Guidance for CSU Policies on Intellectual Property

"The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . "

United States Constitution, Article I.

Intellectual Property, Fair Use, and the Unbundling of Ownership Rights

Furthering the Mission of Public Higher Education

The Academic Senate
of the
California State University

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Copyright Notice

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Executive Summary

This 2003 publication is an update and extension of earlier work published in 1995 and 1997 in the subject area of intellectual property rights (copyright) in the setting of large multicampus systems of public higher education. It continues the efforts, supported by the Statewide Academic Senate, of California State University (CSU) faculty, students, staff, and administrative, working jointly in task force and committee settings, to come to grips with the complex and changing implications of intellectual property laws and court decisions as they affect teaching and learning.

The document is intended to educate the CSU community on important issues regarding both copyright and patent rights, and it makes recommendations which call on the CSU and its local campuses to initiate copyright and patent educational programs for its faculty, staff, students, and administrators.

The two major themes of the document concern the *fair use doctrine* as it applies to copyrighted materials and the use of *licenses* as the mechanism for the *unbundling of ownership rights* within the university setting. The importance of both these themes is increasing, and will continue to increase, as a consequence of the application of electronic and digital technologies in public higher education.

Specifically, the document addresses the issues of:

- author's rights in light of new technologies and the current legal context;

- multiple author's rights, including situations in which one or more students are involved in the creation of intellectual property;

- ownership as it regards classroom materials created in electronic formats, made available on the World Wide Web, or otherwise distributed electronically.

Recommendations are made which are intended to provide the CSU faculty, staff, students, and admini-

stration with necessary tools for effective teaching, research, and learning in the 21st century: 1) the continued aggressive application of the fair use doctrine; 2) the accelerated development of licensing so as to optimally distribute and manage intellectual property ownership rights associated with new works and inventions created by members of the CSU community; 3) educational programs for all members of the CSU community; and 4) university assistance in negotiating intellectual property agreements with publishers and with third-party entities which develop and commercially exploit new works and inventions.

A special section is devoted to the recently enacted TEACH Act and to its requirements and implications in the field of distance learning. Both its benefits and the new requirements and responsibilities it places on the CSU are addressed.

Introduction

In 2001, the Executive Committee of the Academic Senate of the California State University (CSU) created a Task Force on Intellectual Property to review local campus and systemwide policies in the subject area of intellectual property in light of the work done in the early and mid-1990s by the CSU-SUNY-CUNY Work Group on Ownership, Legal Rights of Use and Fair Use. The Task Force also was charged to consider the implications of recent legislation and judicial decisions, new technologies, and the wider use of electronic technologies as they apply to the ownership of intellectual property. Finally, the Executive Committee charged the Task Force to review and update as necessary the publications *Fair Use of Copyrighted Works: A Crucial Element in Educating America* (1995) and *Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning* (1997), and specifically to:

- Address the issue of author's rights in light of new technologies and the current legal context.

- Address the issue of multiple authors' rights, including situations in which one or more students are involved in the creation of intellectual property.

- Address ownership issues regarding classroom materials created in electronic formats, made available on the World Wide Web, or otherwise distributed electronically.

The Task Force began its work in September 2001 and made interim reports to the Academic Senate meeting in plenary session in January and May 2002. The final draft of this publication was delivered to the Academic Senate on 15 November 2002. The final report to the Academic Senate was made at its 6 March 2003 meeting where it received the Senate's endorsement. Copies of these reports are available from the Academic Senate office.

The two publications mentioned above are listed in the References section of this publication, and in the Appendix some historical information is given about the earlier effort, the products of which appeared under

the auspices of the Consortium for Educational Technology for University Systems (C.E.T.U.S.) – the members of which were California State University, State University of New York, and City University of New York

Both the earlier effort and this one were approached from the premise that good university policy arises as the result of shared governance and the work of the Task Force benefited from the inputs of faculty, staff, students, and administrators.

A major difference between this publication and the earlier ones is that the Task Force has attempted to address topics associated with patents as well as copyright. The work in the 1990s focused solely on copyright.

Purpose

This publication addresses several important points:

- The effectiveness of higher education requires a thorough understanding of the fair-use doctrine.

- Faculty and students, in particular, necessarily apply the fair-use doctrine as they perform their work.

- Newly enacted copyright law pertaining to distance education known as the TEACH Act will assist those who are teaching in this arena, but it is complex and requires a substantial effort by the university so as to qualify for access to its benefits.

- The initial ownership of newly created intellectual property in traditional university settings, and the subsequent disposition of the associated ownership rights, often has been unguided – sometimes to the detriment of teaching, learning, and research.

- The effectiveness of higher education requires a better understanding of how ownership rights associated with new intellectual property promote the mutual benefit of faculty, staff, and students and their learning communities.

- New models for the allocation of intellectual rights, based on licensing agreements which anticipate the influence of new technologies on teaching, learning, research, and creative activity in American universities must be designed and implemented.

PART I

THE FOUNDATION FOR INTELLECTUAL PROPERTY POLICIES IN THE ACADEMIC SETTING

SECTION 1 University Guidelines for Intellectual Property

The following guidelines are an attempt to provide the nexus between the subject of intellectual property and the mission of higher education. The management and administration of matters related to university contracts, licenses, policies, and guidelines which bear on the creation, ownership, storage, transmission, and use of intellectual properties should:

- Foster the creation of the best possible quality new intellectual properties so as to further the academic mission of higher education.

- Foster the dissemination of new knowledge and the maintenance of high academic standards.

- Provide incentive for university faculty, staff, and students to fully participate in the creation and use of intellectual properties.

- Recognize that newly created intellectual properties in a university setting come in a wide variety of specific contexts and media. Nonetheless, strong mutual interests are shared among the university, the faculty, the staff, and the students in the appropriate allocation of the ownership rights associated with intellectual properties which are created and invented in the academic setting.

- Support the concept that the ownership of intellectual property rights is not necessarily an "all-or-nothing" proposition. Rather, the set of rights that belongs to the owners of intellectual

properties should be allocated so as to optimally support the mutual interests of the university, faculty, staff, and students.

- Foster within the university community the continued collective and individual ability to access, acquire, and store information and copyrighted works, to help scholars and students in the proper use and citation of the works of others, and to maintain coordination and contact with the world of publishers and other information providers.

- Foster within the university community the continued collective and individual ability to invent, develop, and perfect patentable creations and devices, to make lawful uses of the patents held by others, and to maintain contacts and coordination with the world of technology development and transfer.

- Ensure that university contracts, licenses, policies, and guidelines appropriately address the challenges and opportunities presented as technologies and cultures continue to evolve and affect the practices of higher education.

SECTION 2 Principles of Good Practices in the Academic Setting

The following principles of good practices provide some operational interpretation which can be used in designing and improving intellectual property policies in the CSU.

Intellectual property arrangements and resolution of intellectual property concerns shall not chill the creative development and dissemination activities that are essential to academic freedom and to the mission of higher education.

- Practical arrangements for intellectual property ownership, for the licensing of ownership rights, and for the allocation of revenues (if any) shall optimally support and foster the ongoing development and dissemination of intellectual properties in the CSU.

- Local campus policies shall address faculty, staff, and students as creator(s) of intellectual properties.

- Decisions regarding the ownership of intellectual property in the academic setting shall be decided such that ownership resides and remains with the faculty, staff, and student creator(s) of the property unless a prior, written agreement to the contrary exists.

- In all cases, matters of ownership of intellectual property – and subsequent licensing of intellectual property rights, and the allocation of revenues (if any) – shall be decided in a fair and equitable manner.

- Students shall be deemed to own their creations and inventions made in pursuit of their academic instructional program.

Unbundling the exclusive rights of copyright and patent ownership (by means of exclusive and non-exclusive licensing) is the best way to advance the mission of the CSU. Thus, the main purpose of intellectual property ownership in the academic setting is to provide the means of appropriately licensing ownership rights and legal uses.

- Where the copyright to a work or the patent to an invention created at the CSU is owned by the author(s) or inventor(s) – *the usual case* – the local campus or university might be interested in a standard agreement with the author(s) or inventor(s) which allocates (licenses) to the university the ability to exercise rights without obtaining permission from the intellectual property rights owner(s).

- If the copyright to a work or patent to an invention created at the CSU is owned by the university, the creator(s) or inventor(s) of the work might be interested in a standard agreement with the university which allocates (licenses) to a creator or inventor the ability to exercise rights without obtaining permission from the university owner.

The faculty, staff, students, and administrations of the CSU must adhere to federal and state intellectual property laws and regulations.

- The CSU is responsible for providing an on-going educational program which shall inform the faculty, staff, students, and administrators of the university about the law and policy relevant to the four areas of intellectual property: copyright, patent, trademark, and trade secret.

- Current trends in American public higher education increase the importance of and the role played by intellectual property. The administrative support for the necessary activities related to intellectual property – for example, copyright management, copyright clearance, and patentability – must be increased. Initiatives are necessary at both the systemwide and local campus levels.

- Faculty, staff, students, and administrators need to become better informed about the real costs associated with traditional stewardship of intellectual property – the cost of multiple licensing agreements or the loss of access that sometimes follows for assignment of copyright to academic works.

- The mission of the university is advanced when its faculty, staff, and students honor, protect, and aggressively use the fair-use exclusion that is provided by the federal copyright law.

In the cases of faculty and staff, collectively bargained MOU language shall be used whenever possible to address and clarify such concepts as compensation, normal and ordinary university support, and extraordinary university support.

- Any extraordinary university support provided for a faculty member, a staff member, or a student does not include such things as the reassigned time, paid or unpaid leaves, and the normal and ordinary university support or facilities that are accessible in connection with normal duties or academic instructional programs.

PART II

FAIR USE OF COPYRIGHTED WORKS

SECTION 1 The Imperative for Sound University Policy on Copyright

Copyright law is in transition, and many of the changes have direct and profound consequences for universities. Not only are universities increasingly affected by the law, but they have an extraordinary opportunity to influence the development of copyright law and related practices. If universities fail to provide initiative on copyright issues, other parties will exert their influence to shape the law for purposes which do not necessarily advance teaching, learning, and scholarship.

Examples of recent developments in the law include:

- The enactment of the Digital Millennium Copyright Act in 1998, which secures "technological restrictions" on access to copyrighted works, and has the potential of placing many of our own materials outside the the reach of scholars, teachers, and students.

- The extension of the term of protection for copyright to life of the author plus 70 years, which has the direct effect of keeping more materials under copyright protection and outside the public domain.

- The proposal of various interpretation standards of fair use from the "Conference on Fair Use," most of which standards are highly meticulous and would have the effect of constraining the law.

- The expansion of copyright protection to the transmission of sound recordings, which puts in place an elaborate set of regulations with a detailed fee schedule for many uses of music and other sound recordings.

- The enactment of California law addressing rights to lectures and other instructional materials but raising new responsibilities for good management of classroom activities.

- The new copyright provisions signed into law in 2003, known as the "TEACH Act," allows greater use of copyrighted works in distance education, subject to the careful and thorough implementation of policies, procedures, and restrictions.

Most of the latest developments in copyright law are a direct response to changing educational needs and innovative technologies. New technology allows digital conversion of images and text, creation of multimedia composite works, transmission of data to remote locations, and teaching of students who are located far beyond the campus bounds. These activeties often are central to innovative and effective scholarship. They also are imperative to the exchange of ideas upon which the academy is based and to the success of America's commitment to mass higher education in a democratic society.

Several recent events dramatize the fluid state of copyright law, the ever-present opportunity for change, and the fragility of the university's interest in safeguarding fair use as a crucial aspect of the innovative deployment of essential information resources.

Erosion of Fair Use

A series of court rulings threatens the application of fair use to such common pursuits as photocopying for research, teaching, learning, scholarship, and even quoting from historical manuscripts. The reasoning in these cases will no doubt extend to newer technologies. Other developments related to fair use:

- The "Conference on Fair Use" held meetings through the mid-1990s, and in 1998 issued a final report with proposed "fair-use guidelines" on such topics as creation of multimedia tools, distance learning, and the use of digital images.

Those guidelines are largely endorsed by copyright owners, but have faced intense criticism from some educators and librarians.

- The DMCA, enacted in 1998, purported to preserve fair use, but as a practical matter the DMCA secures the right to "lock" materials behind technological controls. If they cannot be accessed, they cannot be used – even if within the law.

- The growth of licensing has established greater reliance on contractual terms for the proper use of materials, rather than a primary reliance on the law. The result may be greater or less restriction, but the "rules of use" will vary from one resource to the next, and will depend on the attitude and bargaining strength of the parties to the licensing agreement

Many of these developments often have the effect of placing more materials farther from the reach of faculty, librarians, and students, and the availability of those materials for study increasingly will be subject to payment of a license fee.

Section 2 Fair Use and the Pursuit of Higher Education: A Statement of Principles

The Need to Address Fair Use

It is urgent, timely, and in the best interests of higher education that our universities raise a coordinated voice to address the topic that is known as the "fair use" of copyrighted works. For many years, the fair-use doctrine has been under debate in several different forums – locally, nationally, and internationally. The debate involves both public and proprietary interests. It arises because of the changing dynamic between the broad sweep of "intellectual properties" and the deployment of powerful and rapidly evolving communications techniques and infrastructures. These developments already have demonstrated their significant consequences for higher education and will have more pervasive effects in the future. Thus, we advance this statement of educational principle.

The Legal Framework of Fair Use

Fair use today is embodied in Section 107 of the U.S. Copyright Act, and it exempts limited uses of materials from infringement liabilities. As detailed in Part II, Section 3 of this publication, the full text of the fair-use statute makes clear that the right of fair use is specifically applicable to teaching, research, and scholarship, and that its scope depends on the four statutory factors. These four factors are open to diverse interpretations; the law offers virtually no details for determining which activities may be safely allowed.

The Statement of Principles

The law's flexibility is an opportunity and a challenge. It is an opportunity to expand and apply the fair-use doctrine to diverse and changing requirements in an effort to be fair to all parties. It is also a challenge to apply fair use amidst rela-

tive uncertainty, and new interpretations often do not favor educational needs. The four principles stated below serve to focus attention on these needs.

Higher education's legitimate right to use copyrighted works must be protected.

The fundamental mission of higher education is to advance and disseminate knowledge. This mission is realized through the use of various information formats, learning environments, and modes of delivery without unreasonable copyright restrictions. The goals and objectives that we set in order to accomplish our mission require the ability to explore, analyze, and exchange information. The effectiveness of our work depends on our right to make creative and balanced fair use of copyrighted works.

To succeed, all members of the college and university community must have reliable access to a wide variety of materials for teaching, learning, scholarship, and personal study. The materials also need to be stored and retrieved across the full range of the ever-richer diversity of useful electronic and traditional formats.

Fair use in the electronic era must allow that access when and where it is needed, without the burden of myriad negotiated transactions, and consistent with the constitutional objective that copyright "promote the progress of science."

Freedom of access to information, regardless of its format, is essential for the creative and learning processes.

Higher education must make use of the full range of means for accessing and utilizing various works which are protected by copyright law in both electronic environments and in traditional environments. Fair use is a historically important doctrine which is essential to fulfilling our higher education objectives. Fair use allows the academy to respond to the dynamic nature of the educational process and to the evolving formats of information resources.

Fair use allows an otherwise rigid copyright system to respond to the fluctuating volume of available information and to the changing demands for its use. Fair use allows all members of the university community to sample the broadest possible range of ideas, to build new works upon the old, and to facilitate equal access to copyrighted works within the reasonable limits of the law.

Higher education's right of fair use in the electronic era must continue unencumbered by terms of commercial licenses or transaction fees.

Fair use is the crucial legal provision that allows our educational system to be assured of enriching the student experience and of realizing its research objectives with the widest array of knowledge and insights. It provides the necessary educational opportunity that enables our institutions of higher education to prepare students for success in the world economy.

Colleges and universities have supported, and will continue to support, the economic and creative incentives of copyright owners. But higher education also must support an expansive and flexible view of fair use in order to assure the fullest possible sharing of knowledge and to meet the unpredictable demands of teaching, learning, and scholarship, regardless of information format, learning environment, or mode of delivery.

Higher education has an obligation to educate its constituencies about intellectual properties and about the lawful uses of copyrighted material.

The remainder of this part of this publication is presented as a first step in the discharge of this educational obligation among the constituencies of higher education. In this regard, it is important for higher education to take the initiative in an effort to achieve the appropriate balance in matters related to the evolving interpretation of the fair-use doctrine.

SECTION 3 Fair Use: Overview and Meaning For Higher Education

Copyright law begins with the premise that the copyright owner has exclusive rights to many uses of a protected work, notably rights to reproduce, distribute, make derivative works, and publicly display or perform the work. But the Copyright Act also sets forth several important exceptions to those rights. Key statutes make specific allowance for concerns such as distance learning, backup copies of software, and some reproductions made by libraries. The best known and most important exception to owners' rights is fair use.

The Fair-Use Statute

The following is the full text of the fair-use statute from the U.S. Copyright Act.

Section 107 of the Copyright Act of 1976. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified 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.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

1) *the **purpose and character** of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*

2) *the **nature** of the copyrighted work;*

3) *the **amount and substantiality** of the portion used in relation to the copyrighted work as a whole; and*

*4) the **effect** of the use upon the potential market for or value of the copyrighted work.*

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. (Emphasis added)

The Meaning of the Four Factors

While fair use is intended to apply to teaching, research, and other such activities, a crucial point is that an educational purpose alone does not make a use fair. The purpose of the use is, in fact, only one of four factors that users must analyze in order to conclude whether or not an activity is lawful.

Moreover, each of the factors is subject to interpretation as courts struggle to make sense of the law. Some interpretations, and their subsequent reconstruction by policy-makers and interest groups, have been especially problematic. For example, some copyright analysts have concluded that if a work being used is a commercial product, the "nature" factor weighs against fair use. Their view is that no clip from a feature film or copy from a trade book could survive that fair-use factor. Similarly, some commentators argue that if a license for the intended use is available from the copyright owner, the action will directly conflict with the market for licensing the original. Thus, the availability of a license will itself tip the "effect" factor against fair use. Neither of these simplistic constructions of fair use is a valid generalization, yet they are rooted in some truths under limited circumstances. Only one conclusion about the four factors is reliable: each situation must be evaluated in light of the specific facts presented.

The following are brief explanations of the four factors from the fair-use statute. All four factors which affect fair use must be taken into account before reaching a conclusion.

Purpose

Congress favored nonprofit educational uses over commercial uses. Copies used in education, but made or sold at monetary profit, may not be favored. Courts also favor uses that are "transformative" or that are not mere reproductions. Fair use is more likely when the copyrighted work is "transformed" into something new or of new utility, such as quotations incorporated into a paper and, perhaps, pieces of a work mixed into a multimedia product for use in teaching or included in a commentary on, or criticism of, the original. For teaching purposes, however, multiple copies of some works are specifically allowed, even if not "transformative." The Supreme Court underscored that conclusion by focusing on these key words in the statute: "including multiple copies for classroom use."

Nature

This factor examines characteristics of the work being used. It does not refer to attributes of the work that one creates by exercising fair use. Many characteristics of a work can affect the application of fair use. For example, several recent court decisions have concluded that the unpublished "nature" of historical correspondence can weigh against fair use. The courts reasoned that copyright owners should have the right to determine the circumstances of "first publication." The authorities are split, however, on whether a published work that is currently out of print should receive special treatment. Courts more readily favor the fair use of nonfiction rather than fiction. Commercial audiovisual works are generally subject to less fair use than are printed works. A consumable workbook will most certainly be subject to less fair use than will a printed social science text.

Amount

Amount is both quantitatively and qualitatively measured. No exact measures of allowable quan-

tity exist in the law. Quantity must be evaluated relative to the length of the entire original and the amount needed to serve a proper objective. One court has ruled that a journal article alone is an entire work; any copying of an entire work usually weighs heavily against fair use. Pictures generate serious controversies, because a user nearly always wants the full image or the full "amount." Motion pictures are also problematic because even short clips may borrow the most extraordinary or creative elements. One may also reproduce only a small portion of any work but still take "the heart of the work." The "substantiality" concept is a qualitative measure that may weigh against fair use.

Effect

Effect on the market is perhaps even more complicated than the other three factors. Some courts have called it the most important factor although such rhetoric is often difficult to validate. This factor fundamentally means that when one makes a copy of a copyrighted work, for which a purchase of a commercially available copy should, theoretically, have been made, then this set of circumstances weighs against fair use regardless of personal willingness or ability to pay for such purchase. "Effect" is closely linked to "purpose." If your purpose is research or scholarship, market effect may be difficult to prove. If your purpose is commercial, then effect is presumed. Occasional quotations or photocopies may have no adverse market effects, but reproductions of software and videotapes can make direct inroads on the potential markets for those works.

Weighing and Balancing the Factors

A central tenet of this analysis is that fair use is a flexible doctrine that Congress wanted us to test and adapt for changing needs and circumstances. The law provides no clear and direct answers about the scope of fair use and its meaning in specific situations. Instead, we are

compelled to return to the four factors and reach creative and responsible conclusions about the lawfulness of our activities. People will always differ widely on the applicability of fair use, but any reliable evaluation of fair use must depend upon a reasoned analysis of the four factors of fair use. The four factors need not all lean in one direction. If most factors lean in favor of fair use, the activity is allowed; if most lean in the opposite direction, the action will not fit the fair-use exception and may require permission from the copyright owner.

Examples of Fair-Use Cases

While courts have ruled on many fair-use cases, few are directly related to higher education. Nevertheless, many cases do offer valuable guidance for the meaning of fair use at colleges and universities. Here is a sample of such cases, with an indication of how courts apply the four factors of fair use.

Basic Books, Inc. v. Kinko's Graphics Corp., 758 F.Supp. 1522 (S.D.N.Y. 1991)

Kinko's was held to be infringing copyrights when it photocopied book chapters for sale to students as "coursepacks" for their university classes.

Purpose: When conducted by Kinko's, the copying was for commercial purposes and not for educational purposes.

Nature: Most of the works were factual – history, sociology, and other fields of study – a factor which weighed in favor of fair use.

Amount: The court analyzed the percentage of each work, finding that 5 to 25 percent of the original full book was excessive.

Effect: The court found a direct effect on the market for the books because the coursepacks directly competed with the potential sales of the original books as assigned reading for the students. Three of the four factors leaned against fair use. The court specifically refused to rule that all coursepacks are infringements, requiring instead

that each item in the "anthology" be individually subject to fair-use scrutiny.

Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986)

In 1973, the plaintiff wrote a book based on interviews with women about their own pregnancies and abortions. The defendant wrote his own book on the same subject and sought permission to use lengthy excerpts from the plaintiff's work. The plaintiff refused permission, and the defendant proceeded to publish his work with the unpermitted excerpts.

Purpose: Although the defendant's book was published by a commercial press with the possibility of monetary success, the main purpose of the book was to educate the public about abortion and about the author's views.

Nature: The interviews were largely factual.

Amount: Quoting 4.3 percent of the plaintiff's work was not excessive, and the verbatim passages were not necessarily central to the plaintiff's market.

Effect: The court noted that the plaintiff's work was out of print and not likely to appeal to the same readers.

This court affirmed that quotations in a subsequent work are permissible, sometimes even when they are lengthy. Implicit throughout the case is the fact that the plaintiff was unwilling to allow limited quotations in a book that argued an opposing view of abortion; thus, fair use became the only effective means for the second author to build meaningfully on the scholarly works of others.

Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982)

For-profit producers of educational motion pictures and videos sued a consortium of public school districts, which was systematically recording programs as they were broadcast on public television

stations and providing copies of the recordings to member schools.

Purpose: The court was largely sympathetic with the educational purpose.

Nature: Although the films had educational content, they were commercial products intended for sale to educational institutions.

Amount: The defendant was copying the entire work and retaining copies for as long as 10 years.

Effect: The copying directly competed with the plaintiff's market for selling or licensing copies to schools.

The court had little trouble concluding that the activities were not fair use.

American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1995)

The court ruled that photocopying of individual journal articles by a Texaco scientist for his own research needs was not fair use. The court amended its opinion to limit the ruling to "systematic" copying that may advance the profit goals of the larger organization.

Purpose: While research is generally a favored purpose, the ultimate purpose was to strengthen Texaco's corporate profits. Moreover, exact photocopies are not "transformative"; they do not build on the existing work in a productive manner.

Nature: The articles were factual, which weighs in favor of fair use.

Amount: An article is an independent work, so copying the article is copying the entire copyrighted work.

Effect: The court found no evidence that Texaco reasonably would have purchased more subscriptions to the relevant journals, but the court did conclude that unpermitted photocopying directly competes with the ability of publishers to collect license fees. According to the court, the Copyright Clearance Center (CCC) provides a practical method for paying

fees and securing permissions, so the copying directly undercuts the ability to pursue the market for licensing through the CCC.

Despite an impassioned dissent from one judge who argued for the realistic needs of researchers, the court found three of the four factors weighing against fair use in the corporate context.

Los Angeles Times v. Free Republic, 54 U.S.P.Q.2D 1453 (C.D. Cal. 2000)

A bulletin board website allowed members to post full articles from newspapers in order to generate awareness and discussion of various subjects. Access to the site was unrestricted. The defendant was a for-profit corporation but was in the process of seeking nonprofit tax status and did not charge for access to materials on its website.

Purpose: The articles were copied directly from the news sources and were not "transformative." The judge also rejected the defendant's argument that a simple link to the source of the news article was insufficient for the purposes of the bulletin board. While the court generally favored the claim of a "nonprofit" use, the court still found that posting the articles was drawing readers away from the commercial websites where the articles originated.

Nature: The articles are predominately factual, tipping the factor in favor of fair use.

Amount: The website included the full text of the articles, and the court found that the copying was more extensive than necessary to accomplish the defendant's objectives.

Effect: The newspapers were seeking to exploit the market for the articles and draw traffic to their websites; the defendant was "usurping" the copyright owner's potential markets.

SECTION 4 New Copyright Law for Distance Education: The TEACH Act

The use of existing copyright-protected materials in distance education has been a topic of many discussions, reports, and publications. The subject of this section is newly enacted copyright law which deals directly with this topic. The reader must keep in mind the fact that none of the provisions of the TEACH Act affects in any way the fair-use exclusion which is treated in Part II of this publication. Fair-use in distance education remains crucially important to higher education and stands, without any change.

This summary of the TEACH Act was originally produced for publication by the American Library Association on its website:
http://www.ala.org/washoff/teach.html

As of this writing, the bill has been passed by Congress, and signed into law.

New Copyright Law for Distance Education:
The Meaning and Importance of the TEACH Act

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Introduction: The New Legislation

Of great importance to the use of new technologies in innovative education, on October 4, 2002 Congress enacted the "Technology, Education and Copyright Harmonization Act," commonly known as the "TEACH Act." Long anticipated by educators and librarians, the new law will demand a full reconsideration of the ability to use existing copyright-protected materials in distance education. The law is a complete revision of the current Section 110(2) of the U.S. Copyright Act, and one of its fundamental objectives is to strike a balance between protecting copyrighted works, while permitting educators to use those materials in distance education. If educators remain within the boundaries of the law, they may use certain copyrighted works without permission from, or payment of royalties to, the copyright owner – and without copyright infringement.

The new law offers many improvements over the previous version of Section 110(2), but in order to enjoy its advantages, colleges, universities, and other qualified educational institutions will need to meet the law's rigorous requirements. Educators will not be able to comply by either accidental circumstances or well-meaning intention. Instead, the law calls on each educational institution to undertake numerous procedures and involve the active participation of many individuals.

This paper principally summarizes the new standards and requirement established by the TEACH Act. The statutory language itself is often convoluted and does not necessarily flow gracefully. This paper accordingly isolates the various requirements and benefits of the new law and organizes them in a manner that may be helpful to educators and others seeking to understand and comply with the law. This paper will also suggest strategies and implementation methods that an educational institution may choose to follow. In general, this paper will outline the benefits of the TEACH Act and organize the law's requirements into three groups of duties that may be assigned to three divi-

sions within a college or university for implementation: duties of institutional policymakers; duties of information technology officials; and duties of faculty members or other instructional staff. In this multifaceted process, librarians will also find an important role.

Background of Copyright Law

To understand the magnitude of the issues at stake, one needs to comprehend not only the growth of distance education, but also the expansion of copyright protection. Much of the material used in educational programs – in the classroom or through "transmission" – is protected under copyright law. Copyright protection vests automatically in nearly all works that are "original works of authorship" and "fixed in any tangible medium of expression" (Section 102(a)). Hence, most writings, images, artworks, videotapes, musical works, sound recordings, motion pictures, computer programs, and other works are protected by copyright law. That protection applies even if the work lacks any form of "copyright notice" and is not registered with the U.S. Copyright Office. Some works are in the "public domain" and do not have copyright protection. For example, works of the U.S. government are generally barred from copyright protection, and the copyrights on other works eventually expire. Copyrights today usually last through the life of the author, plus seventy years. Quite simply, the law protects vast quantities of works for many, many years.

When educators use any of these works in their teaching, they are using copyright-protected materials. Among the rights of copyright owners are rights to make copies and rights to make public performances and public displays of the works. An assembled – or even dispersed – group of students may well constitute the "public" under the law. Consequently, educators frequently incur possible violations of owners' rights whenever they copy materials as handouts, upload works to websites, "display" slides or other still images, or "perform" music, videos, and other works. In the con-

text of traditional, face-to-face teaching, educators long have debated the application of "fair use" to making copies, and the Copyright Act since 1976 has included a relatively simple and broad provision allowing "performances" and "displays" in the face-to-face classroom setting (Section 110(1)). The rules for distance education, however, are significantly different. Both the meaning of fair use and the details of the specific statute (Section 110(2)) become much more rigorous when the materials are uploaded to websites, transmitted anywhere in the world, and are easily downloaded, altered, or further transmitted by students and other users – all posing possible threats to the interests of copyright owners.

Context of Distance Education

Comprehending the practical implications of the new legislation also requires understanding the congressional vision of "distance education" and the relationship between educators and the institution. The TEACH Act is a clear signal that Congress recognizes the importance of distance education, the significance of digital media, and the need to resolve copyright clashes. The new law is, nevertheless, built around a vision that distance education should occur in discrete installments, each within a confined span of time, and with all elements integrated into a cohesive lecture-like package.

In other words, much of the law is built around permitting uses of copyrighted works in the context of "mediated instructional activities" that are akin in many respects to the conduct of traditional classroom sessions. The law anticipates that students will access each "session" within a prescribed time period and will not necessarily be able to store the materials or review them later in the academic term; faculty will be able to include copyrighted materials, but usually only in portions or under conditions that are analogous to conventional teaching and lecture formats. Stated more bluntly, this law is not intended to permit scanning and uploading of full or lengthy works, stored on a website, for students to access throughout the semester – even for private study in connection with a formal course.

The TEACH Act suggests another general observation: Many provisions focus entirely on the behavior of educational institutions, rather than the actions of instructors. Consequently, the institution must impose restrictions on access, develop new policy, and disseminate copyright information. The institution is allowed to retain limited copies for limited purposes, but the statute indicates nothing about whether the individual instructor may keep a copy of his or her own instructional program. Most important, educational institutions are probably at greater risk than are individuals of facing infringement liability, and individual instructors most likely will turn to their institutions for guidance about the law. These circumstances will probably motivate institutions to become more involved with oversight of educational programs and the selection and use of educational materials. This substantive oversight may raise sensitive and important issues of academic freedom.

One consequence of these developments is apparent: The pursuit and regulation of distance-education programs will become increasingly centralized within our educational institutions. Because the law calls for institutional policymaking, implementation of technological systems, and meaningful distribution of copyright information, colleges and universities may well require that all programs be transmitted solely on centralized systems that meet the prescribed standard. Because the law permits uses of only certain copyrighted materials, institutions will feel compelled to assure that faculty are apprised of the limits, and some colleges and universities will struggle with whether to monitor the content of the educational programming.

Some news announcements anticipating the TEACH Act have suggested that the use of materials in distance education will be on a par with the broad rights of performance and display allowed in the face-to-face classroom. This characterization of the law neglects the many differences between the relevant statutes. In the traditional classroom, the Copyright Act long has allowed instructors to "perform" or "display" copyrighted works with few restrictions (Section 110(1)). By contrast, both the previous and the new versions of the statute applicable to distance education are

replete with conditions, limits, and restrictions. Make no mistake: While the TEACH Act is a major improvement over the previous version of Section 110(2), the law still imposes numerous requirements for distance education that reach far beyond the modest limits in the traditional classroom.

Benefits of the TEACH Act

The primary benefit of the TEACH Act for educators is its repeal of the earlier version of Section 110(2), which was drafted principally in the context of closed-circuit television. That law permitted educators to "perform" only certain types of works and generally allowed transmissions to be received only in classrooms and similar locations. These restrictions, and others, usually meant that the law could seldom apply to the context of modern, digital transmissions that might utilize a range of materials and need to reach students at home, at work, and elsewhere. The new version of Section 110(2) offers these explicit improvements:

Expanded range of allowed works. The new law permits the display and performance of nearly all types of works. The law no longer sweepingly excludes broad categories of works, as did the former law. However, a few narrow classes of works remain excluded, and uses of some types of works are subject to quantity limitations.

Expansion of receiving locations. The former law limited the transmission of content to classrooms and other similar location. The new law has no such constraint. Educational institutions may now reach students through distance education at any location.

Storage of transmitted content. The former law often permitted educational institutions to record and retain copies of the distance-education transmission, even if it included copyrighted content owned by others. The new law continues that possibility. The law also explicitly allows retention of the content and student access for a brief period of time, and it permits copying and storage that is incidental or necessary to the technical aspects of digital transmission systems.

Digitizing of analog works. In order to facilitate digital transmissions, the law permits digitization of some analog works, but in most cases only if the work is not already available in digital form.

None of these benefits, however, is available to educators unless they comply with the many and diverse requirements of the law. The rights of use are also often limited to certain works, in limited portions, and only under rigorously defined conditions. The remainder of this paper examines those requirements.

Requirements of the TEACH Act

This paper groups the law's many new requirements according to the unit within the institution that will likely be responsible for addressing or complying with each.

Duties of Institutional Policymakers

1. *Accredited nonprofit institution*. The benefits of the TEACH Act apply only to a "government body or an accredited nonprofit educational institution." In the case of post-secondary education, an "accredited" institution is "as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education." Elementary and secondary schools "shall be as recognized by the applicable state certification or licensing procedures." Most familiar educational institutions will meet this requirement, but many private entities – such as for-profit subsidiaries of nonprofit institutions – may not be duly "accredited."

2. *Copyright policy*. The educational institution must "institute policies regarding copyright," although the language does not detail the content of those policies. The implication from the context of the statute, and from the next requirement about "copyright information," suggests that the policies would specify the standards educators and others will follow when incorporating copyrighted works into distance education. For most educational institutions, policy development

is a complicated process, involving lengthy deliberations and multiple levels of review and approval. Such formal policymaking might be preferable, but informal procedural standards that effectively guide relevant activities may well satisfy the statutory requirement. In any event, proper authorities within the educational institution need to take deliberate and concerted action.

3. *Copyright information*. The institution must "provide informational materials" regarding copyright, and in this instance the language specifies that the materials must "accurately describe, and promote compliance with, the laws of United States relating to copyright." These materials must be provided to "faculty, students, and relevant staff members." Some of this language is identical to a statutory requirement that educational institutions might already meet regarding their potential liability as an "online service provider." In any event, the responsibility to prepare and disseminate copyright information is clear; institutions might consider developing websites, distributing printed materials, or tying the information to the distance-education program, among other possible strategies.

4. *Notice to students*. In addition to the general distribution of informational materials, the statute further specifies that the institution must provide "notice to students that materials used in connection with the course may be subject to copyright protection." While the information materials described in the previous section appear to be more substantive resources detailing various aspects of copyright law, the "notice" to students may be a brief statement simply alerting the reader to copyright implications. The notice could be included on distribution materials in the class or perhaps on an opening frame of the distance-education course. Taking advantage of electronic delivery capabilities, the educational materials may include a brief "notice" about copyright, with an active link to more general information resources.

5. *Enrolled students*. The transmission of content must be made "solely for . . . students officially enrolled in the course for which the transmission is made." The next section will examine the technological restrictions on access, but in addition, the law also

requires that the transmission be "for" only these specific students. Thus, it should not be broadcast for other purposes, such as promoting the college or university, generally edifying the public, or sharing the materials with colleagues at other institutions. Educators might address this requirement through technological restrictions on access, as mentioned in the following section.

Duties of Information Technology Officials

1. *Limited access to enrolled students*. The new law calls upon the institution to limit the transmission to students enrolled in the particular course "to the extent technologically feasible." Therefore, the institution may need to create a system that permits access only by students registered for that specific class. As a practical matter, the statute may lead educational institutions to implement technological access controls that are linked to enrollment records available from the registrar's office.

2. *Technological controls on storage and dissemination.* While the transmission of distance education content may be conducted by diverse technological means, an institution deploying "digital transmissions" must apply technical measures to prevent "retention of the work in accessible form by recipients of the transmission . . . for longer than the class session." The statute offers no clarification about the meaning of a "class session," but language throughout the statute suggests that any given transmission would require a finite amount of time, and students would be unable to access it after a designated time. Also, in the case of "digital transmissions," the institution must apply "technological measures" to prevent recipients of the content from engaging in "unauthorized further dissemination of the work in accessible form." Both of these restrictions address concerns from copyright owners that students might receive, store, and share the copyrighted content. Both of these provisions of the statute call upon the institution to implement technological controls on methods for delivery, terms of accessibility, and realistic abilities for students to download or share

copyrighted content. These provisions specifically demand application of "technological measures" that would restrict uses of the content "in the ordinary course of their operations." In other words, when the restrictive controls are used in an "ordinary" manner, they will safeguard against unauthorized reproduction and dissemination. This language apparently protects the institution, should someone "hack" the controls and circumvent imperfect technology.

3. *Interference with technological measures*. If the content transmitted through "digital transmissions" includes restrictive codes or other embedded "management systems" to regulate storage or dissemination of the works, the institution may not "engage in conduct that could reasonably be expected to interfere with [such] technological measures." While the law does not explicitly impose an affirmative duty on educational institutions, each institution is probably well advised as a practical matter to review their technological systems to assure that systems for delivery of distance education do not interrupt digital rights management code or other technological measures used by copyright owners to control their works.

4. *Limited temporary retention of copies*. The statute explicitly exonerates educational institutions from liability that may result from most "transient or temporary storage of material." On the other hand, the statute does not allow anyone to maintain the copyrighted content "on the system or network" for availability to the students "for a longer period than is reasonably necessary to facilitate the transmissions for which it was made." Moreover, the institution may not store or maintain the material on a system or network where it may be accessed by anyone other than the "anticipated recipients."

5. *Limited long-term retention of copies*. The TEACH Act also amended Section 112 of the Copyright Act, addressing the issue of so-called "ephemeral recordings." The new Section 112(f)(1) explicitly allows educational institutions to retain copies of their digital transmissions that include copyrighted materials pursuant to Section 110(2), provided that no further copies

are made from those works, except as allowed under Section 110(2), and such copies are used "solely" for transmissions pursuant to Section 110(2). As a practical matter, Congress seems to have envisioned distance education as a process of installments, each requiring a specified time period, and the content may thereafter be placed in storage and outside the reach of students. The institution may, however, retrieve that content for future uses consistent with the new law. Incidentally, the TEACH Act did not repeal the earlier language of Section 112 that generally allowed educational institutions to keep some copies, such as videotapes, of educational transmissions for a limited period of time.

Duties of Instructors

Thus far, most duties and restrictions surveyed in this examination of the TEACH Act have focused on responsibilities of the institution and its policymakers and technology supervisors. None of the details surveyed so far, however, begins to address any parameters on the substantive content of the distance-education program. Under traditions of academic freedom, most such decisions are left to faculty members who are responsible for their own courses at colleges and universities. Consequently, to the extent that the TEACH Act places restrictions on substantive content and the choice of curricular materials, those decisions are probably best left to the instructional faculty. Faculty members are best positioned to optimize academic freedom and to determine course content. Indeed, the TEACH Act does establish numerous detailed limits on the choice of content for distance education. Again, the issue here is the selection of content from among copyrighted works that an instructor is seeking to use without permission from the copyright owner.

1. *Works explicitly allowed.* Previous law permitted displays of any type of work, but allowed performances of only "nondramatic literary works" and "nondramatic musical works." Many dramatic works were excluded from distance education, as were performances of audiovisual materials and sound recordings. The law was problematic at best. The TEACH Act expands upon

existing law in several important ways. The new law now explicitly permits:

- Performances of nondramatic literary works;
- Performances of nondramatic musical works;
- Performances of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions"; and
- Displays of any work "in an amount comparable to that which is typically displayed in the course of a live classroom session."

2. *Works explicitly excluded*. A few categories of works are specifically left outside the range of permitted materials under the TEACH Act. The following materials may not be used:

- Works that are marketed "primarily for performance or display as part of mediated instructional activities transmitted via digital networks"; and
- Performances or displays given by means of copies "not lawfully made and acquired" under the U.S. Copyright Act, if the educational institution "knew or had reason to believe" that they were not lawfully made and acquired.

The first of these limitations is clearly intended to protect the market for commercially available educational materials. For example, specific materials are available through an online database, or marketed in a format that may be delivered for educational purposes through "digital" systems, the TEACH Act generally steers users to those sources, rather than allowing educators to digitize or upload their own copies.

3. *Instructor oversight*. The statute mandates the instructor's participation in the planning and conduct of the distance education program and the educational experience as transmitted. An instructor seeking to use materials under the protection of the new statute must adhere to the following requirements:

- The performance or display "is made by, at the direction of, or under the actual supervision of an instructor";

- The materials are transmitted "as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities" of the educational institution; and
- The copyrighted materials are "directly related and of material assistance to the teaching content of the transmission."

The requirements share a common objective: to assure that the instructor is ultimately in charge of the uses of copyrighted works and that the materials serve educational pursuits and are not for entertainment or any other purpose. A narrow reading of these requirements may also raise questions about the use of copyrighted works in distance-education programs aimed at community service or continuing education. While that reading of the statute might be rational, it would also be a serious hindrance on the social mission of educational institutions.

4. *Mediated instructional activities*. In perhaps the most convoluted language of the bill, the statute directs that performances and displays, involving a "digital transmission," must be in the context of "mediated instructional activities." This language means that the uses of materials in the program must be "an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting." In the same provision, the statute specifies that "mediated instructional activities" do not encompass uses of textbooks and other materials "which are typically purchased or acquired by the students." The point of this language is to prevent an instructor from including, in a digital transmission, copies of materials that are specifically marketed for and meant to be used by students outside of the classroom in the traditional teaching model. For example, the law is attempting to prevent an instructor from scanning and uploading chapters from a textbook in lieu of having the students purchase that material for their own use. The provision is clearly intended to protect the market for materials designed to serve the educational marketplace. Not entirely clear is the treatment of other materials that might ordinarily

constitute handouts in class or reserves in the library. However, the general provision allowing displays of materials in a quantity similar to that which would be displayed in the live classroom setting ("mediated instructional activity") would suggest that occasional, brief handouts – perhaps including entire short works – may be permitted in distance education, while reserves and other outside reading may not be proper materials to scan and display under the auspices of the new law.

5. *Converting analog materials to digital formats*. Troublesome to many copyright owners was the prospect that their analog materials would be converted to digital formats, and hence made susceptible to easy downloading and dissemination. Some copyright owners have held steadfast against permitting digitization in order to control uses of their copyrighted materials. The TEACH Act includes a prohibition against the conversion of materials from analog into digital formats, except under the following circumstances:

- The amount that may be converted is limited to the amount of appropriate works that may be performed or displayed, pursuant to the revised Section 110(2); and
- A digital version of the work is not "available to the institution," or a digital version is available, but it is secured behind technological protection measures that prevent its availability for performing or displaying in the distance-education program consistent with Section 110(2).

These requirements generally mean that educators Must take two steps before digitizing an analog work. First, they need to confirm that the exact material converted to digital format is within the scope of materials and "portion" limitations permitted under the new law. Second, educators need to check for digital versions of the work available from alternative sources and assess the implications of access restrictions, if any.

Role for Librarians

Nothing in the TEACH Act mentions duties of librarians, but the growth and complexity of distance education throughout the country have escalated the need for innovative library services. Fundamentally, librarians have a mission centered on the management and dissemination of information resources. Distance education is simply another form of exactly that pursuit. More pragmatically, distance education has stirred greater need for reserve services and interlibrary loans in order to deliver information to students in scattered locations. Librarians are also often the principal negotiators of licenses for databases and other materials; those licenses may grant or deny the opportunity to permit access to students located across campus or around the world.

Within the framework of the TEACH Act, librarians may find many new opportunities to shape distance-education programs, such as:

- Librarians may participate in the development of copyright policy, including policies on fair use that long have been of central importance to library services.
- Librarians may take the lead in preparing and gathering copyright information materials for the university community. Those materials may range from a collection of books to an innovative website linking materials of direct relevance.
- Librarians may retain in the library collections copies of distance-education transmissions that the institution may make and hold consistent with the law. In turn, the librarians will need to develop collection polices, usage guidelines, and retention standards consistent with limits in the law.
- Many materials used in distance education will come from the library collections, and librarians may be called upon to locate and deliver to educators proper materials to include in the transmissions. Librarians may need to evaluate materials based on the allowable content limits under the law.
- Librarians often negotiate the licenses for acquisition of many materials. To the extent that the law imposes undesirable restrictions, the librarians are

in a position to negotiate necessary terms of use at the time of making the acquisition.

- Librarians have many opportunities for offering alternative access to content that cannot be included lawfully in the distance-education programming. When materials may not be lawfully scanned and uploaded, the library may respond with expanded reserve services, or enhanced database access, or simply purchasing alternative formats or multiple copies of needed works.
- Librarians long have recognized the importance of fair use and often have the best grasp of the doctrine. Librarians are usually best positioned to interpret and apply fair use to situations and needs not encompassed by the rigorous details of the TEACH Act.
- Librarians may research and track developments related to the TEACH Act, including policies, information resources, and operating procedures implemented at other educational institutions. That effort can allow one university to learn from others, in order to explore the meaning of the law and to consider options for compliance.

Conclusion

The TEACH Act is an opportunity, but it is also a responsibility. The new law is a benefit, but also a burden. Implementing the law and enjoying its benefits will be possible only with concerted action by many parties within the educational institution. Because of the numerous conditions, and the limitations on permitted activities, many uses of copyrighted works that may be desirable or essential for distance education may simply be barred under the terms of the TEACH Act. Educators should seek to implement the TEACH Act, but they should also be prepared for exploring alternatives when the new law does not yield a satisfactory result. Among those alternatives:

- Employing alternative methods for delivering materials to students, including the expansion of diverse library services, as noted above.
- Securing permission from the copyright owners for the use of materials beyond the limits of the law.

- Applying the law of fair use, which may allow uses beyond those detailed in the TEACH Act.

One objective of the TEACH Act is to offer a right of use with relative clarity and certainty. Like many other such specific provisions in the Copyright Act, the new statutory language is tightly limited. An ironic result is that fair use – with all of its uncertainty and flexibility – becomes of growing importance. Indeed, reports and studies leading to the drafting and passage of the new law have made clear that fair use continues to apply to the scanning, uploading, and transmission of copyrighted materials for distance education, even after enactment of the TEACH Act. A close examination of fair use is outside the scope of this particular paper, but fair use as applied to distance education will be the subject of further studies supported by the American Library Association.

A Transitional Comment

The next Section of this publication presents scenarios designed to assist the reader in acquiring a better understanding of the application of the four fair-use factors. The TEACH Act does not change the fair-use exemption provided by the copyright statute. All those who are involved in distance education still must be able to arrive at well-considered fair-use determinations.

The scenarios in the next Section do not include illustrations of how universities should apply the TEACH Act, however. This is the result of a conscious decision which reflects the complexity of the TEACH Act. This important new copyright law does not lend itself well to illustration by means of the scenario method. Distance educators will be well advised to consider the TEACH Act in its entirety as they approach its interpretation and application. The Act's provisions must be considered as a whole.

The scenario method, which focuses on the small number of statutory factors, is a simple and reliable approach to the subject of fair use. In contrast, the TEACH Act is complex, not simple – and its provisions are numerous, rather than just a few. Applying the TEACH Act requires a separate, thorough analysis.

SECTION 5 Illustrative Scenarios

Faculty increasingly find themselves in situations which may involve the legitimate fair use of copyrighted works. The examples below were selected from current practices in higher education and, depending on the facts, may or may not pass scrutiny under the fair-use test.

In the future the need for appropriate fair use as a part of education undoubtedly will expand. Faculty will have to consider and balance the four factors in situations such as the ones that follow.

Fair use is a flexible concept intended to be used. In any situation, the careful evaluation of the four factors – purpose, amount, nature, and effect – will tell you whether your use is "fair" or whether you ought to seek permission from the copyright owner *(see also pages 22-24 and Part II, Section 6).*

The following scenarios are intended to emphasize the growing range and escalating complexity of copyright and fair-use issues on campuses. Many readers may hope that these scenarios will give them "the clear answer to the fair-use dilemma." However, such readers will experience some inevitable degree of frustration: rarely does the law provide a clear answer that fits all cases. A fresh balancing of the four factors of fair use is the most reliable and defensible decision-making method.

Electronic Reserves or Coursepacks

A professor has been told by students that it is difficult to obtain reserve materials because of the large number of enrolled students. As an alternative, he scans several journal articles onto a campus network server and instructs the students on how to access them so that they may complete the class assignments.

ANALYSIS: *Access restrictions can have the greatest influence on tipping the factors in favor of fair use. A problem with making text available on any network is that it can be accessible by readers far beyond the intended audience of students registered in the class. Thus, restrictions on access through passwords or other similar restrictive systems can enable the professor to argue that the purpose is solely to benefit the students and not to provide access for others.*

Access restrictions also can limit the potential adverse effect on the market for the original. By limiting the range of users who may find the document, the professor can minimize or eliminate any possibility that an unauthorized person will retrieve the work from the network instead of purchasing a copy. Some critics of electronic reserves have argued that the educational purpose and the minimal market effects cannot be controlled because the electronic medium allows users to print, download, and transmit copies at little cost or effort and thereby undermine the restricted access.

The professor also must watch closely the nature of the material posted on reserves and the amount of material from the original source put on reserves.

Ultimately, the proper fair-use analysis will apply the four factors to each work separately. Including the full text of a long article that is readily available through a commercial database may not be fair use. Excerpts from a news item, or excerpts presented in a manner useful to the students only, and not likely to any other reader, are more likely to be fair use. The Conference on Fair Use declined to offer guidelines on these issues, and the TEACH Act in Congress specifically does not address electronic reserves or similar copying.

Multimedia Production – Faculty

A professor teaches a course in which she occasionally uses a piece of music, shows a picture, or plays a piece of videotape. She has lawfully obtained all of these materials and

clearly may use them in face-to-face teaching under the Copyright Act. But the professor would like to reproduce these short items onto one compact disk in order to prevent their loss or deterioration, keep them organized, and show them in the class by using a single piece of equipment.

ANALYSIS: *One of the complex fair-use issues for multimedia production has been an understanding of its potential effect on the market for the originals. Even brief excerpts, reproduced into digital format, are sometimes said to directly undermine the ability of the creator or publisher to market or license such excerpts. Thus, making the copies would directly erode that potential market.*

Also problematic is the "nature" of the different works. Some materials may be of a factual or scholarly nature and thus more amenable to fair use. Other materials used in multimedia are often professional photography, music, or motion pictures that may have a significant public market value.

Multimedia Production – Student

Students in a Twentieth Century U. S. History course are asked to create an "electronic term paper" using lawfully acquired resources from the institution's library and media center. While doing research, he finds a book with just the information he needs and photocopies the bibliography and several pages of images and text. He takes the photocopies to the student computer lab and scans the material into his electronic term paper.

ANALYSIS: *Multimedia production in the hands of students solely for an individual term project will more easily pass fair-use scrutiny. If the use is limited to the one-time project, the student can easily argue that the purpose is solely educational. Short clips of non-fiction works may also receive favorable treatment under the "nature" and "amount" factors.*

Moreover, because the work is for one-time use only, and not for further reproduction, broadcast, or other dissemination, the copyright owners of the materials are not likely to find a market for licensing under these circumstances. Thus the isolated, individual uses may have no significant adverse effect on the market.

Some current trends in higher education, however, may raise further issues for analysis. For example, will the students in an on-line or web-based course examine and discuss each other's multimedia projects, once completed? Will a digital or other electronic copy of the student's finished project be made, kept for a period of time, and used by the instructor in future semesters as an exemplar of good student work? Will peer-feedback be used in a distant-learning course as one of the steps during the student's creation of his or her project? In each of these variations the new issues which arise are unlikely to weigh toward fair use.

Developing a Slide Collection

A professor photographs and makes slides of a number of reproductions of artworks in a book on Italian painting and sculpture. She plans to show the slides to the students enrolled in her course by loading digital images onto the university server.

ANALYSIS: *This scenario is much more problematic than it appears. The purpose may be clearly educational, but when a professor copies a photograph, he or she is reproducing the entire work of the copyright owner. Fair use seldom allows the reproduction of an entire copyrighted work. Further, art is highly creative, so under the "nature" factor a court may not conclude that it is the type of work meant to be reproduced to serve the purposes of fair use.*

Further complicating the scenario is the contention that a photograph of a work of art actually embodies two copyrights: the first is the copyright to the original art, and the second is the possible copyright to the photograph of the work of art.

By that standard, even if the original painting is now in the public domain, the photograph of it may still be under copyright protection. A recent court ruling, however, has greatly reduced this possibility (see page 71).

A textbook with multiple art images is likely based on the work of many different photographers. Perhaps the most feasible method for arguing that the "amount" and "effect" factors may weigh in favor of fair use is by reproducing only a small number of images from any one textbook. Adverse effect on the market may also be minimized if the publisher does not sell either select slides or a set of slides from the textbook.

This scenario continues to raise one of the most troublesome quandaries for the application of fair use. Many collections of such images exist at universities, and some of them are readily accessible on the Internet. Some collections include no indication whatsoever of the legal standard, if any, used by the collection developer. Yet one court ruled recently that an Internet search tool could include copyrighted images only if they were low-resolution scans of thumbnail size, and then for purposes of leading the user to the site where the original is located.

Adapting Materials for Students with Disabilities

A university serves many students with various disabilities. Certain works need to be adapted to serve their needs, perhaps by creating large print copies of some materials or by creating a closed-captioned version of a commercial educational videotape. The copyright owners have not authorized anyone to make such versions available for purchase. In addition, some of these adapted materials might be electronically delivered to disabled students in their homes.

ANALYSIS: *Adapting materials for students with disabilities raises several problems under traditional fair-use analysis. First, the students generally need*

the entire work, so the "amount" factor will often weigh against fair use. Students also need a wide range of materials, often including works of fiction and feature-release motion pictures.

In some such instances, the "nature" of the material can weigh against fair use. Although the copyright owner may not currently market a version of the work adapted for students with disabilities, the owner may nevertheless argue that making and providing any copy under any circumstances will deprive the owner of a potential sale and create an adverse effect on the market. The making of a single copy for one-time use may have at best a limited effect on the market, but anytime such a work is disseminated in copies or otherwise distributed or broadcast to the students, the effects on the market will be compounded.

Fair-use law may ultimately protect the adaptation of short works or excerpts from longer works as may be needed to serve the requirements of specific students enrolled in specific courses. Fair use is less likely to encompass the adaptation of a full textbook or full motion picture for long-term retention in anticipation of unspecified needs.

Fair use will continue to be important, even though Congress recently added Section 121 to the Copyright Act. That provision allows certain organizations to make formats of some works for persons who are blind or have other disabilities. The law is not extraordinarily confining, but it does apply only to organizations with a "primary mission" of serving such persons, and it allows specialized formats of "previously published, nondramatic literary" works. America's colleges and universities are required by law to serve disabled students. They typically exert effort and facilities to the discharge of this part of their mission, and thus should fall within the reach of this new section of the Copyright Act.

SECTION 6 Obtaining Permissions

The complexities of fair use require that each member of the university community learn to apply the four factors and make a sound judgment about the permissibility of quoting, photocopying, downloading, and making other uses of protected works. Invariably, however, each of us will encounter situations where we need to obtain permission from the copyright owner. Common examples where permission is ordinarily required include photocopying an entire article or entire book chapter into a course reader that students will purchase, or mounting substantial text or graphic work onto a publicly accessible website.

When permission is necessary, you must contact the copyright owner or the owner's authorized agent. Often the copyright owner will be named in the formal copyright notice accompanying the original work. Such notices are no longer required to obtain copyright protection, so many works often lack the notice or include the name of someone who is not the actual or current copyright owner. Nevertheless, you should logically begin your search for the copyright owner by directly contacting the author or publisher. Reference librarians can be extremely helpful for finding names and addresses. You will also find that the quest for the copyright owner can be simplified by using your telephone to call the parties and to ask direct questions about ownership and rights of use.

The Copyright Clearance Center (CCC) also can simplify the process by acting as the agent on behalf of thousands of publishers and authors to grant permission. You can learn more about the CCC by reviewing their World Wide Web home page at the following address: **http://www.copyright.com/.**

Please keep in mind that copyright owners have wide discretion when responding to your request for permission. Your permission may be granted or it may be denied. It may be granted, but only

on condition of paying a fee. The fee may be modest or it may be exorbitant. Copyright owners also have no obligation to respond at all. For most common uses of materials for educational and research purposes, you often will find that copyright owners will be cooperative and will understand your needs.

The following is a sample letter, with instructions, that you may adapt when requesting permission. Please remember that a telephone call before sending the letter can give you the exact name and address of the person to contact and might even give you an immediate answer to your request. Oral permission granted over the telephone is legally valid, but good practice requires that you document the permission with a letter that the grantor will sign and return to you.

Sample Permission Letter

[*Letterhead stationery or return address, including voice & fax telephone nos.]*

[*Date*]

[*Name & address of addressee*]

Dear [*Title & name*]:

[*If you called first, begin your letter:* This letter will confirm our recent telephone conversation.] I am [*Describe your position*] at [*Name of institution*] University. I would like your permission to [*Explain your intended use in detail, e.g., reprint the following article in a coursepack for my course*].

[*Insert full citation to the original work.*]

Please indicate your approval of this permission by signing the letter where indicated below and returning it to me as soon as possible. My fax number is set forth above. Your signing of this letter will also confirm that you own [*Or your company owns*] the copyright to the above described material.

Thank you very much.

Sincerely,

[*Your name and signature*]

Permission granted for the use requested above:

_____

[*Type name of addressee below signature line*]

Date: _____

Instructions for Permission Letters

1. Be sure to include your return address, telephone number, fax number, and the date at the top of the letter.

2. Spare no effort in confirming the exact name and address of the addressee. Call the person to confirm the copyright ownership.

3. Clearly state the name of your university and your position.

4. Precisely describe the proposed use of the copyrighted material. If necessary or appropriate, attach a copy of the article, quotations, diagrams, pictures, and other materials If the proposed use is extensive, such as the general use of an archival or manuscript collection, describe it in broad and sweeping terms. Your objectives are to eliminate any ambiguities and to be sure the permission encompasses the full scope of your needs.

5. The signature form at the end of the sample letter is appropriate when an individual grants the permission. When a company (such as a publishing house) is granting the permission, use the following signature format:

   Permission granted for the use requested above:

   [*Type name of company*]

   By: _____

   Title: _____

   Date: _____

PART III

UNBUNDLING OF OWNERSHIP RIGHTS

SECTION 1 Why Pay Attention to Ownership of Intellectual Property at the University?

Whether printed on paper, exposed on celluloid, or digitized in an electronic medium, the expression of an idea in a concrete or *fixed* fashion transforms thought into intellectual property. This property has value, making ownership a significant incentive for creativity. Creation of intellectual property is a normal and everyday consequence of work at a university – where faculty, staff, and students may incorrectly assume they automatically own all their creations.

The current Copyright Act, signed into law in 1976, has changed significantly since the printing of the publications, *Fair Use of Copyrighted Works* and *Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Learning*. Moreover, determining ownership has become a much more complex issue at universities, and recent legal and educational changes further complicate the process and necessitate this update of the original publications.

Legal Changes

The Supreme Court has handed down a series of rulings on "sovereign immunity" of states, barring most lawsuits against states and state entities in federal court. Based on sovereign immunity, federal courts have dismissed a string of cases involving intellectual property brought in federal court against states, sometimes state universities. Additionally, the concept of "work for hire" has been applied in some cases in such a way as to give copyright of teaching materials to universities and to bar the creator of the materials, the instructor, from using them without the permission of the university. The Digital Millennium Copyright Act (1998) provided new legal technical specifications, but is still being interpreted in the courts. Although the DMCA may not have significant direct consequences

for faculty and others on a routine basis, this complex legislation has drawn widespread attention to the complexities and problems of copyright law. The TEACH Act revised the copyright law relevant to the ability of teachers to use certain copyrighted materials in distance education and will lead to more centralized control of distance education. Clearly recent trends in legislation and court decisions indicate the university has a strong argument in most copyright disputes.

Educational Changes

Traditionally, the university professor has been the sole author and copyright owner of most new works in higher education. Today, however, faculty are increasingly dependent on support staff and materials. At the same time, many universities are moving toward greater centralization of resources such as support staff and facilities support at the campus level (e.g. media centers). And, increasingly centralized instructional programs lead to more centralized provision and control of funding. Today, a collaborative production, perhaps under a grant from a multicampus state higher education system, may include faculty members and students who provide original expressions used to communicate substantive content, staff who mount the work on the web with an online teaching tool, and an outside provider who creates the graphics for an online course. The resulting product may be marketable beyond the local university campus. Each person who has contributed original expressions and elements to the final product holds a potential claim of copyright, and the University may exert its own claim based on funding support or other resources provided.

Dealing with a Complex and Changing Situation

The complex context of creating intellectual property requires a thoughtful response that treats all interested parties fairly and demands that creators pay close attention to their rights and the rights of others. The foundation of this fair treatment is the concept of ***unbundling***, the sharing of ownership rights by means of exclusive and nonexclusive license agreements. The negotiation of prior licensing agreements – the practical means of unbundling the rights of intellectual property ownership –

also can shift the parties' focus away from purely economic concerns, promote enhanced access to the intellectual content of new works, and spur the genesis of patentable ideas. Protection of rights and an equitable unbundling promote the creation and dissemination of intellectual property, in direct furtherance within higher education of the Constitutional impetus to "promote the Progress of Science and the useful Arts."

Copyright: One Type of Intellectual Property

Intellectual property generally consists of four types – copyrights, patents, trademarks, and trade secrets – but Part III of this publication deals primarily with rights that copyright owners may exercise and allocate. Copyright has been, and continues to be, fundamentally different from patents, both conceptually and economically. Some research universities require assignment of all patent rights to the university, with the inventor perhaps retaining a share of any royalties. Copyright, on the other hand, often protects the highly personal, literary, expository, and creative expressions which may grow from an instructor's overall program of teaching and research, and each work can become the foundation for a future agenda of scholarly inquiry. Creators and inventors are well advised to refer to university policy and to consult appropriate professionals in matters of copyright, patent, trademark, or trade secrets.

Other Important Considerations and Limitations

When a faculty author signs an unconditional assignment of copyright to a publisher or information service provider, some adverse consequences occur. University libraries often pay subscription fees for the use of documents which originated on their own campus. Such unconditional assignments can also severely limit creators' and their colleagues' use of intellectual property on their own campuses and even in their own classrooms.

Many other topics which bear on intellectual property are beyond the scope of this publication. Interpretation and details of copyright law are fluid and shaped by assumptions crucial to commerce but less important in the academy. Separate ethical and legal protections may apply to the ideas which initiate the creative process

or to the data resulting from research. Finally such topics as plagiarism, proper citation of works, the protection of property – as property subject to theft, for example – and the protection of a person's personal image and reputation also are not addressed.

Patent

The Constitution's enabling language addresses inventors and their discoveries, in addition to authors and their writings. This publication attempts to include patents in the context of a large, public, multi-campus comprehensive university system. Together, patent and copyright comprise the major portion of intellectual property subject matter in a university setting. The two other components of intellectual property, trade (and service) marks, and trade secrets, are relatively minor topics where university policies are concerned.

Patent and copyright have significant differences. The major practical difference is an economic one: the typical cost of securing a patent greatly exceeds that of copyright.

Virtually all CSU faculty, staff, and students create and fix new works or authorship and are initially and automatically vested with copyright ownership at the moment of fixation. The number of such copyright works is legion, and the sum of their commercial value is relatively small in practice. Should the CSU change its current approach to copyright ownership so as to increase the university's role in the ownership of faculty, staff, and student works, then this action would result in relatively small additional expense in pursuit of modest financial gain with a low probability of success in achieving even that modest gain. The overriding effect would be to chill the creation of original works at the university.

In contrast, the number of faculty, staff, and student inventions which are conceived and reduced to practice during the term of the inventor's employment or matriculation in the CSU is small. These few existing patents to date have, in sum, a relatively small commercial value. However, the probability of a single future patent's yielding a very large commercial value is small, but not zero. For the CSU to change its approach to patent own-

ership so as to increase the university's role in the ownership of faculty, staff, and student inventions would result in taking a large financial risk in pursuit of a large financial gain with a very low probability of success in achieving significant new financial resources. The overriding effects could be to divert attention away from the teaching and research mission of the CSU and could lead to new restrictions to the freedoms necessary for teaching and research – arising from efforts to maximize patent-related revenue streams.

The lifetime of the limited-term monopoly which a valid patent grants to an inventor is only about 20% as long as that associated with copyright. Four exclusive rights, rather than five as in the case of copyright, are vested in the patent owner concerning the patented invention:

- The right to use it,
- The right to make or manufacture it,
- The right to sell it, and
- The right to develop and commercially exploit it, including its distribution, marketing, and comercial manufacture.

There are three different types of patent: a utility patent, a design patent, and a plant patent. To receive a patent, an invention (innovative idea) must be novel (new) and nonobvious in light of the prior art (clever). Certain things are unpatentable: mathematical formulas (algorithms); newly discovered laws of nature (deemed to lie in the public domain); and newly discovered substances that occur naturally in the world.

Finally, the invention must be "reduced to practice." That is, the thing, process, or idea must have a tangible and workable nature which is the result of continued efforts to reduce it to practice.

The concept of "novelty" is fairly explicitly expressed in the patent world, and courts have interpreted the standard for originality with greater rigor when considering a patent than when considering copyright. To receive a patent, the invention must not be generally and currently known. Three further requirements also must be met:

- Without too much skill or ingenuity, the invention can exist, be reduced to tangible form, or be used in a tangible thing.
- The invention must have some value or use to society.
- The invention must have been thought up or discovered by someone.

More than copyright, patents are firmly rooted in the context of commercial exploitation. For this reason, the subject of patent ownership *vis-à-vis* employee and employer has a considerable history in case law. When inventions result from work done in the course of employment, the employer (business) usually ends up owning the patent rights. Even when an employee (inventor) is the patent owner, employers retain the right (called "shop rights") to make and use an invention created (conceived and reduced to practice) in the course of the employment relationship (company time) and with the employer's tools and facilities. Such employer's shop rights are irrevocable, non-assignable, non-exclusive, and royalty-free. In this situation, the employee retains the right to issue non-exclusive licenses for others (third parties) to use and manufacture the invention in exchange for royalties or other compensation.

Major research universities often provide patent-related services known as technology transfer offices. The CSU devotes a relatively small degree of effort and resources to this function. The successful development of an invention to the point where a patent is successfully granted to a patent owner involves significant investment, whereas the vesting of copyright in a copyright owner does not. The amount of investment to achieve successful commercial exploitation of a patent is many times more expensive than the investment associated with an academically successful copyrighted work.

Relatively few faculty, staff, or students have the financial resources to successfully obtain a patent. All such individuals should be free to approach the CSU and its auxiliary organizations to explore the possibility of receiving university assistance in this regard. The decision whether to provide the resources to proceed must reside solely with the university.

Because of the magnitude of the resources which are required and because of the substantial risks which are involved, commercial firms usually play the central role in the perfection of a patent (all the steps between conceiving the idea and successfully obtaining a patent). Thus, both the perfection of a patent and the actual granting of the patent itself typically are completed by specialized commercial firms and patent attorneys. Also, the subsequent commercial exploitation of a patent typically falls to a commercial firm which either owns the patent or pays a royalty for a license to exploit or use the patent.

Individual campuses in the CSU which are in the position to do so have increased the resources which they choose to devote to technology transfer. Many of the campuses, however, are not in such a position. Until the State of California defines and funds the CSU as a major research university system, the system-wide support of technology transfer activities and the associated greater CSU participation in patent ownership should remain unchanged.

SECTION 2 Ownership of New Works and Inventions at the University

The tradition of ownership of copyright at most American universities is that ownership is presumed to vest initially with the creator of original works, typically a faculty member. Copyright ownership represents an opportunity to promote or to inhibit access to copyrighted works. The owner may make works freely available or may allow access or use under stringent or costly circumstances. Most creative work at universities is scholarly in nature, and most authors intend for their works to be widely shared and studied.

An academic environment that best advances knowledge will view copyright ownership as a set of opportunities that may be shared within the university community rather than as an "all-or-nothing" property concept. To optimize the availability of new works for teaching and scholarship, copyright should not be viewed as a simplistic claim of title, but should instead be understood as a divisible bundle of rights that may be allocated among different parties to provide maximum opportunities for sharing and learning. Effective publication of articles, for example, does require a grant of rights to the publisher for reproduction and distribution, but publishers seldom need all rights of copyright ownership.

A careful allocation of rights among parties can best allow faculty to build on their previous works, enable colleagues and students to benefit from one another's research and creativity, and allow universities to foster the greatest growth of knowledge from increasingly scarce support funds. In particular, our proposal calls for a sharing of new works within the broadest possible university community.

We affirm the right of creative faculty members and students to retain primary control over their new works and inventions. Similarly, we also affirm that situations exist at the university where university staff have the right to retain primary control over their new works and inventions. We further recognize that sharing of knowledge is central to the success of academic insti-

tutions, and copyright should not inhibit productive work. In that regard, we also understand the narrow application of fair use in some recent court rulings and "guideline" agreements; in response, we seek to overcome those developments by making works more widely available by better managing our own copyrights and allowing greater rights of use beyond the confines of fair-use law or publication contracts.

We recognize the right of faculty, staff, and student inventors to freely pursue their novel and potentially patentable ideas while at the university. We further recognize that universities, increasingly beset by funding difficulties, may long for the potentially lucrative revenues associated with "the next great patentable idea." Finally, we recognize that few, if any universities have successful commercial exploitation as a front-rank component of their educational mission. The unfettered freedom to pursue an idea wherever it might lead is essential to the definition of the academy. Many articles have been written which, in part, examine the potential dangers of opening the university to the pressures of the commercial marketplace in connection with both the funding of research and the all-out pursuit of potential financial and economic benefits. Neither the funding nor the benefits can be considered "risk free." Therefore, the academic environment will benefit by some consideration of topics in the area of patent ownership. Some first efforts in this subject area are included in this publication.

The subject of copyright ownership is pervasive throughout any university. As such, we recommend significant new attention and action in this subject area and treat this subject in some depth.

Individual university campuses in the CSU have decided to place greater or lesser emphasis on the pursuit of patentable ideas by their faculty, staff, and students. Some have "technology transfer" offices and patent assistance programs; most do not. We advocate maintaining the *status quo* where such programs are concerned. We treat some patent ownership topics, but our efforts are just a beginning.

SECTION 3 Fundamentals of Copyright Ownership: Overview and Meaning for Higher Education

Why Examine the Ownership of Newly Created Works?

An examination of current practices with respect to the ownership and management of copyrighted works is timely and essential. Recent technological developments create new opportunities for creators and authors to produce and distribute new works and give new meaning to the terms "creator" and "publisher." The recent advent and rapid growth of the Internet and other electronic distribution mechanisms for information exchange are salient examples of why we should reexamine the current copyright environment. Thus, ownership questions worthy of discussion in the traditional context of print media have now become more critical given the impact of technology on the production and distribution of information in higher education and its scholarly and creative endeavors.

The copyright decisions of faculty members, in particular, too often ignore complex nuances associated with copyright. Promotion and tenure policies within universities often encourage faculty to emphasize the quest for publication without focusing directly on optimal access to new works for the advancement of learning. Too often copyright is assigned to publishers without the author's having reserved rights to future uses such as the incorporation of elements of a copyrighted work into his or her next work or the photocopying of the author's journal article even for his or her own teaching and research.

Moreover, revenue from sales of many faculty works – notably research articles – often flows to third parties, much to the frustration of universities and funding agencies which underwrite most works produced at the university and which then find themselves in the position of having to buy the work back in the form of subscription fees, royalty payments, and other current and future costs. The economic equilibrium associated with traditional faculty scholarly

publications has led some to conclude that both the traditional publishing industry itself and the ability of the university to acquire the materials which its mission requires are in jeopardy.

Another facet of creativity and authorship at the university is becoming more important, in part, because of new technological capabilities. The professor often benefits from the original efforts of staff and student assistants who create the copyrighted expressions fixed in print – and, increasingly, in electronic – versions of instructional, scholarly, and research works.

Discussions of ownership and creativity too often isolate parties at opposite ends of a linear continuum, manifesting a competitive relationship between the author and the university. Our position, however, takes a different perspective. We prefer to think of the relationship of the author and the university, centered on issues related to copyright, as circular rather than linear. This interdependent relationship provides on-going mutual reinforcement of shared interests and operates positively as a dynamic system in which:

- the creative environment fosters works protected by copyright;
- the works are protected by copyright ownership;
- the benefits of authorship accrue to the creator/author;
- appropriate benefits of ownership also accrue to the institution;
- the institution fosters a creative/scholarly environment;
- and the creative cycle can begin again.

What Does Copyright Law Protect?

Copyright law protects original works of authorship that are "fixed in any tangible medium of expression." Protectable works include books, articles, artwork, music, software, traditional or electronic correspondence, and materials placed or found on the Internet.

Copyright protection vests automatically upon creation of any protectable work. Placing a copyright notice on the work and registering it with the U.S. Copyright Office are no longer required. These steps, however, are still good practice and provide some legal benefits in the unlikely event of a lawsuit. You may also use the copyright notice as an opportunity to clarify how you prefer to share your work with others (see, for example, the notice at the beginning of this publication).

For more information about registering your work, call the U.S. Copyright Office at (202) 707-9100 to request forms and instructions, or check its home page at: www.copyright.gov

The copyright owner holds a set of exclusive rights:

- the right to make reproductions of the work,
- the right to distribute copies of it,
- the right to make derivative works that borrow substantially from an existing copyrighted work, and
- the right to make public performances or displays of most works.

These rights are limited by certain rights of use granted to the public. The best known of such public rights of use is "fair use."

Some materials are not protectable by copyright. Examples include ideas, facts, U.S. government works, works for which the copyright has expired, works in the public domain, and live performances which are not "fixed."

Who Is the Copyright Owner?

*The important question is **not who** is the owner, **but what** are the terms of the unbundling agreement. But to "unbundle," someone must be identified as "the owner."*

Copyright owners may be individuals or organizations. In general, the copyright owner is the person or entity that created the new protectable work. A corollary to this principle is that copyright extends only to

original contributions to the work and does not extend to any elements of a work that may have been borrowed from others. For example, if your new multimedia project incorporates materials from other sources or from the public domain, you may have a copyright to your original organization or compilation of the works, but you have no claim to those borrowed portions.

An exception to the general rule is the work-for-hire doctrine, which in its fundamental form in the U. S. Copyright Law, states that when an employee creates a work within the scope of employment, the employer owns the copyright. This version of the doctrine applies only to employees, not to independent contractors. You might pay someone handsomely for creative labors, but that person, in fact, may not be your "employee." Paying someone to create a new work does not mean that you own the copyright. The doctrine can sometimes apply to "contractors," but only under a signed agreement.

Although the work-for-hire doctrine may be widely applied in the commercial environment, statutes and court rulings do not make clear whether creative or scholarly work by faculty members should be treated as work-for-hire. The law also does not make clear whether the work of research assistants, for example, would be work-for-hire. Yet, a court case summarized later in this report will demonstrate that much faculty work may well be "for hire."

Contractual agreements can alter or clarify general results established by the law. Thus, if the law does not clearly indicate who the copyright owner would be, or if the law produces an undesirable result, parties are free to enter into their own agreement respecting the copyright owner's identity.

In connection with the creation of copyrighted works, staff employees at the university typically are constrained in a way that distinguishes them from faculty and students. The work of a staff employee often is set out in his or her job description which is very much more prescriptive and less flexible than is the case for a member of the faculty. The staff member may be employed to take photographs, to create

graphic materials, to write documents and articles, to create computer software, *etc*. The professor may be employed to "teach a course." The scope of work of a student employee at the university, however, often is even less well-defined than that of either a staff or faculty member. The student employee may, indeed, create copyrighted works, but often the degree of supervision, clarity of job description, and provision of tools and resources by the university is minimal. It is not unusual for a staff employee to be doing original, creative work outside the scope of his or her job description. And it is common for the work of student employees to proceed with no job description at all. In both these cases, clear agreements as to the ownership of new works can help avoid controversy and foster creative endeavor.

Copyrights may also be jointly owned by the parties who created the work, or a single copyright owner may agree with another party that they will hold the copyright jointly. However, a thoughtful agreement among the parties almost always proves preferable to joint copyright ownership.

The Problem of Joint Ownership

In the search for an equitable solution to the potentially conflicting ownership interests in a copyrighted work, the discussion often leads to the prospect of "joint copyright ownership" of a work between the university and the individual(s) who created it. Whether desired or not, the law often finds that a work is owned "jointly" when two or more parties pool their creative efforts and intend that they will own or control the finished work together.

In general, joint copyright ownership is problematic and should be avoided. Joint owners have a legal obligation to one another throughout the many years that the copyright endures. It is a huge and potentially complex and troublesome long-term partnership. Partnerships often suffer when circumstances change for one or more of the partners. Career goals change, institutions dissolve, enmity erodes positive attitudes, and people die. Copyright lasts at least as long as 70 years. This is a recipe for copyright management stress!

Joint copyright owners are well advised to enter into a detailed written agreement specifying their interests in, and the terms of, copyright management for the work(s) they own. In many respects, the proposals for policymaking in this publication lead to exactly that result.

Accordingly, we believe that informed and creative policies are a more effective route to the successful advancement of the creation of copyrighted works at the university than simply resolving or fuzzily stating that a new work should be "jointly owned."

Why Are Faculty Works Different?

Often in copyright ownership discussions, faculty works are given special treatment, with the instructor holding rights, while works created by staff members are more often regarded as owned by the institution. Why are faculty members given such distinction?

It is not our intention to give faculty members special treatment because of their status. Instead, our purpose is to give special treatment to certain types of works that faculty members are more likely to create. Scholarly and instructional works, in particular, regularly embody substantive content that is central to the advancement of the professor's career and contribution to the discipline. The university should not interfere with that essential progress. Further, such works usually merit special protection in order to secure the academic freedom that is critical to the survival and growth of all education and research. Placing primary control of such works with someone other than the individual who is responsible for the content holds out the risk of inhibiting scholarly growth.

Therefore, we are not proposing specifically that faculty works are treated differently, but rather that works embodying substantive educational and scholarly work should be managed in a manner that leaves principal authority with the individual who created the work, whether that person is professor, librarian, staff member, or associated with the university in any other capacity. On the other hand, when any such person creates another

type of work – from an original template for online instructional design at his or her employing university to the internal administrative report – the primary copyright and legal use set of rights and control ought to belong to the institution.

Can Copyright Ownership Be Transferred?

The owner of the copyright may **assign** or **license** all or only part of the set of copyright privileges to other individuals or organizations. The set of rights associated with copyright is divisible. That is, the copyright owner may allow another party to hold or exercise some of the rights, rather than all of them. Copyright ownership, while identified with a single entity, does not have to be an all-or-nothing proposition.

Assignments of copyright often occur in the context of publishing agreements. For example, when the author of a book signs a publishing agreement, the author often is asked to assign to the publisher the copyright in its entirety, or at least to assign the rights of reproduction and distribution of the book, so that the publisher can print and sell it. An assignment of copyright, or an ***exclusive*** grant of any one or more of the rights associated with copyright, must be in writing and must be signed by the party who is making the assignment to be effective.

The copyright owner need not grant an exclusive license to anyone, however. Other options are available. The copyright owner may grant a ***nonexclusive*** right to a particular use of the work. "Nonexclusive" in this context means that owner can grant the same right to other parties. These transactions are called "licenses," and a common example of a license is the permission given to photocopy or otherwise reprint an existing work. Nonexclusive licenses do not have to be in writing, but a written confirmation of the transaction is always good practice.

Licenses or transfers do not have to give away everything. The owner of the copyright is free to set limits as to who, what, when, where, why, and how the material may be used. The owner may also set a price for the licensed use.

Ownership of copyright means both the right to protection and the responsibility to exercise that protection. That is, one cannot just own the assets; the liabilities belong to the owner, too. Copyright sometimes requires enforcement. Enforcement is the owner's responsibility.

Court Cases on Copyright Ownership

Few court decisions have clarified whether certain types of new works produced by faculty will belong to the professor or to the university. These occasional decisions provide important insight on the applicability of the work-for-hire doctrine to faculty work. They also underscore the importance of well-planned agreements and clear university policy to help resolve uncertainty.

Williams v. Weisser, 273 Cal. App. 2d 726 (1969)

A professor owns the common law copyright to his or her lectures.

A for-profit company paid students to attend university courses for the purpose of taking notes and providing a typed version of the notes. The company created outlines from the notes and sold them to university students.

Ownership: Under the pre-1976 common law applicable here, a professor, and not the university, owns his or her lecture materials regardless of whether the professor developed the materials during his "leisure time" or university time; the copyright is with the professor and not with the employer. The court emphasized the undesirable consequences of constraining a professor's ability to build on his or her work and to move freely to other institutions. Although this case relies on the former law, it reveals the policy concerns that underlie ownership issues.

Express Agreement: A university-issued memorandum proclaimed the professor's property rights in his or her lectures. The court expressly distinguished a university lecture from other "products of the mind" an employee is hired to create. Lectures were distinguished from

"valve designs, commercial drawings or radio scripts," which are owned by the employer.

Vanderhurst v. Colorado Mountain College District, 16 F.Supp.2d 1297 (D. Colo. 1998)

Without a written agreement to the contrary, the copyright to a professor's work, created in the course of fulfilling teaching duties, belongs to the university.

A professor of veterinary technology prepared a course outline on his own time with his own materials for a course that he taught at the college. After termination of his employment, the professor claimed ownership of the copyright to his course outline. The court held that the creation of the outline by the professor should be fairly regarded as one method of carrying out the objectives of his employment. Therefore, the outline was subject to the work-for-hire doctrine and the rights belong to the college.

***Ownership*:** Pursuant to the work-for-hire doctrine, copyrights to a professor's work that was created fairly and reasonably incidental to his or her employment do not belong to the professor, but to the college or university.

***Express Agreement*:** A university policy specifying faculty members' duties included professional service activities such as course, program, and curriculum development and course preparations. In this case, the policy reinforced the court's decision that a professor's work created for the class fell within the scope of his employment.

Weissman v. Freeman, 684 F.Supp. 1248 (S.D.N.Y. 1988)

Collaborative work efforts can result in joint ownership of the work product.

Two nuclear-medicine physicians conducted research that was documented in papers, syllabi, and articles throughout the project. Their efforts culminated in a

publication used by the physicians for lectures. One physician objected when the other author prepared a new version of the material for his own lectures but removed the name of the second author.

Ownership: A collaborative work product results in joint copyright ownership, even if the authors did not contribute equally. As joint owners, each contributor shares equally in the ownership and control of the work unless otherwise agreed.

Express Agreement: Lacking an express agreement allocating rights to control the work product, both physicians shared equally in the ownership of the work. As such, each author is permitted to modify or update the material as needed for his or her use.

Weinstein v. University of Illinois, 811 F.2d 1091 (7th Cir. 1987*)*

A professor owns his or her scholarly work, while the university owns materials created for administrative purposes.

Three professors agreed to work jointly on a clinical program for practicing pharmacists culminating in an article describing the results. One professor changed the work and published his own article with his name listed first in the list of co-authors.

Ownership: Tradition dictates that scholarly articles are owned by the scholar or professor and not by the university, even under the "work-for-hire" provision of the Copyright Act. As co-owners of the copyright material, one author may modify the work product (create a derivative work) and publish the new version without infringing on the other co-authors' property rights.

Express Agreement: A university policy set forth parameters for when a faculty member retains copyright. Interpreting that university policy, the court differentiated scholarly work from administrative work, which would fall under the work-for-hire provision of the Copyright Act. If, for example, the professor is commissioned to participate in a study for the use of

computers at the university, the resulting report is the property of the university.

University of Colorado Foundation v. American Cyanamid, 880 F.Supp. 1387 (D. Colo. 1995)

In a case where the issue is not contested, a court will readily conclude that scholarly journal articles are "work-for-hire."

Two professors of the University of Colorado agreed to perform a study for Cyanamid, a private company. The study resulted in new findings and a published article in a scientific publication. University patent policy established that inventions made by university employees using university facilities were to be assigned to the university. Although the policy did not extend to copyright, the court readily accepted the university foundation's assertion that journal articles also belonged to the institution.

Ownership: The university owns the copyright to the article written by its professors, because it was work done within the scope of their employment.

Express Agreement: The professors and the university were cooperating on this litigation, so they did not contest this issue. Cyanamid also did not contradict the university foundation's claim of institutional ownership. The case tacitly reveals that faculty, individually, may not have the resources to defend or assert their legal claims to ownership of copyright.

Manning v. Board of Trustees Community College, 109 F.Supp.2d 976 (C.D. Ill. 2000)

The university owns the copyright in a work made for hire created by a staff member unless both parties have signed an express, written agreement that the copyrights to the work shall belong to the staff member.

After a community college had terminated a full-time employee working as a staff photographer, both the college and the photographer claimed

ownership to the rights of the photographer's pictures taken for the college during the course of his employment. The staff member alleged that, based on copyright policy included in the college's policy manual, he owned the rights to the photographs. The court held that even if the copyright policy was sufficient to create an implied contract between the college and the photographer, the photographer failed to show an express agreement signed by the parties stating that he had the copyright in the photographs.

***Ownership*:** The Copyright Act of 1976 sets forth a statutory presumption that the employer owns the copyright in a work made for hire unless the parties have expressly agreed otherwise in a written instrument signed by both parties designating the employee as the owner of the rights to the work.

***Express Agreement*:** The court found that the language of the university's copyright policy was not binding, because the parties had not signed an express, written agreement as required by law to effect the change of ownership. Therefore, the statutory presumption that the university owned the work made for hire prevailed.

Unauthorized Recordings of Academic Presentations

New Sections of the California Education Code (see Appendix A), which as of this printing have not been tested in court, require authorization prior to the recording (fixing) of "instructional materials in any medium" – at which point the materials become new copyrighted works. This law requires that "the Trustees of the California State University shall … in consultation with faculty, in accordance with applicable procedures, develop policies to prohibit the unauthorized recording, dissemination, and publication of academic presentations for commercial purposes." Further, that the CSU Trustees shall "adopt or provide for the adoption of specific regulations governing a violation of this chapter by students, along with applicable penalties for a violation of the regulations … and . . . adopt procedures to inform

all students of those regulations, with applicable penalties and any revisions thereof."

"Commercial purpose" means any purpose that has financial or economic gain as an objective. Universities may see the possibility of such gain arising from: selling instructional materials, proceeds associated with fees of various kinds, monies generated by licenses, revenues generated by other kinds of activities, commercial value in the marketplace, selling the product in the marketplace, or by "making money for the institution."

To avoid chilling the creative efforts that are essential to the mission of higher education, the new university policies required by the California Education Code must clearly state that the authorizing agent for any such recording is the author(s) or creator(s) of the instructional material in question. Further, the university must make full disclosure, prior to obtaining the necessary authorization, of any contemplated "financial or economic gain" associated with the contemplated uses of the materials and must disclose to the author(s) or creator(s) any revisions or changes which may arise in the future regarding such gains and uses.

SECTION 4 Unbundling Ownership Rights: A Decision Framework

Philosophical Basis

Universities exist to advance and disseminate knowledge, and they accomplish those objectives through teaching, research, publication, and community service. It should be noted that students are vested with the ownership of the copyright to their original works at the moment of fixation, and that university staff should have the right to retain ownership of copyright to their creative works in situations specified in their job descriptions or in situations where they may be working outside their job description.

Faculty members usually provide creative contributions which bring new works into existence, while their home institutions provide essential facilities and support. The most fruitful environment for teaching, learning, scholarship, and creative activity, therefore, involves recognition of the shared interests among creators, colleagues, and their institutions in promoting the growth of knowledge from those new works.

The decisions concerning copyright matters at today's colleges and universities need to address copyright ownership, the assignment of all rights associated with copyright ownership or the licensing of apportionment rights, and the distribution of associated revenues or royalties, if any. The related issues are complex; the decision framework presented here provides a model for avoiding pitfalls and contentiousness. This approach is rooted in the firmly held belief that all parties share the common goals of furthering higher education’s mission and that they have a thorough understanding of the interdependence between the creator or author of new works in a university setting and his or her academic institution. New policies and agreements must not diminish the power of the partnership between American academic authors and their universities.

Three Key Factors

Three key factors are suggested for reevaluating the relationship between the faculty member who creates a new work and the university, which may have a stake in the use of the work for future studies and instructional programs. Our proposal suggests three factors that may help identify the extent of the professor's and the university's rights respecting the work. These factors will hardly define a prescribed result. Instead, each factor is a continuum, and the factors must be weighted against one another to decide on an overall outcome in determining the copyright owner and allocating the rights.

The three factors are: (1) the **creative** initiative for the new work; (2) the **control** of its content; and (3) any extraordinary **compensation** or support provided by the university. The following pages explain these factors.

We need to underscore that our focus for this effort has been on the creation of scholarly works and instructional materials. We believe that copyright to administrative works created by faculty – ranging from committee minutes to curriculum studies – appropriately is owned by the university for its use in the advancement of its mission. Nevertheless, in the spirit of the "unbundling" of rights we espouse here, the university may own the copyright, but the professor, student, or staff member who created it should have appropriate rights to use the copyrighted expressions in other contexts, particularly future projects of a similar nature, or to incorporate the material into scholarly studies, instruction, portfolios, or workshops, for example.

Who Initiated the Creative Effort?

A finished work owes its existence both to the person who conceived of the idea and to the author(s) who created and fixed the protectable expressions. Those contributors are not always the same person. Our primary focus here is on the person who initiates the creative content of the finished work. For example, a university administrator may encourage faculty

members in general terms to create publications or to create patentable inventions. Or a dean of continuing or extended education may even suggest a specific project such as the creation of an on-line course or a contract course for the employees of a specific private corporation. While such occurrences are "initiative" of a sort, they alone would not ordinarily move this factor in favor of university ownership. By contrast, under most circumstances the faculty member chooses and defines the content of scholarly projects and course materials and decides what expressions to fix in order to best convey them to the audience in question.

Given the independent nature of scholarly inquiry and the academic freedom that must protect classroom instruction, the creative initiative factor will most often weigh heavily in favor of the professor. Our suggested default condition for most college and universities is to presume that this factor and the next will weigh in favor of copyright ownership by the author, with the burden being placed on the university to state the rights it wishes to exercise in the language of prior agreements, if any, to be proposed before the creative effort begins.

Who Has Control Over the Content, Scope, and Final Approval of the Copyrighted Work?

Degree of control is a second factor to weigh in determining ownership rights. This factor focuses on the extent of control that was, or was not, exercised during the creation of the copyrighted work. This continuum includes the degree to which the university provided direct and detailed specifications for the content and form of expression of the copyrightable work, the extent to which the university specified and controlled the time, place, and manner of creation of the copyrightable work, and whether the university exercised ultimate authority over the final acceptance of or required corrections to the final copyrighted work.

The more the creative effort is directly specified, detailed, supervised, and overseen by the university and the more the university exercises ultimate control

of the acceptance of the final copyrighted work, the greater the likelihood of a decision favoring university ownership of copyright. If the author who creates a copyrighted work controls the content and form of expression – the time, place, and manner of creation, and the timeline and final authority over the acceptance of the finished work – a decision for copyright ownership by the author would be likely.

What Is the Form of Compensation and Other Support Provided for the Creative Effort?

This factor provides a means of weighing the effect of extraordinary support by the author's sponsoring university on the question of copyright ownership.

To the extent that a copyrighted work has been created under conditions where the faculty author is afforded the normal compensation by the university and the normal types and amounts of support available to those who occupy similar employment situations, then the compensation and support factor favors faculty copyright ownership. However, when the university provides extraordinary compensation or provides extraordinary levels of support for the creative effort (levels beyond the usual compensation or support generally available to others in the same employment situation), then this factor would favor university ownership.

In the case of staff or student assistants who are the author(s) or creator(s) of copyrightable works, a crucial factor will be the person's job description. In the case of students who are not being paid by the university for their work as student assistants, a crucial factor will be the written understanding which describes the student's function and the ownership of intellectual property which may be fixed or may be invented by the student assistant.

That fact that the provision of funding, by itself, will not determine the question of intellectual property ownership is consistent with a provision of copyright law which is often surprising both to employers and to the creators of new works. Under the work-for-hire doctrine, the employer gener-

ally takes ownership only if the creator is, in fact, an "employee," which is a status that depends on much more than just compensation.

Consequently, an "independent contractor" may be paid for work, but that person is not an employee and will therefore probably be the copyright owner under the law.

Copyright Ownership as a Gateway, Not a Barrier

The answer to the question of who owns a copyrighted work in a university setting is not an end result in and for itself. Rather, an ownership determination is a first step toward the more important matter of allocating the set of rights protected by copyright ownership. As a practical matter, the allocation, or unbundling, of these various rights cannot occur without first identifying a copyright owner who, we believe, ought to accept a set of exclusive or nonexclusive license agreements appropriate to the university setting.

License agreements can, and should in our opinion, enable reproduction, use, and control of the copyrighted work so as to maximize the mutual benefit of the author and other members of the university community. Agreements that could benefit from support within the community include those with publishers of traditional academic papers. Rather than assign all rights to the publishers, for example, the university could support the professor in the effort to retain rights to reproduce and distribute the work for educational and research purposes throughout at least the home campus, and the professor should retain rights to build on the work by developing derivative works. Appendix A contains examples of forms that can simplify the licensing process at an individual campus.

Some Cautions

Agreements should be enabling tools rather than prohibitive mechanisms. It is possible to design and enter into bad agreements, prior or otherwise. Sometimes university faculty and administrators are not as aware as they should be of the relative levels of power

which exist within the university environment. While the law does not prohibit anyone from entering into a disadvantageous agreement, all parties at the university need to become alert to the danger of signing onto an agreement that would unbalance the creative process so essential to the functioning of higher education. Unbalanced or disadvantageous agreements breed unnecessary resentment and discontent.

SECTION 5 Unbundling Ownership Rights: An Increasingly Important Role for University Policy

Campus copyright policy should provide guidance for determining who is the owner of a copyrighted work and for using licensing to allocate among the interested parties the set of rights provided by the copyright and patent law. University policy can help campus administrators, authors, and inventors efficiently address questions related to these matters as they may be appropriate to the particular campus and as the means for meeting the challenges of copyright and patent ownership. This Section addresses this topic in both cases: creator ownership and university ownership. Appendix A includes sample agreement forms which demonstrate how licenses to unbundle intellectual property rights might be written at an individual campus in accordance with that campus' policies.

Creator Ownership with Certain Rights Licensed to the University

Where the copyright to a work created at the university is owned by the creator(s), the college or university might be interested in a standard agreement with the creator(s) which allocates (licenses) to the university the ability to exercise rights, without obtaining permission from the copyright owner, such as:

- on a limited, nonexclusive basis, the right of colleagues and students in the creator's own department, on his or her own campus, or on campuses within a large university system to make reproductions of the work to use in teaching, scholarship, and research;

- the right to control whether the university's name or logo is displayed in association with the work;

- the right to require an appropriate acknowledgment of university support of the creation of the work;

- the right to borrow portions of the work for use in compilations or other composite works;

- the right to reproduce the work for uses directly related to advancing the mission or maintaining the culture of the university;

- the right to be informed in advance of any uses, reproductions, distributions, and dispositions of the copyrighted work; and

- the right to retain for the university the right to duplication of the work for teaching, scholarship, and research and, on a limited basis, the right to make derivative works if the author or authors assign copyright ownership to a third party.

Circumstances surrounding unpublished copyrighted works such as course syllabi, lecture notes, exams, student essays, and multimedia materials prepared for the face-to-face classroom, for example, raise many extraordinary issues. This is especially true if modern, electronic means are involved at any one of the many different stages in their preparation, fixation, or dissemination or transmission. We suggest that rights associated with such works remain with the author until the author decides to publish the work – in print or electronically. Because the reputation and credibility of an author is related directly to the assessment of publicly shared materials, it is most reasonable to vest with the author all decisions related to the publishing, dissemination, and transmission of new works.

The act of publication – even electronically – constitutes a determination of when a work is ready to be judged for its merit in the crucible of public and professional examination and opinion. In our view, inappropriate or premature public access to the private materials associated with teaching, scholarship, and research is likely to foster undesirable consequences in the university environment. Of course, even though an instructor may retain the copyright to unpublished materials, they are nevertheless subject to some measure of "fair use" by any third party who might have access to them.

University Ownership with Certain Rights Licensed to the Creator

When the copyright to a work created at the university is owned by the university, the creator of the work might be interested in a standard agreement with the university which allocates (licenses) to the creator the ability to exercise rights, without obtaining permission from the university owner, such as:

- the right to make reproductions of the work to use in teaching, scholarship, and research;
- the right to borrow portions of the work for use in compilations or other composite works;
- the right to make derivative works, such as translations, video-taped versions, film scripts, etc.;
- the right to alter the work, add to the work, or to update the content of the work;
- the right to be identified as the author of the work, including the right to decide whether to allow the author's name to be displayed in association with the work;
- the right of portability; that is, the right to take the work to, and use the work with, a new employer;
- the right to use the work in pursuit of one's profession; that is, during expert witness testimony, in consulting, etc.;
- the right to use the copyrighted work for teaching, scholarship, and research by colleagues or students in one's own department, on one's own campus, across the campuses of a large university system, etc.;
- the right to be informed in advance of any uses, reproductions, distributions, and dispositions of the copyrighted work by the university;
- the right to retain for his or her university the right to duplication of the work for teaching, scholarship,

and research and, on a limited basis, the right to make derivative works even if the author assigns copyright ownership to a third party; and

- the right to exclusive control of decisions related to the publishing of unpublished works.

Situations may arise where a university copyright owner may decline to enter into license agreements, or may limit a license, for reasons which are unrelated to the actual creation of the copyrighted work. Some of these reasons may hinge on the need for privacy, confidentiality, or the protection of a competitive advantage. Because these circumstances are not rooted in copyright law, they are not discussed here. Nevertheless, they may form the occasional basis for a desire by the university to limit an author's dissemination or certain future uses of a copyrighted work. We recommend the disclosure of these limitations, if any, during the process of negotiating a prior agreement between the parties.

Inventor Ownership with Certain Rights Licensed to the University

Where the patent rights to an invention created at the University are owned by the inventor(s), the college or university might be interested in a standard agreement with the inventor(s) which allocates (licenses) to the university the ability to exercise rights, without obtaining permission from the patent owner, such as:

- on a limited, nonexclusive basis, the right of colleagues and students in the inventor's own department, on his or her own campus, or on campuses within a large university system to use the patented invention, or to make or manufacture a limited number of the patented items to use in teaching, scholarship, and research;

- the right to control whether the university's name or logo is displayed in association with the patented invention;

- the right to require an appropriate acknowledgment of university support of the patented invention;

- the nonexclusive right to use the patented invention, or to make or manufacture a limited number of the patented items, without the payment of license fees or royalties, for uses directly related to advancing the mission or maintaining the culture of the university;

- the right to be informed in advance of any uses, reproductions, distributions, and dispositions of the patented invention; and

- the right to retain for the university the use of the patented invention, without the payment of license fees or royalties, for teaching, scholarship, and research and, on a limited basis, the right to make or manufacture the patented item for use in research if the inventor(s) assign patent ownership to a third party.

University Ownership with Certain Rights Licensed to the Inventor

When the patent to an invention created at the university is owned by the university, the inventor(s) might be interested in a standard agreement with the university which allocates (licenses) to the inventor the ability to exercise rights, without obtaining permission from the university owner, such as:

- the right to use the patented invention, or to make or manufacture a limited number of the patented items use in teaching, scholarship, and research;

- the right to further develop the patented invention;

- the right to be identified as the inventor(s) of the patented invention including the right to decide whether to allow the inventor's name(s) to be displayed in association with the patented invention;

- the right of portability; that is, the right to take the patented item(s), and use the patented item(s) with, a new employer;

- the right to use the patented invention or patented item(s) in pursuit of one's profession; that is, during expert witness testimony, in consulting, etc.;

- on a limited, nonexclusive basis, the right to use the patented invention for teaching, scholarship, and research by colleagues or students in one's own department, on one's own campus, across the campuses of a large university system, etc.;

- the right to be informed in advance of any uses, manufacturing, development, commercial exploitation, distribution, marketing, or comercial manufacturing of the patented invention by the university;

- the right to retain for his or university the right to use the patented invention, or to make or manufacture a limited number of the patented items, for teaching, scholarship, and research and, on a limited basis, the right to further develop the patented invention even if the inventor assigns patent ownership to a third party; and

- the right to exclusive control of decisions related to the pursuit of related ideas which have not yet reached the stage of development necessary for the initiation of the formal patenting process.

The Relationship to Third Parties

Fundamentally, the decision framework proposed here allocates distinct rights associated with a work or invention to separate parties. In so doing, this proposal has the potential of generating some new problems for the future use of the completed work or the patented invention by third parties. The sharing of rights may be fair and equitable among the immediate parties, but should one of those parties contract with a publisher, commercial firm, or other party for the use of the work or invention, that new agreement must take into consideration the rights that remain with others.

For example, a professor holds rights to the expressions of the substantive content of an online course, but the university also retains limited rights of use (by license). The professor needs to inform potential publishers of a textbook or other work based on content of the online course that the university has certain specified interests in the same content that might have been incorporated into the course.

Similarly, if a dean recruits faculty members to prepare contributions to an online degree program that may be delivered or marketed through a third-party service, the dean needs to understand and clarify to the faculty members and to the outside provider that the policy specifies an allocation of rights. In that event, we would advise the dean to negotiate with the faculty and with the outside provider to assure that everyone is fully informed and to assure that all rights of use are clarified and appropriate.

Another reality of course development and other projects is that many elements of the finished work may be derived from other sources. The professor may include quotations and images from textbooks; elements of a web design may be drawn from similar projects. To the extent that the course includes such elements, all parties must give appropriate credit for purposes of intellectual honesty, but they also need to assure that the use of the works is "fair use" or is within the terms of a license or permission. Part II of this publication addresses the meaning of fair use and the methods for securing permissions.

Similar lines of thought and courses of action must be thought through and provided for the interface between the patent holder and the third parties who may be interested in further uses, manufacture, sales, development, commercial exploitation, distribution, marketing, and commercial manufacture of the patented invention in question.

SECTION 6 Illustrative Scenarios

The following scenarios illustrate the application of the principles and policy positions suggested in this booklet. Because we have not sought to be prescriptive about policies and legal ownership, the resolution of specific situations will often depend on many variables. Most of all, these scenarios illustrate the opportunities for flexibility and creativity in the application of legal principles related to copyright ownership.

Student Projects

A student is enrolled in a required graduate research course in preparation for earning a master's degree. One of the standard requirements of the course is to engage in research studies in connection with a professor and in support of that professor's ongoing research program. The student submits his findings in writing, and the professor would like to include some parts of the student's work in a final, published version of the research study.

The federal copyright law vests initial ownership of copyright with the creator(s) of original works. We believe university policy should not alter this entitlement for students. Clearly students retain copyright for term papers, theses, and other projects that students complete in their own name as part of their course assignments and degree programs, regardless of the supervision, guidance, or even detailed assistance that an instructor may have provided.

Although the student is working directly for and under the guidance of the professor, the student's work is in furtherance of a degree program, and the student is clearly not "employed" nor paid to do the work. Indeed, the student is more than likely paying fees or tuition. In this scenario, university policy should provide that the student holds the copyright to the work submitted.

We realize that this outcome may not be seen by some as "serving the needs" of the department or the professor. In creating such an instructional program, the

department is free to ask students to sign a document that either licenses or transfers (assigns) to the professor or university the rights to their work or their patentable idea, if any. A student who declines to sign such a license or assignment document should not suffer any penalty. Instead, the department might develop an alternative project that would still allow the student to meet the academic requirements of the course or program.

A contrasting scenario which require some clarification is the case of a student employee, such as a research assistant. In such cases, students' intellectual property rights should be clearly addressed in writing at the time of employment. Whatever the ownership situation is for an employed student research assistant, the ownership of copyright and patent rights should be in writing and disclosed to the student prior to his or her employment. In the absence of a written document the copyrights of such student employees may belong to the employer.

In any use of student works, the professor and the university should demonstrate great sensitivity to the interests of the student. Students come to the university in quest of intellectual, social, and economic growth. The university must foster an environment that allows students to pursue their fullest potential and to reap the benefits of their achievements. Any faculty or university use of student work should give them all appropriate credit. In fact, student work is often an "education record," and disclosure may be subject to the student's federally protected rights of privacy. On the other hand, faculty may want to share student papers as examples of student work or even to submit them, for example, to services that screen papers for plagiarism.

The issue becomes more complex when online services, such as some plagiarism screens, retain copies of submitted papers in their data bases. As copyright holders, students should be informed in the course syllabus both that a copy of their completed work will be sent to any such service and whether their work will become a part of the service's database.

The university should develop consent forms to clear the appropriate copyright rights as needed. We urge campuses, schools, and departments to institute education programs for faculty, staff, and students about the proper legal and ethical uses of student works and inventions.

Nota bene: We need to remind ourselves that only the "expression" in the work by the student or by anyone else is subject to copyright protection. Ideas and facts are not protectable through copyright. Thus, the research data and findings themselves – whether they originate with the student or the professor – have little if any such legal protection. If anyone wants to control the use of such factual works, the data or findings should be disclosed only with care and only with an agreement as to their proper use.

Course Syllabi and Class Materials on the World Wide Web (WWW)

In an effort to expand access to its course offerings in its distance learning program, the university is now asking faculty members to put course syllabi and unpublished course materials and laboratory manuals on the WWW.

Creation: In most situations, the instructor has sole responsibility for the content and structure of the course. In some cases the structure and content of a course are determined by the institution collectively, especially in core and introductory courses. The extent of individual faculty contribution to the course materials will weigh in favor of the faculty member's ownership of copyright.

Control: While the university may have a policy requiring faculty to develop course syllabi that are consistent with course catalog descriptions, and may even provide a list of particulars to be included in each syllabus, generally professors independently create and develop the particular scope and content to be included in the syllabi. The faculty member controls the expressions used in the syllabus and course materials and the detail and quality of the syllabus and course content.

As long as the materials remain unpublished, or at least generally not circulated beyond the students in a class or to university officials, the professor ordinarily has complete control over creation, modification, and even access to the materials. This level of control helps strengthen the professor's rights. But if the professor chooses to widen access to the materials through their distribution at conferences or by publishing the works on the Internet, then the professor has reduced his or her control and increased the opportunities for others to build upon those creative works.

Compensation and Resources: Ordinarily, the instructor receives no additional compensation for preparing course materials. The creation of such materials are generally part of the instructor's normal instructional responsibilities. If, however, the instructor is specifically commissioned by the university to develop materials for shared or common application, then such works would be available to others consistent with institutional needs.

In almost every situation, the unpublished syllabus and course materials created by an individual instructor will remain her property and under her control. The university may have some rights with respect to course materials only under the most extraordinary circumstances, such as when the materials are the product of a coordinated departmental effort or when the professor has made the materials widely available to the public, such as the Internet or World-Wide Web, or has intended that the materials would be used by others for common classes or laboratory sections. Even under these circumstances, the instructor retains rights to receive credit for her work and to keep the work current and accurate.

Notes of Caution: Educators and students are advised to exercise caution when placing their materials on the Internet. Because of the dynamic phase of technology, materials can be easily duplicated or altered without the owner's knowledge or permission, whether lawfully or not. Instructors should, on the other hand, not use their rights to unduly preclude the good efforts of their colleagues. While no one should be compelled to share their works, voluntary sharing creates strong communities for productive learning.

Multimedia - Creative Writing

An English professor wants to use the university's multimedia laboratory to create a multimedia program incorporating his/her own works which include poems, short stories, essays, drawings and photographs using the university's multimedia laboratory. He/she is the sole creator of the program and wants to use it in his/her instruction.

Creation: The professor is the sole creator of the content, the copyrightable expressions and images, and the multimedia program design.

Control: From conception to the final product, he/she exercises control over the entire project.

Compensation and Resources: If the professor is on a campus where the multimedia center is openly available for all faculty to use for instructional multimedia projects, then the university has not committed any extraordinary resources to the project and the professor has not received any extra compensation from the university. To the extent that this is, in fact, the independent effort of the professor, then he/she is likely to own all or most of the rights associated with this project. But, to the extent that the university may, in fact, have provided unusual or extraordinary support not accessible to all faculty, then the university may have some rights, including future use of the work, or a share of the proceeds from its commercialization.

To the extent that the finished project includes text, photographs, video, music, and other materials drawn from the copyrighted work of others, then neither the faculty member nor the university may claim ownership to that part of the project. If the project includes such materials, the creators need to consider the limits of fair use and the need for permission to use those materials.

Online Course Development

A professor develops the substantive elements for an online course, and one or more staff members

serve as web designers, instructional designers, or provide other creative elements to the finished work.

Because multiple parties have contributed copyrightable elements to a cohesive whole, this work has the potential of being deemed to be "jointly owned." An earlier section of this publication advised against joint ownership. Thus, the copyright ownership may better be understood as having separate claims of ownership with respect to the separate elements contributed by each party. The professor contributed expressions of the substantive elements. The staff member contributed the design, layout, and functional aspects.

Thus, the substantive content as expressed by the faculty member belongs to him or her. With respect to a typical university course, the instructional content is left wholly to the instructor. The balance shifts, however, when the university has an interest in the future use of the online course. This point is examined in a later scenario.

By contrast, multiple parties may have a direct interest in the work of the staff member under any circumstances. The web designer has an interest in using his or her copyrighted template in future projects. The university has an interest in applying the copyrighted design to other courses. Instructors have an interest in assuring that they can continue to use the web design in all their future teaching from the finished work.

Consequently, the various interested parties (faculty, staff, and university) should have a broadly termed written license to one another to enable the making of reasonable future uses of the web design and other related elements of the work. For example, most staff members are hired to further specific goals of the institution. Therefore, under the work-for-hire doctrine as well as under the normal expectations of the parties, we might conclude that the copyrights to staff works are held by the university. If so, then the staff member should receive a broad right to include his or her design in a personal portfolio and to use versions of the design in connection with future employment at other educational institutions. Also,

the faculty member should have a broad right to use the copyrighted design in connection with teaching that particular course at the home institution and elsewhere.

Online Course Development – Multiple Instructors and Multiple Campuses

Sorting out the ownership of the rights to a copyrighted work naturally becomes more complex when more parties are involved, such as when the substantive content and its expressions are developed by more than one faculty member. While most decisions about copyright management are left to local campus policy, the CSU has a university-wide policy governing the rights to works created pursuant to the aims of a grant from CSU to the local campus budget for the development of an instructional project by faculty members from multiple CSU campuses. The systemwide policy then prevails over local policy in this situation, and it provides that the individuals own the copyright to their contributions but that they are deemed to grant to the university a non-exclusive, perpetual, royalty-free license which allows the university to use the copyrighted work at all CSU campuses. The parties also are free to enter into an *a priori* agreement to change the allocation that the systemwide policy sets.

If, however, the several faculty members are not all from CSU, or if they have not received a CSU grant for their project, then they are not subject to the systemwide policy. They may instead be joint copyright owners, with all of the problems of joint ownership. Moreover, the copyright ownership interest of each of them will be governed by their respective local-campus policies. Joint copyright ownership can become especially problematic when one policy leaves the copyright with the individual and the next policy makes the university the holder of another share of the work.

As emphasized earlier, we urge all parties to joint copyright ownership agreements to enter into an explicit written agreement among themselves detailing the management of the work. The parties may derive some helpful ideas for that agreement from this publication, but the parties may also need to consult independent legal counsel.

Faculty Member Leaves the University

A professor has created a set of instructional materials that has the potential to be reused by other instructors who might teach the same course. The materials might be a set of videotaped lectures, original materials collected and organized on a website, or gathered in any other form or medium. The professor leaves the university. The department chair would like his or her faculty to be able to use the materials in future course offerings at the university.

Under the principles in this publication, the professor ordinarily would hold the copyright to the expressions of the substantive content of the course, and the university would not be able to use the materials without permission from the professor. Thus, if the professor retires, resigns, dies, or leaves for any reason, the university's right to continue using the materials would terminate.

On the other hand, the university would have an obvious interest in the future use of the work when it has been integrated into the curriculum, and the university seeks to continue a program offering without interruption. The university likely has an interest if the instructional content becomes part of the systematic curriculum of the department, degree program, or other endeavor of the university, or if the university has provided special compensation or other resources to the creator(s) of the works. The university will have an even greater interest when the professor has developed the specific materials at the clear request and initiative of the institution, and specifically for a systematic program of instruction.

In all these cases, the copyright to the expressions used to convey the course content should still remain with the professor (or his or her estate), but the university may hold a license to certain rights of use – perhaps for a limited period of time – to offer courses based on the copyrighted work in order to protect the academic integrity of the instructional program, or to serve an optimal number of students on and off campus as a result of direct university encouragement of the creation of innovative course materials.

Many other issues are likely to arise in the discussion of this situation. For example, the professor will want to be

assured of proper credit for the course materials and to have the ability to control revisions and updates. Any revenue derived from the use of the works should be shared with the professor in an equitable manner – including a modest sharing of extra fees or tuition paid by an extraordinarily large number of enrolled students.

By placing the copyright with the professor, all other rights remain with him/her. Thus, the professor may continue to revise and redevelop the materials and teach from them on behalf of another institution, for example. The professor may create other works – such as textbooks, articles, videotapes, CD-ROMs, etc. – based on the copyrighted materials. The professor may sell them to third parties.

The place where the professor and the university are most likely to have conflicting goals is with respect to the use of the copyrighted materials in distance education, when the institution and a third party might be competing for the fees or tuition paid by the same students. Universities should develop policies and/or explicit agreements outlining the proper allocation of rights to use instructional materials under these and other circumstances.

Distance Learning - Calculus on the Internet

The dean asks a professor to teach a televised introductory calculus course through distance learning. The university's media center will videotape the course as broadcast for possible future use to provide instruction for the large number of undergraduate students who need that class. The dean makes it clear to the professor that both the college and the university's distance learning program intend to derive new revenue from the fees paid by the distance learners who will be viewing the videotapes both on and off campus. The professor is aware of the California Education Code requirement that prohibits, for any commercial purpose, the unauthorized recording in any medium of his academic presentation in the classroom. After being satisfied with the terms of his participation in the new revenue stream, the professor agrees to provide his signature authorizing the fixation of his course presentations and materials. The staff members who assist the professor and who create the visual content are worked in job descriptions which provide this kind of staff

assistance to professors as a routine matter of instructional support.

Creation: The instructor most likely is responsible for creation of the substantive content of the course, while the media center staff created the visual content – the camera images, the graphics, and the like. The university provided the facilities and staff which made the work possible.

Control: Again, the professor will likely have control over the substantive content, but decisions related to control of the visual images may not be so clear. To the extent that the professor controls graphics and images and develops them, that person will be deemed to have greater control. But if the media center has control over the appearance of the finished work, then the university and its staff will have greater rights. In reality, faculty and staff often share decisions about the shape of the final work, leaving "control" a diffuse concept.

Compensation and Resources: To the extent that the professor receives additional compensation from the university for the project, the university's claim of rights to the work will increase. The university, however, probably is not making an extraordinary investment in the project through the assignment of media resources and staff time, since faculty have open access to the multimedia facilities and staff at their institution (subject to scheduling, for example). If the professor received little or no extra compensation or benefit for this particular project, then the university's claim of rights is reduced.

Overall, a distance learning project is an important example of the growing need for instructors and staff to cooperate as a team, in which they share perspectives and contributions. In the end, however, consideration of these factors underscores that no one party ought rightly claim all rights to the entire work. The professor should not be restricted from utilizing the substantive content in future work, which could result if the university claimed full ownership. On the other hand, the university and the media staff should not be barred from the future use of their contributions to the work, which

could also result if the professor owned all rights.

The inevitable complexities of such a project, and the uncertainties of future needs, indicate the need for a clear agreement, in writing, among the parties before commencing production. More important than identifying the formal copyright owner of the work, all parties will benefit by unbundling the rights to use the works according to their own needs. For example, the university might retain rights for future use for a few years and to reuse the graphics and media elements in other projects. The professor may retain rights to modify and update the content, and to use the content in future writings, research, and teaching. The parties ought to consider other relevant issues such as course load and compensation in future academic terms.

Research Journal Article

An engineering professor completed a research project as the principal investigator pursuant to a NSF grant, which has no restrictions on copyright, publication, or products derived from the grant. He wrote a scholarly journal article based on the research. A leading scientific journal has accepted the article for publication. The standard publishing agreement offered to the professor includes an assignment of all rights, including copyright, to the publisher.

Creation: The professor made all creative contributions to the finished work.

Control: Although the work would not have existed but for funding from NSF and probably some low-key administrative oversight by the university, substantive control of the research and of the published article will be predominately that of the professor. Because of the formal grant arrangement that governs such work, to the extent that any party wanted to assert control over this work, that party had its opportunity to do so in the negotiation of the grant contract.

Compensation and Resources: Any additional compensation that the professor might receive may be the result of the grant funding and not from the university itself. If the university has provided extraordinary support in

addition to the external grant support, then, perhaps, the university may have some claim to this copyrighted work.

In sum, even in a situation involving an external grant and university oversight of it, rarely would the university have any claim to own the copyright to this work. On the other hand, faculty research and publication often are central to the mission of the university and to the general support that universities provide to faculty members. The university, therefore, has a strong interest in how the faculty member chooses to manage the ownership of that copyright. A professor typically might assign the copyright to a publisher of such an article, leaving that professor unable even to use his own work in future research and teaching without permission from the publisher. The university may insist that the publisher permit the professor to retain rights to use the article for teaching and research by that professor and by all colleagues at that university.

PART IV

RECOMMENDATIONS FOR POLICYMAKING AND EDUCATIONAL ACTIONS

SECTION 1 Recommendations on Fair Use

University policies related to fair use may reflect principles articulated in this publication through the following actions:

Policymaking Actions Related to Fair Use

1. Provide on every campus an educational program, available to all members of the campus community, about how to exercise fair use appropriately.

2. Provide on every campus assistance in obtaining copyright clearance and necessary permissions in those situations which are clearly not fair use.

3. Provide systemwide policy which qualifies each CSU campus for the benefits of the TEACH Act, but does not chill fair use for teaching, scholarship, and research on any individual campus.

4. Adopt *written* policy statements that provide for appropriate nonexclusive licensed use, in non-fair use situations, by colleagues in a single department, at a single CSU campus, and in multi-campus programs in the CSU system of the diverse materials commonly created by faculty, staff, and students. These works may include course materials, scholarly articles, multimedia projects, distance-learning resources, etc.

Copyright education and services must be made available to all members of the university community. These programs must provide information on how to exercise the fair-use exception to the rights of copyright owners in ways that promote the dissemination and development of knowledge. Such information should include case studies and examples wherein the university has assisted faculty, staff, and students in maximizing the

the fair-use of copyrighted works for teaching and research. It must also include information on how to comply with copyright law when using works owned by others in those situations which clearly do not constitute fair use.

SECTION 2 Recommendations on Ownership

University policies related to copyright ownership may reflect principles articulated in this publication through the following actions:

Policymaking Actions Related to Copyright

1. Adopt *written* policy statements that establish a framework for addressing the ownership of diverse materials commonly created by faculty, staff, and students. These works may include course materials, scholarly articles, multimedia projects, distance-learning resources, etc.

2. Adopt a set of general principles for determining copyright ownership based on the three factors described in Part III of this publication: *creation*, *control*, and *compensation*.

3. Establish a framework for allocating or "unbundling" rights associated with new works in order to make them most widely available for teaching, learning, and research.

4. Provide standard agreement forms (licenses) for the university and the creator(s) to enter into in order to set out and clarify the ownership of copyrights, and the allocation of rights associated with specific projects and the new works which are created. Such *written* agreements, at the onset of a collaborative project and clarifying the rights of all contributors to collaborative works, are especially helpful if one or more of the authors wishes to work with a third party.

See Appendix B for a sample of standard agreement forms which have been designed as a result of policy-making processes at a single campus.

5. Specify in *written* license agreements the persons who will own and manage certain rights associated with the new works created during a project and with the allocation of rights to others – particularly the right to copy and use for teaching and learning by others at the creator(s) home university campus(es).

6. The CSU should provide copyright education and services on every campus. (See also the fair-use recommendations in Section 1, above.)

7. The CSU should provide assistance designed to help individual faculty, staff, and students manage their agreements with commercial journal publishers so that they retain those rights necessary to ensure that they may freely use their own works in teaching and research. This assistance should include advice to individuals about how to structure agreements so as to preserve necessary access to scholarly works for the CSU and should not be used to promote private interests, such as higher royalties.

8. The CSU must adopt policy which ensures that no recordings of academic presentations by faculty or student participants shall be made, reproduced, or distributed without the written, prior permission of the faculty and student participants and of responsible university administrators. Such policy shall not distinguish among the media in which class materials are created or fixed.

Copyright education and services must be made available to all members of the university community. These programs must provide information on how to exercise the rights of copyright owners in ways that promote the dissemination and development of knowledge. Such information should include case studies and model contracts. A major focus should be on demonstrating how collaborative works and assignment of copyrights to third parties may be managed to protect the integrity of works and to ensure that works are freely accessible for teaching and research. Model contracts and opportunities to discuss choices and their implications are tools that are available for this purpose. (See also Section 3, below.)

Policymaking Actions Related to Patents

1. The CSU should provide patent education and services available to all members of the campus community on every campus which provides tech-

nology transfer services in connection with its patent policy.

2. Educational efforts and model contracts are needed to assist faculty, staff, and students in negotiating contracts with private-sector research sponsors.

On each such campus, information should be provided on how to exercise the rights of patent owners in ways that promote the dissemination and development of knowledge. Such information should include case studies and model contracts. A major focus should be on demonstrating how collaboration with, and assignment of patent rights to, third parties may be managed to protect the integrity of inventions and to ensure that the research and scholarship behind new ideas and techniques remain subjects of free inquiry and an essential aspect of teaching and research. (See also Section 3, below.)

SECTION 3 Educational Actions Related to Intellectual Property

1. Provide educational programs for every campus on definitional, legal, ethical, and practical issues related to copyright and patents.

2. Encourage authors to retain rights to future uses of their works when entering into publishing agreements. In particular, the university should support authors in their efforts to avoid assigning copyright to publishers and to use license agreements with publishers so as to retain rights of future use for teaching and research by the author and by others at the author's home university campus(es) and perhaps elsewhere.

3. Craft and widely distribute models of copyright notice language which will provide more easily understood and clearer rights to use works for which the copyright is held by the university and its faculty, staff, and students so as to further advance learning throughout American higher education.

4. Include the following (or equivalent) catalog copy as a part of the university catalog at each campus:

Students and Intellectual Property Rights:
The students of the CSU are, and will remain, important to the future success of the University. For this reason, CSU students own the intellectual property rights to their creations and inventions made pursuing their academic program. While they are with us as matriculated students and during their subsequent careers, we wish them the very best in their creative and technical endeavors.

In some cases, the CSU or one of its auxiliaries may be able to answer questions for, or to assist the efforts of, current or former students, faculty, or staff who are interested in exploiting a creation or invention.

In pursuit of their academic program, CSU students make use of copyrighted works owned by others, under the fair-use exemption provided by copyright law.

However, there are limits to fair use. It is important that students, faculty, and staff obtain permission of the copyright owner when the limits of fair use are exceeded. In the case of the copyrighted works created by CSU students, faculty recognize that students are free to permit or not to permit faculty or staff use of their intellectual property – if such a proposed use falls outside the limits of fair use or the other exemptions provided in the copyright law.

The CSU provides an educational program and materials which are intended to answer questions for students, faculty, or staff and to address their concerns regarding the fair-use exemption.

5. Encourage inventors to retain rights to future uses of their patented inventions works when entering into agreements to pursue, perfect, or license inventions. In particular, the university should support inventors in their efforts to use license agreements with third parties so as to retain rights of future use for teaching, development, and research by the inventor and, possibly, by his or her colleagues and students at the inventor's home university campus(es) and perhaps elsewhere.

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Association of Research Libraries. "Copyright and Intellectual Property." http://www.arl.org/scomm/copyright/copyright.html

Budapest Open Access Initiative. http://www.soros.org/openaccess/read.shtml

Center for the Public Domain. http://www.centerpd.org

Chilling Effects Clearinghouse: Monitoring the Legal Climate for Internet Activity. A joint project of the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, University of San Francisco, and University of Maine Law School Clinics. http://www.chillingeffects.org

Creative Commons. www.creativecommons.org

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APPENDIX A

California Education Code – Sections 66450, 66451, 66452 (in full)

66450. (a) Except as authorized by policies developed in accordance with subdivision (a) of Section 66452, no business, agency, or person, including, but not necessarily limited to, an enrolled student, shall prepare, cause to be prepared, give, sell, transfer, or otherwise distribute or publish, for any commercial purpose, any contemporaneous recording of an academic presentation in a classroom or equivalent site of instruction by an instructor of record. This prohibition applies to a recording made in any medium, including, but not necessarily limited to, handwritten or typewritten class notes.

(b) Nothing in this section shall be construed to interfere with the rights of disabled students under law.

(c) As used in this section:

(1) "Academic presentation" means any lecture, speech, performance, exhibit, or other form of academic or aesthetic presentation, made by an instructor of record as part of an authorized course of instruction that is not fixed in a tangible medium of expression.

(2) "Commercial purpose" means any purpose that has financial or economic gain as an objective.

(3) "Instructor of record" means any teacher or staff member employed to teach courses and authorize credit for the successful completion of courses.

66451. (a) Any court of competent jurisdiction may grant relief that it finds necessary to enforce this chapter, including the issuance of an injunction. Any person injured by a violation of this chapter, in addition to actual damages, may recover court costs, attorney's fees, and a civil penalty from any person who is not a student enrolled in the institution at which the instructor of record makes his or her academic presentation and who seeks to obtain financial or economic gain through the unauthorized dissemination of the academic presentation. The amount of the civil penalty shall not exceed one thousand dollars ($1,000) for the first offense, five thousand dollars ($5,000) for the second offense, and for any subsequent offense, a penalty of not less than ten thousand dollars ($10,000) or more than twenty-five thousand dollars ($25,000).

(b) Actions for any relief pursuant to this chapter may be prosecuted in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the

district attorney, by a city attorney in any city, or city and county, in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members, or the general public.

(c) It does not constitute a violation of this chapter for a business, agency, or person solely to provide access or connection to or from a facility, system, or network over which that business, agency, or person has no control, including related capabilities that are incidental to providing access or connection. This subdivision does not apply to a business or agency that is owned by, or to a business, agency, or person that is controlled by, or a conspirator with, a business, agency, or person actively involved in the creation, editing, or knowing distribution of a contemporaneous recording that violates this chapter.

66452. (a) The Regents of the University of California and the governing boards of private postsecondary institutions are requested to, the Trustees of the California State University shall, and the governing board of each community college district may, in consultation with faculty, in accordance with applicable procedures, develop policies to prohibit the unauthorized recording, dissemination, and publication of academic presentations for commercial purposes. Nothing in this chapter is intended to change existing law as it pertains to the ownership of academic presentations.

(b) The Regents of the University of California and the governing boards of private postsecondary institutions are requested to, the Trustees of the California State University shall, and the governing board of each community college district may, adopt or provide for the adoption of specific regulations governing a violation of this chapter by students, along with applicable penalties for a violation of the regulations. The regents are requested to, the trustees shall, and the governing board of each community college district may, adopt procedures to inform all students of those regulations, with applicable penalties, and any revisions thereof.

APPENDIX B

A Practical Guide to Intellectual Property Rights California State University, Chico

Examples that assist in the application of the Collective Bargaining Agreement and CSU, Chico Executive Memorandum EM 97-07

October 24, 2002

The ownership of intellectual property rights at CSU, Chico is defined by collective bargaining agreements (faculty CBA article 39) and University policy (EM 97-07). Although the CBA clearly states that intellectual property rights created during course of normal bargaining unit work belong to the faculty member unless the creation of the work required extraordinary support by the University, it does not provide guidance on how to best optimize the benefits to both the faculty and the University. CSU, Chico's Executive Memorandum (EM97-07) addresses this issue by introducing the concept of unbundling rights. "A more creative conceptualization of copyright may help avoid the animosities and misunderstandings that often arise amidst discussions and debates over the ownership of intellectual property in general. Also, the concept of unbundling of rights--the creative sharing or licensing of specific rights--can help to focus discussion on optimizing access to the intellectual content of new works and to steer debates away from the economic issues of royalties and revenue sharing (whether such proceeds are large or small) that sometimes unduly monopolize intellectual property questions and distract attention from the widest pursuit of knowledge." The idea of unbundling rights fits well with the production of both traditional and electronic content in a university environment. Below are some examples of how this might be applied at CSU, Chico.

Course materials initiated and created by an individual faculty person or a team of faculty persons using WebCT™ software

Intellectual property rights for all course materials initiated and created by faculty on WebCT or any other learning management system as part of his/her normal workload belong to the faculty member as creator (faculty CBA article 39). Sharing of the electronic course content is totally at the discretion of the faculty member. Usually these materials are very specific to a particular faculty member's pedagogy and no issues related to intellectual property rights arise. However, sometimes course materials are created that could be useful for other sections of a course or for other related courses. In the past, faculty have often informally shared materials in traditional formats. Today, with the increased ability to copy and adapt electronic content, faculty may wish to fill out the University's Standard Agreement Form for Intellectual Properties: Ordinary Support. This form would recognize the faculty creator as copyright holder, but could also allow other faculty or the University to use the work as deemed appropriate by the creator. A faculty member for example might wish to share their work but have concerns about the number of sections to be taught simultaneously with the course content, or the

number of years that material will be available for others to use. They also might wish to allow fellow faculty to adapt and build upon the work within certain constraints. The advantage of the written agreement is that the creating faculty member can still share the work if she/he wishes and feels comfortable with how it will be used in the future. Similarly others can feel free to use the work as is appropriate by the agreement. The result is no misunderstandings leading to unnecessary animosities.

Course materials developed by an individual faculty person or a team of faculty persons using reassigned time as part of their normal workload

It is now common for the University to offer release time for a faculty member to develop both traditional and/or electronic curriculum. This release time usually occurs through initiatives at either the college or the university level and the release time activity is treated as part of a faculty member's normal workload. Such release time includes open campus grants such as those under the CELT program, **but does not include work covered by externally awarded grants and contracts (see below)**. Since this course content is created as part of their normal workload, the faculty member would retain intellectual property rights as outlined in the CBA. The faculty member may or may not choose to provide a nonexclusive agreement for the University to use some aspect of their work. However, sometimes the University has a very specific goal it wishes to achieve with an open grant that would require use of course content in a context other than sections taught by the creator. An example might be the redesign of a GE course serving a large number of students taught in multiple sections. If the University expects that the outcome of a release-time grant is that the course materials would be used outside of classes taught by the creator, it should make those expectations known prior to awarding the grant of release time. Explaining the University's expected use of the created course content as part of the grant process would provide an opportunity for the faculty and the institution to discuss the University's needs and the faculty member's concerns. If the faculty member and the University mutually agree to proceed with the project, he/she would fill out a Standard Agreement Form for Intellectual Properties: Ordinary Support. This allows the University to accomplish its goal to use the materials across multiple sections taught by multiple instructors but also recognizes the faculty member as creator and holder of all rights not explicitly stated in the agreement form. Typically the agreement might also describe rights for updating the course content that have been mutually agreed to by the faculty and the University.

Course materials created by an individual faculty person or a team of faculty persons under a contract outside of their normal workload

The University may, for a number of reasons, decide to contract with a faculty member for the creation of traditional or electronic course content outside of their normal workload. In these cases, it is likely that the University is the owner of the copyright since the work is under a contact for additional or outside employment. This applies to grants run through the Office of Sponsored Programs as the Research Foundation (on behalf of the University) is the entity responsible for the grant. However, even though the University may be the owner of the intellectual property, there may be mutual advantages

in a non-exclusive agreement that allocates certain rights to the faculty member. For example, the faculty member might choose to devote extensive time to a grant or contract only if they have the right to use the course content in another context. In this case, the faculty member should make known their concerns prior to agreeing to carry out their role in the grant. The University and the faculty member would then use the Standard Agreement Form, Intellectual Properties: Extraordinary University Support to mutually agree on the sharing of rights. The development of this shared rights agreement could be done at any time during the grant approval process or even after the grant is completed, however the later in the process intellectual property rights are discussed, the greater the risk of misunderstandings and perhaps a failed grant project. It also must be kept in mind that grant and contract award regulations may preclude University (or Research Foundation) ownership of the intellectual property, reserving it to the funder, or may provide a nonexclusive license to the funder who may distribute the material as it chooses.

Course materials created by an individual faculty person or a team of faculty persons in conjunction with one or more University staff persons

The creation of traditional or electronic course content by staff under the direction of a faculty member is becoming increasingly common. The intellectual property ownership may be very clear or may become difficult to determine based on the level of creative contribution made by the faculty member or the staff member. In the most common instances, the staff member is assisting with web pages, images or other small multimedia pieces, and the faculty member is clearly the creator and owner of the intellectual property rights. However, as the staff member's creative contribution increases, ownership issues for all or part of the course content may arise. Normally the faculty member would still be the lead creator if, for example, they described in detail a learning module that simulates the ecological system of a riparian environment. In this case the faculty member might choose to share rights with the staff member or with the institution using the Standard Agreement Form for Intellectual Properties: Ordinary Support. However, cases will arise where the initial concept for an electronic learning module will start with a staff member and the artistic creation primarily lies with the staff member. In these cases the intellectual property rights may reside with the staff member or the University. In order for the faculty member to feel comfortable building the material into their course, she/he would need assurance that they have appropriate rights for its use. Again, this situation can be resolved with up-front conversations between all parties resulting in an assignment of rights using the Standard Agreement Form for Intellectual Properties: Ordinary Support.

All of the above examples share a common approach to intellectual property rights. They encourage discussion as early as possible on ownership and assignment of rights. In almost all situations, the University, faculty, and staff can develop a win/win proposition by an understanding of the needs of the various parties. The use of the standard forms illustrated above is by no means mandatory. Faculty, staff, and the University are free to negotiate any other arrangement that is mutually agreeable.

STANDARD AGREEMENT FORM
Intellectual properties: Ordinary University Support
CSU, Chico

Name of Copyrighted Work _____
Date of Creation _____
Creator(s) of Copyrighted Work _____
Owner(s) of Copyrighted Work _____

Copyright Ownership and Licensing

_____ Creator(s) [All rights—including licensing of use rights to the University, if any.]

_____ Non-exclusive License to the University _____ Exclusive License to the University

Unbundling of rights	**Terms**
1. Distribution Rights	_____
2. Duplication Rights	_____
3. Derivative Works Rights	_____
4. Public Display Rights	_____
5. Public Performance Rights	_____

Revenue Sharing

_____% To Copyright Holder(s)
_____% To License Holder(s)

It shall be the policy of the California State University, Chico to encourage the allocation of copyright so as to optimally support the mutual interests of the University, faculty, staff, and students. The preceding agreement meets these objectives and is mutually satisfactory to the following:

For the Copyright Owner(s)

_____
Signature, Date

_____
Print name and title

For the University:

_____
Signature, Date

_____
Print name and title

STANDARD AGREEMENT FORM
Intellectual Properties: Extraordinary University Support
CSU, Chico

Name of Copyrighted Work _____

Date of Creation _____

Creator(s) of Copyrighted Work _____

Extraordinary University Support Itemization

Description:	Cost:
1. _____	$ _____
2. _____	$ _____
3. _____	$ _____
4. _____	$ _____

Copyright Ownership and Licensing

_____ University [All rights—including licensing of use rights to the Creator(s), if any]

_____ Non-exclusive License to the Creator(s) ___ Exclusive License to the Creator(s)

Unbundling of rights	**Terms**
1. Distribution Rights	_____
2. Duplication Rights	_____
3. Derivative Works Rights	_____
4. Public Display Rights	_____
5. Public Performance Rights	_____

Revenue Sharing

_____% to University
_____% to Copyright Holder(s)

Terms and Conditions of University Cost Recovery (if any)_____

_____

_____

It shall be the policy of the California State University, Chico to encourage the allocation of copyright so as to optimally support the mutual interests of the University, faculty, staff, and students. The preceding agreement meets these objectives and is mutually satisfactory to the following:

For the University:	For the Creator(s)
_____	_____
Signature, Date	Signature, Date
_____	_____
Print name and title	Print name and title

APPENDIX C – SOME HISTORICAL NOTES

This publication owes its origin to work to the chief executives of the California State University (CSU), the State University of New York (SUNY), and the City University of New York (CUNY) who identified copyright and intellectual property as central issues that will increasingly affect the future of American higher education. They agreed to work together on these important educational issues in an effort to advance higher education across the nation. Two earlier booklets appeared in 1995 and 1997 which summarized the work a broadly drawn working groups composed of university faculty, librarians, and administrators from the three multi-campus public higher education systems. The two copyright and intellectual property booklets were published, as part of a four-booklet set, under the auspices of the Consortium for Educational Technology for University Systems (C.E.T.U.S.)

The Working Group mentioned above was the CSU-SUNY-CUNY Work Group on Ownership, Legal Rights of Use, and Fair Use. This group worked in two general subject areas: fair use in a university setting; and the ownership of new works in a university setting. The parent body of the Working Group was know as the CSU-SUNY-CUNY Joint Committee. Two other working groups parented by the Joint Committee produced booklets in the subject areas of: the academic library in the information age; and information resources and library services for distance learners.

The members of the Joint Committee and of the Working Group on Ownership, Legal Rights of Use, and Fair Use are listed on the next two pages. The CSU members of the Joint Committee and of the Working Group enjoyed the support and sponsorship of the Academic Senate of the CSU and the CSU Commission on Learning Resources and Instructional Technology (CLIRT). Professor Rolland K. Hauser was appointed to CLRIT by Chancellor Munitz upon the nomination of the CSU's faculty union – the California Faculty Association (NEA, AAUP, CSEA, SEIU-AFL/CIO).

CSU-SUNY-CUNY Joint Committee

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Betty J. Blackman
Kenneth D. Crews
Bonnie F. Dunn
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Germaine C. Linkins
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CUNY Members

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Lisa Livingston
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Working Group on Ownership, Legal Rights of Use and Fair Use of the CSU-SUNY-CUNY Joint Committee

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