



COPYRIGHT ISSUES:
University-Owned Listserv Posting and Archiving Articles

Frequently Asked Questions

- **Whether the online distribution of complete copies of newspaper or magazine articles to individuals who are part of a University-operated listserv is copyright infringement.**

The general rule is that without the copyright owner's permission, the act of copying, publicly displaying, publicly performing, distributing or making derivative works from, copyrighted materials is copyright infringement. The acts of online copying, distribution and archiving involve one or more of these rights of the copyright owner. The first place to look would be the terms of any license agreement, or terms and conditions posted online, applicable to the materials in question.

This general rule is subject to various exemptions and defenses available under the U.S. Copyright Act, including the fair use defense. *See* 17 U.S.C. § 107. www.copyright.gov/fls/fl102.html Factors that weigh against fair use under these facts are the copying and distribution of an entire article (rather than a limited excerpt); regular and routine distribution to all members of the listserv; and the potential that the distribution and archiving of articles would diminish the copyright owner's market for the sale or licensing of the materials. Factors that would favor fair use include: educational nature of the use, restricted access only to current students, and use of only as much of the content as is necessary for the purpose of the educational objective.

- **Whether the University legally can archive complete copies of newspaper articles sent by a University employee to all members of a University-maintained listserv.**

An employer (such as the University) can be liable for the acts of its employees within the scope of their duties, including their online copying, distribution and archiving activities. In this regard, the University has implemented policies that make clear that copyright infringement is an unacceptable use of University computers or networks.

Various potential exemptions and defenses to infringement claims may be available to the University as an online service provider. These include fair use and the safe-harbor provisions of the Digital Millennium Copyright Act ("DMCA"). *See* 17 U.S.C. § 512.

www.copyright.gov/legislation/dmca.pdf In addition, sovereign immunity may shield a state institution from liability under federal copyright law. While the DMCA and sovereign immunity exemptions shield the institution, however, they do not necessarily provide a defense to individuals charged with infringement.

DISCUSSION:

Online Subscriber Licenses. Newspapers and other publications often make available their content online, or may enter into license agreements for online publications. The publisher typically requires, as a condition of access, that an online subscriber adhere to the publisher's terms & conditions for the use of such materials. Therefore, when considering whether or not a use is permitted, the license agreement or online terms & conditions for use should be the first place to look.

The publisher's website generally will include a statement as to whether and to what extent an individual may distribute, via e-mail or otherwise, copyrighted materials made available online. Even if no terms and conditions are posted online, silence does not equal permission; and providing attribution or acknowledgement of the source is not a substitute for obtaining permission prior to the use of materials. By registering online to access publications, an individual or institution may have agreed to the publisher's terms & conditions of use. As an example, the current online edition of The New York Times specifies in its terms & conditions that an online subscriber may download or copy its content "for personal, non-profit use only," provided that "all copyright and other legal notices" are maintained. Whether the distribution of entire newspaper articles to all members of a listserv or maintaining an archive of such materials constitutes "personal use" is questionable, however.

Fair Use Defense. If a copyright owner's express permission does not extend to the use in question, the doctrine of "fair use" may provide a defense against a claim of infringement. To qualify, the use must be for teaching, scholarship, criticism, comment, review or news reporting. Four factors then are weighed to determine whether, in balance, a fair use defense is available: (1) the nature of the copyrighted work; (2) the purpose and character of the use; (3) the amount and substantiality of the use in relation to the work as a whole; and (4) the effect of the use on the potential market for, or value of, the copyrighted work. www.copyright.gov/fls/fl102.html

Even assuming that the University listserv distribution is for non-profit educational purposes, the fair use inquiry doesn't end there. Applying the balancing test, certain factors are present under our facts that operate against a finding of fair use. For example, it detracts from a fair use defense if the distribution of the newspaper articles is routine and systematic (rather than infrequent, limited and sporadic). The plan to distribute and archive entire articles (rather than excerpts related to the teaching, scholarship, etc.) is another factor that weighs against fair use. Additionally, a fair use analysis requires

consideration of the potential negative effect of the planned copying, distribution and archiving upon the copyright owner's ability to sell or license its archives.

DMCA Exemption for Materials Sent by a Third Party. The safe harbor provisions of the DMCA exempt an online service provider ("OSP") from liability for hosting on its websites or other informational sites allegedly infringing materials that are sent by a person other than the service provider, *provided that*:

- (1) (1) The OSP does not have the "requisite knowledge of infringement" (defined below); and
- (2) (2) If the OSP has the right and ability to control the activity, it does not receive a direct financial benefit from the infringement; and
- (3) (3) Upon receipt of statutory notification of a claimed infringement, the OSP expeditiously must take down or block access to the allegedly infringing material.

The "requisite knowledge" of infringement (referred to in point (1) above) includes either actual knowledge of infringement, or the awareness of facts or circumstances from which infringing activity is apparent. For example, an employer such as the University may be assumed to have knowledge of its employees' acts within the scope of her/his employment. Acts that violate University policy, however, may be viewed as outside the scope of the employee's duties.

DMCA Exemption for Postings by Faculty and Grad Student Employees. As noted above, an employer may be deemed to have knowledge of an employee's acts in the scope of employment, resulting in potential liability for both parties. The DMCA provides a limited exemption for universities, with respect to materials posted by a faculty member or graduate student employee on a website or other information site maintained by a university. The university will not be deemed to have "requisite knowledge" of any infringement with respect to such materials, *subject to* the following conditions:

- (1) (1) The infringing activities do not include providing online access to copyrighted materials included in course materials required or recommended during the past 3 years;
- (2) (2) The university has not received more than two notifications over the past 3 years that the individual was infringing copyrighted materials; and
- (3) (3) The university provides all its users with informational materials describing and promoting compliance with copyright law.

Consistent with the requirements for the DMCA safe-harbor exemptions, the University of Arizona has appointed an agent for the receipt of DMCA infringement notifications, has instituted notice and take-down procedures following the receipt of such notifications, and has implemented policies and provided information on the appropriate online uses of copyright materials.