

A Copyright Compliance (Notice) Audit for the Library, School or Educational Entity*

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Section 108: Required Copyright Warning Notices and the Reproduction and Distribution of Copyrighted Materials for Collection Management, Interlibrary Loan, and Patron Self-Reproducing Equipment and Awareness of Downstream Uses

Required Notice of Copyright on Section 108 Reproductions

Q1: Does the library reproduce copyrighted material for inclusion in its collections for purposes of “preservation and security or for deposit for research” in the collections of another library, or for purposes of replacement, under section 108(b) and (c), or offer interlibrary loan services or a reproducing service for patrons whereby copies of copyrighted material is made and given to patrons under section 108(d) and (e)? If so, does the library also reproduce or include a copyright warning notice on the material it reproduces and distributes?

Section 108(a)(3) is a compliance-oriented provision and requires that any copy made and distributed either in the library collection or to a patron must “include[] a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.” 17 U.S.C. § 108(a)(3). Librarians expressed concern over the years that placing a notice on some works when it was unknown whether the work was in fact protected might be raising more issues than it solved, i.e., meeting the notice requirement of section 108(a)(3), but misleading the patron as to the true copyright status of the work. 1998 amendments to the copyright law added a second notice option, now providing librarians with a choice. Either reprint or repeat the copyright notice from the original or in those cases where knowledge of the work’s copyright status is established: “**Warning: this material is protected by the copyright laws of the United States, Title 17, United States Code**” or similar words. In the alternative, when the status of the work is unknown, a notice that meets the section 108(a)(3) requirement: “**Warning: this work may be protected by the copyright laws of the United States, Title 17, United States Code**” or words to that effect.

Required Copyright Warning Notice in Conjunction with Interlibrary Loan and Library Reproducing Service

Q2: Does the library offer interlibrary loan services or a reproducing service for patrons whereby copies of copyrighted material is made and given to patrons? If so, does the library display a copyright warning notice near the location where orders are taken and on the form the patron signs in accordance with procedures in 37 C.F.R. § 201.14?

In order to insure that section 108 libraries do not become the source of material for later infringements, subsections (d)(2) and (e)(2) require that “the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.” Such warning must be displayed at the place where “orders are accepted” such as the interlibrary loan office or the photocopy service desk and on any forms such departments use. The text of the notice is precisely prescribed by regulation (37 C.F.R. § 201.14(b).):

“NOTICE WARNING CONCERNING COPYRIGHT RESTRICTIONS. The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be ‘used for any purpose other than private study, scholarship, or research.’ If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of ‘fair use,’ that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.”

The form and manner of the notice is also detailed and requires that it be on at least one sign in the service area and on the form itself, highlighted in box on the front page of the form or near the signature line of the patron-requester.

37 C.F.R. § 201.14(c)(1) provides that “A Display Warning of Copyright shall be printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently, in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer within the immediate vicinity of the place where orders are accepted.” 37 C.F.R. § 201.14(c)(1) provides that “An Order Warning of Copyright shall be printed within a box located prominently on the order form itself, either on the front side of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than 8 points. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.”

Limitations on Downstream Uses: A Copyright Mens Rea?

Q3: Does the library offer interlibrary loan services or a reproducing service for patrons whereby copies of copyrighted material is made and given to patrons? If so, does staff have notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research?

If so, then the reproduction and distribution is not authorized by section 108, although a license, fair use or other provision of the copyright law may nonetheless authorize its use. A second notice provision is also contained in 108(d)(2) and (e)(2). Recall that these two subsections require that the copies made by the library “becomes the property of the user” and that the reproduction and distribution can be made only if the library has “no notice that the copy would be used for any purpose other than private study, scholarship or research.” 17 U.S.C. § 108(d) (1) and (e) (1).

The legislative history is silent as to what would constitute such notice. Looking to the concept of knowledge in copyright liability in general might help administrators should understand what would be a legitimate absence of that notice under 108(d)(1) or (e)(1) or identify what inquiry if any is required to satisfy the section 108(d)(1) and (e)(1) notice. Again, potential infringing uses made by patron do not necessarily factor into the analysis, rather inquiry is into whether the use falls into one of three ‘private uses’ proviso of the statute, regardless of whether it would be a lawful use or not. The general mens rea of contributory copyright infringement might be characterized as a “know or reason to know” standard, it is not a “should have known” standard. Under tort law (Restatement of Torts 2d § 12A) “reason to know” standard suggests “that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.” This does not require that one is under a duty to use reasonable diligence to ascertain the existence or non-existence of the fact in question, this would be a higher, “should know” standard.

If the library is made aware of this non-private use the reproduction vis-à-vis the interlibrary loan process or reproducing service and distribution of the item to the faculty would not be authorized under section 108 as it could be argued that the library through its librarian or staff assistant would have notice that the use of the interlibrary loan copies made under section 108(d) and distributed to the patron would be for a non-private use, i.e., a public distribution or display in the classroom, reserve or e-reserve.

It could be argued that having the patron read and sign the warning notice containing the private use language equates to the library having no notice of “other than private study, scholarship, or research.” (See discussion Q2.)

However, if the library was in fact aware (actual or constructive knowledge) of such uses “other than private study, scholarship, or research,” patron signature to the contrary, legal logic as well as professional ethics would suggest that the library could not hide behind the subterfuge of such a formalization as a mere signature on a piece of paper. What it does mean is that there exists no duty to investigate or monitor or otherwise check-up on the subsequent use by a faculty, student or administrator. The point the author makes is that should the library or its employees become aware of such prohibited downstream uses, the section 108(d)(1) and (e)(1) private uses rule would be triggered. The library and its employees could not ignore obvious facts and circumstances to the contrary of such a false attestation.

Under the *Hotaling v. Church of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1997), placing the copy on the library reserve or e-reserve would be a public distribution. “When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.” 118 F.3d at 203. Placing the article on a classroom bulletin board would be a public display. Likewise, material that is reproduced under subsection (d) or (e) could not then be placed in the collection, in reserves for example, as this would violate the first proviso, i.e., that the material become “property of the user.” Subsection (d) or (e) reproductions cannot be used for purposes of ‘collection building.’

Required Copyright Warning Notice on Reproducing Equipment

Q4: Does the library provide reproducing equipment (photocopier, computer, printer, scanner, sampler, etc.) for patron use? Is the use of the equipment unsupervised? If so, then does the library display a notice that the making of a copy may be subject to the copyright law?”

Section 108(f)(1) states that “Nothing in this section ... shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: Provided, That such equipment displays a notice that the making of a copy may be subject to the copyright law.” This is an important grant of immunity to section 108-libraries against the worries of ‘downstream’ infringement by library patrons, vis-à-vis the reproduction of copyrighted material through the misuse of reproducing equipment, and the ‘upstream’ secondary liability that might result from a claim of contributory infringement for example. According to the authors of the infamous White Paper on intellectual property reform, regarding the section 108(f)(1) provision, “no other provider of equipment enjoys any statutory immunity.” Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 111, n. 357 (1995). As no notice-fulfilling the section 108(f)(1) posting obligation is offered by the U.S. Copyright Office, use of the following, adapted from the section 108(d) and (e), 37 C.F.R. § 201.14 notice, is possible:

“NOTICE WARNING CONCERNING COPYRIGHT RESTRICTIONS. The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Libraries and archives furnish unsupervised photocopy or other reproduction equipment for the convenience of and use by patrons. Under 17 U.S.C. § 108(f)(2) the provision of unsupervised photocopy or reproduction equipment for use by patrons does not excuse the person who uses the reproduction equipment from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107 or any other provision of the copyright law. This institution reserves the right to refuse to make available or provide access to photocopy or other reproduction equipment if, in its judgment, use of such equipment would involve violation of copyright law.”

A practical matter, such notice should be placed on all photocopiers or other reproduction equipment in the library that is accessible by patrons that is capable of reproducing copyrighted material, not just the photocopier but the computer, printer, scanner, sampler, VCR, or any other technology that has a reproducing capacity. (A generic warning notice, sans the section 108(f)(2) patron language, can be used on other photocopiers and reproduction equipment accessible by staff, as the library is not protected under section 108 for their acts of infringement, but such employee-oriented warning notice can be evidence of attempts to control infringement by employees that while having no impact on liability can impact the assessment of damages. Such serves a valuable purpose in the overall risk management and compliance endeavors of the institution as employee use of such photocopying or other reproducing equipment located on its premises, would not be “unsupervised” as required by section 108(f)(1), and therefore the immunity offered by that subsection would not apply.

However, section 108(f)(1) does not offer immunity for other acts of infringement unrelated to the use of photocopying or other reproduction equipment, e.g., allowing a public performance of a video in the library to the Young Organization of African-American Medical Students with the use of the library VCR or DVD player. This would be an issue of the performance right of copyright owners, not the exclusive reproduction or distribution rights that section 108 addresses.

Section 109 and the Required Notice Provision Relating to the Circulation of Software by Nonprofit Libraries

Q5: Does the library circulate or make copyrighted materials in its collections available to the public, i.e., make a public distribution of copyrighted works? If so, in order to exercise distribution rights under the first sale doctrine, all materials distributed must be lawfully made.

The catch is that in order to exercise use rights beyond the first sale, the transfers suggested in the Question 5, must be lawfully made copies. Section 109(a) articulates the essences of the first sale right: “the owner of a particular copy or phonorecord *lawfully made under this title*, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C. § 109(b) (emphasis added).

In *Hotaling v. Church of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1997), the court concluded that: “When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.” 118 F.3d at 203. This dissent disagreed but remained silent on whether the check-out (actual lending under 17 U.S.C. § 106(3)) of reproduced (unauthorized) materials would be an illegal distribution. Arguably if this were the case both the majority and the dissent might have agreed that the circulation of unauthorized or illegal reproductions would be an infringement.

However, this right of public distribution of lawfully made copies does not apply to phonorecords or software programs made available by rental lease or lending or similar act. “Neither the owner of a particular *phonorecord* nor any person in possession of a particular copy of a *computer program* (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending.” 17 U.S.C. § 109(b)(1) (emphasis added). Thus the right to dispose of a phonorecord or computer program by “rental, lease or lending” requires the permission of the copyright owner.

Q6: Does a nonprofit library or nonprofit educational institution lend phonorecords? If so, this distribution is except from the copyright owner’s restoration of first sale rights as explained in Q5.

“Phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 101. In other words the object in what a recording of sounds exist, e.g., a cassette tape, a CD, an old record (33 $\frac{1}{3}$, 45, or 78 rpm), etc.

However, Section 109(b) provides that the “phonorecord” exception to the first sale doctrine “shall [not] apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution.” 17 U.S.C. § 109(b). In other words, there is an exception to the exception for “nonprofit library and nonprofit educational institutions” for the rental, lease or lending of phonorecords, like a book-on-tape cassette or music CD.

Q7: Does a nonprofit educational institution possess a computer program that it desires to publicly distribute through a transfer of possession to another nonprofit educational institution? If so, the right is also except from the copyright owner’s restoration of first sale rights as explained in Q5.

With respect to software, section 109(b) also provides for the “transfer of possession of a *lawfully* made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection.” This allow schools, colleges or universities to transfer permanent possession of software among institutions within a consortia for example, i.e., beyond the transfer that might occur for purposes of interlibrary loan or other non-permanent transfers, see discussion in Question 8 below. This provision does **not** confer the “transfer of possession” right on nonprofit libraries, only educational institutions; the transfer of possession right would apply to a library within a larger nonprofit educational institution.

Q8: Does a nonprofit library desire to lend computer programs in its collection? If so, the computer program restoration right of copyright owners does not apply to such lending “for nonprofit purposes by a nonprofit library” if a copyright warning is used.

Operating as an exception to the restoration of first sale rights of copyright owners in computer programs, i.e., as an exception to the exception so to speak, section 109(b) states: “Nothing in this subsection [that is subsection (b), which restores the reach of the copyright owner’s exclusive right of distribution, the first sale right, to dispositions of computer programs] shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, *if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.*” 17 U.S.C. § 109(b)(2)(A). In an attempt to balance the rights of owners and users, Congress required that libraries remind patrons of their obligation to honor the rights of copyright owners: “The Committee does not wish, however, to prohibit nonprofit lending by nonprofit libraries and nonprofit educational institutions. Such institutions serve a valuable public purpose by making computer software available to students who would not otherwise have access to it. At the same time, the Committee is aware that the same economic factors that lead to unauthorized copying in a commercial contest may lead library patrons also to engage in such conduct.” H.R. Rep. No. 101-735, 101st Cong. 2d Sess. 8 (1990). Thus in return for the ability to lend software to students and patrons of nonprofit educational schools and its libraries, the library must place a warning notice on the software to be distributed. As with section 108(d)(2) and (e)(2), the text of the notice is established by regulation:

“Notice: Warning of Copyright Restrictions. The copyright law of the United States (title 17, United States Code) governs the reproduction, distribution, adaptation, public performance, and public display of copyrighted material. Under certain conditions specified in law, nonprofit libraries are authorized to lend, lease, or rent copies of computer programs to patrons on a nonprofit basis and for nonprofit purposes. Any person who makes an unauthorized copy or adaptation of the computer program, or redistributes the loan copy, or publicly performs or displays the computer program, except as permitted by title 17 of the United States Code, may be liable for copyright infringement. This institution reserves the right to refuse to fulfill a loan request if, in its judgment, fulfillment of the request would lead to violation of the copyright law.” 37 C.F.R. § 201.24(b).

The wording of the notice must conform to the prescribed regulation; it may not deviate from it. 37 C.F.R. §201.24(b) The final sentence of the notice does not require active intervention by the institution, but indicates that the nonprofit library with a college or university would be within its rights if it chose to enforce the copyright law and the lending of the computer program to a particular patron in a particular set of circumstances. The warning notice preserves instead of requires that refusal function. In addition the form and manner of notice is articulated with a fair amount of specificity as well: “A Warning of Copyright for Software Rental shall be affixed to the packaging that

contains the copy of the computer program, which is the subject of a library loan to patrons, by means of a label cemented, gummed, or otherwise durably attached to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copy of the computer program. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual user of the computer program.” 37 C.F.R. §201.24(c). This could be accomplished by having self-adhesive labels consisting of the text of the warning notice printed and prepared that library staff can easily peel off and attach to the software jacket, container, etc.

Additional Compliance Oriented Provisions from the 1998 DMCA Amendments Relating to Section 512

Q9: Does the library, school, college, university or other service provider desire to obtain the limitations on liability, the so-called safe harbor that section 512 offers? If so, then the service provider must adopt and reasonably institute a repeat infringer policy.

Repeat infringer policy: 17 U.S.C. § 512(i)(1)(A) regarding the limitation of liability of service providers such as libraries of schools, if the entity “has **adopted and reasonably implemented, and informs subscribers and account holders** of the service provider's system or network of, a **policy** that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.” The adoption and implementation of the policy is a prerequisite of the section 512 safe harbor qualification: “Unless this threshold requirement is met, further analysis of the specific safe harbors is not required.” *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1087 (C.D. Cal. 2004), affirmed in part, reversed in part and remanded 481 F.3d 751 (9th Cir. 2007), amended and superseded on denial of rehearing 488 F.3d 1102 (9th Cir. 2007), cert. denied 128 S.Ct. 709 (2007).

Logic dictates that “reasonable implementation” means enforcement of the policy consistent with the ways and means with which other policies are enforced within a given institutional structure. The words “reasonably implemented” do not require that the service provider ensure that infringement never occurs: “The Committee recognizes that there are different degrees of online copyright infringement, from the inadvertent to the noncommercial, to the willful and commercial. In addition, the Committee does not intend this provision to undermine the principles of subsection (l) or the knowledge standard of subsection (c) by suggesting that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.” H.R. Rep. No 551 (Part 2), 105th Cong., 2d Sess. 61 (1998); Senate Report 105-190, 105th Cong., 2d Sess. 52 (1998). The legislative history indicates that the threat of termination should indeed be real: “However, those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.” H.R. Rep. No 551 (Part 2), 105th Cong., 2d Sess. 61 (1998); Senate Report 105-190, 105th Cong., 2d Sess. 52 (1998).

The following language could be used in an educational environment:

Notice: Warning of Copyright Restrictions. As a student your ability to post or link to copyrighted material is also governed by United States Copyright law. This instructor or other staff of this institution reserves the right delete or disable your post or link if, in his or her judgment, the post or link would involve violation of copyright law. In accordance with 17 U.S.C. § 512(i)(1)(A), this institution has adopted and shall make all reasonable effort to enforce a policy whereby the instructor or staff reserves the right to terminate in appropriate circumstances the access to the system or network of students who disrespect the intellectual property rights of others or are otherwise repeat infringers of copyright.

The following language could be used in a public library setting:

Notice: Warning of Copyright Restrictions. As a patron your ability to post or link to copyrighted material is also governed by United States Copyright law. The librarian or other staff of the library reserves the right delete or disable your post or link if, in his or her judgment, the post or link would involve violation of copyright law. In accordance with 17 U.S.C. § 512(i)(1)(A), this library has adopted and shall make all reasonable effort to enforce a policy whereby the librarian or staff reserves the right to terminate in appropriate circumstances the access to the system or network of patrons who disrespect the intellectual property rights of others or are otherwise repeat infringers of copyright.

Either language clause could be made part of a system or network log-in screen, included in the institution's AUP (Acceptable Use Policy) to which all users assent before obtaining network access, reprinted in other documentation such as an institutional copyright policy and appear on network and other technology capable of infringing digital copyright or in the case of students, appear on the first page of all course syllabi.

Case law also suggests the policy must be adopted before the safe harbor can apply, thus like the life insurance policy that must be contracted while there's still a pulse, the parameters of section like its repeat infringer policy, must be in place before the harm, in this case copyright infringement, occurs in order for the policy to do any good, i.e., offer the institution the protection of the section 512 safe harbor: "We hold that the district court erred in concluding on summary judgment that AOL satisfied the requirements of § 512(i)...There is ample evidence in the record that suggests that AOL did not have an effective notification procedure in place at the time the alleged infringing activities were taking place...AOL allowed notices of potential copyright infringement to fall into a vacuum and to go unheeded; that fact is sufficient for a reasonable jury to conclude that AOL had not reasonably implemented its policy against repeat infringers." *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004). It would logical to conclude that a repeat infringer policy that had a little chance of being enforced such as the one AOL employed in *Ellison v. Robertson*, does not meet the "reasonably implemented" command of section 512(i)(1)(A).

A similar lesson is demonstrated by the *Napster* case. True Napster also had a repeat infringer policy. Unfortunately, Napster created its policy after the fact of legal proceedings against it by the recording industry, some two months later. *A&M Records, Inc. v. Napster, Inc.*, 2000 WL 573136, at * 9 (N.D. Cal. 2000). Napster “adopted” a policy to be sure, but the question remained as to whether this after-the-fact policy adoption was nonetheless “reasonably implemented.” Napster’s fruitless response to this bit of illogic was that the statute did not indicate when the repeat infringer policy should be in place. *A&M Records, Inc. v. Napster, Inc.*, 2000 WL 573136, at * 9 (N.D. Cal. 2000). The court was not convinced and responded that such *rationalization* “defies the logic of making formal notification to users or subscribers a prerequisite to exemption from monetary liability.” *A&M Records, Inc. v. Napster, Inc.*, 2000 WL 573136, at * 9 (N.D. Cal. 2000).

In another case, district court in the Ninth Circuit found the following policy *did* satisfy the requirements of section 512(i): “The policy provides that Internet Key will disable access to an Affiliate Website after it receives a single notification of an infringement. It also provides that it will permanently ban a webmaster from Internet Key after it has received three notifications regarding websites of any particular webmaster. Therefore, Perfect 10’s characterization of Internet Key’s policy is incorrect... The Court finds, therefore, that Perfect 10 has failed to raise a genuine issue of material fact that Internet Key has not adopted a policy that terminates repeat infringers in appropriate circumstances.” *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1094 (C.D. Cal. 2004) , affirmed in part, reversed in part and remanded 481 F.3d 751 (9th Cir. 2007), amended and superseded on denial of rehearing 488 F.3d 1102 (9th Cir. 2007), cert. denied 128 S.Ct. 709 (2007). The lack of definition of what is meant “repeat” in the legislative history led the district court to conclude that a three-strike rule was a reasonable implementation under the statute: “In order for an infringer to be a ‘repeat’ infringer, he or she must infringe at least twice. Therefore, the Court finds that Internet Key’s policy of terminating a webmaster after 3 notifications is reasonable.” *Id.* at n. 12. Concluding that “[i]n the absence of evidence of DMCA-compliant notice, the Court finds that Perfect 10 has failed to raise a genuine issue of material fact that Internet Key failed to implement its termination policy in a reasonable manner. Therefore, there is no genuine issue of material fact that Internet Key has met the threshold requirements under §512(i).” *Id.* at 1097.

Q10: Does the library, school, college, university or other service provider desire to obtain the limitations on liability, the so-called safe harbor that section 512 offers? If so, then the service provider must accommodate and not interfere with standard technical measures that are made available to help protect copyrighted works in online environments.

A second qualifying requirement operates as an anti-interference provision of sorts: the service provider “accommodates and does not interfere with standard technical measures.” 17 U.S.C. § 512(i)(1)(B). Standard technical measures are defined as those measures “used by copyright owners to identify or protect copyrighted works.” 17 U.S.C.

§ 512(i)(2). The statutory definition of standard technological measure suggests some sort of marketplace determination of what those measure might be. Section 512(i)(2) offers a three-part test to determine what qualifies as a technological measure: industry consensus, availability, and nonburdensome cost. Availability occurs when the technology is available to any person on “reasonable and nondiscriminatory terms.” 17 U.S.C. § 512(i)(2)(B). This phrasing coupled with the section 512(i)(1)(B) “accommodates” suggests at least that any **affirmative duty** to accept and adopt (“accommodates”), i.e., purchase and use, such measures is first conditioned on the technology (the “standard technical measures”) being available (“reasonable and nondiscriminatory terms”). Finally the technological measure must be affordable; it must “not impose substantial costs on service providers or substantial burdens on their systems or networks.” 17 U.S.C. § 512(i)(2)(C). In other words as long as the cost would not be substantial is would still require that the service provider accommodate and not interfere with its use, even if it would not be without some cost.

Q11: Does the college, university or educational entity of higher education desire to obtain the additional limitations on liability, offered by the section 512(e)? If so, then the service provider educational entity must in addition to several qualifying conditions, “provide[] to all users of its system or network informational material that accurately describe, and promote compliance with the laws of the United States relating to copyright.”

Section 512(e) allows institutions of higher education to treat faculty and graduate students engaged in teaching and research functions as third parties (and not as employees) with respect to the conduit and cache provisions, sections 512(a) and (b) (“such faculty member or graduate student shall be considered to be a person other than the institution”), and second, for purposes of the post and link provisions, sections 512(c) and (d), need not impute the knowledge of qualifying employees to the institutional mens rea of the knowledge or “red flag” awareness of 512(c)(1)(A)(i) and (ii) and (d)(1)(A) and (B) (“such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution”).

The provision applies only “when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function.” Thus not all employee duties are covered, teaching and research are covered, but administrative or service duties are not.

The first specific requirement of section 512(e)(1)(A) excludes a significant portion of teaching activity from protection: “such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by the faculty member or graduate student.” In other words, section 512(e) will not shield the institution from liability for the infringing activity of teaching and researching faculty and graduate students undertaken in conjunction with online education. This might still insulate the institution from an

employee's use of computing facilities in "teaching functions" short of "online access to instructional materials," course preparation for example.

Second, section 512(e)(1)(B) requires that, within the preceding 3 years the institution must not have received three or more notices of infringement (according to the notice provisions of 512(c)(3)) from copyright owners regarding the behavior of the specific faculty member or graduate student "and such notifications of claimed infringement were not actionable under subsection (f)." 17 U.S.C. § 512(e)(1)(B). (Section 512(f), creates a remedy against "any person who knowingly materially misrepresents ... that material or activity is infringing.")

Section 512(e) contains a significant compliance oriented measure, significant because with the enactment of the DMCA, for the first time the copyright law commands an educational tertiary entity engage in a specific form of copyright outreach to its user community: Section 512(e)(1)(C) requires that "the institution provide[] to all users of its system or network informational material that accurately describe, and promote compliance with the laws of the United States relating to copyright." The legislative history offers no further articulation of what sort of informational material should be provided only to suggest what could be provided: "The legislation allows, but does not require, the institutions to use relevant informational materials published by the U.S. Copyright Office in satisfying the condition imposed by paragraph (C)." House (Conference) Report 105-796, 105th Cong., 2d Sess. 75 (1998). This is reference to the various copyright circulars available from the Copyright Office website, but it could of course include other information in the form of posters, brochures, handouts, brief articles in various institutional house organs, such as newsletters, magazines, etc. In-services, workshops and other methods of instruction might also satisfy this requirement. Moreover, it does not limit education to copyright issues related to section 512 alone, but all the laws relating to copyright in general as well as the section 1201 anti-circumvention and anti-trafficking rules discussed in the next chapter.

In addition, the "informational materials" must be provided to all campus computing users ("system or network"), such as students, other patrons and staff and not just the section 512(3) targets, teaching and researching faculty and graduate students. Rather than a burden, the tertiary institution should view this obligation as an opportunity to design a comprehensive copyright outreach or instructional program to all members of its immediate community, faculty, staff and students.

Additional Compliance Oriented Provisions from the 2002 TEACH Amendments Relating to Section 110(2)

Q12: Does the school, college, university or educational entity of higher education engage in distance education that involves the performance or display of copyrighted material? If so, then in order to obtain the benefits of section 110(2) the entity must fulfill several compliance oriented obligations.

Libraries or information centers supporting distance education: 17 U.S.C. § 110(2)(D)(i) requiring a variety of “compliance” measures by the educational institution, “**institutes policies** regarding copyright, **provides informational materials to faculty, students, and relevant staff members** that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and **provides notice to students** that materials used in connection with the course may be subject to copyright protection.”

While the statute requires that the “transmitting ... institution institutes policies regarding copyright” the legislative history does not provide detail as to the contents of the policies. However, the statute uses the plural to suggest multiple policy statements or documents. It would be broader than the single “repeat infringer” policy requirement of section 512(i)(1)(A) discussed in Question 9, and include a policy on photocopying and other reproductions in the classroom, performance and display of copyrighted material in the classroom, fair use, copyright and campus computing facilities, etc. Unlike section 512(e), section 110(2) benefits all accredited nonprofit and otherwise qualifying educational entity that engages in distance education, i.e., a transmission of copyrighted material. Thus a grade school that supplements its instructional programming with web-based enhancements that students can access from home is engaging in distance education for the purposes of the copyright law. For a thorough discussion of copyright in distance education see, Tomas A. Lipinski, *Copyright and the Distance Education Classroom* (2005).

Second, like section 512(e)(1)(C), but also in an expanded articulation, the institution must “provide[] informational materials to faculty, students, and relevant staff members that accurately describe and promote compliance with, the laws of the United States relating to copyright.” The section 512(e) command discussed in Question 11 is more limited, as it targets network users alone: the “institution provides to all users of its system or network informational material that accurately describe, and promote compliance with the laws of the United States relating to copyright.” Under section 110(2) however, there is no limitation to “users of its system or network” alone, but the information must proceed to reach all “faculty, students, and relevant staff members.” As with section 512(e), there is a similar purpose-content of material charge, i.e., that the material “accurately describe and promote compliance with, the laws of the United States relating to copyright.”

Finally, the institution must “provide[] notice to students that materials used in connection with *the course* may be subject to copyright protection. 17 U.S.C. § 110(2)(D)(i) (emphasis added). The use of the article “the” instead of “a”, suggests that notice be included only with respect to the use of copyright material in conjunctions with a distance education course, and not all courses offered by the institution. While both the legislative history and the U.S. Copyright Office offer no direction as to the content of the required notice, one could be adopted from the section 108 and 109 regulatory notices.

The following notice could be used to fulfill the notice requirement, language is also included that would satisfy the repeat infringer policy requirement notice of section 512(i)(1)(A):

Notice: Warning of Copyright Restrictions. All materials that under United States Copyright law would be considered the normal work product of the instructor, i.e., the class or lecture note exception to the work for hire doctrine [**] are under the sole ownership of the instructor, this includes but is not limited to assignments and exercises, discussion questions and case studies, tests, etc. See, *Hays v. Sony Corp of America*, 847 F.2d 412 (7th Cir. 1988); and *Weinstein v. University of Illinois*, 811 F. 2d 1091 (7th Cir. 1987).

The instructor, the university, and the web site designer share the copyright in the “look and feel” of the site. Underlying copyright in the software generating the web site is also protected by copyright. Documents and other material appearing on the web site or by link from the site may also be protected by copyright. This site is maintained for educational purposes only. Your viewing of the material posted here does not imply any right to reproduce, to retransmit or to redisplay it other than for your own personal or educational use. Links to other sites are provided for the convenience of the site user (staff or student) or visitor and do not imply any affiliation or endorsement of the other site owner nor a guarantee of the quality or veracity of information contained on the linked site.

As a student your ability to post (including storage) or link to copyrighted material is governed by United States copyright law. This instructor or other staff of the [insert the name of your institution] reserves the right delete or disable any post or link if, in its judgment, the post or link would involve violation of copyright law. In accordance with 17 U.S.C. § 512(i)(1)(A), the [insert the name of your institution] adopts and shall make all reasonable effort to enforce a policy whereby the instructor or staff reserves the right to terminate in appropriate circumstances the access to the system or network of students who disrespect the intellectual property rights of others and are repeat infringers. Access may be restored upon demonstration of an appropriate level of responsible use of and respect for the copyright of others.

**In primary and secondary educational setting the section work-for-hire doctrine vests copyright ownership with the employer-school district. Section 201 indicates that: “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, *unless* the parties have *expressly agreed* otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” 17 U.S.C. § 201(b) (first and second emphasis added). However, there is precedent, cited in the sample notice above that creates an exception to this rule for faculty at tertiary institutions. In contrast to this, some institutions of higher education claim ownership rights under the work-for-hire doctrine, while others affirm a policy of faculty ownership. In author’s opinion this can still be problematic.

If the work-for-hire doctrine truly vests the copyright ownership of all employee work-product including that of faculty with the institution, then a statement in the institution's policy that it waives or transfers those ownership rights is *not* effective under the copyright law. The current state of the work-for-hire doctrine with a bent towards faculty ownership for obvious reasons is discussed in Tomas A. Lipinski, *Copyright and the Distance Education Classroom* (2005).

According to the legislative history the purpose of these requirements is to “promote an environment of compliance with the law, inform recipients of their responsibilities under copyright law, and decrease the likelihood of unintentional and uninformed acts of infringement.” Conference Report, H. Rpt. No. 107-685, 107th Cong., 2nd Sess. 230-231 (2002). Institutions will have to plan, adopt and implement a copyright compliance program that includes copyright policies, organizational development programs that seek to inform students and staff of copyright law requirements and responsibilities, not only those issues associated with the distance education alone, but a wide array of copyright issues, and have warning notices that at least distance course material may be subject to copyright law.

Q13: Does the college, university or educational entity of higher education engage in distance education that involves the performance or display of copyrighted material by means of a digital transmission? If so, then in order to obtain the benefits of section 110(2) the entity must fulfill several additional compliance oriented obligations.

An educational entity that desires to obtain performance and display rights under section 110(2) must use “**technological measures** that reasonably prevent[s] retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session and unauthorized further dissemination of the work in accessible form by such recipients to others.” 17 U.S.C. § 110(2)(D)(ii)(aa) and (bb). This provision is interpreted by the legislative history to require the use of encryption technology, though it need not require actual monitoring and a complete answer here might have discussed the futility of preventing savvy students from hacking around such controls or the pedagogical impact such measures might have on the distance education classroom. See, Conference Report, H. Rpt. No. 107-685, 107th Cong., 2nd Sess. 232 (2002).

This obligation is suggested by the following legislative history comment: “Further, it is possible that, as times passes, a technological protection measure may cease to reasonably prevent retention of the work in accessible form for longer than the class session and further dissemination of the work either due to the evolution of technology or to the widespread availability of a hack that can be readily used by the public.” Conference Report, H. Rpt. No. 107-685, 107th Cong., 2nd Sess. 232 (2002). This would suggest at least periodic monitoring to determine if the technological measures used by the institution is reasonably effective, but not the necessarily constant monitoring of individual network users, is required. “Examples of technological protection measures that exist today and would reasonably prevent retention and further dissemination, include measures used in connection with streaming to prevent the copying of streamed

material, such as the Real Player ‘Secret Handshake/Copy Switch’ technology discussed in *Real Networks v. Streambox*, 2000 WL 127311 or digital rights management systems that limit access to or use encrypted material downloaded onto a computer.” Conference Report, H. Rpt. No. 107-685, 107th Cong., 2nd Sess. 232 (2002).

A final proviso, section 110(2)(D)(II), commands the institution not to “engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination.”ⁱ In other words if the copyright owner has placed a technological control on the material that prevents further retention or dissemination, then the educational institution cannot engage in any conduct that would impede the proper functioning of the that measure. Even if the interference does not actually interfere with the protection measure it might still trigger the proviso, and the benefits of section 110(2) would not be available to the institution.

Since the statute prohibits conduct that “could reasonably be expected to interfere” with technological measures used by copyright owners to prevent section 110(2)(D)(ii)(I) retentions and disseminations, it would by logic also prohibit conduct that actually succeeds in interfering with those technological measures. Since these sorts of technological measures by nature apply only to copyrighted material in digital form, the proviso is placed with section 110(2)(D)(ii) regarding those uses “in the case of digital transmissions.” Failure to meet this requirement does not create separate liability; rather the provision operates only as an eligibility clause, such interference could violate the anti-circumvention rules of section 1201(a)(1) as discussed in chapter 8.

***A thorough discussion of these concepts is found in TOMAS A. LIPINSKI, THE COMPLETE COPYRIGHT LIABILITY HANDBOOK FOR LIBRARIANS AND EDUCATORS (2006) (Neal-Schuman Publishers, Inc.).**

ⁱ 17 U.S.C. § 110(2)(D)(ii)(II).