The Society for Cinema and Media Studies' Statement of Best Practices for Fair Use in Teaching for Film and Media Educators

INTRODUCTION

The field of film and media studies in the United States was shaped by the legal principle of fair use - the ability of educators, critics, and others to teach, study, and write about media without having to ask copyright holders for permission every time their works are used. Educational and critical uses of media, such as those employed by film and media educators, are woven into the fabric of a free, democratic society, and lead directly to the continued health and creative vibrancy of both commercial and non-commercial film and media. There are two main barriers to the full exercise of lawful uses of media by film and media educators. First, many film and media educators lack a basic understanding of copyright law, particularly of the framework through which they may make legal, non-infringing uses of another's work. Second, vagueness in the law has resulted in a lack of consensus among educators regarding permissible practices and a confusing patchwork of policies, guidelines, and actual uses. In light of these two barriers, it is unsurprising that academic gatekeepers (libraries, university general counsels, IT staffs, etc.) frequently choose to adopt overly cautious and conservative copyright policies that sometimes result in a diminished educational experience for film and media students.

The Society for Cinema and Media Studies ("SCMS") has created this Statement of Best Practices for its membership to clarify some of the issues concerning the permissible use of media for teaching. Note that this statement explains and clarifies United States copyright laws and policies, as over 85% of SCMS survey respondents teach within the U.S. SCMS members teaching in other countries should consult with local experts as to how these guidelines might apply in other parts of the world. This statement is informed by statutory provisions and their legislative histories, analogous case law, and current professional practices based on a survey conducted by the SCMS Public Policy Subcommittee and input from members of the subcommittee. The online survey was administered using SurveyMonkey.com. It generated 659 responses over 10 days in Spring 2007, representing approximately 30% of SCMS membership, polled the current practices of SCMS members and asked for comments and feedback concerning the issue of copyrighted material and film and media pedagogy. The survey focused on the sources used to obtain course material, the screening of that material, and the creation of compilations for instructional purposes and student uses. SCMS has attempted to use the information it gained through the survey to compile, analyze, and evaluate common practices of film and media educators. The final report was reviewed and approved by the SCMS Board of Directors.

SCMS' Statement sets out to accomplish four specific goals:

1. To provide practical assistance to film and media educators in determining whether a particular use of a work is permissible;

2. To provide a guide for publishers, universities, and other gatekeepers or insurers to support the work of film and media educators;

3. To deter copyright owners from taking unfair or intimidating action; and

4. To formalize customary practices that over time can help guide courts in determining what types of uses are generally accepted as non-infringing by film and media educators.

THE CONCEPTS OF COPYRIGHT AND FAIR USE

The freedom of film and media educators to use audiovisual works in their courses – and the limits on such use – are rooted in existing copyright laws. Copyright law provides owners of copyrighted works a number of limited rights, including the right to exclude others from reproducing, performing, displaying, and distributing their works. The law also gives copyright owners the right to exclude others from preparing derivative works from their original works, including translations, adaptations, and compilations. In many cases, if someone engages in any of these activities without the permission of the copyright owner, that person may be infringing on the owner's rights and may thus be held liable for damages.

In the interest of balancing copyright owners' rights against potentially beneficial uses of the works by others, copyright law has imposed a number of restrictions on these rights. These restrictions serve as "safe harbors" for educators by allowing certain uses of protected works that do not infringe copyright holders' rights. There are three important safe harbors of particular interest to film and media educators: the doctrine of fair use, the exception for face-to-face teaching activities, and the exception for online distance education. The fair use doctrine affords the broadest protection for use of copyrighted materials because it is a general and flexible standard. In general, fair use allows people to use copyrighted materials without authorization for purposes such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," so long as their use qualifies as a "fair use" in light of the four factors set out in 17 U.S.C. § 107:

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.

The Copyright Act specifically recognizes that uses of copyright works for the purposes of teaching and criticism are the kinds of uses that the fair use doctrine is intended to protect. Under the first factor, if the "purpose and character of the use" is non-profit educational activity, it would tend to weigh heavily in favor of the use being fair and non-infringing. However, not every educational and noncommercial use is non-infringing; fair use analysis requires examining all of the factors relative to the others and in view of the overall aims of U.S. copyright law. Further, different courts have emphasized different factors at different times. The second factor asks users to consider "the nature of the copyrighted work." Generally, creative works are afforded greater protection than purely factual works. The third factor depends on the "amount and substantiality of the portion" borrowed from the overall copyrighted work, taking into account whether more of the work was used than necessary to accomplish the specific purpose of the use. The fourth factor examines "the effect of the use upon the potential market for or value of the work." In the educational context, this factor protects the copyright owners' financial interests in being able to create and sell works to educational institutions, educators, and students. If the audiovisual work being used by an educator was specifically marketed for classroom use and the use would substitute for purchases or licenses that otherwise would be likely to occur, it would tend to weigh against it being fair use and the educator may have to obtain formal permission for such use.

Educators may also rely on the face-to-face classroom exception and the online distance education exception to protect educational uses of media. Educators may seek protection under these exceptions when their use meets their respective requirements. However, even if their particular use is not covered by one of the exceptions, it may still qualify as a "fair use" under the four factors outlined above.

It is important to note that neither the educational exceptions nor the statute's definition of fair use delineate specific permissible uses. As a result, it is somewhat unclear exactly which uses they protect and every use is subject to individual analysis. Thus, this statement does not attempt to establish specific practices that would be protected under current copyright law. Instead, it outlines basic copyright principles regarding educational use. It also describes prevalent practices in the community of film and media educators that are believed to be fair uses or otherwise permissible without copyright holder authorization. The Statement identifies five broad principles for use of film and media in U.S. classrooms and then sets out limitations and clarifications regarding certain uses. The stated principles are critical to ensure a thriving film and media educational curricula which in turn will support the growth of the field of film and media studies.

PRINCIPLE I: CLASSROOM SCREENINGS

The practice of screening excerpts or entire works within the face-to-face teaching context is well established, requiring no permission or payment. A face-to-face teaching context involves educators being in the same general place as their students during the display and performance of copyrighted works. The space itself does not have to be an actual classroom and may include other places used for instruction, such as a gymnasium, auditorium, or library. Educators using film and media for instructional purposes within the face-to-face teaching context require great latitude to display, perform, and reproduce copyrighted works. They routinely utilize still images, film and video clips, video games, audio segments, and other media for the purposes of analyzing and illustrating historical, theoretical, and critical ideas. In many cases, educators need to use complete works, either in class or during separate screening times. Educators have been doing this at U.S. universities for many decades. This understanding of the fair use doctrine seems to be supported by current practices, as at least 70% of SCMS survey respondents reported that they screen materials for courses without formally securing permissions from rights holders.

Limitations & Clarifications

Lawfully Made Copies: The practice of screening works falls squarely within the face-to-face teaching exception so long as the copy of the work used for such instruction was lawfully made and it was screened in an appropriate location, as described above. A copy is lawfully made if: (1) it is reproduced with the permission of the copyright holder; or (2) it is reproduced such that it falls within the fair use exception. It may be purchased, rented, reproduced, or borrowed by the person using the work or by anyone else. Thus, a library copy, a student's copy, or another professor's copy could all be considered lawfully made. It is important to note, however, that even if the copy was unlawfully made, the performance or display of the work may still fall within the exception if the educator did not know or have reason to know of that fact.

Screenings: In some cases, film and media educators may be required to obtain licenses for certain screenings of audiovisual works. A license may be required for classroom screenings that are advertised to persons who are not enrolled in the course or that require an admission charge beyond the regular tuition and fees for the course. A license may also be required for screenings aimed at entertainment rather than educational purposes. Many films and videos directed at an educational market may be rented

with licenses that permit their screening or broadcast outside of the classroom. There are also a number of rights clearinghouses that may be contacted to secure licenses for such use. It is important to remember, however, that even when the audience for the screening extends beyond the classroom or admission is charged, educators' screening of the material may still qualify as a fair use under the Copyright Act.

Distribution to Students: Copyrighted media may also be made available to students for further study through library or departmental reserves. In addition, such works may be distributed online, provided that the requirements of the online distance education exception are satisfied or the use qualifies as a fair use under the Copyright Act. See the discussion in Principle IV regarding the online distance education exception for further information.

PRINCIPLE II: BROADCAST RECORDINGS

Film and media educators routinely record radio and television broadcasts for use in their classrooms. These recordings are often retained in personal or university libraries for the purposes of teaching and study. SCMS believes these recordings can be retained indefinitely, used for subsequent courses, and qualify as fair use.

Limitations & Clarifications

Previous Broadcast Guidelines: The community of film and media educators believes that fair use of recorded broadcast programs in the classroom is not limited by the restrictions laid out in the "Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes," which were issued in 1981 and are available through the Copyright Office at http://www.copyright.gov/circs/circ21.pdf. Although the guidelines impose some restrictions on such copying, they are not binding, have never been relied on by a court, and have not been widely adopted by universities nor enforced by copyright owners. The guidelines also may have been superseded by the decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). The *Sony* decision made the recording of broadcast television programming for personal use lawful as a fair use. Accordingly, such copies should meet the "lawfully made" requirement if later used in the classroom under the face-to-face teaching exception, even if they do not meet the broadcast guidelines.

Highly Organized, Large-Scale, and Systematic Reproduction: The highly organized, large-scale, and systematic reproduction of copyrighted works that are originally recorded from broadcast television may not be permissible regardless of whether such recordings are intended for non-profit educational use. For example, in *Encyclopedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (1982), a court held that the fair use doctrine did not protect the activities of the Board of Educational Services in Erie County, New York, which made mass copies of copyrighted works taped off of broadcast television for distribution to educators. The use was held to be infringing despite the fact that the original works were not specifically marketed to educators. Such mass reproduction is not likely to be a fair use because it may harm the general marketability of the copyrighted works by impacting their potential sales and hindering their entry into or standing in the educational market.

PRINCIPLE III: DERIVATIVE WORKS

It is often necessary for educators to copy excerpts from films, television shows, and other media and include them in compilations or presentations for illustrative purposes. The ability to copy, excerpt and edit, capture stills, and manipulate images and sounds in this way enhances film and media educators'

ability to analyze, critique, and teach media. The community of film and media educators believes that such practices qualify as fair uses of copyrighted works.

In addition, students need latitude for using copyrighted media for classroom presentations or other course assignments. More than half of the SCMS survey respondents reported that they assign students projects that may include incorporating clips into their work. Students need the same access to the tools of criticism, analysis, and demonstration as educators. Specifically, they may need to reproduce, manipulate, and remix media as a part of a course. SCMS believes such student uses are fair uses so long as the excerpts are used in the service of coursework or study and are not circulated beyond the class.

Limitations & Clarifications

Anti-Circumvention: The 1998 Digital Millennium Copyright Act ("DMCA") amended U.S. law by including an "anti-circumvention provision" to prohibit bypassing technological measures on digital media that effectively control access to that media, such as on most commercial DVDs and iTunes music and videos. This prohibition presented a problem for film and media educators because digital copies have become the standard for classroom use, but making digital copies of DVDs and other technologically-protected media for such use requires bypassing such technological measures. Although the text of the DMCA made clear that it was not intended to restrict the fair use of copyrighted works, a fair use claim does not exempt a use from the DMCA's restrictions on circumventing copy protection.

In 2006, however, the Library of Congress created an exemption to the DMCA's anti-circumvention provision specifically for film and media educators. Media educators may now circumvent technological measures for such protected works included in the educational library of a college or university's film or media studies department for the purpose of making compilations of portions of those works for educational use in the classroom. This exemption is subject to renewal in October 2009, at which time it may be expanded or modified. The community of film and media educators believes that this exemption should be expanded to allow students to similarly circumvent technological measures for classroom use, as well as allowing educators to circumvent protection on materials acquired from sources outside of a departmental educational library if they are using the work for classroom use.

It is important to note that the DMCA's limitation on circumvention of technological measures only applies to technologically-protected media where the underlying work is subject to copyright protection. The anti-circumvention provision thus does not apply to: (1) technologically-unprotected media; or (2) technologically-protected media where the underlying work is not protected by copyright (i.e. works in the public domain). Further, if the technologically-protected work is subject to copyright protection and the exemption does not apply, an educator still has the option of translating the digital copy into an analog copy. This can be done by recording the video and analog feed from a DVD player or a computer through the analog out jack. However, the translation from digital to analog frequently results in a severe degradation of image quality, which may make this method unacceptable in many instances.

PRINCIPLE IV: ONLINE DISTANCE EDUCATION

The community of film and media educators is increasingly integrating the internet into their curricula and pedagogy. Copyright law has evolved to recognize that more and more individuals are accessing educational opportunities through the internet. Educators engaged in distance education teaching may rely on the general protection afforded under the fair use doctrine or rely on the safe harbor of the online distance education exception to create an educational experience for online students that is

comparable to that of their face-to-face classroom counterparts. It is unclear whether the exception applies only to fully online courses or also encompasses hybrid courses that have a traditional face-to-face classroom component as well as an online component. Accredited, nonprofit educational institutions can take advantage of the exception to perform and display a variety of film and media works as part of their courses by understanding and managing the institutional, educator, and IT responsibilities imposed by the exception. While the online distance education exception protects the use of materials by educators in certain contexts, activities beyond the scope of the exception may still be protected under the broader fair use doctrine.

Limitations & Clarifications

Online Distance Education Exception: *Under the online distance education exception, the requirements for the use of copyrighted material in online distance education courses are much more specific and cumbersome than those of the face-to-face classroom exception. The online distance education exception was amended by the Technology, Education, and Copyright Harmonization Act ("TEACH Act") of 2002 in an effort to put the digital classroom on par with the traditional face-to-face classroom setting. The amended online distance education exception allows for: (1) display and performance of nearly all types of work; (2) transmission of course content to students in any location over the internet; (3) temporary access by students; and* (4) digitization of analog works.

Currently, educators in the face-to-face teaching context enjoy more latitude and face fewer restrictions under the face-to-face exception than do their counterparts in the distance education context under the online distance education exception. For example, while educators in the online distance education context may only use "reasonable and limited portions" of an audiovisual work, educators in the face-to-face context face no such limitation. While the responsibilities initially seem overwhelming and confusing, they are not unmanageable. The TEACH Act imposes responsibilities on three groups in particular: (1) institutional decision-makers, (2) educators, and (3) IT specialists. Because the TEACH Act imposes a number of technical requirements, most academic institutions have been reluctant to employ the TEACH Act's provisions or to draft TEACH Act policies. Instead, they have continued to rely on copyright licensing and fair use to ensure that their use is legally permissible. Although initial implementation of the TEACH Act requires considerable commitment and resources, it may offer greater predictability than just relying on the general fair use doctrine. The chart in Appendix A is meant to simplify the various requirements of the TEACH Act so that institutions and educators can better understand them and begin to implement them.

It is important to remember that the broader fair use doctrine may provide additional protection of distance education activities beyond the scope of this exception.

PRINCIPLE V: PUBLIC DOMAIN

A public domain work is a work that is not protected by copyright and which may be freely used by everyone. There are no restrictions on copying or use of such works under the Copyright Act or the DMCA. In general, public domain works include works for which:

1. The term of copyright for the work has expired;

2. The author of a work published before 1978 failed to satisfy statutory formalities to perfect the copyright;

3. The copyright owner has dedicated the copyright term to the public; or

4. The U.S. Government is the source.

Educators may use a copyright term chart to calculate whether the copyright term in a work has expired. One is available at: http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

This Statement was prepared by the Society for Cinema and Media Studies ("SCMS"). SCMS is a professional organization of college and university educators, filmmakers, historians, critics, scholars, and others devoted to the study of the moving image. For further information, please visit SCMS' website at www.cmstudies.org. SCMS would like to thank the Glushko-Samuelson Intellectual Property Law Clinic of the Washington College of Law for their assistance on this project.

APPENDIX A

TEACH ACT RESPONSIBILITIES FOR DISPLAYING OR PERFORMING FILM AND MEDIA IN ON-LINE INSTRUCTION[1]

INSTITUTIONAL	FACULTY	INFORMATION TECHNOLOGY
Your institution must be a government body or an accredited nonprofit educational institution. Your institution must incorporate institutional copyright policies to educate faculty, staff, and students. The institution must disseminate information about copyright policies and laws. The institution must provide notice to students about potential legal limitations on the use of materials used as part of the online course. The institution must limit access to the materials to students enrolled in the specific online course.	Faculty may: 1. Perform nondramatic literary works; 2. Perform nondramatic musical works; 3. Perform any other work in "reasonable and limited portions;" and 4. Display any work "in an amount comparable to that which is typically displayed in the course of a live classroom session." Faculty must ensure that the performance or display is: 1. *Supervised* - "made by, at the direction of, or under the actual supervision of an instructor;" 2. *Part of a structured course* - "an integral part of a class session offered as a regular part of the systematic, mediated instructional activities" of the educational institution; and 3. *Relevant* - "directly related and of material assistance to the teaching content of the transmission," not just for entertainment purposes. Faculty may not use: 1. Works that are specifically produced or marketed for distance education contexts; and 2. Copies that the educational institution "knew or had reason to believe" were not lawfully made and acquired. Faculty may not convert materials from analog into digital formats, except where, as outlined in 17 U.S.C. § 112(f): 1. The amount that may be converted is limited to the amount of appropriate works ("reasonable and limited portions" for performances and "amount comparable to that which is displayed in the course of a live classroom session" for displays); and 2. A digital version of the work is not "available to the institution" or is secured behind technological protection measures.	IT specialists must help ensure that access to copyrighted materials is limited to students enrolled in the online distance course. IT specialists must employ reasonable measures to ensure that students' abilities to receive, store, and transmit the materials is limited. Students should receive the information in a form that allows them to access or receive the materials only for the class session; they should only be able to access the information temporarily. They should also not be able to store or download the materials beyond the class session. IT specialists must make reasonable efforts to ensure that their technology for the online distance education course does not interfere with digital rights management technology measures used by copyright owners to control their works, except where the 2006 exemption applies (see above section on anti-circumvention). IT specialists must restrict retention/storage of the materials to reasonably necessary periods of time sufficient to facilitate class transmission and in such a way that only enrolled students may access them. IT specialists may not retain or copy digital transmissions if they are for purposes other than the educational purposes outlined in Section 110(2).

[1] **Sources**: 17 U.S.C. 110(2); 117 U.S.C. 112(f); http://www.copyright.iupui.edu/teach_summary.htm; http://www.lib.ncsu.edu/scc/legislative/teachkit/overview.html; http://www.copyright.com/services/copyrightoncampus/basics/teach.asp.