

UNIVERSITY OF HAWAII

COPYRIGHT GUIDELINES

April 1992

These Guidelines seek to provide University personnel with guidance in complying with United States copyright law. They do not constitute legal advice, and they are not intended for private use. These Guidelines and the underlying law are subject to change.

Although these Guidelines are copyrighted, University personnel are authorized to copy, distribute, display and perform them for any University purpose. Context, however, is vital to understanding and proper use of these Guidelines. Accordingly, users are encouraged to copy them in their entirety, if at all. Additional copies may be obtained from the University's Procurement and Property Management Office.

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HOW TO USE THIS BOOKLET

This Booklet seeks to provide practical guidelines on copyright matters of interest to University personnel. Part I outlines some general principles of copyright law that affect the use of copyrighted material in education and research. The Guidelines in Part II contain specific questions and answers on the use of written materials, graphics, music, computer software, and audiovisual works. Part III describes how to obtain permission from copyright holders for uses of their works that otherwise might constitute copyright infringement.

The Appendices provide additional information that may be of interest to University personnel. Appendix 1 contains a list of types of copyrighted works, illustrating the broad range of material that may be protected by copyright. Appendix 2 provides guidance to those who wish to protect copyright in their own material.

The Guidelines in this Booklet are issued by the University to assist University personnel in complying with the University's policy. The University believes that the Guidelines are a reasonable interpretation of existing law but cautions that the law is subject to interpretation and may be changed.

If you need further information, please contact the University office designated to assist compliance with copyright law. Your supervisor, dean, or department head will be informed of the proper person(s) to contact as soon as they are designated. Urgent questions should be addressed to the Office of the Attorney General at the University, or you should retain private counsel of your own.

I. SUMMARY OF COPYRIGHT PRINCIPLES

The United States Constitution gives Congress power to adopt copyright laws "to promote the Progress of Science." The current copyright law, which became effective January 1, 1978, is the Copyright Act of 1976. It has two purposes: to provide economic incentives for creativity and to encourage the broad dissemination of creative works. These goals occasionally conflict, making interpretation of the law complex and uncertain.

USING OTHERS' COPYRIGHTED WORKS

Each copyright owner has five exclusive rights with respect to the copyrighted work. Except as authorized by law or by the "fair use" doctrine discussed below, only the copyright owner may engage in or authorize these five activities:

1. Reproduction: copying the work, in any form or medium;
2. Preparation of Derivative Works: preparing a "derivative work", that is, any work based on or derived from the copyrighted work, in any form or medium;
3. Distribution: distributing copies of the work to the public by sale, gift, rental, lease, or lending;
4. Public Performance: performing the work publicly (for example, by acting out a play, running a movie or videotape, or broadcasting a film, videotape or live performance); or
5. Public Display: displaying the work publicly, directly or by telecommunication (for example, by hanging a work of art in a gallery or transmitting its image by television).

The concept of a "derivative work" is important in University activities, because universities develop new knowledge based on old. Derivative works include, among other things, abridgements, annotations, arrangements of music, condensations, performances of musical works, revisions, and translations. A derivative work can be loosely defined as any work that includes significant material from a pre-existing work.

Because the exclusive rights of copyright owners are so broad, you should avoid using others' copyrighted works unless your use is authorized by the copyright owner or by law. In determining whether you may use a pre-existing copyrighted work, you should ask the following questions:

- * Is the work not protected by copyright, that is, is it in the "public domain"?

- * Has the copyright owner given permission for the proposed use?
- * Is there a legal exception to copyright protection that applies to the proposed use? (See "STATUTORY EXCEPTIONS" below)
- * Does the general doctrine of "fair use" (discussed below) permit the proposed use?

Unless the answer to one of these questions is "yes," your proposed use will constitute copyright infringement.

WHAT IS COPYRIGHTED?

Copyright law generally protects any expression recorded in tangible form, regardless of the type of work or the recording medium used. Copyright may protect a work whether it is published or unpublished.

Protection begins the moment a work is first "fixed" in a tangible medium of expression. Thus, the notes that you take at a lecture and audiovisual works that you make with a personal video recorder are automatically protected by copyright as soon as they are recorded.

Because of the broad scope of copyright law, most recorded expression and information are protected by copyright. However, some categories of works, and some aspects of copyrighted works, are unprotected. These are explained below.

WHAT IS NOT COPYRIGHTED?

1. Publications of the Federal Government

Publications of the United States Government do not enjoy copyright protection. You may copy freely from federal government publications, but not necessarily from the publications of state, local or foreign governments.

If federal publications contain material derived from other sources, or are reprinted with editing and annotations, copyright may still protect the nonfederal material, editing or annotations. Moreover, Congress is considering legislation to preserve copyright protection for computer software developed by the federal government, and you should check the status of this legislation before using or copying federal software without permission.

2. Works Published without Copyright Notice

Published Works. Works published without copyright notice before January 1, 1978, are generally in the public domain, and you may use them freely as long as you have no reason to believe they are copyrighted. Works published without copyright notice on or after January 1, 1978, but before March 1, 1989, may still be protected by copyright. However, you may use such a work without fear of monetary damage liability as long as: (1) you are sure the work was "published" generally; (2) you are sure the copy you are using has no copyright notice and is an authorized copy; (3) you have no reason to believe that the work is copyrighted; and (4) you do not use the work for profit. Although satisfying these conditions will protect you from monetary liability, if the work is actually copyrighted the copyright owner still may have the right to an injunction (court order) prohibiting further infringement.

Copyright notice is not required on copies of works distributed to the public on or after March 1, 1989, when the United States acceded to the Berne Convention, a multilateral, international agreement regarding copyright. Thus, if you received a copy of a work on or after that date, the mere fact that it has no copyright notice does not mean that you may copy or use the work without liability.

For technical reasons, the use of copyright notice is still advisable, even though it is no longer required. Copyright notices therefore will continue to appear on copies of published works, despite the change in law.

Unpublished works are generally protected by copyright, whether created before or after January 1, 1978. A work may be unpublished, even if distributed, as long as the distribution is to a limited group of persons and for limited purposes. For example, the circulation of a scholarly article to several journals for possible publication, and the journals' circulation of the article to peer reviewers, would not constitute "publication" for copyright purposes.

3. Works with Expired Copyright

Copyright terms are long. For works created on or after January 1, 1978, the copyright term lasts for the author's lifetime, plus 50 years, if the author is identified. If the work is anonymous, pseudonymous or for hire (for example, a corporate work), the term lasts until the first to expire of 75 years after publication or 100 years after creation. For pre-1978 works, copyright was renewable, and the

duration of the copyright depends upon whether or not it was renewed. All copyright terms run to December 31 of the year in which they expire.

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The length of a copyright term depends on several variables, the most important of which are whether the work was published and, if so, whether its was first published before January 1, 1978, or on or after that date. The only secure rule of thumb is the "75-year" rule. If a published work bears a copyright notice with a year-date more than 75 years earlier than the current year, it is unprotected. For example, in 1991 all works published in 1915 or earlier are unprotected.

However, this rule does not apply to unpublished works created before 1978 that were still unpublished on January 1, 1978. Those works are generally protected until at least yearend 2002, and their terms of protection may last longer if they are published after 1977.

4. Facts and Ideas

Facts and ideas contained in a copyrighted work cannot be protected by copyright. Only the "expression" of the facts or ideas can be protected. This rule applies to technical and scientific ideas, historical and biographical facts, raw data in a database, and the abstract results of research.

However, this rule does not give anyone a right to copy the way an author expresses the facts or ideas. If a physician writes about a new process for treating disease, copyright does not prevent others from using that process for treatment, or from describing it in their own words, but copyright does prevent them from borrowing the physician's language.

Copyright law prohibits far more than verbatim copying. For example, for literary works it prohibits paraphrasing and the use of the same plot, sequence, organization, structure, arrangement and style as a pre-existing work. Similar principles apply to scientific works such as computer programs. Thus, writing a new computer program using the same flow chart as a copyrighted computer program may constitute copyright infringement, even if the new program is written in a different programming language.

The line between unprotected "facts" and "ideas", on the one hand, and protected "expression" on the other is often difficult to draw. In deciding lawsuits, courts compare the preexisting work with the later work in some detail. If you wish to rely on the doctrine that facts and ideas are not protected, you should be sure that you are not copying anyone else's copyrighted expression.

STATUTORY EXCEPTIONS

The copyright statute permits certain specific activities that otherwise would constitute copyright infringement. Under the "first sale" doctrine, the owner of an authorized copy of a copyrighted work may distribute or display that copy. For example, the buyer of a book may sell, lend, rent, or destroy the book, or put it on public display. However, the first sale doctrine does not allow anyone to make additional copies, prepare derivative works, perform any work publicly, or display any work publicly by telecommunication. In addition, exceptions to the first-sale doctrine preclude the rental or lending of computer software and sound recordings for profit.

More specific exceptions to copyright protection cover the following university activities:

- * Libraries and archives may copy works for purposes of preservation, security, and copy replacement, and may make and distribute certain limited copies to library users for purposes of private study, scholarship and research.
- * Instructors and students may perform or display works in face-to-face classroom teaching, and may transmit performances of nondramatic literary or musical works, or displays of any work, in systematic instructional activities.
- * University personnel and students may perform nondramatic literary or musical works on a nonprofit basis, without charge or payment, for educational or charitable purposes.
- * Computer Program users may make a single backup copy and minor adaptations of each program as needed for use, subject to restrictions in licensing agreements.

Each of these exceptions is governed by specific conditions and limitations. The outline above is only an imprecise, general description. Before relying on any exception, you should read the applicable Guidelines below.

FAIR USE

"Fair use" is a flexible legal doctrine that permits certain limited uses of copyrighted works that otherwise would constitute copyright infringement. The doctrine, however, is defined only in vague and general terms. Whether a particular use of a copyrighted work is a "fair use" depends on four factors: (1) the purpose and character of the use (especially whether it is for profit), (2) the nature of the work used, (3) the amount taken from the work used, and (4) the effect of the use upon the potential market for the copyrighted work.

Of the four factors, the last--the "market effect"--is the most important. It reflects the constitutional requirement that copyright law encourage creativity through economic incentives. You should suspect that your proposed use is not "fair" if it is a substitute for commercially available purchases, subscriptions, or licenses.

The doctrine of fair use is difficult to apply. The Supreme Court has approved the copying of entire television programs by private individuals for home viewing at a later time. On the other hand, it has condemned as copyright infringement the use of 300 words from a 200,000 word unpublished manuscript, where excerpts from the manuscript at issue were used to "scoop" the first authorized publication.

As these examples indicate, the amount taken is not decisive in determining whether a use is "fair." Use of relatively insubstantial excerpts can constitute infringement.

To reduce the uncertainty of the "fair use" doctrine, groups of copyright owners and users have negotiated four sets of published guidelines describing "fair uses" of specific copyrighted works. These cover: (1) photocopying of written material for classroom use, (2) library photocopying for educational and research use, (3) educational use of music, and (4) off-the-air videotaping for classroom use.

None of these published guidelines constitutes law. Their legal effect varies from authoritative legislative history to simply a consensus between conflicting groups, with no particular legal authority. In some cases, the published guidelines represent a conservative view, and uses beyond their scope may be fair. The Guidelines in this Booklet sometimes permit activities beyond the scope of the published guidelines.

LICENSING AGREEMENTS

Licensing agreements may affect these principles of copyright law. They may permit uses generally prohibited by copyright law, or they may restrict uses that copyright law permits. For example, the University has a license agreement that permits certain public performances of copyrighted musical works.

Computer software, films and videotapes, and copyrighted music are often licensed, rather than sold. The Guidelines in this booklet describe in general terms certain licensing agreements between commercial providers of these items and the University. University policy requires that you understand and comply with the terms of any applicable license agreement.

COPYRIGHT INFRINGEMENT AND PENALTIES

If you infringe someone else's copyright, you may be sued. If you lose the lawsuit, you may be liable for both the copyright owner's losses and your profits, if any, from the infringement. or the copyright owner may recover statutory damages of up to \$20,000 per work infringed, or up to \$100,000 per work infringed willfully. You also may be liable to pay the copyright owner's attorneys' fees, as well as your own. Finally, you may be the subject of an injunction (a court order) forbidding further infringement.

If you are sued for activities within the scope of your employment, the University may defend you. However, you may have to hire an attorney to defend yourself at your own expense, and, if you lose, you may be liable for damages. For this reason, having knowledge of the limits of copyright law, as indicated in this Booklet, is in your personal financial interest.

ABROGATION OF STATE GOVERNMENT IMMUNITY

In the late 1980's, several courts ruled that state government institutions, including state universities, were immune from damage actions for copyright infringement under the Eleventh Amendment to the United States Constitution. The legal basis for this immunity was that the copyright statute did not make state liability clear enough to meet constitutional standards.

On November 15, 1990, President Bush signed into law a bill passed by Congress to abrogate this immunity. The new law modifies the copyright statute to make crystal clear that the several states, their respective agencies and institutions, and their officers and employees are liable for copyright infringement to the same extent as private parties. Under this new law, neither you nor the University is protected from copyright infringement liability by virtue of the University's status as a state institution.

II. GUIDELINES FOR USE OF OTHERS' COPYRIGHTED MATERIAL

A. GUIDELINES FOR PHOTOCOPYING AND OTHER USE OF WRITTEN MATERIALS

For convenience, these Guidelines are divided into four sections. The first covers the making of single copies for study, scholarship, teaching, and research, that is, use by an individual professor or student without further dissemination. The second covers the making of multiple copies for distribution to students in the classroom. The third covers the making of single or multiple copies to be held on reserve in the library for use in a specific class or program. The last section covers photocopying by libraries for internal use and distribution to library users. Because different principles of law govern these four areas, the Guidelines in the four areas have different standards.

i. COPYING FOR INDIVIDUAL USE

This section covers the making of a single copy of written material by an individual professor or student for personal use in study, scholarship, preparation for teaching, or research, without further dissemination. It also covers the display or circulation of the single copy in the classroom if the single copy is returned to the professor at the end of the class.

1. I would like to make a single copy of some copyrighted material for my own use in study, scholarship, preparation for teaching, or research. How much of a copyrighted work may I copy?

The published "safe harbor" guidelines permit you to copy the following:

- (a) A chapter from a book;
- (b) An article from a periodical, scholarly journal, or newspaper;
- (c) A short story, short essay or short poem, whether published by itself or in a collective work; or
- (d) A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, scholarly journal, or newspaper.

If you wish to copy more than this, you should consider purchasing a copy of the entire work. If copies are readily available for purchase at a fair price, you should buy one or have your department do so.

For example, if you wish to copy several articles from a newspaper, you should buy the newspaper instead.

2. What do I do if I want to copy more than the safe harbor guidelines permit but cannot obtain a commercial copy of the material I need?

In the vast majority of cases, commercial sources will be able to supply you with the material that you need. Before exceeding the limitations in these Guidelines, you should make a reasonable effort to contact the author, publisher, named copyright owner, and all the usual commercial sources for the work, in order to verify that the work in fact is "out of print" or otherwise unavailable at a fair price. To protect yourself in case legal questions later arise, you should document your inquiries in writing and retain the written record for at least three years after your last use of the work. In the rare case in which a commercial copy of the material you need is truly unavailable at a fair price, you may photocopy what you reasonably need to use, but no more.

3. What if commercial copies are available but I have to wait a long time for delivery?

Once you have ordered a commercial copy of a work, you may make a photocopy of the portions of the work that you need for your temporary use while awaiting delivery of the commercial copy. However, you must destroy the Photocopy once the commercial copy arrives. Since this process is wasteful, you should use it only when the need is great.

4. I do research in microbiology. Each week, I copy from one to several of the leading biology articles from a particular journal. Is this "fair use"?

No. Systematic and repeated copying from a single publication or from the works of a single author is not fair use. In this case you should read the library's copies of the journal or get your own subscription.

5. I am a professor of electrical engineering. Each month, I photocopy anywhere from five to twenty articles from various engineering and scientific journals. The journals vary from month to month, depending on which have articles of interest to me, but all are selected from a group of about thirty journals that I follow. I keep the copies in my private files for study and research. Is this "fair use"?

Probably not. The systematic making and collection of copies, even though from different journals in different months, may severely impact the aggregate subscription revenues of the publishers.

The better procedure is to request reprints from the authors of the articles that you need, or to purchase copies from the Copyright Clearance Center or other central clearinghouse for scholarly works. Many journals state in their mastheads what clearinghouses they use and what fees (if any) they charge for copies. In most cases, you may also buy back issues from the journal itself.

If an immediate photocopy is essential for your research, you may make one, as long as you order an author's reprint, commercial copy, or back issue and destroy the photocopy when the authorized copy arrives. If you make a photocopy and do not receive an author's reprint within a reasonable time after your request for one, you should purchase a commercial copy from a clearinghouse, or buy the appropriate back issue from the journal.

ii. COPYING FOR DISTRIBUTION TO STUDENTS

This Section covers the making of multiple copies of copyrighted material for distribution to students in the classroom. Since the potential impact on publishers' revenues is much greater when multiple copies are made, the Guidelines in this Section are stricter than those in Section A(i) above, which covers the making of single copies other than for distribution.

1. From time to time during each semester, I spot written material that I would like to distribute to my students for discussion and study. Under what circumstances may I copy and distribute this material to my students, and how much may I copy?

The published "safe harbor" guidelines allow multiple copies to be made for classroom use if four requirements are satisfied. The requirements are: (1) brevity; (2) spontaneity; (3) cumulative effect; and (4) terms of copying.

The brevity requirement is as follows:

Poetry: up to 250 words (including a complete poem of up to two pages)

Prose: a complete article, story or essay up to 2,500 words (about 10 double-spaced typewritten pages), or (for works longer than 2,500 words) an excerpt of 500 words or 10% of the work, but not more than 1,000 words.

Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue

"Special" Works (containing mainly illustrations and less than 2,500 words in all): up to two pages, but not more than 10% of the words

To satisfy the spontaneity requirement, you must "spontaneously" decide to use the copies at your own "instance and inspiration" when there is no longer a reasonable time to get permission from the author or publisher before the "moment . . . of maximum teaching effectiveness." This requirement precludes copying pursuant to instructions of a superior or standing orders of your department or administration, as well as copying the same material from term to term.

The cumulative effect requirement is as follows:

single course: copying for only one course

Per single author (other than of current news): no more than one short poem, article, story or essay, and no more than two excerpts, per class term

Per single collective work or periodical volume (other than of current news): no more than three excerpts per class term

Instances per course: up to nine instances of multiple copying per course per term

Even if you satisfy these three requirements, you must also satisfy the terms of copying. First, you may make no more than one copy per student. Second, you may not charge students more than the actual cost of copying. That is, you may not make a profit, even if the profit goes to the University or a charitable organization. Third, you must include in each copy a copyright notice exactly as in the original work. Fourth, you may not use copying to create or replace anthologies, compilations, or collective works, whether you make the copies in a batch or separately. Finally, you may never copy "consumables" such as workbooks, standardized tests, test answer sheets and the like.

2. The conditions of the safe harbor guidelines (see Question 1 above) are very restrictive. If I copy more than they permit, am I a copyright infringer?

Not necessarily. If your proposed use is close to that permitted by the safe harbor guidelines but does not fit within their letter, it may still be fair use. The brevity and cumulative effect requirements are somewhat arbitrary, and the statutory fair use doctrine gives teachers greater latitude in many instances.

However, you should take the spontaneity requirement and the terms of copying very seriously. If your copying is not spontaneous, that is, if there is plenty of time to seek permission from authors or publishers before you need to use the copied materials in class, you should get their permission (see Part III of this Booklet). Similarly, if your copying violates one of the terms of copying, it is probably not fair use. Other factors that tend to negate fair use are: (1) copying that substitutes for purchases or subscriptions, (2) copying directed by higher authority, such as a department chair, dean, or administration official, and (3) use of the same materials, without permission, in more than one class term, whether or not consecutive.

3. I teach a course on literature to about thirty students. I would like to copy twenty poems about rain and distribute the poems to the students in class. Is this permissible?

Probably not. This greatly exceeds the cumulative effect requirement of the safe harbor guidelines (see Question 1), which limits the making of multiple copies to nine instances per term. It also constitutes the creation of an anthology or collective work and therefore violates the terms of copying of the safe harbor guidelines.

The better procedure in this case is to get permission from owners of copyright (usually the authors or publishers) in the individual poems. That permission might cover repeated use of the collection of poems from term to term, whereas the fair use doctrine would not. If the collection is of general interest, you might explore with the copyright owners the possibility of publishing the collection as a separate work.

4. It is August, and I am preparing to teach a course in American history that begins next January. I would like to copy three historical essays by different authors from different works for my class. May I?

Probably not. The five-month lead time before the course begins should be ample to request and (if forthcoming) receive permission from the publishers. Thus, the spontaneity requirement of the safe harbor guidelines (see Question 1) is not satisfied. You should request permission from the publishers.

5. It is now December. Two of the three publishers (see Question 4) have granted permission for me to use their historical essays in my American history class that begins in January. However, I have not heard from the third publisher. What should I do?

You should send a second request for permission to the third publisher, stating when you intend to use the essay and enclosing a copy of the first request. Then you should follow up with a telephone call about a week later. If, by the time the course begins, you have no decision from the third publisher, you may use the essay, as long as you have no reason to believe that the publisher intends to deny permission or to ask for a fee that you are not willing to pay. Before using the essay in another course or term, however, you should get permission or obtain authorized copies.

6. I use an anthology of short stories in my course on English-language literature. The anthology does not contain a story that I would like to include in the course. The story is only four pages long, about 2,000 words, and there are thirty students in my course. May I copy it for them?

Yes, as long as you satisfy the spontaneity and cumulative effect requirements and the terms of copying of the safe harbor guidelines (see Question 1). In adding a single story to the anthology, you are simply supplementing it, not creating a new anthology or preparing a substitute. However, if you recognized the need for the additional story in time to request and receive permission, you should get permission.

7. After the midterm examination in my undergraduate political science course, I read three interesting short essays, each published in a different periodical. I would like to distribute copies of all three essays to my students well before the end of the term. The three essays are by different authors. Two are about 2,000 words in length, and one is 3,000 words in length. May I make copies of the three essays and distribute them to my students?

Probably yes, as long as the moment of "maximum teaching effectiveness" in your opinion is "well before the end of the term" and you satisfy the cumulative effect requirement and the terms of copying of the safe harbor guidelines (see Question 1). Since you just discovered the essays and there is unlikely to be sufficient time to request and receive permission, you probably satisfy the spontaneity requirement. Although the 3,000 word essay does not literally fall within the 2,500 word brevity requirement for essays, it is fairly close and therefore appears to satisfy the spirit of the safe harbor

guidelines, if not their letter. Unfortunately, you cannot fit within the letter of the safe harbor guidelines simply by editing the longer essay because the brevity rule for excerpts allows at most 10% of a work.

8. In my graduate physics course, I would like to use a recent article published in a scientific journal. The journal masthead contains the following legend: "ALL RIGHTS RESERVED. NO PART OF THIS JOURNAL MAY BE REPRODUCED OR UTILIZED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR THE USE OF AN INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT PERMISSION IN WRITING FROM THE PUBLISHER." May I copy the article for my students?

As long as you have not agreed to the legend, you may copy the article if you satisfy the spontaneity, brevity, and cumulative effect requirements and the terms of copying of the safe harbor guidelines (see Question 1) , or if your copying otherwise constitutes fair use. Unless agreed to, such legends do not bind you and do not extend or diminish the rights of the publisher or other copyright holder; you have the same rights under the doctrine of fair use as if there were no such legend.

9. I would like to give students in my pre-law courses a chance to practice taking the Law School Admission Test. I have a book with a sample test and a sample answer sheet. May I copy these for my students?

No. Test booklets and test answer sheets, like workbooks for laboratories and "drill" courses, are "consumable" publications, and your copying would directly replace potential commercial sales. You must obtain permission from the copyright owner or buy enough books for your students to use.

iii. COPYING FOR LIBRARY RESERVE

There are no specific statutory provisions governing the making of copies to be placed on library reserve. Nor are there any agreed and published guidelines covering this use of copyrighted works. The American Library Association has published unilateral guidelines, called the "Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use" (March 1982). However, these guidelines have been criticized, and, since the issue has not been decided in court, the legality of copying for library reserve use is subject to uncertainty.

Some principles of copying for library reserve use follow logically from other instances of fair use. For example, if the rules of fair use would permit a professor to make and distribute copies of a work to her thirty students, then logically those same rules should permit her instead to make only six copies and place them on library reserve. The library reserve option should have less impact on the copyright owner's revenue as long as the reserve copies are used for a single class, and not placed on reserve for repeated use in different terms.

In other instances, however, reliance on logic alone may be dangerous. If the rules of fair use would permit each student to make a single copy of a work for his or her own private study, should the professor feel free to make a smaller number of copies for library reserve? Although this might reduce the total number of copies made, the professor would not be able to control the number of additional copies made by students. Moreover, the fact that the copies would all be made by one person or organization (the professor or the library) might render the Guidelines for individual copying (See Section A(i) above) inapplicable.

1. I would like to make a single copy of an 1,800-word essay that I recently discovered and put it on library reserve for the students in my psychology class. May I do so? May I keep it on reserve for the next term? (I do not plan to copy any other materials for this course.)

You may place the single copy on reserve if there is insufficient time to get permission from the copyright owner, or if an authorized copy of the essay is unavailable at a fair price. In either case you must duplicate the applicable copyright notice in the reserve copy. However, if you plan to copy the essay from a larger work in the library's collection, the safest procedure would be to place the entire larger work on reserve and avoid copying altogether.

To verify that an authorized copy is unavailable at a fair price, you should make a reasonable effort to contact the author, publisher, named copyright owner, and all the usual sources of commercial copies of the work. In case legal questions arise later, you should document your inquiries and retain the records for at least three years after your last reserve use of the copy.

Although the "safe harbor" guidelines (see Section A(ii), Question 1) do not apply to copying for library reserve use (as distinguished from classroom distribution), they would permit you to make copies for all of your students if you satisfied the spontaneity requirement and the terms of copying of those guidelines. Logically, then, the fair use doctrine should permit you to make a single copy for all of the students to use in the library. Once the term is over, however, you no longer would satisfy the spontaneity requirement of the safe harbor guidelines. By that time you should have permission to

place the copy on reserve again, or you should use an authorized copy or verify that none is available at a fair price.

2. I teach a senior-level class in English literature, and I would like my students to read a long chapter from a recent novel, a whole poem by a different author, and an article by a critic discussing the novel and poem. Unfortunately, all of these items are too long to satisfy the brevity requirements of the Guidelines for multiple photocopying (see Section A(ii) , Question 1, above). May I make copies of these items to place on library reserve? If so, how many copies may I make?

As in Question 1, the safest procedure would be to place on reserve the library's authorized copies of the larger works in which these items appear. If this solution is impractical (for example, due to the size of the class or the value of the larger works), you may make copies if there is insufficient time to get permission from the copyright owners, or if authorized copies are unavailable at a fair price. In either case you must duplicate the applicable copyright notice in each reserve copy. If you rely on the unavailability of authorized copies, you should verify and document it (see Question 1).

No binding legal authority specifies the number of copies that you may make. The American Library Association guidelines say that the number of copies must be "reasonable in light of the number of students enrolled, the difficulty and timing of assignments, and the number of other courses which may assign the same material." Those guidelines also say that a reasonable number "in most instances" will be less than six, but the source of this rule of thumb is unclear. If you rely on the doctrine of fair use, the best procedure is to use the smallest number of copies that will not cause undue inconvenience to your students.

If you plan to use the same materials in more than one class or in more than one semester, you should get permission, or you should get (or ask the library to get) authorized copies, if available. If authorized copies are not available at a fair price, you of course may make a reasonable number of copies after verifying and documenting their unavailability (see Question 1). If authorized copies are available but cannot be delivered in time for the first course, you may make temporary copies for use until the authorized copies arrive, but you should destroy the temporary copies as soon as you receive the authorized copies.

3. I placed three photocopies of a play on library reserve this semester when I discovered in mid-semester that the University Bookstore had not ordered enough copies for my class. May I use those copies for class reserve next semester?

No. Your spontaneous need justified the use of the copies for this semester, but you may not use them again without permission if authorized copies are available at a fair price. If you order three authorized copies, however, you may continue to use the photocopies until the authorized copies arrive, but then you should destroy the photocopies.

4. I teach an undergraduate chemistry course. A graduate level chemistry textbook has three chapters that would be quite useful for my students, but the rest of the material is too advanced for them. The book is too expensive to assign for just three chapters. May I make five copies of the three chapters and put the copies on library reserve?

Probably not, unless the graduate-level book is not available at a fair price. Three chapters is a substantial portion of the whole book, and your purpose (saving your students money), while laudable, would adversely impact the copyright holder's revenue. The best procedure would be to have the library buy five copies of the book.

iv. LIBRARY PHOTOCOPYING

This Section contains guidelines for photocopying by libraries and their personnel, both for library use and for users of the library. Like other users of copyrighted works, libraries have the benefit of the "fair use" doctrine. However, since they deal with copyrighted works routinely and systematically, libraries' activities are less likely to qualify as "fair use" than those of individual professors and students. A special statutory provision--Section 108 of the Copyright Act of 1976--covers use of copyrighted works by libraries, and this Section is based largely on it.

1. One of the books in the library, still under copyright, has about 20 of its 400 pages missing. May the library replace the missing pages with photocopies made from another copy of the same work in the library's collection?

Probably yes. Copying so small a portion of the original work for this purpose probably would constitute fair use. As the number of missing pages increases, however, the application of the fair use doctrine becomes uncertain. When large portions of a book are missing, the best procedure is to buy a new copy. once a new copy is ordered, however, it should be permissible to repair the old one

temporarily for circulation by using photocopies, as long as the old one is taken out of circulation and destroyed as soon as the commercial replacement copy arrives. The library should make sure that any copyright notice in the original is included in the repaired copy.

2. One of the copyrighted works in the library was badly damaged by a user. May the library make a replacement using another copy of the same work?

Only if the library "has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price." If a commercial replacement is available at a fair price, the library must buy one.

Before making a photocopy, the library should, at a minimum, make a reasonable effort to contact the author, publisher, named copyright holder, and all the usual commercial sources of the work to determine whether a replacement copy is available at a fair price. If a commercial replacement appears to be unavailable, the library should document its inquiries in case anyone later should question its right to make the replacement copy. The library then should retain the records of its inquiries for at least three years. In any event, the library should make sure that any copyright notice in the original is included in the replacement copy.

These principles apply to copies that are damaged, deteriorating, lost, or stolen. They also apply to every type of copyrighted work,, including phonorecords, pictures, graphics, sculpture, movies and other audiovisual works.

- 3, We have ordered a commercial replacement for our second copy of a book, which was badly damaged while in circulation. The replacement copy will not arrive for two months, and there is great user demand for the work. May we make a replacement copy for temporary use by duplicating our first copy?

Yes. Once the library has ordered a commercial replacement copy, it may prepare a temporary replacement (with a copy of any copyright notice) for circulation. As soon as the commercial replacement copy arrives, however, the library must remove the temporary replacement copy from circulation and destroy it. If the temporary replacement copy is lost or stolen, the library should not make another.

4. Our library contains an unpublished historical manuscript by the grandson of an early Hawaiian missionary. The manuscript is still under copyright, but it is deteriorating due to age and the effects of humidity. May the library make a duplicate copy for preservation? May it provide a duplicate to the Library of Congress for its historical collection?

The answer to both questions is "yes." A library may duplicate an unpublished work in its collection for preservation, security, or deposit for research use in another library open to the public. The library, however, may not make money by supplying such copies to other libraries. In any event, the library should include in all duplicates a special copyright notice indicating that the work is unpublished.

5. Users often request that the library provide them with copies of portions of copyrighted works. Under what circumstances may the library do so?

The library may supply a user with a single copy of a portion of a copyrighted work under six conditions:

- (1) The portion must be brief -- no more than one article or other contribution to a collective work, or a "small part" of any other copyrighted work (This rule does not permit copying of sheet music, pictures, or graphics, except for incidental illustrations of text, nor does it permit copying of sculpture, movies, or audiovisual works other than news programs);
- (2) The copy must become the property of the user;
- (3) The library must have had no notice that the copy is to be used for any purpose other than private study, scholarship, or research;
- (4) The library must use two copyright warning notices as required by Copyright Office regulations, one displayed prominently at the place where orders are accepted, and the other printed on its order form;
- (5) The copy made by the library must include a copyright notice; and
- (6) Requests for copying the same material must be "isolated and unrelated"--the library may not engage in "systematic" copying and must not have "substantial reason to believe that it is

engaging in the related or concerted reproduction or distribution of multiple copies of the same material."

The last requirement is difficult to interpret. However, it probably precludes library copying in response to "standing orders" by a professor, department, school, or other unit (for example, a standing order for the major articles in three leading medical journals each month). Similarly, it precludes any copying that has the purpose or effect of replacing a subscription or purchase.

6. Occasionally, users ask the library to copy entire books or major works. Is this permissible?

Sometimes. The library may copy and provide to users an entire work or a "substantial part" of it if the work is not commercially available. All of the conditions for copying a portion of the work (see Question 5) must be satisfied, including the requirement under condition (1) as to type of work, but excluding, of course, the brevity requirement of condition (1). In addition, the library must have determined, "on the basis of a reasonable investigation", that a copy of the work cannot be obtained at a fair price.

Although the library may be responsible for making an unauthorized copy, the patron who requests the copy may be legally liable for inducing infringement by the library. Therefore, before asking any University library to make a photocopy of all or a substantial part of a work, a patron should, at a minimum, make a reasonable effort to contact the author, publisher, named copyright owner, and all the usual commercial sources of the work to determine whether a commercial copy is available at a fair price. If a commercial copy appears to be unavailable, the user should document his or her inquiries in case anyone later should question the right to make the copy.

The library should provide patrons with information or forms to document their inquiries. The library should retain records of this documentation and of the copying for at least three years.

7. There is a coin-operated photocopier in our library. Normal use of this machine is unsupervised. Is our library or its personnel liable if users make unauthorized copies on this machine?

No. The library and its employees are not liable for infringing use of photocopiers by library users as long as library personnel do not suggest or participate in the infringement, and as long as each machine displays a copyright warning notice in the form prescribed by the Copyright Office.

8. Occasionally library users ask about their rights and liabilities under the copyright law. What should library personnel tell them? Are they liable for copyright infringement if they use copying machines in the library?

Library personnel could incur legal liability if they attempt to render legal advice to users. The most that library personnel should say is that a work may be protected by copyright. (With respect to any computer software or videotapes that it lends, however, the library can and should warn users that unauthorized copying and public performances are prohibited. See Section D, Question 9 and Section E, Questions 11 and 15, below.) Of course, library personnel also may refer users to works on copyright law in the library's collection.

As for infringement, use of the library's copying machine neither expands a user's liability nor protects the user. The user's liability is the same as if he or she used a copying machine outside the library.

9. Our library has a large collection of sheet music still under copyright. May we make copies of musical works, in whole or in part, for users?

No. The statutory permission for making copies at the request of library users (see Questions 5 and 6) does not apply to sheet music. It also does not apply to pictures and graphics (other than incidental illustrations of text), or to movies or audiovisual works other than news programs.

10. Our library engages in interlibrary loan programs. May we make a copy of a work or a portion of it for a user at another library?

Yes. A library may copy portions of works or whole works in its collection under the conditions explained in Questions 5 and 6 for its own users or for the users of other libraries. However, in providing copies for users at other libraries, the library may find it more difficult to be sure that it is not engaging in "systematic" photocopying, and that its copying does not have the purpose or effect of substituting for a purchase or subscription. Each library furnishing photocopies to other libraries' users should establish administrative procedures to monitor these conditions in its interlibrary loan programs, as well as in its own services.

Certain organizations of libraries, publishers and authors have agreed upon guidelines for photocopying in interlibrary loan arrangements. The agreed guidelines appear in the Final Report of the National Commission on New Technological Uses of Copyrighted Works ("CONTU") , Library of

Congress, July 31, 1978, at pages 54-55. Although these guidelines do not have the force of law, libraries should follow them in the absence of more reliable authority.

B. GUIDELINES FOR USE OF PICTORIAL WORKS

The term "pictorial works" or "graphics" refers generally to two-dimensional images, such as blueprints, flow charts, drawings, paintings, photographs, and renderings. All of these may be protected by copyright, and most of them generally are. Moreover, like other kinds of copyrighted works, pictorial works can enjoy copyright protection regardless of the form or medium in which they are fixed. A copyrighted photograph, for example, is no less protected by copyright after its conversion into digitized pixels stored in a computer's memory.

Only four of the five exclusive rights of copyright owners apply to pictorial works. These are: the rights of reproduction and distribution, the right to prepare derivative works based on the copyrighted work, and the right to display the copyrighted work publicly.

The first-sale doctrine restricts the distribution right by allowing the owner of an authorized copy of a pictorial work to transfer, rent, lend, sell or give that copy away without the copyright owner's permission. It also allows the owner of an authorized copy to display that copy publicly, but not to transmit its image to viewers at another location.

However, the first-sale doctrine does not affect the copyright owner's exclusive rights to copy and prepare derivative works based on copyrighted pictorial works. Thus, although the owner of a copyrighted photograph has the right to give it away or display it in a gallery without the copyright owner's permission, she has no right to make additional copies of it or to use it to prepare derivative works.

Two things make copyright in pictorial works especially problematic. First, pictorial works are often included in larger works. For example, a book or magazine consisting largely of text may contain photographic or hand-drawn illustrations, or an instruction manual may contain blueprints or schematic diagrams. The owner of copyright in these pictorial works may be different from the owner of copyright in the work as a whole. That is, the owner of copyright in the pictorial work may have retained the copyright in it and may have given the publisher of the larger work only a license to publish the pictorial work in it.

When two different people own copyright in the larger work and the pictorial work, the extent or absence of copyright protection for the larger work does not affect copyright in the pictorial work. For example, if a photograph is properly copyrighted, the fact that it was included in a book whose copyright was forfeited by publication without

copyright notice before March 1, 1989, does not impair copyright in the photograph. In general, one cannot assume that a pictorial work is unprotected simply because it appears in a larger work that lacks protection.

For similar reasons, the doctrine of fair use may not permit the copying and use of a single picture from a book, even though the picture resides on only one of many pages. The picture may constitute a separate copyrighted work in its own right, especially if the owners of copyright in the book and picture are different. Since the doctrine of fair use generally disfavors copying or other use of an entire work, it is less likely to apply to pictures and other separable works under these circumstances.

The second reason why pictorial works are often problematic is that they may enjoy additional rights--so-called "moral rights"--of the author or artist. Moral rights include the rights to claim or disclaim authorship of a work and to prevent certain kinds of unauthorized modification, mutilation, distortion or destruction of it. Under a 1990 statute, these special rights apply to certain works of fine art, namely paintings, drawings, prints, sculpture, and still photographic images for exhibition, but only if they are signed by the author and are either one of a kind or part of a limited, numbered edition of 200 or fewer copies. These special rights do not apply to computer images or images in mass-produced books and magazines, even if they themselves are copies of works that enjoy these rights.

The following questions and answers illustrate the application of these principles to copyrighted pictorial works:

1. I am a professor of astronomy. I have an out-of-date textbook, still under copyright, which contains excellent drawings and photographs of the solar system and various features of the sky. I would like to make copies of about thirty of these pictorial works for students in my introductory astronomy class. May I do so?

Not without permission from the copyright holder or holders. The published "safe harbor" guidelines for distribution of copies to students (see Part II(A) (ii) of this Booklet above) apply to pictures just as to other kinds of works. However, the brevity requirement limits copying under the guidelines to a single picture per book, or up to two pages (but not more than 10% of the words) of special works consisting primarily of illustrations. Thus your planned use of the out-of-date textbook would not meet the published fair use guidelines.

With respect to pictorial works, the published fair use guidelines seem quite restrictive. Those guidelines are not the last word on fair use, and the fair use doctrine may well permit broader use of copyrighted pictures. For example, the use of two or three pictures from the same book might be fair if

you strictly observed the other requirements of those guidelines-spontaneity, cumulative effect, and terms of copying. It is unlikely, however, that copying as many as thirty pictures from the same book would be fair use.

2. Suppose in Question 1 that I wish just to show the pictures to my students during my lectures, without giving them copies. May I do so?

Yes. If you or the University owns the textbook, and if the textbook is authorized by the holders of copyright in the various pictures, the first-sale doctrine gives you the right to display the pictures to your students, or even to the public. You may use an opaque or similar projector to do so, but you may not transmit the images outside the place where the textbook is located, for example, by closed circuit television.

Besides the first-sale doctrine, two other special statutory exceptions (17 U.S.C. § 110(l) & (2)) apply to this situation. The first permits display "in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction." The second exception is discussed further in Question 5 below.

3. As a botany professor, I would like to show my students hand drawings of certain rare flowers from a book in my special collection. The book is in poor condition. The drawings, which are in color, are fading. Rather than take the book to the classroom, I would like to photograph the drawings in it and display the photographs to my students using a slide projector. May I do so?

Ordinarily no. Taking the photographs would infringe the copyright owner's exclusive reproduction right, and neither the first-sale doctrine nor the two special exceptions permit copying. You should locate the copyright holder or holders and ask them for permission. In an effort to locate them, you should contact at least the book publisher, the book's author or authors, and the persons or institutions named in any copyright notices (both for the book and for the pictures separately) and in any credits for the pictures.

If you cannot locate the copyright holders, it probably would be fair use for you to take and use the photographs as you propose, as long as you use them only for nonprofit pedagogic purposes and do not further copy or publish them. If you do so, however, you should document your attempts to locate the copyright holders and retain a record of the attempts for as long as you retain the slides, plus three years. You also should include in your slides any copyright notices in the book or on the

individual pictures. Finally, when you no longer have a use for the slides, you should not give them away or sell them, but you should destroy them.

4. I would like to use an overhead projector, as discussed in Question 2, to show my students copyrighted pictures from several books on zoology. May I videotape my lecture, including the displays of copyrighted pictures, for repeated showing to later classes?

No. Like taking unauthorized photographs of the pictures, as in Question 3, unauthorized videotaping would violate the copyright owners' exclusive rights of reproduction. You should contact all the sources listed in Question 2 and try to get permission from the copyright holders.

If you are unable to locate the holder of copyright for a particular picture, videotaping the lecture for nonprofit educational use would probably be fair use, as would the photography in Question 2. However, as in Question 2, you should keep records of your attempts to locate the copyright holder for at least three years after erasing the videotape, you should include in the videotape any copyright notices for the various pictures, and you should erase the videotape (and not sell or transfer it) when you no longer have any use for it.

5. I offer a University-wide course on cinematic arts. I have a delightful book on the history of American film, filled with photographs of movie stars and scenes from movies. I would like to show a number of these pictures to students in my class at Manoa, which is transmitted by television to classes on the Outer Islands. May I do so?

Unfortunately, current law requires you to get permission from the copyright holders to do this, even if you make no copies of the photographs and use only an opaque projector as in Question 2. The reason is that neither the first-sale doctrine nor the two special exceptions for educational display of copyrighted works permit transmission of the image of a work beyond the confines of a single campus. The first sale doctrine allows only "the projection of no more than one image at a time, to viewers present at the place where the copy is located." The first special exception (17 U.S.C. § 110(l)) applies only to "face-to-face teaching . . . in a classroom or similar place devoted to instruction[.]"

The second special exception (17 U.S.C. § 110(2)) permits transmission of displays more generally "as a regular part of the systematic instructional activities of a governmental body or nonprofit institution[.]" The legislative history of this provision, however, makes clear that it does not cover transmission beyond the confines of a single campus.

Even if your proposed transmission were within the confines of a single campus, the display would have to be "directly related and of material assistance to the teaching content of the transmission[.]" Unauthorized transmission of displays of copyrighted pictorial works for purposes of entertainment or "comic relief" would not be permitted.

6. I am scheduled to give a public lecture on the history of American cinema on the Manoa campus. During my lecture, I would like to show pictures from various copyrighted books on the subject. I plan to use an overhead slide projector and make no copies of the pictures. May the University charge the public an admission fee to attend the lecture?

Yes. The first-sale doctrine permits you to use authorized copies of books owned by the University for this purpose, regardless whether or not the display is for profit, as long as the display is made at a single location and not transmitted. In contrast, a similar public performance of a copyrighted work, such as a film or videotape, would have to be licensed, because the first-sale doctrine does not affect the copyright holder's exclusive public performance right (see Section E, Question 11, below).

If you wished to transmit this lecture to other campuses, you would need permission from the copyright holders. The same is true of transmission within the same campus, unless you could rely upon the special exception for transmitted displays that are "a regular part of the systematic instructional activities of a governmental body or nonprofit institution[.]" A lecture that is part of a regular series might qualify for this exception, while an isolated or occasional lecture probably would not.

7. I am an art teacher. I have just purchased a book of high-quality reproductions of famous twentieth-century paintings, many of which are still under copyright. I would like to cut out various portions of copyrighted reproductions from this book and use them in a collage. May I do so?

No. You must get permission from the original artists or other copyright holders. The collage would constitute a derivative work of the various pictures used in it, and no general exception--other than the doctrine of fair use--permits unauthorized preparation of derivative works.

Generally speaking, the fact that only a small portion of your collage derives from each copyrighted picture does not make preparation of the collage a fair use, because "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." There may be circumstances under which taking a small portion of a particular picture for use in a collage might be fair use, but the fairness of that use depends on the amount taken from the original picture, not on the percentage of the collage that the borrowed portion of that picture represents. In any event, application of the fair use doctrine under these circumstances is sufficiently uncertain that you would be unwise to rely on it.

8. In question 7, would it make any difference if I used computerized image processing to make my collage?

No. Protection for a copyrighted work does not depend upon the form or medium in which the work is recorded. Moreover, your use of a scanning apparatus to make a digitized copy of the original images for computer processing would constitute unauthorized copying and would infringe the copyright owners' exclusive reproduction rights.

9. In Question 8, suppose I use computer image processing techniques to alter the various pre-existing images before including them in my collage. Would this avoid infringement?

Again, no, for two reasons. First, as in Question 8, the use of computer equipment to "copy" the images of the copyrighted works into the computer memory or storage for processing would infringe the copyright owners' exclusive reproduction rights. Second, the distorted or modified images themselves would be derivative works of the original copyrighted pictures.

If each portion of a pre-existing image were distorted sufficiently (for example, so much as to be unrecognizable), it might cease to be a derivative work, as well as to avoid detection as a copy of portion of the original work. However, the initial "copying" of the copyrighted images for processing would still constitute infringement, and the extent of modification needed to make a "new" work instead of a derivative work is highly uncertain and likely to be considerable. Accordingly, you should obtain permission from the owners of copyright in the works you intend to use, or you should use only pictures in the public domain

C. GUIDELINES FOR USE OF COPYRIGHTED MUSIC

Music involves two types of copyrighted works: the musical composition itself (the "musical work" or "sheet music") and particular recorded arrangements of the music, called "sound recordings." Each sound recording is a derivative work of the underlying music, and its creation requires a license from the owner of copyright in the underlying musical work, usually the composer or music publisher. The statute refers to copies of sound recordings as "phonorecords."

The owner of copyright in a musical work has all the five exclusive rights that pertain to any copyright. The owner of copyright in a sound recording of that work, however, has no exclusive public performance right, but has only the right to control mechanical copying and distribution of the sound recording directly from the phonorecord. Thus a phonorecord producer's rights are often referred to as "mechanical rights."

Because a phonorecord producer cannot control the public performance of the sound recording or the underlying musical work, anyone in possession of a phonorecord may play it ("perform" it), publicly or otherwise, without liability to the phonorecord producer. Nevertheless, any public performance of the music, whether in person or by playing a phonorecord, requires permission from the owner of copyright in the underlying musical work, unless a specific statutory exception or the doctrine of fair use applies.

University use of copyrighted music is governed by two sets of rules. First, there are published "safe harbor" guidelines for copying and performance of music in the course of educational activities. Second, the University has blanket licenses from the performing rights societies, Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors, and Publishers ("ASCAP") . These licenses authorize public performances of the music in the respective repertoires of these societies under specified circumstances. The Guidelines that follow are based upon these sets of rules.

1. I teach music at the University and conduct a student orchestra. When may I or my students duplicate copyrighted sheet music for purposes of performance?

Only in an emergency, to replace purchased copies that are not available for an "imminent performance." You must include the copyright notice on the originals in each copy, and you must order commercial replacement copies of the music that you duplicate. When the commercial replacement copies arrive, you should destroy the emergency copies. In no event may you copy sheet music for purposes of performance if purchased copies are available and can be procured in time for the performance.

2. May I copy sheet music for purposes other than performance?

Yes. Professors and students may make copies for "academic purposes other than performance," as follows:

Multiple copies for distribution to students: one copy per student of excerpts up to 10% of a work, but less than a performable unit such as a section, movement, or aria.

Single copy for professor's own use in research or preparation for teaching: a single copy of an entire performable unit if confirmed by the copyright holder to be out of print or unavailable except as part of a larger work.

You may not, however, use copies to create, replace or substitute for anthologies, compilations or collective works; and each copy must contain the same copyright notice that appears on the printed copy.

3. For pedagogic reasons, I would like to simplify the score of a modern piano concerto (still under copyright) for study by my students. May I do so?

Yes, with limitations. You may edit or simplify printed purchased copies of the music, as long as you do not alter the "fundamental character" of the work. However, you may not transcribe the music in edited form and copy the transcription for your students because to do so would be to create a derivative work.

4. To illustrate the dramatic use of music for my class, I would like to edit and simplify the score for a musical comedy and alter the lyrics correspondingly. May I do so and provide copies of the music and lyrics to my students?

No. The safe harbor guidelines do not permit alteration of lyrics or the addition of lyrics where none existed. Minor alterations to the lyrics, written directly on the printed sheet music, might be permitted under the doctrine of "fair use." Significant changes, however, would constitute the creation of a derivative work and would require permission.

5. I teach a performance course in which the grade depends on an audition. May I record the students' performances and keep copies of the recordings?

Yes. You may record students' performances for evaluation or rehearsal purposes, and either the University or you personally may retain a phonorecord of the performance. However, only a single phonorecord of each performance may be made.

6. I own tapes of several performances of modern music. May I make copies of these tapes and use them to prepare aural examinations for students in my modern music course?

Probably yes. The safe harbor guidelines permit you to make a single copy of sound recordings owned by you personally or by the University in order to construct aural exercises or examinations. Either you or the University may retain the copy.

Strictly speaking, the safe harbor guidelines apply only to the underlying musical work, not the sound recording. Phonorecord producers have not subscribed to the safe harbor guidelines. However, if you actually edit the copy to prepare aural exercises or examinations, the use is probably fair. The reason is that you must have a copy to edit, or you must destroy the original. To force an educator to purchase a new phonorecord each time an examination or exercise is prepared would seem to require an excessively narrow reading of the fair use doctrine. However, for this reasoning to apply, you must retain only the edited copy of the exercise or examination, and not make a complete copy of the work.

7. I teach a course in harmony and in the past have used commercial workbooks in my course. I only have six workbooks left, and ten students have registered for my course next fall. May I make four extra copies?

No. Workbooks, like standardized tests and answer sheets, are "consumable" items, copying of which is seldom, if ever, fair use. You must order an additional four copies from the publisher. If the copies cannot be delivered in time, you may copy particular exercises for the four students, after ordering replacement copies, but the students must destroy the replacement copies after the commercial copies arrive.

8. Our University orchestra would like to perform copyrighted music on University premises. Under what circumstances may we do this?

Public performance of certain copyrighted music on University premises is authorized by blanket licenses to the University from BMI and ASCAP. In order for a performance to be licensed, however, three conditions must be satisfied:

- (1) Repertoire. All of the copyrighted music to be performed publicly must be in the BMI or ASCAP repertoire. This may be checked in advance with the Procurement and Property Management office or directly with BMI and ASCAP.
- (2) Sponsorship. The performance must be sponsored by the University or one of its units. The BMI license appears to permit performances by non-University musicians under contract with the University, but the ASCAP license appears to require the performers to be faculty, students, staff or alumni.
- (3) Premises. The performance must be on University "premises." The licenses define this term as including University campuses and off-campus sites "engaged for use" by University units.

(The scope of the BMI and ASCAP licenses is explored further in the following questions.)

9. Some University music students would like to present a performance of several modern jazz pieces, most of which are copyrighted, in the Andrews Outdoor Theater on the Manoa Campus. They would like to charge a nominal admission fee. May they do so?.

They may if the performance is under the auspices of the University and if the copyrighted pieces they wish to play are in the BMI or ASCAP repertoire. They should check with the University's Procurement and Property Management Office to be sure that the BMI or ASCAP license covers the works they wish to play.

10. Students from the Drama & Theatre Department would like to perform "West Side Story" in the Andrews Outdoor Theatre on the Manoa campus. There would be no admission charge, but the public would be invited. Is this permissible?

No. The University's licenses from BMI and ASCAP explicitly exclude dramatic performances of music. Thus, public performance of an opera, musical comedy, ballet, or pantomime set to music would require a special license. The students should contact the University's Procurement and Property Management Office for help.

11. Some students in the music department participate in an informal chamber orchestra that includes some members of the Honolulu Symphony Orchestra and some "free-lance" professional musicians. May this chamber orchestra perform copyrighted music on the Hilo campus for an admission charge?

Perhaps, but only if the performance is sponsored and approved by the University, and only if the music to be performed is in the BMI repertoire. (The ASCAP license does not appear to authorize performances by non-University personnel.) The students or sponsoring department should contact the Procurement and Property Management office for help.

12. A sorority would like to sponsor a dance on the Manoa campus. All music would be provided by playing phonorecords owned by the sorority or its members, and there would be an admission charge. Is this permissible?

Yes, as long as the University sponsors the dance and the works played are in the BMI or ASCAP repertoire. Since phonorecord producers have no performance rights, the playing or "performance" of the phonorecords is permissible if performance of the underlying musical work is licensed. If the BMI or ASCAP licenses apply, the performances are authorized and there is no infringement.

13. Our library's audiovisual center has self-service equipment for high-speed cassette-to-cassette duplication of audio tapes. This equipment has the same copyright warning notices that appear with the library's photocopying machines (see Section A(iv), Question 7). Will the library or its employees bear liability for users' infringing use of these machines?

No. The library and its employees are not liable for "unsupervised use of reproducing equipment located on its premises" if the equipment displays an appropriate warning notice. This principle is not limited to photocopying machines, but applies to any type of reproducing equipment. The library and its employees will have no liability as long as library personnel do not suggest or participate in infringement, and as long as each machine displays a copyright warning notice in the form prescribed by the Copyright Office.

Library personnel should be aware, however, that duplication of audio tapes is more likely to involve infringement than use of photocopying machines for two reasons. First, users seldom photocopy an entire book or periodical issue, but they may copy an entire musical work. Copying of an entire work, particularly for entertainment purposes, is unlikely to be fair use. Second, if users play any substantial portion of copies of tapes that they make before general audiences (other than a small circle of family and acquaintances), they may infringe the copyright owner's exclusive public performance right. If a user expresses an intention to make copies for entertainment purposes or for purposes of public performance, library employees should warn the user that such use may violate the copyright laws.

14. Faculty and students occasionally ask our library's audiovisual center to prepare cassette copies of phonodiscs in the library's collection. Sometimes a request is for excerpts only, and sometimes it is for an entire musical work. Is this permissible? If so, may the requesting faculty member retain the copy for repeated use?

The answer depends upon the purpose for which the copy is to be used and the portion of the complete work that is requested. If a faculty member edits the copy to prepare aural exercises or examinations, that probably constitutes fair use (see Question 6). The library probably may make and distribute even copies of the entire work for this purpose. However, the requesting faculty member should retain only a copy of the exercise or examination, and not a complete copy of the musical work (or even of excerpts, unless the excerpts are an insubstantial portion of the entire work).

The answer is less clear if the copy is to be used for purposes of study, research or "performance" (i.e., playing) in the classroom. If a faculty member is to retain a copy of the entire work, or of substantial portions of it, the better procedure would be to order a commercial copy of the sound recording, if available. Otherwise, preparation of a copy would replace a potential commercial sale--a factor that tends to negate fair use.

If a faculty member or individual student requests a copy of excerpts that are insubstantial--for example, less than a performable unit such as a section, movement, or aria--the doctrine of fair use probably permits the library to make and supply such a copy for purposes of study, research, or teaching. However, if a group of students requests excerpts (for example, all members of a particular class), even copying of different excerpts of the same work for different students may not be fair use. In any event, the library should make sure that copying of this sort does not become regular or systematic or a substitute for library acquisition.

If a faculty member requests a copy of an entire work for research or educational purposes other than preparation of exercises or examinations, the library should seek to comply with the request through the temporary loan of a copy. That is, the library should lend out a complete copy on a temporary basis while retaining the original phonorecord as a "backup" copy for purposes of preservation or control. The library should make only one circulating copy, should lend it only for a limited period of time, and should not circulate the original phonorecord at the same time. (Any additional copies would substitute for purchase of additional commercial copies of the sound recording.)

Until the legal situation is clarified, University units should observe the following guidelines with respect to requests for copies of sound recordings of music by faculty and music students. The library may make and supply copies of phonorecords in the library's collection pursuant to three types of requests. Each request must be made in writing by a faculty member or music student upon a form prepared by the library and signed by the requesting person. For this purpose, "music student" means a student who makes a request in connection with the formal study of music in which the student is engaged at the time of the request.

- (1) The first type of request is one for a copy of a sound recording to edit for the purpose of preparing aural exercises and examinations. This request must be made by a faculty member and must state that the copy will be consumed in the editing process and that the faculty member will retain a phonorecord of the exercise or examination only. The library may supply copies of excerpts or of a complete work in response to this type of request.
- (2) The second type of request is for excerpts of insubstantial portions of a work--for example, less than a performable unit such as a section, movement or aria. The library may supply copies of such portions at the request of individual faculty members and music students for purposes of study, research, or teaching. However, the library should limit the number of requests per faculty member to a reasonable number (for example, less than six) per semester, and the number of requests per student to one per semester. In addition, the library should be sure that copying of this sort does not become regular or systematic or a substitute for library acquisition.
- (3) The third type of request is for a copy of an entire sound recording, for purposes of study, research, preparation for teaching, or playing in the classroom. The library may make a single copy for lending pursuant to this sort of request as long as the original commercial copy does not circulate at the same time, and as long as only one copy of it exists at any time. The library may determine the duration of the loan, but ordinarily it should not exceed one semester.

All copies of phonorecords prepared by the library, in whole or in part, whether for editing, distribution, or temporary circulation, should have copyright notices like those appearing in or on the cover of the original phonorecord. This includes notices for both the phonorecord and the underlying musical work,

if different. In addition, all such copies should have a prominent legend to the effect that unauthorized duplication or public performance may constitute a violation of the copyright laws.

15. A faculty member from the Hilo campus has requested a copy of a phonorecord of a musical work in the Manoa campus library for instructional use. As a matter of policy, the Manoa campus library does not lend phonorecords off campus. May the Manoa library comply with the request?

The Manoa library may comply with the request as described in Question 14. If the copy is not to be edited for the purpose of preparing exercises or examinations, the library may prepare a copy to be lent on a temporary basis to the Hilo faculty member at his or her written request. The library should not lend the original phonorecord, even on the Manoa campus, while the copy is in circulation. The copy should bear applicable copyright notices and a copyright warning legend.

16. In Questions 14 and 15, may the library make and supply copies of complete works for permanent retention by the requesting faculty member if the sound recording is commercially unavailable?

Yes. However, the faculty member making the request must make a reasonable investigation to determine that a commercial copy of the sound recording is not available at a fair price. At a minimum, the faculty member should make a reasonable effort to contact the composer, music publisher, music director, record producer, named copyright owners (both for the musical work and the phonorecord), and the usual commercial sources for phonorecords of that kind, in order to determine whether a copy of the phonorecord is available at a fair price. The faculty member also should document these inquiries on a form supplied by the library, and the library should retain a copy of the completed form for at least three years.

Once the faculty member has documented the unavailability of a commercial copy of the sound recording at a fair price, the library may make a copy of the sound recording for the faculty member to retain and use for any educational purpose. At the same time, the library also may make a reasonable number of additional copies for purposes of preservation and satisfaction of reasonably anticipated faculty demand.

D. GUIDELINES FOR USE AND COPYING OF COMPUTER SOFTWARE

For purposes of these Guidelines:

The term "Computer Software" includes computer programs, instruction manuals and other written documentation relating to computer programs, and computer data such as the data stored in computer databases.

The term "University Software" means Computer Software that is supplied by or through the University and is used on University premises or with University equipment. University Software may be created on campus by faculty, students, or other University employees, or it may be supplied by commercial or other concerns outside the University.

The term "Software License Agreement" means a contract between the author or other copyright owner and the user of Computer Software establishing the conditions for use, copying, and distribution of the Computer Software.

The use, copying, and distribution of Computer Software is governed by copyright law, as well as other federal and state laws. In addition, most software copyright owners claim to license rather than sell their software. That is, they try to impose a Software License Agreement upon users of their software.

In some cases, it is unclear whether the Software License Agreement is an enforceable contract. For example, an unsigned or "boxtop" Software License Agreement may be unenforceable.

If the Software License Agreement is enforceable, it may restrict rights that the user would have under the general law of copyright, including the doctrine of fair use. In other cases, the Software License Agreement may give the user greater rights than those provided by copyright law.

Unless and until a court determines that a particular type of Software License Agreement (for example, an unsigned or "boxtop" license agreement) is unenforceable, you should treat all Software License Agreements, whether signed or unsigned, as enforceable contracts. University policy requires that you do so.

In any event, the "fair use" doctrine normally has little applicability to Computer Software for three reasons. First, Computer Software nearly always must be copied or used in its entirety if it is to work at all. Fair use seldom excuses the use of a copyrighted work in its entirety. Second, unauthorized copying of Computer Software has a direct and measurable impact on the copyright owner's revenue, which tends to negate any claim of fair use. Finally, if the

Software License Agreement is enforceable, a breach of it is actionable as a breach of contract even if the breach by itself does not constitute copyright infringement.

Unfortunately, there is no such thing as a "standard" software License Agreement. The terms of licenses vary from vendor to vendor, from program to program, and even sometimes from version to version of the same software. The Guidelines that follow are based on the most common forms of Software License Agreements for microcomputer (personal computer) software.

If you have any question about the Guidelines as applied to Computer Software that you use, you should first locate and read the applicable Software Licensing Agreement.

1. Who may use University Software?

Only University employees, contractors, faculty and students may use University Software. Unless otherwise instructed in writing, students who are not University employees and have no contractual relationship with the University may use University software only for University purposes (teaching, learning, or research), on University premises and/or on University equipment, and under the supervision and control of University employees or faculty.

2. On how many computers may I use a single copy of University Software?

Normally only one. A few Software License Agreements allow software to be used on multiple computers, to be copied or downloaded from one computer to another, or to be accessed simultaneously by multiple users through multiple terminals on a computer network. Most microcomputer Software Licensing Agreements, however, restrict the use of a single copy of software to a single processing unit. As a general rule, you may use a single copy of University Software only on a single processing unit unless its Software Licensing Agreement permits broader use.

3. May I make copies of University Software?

Unless the software is copy-protected, you may make a single copy for each of two purposes. First, you may make a copy as necessary to use the software on the computer for which it is licensed. For example, you may copy the software onto the hard disk of a personal computer. Second, you may make and keep one copy of the software for backup purposes, in case the original copy deteriorates or is destroyed.

These rights to make copies normally do not apply to software provided for your temporary use in PC laboratories. The laboratory operators will load the software onto hard disks and make backup copies as necessary. If the laboratory provides you with software on a floppy diskette, however, you may load the software into a personal computer as may be necessary to use the software on that computer, as long as that use is permitted by the laboratory's rules.

Except under written permission or instructions from University personnel, you may not make copies of University Software, use the backup copies you have made, or provide copies of University Software to others, for use on additional (unlicensed) computers or by non-University personnel.

If Computer Software is copy-protected, you may not attempt to copy it for any purpose.

4. May I modify University Software or merge it into other software?

Unless the applicable Software License Agreement clearly states that modification or merging is permitted, you should not attempt to modify or merge software. Even if the applicable Software License Agreement permits modification or merging, the software copyright owner still has rights in the merged or modified software. Accordingly, you should treat modified versions of University Software and programs into which University Software has been merged like the original University Software. You should assume that the terms of the Software License Agreement for the original University Software also apply to the modified or merged software.

5. My Department has a single copy of a word processing program. May I load the program onto several computers for use by students?

Normally, no. Unless the Software License Agreement for the software authorizes using it on more than one computer at a time, you may not load it onto several computers for use by students or by anyone else. Since each act of loading constitutes the making of a "copy" of the software, your doing so would violate the terms of most Software License Agreements and therefore would infringe the copyright in the software.

This does not necessarily mean that you or your Department must pay the single-unit price for every copy of the same software. Some software vendors offer volume discounts, site licenses, and other discount purchase options. You should contact the software vendor or the University's software consultants for advice on these alternatives.

6. My Department recently purchased three more computers. May I copy the software from our "older" computers onto the three new ones?

Normally, no. Unless your Software License Agreement authorizes the use of the software on more than one computer at a time, you may not load it onto any new computer without first purging it from an old one, on a one-for-one basis. To load the software onto a new machine without first purging it from an old one would increase the total number of machines on which the software can be run without authorization in the Software License Agreement, and therefore would violate both the software License Agreement and the copyright law.

7. My Department has purchased licenses for a new word processing program. Can we sell, give away, or trade our old word processing program to another Department?

Normally, yes. Many software License Agreements state that the "licensee" is the University as a whole, not a particular unit of it. Unless the applicable Software License Agreement is specific to your Department and prohibits the transfer, you may transfer the software to another user within the University under the following conditions:

- (1) You must give the new user All copies of the software to be transferred in the possession or under the control of your Department (including all diskettes and manuals).
- (2) You must purge all remaining copies of the transferred software from your Department's computer systems, including all memory and storage devices.
- (3) The recipient of the software must be authorized to use University Software.

8. These Guidelines appear to be too restrictive for my proposed use. What should I do?

The first thing you should do is obtain a copy of the applicable Software License Agreement and read it carefully. It may permit uses beyond those authorized in these Guidelines.

If the Software License Agreement is not helpful, you may wish to ask the copyright owner for permission for the use that you propose, or for a modification of the license terms. Be sure to obtain any permission or modification to the license agreement in writing and have it signed by an authorized official of the copyright owner.

If the license agreement is not helpful and you are unable or unwilling to secure permission or a license modification from the copyright owner, you should consider the possibility of using a different computer program for the task you wish to perform. Other programs may be offered under more generous terms of use and distribution, or they may be more affordable. Your software supplier or a University software consultant may be able to advise you regarding alternative software packages.

9. Our engineering department has need for only occasional use of certain specialized engineering software. May we buy licenses for a single copy and have our library lend it to users when they need it?

Yes, as long as all the users are University professors, University employees or contractors, or University students using the software under the direction of University professors. Your Department should buy the licenses in the name of the University as a whole to allow for the widest use within the University community. To avoid liability for unauthorized copying, you also should include legends on the diskette or tape and its cover stating (if true) that copying of the software is prohibited, except for the purpose of loading the software into a computer for use, and that all copies of the software must be purged from memory and storage when the loaned copy is returned.

10. In the situation in Question 9, may our Department lend the software to users outside the University, for example, to researchers in local high-technology companies?

Normally, no. Most standard microcomputer Software License Agreements forbid the lending of software. Accordingly, if your Department purchases a standard software package, chances are it will have no outside lending rights.

Lending to persons outside the University may be permissible if special precautions are taken in the procurement process. If you wish to lend software to users outside the University, you should contact the Procurement and Property Management Office for advice before you procure the software of interest.

11. Our library lends certain personal computer software to users. For each type of software, we keep a backup copy in the library archives. If a circulating copy is damaged or deteriorates while in circulation, may we use the backup copy to make another circulating copy? What if the circulating copy is lost or stolen?

It is permissible to use the backup copy to make a new circulating copy if the circulating copy is damaged or deteriorates. That is what the backup copy is for. The new circulating copy should have a copyright notice embedded in its code and written on its label, as well as on the tape or diskette cover. After the new circulating copy is made, the bad copy should be erased or destroyed.

It is also permissible for the library to make a new backup copy from the circulating copy (and to destroy or erase the old backup copy) if the original backup copy is damaged or deteriorates. Of course, neither the old nor the new backup copy should be placed in circulation.

If the circulating copy is lost or stolen, the library should not make a new circulating copy, but should buy or license a new commercial copy. In that case, the original circulating copy may still be operational and in circulation, and the library's duplication of the backup copy then might in effect place two copies in circulation for the price of one -- directly impacting the vendor's revenue.

E. GUIDELINES FOR VIDEOTAPING AND USE OF VIDEOTAPES
AND OTHER AUDIOVISUAL WORKS

Videotapes are a form of "audiovisual work" normally protected by copyright. Movies are another form. Playing a movie or videotape constitutes "performing" it under the copyright law, and therefore the copyright holder's exclusive right of public performance plays an important part in the use of movies and videotapes. The exclusive right of reproduction is also important, especially for videotapes, which are easier to copy than movies.

The performance (playing) of a movie or videotape does not constitute copyright infringement unless it is both unauthorized and public. Performance by an individual for himself or herself or a small circle of family or acquaintances is not public and therefore does not constitute copyright infringement, even if unauthorized.

A performance may be public, however, if it is available to anyone who wants to attend or view it, whether or not all the viewers are in the same place or view it at the same time. For example, a performance may be public if individuals may watch it on a number of separate closed-circuit television screens, or seriatim on the same screen, if there is no limit on or control over who the viewers are. Performance under these circumstances requires the copyright holder's permission.

1. Occasionally I see television programs that would be relevant to my political science course. May I videotape them and show them to my class?

Yes. The Public Broadcasting System, the commercial television networks, and certain (but not all) television producers and copyright holders have agreed to published "fair use" guidelines for the nonprofit, educational use of off-the-air videotaping. Under these published guidelines, you may record, play, retain, and use copies of off-the-air programs as follows:

Recording must be (1) simultaneous with broadcast transmission or cable retransmission; (2) by or at the request of an individual teacher for his or her own use; and (3) not regularly recorded in anticipation of requests.

Time of Playing must be once only, and repeated once only "when instructional reinforcement is necessary"--all within 10 school days after recording.

Place of playing: (1) classrooms, (2) similar places (such as gyms, libraries, and laboratories) "devoted to instruction within a single building, cluster or campus," and (3) homes of students receiving formalized instruction at home.

Editing: Playing of less than all of a program is permitted, but alteration, combination with other works, and creation of anthologies or collective works are prohibited,

Destruction or erasure must occur within 45 calendar days after recording.

After expiration of the ten-school-day period for playing the recordings, and before expiration of the 45-calendar day retention period, you may use the recordings for evaluation only, for example, to determine whether to license copies for repeated use in the curriculum. However, you may not play the tapes for students after ten school days have passed, and you may not retain the recording in any form after 45 calendar days have passed. You must include the copyright notice from the original (if any) in all copies that you play.

2. The off-the-air taping guidelines (see Question 1) apply to programs of Public Broadcasting Stations (educational television). Do they also apply to commercial television?

The off-the-air taping guidelines may be applied to commercial television programs, with two qualifications. First, the guidelines do not apply to cable-originated programming, pay programs, or ITFS (Instructional Television Fixed Service) programs. Second, they may not apply to certain broadcast television programs.

The guidelines were published in a legislative report in 1982, almost six years after Congress' adoption of the Copyright Act of 1976. Therefore they cannot serve as legislative history for the copyright act, and they have legal effect only insofar as they represent an industry consensus. Two participants in the negotiation process, the Motion Picture Association of America, Inc., and the Association of Media Producers, did not endorse the guidelines. Consequently, members of these associations, and possibly other producers as well, may be able to claim that they are not bound by them.

The chance of such a claim being made appears remote, and the chance of it succeeding in a court of law is not great. Accordingly, you may assume, in the absence of information to the contrary, that the off-the-air taping guidelines apply to commercial, as well as noncommercial, broadcast television other than pay TV. However, if you have reason to believe that a particular producer has repudiated the guidelines, you should seek permission.

3. I asked the Campus Media Center to make a tape of a broadcast "Nova" science program to show in my introductory undergraduate science class. The tape was misplaced in transit and did not arrive at my department until twelve school days after the broadcast. May I still show the tape to my class?

Probably. Your classroom performance of the tape would not fall within the agreed guidelines (see Question 1) because it would occur more than ten school days after the broadcast. However, the agreed guidelines are only a "safe harbor"; they are not the exclusive statement of what constitutes fair use. As long as you and others in the University community make every effort to follow the guidelines as a general rule, occasional and isolated instances of substantial but incomplete compliance with the guidelines probably will not exceed the bounds of fair use.

You should, however, comply with the guidelines in other respects, for example, by making sure the tape is erased within 45 calendar days of recording. In addition, since the ten-school-day period has expired, you should show the tape only once.

4. I teach an undergraduate course in basic astronomy. Last fall, I taped an episode of "Cosmos" for my basic astronomy class. This summer, the episode will be rerun, and I would like to tape it again for my summer session class. May I?

Probably not. The guidelines (see Question 1) permit a single professor to tape or request a tape of a particular program only once, regardless of how many times the program is rebroadcast. If you wish to

use the program again in the future, you have plenty of time to seek permission or a paid license from the producer. You should do so.

5. In Question 4, suppose another professor were to teach the summer session course. Could he or she tape the rerun?

Yes, if he or she had not taped the same program before, and if the other conditions of the guidelines (see Question 1) were met. The guidelines' prohibition on repeated copying operates on a professor-by-professor basis and does not apply to the University or any department as a whole.

6. I recorded a program on the origins of American English five school days before the beginning of the examination period for the spring semester. I would like to play the tape in the first week of my introductory English class in the fall. May I?

No. Your doing so would meet the ten-school-day requirement of the guidelines (see Question 1) because days during examination periods do not count as school days. However, you would fail the 45-calendar-day retention test. The guidelines require you to destroy or erase the tape after 45 calendar days, some time during the middle of the summer. In any event, the summer should give you plenty of time to ask for permission or a license to use the program in the fall.

7. I recently taped the movie "Spartacus" off the air. I think my Latin class would enjoy seeing it, so I plan to play it for the class in a University auditorium as an "optional" extracurricular event. Is this permissible?

No. The guidelines (see Question 1) apply only to educational uses of off-the-air videotaping, that is, use as part of systematic instructional activity. The guidelines do not permit taping or playing for purposes of recreation or entertainment. Since the purpose of your proposed "extracurricular event" appears to be primarily entertainment and only incidentally educational, it would not be covered by the guidelines.

8. I teach one of seven sections of an introductory Japanese language class. I just taped a subtitled Japanese movie from a broadcast by the local Japanese language station. The professors who teach the other sections and I would like to play the tape in an auditorium not used for any of our classes, so that students from all sections may see it at once. All students would be required to attend. Is this permissible?

Yes, as long as the time limits and other conditions of the guidelines (see Question 1) are observed. Even though no section holds classes in the auditorium, it is a "similar place devoted to instruction" for this event. The movie appears relevant to development of language skills, and the fact that students are required to attend indicates that the purpose is education, not just entertainment.

9. In Question 8, suppose that three of the seven sections are at Hilo, and the other four are at Manoa. May I reach the three Hilo sections by closed-circuit television?

Probably not. The guidelines (see Question 1) require that the tapes be shown in a single "building, cluster, or campus," as well as to home-bound students. Since Hilo and Manoa constitute two separate campuses, your proposed showing would not be covered by the guidelines.

However, if you had known about the broadcast in advance, you could have taped it for the Manoa campus, and a professor on the Big Island could have taped it for the Hilo campus. Then the guidelines would permit two separate showings of the separate tapes, one at Manoa and one at Hilo, as long as both of you observed the time limitations and other conditions of the guidelines.

10. We are three instructors teaching introductory Korean language sections. Next week a local television station will air a one-hour program on the fundamentals of Korean writing. May we have the Campus Media Center tape the program and make a copy of the tape for each of us to show in his or her class?

Yes, as long as each of you makes a separate request for a copy and observes the time limits and other conditions of the guidelines (see Question 1). The guidelines permit a central office or facility to tape programs off the air for teachers as long as the taping is at the request of each individual teacher, and there is no regular advance recording.

11. Our media library buys videotapes from consumer outlets and lends them to professors and students for five-day periods. We have noticed that many of the tapes we buy have a warning notice which says that the tape is licensed for home use only. Do our lending activities constitute copyright infringement?

No, unless you have agreed to the warning notice, for example, through papers that you signed in buying the tapes. A warning notice on copyrighted material cannot bind the user unless the user agrees to it, or unless it simply restates the limitations of copyright law. If you bought the tapes and

did not license them, under the "first sale" doctrine you have the right to lend them or give them away to anyone.

There are, however, four things you should do to limit your liability in connection with your lending activities. First, you should be sure to leave the warning notice on the tape. Second, you should place a warning sticker on each tape that you lend, stating that unauthorized copying and public performance are prohibited. Third, you should place the following legend prominently on all purchase orders for such tapes: "THIS PURCHASE IS FOR LIBRARY CIRCULATION AND LENDING TO USERS." Finally, if you know that a particular vendor sells tapes at two prices, one for home use and the other for library lending, you should avoid buying the lower-priced tapes for library use.

12. Our library has two videotapes of "Civilisation. One is deteriorating from use. May we duplicate the other to replace the deteriorating one?

Yes, but only if a commercial replacement is not available at a fair price and you have so determined after reasonable effort. The same rules that govern replacement of deteriorating books by photocopying govern this situation (see Section A(iv), Question 2).

13. Our library maintains a stock of videotapes for lending to professors for use in the classroom. We lend the tapes for showing to all sorts of classes. Some have as many as 200 students. Is this permissible?

Yes. Ordinarily a library need not control how its patrons use the materials it lends (see Question 15 below). This is as true for video materials as for books. Here, however, the library knows that the tapes will be used in the classroom; indeed, that is the purpose for lending them. Consequently, the library should not proceed in the absence of a special exception that permits instructors to "perform" (play) the videotapes in the classroom.

In this case there is such an exception. Section 110(1) of the Copyright Act of 1976 permits teachers and students to perform or display any work in the course of face-to-face teaching activities in "a classroom or similar place devoted to instruction," as long as the copy used for the performance is lawfully made. Thus, as long as the library has no reason to believe that the videotape was not lawfully made and follows the suggestions in Question 11, the library may lend it; and, as long as the teachers and students have no reason to believe it was not lawfully made, then they may play it in the classroom.

14. I am a drama professor. In our archives in the Drama and Theatre Department, we have a film of the original "Ben Hur" and a videotape of the remake. I would like to show one or both of these works in a large classroom. Anyone from the University community would be invited to attend at an admission charge of \$1. Is this permissible? If not, is it permissible at no admission charge?

Unfortunately, showing either work in this manner would not be permissible without a performance license from the copyright holder or distributor. This is true whether or not an admission fee is charged. Since the potential audience is anyone from the University community--a very large group--the performances would be public. Since the evident purpose of the performances would be entertainment, not education, no statutory exception applies. Nor would the showings be fair use, since they would compete with theater reruns and deprive the copyright holders of license revenue.

You should contact a distributor and arrange for a temporary license to show the works for entertainment purposes. Often the license fees are low enough that you may pass them on to the audience through a nominal admission fee.

15. Our library would like to allow users from outside the University to borrow from its videotape collection. Is this permissible and, if so, what precautions should the library take to protect itself from liability for copyright infringement by users?

Lending to non-University users is permissible unless the videotapes are licensed rather than purchased and the licenses prohibit it. Thus the library is free to lend to anyone the tapes that it buys (see Question 11).

The library and its employees generally will not be liable for infringement by library users as long as library personnel do not suggest or participate in the infringement. (See Section A(iv), Questions 7 and 8). Library personnel lending copyrighted videotapes, however, should do four things to reduce potential legal exposure. First, they should not remove any warning notices recorded on the tapes. Second, they should tell users who ask, or who express an intention to copy a tape or play it publicly, that unauthorized copying and public performance are prohibited. Third, they should put warning stickers with statements to that effect on the reels or covers of all tapes that they lend. Finally, if they lend videotape machines along with tapes, they should put warning stickers on the machines similar to those required by the Copyright Office for photocopying machines on library premises. To reduce the potential for liability as a result of University personnel playing the tapes, the warning notice should

also contain the following language: "PLAYING THIS VIDEOTAPE FOR ANY AUDIENCE LARGER THAN AN INDIVIDUAL OR A SMALL GROUP OF FAMILY, FRIENDS OR CLOSE COLLEAGUES OF A UNIVERSITY BORROWER MAY CONSTITUTE COPYRIGHT INFRINGEMENT."

Beyond this, however, library personnel should not attempt to offer legal advice to users regarding copyright protection or infringement. They could incur legal liability if they do so. Of course, library personnel may refer users to works on copyright law in the library's collection.

16. Our library has rooms with videotape players where library users may play videotapes from the library's collection. Is this permissible?

This is a difficult and unresolved area of the law. Since videotapes can only be viewed by playing them, a library patron's using the library's equipment to play a videotape on library premises may be analogized to his reading a library book at the library. The analogy, however, is not complete. Groups of people can view a videotape at the same time, but they cannot read a book together. More important, playing a videotape may infringe the copyright owner's exclusive performance right, while reading a book does not involve the performance right. Thus copyright law treats videotapes in the library's collection more restrictively than books.

If the library is open to the public and allows all patrons to borrow videotapes and play them on library equipment, the library thereby authorizes public performances of the videotapes. Limiting access to the University community is unlikely to make the performances private because the University community is so large. Narrowing the audience still further, for example, to students in a particular course, may make the performance private, but there is no reliable authority to that effect. Thus the proposed use may infringe copyright owners' exclusive rights to authorize public performances of their works unless the performances constitute fair use, or unless a specific statutory exception applies.

One useful statutory exception covers performances "by instructors or pupils in the course of face-to-face teaching activities . . . in a classroom or similar place devoted to instruction" (see Question 13). This exception probably applies if the group watching the videotape consists of students in a particular course and includes an instructor or teaching assistant who comments on the videotape or leads discussion on it after the showing. For this exception to apply, however, the videotape must be viewed as part of a course of instruction, and not merely for entertainment, and the viewers must have no reason to believe that the tape used is an unauthorized copy (see Question 13).

More generally, playing a library videotape on library premises may be permissible if it constitutes fair use. Unfortunately, there are no applicable guidelines for fair use under these circumstances. According to a published opinion of the American Library Association's legal counsel, Sidley & Austin, it is reasonable to assume that playing a videotape in a nonprofit library constitutes fair use if there is only a single viewer and no fee is charged. This opinion, however, does not cover group viewing (whether or not a fee is charged) or individual viewing for a fee.

If a court later finds the use to be unfair, library employees in theory could be liable for statutory damages. There is limited statutory immunity for library and university employees who act based on a reasonable belief that a use is fair, but this immunity applies only to the making of copies, not unauthorized public performances. As a practical matter, however, courts are unlikely to award substantial statutory damages against employees who are acting pursuant to University policy based on a reasonable, good faith belief that certain activities constitute fair use.

Accordingly, until the legal uncertainty is clarified, the University has adopted the following guidelines for lending of University videotapes for viewing with University equipment on university premises. First, the library should make no charge for use of the videotape or equipment. Second, before lending tapes for such viewing, the library should require a written request, signed by a member of the faculty, stating that the viewing is part of a regular course of instruction or faculty-supervised research and naming the course, the tape (by title), the individuals authorized to view it, and the semester or other time period during which the authorization is valid. Third, before lending a tape to any individual or group, the library should verify that the individual or all persons in the group are authorized. Fourth, each library should attach legends to all videotape players stating that unauthorized public performance of videotapes may constitute copyright infringement. Fifth, no library should lend tapes for this purpose to people who are not members of the University community, or to anyone for purposes of entertainment, as distinguished from learning and research. Finally, if on-premise playing of any videotape is challenged by any videotape producer or distributor, the library should immediately stop lending that tape for on-premise playing and consult with the Office of the Attorney General at the university.

These restrictive guidelines, however, do not apply to the lending of videotapes for off-campus viewing on privately-owned equipment. As long as the tapes it lends are legitimate, authorized copies and are-owned by the University (not licensed under restrictions), the University may lend its videotapes

for off-campus viewing on private equipment to anyone for any purpose, including entertainment, but not including public performance (see Question 15).

III. OBTAINING PERMISSION FROM COPYRIGHT HOLDERS

Authors, publishers, and other copyright holders are often happy to approve legitimate educational and research use of their copyrighted works. Many publishers have special employees or offices assigned to review and approve requests for permission. If you wish to use a copyrighted work in a way that is not permitted by law or by agreement, you should try to obtain permission from the copyright holder for your use.

If you request permission, you should make sure that the permission is in writing and that it properly covers the scope of your proposed use. Also, whenever you copy another's work with permission, you must include in all your copies a copyright notice exactly in the same form as the one (if any) on the original.

Table 1 provides sample letters that you may use to request permission from a publisher for (1) repeated photocopying of copyrighted materials for classroom use or (2) republication of copyrighted material as part of another work. The publisher grants permission simply by signing an enclosed copy of the letter and returning it to you. You should retain copies of the permission letter in your files in case a question later arises about the existence or scope of permission.

Publishers routinely grant permission for classroom use of copyrighted material that does not adversely affect their market. Sometimes they charge fees for permission, but often these fees are nominal. If your proposed use involves significant impact on the market for the copyrighted work, however, you may have to negotiate a licensing agreement and pay royalties.

It is important that you apply for permission long enough in advance of your proposed use to give the copyright holder time to review and approve the proposed use or, if necessary, to negotiate terms. A good rule of thumb is to request permission six to eight weeks prior to the first proposed use.

Table 1

SAMPLE PERMISSION LETTERS

I. Request for Permission for Classroom Use

[UNIVERSITY LETTERHEAD]

[Date]

[Name and address of copyright owner indicated in copyright notice]

Dear _____:

I am a professor of _____ at the University of Hawaii, _____ Campus. I would like to reproduce and distribute the following material to students and auditors in University courses:

Title of Work: _____

Edition or Date: _____

Author: _____

Portion(s) of work to be used: _____

[Describe specifically by pages, sections, chapters, etc.]

This material will be used for [describe purpose]. I anticipate that classes will use this material _____ times per academic year and that each class will have approximately _____ students. I intend to have this material copied using [describe copying process, e.g., photocopiers, offset, etc.].

Copies of this material will be made and distributed only (1) to students and auditors in University-related classes, (2) on a nonprofit basis, (3) when, for pedagogical or other reasons, it is not practical to assign the entire work from which this material is taken. We will include your copyright notice in our copies of this material.

While I believe that copying and distribution of this material as described above is "fair use," in the interest of greater certainty I would appreciate your consent. [Delete this sentence if untrue.]

Please indicate your consent by signing the enclosed copy of this letter and returning it to me in the enclosed envelope. Also, please use the appropriate spaces at the end of this letter to indicate the name and address of any other person whose consent might be required.

Very truly yours,

[name of professor]
[title]

Enclosure

Consent granted:

[Legal name of copyright holder]

By: _____
[Signature]

Name: _____
[Please print]

Title: _____

Date: _____

Other persons to contact for consent:

Name(s): _____

Address(es): _____

Telephone No(s): _____

II. Request for Permission to Republish

[UNIVERSITY LETTERHEAD]

[Date]

[Name and address of copyright holder indicated in copyright notice]

Dear _____:

I am a professor of _____ at the University of Hawaii, _____ Campus. I am preparing an [article or book] on the subject of _____ for publication [in or by] _____. I expect the [article or book] to be approximately _____ pages long.

I would like to include the following material of yours in my [article or book]:

Title of Work: _____

Edition or Date: _____

Author: _____

Portion(s) of work to be used: _____

[Describe specifically by pages, sections, chapters, etc.]

Your contribution will have your copyright notice and will receive credit in the following form: "[Duplicate precisely existing copyright notice on work to be used.] Reprinted by permission of [name of copyright holder] from [title, edition, author, publisher and date of work used]." If you would like credit in some other form, please indicate the form of credit you would like in the space provided at the end of this letter.

While I believe that my publication of this material as described above will be "fair use," in the interest of greater certainty I would appreciate your consent. [Delete this sentence if not true.]

Please indicate your consent by signing the enclosed copy of this letter and returning it to me in the enclosed envelope. Also, please use the appropriate spaces at the end of this letter to indicate the name and address of any other person whose consent might be required.

Very truly yours,

[name of professor]
[title]

Enclosure

Consent granted:

[Legal name of copyright holder]

By: _____
[Signature]

Name: _____
[Please Print]

Title: _____

Date: _____

Alternative form of credit requested: _____

Other persons to contact for consent:

Name(s): _____

Address(es): _____

Telephone No(s): _____

APPENDICES

Appendix 1: Examples of Copyrighted Works By Category

Audiovisual Works

Cinematographic Works
Film Strips
Live Broadcasts (if simultaneously recorded)
Motion Pictures
Sets of Transparencies
Slide Sets
Sound Tracks of Motion Pictures
Videodisks
Videotapes

Compilations and Collective Works

Anthologies
Atlases
Catalogues
Collections
Collected Works
Directories
Encyclopedias
Instructional Texts
Magazines
Newspapers
Periodical Issues
Philatelic Publications and Catalogues
Serials
Series of Greeting Cards
Symposia

Derivative Works

Abridgements
Arrangements of Music
Art Reproductions
Ballets
Condensations
Detailed Commentaries
Dramatizations
Editorial Revisions, Annotations and Elaborations
(containing some original new material)
Fictionalizations
Improvised Performances
Pantomimes
Programmatic Musical Compositions

Sound Recordings (derivative with respect to underlying literary or musical work)
Translations
Versions of Motion Pictures

Dramatic Works (including accompanying music)

Dramatico-Musical Works
Motion Pictures
Musical Comedies
Operas
Plays
Stage Presentations (if recorded)
Theatrical Productions (if recorded)

Forms of Fixation

Audiotapes
Books
Cards
Computer Punch Cards
Computer Tapes
Disks
Films
Manuscripts
Microfilm
Periodicals
Phonorecords
Tape Recordings
Tapes
Television Images
Slides
Videodiscs
Videotape

Literary Works

Books
Cards
Catalogues
Compilations of Data
Computer Data Bases
Computer Programs
Directories
Factual References
Instructional Works
Magazines
Manuscripts
Newsletters

Novels
Periodicals
Phonorecords (including vinyl records, audio cassettes, and compact disks)
Poems

Pantomimes and Choreographic Works (if recorded)

Pictorial, Graphic and Sculptural Works

Applied Art
Architectural Works (only nonfunctional aspects)
Art Reproductions
Artistic Sculpture
Billboard Posters
Cartographic Works
Carvings
Ceramics
Charts
Costume Jewelry
Decorative Ornamentation or Embellishment
Design of Useful Article (if ornamental, but only to the extent ornamentation is capable of existing independently of the article's useful aspects)
Diagrams
Dolls
Drawings
Floral Leaf Designs
Glassware
Globes
Graphic Art
Greeting Cards
Illustrations
Jewelry
Labels for Merchandise
Models
Paintings
Photographs
Postage Stamp Designs
Postcards
Prints
Sculptures
Shapes (if ornamental and separable from functional aspects)
Stationery Structures (if monumental and nonfunctional)
Technical Drawings
Toys

Sound Recordings

- Arrangements of Music
- Concrete Music
- Electronic Music
- Live Performances (if simultaneously recorded)
- Phonorecords (for example, vinyl records, audio cassettes, and laser disks)
- Recordings of Bird Calls
- Songs
- Sounds of Racing Cars
- Tape Recordings

Appendix 2: Protecting Copyright In Materials That You Produce

The Copyright Act of 1976 protects every new and original work of authorship the moment it is first fixed in a tangible medium of expression. Thus, you need not do anything special to be sure that your work is "copyrighted," at least initially.

Moreover, since March 1, 1989, copyright notice is no longer required to preserve the copyright, although it is still advisable on published copies of copyrighted works, especially if you plan to make commercial use of your copyrighted work. Thus, you need not do anything specific to be sure your work is copyrighted.

However, you can enjoy full legal remedies for copyright infringement only if your copyright is registered with the Copyright Office in Washington, D.C. This Appendix explains these requirements and describes briefly how to obtain full copyright protection.

1. Who Owns the Copyright?

The first task in preserving copyright protection is determining who owns the copyright. Under the Copyright Act of 1976, the author of a copyrighted work initially owns the copyright. If there is more than one author, they own the copyright jointly.

If a work is prepared by an employee acting within the scope of his or her employment, however, the copyright belongs to the employer. Thus, for example, if a University librarian prepares a bibliography in the course of her duties as librarian, copyright in the bibliography belongs to the University.

Similarly, if a professor, acting as department chairperson, submits an annual report to the University administration, copyright in the report belongs to the University.

Students as such are not employees of the University unless they are hired as employees for specific jobs. Thus, if a student not specifically employed by the University writes a computer program, the student owns the copyright in the program, even if university equipment was used in preparing it. The same is true of students' papers and class projects. The professor who gives the assignment owns no part of the copyright unless she contributed original expression (not just abstract ideas) to the resulting copyrighted work.

As for faculty, they are governed by the University's Copyright Policy that is, in part, a matter of collective bargaining. Under that policy, University faculty in general retain copyright in their scholarly writings, notwithstanding the fact that they are expected to produce such writings as part of their professorial duties.

However, administrative and other employment-related writings, such as reports to the University administration, do not fall under this policy. They are treated as the work product of employees, and the University owns the copyrights in them, even if professors write them.

2. Copyright Notice

Copyright notice, if any, should contain the correct name of the copyright owner. (See § 1 of this Appendix) Incorrect designation can weaken copyright protection.

Now that the United States has acceded to the Berne Convention (the primary international convention governing copyright matters), the use of copyright notice is no longer required to preserve legal protection and avoid forfeiture of copyright. However, the use of copyright notices on all publicly distributed copies of "published" copyrighted works may increase the damages available for copyright infringement by eliminating certain legal defenses of copyright infringers. Thus, although copyright notice is no longer as important as it was before March 1, 1989 (the date of U.S. accession to the Berne Convention), it is still advisable for works of commercial value.

On the other hand, there may be cases in which you wish to encourage copying. For example, you may want maximum dissemination of such things as advertisements, announcements of upcoming events, program schedules, or conference outlines. By purposely omitting copyright notice, you may insure that others will not be afraid to copy these materials. You also may encourage their wide dissemination by explicit legends granting permission to copy, under any conditions consistent with copyright law.

The proper form of copyright notice is simple. If copyright is owned by the University, the notice should read as follows:

Copyright © 20XX University of Hawaii
All rights reserved.

If copyright belongs to one or more individual authors, the copyright notice should read as follows:

Copyright © 20XX [Full legal name(s) of individual author(s)]
All Rights Reserved.

In each form of notice, the year-date "20XX" is the year during which copies of the work are first distributed publicly. Certain other forms of notice also may satisfy the statutory requirements.

You also may use copyright notice for unpublished works by identified individual authors that you wish to protect. Since the duration of copyright is determined by the lifetimes of such authors, and not by the date of publication, your use of copyright notice will not affect the copyright term. For an unpublished work of the University, however, any date in the copyright notice may be viewed as evidence of the date of publication, which determines the maximum duration of the copyright term. Accordingly, for unpublished works for which copyright is held by the University, the following notice is preferable:

Copyright © University of Hawaii
This is an unpublished work protected by copyright.

This form of notice may be used, for example, with works whose content is to be kept confidential, along with a confidentiality legend.

Copyright notices should be affixed to copies "in such manner and location as to give reasonable notice of the claim of copyright." The Copyright Office has specified certain positions for copyright notice that satisfy this requirement. Although other positions are possible, the following are permissible:

<u>Item</u>	<u>Position of Copyright Notice</u>
Article	Title Page or under Author's Name
Book	Title Page
Pamphlet	Front or Back Cover
Computer Program	Title Screen, Embedded in Code, <u>and</u> on Label Affixed to Diskette, ROM or Tape Reel

3. Registration of Copyright

Although registration of copyright is not a prerequisite for copyright protection, it is a prerequisite for certain legal remedies. No author of a work of United States origin can sue for copyright infringement without having registered the copyright for the work in question. In addition, no one can recover attorneys' fees or statutory damages (as distinguished from actual losses and the infringer's profits) for certain infringements committed before registration.

For these reasons copyright registration is advisable for all works of commercial value. If a work has commercial value, its copyright should be registered as soon as there is significant risk of unauthorized copying. If a work is published, its copyright should be registered within three months after first publication.

Registration of copyright is one of the great bargains in intellectual property law. You need only complete a two-page application form, submit one or two copies of the "best edition" of the work, and pay a \$20 application fee.

The application form is simple. Most nonlawyers can complete it, but some of the entries have legal implications. If the work has significant commercial value, it is best to have a lawyer or someone familiar with copyright law review the form after you have completed it, but before you submit it to the Copyright Office in Washington, D.C.

There are four forms used for registration, as follows: (1) Form TX, for textual works, including computer programs and databases; (2) Form PA, for works of performing art, including plays, music, audiovisual works and motion pictures; (3) Form VA, for works of visual art, including pictorial works, sculpture, maps, globes, diagrams and photographs; and (4) Form SR, for sound recordings, as distinguished from the underlying textual or musical work. You may order the forms and instructions that you need by calling the Copyright Office's "Hot Line" at (202) 7079100.

In the ordinary course of business, copyright registration takes six to eight weeks. The Copyright Office may reject an application for registration if it believes the work is not eligible for copyright, if the copies of the work submitted for deposit are improper, or if the application form is not properly filled out. In most cases, however, it is easy to resolve objections by a phone call to the Copyright Office, by submission of new copies for deposit, or by amendment of the application. Expedited registration procedures are available when needed for litigation.