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Electronic Reserves and Fair Use: Preservation of Educational Exceptions to Copyright Law

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Abstract

Electronic course reserves serve a vital function in university instruction, enabling students to easily access important published literature in their discipline. While electronic systems have greatly improved the functionality of course reserves and have led to their ubiquitous use on campus, publishers have become more litigious and threaten to erode educational exceptions to copyright law under fair use. This paper reviews recent relevant case law with a view to providing recommendations for best practices for electronic reserves in university libraries that preserve traditional legal exceptions to copyright protections in education. While the courts have often upheld these exceptions, libraries could lose these legal rights as they shift the norms of operation into safer and safer spaces to avoid litigation and minimize risk. Only by continuing to reinforce these legal exceptions as societal norms through regular practice, can we, as librarians, hold the line and ensure that these norms are not eroded through reflexive compliance with publisher demands that overreach their rightful protections under the law.

Introduction

Higher education and research have historically depended heavily on the use of copyrighted materials in educational settings in the form of distributed materials for course related reading and discussion, and for personal research. Electronic reserves have increasingly become a regular part of library and educational infrastructure, serving the needs of instructors and students by providing ready access to materials supporting these educational needs via simple centralized Internet access. The distribution of materials through electronic reserves offers numerous benefits, facilitating access, reducing risk of damage to library materials, and decreasing the space needed to manage reserve services[1]. While distribution under e-reserve systems have increasingly been scrutinized by

[1] B. Austin, "A brief history of electronic reserves," *Journal of Interlibrary Loan, Document Delivery & Information Supply* 12, no. 2 (2002): 1–15.

publishers as infringing upon rights of distribution provided under the law[2], librarians argue that such uses fall under fair use[3] and, therefore, they do not constitute infringement. Those disputes that have arisen have, in most situations, been settled out of court[4], however a recent lawsuit filed against Georgia State University will test the boundaries of fair use in the use of electronic reserves.

In order to minimize risk, libraries have been willing to yield to pressures to license works for many such uses. Such willingness to pay for what, under the law, is a legal right, not only unnecessarily drives up costs for access to materials[5], it also creates a culture of permission and customary practice which may affect the viewpoint of courts in future litigation[6]. As libraries have given ground over the years, redefining the notion of copies through negotiated licenses that force them to pay for uses that might well fall under the fair use provisions, and establishing guidelines that proscribe rigid limits on fair use copying, the practice of fair use has eroded[7]. The foundations of copyright law in the "Progress Clause" of the U.S. Constitution positions the root of these protections in the advancement of knowledge[8]. The Supreme Court has even gone so far as to say that copyright is a privilege, and that the reward to copyright holders is secondary to the public need[9]. Libraries, thus, have a right and a duty to their users to protect those rights, and ought to exert their users' rights to fair use as fully as possible[10].

Much of the case history has been tainted by commercial ventures that work against the fourth factor, market effect, and weigh heavily in the balance of fair use. However, purely educational uses without willful infringement or commercial benefit, such as electronic reserves, are very likely to favor fair use for libraries in the electronic distribution of materials if certain principles are adhered to[11]. This paper examines the policy and legal history relevant to electronic reserves to identify best practices for implementation of e-reserves that allow libraries to exert fair use to the full benefit of their users, while constraining their operation to the legal exceptions to copyright provided under the law.

Model Policies

Attempts at the creation of guidelines through negotiations of copyright stakeholders have failed to achieve consensus, due to the polarity of interests and the ambiguities intentionally written into copyright law. Publishers would prefer to protect their interests by supporting

[2] *17 U.S.C. § 106*, 2010.
[3] *17 U.S.C. § 107*, 2010.
[4] A. R Albanese, "Down with e-reserves," *Library Journal* 132, no. 16 (October 1, 2007): 36-8.
[5] C. Cubbage, "The changing cost environment of managing copyright for electronic reserves," *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve* 18, no. 1 (2008): 57–66.
[6] D. R Gerhardt and M. F Wessel, "Fair use and fairness on campus," *North Carolina Journal of Law and Technology* 11 (2010).
[7] James Gibson, "Risk aversion and rights accretion in intellectual property law," *Yale Law Journal* (2007): 882.
[8] *U.S. Const. art , § 8, cl. 8.*, n.d.
[9] Twentieth Century Music Corp. v. Aiken, 422 U.S.151, 156 (1975).
[10] R. B Schockmel, "The premise of copyright, assaults on fair use, and royalty use fees," *The Journal of Academic Librarianship* 22, no. 1 (1996): 15–25.
[11] K. D. Crews, *Expert Report of Kenneth D. Crews. Cambridge University Press v. Patton, et al.* (United States Federal District Court. Northern District of Georgia, June 1, 2009).

overly stringent practices for copying and reserve readings, while librarians support much more liberal policies in the free use of information for knowledge advancement. While the intention of these guidelines is to make the fair use provisions more usable, they have been the subject of much contention, and though they have no force of law, have occasionally been looked to by the courts as providing legislative history that bears on the decision[12]. However, it is often argued that these policies are overly strict, denying fair use many more situations than might be legally sound[13].

The most cited guidelines in library policies, and indeed in legal cases involving fair use, are the 1976 Agreement on Guidelines for Classroom Copying[14]. This policy was developed as a reaction to the vagaries of the demarcation of fair use in section 107, and to Congress's unwillingness to pursue more exact standards. It codified negotiations between the many stakeholders in such fair use policies, including educators, librarians, authors, and publishers. These guidelines allow single copies of book chapters, articles and other short works, and permit the use of multiple copies for classroom use as handouts. However, the guidelines place severe restrictions through standards of "brevity" and "spontaneity" and "cumulative effect". These standards limit use to very small portions under conditions that have no foundation in the law. These guidelines have gained wide acceptance in library policies, particularly due to a settlement of an infringement claim at New York University that led to an agreement to adhere to the guidelines[15], but the fact that the restrictions are far more narrow than the law allows means that libraries' acceptance of them compromises the rights of users.

Because of this, in 1982, the ALA attempted to lay out some standard policies for print reserves suggesting that the minimum standards offered by the 1976 Guidelines "normally would not be realistic in the university setting"[16] in what has come to be known as the Model Policy. It allowed greater leeway in terms of length, authorizing an entire article, book chapter, or poem. It did, however, set limits on the repeated use of materials over consecutive semesters, stating that such use should be entail rights permissions. The ALA Model Policy again was unilaterally defined with no publisher interests involved in the negotiations[17], and can be seen to represent too strongly the interests of librarians and educators. However, even this policy has been seen as too rigid by some[18]. In any case, it also is not well founded in fair use law and has actually been opposed for compromising the range of use deemed fair under the law.

In an effort to address the lack of agreement and workability of the earlier policies a conference was arranged in 1994 to negotiate more usable

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12 K. D. Crews, "The law of fair use and the illusion of fair-use guidelines," *Ohio State Law Journal* 62, no. 2 (2001): 602–700.
13 Ibid.
14 *Agreement on Guidelines for Classroom Copying in a Not-for-Profit Educational Institutions with Respect to Books and Periodicals,* H.R. Rep. No. 94-1476.
15 K. D. Crews, *Copyright, fair use, and the challenge for universities: Promoting the progress of higher education* (University of Chicago Press, 1993).
16 American Library Association, *Model Policy Concerning College and University Photocopying for Classroom, Research, and Library Reserve Use*, 1982.
17 Crews, "The law of fair use and the illusion of fair-use guidelines."
18 S. J Melamut, P. L Thibodeau, and E. D Albright, "Fair use or not fair use: That is the electronic reserves question," *Journal of Interlibrary Loan, Document Delivery & Information Supply* 11, no. 1 (2000): 3–28.

guidelines for fair use in education and research environments. These negotiations, which carried on for over a year, focused heavily on the rising issue of electronic reserves, but no agreement was reachable[19] and discussions broke down. A small subgroup composed of librarians and educators again pressed on to layout a proposal attempting some definition of limits in the development of electronic reserves. However, as this proposal again did not include all stakeholders, it received little recognition and was criticized by some as being too strict, and others as being too lenient[20]. Because of the lack of input and agreement on the part of all stakeholders, it was completely excluded from the CONFU final report[21].

Nonetheless, the proposal incorporated many similar limitations, allowing single articles and book chapters, and the limitation to a single use without seeking permission. It also addressed important questions inherent to the electronic delivery systems, proposing simultaneous access to the same content by multiple users, the inclusion of a notice of copyright, and limitation of access to enrolled students. Other proposals sought to reflect a balance of interests with the rights holders. Thus, electronic reserves were recommended to represent only a small portion of the total reading for a class, and provision that they not be used to compete with fee-based creation of coursepacks[22].

While none of these model policies accurately reflect the range of acceptability under the ambiguous constraints of the law, and many offer proposals with no basis in the law, the fact that the same provisions have been revisited again and again, draws attention to many of the most important issues of contention, and points to an arising custom of practice within the library community regarding e-reserves. While libraries will likely continue to represent interests somewhat opposed to those of rights holders, a view to these models offers important areas for attention in the drafting of any local institutional policy.

Case History

The assembly of copyrighted materials for use in education and research has been treated repeatedly in the courts, but since the passage of the 1976 Copyright Act, these cases have all involved a commercial enterprise of some sort. Nonetheless, some important elements have been contributed to defining fair use in ways that carry strong relevance to the electronic reserves policies, some of which can be seen to have narrowed the range of operability of fair use for research and scholarship.

In a number of cases, decisions centered upon the creation of coursepacks to be utilized for scholarship. The educational nature of these anthologies, it was argued, excluded these uses as non-infringing. However, the courts have repeatedly ruled that where a financial benefit arises for a commercial enterprise, the fourth factor weighs heavily in the balance. Electronic reserves have often been viewed as an assembly of materials that bears a strong relation to coursepacks, and any court would likely treat fair use in these instances in similar ways.

In 1991, a case that went all the way to the Supreme Court tested whether copyright protections extended to the commercial selling of

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[19] K. D. Crews, "Electronic reserves and fair use: The outer limits of CONFU," *Journal of the American Society for Information Science* 50, no. 14 (1999): 1342–1345.
[20] Ibid.
[21] Conference on Fair Use, *Final Report to the Commissioner on the Conclusion of the Conference on Fair Use*, November 1998.
[22] Crews, "Electronic reserves and fair use."

assembled coursepacks for educational use[23]. The court found that such use was not fair under the law. A significant factor in this decision was the fact that Kinko's was profiting from the duplication of materials for educational purposes. While the commercial nature of the Kinko's enterprise was a critical element, other findings in the case bear more relevantly upon the examination of electronic reserves.

Importantly, the court looked to the 1976 Guidelines in their weighing of the third factor, the amount of the original work copied. Interestingly, the court viewed single chapters as whole works in their own right and found that the percentages of many works copied were in excess of fair use. However, the court soundly rejected the view that the rejection of the simple act of the creation of anthologies, as expressed in the Guidelines should on that fact alone bar a fair use ruling. Thus, according to this decision, assembly of collections of reading materials for coursework, could in some cases, particularly where the commercial aspect does not weigh so heavily, still fall under fair use.

In 1994 the 2nd Circuit of Appeals ruled in the case of the *American Geophysical Union v. Texaco*[24]. In this case, a group of publishers claimed that unauthorized photocopying by scientists at Texaco infringed on the protections of copyright held by them. While the main ruling held against using extending fair use to a for-profit setting, some aspects of the ruling continue to apply to the policies of fair use regularly employed in libraries. Firstly, the court again recognized each published article as constituting a "discrete original work of authorship"[25]. This bears heavily on electronic reserve practices since, under most library policies based on the liberal readings of the Guidelines and the ALA Model Policy, a single article can be considered a small enough portion as to warrant fair use under the considerations of the third factor[26].

Secondly, in light of the fact that Texaco could have paid licensing fees through a service like the Copyright Clearance Center, the court felt that a viable market existed. The CCC has now begun to commonly negotiate licenses for course reserves in both traditional and electronic environments, and such licenses play a large role in the costing of electronic database and content subscriptions through vendors like EBSCO and Gale. As the CCC is regularly being used for such licenses this aspect of the Texaco case could combine with customary practices leading a court to a negative decision on the free exercise of reserve practices. A court might consider a library's refusal to seek readily available licenses through the CCC as constituting a considerable effect on the market and thus rule against fair use in the use of electronic reserves.

In neither of these cases did the court agree to accept the 1976 Guidelines as any sort of legal standard. However, the court in Princeton v. Michigan Document Services did look to the Guidelines as a starting point in their assessment of the third factor (amount copied) in their evaluation of fair use, but they specifically denoted their delineation of a safe harbor expressing "the minimum and not the maximum standards of educational fair use"[27].

Given the limited acceptance of any of the limited guidelines as a legal standard, over-reliance upon the letter of this minimum, safe harbor remains ill founded if libraries wish to best represent their interests and protect the full extent of their legal

[23] *Basic Books, Inc. v. Kinkos Enterprises*, 758, F. Supp. 1522 (S.D.N.Y. 1991)
[24] *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).
[25] *Ibid.* at 59.
[26] 17 U.S.C § 107.
[27] *Princeton University Press v. Michigan Document Services, Inc. 99 F.3d 1381*, 1996, at 1390.

rights. Further, the for-profit nature of these cases strongly limits their applicability to an environment that takes place strictly within the walls of a non-profit institute of education. Thus, the widespread demand of license fees by publishers for the use of copyrighted materials can been seen as reaching far beyond the range of acceptability and legal protections of copyright.

Best Practices for Libraries

Given the increasing litigation from the side of the publishing industry, any library implementing an electronic reserve system should give careful consideration to the creation of a policy that sets limits upon the use of that system. In order to adhere as closely as possible to the spirit of fair use these policies should act to frame fair use within the framework of the four factors. This should require some sort of fair use analysis such as the Fair Use Checklist, developed by Kenneth Crews [28]. This tool allows for guided assessment of the factors that contribute to fair use. Again, this is not a legal tool, but rather, it is intended to provide detailed guidance and evidence of a good faith assessment of fair use. Given legal protections for libraries when they exercise good faith efforts, such considerations provide clear evidence of the decision process that can be presented in the case of legal action.

In keeping with the first factor, educational vs. commercial use, electronic reserves should be strictly restricted to educational purposes only. Materials posted within the system should be closely related to the course syllabus and have a specific educational purpose. Policies should require instructors to assert that the materials are related to the objectives of the course for which they are used.

In order to limit the effect of reserves on the market of the original work, a number of precautions can be taken. First and foremost, a lawfully purchased copy ought to be owned by either the professor posting the work, or by the library institution. When posting materials it is best to check the resources of the library to see if a licensed electronic version is available prior to copying materials for reserve use. If possible, linking to the resource through a database will minimize the need for questionable duplication.

Access limitations are another critical factor for ensuring that market effect is constrained. Where possible, access to reserve materials should be limited to enrolled students. This helps to ensure that the general public is not able to access materials instead of purchasing them, and also contributes to limits of educational purpose.

Given the ambiguous treatment in the standard policies and legal decisions of what constitutes a reasonable amount of a work to be distributed under fair use, libraries are left without much guidance in this regard. Since the Texaco decision defined a single research article as a whole work, caution must be taken here. Length limits of some sort certainly should constitute a part of the evaluation for inclusion. If it can be shown that precautions are taken that do indeed exclude infringing uses, then the argument can be made that the policy is serving its purpose of good faith evaluation.

While the above considerations do not guarantee that a library will be protected from infringement litigation, such minimum practices should minimize the likelihood of legal action and provide evidence of good-faith considerations, should legal action arise. By steering away from the range of actions that have led to negative decisions in the past, e-reserve policies can be

[28] K. D. Crews and D. K. Buttler, "Fair Use Checklist," *Columbia Copyright Advisory Office*, 2009, http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/.

created that restrict actions that might lead to infringement litigation, without overly compromising fair-use rights for libraries and their users.

Conclusion

For better or worse, submission to unnecessary licenses and adherence to overly restrictive guidelines can be viewed as customary practices and play a strong role in how the courts weigh their decision[29]. The pressure upon libraries to walk a safe path with regard to copyright has created a culture of permission that threatens to leave the practice of fair use behind. Libraries continue have recourse to the fair use provisions, and even hold some protection from damages should litigation arise, as long as they make good faith efforts to determine that the uses are fair[30]. Reliance on the rigidities of the guidelines and licenses compromises many of the rights of libraries and threatens to weaken the protections so critical to their mission.

By enacting specific fair use policies that adhere to the spirit of the law, libraries can demonstrate not only their willingness to respect the limits of copyright law, but they will also position themselves to better shield their use of electronic reserves. When they can clearly demonstrate policies for the protection of copyright where appropriate, more aggressive utilization of fair use can be retained without that overly compliant policies contribute to the dangerous advancement of the "customary practice" that might erode fair use rights.

[29] Crews, "The law of fair use and the illusion of fair-use guidelines.".
[30] 17 U.S.C. § 504 (2010).