ mixed history as it considers the appropriateness of CROs as a possible solution to copyright problems in general and the obstacles relating to preservation, orphan works, and mass digitization in particular.

I can offer two recent examples of the problematic behavior of CROs. First, the Copyright Clearance Center (CCC), a collecting society for publishers, has paid half of the litigation expenses of publishers in the Georgia State electronic reserves case. Many in the library world find it troubling that CCC is using the fees it has collected from academic libraries to sue an academic institution over the use of books written by academics.

Second, the Educational Rights Collective Canada (ERCC) has failed to distribute any royalties to authors. ERCC was formed in 1998 to collect royalties for educational copying of broadcast programs.⁴ The ERCC asked the Copyright Board of Canada (CBC) to put an end to its tariff, acknowledging that in its fifteen years of operation it has never distributed any money to rights holders and it is \$830,000 in debt. According to Professor

³ Johan Axhamn & Lucie Guibault, *Instituut Voor Informatierecht, Cross-border extended collective licensing: a solution to online dissemination of Europe’s cultural heritage?* viii (2011). *See also, id.* at 41 (“[ECL] presupposes the existence of a representative CMO with a sound culture of good governance and transparency”); Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J. L. & ARTS 1, 24 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818126 (noting that the unfamiliarity of ECLs may be a barrier to their adoption in the U.S.); Tarja Koskinen-Olsson, *Collective Management in Nordic Countries*, in *Collective Management of Copyright and Related Rights* 283, 306 (Daniel J. Gervais ed., 2010) (“[The system of ECLs in Nordic countries] presupposes that the ‘copyright market’ is well organized and disciplined.”). Experts have suggested that the United States has a copyright culture that would be less favorable to a broader role for CROs. *See, e.g.,* Daniel J. Gervais, *The Landscape of Collective Management Schemes*, 34 COLUM. J.L. & ARTS 423, 424 (2011) (explaining that “the fundamentally economic model under which [CROs] operate in the United States, and the worldview that informs it, are likely to limit” the role that CROs play in the copyright ecosystem in the U.S.).

⁴ Michael Geist, *Copyright Collectives Gone Mad: How the ERCC Spent Dollars to Earn Pennies* (Dec. 20 2013), <http://www.michaelgeist.ca/content/view/7036/125/>.

Michael Geist, “the debt was largely accumulated in trying to create the tariff in the first place.” Professor Geist concludes that “the ERCC was simply a bad idea in which millions was spent by both sides to decide on royalties worth a fraction of expense....”

The Subcommittee should avoid promoting the creation of similarly expensive licensing infrastructures that benefit intermediaries at the expense of users and rights-holders. This is particularly the case with respect to orphan works, where the CRO likely would distribute few of the funds collected because it would be able to find only a very small percentage of the rights holders.

II. Contractual Restrictions on Copyright Exceptions

As I briefly mentioned at the end of my testimony, the Subcommittee should focus attention on a serious negative consequence of the proliferation of licensing: the use of contract terms to circumvent limitations in the Copyright Act. This is a serious problem confronting libraries, which license access to e-books and electronic databases of journals and other information resources.⁵ Publishers frequently include terms in their licenses that restrict libraries’ ability to exercise their rights under sections 107 (fair use), 108 (library exceptions), and 109(a) (first sale doctrine). This problem will only get worse as publishers distribute more of their materials solely in digital formats.

Courts have considered a variety of legal theories for refusing to enforce contractual restrictions on copyright exceptions in the mass-market license context. These include questioning whether a consumer manifested assent sufficient to form a contract, preemption under Section 301(a) of the Copyright Act, and constitutional preemption. No consensus has emerged on any of these theories, in part because of variations in the facts of these cases in terms of the nature of the contract, the nature of the relationship between licensor and licensee, and the nature of the work. Further, it is unclear how courts would apply these theories in the library context.

Congress and other legislatures frequently restrict the waiver by contract of protections provided by statute.⁶ Indeed, in the Copyright Act itself, Congress provided

⁵ Research libraries already spend two-thirds of their acquisition budgets on licenses to electronic resources.

⁶ For a list of examples of statutory limitations on contractual waivers of rights in various jurisdictions, see Jonathan Band and Deborah Goldman, *Restrictions on the Waiver of Rights*, <http://www.arl.org/focus-areas/copyright-ip/2871-restrictions-on-the-waiver-of-rights>.

that a termination of a grant of copyright “may be effected notwithstanding any agreement to the contrary.” 17 U.S.C. § 203(a)(5). Congress included this provision to protect authors from publishers who might take advantage of their bargaining strength to force authors to waive their termination rights.

As part of its review of the Copyright Act, the Subcommittee should assess the adverse impact of the potential replacement of the public law of copyright with the private law of contract, both on libraries and the public at large.⁷ I believe that Congress should adopt restrictions on the enforcement of contractual terms that attempt to limit exceptions in the Copyright Act such as first sale, fair use or interlibrary loan under Section 108.⁸

III. Preservation of Born-Digital Materials

I would like to expand on my testimony on the need for preserving born-digital materials, both those under license and those openly available over the Internet. Some believe that because digital materials do not suffer the same kind of physical wear and tear as printed paper copies, library preservation is less important than before and can be recalibrated or safely surrendered in license terms. This is not so. As a study just released at the University of British Columbia illustrates, digital materials are subject to risks of loss, corruption, and destruction just as profound, if not more so, as those that face older formats. The study found that 80 percent of scientific data from a random sample of studies were lost over two decades because of old email addresses and outdated storage devices.⁹ The researchers tried to collect data from 516 studies made between 1991 and 2011. They found that although complete data sets were available in the year of publication, the ability to access the data dropped by 17 percent per year. According to

Restrictions on “contracting out” are also included in the legislative proposals of the UK Intellectual Property Office, the Irish Copyright Review Committee, and the Australian Law Reform Commission.

⁷ The Register of Copyrights, Maria Pallante, identified this issue when she observed that “Congress may not want a copyright law where everything is licensed and nothing is owned.” Maria Pallante, *The Next Great Copyright Act*, at 18.

⁸ The suite of statutory instruments for amending the UK copyright law that will come into force on June 1, 2014, prohibit the “contracting out” of many exceptions in the research and education context.

⁹ Julie S., *80 Percent of Scientific Data Gone in 20 Years*, Headlines & Global News (Dec. 20, 2013), <http://www.hngn.com/articles/20083/20131220/80-percent-of-scientific-data-gone-in-20-years.htm>.

the lead investigator, Tim Vines, “much of these data are unique to a time and place, and is thus irreplaceable, and many other datasets are expensive to regenerate. The current system of leaving data with authors means that almost all of it is lost over time, unavailable for validation of the original results or to use for entirely new purposes.” Vine stated that scientists should upload their data to public archives before agreeing to publish their findings.

Research and academic libraries rely heavily upon commercially-produced digital content. This content is usually licensed with provisions that do not permit its preservation by libraries. As the number of born-digital publications increases significantly, and as they represent an increasing percentage of electronic publications that libraries license or acquire, preservation entities are unable to keep pace. These entities are only preserving less than a quarter of electronic journal titles. A 2011 study by the libraries of Columbia University and Cornell University found that two preservation entities—LOCKSS and Portico—preserve a very small percentage of the holdings of electronic journals of these libraries, confirming earlier estimates of very low preservation rates for born-digital journal content.¹⁰

These studies highlight the importance of libraries acting decisively to preserve digital materials.¹¹ Many publishers simply do not have the financial incentive, or the institutional stability, to preserve digital materials for decades, let alone centuries. Moreover, because of their commitment to intellectual freedom, libraries collectively seek to preserve as much as possible of our cultural heritage, not just materials with potential economic value. The copyright system must encourage this preservation through exceptions that allow preservation and “contractual override” provisions.

Likewise, libraries must be encouraged to preserve our cultural heritage expressed through websites. Many libraries have long recognized the importance of preserving websites, and have website archiving projects underway.¹² Website archiving by

¹⁰ <http://blogs.cornell.edu/dsps/2014/02/06/strategies-for-expanding-e-journal-preservation/>.

¹¹ See also Jennifer Howard, *Born Digital, Projects Need Attention to Survive*, Chronicle of Higher Education (Jan. 6, 2014), http://chronicle.com/article/Born-Digital-Projects-Need/143799/?cid=at&utm_source=at&utm_medium=en.

¹² See, e.g., Web Archive Collections – Web Archiving (Library of Congress), <http://www.loc.gov/webarchiving/collections.html>; The Columbia University Human Rights Web Archive, <http://hrwa.cul.columbia.edu>.

academic and research libraries is a transformative fair use.¹³ In countries such as the UK, where seeking permission and paying licenses for “high volume, low value uses” is already the norm, web archiving lags far behind what is available under fair use in the United States.¹⁴ Copyright and generic “terms of use” provisions should not interfere with this significant work.

A more recently identified digital preservation problem is “link rot” – where a link in a webpage, or a URL cited in a document, no longer functions. A recent study found that more than 50 percent of the links in U.S. Supreme Court opinions no longer resolve to working websites.¹⁵ In response, a coalition of more than thirty law libraries has created a tool to help ensure the continued functioning of URLs in academic journals and other sources.¹⁶ It is essential for our cultural, scientific, and legal future that libraries continue to rely on fair use to preserve linked references without waiting for a licensing regime or a special exception.

IV. The Cost of Preservation

Vice Chairman Marino asked for creative solutions to the significant problem of funding preservation efforts. In addition to the public/private partnerships I mentioned, research libraries have formed consortia such as HathiTrust and the Digital Preservation Network to avoid needless duplication and to achieve economies of scale. These cooperative efforts reduce the overall cost of preservation.

¹³ Association of Research Libraries, et al., CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 26 (2012) available at <http://www.arl.org/fairuse>; Jonathan Band, A NEW DAY FOR WEBSITE ARCHIVING 2.0, <http://www.arl.org/storage/documents/publications/band-new-day-for-archiving-2.0-23feb12.pdf>.

¹⁴ Mark Ballard, *UK prepares to launch internet archive without internet access*, COMPUTER WEEKLY (Dec. 11, 2013), <http://www.computerweekly.com/news/2240210795/UK-prepares-to-launch-internet-archive-without-internet-access> (“The archive was held up by a decade of negotiations between publishers and the [British Library](#), meaning that regulations permitting the library to perform its first archive copy of every UK website were not passed until April this year, more than 20 years since the World Wide Web took off and 10 years since Parliament passed a law making it possible.”).

¹⁵ Jonathan Zittrain et al., *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations*, (October 2013), Harvard Public Law Working Paper No. 13-42, available at <http://ssrn.com/abstract=2329161>.

¹⁶ See Perma.cc, <http://perma.cc> (last visited Dec. 27, 2013).

Further, it is important to recognize that Google has spent hundred of millions of dollars digitizing books in the course of developing Google Book Search.¹⁷ These scans are an important part of the HathiTrust Digital Library. My colleague Paul Courant at the University of Michigan estimated that at the pace Michigan was digitizing its collection of books before its partnership with Google, it would have taken Michigan 1,000 years to complete the task. But with Google's assistance, this task is already largely completed. However, there are millions of other items in our libraries, archives and special collections that Google is not digitizing, and libraries need to find alternative funding sources for the preservation of these important materials.

V. Community Fair Use Best Practices

As Mr. Donaldson and I mentioned, the development of fair use best practices has been a very productive and useful tool for a number of communities working with copyrighted works. For example, "The Code of Best Practices in Fair Use for Academic and Research Libraries" provides a clear statement of fair and reasonable approaches to fair use developed by and for librarians who support academic inquiry and higher education. A copy of the Code is attached.

¹⁷ Contrary to Jan Constantine's statement at the hearing, there is no evidence that Google is earning millions of dollars from its investment in Google Book Search.



CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

JANUARY 2012

CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

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INTRODUCTION

The mission of academic and research librarians is to enable teaching, learning, and research.¹ Along with serving current faculty, researchers, and students (especially graduate students), these librarians also serve the general public, to whom academic and research libraries are often open. Finally, academic and research librarians are committed to faculty, researchers, and students of the future, who depend on the responsible collection, curation, and preservation of materials over time.

Copyright law affects the work of academic and research librarians pervasively and in complex ways, because the great bulk of these librarians' work deals with accessing, storing, exhibiting, or providing access to copyrighted material. The rights of copyright holders create incentives for the publication of important work that forms the core of library collections, while at the same time constraining academic and research librarians in the exercise of their mission. Similarly, limitations on and exceptions to copyright rights enable academic and research librarians to use copyrighted materials in important ways, but impose limits and responsibilities of their own.

In addition to specific exceptions for libraries and educators, academic and research librarians use the important general exemption of fair use to accomplish their mission. Fair use is the right to use copyrighted material without permission or payment under some circumstances, especially when the cultural or social benefits of the use are predominant. It is a general right that applies even—and especially—in situations where the law provides no specific statutory authorization for the use in question. Consequently, the fair use doctrine is described only generally in the law, and it is not tailored to the mission of any particular community. Ultimately, determining whether any use is likely to be considered “fair” requires a thoughtful evaluation of the facts, the law, and the norms of the relevant community.

1. This code was developed by and for academic and research librarians. While some of the ideas and principles in the code may be helpful to librarians in other contexts, any reference to “librarians” in this document refers to academic and research librarians, not to all librarians.

HOW THIS DOCUMENT WAS CREATED

The first step in creating this code was to conduct an in-depth survey, using long-form interviews, with 65 librarians at a diverse array of academic and research institutions in the United States, from Ivy League colleges to rural satellite campuses. The results demonstrated clearly both that fair use is an essential component of copyright exemptions for librarians, and also that they lacked a clear sense of what they and their peers might agree to as appropriate employment of fair use in recurrent situations.² As a result, librarians frequently did not use their fair use rights when they could have, and they overestimated the level of conflict between the strictures of copyright law on the one hand and their respective libraries' missions on the other. The cost of this uncertainty was amplified because many research and academic librarians routinely act as the de facto arbiters of copyright practice for their institutions and the constituencies they serve.

Working librarians with many different institutional roles at a wide range of institutions then gathered together in a series of small group discussions about fair use held in five cities between October 2010 and August 2011. In each conversation, participants were asked to discuss a series of brief hypothetical examples designed to raise questions about fair use and its limitations. Conversations revealed that members of this community understand that their mission depends on copyright, both the protection it provides for those who have already produced knowledge and the important rights it creates for those who need access to copyrighted material to enable learning, scholarship, and creativity. Their understanding of fair use, represented below, is grounded in this understanding of copyright balance. To ensure that the applications of fair use represented by the principles fall within the bounds of reason, an outside panel of distinguished copyright experts reviewed this document. However, this document is not intended and should not be construed as representing their legal advice. With this information in hand, each institution can undertake its own legal and risk analysis in light of its own specific facts and circumstances.

2. See Association of Research Libraries et al., *Fair Use Challenges in Academic and Research Libraries* (2010), http://www.arl.org/bm-doc/arl_csm_fairusereport.pdf.

WHAT THIS IS

This is a code of best practices in fair use devised specifically by and for the academic and research library community. It enhances the ability of librarians to rely on fair use by documenting the considered views of the library community about best practices in fair use, drawn from the actual practices and experience of the library community itself.

It identifies eight situations that represent the library community's current consensus about acceptable practices for the fair use of copyrighted materials and describes a carefully derived consensus within the library community about how those rights should apply in certain recurrent situations. These are the issues around which a clear consensus emerged over more than a year of discussions. The groups also talked about other issues; on some, there seemed not to be a consensus, and group members found others to be less urgent. The community may wish to revisit this process in the future to deliberate on emerging and evolving issues and uses.

WHAT THIS ISN'T

This code of best practices was not negotiated with rights holders. This code is the work of the academic and research library community and arises from that community's values and mission. It presents a clear and conscientious articulation of the values of that community, not a compromise between those values and the competing interests of other parties.

This code of best practices does not exhaust the application of fair use rights when copyrighted material is concerned. The objective of this code is not to constrain librarians' reliance on fair use, but to enable it. The principle of fair use can and does operate in a wide diversity of contexts, along with the ones specifically addressed below.

Although the code incorporates consensus-based community standards relating to commonly experienced conflicts between library practice and perceived copyright constraints, it is not a comprehensive or exhaustive guide to all possible applications of fair use in and around libraries—even in the recurrent situations detailed below. Institutions may be able to make persuasive arguments for fair use that go beyond the shared norms expressed here. Likewise, institutions engaging in their own “risk management” may choose policies that do not take full advantage of these consensus principles.

This dynamic legal doctrine will no doubt continue to evolve along with educational, scholarly, and artistic practice. One area in which further developments certainly can be expected is that of so-called “orphan works”—texts (or images or music) that can no longer be reliably traced to a known copyright owner, and therefore cannot be licensed for use. Although the principles below address this problem obliquely, they do not by any means exhaust the range of possible solutions—including those based in the application of fair use.

This code is not a guide to using material that people give the public permission to use, such as works covered by Creative Commons licenses. While fair use applies to such works, anyone may use those works in ways their owners authorize in addition to ways permitted by the fair use doctrine. Similarly, it is not a guide to the use of works that are in the public domain; those works may be used without any copyright limitation whatever, including uses that otherwise would far exceed the bounds of fair use.

Copyright law is “territorial,” which means that fair use applies to uses of copyrighted material in the United States, regardless of where in the world it originates. Hence, the principles in this code also apply regardless of a work’s origin, so long as the use takes place in the U.S. By the same token, these principles will not necessarily apply to uses outside the U.S., where fair use may have little or no legal status.³

Under some circumstances, fair use rights can be overridden by contractual restrictions. Thus, these principles may not apply if a library has agreed, in a license agreement, donor agreement, or other contract, to forgo the exercise of fair use with respect to some set of collection materials. If fair use rights are to be preserved, library personnel in charge of acquisitions and procurement should be vigilant as they negotiate and enter into contracts related to collections materials.

3. At this time, the issue of “choice of laws” in copyright disputes that cross national boundaries is unclear, whether or not those disputes involve the Internet. See Peter K. Yu, “Conflicts of Laws Issues in International Copyright Cases” (2001), <http://www.peteryu.com/gigalaw0401.pdf>.

COPYRIGHT AND FAIR USE

The goal of copyright law and policy is to foster the progress of science, the creation of culture, and the dissemination of ideas. Its best-known feature is protection of owners' rights. But copying, quoting, and generally re-using existing cultural and scientific material can be a critically important part of generating new research and culture and promoting intellectual exchange. In fact, the value of these practices is so well established that it is written into the social bargain at the heart of copyright law. We as a society give limited property rights to creators to encourage them to produce science and culture; at the same time, we guarantee that all works eventually will become part of the public domain and, in the meantime, we give other creators and speakers the opportunity to use copyrighted material without permission or payment in some circumstances. Without the second half of the bargain, we could all lose important new work and impoverish public discourse.

Fair use is widely and vigorously employed in many professional communities. For example, historians regularly quote both other historians' writings and primary sources; filmmakers and visual artists use, reinterpret, and critique copyrighted material; scholars illustrate cultural commentary with textual, visual, and musical examples. Fair use is also healthy and vigorous in broadcast news and other commercial media, where references to popular films, classic TV programs, archival images, and popular songs are frequently unlicensed. Trade and academic publishers regularly rely on fair use to justify the incorporation of third-party material into books they produce. Librarians likewise need fair use to execute their mission on a daily basis.

No group of institutions, no matter how important their cultural function, is immune from the operation of copyright law. Academic and research libraries are not-for-profit institutions, but they still must build collections by buying books and subscribing to journals and databases. Likewise, they get no "free pass" simply because their function is to support education. That said, the United States Copyright Act is particularly solicitous of educational and academic uses in many circumstances. That solicitude is reflected in several structural features that benefit users of copyrighted material in and around the academic or research library. These include the specific exceptions contained in Sections 108, 110, and 121 of the Copyright Act and the special protections granted by Section 504(c)(2). Even when, as is often the case, specific exceptions don't literally reach the proposed library

activities, the policies behind them may help to guide the interpretation of fair use as it applies to schools and libraries.⁴

As legislative history makes clear, these provisions were designed to complement rather than to supplant fair use, which has been part of copyright law for 170 years and remains the most fundamental of such structural features.⁵ Section 107 of the Act, which codified the fair use doctrine in 1976, specifically includes references in its preamble to a number of activities associated with the academic and research library mission, including “criticism, comment..., teaching..., scholarship, [and] research.”

Fair use is a user’s right. In fact, the Supreme Court has pointed out that it is fair use that keeps copyright from violating the First Amendment; without fair use and related exceptions, copyright would create an unconstitutional constraint on free expression. Creators, scholars, and other users face new challenges as copyright protects more works for longer periods, with increasingly draconian punishments and narrow, outdated specific exceptions. As a result, fair use is more important today than ever before.

Because copyright law does not specify exactly how to apply fair use, the fair use doctrine has a useful flexibility that allows the law to adjust to evolving circumstances and works to the advantage of society as a whole. Needs and practices differ with the field, with technology, and with time. Rather than following a prescriptive formula, lawyers and judges decide whether a particular use of copyrighted material is “fair” according to an “equitable rule of reason.” In effect, this amounts to taking all the facts and circumstances into account to decide whether an unlicensed use of copyrighted material generates social or cultural benefits that are greater than the costs it imposes on the copyright owner.

4. See Jonathan Band, “The Gravitational Pull of Specific Exceptions on Fair Use” (Sept. 1, 2011), unpublished manuscript, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966593.

5. See, e.g., 17 U.S.C. § 108(f)(4), (“[Nothing in this section] in any way affects the right of fair use as provided by section 107...”); U.S. Copyright Office, *The Section 108 Study Group Report 22* (2008), (“[S]ection 108 was not intended to affect fair use. Certain preservation activities fall within the scope of fair use, regardless of whether they would be permitted by section 108”); memorandum from Randolph D. Moss, acting assistant attorney general to the general counsel, Department of Commerce (April 30, 1999), (“Section 108 of the 1976 Act does not narrow the protection for fair use provided by the common law doctrine codified in section 107”), <http://www.justice.gov/olc/pincusfinal430.htm>.

This flexibility in the law can lead to uncertainty among librarians (as in other practice communities) about whether specific uses are fair. However, fair use is flexible, not unreliable. Like any exercise of expressive freedom, taking advantage of fair use in education and libraries depends on the application of general principles to specific situations. One way of easing this application is to document the considered attitudes and best practices of the library community as it works to apply the rules.

In weighing the balance at the heart of fair use analysis, judges generally refer to four types of considerations mentioned in Section 107 of the Copyright Act: the nature of the use, the nature of the work used, the extent of the use, and its economic effect (the so-called “four factors”). Over the years, attempts have been made to promulgate so-called “fair use guidelines,” with the goal of reducing uncertainty about the application of this formula—even at a cost to flexibility. Unfortunately, the processes by which most guidelines have been developed are suspect, and the results are almost universally over-restrictive.⁶ In fact, “bright line” tests and even “rules of thumb” are simply not appropriate to fair use analysis, which requires case-by-case determinations made through reasoning about how and why a new use repurposes or recontextualizes existing material.

How judges have interpreted fair use affects the community’s ability to employ fair use. There are very few cases specifically involving libraries.⁷ However, we know that

6. See Kenneth Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” 62 *Ohio State Law Journal* 602 (2001).

7. At the time of this writing, there are no judicial opinions describing in any detail the scope of fair use in a nonprofit educational context. Courts have examined unlicensed copying in for-profit copy shops, but those cases have explicitly distinguished commercial enterprises from nonprofit ones (see, e.g., *Princeton University Press v. Michigan Document Svces*, 99 F.3d 1381, 1389 (6th Cir. 1996), (“We need not decide [the status of nonprofit uses], however, for the fact is that the copying complained of here was performed on a profit-making basis by a commercial enterprise”). Several cases involving fair use were filed against universities in the last year or two. Of these, one has been dismissed without a clear finding on the issue of fair use (*AIME et al. v. Regents of Univ. of Cal. et al.*, No. CV 10-9378 (C.D. Cal. Oct. 10, 2011)). (AIME subsequently filed an amended complaint, which is pending at the time of this writing, while two others await decision.) See *Cambridge U.P. v. Patton*, No. 08-1425 (N.D. Ga. filed April 15, 2008); *Authors’ Guild, Inc. v. HathiTrust*, No. 11-6351 (S.D.N.Y. filed Sept. 12, 2011). The path of litigation is typically long and unpredictable, and even a final decision in one case may not provide clear guidance to users in other judicial districts or whose uses may differ in important ways.

for any particular field of activity, lawyers and judges consider expectations and practice in assessing what is “fair” within that field. Moreover, the history of fair use litigation of all kinds shows that judges return again and again to two key analytical questions:⁸

- Did the use “transform” the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?
- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

These two questions effectively collapse the “four factors.” The first addresses the first two factors, and the second rephrases the third factor. Both key questions touch on the so-called “fourth factor,” whether the use will cause excessive economic harm to the copyright owner. If the answers to these two questions are “yes,” a court is likely to find a use fair—even if the work is used in its entirety. Because that is true, the risk of a challenge to such a use is dramatically reduced.

Fair use ensures that copyright owners do not have a monopoly over transformative uses of their works. The converse is also true. When a use merely supplants a copyright owner’s core market rather than having a transformative purpose, it is unlikely to be fair. Thus, for example, a library clearly cannot acquire current books for its collection simply by photocopying or scanning published editions.

In cases decided since the early 1990s, the courts have made it clear that in order for a use to be considered “transformative,” it need not be one that modifies or literally revises copyrighted material. In fact, uses that repurpose or recontextualize copyrighted content in order to present it to a new audience for a new purpose can qualify as well. The courts also have taught that the more coherent an account the

8. See Neil Netanel, “Making Sense of Fair Use,” 15 *Lewis & Clark L. Rev.* 715, 768 (2011), surveying data about fair use cases decided between 1978 and 2011 and concluding that “the key question” is whether the use is transformative, and, if so, whether the amount taken is appropriate to the transformative purpose.

user can give of how and why the material was borrowed, the more likely the use is to be considered transformative.⁹

A final consideration influencing judges' decisions historically has been whether the user acted reasonably and in good faith in light of standards of accepted practice in his or her particular field. Among the eight other communities of practice that established codes of best practices in fair use for themselves between 2005 and 2012, all have benefited from establishing a community understanding of how to employ their fair use rights. Documentary filmmakers, for example, changed business practice in their field; errors-and-omissions insurers, whose insurance is essential to distribution, now accept fair use claims routinely, as a direct result of the creation of such a code. Groups that followed in creating codes include K-12 teachers, open educational resources providers, dance archivists, film and communications scholars, and poets. No community has suffered a legal challenge for creating a code of best practices in fair use. Nor have members of any community with a code been sued successfully for actions taken within its scope.¹⁰

Exercising fair use is a right, not an obligation. There will always be situations in which those entitled to employ fair use may forgo use or obtain permission instead; people may, for instance, choose easy licensing or a continued low-friction business relationship over employing their fair use rights. Seeking selected permissions from known, reasonable, and responsive rights holders may be an appropriate risk management strategy for large-scale digitization or web archiving projects, for example, even when the fair use analysis seems favorable. But the choice to seek a license or ask permission should be an informed one.

9. Courts also have applied and will continue to apply the fair use doctrine to uses that do not fall neatly into the “transformative” rubric, but are nevertheless important aspects of users’ rights. Examples include the transient digital copies that are incidental to valid uses, as well as time- and space-shifting for personal uses.

10. Documentary filmmakers won a high-profile dispute with Yoko Ono and EMI records over a parodic use of John Lennon’s “Imagine.” Fair use experts collaborated with the filmmakers to vet the film, and ultimately prevailed in a precedent-setting order that held the filmmakers had made a fair use of the song. Ono and EMI dropped their suit in light of the court’s findings on fair use. See *Lennon v. Premise Media*, 2008 U.S. Dist. LEXIS 42489 (S.D.N.Y. June 2, 2008).

Some librarians express concern that employing one's fair use rights in good faith may inadvertently make material available for potential misuse by others. But—just as they must now—all future users will have to engage in fair use analysis for themselves and in their own context. Libraries should of course be prepared to assist students and others who have questions about how to exercise their own rights with regard to library materials, but the ultimate responsibility will lie with the user, not the library. But—just as they do now—libraries that employ fair use responsibly to make material available to students, to researchers, or even to public view are unlikely to have legal liability for uninvited and inappropriate downstream uses.

Perfect safety and absolute certainty are extremely rare in copyright law, as in many areas of law, and of life. Rather than sit idle until risk is reduced to zero, institutions often employ “risk management,” a healthy approach to policy making that seeks to enable important projects to go forward despite inevitable uncertainty by identifying possible risks (legal and otherwise) and reducing them to acceptable levels. This code of best practices should be of great assistance in arriving at rational risk management strategies, as it provides a more accurate picture of the risk (or lack thereof) associated with exercising legitimate fair use rights. Indeed, simply by articulating their consensus on this subject, academic and research librarians have already lowered the risk associated with these activities.¹¹

11. The law bars statutory damages for unauthorized reproduction of copyrighted works where employees of nonprofit educational institutions or libraries have “reasonable grounds for belief” that their use was fair, even if the court ultimately decides the use was not fair. See 17 U.S.C. 504(c)(2).

CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

GENERAL POINTS ABOUT THE PRINCIPLES

This code of best practices identifies eight sets of common current practices in the use of copyrighted materials in and around academic and research libraries, to which the doctrine of fair use can be applied. It articulates **principles** describing generally how and why fair use applies to each such practice or situation. Each principle is accompanied by a list of considerations that the library community believes should inform or qualify it: **limitations** that should be observed to assure that the case for fair use is strong, and **enhancements** that could further strengthen that case. Please note that enhancements represent what the community believes are additional practices that demonstrate “above and beyond” efforts to add value to existing material or accommodate the interests of other stakeholders; such measures are laudable when they will not cause undue hardship but are not prerequisite to support a strong fair use rationale.

Some of the limitations and suggested enhancements involve the use of technical protection measures (TPMs) to help ensure that material intended for a particular institutional audience is confined to that audience. In some circumstances, the use of TPMs may be a meaningful demonstration of “good faith” on the part of the library in question. However, TPMs come in many varieties; for a library’s purposes, less obtrusive ones (password protection or watermarking) may be as or more appropriate than, for example, encryption.

Because, in the opinion of some courts, fair use is sensitive to whether a use is undertaken in good faith, some of the principles include limitations or enhancements that address broader ethical concerns. While issues such as respecting privacy and including proper attribution may seem unrelated to copyright at first, they show good faith and serve the same overarching goals of responsible stewardship of library collections. These values are central to academic and research libraries, of course, but it is worth noting that by doing what comes naturally, libraries are also strengthening their fair use case.

In addition, the code refers at several points to providing copyright holders an opportunity to register concerns or complaints about a library's decision to employ fair use. The library community believes that engaging in such a process should not necessarily lead to automatic removal of content. Rather, it would trigger a conversation between the library and the rights holder, which would inform the institution's decision about whether to remove or maintain the material. Welcoming this interaction with a rights holder shows the library's good faith and provides an opportunity to develop voluntary arrangements that benefit all parties.

The fair use doctrine draws no blanket distinctions among different media or among different formats. Librarians felt strongly that except in narrow, specific instances, all kinds of content (e.g., text, image, audiovisual, music) should be subject to the same principles. Likewise, they did not distinguish generally between uses in various media. So, except as otherwise indicated, a digital copy should be considered on the same footing as an analog one for purposes of fair use.

The situations below concern the fair use of copyrighted materials, not the way the user acquires the copy from which she works. When a user's copy was obtained illegally or in bad faith, that fact may negatively affect fair use analysis; similarly, special contractual restrictions (such as conditions on the use of donated material) may circumscribe fair use. The principles therefore assume the library or user has obtained a copy in good faith and that it is not subject to conflicting license or contract restrictions.

While the principles address separate situations, in practice these areas are sure to overlap from time to time; some special collections will need digitizing for both scholarly access and preservation, for example, implicating both the third and fourth principles. Libraries should feel free to consult multiple principles to determine the best fair use rationale to apply to their specific situations.

ONE: SUPPORTING TEACHING AND LEARNING WITH ACCESS TO LIBRARY MATERIALS VIA DIGITAL TECHNOLOGIES

DESCRIPTION:

Academic and research libraries have a long, and largely noncontroversial, history of supporting classroom instruction by providing students with access to reading materials, especially via physical on-site reserves. Teachers, in turn, have depended on libraries to provide this important service. Today, students and teachers alike strongly prefer electronic equivalents (e-reserves for text, streaming for audio and video) to the old-media approaches to course support. Section 110(2) of the Copyright Act provides specific protection for some streaming and other uses, but it does not cover the entire variety of digital uses that are becoming increasingly important to twenty-first-century instruction. Over time, a set of practices has grown up around the related but distinct practice of providing students with physical “course packs,” which typically occurs outside the library setting. The following principle is not intended to address that activity, but rather to focus on emerging digital uses in the library context. Fair use will play an important role in making these uses possible.

There are multiple bases on which these library uses can be considered fair ones. These modes of course support occur in a nonprofit educational environment, can be persuasively analogized to activities specifically authorized by Congress in Section 110 of the Copyright Act, may be supported by a “place-shifting” argument,¹² and are susceptible to a compelling transformativeness rationale. Most of the information objects made available to students, in whatever format, are not originally intended for educational use. For example, works intended for consumption as popular entertainment present a case for transformative repurposing when an instructor uses them (or excerpts from them) as the objects of commentary and criticism, or for purposes of illustration. Amounts of material used for online course support should be tailored to the educational purpose, though it will not infrequently be the case that access to the entire work (e.g., an illustrative song in a class on the history of popular music) will be necessary to fulfill the instructor’s pedagogical purpose. It is also reasonable for works to be posted repeatedly from semester to semester to the

12. Space-shifting is a theory of fair use often employed in the context of new technological uses of media. See, e.g., David Hansen, “Why Can’t I Digitize My (Institution’s) Library?,” *Scholarly Communications @ Duke*, July 27, 2011, <http://blogs.library.duke.edu/scholcomm/2011/07/27/why-can-t-i-digitize-my-institution-s-library>.

extent that they are the most appropriate, relevant, and still timely materials for the course.

PRINCIPLE:

It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks.

LIMITATIONS:

- Closer scrutiny should be applied to uses of content created and marketed primarily for use in courses such as the one at issue (e.g., a textbook, workbook, or anthology designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use.
- The availability of materials should be coextensive with the duration of the course or other time-limited use (e.g., a research project) for which they have been made available at an instructor's direction.
- Only eligible students and other qualified persons (e.g., professors' graduate assistants) should have access to materials.
- Materials should be made available only when, and only to the extent that, there is a clear articulable nexus between the instructor's pedagogical purpose and the kind and amount of content involved.
- Libraries should provide instructors with useful information about the nature and the scope of fair use, in order to help them make informed requests.
- When appropriate, the number of students with simultaneous access to online materials may be limited.
- Students should also be given information about their rights and responsibilities regarding their own use of course materials.
- Full attribution, in a form satisfactory to scholars in the field, should be provided for each work included or excerpted.

ENHANCEMENTS:

- The case for fair use is enhanced when libraries prompt instructors, who are most likely to understand the educational purpose and transformative nature of the use, to indicate briefly in writing why particular material is requested, and why the amount requested is appropriate to that pedagogical purpose. An instructor's justification can be expressed via standardized forms that provide a balanced menu of common or recurring fair use rationales.
- In order to assure the continuing relevance of those materials to course content, libraries should require instructors of recurrently offered courses to review posted materials and make updates as appropriate.

TWO: USING SELECTIONS FROM COLLECTION MATERIALS TO PUBLICIZE A LIBRARY'S ACTIVITIES, OR TO CREATE PHYSICAL AND VIRTUAL EXHIBITIONS

DESCRIPTION:

Academic and research libraries have always sought publicity of a certain kind—in order to introduce themselves, their services, and their valuable holdings to potential students, scholars, and others, as well as to attract donors of materials and to assure administrators and funders of their fidelity to mission. Just as libraries have chosen in the past to display their holdings through on-site exhibitions, or through in-house publications ranging from simple newsletters to glossy magazines, they now use the Internet as a tool for making themselves known. Library websites have become extremely important modes of access for library patrons, and most temporary physical exhibitions now have permanent virtual counterparts. While the lawfulness of past practices has been widely (and correctly) assumed, the use of new technology adds a new dimension to the issue. The wider audience that online exhibits reach, and the possibility of downstream misuse, could lead librarians to avoid online uses, but in fact these uses can be just as fair as their physical counterparts.

Section 109(c) of the Copyright Act provides a safe harbor for certain on-site exhibits. However, exhibition and related illustrative uses, whether physical or virtual, can also be transformative. They highlight and publicize library collections and stimulate interest in the individual original works of which they are comprised. Exhibits place original works in a new context to convey information and illustrate

themes and ideas that can be quite different from those of the single work. Curation, in-line commentary, and juxtaposition add to the transformative nature of exhibits, displays, and other illustrative uses.

PRINCIPLE:

It is fair use for a library to use appropriate selections from collection materials to increase public awareness and engagement with these collections and to promote new scholarship drawing on them.

LIMITATIONS:

- Full attribution, in a form satisfactory to scholars in the field, should be provided for each work included or excerpted in an exhibit, to the extent it can be determined with reasonable effort.
- The amount of any particular work used and the format in which it is displayed should be appropriate to the illustrative purpose, i.e., tailored to support the goals of the exhibit or other illustrative project. The use of a work (other than a single image) in its entirety is likely to require a special level of justification. Similarly, larger-scale, high-resolution images should be displayed only when appropriate to the pedagogical or illustrative purpose of the exhibit.
- This principle does not apply to the sale of souvenirs and other nonprint merchandise in connection with an exhibit.

ENHANCEMENTS:

- For publications such as catalogs of exhibitions, the case for fair use will be stronger when the material is offered to the public without charge, or on a cost-recovery basis.
- Where library websites are concerned, fair use claims will be enhanced when libraries take technological steps, reasonable in light of both the nature of the material and of institutional capabilities, to discourage downloading.
- Fair use claims will be further enhanced when libraries provide copyright owners a simple tool for registering objections to use of copyrighted works, such as an e-mail address associated with a full-time employee.

- Fair use arguments will be enhanced when curation is overt and visible rather than implicit—for instance, when commentary is being provided on the illustrative objects, whether by means of express written or spoken commentary by critics or curators, through selection and juxtaposition of works in a larger context, or both. For example, when exhibited works and excerpts are viewable online in isolation from the larger exhibit or display, it may be helpful to use graphical cues or navigational elements to ensure that visitors who find the item via a deep link can perceive and easily move to the larger exhibit of which the item is a part.

THREE: DIGITIZING TO PRESERVE AT-RISK ITEMS

DESCRIPTION:

Preservation is a core function of academic and research libraries. It involves not only rescuing items from physical decay, but also coping with the rapid pace of change in media formats and reading technologies. Even when libraries retain the originals of preserved items, digital surrogates can spare the original items the wear and tear that access necessarily inflicts. Section 108 of the Copyright Act authorizes some preservation activities, but does not address some of today's most pressing needs: the preemptive preservation of physical materials that have not yet begun to deteriorate but are critically at risk of doing so, and the transfer to new formats of materials whose original formats (such as VHS magnetic tape) are not yet obsolete (as the term is narrowly defined in section 108(c)) but have become increasingly difficult for contemporary users to consult.

The primary purpose of preservation is indubitably beneficial and arguably strongly transformative: ensuring access to aspects of our cultural heritage for future generations, well past the limited term of copyright protection. Furthermore, responsible preservation is a necessary precursor for future scholarly use in a variety of transformative contexts, including criticism, commentary, and teaching. A broader, four-factor analysis further supports digital preservation: Its purpose is non commercial and educational, the amount of the work used is appropriate to the purpose (preserving only parts of works would be unsatisfactory), the nature of the works will in many cases be scholarly nonfiction (although this may be less likely in the case of VHS tapes), and preservation in the absence of a suitable replacement

copy has no negative effect on the potential market of the preserved work (indeed, preserving the work for posterity should have a positive effect, if any). To justify the effort and expense of digital preservation, the works preserved will typically be unique, rare, or, in any event, out-of-commerce, and the library's activities therefore will not be mere substitutes for acquisition of a new digital copy of the work. Works in obscure, near-obsolete formats present access challenges as well as preservation ones, but the same fair use rationales will apply. Works trapped in decaying and increasingly obscure formats will disappear completely without diligent work from librarians to migrate them to usable formats.

PRINCIPLE:

It is fair use to make digital copies of collection items that are likely to deteriorate, or that exist only in difficult-to-access formats, for purposes of preservation, and to make those copies available as surrogates for fragile or otherwise inaccessible materials.

LIMITATIONS:

- Preservation copies should not be made when a fully equivalent digital copy is commercially available at a reasonable cost.
- Libraries should not provide access to or circulate original and preservation copies simultaneously.
- Off-premises access to preservation copies circulated as substitutes for original copies should be limited to authenticated members of a library's patron community, e.g., students, faculty, staff, affiliated scholars, and other accredited users.
- Full attribution, in a form satisfactory to scholars in the field, should be provided for all items made available online, to the extent it can be determined with reasonable effort.

ENHANCEMENTS:

- Fair use claims will be enhanced when libraries take technological steps to limit further redistribution of digital surrogates, e.g., by streaming audiovisual media, using appropriately lower-resolution versions, or using watermarks on textual materials and images.

- Fair use claims will be further enhanced when libraries provide copyright owners a simple tool for registering objections to use of digital surrogates, such as an e-mail address associated with a full-time employee.

FOUR: CREATING DIGITAL COLLECTIONS OF ARCHIVAL AND SPECIAL COLLECTIONS MATERIALS

DESCRIPTION:

Many libraries hold special collections and archives of rare or unusual text and nontext materials (published and unpublished) that do not circulate on the same terms as the general collection. The copyright status of materials in these collections is often unclear. Despite the investments that have been made in acquiring and preserving such collections, they frequently are of limited general utility because they typically can be consulted only on-site, and in some cases using only limited analog research aids. The research value of these collections typically resides not only in the individual items they contain (although such items are often unique in themselves), but also in the unique assemblage or aggregation they represent. Special collections can have a shared provenance or be organized around a key topic, era, or theme. Libraries and their patrons would benefit significantly from digitization and off-site availability of these valuable collections. While institutions must abide by any donor restrictions applicable to their donated collections, and they will inevitably consider practical and political concerns such as maintaining good relations with donor communities, librarians will benefit significantly from knowing their rights under fair use.

Presenting these unique collections as a digital aggregate, especially with commentary, criticism, and other curation, can be highly transformative. Works held in these collections and archives will serve a host of transformative scholarly and educational purposes relative to their typically narrower original purposes. Materials in special collections typically include significant amounts of primary sources and artifacts (correspondence, institutional records, annotated volumes, ephemeral popular entertainment) whose value as historical objects for scholarly research is significantly different from their original purpose. The new value created by aggregating related documents in a single, well-curated collection is also significant. In addition to access for scholarly purposes, digitization facilitates novel

transformative uses of the collection as a whole—see principle seven below regarding digitization for search and other nonconsumptive uses.

PRINCIPLE:

It is fair use to create digital versions of a library's special collections and archives and to make these versions electronically accessible in appropriate contexts.

LIMITATIONS:

- Providing access to published works that are available in unused copies on the commercial market at reasonable prices should be undertaken only with careful consideration, if at all. To the extent that the copy of such a work in a particular collection is unique (e.g., contains marginalia or other unique markings or characteristics), access to unique aspects of the copy will be supportable under fair use. The presence of non-unique copies in a special collection can be indicated by descriptive entries without implicating copyright.
- Where digitized special collections are posted online, reasonable steps should be taken to limit access to material likely to contain damaging or sensitive private information.
- Full attribution, in a form satisfactory to scholars in the field, should be provided for all special collection items made available online, to the extent it is reasonably possible to do so.

ENHANCEMENTS:

- The fair use case will be even stronger where items to be digitized consist largely of works, such as personal photographs, correspondence, or ephemera, whose owners are not exploiting the material commercially and likely could not be located to seek permission for new uses.
- Libraries should consider taking technological steps, reasonable in light of both the nature of the material and of institutional capabilities, to prevent downloading of digital files by users, or else to limit the quality of files to what is appropriate to the use.
- Libraries should also provide copyright owners with a simple tool for registering objections to online use, and respond to such objections promptly.

- Subject to the considerations outlined above, a special collection should be digitized in its entirety, and presented as a cohesive collection whenever possible.
- Adding criticism, commentary, rich metadata, and other additional value and context to the collection will strengthen the fair use case.
- The fair use case will be stronger when the availability of the material is appropriately publicized to scholars in the field and other persons likely to be especially interested.

FIVE: REPRODUCING MATERIAL FOR USE BY DISABLED STUDENTS, FACULTY, STAFF, AND OTHER APPROPRIATE USERS

DESCRIPTION:

Print-disabled academic and research library patrons require access to readable text in order to function as full members of an academic community; likewise, hearing-disabled patrons require captioned audiovisual materials, while those with physical disabilities may require the electronic delivery of materials outside the library setting. Relatively new electronic technologies make these kinds of accommodations possible at relatively low cost. True accommodation for these patrons means access to any materials in the library's collection for any reason the patron may have (required reading, voluntary study, or recreation), i.e., access that is equivalent to the access afforded to students without disabilities. In addition to moral and mission-related imperatives to serve all patrons, there are also legal obligations to accommodate scholars and researchers with diverse needs. Although Section 121 of the Copyright Act authorizes the reproduction of copyrighted materials to meet these needs under some circumstances, there is continued controversy over its exact scope. Some stakeholders insist, however unreasonably, that Section 121 does not cover academic libraries' efforts to provide accessible materials to print-disabled members of a college or university community. No specific exception to copyright even arguably addresses the needs of patrons with disabilities related to media other than print.

Making library materials accessible serves the goals of copyright, not to mention the goals of a just and inclusive society, and has no negative consequence for rights holders who have not entered the market to serve these users. Such uses add value to a work by making it available to communities that would otherwise be excluded,

presenting the work in a format the rights holder has not provided and to an audience that the rights holder is not serving. Making this material available to disabled patrons, furthermore, should not penalize other potential constituents, for instance, by removing the original copy for the time that the version for the disabled is available.

PRINCIPLE:

When fully accessible copies are not readily available from commercial sources, it is fair use for a library to (1) reproduce materials in its collection in accessible formats for the disabled upon request, and (2) retain those reproductions for use in meeting subsequent requests from qualified patrons.

LIMITATIONS:

- Libraries should provide patrons with information about their own rights and responsibilities regarding works provided to them in this way.
- When appropriate (taking into consideration the needs of the disabled patron), the requester's use of the materials should be time-limited by analogy to the limits the library imposes on use by other persons.
- Libraries should coordinate their response to requests with the university's disability services office, or the equivalent, and observe standard conventions on the identification of individuals entitled to service.

ENHANCEMENTS:

- Claims for fair use may well be further reinforced if technological protection measures are applied to assure that limitations on the use of accessible copies are observed.
- The fair use case will be enhanced by programs that are well publicized to the affected communities together with policies that are widely and consistently applied.

SIX: MAINTAINING THE INTEGRITY OF WORKS DEPOSITED IN INSTITUTIONAL REPOSITORIES

DESCRIPTION:

Many libraries that serve postsecondary institutions are developing digital institutional repositories (or IRs) that house and provide access to a variety of different kinds of material directly related to their institutions' activities, including scholarship of faculty and graduate students as well as documentation of institutional histories. The collection and maintenance of electronic theses and dissertations (ETDs) is a related issue. Access to ETDs and other material in IRs may be restricted to individuals with institutional affiliations, but many libraries aspire to make their contents available to the general public. Many deposited works quote or incorporate third-party material in ways that represent appropriate fair use by the faculty member or student in question. Librarians can and should respect the integrity of deposited materials that include selections from copyright works incorporated in reliance on fair use.

Use of quotations, still frames, illustrative excerpts, and the like is common practice in scholarly writing, and is at the heart of fair use. Libraries respect the authors' fair use rights when they accept these materials intact into the IR and make them available unchanged to the public. Libraries that operate IRs can and should respect and maintain the integrity of materials they accept for deposit, rather than insisting on unnecessary permissions or requiring unnecessary deletions. Fair use makes this possible. Many institutions use vendors to host and maintain ETDs and IRs, and libraries should work to ensure that vendors also respect authors' fair use rights.

PRINCIPLE:

It is fair use for a library to receive material for its institutional repository, and make deposited works publicly available in unredacted form, including items that contain copyrighted material that is included on the basis of fair use.

LIMITATIONS:

- In the case of publicly accessible IRs, libraries should provide copyright owners outside the institution with a simple tool for registering objections to the use of materials in the IR, and respond to such objections promptly.

- Libraries and their parent institutions should provide depositing authors with useful information about the nature and the scope of fair use, and the proper forms of attribution for incorporated materials, in order to help them make informed uses in their own work. This information should specifically address the fact that fair use is context-specific, and that what is fair use within the academy may not be fair use when a work is more broadly distributed.
- Full attribution, in a form satisfactory to scholars in the field, should be provided for all incorporated third-party materials included in works deposited to the IR, to the extent it is reasonably possible to do so.

ENHANCEMENTS:

- The fair use case will be stronger when institutions have developed or adopted a clear institutional policy about appropriate use of quotations, illustrations, etc., in faculty and student scholarship.
- Likewise, libraries may consider providing individualized advice on the appropriate use of copyrighted material in scholarship to members of the community upon request.

SEVEN: CREATING DATABASES TO FACILITATE NON CONSUMPTIVE RESEARCH USES (INCLUDING SEARCH)**DESCRIPTION:**

In addition to making specific collection items available to patrons for intensive study, librarians have always played an important role in conducting and supporting scholarship in disciplines that examine trends and changes across broad swaths of information, e.g., information science, linguistics, bibliography, and history of science. Developing indexing systems and finding aids is also a core part of the library mission. Digital technology offers new possibilities where both of these traditional functions are concerned. Libraries can offer scholars digital databases of collection items on which to perform computerized analyses, and they themselves can employ such databases to develop new and powerful reference tools. Because they do not involve ordinary reading or viewing of the processed works, these uses are often referred to as nonconsumptive.

Nonconsumptive uses are highly transformative. Digitizing and indexing works for purposes such as statistical meta-analysis and search creates a powerful new scholarly resource that is not at all a mere substitute for the original work. The analyses facilitated by scanning for nonconsumptive use do not use the works for their original intended purposes; no person ever “reads” the underlying work or works. Instead, this kind of analysis focuses on the underlying facts about a collection of works (how many times a word appears across an author’s body of work, how frequently scientists used a particular species of mouse as test subject, and so on) rather than the protected expression of any single work. Courts have found search engines, which copy millions of web pages into their indexed databases in order to help users find relevant sites, to be fair uses for precisely this reason.

Nonconsumptive uses are an emerging phenomenon at many libraries, and despite their obvious transformative character, there is a risk that the opportunity to make use of these techniques will be lost due to overly restrictive licensing provisions. If librarians agree to licensing restrictions that prohibit such uses, they lose their ability to exercise or permit others to exercise their fair use rights. Librarians should be mindful of this as they negotiate license agreements and should work to preserve their patrons’ rights to conduct nonconsumptive research across licensed database materials.

PRINCIPLE:

It is fair use for libraries to develop and facilitate the development of digital databases of collection items to enable nonconsumptive analysis across the collection for both scholarly and reference purposes.

LIMITATION:

- Items in copyright digitized for nonconsumptive uses should not be employed in other ways (e.g., to provide digital access for ordinary reading) without independent justification, either by a license from the rights holder or pursuant to a statutory exception. Search access to database materials should be limited to portions appropriate to the nonconsumptive research purpose.

ENHANCEMENTS:

- The case for fair use will be at its strongest when the database includes information such as rich metadata that augments the research or reference value of its contents.
- Assertions of fair use will be particularly persuasive when libraries cooperate with other institutions to build collective databases that enable more extensive scholarship or reference searching.

EIGHT: COLLECTING MATERIAL POSTED ON THE WORLD WIDE WEB AND MAKING IT AVAILABLE**DESCRIPTION:**

Gathering impressions of ephemeral Internet material such as web pages, online video, and the like is a growth area in academic and research library collection-building, with activities typically focusing on areas in which the institution has an established specialty, or on sites specific to its local area. Such collections represent a unique contribution to knowledge and pose no significant risks for owners of either the sites in question or third-party material to which those sites refer. In the absence of such collections, important information is likely to be lost to scholarship.

Selecting and collecting material from the Internet in this way is highly transformative. The collecting library takes a historical snapshot of a dynamic and ephemeral object and places the collected impression of the site into a new context: a curated historical archive. Material posted to the Internet typically serves a time-limited purpose and targets a distinct network of users, while its library-held counterpart will document the site for a wide variety of patrons over time. A scholar perusing a collection of archived web pages on the Free Tibet movement, or examining the evolution of educational information on a communicable disease, seeks and encounters that material for a very different purpose than the creators originally intended. Preserving such work can also be considered strongly transformative in itself, separate from any way that future patrons may access it. Authors of online materials often have a specific objective and a particular audience in mind; libraries that collect this material serve a different and broader purpose and a different and broader network of users. Libraries collect not only for a wide range of purposes today, but also for unanticipated uses by future researchers.

PRINCIPLE:

It is fair use to create topically based collections of websites and other material from the Internet and to make them available for scholarly use.

LIMITATIONS:

- Captured material should be represented as it was captured, with appropriate information on mode of harvesting and date.
- To the extent reasonably possible, the legal proprietors of the sites in question should be identified according to the prevailing conventions of attribution.
- Libraries should provide copyright owners with a simple tool for registering objections to making items from such a collection available online, and respond to such objections promptly.

ENHANCEMENTS:

- Claims of fair use relating to material posted with “bot exclusion” headers to ward off automatic harvesting may be stronger when the institution has adopted and follows a consistent policy on this issue, taking into account the possible rationales for collecting Internet material and the nature of the material in question.
- The more comprehensive a collection of web impressions in a given topic area is, the more persuasively the inclusion of any given item can be characterized as fair use.

For more information, consult
arl.org/fairuse
centerforsocialmedia.org/libraries
pijp.wcl.edu/libraries

COORDINATING ORGANIZATIONS:

The Association of Research Libraries (ARL) is a nonprofit organization of 126 research libraries at comprehensive, research-extensive institutions in the U.S. and Canada that share similar research missions, aspirations, and achievements. The association's importance and distinction is born from its membership and the nature of the institutions represented. ARL member libraries make up a large portion of the academic and research library marketplace, spending more than \$1 billion every year on library materials.

The Program on Information Justice and Intellectual Property (PIJIP), co-founded by Prof. Peter Jaszi, promotes social justice in law governing information dissemination and intellectual property through research, scholarship, public events, advocacy, and provision of legal and consulting services. The program is a project of the Washington College of Law at American University in Washington, D.C.

The Center for Social Media (CSM), founded and led by Prof. Patricia Aufderheide, has run the Fair Use and Free Speech project in coordination with PIJIP and Prof. Jaszi since 2004. The center is a project of the School of Communication at American University in Washington, D.C.

CO-FACILITATORS:

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ENDORSERS:

The American Library Association

The Art Libraries Society of North America

The Association of College and Research Libraries

The College Art Association

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