

**TO:** Members of the Faculty, Hoover Institution Fellows, Senior Fellows, Department Administrators, Academic Staff (teaching and research), Library Directors, Staff and Students.

**FROM:** John Etchemendy, Provost

**DATE:** Fall 2004

**SUBJECT:** Copyright Reminder

The attached informational sheets are intended to update and remind the University community of the applicability of copyright law at an academic institution like Stanford. Since this Reminder was last distributed in Fall 2003, file-sharing has been the focus of much attention, from Congress to college campuses. In January 2004 and again in September 2004, users of the Stanford network were named in “John Doe” lawsuits, which alleged the Stanford network users had unlawfully downloaded and/or shared 11 and 8 songs respectively. This Copyright Reminder includes an expanded section on file-sharing, which describes the penalties that may result from illegally downloading or sharing copyrighted works. This section also discusses the new California law that makes it a misdemeanor to anonymously file-share a “commercial recording” to more than 10 people. While Stanford supports and encourages the fair use of copyrighted materials, file-sharing entire works without permission from the copyright owner, such as music, movies, TV shows, games, software and images, for personal enjoyment is not a fair-use and will not be tolerated at Stanford.

This Reminder covers:

- I. BASIC COPYRIGHT PRINCIPLES
- II. THE FAIR USE DOCTRINE
- III. FACE-TO-FACE TEACHING ACTIVITIES
- IV. DISTANCE EDUCATION
- V. INTERNET AND ELECTRONIC MEDIUM COPYRIGHT
- VI. THE DIGITAL MILLENNIUM COPYRIGHT ACT & PEER-TO-PEER FILE-SHARING
- VII. LIBRARY COPYRIGHT CONSIDERATIONS
- VIII. OBTAINING PERMISSION TO USE COPYRIGHTED MATERIAL
- IX. COPYRIGHT AND FAIR USE RESOURCES

If these informational sheets and the listed resources do not address your specific copyright concerns, please feel free to contact the Fair Use Panel at 723-5553 for assistance.

## I. BASIC COPYRIGHT PRINCIPLES

**The Law.** Copyright laws protect original works of authorship. The Copyright Act gives the owner of a copyright the exclusive right to do and authorize others to do certain things in regard to a copyrighted work, including: make copies, distribute the work, display or perform the work publicly, and create derivative works. These exclusive rights are subject to only limited exceptions.

**Scope of Copyright.** Copyright laws apply to nearly all forms of captured content, including traditional works like books, photographs, architectural drawings, music, drama and sculpture. The laws also adapt to changes in technologies, and include in their scope modern forms of works like motion pictures, electronic media, software, multimedia works and some databases.

**No Mark or Registration Necessary.** A copyright interest attaches to an original work that is “fixed in any tangible medium of expression” (i.e., a medium that is captured in an accessible form of content) at the work’s creation. Registration is not required to obtain a copyright, though registration may be required to enforce a copyright in federal courts. Works published after 1989 also do not need to have a copyright notice to enjoy copyright protection. So if in doubt, assume copyright applies.

**Public Domain Works.** Not all works enjoy copyright protection, and all works eventually fall into the public domain. Certain classes of works, such as United States (but not state or local) government works and databases of facts, do not receive copyright protection. They are in the public domain and may be freely used. Once the copyright in a work expires, that work also falls into the public domain. Any work published before 1923 is in the public domain. Works published from 1923 through 1978 are protected for 95 years from the publication date, if proper copyright formalities were followed. Since 1978, works generally have copyright protection for the life of the author plus 70 years.

**If No Exception, Seek Permission.** Unless an exception to the copyright owner’s exclusive rights applies, you must obtain permission from the copyright owner to copy, distribute, display or perform a copyrighted work in any medium for any purpose. In academia, the four major exceptions to the copyright owner’s exclusives rights are: the fair use exception, the library exception, the face-to-face teaching exception, and the distance-learning exception. These four exceptions are described below.

**Penalties.** The penalties for copyright infringement can be harsh. Under the Copyright laws, a court may award up to \$150,000 for each separate willful infringement. Under Stanford policies, violation of copyright law may result in administrative action, such as loss of networking privileges and SUNet ID, or disciplinary action up to and including termination for faculty and staff and expulsion for students.

## II. THE FAIR USE DOCTRINE

**Fair Use Defined.** The Fair Use Doctrine provides for limited use of copyrighted materials for educational and research purposes without permission from the owners. It is not a blanket exemption. Instead, each proposed use must be analyzed under a four-part test.

**Fair Use Applied.** Unfortunately, the four-part test to determine fair use is necessarily vague and fact-dependent. In some instances, two reasonable people could apply the four factors to the same facts and reach opposite conclusions. If the weighing and balancing analysis below does not provide an answer, please refer to the Copyright and Fair Use Resources section below.

### Fair Use Four Factor Test.

- 1. What is the character of the use?** Educational, nonprofit and personal use is favored for fair use, while commercial use is disfavored. However, the fact that a use is educational or nonprofit in nature does not in and of itself mean the use is necessarily fair. More important than the educational or nonprofit nature of the use is whether the use is “transformative” in nature. A use is transformative if it builds upon, criticizes, comments on, parodies or otherwise adds something new to the original work. Put another way, the question is whether the new use, in the words of the Supreme Court, merely “supercedes the objects of the original, or instead adds something new, with a further purpose or different character.”
- 2. What is the nature of the work to be used?** Use of a work that is factual in nature weighs toward a finding of fair use. Use of imaginative works is more likely to require permission.
- 3. What is the amount and substantiality of the portion to be used?** Using only a small portion of a copyrighted material tips towards fair use, while using large portions indicates a need for permission. Be careful with this factor, however; a court has held that copying only 5% of a book into a coursepack was not fair use.
- 4. Will the use negatively affect the value of the copyrighted material?** Where a work is available for purchase or license from the copyright owner, copying all or a significant portion of the work (in lieu of purchasing or licensing a sufficient number of “authorized” copies) would likely be unfair. If only a small portion of a work is to be copied, and one would likely forego using the portion if permission were required, then the balance tips towards fair use.

**Good Faith Fair Use Defense.** Even if a copyright infringement occurs, a court may refuse to award damages if the infringer reasonably believed that the use was fair.

## III. FACE-TO-FACE TEACHING ACTIVITIES

**Performance or Display of Copyrighted Materials During Face-to-Face Teaching.** In addition to the fair use exemption and library exemption, the Copyright Act does provide an exemption to perform or display copyrighted materials during face-to-face teaching activities. Such use does not require the author’s permission. Note, however, that this exemption does not permit copying or distributing a work—only displaying or performing it.

## IV. DISTANCE EDUCATION

**Distance Learning and the TEACH Act.** In November 2002, the Technology, Education and Copyright Harmonization (TEACH) Act took effect. That act extends in a limited way the Face-to-Face Teaching exemption to distance learning activities. Provided the requirements of the Act are followed, transmissions of performances of entire non-dramatic works and reasonable and limited portions of any other performance or audiovisual work may be made without obtaining permission from the copyright owner. To take advantage of the Act, you must abide by the following strict requirements:

**The performance or display must be:**

- 1) A regular part of mediated instructional activity;
- 2) Made by, at the direction of, or under the supervision of the instructor; and
- 3) Directly related and of material assistance to the content of the course.

**Further, the following technological restraints must be in effect:**

- 1) The content must be accessible only to those students who are enrolled in the course;
- 2) The content must be accessible only for the duration of a class session;
- 3) To the extent technologically possible, the content must be protected from further distribution (“downstream-controlled”); and
- 4) To the extent technologically possible, the content must not be subject to retention by students.

**All material displayed under the TEACH Act must contain the following notice:**

The materials on this course website are only for the use of students enrolled in this course for purposes associated with this course and may not be retained or further disseminated. The materials on this course website may be protected by copyright; any further use of this material may be in violation of federal copyright law.

**You may digitize works for display from an analog format provided that:**

- 1) No existing licensed digital copy is available for use at the University; and
- 2) Only the portion needed for transmission is digitized (i.e., only a reasonably limited portion).

**Note: The TEACH Act does NOT permit:**

- 1) Uploading material such as textbooks, coursepacks or other resources typically purchased by students to review outside of the classroom. (The TEACH Act only applies to works that an instructor would show or play during class. Any uploading of material for (non-classroom) study purposes must comply with the copyright laws, including fair use principles, and SUL’s E-Reserve policies).
- 2) Uploading materials specifically marketed as distance education courses.
- 3) Uploading material that was obtained illegally.

To display materials under the TEACH Act, please contact Kim Hayworth [kimhwrth@stanford.edu](mailto:kimhwrth@stanford.edu), Academic Technology Consultant in Academic Computing at Meyer Library for assistance with the technology. Additionally, Georgia Harper, an attorney in the General Counsel’s Office at the University of Texas has developed an excellent checklist to determine if “you are ready to use the TEACH Act.”

<http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>; see also North Carolina State University’s Teach Act Toolkit, available at <http://www.lib.ncsu.edu/scc/legislative/teachkit/overview.html>. Our designated TEACH Act agent is Lauren Schoenthaler, University Counsel, at [teachactagent@standford.edu](mailto:teachactagent@standford.edu) or 723-9611.

## V. INTERNET AND ELECTRONIC MEDIUM COPYRIGHT

**In General.** Digitally created works and analog works transformed into a digital format and placed on-line or on the internet are still protected by the copyright laws.

**Exercise Caution. Be especially careful of copyright/fair use principles when downloading material from the internet. Just because a work is posted on the internet does not mean that the owner of the copyright in it has given you permission to use it. Note too that material may have been placed on the internet without the author's permission.**

**The Fair Use Doctrine.** When dealing with an electronic use of a work, in addition to the traditional four fair use factors, you should consider the following additional concern:

- 5. Is access to the material limited or protected?** It is a violation of law to circumvent an access control mechanism and use copyrighted material — even if the use would otherwise be fair — except in very limited circumstances. For providing access to digital works that you have lawfully obtained, limiting access to a small audience by using passwords or other access control devices weighs toward a finding of fair use. (Some Stanford libraries will accept e-reserves, which are access controlled and limited to currently enrolled students.)

**Protect the Copyright.** Electronic distribution of a copyrighted work should state: This work is protected by copyright laws and is provided for educational instruction only. Any infringing use may be subject to disciplinary action and/or civil or criminal liability as provided by law.

## VI. THE DIGITAL MILLENNIUM COPYRIGHT ACT & PEER-TO-PEER FILE-SHARING

**In General.** The DMCA provides limited protection for Internet Service Providers (ISP), such as Stanford, from the infringing acts of their users provided that the ISP comply with the DMCA, including responding to copyright infringement complaints and establishing a procedure to terminate repeat copyright infringers from the ISP. It also prohibits gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner to control access to the work. Such circumvention is normally prohibited even if the use of the work would otherwise be a fair use. The DMCA also prohibits trafficking in technology or devices that are primarily designed to circumvent such a technological protection.

**File-Sharing under the DMCA.** The use of file-sharing networks to download and share copyrighted works without permission from the copyright owner -- like software, music, movies, TV shows, games and images -- for personal enjoyment violates copyright laws. Both the person who makes an illegal copy of a copyrighted work available and the person who receives or downloads an illegal copy have violated copyright laws and Stanford policies. Under the DMCA, a copyright owner or an authorized agent may lawfully scan internet traffic and send a complaint to Stanford as the ISP. If the copyright owner chooses to follow-up with civil litigation, it may file a "John Doe" lawsuit against the IP address, and Stanford would have to provide the identity of the Stanford network user in response to a valid subpoena. Copyright violations can result in penalties of up to \$150,000 per violation. Stanford policy, in Administrative Guide Memo 62 (<http://adminguide.stanford.edu/62.pdf>), prohibits the copying or distributing of copyrighted materials without permission. Stanford follows up and responds to every DMCA complaint. If an individual at Stanford receives more than one DMCA complaint, the matter is referred for consideration of further disciplinary action: for undergraduate students, the matter is referred to a residential dean; for graduate students and faculty, the matter is referred to a Department Chair; and for staff on a first and second DMCA complaint, the matter is referred to a supervisor and to HR. Upon receipt of a very rare third DMCA complaint, administratively, Stanford terminates internet connectivity, including disabling the SUNet ID, and the matter is referred on for discipline: students are referred to Judicial Affairs; faculty are referred to the Provost; and staff are referred to HR and can expect to be terminated. For more information, please refer to Residential Computing's file-sharing website, <http://rescomp.stanford.edu/info/dmca/> and the Provost's Letter to the Stanford Community of September 2004, [http://www.stanford.edu/dept/legal/Worddocs/Provost\\_ltr.pdf](http://www.stanford.edu/dept/legal/Worddocs/Provost_ltr.pdf).

**File-Sharing under California Law.** In September 2004, Governor Schwarzenegger signed into law an act that makes it a misdemeanor to knowingly electronically disseminate a commercial recording or audiovisual work to more than 10 other people without disclosing 1) your email address and 2) the accurate title of the shared material. The law excepts 1) distribution to immediate family members, 2) distribution within a personal network accessible only to those within the distributor's "immediate household", and 3) anyone distributing with permission of the copyright owner. Violation of Penal Code section 653aa (which is effective January 1, 2005) includes a fine of up to \$2500 and up to one year in County Jail. For more information, please see <http://www.aipla.org/html/reports/2004/CalPiracy.pdf>. Note, that even though California law makes it a misdemeanor to anonymously file-share to more than 10 other people, federal copyright law provides a civil penalty of up to \$150,000 for **every** instance of knowingly distributing a copyrighted work, even if it is distributed to only **one** person. So even if a Stanford network user tailors his or her conduct to be in compliance with California Penal Code section 653aa, that user remains subject to potential action under both federal law and Stanford policy for any instance of unlawfully file-sharing a copyrighted work.

## VII. LIBRARY COPYRIGHT CONSIDERATIONS

**Library Exemption for Reproduction of Copyrighted Works.** Copyright laws provide certain exemptions for libraries and archives to reproduce copyrighted works.

**Filing a Course Reserve.** Some libraries at Stanford will not accept multiple photocopies of copyrighted materials needed for course reserves without first having permission from the copyright holder. Other libraries on campus will accept a limited number of photocopies for course reserves. Consult individual libraries for their policies. The Green Library policy on course reserve is located at <http://www-sul.Stanford.edu/services.html>.

**Filing an E-Reserve.** Electronic files may be placed into a password protected e-reserve in limited circumstances and according to copyright principles. Material may only be placed into e-reserves after copyright permission has been obtained, or if a copyright exception, such as Fair Use, applies. A sound guideline is if copyright clearance were necessary to place something into a coursepack, then copyright clearance is necessary to place it into an e-reserve. The preferred method for creating an e-reserve at Stanford is through CourseWork, which is located at <http://coursework.stanford.edu/>. CourseWork provides a web-based document bank and password-protected access system to course participants only.

**Allow Several Months for Course Reserve Permission.** Note that filling course reserve requirements may take two to three months before the quarter begins if the library does not already have a copy of the publication and copyright permission is needed.

**Contact.** For further questions about the library exemption, library policy and course reserves, please contact:

Print Reserves: (650) 723-2201

Ajit Gellon, Print Reserves Processing Supervisor, (650) 725-2191, [agellon@stanford.edu](mailto:agellon@stanford.edu).

Guidelines for submitting print lists

Electronic form for submitting print materials

Media Reserves: (650) 723-9394

Joe Leggette, Media and Reserves Specialist, (650) 725-1179, [mediares@sulmail.stanford.edu](mailto:mediares@sulmail.stanford.edu)

Guidelines for submitting media materials

Electronic form for submitting media lists

For information about reserve operations in campus libraries, contact the relevant library (see <http://library.stanford.edu/geninfo/libraries.html>)

## VIII. OBTAINING PERMISSION TO USE COPYRIGHTED MATERIAL

**In General.** If an exception (such as fair use, the library exception, face-to-face teaching activities or distance education) is not clearly available, permission to use a copyrighted work must be obtained from the owner of the copyright holder. A request to use copyrighted material usually can be sent to the permission department of the publisher of the work. Assume four to six weeks for a request to be processed. Permission requests should contain:

1. Title, author and/or editor, and edition.
2. Exact material to be used.
3. Number of copies to be made.
4. Intended use of the material, e.g., educational.
5. Form of distribution, e.g., hard copy to classroom, posted on internet with password protection.
6. Whether material is to be sold (e.g., as part of a coursepack).

**Journal Articles.** The Stanford libraries have blanket copyright permission from many journals. Before forwarding a request for an article, check with the appropriate library to see if there is a blanket permission covering the article you would like to use.

**Copyright Clearance Center (CCC).** The CCC is able to give permission to use a wide number of materials for a fee. Please contact CCC at [www.copyright.com](http://www.copyright.com) or (978) 750-8400.

**Coursepacks.** Many commercial copying services will obtain copyright permission for included materials and add the royalty to the price of the coursepack.

**Evidence of Permission.** Written permission should be obtained and kept by the academic department. If oral permission only is obtained, a written record should be kept of the oral permission.

## IX. COPYRIGHT AND FAIR USE RESOURCES

**Stanford's Copyright Ownership Policy.** The University's copyright policy establishes that all rights in copyright, regardless of their form of expression, remain with the creator, except in specified cases where law or University policy require otherwise. For more information, please refer to the policy at <http://www.stanford.edu/dept/DoR/rph/5-2.html>

**Stanford's Fair Use Resources.** Further guidelines and useful material are located at <http://fairuse.stanford.edu>.

**Guidelines for Classroom Copying.** These guidelines were prepared by the Authors League of America and the Association of American Publishers. [http://caselaw.lp.findlaw.com/cascode/uscodes/17/chapters/1/sections/section\\_107.html](http://caselaw.lp.findlaw.com/cascode/uscodes/17/chapters/1/sections/section_107.html).

**Guidelines for Educational Multimedia.** These guidelines were prepared by the Consortium of College and University Multimedia Centers. <http://www.libraries.psu.edu/mtss/fairuse/default.html>.

**Further Assistance.** Please contact the Fair Use Panel at 723-5553.