

Cumberland County Library System

Copyright & Fair Use Policy¹

(Creation & revision: 6/15/09)

1. Copying by Members of the Public

In order to protect Cumberland County Library System (CCLS) from secondary liability for the reproductions made by members of the public a warning notice shall be placed on all reproducing equipment located on library premises.² Such notice will be placed on all photocopiers or other reproduction equipment in the library that is accessible by members of the public and that is capable of reproducing copyrighted material, e.g., photocopier, computer, printer, scanner, sampler, VCR, or any other technology that has a reproducing capacity.

The following notice shall be used³:

NOTICE WARNING CONCERNING COPYRIGHT RESTRICTIONS. The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Libraries and archives furnish unsupervised photocopy or other reproduction equipment for the convenience of and use by members of the public. Under 17 U.S.C. 108 (f) (2) the provision of unsupervised photocopy or reproduction equipment for use by members of the public does not excuse such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107 or any other provision of the copyright law. CCLS reserves the right to refuse to make available or provide access to photocopy or other reproduction equipment if, in its judgment, use of such equipment would involve violation of copyright law.

In order to preserve the immunity for secondary liability, contributory or vicarious, that might result, library staff must make every effort to ensure that the reproducing by members of the public remains unsupervised, otherwise the immunity will not apply. In the absence immunity, the library may be subject to liability as a contributory or vicarious infringer.⁴

Members of the public remain liable for any copying in excess of fair use or that is otherwise infringing.⁵

2. Copying for the Library System

Reproduction includes copies or phonorecords of unpublished material made for purposes of preservation and security in the library or for deposit for research use in another qualifying library under of published materials in case of damage,

¹ Adapted with permission from The Complete Copyright Liability Handbook for Librarians and Educators by Tomas A. Lipinski, Neal-Schuman Publishers, c2006

² 17 U.S.C. § 108 (f) (1).

³ 37 C.F.R. § 201.14

⁴ 17 U.S.C. § 108 (f) (1)

⁵ 17 U.S.C. § 108 (f) (2)

deterioration, loss, or theft, or if the existing format in which the work is stored has become obsolete, or copies made for members of the public, respectively.⁶

In cases of preservation and security, the copy or copies, phonorecord or phonorecords made (up to three copies or phonorecords may be made) must be from a work in the current collections of the library and if a digital copy is made, it must not be made available to the public in that format outside the premises of the library, i.e., remote access to the material is not allowed.⁷

A copy made for deposit in another library may be transferred to that library in digital format, but the receiving library must not distribute the material in that format. Likewise, if the CCLS is the receiving library, staff cannot make the reproduced material available to members of the public in digital form in any capacity, whether through in-house or remote access.⁸

In cases of damage, deterioration, loss, or theft, or if the existing format in which the work is stored has become obsolete, the copy or copies made (up to three copies maybe made) are subject to the same limitation on digital distribution, i.e., remote access to the material is not allowed, and the library must make a reasonable effort to obtain an unused replacement at a fair price.⁹

A “reasonable effort” will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.”¹⁰

3. Copying for Members of the Public

Reproduction of copyrighted material under Title 17 of the United States Copyright Law, section 108 includes copies or phonorecords made for members of the public, where the library provides a reproducing service, or through interlibrary loan, of no more than one article or other contribution to a copyrighted collection or periodical issue or to a copy of a small part of any other copyrighted work under section 108 (d), or of an entire work or to a substantial part of it under section 108 (e).

Reproduction must meet three conditions:¹¹

1. The copy must be the property of the user.
2. The library, through its staff, must have no notice that the copy would be used for any purpose other than private study, scholarship, or research, i.e., the copy cannot be used for reserve, e-reserve, or course-pack

⁶ 17 U.S.C. § 108 (b) or § 108 (c)

⁷ 17 U.S.C. § 108 (b)

⁸ 17 U.S.C. § 108 (b)

⁹ 17 U.S.C. § 108 (c)

¹⁰ H. Rpt. No. 94-1476, 94th Cong., 2d Sess. 75-76 (1976) reprinted in 5 United States Code Congressional and Administrative News 5659, 5689 (1976).

¹¹ 17 U.S.C. § 108 (d) and (e)

creation, or for other public distribution , nor for other private uses even if lawful, such as for recreation or entertainment.

3. The library displays prominently at the place where orders are accepted and includes on any customer order forms a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation. ¹²

- i. The text of the notice shall read:¹³

NOTICE WARNING CONCERNING COPYRIGHT RESTRICTIONS. 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 the photocopy or reproductions 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. CCLS reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

- ii. The notice must be (1) on at least one sign in the service area, interlibrary loan office, or similar station, and (2) on the customer request form itself, highlighted in a box on the front page of the form or near the requester signature line¹⁴.
 - iii. The form and manner of the notice is also prescribed by regulation. The notice "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."¹⁵ Interlibrary loan customer request forms must also contain a notice "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 such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form."¹⁶

¹² 17 U.S.C. § 108 (d) (1) and (2) and 17 U.S.C. § 108 (e) (1) and (2).

¹³ 37 C.F.R. § 201.14 (b)

¹⁴ 17 U.S.C. § 108 (d) (2) and 17 U.S.C. § 108 (e) (2).

¹⁵ 37 C.F.R. § 201.14 (c) (1).

¹⁶ 37 C.F.R. § 201.14 (c) (2).

Additionally, in instances of copies made, library staff must not engage in the systematic reproduction or distribution of single or multiple copies¹⁷. Interlibrary loan arrangements are acceptable as long as the library receiving the copies for distribution does not copy in such aggregate quantities as to substitute for a subscription to or purchase of such work.¹⁸

4. Using a Copyright Notice

To preserve the rights of reproduction and public distribution granted to CCLS under Title 17 of the United States Copyright Law, section 108, any copies reproduced, under this section must include a notice of copyright.

In instances where the item has an existing copyright notice, it should be reproduced. Such notice can typically be found in the front pages of a book, or at the beginning or end of an article. This notice must be added to the copy that the library produces.

If a copyright notice does not appear, a “legend” can be stamped on the copy, saying that the work may be under copyright protection. For example: “*NOTICE: This material may be protected by Copyright Law (Title 17 U.S.C.)*”¹⁹

Any reproduction or distribution made under this section must be without any purpose of direct or indirect commercial advantage; any fees should be on a cost-recovery basis only.²⁰

5. Distribution of Lawful Copies

In effort to preserve the right of public distribution granted under Title 17 of the United States Copyright Law, section 109, all CCLS staff shall make every effort to ensure that any items made available to the members of the public in the collections of the library are lawfully made copies.²¹

6. Circulation of Computer Programs

The Cumberland County Library System circulates software in its possession if it affixes to the package containing the software the following warning notice:²²

Notice: Warning of Copyright Restrictions. The copyright law of the United States (title 17, United States Code) governs the reproduction, distribution, adaptation, public performance, and public display of copyrighted material. Under certain conditions specified in law, nonprofit libraries are authorized to lend, lease, or rent copies of computer programs to members of the public on a nonprofit basis and for nonprofit purposes. Any person who makes an unauthorized copy or adaptation of the computer program, or redistributes the loan copy, or publicly performs or displays the

¹⁷ 17 U.S.C. § 108 (d)

¹⁸ 17 U.S.C. § 108 (g) (2).

¹⁹ 17 U.S.C. § 108 (a) (3).

²⁰ 17 U.S.C. § 108 (a) (1)-(3)

²¹ 17 U.S.C. § 109 (a)

²² 17 U.S.C. § 109 (b) (2) (A)

*computer program, except as permitted by title 17 of the United States Code, may be liable for copyright infringement. CCLS reserves the right to refuse to fulfill a loan request if, in its judgment, fulfillment of the request would lead to violation of the copyright law.*²³

The notice should be affixed by means of a label cemented, gummed, or otherwise durably attached to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copy of the computer program. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual user of the computer program.²⁴

7. Transfer of Computer Program Licenses

CCLS may transfer the possession of a lawfully made copy of a computer program to another nonprofit educational institution or to staff under any conditions, but it must ensure that no copy remains on any computer or any place on its network or system.²⁵

8. Copyright Infringement Policy

As provided for in Title 17 of the United States Copyright Law, section 512 (c), the CCLS Executive Director is designated as the CCLS Copyright Compliance Officer. The Executive Director shall receive complaints from copyright owners relating to infringing material or activity on its system or network and arising from caching, posting, or linking. The Executive Director shall file a notice of such designation with the U.S. Copyright Office (www.copyright.gov/onlinesp).

The Executive Director shall file any change of contact information or termination of service with Copyright Office.²⁶

Once the Executive Director receives a written communication from the copyright owner or its agent relating to cache, post, or link scenarios, the Executive Director will remove or disable access to the alleged infringing material.²⁷ A proper notice is one that substantially complies with the following requirements:²⁸

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) ► Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- (iii) ► Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which

²³ 27 C.F.R. § 21.24 (b)

²⁴ 37 C.F.R. § 210.24 (c).

²⁵ 17 U.S.C. § 109 (b) (1) (A).

²⁶ 37 C.F.R. § 201.38 (f) and (g)

²⁷ 17 U.S.C § 512 (c) (1) (C)

²⁸ 17 U.S.C § 512 (c) (3) (A) (i)-(vi)

is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

- (iv) ► Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- (v) A statement that the complaining party has a good-faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
- (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

In order for a notice to be valid in instances of caching, the notice must also contain a statement that the material has been removed or access to it disabled, or that a court has ordered such occurrence.²⁹

In instances where the failed notice substantially complies with notice sub-provisos (the identification of the work, identification of infringing material, and contact information, marked with a “►” above, then this partial notice can still trigger the removal or disabling obligation (see “knowledge or Awareness and Appropriate Response Mechanisms” below), unless the Executive Director “promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).”³⁰ As a result, in these circumstances, the Executive Director must contact the issuer of the notice and attempt to facilitate receipt of a perfected notice, i.e., one that substantially complies with all of the (i)-(vi) provisos of section 512 (c) (3) (A).

9. Knowledge or Awareness and Appropriate Response Mechanisms

In instances of posting and linking by members of the public, if any staff member possesses knowledge or is aware of facts or circumstances from which infringing activity is apparent, then that staff member shall contact the Executive Director who shall then act expeditiously to remove, or disable access to, the alleged infringing materials.³¹

For purposes of this policy, “knowledge” means actual knowledge and “awareness” is the equivalent of a “red flag” test.

The “red flag” test has both a subjective and an objective element. In determining whether the service provider was aware of a “red flag,” the subjective awareness of the service provider of the facts or circumstances must be determined. However, in deciding whether those facts or circumstances

²⁹ 17 U.S.C. § 512 (b) (E) (i) and (ii)

³⁰ 17 U.S.C. § 512 (c) (3) (B) (ii)

³¹ 17 U.S.C. § 512 (c) (1) (A) and 17 U.S.C. § 512 (d) (1).

constitute a 'red flag"—in other words whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used.³²

The red flag standard “imposes no obligation on a provider to seek out such red flags. Once a provider becomes aware of a red flag, however, it ceases to qualify for the exemption” unless it response in the appropriate fashion.³³

The following can assist staff in determining when the requisite “awareness” is raised:

- “[O]nline editors and catalogers would not be required to make discriminating judgments about potential copyright infringement. If, however, an Internet site is obviously pirate, then seeing is may be all that is needed for the service provider to encounter a 'red flag.’”³⁴
- For example, in an information location tool scenario, “if the copyright owner could prove that the location was clearly, at the time the directory provider viewed it, a 'pirate' site of the type described below where sound recordings, software, movies or books were available for unauthorized downloading, public performance or public display” the red flag would be raised.³⁵
- “[A] directory provider would not be similarly aware merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be expected, during a brief cataloging visit, to determine whether the photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.”³⁶

If the infringing nature of the post or link is apparent it should be removed or disabled. If staff is in doubt, consultation with the Executive Director and the CCLS solicitor should be sought.

10. Follow-Up Procedures for the Removal or Disabling of Infringing Material

At times it may be difficult to judge whether material is infringing or to know whether a notice provided by a copyright owner or its agent is in error. When a judgment call must be made, Cumberland County Library System staff shall favor removal or disabling.

³² H.R. Rep. No 551 (Part 2), 105th cong., 2d Sess. 53 (1998); Senate Report 105-190, 105th Cong., 2d Sess. 44 (1998).

³³ H.R. Rep. No 551 (Part 1), 105th cong., 2d Sess. 25 (1998).

³⁴ H.R. Rep. No 551 (Part 2), 105th Cong., 2d Sess. 58 (1998).

³⁵ H.R. Rep. No 551 (Part 2), 105th Cong., 2d Sess. 57 (1998); Senate Report 105-190, 105th Cong., 2d Sess. 48 (1998),

³⁶ H.R. Rep. No 551 (Part 2), 105th Cong., 2d Sess. 57-58 (1998); Senate Report 105-190, 105th Cong., 2d Sess. 48 (1998).

Title 17 of the United States Copyright Law, section 512 (g) provides immunity for erroneous removal or disabling made in good faith by or at the direction of the CCLS Executive Director. In instances of removal or disabling in response to a subsection 512 (c) (1) (C) notice, and in order to protect the library for claims that may arise from a good-faith removal or disabling made in error, the following procedures shall be followed.

The CCLS Executive Director shall “take reasonable steps promptly to notify” members of the public whose post or link was removed or disabled “that it has removed or disabled access to the material” and off the individual the opportunity to challenge the service provider’s removal or disable.³⁷

For purposes of this policy “promptly to notify” shall mean within three to five (3 to 5) business days within receipt of a section 512 (c) (1) (C) notice from a copyright owner or his or her representative.

The CCLS Executive Director shall conduct a search of the library’s records to obtain the appropriate contact information. Once the contact information is retrieved, the CCLS Executive Director shall notify the customer of the removal or disabling and include in the notification to the individual a copy of the following materials:

- The notice received from copyright owner,
- Section 512 (g), highlighting the subsection (g) (3) counter notification requirements
- The relevant CCLS policy relating to section 512 (g) implantation. To be effective, the challenge be in writing and must include substantially the following:
 1. A physical or electronic signature.
 2. Identification of the material that has been removed or to which access has been disabled, and the location at which the material appeared before it was removed or access to it was disabled.
 3. A statement under penalty of perjury that the customer has a good-faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.
 4. Contact information including the name, address, and telephone number of the customer, and a statement that the customer consents to the jurisdiction of Federal District court for the judicial district in which the address is located, or, if the customer’s address is outside of the United States, for any judicial district in which the service provider may be found, and indication that the customer will accept service of process from the person who provided notification under subsection (c) (1) (c) or an agent of such person.³⁸

³⁷ 17 U.S.C. § 512 (g) (2) (A)

³⁸ 17 U.S.C. § 512 (g) (3) (A)-(D).

For purposes of this policy “substantially” shall mean the inclusion of at least items 2 and 4.

If a challenge occurs by a customer, then the CCLS Executive Director shall contact the copyright owner (or its agent) from whom it received the initial subsection 512 (c) (1) (C), within three (3) business days after receipt of an effective counter notification from the customer. The CCLS Executive Director must inform the copyright owner (or its agent) that it will replace the material or restore access in ten (10) business days from the receipt date of the customer’s counter notification unless the copyright owner (or its agent) responds to the Executive Director indicating that the owner has filed an action seeking a court order to restrain the customer from engaging in infringing activity relating to the material on the library’s system or network. The CCLS Executive Director shall request that the owner include with the second notice appropriate documentation such as a court issued receipt of filing or a stamped copy.³⁹

This copyright owner contact must include two items:

- A copy of the customer’s counter notification or challenge
- A statement that CCLS will “replace the removed material or cease disabling access to it in 10 business days”⁴⁰.

If such second notice is not forthcoming from the copyright owner (or its agent), then the CCLS Executive Director shall replace the removed material or cease disabling access to it no less than ten (10), nor more than fourteen (14), business days following receipt of the customer challenge.⁴¹

11. Responding to Section 512 (h) Subpoena Powers

Upon receipt of a subpoena issued by a clerk of the federal court “for identification of an alleged infringer” under Title 17 of the United States Copyright Law, section 512 (h), the CCLS Executive Director shall “expeditiously disclose” the identity of the alleged infringer to the copyright owner (or its agent). Any staff member in receipt of any such subpoena issued under section 512 (h) or under any other provision of the law for release of member of the public identity information shall refer the matter to the CCLS Executive Director or CCLS Solicitor. A court-ordered subpoena is subject to challenge. An administrative subpoena issued without court authority may in fact have no legal effect. In addition, state confidentiality statutes regulate the disclosure of library customer and circulation records.

12. Technological Measures that Control Access or Use of Materials

Staff must not circumvent a technological measure that effectively controls access to copyrighted material, i.e., an access control.⁴²

³⁹ 17 U.S.C. § 512 (g) (2) (B)

⁴⁰ 17 U.S.C. § 512 (g) (2) (B)

⁴¹ 17 U.S.C. § (g) (2) (C).

⁴² 17 U.S.C. § 1201 (a) (1)

Staff may circumvent a technological measure that effectively controls the exercise of an exclusive right of a copyright owner, i.e., a use control.⁴³

Staff must not distribute or otherwise make available a “device” that circumvents either an access or use control.⁴⁴ An example would be a patch of code that allows an individual to hack past a technological protection measure, such as the DeCSS code that allows individuals to crack the CSS code on a DVD in order to port it onto a computer or other technology.

Anti-circumventing technology or such a “device” is one that meets any of the following conditions:

1. Is primarily designed or produced for the purpose of circumventing the protection afforded by a technological measure that effectively protects a right of a copyright owner under the copyright law or the protection afforded by a copyright law.⁴⁵
2. Has only limited commercially significant purpose or use other than to circumvent either a technological measure that effectively controls a work protected under law or protection afforded by a technological measure that effectively protects a right of a copyright owner under the copyright law in a work or a portion thereof.⁴⁶
3. Is marketed by the actual person or another acting in concert with trafficker with the trafficker’s knowledge for use in circumventing either a technological measure that effectively controls access to a work protected under the copyright law or protection afforded by a technological measure that effectively protects a right of a copyright owner under the copyright law in a work.⁴⁷

Examples would include patches of computer code or other technologies that allow members of the public to fast-forward past advertisements on a DVD,⁴⁸ play a DVD on a PC or platform other than a DVD player,⁴⁹ disable so-called technological handshake protocols,⁵⁰ and disable or alter geographic use restriction codes.⁵¹

13. General Exceptions

As provided by federal regulation, it is not a violation of the anti-circumvention rule to circumvent a technological measure that controls access to:

- Lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, Web sites, or

⁴³ 17 U.S.C. § 1201 (b).

⁴⁴ 17 U.S.C. § 1201 (a) (2) and (b).

⁴⁵ 17 U.S.C. § 1201 (a) (2) (A) and (b) (1) (A).

⁴⁶ 17 U.S.C. § 1201 (a) (2) (B) and (b) (1) (B).

⁴⁷ 17 U.S.C. § 1201 (a) (2) (C) and (b) (1) (C).

⁴⁸ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62011, 62015-62016 (October 31, 1003).

⁴⁹ *Universal Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001)

⁵⁰ *Real Networks, Inc. v. Streambox, Inc.* 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000).

⁵¹ *Sony Computers Entertainment America Inc. v. Gamemasters, Inc.*, 87 F. Supp. 2d 976, 987 (N.D. Cal. 1999).

portions of Web sites. (note that lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network and lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of e-mail are not included.)

- Computer programs protected by dongles that prevent access due to malfunctions or damage. Obsolete dongles are those that are “no longer manufactured or reasonably available in the commercial marketplace.”
- Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access.
- Literary works distributed in e-book format when all existing e-book editions of contain access controls that prevent the enabling of the e-book’s read-aloud function and that prevent the enabling o screen readers to render the text into a “specialized format.”⁵²

14. Specific Exception for Nonprofit Libraries

In addition if the following conditions are met, it is not a violation of the anti-circumvention rule to circumvent a technological measure that controls access to a copyrighted work when:

- The purpose of the access is to make a good-faith determination of whether to acquire a copy of that work for a lawful purpose.⁵³
- The work so accessed must not be retained long than necessary to make such good-faith determination.⁵⁴
- The work so accessed must not be used for any other purpose.⁵⁵
- An identical copy of the work must not be reasonably available in another form.⁵⁶

Policy Notice

This policy is subject to change at any time without notice. Updates to the policy may be obtained from the Library System

⁵² 68 Federal Register 62011, 62014 (October 31, 2003), amending 37 C.F.R. § 201.40.

⁵³ 17 U.S.C. § 1201 (d) (1)

⁵⁴ 17 U.S.C. § 1201 (d) (1) (A)

⁵⁵ 17 U.S.C. § 1201 (d) (1) (B)

⁵⁶ 17 U.S.C. § 1201 (d) (2)