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I. PURPOSE

Salus University desires to contribute to the vast body of public knowledge through the teaching / learning, research, and scholarship of its faculty, students, and staff. Everyone who is associated with the University is encouraged to engage in the free exchange and expression of ideas, explore new frontiers of scholarship, and expand the boundaries of knowledge. This policy is intended to support and promote goals such as these.

The University values and respects the creative process and copyrighted material that results from such process and expects that its faculty, students, and employees will recognize and respect the copyright ownership of others.

The University also recognizes that, during the course of teaching, research and scholarship, Inventions may be conceived and developed. The University desires to ensure that any Inventions resulting from teaching, research and scholarship at the University are developed, disseminated, marketed and commercialized for the mutual benefit of the inventor, the University and the public.

The University must also reasonably assure that its facilities, resources, and property are not inadvertently or purposefully used for personal profit or gain by University Employees.

If materials created at the University are both patentable and copyrightable, the terms of this policy covering patents shall govern the intellectual property rights in such works.

II. DEFINITIONS

Author refers to the creator(s) of a copyrighted work.

Committee refers to the University's Intellectual Property Committee which shall be responsible for implementing all aspects of this policy, including any disputes of Copyright or Invention ownership hereunder. The Committee shall consist of:

- One faculty member from each of the University's colleges (including one faculty member from any department not then housed within one of the University's colleges);
- One at-large faculty member;
- Two deans or program heads selected by the President;
- The Provost / Vice President for Academic Affairs; and
- The Chief of Staff and Counsel

Faculty representing each college shall be selected by the faculty of that college and the at-large faculty member shall be selected by the entire faculty, in accordance with procedures to be established by the Committee. The initial faculty members selected for the Committee shall serve for a term of two (2) years, and there shall be no limit on successive or cumulative terms. The Provost / Vice President for Academic Affairs will chair the Committee.

The Committee will meet on an *ad hoc* basis when it is determined by the Chair of the Committee or by a majority of the members of the Committee that there are matters that require deliberation.

Invention means potentially patentable devices, methods, products, processes, improvements or other discoveries.

Inventor refers to the creator of the Invention.

University Employees means (a) all faculty, staff and administrative employees, whether full time or part time, and (b) all University research assistants and graduate assistants, whether compensated or not.

Copyright Explanation and Terms

Protection. United States copyright law protects original works of authorship fixed in a tangible medium of expression. Copyright law does not protect ideas, facts, processes, methods of operation, concepts or principles, although it does protect the original expression of such things. As used in this policy, the terms "**copyrighted work**" and "**copyrightable work**" mean any work that can be protected by copyright law, including, but not limited to, books, articles, music, movies, computer software, artwork and other literary works.

Importantly, to be protected by copyright law, a work must be "fixed" in some way, whether on paper, electronically or otherwise. So, for example, a spontaneous speech or lecture would not be protected, but if that same speech or lecture were recorded in some manner, the recording would be protected. Similarly, any written, typed or electronic notes for that speech or lecture would also be protected.

Ownership. Copyright law gives the copyright owner the following exclusive rights: (a) the right to reproduce the copyrighted work; (b) the right to make derivative works based upon the copyrighted work; (c) the right to distribute copies of the copyrighted work; (d) the right to perform the copyrighted work publicly; (e) the right to display the copyrighted work publicly; and (f) the right to include the copyright notice on created works (collectively, the "**Exclusive Rights**").

The copyright notice, or symbol ©, is a statutorily prescribed identifier in the United States that visibly indicates the copyright ownership of created / published works. While use of the copyright notice was once required to establish copyright ownership, the use of the notice is now statutorily optional. However, the University recommends that University Employees use the copyright notice when appropriate and as described in this Intellectual Property Policy.

Use of the copyright notice on original created fixed (published) works does not require permission from, or registration with, the Copyright Office or other agencies. Examples of a reasonable approach to copyright notice by individuals or the University are shown as follows:

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Infringement. Copyright infringement occurs when someone (other than the copyright owner) exercises one of the Exclusive Rights without the permission of the copyright owner.

However, unauthorized copies or uses in the context of academia are sometimes permissible under the established legal doctrine known as "**fair use**". To determine whether unauthorized copies or use of a copyrighted work by a University Employee is a fair use, a court will consider four factors: (1) the purpose and character of the use being made; (2) the nature of the copyrighted work (whether the work is more informational or creative in nature); (3) the amount and substantiality of the portion of the work used in relation to the copyrighted work as a whole; and (4) the effect of the unauthorized copy or use on the potential market for or value of the copyrighted work. A more complete explanation of "fair use" is set forth in Addendum A attached hereto. Although University Employees should be mindful to avoid infringing the copyrights of others in their scholarly pursuits, in many cases, the fair use doctrine will serve as a measure of protection. If any University Employee has any questions regarding the fair use doctrine, he or she should submit them in writing to the Chair of the Committee.

Patent Explanation and Terms

Protection. A patent for an Invention is the grant of a property right to the Inventor, issued by the United States Patent and Trademark Office. Generally, the term of a new patent is 20 years from the date on which the application for the patent was filed in the United States or, in special cases, from the date an earlier related application was filed, subject to the payment of maintenance fees. U.S. patent grants are effective only within the United States, U.S. territories, and U.S. possessions. Under certain circumstances, patent term extensions or adjustments may be available.

Ownership. The right conferred by the patent grant is, in the language of the statute and of the grant itself, "the right to exclude others from making, using, offering for sale, or selling" the Invention in the United States or "importing" the invention into the United States. What is granted is not the right to make, use, offer for sale, sell or import, but the right to exclude others from making, using, offering for sale, selling or importing the Invention. Once a patent is issued, the patentee must enforce the patent without aid of the USPTO.

There are three types of patents:

- 1) **Utility patents** may be granted to anyone who invents or discovers any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof;
- 2) **Design patents** may be granted to anyone who invents a new, original, and ornamental design for an article of manufacture; and
- 3) **Plant patents** may be granted to anyone who invents or discovers and asexually reproduces any distinct and new variety of plant.

Patent Prosecution. After publication, an Inventor has a grace period of one year in which to file for U.S. patent protection. However, the laws of many foreign countries foreclose any possibility of patenting following publication. Accordingly, filing a U.S. patent application before publication is strongly encouraged. Such action not only meets the one year deadline in the U.S. but also gives the Inventor and the University a year in which to file patent applications in other countries that

are members of that International Convention for the Protection of Industrial Property.

As proscribed by this policy, the University shall assume all responsibility for all costs, expenses and liabilities relating to patent prosecution, maintenance, enforcement and licensing with respect to Inventions developed by University Employees (except as provided in Article III, Section B.1.a). Accordingly, University Employees shall cooperate with the University by promptly furnishing to the Chair of the Committee a written report of any and all Inventions, at the time that they are conceived or first actually reduced to practice, whichever is earlier (a “**Disclosure**”). Disclosures shall be in writing and shall be signed by each individual or entity that participated in the development, creation or discovery of the Invention. Disclosures are required regardless of whether the Invention was developed, created or discovered in connection with University matters.

III. POLICY

This policy establishes (a) the ownership, control and use of copyrighted material by the University community and (b) the ownership of Inventions by the University community.

A. Copyrights

1. Ownership

a. Ownership by University Employees. Generally, in the non-academic world, any copyrightable works that are created by an employee in the furtherance of his or her employment will be owned, as a matter of law, by his or her employer. In the academic world, however, it is customary for colleges and universities to relinquish any claims that they may have in and to the works created by their employees, namely faculty, staff, and other persons receiving compensation from the University for services rendered, whether full time or part time.

Under this policy, except in those circumstances described in Article III, Section A.1.b, the University hereby relinquishes all claims to ownership to the copyright of works created by University Employees, and hereby assigns, transfers and conveys the copyright of those works to the respective Authors of the works.

The following clarifies commonly occurring instances of ownership of copyrighted materials by a University Employee:

- Curricular content, including electives, advanced studies, on-line courses, posted lecture and course-related materials, and lectures electronically captured, created by a University Employee as part of his or her assignment with the University is owned by the University Employee, except in those circumstances described in Article III, Section A.1.b, or unless otherwise specified in a written agreement between the University and the University Employee.

- Lectures developed by University Employees for international programming or domestic or international continuing education, including on-line instruction / education, are owned by the University Employee, unless the executed written agreement between the University Employee and the University for the development and delivery of those lectures stipulates that the work is owned by the University.

- The results of scientific and clinical studies conducted by University employees using either extramural or intramural support for the research. When required by a publisher, the University Employee has rights as an Author to assign the copyright to that publisher.

b. Ownership by the University. Notwithstanding the foregoing, there will be certain circumstances in which the University will retain copyright ownership of works created by University Employees. Those circumstances are as follows:

i. Where there has been a Substantial Use of the University's resources, funds, space or facilities. "Substantial Use" means that, in the creation of a copyrightable work, the University Employee has used University resources that are not ordinarily used by or are not ordinarily available to all similarly situated University Employees. The provision of office or library facilities by the University to the University Employee generally will not be considered Substantial Use of the University's resources.

ii. Where the University commissions a copyrightable work to be created by a University Employee, and the University and the University Employee producing the work sign a written agreement stating that the copyright in that work is to be owned by the University.

c. Ownership by Third Parties.

i. Where the copyrightable work results from a grant or other financing provided by the United States or any state government, or their respective commissions or agencies, any other administrative, legislative or judicial bodies, or any non-governmental agencies, the ownership of such works will be governed by the terms of the applicable grant or contract under which the financing was provided and, if there is no such agreement, the ownership of such works shall be governed by paragraphs 1 and 2 of this Section A.

ii. Where the University commissions a copyrightable work other than core curricular content to be created by anyone other than a University Employee, namely, a consultant or independent contractor, such consultant or independent contractor will be required, before beginning the work, to assign and transfer all of his, her or its ownership interest in that work to the University.

2. Control

a. Where the University Relinquishes Copyright Ownership. In cases where the University relinquishes copyright ownership of a work in favor of the Author as described in Article III, Section A.1.a, the University hereby assigns and transfers to such Author the copyright in and to such work and all of the Exclusive Rights associated with the ownership of the copyright in such work, including, but not limited to, the right to commercialize the copyrighted work.

i. Use of Electronically Captured Lecture Materials. Unless specifically requested in writing of a lecturer by the University, lecture capture is at the discretion of the instructor of record for the course. Permission by the Author for use of electronically captured lecture materials is automatically granted under this policy for the University to use:

- within the same term in which the lectures were captured;
- for individuals in the same cohort of students who may not have successfully completed the course within the term;

- students needing remediation of the same course material;
- students needing re-enrollment of the same course material;
- students needing ADA accommodations;
- students needing to prepare for professional licensure;
- students returning from an approved leave of absence; and
- for use in connection with the University's disaster recovery activities.

Faculty who are leaving the University (for other employment or for retirement) can transfer ownership of the electronically captured lecture materials to the University at his/her discretion. In the event that a faculty member has an unscheduled transition or unanticipated leave, the University will automatically assume ownership of the electronically captured lecture materials. If the instructor of record for a course changes, prior electronically captured lecture materials for the course are available for the new instructor of record for a time period not to exceed 24 months. The University may request to utilize electronically captured lecture materials in the programming of new / additional student cohorts beyond the term in which the lectures were captured. The lecturer granting such permission may, as a condition of such grant, request fair compensation in exchange for granting such permission.

b. Where the University Retains Copyright Ownership. In cases where the University retains copyright ownership of a work, as described in Article III, Section A.1.b, the following rules shall apply:

i. The University shall be entitled to exercise any and all of the Exclusive Rights associated with the ownership of such copyrighted work, including the right to commercialize the copyrighted work. Should the University receive any royalties or other payments on account of its commercialization of the copyrighted work, it shall distribute such royalties in accordance with Article III, Section A.3, unless the University and the Author agree to a different arrangement in writing. For the avoidance of doubt, neither tuition nor other amounts paid to the University by or on behalf of students will constitute payments on account of the commercialization of a copyrighted work.

ii. If the University retains ownership of a the copyright in a work, and the Author of such work desires to own the copyright in such work, the University may, but shall not be required to, assign and transfer such copyright to the Author of the work. The Author shall submit a request in writing to the Chair of the Committee, stating the basis for his or her request for such a transfer.

3. Income Distribution

a. All income derived from copyrightable works owned by a University Employee shall belong to that University Employee.

b. All income derived from the commercialization of a copyrightable work owned by the University shall be distributed in accordance with the following procedure:

i. The University shall first deduct any costs and expenses incurred by it or on its behalf in connection with the protection, registration, licensing and marketing of the copyrightable work. Additionally, similar costs or expenses incurred by the University Employee, with the prior written approval of the University, will also be deducted and paid to the University Employee. The resulting income following these deductions shall be referred to as "**Net Income**".

ii. From the Net Income, the Committee shall deduct and withdraw 25% of the funds for future operations and unrecovered marketing costs (the "**Copyright Fund Charge**"). Any

amounts deducted by the Committee as the Copyright Fund Charge that are not needed after a period of 18 months shall be distributed to the University's Academic Development Fund.

iii. The sum remaining after the removal of the Copyright Fund Charge shall be referred to as the "**Divisible Income**". The Divisible Income shall be divided in the following manner: (a) the University Employee will receive 50% of the first \$100,000 of Divisible Income and 25% of the excess Divisible Income over \$100,000, and (b) the balance of the Divisible Income shall be distributed by the University in accordance with the following schedule:

- (A) 10% to the University Employee's program, if any;
- (B) 30% to the University Employee's college;
- (C) 10% to the Office of Academic Affairs; and
- (D) 50% to the general fund of the University.

4. Respect for the Copyrights of Others

a. The University respects the copyrights of others outside the University community. The Committee shall arrange for training for University Employees and instructional sessions for students to assist them in complying with copyright laws and this Intellectual Property Policy.

b. University Employees will be instructed to routinely request permission from the owner of the copyright in a work, or their agent, and to comply with license agreements in accordance with University procedures. University Employees will instruct students concerning copyrights, request permission when appropriate, and comply with license requirements as and when appropriate. The University shall develop an appropriate standardized permission request form, and, when permission has been received, appropriate credit will be given to the creator of the work.

c. Violations of the copyright law can be a felony, punishable by fines, jail time, or both. The law permits a court to find individuals personally responsible for copyright infringement. The University neither permits nor condones copyright infringement by University Employees, students, guests, visitors, consultants or independent contractors. Anyone who violates the copyright law following reasonable and appropriate training which the University shall provide does so at their own risk and assumes all liability associated with their actions.

B. Inventions and Patent Prosecution

1. Ownership

a. Ownership by University Employees. Subject to Article III, Section B.1.c, University Employees shall be entitled to own all right, title and interest in and to any Inventions that are developed: (1) entirely on their own time, (2) outside the scope of their employment with the University (or otherwise having nothing to do with University matters in the case of research assistants and graduate assistants), and (3) which involve only incidental use of University resources. "Incidental use" of University resources means normal use of resources that are generally available to all faculty, such as provision of office or library facilities.

If ownership of an Invention is claimed by one or more University Employees, the University Employee(s) shall so state in his, her or their Disclosure to the Committee. If any dispute should arise over the ownership of an Invention, the University Employee(s) shall be responsible for demonstrating to the Committee that the Invention meets all of the elements set forth above.

When an Invention is claimed by one or more University Employees and acknowledged and agreed upon by the University, or the University waives its ownership of such Invention, the University shall not have any responsibility for any costs, expenses or liabilities relating to patent prosecution, maintenance, enforcement or licensing with respect to that Invention.

Any University Employee who is entitled to all or any part of the ownership interest in an Invention may petition the Committee to accept, on behalf of the University, the assignment of that ownership interest and the responsibilities associated with that ownership interest. The Committee is under no obligation to accept any such assignment, but shall evaluate the University Employee's petition in view of the objectives of this policy and the University.

b. Ownership by the University. Subject to Article III, Section B.1.c, the University shall be entitled to own all right, title and interest in and to any and all Inventions that do not meet all of the elements set forth in Section B.1.a of this Article III. University Employees shall, upon request, assign and transfer to the University all of their right, title and interest in and to any such Inventions and shall make known and available to the University all documentation and other materials related to the same, but the failure of any University Employee to make such assignments shall not limit the University's rights in such Inventions.

The University shall assume all responsibility for all costs, expenses and liabilities relating to patent prosecution, maintenance, enforcement and licensing with respect to such Inventions. The University may elect to waive its ownership interest and transfer it to the University Employee. Where such a waiver occurs, the University shall incur no further costs or expenses and shall assume no liabilities relating to such Invention.

c. Ownership by Third Parties.

i. The ownership of Inventions arising from research or other work sponsored or financed by the United States or any state government, or their respective commissions or agencies, any other administrative, legislative or judicial ("**Government Inventions**") will be governed by the terms of the applicable grant or contract. Within thirty (30) days of the Disclosure to the University of a Government Invention, the University shall report the Government Invention to the appropriate government agency for definition of the government's rights and interests. In cases where the government claims no patent or other ownership rights in a Government Invention, or waives such rights, the other provisions of this Article III, Section B.1 shall govern the ownership of such Government Invention, subject to such limitations as the government may impose by contract, law, rule, regulation or otherwise.

ii. Inventions resulting from research or other work sponsored or financed by commercial corporations or other entities, and/or by non-governmental agencies, shall be governed by the terms of the agreement entered into in connection therewith, and if there is no such agreement, by the other provisions of this Article III, Section B.1.

iii. Where a consultant or independent contractor (who is not a University Employee) creates an Invention in connection with research or other work done for the University, such

consultant or independent contractor will be required, before beginning the work, to assign and transfer all of his, her or its ownership interest in that work (and any resulting Inventions) to the University.

2. Committee Operations

a. Upon the Committee's receipt of a Disclosure from or on behalf of a University Employee, the Chair shall promptly disseminate a copy of such Disclosure to all members of the Committee and convene a meeting of the Committee. The Committee will conduct a thorough evaluation of the Invention disclosed by the University Employee, either through an internal review or by referral to an external party, in the sole discretion of the Committee. Following the completion of the evaluation process and the acceptance of the resulting report by the Committee, the Committee shall notify the University Employee in writing whether or not the University intends to claim ownership of the Invention in the name of the University. The Committee shall endeavor to complete its evaluation process within three (3) months of the Committee's receipt of the Disclosure. If the Committee does not complete the evaluation process within such three (3) month period and such failure continues for thirty (30) days after notice of such failure is provided to the Committee by the University Employee who submitted the Disclosure, then the Committee shall be deemed to have waived the University's right to claim ownership of such Invention.

b. If the Committee elects to claim ownership of the Invention in the name of the University, then the University may, at such time and in its sole discretion, prepare, file and prosecute a patent application with respect to such Invention or take such other actions as it deems necessary or desirable in connection therewith. If the University elects not to file and prosecute a patent application for any reason whatsoever or fails to begin such process within three (3) months of making its determination of ownership pursuant to subsection a, then the University shall have been deemed to have waived its ownership of such Invention and shall, upon request, assign its rights in such Invention to the University Employee who submitted the Disclosure.

c. If the Committee determines, in its sole discretion, that the University should not or is not entitled to claim ownership of the Invention, the University Employee shall then be free to dispose of the Invention in his or her discretion. At the University Employee's request, the University shall assign to such University Employee all of its right, title and interest in and to any such Invention.

d. If the Committee determines that the University is entitled to claim ownership of an Invention, the Committee shall seek to maximize the public utility of such Invention. To this end, the Committee, for and on behalf of the University, may enter into one or more exclusive or non-exclusive license, sale or other agreements, in its sole discretion.

e. University Employees may appeal any decision of the Committee to the President of the University.

f. Notwithstanding anything to the contrary, if the Committee desires to file a patent application or otherwise take any action in connection with an Invention which involves anything other than an incidental expense to the University, such action shall require approval in writing of the President of the University upon recommendation from the Committee.

3. Income Distribution

a. All income derived from an Invention owned by a University Employee shall belong to that University Employee.

b. All income derived from the commercialization of an Invention owned by the University shall be distributed in accordance with the following procedure:

i. The University shall first deduct any costs and expenses incurred by it or on its behalf in connection with the development and patent prosecution of the Invention. Additionally, similar costs or expenses incurred by the University Employee, with the prior written approval of the University, will also be deducted and paid to the University Employee. The resulting income following these deductions shall be referred to as "**Net Income**".

ii. From the Net Income, the Committee shall deduct and withdraw 25% of the funds for future operations and unrecovered marketing costs (the "**Invention Fund Charge**"). Any amounts deducted by the Committee as the Invention Fund Charge that are not needed after a period of 18 months shall be distributed to the University's Academic Development Fund.

iii. The sum remaining after the removal of the Invention Fund Charge shall be referred to as the "**Divisible Income**". The Divisible Income shall be divided in the following manner: (a) the University Employee will receive 50% of the first \$100,000 of Divisible Income and 25% of the excess Divisible Income over \$100,000, and (b) the balance of the Divisible Income shall be distributed by the University in accordance with the following schedule:

- (A) 10% to the University Employee's program, if any;
- (B) 30% to the University Employee's college;
- (C) 10% to the Office of Academic Affairs; and
- (D) 50% to the general fund of the University.

Addendum A: What Is Fair Use?

Fair use may not be what you expect. Whether or not you are within the boundaries of fair use depends on the facts of your particular situation. What exactly are you using? How widely are you sharing the materials? Are you confining your work to the nonprofit environment of the University?

To determine whether you are within the bounds of fair use, the law calls for a balanced application of these four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

These four factors come directly from the fair use provision, Section 107 of the U.S. Copyright Act, and they have been examined and developed in court rulings. The following summaries explain the significance of the factors as they relate to many University needs.

Factor 1: The Purpose and Character of the Use

The fair use statute itself indicates that nonprofit educational purposes are generally favored over commercial uses. In addition, the statute explicitly lists several purposes especially appropriate for fair use, such as criticism, comment, news reporting, teaching, scholarship, and research. These activities are also common and important at the University. But be careful: Not all nonprofit educational uses are “fair.” A finding of fair use depends on an application of all four factors, not merely the purpose. However, limiting your purpose to some of these activities will be an important part of claiming fair use.

Courts also favor uses that are “transformative” or that are not merely reproductions. Fair use is more likely to be found when the copyrighted work is “transformed” into something new or of new utility, such as quotations incorporated into a paper, or perhaps pieces of a work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original. Mere reproductions of disposable works, such as workbooks and tests, are almost never considered fair use.

Factor 2: The Nature of the Copyrighted Work

This factor centers on the work being used, and the law allows for a wider or narrower scope of fair use, depending on the characteristics or attributes of the work. For example, the unpublished “nature” of a work, such as private correspondence or a manuscript, can weigh against a finding of fair use. The courts reason that copyright owners should have the right to determine the circumstances of “first publication.” Use of a work that is commercially available specifically for the educational market is generally disfavored and is unlikely to be considered a fair use. Additionally, courts tend to give greater protection to creative works; consequently, fair use applies more broadly to nonfiction, rather than fiction. Courts are usually more protective of art, music, poetry, feature films, and other creative works than they might be of nonfiction works.

Factor 3: The Amount or Substantiality of the Portion Used

Although the law does not set exact quantity limits, generally the more you use, the less likely you are to qualify as fair use. The “amount” used is usually evaluated relative to the length of the entire original and in light of the amount needed to serve a proper objective. However, sometimes the exact “original” is not always obvious. A book chapter might be a relatively small portion of the book, but the same content might be published elsewhere as an article or essay and be considered the entire work in that context. The “amount” of a work is also measured in qualitative terms. Courts have ruled that even uses of small amounts may be excessive if they take the “heart of the work.” For example, a short clip from a motion picture will usually be acceptable, but not if it encompasses the most extraordinary or creative elements of the film. Similarly, it might be acceptable to quote a relatively small portion of a magazine article, but not if what you are quoting is the journalistic “scoop.” On the other hand, in some contexts, such as critical commentary or parody, copying an entire work may be acceptable, generally depending on how much is needed to achieve your purpose. Photographs and artwork often generate controversies, because a user usually needs the full image, or the full “amount,” and this may not be a fair use. On the other hand, the courts have ruled that a “thumbnail” or low-resolution version of an image is a lesser “amount.” Such a version of an image might adequately serve educational or research purposes.

Factor 4: The Effect of the Use on the Potential Market for or Value of the Work

The effect of the copy on the market is perhaps more complicated than the other three factors. Fundamentally, this factor means that, if you could have realistically purchased or licensed the copyrighted work, that fact weighs against a finding of fair use. To evaluate this factor, you may need to investigate the market to determine if the work is reasonably available for purchase or licensing. A work may be “reasonably available” if you are using a meaningful portion of a book that is for sale at a typical market price. “Effect” is also closely linked to “purpose.” If your purpose is research or scholarship, market effect may be difficult to prove. If your purpose is commercial, then an adverse market effect may be easier to prove. Occasional quotations or photocopies may have no adverse market effects, but reproductions of entire software works and videos can make direct inroads on the potential markets for those works.

Remember: Fair Use is a Balancing Test

To determine whether a use is or is not a fair use, always keep in mind that you need to apply all four factors. For example, do not jump to a conclusion based simply on whether your use is educational or commercial. Similarly, do not conclude that your use is fair merely because a work is out-of-print. You still need to evaluate, apply, and weigh in the other fair use factors, as described above. This flexible approach to fair use is critical in order for the law to adapt to changing technologies and to meet innovative needs of higher education. Not all factors need to weigh either for or against fair use, but overall the factors will usually lean in one direction or the other. Also, the relative importance of the factors is not always the same. Your analysis should guide you to a conclusion.

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