
ASBURY THEOLOGICAL SEMINARY COPYRIGHT MANUAL

INDEX

PART 1 MANUAL FOR THE USE OF COPYRIGHTED MATERIAL

I. Introduction and ATS Copyright Policy.....	2
II. Fair Use.....	2
III. Guidelines/Permissible Educational Uses	
A. Printed Materials	3
B. Music	4
C. Off-air and Cable Television	5
D. Library Copying	5
E. Multimedia	7
F. Distance Learning (TEACH Act)	8
G. Computer Software	10
H. Performance and Display Exemptions	11
IV. Tools	
A. Copyright Warnings	13
B. Copyright and Publicity Consent	14
C. Copyright Permission Form	15
D. Fair Use Checklist	16
E. TEACH Act Checklist	17

PART 2 COPYRIGHT OWNERSHIP AND CONTROL POLICY

I. Preamble	18
II. Definitions.....	18
III. Rights of Ownership.....	19
IV. Rights of Use.....	20
V. Licensing Rights.....	21
VI. Copyright Notice and Use of the ATS Name.....	21
Addendum:	
Explanation of Copyright Ownership and Control Policy.....	22

MANUAL FOR THE USE OF COPYRIGHTED MATERIALS

I. Introduction and ATS Copyright Policy

Recent changes in the federal Copyright Act have made it clear that educators and educational institutions may be liable for copyright violations regardless of the educational purposes otherwise served by using the copyrighted materials. Recent case law also has placed a new burden on employers to make certain their employees are trained about the legal limits on the use of copyrighted material.

Therefore, it is important that all Asbury Theological Seminary ("ATS") faculty, staff and students follow the basic guidelines set forth in the ATS Copyright Policy and Compliance Manual. This Compliance Manual ("Manual") provides ATS faculty, staff and students with guidelines and tools to deal with copyright issues in the educational environment. Individuals should become familiar with the Manual and refer to specific sections that pertain to particular issues as they arise on campus.

ATS Copyright Policy

ATS recognizes its obligation to comply with U.S. copyright laws. The following guidelines, and the accompanying Manual, provide rules and guidance for ATS faculty, staff, and students when using materials protected by copyright laws.

1. Unlawful copies of copyrighted materials should not be produced or used with ATS-owned equipment, within ATS owned facilities, or at ATS-sponsored functions.
2. ATS employees shall not direct other employees to willfully violate copyright laws.
3. ATS shall make efforts to post copyright warnings for print, and electronic resources as required by law.
4. ATS employees are expected to be familiar with the Copyright Compliance Manual and to provide their supervisor, upon request, the justifications for "fair use" of copyrighted materials copied or used under their supervision without license or ownership.

II. Fair Use

Generally, a copyright owner may control all uses of his or her copyrighted work, including reproduction, distribution, performance, display and adaptation. The Copyright Act provides some specific rules when copyrighted works may be used without the permission of copyright owners (e.g., exemptions and TEACH Act discussed in subsequent sections). However, "fair use" may allow broader use of copyrighted materials in certain situations.

There is no simple test to determine what is fair use. Instead, the Copyright Act provides very cursory guidelines for individuals to make their own determination of whether a specific use is fair use. Specifically, Section 107 of the Act sets forth the following four fair use factors that should be considered in each instance to determine whether a use is a fair use:

- (1) the *purpose and character* of 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 factors must be evaluated as a whole to determine if the use of a copyrighted work is fair use. In evaluating fair use, the following considerations are applied: (1) Nonprofit educational purposes are favored in the first factor analysis. (2) The second factor looks at the nature of the copyrighted work. The courts usually favor uses of nonfiction over fiction and published works over unpublished ones. Highly creative works, such as music, creative writing and films are given highest protection. (3) Amount and substantiality are difficult to gauge. There is no specific number of words, lines, or notes that may be safely taken without permission. Generally, the courts favor excerpts over entire works, however, a small portion could capture the heart or essence of a work and be considered infringement. (4) Finally, the effect copying has on the market for a copyrighted work is often considered the most important factor in determining fair use.

[See Section IV. D., Fair Use Checklist, for a useful tool in making decisions about fair use.]

III. Guidelines/Permissible Educational Uses

Responding to a need for clarification of the fair use doctrine, Congress, developed the Congressional Guidelines for the permissible educational uses of copyrighted material ("Guidelines"). These Congressional Guidelines are not law, but were written to indicate legislative intent and are used as benchmarks against which copyright infringement is gauged. This Manual sets forth the Congressional Guidelines, the TEACH Act for distance learning, and the exemptions for library and performance displays.

While only the courts can authoritatively determine whether a particular use is fair use, these guidelines represent the conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use, but the more one exceeds these guidelines, the greater the risk that fair use does not apply.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain—such as U.S. Government works or works on which copyright has expired or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the use of some works, and users should refer to the applicable license terms for guidance.

A. Printed Materials

These guidelines should be followed with respect to copying printed materials in an educational setting.

1. Permissible Uses

Single Copying for Instructors

A single copy may be made of any of the following by or for an instructor at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

1. A chapter from a book;
2. An article from a periodical or newspaper;
3. A short story, short essay, or short poem, whether or not from a collective work;

4. A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per student in a course) may be made by or for the instructor of the course for classroom use or discussion, provided that:

1. the copying meets the tests of brevity and spontaneity as defined below; and
2. the copying meets the cumulative effect test as defined below; and
3. each copy includes a notice of copyright.

Brevity (The following satisfy the test of brevity.)

- a. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages, or (b) from a longer poem, an excerpt of not more than 250 words.
- b. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

- c. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- d. "Special Works": Certain works in poetry, prose, or "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience and fall short of 2,500 words in their entirety. Paragraph "b" above notwithstanding, such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10 percent of the words found in the text thereof may be reproduced.

Spontaneity (The following satisfy the test of spontaneity.)

- a. The copying is at the instance and inspiration of the individual instructor; and
- b. The inspiration and decision to use the work

and moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect (The following satisfy the test of cumulative effect.)

- a. The copying of the material is for only one course in the institution in which the copies are made.
- b. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- c. There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "a" and "b" above shall not apply to current news periodicals and newspapers and current new sections of other periodicals.]

2. Prohibitions

Notwithstanding any of the above, the following shall be prohibited:

1. Copying shall not be used to create or to replace or to substitute for anthologies, compilations, or collective works. Such replacement or substitution may occur whether copies of various works or excerpts there-from are accumulated or are reproduced and used separately.
2. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests, test booklets, answer sheets, and like consumable material.
3. Copying shall not:
 - a. substitute for the purchase of books, publishers' reprints, or periodicals;
 - b. be directed by higher authority; or
 - c. be repeated with respect to the same item by the same instructor from term to term.
4. No charge shall be made to the student beyond the actual cost of the photo-copying.

B. Print Music

These guidelines should be followed with respect to copying print music in an educational setting.

1. Permissible Uses:

- a. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance, provided purchased replacement copies shall be substituted in due course.
- b. For academic purposes other than performances, multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.
- c. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered, or lyrics added if none exist.
- d. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual instructor.
- e. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual instructor for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual instructor. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

2. Prohibitions:

- a. Copying to create or to replace or to substitute for anthologies, compilations, or collective works.
- b. Copying of or from works intended to be "consumable" in the course of study or teaching such as workbooks, exercises, standard tests and answer sheets and like material.

- c. Copying for the purpose of performance, except as in B.1.a. above.
- d. Copying for the purpose of substituting for the purchase of music except as in B. above.
- e. Copying without inclusion of the copyright notice which appears on the printed copy.

C. Off-air and Cable Television Recordings

Standards for using television broadcast programs for educational purposes are covered by the off-air guidelines below. Additional uses of video are covered in other sections of the Manual (Performances and Displays, Multimedia and Distance Learning). While the off-air standards were developed before cable television was in general use, most authorities agree that the guidelines do apply for cable television broadcasts.

Off-air and Cable Guidelines

1. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable re-transmission) and retained by a nonprofit educational institution for a period not to exceed forty-five (45) calendar days after the date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.
2. Off-air recordings may be used once by individual instructors in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster, or campus, as well as in the homes of students receiving formalized home instruction during the first ten (10) calendar days in the forty-five (45) calendar day retention period.
3. Off-air recordings may be made only at the request of individual instructors for their own use and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same instructor, regardless of the number of times the program may be broadcast.
4. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of instructors under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.
5. After the first ten (10) consecutive school days, off-air recordings may be used up to the end of the forty-five (45) calendar day retention period only for instructor evaluation purposes, *i.e.*, to determine whether or not to include the broadcast program in the teaching curriculum. They may not be used by the recording institution for student exhibition or other evaluation purposes without authorization. "School days" are school session days - not counting weekends, holidays, vacations, examination periods or other scheduled interruptions - within the forty-five (45) calendar day retention period.
6. Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.
7. All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.
8. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

D. Library Copying

If a librarian makes copies of copyrighted works for patrons to use in personal research, he/she must observe the following rules (primarily set forth in Section 108 of the Copyright Act):

To make a single copy, the following conditions must be satisfied:

1. The copy must be made without commercial advantage.
2. The library must be open to the public.
3. The copy must include the notice of copyright that appears on the work or, if no such notice can be found, a legend stating that the work may be protected by copyright.

4. The copy must be made at a user's request.
5. The copy must be made from the collection of the library or archives where the user makes his or her request or from the collection of another library or archives.
6. The copy must be no more than one article or other contribution to a copyrighted collection or periodical, or a small part of any other copyrighted work.
7. If an entire work, or substantial part of it, is requested, the library must first determine that a copy cannot be obtained at a fair price.
8. The copy must become the property of the user, and the library must have no notice that the copy would be used for any purpose other than private study, scholarship, or research.
9. A copyright warning must be prominently displayed at the place orders are accepted and on order forms (see Section IV. A.).

To make a digital copy, the following additional conditions must be satisfied:

1. If the work is protected by a license agreement, the terms of the agreement must be followed.
2. In addition to including the notice of copyright on the copy, add "No further reproduction and distribution of this copy is permitted by transmission or any other means."
3. The copy (e.g., diskette, file attached to e-mail, etc.) becomes the property of the user and all other digital copies must be destroyed.

To make three archival copies of an unpublished work under Section 108(b), the following conditions must be satisfied:

1. The copies must be made solely for purposes of preservation and security or for deposit for research use in another library.
2. The work must be in the collections of the library.
3. Copies reproduced in digital format must not be otherwise distributed or made available to the public (e.g., via a public web site) in that format outside the premises of the library.

To make three replacement copies of a published work under Section 108(c), the following conditions must be satisfied:

1. The copies must be made solely for the purpose of replacement of a copy that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete.
2. An unused replacement cannot be obtained at a fair price.
3. Copies reproduced in digital format must not be made available to the public in that format outside the premises of the library.

To reproduce, distribute, display, or perform a published work during the last 20 years of its copyright term under Section 108(h), the following conditions must be satisfied:

1. The use must be for purposes of preservation, scholarship, or research.
2. The user must be a library or archives.
3. The work must no longer be subject to normal commercial exploitation.
4. A copy of the work cannot be obtained at a reasonable price.

Guidelines on photocopying and interlibrary arrangements

These guidelines, often referred to as the rule of fives, allow, within any calendar year, a library to receive no more than five photocopies of articles from a periodical title (not issue) less than five years old.

Section 108 does none of the following:

1. Impose liability for copyright infringement upon a library or its employees for the unsupervised use of reproducing equipment, provided that the equipment displays a notice that the making of a copy may be subject to the copyright law.
2. Excuse a person who uses library reproducing equipment or requests a copy from the library from liability for copyright infringement if it exceeds fair use as provided by Section 107.
3. Limit the lending of a limited number of copies and excerpts of an audiovisual news program.
4. In any way affect the right of fair use as provided by Section 107 or any contractual

obligations assumed by the library when it obtained a copy of a work in its collections.

Copying rights throughout Section 108:

1. Extend to the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions.
2. Do not extend to cases where the library is aware (or has substantial reason to believe) that it is engaging in the related or concerted reproduction or distribution of multiple copies of the same material.
3. Do not extend to the systematic reproduction or distribution of single or multiple copies - this does not, however, prevent a library from participating in interlibrary arrangements as long as the quantity of copies received does not substitute for a subscription or purchase of a work.
4. Do not apply to a musical work, a pictorial, graphic, or sculptural work or a motion picture or other audiovisual work other than an audiovisual work dealing with news.

E. Multimedia

In creating multimedia works, the user is likely to deal with copyrights on all aspects of the production that are not original, including video, graphics, music, and or other sound recordings and computer software. There are no provisions of the Copyright Act specific to this issue, but direction can be found in the 1996 Fair Use Guidelines for Educational Multimedia, endorsed by the U.S. Copyright Office. The following is a summary of these guidelines:

Permitted Uses:

1. Students may perform and display their own educational multimedia projects for the course for which they were created and may use them in their own portfolios as examples of academic work.
2. Educators may perform and display their own education multimedia projects for face-to-face instruction, assigning to students for directed self-study, peer conferences, and professional portfolios.

Limitations:

1. Educators may use their projects for teaching courses for two years. Use beyond that time

period requires obtaining permission for each copyrighted portion.

2. Portions are generally specified "in the aggregate," meaning the total amount that can be used from a single copyrighted work.
3. Motion Media (film, video, television): Up to 10% or 3 minutes, whichever is less, from a single copyrighted work.
4. Text (prose, poetry, drama): Up to 10% or 1000 words, whichever is less, from a single copyrighted work.
5. Special limitations are placed on poems.
6. Music, Lyrics, and Music Video: Up to 10%, but in no event more than 30 seconds, of the music and lyrics from an individual musical work.
7. Illustrations and Photographs: No more than 5 images by an artist or photographer. From a published collective work, no more than 10% or 15 images.
8. Data Sets: Up to 10% or 2500 fields or cell entries from a database or table.
9. Copying and Distribution: There may be no more than two copies, only one of which can be placed on reserve. An additional copy may be made for preservation (backup) purposes.

When Permission is Required:

Educators and students must seek individual permissions for all copyrighted works incorporated in their educational multimedia projects for non-educational or commercial purposes, for duplication beyond guideline limitations, and for distribution over an electronic network other than certain remote instruction uses.

Important Reminders:

1. Exercise caution in using digital material downloaded from the Internet. Some copyrighted works cannot be reused without permission or royalty payment. Also, many web sites contain material posted without authorization from the copyright holder. See Section III. F. below, regarding the TEACH Act.
2. Credit the sources and display the copyright notice and copyright ownership information.

3. Alterations of copyrighted works must support specific instructional objectives. Make note that alterations have been made.

F. Distance Learning and the TEACH Act

Under the "Technology, Education and Copyright Harmonization Act," (the "TEACH Act") codified at Section 110(2) of the Copyright Act, instructors may now digitally distribute a variety of copyrighted materials to those students enrolled in a distance learning course. Subject to a number of conditions placed on accredited educational institutions, which have copyright use policies in place, and their instructors, the TEACH Act permits an instructor to transmit digital copies of copyrighted materials provided that such materials are an "integral part of the class experience" and are comparable to the type of performance or display that typically would take place in a classroom setting. Without retracting the exemptions afforded educational institutions under Section 110(4) of the Copyright Act (see Section III. H. below), the TEACH Act imposes certain duties upon educational institutions to apprise faculty and students of the limitations imposed on digitally transmitted copyrighted materials utilized in distance learning courses, and to facilitate the implementation of technological restrictions with respect to transmission and retention of such materials. The guidelines that follow are consistent with the TEACH Act as they relate to instructors, staff, and students at ATS.

Instructor and Staff Guidelines

ATS instructors involved in distance education should follow the guidelines described below with respect to the transmission of copyrighted materials in distance learning courses.

1. Only reasonable and limited portions of any copyrighted material may be transmitted. Under the TEACH Act, the provision of copyrighted materials in distance learning courses is intended to emulate conventional instruction and lecture formats. Accordingly, instructors may use almost any copyrighted work in a distance learning course provided that the materials are (i) included in reasonable and limited portions and (ii) displayed in an amount comparable to that which is typically displayed in the course of a live classroom session. Students must have

limited access to each session (*i.e.*, within a prescribed time period) and not be able to store the materials or review them later in the academic term. In selecting materials for use in a distance learning course, an instructor should consider the following:

- materials should be limited to an amount and duration comparable to what would be displayed or performed in a live classroom setting (*i.e.*, no transmission of unreasonably substantial portions of textbooks or course packs);
 - the selected materials should be used as part of a class assignment and not for entertainment purposes or optional reading; and
 - the selected copyrighted materials should pertain to the subject matter of the distance learning course.
 - in utilizing such materials, instructors should provide a notice to enrolled students that the materials used in the distance learning course may be subject to copyright protection.
2. Supervision over transmission. Materials transmitted to enrolled students must be made by, at the direction of, or under the actual supervision of an instructor. The TEACH Act requires instructors to generally supervise course activities but does not require real-time supervision or pre-approval of a transmission by the instructor for the performance or display of the copyrighted materials. An instructor's following the guidelines described in this section should result in the instructor's adequate supervision over course activities with respect to the related copyrighted materials for a distance learning course.
 3. Restricted conversion of analog to digital formats. Digitization of copyrighted materials is not allowed unless (i) the amount converted is limited to the amount lawfully displayed under Section 110(2) of the Copyright Act (see Section III. H. below), or (ii) a digital version is unavailable or (iii) the available digital version is shielded behind protection measures that prevent it from being displayed under Section 110(2) of the Copyright Act (see Section III. H. below).

4. Transmission of commercially available digital educational materials prohibited. Instructors may not use copyrighted materials that are marketed primarily for instructional use in distance education courses. Instructors are advised to either gain the permission of the copyright owner, encourage students to acquire it through the preexisting commercial channels, or refrain from using these commercial materials in their distance learning courses.
5. Alternatives. If the TEACH Act prohibits the use of copyrighted materials, instructors may pursue two alternative routes to incorporate the materials in their distance learning course. First an instructor, may apply the provisions of fair use as outlined in the Introduction above. If fair use does not apply, an instructor may secure permission from the copyright owner (see Copyright Permission Form in Section IV. C. below).

Access and Control

Under the TEACH Act, each educational institution is required to establish controls to ensure limited access to the copyrighted materials transmitted specifically for use in a distance learning course. Accordingly, the information and technology staff of ATS should consider the following in establishing an environment consistent with the requirements of the TEACH Act.

1. Access Code. To the extent technologically feasible, ATS staff should establish systems to ensure that only students enrolled in a given distance learning course actually receive the transmitted copyrighted materials. This may be accomplished, and maintained, pursuant to an access code system enabling students to access the information through the use of an assigned password for the respective course.
2. Implement controls to prevent storage and dissemination of copyrighted materials. Staff must work to prevent the retention of the copyrighted materials in accessible form by recipients of the transmissions for longer than the class session. Staff should work with instructors to determine and to minimize the amount of time and number of times students may access the copyrighted materials. Additionally, staff must employ technological

measures to prevent students from further disseminating of the work in accessible form. This may include introducing technological controls to prevent enrolled students from downloading or retaining the information on their own computers thereby minimizing the risk that students may further disseminate the copyrighted materials to others. The internal controls that the staff may implement to limit accessibility of the transmitted materials with respect to a distance learning course must not interfere with the copyright owner's own digital access control or management, if any.

3. Retention of temporary electronic copies. ATS may retain temporary copies of the copyrighted materials to effect the transmission; however, ATS may not store the material for access by the enrolled students on the system or network for a longer period than is reasonably necessary to facilitate the transmissions for which it was made. Further, staff must ensure that such materials are stored on a system or network accessible only to the instructors, enrolled students, or any other anticipated recipients.
4. Archiving electronic copies of the materials. The TEACH Act, under a new Section 112(f) of the Copyright Act, permits ATS to retain copies of its digital transmissions, including those used in connection with distance learning courses. However, no further copies may be made from those materials other than the copies and transmissions authorized under Section 110(2) of the Copyright Act (see Section H of this Manual). Instructors may retrieve the electronic copies of copyrighted materials which have been secured outside the electronic reach of students for use in future distance learning courses.

Student Guidelines

1. Students should be mindful of the fact that class material obtained in a distance learning course may contain copyrighted works. Under the TEACH Act, students are prohibited from any retention or redistribution of this information.
2. Access to distance learning course materials should be restricted by an access code. Students who are registered to take the distance learning course should be given

access to the protected materials via the access code. Students should take every precaution to protect the access code to prevent unauthorized access to course materials.

Synopsis of TEACH Rules

Instructors should consider the following when incorporating copyrighted materials in their distance learning courses so as to avoid copyright infringement.

1. The copyrighted material transmitted for the distance learning course should be:
 - a. a performance of a non-dramatic literary work; or
 - b. a performance of a non-dramatic musical work; or
 - c. a performance of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions;" or
 - d. a display in the amount comparable to that which is typically displayed in the course of a live classroom session.
2. The copyrighted material transmitted for the distance learning course should not be:
 - a. sold or licensed in other formats primarily for digital distance education; and
 - b. a text book, course pack, or other copyrighted material typically purchased or acquired by students for their instructional use as part of a class; and
 - c. an unlawful copy of copyrighted materials (that is, neither the instructor nor ATS has reason to believe that the material transmitted is an unlawful copy).
3. The performance or display of the copyrighted materials should be:
 - a. an integral part of a class session offered as a regular part of the systematic, mediated, instructional activities of ATS; and
 - b. made by, at the direction of, or under the actual supervision of an instructor; and

- c. directly related and of material assistance to the teaching content of the distance learning course.
4. If the instructor is considering using materials that must be converted from print or other analog format to digital format, ensure that:
 - a. the amount of work converted is no greater than the amount that lawfully may be used for the course; and
 - b. there is no digital version of the work available to ATS or the available digital version utilizes technological protections preventing its availability for use in a distance learning course.
5. ATS instructors and staff should utilize any available technological tools to:
 - a. limit access to the copyrighted materials used in the distance learning course to enrolled students of such course; and
 - b. prevent downstream copying by the enrolled students; and
 - c. prevent the students from retaining the materials for longer than a class session.
6. Instructors or staff should provide a notice to the enrolled students that the materials used in the distance learning course may be subject to copyright protection and that they may not violate the legal rights of a copyright owner.

[See Section IV. E., TEACH Act Checklist, for a useful tool in making determining what is acceptable under the TEACH Act.]

G. Computer Software

Copying Software

Section 117 of the Copyright Act permits the owner of a computer program:

1. To make another copy or adaptation of the program for archival (backup) purposes, but not to make multiple copies or replacement copies from an archival copy.
2. To adapt a copyrighted program from one language to another in which it is not commercially available.

3. To add features to a copyrighted program for use at school, in order to make better use of the program.

It is important to review the terms and conditions of license agreements, especially clauses relating to permitted uses, prohibited uses, restrictions, and copying limitations, because limitations on exclusive rights can be overridden by contract. By installing or using a licensed software product, an educational institution will be legally bound by the agreement.

Educational institutions will sometimes purchase a single-user copy of a program and install it on multiple machines. This is more than likely infringing activity. There is currently no fair use or exemption that would allow for making multiple copies of a computer program within a college. Thus, administrators should always consult the terms of a license to determine the authorized uses of software.

Lending Software

The Copyright Software Rental Amendments Act of 1990 grants copyright owners of computer software the right to control rental, lease or lending of their software (Section 109(b) of the Copyright Act). However, the law does provide an exemption for nonprofit libraries provided that a warning of copyright is affixed to the software, reading: This exemption does not apply to software lending by technology or academic departments or administrators.

H. Performance and Display Exemptions

The owner of a musical work or a motion picture has the right to control the public performance or display of the respective work. The music performing rights societies (ASCAP, IBM and SESAC) provide licenses to allow music performances (live and recorded) in public places. Swank Films similarly licenses universities to show commercial films. Section 110 of the Copyright Act sets forth several specific exemptions to the performance and display right:

Face-to-Face Teaching Activities

Section 110(1)

1. Section 110(1) permits the performance or display of any copyrighted work in face-to-face teaching activities without having to obtain a public performance license if certain conditions are met.

2. This section requires that the performance or display of a copyrighted work take place in a classroom or similar place of instruction (such as a school library).
3. The performance or display must be directly related to the curriculum and not connected with recreation or a reward (e.g., treating a class to a movie, unrelated to course content, would require obtaining permission).

Transmission of Instructional Activities

Section 110(2)

1. Section 110(2) permits the transmission of a performance of a non-dramatic literary or musical work or display of a work without having to obtain a public performance license if certain conditions are met.
2. Permissible copyrighted works include singing a song, reciting a poem, reading a short story out loud or displaying paintings.
3. Plays, movies and most audiovisual works are not "non-dramatic" and are not covered by this section.
4. The performance must be a "regular part of systematic instructional activities" and "directly related and of material assistance to the teaching content."
5. The transmission must be made for reception in a classroom or similar place of instruction.

Exemption for Certain Nonprofit Performances

Section 110(4)

1. Section 110(4) permits a live performance (not televised) of a non-dramatic literary or musical work—by live performance, the playing of phonorecords or by a receiving apparatus—without having to obtain a public performance license if certain conditions are met.
2. The performance must be without any purpose of direct or indirect commercial advantage (e.g., a performance by a school orchestra conducted by a music instructor who is paid an annual salary is exempt, but the same performance conducted by a hired band leader is not. Furthermore, while admission charges usually indicate commercial purpose, the exemption applies if the proceeds are used exclusively for an educational, religious or charitable purpose; but, in such a case, the copyright owner has

veto power under Section 110(4)(B)).

3. The performance must be non-dramatic (e.g., a concert, choral work or poetry reading). Performing dramatic works, such as plays and musicals, is only allowed in face-to-face teaching activities.

IV. TOOLS

IV. A. Copyright Warning for Use by Libraries and Archives

The following warning is required (1) to be displayed at the place where orders for copies or recordings are accepted by the ATS library and (2) to be included on printed forms supplied by the library and used by its patrons for ordering copies or recordings.

Copyright Regulations

(a) *Definitions.*

(1) A "Display Warning of Copyright" is to be displayed at the place where orders for copies or sound recordings are accepted by libraries and archives.

(2) An "Order Warning of Copyright" is to be included on printed forms supplied by libraries and archives and used by their patrons for ordering copies or phonorecords.

(b) *Contents.*

A Display Warning of Copyright and an Order Warning of Copyright shall consist of a verbatim reproduction of the following notice, printed in such size and form and displayed in such manner as to comply with copyright law:

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

(c) *Form and Manner of Use.*

(1) A Display Warning of Copyright shall be printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently, in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer within the immediate vicinity of the place where orders are accepted.

(2) An Order Warning of Copyright shall be printed within a box located prominently on the order form itself, either on the front side of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the size be smaller than 8 points. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.

IV. B. Copyright and Publicity Consent

The following request form may be used to obtain consent from a presenter on campus, whose presentation is being recorded and disseminated throughout ATS in some way. This consent form provides license for the use of the presenter's copyrighted materials and name and likeness.

Dear _____:

Under state and federal laws, you have rights of publicity that provide you with certain control over the use of your name and likeness. In addition, you may hold copyrights in specific images, text or other materials you make available to Asbury Theological Seminary ("ATS") ("Copyrighted Materials"). ATS appreciates your allowing us to use your name, image, likeness or other materials you make available to us for our educational purposes. ATS respects your rights and is open to discussing any concerns that you might have related to this issue.

By signing this agreement, and for valuable consideration, the receipt and sufficiency of which you hereby acknowledge, you grant to ATS a worldwide, nonexclusive, perpetual, royalty-free license to use your name, image and likeness and any Copyrighted Materials you provide, whether (i) in full or in part, (ii) changed, altered or transformed or (iii) reproduced in print, digital or electronic media, or in any other format now known or hereafter to be discovered. You agree to irrevocably and unconditionally release ATS, its directors, employees and affiliates from any claims related to such use, including but not limited to, claims under right of publicity, right of privacy, copyright, and trademark laws.

All copyrights in photographs, video, publications, or other works created by ATS or our agents incorporating your name, image, likeness, or Copyrighted Materials shall be solely owned and/or controlled by ATS and/or our agents, without affecting your underlying proprietary rights in such materials. You acknowledge that this agreement is voluntary and that you expect no further remuneration whatsoever in exchange for the rights granted hereunder.

Thank you for taking the time to read and sign this agreement. Please let us know if you have any questions.

Sincerely,

Accepted and Confirmed:

Asbury Theological Seminary

By: _____

Presenter's Printed Name: _____

Date: _____

IV. C. Request for Permission

The following request form may be used to request permission for use of copyrighted materials when fair use, the TEACH Act, or statutory exemptions do not allow use of the materials without a license.

Request for Permission

Date: _____

To Whom It May Concern:

We are writing to request permission to reproduce/use the below-identified work for the following purpose:

Title: _____

Copyright Information: _____

Author(s): _____

Number of Copies: _____

Method of Distribution, Display, etc.: _____

A self-addressed-stamped-envelope is enclosed for you to return your response. Please reply to let us know if you require any fees to be paid for this proposed use in an educational setting.

Sincerely,

Address: _____

Copyright Owner Information:

Permission Granted by: _____

Printed Name: _____

Title: _____

Date: _____

Fee or other Condition of Use: _____

IV. D. Fair Use Checklist

This checklist may be used in connection with the determination of fair use as explained in the Introduction to this Manual. This is a tool to help in the subjective decision-making in this area, and there is no foolproof method to decide if a use is a fair use. In general, if the weight of factors strongly favors fair use, then fair use likely applies (and vice versa).

PURPOSE

Favoring Fair Use:

- Teaching
- Research
- Scholarship
- Criticism/Commentary/Parody
- Transformative

Opposing Fair Use:

- Commercial activity
- Profiting from the use
- Entertainment
- Bad-faith behavior
- Denying credit to original author

NATURE

Favoring Fair Use:

- Published Work
- Factual or nonfiction

Opposing Fair Use:

- Unpublished work
- Highly creative work (art, music, novels, films, plays)
- Fiction

AMOUNT

Favoring Fair Use:

- Small quantity
- Portion used is not significant to entire work
- Amount is appropriate for educational purpose

Opposing Fair Use:

- Large quantity or whole work
- Portion used is central to work or "heart of the work"

EFFECT

Favoring Fair Use:

- Uses lawfully acquired copy of original work
- One or few copies made
- No significant effect on the market or potential market
- Lack of licensing mechanism
- No similar product marketed by the copyright holder

Opposing Fair Use:

- Could replace sale of copyrighted work
 - Numerous copies made
 - Significantly impairs market or potential market
 - Reasonably available licensing mechanism
 - Affordable permission available for using work
 - Repeated or long term use
 - Accessible on web or in other public forum
-

IV. E. TEACH Act Checklist

This checklist may be used when making decisions about use of copyrighted materials in distance education settings. Each of these requirements must be satisfied and are explained further in Section III. F., above.

Requirement Satisfied?

YES

1. Accredited nonprofit educational institution.
2. Institutional copyright use policy.
3. Educational materials on copyright available.
4. Work is not a digital educational work, unless allowed under § 110(2).
5. Work is lawfully made and acquired.
6. Work is integral to class session.
7. Work is part of systematic mediated instructional activities.
8. Work is directly related/material assistance to teaching.
9. Work is (check one):
 - Non-dramatic literary work (may use all).
 - Non-dramatic musical work (may use all).
 - Reasonable and limited portion of any other work (for a performance); *or*
 - Display of any work in amount analogous to live classroom setting.
10. Reception limited to students enrolled in course.
11. Reasonable "downstream" controls instituted, including:
 - No retention of work longer than class session.
 - No dissemination beyond recipient.
12. For conversions of analog to digital:
 - No digital version available to institution; and
 - Digital version available is technologically protected.
13. Warning notice to students present on work.

ATS COPYRIGHT OWNERSHIP AND CONTROL POLICY

1. PREAMBLE

The mission of Asbury Theological Seminary ("ATS") is to create, preserve and disseminate knowledge through offering courses of study in the classical and practical disciplines with a biblically-grounded and theologically informed scholarly perspective. Scholars within the ATS community are encouraged to pursue areas of study and concentration without interference, to share the results of their intellectual efforts with colleagues and students and to use and disseminate their own original creative works. ATS also recognizes its obligation to provide the highest quality educational products and services through development of a richness of resources to serve its students and the broader public interest.

As the above mission is fulfilled, intellectual property inevitably will be created. This Copyright Policy (the "Policy") balances the interests of the administration, the faculty and the staff within the ATS community and the public at large. Section 2 defines the key terms used throughout the Policy; Section 3 sets forth the rights of ownership of the various types of copyrightable materials created at or for ATS; Section 4 sets forth the respective rights of use; Section 5 addresses the issue of licensing and the allocation of income; and Section 6 addresses the use of copyright notice and the use of the ATS name on copyrighted works.

The Policy clarifies which works are created "within the scope of employment" with the authorship vesting in ATS. The Policy is incorporated by reference into the employment contracts of faculty, staff and other ATS employees and is binding as between ATS and its employees. Furthermore, the Policy applies to all material created at or for ATS, embodied in any format now known or to be discovered, including, without limitation, electronic formats used with Internet, Intranet and other distance learning methods.

In the event that the Policy, in conjunction with federal copyright law, does not effect the desired rights of ownership and use described below, the parties covered by this policy agree to execute any documentation necessary to effect these desired results.

2. DEFINITIONS

"ATS Publication" means a journal, periodical, yearbook or other print or electronic work owned by ATS in any format now known or to be developed.

"Copyrightable" under the Copyright Act 17 U.S.C. §101 *et seq.*, means "original" and fixed in a tangible medium of expression. "Original" means created independently (*i.e.*, not copied). A work is "fixed in a tangible medium of expression" when its embodiment in a copy or phonorecord is sufficiently permanent to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.

"Course Content" means the Copyrightable intellectual materials used in a course taught at or sponsored by ATS, including, but not limited to: lecture notes, quizzes, exams, class hand-outs and syllabi.

"Courseware" means the Copyrightable set of tools and/or technologies used to present Course Content, independent of the content itself. Courseware includes, but is not limited to: videotapes and other recordings of all course lectures or presentations; Internet- and Intranet-based course materials; computer slides, CD-ROMs and other computer-based course materials.

"Institutional Work" means a Copyrightable work of authorship that is (i) created with the use of Substantial ATS Resources (as defined below) or (ii) specifically commissioned by ATS. The following works presumptively shall be considered Institutional Works: Courseware; computer software; and ATS Publications.

"Net Income" means gross proceeds, less any costs of licensing, sale, marketing, development, discounts, returns and taxes.

"Noncommercial" means that no *direct* payment is received for the use of the copyrighted work. *Indirect* payments, including, without limitation, speaking and teaching fees, shall not affect the Noncommercial status of a particular use.

"Non-institutional Work" means a work of authorship created without the use of Substantial ATS Resources. The following works presumptively shall be considered Non-institutional Works: Traditional Academic Works, Course Content and Research Material.

"Originator" means an individual or group of individuals who author(s) a Copyrightable work or, in the case of a Work Made for Hire, otherwise makes a substantive intellectual contribution to the work.

"Research Material" means a work of authorship created by an Originator as part of scientific or technical research during his or her employment by ATS.

"Substantial ATS Resources" means financial, material, personnel or other support beyond the level of common resources typically provided by ATS to a Originator in the course of employment. Ordinary use of commonly provided resources (such as libraries, offices, computers, salaries, classrooms, laboratories, secretaries and sabbaticals) shall not be considered Substantial ATS Resources.

"Traditional Academic Work" means a work created solely at the Originator's own initiative for the purpose of scholarship and research, including, but not limited to: textbooks, other works of non-fiction and fiction, articles, monographs, speeches and other creative works, such as poems, musical works and other artistic works.

"Work Made for Hire," under the Copyright Act, 17 U.S.C. §101, means:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

3. RIGHTS OF OWNERSHIP

A. Institutional Works

Institutional Works shall be considered to be created within the scope of employment and to be Works Made for Hire with ownership vesting in ATS unless otherwise provided in this Policy. Courseware and software presumptively shall be considered to be Institutional Works unless created solely at the inspiration of the Originator, solely outside of authorized work hours and space and without the use of Substantial ATS Resources. Ownership of the Courseware is independent of any underlying Course Content contained in the Courseware or software. ATS Publications shall be considered Institutional Works in all circumstances, independent of the rights in any individual contributions.

B. Non-institutional Works

Non-institutional Works, including Traditional Academic Works, Course Content and Research Materials, shall be considered to be created outside the scope of employment, and ownership will vest in the Originator who creates the work unless otherwise provided in this Policy. If a work of any of the above types is created at the initiation of ATS, under the direction of ATS and with the

use of Substantial ATS Resources, then notwithstanding the general ownership rule set forth here, such works shall be owned by ATS as a Work Made for Hire.

C. *Works by Non-Employees*

Under U.S. law, copyrights in works specially prepared for ATS by non-employees, such as consultants or subcontractors, are owned by their Originator(s) unless there is a written agreement to the contrary. Furthermore, as set forth in the definition of Work Made for Hire, such works created by non-employees may only be considered Works Made for Hire if they fall into one of nine enumerated categories. Accordingly, ATS requires there to be a written Work Made for Hire agreement between ATS and any non-employee retained to create Copyrightable subject matter for ATS, unless an authorized ATS administrator provides otherwise.

4. RIGHTS OF USE

A. *Institutional Works*

(i) Courseware and Software

- (A) Noncommercial Use. An Originator shall have the following Noncommercial rights in any Courseware or software: the worldwide, nonexclusive, royalty-free, perpetual right to reproduce, publicly display or perform, distribute, make a derivative use of or otherwise use such work in any format now known or to be developed, as is necessary or convenient to the performance of teaching, lecturing, writing or research activities.

In the event that an Originator is deemed to own any Courseware or software created with the use of any ATS resources during his or her employment by ATS, ATS shall have the following Noncommercial rights in such work: the worldwide, nonexclusive, royalty-free, perpetual right to reproduce, publicly display or perform, distribute, make derivative use of or otherwise use such works in any format now known or to be developed, for the limited purpose of furthering the mission of ATS.

- (B) Commercial Use. All rights to commercial use of Courseware or software shall be the sole right of the party deemed to own the work under Section 3 of this Policy, and commercial use by a party other than the copyright owner shall require the express written permission of the copyright owner.

(ii) ATS Publications

ATS shall control all commercial and Noncommercial use of ATS Publications, and faculty shall be required to obtain written permission from ATS to use such works. This general rule shall not affect the Originator's independent rights in any underlying contribution to an ATS Publication.

b. *Non-institutional Works*

- (i) Traditional Academic Works. An Originator who owns the copyright in a Traditional Academic Work shall control all commercial and Noncommercial use of such work, and ATS shall be required to obtain permission from the Originator to use such work.

In the event that ATS is deemed to own a Traditional Academic Work, the Originator of that work shall have the following Noncommercial right in such work: the worldwide, nonexclusive, royalty-free, perpetual right to reproduce, publicly display or perform, distribute, make a derivative use of or otherwise use such work in any format now known or to be developed, as is necessary or convenient for the performance of teaching, lecturing, writing or research activities.

(ii) Course Content and Research Materials. ATS shall have the following Noncommercial rights in any Course Content or Research Materials: the worldwide, nonexclusive, royalty-free, perpetual right to reproduce, publicly display or perform, distribute, make a derivative use of or otherwise use the work in any format now known or to be developed, for the limited purpose of furthering the educational objectives of ATS.

In the event that ATS is deemed to own any Course Content or Research Materials, the Originator of that work shall have the following Noncommercial rights in the work: the worldwide, nonexclusive, royalty-free, perpetual right to reproduce, publicly display or perform, distribute, make a derivative use of or otherwise use such work in any format now known or to be developed, as is necessary or convenient to the performance of teaching, lecturing, writing or research activities.

Any commercial use of Course Content or Research Material by a party other than the copyright owner, as defined in Section 3, shall require the express written permission of the copyright owner.

5. LICENSING RIGHTS

a. *Licensing Decisions*

The decision whether to license a Copyrightable work shall be made solely by the owner(s) of the work, as defined in Section 3. If there are multiple owners of a single work, each shall have the right to non-exclusively license the work as provided for under the Act, 17 U.S.C. § 204(a). If the licensing of any works covered by this Policy materially affects the exercise of any rights of use set forth in Section 4, the licensor shall provide reasonable notice to the affected parties.

b. *Distribution of Income*

(i) Institutional Works.

(A) Originator's Share. The Originator shall receive fifty percent (50%) of any Net Income generated from the sale, licensing or other use of an Institutional Work up to the first \$100,000 of Net Income, and thirty-five percent 35% thereafter. If there are multiple Originators, the Net Income shall be divided equally among them absent a mutual written agreement to the contrary.

(B) ATS Share. ATS shall receive fifty percent (50%) of any Net Income generated from the sale, licensing or other marketing of an Institutional Work up to the first \$100,000 of Net Income, and sixty-five percent 65% thereafter.

(ii) Non-institutional Works.

Owners of Non-institutional Works have the right to retain full income generated from the use of their works, unless otherwise arranged with ATS.

6. COPYRIGHT NOTICE AND USE OF THE ATS NAME

a. Notice

The following form of copyright notice shall be used on all Institutional Works or any other works owned by ATS:

@[year of first publication] Asbury Theological Seminary. All Rights Reserved.

b. Use of the ATS Name

Use of the ATS name in connection with a work, other than for the sole purpose of identifying the Originator as a faculty member, researcher, other employee or student affiliated with ATS requires the advanced written permission of an authorized ATS administrator. Furthermore, faculty members, researchers, other employees or students at ATS may not participate in the use of works or the ATS name that might give the impression of ATS sponsorship where there is none. If the name of ATS is to be used in connection with any works created under collaborative agreements with outside entities, other than to identify the Originator by his or her title at ATS, such agreements must be approved in advance and in writing by an authorized ATS administrator.

c. ATS Permission

Any permission required from ATS under this policy shall be obtained from the Office of the President or a designated representative.

Addendum to the Asbury Theological Seminary Copyright Ownership and Control Policy

This Addendum explains the Asbury Theological Seminary ("ATS") Copyright Ownership and Control Policy (the "Policy"). The Policy was drafted to be consistent with the administration, faculty and staff views of copyright ownership and control at ATS. The central goals in promulgating the Policy include: (1) protecting administration, faculty and staff expectations with regard to ownership of copyrightable materials; (2) promoting the mission of ATS as set forth in the Policy preamble; (3) encouraging creativity and productivity by faculty and staff; and (4) encouraging continuing investment by outside funding sources.

This Addendum summarizes the key issues and background materials considered in drafting the Policy, including: the Copyright Act of 1976, 17 U.S.C. §101 et seq. (the "Act"), the Restatement on Agency and case law. First, the Addendum describes the default rules of copyright ownership that govern in the absence of the Policy, including an explanation of the "work made for hire" doctrine and the controversial "teacher exception." Next, the Addendum describes the three-fold approach of the Policy, namely: (1) clarifying rights of ownership flowing from a definition of "scope of employment," (2) providing "rights of use" rules and (3) setting forth licensing and income allocation rules.

Work Made for Hire and the Teacher Exception

The Act provides that an author initially owns the copyright in a work he or she creates. In the case of multiple authors with the intent to create a "joint work," each author co-owns the work and is allowed to use it himself and non-exclusively license the work. Each author has a duty to equally share net profits with the co-authors.

The Act additionally categorizes certain works as "for hire," in which ownership vests with an employer or hiring party, rather than the originator of the work. The owner of a "work made for hire" is considered the legal author of the work and reaps the benefit of ownership of the full copyright term, the shorter of 95 years from publication or 120 years from creation (as compared to a term of life of the author plus 70 years for works that are not "for hire"). It is important that ATS consider whether a work is "for hire"; if the law classifies a work as "for hire," then terms of ownership and duration of copyright are dictated by the Act regardless of the intent of the parties. Even an explicit agreement between employer and employee that works prepared by the employee within the scope of employment will not be considered "works made for hire" would not be effective to move the works out of the "for hire" category.

The Act defines a work made for hire as follows:

A "work made for hire" is:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. 17 U.S.C. § 101.

Although the Act provides that "a work prepared by an employee within the scope of employment" constitutes a work made for hire, the Act does not define *employee* or *scope of employment*, and, thus, the courts have been called upon to define these terms. In determining whether a person is an employee, the Supreme Court has turned to the law of agency. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). Following the *Reid* case, courts have referred to the same authority to set forth three standards to establish when an employee's conduct is within the scope of employment: (1) it is the kind of work the employee is employed to perform; (2) it occurs substantially within authorized work

hours and space, and (3) it is initiated, at least in part, by a purpose to serve the employer. *Restatement (Second) of Agency* § 228.

The difficulty in applying these standards in the educational environment stems from the following: educational employment agreements often do not describe the work employees are to perform with a high degree of particularity, faculty members and other employees perform significant creative work outside of the office on their "own time," and these individuals may create many works to serve their own purposes as opposed to those of the institution.

Under the controversial "teacher exception" view, some commentators and courts consider educators to be exempt from the "work made for hire" provision of the Act. Unfortunately, this view tends to be extreme and does not consider that certain educational works may be created within the scope of employment while others are not. The few instances where the courts have considered the "teacher exception" have produced mixed results: certain courts have bent over backwards to apply the exception on behalf of educators, although it appears to be contrary to the Act; other courts have strictly applied the "work made for hire" doctrine in favor of educational employers. Because of the ambiguous nature of the "teacher exception" under current law, we do not mention it in the Policy, and we recommend that ATS refrain from relying on it under any circumstance.

ATS Copyright Ownership and Control Policy

The Policy rejects both an overly inclusive approach, where ATS would be viewed as owning all faculty and staff works, and application of the "teacher exception," where faculty members would be deemed to own all works they produced. Instead, the Policy is designed to (a) clarify the parties' understanding of "scope of employment," resulting in predictable ownership and (b) set forth clear rights of use which account for traditional works and new technology. This approach respects ATS's interest in works without chilling creativity or curtailing productivity. By establishing royalty allocation for certain uses, the Policy is sensitive to the concerns of all parties regarding the commercial exploitation of creative works at ATS.

A. Ownership

The Policy segregates copyrightable works into two broad categories, based on the amount of support ATS provides for their creation. First, "Institutional Works" are created with "Substantial University Resources" and are deemed to fall within the scope of employment. "Substantial University Resources" is defined to mean "financial, material, personnel or other support beyond the level of common resources typically provided by ATS." Courseware (e.g., course videos and Internet materials), computer software and ATS Publications presumptively are considered Institutional Works. Thus, Institutional Works are owned by ATS.

Second, "Non-institutional Works" are created without "Substantial University Resources" and are deemed to fall outside the scope of employment. Traditional Academic Works (e.g., textbooks, articles and works of art), Course Content (e.g., lecture notes and tests) and Research Materials are presumptively considered Non-institutional Works. Thus, Non-institutional Works are owned by the respective individual Originator(s), as defined in the Policy.

Although the Policy sets forth presumptions with regard to copyright ownership, a party may argue, in specific circumstances, that a work deviates from the norm. For example, a professor might create digital Courseware solely at his or her own inspiration, solely outside of authorized work hours and space and without the use of Substantial University Resources. In this case, the professor would own the copyright in his Courseware.

B. Rights of Use

The Policy establishes the "Rights of Use" to exploit copyrighted works under certain circumstances. In summary, the Policy provides the following Noncommercial rights of use: (1) Originators of Courseware, software, Traditional Academic Works, Course Content or Research Materials that are considered to be Institutional Works, may broadly use such works as necessary or convenient to the performance of normal teaching, lecturing, writing or research—so long as direct payment for the Courseware or software is not provided; and (2) ATS may use any Courseware, software, Course Content and Research Materials that are considered Non-institutional Works, for furthering the mission of ATS. All commercial exploitation requires the permission of the respective copyright owner(s), as defined in Section 3 of the Policy.

C. Licensing Rights

The decision of whether to license a Copyrightable work is solely up to the owner(s) of the work as set forth in Section 3 of the Policy. The allocation of profits from the sale or license of Institutional Works is a business decision, which ATS may make in its sole discretion. We put forth the following allocation, as a suggestion: for Institutional Works, ATS agrees to pay the Originator(s) 50% of the first \$100,000 of Net Income (as defined in the Policy) derived from such licensing or sale and 35% thereafter. For Non-institutional Works, the Originators who own the work will not be obligated to pay ATS any amount derived from licensing. We can discuss and amend these terms at your request.

D. Copyright Notice and Use of the ATS Name

This section sets forth the proper form of copyright notice and restrictions on the use of the ATS name by faculty and staff in connection with creative projects and programs. Additionally, all permissions are to be obtained from the Office of the President or a designated representative.