

**COPYRIGHT, FAIR USE, AND THE TEACH ACT: OPINIONS AND  
PRACTICES OF ACADEMIC LIBRARIES AND LIBRARIANS**

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University of Pittsburgh, 2012

Problem: The law of copyright in the United States represents a balancing of creative and commercial protection for copyright holders against the freedom and needs of others to use copyrighted resources including academic libraries, faculty, and students. Although a significant body of literature exists that describes and analyzes the course and mechanics of copyright through its long and storied history, few researchers have gathered statistics relating to academic librarians' opinions concerning the efficacy of present-day United States copyright laws including the TEACH Act, their understanding of them, and their everyday resource use within the confines of these laws in the area of provision of digital resources. The views and practices of academic librarians are valuable in determining whether the TEACH Act is accomplishing its intended purpose of extending copyright exceptions beyond the classroom to digitally based academic course materials.

Methodology: Based in grounded theory, data collection emanated from two sources – an online survey to all American academic members of the Association of Research Libraries and a content analysis of the websites of twenty-five randomly selected American academic members of the Association of Research Libraries.

Summary of findings: Survey results indicate that academic librarians are dissatisfied with current copyright law and the realities of resource licensing. Fifty-four percent of the institutions in which the libraries are situated appear to be using the TEACH Act. Compliance with the Act's requirements could not be definitively ascertained. The content analysis of websites indicate that a conflicting higher percentage of institutions are using the TEACH Act than what was reported through the survey. These perceived usages, however, could be the result of negligent linking to online information outside of the library's own institution.

Conclusions: Academic institutions are utilizing the benefits of the TEACH Act. Suggestions for statutory revision are made based upon findings made in this study.

## TABLE OF CONTENTS

<b>PREFACE.....</b>	<b>X</b>
<b>1.0 INTRODUCTION .....</b>	<b>1</b>
<b>1.1 STATEMENT OF THE PROBLEM.....</b>	<b>1</b>
<b>1.2 RESEARCH QUESTIONS.....</b>	<b>2</b>
<b>1.3 SIGNIFICANCE OF THE STUDY .....</b>	<b>3</b>
<b>1.4 LIMITATIONS.....</b>	<b>4</b>
<b>1.5 DEFINITIONS.....</b>	<b>5</b>
<b>2.0 LITERATURE REVIEW .....</b>	<b>11</b>
<b>2.1 LITERATURE REVIEW ON THE TOPIC.....</b>	<b>11</b>
<b>2.1.1 The History of Copyright .....</b>	<b>11</b>
<b>2.1.2 Mechanics of Copyright.....</b>	<b>21</b>
<b>2.1.3 Exceptions to Copyright .....</b>	<b>21</b>
<b>2.1.3.1 The Fair Use Doctrine .....</b>	<b>21</b>
<b>2.1.3.2 The TEACH Act .....</b>	<b>23</b>
<b>2.1.4 Digital Rights and Academic Environments .....</b>	<b>28</b>
<b>2.1.5 Permissions and Institutional Policies.....</b>	<b>34</b>
<b>2.1.6 Copyright and Distance Learning .....</b>	<b>34</b>
<b>2.1.7 Electronic Delivery of Resources .....</b>	<b>39</b>

2.2	LITERATURE ON THE RESEARCH METHODS.....	49
2.3	SUMMARY OF THE LITERATURE .....	53
3.0	METHODOLOGY .....	55
3.1	GENERAL METHODOLOGY .....	55
3.2	SPECIFIC PROCEDURES RESEARCH POPULATION .....	56
3.3	PRETEST STUDY .....	59
3.4	DATA COLLECTION.....	62
4.0	DATA DISCOVERY PART I.....	64
4.1	DEMOGRAPHICS.....	64
4.2	COPYRIGHT ROLES.....	65
4.3	THE TEACH ACT .....	73
4.4	PUBLISHERS.....	74
4.5	PRESERVATION .....	81
4.6	PRIVACY.....	84
4.7	OPINIONS AND CONCERNS .....	86
5.0	DATA DISCUSSION PART I .....	90
6.0	DATA DISCOVERY PART II .....	99
7.0	DATA DISCUSSION PART II.....	109
8.0	CONCLUSIONS .....	112
9.0	LIMITATIONS.....	114
10.0	FURTHER INVESTIGATIONS .....	116
	APPENDIX A .....	119
	APPENDIX B .....	121

<b>APPENDIX C</b> .....	<b>123</b>
<b>APPENDIX D</b> .....	<b>131</b>
<b>APPENDIX E</b> .....	<b>135</b>
<b>APPENDIX F</b> .....	<b>142</b>
<b>APPENDIX G</b> .....	<b>147</b>
<b>BIBLIOGRAPHY</b> .....	<b>155</b>

## LIST OF FIGURES

Figure 1. Instructor copyright knowledge.....	68
Figure 2. Librarian copyright knowledge .....	69
Figure 3. Copyright policies .....	72
Figure 4. Do laws favor publishers .....	74
Figure 5. Who is liable.....	75
Figure 6. Conflict.....	76
Figure 7. Control.....	77
Figure 8. Access.....	78
Figure 9. Conservative stances .....	79
Figure 10. Unnecessary licensing .....	80
Figure 11. Adequate archival.....	81
Figure 12. Publisher stability .....	82
Figure 13. Importance of preservation.....	83
Figure 14. Privacy issues .....	84
Figure 15. Information gathering.....	85
Figure 16. Reference to TEACH Act.....	104
Figure 17. Using the TEACH Act.....	106
Figure 18. TEACH Act explained .....	107

## **PREFACE**

### **ACKNOWLEDGEMENTS**

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having children who are compassionate, create joy, work diligently, and pursue their aspirations is life-defining and life-fulfilling.

## **1.0 INTRODUCTION**

### **1.1 STATEMENT OF THE PROBLEM**

The law of copyright in the United States represents a balancing of creative and commercial protection for copyright holders against the freedom and needs of others to use copyrighted resources including academic libraries, faculty, and students. Although a significant body of literature exists that describes and analyzes the course and mechanics of copyright through its long and storied history, few researchers have gathered statistics relating to academic librarians' opinions concerning the efficacy of present-day United States copyright laws including the TEACH Act, their understanding of them, and their everyday resource use within the confines of these laws in the area of provision of digital resources. The U.S. Department of Education reports that the use of distance education by post-secondary educational institutions has steadily increased since the mid-1990s (National Center for Education Statistics, 1999). Ninety-six percent of the largest American colleges and universities are utilizing electronic delivery of courses (Allen & Seaman, 2006). In 1998, the Digital Millennium Copyright Act (DMCA) was signed into law. Although its drafters' intent was to bring U.S. copyright law into the twenty-first century, the DMCA mainly addressed unauthorized copying while failing to redefine what actually constituted unauthorized copying. The Act did, however, offer libraries and educational institutions some protection if they followed the guidelines contained in the law such as posting copyright notices on copying machines. These protections addressed the institution's liability for misconduct of its clients in using the institution's technology.

On November 2, 2002, President George W. Bush signed into law the "Technology, Education, and Harmonization Act" (TEACH Act) as part of the more comprehensive "Justice Reauthorization Act" (HR 2215) and as an amendment to the Copyright Act of 1976. Legislators consulted the Copyright Office in their second attempt to redefine copyright law and

its application to accredited, non-profit educational institutions. The TEACH Act extended copyright exceptions beyond the classroom for the first time. Within Section 119(2) of the TEACH Act are found guidelines that address the use of content for both face-to-face classrooms and distance education that includes online, web-enhanced, transmitted, or broadcast components.

Accredited, non-profit educational institutions can find many benefits under the TEACH Act that they were not afforded under previous copyright law. Benefits for using digital materials include: the display or performance of most works is permitted in limited amounts, material can be viewed from any location (previously limited to synchronous closed caption television), analog materials may be digitized if not otherwise available in a digitized format, and materials may be stored and accessed for limited time periods. Concomitant with the benefits of the TEACH Act, however, are requirements and restrictions. These include: both faculty and the institution have compliance duties, mediated instruction is still required, transmission of digitized materials is limited to students registered in that course, notice requirements, the institution must have TEACH Act compliance policies in place and must be abiding by them. In other words, good intentions are not enough, and the institution must provide “informational materials” regarding copyright.

Insufficient data exists as to whether colleges and universities are weighing the costs and benefits presented to them by the TEACH Act, and, if they are electing to use the TEACH Act, whether or not these institutions are complying with the law’s requirements. Regardless of the institution's decision to comply with the TEACH Act, academic librarians have assumed additional responsibilities involving copyright with increased offerings of e-reserves and distance education programs. An understanding of U.S. copyright law is beneficial to librarians in fulfilling these responsibilities.

## **1.2 RESEARCH QUESTIONS**

1. Based on the opinions and practices of academic libraries and librarians, are libraries and the institutions within which the libraries are situated, utilizing the benefits afforded under the

TEACH Act while complying with its requirements?

2. Based on the opinions and practices of academic libraries and librarians, is the TEACH Act accomplishing its intended purposes?

3. Does the online copyright information provided by the libraries reflect that the libraries and/or their institutions are electing to use the TEACH Act and are complying with its requirements?

### **1.3 SIGNIFICANCE OF THE STUDY**

The significance of this study could be far-reaching. The provision of distance education by colleges and universities is increasing. With this increase, academic librarians have assumed new responsibilities including providing access to digital resources. Consequently, the need to understand copyright laws has increased for academic librarians. Recent changes to copyright laws are the result of efforts to make the laws applicable to new technologies. Data showing academic librarians' satisfaction or dissatisfaction with current copyright laws will evidence whether or not the laws are effectively accomplishing the laws' intended goals. In the past, library associations have offered their comments to the United States Copyright Office when revisions to copyright law were being debated (Library Associations, 2002). The goal of this study is to produce data that relates to the day-to-day experiences of librarians with copyright in academic libraries. This data could be used not only to show trends and problems with current copyright laws but also to communicate these trends and problems to library associations, the United States Copyright Office, the U.S. Copyright Czar, legislators, copyright content holders, publishers, copyright intermediaries such as distributors and rights brokers, and civil society groups such as the Electronic Frontier Foundation (EFF), and Public Knowledge.

## 1.4 LIMITATIONS

This study has certain limitations that may affect its final contributions. The focus of this study, copyright law, is considered by even experienced copyright law practitioners to be one of the most extensive and complicated areas of American law. “Copyright itself is a terrifically complex legal doctrine, built over many years by many hands, full of exceptions and caveats that even legal scholars find ‘complex, internally inconsistent, wordy, and arcane’” (Gillespie, 2007, p.21). Most academic librarians taking part in this survey are not attorneys. To evaluate librarians’ understanding of an area of law based upon their subjective answers is challenging. Also affecting the outcome of the study is the survey design. The choice of questions by the researcher and the presentation of these questions will impact the effectiveness of eliciting the desired information.

Delimitations concerning the web site review portion of this study involve the selection process. Although the selection process of web sites to be reviewed is designed to provide a diverse, and wide-ranging sampling, the process cannot be perfect and faults in the selection will affect the generalization of the results of this study.

Finally a limitation exists in this study in regard to perspective. This study is designed and executed from the perspective of an academic librarian. Care must be taken not to generalize results past that perspective. Academic librarians for the most part are not trained legal professionals, and their perspective of copyright law must be valued as resulting from their professional experience and not extrapolated to reflect legal interpretations or trends.

## 1.5 DEFINITIONS

Defined terms are terms that people not in the discipline may not understand and terms that go beyond common language (Locke, Spirdoso, & Silverman, 2007).

**Advocacy/participatory:** one of four worldviews of research philosophy described by Creswell. Advocacy/participatory is political, empowerment issue-oriented, collaborative, and change oriented (2009).

**ALA (American Library Association):** a not for profit organization that promotes libraries and library education throughout the world.

**ARL (Association of Research Libraries):** a not for profit organization representing the leading research libraries in North America. At present, 126 member libraries comprise the association.

**Asynchronous learning:** “Learning that takes place between teacher and learner independent of space and time” (McMullen, Goldblum, Wolffe, & Sattler, 1998, p.3).

**ATLAS.ti®:** ATLAS.ti Scientific Software Development GmbH’s software package used to analyze qualitative data.

**Berne Convention:** international copyright treaty that was signed in Berne, Switzerland, in 1886. One-hundred and sixty-five member nations from the Berne Union have agreed to abide to the terms of the treaty. The United States delayed joining the union until 1989. The World Intellectual Property Organization (WIPO) serves as the administering agency of the Berne Union (WIPO, 2011).

**Blackboard®:** Blackboard, Inc.'s trademarked electronic course management program used by educational institutions for delivery of web-based and web-enhanced classes.

**Clickwrap agreement or license:** similar to a shrink-wrap agreement, a click wrap agreement binds an end-user of a website to contractual terms before accessing the site usually by registering his/her name and clicking an agreement button (Internet Law Treatise, 2009).

**Coding:** a process used in analyzing data in which the data is categorized and renamed in order to facilitate analysis (Charmaz, 2000).

**CONFU Guidelines:** "Established in September 1994, CONFU (Conference on Fair Use) is the venue for development of guidelines for Fair Use in the electronic environment. CONFU participants have been working toward development of guidelines for a number of areas including: interlibrary loan, electronic reserves, visual images, and distance education" (UNI, 2009).

**CONTU Guidelines:** "Non-binding, but commonly accepted, numerical specifications adopted by libraries and others to define practical limits to copying of copyrighted works under the doctrine of 'fair use' as set forth in the new Copyright Act of October 19, 1976. These guidelines were developed by 'CONTU,' the 'National Commission on New Technological Uses of Copyright Works,' and were agreed to by the principal library, publisher, and author organizations prior to acceptance by House and Senate sub-committees working on the Copyright Act. Libraries generally base their limits on fair use photocopying on the CONTU Guidelines" (UNI, 2009).

**Copyright:** the right held by the creator of a work to exclude others from reproducing it, adapting it, distributing it to the public, performing it in public, or displaying it in public (Garner, Black's Law Dictionary, 2009).

**Copyright Clearance Center (CCC):** Founded in 1978 as a nonprofit corporation, the CCC is an international rights broker for copyrighted print and online content (CCC, 2011).

**Digital libraries:** libraries that provide many of the same functions of traditional libraries but with the inclusion of digital databases and digitized formats. Digital libraries usually base their collection on a purposeful selection of texts and employ various means of access to these texts (Anderson & Perez-Carballo, 2006).

**Digital rights management (DRM):** refers to technologies used by the owner of a copyright to control access to and usage of digital data and hardware (WGBH, 2007).

**Distance education:** a format of education in which institutions provide access to learning when the source of information and the learners are separated by time and distance, or both (Miller & Honeyman, 1993). Institutions usually implement distance learning programs through use of course management software and the Internet. Distance education can also be referred to as "distance learning," "distributed learning," and "e-learning."

**Desire2Learn®:** Desire2Learn, Inc.'s electronic course management program used by educational institutions for delivery of web-based and web-enhanced classes.

**DMCA or Digital Millennium Copyright Act:** a law enacted in 1996 as a comprehensive reform of U.S. Copyright Law which was intended to address copyright issues presented by emerging digital media environment (UNI, 2009).

**DODL or Distributed Open Digital Library:** a collaborative digital library formed by the Digital Library Federation (Marcum, 2004).

**Fair use:** an exception to the right of copyright. For the exception to apply, four factors are considered: the purpose and character of the disputed use; the nature of the copyrighted work; the importance of the portion used in relation to the work as a whole; and the effect of the

use on the potential market for or value of the copyrighted work (Garner, Black's Law Dictionary, 2009).

**First sale doctrine:** an exception to the right of copyright in which the copyright owner has the right to sell a copy of a book but not the right to control subsequent sales of that copy (America.gov, 2008).

**Interlibrary loan (ILL):** Interlibrary loan is the process involved in the loaning of library materials from one library to another library (ALA, 2011).

**Infringement:** the unauthorized reproducing, adapting, distributing, performing in public, or displaying in public of a copyrighted work (Garner, Black's Law Dictionary, 2009).

**Intellectual property:** the legal aspect of a property right applied to creative works. The term is all encompassing and applies to the following areas of law: patent, trademark, unfair competition, copyright, trade secret, moral rights, and the right of publicity (Garner, Black's Law Dictionary, 2009).

**License:** A contractual right that gives a person or entity the right to do something that otherwise they had no legal right to do. Licenses usually involve ownership rights or privileges. For example, a license can grant a licensee permission to access and use copyrighted, digital information under the terms and conditions described in the license agreement (Garner, Black's Law Dictionary, 2009).

**License agreement:** the contract which designates the terms and conditions under which the licensor is granting a license to the licensee. Contracts require consideration such as licensing fees, which are usually negotiated (Garner, Black's Law Dictionary, 2009).

**Moodle®:** Moodle Trust's electronic course management program used by educational institutions for delivery of web-based and web-enhanced classes.

**NDIIPP or National Digital Information Infrastructure and Preservation Program:** a program in development by the Library of Congress, which aims to preserve digital collections (Marcum, 2004).

**Postpositivism:** one of four worldviews of research philosophy described by Creswell. Postpositivism includes determination, reductionism, empirical observation and measurement, and theory verification (2009).

**Pragmatism:** one of four worldviews of research philosophy described by Creswell. Pragmatism involves the consequence of actions, is problem centered, pluralistic, and real-world practice oriented (2009).

**Public domain:** If a creative work is in the public domain, any form of intellectual property right does not protect it. The work may be freely copied and used by anyone (Garner, Black's Law Dictionary, 2009).

**Shrinkwrap agreement or license:** a contract or agreement constructively agreed to by the purchaser of software by opening the software package or using the software. Such contracts are an attempt on the part of copyright holders to gain more rights than afforded to them under copyright law (Finkelstein & Wyatt, 1997).

**Social constructivism:** one of four worldviews of research philosophy described by Creswell. Constructivism includes understanding, multiple participant meanings, social and historical construction, and theory generation (2009).

**SPSS® or Statistics Program for the Social Sciences®:** IBM's analytical software program used especially in the social sciences (SPSS, 2009).

**SurveyMonkey™:** SurveyMonkey.com Corporation's web-based survey software.

**TEACH Act or Technology, Education and Copyright Harmonization Act:** signed into law on November 2, 2002, the law addresses the terms and conditions under which accredited, nonprofit educational institutions may use copyright protected materials in distance education including websites without permission from the copyright owner and without payment of royalties (UNI, 2009).

**UCITA or Uniform Computer Information Transaction Act:** proposed state contract law, developed in 1999 and revised in 2002, that would regulate software license and database access transactions. To date, only Virginia and Maryland have adopted the law. Librarians as a group have successfully lobbied against the proposed law (Nesbit, 2003).

**WebCT®:** Blackboard, Inc.'s electronic course management program used by educational institutions for delivery of web-based and web-enhanced classes

**WIPO or World Intellectual Property Organization:** one of the sixteen "specialized agencies" of the United Nations system that serves as the administering agency of the Berne Union (WIPO, 2011).

## **2.0 LITERATURE REVIEW**

### **2.1 LITERATURE REVIEW ON THE TOPIC**

In this section, a summary and analysis of background literature concerning copyright is presented. The history of copyright, the mechanics of copyright, and exceptions to copyright comprise the first through third sections. Digital rights and academic environments comprise the following two sections. Permissions and institutional policies; copyright and distance learning; and electronic delivery of resources, academic librarians, and copyright comprise the last three sections of the review. In order to understand the ramifications of present day issues in copyright, knowledge of the history and mechanics of copyright is valuable.

#### **2.1.1 The History of Copyright**

Copyright or quite literally, the right to copy is a legal principle based on the concept that the creator of intellectual property is entitled to reap the profits related to that property for a limited period of time (U.S. Copyright Office, 2009). Copyright law grants the holder of a copyright the exclusive right to reproduce, distribute, and in the case of certain works, publicly perform or display the work; to prepare derivative works; to perform sound recordings publicly by means of a digital audio transmission; or to license others to engage in the same acts under specific terms and conditions (17 USC 101). Holders of copyright typically are the creator of the work but not

always, since the right can be assigned or otherwise transferred. The laws of copyright do not extend to pre-existing material; facts; ideas, concepts, and principles; procedures, processes, systems, or methods of operation; and works already in the public domain (U.S. Copyright Office, 2008).

The history of copyright is long and storied. Copyright laws of the United States have their roots, similar to the greatest body of American laws, in the common and statutory law of the United Kingdom (Patterson, 1993). In the year 567 AD, the first documented case of copyright infringement involved a prayer book. An Irish monk, who later would become Saint Iona, visited a nearby monastery. Without first obtaining permission, the monk surreptitiously and painstakingly hand-copied the Abbot of Finnian's psalter. Upon the Abbot's discovery of the copy, the Abbot demanded that Columba return the copy to him. Columba did not comply, and the Abbot petitioned the King. Finding against Columba, King Diarmid fined the monk forty head of cattle, and ordered, "To every cow its calf, to every book its copy" (Chartrand, 2000). What is surprising to a modern viewpoint is that the Abbot of Finnian neither wrote nor published his book of psalms. The abbot simply owned the psalter. By granting the owner of the book derivative rights in the book, the King sustained the tradition of retaining property rights in the wealthy or aristocracy.

A stronger need for copyright protection presented itself upon the invention of the printing press in the fifteenth century. No longer was creating a copy a laborious, time-consuming task as it had been in the case of the monk and the psalter. Gutenberg's invention of a movable type printing press in 1456 enabled standardized copies to be cheaply and quickly made. The propriety or ownership of the printed materials produced by Gutenberg's invention lay with the owner of the printing press. Authors greatly outnumbered printing presses, and

economic power rested with the holders of the new technology. Authors relinquished all economic and moral rights in their works upon the sale of their work to the printer. Chartrand explains that the English Crown used the limitations created by the few number of printing presses to censor what was printed and distributed to the masses in order to protect the people from heretical or seditious materials (2000). In 1476, William Caxton set-up the first printing press in England near Westminster Abbey (Blake, 2003). In this same year, the first licensing law for printing was passed in England. This law required printers to inscribe their name, location, and the titles of the works they planned to print on a register. Carefully scrutinized by the monarch, the titles upon the register represented information that would be available to the public once printed. If titles were approved by the crown, the printer was issued a *copye* or permission to print for each work submitted for printing. This copye translated into a copyright upon publication in favor of the printer and not the author (Abrams, 1983). This power of the English monarchy to control printing led to the creation of printing monopolies such as the Stationer's Company and continued through the next two hundred years until the English Revolution in 1624. Previous to the revolution, Parliament tried to limit the power of monopolies that were benefitting the king and no one else with the passage of the Statute of Monopolies in 1624. The Act, unfortunately however, specifically exempted the largest printing monopoly, the Stationer's Company (Chartrand, 2000). Bettig traces similar paths of rights beginning with the appearance of the printing press in Italy and Germany (1996).

The English Revolution led to the beheading of King Charles I and the interregnum rule of Oliver Cromwell for the years 1625 – 1660. During this time period, Cromwell tightened the control of what was being printed by increasing the monopolization of the Stationer's Company and banning printing presses outside of London, Cambridge, and Oxford (Feather, 2006). Upon

the restoration of the monarchy in 1660, censorship through licensing and patent acts enabled the printing monopoly to continue. Not until public awareness increased with demands for a “free press” by Enlightenment writers such as John Locke did things begin change (Rose, 2003). Shirata in 1999, reported that John Locke, in support of the furtherance of science, had had much influence in the repeal of the licensing acts. In 1697, the last of the Licensing Acts expired, and the crown lost its ability to control what went to print. The Stationer’s Company and other printers continued business much as before with securing rights from authors upon the sale to the printer until 1710.

For the first time in the history of the world, a law worked to protect authors’ rights against acts of infringement. The Statute of Queen Anne, or more officially “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned,” was enacted with three objectives. First, the law prevented future printing monopolies; secondly, the law encompassed both England and Scotland; thirdly and most significantly for this topic, enactors of the law strove to encourage production and distribution of new works (Rose, 2003). While recognizing proprietary rights of distributors, the Statute of Queen Anne granted an exclusivity of rights in new works for a period of fourteen years with an option to renew for an additional fourteen years to the original copyright holder. Authors of works already in print but with rights not already transferred or assigned were entitled to twenty-one years protection with no right to renewal. The original copyright holder under the statute was the work’s creator in order to encourage “learned men to write and compose useful books” (Tallmo, 2006). According to Shalini, the balancing of rights, first addressed by the Statute of Queen Anne, between the creator of the work and the distributor of the work has continued into the digital age (2004).

Copyright began its evolution into the modern legal concept found today in the United States in the 1774 decision of *Donaldson v. Beckett* by the English House of Lords. In an 1879 article in *The Atlantic Monthly*, Arthur Sedgwick discusses the need to reform copyright in America. Sedgwick explains that originally copyright was a right infinitum granted to a work's creator under English common law. The Statute of Anne effectively stripped this right away and replaced it with a statutory right: "here we find an admitted right, said to have existed from time immemorial, swept away in the very act of protecting it. It is impossible to avoid the conclusion that literary property was, even by those who looked upon it with favor, regarded in 1774 as differing in many essential respects from other sorts of property" (Sedgwick, np). The Donaldson Court reaffirmed the opinion of a British Justice named Yates given in an earlier case, *Millar v. Taylor*, in which the legal concept of intellectual property as opposed to tangible real or personal property was introduced:

Property [is] founded on occupancy, how is possession to be taken, or any act of occupancy to be asserted, on mere intellectual ideas? All writers agree that no act of occupancy can be asserted on a bare idea of the mind. Some act of appropriation must be exerted to take the thing out of a state of being common, to denote the accession of a proprietor; for otherwise how should other persons be apprised they are not to use it? These are acts that must be exercised upon something. The occupancy of a thought would be a new kind of occupancy indeed ... [if he had not published the work] he might have excluded all the world from participating with him, or knowing the sentiments it contained; but by publishing the work the whole was laid open, -- every sentiment in it made public forever; and the author can never recall them to himself, -- never more confine them to himself, and keep them subject to his own dominion (Justice Yates, quoted by Sedgwick, 1879, np).

This case exemplifies how most legal concepts evolve. Much of American law is based on the opinions of similar English justices, who wrote their decisions hundreds of years ago. Later in his opinion, Yates compares the publication of a literary work to the letting loose of a wild animal – once the animal is loosed, it can no longer be owned. Sedgwick writes, "In the

copyright cases which have subsequently arisen we shall find his ideas, in one form another, continually recurring, and interfering with the adoption of what we are now accustomed to consider the natural view of the subject” (Sedgwick, 1879, np). Whether the Yates opinion is sound or not, the seeds of intellectual property law sprouted with his words.

Before the American Revolutionary War, attempts to regulate copyright in the American colonies were scant. Shirata reports that this lack of regulation was caused mainly by three factors: only a limited number of works were published in the Colonies compared to those published in Britain; authors in the colonies were frequently also the publisher or printer; there was little market competition among publishers because of the burgeoning American market, and publishers often supported only a particular segment of the market (1999). In response to a request by the Continental Congress in 1783, all but three of the new American States enacted trade-regulating or copyright laws similar to the Statute of Queen Anne (Chartrand, 2003). The Continental Congress viewed copyright as a suitable topic in its drafting of the Constitution: “The framers of the United States Constitution, suspicious of all monopolies to begin with, knew the history of the copyright as a tool of censorship and press control. They wanted to assure that copyright was not used as a means of oppression and censorship in the United States” (Loren, 1999). Accordingly, in 1788, upon ratification of the Constitution, Article I, Section 8, commonly known as the “Intellectual Property” or “Copyright Clause” states: “The Congress shall have power . . . To promote the progress of science . . . and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” (U.S. Constitution, 1787). The historical basis for this clause was the Statute of Queen Anne. Similar to the original English statute, Article I, Section 8 of the Constitution retains the English statute’s concepts of authors owning the copyright and that of a fixed term of protection.

In 1790, the First Congress enacted *The Copyright Act of 1790, An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies*. The title of the Act echoes that of the official title to the Statute of Queen Anne. Patterson writes that, in fact, the Copyright Act of 1790 is a copy of the English Act. When the United States Supreme Court decided its first copyright case, *Wheaton v. Peters*, the Court based its decision using the English copyright case of *Donaldson v. Beckett* as guiding precedent (Patterson, 1993). In *Wheaton v. Peters*, the U.S. Supreme Court held that there was no common right to copyright, that copyright was a privilege granted under statutory law and more particularly, the Copyright Act of 1790 (Patterson, 1993).

Significant to the language of the Copyright Act of 1790 is the purpose of the act as stated in its title, “An Act for the Encouragement of Learning . . . ” which evidences the recognition that academic and scientific endeavors should be balanced with protecting the proprietary interests of a work’s creator. Chartrand explains that this language represents the intent to benefit the people or users of the documents:

The importance of ‘learning’ led to the ‘Fair Use’ clause of the Copyright Act limiting the copyright monopoly even during its limited duration. In the simplest terms, this means: nonprofit copying is fair use. This provision allows public libraries, educational institutions and individuals to copy works without paying royalties to Proprietors and still avoid the charge of ‘copyright infringement’ (Chartrand, 2003, np).

Consequently, the retention of “learning” by the U.S. Congress in the Copyright Act established the basis for Fair Use exceptions to copyright upon which multitudes of users depend. This consideration for learning represents the first balancing of interests that includes the user.

The Copyright Act of 1790 did not provide protection equally. Under the Act, only American authors could receive copyrights. In 1891, the International Copyright Act, commonly

known as the “Chace Act,” extended copyright protection to non-American authors as long as the author’s country of origin recognized and respected American copyrights. Goldstein reports that due to the Act’s “Manufacturing Clause,” American printers benefitted under the Chace Act since works protected under this law had to be printed in the United States. Therefore, foreign authors could receive an American copyright if their country of origin recognized American copyrights and if the authors’ works were printed by American printers (Goldstein, 2003). Enacted in Berne, Switzerland in 1886, the Berne Convention for the Protection of Literary and Artistic Works, commonly known as the Berne Convention, represents an international agreement amongst member nations governing copyright. The United Kingdom signed the agreement in 1887, but did not comply with its provisions fully until 1988. The United States did not join the Berne Convention until 1989 (Goldstein, 2003). Many of the recent changes to American copyright law such as no longer needing to provide copyright notice, no longer needing to register a copyright, and protection term changes reflect the 1989 joining of the Berne Convention by the United States.

Copyright law in the United States has undergone many revisions. Major revisions occurred in 1831, 1870, 1909, and 1976. Originally, authors gained protection for a term of fourteen years with the option to renew for another fourteen. Presently, the term for works published since January 1, 1978 is seventy years after death of author, or for works of corporate authorship, the shorter of ninety-five years from publication, or 120 years from creation.

Laura Gasaway, Professor of Law at the University of North Carolina, has summarized the different terms of protection as dictated by current law in an online table, which can be accessed at <http://www.unc.edu/~uncclng/public-d.htm> (Gasaway, 2003). Time periods of copyright protection vary in the United States according to when the protected work was created.

Gasaway's table graphically presents terms of copyright duration that are dictated by Section 302 of Title Seventeen of the United States Code as revised through the years by various acts of legislation including the *Sonny Bono Copyright Term Extension Act* (CTEA) in 1998 (Pub. L. No. 105-298, 1998).

When the "Sonny Bono Copyright Term Extension Act" (CTEA) was enacted in January of 1998, actor/singer/mayor/congressman Sonny Bono was deceased. His widow and congressional successor, Mary Bono, was a fervent proponent of the bill. Lobbying in support of the bill was so intense on the part of the Walt Disney Company that the bill was nicknamed the "Mickey Mouse Protection Act" (Schwartz & Treanor, 2003).

The underlying goal of the CTEA, despite its Hollywood and Disney associations, is summarized in Section I of the Senate Report accompanying the Act.

The purpose of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. The bill accomplishes these goals by extending the current U.S. copyright term for an additional 20 years. Such an extension will provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve to benefit fully from the exploitation of their works. Moreover, by stimulating the creation of new works and providing enhanced economic incentives to preserve existing works, such an extension will enhance the long-term volume, vitality, and accessibility of the public domain (Sen. Rep., 1998).

The Sonny Bono Copyright Term Extension Act brought U.S. copyright protection terms in line with those established by the Berne Convention. Effectively, each existing time period was lengthened by twenty years. Although the U.S. did not become a member of the Berne Convention until 1988, revisions under the *U.S. Copyright Act of 1976* significantly complied with Berne Convention guidelines including copyright duration terms (Pub. Law 94-553, 1976).

In 1993, the Berne Convention extended term durations causing the necessity for Congressional consideration of the CTEA.

The Sonny Bono Copyright Term Extension Act has not been without critics or opponents. An internet publisher joined by various interest groups, including the American Association of Law Libraries, filed suit in federal court in 1999 to challenge the constitutionality of the CTEA. In *Eldred v. Ashcroft*, the petitioners claimed that successive revisions to the Copyright Act extending the duration of protection violated the framers' intent in drafting the Constitution's requirement of protection "for limited Times" (U.S. Constitution, 1788). In the 2003 decision of *Eldred v. Ashcroft*, the U.S. Supreme Court disagreed.

Changes to United States copyright laws create benefits and losses to different individuals and entities. While copyright holders usually desire to retain their rights as long as possible, other groups want works to fall into the public domain. Educators and libraries usually fall into this latter grouping.

In addition to the length of time that a work receives copyright protection, American copyright law has also changed what works are covered by copyright. Under current law, all works are covered from the moment of creation with no necessity for registration or copyright notice. The types of works has expanded from only books under the original Act of 1790, to include creative works in many formats including but not limited to films, live performances on film, digitized works, music, and computer programs. American copyright laws will assuredly continue to change as technology advances and copyright changes occur elsewhere in the world.

## **2.1.2 Mechanics of Copyright**

Copyrights, along with patents and trademarks, protect intellectual property or creations of the mind by granting certain exclusive rights to the property's creator. The current governing law for copyright in the United States is Title 17 of the United States Code starting with Section 101 and any applicable case law (17 USC 101, 2009). Title 17, Section 101 provides that the exclusive rights enjoyed by a work's creator include rights of copying, distribution, public performance, public display, and derivative works. Copyrights typically belong to the creator of the work but can be assigned or sold to others.

Beginning in 1978, copyright protection is automatic once the work is fixed in any tangible medium of expression. Although registration of copyrighted works is no longer necessary to achieve protection, registration must be done prior to filing a legal action for infringement. Certain works cannot be copyrighted. These include facts, titles, names, short phrases, and works in the public domain. Works in the public domain include non-protected works, works that have lost their copyright, abandoned works, works that have expired copyrights, and works produced by the Federal Government (Copyright Clearance Center, 2009).

## **2.1.3 Exceptions to Copyright**

**2.1.3.1 The Fair Use Doctrine** There are exceptions to copyright that allow a work to be used without permission from or compensation to the copyright holder. The most notable exception to copyright is the Fair Use exception, Section 107 of the Federal Copyright Law (17 USC 107, 2009). First codified by the Copyright Act of 1976, the Fair Use Doctrine supports the goals of the framers of the Constitution – the progress of science and the useful arts, learning, and

education. Fair use is a valuable exception for educational institutions, libraries, and the public (Copyright Advisory Network, 2009).

Uses of copyrighted materials permitted under a Fair Use analysis include criticism, comment, news reporting, teaching, scholarship, and research. These allowable uses are not without limitations. Limitations exist to both the amount of work used and to the period of time the work is used. Overall, a *fair* amount of the work for *fair* purposes and for a *fair* amount of time is permitted under the Fair Use doctrine. Section 107 does not clearly describe what constitutes an exception. Rather the doctrine sets forth four factors to be considered equally. These four factors to be used in a fair use analysis are: the character or purpose of the use (commercial or nonprofit), nature of the work (factual or fictional), amount of the work used compared to its total, and the impact that the use will have on the market for the work. Both the legislators who enacted the doctrine and the Courts that have interpreted the doctrine reference the characteristic of flexibility that requires a case-by-case analysis.

Prior to 1994, the United States Supreme Court did not look at all four of the stated factors of Section 107 equally (Fair Use, 2009). The Court's analyses began with the first factor of whether the purpose of the use of copyrighted materials was for profit or nonprofit reasons. If purposes were commercial, then the Court considered the use to be not allowable under the Fair Use exception, and the remaining three factors went without examination. This reasoning changed with the case of *Campbell v. Acuff-Rose Music* (510 U.S. 569, 1994). In this case, the rap group 2 Live Crew requested permission to use Ray Orbison's song, *Oh Pretty Woman*, for a parody. The copyright holder of the song, Acuff-Rose Music, denied the group's request. In spite of its inability to gain permission from the copyright holder, 2 Live Crew recorded and marketed the parody. When the case for copyright infringement filed by Acuff-Rose Music

reached the U.S. Supreme Court, the Court for the first time looked beyond the purpose of the use in doing a Fair Use analysis. Although the use was commercial, the Court ruled that all four factors must be considered equally on a case-by-case basis. In this instance, the Court found that the third factor's examination of the amount of the work used was reasonable since the nature of a parody required substantial use. Also, the market value of the original was not diminished by 2 Live Crew's parody since the markets for the two works differed. The Court reasoned that the more transformative the derivative, the less harm to the market for the original (Stanford, 2007).

Section 110(1) of the Copyright Act offers educators a more expansive exception than Fair Use. Educators may display or perform any work in the classroom as long as the work is related to the course's curriculum, regardless of the medium. "In the classroom," however, is key. When the classroom became remote, the exception practically disappears.

### **2.1.3.2 The TEACH Act**

*Intellectual property is a subtle and esoteric area of the law that evolves in response to technological change -- Bruce A. Lehman*

When advancements in technology enabled the conversion of analog information into digital information, copyright requirements changed. In 1998, the United States Congress attempted to bring the Copyright Act into the digital age. President Bill Clinton signed the Digital Millennium Copyright Act into law on October 28, 1998. Policy underlying the DMCA was to bring the United States into compliance with the World Intellectual Property Organization's Copyright Treaty, and its Performances and Phonograms Treaty in requiring that the circumvention of digital locks be prohibited under any circumstances, even if the intended use constituted fair use.

The Act succeeded, however, in doing little more than targeting unauthorized access to materials (Pub. L. No. 105-304, 1998). The Act failed to adequately address the changing views of unauthorized copying. The DMCA did grant some protections to libraries and institutions if they followed guidelines contained within the law such as posting copyright information on copying equipment. These protections addressed the institution's liability for misconduct of its clients in using the institution's technology. Section 1201 of the Copyright Act of 1976, the codification of the DMCA's prohibition against circumvention of technological protections of copyrighted material, continues to cause concern to libraries and their access to materials.

Congressional intent underlying the Digital Millennium Copyright Act (DMCA) was to address problems presented by new technology. Instead of clarification, the DMCA seemingly confused matters further. When the U.S. Copyright Office was directed to examine whether Section 1201 of the DMCA, the circumvention provision, hampers traditional copyright principles such as "Fair Use" and "First Sale," libraries offered their comments. The American Library Association, the American Association of Law Libraries, the Special Libraries Association, the Medical Library Association, and the Association of Research Libraries provided "modest proposals" since "more appropriately ambitious exemptions designed to address the growing imbalance between copyright holders and the public with respect to access to copyrighted works were rejected by the Register of Copyrights in the first rulemaking" (Library Associations, 2002, p.2). The collective libraries referred to terms that were ambiguous within the Act and voiced objection that civil and criminal penalties could be levied against actions made in reliance upon ambiguous law. The libraries stated their primary concern was "that technological access controls, both in conjunction with and apart from licensing terms, are being implemented in a manner that adversely and inappropriately impacts the ability of

individuals to make noninfringing uses of all classes of copyrighted works in digital media” (Library Associations, 2002, p.13).

Owners of copyrights lobbied for the restrictive terms found in Section 1201 based on a claim that nothing less could impede the increasing trend of digital piracy. The Electronic Frontier Foundation, however, continues to document cases in which the anti-circumvention provisions have been invoked to prosecute consumers, scientists, and legitimate competitors and not pirates (2009). The Foundation states that the DMCA threatens four public interests:

- The DMCA Chills Free Expression and Scientific Research. Experience with section 1201 demonstrates that it is being used to stifle free speech and scientific research. The lawsuit against *2600* magazine, threats against Princeton Professor Edward Felten’s team of researchers, and prosecution of Russian programmer Dmitry Sklyarov have chilled the legitimate activities of journalists, publishers, scientists, students, programmers, and members of the public.
- The DMCA Jeopardizes Fair Use. By banning all acts of circumvention, and all technologies and tools that can be used for circumvention, the DMCA grants to copyright owners the power to unilaterally eliminate the public’s fair use rights. Already, the movie industry’s use of encryption on DVDs has curtailed consumers’ ability to make legitimate, personal-use copies of movies they have purchased.
- The DMCA Impedes Competition and Innovation. Rather than focusing on pirates, some have wielded the DMCA to hinder legitimate competitors. For example, the DMCA has been used to block aftermarket competition in laser printer toner cartridges, garage door openers, and computer maintenance services. Similarly, Apple invoked the DMCA to chill RealNetworks’ efforts to sell music downloads to iPod owners.
- The DMCA Interferes with Computer Intrusion Laws. Further, the DMCA has been misused as a general-purpose prohibition on computer network access, a task for which it was not designed and to which it is ill-suited. As a result, a disgruntled employer has used the DMCA against a former contractor for simply connecting to the company’s computer system through a VPN (Electronic Frontier Foundation, 2009).

These effects contrast sharply with Congress’s stated intent of preserving a “Meaningful Exercise of Fair Use and Other Copyright Exceptions” and preventing piracy (Congressional Record, 1998). Commerce Committee Chairman Bliley stated during deliberations that this rule

is “a mechanism to ensure that libraries, universities and consumers generally [will] continue to be able to exercise their fair use rights and other exceptions that have ensured access to works” (Congressional Record, 1998). In reviewing these critiques, a question arises as to whether academic librarians, while accessing digitized resources, are obligated to follow copyright provisions that are ambiguous and serve commercial interests to a greater and better degree than the interests of libraries, universities, and consumers, which the law was enacted to preserve.

On November 2, 2002, President George W. Bush signed Section 110(2) of the Copyright Act known as the Technology, Education, and Copyright Harmonization Act of 2002 (the TEACH Act) into law. This act extended copyright exceptions beyond face-to-face classroom teaching. In Section 403 of the Digital Millennium Copyright Act of 1998 (DMCA), Congress charged the U.S. Copyright Office with the responsibility of studying the issue of applying copyright law to distance learning and then reporting its recommendations to Congress. On May 25, 1999, the Register of Copyrights of the United States of America presented to the Speaker of the House of Representatives the Copyright Office’s Report on Copyright and Digital Distance Education. Congress drafted the TEACH Act with consideration of the findings and recommendations found in this report. The Senate passed its version of the TEACH Act (Senate Bill 487) on June 7, 2001, with revisions based on recommendations of various stakeholders (ALA, 2009). The bill passed in the Senate with the support of “both the higher education community and the content community” (ALA, 2009).

The TEACH Act is a law of benefits and conditions. While the TEACH Act extends many of the copyright exceptions previously permitted in face to face classrooms to distance learning, it does not extend all exceptions. The Act allows the display or performance of most works but in limited amounts. Previously, transmissions could be viewed synchronously from

closed caption televisions, now transmissions can be viewed asynchronously from any locations. Analog materials may be digitized if such works are not otherwise available in a digitized format. Materials may be stored and accessed for limited time periods.

The TEACH Act requires compliance on an institutional level with its provisions. The Act applies only to a government body or an accredited nonprofit education institution. Both the faculty and the institution now have compliance duties whereas copyright compliance was previously mostly the responsibility of the faculty member using copyrighted works (Crews, 2002). Faculty must mediate the course, meaning for example, that someone other than the registered course instructor may post materials to a course website or otherwise transmit materials, but the registered instructor must act in the role of an administrator and be responsible for what goes online. Transmission of digitized materials must be limited by technology to the students registered in the course. Notice must be given to students that materials may be subject to copyright protection. Additional compliance requirements relate to technological controls that limit the time that materials are available and not interfering with any other rights management technological controls already in place. The institution must have TEACH Act compliance policies documented, and the institution must be abiding by them. Good intentions are not a defense to noncompliance. The institution must make informational materials regarding copyright available to faculty, staff, and students. These materials must include guidelines for faculty regarding the use of copyrighted materials in a digital setting (17 USC 101, 2007).

Both the TEACH Act and the Fair Use Doctrine offer exceptions to copyright. If an institution elects to avail itself of the benefits offered under the TEACH Act, the institution may still rely upon Fair Use exceptions. Senate Report 107-31 accompanying the TEACH Act states, “Critical . . . is the continued availability of the fair use doctrine. Nothing in this Act is intended

to limit or otherwise to alter the scope of the fair use doctrine.” Consequently, if an exception is not found to copyright under the TEACH Act, a Fair Use analysis can still be applied.

#### **2.1.4 Digital Rights and Academic Environments**

While classroom learning resources have remained fairly consistent – lectures, books, sound recordings, slides, videos, and other media -- the environment of the classroom has changed. Tam and Robertson report that developments in electronic information resources and advent of digitization have created new challenges for academic libraries (2002). Academic environments utilize integrations of multi-media formats with storage, retrieval, and duplication capabilities. Abilities to store, retrieve, and duplicate copyrighted information present new copyright questions. The use of easily available, online images raises questions as to how much and how often is allowed. Digital transmissions of classroom lectures with inclusions of copyrighted materials present problems for distance learning. In examining changing academic environments, Crew writes, “The need for a full appraisal of copyright law, fair use, and their relationship to higher education could never be more clear” (Crew, 1993, p.xi). Eighteen years after Crew wrote this opinion, how legislators, courts, and information users are responding to questions caused by changing technologies used to deliver course materials and lectures remains in a state of evolution.

Beginning in September 1994, a diverse group of ninety-three organizations representing all sides of copyright issues formed the Working Group on Intellectual Property Rights in the Electronic Environment as part of the Clinton Administration's National Information Infrastructure Initiative. The group sponsored the Conference on Fair Use (CONFU) with goals of developing working guidelines for fair use and subdivided into the following groups: distance

learning, multimedia, electronic reserves, interlibrary loans, and image collections. After two and a half years of study and negotiation, the groups failed to come to any consensus. Not all viewed the group's efforts as a failure:

In the view of many participants, the disagreements at CONFU meetings deserve to be cherished. Many believe the technology is not mature enough for agreement about fair use guidelines. They shy away from making legal commitments before they really understand the implications of what they agree to, and at this writing it appears that the process of reaching adequate voluntary electronic fair use agreements will take a long time (Okerson, 1999).

In October of 1996, the CONFU subgroups presented drafts of proposed guidelines. Compiled as a result of both the CONFU process and previous work completed by the Consortium of College and University Media Centers, the *Fair Use Guidelines for Educational Multimedia* garners the most confidence for use. The electronic reserve group and the interlibrary loan group failed to come to any agreement on guidelines. The groups produced fair use guidelines for distance learning and images but the status of these two compilations is unclear. The Copyright Office's *Report on Copyright and Digital Distance Education* submitted to Congress in 1999 included the CONFU *Fair Use Guidelines for Educational Multimedia* in its appendices. Also included in the appendices is the CONFU *Proposal for Educational Fair Use Guidelines for Distance Learning*.

Guidelines are not laws and are thereby not legally enforceable. Guidelines can, however, be looked to for guidance. Just as an application of the Fair Use doctrine of the Copyright Act is unclear and undefined because such an application involves a case by case application and interpretation, choosing to apply CONFU guidelines is unclear and undefined because a choice between using or not using the guidelines is a matter of individual judgment. Crews states that the guidelines are illusory:

...in fact the guidelines bear little relationship, if any, to the law of fair use...the process of developing the guidelines gives them the appearance of a normative quality, while the portrayal of the guidelines as formal standards sanctioned by authoritative structures gives them the appearance of positive law. These qualities are merely illusory, and consequently the guidelines have had a seriously detrimental effect. They interfere with an actual understanding of the law and erode confidence in the law as created by Congress and the courts (2001, p.599).

What lacks with regard to the guidelines is any applicable case law. For application of the fair use exception to copyright, how the U.S. Supreme Court determined cases involving the doctrine is important. Use of the guidelines may restrict the full flexibility of a fair use analysis or application of the TEACH Act (Crews, 2001).

For multimedia purposes, the CONFU guidelines seem helpful. The CONFU guidelines apply only to uses by nonprofit educational institutions of lawfully gained copyrighted materials that are intended for educational purposes only. The guidelines require the inclusion of a notice at the start of any presentation or project that states that copyrighted materials are included under the Fair Use exemption of U.S. Copyright Law, that the materials have been prepared according to the Multimedia Fair Use Guidelines, and that the materials are restricted from further use. Each instance of the use of copyrighted materials must appear with full bibliographic information and a copyright notation.

Under the CONFU guidelines for multimedia, an educational institution's faculty members are permitted to use materials for face-to-face classroom instruction, for assigned, directed self-study for students, and for distance learning, provided that transmission of the materials is over the institution's secure network. Drafted in 1999, the guidelines require transmissions to be synchronous or in real time. Materials can be stored for after-class review or directed self-study as long as there are controls for access and duplication. If duplication cannot be prevented, then materials can be available over the network for fifteen days only.

For teaching purposes, the guidelines advise that materials be used for two years only, and then permission from the copyright holder must be obtained. Limitations as to amounts of works used relative to the whole are: the less of 10% or 1000 words of text, no more than five images by the same artist or photographer and the less of 10% or fifteen images from a published collective work, and the less of 10% or 2500 fields or cell entries for data sets. Materials are also limited as to distribution and copying. Two copies may be made, only one of which may be placed on reserve.

Copyright considerations also apply to eReserves. If materials are available on an electronic database subscribed to by the University, and use of the materials on eReserves is not prohibited under the licensing agreement, then no additional analysis or permission is required. A full bibliographic citation should appear on the first page of every document, and the DMCA requires that a copyright notice accompany the citation. No provisions of the TEACH Act apply to eReserves (Lipinski, 2005).

Prior to the convening of the Conference on Fair Use in 1994 as part of the Clinton Administration's National Information Infrastructure Initiative, a CONFU process also surrounded the revision of the Copyright Act in 1976. Similar to the later CONFU process, failures to find common grounds prevented the production of many guidelines. What did emerge from this process was the *1976 Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals* (1976 *Guidelines for Classroom Use*), which was included in the House Report accompanying the Copyright Act of 1976. This set of guidelines applies to copyrighted works used in the classroom and placed on reserve. Although the guidelines are not legally binding, their stated purpose is "to state the minimum and not the maximum standards of educational fair use under section 107."

Basic to the 1976 *Guidelines for Classroom Use* along with *United States Copyright Office (1976) Circular 21: Reproduction of Copyrighted Works by Educators and Librarians* as the publications pertain to classroom reserves, is that the amount allowed to be copied is limited. For text, either a complete article, story or essay of less than 2,500 words, or an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words can be used. For images, one image can be used per book or per periodical issue. Circular 21 provides that the use of copyrighted works is cumulative per course per semester. Copies of copyrighted works are for one course only within the school; not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term; and not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term. Circular 21 also forbids the same faculty member from copying the same materials from term to term.

In response to uncertainties concerning the TEACH Act, the American Library Association's Office for Information Technology Policy, the Association of Research Libraries, the Medical Library Association, and the American Association of Law Libraries endorsed the "Statement on Fair Use and Electronic Reserves," which was issued in November of 2003 (ACRL, 2003). With regard to e-reserves, the document explains how librarians can apply a fair use analysis using the four prongs of intended use, nature of the work to be used, the amount used, and the effect on the market for or the value of the work (ACRL, 2003).

Increasingly, copyrighted works are provided in an educational setting through electronic databases accessed through licensing agreements. Licensing agreements are contracts between

the institution and the information provider. As agreements, their terms often are negotiable. Rights under licensing can be more expansive than under a copyright analysis or more restrictive. If copyrighted documents are found on electronic databases licensed for use by an educational institution, then linking to these documents for course use requires no further permission or copyright analysis. Section 108(f)(4) of the Copyright Act states “any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections is not affected by federal copyright law.”

Property rights that specifically can be addressed by licensing agreements between the educational institution and the information provider include: length of time materials are available, storage and archival rights, reproduction and downloading, interlibrary loan rights and other redistribution of documents, prohibitions against commercial use of documents, and distance learning access. Any use restrictions or permissions found in the licensing agreement control the use of the copyrighted material regardless of any possible exceptions to copyright.

As the written word becomes increasingly digitized, libraries concomitantly lose control over rights of dissemination. When mainstream materials that are now possessed in physical form by a library become digitized, the library becomes subject to contractual conditions. Libraries have long enjoyed the advantages of the “First Sale” doctrine, which allows the legal purchaser of a copyrighted work to “sell or otherwise dispose” of the work (Section 109(a)). If a book becomes licensed instead of sold, the doctrine of First Sale becomes inapplicable. Although a consumer owns a physical storage medium such as a compact disc when he/she buys software, the consumer technically only owns a license to use the software and not the work itself. Copyright owners accomplish licensing through non-negotiable “shrinkwrap” or “clickwrap” agreements. Since there is no sale of content, there is no “First Sale.”

### **2.1.5 Permissions and Institutional Policies**

If a faculty member wants to use copyrighted materials as part of the course's offerings and no exception to copyright is found, such as under a fair use analysis or the TEACH Act, and the educational institution has no pre-existing rights to the materials under a licensing agreement, then permission can be requested from the copyright holder to use the materials (Copyright, 2009). Permissions may also be required when a faculty member wants to use copyrighted works for an extended period of time.

Each educational institution may have a copyright policy in place. Such policies often address the ownership of intellectual properties created by faculty or students of the institution. Less frequently, policies may address the responsibility of faculty and students in using copyrighted materials. Since the enactment of the TEACH Act in late 2002, institutions must have a compliance program in place if the institution chooses to avail itself of the advantages of the TEACH Act. These institutions are likely to have detailed information available to their information users regarding copyright.

### **2.1.6 Copyright and Distance Learning**

Distance learning allows a student to receive instruction while being separated from the instructor by place and time through means of technology. These electronic transmissions can be accomplished through Internet, cable, and satellite connections. Greenberg defined distance learning as “a planned teaching/learning experience that uses a wide spectrum of technologies to reach learners at a distance and is designed to encourage learner interaction and certification of learning” (1998, p. 36). The U.S. Department of Education reports that the use of distance

education by post-secondary educational institutions has steadily increased since the mid-1990s (National Center for Education Statistics, 1999). Distance learning enables more people to take more courses. The flexibility of online courses directly benefits those with children and no care alternatives, those with jobs, those who are located at a distance from the educational source, and those whose disabilities make attendance at classes inconvenient or difficult. In addition to the advantages of online courses for those who cannot easily attend traditional classrooms, researchers believe that the ability to make web-based courses interactive may provide benefits to different types of learners (Newman & Scurry, 2004). Although not all students are well suited for distance learning (Valentine, 2002), distance learning is here to stay. King states that no longer is there a question of whether students should engage in distance learning, but that the time has come to address the issues, problems, and controversies facing distance learning (2009).

If the goal of institutions is “to provide an educational opportunity equal to that provided in traditional classroom teaching” (Harry, John, & Keegan, 1993, 41), then instructors need to be able to use the same content and same media in their web-based applications that they employ in their face-to-face classrooms. Congress acknowledged the need of providing rules or guidelines for online courses in 1998 when it enacted the Digital Millennium Copyright Act by charging the U.S. Copyright Office with the responsibility of studying the issue of applying copyright law to distance learning. The Copyright Office reported to Congress, “discussions came to an end without conclusion in the midst of the controversy about the advisability of guidelines in general” (Copyright Office, 1999, p.119). In 2002, Congress again addressed the need of educational institutions in providing online courses by enacting the TEACH Act. The Act, however, fails to provide rules and guidelines.

The intent of the framers of the U.S. Constitution must be remembered. In Article I, Section 8, the Constitution states, “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” The granting of a copyright coupled with statutory exceptions to copyright is a balancing process between the promotions of education and research and the interests of creators in their works. What differentiates distance learning from traditional, face-to-face classrooms and creates new copyright concerns are the storage, replication, and distribution abilities enabled by distance learning’s digital environment.

Although the U.S. Supreme Court ruled in *Campbell v. Acuff-Rose Music*, that all four factors of a fair use analysis are to be considered, the Court in later cases seems to place the most weight on the fourth factor of harm to the market for the copyrighted work. The technological abilities involved in electronic transmissions to store, replicate, and distribute represent potential harm to markets. These risks are addressed by Congress in the TEACH Act by limiting the amount of, the storage of, and access to copyrighted materials. These limitations work, however, to make a face-to-face classroom presentation different than that which is accessed electronically. For example in the classroom, the instructor may display an image found on the compact disc that accompanies the course text; on a course web, the instructor may not do so. Instead the instructor must depend on the student to react to a cue to look at the image on the student’s own disc. Although the market protections may be understandable, such protections work to make the online course environment not equal to the classroom and not as efficient as it could be. Other case law has been established regarding copyright in recent years, most particularly regarding the non-circumvention language of the DMCA. Case law based on actions of copyright infringement in academics historically has been scarce. Kwall explains that this

paucity is a function of the fact that works produced by academes traditionally do not generate much income (2001).

If an educational institution chooses not to implement TEACH Act compliance, a web-based course instructor may apply a fair use analysis to determine if a possible exception to copyright exists, seek permission from the copyright holder, or pay for licensing. In its report to Congress, the U.S. Copyright Office stated that the difficulty of obtaining licensing for certain content for online course use was a factor in seeking statutory reform leading to the enactment of the TEACH Act (Copyright Office, 1999, p.157). In the same report, the Copyright Office also stated that licensing charges for digital uses are often higher than those for analog uses and may be unaffordable for nonprofit educational institutions (Copyright Office, 1999, p.43). Also important are the time required to seek licensing and the inflexibility that results from having to secure licensing beforehand.

A possible stumbling block in the path of greater online course freedom through the use of the TEACH Act is the question of what technological controls must be in place. The statute requires not only that unauthorized access be prevented but also that controls be in place that can reasonably prevent unauthorized dissemination and retention of the copyrighted materials. Whether technology now exists that can effectively block unauthorized downloading and copying is questionable (Crews 2006, p 70). In addition to this question, institutions may fear the cost of the implementation of such technology (Carnevale 2003, p. 29). What Kenneth Crews wrote in 1993 remains valid:

Educators must also lessen their insistence on “answers” to all copyright questions. Their demand for specifics led to the meticulous and ultimately unrealistic Classroom Guidelines. Sometimes the questions are better left unanswered, or perhaps the best answers might be only general principles of law and practice. The ALA Model Policy, for example, allows “selective and sparing” copying for classroom distribution. That vagueness

begs further questions, but it liberates the university from exacting and inflexible parameters. Precise answers are only a short-run solution. They do not respond to unpredictable future needs, and they do not preserve the fluidity of fair use that Congress intended (1993, p.134).

In 2006, Allen and Seaman reported that ninety-six percent of the largest American colleges and universities are utilizing web-cast electronic delivery of course materials in face-to-face classroom settings, distance learning programs, or complete academic programs in which students never attend a physical campus. In an examination of online courses, the Sloan Commission found:

- Eighty-one percent of all institutions of higher education offer at least one fully online or blended course.
- Complete online degree programs are offered by 34 percent of the institutions.
- Among public institutions, the numbers are even more compelling, with 97 percent offering at least one online or blended course and 49 percent offering an online degree program.
- Perhaps most telling, when asked about the role of online education for the future of their institution, 67 percent answered that it is a critical long-term strategy for their institution.
- Over 1.6 million students took at least one online course during Fall 2002.
- Over one-third of these students (578,000) took all of their courses online.
- Among all U.S. higher education students in Fall 2002, 11 percent took at least one online course.
- Among those students at institutions where online courses were offered, 13 percent took at least one online course.
- The number of students taking at least one online course is projected to increase by 19.8 percent over the one-year period from Fall 2002 to Fall 2003, to include a total of 1.9 million students (Sloan, 2003).

A comparison of enrollment in online courses and the percent of total enrollment in degree-granting post-secondary institutions shows a steady increase from 9.6 percent in 2002 to 21.9 percent in 2007 (Allen & Seaman, 2008). The future of delivering academic course content, whether partially or completely, by institutions of higher learning looks secure.

### **2.1.7 Electronic Delivery of Resources**

The technological ability to deliver course materials electronically has created new opportunities for academic institutions, their faculties, and students while creating new abilities and responsibilities for academic libraries and librarians. Since an academic institution is no longer “a black box where well-qualified faculty and staff and a certain number of library books magically turn out fit and educated college graduates” (Abbott, 1994, p.82), the roles of those within the institution have changed concurrently with the changes occurring to the institution itself. The electronic delivery of course materials has affected libraries, librarians, and their services. Focusing on the needs of certain groups of distance learners such as those who are disabled, Burgstahler submits that distance learning can enable academic libraries to provide access to the libraries’ electronic resources to all students (2002). Balancing the advantages that technology can offer library service with restraints of copyright is in keeping with the American Library Association’s Code of Ethics, while striving to provide library users with the highest level of service possible, librarians should “respect intellectual property rights and advocate balance between the interests of information users and rights holder” (ALA, 2009).

In researching the role of digital libraries to e-learning programs, Sharifabadi confirms the value of both the library and librarians to e-learning (2006). Whether academic librarians are characterized as “intellectual middlemen” (Barzun, 1993, 198), or the “research colleague” as proposed by Crowley (2001, 580), academic librarians play an integral part in the acquisition, organization, and dissemination of electronic information and resources. Crowley quotes Brown and Duquid’s statement in regard to the role of academic librarians: “when information takes center stage and lights dim on the periphery, it’s easy to forget these necessary intermediaries. But while these may be invisible, they are not inconsequential” (Crowley, 2001, p.565, quoting

Brown and Duquid, 2000, p.5). Although Crowley acknowledges that librarians may be at first pleased to have their roles viewed as “not inconsequential,” Crowley asserts that academic librarians should be viewed within the institution as “central, visible, and consequential” (p.567), and that this role should continue into the future with their involvement in providing digital resource materials. In his article “Planning for Distance Education: Support Services and the Librarian’s Role,” Hufford states that a significant factor in the success of a distance learning course is the ease with which the students can conduct the library research related to their assignments (2001). The goals of comprehensive library support for distance education include: reference services, information literacy instruction, and document delivery services (Hufford, 2001).

Both the growth and complexities of distance education programs have increased the necessity for innovative library services (Crews, 2002). In their roles of acquiring, accessing, managing, and disseminating information, librarians find many responsibilities and opportunities created by digital delivery. Crews identifies the following new opportunities:

- Librarians may participate in the development of copyright policy, including policies on fair use that long have been of central importance to library services.
- Librarians may take the lead in preparing and gathering copyright information materials for the university community. Those materials may range from a collection of books to an innovative website linking materials of direct relevance.
- Librarians may retain in the library collections copies of distance-education transmissions that the institution may make and hold consistent with the law. In turn, the librarians will need to develop collection policies, usage guidelines, and retention standards consistent with limits in the law.
- Many materials used in distance education will come from the library collections, and librarians may be called upon to locate and deliver to educators proper materials to include in the transmissions. Librarians may need to evaluate materials based on the allowable content limits under the law.
- Librarians often negotiate the licenses for acquisition of many materials. To the extent that the law imposes undesirable restrictions, the librarians are in a position to negotiate necessary terms of use at the time of making the acquisition.
- Librarians have many opportunities for offering alternative access to content that cannot be included lawfully in the distance education programming. When

materials may not be lawfully scanned and uploaded, the library may respond with expanded reserve services, or enhanced database access, or simply purchasing alternative formats or multiple copies of needed works.

- Librarians long have recognized the importance of fair use and often have the best grasp of the doctrine. Librarians are usually best positioned to interpret and apply fair use to situations and needs not encompassed by the rigorous details of the TEACH Act.
- Librarians may research and track developments related to the TEACH Act, including policies, information resources, and operating procedures implemented at other educational institutions. That effort can allow one university to learn from others, in order to explore the meaning of the law and to consider options for compliance (Crews, 2002).

In addition to the opportunities suggested by Crew for the involvement of librarians in distance education, Jill Marksgraf suggests “lurking” (2004). She suggests that a librarian’s waiting in the background or lurking for a reference need to arise will provide better service to students taking online courses through Blackboard and Distance2Learn. One mentioned downside to this approach is time consumption (Marksgraf, 2004). Librarians may have to be more creative or proactive for online courses or distance education courses. For example, faculty members are less likely to be familiar with electronic resources than in-print resources; and consequently, rely more upon the help of librarians (Ghandi, 2003). Whether it is developing copyright policies or providing more traditional services such as reference, academic librarians have roles within the provision of online courses and distance education by colleges and universities.

The electronic delivery of course materials has given rise to new copyright questions. Janis H. Bruwelheide, an education professor at Montana State University, states that educators are unsure about how copyright laws apply to distance education (1998). Within the environment of an academic library, an examination of the effect of distance education on library services identified issues concerning copyright as a factor in the functioning of the library (Budd, 1998). The Interinstitutional Library Council listed the following as considerations in planning a

distance learning program: availability of resources and technology, copyright issues, and the training of faculty, librarians, and students (1995). Hoerman and Furniss discuss the importance of Library and Information Science programs including courses to prepare future librarians for their roles in the provision of distance education (2001). Ghandi identifies the following as necessary for a successful online program or e-reserves:

Librarians also need to acquire a clear understanding of the Technology Education and Copyright Harmonization (TEACH) Act, Digital Millennium Copyright Act, Conference on Fair Use (CONFU) guidelines, and other copyright laws pertaining to electronic reserves and distance education. In short, academic librarians have a good grasp of copyright and intellectual property issues and understand the nuances of fair use exemptions applicable to e-reserves. The principal challenge for librarians lies in helping faculty understand these issues. Librarians have the opportunity to educate faculty about copyright regulations through concerted copyright awareness programs consisting of orientation sessions, tutorials, dedicated Web pages, and how-to guides.<sup>[sup74]</sup> Librarians can also guide faculty about the kinds of materials that can or cannot be placed on e-reserve, assist faculty in acquiring the materials they want to place on e-reserve, obtain permissions, negotiate licenses for electronic resources to permit e-reserves, digitize or scan articles, and archive copies of materials to be used *in* more than one semester (Ghandi, 2003, p.11).

In addition to the complexities of the TEACH Act and Fair Use, copyright law is not stagnant. Case law may change interpretations. American provisions will likely change as international treaties addressing copyright to which the United States is a signatory change (Ferullo, 2004). If academic librarians need to have a clear understanding in order to function in their roles in the provision of electronic resources, then librarians require familiarity with the intricacies and changing environment of copyright law. Ferullo states that in many colleges and universities, the institution has not implemented clear-cut copyright policies; and consequently, many librarians are reluctant to “undertake the risk of liability for having their university sued for copyright infringement” (2004, p.35). If librarians are afraid to make a decision regarding copyright

because of lack of knowledge or lack of an understandable university policy, then librarians are probably not rendering the best quality services. On the other end of the spectrum, if some librarians are afraid of liability because of non-understanding, the possibility exists that there are those who may go ahead regardless of their lack of understanding and consequently expose their institutions to liability.

The legalities and restrictions placed on digitized materials may be at odds with the traditions of librarianship. Librarians throughout history have been advocates of free access to information. While academic librarians respect intellectual property rights, their goal of meeting the information needs of resource users often requires distribution as non-restricted as possible. Publishing and distribution entities have striven, rightfully to a certain extent, to protect copyrighted material from unauthorized access. Although guarding against piracy is an understandable goal, digital rights management or “DRM” may perhaps be better termed “digital restrictions management” (Witten, 2004, np), since in effect, commercial interests have created a “private governance system in which computer systems regulate which acts users are and are not authorized to perform” (Samuelson, 2000). Digitization has enabled the world to share resources. At the same time that technology is enabling greater access through such programs as inter-library loans, intellectual property owners are including technologies in their works in order to restrict these capabilities. Scholars such as Ian Witten at the University of Waikato in New Zealand have called for the universal access that digitization abilities have made possible. After stating, “Intellectual property issues are a central driving force behind the market in information of which libraries are a part” (2004, p.3), Witten continues: “digital library technology can and should be available to everyone, on all platforms, in all countries; and it can and should enable ordinary people to exercise their creative powers to conceive, assemble, build, and disseminate

new information collections that are designed not just for western academics but for a wide diversity of different audiences throughout the world” (2004, p.4). As the demand for worldwide sharing of resources reaches librarians, librarians have the dilemma of respecting intellectual rights while wanting and needing to provide information.

Librarians have opinions regarding the TEACH Act. Librarians converged on Washington, D.C. in order to meet with their representatives in Congress to discuss issues pertaining to libraries in 2002 during the 28th annual National Library Legislative Day sponsored by the American Library Association. One area the librarians were asked to focus on was the TEACH Act and other copyright issues (Wise, 2002). Duane Webster, then the Executive Director of the Association of Research Libraries, in a 2002 speech, aptly summarized the practical realities of present copyright laws and their effects upon academic librarians. He stated that librarians find themselves in the “crossfire” between publishers gaining more control over digital sources and users who want easy access to digital sources (Webster, 2002). New models of publishing, complex legal changes, and the need to make resources affordable are also concerns. In regard to copyright, Webster stated: “We may well be heading toward a period when copyright laws are so complex that they will be overlooked or simplified by these confused users” (2002, p.2). Just as Lipinski cautions, distance education programs must evolve with deference to copyright laws and its exceptions (2002). Copyright reform is needed (Deazley, 2003). Copyright will continue to evolve and change, especially in areas as unsettled as multimedia works, and in areas as misunderstood but nevertheless widely used as provisions regarding distance education. As technology changes, copyright changes (Ogden, 2003). Revisions and reinterpretations can occur through legislation, judicial decisions, administrative interpretations in the form of guidelines, and even in the form of the establishment of accepted practices

amongst academic institutions. Schuler states: “academic libraries (and libraries in general) have got to begin to ask themselves if their copyright and fair use understandings, largely forged during the latter half of the nineteenth century, need to be reconsidered in radical new ways” (2003, p.50). Additionally, he asks: “Have we limited the Internet’s expansiveness, as well as its potential to be a tool of mass education, to further enhance information economic self interests that already enjoy a considerable amount of protection from the government?” (Schuler, 2003, p.50). Urs suggests that copyright laws need to be revised with an adjustment of the traditional balances in favor of scholarly publishing, which differs from creative works since scholarly works are usually fact-based, often funded by the public, and are part of the intellectual heritage of academic institutions (Urs, 2004).

Library and information science literature evidences librarians’ views of the TEACH Act and acknowledges the burden of the Act’s compliance requirements. Simpson reports that unlike prior copyright compliance, institutional compliance under the TEACH Act must be an orchestrated effort of the institution’s policymakers, course instructors and developers, and information technology staff (2005). In his positively entitled article “Why the Technology, Education and Copyright Harmonization Act Matters to Librarians: Two Cheers for the TEACH Act,” Carter describes the value of and need for the Act’s guidelines and states that it is important for librarians to understand the TEACH Act and its applications (2007). Library and information science literature also provides practical advice relating to the TEACH Act. In agreement with U.S. Supreme Court cases, Seadle points out that each copyright determination is unique. Although each use of copyrighted material must be looked at individually, a discussion of each decision can lead to the establishment of good practices that will support determinations in similar cases (Seadle, 2006). After reviewing the history of copyright changes and the

requirements of the TEACH Act, Alinor states the importance of educating library personnel about copyright law (2004). Other writers such as Ferullo also strongly support the education of librarians about copyright law in order to make informed decisions (2004).

In their 2007 study, Shachaf and Rubenstein first describe the present state of copyright as a war between the creators of information and the users of information. Although the role that librarians should play in this war remains undetermined, the researchers report that whatever the role, “they should follow their ethical guidelines and comply with copyright laws” (Shachaf and Rubenstein, 2007, p.94). In their comparative analysis of library compliance with copyright laws and ethical guidelines in Israel, Russia, and the United States, the authors examined differences and similarities in attitudes relating to copyright in academic libraries. Their findings included that the American libraries seemed more proactive toward copyright and ethically concerned. Furthermore, the researchers reported that vagueness in American copyright law, especially in the Fair Use provisions; contribute to differences among libraries (Shachaf and Rubenstein, 2007). This research evidences attitudes of American academic librarians toward copyright as involved, concerned, and ethically minded.

The TEACH Act has its critics in the literature. In *A Tough Act to Follow*, the complexities of the Act are highlighted (Russell, 2003). John Shuler in *The Journal of Academic Librarianship* describes the increased burdens placed on institutions by the TEACH Act. He then relates how the Act may work to negatively impact the rights of individuals to read and exchange information while protecting economic interests in information (Shuler, 2003). Although the TEACH Act provides exceptions to copyright, its restrictions and requirements create confusion and criticism.

Frustration in not being able to provide digital resources that are either requested or already being used in a face-to-face classroom may be a problem for today's academic librarians. After stating that the TEACH Act is a "dramatic departure in the construction of copyright, especially with respect to the rights of educational users," Lipinski asserts that distance educators and their students retain their status as a "lesser citizen" (2002, p.370). Non-traditional classroom students are therefore less likely to be able to receive equal access to resources as traditional classroom students. Lipinski predicts that the increased compliance duties will likely fall to librarians (2002). Due to the complexities of the TEACH Act:

an intellectual and administrative gasp of exasperation may occur whereby the access and source of the copyrighted material intended for course use may simply be shifted to the library forcing it to serve as the centralized clearinghouse of digital access to all educationally related copyrighted material. This might result in less material available to the educators and their charges as some library decisions may be made with a tendency to error on the side of copyright caution (Lipinski, 2002, p.371).

If librarians error on the side of copyright caution, then in order to provide access to the materials that are requested, librarians may obtain these materials through licensing agreements. If the materials could have been made available under the TEACH Act without a licensing agreement, then the institution and library are subjecting themselves to increased expense for no reason (Harris, 2002). Duane Webster, Executive Director of the Association of Research Libraries stated: "contractual licenses are supplanting copyright laws, with content owners mandating more restrictions on who uses resources and how these resources may be used" (2004). Understanding the TEACH Act and choosing in cooperation with the institution to comply with its provisions, may save the library and institution financial resources by avoiding unnecessary licensing fees.

The users of academic libraries unquestionably could benefit from the provision of open information sources of all formats, easily and efficiently accessed all over the world. Ideally, these sources would also be preserved for all time. Marcum reports this is the vision of DODL (Distributed Open Digital Library), a collaborative digital library being formed by the Digital Library Federation, and the NDIIPP (National Digital Information Infrastructure and Preservation Program), a program of the Library of Congress, which aims to preserve digital collections (2004). This utopian vision of global digitized access and preservation cannot happen within the confines of current copyright law. Global library access must first be reconciled with intellectual property rights (Marcum, 2004). Technology seems to be tipping the historical balance of copyright in the favor of copyright owners. This is opposition to the equally historical goal of promoting science and education.

Librarians can make a difference. Nisbet reports that legislators have told her, more than once, that if librarians are against something, then they are also (Nisbet, 2003). For example, in 1999, libraries were instrumental in opposing UCITA, the Uniform Computer Information Transaction Act, a model law for states that would regulate software licenses and database access transactions (Nisbet, 2003). As discussed previously, library associations have contributed opinions regarding copyright reform to the U.S. Copyright Office, thereby influencing copyright legislation.

## 2.2 LITERATURE ON THE RESEARCH METHODS

In a 2001 article, Pettigrew and McKechnie report that in the 1,160 information science articles they reviewed, only 34.1 percent of the articles mentioned the use of research theory. Although the authors cited Hjørland in noting a shortage of theories in information science research, they noted that the use of theory is on the rise (Pettigrew and McKechnie, 2001, p.62, citing Hjørland, 1998, p.607). They further report that seventy-one researchers created their own theory while the remainder used pre-existing theories mostly from the social sciences (Pettigrew and McKechnie, 2001). According to Creswell, a proposal to do research “involves the intersection of philosophy, strategies of inquiry, and specific methods” (2009, p.5). He presents four worldviews of research philosophy: postpositivism, constructivism, advocacy/participatory, and pragmatism. A pragmatist’s view is beneficial for mixed method researchers since pragmatists do not “see the world as an absolute unity” (Creswell, 2009, p.11).

Lincoln and Guba first coined the term “constructivist” in 1985 in their book *Naturalistic Inquiry*. Not wanting their research to be viewed as complete, they opted to describe it “as a snapshot in time of a set of emergent ideas” (Lincoln and Guba, 1985, p.9). In a research design based upon a constructivist approach, the researcher believes that people do not happen upon knowledge but rather think and work toward knowledge. Knowledge and truth are created, not discovered by mind" (Schwandt, 1994, p. 236). In regards to interpreting research results, constructivists acknowledge that meanings derived from experiences are unique to each individual: In designing a constructivist project, research begins with the problem or issues

facing the target population. When the research is complete and findings are made, these findings are considered to be a joint finding of both the population and the researcher (Schwandt, 1994). These joint findings or constructions are then examined for their relevance to and compatibility with the data, which leads to an understanding (Guba and Lincoln, 1989).

Survey research involves quantitative analysis since it involves the numeric description of “trends, attitudes, or opinions of a population by studying a sample of that population. It includes cross-sectional and longitudinal studies ... with the intent of generalizing from a sample to a population (Creswell, 2009, 12, citing Babbie, 1990). Grounded theory is a qualitative research approach. During this type of inquiry, the researcher “derives a general, abstract theory of a process, action, or interaction grounded in the views of the participants (Creswell, 2009). Charmaz introduced a constructivist view of grounded theory that resulted in a theory of research that encompasses action, process, and meaning while also valuing emergence within symbolic interactionism and the acceptance of differing perspectives (2000).

Creswell has broken down the various combinations of qualitative and quantitative analyses into three general categories: sequential mixed methods, concurrent mixed methods, and transformative mixed methods (2009). In concurrent mixed methodology, the researcher merges qualitative and quantitative data collection and analysis. For example, the researcher may use qualitative questions to assess a process and quantitative questions to assess the outcome (Creswell, 2009).

The research methodology of content or textual analysis is a methodology designed to evaluate the content of communications including books, laws, websites, speeches, and even works of art (Babbie, 2003). Holsti defines content analysis or textual analysis as "any technique for making inferences by objectively and systematically identifying specified characteristics of

messages" (Holsti, 1969). Klaus Krippendorff identifies six elements, which are necessary for the execution of content analysis:

- Which data are analyzed?
- How are they defined?
- What is the population from which they are drawn?
- What is the context relative to which the data are analyzed?
- What are the boundaries of the analysis?
- What is the target of the inferences? (Krippendorff, 2004).

Holsti states that the research methodology of content analysis can be used for fifteen different purposes. These fifteen purposes can then be subdivided into three main categories:

- Make inferences about the antecedents of a communication
- Describe and make inferences about characteristics of a communication
- Make inferences about the effects of a communication (Holsti, 1969).

Laswell offers core questions for using the methodology of content analysis:

- Who?
- Says what?
- To whom?
- Why?
- To what extent?
- With what effect? (Laswell, 1948).

Neuendorf states that the process of content analysis is not an easy process to utilize (2001). For this study, qualitative and quantitative data was coded, collected, and entered into a statistical analysis software package. The software used in this study to analyze data was SPSS®.

Issues in methodology include the analysis of qualitative data by a software program. “Why would you want to engage in work that connects you to the deepest part of human existence and then turn it over to a machine to 'mediate'?”(Charmaz, 2000, p.520). Researchers such as Coffey, Holbrook, and Atkinson also question the use of qualitative data analysis programs. They state that such processing of data overemphasizes coding, gives a superficiality

to grounding theory, and falsely gives the impression that interpretive work can be proceduralized (Coffey, Holbrook, and Atkinson, 1996). Other researchers, however, assert that this claim is groundless (Tesch, 1989). The humanity of the researcher is part of the research, and this humanity becomes an inevitable part of it (Guba & Lincoln, 1989). The human interaction with the data and coding should offset any dehumanization of qualitative data by the statistical software.

Another area of concern in this study is the possibility of bias. Types of bias that may enter into the study are selection bias caused by the researcher's misjudgment in the selection of participants or institutions and institutional bias. Just as academic librarians may be overly cautious in their use of copyrighted materials for fear of infringing upon copyrights and exposing their institution to liability, academic librarians may also hesitate to admit that they or their institutions are not properly knowledgeable about copyright provisions or compliant with copyright laws. Academic librarians, however, will likely value the integrity of a research project and acknowledge the significance of the investigation; and consequently and hopefully, will resist any latent bias toward protecting their institution, especially if assured of anonymity.

### **2.3 SUMMARY OF THE LITERATURE**

The use by educational institutions and their libraries of copyrighted materials in the classroom and distance learning will always be done with regard to copyright law. Copyright law allows certain exceptions to restrictions including fair use. The Technology, Education and Copyright Harmonization Act or TEACH Act was signed into law on November 2, 2002. The intent underlying its enactment was to extend many of the freedoms enjoyed by face-to-face classrooms in using copyrighted materials for educational purposes to distance learning. The TEACH Act is a law of benefits and conditions. If a fair use analysis or the TEACH Act does not provide an exception to copyright for academic information users, then licensing agreements may be entered into or permission may be sought from the copyright holder.

Academic publishing in relation to copyright and the TEACH Act has focused mostly on the history of the Act and how it works. Very little quantitative research data exists in order to identify trends in the academic community regarding librarians' interactions with and opinions concerning copyright, and more particularly with and concerning the TEACH Act. Library and information science literature is consistent in its descriptions of how the TEACH Act works, the need for academic librarians to be familiar with copyright law, and the complexities of the TEACH Act and its compliance requirements.

Distance education is a valuable educational tool that connects students to instructors across time and space. Universities and colleges are increasing the opportunities for their students to participate in distance education courses. Correlating with the increase in distance education offerings, academic librarians are providing more services related to the provision of

digital materials. If research can be used to identify ways to save time and resources, to obtain consistency in the application of copyright laws, to improve online learning environments, and to better communicate to faculty and students implications of copyright law; then research should be accomplished.

Developing technology will continue to change the way people learn, work, and live. Since copyright truly is a “subtle and esoteric area of the law that evolves in response to technological change” (Lehman 1999), understanding and administering its unclear but flexible boundaries can be difficult. In agreement with the intent of the framers of the U.S. Constitution, it remains in the best interests of education, research, and the promotion of creative works to understand copyright laws and apply them as fairly as possible.

### **3.0 METHODOLOGY**

The primary purpose underlying this study is the identification and examination of academic librarians' views on elements of American copyright law and resource licensing that are involved in the job duties of academic librarians, particularly in the provision of services for online or distance education courses. Institutional websites providing copyright information, which academic libraries may be either relying upon or providing, were examined. Within this chapter is a discussion on the methods in general, which finds support in the preceding literature review on methods. The second section "Specific Procedures Research Population" describes the method by which the general methodology is applied to this study's target population and defines that population. The third section "Pre-test Study" explains how initial testing was used to improve the quality and efficiency of the larger study. Finally, the third section "Data Collection" describes data sources and procedures utilized for the data analysis.

#### **3.1 GENERAL METHODOLOGY**

This study used both quantitative and qualitative methods in a concurrent mixed methodology to discover (1) aspects of copyright information that is presented by libraries situated within institutions of higher education on websites and (2) aspects of academic librarians' interactions with copyright law. The survey of academic librarians involved qualitative data collected from

open-ended questions and quantitative data collected from close-ended questions. Some questions were qualitative since they examined academic librarians' responses in an exploratory sense with unknown variables. Quantitative measurements were made in the content analysis of websites. Similarly, qualitative methods were involved in the examination of websites since the interpretation and objective identification of variables will be involved in the content analysis.

### **3.2 SPECIFIC PROCEDURES RESEARCH POPULATION**

The setting of the survey portion of this study is academic libraries within colleges or universities having Association of Research Libraries (ARL) member libraries. Librarians within the libraries were pre-evaluated for position. In order of preference, the targeted librarians were those responsible for copyright, provision of library services to the school's distance education program, digital management or services, e-reserves, and head of access services. Indications of job responsibilities appeared in online departmental or staff listings and/or organizational charts for each library. In two cases, further investigation into library publications was necessary in order to make a determination of a proper survey target. The librarians with these responsibilities were chosen because of their probable involvement with copyright policies. Ninety-nine librarians from ARL member libraries were asked via email to participate in a survey. Ninety-nine represents the total number of libraries that are ARL members that are both American and academic.

The email format of the solicitation email complied in both content and structure with that prescribed by the University of Pittsburgh Institutional Review Board (IRB), a copy of this email appears in Appendix A to this document. In this first email, potential participants were

informed that at the completion of the survey, they could elect to receive a ten-dollar gift certificate by emailing the primary researcher with the subject line “completed survey.” Electronic Amazon.com® gift certificates were sent to the survey takers who requested them. Their emails and their surveys in no way corresponded to each other. Additionally, no surveys were examined upon electronic receipt, thereby negating the possibility of associating any survey with any recently received email.

Out of the ninety-nine librarians solicited for the survey portion of this study, twenty-six librarians or just over twenty-six percent completed the survey after receiving one email. Of these twenty-six survey takers, eleven or approximately forty-two percent requested the ten-dollar gift certificate. Twenty-three days after the initial email, a second request was sent to all of the ninety-nine librarians excluding only the eleven who had requested the incentive. Although fifteen other librarians had completed the survey, they could not be identified as having done so; consequently, they received an unnecessary second email and were asked to disregard it if this were the case.

The second email included and referenced the text of the first email, thus still complying with the requirements of the university’s IRB. The follow-up email request from the primary investigator, however, was more personal in style and appears as Appendix B to this document. The librarians were personally addressed, the incentive was increased to a twenty dollar Amazon.com® gift certificate, and an appeal was presented for increased participation based on the fact that the population of the study was a limited one, the need for study reliability, and the investigator’s need for a reliable study in order to complete the study and the degree based upon the study.

Following the second email request, thirty-eight additional librarians completed the survey. This number represents thirty-eight and four tenths percent of the total librarians, making the total of responding librarians sixty-four or almost sixty-five percent. Of the group that completed the survey after receipt of the second email, eleven or twenty-nine percent requested the gift certificate, which compares to forty-two percent of the first group of responders. Based on the percentages of survey completers requesting the incentive following the two emails, other factors such as receiving a reminder, the personal plea, or a change in the character of the email may have played as much or more of a part in the increased return rate than the incentive of the reward.

All surveys conducted within this study were presented electronically using the Survey Monkey™ software package to participants. The text of this survey appears in Appendix C of this document. Neither the librarians' names nor the names of their institutions were collected. The confidentiality and anonymity of participants were closely guarded and maintained at all times.

The selection of participants for the website content analysis segment of this study was made by random sampling. The goal of the sampling was to provide diversity in size and research emphasis of the educational institutions involved. Random sampling was accomplished by the selection of the first, then every fourth, and then the last, alphabetically listed American, academic library belonging to the Association of Research Libraries after removal of those libraries involved in the pre-test. The website analysis began with the homepage of each library using the links posted on the ARL site.

Two coders independently within the same week recorded data regarding the provision or non-provision of copyright information. Coder One was the primary investigator, and Coder

Two was Jason Canham, a 2009 graduate of the University of Pittsburgh pursuing further studies at The Ohio State University in communications with a focus on new media and technology. Inter-coder reliability was achieved over a course of face-to-face meetings held on several consecutive days following the pre-test portion of this study. Further discussion of the training and practice necessary to achieve inter-coder reliability appears in the Pre-Test section of this Methodology chapter.

For institutions providing online copyright information, the coders analyzed elements of web pages containing copyright information. In keeping with content analysis theory, the following aspects of the web pages were examined: the purpose of the website, the authorship of the content, the selection of the content, from where the information can be accessed, the intended audience, and the use of the TEACH Act. Information relating to access was gathered by examining the institution's site map, by examining the library's home page, by use of the library's search box, and by counting the mouse clicks necessary to arrive at copyright information from the library's home page. Access to information was also verified by searching on Google® for each institution. To facilitate data gathering and analysis, the Code Form was uploaded to Survey Monkey and digitally completed by each coder. The Code Book and the Code Form for this study are attached to this document as Appendices D and E.

### **3.3 PRETEST STUDY**

For the pre-test study of the survey portion of this research, two professionals and two graduate students completed the survey at two separate junctures. The primary researcher chose not to survey members of the research population because the research population contained only

ninety-nine members. At the first juncture, the pre-testers completed two in-print surveys. The original design of the study was a two-step survey process. The first survey asked general questions about the institutions, libraries, librarians, and copyright. If the survey takers agreed to participate in a second survey, and if they had familiarity with the TEACH Act, a second survey presented questions that were more specific to the TEACH Act. Copies of the two surveys that were part of the original study design are included in Appendix F of this document.

The pre-test of the original surveys showed that the surveys contained questions that were redundant between the first and second surveys and would thereby waste the time of the survey takers. A second problem emerged with the requirements of the University's IRB. By complying with the removal of all identifying information, there was no means available to determine which librarians had knowledge of or interaction with the TEACH Act and therefore, would make proper participants for the second stage of the survey process. Consequently, the primary investigator chose to reformat and combine the two surveys into one survey of thirty-four questions.

Upon completing the redesigned survey online, the four pre-testers found no faults. In retrospect, this amounts to an error in the pre-test process. Question eighteen of the survey has a technical flaw that was unknown until several actual survey responders brought it to the attention of the primary researcher by email or question response. Question eighteen was designed to be a question with the ability to choose one or more answers. The question design, however, limited responders to choosing one response. None of the pre-testers caught this error. A better pre-test design would have required that the study's designer test each question for its ability to be answered as intended.

For the pre-test study of the website review portion of this research, the websites of four universities with libraries belonging to the Association of Research Libraries were analyzed by two coders using the Code Book and Code Form. Choosing the first and then every twenty-fifth library listed on the ARL's alphabetical listing of members, the coders first eliminated the non-American and non-academic members from the list. No participant of any portion of the pre-test study was included in the later research.

The original design of the questions intended to evaluate institutional websites for copyright information was more qualitative than those eventually used in the study. The coders used in-print forms for the pre-test of online information linked from the four libraries. The coders, while in the same room, did the pre-test simultaneously. The pre-test showed inconsistencies in qualitative answers. The coders achieved consistency for most quantitative questions. Inconsistencies in quantitative answers were discussed, and differences in method emerged and were remedied. For example, Coder Two chose the first means by which he was able to access copyright information and not all means. A clarification of the question resulted in consistency between the coders.

Differences in qualitative evaluations were more difficult to identify and remedy. The outlooks and opinions of the two coders factored too heavily into their responses. For example, Coder One remarked "lacked citations or other authority" while Coder Two remarked for the same question, "stupid." In order to achieve cohesion in results, the questions were reformatted to be more quantitative. Sliding scales were utilized for qualitative answers, and in keeping with grounded theory, similar concepts and categories were chosen for use as tools of evaluation.

Information gathered from the pre-test study was used to improve the quality and efficiency of the larger study. Information was gathered relating to time needed to complete the

survey in order to communicate that information to potential survey participants. A technical deficiency in the survey became apparent after the pre-test study and negated the usefulness of that question.

### **3.4 DATA COLLECTION**

Data to be used in the examination and analysis of research questions for this study emanated from two sources: the survey and the content analysis of web pages publicly posted on university web sites. Data was collected digitally from the survey, which was electronically distributed to ninety-nine academic librarians employed by colleges or universities having ARL member libraries. Data collection began when the librarian participants followed a link embedded in an email survey solicitation. All survey data was anonymously and electronically collected on SurveyMonkey™. After three weeks, the amount of data collected was viewed as insufficient for an acceptable statistical confidence level, and the same librarians were emailed with a second request and survey link.

For the content analysis portion of this study, data was collected electronically from web pages containing copyright information provided by academic libraries or their institutions. The data was coded by two coders and input into statistical software. Coding is an analytical process in which collected non-numerical data is categorized, identified by characteristics, and assigned a name.

For qualitative data, this researcher relied upon Charmaz's research relating to the understanding and organization of responses (2000). The statistical software chosen for the analysis of data for this study is SPSS®. This software offers a wide-range of tools that are

helpful in categorization, coding, and creating graphs and tables. The program also enables easy exportation into word processing programs.

Throughout the data collection and data analyses processes, the researcher examined the data for inconsistencies based on correlations among the sources of data. For example, the researcher correlated responses among survey responses given by each survey participant. No inconsistencies were noted. A correlation between the survey portion of this study and the online content review was not possible given the anonymity of the survey procedure. This type of data collaboration is also termed “structural collaboration” by Eisner or “triangulation” by Lincoln and Guba (Eisner, 1998, Lincoln & Guba, 1985). In conjunction with research diligence and care, data collaboration increases research reliability and trustworthiness.

## **4.0 DATA DISCOVERY PART I**

Librarians from sixty-four of the ninety-nine members of the Association of Research Libraries (ARL), which met the research design criteria of being an academic library and being American, participated in the survey portion of this study, representing a return rate of 64.6%. Respondents posted survey returns online over a period just exceeding seven weeks.

### **4.1 DEMOGRAPHICS**

**1. What are your educational degree(s)?** Of the sixty-four respondents, sixty hold a Masters Degree in Library Science. Twenty participants report having an alternate or an additional masters degree outside the field of library science. Ten of the survey participants have a Doctor of Philosophy Degree, and eight have a Juris Doctor degree.

**2. Size of college or university based on student (undergraduate, graduate, and professional) enrollment on main campus:** Given the choice of three sizes for academic enrollment of their institutions, less than five thousand, five to fifteen thousand, and greater than fifteen thousand, four out of five chose greater than fifteen thousand. The remainder fell into the five to fifteen thousand category.

## 4.2 COPYRIGHT ROLES

**3. Does your position involve copyright duties or decisions?** A large percentage of the librarians responding to the survey indicated that their job position involves copyright duties or decisions. Nearly 83% of the sixty-four participants answered yes to this question. Forty-seven of the sixty-four respondents elaborated in a text box. Their descriptions of their job duties that are not related simply to title or position can be found in Appendix G of this document.

**4. Of the following: e-reserves, distance learning, online courses, none of the above, which does your institution offer?** Of the ARL member libraries represented in the survey responses, 92.2% of them utilize e-reserves. Almost 77% of the libraries' institutions offer distance learning, while 71.9% offer online courses. One respondent indicated that his/her institution had none of these offerings.

**5. In providing resources for distance learning courses or e-reserves, have you or other librarians in the library ever had copyright questions from faculty?** In the provision of resources for distance learning courses or e-reserves, nearly all of the librarians answered that they do receive copyright questions from faculty members. When asked to elaborate, the librarians gave a range of responses. Many responses reported questions that related to what constituted fair use and how to obtain permissions to use materials. One respondent said he/she

received one or two copyright questions a day; another said he/she received one or two copyright questions per week. Other comments described inquiries relating to:

- What can be copied, used, and placed on e-reserves
- Changes of format to materials for online use
- Re-use of materials
- Amount of materials that can be used online
- What use can students make of materials in open sites
- Use of multi-media resources in distance learning

One respondent stated that almost all the copyright questions that they receive concern the placement of materials online. One librarian stated, “Most faculty are surprised that copyright is a factor” when addressing the amount of journal or book material that can be used.

**6. How do librarians in your library typically handle copyright questions?** Three fifths of the responders indicated that the librarians in his/her library answer the questions that are presented to them relating to copyright. Of this percentage, about one fifth do not follow through with another source, while four fifths of them refer questions to an additional copyright source. A few of the total respondents refer to a listserv; one quarter of the total respondents refer copyright questions to university counsel; and over half of the total respondents refer to a designated copyright expert or center (which may or may not include the respondent themselves).

**7. Who makes copyright decisions regarding digital resources for e-reserves, distance education, or online courses?** In response to who is responsible for copyright decisions regarding digitized materials available through e-reserves, distance education, or online courses, the majority of the librarians indicated that the library is responsible for such decisions. Almost

42% responded that the library made the decisions; 25.8% responded that the department or faculty posting the materials made the decisions; and 32.3% responded that a varied combination of the library, the faculty, or the department posting the materials made copyright decisions regarding these materials. The librarians further explained that the librarians are almost always responsible for e-reserves while instructors frequently determine what resources get posted on course management systems.

**8. Do you feel that instructors cooperate with librarians in making materials available?**

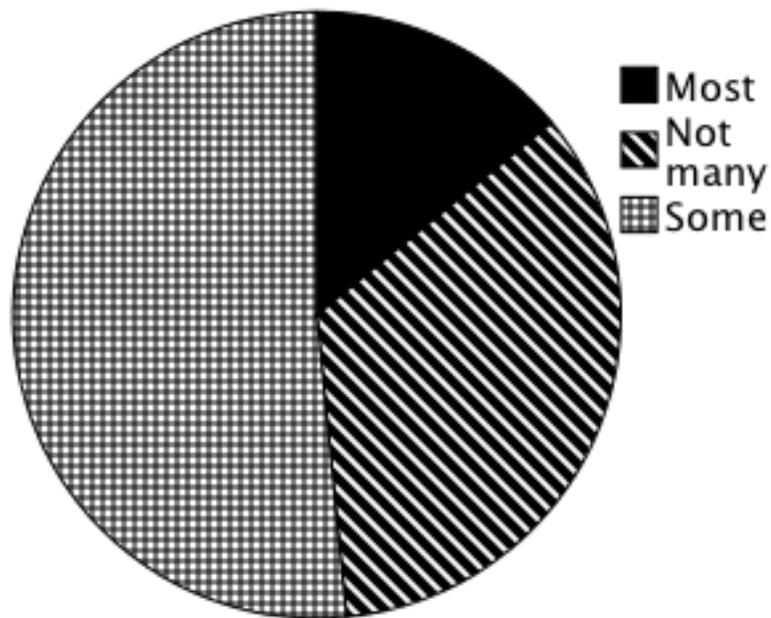
Nine out of ten of the participants who answered this question feel that instructors cooperate with librarians in making materials available. The remaining respondents indicated that instructors do not cooperate with librarians in making materials available.

**9. In your opinion, how many instructors of distance education courses or those using e-reserves understand copyright laws?** Most of the surveyed librarians believe that instructors of distance education courses or those using e-reserves understand copyright.

**Most: 14.1%**

**Not many: 34.4%**

**Some: 51.6%**



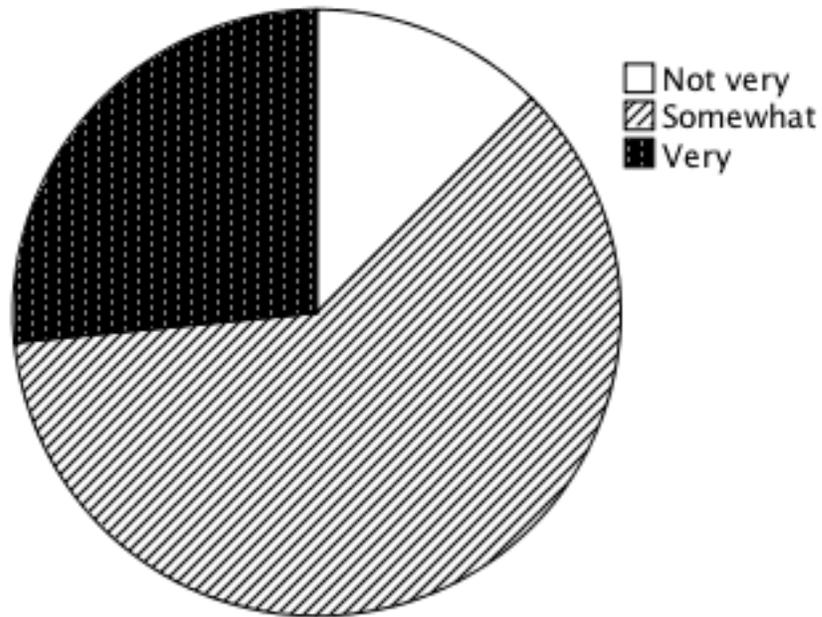
**Figure 1. Instructor copyright knowledge**

**10. How well equipped or prepared do you believe librarians in your library are to make copyright decisions?** The number of survey participants who felt that the librarians in their library are equipped to make copyright decisions outnumbered those who felt that the librarians in their library are not equipped to make such decisions.

**Not very: 12.5%**

**Somewhat: 60.9%**

**Very: 26.6%**



**Figure 2. Librarian copyright knowledge**

**11. Is your library consulted regarding resource availability of materials for e-reserves or in the planning stages of a distance education or online course?**

Three out of five respondents to this question believe that the library is consulted regarding resource availability of materials for e-reserves or in the planning stages of a distance education or online course. The other respondents believe that the library is not consulted for either. When asked what kind of evaluation the library engages in when consulted, one answered that they assist the faculty in making fair use determinations and explain to them how to seek permissions. Another respondent wrote that there is very little evaluation needed in this instance since the university requires that all copyrighted materials either be linked to licensed resources or reported for clearance with the copyright holder. Similarly, another reports that this process is “more of a licensing evaluation than a copyright evaluation.” At one institution, “The faculty considers the library a partner in learning and will usually consult on issues.” Several relate that faculty members often make determinations for online courses themselves. Another librarian states, “Regarding distance courses, the library has started to be more involved, since sometimes copyright issues may prevent being able to use materials via a distance. Regarding e-reserves, usually the library just gets a list of resources from the faculty person and those that we can provide e-access to we do, and those that we can't we let the faculty person know.” Appendix G of this document lists additional responses to this question.

**12. Do you believe the library should be involved?** When asked if they believe the library should be involved during the planning stages of a distance education or online course or about the availability of materials for e-reserves, nine out of every ten librarians who responded to this question believed that the library should be involved.

**13. Does your college or university have a designated copyright center or expert?** Nearly 61% of the sixty-four survey participants indicated that their institution has a designated copyright center or expert. Forty of the participants elaborated with what department, school or college within the institution the copyright expert or center is affiliated. Over 37% said that the expert or center was affiliated with the library, 22.5% indicated that the copyright expert or center was connected to the university's general counsel, and 20% said the affiliation was with both the library and general counsel. One participant said that copyright expertise lay with the library, general counsel, and the distance learning department of the university. Lastly, 17.5% stated that the designated copyright center or expert was found in a combination of the library, information technology departments, the "Bookstore," general counsel, and centers of copyright separate from general counsel or the library.

14. Which of the following maintains a stated copyright policy? The number of libraries or institutions that maintains an online copyright policy ranges from 73% that do maintain an online copyright policy to 7.9% that do not.

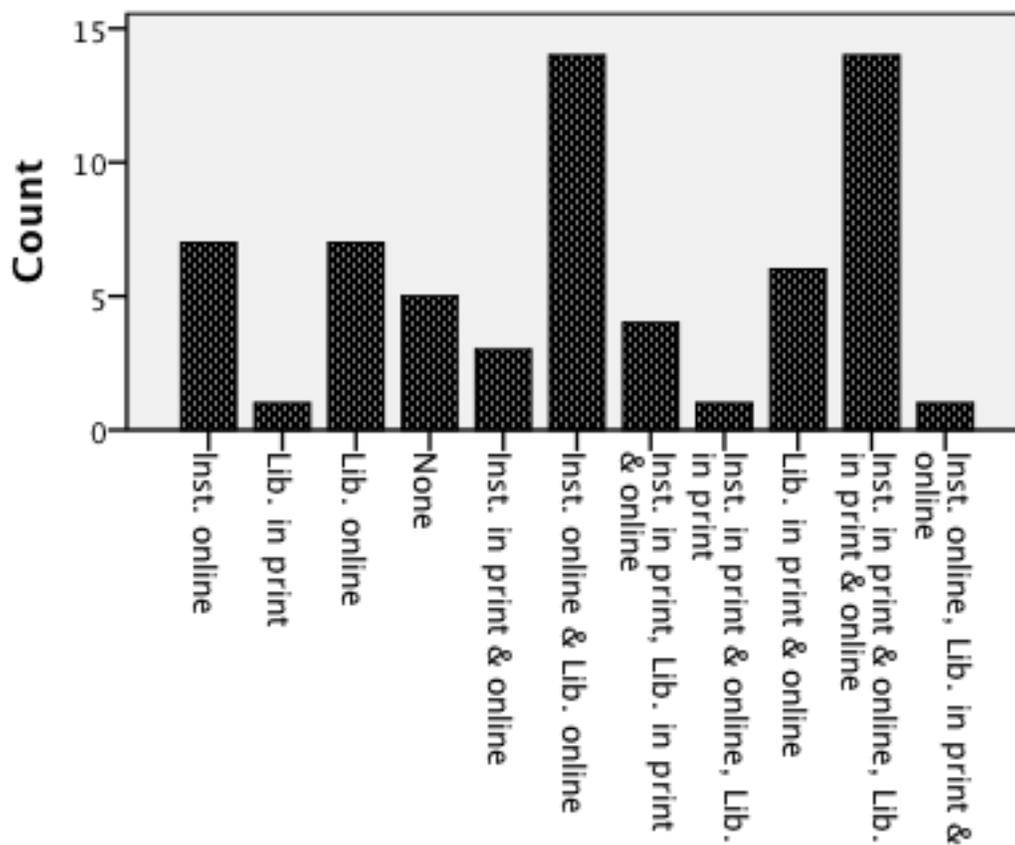


Figure 3. Copyright policies

15. Does your institution refer you to any source outside the institution, such as another institution's online information, for copyright information? Three fifths of the respondents to this question indicated that their institutions make referrals to sources outside the institution for copyright information. Other institutions specifically listed as resources were: University of

North Carolina, North Carolina State University, University of Texas, Stanford University, Cornell University, Columbia University, University of Washington, Purdue University, Indiana University, University of Nebraska, University of California, University of Minnesota, and Duke University. Federal government resources such as the U.S. Copyright Office is frequently linked to for information. Additionally, the Association of Research Libraries' website and the American Library Association's website appear on information reference lists.

### **4.3 THE TEACH ACT**

**16. Are you familiar with the TEACH Act (The Technology, Education and Copyright Harmonization Act of 2002)?** Nearly all of the respondents (93.8%) are familiar with the TEACH Act.

**17. Does any copyright policy of your library or institution reference the TEACH Act?** In answer to the question if any copyright policy of their library or institution reference the TEACH Act, 54% answered yes, 25.4% answered no, and 20.6% answered that they did not know.

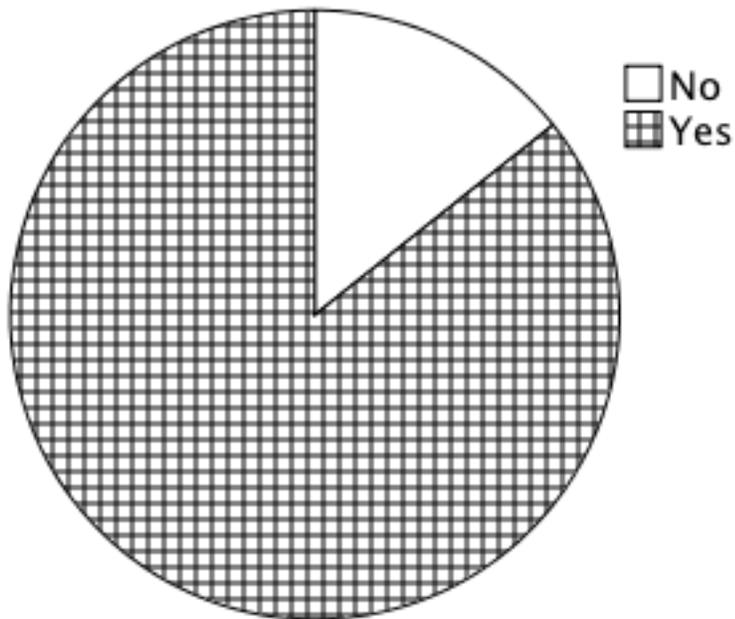
**18. Has your institution distributed information regarding the TEACH Act to any of the following? Please choose all that apply.** This question was technically flawed and consequently, is unreliable. Responders were intended to be able to choose multiple answers but instead were limited to the choice of one answer.

#### 4.4 PUBLISHERS

**19. Do you believe copyright laws, as they now exist, favor publishers over resource users?**

Over five sixths of the academic librarians answering this question believe that copyright laws as they now exist favor publishers over resource users.

**Yes: 85.7%      No: 14.3%**



**Figure 4. Do laws favor publishers**

20. Of the following, whom do you believe can be held criminally or civilly responsible for breach of copyright laws? When asked if they thought whether the institution, the librarians, and/or the library's patrons could be held criminally or civilly liable for breach of copyright laws, nearly all of the responding librarians acknowledged liability on the part of one or more of these choices.

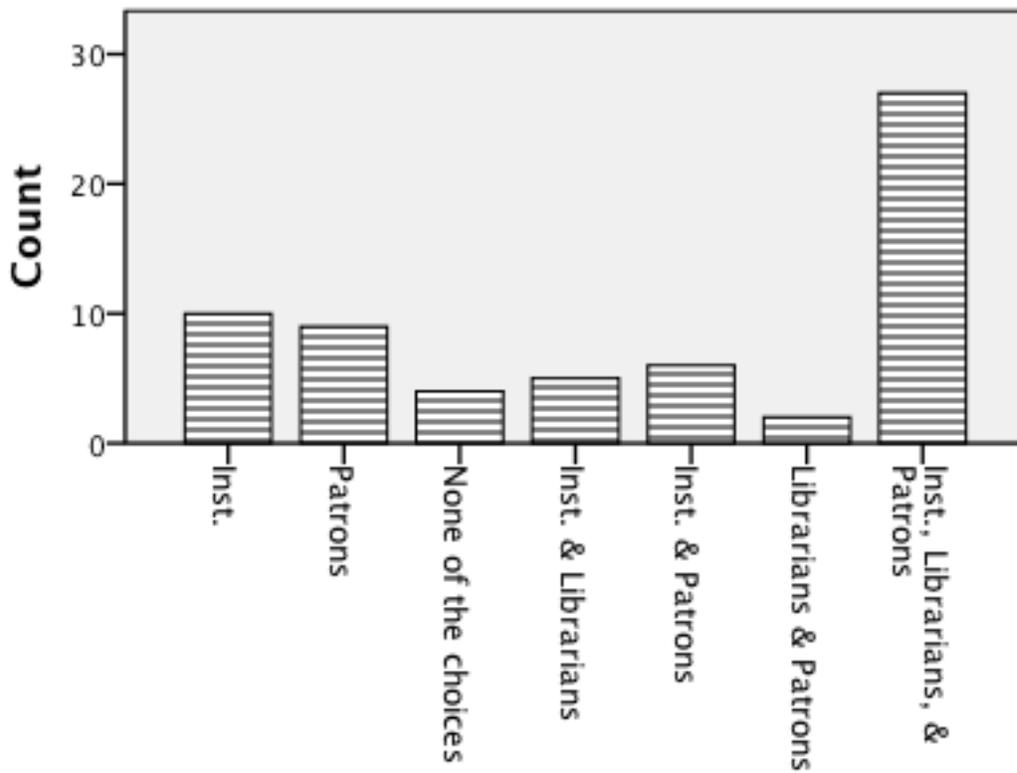
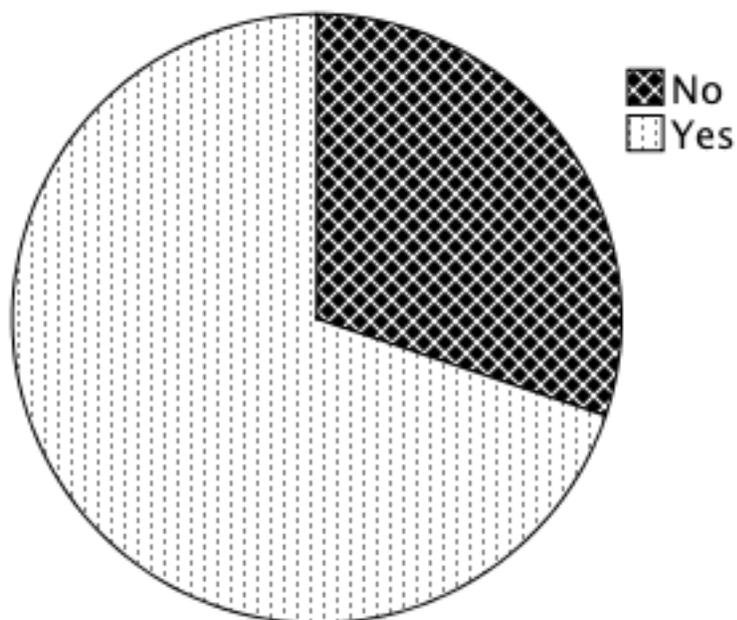


Figure 5. Who is liable

**21. Do you feel that librarians are conflicted between the interests of publishers of digital material and users wanting access to digital materials?** Just over two thirds of the survey participants feel that librarians are conflicted between the interests of publishers of digital material and users wanting access to digital materials.

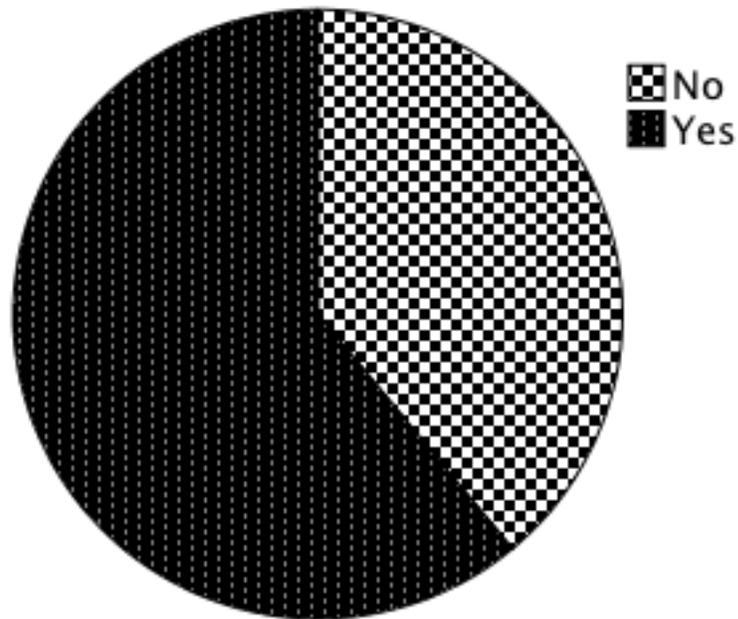
**Yes: 60.9%      No: 30.2%**



**Figure 6. Conflict**

**22. Do you believe digital publishers have control over matters that more properly should be managed by the library?** Of the surveyed librarians, nearly three fifths of them believe that digital publishers have control over matters that more properly should be managed by the library. The remaining librarians disagreed.

**Yes: 69.8%**      **No: 30.2%**

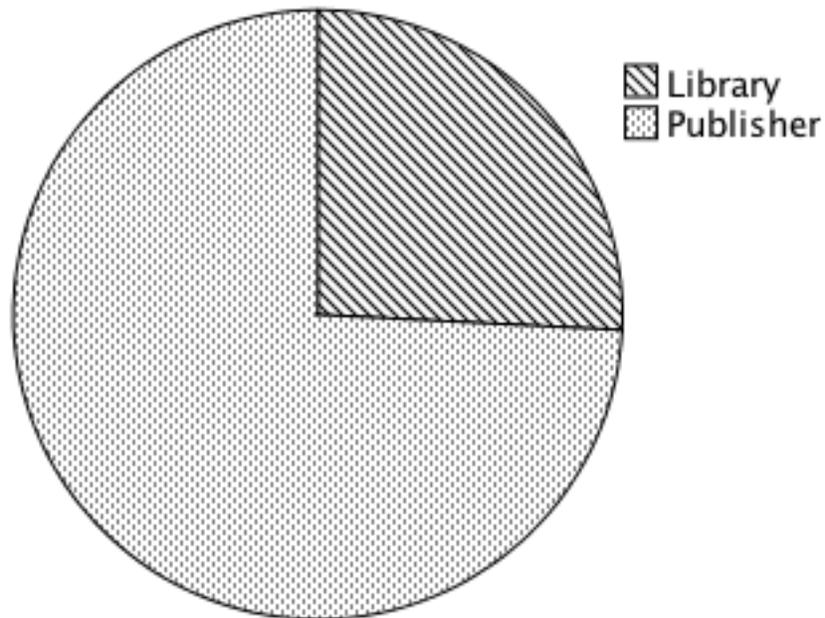


**Figure 7. Control**

Quotations from the survey participants as elaborations on this question are listed in Appendix G of this document.

**23. Whom do you believe has more control over how a user accesses a licensed digital work?** Nearly three fourths of the survey participants believe that the publisher has more control over how a user accesses a licensed digital work. The remaining one fourth of them believe that the library exerts more control over such access.

**Library: 25.8%      Publisher: 74.2%**

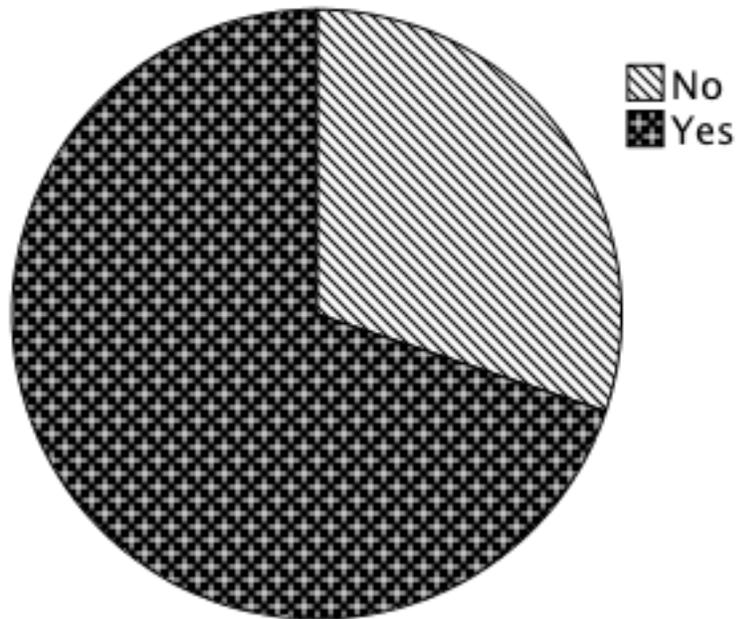


**Figure 8. Access**

**24. Does the library evaluate copyright exceptions for resource availability before entering into a license to use the work from the publisher?** A large majority, nearly nine of every ten, of the librarians states that their library does evaluate copyright exceptions for resource availability before entering into a license agreement to use a copyrighted work.

**25. Do you believe that resources that are actually and properly available under copyright exceptions have been denied to users because of a conservative copyright stance?** Seven tenths of survey takers indicated that they believe that resources that are actually and properly available under copyright exceptions have been denied to users because of a conservative copyright stance.

**No: 30.2%      Yes: 69.8%**



**Figure 9. Conservative stances**

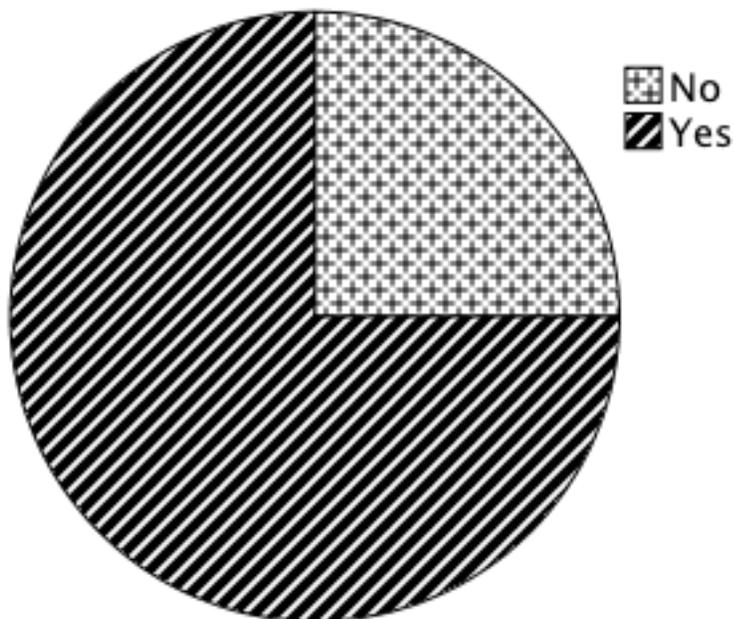
When asked if they believe this happens frequently, occasionally, or rarely, 29.4% chose frequently; 67.6% chose occasionally; and 2.9% chose rarely. One commenter wrote, “Occasionally. It depends on who was the first point of contact and their understanding of copyright law.” Another stated, “Frequently - this institution has a very conservative stance in

copyright, and it is highly doubtful that it will change.” While another stated, “Not here, but I gather this happens at other places regularly. We push fair use well beyond most places risk tolerance.”

**26. Do you believe that resources that are actually and properly available under copyright exceptions have been made available instead through unnecessary licensing?** Over three quarters of the respondents believe that resources that are actually and properly available under copyright exceptions have been made available to the library through unnecessary licensing rather than through use of a fair use exception.

**No: 23.7%**

**Yes: 76.3%**



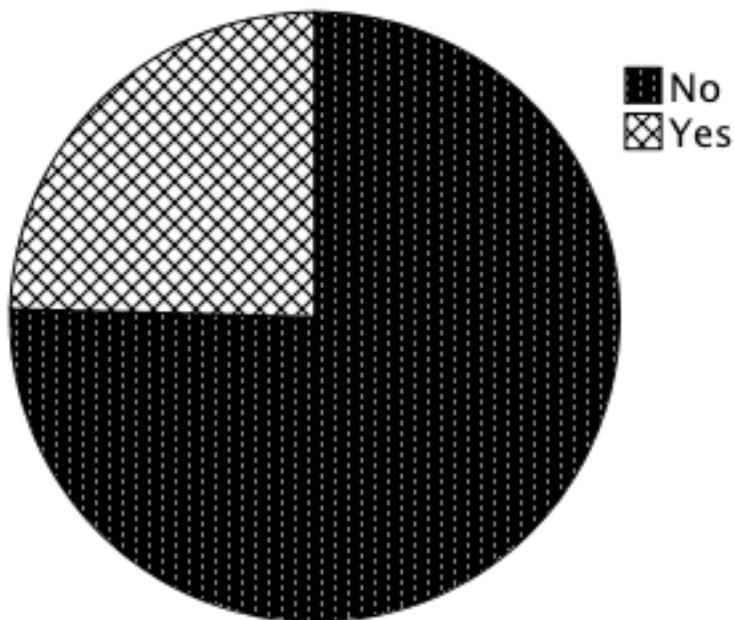
**Figure 10. Unnecessary licensing**

Among the respondents who elaborated on this question, 32.4% thought that the unnecessary licensing occurred frequently. Fifty percent thought unnecessary licensing occurred occasionally, while 17.6% thought this practice occurred rarely. One librarian explained that this happened occasionally in order to take advantage of publishers' added values such as indexing or bundling of resources. Two commenters stated that there was one publisher or licensing broker who did this "all the time."

#### 4.5 PRESERVATION

**27. Do you believe that publishers adequately archive their digital offerings?** Three fourths of the librarians believe that publishers do not adequately archive their digital offerings.

**No: 75.4%      Yes: 24.6%**

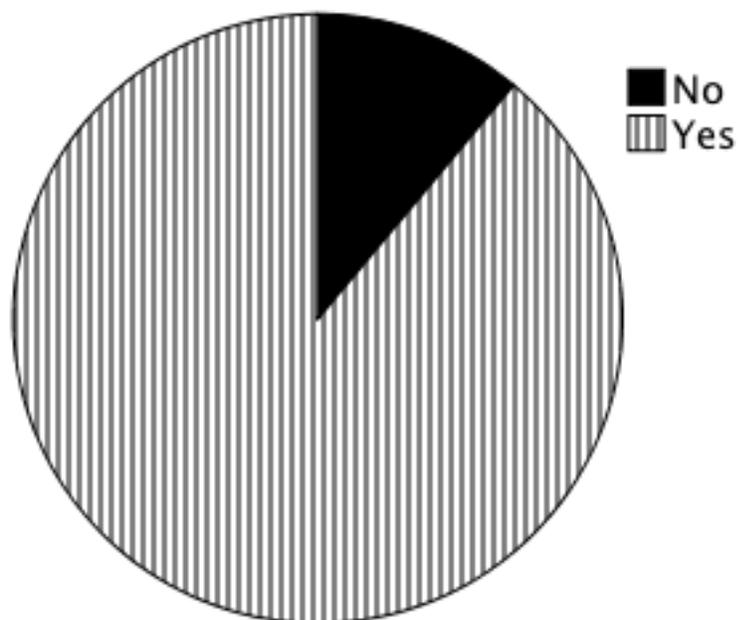


**Figure 11. Adequate archival**

**28. Are you concerned with access or archival problems due to a publisher going out of business or changing its business?** When asked if they are concerned with access or archival problems due to a publisher going out of business or changing its business, nearly nine tenths of the surveyed librarians stated that they were concerned.

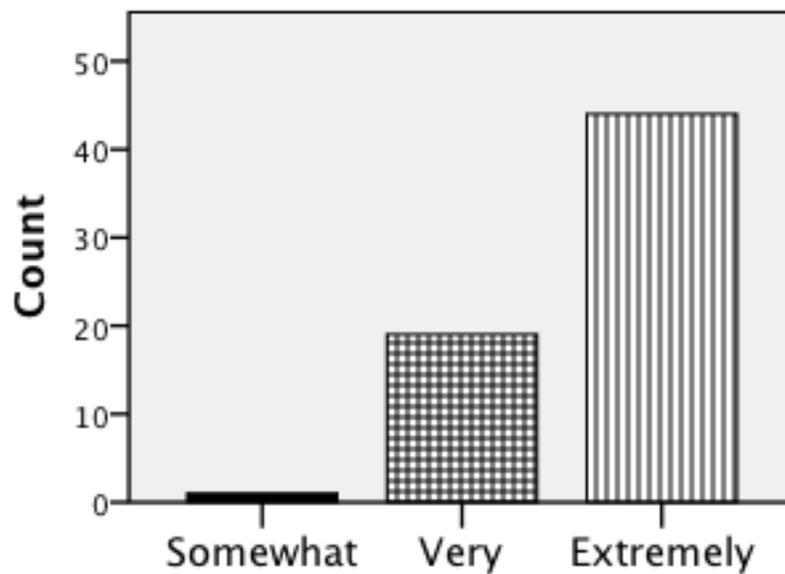
**No: 11.1%**

**Yes: 88.9%**



**Figure 12. Publisher stability**

**29. How important do you believe the preservation of digital works to be?** In response to the question, “How important do you believe the preservation of digital works to be?” Most of the surveyed librarians indicated that preservation was extremely important, less than one third of the surveyed librarians indicated that preservation was very important, and one of the surveyed librarians indicated that preservation was somewhat important.



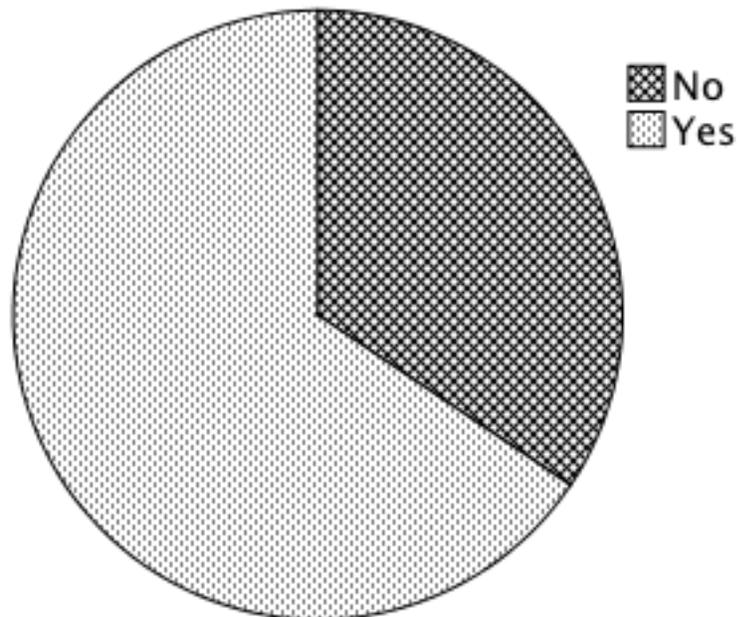
**Figure 13. Importance of preservation**

## 4.6 PRIVACY

**30. Due to technological capabilities of the publisher, do you have privacy concerns for your users in their use of licensed digital works?** More than half of the academic librarians taking the survey expressed that they had privacy concerns for their users of licensed digital works.

**No: 34.4%**

**Yes: 65.6**

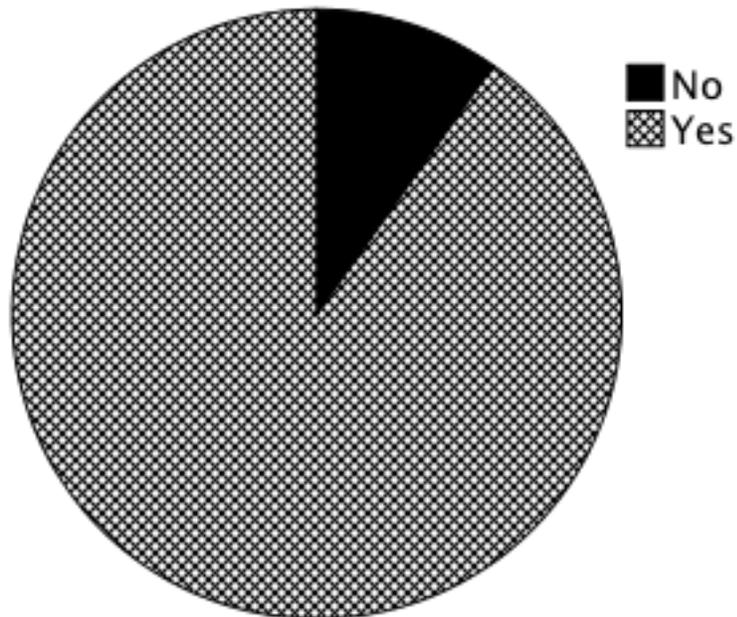


**Figure 14. Privacy issues**

**31. Do you believe that publishers collect information by way of technology about the users and their uses of resources?** Nearly all of the responding librarians believe that publishers collect information by way of technology about the users and their uses of resources..

**No: 9.8%**

**Yes: 90.2%**



**Figure 15. Information gathering**

## 4.7 OPINIONS AND CONCERNS

**32. What is your biggest concern regarding copyright?** In response to the question of what is their biggest concern regarding copyright, fifty-five of the sixty-four survey respondents answered by textual comment. Respondents' comments reported concerns in order of greatest to least frequency:

- Fair Use is giving way to licensing
- Copyright laws are confusing
- Publishers have the means to lobby and influence lawmakers
- Unreasonable copyright term extensions
- Faculty's property rights to their own works
- Copyright has not kept current with technology
- Publishers claiming rights to non-copyrightable materials
- Fear of legal action for copyright infringement
- Lawmakers will diminish Fair Use exceptions
- Copyright limitations restrict information access and sharing in research collaboration
- The confusing state of copyright laws leads to arbitrary interpretations and applications among institutions
- Fear of unnecessary access restriction to materials
- Identification of access to orphan works without unreasonable cost
- Faculty's and students' complacency about copyright because everything can be licensed
- Conglomerate copyright holders trying to restrict fair use
- Archiving of digital materials
- Multimedia copyright issues
- Incomplete licensing of images in e-books
- University-wide copyright awareness
- Privacy issues and the selling of private information
- Current state of copyright favors publishers over readers
- Loss of the First Sale doctrine
- Undue restrictions on libraries caused by DRM
- Unnecessary restrictions caused by copyright laws
- The divisive dialog between libraries/institutions and publishers/publishing associations leads to rash actions and decisions

**33. In your opinion, what changes could be made to current copyright law to better serve your library and its goals?** Forty-seven of the sixty-four survey respondents chose to enter textual responses to this question. One librarian stated, “I think copyright should be reimagined for the digital world, i.e. a world where we don’t really know what a ‘copy’ of a work is.” In order of greatest to least frequency, the comments were:

- Clarify the law
- Better address of digital technology, especially multi-media, revision of the DMCA and the TEACH Act
- Limit terms of copyright
- Revise legislation to address orphan works
- Fair Use exceptions strengthened or broadened for educational and library uses
- Limit power of licensing against fair use
- Standardize licensing language and rights
- Affirm the right of First Sale in the digital environment
- Change the anti-circumvention provision of the DMCA to prevent publishers from using it to restrict fair use
- Eliminate the restoration of foreign copyrights
- Increase the understanding of U.S. copyright law on the part of both American and foreign publishers
- Create an exception to copyright for indexing purposes
- An overhaul

Comments particular to the revision of laws that relate to use of multi-media materials included: “Ability to interlibrary loan sections of e-books.” “Ability to break up electronic content to make it available through e-reserves, course management systems, etc.” “Technology is driving the need for change, so the DMCA and TEACH Act need closer review. The library's goal is to serve the students and faculty, so the laws should complement how students and educators actually use the content, especially or streaming media and blended learning courses.” “Allow for the use of electronic resources and full text articles inside locked course management systems, such as articles, video, audio, etc. for educational/instructional purposes.”

Further comments in this section not related directly to the revision of copyright law, were several concerning the encouragement of open access journals for scholarly publishing. One librarian wrote that what is needed is “a significant change in the way that research is disseminated and evaluated for promotion and tenure that emphasizes scholarly and educational value rather than relying on ‘big name’ journals to vet scholarship.” Another wrote, “There needs to be a move away from the idea that just because it might be possible to license a particular use, that therefore money must change hands. Not all uses of copyrighted works need to be commoditized. Let's limit copyright laws to information that is marketed.” Another comment highlights a belief that institutions and publishers could be more trustful of the respect that academic librarians do give copyright: “Recognize that libraries are careful about e-reserve offerings and stop trying to use CCC and fearful publishers to stop that service. It's likely to drive that service into BlackBoard® and other web enterprise software where the library isn't present and major copyright infringements can take place.”

**34. Lastly, do you have any other opinions or concerns regarding copyright that you would like to convey?** For the final question, survey respondents were asked if they had any other opinions or concerns regarding copyright that they would like to convey. Twenty-six of the survey respondents entered textual content as a response. Many of the comments referred to the technical fault of Question Eighteen of the survey. One survey taker stated, “I think most universities do not realize what a resource they have for copyright education in their librarians.”

Other librarians expressed their opinions that learning about copyright is not given due consideration: “I am concerned that faculty and students do not seem that interested in educating themselves to better understand copyright. I think in the digital age it's a must.” “Copyright and

intellectual freedom are issues that should be relevant to everyone in librarianship and academia. Unfortunately, too many people are unaware of how changes to copyright laws can potentially undermine educational objectives and the public's ability to gain access to information.” More quotations given in response to this question are noted in Appendix G of this document.

## 5.0 DATA DISCUSSION PART I

The participation of 64.6% of the study's total population of ninety-nine in the survey yields a confidence level of plus or minus 7.4 (Lauer and Asher, 1988). Due to the large percentage of the population that participated in the survey, a correction factor of .59 was applied to the usual confidence level of plus or minus 12.5 for this numerical level of participation (Lauer and Asher, 1988). Consequently, the confidence limits of plus or minus 7.4 for this survey are favorable.

The data elicited through the survey of librarians from member libraries of the Association of Research Libraries reveal interesting statistics regarding the practices and opinions of librarians and their libraries in the ARL. Statistics relating to demographic information of the survey participants indicate a well-educated group of librarians. The data shows that 93.8% of the group has a degree in library science, and 31.3% of the group has a first or second masters in another discipline. Of the 15.6% of the respondents who hold PhD degrees and the 12.5% who hold JD degrees, several of these are well-known and well-respected national experts in the field of library science and in particular copyright. Almost 80% of the libraries with librarians responding to the survey request have an undergraduate, graduate, and professional school enrollment that exceeds fifteen thousand students. This is an expected statistic for the institutions that have ARL member libraries. Not one library's institution fell under a five thousand-student enrollment size.

The pre-evaluation of librarians for selection to receive the email invitation for the survey proved successful. Librarians were pre-evaluated by online review of staff listing, library organizational charts, biographies, news items, blogs, and Google® searches. This process is deemed successful because 82.8% of the respondents indicated that their position involved copyright duties or decisions. Key terms from comments made by those that described actual job duties include:

- Fair Use (making determinations if the exception to copyright applies)
- Reserves (mainly electronic)
- Scholarly publishing (assisting both faculty and graduate students about copyright issues)
- Interlibrary loan
- Licensing
- Digitization projects

Librarians are involved in copyright duties and making copyright decisions in their libraries. Faculty and students, seeking help with publishing agreements, at times consult the academic librarians within their institutions.

In assessing whether or not copyright knowledge is needed in a university library, a consideration of what digitally driven offerings the university has is valuable. Making copyrighted materials available through electronic means requires an exception to copyright, a license to use the materials, or permission from the copyright holder. Nearly all the respondent ARL members have offerings of e-reserves (92.2%) at their institutions. A majority equal to 76.6% of the represented universities has distance-learning courses, and 71.9% of them offer online courses. The need exists at these institutions for someone to make copyright evaluations.

Nearly all of the librarians responded that they receive questions from faculty that involve copyright issues related to distance learning courses or e-reserves. The frequency of the questions range from daily to occasionally with most related to placing course materials on

reserve. Upon receiving a question related to copyright, 62.5% of the librarians answer the questions themselves. 80.4% of the survey participants refer questions or follow-through at times with an additional copyright source. A quarter of the respondents refer at times to university counsel, and over half of the respondents make use of an institutionally designated copyright expert or center. The 19.6% that indicated that they do not follow-through or refer to another source may very well be the copyright expert themselves. Copyright questions are being asked at these ARL member libraries, and the librarians are either responding to the questions or further processing the questions.

Designated copyright experts for institutions having ARL member libraries are often affiliated with the library. Of the almost 70% of the institutions that have a designated copyright center or expert, 37.5% of them are affiliated with the library. An additional 20% of the libraries enjoy a joint copyright expert affiliation with general counsel. Alternative locations for copyright centers or experts included distance learning departments, information technology departments, and independent intellectual property centers.

When the digital offerings of the universities are broken down into categories of e-reserves, distance education, and online courses, a divide becomes apparent with respect to responsibility for copyright. Nearly 42% of the librarians indicated that the library made copyright decisions regarding digital resources for e-reserves, distance education, and online courses. 25.8% of the librarians indicated that the department or faculty posting the materials made the decisions, while the remaining almost one third of the librarians indicated that such decisions were a joint effort among the library, the academic department or faculty posting the materials, and sometimes the distance education departments. Here, however, the divide between e-reserves and other digital offerings becomes known. Librarians are almost always

responsible for making copyright decisions for e-reserves, while faculty or distance education personnel often are responsible for making copyright decisions for web offerings and course management systems.

Over half (64.5%) of the responding librarians state that the library is consulted during planning stages for distance education or online courses and consulted concerning the availability of materials for e-reserves. Nearly all of the respondents believe that the library should be involved. Again, the librarians are more active in copyright issues involving e-reserves than they are for distance education. Some statements, however, support a trend that libraries are becoming increasingly more involved in access determinations for online courses.

When assisting instructors with making materials available, nearly all of the respondents feel that instructors cooperate with them. Approximately one half of the survey takers believe that some instructors understand copyright laws, while 14.1% of the them believe that most instructors understand copyright, and a little over one third of the survey takers believe that not many of the instructors understand copyright. Although instructors cooperate with librarians in making materials available, the librarians believe that the instructors' understanding of copyright is not complete.

The need for librarians to understand copyright and to be able to assist faculty and students with copyright issues is definite. Their ability to help with these issues is measured in this study by their own opinion. Nearly 61% of the group believes that the librarians in their own libraries are well equipped to make copyright decisions. While 26.6% believe the librarians in their libraries are very well-equipped to assist with copyright decisions, only 12.5% believe the librarians in their libraries are not very equipped to make copyright decisions.

Since the libraries are sources for copyright information, many maintain online copyright information. Nearly three fourths of the libraries report having online copyright policies in place. Additionally, most of their institutions also post copyright information online. Interestingly, approximately half of each statistic maintains in-print copyright policies. Other resources used by the libraries are websites maintained by other academic libraries. The most commonly noted institutions are the University of North Carolina, North Carolina State University, the University of Texas, Stanford University, Cornell University, and Columbia University. Each of these institutions provides extensive copyright resources online. The libraries also look to the federal government, the ARL, and the American Library Association for copyright information.

When asked if they were familiar with the TEACH Act, nearly 94% of the librarians answered affirmatively. Fifty-four percent of the librarians stated that their library or institution referenced the TEACH Act in its copyright information. When asked in question eighteen of the survey if the institution has distributed information regarding the TEACH Act to the library, the faculty, the students, or none of these choices, respondents were unable to choose more than one answer due to a technical flaw that was not caught in the pre-testing of the survey. Although the question is unreliable, the researcher believes that an assumption can be made that if the first three choices are added together, at least that percentage distributes information regarding the TEACH Act to at least one category of recipients. This combined percentage is 57.7% with 42.4% of the survey takers having chosen the faculty as the recipient group. This percentage is considered a minimum percentage and perhaps not a true percentage because a survey taker could foreseeably choose “none of the above,” if he or she could not enter multiple answers and

wanted to do so. The TEACH Act is known, is being used, and is having at least one of its provisions complied with on a number of university campuses.

According to the Constitution of the United States of America, Article I, Section 8, the original intent underlying copyright is “To promote the progress of science and useful arts” (1788). Throughout the history of American copyright, a balance has been assumed between the interests of science and useful arts, or knowledge stakeholders, and the marketing interests of copyright holders whether they are the works’ creators or the publishers of the works. The advancement of technology has altered how information is created, shared, transmitted, viewed, purchased, licensed, and even considered. As one survey respondent commented, “I think copyright should be reimagined for the digital world, i.e. a world where we don’t really know what a ‘copy’ of a work is.”

Many of the survey takers do not believe that copyright laws have kept pace with technology. They list this as one of their main concerns. One stated, “Current copyright law cannot adequately address the current digital environment. It is still based on concepts and presumptions that are usually not applicable. As a methodology to ensure that creators of unique content are paid for their output, it is a concept that does not apply to the digital world or the way it is evolving.”

One problem identified by the survey participants is that 85.7% of them believe that copyright laws, in their present form, favor publishers over resource users. Some respondents expressed concern that publishers had the means and power to influence legislation. Some communicated that the DMCA’s anti-circumvention provisions enable publishers to restrict Fair Use. Technology has made the complicated area of copyright law even more complicated. Over 65% of the librarians also felt that technologies used by the publishers created privacy concerns

for their resource users. Just over 90% of the librarians believe that publishers collect information about their users by way of technology.

Advancements in technology spurred the enactment of the TEACH Act. The TEACH Act “redefines the terms and conditions on which accredited, nonprofit educational institutions throughout the U.S. may use copyright protected materials in distance education—including on websites and by other digital means--without permission from the copyright owner and without payment of royalties” (ALA and Crews, 2011). If the intent of the TEACH Act was to extend the advantages that Fair Use exceptions to copyright law afford the face to face classroom to the electronic classroom, the law must be in effective use by institutions of higher learning that utilize this technology.

The law was intended to allow the use of copyrighted materials that meet certain conditions in digitized forms without the payment of royalties. When asked if their library evaluates copyright exceptions for resource availability before entering into a license to use a copyrighted work, 74.2% of the respondents answered yes. When asked, however, if they believe that resources that are actually and properly available under copyright exceptions have been denied to users because of a conservative copyright stance, 69.8% said yes. When asked if they believe that resources that are actually and properly available under copyright exceptions have been made available instead through unnecessary licensing, 76.3% indicated yes. If academic libraries are paying to use materials that are properly available to them without fees because of exceptions to copyright, then institutions and libraries are wasting their monetary resources. Comments made by survey takers indicate that the occurrence of unnecessary licensing is due in part to the actions or inactions of all parties involved.

The majority of the responding librarians (69.8%) feel conflicted between the interests of publishers of digital material and their users who want access to the materials. Another problem that concerns academic librarians is the preservation of digital materials. 75.4% of the librarians representing ARL member libraries in the survey believe that publishers do not adequately archive their digital offerings. 88.9% of the librarians are concerned with access or archival problems due to the possibilities of a publisher going out of business or changing its business. If the preservation and archiving of digital materials are proved to be valid concerns, then adequate fair use exceptions for educational institutions need to address the problem.

Additional concerns of the librarians participating in the survey include the confusing state of copyright laws. Many expressed the need for the law to be clarified, which affects not only the university communities but also both American and international publishers. A few disagree with the copyright term extensions imposed after Congress enacted the Berne Convention Implementation Act of 1988<sup>1</sup>, which made the United States a party to the Berne Convention beginning in 1989. Many librarians are concerned with scholarly publishing and support open access publishing. Another area of need that surfaced from the survey is the need to address the treatment of orphan works. Access to orphan works should be made without unreasonable costs. A library's need to index also arose as an area that should be addressed by fair use exceptions.

At least two librarians indicated the need for standardization in licensing language and rights. Uniformity of state laws in certain areas of the law is common. For example, the

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<sup>1</sup> Pub. L. No. 100-568, 102 Stat. 2853

<sup>2</sup> The TEACH Act addresses the terms and conditions under which accredited, nonprofit educational institutions may use copyright protected materials in distance education including websites without permission from the copyright owner and without payment of

Uniform Commercial Code, which applies to the sales of goods and other commercial transactions, is enacted in nearly all U.S. states (Cornell ILL, 2011). Robert L. Holder, former General Counsel for The Ohio State University and long-time assistant and counsel to the Chief Medical Officer and Associate Vice President of The Ohio State University Health System Administration, reviewed licensing agreements for The Ohio State University's Prior Health Sciences Library. He stated, when asked his opinion on achieving uniformity in licensing agreements, "It would be a great savings of time and resources, not to mention gaining more fairness in transactions for institutions without significant legal resources available to them." Although not directly related to the copyright topics addressed herein, this is a viable topic that can be presented to the National Conference of Commissioners on Uniform State Laws, the body of legal professionals that promotes and prepares uniform laws.

Nearly all concerns and comments made by the survey's participants either directly or indirectly relate to licensing from publishers. Many feel that Fair Use exceptions to copyright restrictions are being lost to licensing restrictions. Educational objectives demand the availability of copyrighted materials, and those objectives are constitutionally mandated. Technology, however, has changed the landscape of rights management in academic institutions. One librarian wrote, "Historically, use of copyright material has been worked out via meetings of all interested parties. Digital material has not been handled this way. We have been told 'this is the way it is,' like it or not." Commercial interests and resignation on the part of institutions should not rule out the intent of legislation.

## 6.0 DATA DISCOVERY PART II

**1. From what source can copyright information be accessed?** Access to ARL member libraries' copyright information proved to be available from many starting points. The coders for this study looked for access from each library's homepage, from a secondary page of the library such as *Reserves*, *Policies*, or *Services*, from the library's site map, from the library's search box, and from a search using Google®. Twelve percent of the libraries had a direct link from their main page. Copyright information could be reached from a secondary page of the libraries websites for 60% of the libraries. Twenty percent of the libraries had links to copyright information in site maps. This information was reachable through a search box belonging to the library for 68% of the libraries. Sixty-four percent of the libraries had copyright information on their sites that could be found by using Google®. All libraries had copyright information available at some location, reachable either through the libraries' websites or through Google®.

**2. How many clicks were necessary to access copyright information from the library's homepage?** Beginning at each of the reviewed library websites, navigation clicks were counted to ascertain how many clicks were necessary to arrive at copyright information. Twelve percent of the libraries provided information within one click. Eighty percent of the libraries provided information within two clicks. Three clicks were needed to navigate 4% of the libraries' websites, while 4% of the libraries required four clicks or more.

**3. Who owns the copyright webpage as evidenced by its heading?** As evidenced by the heading of the reviewed copyright webpages for each ARL library, 88% of the copyright information webpages found through the libraries belonged to the libraries. Twelve percent belonged to the libraries' institutions, none belonged to another college or university, none belonged to the U.S. Government, and all cases of ownership were ascertainable. The institutions within which the libraries are situated may also provide copyright information. The statistic above related to "library's institution" indicates the online source that the library's web pages refers its users to for copyright resources.

**4. What words appear in the title of the copyright information page?** The coders scanned the titles of the libraries' copyright information pages for certain words or terms. The frequency of these words or terms were found as follows:

- 100% Copyright
- 0% Reserves or e-reserves
- 8% Digital rights management
- 0% Distance education
- 12% Intellectual Property

**5. Who is the intended audience for the copyright information?** A 76% majority of the examined libraries that were randomly selected for this part of the study addressed their online copyright information to the faculty. Fifty-two percent addressed this information to students, while only one of the libraries provided information for the public. An intended target audience was undeterminable in 24% of the libraries. The above percentages are not mutually exclusive. Those that targeted students nearly always targeted faculty. The one school that targeted the public also targeted both faculty and students.

**6. The policy statement, mission statement, or introduction does which of the following?**

Forty-eight percent of the online copyright information provided by the ARL member libraries randomly chosen for this part of the study indicates in a policy statement, mission statement, or introduction to copyright information that support is given to the principles and goals of intellectual property laws. Twelve percent of these statements provide links to an institutional policy, while 8% of the libraries link to statutory sources. Forty-eight percent of the libraries expressed a goal to help students or faculty understand or handle copyright issues. Four percent of the statements contain a warning for violation of copyright. Finally, 36% of the libraries had no policy statement, mission statement, or introduction regarding copyright.

**7. Is a legal disclaimer present?** A legal disclaimer is a warning that the given information does not constitute legal advice and should not be relied upon as such, or that the author of the material is not legal counsel to the institution, library, or users. Twenty-eight percent of the library websites reviewed had a legal disclaimer; 72% of the library websites did not.

**8. Which of the following appear as content, subsections, or links on the site's main copyright page?** The coders scanned the main copyright page for the libraries for certain subsections or links. These subsections or links appeared on the pages in the following percentages:

- 52% Copyright policy
- 68% Copyright basics
- 32% Faculty rights as authors
- 44% e-reserves
- 12% Distance learning
- 0% Course management program
- 16% Digital rights management
- 76% Fair Use

- 32% TEACH Act
- 16% Recent developments or news
- 88% Links or resources lists

**9. Is CONFU, CONTU, DMCA, or U.S. Copyright Office Circular 21 referenced in any page?** The web pages of each randomly selected ARL member library were scanned for references to CONFU, CONTU, the DMCA, or the U.S. Copyright Office Circular 21. Any of these sources could be referred to for copyright guidance. The reference could either be made through a textual mention or through a link to other material that addressed the target source. Eight percent of the libraries referenced CONFU, 8% of the libraries referenced CONTU, 64% of the libraries referenced the DMCA, and 8% of the libraries referenced the U.S. Copyright Office Circular 21.

**10. Does the online copyright information provide any links to or recommendations for further information from sources outside the institution regarding copyright?** All libraries that were examined refer their users to copyright sources outside of the library. Sixty-four percent of those examined refer to sources within the institution but outside of the library, and 84% of the them refer to a federal government provided source. Other copyright resources are those from the ALA and the ARL. Thirty-six percent of the websites refer to the ALA for information, 40% of them refer to the ARL for information, and 20% of the websites refer to the Copyright Clearance Center for information. Many libraries link to copyright information that is provided by other universities. These referrals are nearly all to the following institutions:

- 64% refers to the University of Texas
- 48% refers to Stanford University
- 48% refers to Cornell University
- 44% refers to the University of North Carolina
- 36% refers to North Carolina State University

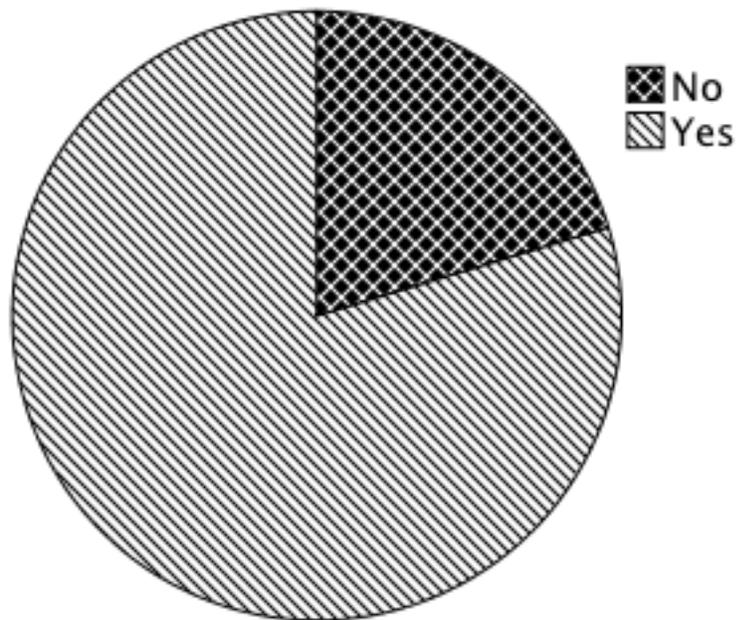
- 32% refers to Columbia University
- 20% refers to the University of Minnesota

Other institutions and organizations, which were listed as referred sources of copyright information, were linked by 8% or less of the libraries.

**11. Is there a copyright toolbox or toolkit provided by the library or linked?** Many of the libraries offer toolboxes, toolkits, or decision trees for aid in making copyright decisions concerning Fair Use. Online copyright information was examined for the presence of a copyright toolbox, toolkit, or decision tree. Twelve percent of the libraries offered them to their users, 28% of the libraries gave links to another library's toolbox, toolkit, or decision tree, and 60% of the libraries offered no toolbox, toolkit, or decision tree to help with copyright decisions concerning Fair use.

**12. Is the TEACH Act referenced anywhere?** The websites of the libraries were scanned for reference to the TEACH Act. References to the TEACH Act were found for 80% of the libraries. No reference to the TEACH Act was found for 20% of the libraries.

**No: 20%**                      **Yes: 80%**



**Figure 16. Reference to TEACH Act**

**13. How is the TEACH Act is referenced?** References to the TEACH Act were categorized and found as follows:

- 20% By name only with no content or explanation of the Act
- 15% By name with an explanation of the law but not the text of the law
- 10% By name and text of the law
- 30% By link to the law
- 40% By link to another institution's information that includes the TEACH Act

Some of the textual content provided by the libraries regarding the TEACH Act was complete; the textual content of other sites was incomplete (ex: a bulleted list of benefits). The above percentages are not exclusive of each other.

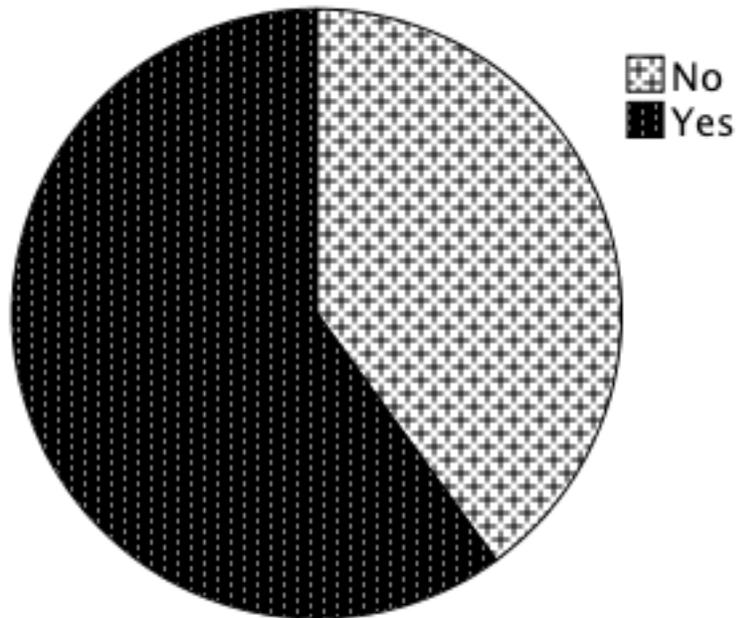
**14. Is there a statement regarding whether the institution has decided to use the TEACH Act?** The online copyright information for the ARL member libraries randomly chosen for this part of the study were examined to determine if there exists a statement regarding whether or not the institution has decided to use the TEACH Act to make Fair Use evaluations. No such statement was found for any of the libraries.

**15. Is there an explanation that the option to use the TEACH Act exceptions to copyright depends upon institutional agreement and compliance?** Similar to the immediately preceding question, the online copyright information for the libraries was examined to verify if any presented a statement that the option to use the TEACH Act exceptions to copyright depends upon institutional agreement and compliance. One library or 4% of the total libraries had such a statement. Ninety-six percent of the libraries did not.

**16. Is there a statement regarding whether the institution has decided to comply with provisions of the TEACH Act?** The online copyright information pages were examined for evidence that the institution has decided to comply with the provisions of the TEACH Act. None of the websites had such a statement.

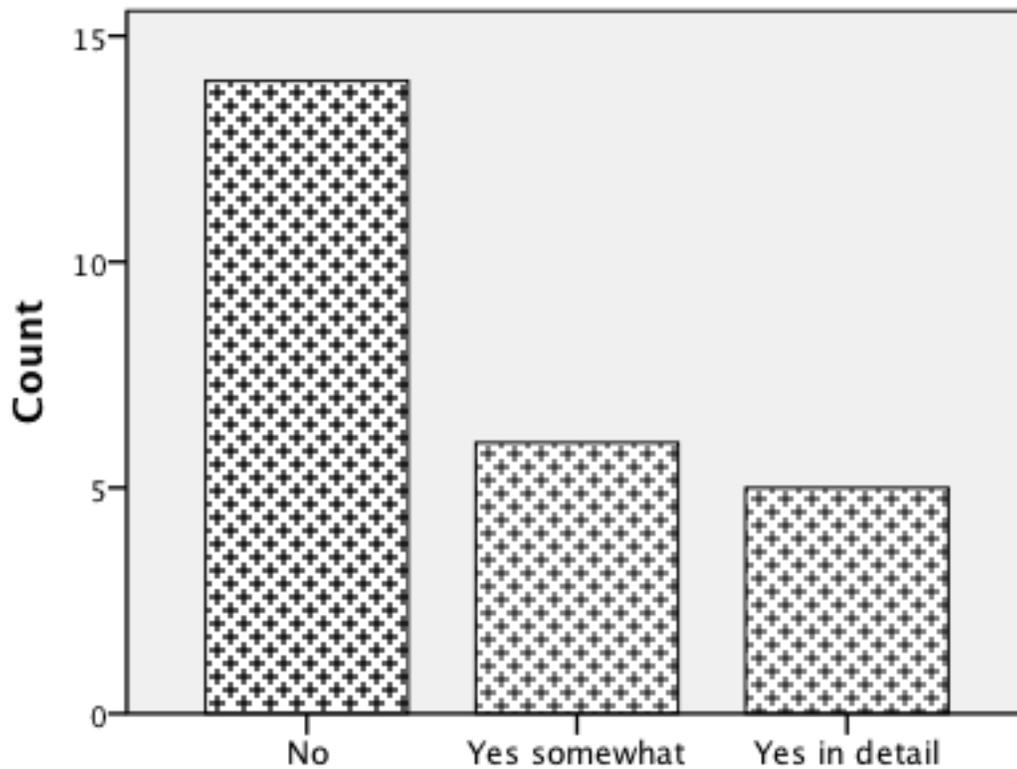
**17. Does it appear from the website, that the library and/or its institution is conveying that copyright decisions can be made using the TEACH Act?** From the information provided online by the libraries and/or their institutions, the coders determined whether or not the libraries and/or their institutions have indicated that copyright decisions can be evaluated using the TEACH Act. Seventy-two percent of the libraries or their institutions appear to be supporting use of the TEACH Act, and 28% of the libraries or their institutions do not.

**No: 28%**                      **Yes: 72%**



**Figure 17. Using the TEACH Act**

**18. Is the TEACH Act explained?** The online copyright information from each of the randomly selected libraries was examined to determine if there existed an explanation of the TEACH Act in the information. Twenty percent of the libraries explained the TEACH Act in detail, 24% of the libraries somewhat explained the TEACH Act, and 56% of the libraries did not explain the TEACH Act.



**Figure 18. TEACH Act explained**

**19. Is the information mostly a listing of resources for copyright information?** The coders evaluated the copyright information for each library to determine if the information was mostly a listing of resources and/or links. While fifty-six percent of the libraries offered mostly a listing of resources and links to resources, 44% of the libraries offered more copyright related content.

**20. Does the site seem authoritative?** The coders considered the apparent authority of the online copyright information provided by the libraries on a scale of one to four. Forty-four percent of the libraries were judged a one or not very authoritative, 40% of the libraries were judged a two or somewhat authoritative, 8% of the libraries were judged a three or authoritative, and 8% of the libraries were judged a four or very authoritative.

**21. Is the site well organized and/or easy to navigate?** The coders rated the libraries' online copyright information pages on whether or not they were well organized and easy to navigate. Twelve percent of the online copyright information pages were considered to be well organized, 8% of the online copyright information pages were considered to be easy to navigate, 28% of the online copyright information pages were considered to be both well organized and easy to navigate, and 52% of the online copyright information pages were considered to be neither well organized nor easy to navigate.

**22. Does the site seem helpful with regard to copyright assistance?** The libraries' online copyright information was evaluated for helpfulness. The coders found that 56% of the libraries had online copyright information that was not very helpful, that 24% of the libraries had online copyright information that was somewhat helpful, that 16% of the libraries had online copyright information that was helpful, and that 8% of the libraries had online copyright information that was very helpful.

## 7.0 DATA DISCUSSION PART II

This content analysis in its proposal stage was more qualitative than it was at its completion. This change was due in large part to the difference in perceptions between the coders. Apparent in pretesting, the observations of an attorney and library science educated person are different than those of a graduate student with one information science course to his credit when looking at copyright issues. On objective points, the findings of the two coders more successfully merged. Both the codebook and the code form were revised to eliminate redundant or unnecessary findings. The questions were revised to be as closed-ended as possible. Key words representing attributes such as authority and organization were agreed upon and incorporated into the review.

Of the twenty-five randomly chosen libraries, which were subject to the content analysis of their online copyright information, 100% of the libraries had copyright information available. The most common way of locating the information was through a search box on the library's main webpage (68%). Almost as successful is finding information through links on a secondary webpage belonging to the library such as a page for services, policies, or reserves. Google® searches also elicited results in 64% of the searches made.

Copyright information for most of the libraries could be accessed in two navigational clicks. While 12% of the libraries provided quicker access with one click, 80% of the libraries required two clicks. Three or more clicks were needed for only 8% of the libraries.

The libraries provided their own information in 88% of the websites studied. The most evident intended target for the information was faculty (76%) followed by students (52%). Faculty is likely a more frequent target because of their need to post materials. If a library chose to include a policy, introductory, or mission statement with its copyright information, these statements most frequently expressed the library's or institution's support for the principles and goals of intellectual property laws and the goal to help students and/or faculty understand or handle copyright issues (both 48%).

All of the libraries in this portion of the study referred users to sources outside their own institution for copyright information. Eighty-four percent linked to federal government sources. Other common sources were the ALA and ARL. In agreement with the survey respondents, the website review showed that many libraries link to copyright information that is provided by other universities. A listing of these institutions, which are linked, agrees with those listed by the survey respondents.

Eighty percent of the websites reviewed make reference to the TEACH Act either directly or indirectly. The largest percentage of TEACH Act references were indirect references that were made by linking another institution's information that includes the TEACH Act. When the library's own information does not reference the TEACH Act, these indirect references by linking appear perhaps unintentional.

Although 80% of the websites analyzed made reference to the TEACH Act, no website evidenced a statement regarding whether or not the institution has decided to use the TEACH Act or is complying with its provisions. One library's online information explained that the option to use the TEACH Act exceptions to copyright depends upon institutional agreement and compliance. Although the posting of such statements is not necessarily to be expected, the

compliance requirements imposed by the TEACH Act are burdensome and some compliance measures should be evident. Since the Act requires an institutional resolution to comply with its requirements, whether or not an institution has chosen to use the TEACH Act arguably should not be left to inference.

Fifty-six percent of the library websites contained no explanation of the TEACH Act. Twenty percent of the websites contained detailed information concerning the ACT, and 24% of the websites somewhat explained the Act. Most importantly for this study, 72% of the twenty-five analyzed websites appeared to convey that copyright decisions can be made using the TEACH Act.

In the coders' opinions, nearly all of the websites appeared less than authoritative. Less than half of the websites were considered well organized and easy to navigate, and more than half provided information that was not very helpful. To be noted is that of the ARL member libraries that are found on the most frequently linked copyright sites, none of them were randomly chosen for this portion of the study.

A question that arose after the content review of the online copyright information provided by the twenty-five ARL member libraries concerns whether or not these libraries may be unintentionally communicating to their users that they may make use of the TEACH Act, when in fact they cannot because of institutional noncompliance with the Act. By providing links, without any kind of disclaimer, to information that discusses the TEACH Act, libraries may be implying that the TEACH Act is available. The incomplete presentation of information about the TEACH Act is also troublesome. To post a bulleted list of TEACH Act benefits without any of its requirements, is providing insufficient information.

## 8.0 CONCLUSIONS

Librarians are involved in a greater capacity than expected in the making of copyright decisions. Librarians, in the ordinary course of their job duties, are evaluating the use of materials for e-reserves. Less frequently, they are helping to make decisions regarding materials for distance learning, online courses, and course management programs. Many feel qualified to make these decisions. Librarians are increasingly assisting faculty and graduate students with scholarly publishing questions. Hopefully, the librarians who indicated in survey comments that they are reviewing publishing agreements for faculty are those that are attorneys or experts in the field of copyright.

In the present and ever-increasingly digitally driven world, the purpose of the TEACH Act seemingly is valid. Digitally delivered course materials should receive most of the benefits accorded course materials delivered in a face-to-face classroom. If, however, the Act is not being used because of overly burdensome compliance requirements or confusion, the intent underlying the Act to achieve this purpose fails.

While 54% of the academic librarians taking the survey indicated that their libraries or institutions reference the TEACH Act in their copyright information, the content analysis of twenty-five of these libraries indicates that 80% of the libraries either directly or indirectly reference the TEACH Act. Unknowledgeable or unintentional endorsement of the TEACH Act could be problematic given the strict compliance requirements of the law.

Based on the opinions and practices of academic ARL member libraries and librarians, approximately half of the libraries and the institutions within which the libraries are situated, are utilizing the benefits afforded under the TEACH Act. Their faculty and students are guided to use the TEACH Act in making copyright decisions. This study failed to find convincing evidence of compliance or noncompliance with the requirements of the law. Based on the content analysis of websites, there are indications, such as the provision of sufficient information, that some institutions are complying; while others, based upon the insufficiency of provided information, are not.

Based on the opinions and practices of academic libraries and librarians, the TEACH Act is not accomplishing its goals. Librarians report unnecessary licensing, refusals of publishers to acknowledge exceptions to copyright, and complacency on the part of institutions to go ahead and license. Librarians consider the present state of copyright laws to be confusing and in need of reform.

The online copyright information provided by the libraries, which was reviewed in this study, indicates that the TEACH Act is not accomplishing its intended purposes. Although most of the libraries either directly or indirectly reference the TEACH Act, the information provided was not considered authoritative in most cases. Additionally, in many instances, the reference to the TEACH Act by indirect link to another institution's information, made institutional compliance on the part of the linking library's institution doubtful.

## 9.0 LIMITATIONS

The limitations of this study are many. Although the librarians, who were invited to participate in the survey portion of the study, were pre-evaluated, there is necessarily great discrepancy among the survey participants. A few are nationally renowned copyright experts while others are likely recent library program graduates. This discrepancy might lead to different understandings of the survey questions. Secondly, upon later review of the survey questions, bias may be present in some of the questions due to a slight leading nature in the format of the questions.

For the website content analysis portion of this study, a limitation exists in the design of the study. The study's design was based upon an expectation that a defined copyright information section would be located for most libraries. This is not what the coders found. In many cases, there was a distinct and intended destination for copyright information. In other cases, however, the coders found a confusing array of destinations such as library sites that provided online copyright information for more than one department or collection, with none seeming dominant. In these cases, the coders combined the content in their analyses. This coding practice does not accurately report the information that a faculty member or student would find when searching for copyright information, since the faculty member or student cannot be expected to refer to all possible information locations.

Similarly, there exists a limitation in how the information gathered from the content analysis of the libraries' websites is reflective of the institution's policies. The starting point was the homepage of the library that was linked from the ARL's member directory. In one instance, the library linked to a copyright policy provided by university counsel. Although this was noted in the analysis, surely for this institution, the information gained through the study more accurately reflected the practices of the institution in comparison with the information gained from other library websites.

## 10.0 FURTHER INVESTIGATIONS

The possibilities of other data discoveries that could greatly contribute to achieving a better understanding of how academic institutions are viewing and using the TEACH Act are numerous. Additionally, the results of this study suggest other areas and aspects of copyright that are appropriate, interesting, and valuable for future research.

Replicating the study with the same methods applied to different research populations is intriguing. For the most part, ARL member libraries belong to very large institutions with extensive research focuses. Future studies could examine the copyright policies and practices of smaller educational institutions. Similarly, a question arises concerning copyright information for those schools of higher education that exist primarily online. If these schools are for-profit institutions, their commercial nature affects their ability to use the TEACH Act. Are the schools, however, referencing or seemingly using the TEACH Act when they should not be?

Although the views and practices of the libraries and librarians are valuable, data gathered from faculty pertaining to their copyright practices would also be enlightening on the subject of the TEACH Act. Answers to questions such as “Does faculty first seek answers to copyright questions from the library, a search engine, or what other source?” could be determined. An involved study in which the websites of different libraries in large universities are scanned for copyright information and compared to that of the main copyright information source for the university could be undertaken. For example, health science libraries, law

libraries, and performing arts libraries can be found with copyright information on the web pages. The review of one university's website during this study disclosed multiple libraries with no cohesive view of copyright. Perhaps a study based on a comparison of different copyright information sources within the same institutions would elicit insightful information.

Perhaps the most pertinent area for future research that has come to light as a result of this study is the need of programs of library and information science to include copyright in their course of studies. This project has revealed that librarians are being looked to as copyright decision makers and that the need for copyright evaluations is increasing. Current LIS programs could be examined with the intent of determining what percentage offer copyright courses and the extent of the focus on copyright within other courses.

As a result of the website review portion of this research, future investigations could include a legal analysis of a library's or institution's possible liability for providing misleading or incorrect copyright information. A future research agenda could be expanded to focus on other legal aspects of copyright such as trends in infringement litigation both criminal and civil, licensing, and how technology is evolving to support both restrictions on and freedoms from copyright. This study could include an examination of pending and proposed laws that affect copyright in academic settings.

With regard to the website portion of this study, the results could be enriched if analyzed by a software package more specifically designed for qualitative results. Consequently, undertaking a similar project with the use of a statistical product such as Atlas.ti® for the analysis of the data. Additional data collection could include the research focus of the institution, the size of the library, and other library characteristics.

Digitization will increase in use. Publishers are not going to stop licensing every possible work on their own. Either licensing will continue to, as the librarians in this study see it, overtake Fair Use exceptions to copyright; or the TEACH Act will be legislatively revised so that it becomes more useable by academic institutions. Further investigation can follow the progression of these inevitable changes.

## **APPENDIX A**

### **FIRST EMAIL TO SURVEY PARTICIPANTS**

As a doctoral student at the LIS Program, School of Information Sciences at the University of Pittsburgh, my dissertation focuses on copyright issues and the opinions and practices of academic librarians relating to copyright. The goal of this research study is to produce data that relates to the day-to-day experiences of librarians with copyright in academics. By survey, information will be collected from academic librarians from American libraries belonging to the Association of Research Libraries.

This study is an online survey with thirty-four questions with an estimated time involvement of seven to eleven minutes. This is an anonymous survey with no foreseeable risks or direct benefits to you. No information requested involves an issue that will put you or your institution at risk in any way. All responses are confidential, and results will be kept under lock and key. Your participation is voluntary, and you may withdraw from this project at any time.

Your help and opinions are greatly appreciated. Copyright legislation is changeable, and librarians historically have wielded significant impact on legislators who create copyright

legislation. If technology is tipping the historical balance of copyright in favor of publishers and away from traditional concerns, then hopefully the information produced by this study will be helpful to those who can make change happen.

In appreciation, those who complete the survey within ten days will receive a \$10.00 Amazon.com gift certificate. Information relating to the incentive is found at the completion of the survey.

<https://www.surveymonkey.com/s/695TY3L>

Please contact me if you have any questions. Thank you for your time and participation.

With kind regards,

Pamela Fowler, JD, MLIS

330-518-8501

LIS Program

School of Information Sciences

University of Pittsburgh

## **APPENDIX B**

### **SECOND EMAIL TO SURVEY PARTICIPANTS**

Dear \_\_\_\_\_ ,

This is a second request asking that you or someone in your library participate in a survey targeted at American, academic member libraries of the Association of Research Libraries regarding copyright. If you completed the survey earlier, I sincerely thank you and ask that you disregard this second request.

This second request is necessary because the reliability of my research, and it then follows my dissertation and degree, depend upon sufficient participation. There is a finite number of American, academic members of the ARL. Consequently, if you have not yet taken the below linked survey, I earnestly ask that you do.

If you feel another person in your library is better equipped to complete the survey, please forward this email to him or her. Please limit the forwarding to one person only. I have been told that the survey may take as few as four to five minutes to complete. In recognition that your

time is valuable, I have upped the incentive to a \$20 Amazon gift certificate (details follow the survey) – quite handy for holiday shopping!

Please refer to the original email below for further information. I sincerely thank you for your consideration of this request and for your participation in the survey. My research is intended to discover data that may be helpful to all academic libraries.

<https://www.surveymonkey.com/s/695TY3L>

Yours truly,

Pam Fowler

University of Pittsburgh

Original email sent 10/12/11: [The first email, as it appears in Appendix A of this document, was included here in full.]

## APPENDIX C

### SURVEY FORM

#### Academic Librarian Survey: Copyright

**1. What are your educational degree(s)? Please choose all that apply.**

BA

BS

MLS

MLIS

PhD

JD

Other (please specify)

**2. Size of college or university based on student (undergraduate, graduate, and professional) enrollment on main campus:**

less than 5,000

5,000 to 15,000

more than 15,000

**3. Does your position involve copyright duties or decisions?**

Yes

No

If yes, please describe.

**4. Of the following, which does your institution offer? Please choose all that apply.**

e-reserves

Distance Learning

Online courses

None of the above

**5. In providing resources for distance learning courses or e-reserves, have you or other librarians in the library ever had copyright questions from faculty?**

Yes

No

Any elaboration regarding type of questions, frequency of questions, etc.?

**6. How do librarians in your library typically handle copyright questions?**

**7. Who makes copyright decisions regarding digital resources for e-reserves, Distance Education, or online courses?**

the library

the academic department posting the materials

Other

**8. Do you feel that instructors cooperate with librarians in making materials available?**

Yes

No

**9. In your opinion, how many instructors of distance education courses or those using e-reserves understand copyright laws?**

all

most

some

not many

none

**10. How well-equipped or prepared do you believe librarians in your library are to make copyright decisions?**

extremely

very

somewhat

not very

not at all

**11. Is your library consulted regarding resource availability of materials for e-reserves or in the planning stages of a distance education or online course?**

Yes

No

If the library is involved, what kind of copyright evaluation, if any, does the library make concerning the materials?

**12. Do you believe the library should be involved?**

Yes

No

**13. Does your college or university have a designated copyright center or expert?**

Yes

No

If so, with what department, school, or college within the institution is he/she/it affiliated?

**14. Which of the following maintains a stated copyright policy?**

**Please choose all applicable answers.**

Your institution in print

Your institution online

Your library in print

Your library online

None of the above

**15. Does your institution refer you to any source outside the institution, such as another institution's online information, for copyright information?**

Yes

No

If yes, please specify.

**16. Are you familiar with the TEACH Act (The Technology, Education and Copyright Harmonization Act of 2002)?**

Yes

No

**17. Does any copyright policy of your library or institution reference the TEACH Act?**

Yes

No

Do not know

**18. Has your institution distributed information regarding the TEACH Act to any of the following? Please choose all that apply.**

the library

faculty

students

none of the above

**19. Do you believe copyright laws as they now exist favor publishers over resource users?**

Yes

No

**20. Of the following, whom do you believe can be held criminally or civilly responsible for breach of copyright laws? Please choose all applicable answers.**

the educational institution

the institution's librarians

the library's patrons

none of the above

**21. Do you feel that librarians are conflicted between the interests of publishers of digital material and users wanting access to digital materials?**

Yes

No

**22. Do you believe digital publishers have control over matters that more properly should be managed by the library?**

Yes

No

If yes, any elaboration?

**23. Whom do you believe has more control over how a user accesses a licensed digital work?**

the publisher

the library

**24. Does the library evaluate copyright exceptions for resource availability before entering into a license to use the work from the publisher?**

Yes

No

**25. Do you believe that resources that are actually and properly available under copyright exceptions have been denied to users because of a conservative copyright stance?**

Yes

No

If yes, do you believe this happens frequently, occasionally, or rarely?

**26. Do you believe that resources that are actually and properly available under copyright exceptions have been made available instead through unnecessary licensing?**

Yes

No

If yes, do you believe this happens frequently, occasionally, or rarely?

**27. Do you believe that publishers adequately archive their digital offerings?**

Yes

No

2

**8. Are you concerned with access or archival problems due to a publisher's going out of business or changing its business?**

Yes

No

**29. How important do you believe the preservation of digital works to be?**

Extremely

Very

Somewhat

Not very

Not at all

**30. Due to technological capabilities of the publisher, do you have privacy concerns for your users in their use of licensed digital works?**

Yes

No

**31. Do you believe that publishers collect information by way of technology about the users and their uses of resources?**

Yes

No

**32. What is your biggest concern regarding copyright?**

**33. In your opinion, what changes could be made to current copyright law to better serve your library and its goals?**

**34. Lastly, do you have any other opinions or concerns regarding copyright that you would like to convey?**

Thank you very much for your time and participation. Your opinions and answers are greatly valued. In order to receive the Amazon gift certificate and in order maintain anonymity, please email the principal investigator at [paf13@pitt.edu](mailto:paf13@pitt.edu) with your name, email address, and name of institution with the subject line "completed survey." There will be no link whatsoever between the answers in this survey and the identifying email. You will receive the gift certificate by reply email. Again, thank you for your considered answers and time.

## APPENDIX D

### CODE BOOK

#### Content Analysis of University Web Pages Relating to Copyright

**Coder:** Name of coder

**Date:** Date on which coding done

**Subject No.:** Number corresponding to Institutional name and URL

**A. Navigation:** From what source can the web page be accessed? Circle all that apply.

1. Library home page
2. Library secondary page starting for example under reserves, services, or policies
3. Library site map
4. Library search box (search for “copyright policy”)
5. Google® (search for “name of institution library copyright policy”)

**B. Access:** How many clicks were necessary to access the copyright information from the library’s home page? Count the click to search as one, Report quickest means but not Google®.

1. 1 click
2. 2 clicks
3. 3 clicks
4. 4 or more clicks
5. no copyright information

**C. Ownership:** Who owns the copyright webpage as evidenced by its heading?

1. Library
2. Institution but not the library
3. Another college or university
4. The U.S. Government
5. Other

**D. Title:** What words appear in the title of the copyright information page? Circle all that apply.

1. Copyright
2. Reserves or e-reserves
3. Digital rights management
4. Distance education
5. Intellectual property

**F. Intended Audience:** For whom is the information contained in the web site intended? Circle all that apply.

1. Faculty
2. Students
3. Public
4. Unknown

**F. Policy Statement, Mission Statement, or Introduction to copyright information does which of the following:** Circle all that apply.

1. Evidences support for the principles and goals of intellectual property laws
2. Provides link to institutional copyright policy
3. Links to statutory sources
4. Contains warning for violation of copyright
5. Evidences goal to help students and/or faculty understand or handle copyright issues
7. No policy statement, mission statement, or introduction present

**G. Legal Disclaimer:** Warning that information does not constitute legal advice or that the author of the material is not legal counsel to the institution, library, or users.

1. Present
2. Not present

**H. Which of the following appear as content, subsections, or links on the sites main copyright page?:** Circle all that apply.

1. Copyright policy
2. Copyright basics
3. More advanced copyright explanation
4. Faculty rights as authors
6. Reserves or e-reserves
7. Distance learning
8. Course management program
9. Digital rights management
10. Fair Use
11. TEACH Act
12. Recent developments or news
13. Links or Resource List

**I. Are any of the following copyright guidelines referenced on any page by content or through link to other sources that reference them?**

1. CONFU
2. CONTU
3. DMCA
4. U.S. Copyright Office Circular 21

**J. Outside links:** Does the web page provide any links to or recommendations for further information from sources outside the institution regarding copyright?

1. The library's institution
2. Government source
3. University of Texas
4. Stanford University
5. University of North Carolina
6. North Carolina State University
7. Columbia University
8. ALA
9. ARL
10. Other \_\_\_\_\_

**K. Toolbox:** Does the web site offer a toolbox, toolkit, decision tree, or other organized step-by-step guide for copyright analysis?

1. Yes by the library itself
2. Yes by link to another site's toolbox, toolkit, or decision tree
2. No

**L. Exceptions to copyright:** Is the TEACH Act referenced anywhere in the site's information?

1. Yes
2. No

**M. The TEACH Act is referenced:**

1. By name only – no content or explanation
2. By name with explanation of law but no text
3. By name and text
4. By link to law
5. By link to other institutional information (Ex: University of Texas toolbox or UNSC's resources that include the Act)

**N. TEACH Act:** Is there a statement regarding whether the institution has decided to use the TEACH Act?

1. Yes
2. No

**O. TEACH Act:** Is there an explanation that the option to use the TEACH Act exceptions to copyright depends upon institutional agreement and compliance?

1. Yes
2. No

**R. TEACH Act:** Is there a statement regarding whether the institution has decided to comply with provisions of the TEACH Act?

1. Yes
2. No

**S. TEACH Act:** Is the TEACH Act explained?

1. Yes in detail (benefits and compliance requirements)
2. Yes somewhat
3. No

**T. Is the information mostly a listing of resources for copyright information?**

1. Yes
2. No

**U. Does the site seem authoritative?**

1. Not very authoritative
2. Somewhat authoritative
3. Authoritative
4. Very authoritative

**V. Is the site well-organized and/or easy to navigate?**

1. Well-organized
2. Easy to navigate
3. Both
4. Neither

**W. Does the site seem helpful?**

1. Not very helpful
2. Somewhat helpful
3. Helpful
4. Very helpful

**X. Notes**

## APPENDIX E

### CODE FORM

#### ARL Member Library Website Review

**1. From what source can copyright information be accessed. Choose all that apply.**

Library homepage

Library secondary page starting for example under policies, services, or reserves

Library site map

Library search box

Google®

**2. How many clicks were necessary to access copyright information from the library's website? (counting click to search as one)**

1 click

2 clicks

3 clicks

4 or more clicks

no copyright information

**3. Who owns webpage as evidenced by its heading?**

Library

Institution but not the library

Another college or university

The U.S. Government

Other

**4. What words appear in the title of the copyright information page?**

Copyright

Reserves or e-reserves

Digital rights management

Distance education

Intellectual property

**5. Who is the intended audience?**

Faculty

Students

Public

Unknown

**6. Policy, mission statement, or introduction:**

Evidences support for the principles and goals of intellectual property laws

Provides link to institutional copyright policy

Links to statutory sources

Contains warning for violation of copyright

Evidences goal to help students and/or faculty understand or handle copyright issues

No policy, mission statement, or introduction present

**7. Legal disclaimer (warning that information does not constitute legal advice or that the author of the material is not legal counsel to the institution, library, or users):**

Present

Not present

**8. Content, subsections, or links listed on main copyright page?**

Copyright policy

Copyright basics

Faculty rights as authors

e-reserves

Distance Learning

Course management program

Digital rights management

Fair use

TEACH Act

Recent developments or news

Links or resource list

**9. Any of the following referenced in any page?**

CONFU

CONTU

DMCA

US Copyright Office Circular 21

**10. Links:**

Institutional source outside of the library

US Government source

University of Texas

Stanford

University of North Carolina

North Carolina State University

Columbia

Cornell

ALA

ARL

Other (please specify)

**11. Is there a copyright toolbox or toolkit provided by the library or linked?**

Yes library's own

Yes linked to another library's toolbox

No

**12. Is the TEACH Act referenced anywhere?**

Yes

No

**13. TEACH Act is referenced:**

By name only -- no content or explanation

By name with explanation of law but no text

By name and text

By link to law

By link to other institutions (Ex: University of Texas Toolbox, or UNSC's resources that include the Act)

Other (please specify)

**14. Is there a statement regarding whether the institution has decided to use the TEACH Act?**

Yes

No

**15. Is there an explanation that the option to use the TEACH Act exceptions to copyright depends upon institutional agreement and compliance?**

Yes

No

**16. Is there a statement regarding whether the institution has decided to comply with provisions of the TEACH Act?**

Yes

No

**17. Does it appear from the website that the library and/or its institution is conveying that copyright decisions can be made using the TEACH Act?**

Yes

No

**18. Is the TEACH Act explained?**

Yes in detail

Yes somewhat

No

**19. Is the information mostly a listing of resources for copyright information?**

Yes

No

**20. Does the site seem authoritative?**

1 not very authoritative

2 somewhat authoritative

3 authoritative

4 very authoritative

**21. Is the site well-organized and/or easy to navigate?**

Well-organized

Both

Easy to navigate

Neither

**22. Does the site seem helpful?**

Not very helpful

Helpful

Somewhat helpful

Very helpful

**23. Any notes:**

## APPENDIX F

### ORIGINAL SURVEY DESIGNS

#### F.1 FIRST SURVEY

Size of college or university based on student (undergraduate, graduate, and professional) enrollment on main campus: less than 5,000 5,000 to 15,000 more than 15,000

Librarian's educational degree(s): Ex: BA, BS, MLS, MLIS, PhD

#### **Academic Librarian Survey: Copyright**

1. Does your position involve copyright duties or decisions? Yes No
2. If so, please specify:
3. Does your institution offer Distance Education or online courses? Yes No
4. What online course system, if any, does your institution employ? Ex: Blackboard®, WebCT®, Distance2Learn®, Moodle®.
5. If so, what is the library's involvement with these courses?
6. In providing resources for distance learning courses or e-reserves, have you or other librarians in the library ever had copyright questions from faculty? yes no
7. Any elaboration?
8. How do the librarians handle these questions?

9. Who makes copyright decisions regarding digital resources for Distance Education or online courses? the library the academic department posting the materials other
10. Do you feel that instructors cooperate with librarians in making materials available?  
yes no
11. In your opinion, how many instructors of distance education courses understand copyright laws? all most some not many none
12. How well-equipped or prepared do you believe librarians in your library are to make copyright decisions? extremely very somewhat not very not at all
13. Is your library consulted regarding resource availability in the planning stages of a distance education or online course? yes no do not know
14. Do you believe the library should be involved? yes no
15. Does your college or university have a person designated as a copyright expert? yes no
16. If so, what department, school, or college is he/she affiliated with?
17. Does the library request copyright information from this person? yes no
18. Are you familiar with the TEACH Act? yes no
19. Does your college or university have a stated copyright policy? yes no
20. If so, does this policy reference the TEACH Act? yes no do not know  
If selected, will you participate in a second survey containing 36 questions? yes no

Thank you very much for your time and participation. Your opinions and answers are greatly valued.

## F.2 SECOND SURVEY

Size of college or university based on student (undergraduate, graduate, and professional) enrollment on main campus: less than 5,000 5,000 to 15,000 more than 15,000

Librarian's educational degree(s): Ex: BA, BS, MLS, MLIS, PhD

### Academic Librarian Survey: Copyright

1. Does your institution maintain online information relating to copyright? Yes No
2. Does your library? Yes No
3. Who maintains online copyright information for your institution or library?  
the library institutional department outside the library other
4. Does any of this information reference the TEACH Act (Technology, Education, and Copyright Harmonization Act of 2002)<sup>2</sup>? Yes No I don't know
5. If information is available, do you believe the information is complete enough? yes no
6. Does your institution refer you to any other source, including sources outside the institution, for copyright information? Yes No
7. If so, where?
8. Does the library consult published copyright information? If so, please list:
9. Are you familiar with the TEACH Act? yes no
10. Has your institution made an official decision to use the TEACH Act?  
yes no do not know
11. Has your institution distributed information about the TEACH Act to the library? yes no

---

<sup>2</sup> The TEACH Act addresses the terms and conditions under which accredited, nonprofit educational institutions may use copyright protected materials in distance education including websites without permission from the copyright owner and without payment of royalties.

12. Has the library distributed information about the TEACH Act to anyone outside the library?  
faculty students both
13. Do you believe copyright restrictions favor publishers over resource users? yes no
14. Do you believe that as an educational institution, your college or university is immune to prosecution or civil suit for breach of copyright laws? yes no do not know
15. Do you feel as a librarian that you are caught between the interests of publishers of digital material and your users wanting easy access to digital materials? yes no
16. Do you believe digital publishers have control over matters that more properly should be managed by the library? yes no
17. If so, please explain:
18. Do you believe the library has control or the publisher has control over how a patron accesses a licensed digital work? library publisher
19. Do you believe that a librarian may be personally held liable for acts of copyright infringement? yes no do not know
20. Do you believe that library patrons may be personally held accountable for acts of copyright infringement? yes no do not know
21. How well-equipped or prepared do you believe you are to make copyright decisions?  
extremely very somewhat not very not at all
22. When making a resource available for a distance education course or an online course, does the library evaluate copyright concerns? yes no
23. If so, does the library evaluate copyright exceptions to make the resource available before entering into a license to use the work from the publisher? yes no
24. Do you believe that resources that are actually and properly available under copyright exceptions have been denied to users because of a conservative copyright stance?  
yes no
25. Do you believe that resources that are actually and properly available under copyright exceptions have been made available instead through licensing? yes no
26. Do you have any concerns about the availability of digital works? yes no
27. If so, please explain:

28. Are you concerned with the preservation of digital works? yes no
29. Do you believe that copyright laws impede the preservation of digital works? yes no
30. Do you believe that publishers adequately archive their digital offerings? yes no
31. How important do you believe the preservation of digital works to be?  
extremely very somewhat not at all
32. Are you concerned with access or archival problems due to a publisher going out of business or changing its business? yes no
33. Due to technological capabilities of the publisher, do you have privacy concerns for your users in their use of licensed digital works? yes no
34. Do you believe that publishers collect information by way of technology about the users and uses of resources? yes no
35. What is your biggest concern regarding copyright?
36. In your opinion, what changes could be made to current copyright law to better serve your library and its goals?

Lastly, do you have any other opinions or concerns regarding copyright that you would like to convey?

Thank you very much for your time and participation. Your opinions and answers are greatly valued.

## APPENDIX G

### QUOTATIONS FROM SURVEY RESPONSES

#### **Question Three: Does your position involve copyright duties or decisions?**

“Basic copyright consultation for faculty using fair use and instruction, and drafting fair use guidelines for course reserves and related services, e.g., streaming media, narrated power points” “work with faculty in the integration of copyrighted materials for their courses” “The campus policy is to place many of the individual copyright decisions back on to the faculty. However, should there be a decision to be made as to what we place on reserves, in the collection, online, etc -- I am one of the primary decision makers.” “Assist with questions about items on Reserve, teaching faculty questions, and issues relating to websites” “Maintain copyright information related to our institutional repository” “Course reserves is a responsibility of one of my departments.” “Help answer questions from students, faculty, and staff about individual projects. Help answer questions from faculty and researchers about teaching and research. Help answer questions from departments and administration about campus-wide

projects. Help answer questions from library staff about library projects and services. Help negotiate library contracts that include copyright aspects”

“Advise students and faculty on copyright decisions related to publishing their work, such as reviewing copyright agreements, answering general questions about copyright.”

“I have programmatic responsibilities for both Interlibrary Loan and E-Reserves”

“I serve as copyright librarian..., providing advice, interpretation and education regarding the use of third party materials in teaching and learning”

“role in making decisions regarding digitization projects. Copyright is often a decision point.”

“in an oversight role”

“I teach a graduate level copyright class and occasionally confer with colleagues on copyright for institutional repository items”

“I direct an office the addresses copyright positions and policies for the library and for the university.”

“Copyright education and advise short of needing an attorney is a large part of my job. I also serve as the campus DMCA agent.”

“fair use analysis of electronic reserves requests, copyright education for university community”

“For ILL and Reserves primarily. We have policies and procedures that our operations staff follow to live within our interpretation of copyright, but when questions come up that fall out side of those, or if we want to change those, then I am directly involved in that process.”

“Interlibrary Loan and Reserve issues”

“I manage staff who create digital collections, so questions/decisions about copyright are sometimes referred to me. I also answer some copyright questions for students who submit electronic theses and dissertations, and their advisers.”

“Applying our copyright policy to materials for reserve as well as for distance education

students.” “I have administrative review responsibilities related to copyright policies and procedures.” “I have administrative responsibilities that include (or have included, in the past) library website, institutional repository, course reserves, and interlibrary loan.” “I am responsible for reviewing licenses for e-resources, e-books, and e-journals so my responsibilities are to negotiate for fair use of our subscribed content and make sure that the license does not fair use and also permits electronic fulfillment of interlibrary loan requests.” “Copyright decisions related to providing course reserves, interlibrary loan, and document delivery services; copying and providing access to copyrighted texts for purposes of ADA accommodation. I also serve on a University-wide committee that seeks to promote good copyright practices on campus.” “I serve as the liaison between the General Counsel's Office and the Libraries and I am the primary point person with the libraries for all questions related to copyright, scholarly publishing, and open access.” “All library-related copyright issues, general copyright overviews for students and faculty, assistance with copyright issues for grad students working on dissertations, open access issues, working with staff and students to create new journals.” “Provide copyright advice and assistance to Library departments (ILL, Special collections, etc.), faculty and students.” “E-reserves and ILL/Doc delivery report to me.” “I advise and lecture on copyright issues at the university and in the wider academic community.” “overseeing Fair Use evaluations and permissions processing (via the CCC) for electronic reserves service occasionally proposing revisions to our copyright policies for electronic reserves occasionally providing assistance to faculty with copyright

questions” “I set and enforce copyright policies for ILL and reserves. I also serve in a less formal role as copyright advisor for other library issues.” “I have Scholarly Communications as part of my responsibilities including copyright -- on which I do presentations, provide advice and assist with permissions when needed” “My department in the library maintains the copyright Web site for the university and my contact information is linked from it. I teach classes about copyright for authors and teachers. I give guidance to faculty and students, largely about fair use largely when to request permission to use copyrighted materials.” “Helping set and communicate library copyright policy” “Principle role to teach and advise re copyright” “I regularly counsel faculty and students about copyright”

**Question Eleven: Is your library consulted regarding resource availability of materials for e-reserves or in the planning stages of a distance education or online course?**

“We frequently publicize established copyright guidelines, answer questions about what is permissible within the guidelines established by legal counsel, and refuse requests for copying outside those guidelines.” “We answer questions as they are raised and review e-reserves and some distance ed course material to weed out egregious violations.” “Regarding distance courses, the library has started to be more involved, since sometimes copyright issues may prevent being able to use materials via a distance.

Regarding e-reserves, usually the library just gets a list of resources from the faculty person and those that we can provide e-access to we do, and those that we can't we let the faculty person know.” “We will sometimes discourage particular uses (especially streaming video), if the resource is under license (many institutionally purchased DVDs carry licenses).” “When asked the library copyright expert provides detailed analysis.”

**Question Twenty-two: Do you believe digital publishers have control over matters that more properly should be managed by the library?**

“If a library licenses use of digital content, the publisher or vendor should not have the right to determine how that content is used by students and faculty. For example, some vendors don't want faculty or students to use links to licensed content, even though the library has paid a premium for access and only users who are affiliated with the institution can use access the material anyway.” “Too many of them, including the CCC, claim erroneously that all electronic content always needs permissions, when in fact, copyright and fair use are still always applied first. When practice becomes de facto, we do lose fair use rights, and it's a worrisome trend where publishers declare that content can't be used just like print.” “While we can't monitor every single user, we can catch excessive use and address it.” “Much DRM is too restrictive and unwieldy. Research institutions need greater flexibility in presenting digital information to their users. Most, if not all, research should

be openly accessible. This is how the future will work. There are business models being developed now that can make this possible for everyone.”

“Undecided. This is not an easy issue and the changing nature of publication and distribution do not lead to easy answers.”

“There should be an electronic first sale doctrine. Things that we used to do with print are now forbidden by our electronic license terms.”

“Excessive DRM on ebooks is a problem.”

“DRM challenges accepted fair use principles -- hard to challenge them. Publisher licenses tend to set up barriers to fair use, although there appears to be some improvement.”

“The move from a purchasing to a licensing model, as well as laws such as the DMCA, have made it problematic for libraries to assert their rights in the digital environment.”

“Well, sort of - I believe that DRM sometimes restricts the flexibility needed by libraries to provide access to materials.”

**Question Thirty-four: Lastly, do you have any other opinions or concerns regarding copyright that you would like to convey?**

“I think most universities do not realize what a resource they have for copyright education in their librarians. As more of the burden of determining copyright compliance is placed on faculty building their own online courses and using course support software, there's more of a danger that the university could get sued due to their actions. Calling on the librarians to help educate the instructors about safe use of copyrighted material could help prevent these problems.”

“I'm

afraid American copyright law is broken beyond repair.” “I’m glad to see this survey because I think we need more information about library and university decision-making so we can reach a stronger consensus about best practices and places to target aggressive use.” “An accepted standard format that was required for license documents would make it a lot easier to evaluate them.” “I wish that library professionals would lose the notion of "guidelines" when it comes to fair use. There is too much dependence upon what "quantifiable" fair use. We are drawing ourselves into a box and hurting our patrons in the process by prohibiting them from making use of materials in ways they are entitled to use them.” “As with any survey, yes/no questions tend to strip away nuance. I believe existing laws provide reasonable Fair Use exceptions but that libraries are often hesitant to exercise those rights due to fear of litigation. It would love to see some court decisions upholding robust Fair Use rights for libraries and researchers.” “It is pretty clear that signing up for Berne was a huge mistake. Just at a time that registries are becoming practical, we abolished all formalities. Dumb.” “Individuals that work with copyright (faculty, researchers, teachers, students, company employees, library staff, authors, editors, publishers, vendors, readers, creators, etc...) should have a basic understanding/framework of copyright. Perhaps through an ad campaign that continues for decades. Songs, commercials, reality TV, school materials, online sites, games, ads in print and online, celebrities---all with the same simple message.” “Historically, use of copyright material has been worked out via meetings of all interested parties. Digital material has not been handled this way. We have been told ‘this is the way it is,’ like it or not.” “Fair

use is a powerful limitation on the exclusive rights of copyright holders and should be relied upon more by libraries and instructors. There is too much emphasis placed on copyright guidelines that are not legislated.” “Creative Commons has the right idea.” “Most libraries (and librarians) are not assertive enough in applying the fair use exception.” “We have been increasingly offering guidance to graduate students and faculty about negotiating their copyright agreements, book contracts, and other IP with publishers. This wasn't reflected in your questions, so I wanted to be clear that this is an activity that we and many other ARL institutions are doing.”

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