BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

HEARING ON COPYRIGHT ISSUES IN EDUCATION AND FOR THE VISUALLY IMPAIRED

STATEMENT OF HIGHER EDUCATION

Submitted on behalf of:
Association of American Universities
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of Public and Land-grant Universities
National Association of Independent Colleges and Universities

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The higher education associations listed above collectively represent a broad range of higher education institutions in the United States, including public and private colleges and universities with comprehensive graduate and professional education programs. Our members educate a substantial majority of American college and university students and conduct most of the nation's basic research.

A Carefully Considered Bargain

In the United States, we are particularly thoughtful and deliberate when we turn our attention to copyright law, because it is so deeply connected to two of our most fundamental values: freedom of expression and promotion of progress. Copyright law provides a strong, effective incentive for authors, artists, musicians and others to produce creative works that enrich the lives of our nation's citizens and produce new knowledge about and understandings of the human condition and the world in which we live. Because the exercise of copyright rights also has the potential to curtail expression and innovation, however, we have crafted the provisions of our copyright law to strike the appropriate balance between the rights granted to copyright holders and the rights reserved for the public.

A Common Cause

Universities share a common mission with copyright—namely, to serve society by promoting the "Progress of Science and useful Arts" by encouraging and supporting the creation and dissemination of knowledge and creative works for the public's benefit. At the same time, universities have a distinctively robust relationship with copyright law. Universities and their constituents—faculty, students, and staff—are creators, distributers, and consumers of copyrighted material, a dynamic that has only become more complex in the digital era.

Our member colleges and universities, the federal government, industry, and philanthropic organizations spend billions of dollars annually to conduct research and scholarship for the benefit of society. Frequently, the

copyrighted works that result from this research are made freely available to the public or are submitted to publishers, which conduct critical peer review and work with authors of accepted manuscripts to prepare articles for commercial distribution. Unsurprisingly, postsecondary institutions are among the nation's leading copyright consumers, as well. We reliably purchase and license billions of dollars of copyrighted works each year and our students, too, annually purchase billions of dollars of copyrighted works.

To provide a few additional examples of the intricate relationship that institutions of higher education have with copyright:

- University faculty—who are authors themselves—present and discuss copyrighted works in both analog and, increasingly, digital formats. For example, as a norm, faculty now teach using PowerPoint presentations and comparable applications and assign materials that are best accessible through digital means. In addition to using such presentations, faculty regularly exploit the vast capacities of the Internet, often accessing research collections held by museums, libraries, and academic and research institutions worldwide in real time. In today's world, course management systems are at least as much a part of the collegiate classroom as the chalkboard.

- "Flipped classroom" experiences, which are a form of blended learning, are becoming increasingly common at American universities. In the flipped classroom, the professor or instructor presents her lectures, slides, notes, and other handouts asynchronously through a course management system *before* the students come to class. The instructor then can spend precious class time in a much more engaged interaction with students rather than lecturing to them. Classroom activity may be recorded, providing students with opportunities to revisit material covered in live classroom sessions and supplement the more interactive, discussion-based live classroom experience. These experiences also offer alternatives to students who, due to illness or other causes beyond their control, cannot attend the live classroom sessions.

- Faculty collaborate within and across institutions of higher education, domestically and internationally, on innovative projects that are difficult to situate within the traditional contours of intellectual property. For example, full-text searching and deep and broad data mining have opened up unprecedented opportunities for innovative scholarship in many different fields, including the biological and physical sciences, the humanities, social sciences, law, etc. Researchers from scores of postsecondary institutions across the world are working collaboratively and in parallel to explore the complexities of the human genome. Because access to the night sky and from certain vantage points are geographically bound, much astronomical research happens through networks of scholars. Similar synergistic efforts take place across disciplines such as medicine, volcanology, public health and infectious disease, environmental studies, journalism, public policy, physics, and archaeology, to name but a few.

- Students commonly need to access copyrighted content, including audio-visual content, as a central component of their educational experiences. Students also yearn to innovate; for example, imagine the student who wishes for her senior project to explain the role of children in 20th century literature by creating an audiovisual presentation, which might include music, performance, and images to illustrate themes and provide critical examples. The doctoral dissertations of today are increasingly dynamic, interactive tools for imparting knowledge.

- Universities also support a range of internal and affiliated enterprises that both generate and depend upon use of copyrighted works, including research libraries, archives, museums, and academic presses. Universities operate television and radio stations, satellites, cable networks, Internet nodes,

and a host of other communication hubs that transmit and receive copyrighted communications. They have music studios, film and video production teams, animation labs, virtual reality labs, 3D printers, and art studios that foster every imaginable expressive medium.

Copyright supports the fundamental mission of colleges and universities to create and disseminate new knowledge and understanding through teaching, research, and scholarship. Copyright does this not only by providing incentives for the creation of new works through the grant of proprietary rights to copyright holders, but also—equally critically—by carefully limiting those rights in order to facilitate public access to, and use of, creative works.[1]

Maintain the Basic *Structure* of Rights in the Copyright Act

First, as an overarching matter, because many sectors of society, including the academy, rely on how the Copyright Act structures the balance of rights, the higher education associations believe that any endeavor to update, amend, or even tweak the Copyright Act should not disrupt the basic structure of rights. This structure has three connected pillars: a) the rights of copyright holders, b) fair use, and c) other limitations supporting additional public uses. This framework has been extraordinarily successful. Changes to the relationship among these grounding elements would destabilize the higher education ecosystem.

The first pillar, the rights of copyright holders, is currently spelled out in §§106 and 106A.[2] These valuable rights are subject to and limited by the rights and uses authorized for the public in §§107-122. This structure balances the constitutional speech and progress objectives of the public with the copyright holders' opportunities to make and to authorize important uses of their copyrighted works.

The public's fair use rights (§107), the second pillar of copyright's structure, stand out among the other limitations on a copyright holder's rights, because the flexibility built into fair use enables copyright to achieve its constitutional objectives. Courts can ensure that the public has sufficient uses so as not to transgress the First Amendment and, at the same time, enable copyright holders to receive their benefits in this bargain. Fair use allows the uncertainties that emerge from new uses, new technologies, or new business models to be addressed in a manner that achieves copyright's constitutional purpose.

The additional rights and uses (§§108-122) of the third pillar have a complementary relationship with fair use. Those that expand upon fair use (e.g., the compulsory license rights in §115) enable the public to make important uses that would likely fall outside fair use. Others (e.g., reproduction rights for libraries and archives in §108) enable the public to apply simpler metrics (than the sometimes unpredictable four-factor test of fair use) to make appropriate uses of copyrighted works. Through this pillar, Congress has been able to foster uses most beneficial to the public without hindering the flexibility necessary for fair use.

Although a changing world may indeed warrant new provisions or adjustments to the Act, these modifications should not disrupt the time-tested structure that carefully balances the copyright holder's rights with limitations that authorize rights and uses for the public.

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[1] To be clear, as the higher education associations noted in their *amicus* brief in Cambridge University Press v. Patton, at 30, No. 12-14676 (11th Cir., Oct. 17, 2014), *available at* http://www.acenet.edu/news-room/Documents/GSU-AmicusBrief.pdf, academic works are typically created with the author's expectation that they will be widely disseminated and discussed for the purpose of scholarship. Academic authors do not look to the economic incentives of copyright protection to induce them to create. Even for such works, however, copyright remains an important means of protecting the integrity of academic works and ensuring appropriate attribution.

[2] These rights include the right to reproduce (i.e., make copies) of a work; create derivative works based on the work; distribute copies of the work; publicly display the work; perform the work; and, for sound recordings, to perform the work publicly by means of a digital audio transmission.

Fair Use

The fair use provisions of §107 permit the use of copyrighted works without permission or payment under certain circumstances. Fair use is a necessary means of 1) ensuring that copyright law does not obstruct the very learning that it should promote; 2) promoting the public interest; and 3) securing First Amendment rights. In fact, the very mission of American higher education—to expand and disseminate knowledge and understanding through education, research, and scholarship, and to foster public service—depends on the fair use right, notwithstanding the uncertainty that sometimes accompanies reliance on it.[3] Accordingly, the higher education associations listed above strongly support the continued viability of flexible fair use as a bedrock principle of U.S. copyright law.

As described above, the power to enact copyright law was included in the Constitution to enrich society by stimulating creative expression and thereby advancing public knowledge. The Supreme Court has consistently emphasized that the primary goal of copyright is to serve the public interest, not the author's private interest.[4] The Eleventh Circuit recently reaffirmed this fundamental principle in its decision in Cambridge University Press et al. v. Patton (otherwise known as "the Georgia State" case): "The fair use doctrine also critically limits the scope of the monopoly granted to authors under the Copyright Act in order to promote the public benefit copyright is intended to achieve."[5] Moreover, also in the Georgia State case, the Eleventh Circuit expressly recognized the specific importance and relevance of fair use in the education context, asserting that "Congress devoted extensive effort to ensure that fair use would allow for educational copying under the proper circumstances and was sufficiently determined to achieve this goal that it amended the text of the statute at the eleventh hour in order to expressly state it."[6]

In short, Section 107 statutorily shapes the boundaries of a copyright holder's rights as delineated in Section 106. It provides a pliable fair use standard that entails a case-specific analysis of whether particular uses of copyrighted works are outside the scope of what the copyright holder is entitled to prohibit.[7] This multi-factored approach ensures that public and private interests are appropriately balanced.

Higher education institutions rely on the elasticity that fair use offers. The availability of fair use enables the effective use of copyrighted works when licenses are not reasonably available or when they are not required, even when available. Universities have found, for example, that several major educational publishers refuse to license content for library reserves, and that some copyright holders simply fail to respond to requests to use copyrighted works. Other rights holders are quick to demand royalties or licenses for sentence-long quotations that are used in scholarly works. If fair use applies, the university may elect to use the work, but the perceived risk of an aggressive, misguided legal challenge nevertheless may cause the university to forego a legitimate use. Universities and their faculty—who are, again, themselves authors and distributers—recognize

[3] As will be discussed below, other limitations on a copyright holder's rights that authorize educational uses in the copyright law—such as Section 110(2) (codified as the TEACH Act)—are so narrow and unwieldy that they must be used in conjunction with fair use in order to be of any real practical value to educators and scholars.

[4] "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); *see also* Sony Corp. of Am. V. University City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.").

[5] Cambridge University Press v. Patton, at 18, No. 12-14676 (11th Cir., Oct. 17, 2014).

[6] *Id.* at 27.

[7] In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(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 copyright work as a whole; and (4) the effect upon the potential market for or value of the copyrighted work.

the important copyright rights granted to authors, publishers, and other copyright holders. Fair use must be available, however, if the mission of higher education is to be realized.

Colleges and universities utilize fair use to teach and research in innovative ways. Extensive use of online resources in education is perhaps the most salient development related to fair use since the enactment of the 1976 Act. Access to and dissemination of digital works for purposes of teaching, scholarship, and research are essential to the higher education process. Full-text searching has been called the most significant advance in search technology in the past five decades, for it allows scholars to perform searches in seconds that used to take days, months, or even years—if the search was possible at all.[8] "Text mining" is a powerful new form of statistical research made possible through application of fair use to digitized works.

Fair use, along with Section 121 ("Reproduction for blind or other people with disabilities"), also expands educational opportunities for people who have print disabilities. Digitization based on fair use is necessary to overcome disadvantages that students who have print disabilities historically have faced in research, scholarship, and instruction. For the first time, students and scholars who have disabilities are now able to access a universe of knowledge that, in its traditional form, they could not. Fair use also facilitates institutional compliance with federal nondiscrimination laws that require higher education institutions to provide reasonable accommodations to people who have disabilities. These statements find support in District Court Judge Baer's statement in Authors Guild v. HathiTrust, quoted approvingly by the Second Circuit, that he could not "imagine a definition of fair use that would not encompass the transformative uses made by the [universities' digitization project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA."[9]

Finally, fair use complements the provisions of Section 108 ("Reproduction by libraries and archives") to assure the preservation of information for future generations. Libraries and archives are only allowed to distribute digital copies made under this provision to a very limited extent, however, and consequently must rely on Section 108 and Section 107 in concert in order to enable the accessibility of the digital copies to the public. Section 108(b) and 108(c) specifically authorize libraries and archives to make digital copies of unpublished works that are not otherwise commercially available, but such copies may only be made available to the public on the premises of the library or archive in possession of such copy. Section 108(e) allows libraries and archives to distribute such works in digital form, but only to patrons who specifically request such a copy; and it does not explicitly permit libraries and archives to provide access by displaying or performing the work, so it does not specifically allow for computer display or performance. And, although Section 108(h) is more expansive in affording nonprofit educational institutions (which would include museums and other collections within such institutions) the right to "reproduce, distribute, display or perform" digital copies of works, such rights only apply to works in their last twenty years of term of copyright. What is more, none of the foregoing sections apply to the reproduction or distribution of music, pictorial, graphic or sculptural works.

TEACH Act

The TEACH Act, enacted in late 2002 and located in Section 110(2) of the Act, was intended to broaden educators' rights to perform and display works in the context of digital distance education. Section 110(2) is strictly limited in scope—for example, requiring that audiovisual and dramatic musical works be shown only as clips—particularly in comparison with the rights afforded to educators in face-to-face teaching settings in

[8] In Authors Guild, Inc. v. HathiTrust, 755 F. 3d 87 (2nd Cir. 2014), the Second Circuit held that digitizing and enabling full-text search is a transformative use and a fair use. The court cited cases from many circuits to support this holding, thereby diminishing a previously perceived circuit split.

[9] Authors Guild, Inc. v. HathiTrust, 755 F. 3d 87 (2nd Cir. 2014), *quoting* Authors Guild, Inc. v. HathiTrust, 902 F.Supp.2d 445, 460-64 (S.D.N.Y. 2012).

Section 110(1). The disparity between face-to-face and distance learning, however, has become far less relevant in the twelve years since the TEACH Act became law, as online education has rapidly flourished. Indeed, many educators find that the TEACH Act's complexity, combined with its array of limitations and conditions, render it essentially useless.

Nonetheless, with the continued growth of online education, a workable TEACH Act would benefit students and faculty engaged in online education. The higher education associations therefore respectfully propose that Congress and the Copyright Office consider updates and revisions to Section 110(2) to make the TEACH Act consonant with current and anticipated pedagogical practices by enabling a fuller exploitation of ever-evolving digital technology for educational purposes.

Orphan Works

The higher education community appreciates Congress's and the Copyright Office's ongoing attention to the challenges presented by orphan works—works protected by copyright, but whose copyright holders cannot be identified or located. Orphan works present a serious problem for institutions of higher education. Typically, these works are unavailable for sale, new or otherwise, and there is no reliable way—even with a good faith, diligent effort—to secure permission to use them. This situation generates uncertainty and raises the specter of copyright liability for colleges and universities (particularly smaller institutions that cannot afford regular legal counsel). Consequently, university libraries, museums, archives, and other public-service entities holding orphan works are deterred from using these works—some of which may be very significant—for education, research, and broad public benefit.

The higher education associations do not at this time endorse any present or past proposed regulatory or legislative mechanism to manage uses of orphan works. We do wish to caution, however, that any such orphan works program must effectively balance the interests of copyright holders whose works might be mistakenly identified as orphan works against the importance of enabling more vigorous uses of orphan works for the public. Further, any regulatory or legislative approach must avoid excessive regulatory burdens that make effective use of orphan works infeasible and must be sensitive to the requirements and capacities of universities and other non-profit institutions and permit appropriate tailoring for differing circumstances; for example, it should not specify procedures for educational and research uses that would be more appropriate for commercial entities.

The Digital Millennium Copyright Act (DMCA)

Section 1201

The higher education associations remain concerned that Section 1201 is adversely affecting, and will continue to adversely affect, the ability of the educational community to access copyrighted works for the purpose of engaging in lawful, noninfringing uses of those works and/or using uncopyrighted materials integrated in those works. Congress made clear that the Section 1201 rulemaking process was meant to temper the restrictive effects of Section 1201 by ensuring that access controls would not be used to impede users' rights to use the copyrighted works in lawful, noninfringing ways.

Yet contrary to Congressional intent, the DMCA's 1201 rulemaking provisions are not only unduly burdensome, but also require such unrealistically extreme evidence of harm that the procedure fails to provide any real relief to entities wishing to use such works in good faith. Furthermore, the cumulative effect of Section 1201's prohibition against circumvention of technological protection and the limited utility of the rulemaking in practice nullifies the fair use of any technologically protected copyrighted works: fair use enables use without

permission, but the Section 1201 anti-circumvention provisions prevent access to a work whose use would otherwise be fair.

We therefore respectfully urge the Copyright Office to recommend, and the Librarian to adopt, an expansion of "classes of works" falling within the scope of Section 1201 exempted works, in order to more closely and expediently effectuate the purpose of Section 1201 as expressed in the statute and legislative history. One such class of exempt works could be lawfully-acquired "*per se*" educational works, comprising, for instance, scientific and social science databases, academic monographs and treatises, law reports, and educational audiovisual works; a "user and environment" restriction could be placed on such a list to curtail any possible abuses. Another option might be to allow for presumptions in the triennial rulemaking process; that is, the fact that a class was previously designated could create a presumption that redesignation is appropriate.

Importance of Open Access Options

The higher education associations wish to take this opportunity to reiterate our goal of creating lawful, noninfringing new opportunities for expanded public access to scholarly publications. We share this aim with President Barack Obama's Administration, which articulated corresponding public access policies in the Office of Science and Technology Policy's February 2013 *Memorandum on Increasing Access to the Results of Federally Funded Scientific Research*.[10] Research universities have a mission to create and build upon new knowledge, broadly disseminate the results of their research, and preserve information for future generations.

Although peer-reviewed scientific and scholarly publications have served researchers and scholars well by making high-quality articles broadly available, the price of some journals has risen far beyond reasonable costs, placing a tremendous burden on research libraries and individual subscribers and restricting access to new knowledge. Digital technologies have enabled new ways to disseminate and preserve the results of research and scholarship. These technologies, coupled with enlightened public access policies such as those espoused by OSTP, can both reduce the cost and increase the dissemination of research and scholarship. It is imperative that publishers—commercial and non-profit academic publishers alike—accommodate their copyright policies to enable the benefits of digital publishing to be realized fully. Novel approaches to rights protection, such as the Creative Commons licenses that allow authors themselves to determine which protections, if any, they want to apply to their works, creatively advance the fundamental goals of copyright. The higher education associations caution that any updates or revisions to the copyright law should not erode or allow others to impinge upon these alternative approaches to constituting and organizing intellectual property dynamics.

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The Constitutional purpose of copyright law is to promote learning and creative expression. The considered constellation of exclusive rights, balanced by fair use and carefully calibrated limitations on those rights, is integral to achieving this purpose. Without these checks and balances in the copyright law, educational, scholarship, and research opportunities would be lost, to the detriment of students, scholars, and researchers at America's higher education institutions and to the detriment of our nation, its economy, and the quality of life of our citizens. Higher education requires flexibility rather than too-narrow or overly-prescriptive exemptions for research, scholarship, and teaching. A loss of this flexibility would impede teaching, learning, research, and scholarship, the very "Progress of Science" the founders intended copyright to promote.

[10] *See* http://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf.