PURSUING FAIR USE, LAW LIBRARIES AND ELECTRONIC RESERVES

by

Steven J. Melamut

A Master's Paper submitted to the faculty of the School of Information and Library Science of the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Master of Science in Library Science.

Chapel Hill, North Carolina

March, 1999

Approved by:

________________________________
Laura N. Gasaway, Advisor

Copyright, © Steven J. Melamut, 1999
Within the last few years, academic libraries have begun to introduce electronic reserve services. Law libraries are naturally suited to this type of service because law schools have included digital materials in the curriculum for many years. The convenient access provided by electronic reserves makes their use inevitable. Whether these materials are in a formal electronic reserve collection or are mounted on faculty homepages, the same legal concerns exist. Placing them under the auspices of the library aids ease of control and helps minimize any legal exposure that the law school may incur. This paper discusses the advantages and disadvantages of electronic reserves, the Copyright Law, relevant past litigation, current reserve room policies, and suggested new standards. In conclusion, the paper looks at where the law in this area is likely to move and what response will best serve law libraries.

Headings:

- Automation of library processes - Reserve collections
- College and university libraries - Legal aspects
- College and university libraries - Reserve collections
- Copyright
- Copyright - computer-stored information
- Law librarians and collections
I. INTRODUCTION ...................................................................................................................... 1
   A. RESERVES IN ACADEMIC LAW LIBRARIES ................................................................. 1
   B. DISADVANTAGES OF TRADITIONAL RESERVES ...................................................... 2
   C. COPYRIGHT ISSUES IN TRADITIONAL RESERVES .............................................. 3
   D. ELECTRONIC RESERVES ............................................................................................. 5

II. CONSTITUTIONAL AND STATUTORY BASIS OF COPYRIGHT .................................... 8
   A. CONSTITUTIONAL BASIS ............................................................................................ 8
   B. THE SUBJECT MATTER OF COPYRIGHT § 102 ......................................................... 9
   C. FAIR USE § 107 ................................................................................................................. 12
      1. Purpose and Character of the Use ............................................................................. 13
      2. Nature or Character of the Work ............................................................................. 16
      3. Amount and Substantiality ....................................................................................... 19
      4. Effect Upon the Potential Market ........................................................................... 20
   D. OTHER EXCEPTIONS ......................................................................................................... 23
   E. PERFORMANCE AND DISPLAY ..................................................................................... 23

III. TRENDS IN LIBRARIES AND PUBLISHING .................................................................. 24
   A. ACADEMIC LAW LIBRARY ISSUES ............................................................................ 24
   B. WHO OWNS THE COPYRIGHT? .................................................................................. 28
   C. COPYRIGHT CLEARANCE CENTER ............................................................................. 29

IV. CURRENT RESERVE ROOM POLICIES ......................................................................... 32
   A. CLASSROOM GUIDELINES ......................................................................................... 32
   B. AMERICAN LIBRARY ASSOCIATION MODEL POLICY ............................................ 35
   C. WISCONSIN POLICY ...................................................................................................... 37

V. LEGAL STATUS OF RESERVES ...................................................................................... 39
   A. COURSEPKACS ............................................................................................................... 39
   B. STUDENT COPYING ...................................................................................................... 39
   C. THE LACK OF LEGAL PRECEDENT .......................................................................... 41
   D. FOR-PROFIT VS. NOT-FOR-PROFIT .......................................................................... 42
   E. THE ARCHIVING PROBLEM ....................................................................................... 44
   F. ENTITLEMENT TO LICENSING INCOME ................................................................... 44
   G. MARKET HARM ............................................................................................................. 45
   H. WHAT IS THE ENTIRE WORK? ..................................................................................... 46

VI. CONFU .................................................................................................................................. 47
   A. NEW BEGINNINGS ......................................................................................................... 47
   B. RETURN TO THE 1976 CLASSROOM GUIDELINES .............................................. 50

VII. MARKET REALITIES ......................................................................................................... 53
   A. PUBLISHERS’ AND EDUCATORS’ CONCERNS .......................................................... 53
   B. EXISTING ELECTRONIC RESERVES ........................................................................ 54

VII. CONCLUSION ...................................................................................................................... 57
I. INTRODUCTION

A. Reserves in Academic Law Libraries

Most academic law libraries maintain a reserve collection consisting of books, documents, journal articles, and other materials that are in high demand. This is not a new idea, the concept dates back to the turn of the last century. Law faculties often place photocopied articles, library books, personally owned books, syllabi, and audiovisual materials on reserve. Professors rely on reserve collections for many reasons. Reserves offer a convenient way to supplement the traditional casebook and to provide the students with the most current materials available. It is also helps faculty members to tailor class readings to match the subjects covered in the classroom. By using reserves, the teacher avoids assigning a long and expensive list of books for student purchase, especially if only a small portion of the work is actually assigned. In addition, some university faculty has come to use reserves to avoid imposing the expense of a coursepack upon their students.

Reserve collections are advantageous to the students too, because they provide

---


2 See, e.g., Harris Hwang, University Pushes Copyright Limits with Online Reserves, THE DUKE UNIVERSITY CHRONICLE, Sept. 15, 1995, at 5. ("Selling a coursepak at the bookstore has become relatively expensive," said John Thompson, director of Canadian studies and professor of history. "We have to make a payment to holders of the copyright to be able to get the material." As a result, faculty place materials, whether in hard copy form or electronically, on reserve so that students can photocopy and theoretically create their own coursepaks. Under the "spontaneity" and "fair use" provisions of copyright law, students can avoid paying these additional copyright royalties.)
easy access to materials. It is unnecessary for the student to locate the volume in the library, bring it to a copier, and make a personal copy. All of the assigned readings are in a single place and restricted use guarantees that everyone has access. The check out time for reserves is generally limited to two to four hours in order to provide the widest possible access. Placing copies on reserve also benefits the library as the use of copies can prevent damage, excessive wear, theft, and mutilation of the original.

In the past, reserve collections have been less prominent in law libraries than in the general academic libraries. This may be because there has been less hesitation to require coursepacks and a greater expectation that students should find material on their own in the law curriculum. As a result of increased computer literacy on the part of law faculty and students, there is rising interest in the use of electronic resources including electronic reserves (e-reserves). In many law schools, professors have already created class homepages to provide links to required class materials that function in the same fashion as the reserve collections.\(^3\) Despite the virtue of relieving the library of additional tasks, this paper will discuss why this is not necessarily in the best interest of the law school.

**B. Disadvantages of Traditional Reserves**

Libraries have discovered some problems with the traditional photocopied paper reserve system. Reserve collections are time consuming and work intensive for the library

---

\(^3\) For example, see Duke Law School’s index of class homepages. The public can view to the list of publications, but access to the documents themselves is restricted by password. *Duke University School of Law, Curriculum, Course Home Pages: Spring 1999*, (visited Feb. 21, 1999) <http://www.law.duke.edu/curriculum/courseHomepagesFrame.html>. 
staff. Despite encouragement to do otherwise, faculty submits more than half of reserve reading lists after the first day of class. Some of the materials requested may require interlibrary loan or simply may be unavailable. Problems with loss and damage of reserve materials are common, since students often remove materials from the folders rather than read or photocopy them. Despite the added controls, texts placed on reserve still suffer the risks of theft, mutilation, or damage.

Likewise, students have many complaints about traditional paper reserves. In order to use the materials, students must come to the library. Once in the library, they may have to wait for the materials if they are in use. After they have checked the materials out, students may have to wait again to use a copy machine. Unfortunately, students frequently leave these readings to the last minute resulting in “traffic jams” at the circulation desk and copiers. This creates a disincentive to read the reserve materials; in fact, a recent study showed that only 40% of the students in a class actually retrieve the materials from reserve collections. How many of the students actually read the material retrieved is unknown, but presumably, it is less than 40%.

C. Copyright Issues in Traditional Reserves

The copyright issues involved in the traditional paper reserve system consisting of photocopies of copyrighted works remain largely unresolved. There is the question of

---

4 Halcyon R. Enssle, Reserve Online: Bringing Reserve Into The Electronic Age, INFORMATION TECHNOLOGY AND LIBRARIES, Sept. 1994, at 197.
5 Id.
whose responsibility it really is: the law library or the faculty members. Some institutions have policies in place that assign responsibility to the faculty. However, if significant violations were found, and the case were litigated, the plaintiff would sue the faculty member, the library, and the institution in order to reach the parties with the deepest pockets. One thing is clear, the institution itself is responsible, and where it places responsibility for obtaining permission for reserves is largely an administrative matter.

There is a so-called “safe harbor” for reserve room copying described in the legislative history of the 1976 Copyright law (CLASSROOM GUIDELINES) but it is largely unused and is held to be too restrictive by most of the library community. Many schools follow the ALA MODEL POLICY on photocopying drafted in 1982, despite the fact that these guidelines were not negotiated by the involved parties, have not been tested in court,

---

7 Georgia Harper, an attorney for the University of Texas System and the author of a number of Web pages about copyright, wrote that "[t]he liability for infringement rests with the actual infringer (the faculty member) and in many cases, with his or her institution, when the copying is done as part of the faculty member’s normal job duties…It’s possible that the institution could argue that any copying outside the scope of the institution/s copyright policy would not be authorized and so if the faculty member was putting massive amounts of things online beyond fair use, the institution could avoid liability for the wrongful acts of its employee. I’m not sure whether this would be a successful argument.” Georgia Harper, (gharper@utsystem.edu). 19 June 1998. “Why Do Libraries Do Electronic Reserves?” E-mail to arl-ereserves (arl-ereserves@arl.org),

8 Although the words “safe harbor” cannot be found within this report it is universally acknowledged as describing practices that are safe from successful litigation. HOUSE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 65-74 (1976), reprinted in 1976 U.S.C.C.A.N. 5659-5688. [hereinafter CLASSROOM GUIDELINES].


10 The CLASSROOM GUIDELINES were heavily publicized when they were adopted by the parties in the New York University litigation. As a result, the Guidelines have overshadowed the ALA MODEL POLICY. A survey of American research universities showed eighty percent of those polices being derived from the Classroom Guidelines and twenty percent from the ALA MODEL POLICY or the Wisconsin policy. Bernard Zidar, Fair Use and the Code of the Schoolyard: Can Copyshops Compile Coursepacks Consistent with Copyright?, 46 Emory L. J. 1363, 1386 (1997).
and are not held by many experts to be a "safe harbor." Interestingly, the American Library Association (ALA) no longer supports this policy and has removed easy access to the policy from ALA's Web site.

Copyright royalties have become an issue in recent years, as convenient means of tracking use and payment have become available. Consequently, the issue of fair use has moved to the forefront. Although publishers and authors have not fully enforced their rights to receive royalties in the past, it is certain that they plan to do so in the future.

D. Electronic Reserves

E-reserves are an important topic in most academic libraries, including law libraries, because of their advantages over paper reserves. E-reserves can permit simultaneous access to a large number of people over a computer network. Consequently, reserve room users do not have to wait in line at the reserve desk or copiers. In fact, they may not even have to come to the library if Internet access is available. Another advantage is that printing these files only requires a computer and printer, so copiers are not required, and there is no degradation to the quality of the copies. Users are no longer tied to the library hours since it does not matter whether the library is actually open if the


12 A search of the ALA Website reveals the page: ALA Standards and Guidelines (visited Feb. 27, 1999) <http://www.ala.org/work/standards.html> which makes no mention of the ALA MODEL POLICY. But, email correspondence revealed that it has been relegated to a hard-to-find Gopher site at Model Policy Concerning College and University Photocopying (visited Feb. 21, 1999) <gopher://ala1.ala.org/00/algophix/50403001.document>. The ALA MODEL POLICY can be easily found on the Internet at Information Policies: ALA (visited Feb. 27, 1999) <www.cni.org/docs/infopols/ALA.html#mpup>. This site is the product of the Coalition for Networked Information (CNI) which is an organization formed to networked information technology for the
material is accessible over the Web. The professor can organize the materials in the most usable form, e.g., in hierarchical or linked format, thus improving access to the contents. Digital files are also searchable and capable of being edited and easily inserted in other documents. Overall, e-reserves files are more versatile since they can be printed, downloaded, or read on a computer screen.

With e-reserves, there is no longer any risk of physical damage, theft, or mutilation to the original materials. In fact, scanning makes it possible to remove unwanted notes and scribbles and even increase legibility. The library no longer has the problem of physical storage of the materials, the inevitable “lost” file, or missing pages. Lastly, the technology makes it possible to track use, not merely for copyright purposes, but also for instructional purposes. The technology makes it possible for a teacher to track how many students have accessed the materials, which materials are accessed and the frequency of use. Although aggregate data provided to faculty members may help guide what to place on reserve in future semesters, the same confidentiality normally accorded to library circulation records is likely to protect the records of individual students.

Most frequently, electronic reserve materials are scanned into digital files by the library, the instructor, or another party, then the works are made available over the campus computer network or on terminals within the library. A limiting factor in the use of scanned materials has been that it is work-intensive, but libraries are developing systems to overcome this problem. Modern computers also provide easy access to non-text files, advancement of scholarly communication.

audio files, and multimedia presentations consisting of graphics, text, and sound.\textsuperscript{14} All of these materials are subject to the copyright law and may require permission from the copyright owner.

One unsettled issue is the extent to which material from online full-text databases can be included in electronic reserves. For this material, legal limitations involve not only fair use, but also the terms of the licensing agreement between the school and the publisher. The issue is whether the school may copy the material from the publisher's database into their reserves, or alternatively, may provide a link to the provider's database for e-reserves.\textsuperscript{15} The answers to many of these questions are contractual and are found in the terms of the license. Some e-reserves software does not permit a link and therefore copying into the reserve system would be required if the work were to be included.

Many of the materials for legal education are available online from the common vendors of legal databases, Lexis-Nexis and Westlaw. These companies have responded to requests from educators with an alternative of their own. Both companies have proprietary software that will create an Internet link to a case, statute, or journal article.\textsuperscript{16} The software creates an HTML (HyperText Markup Language) link that can be inserted

\textsuperscript{14} New technologies such as "streaming video" make these materials available over the Internet to anyone with a computer powerful enough to handle the software.

\textsuperscript{15} “UMI is now beta testing a service called SiteBuilder for Proquest Direct that, among other things, will provide a means of creating durable links for the purpose of linking articles, journals, or even search strategies to online reserves.” Cheryl Bower, (cbower@CCM.HOWARDCC.EDU). 19 June 1998. "Electronic reserves link to commercial database." E-mail to arl-ereserve (arl-ereserve@arl.org); OVID Technologies, Inc. have given verbal permission to the Duke University Medical Center Library to provide links to their full-text database from the library’s electronic reserves. Interview with Patricia L. Thibodeau, Associate Director, Duke University Medical Center Library, in Chapel Hill, NC (Jan. 31, 1999).

in an Internet document. When the student clicks on this link, the software first requests
the student's password, and then displays the information. Westlaw's software even
permits a link to a pre-written search in a specified database. This arrangement permits
legal educators to use the digital materials already provided to law students while still
permitting the publisher to control their product. Using this software eliminates the
copyright issue for cases, statutes, law journals, and other materials available in these
databases.

II. CONSTITUTIONAL AND STATUTORY BASIS OF COPYRIGHT

A. Constitutional Basis

Current copyright law is grounded in the U.S. Constitution which expresses the
goal of copyright to be “[t]o promote the Progress of Science and useful Arts, by securing
for limited Times to Authors and Inventors the exclusive Right to their respective Writings
and Discoveries.”\(^{17}\) There is an inherent tension present here between ensuring access and
fostering creativity by securing a limited monopoly.

One view of the continuum insists that if copyright's primary function is to
promote progress, only minimal protection is desirable. Under this view, progress is best
served by the widest distribution of knowledge because research always builds upon prior
discoveries. On this basis, many researchers, attorneys, and academics maintain that
copyright should not be too restrictive because that would impede creativity.

\(^{17}\) U.S. CONST. art. I, § 8, cl. 8.
The alternate view of copyright maintains that gain stimulates the creative process. Although many works originate in academic settings where the author receives no remuneration, it nonetheless is tied to professional and financial gain. Consequently, proponents of copyright insist that it is in society’s best interests if the creator's product is protected.

An additional concern is that the public dissemination of ideas is dependent upon persons other than the creator. In a free market system, publishers will invest the capital needed to underwrite publication only if remuneration is likely. This outlook assumes that “[t]he basic purpose of copyright is to enrich our society’s wealth of culture and information. The means for doing so is to grant exclusive rights in the exploitation and marketing of a work as an incentive to those who create it.”

There are parties promoting both ends of this continuum, but in order to function, copyright must be a balance between them. Under either view, copyright law serves as a statement of the copyright holder’s rights and their bounds. It is both the basis of a charge of infringement and a defense thereto.

B. The Subject Matter of Copyright § 102

The Copyright Act states that copyright exists for original works of authorship fixed in “tangible medium of expression, now known or later developed, from which they
can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”\textsuperscript{21} The Act is “technology neutral.” That means that it is not limited to the technology in existence at the time of its writing. Photographs, photocopies, and digital copies are all included within its scope.\textsuperscript{22} The Act states that:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

1. literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works;
7. sound recordings; and
8. architectural works.\textsuperscript{23}

It is important to note that this list is not exhaustive and does not rule out additional areas. The statute simply attempts to provide common examples.

Although it used to be safe to reproduce materials that contained no notice of copyright, it is no longer required that a work contain the three element notice: (1) the word "copyright," the abbreviation "copr." or the copyright symbol, (©), (2) date of first publication, and (3) name of copyright holder, in order to be protected.\textsuperscript{24} As part of the

\textsuperscript{21} Id. § 102(a).

\textsuperscript{22} “Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Id. § 101.

\textsuperscript{23} Id. § 102.

\textsuperscript{24} Although, there remain legal advantages such as the availability of certain damages during
United States' adherence to the Berne Convention,\textsuperscript{25} copyright is now accorded to all fixed works at the time of creation.\textsuperscript{26} Consequently, more materials contained in the reserve collection are copyright protected than might first be imagined. A professor’s notes and syllabi have copyright protection regardless of whether notice of copyright is present. These materials can be used only with the author's permission, under the fair use exceptions, or after they have passed into the public domain. The public domain includes materials whose copyright has expired and some materials such as U.S. Government documents that are not protected under statute\textsuperscript{27} plus works that were published without notice before 1978.

Copyright law gives the owner of the copyright a number of exclusive rights. The copyright holder may do, or authorize another to do the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale, transfer, rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly…\textsuperscript{28}

\textsuperscript{25} Id. § 104.

\textsuperscript{26} “Copyright in a work created on or after January 1, 1978, subsists from its creation…” Id. § 302.

\textsuperscript{27} Id. § 105.

\textsuperscript{28} Id. § 106.
An author may transfer one or more of these rights or retain them all. These rights clearly affect all of the functions of the reserve collection.

In print reserves, it is often necessary to reproduce the materials and place them in folders for loaning them to the students; this constitutes both copying and distribution. In e-reserves, copying is still the first step. Whether the material is scanned into the system or downloaded from an existing full-text database, a copy is created. Distribution occurs whether a student receives a file folder of paper copies, or access to digital copies of the original, and arguably copies are made even when the work is read on the screen. Certainly a copy is made if the student prints or downloads a copy.

C. Fair Use § 107

There could be no reserve collections at all without the permission of the authors if the Copyright Act stopped at § 106, but the law provides some important exceptions to the rights of the copyright holder, the most important of which is fair use. Under § 107 it is not an infringement to make a copy for purposes of teaching, including multiple copies for classroom use, scholarship, or research. The fair use section of the Act instructs the courts to consider four factors when determining whether a use is fair use. Case history has not demonstrated a “bright line” where fair use begins and ends. As a result, the courts must analyze all of the factors. No one factor alone can create or

29 Section 106 is entitled "Exclusive rights in copyrighted works." It lists those exclusive rights that belong to the copyright holder, but states that it is “[s]ubject to sections 107 through 120.” Section 121, "Limitations on exclusive rights: reproduction for blind or other people with disabilities," which was added in 1996, provides another limitation on the holder's exclusive rights.


31 See Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1495 n. 7 (11th Cir. 1984), aff'g 572 F. Supp. 1186 (N.D. Ga. 1983) discussing the 1976 Copyright Statute: "It establishes a minimum number of
destroy the existence of fair use. The four fair use factors are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.\(^{32}\)

The Act does not require that all of the factors must be present; nor does it assign a relative level of importance to the factors. Finally, although the Act requires examination of all of the four factors, it does not prohibit examination of other relevant factors.\(^{33}\) Therefore, the interpretation of fair use has been the subject of lengthy argument and significant litigation.

**1. Purpose and Character of the Use**

The first factor deals with why the copy was created, including the question of whether the use is commercial or nonprofit. The legislative history indicates that although the commercial or nonprofit character of an activity is intended to be a factor in the decision, it is not conclusive by itself.\(^{34}\) In 1984, the Supreme Court stated that there was a presumption of unfair exploitation associated with commercial use in *Sony Corp. of*
This kind of “bright line” test presents problems in an area with varying fact situations. Even nonprofit research may eventually return commercial gain and some commercial research may be socially beneficial with no hope of financial gain. Further, with some commercial uses, gain is indirect and uncertain.

Ten years after *Sony*, the Court in *Campbell v. Acuff-Rose Music, Inc.* clarified their finding and stated that this was not really intended to be a “bright line” test. Nonprofit status is only one factor whose weight will vary with the facts.

Another question is whether the use is transformative, or productive and nonsuperseding. The issue is does the use of the material result in the creation of a new socially useful work? The problem with the quality of transformation is that it gives the courts the responsibility of deciding what is new and of value. The argument is that transformation of the copyrighted work into a new work demonstrates an addition of value resulting in something new and different, for example when copyrighted material is used in parody as in *Acuff-Rose*.

The courts have consistently found that coursepack copying does not result in a

---

35. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). “[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of copyright…” This was dicta because the Court had already decided that the use in *Sony* was not commercial before making this observation.


37. “[A]s we explained in *Harper & Row*, *Sony* stands for the proposition that the ‘fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weight against a finding of fair use’…But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance.” *Id.* at 584. *See also* American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1 (S.D.N.Y. 1992), 37 F.3d 881, 889 (2d Cir. 1994), *rehg en banc denied*, 60 F.3d 913 (2d Cir. 1995).

38. Other transformative uses include criticism, comment, news reporting, reaching, scholarship, and research which are found in the list of "preferred" uses in the preamble to § 107.

39. The decision in *Acuff-Rose* is related to Judge Leval’s theories about transformative use found in his
new creation, but the court has not previously required transformation in classroom use. Reserve room use is clearly of social benefit because it increases the availability of a work for nonprofit educational institutional use. However, in Texaco, the court found that archival use lends itself to a finding of infringement because it acts as a replacement for the purchase of a copy of the original. Reserve room use is arguably not a replacement if the school owns the original work and does not permit copies to be placed on reserve repeatedly without permission.

This plays havoc with one of the advantages of e-reserves. It is possible to scan the materials once and then keep them on the computer forever to avoid repeating the labor involved in scanning. This is clearly the creation of an archive by the institution.

Some publishers currently permit this kind of use if the materials are unavailable when stored, and license fees are paid when the materials are made available on the e-reserve

---


41 “The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.” Acuff-Rose 510 U.S. at 579.

42 “The photocopying of these eight Catalysis articles may be characterized as ‘archival’—i.e., done for the primary purpose of providing numerous Texaco scientists (for whom Chickering served as an example) each with his or her own personal copy of each article without Texaco’s having to purchase another original journal” Texaco, 37 F.3d at 919.

43 However, this point remains unsettled. Many schools maintain that there is no reason that fair use will not apply to repeated use of the same materials if they are removed between semesters and access is limited strictly to students in the class. The question is frequently dealt with by omission as in the COPYRIGHT GUIDELINES FOR ELECTRONIC RESERVES, NCSU LIBRARIES (revised by Peggy E. Hoon, Apr. 21, 1998). There is a valid argument for this position since it has not been directly addressed by the courts. The arguments against this position include the spontaneity requirements for multiple copies in classroom use found in the CLASSROOM GUIDELINES and restrictions written in the ALA GUIDELINES. But, it must be remembered that both the CLASSROOM GUIDELINES and the ALA GUIDELINES only aspire to state a minimum level for fair use.
Some libraries are maintaining these archives although they are not paying the license fees.

2. Nature or Character of the Work

The second factor concerns the nature or character of the work. Is it of a creative nature, for example, poetry, novels or short stories? Is it a research article in a scientific journal? Is it a compilation of data or statistics? Fair use analysis is not the same for all materials and not all materials are copyrightable.

Some materials, such as workbooks, exercises and problems that students would usually buy for class and study use are considered “consumables.” Usually there is no fair use in these materials because if they were freely copied, it would destroy their market. Standardized tests such as the Graduate Record Exam (GRE) and Scholastic Aptitude Test (SAT) are also considered consumables because their value is dependent upon the security of their content. The CLASSROOM GUIDELINES specifically mention that educational fair use is not applicable to consumables.\footnote{CLASSROOM GUIDELINES, supra note 7, at 71.}

Anthologies present other problems. In a copyrighted anthology, there are two interests involved: that of the anthologizer and that of the individual author. Infringement of the copyright affects current and future sales of this anthology and any earlier

\footnote{The FAIR-USE GUIDELINES FOR ELECTRONIC RESERVE SYSTEMS produced by a sub-group of the Conference on Fair Use (CONFU) participants dated March 5, 1996 states that “[m]aterial may be retained in electronic form while permission is being sought or until the next academic term in which the material might be use, but in no event for more than three calendar years, including the year in which the materials are last used.” It is interesting to note that the User Permissions Agreement later developed for the Academic E-Reserve Service from the Copyright Clearance Center (CCC) is more liberal; it provides that permission ends at the end of the class for which it is granted and that the school must then delete the material or block electronic access to the material. Thus, CCC’s policy permits the library to maintain a database of materials for future use.}
publications of the works involved. Perhaps for this reason, Congress did provide some guidance in a 1975 Senate report and in earlier House reports.

Collections and Anthologies. Spontaneous copying of an isolated extract by a teacher, which may be fair use under appropriate circumstances, could turn into an infringement if the copies were accumulated over a period of time with other parts of the same work, or were collected with other material from various works so as to constitute an anthology.\footnote{S. REP. NO. 94-473 at 63; H.R. REP. NO. 90-83 at 33-34; H.R. REP. NO. 89-2237 at 63-64.}

Consequently, the CLASSROOM GUIDELINES prohibit copying intended to create or replace anthologies, compilations or collective works.\footnote{CLASSROOM GUIDELINES, supra note 8, at 69.} Not all anthologies are an infringement of copyright, but the fact that excerpts are placed in an anthology weighs significantly against a defendant.\footnote{Basic Books Inc. v. Kinko’s Graphics Corp., 758 F. Supp. 1522, 1537 (S.D. N.Y. 1991).}

The Supreme Court’s definitive decision about compilations occurred in 1991 in \textit{Feist Publications, Inc. v. Rural Telephone Service Co.}\footnote{Rural Telephone Service Co. v. Feist Publications Inc., 499 U.S. 340 (1991).} Until \textit{Feist}, courts had found valid copyrights in factual compilations upon a “sweat of the brow” theory. In other words, if a compiler worked hard to gather the facts, he was entitled to a copyright. In \textit{Feist}, the Court explained that the facts, data, or preexisting materials are not copyrightable because protection is limited to original work.\footnote{107 U.S.C. §102(a) (1994).} There is a valid copyright on the portions of a work that are “original to the author,” but facts and data are not protectable even where they are combined with other facts or data.\footnote{\textit{Feist}, 499 U.S. at 345, 347.} For example, certain

\begin{itemize}
  \item \textit{Feist}, 499 U.S. at 345, 347.
\end{itemize}
factual compilations and derivative works, such as the white pages of the telephone book
cannot be copyrighted.\textsuperscript{52} The uses of compilations of fact, especially those sold in
electronic form, are frequently limited by licensing agreements at the time of sale.
Regardless of the inability to copyright material, it is possible to contract limitations on

copying and usage.

Historically, the use of scientific works by writers in the same field was an
acceptable fair use, and was evaluated under fair use standards.\textsuperscript{53} This resulted in a view
that “the scope of fair use is greater with respect to factual than nonfactual works.”\textsuperscript{54} In
Texaco, both the District Court and the Second Circuit Court of Appeals found that the
second factor of the fair use analysis favored the defendant because the material copied
was predominantly of a factual nature. The court made this decision despite the
publisher's statement that they required broad copyright protection for the continued
vitality of their publications.\textsuperscript{55} Thus, it appears that the scientific nature of an article will
tilt the factor towards the defendant.

Federal case reports are the product of United States Government employees and
as such can not be copyrighted.\textsuperscript{56} Recent litigation, Matthew Bender v. West Publishing

\begin{footnotes}
\item[52] Id.
\item[53] PATRY, supra note 33, at 528.
\item[54] American Geophysical Union v. Texaco, Inc.,802 F. Supp. 1 (S.D.N.Y. 1992), 37 F.3d 881, 925 (2d
Cir. 1994), reh'g en banc denied, 60 F.3d 913 (2d Cir. 1995), cert. dismissed, 516 U.S. 1005 (1995).
(quotating American Geophysical Union v. Texaco, Inc., 802 F. Supp 1, 16-17 (quoting New Era
Publications International, Aps v. Carol Publishing Group, 904 F. 2d 152, 157 (2d Cir.), cert. denied, 498
U.S. 921 (1990)).
\item[55] “[N]early every category of copyrightable works could plausible assert that broad copyright protection
was essential to the continued vitality of that category of works.” Texaco, 37 F.3d at 925.
\item[56] United States Government works is the subject of 17 U.S.C. § 105 (1976). A "work of the United States
Government" is a work prepared by an officer or employee of the government as part of that person's
\end{footnotes}
Company,\textsuperscript{57} resulted in a decision by the Second Circuit United States Court of Appeals that the text, the pagination, parallel citations, identifications of counsel, and subsequent procedural history are not copyrightable. Hyperlaw, one of the defendants in Matthew Bender, was copying a number of West's Federal Reporters and editing out the headnotes and syllabus in order to add them to their own databases. The court found this to be an acceptable practice. In addition, in most states court reports are public records and cannot be copyrighted. In fact, many state courts place the text of current cases on the Internet. As a result, institutions should feel reasonably safe placing court reports on their pages so long as headnotes and annotations have been removed.\textsuperscript{58} Although West is appealing the decision in Matthew-Bender, West is not appealing the issue of star pagination, so it appears reasonably safe not to remove the pagination from the text.\textsuperscript{59}

3. Amount and Substantiality

It is difficult to say with specificity how much of a work safely can be copied. For example, in Sony Corp. of America, Inc. v. Universal City Studios, Inc.,\textsuperscript{60} the Supreme Court found that copying an entire work (a videotape of a television movie) was not necessarily an infringement of copyright, but this is the only case in which the Court held

\footnotesize
\textsuperscript{57} The issue of pagination was decided in: Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 674, (2nd Cir. 1998). The balance of the issues were decided in: Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 693, (2nd Cir. 1998).

\textsuperscript{58} Matthew Bender is only binding in the Second Circuit and is being appealed, but it seems unlikely that West will pursue not-for-profit defendants when there are for-profit entities available.

\textsuperscript{59} Petition for Rehearing with a Suggestion for Rehearing En Banc, Matthew Bender, 158 F.3d 674 (97-7910).

that copying 100% of a work was permissible.\footnote{If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court’s findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. \textit{Sony}, 464 U.S. at 449.} Alternatively, in \textit{Harper & Row, Publishers, Inc. v. Nation Enterprises},\footnote{Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).} the Supreme Court found that publication of a small amount of text taken from a yet unpublished novel could be an infringement.\footnote{\textit{Id.} at 569.} In reaching these conclusions, the Court made both a qualitative and quantitative examination of the material copied.\footnote{\textit{Id.} at 583.}

Certainly, the smaller the amount reproduced, the more likely it will be a fair use. But there is no bright line on the quantity. Sometimes libraries have internal guidelines that they will reproduce no more than 10% of a work for reserves, but this is not really grounded in fair use decisions. An examination of \textit{Texaco}\footnote{American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1 (S.D.N.Y. 1992), 37 F.3d 881 (2d Cir. 1994), \textit{reh’g en banc denied}, 60 F.3d 913 (2d Cir. 1995), \textit{cert. dismissed}, 516 U.S. 1005 (1995).} points to a problem with freely reproducing complete articles. In that case, the court held that the individual article was the copyrighted work as opposed to the journal issue.\footnote{\textit{Id.} at 926.} Therefore, if \textit{Texaco’s} holding proves to be the final decision on what comprises a "work," reproducing one article from a journal will be copying 100% of a work.

4. Effect Upon the Potential Market

Some courts have suggested that if the intended use is for commercial gain, the
likelihood of future harm may be presumed. The 1976 Act itself required that all four of the factors be considered, although it did not assign any priority to the factors. The importance of the fourth factor came to the forefront in 1985 when the Supreme Court in *Harper & Row* wrote that “the effect of the use upon the potential market for or value of the copyrighted work” is “undoubtedly the single most important element of fair use.” Prior to the 1976 Act, there was no requirement that this factor be given priority, in fact a court could ignore it entirely. This question regarding the priority of the factors began in the holding in *Harper & Row*, but was resolved in *Acuff-Rose* when the Court held that the four statutory factors must not be treated in isolation: “all are to be explored, and the results weighed together, in light of the purposes of copyright.” The Court in *Acuff-Rose* reinforced the idea that copyright requires a case by case examination, and that there can be no “bright-line rules.”

Initially, the courts dealt primarily with the publication value of the work, that is the income lost where copies were used to avoid purchases. It was made clear that copying will not be allowed to take the place of a subscription in either a commercial or a nonprofit setting. In *Harper & Row* the Supreme Court found that the impact was not limited to effects upon the book’s sales. The Court was willing to consider the value of

---

69 Patry, supra note 33, at 561.
71 Id. at 1170.
the excerpts where the plaintiff could demonstrate their value.\textsuperscript{73} In both \textit{Texaco} and \textit{Princeton University Press v. Michigan Document Services (MDS)}, the courts have clearly recognized the publisher’s entitlement to licensing fees,\textsuperscript{74} which is of great significance to the future of e-reserves.

The court in \textit{MDS},\textsuperscript{75} clearly expressed its support for the market harm test that had been proposed earlier in \textit{Sony}\textsuperscript{76} and \textit{Harper \& Row}\textsuperscript{77}. Under this test, there is market harm if the plaintiff can demonstrate that if the challenged use were widespread, there would be an adverse effect upon the potential market. Electronic reserves are likely to become widely used. Most institutions will probably choose to use the Internet for maximum convenience, and it is difficult to conceive of a wider distribution. If there is no control exercised over access to the materials, a market effect is inevitable.

Although a demonstration of harm is preferred, the courts do not always require dramatic proof of value. For example, in \textit{MDS}\textsuperscript{78} the court considered the fact that the professors chose the materials for inclusion in a coursepack was of itself evidence of the value of the materials.\textsuperscript{79}

\begin{itemize}
  \item \textsuperscript{73} Id. at 567.
  \item \textsuperscript{75} Id. at 1386.
  \item \textsuperscript{76} \textit{Sony}, 464 U.S. at 451.
  \item \textsuperscript{77} \textit{See Harper \& Row}, 471 U.S. at 568.
  \item \textsuperscript{78} \textit{Id} at 1389.
  \item \textsuperscript{79} \textit{Id}.
\end{itemize}
D. Other Exceptions

Libraries may make single copies of copyrighted works for users under §§ 108(d) and (e), but there are restrictions that apply even to the making of these copies. First, the copy must become the property of the user, second, the library must have no notice that the copy will be used for other than fair use purposes, and lastly, the library must post appropriate warnings. Unfortunately, none of the § 108 exceptions apply to library reserve copying. Reserve copying remains a § 107 fair use issue.

E. Performance and Display

The inclusion of audiovisual materials in the reserve collection may also raise the issue of the performance right. “To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 80 If the materials are checked out and viewed by a single student, there is no public performance.

A public performance occurs when the work is performed “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered” or where the work is transmitted to the public where it can be received in the same or in different places at the same or different times. 81 When a student checks out an audiovisual work and shows it to a roomful of

---

81 Id.
students, it fits within the definition of a public performance and is harder to defend as a fair use.

On the other hand, if the performance is required by the teacher who is also present for the performance, it may fall under the classroom exemption.\textsuperscript{82} Classroom is broadly defined to include the library.\textsuperscript{83} Unfortunately, transmission of the performance to a place outside of the school is only protected where it involves the disabled, or officers or employees of governmental bodies as a part of their official duties of employment.\textsuperscript{84} The requirement for face-to-face teaching makes the use of this exemption for distance education debatable regardless of the transmission site. Furthermore, it makes the exemption completely unsuitable for multimedia materials that are placed in e-reserves.

\section*{III. TRENDS IN LIBRARIES AND PUBLISHING}

\subsection*{A. Academic Law Library issues}

Currently, there are many pressures in academia to make advantageous use of computer technology. Legal education has long been at the forefront of computer use in education, including legal databases and computer aided legal research (CALR). As a result, there is a significant amount of material available in digital format from commercial, government, and free Internet sources. Modern law libraries face the question of how to best provide access to these resources. Because of the advantages provided by e-reserves,

\textsuperscript{82} This is because § 110(1) of the Copyright Act, entitled Limitations on exclusive rights: Exemption of certain performances and displays, allows an exception for nonprofit educational uses of a motion picture or audiovisual work in face-to-face teaching activities in a classroom.

\textsuperscript{83} \textsc{Classroom Guidelines}, \textit{supra} note 8, at 82.

\textsuperscript{84} Although instructional broadcasting is permitted, only nondramatic literary and musical works may be
most libraries will find that digital reserves are difficult to resist. As a result, an
examination of the copyright status of the materials commonly placed in law school
reserve collections is inevitable.

Faculty place a variety of materials on reserve in law schools, including the
obvious items such as case reports, law journal articles, and books. Many professors use
the reserves to make their syllabi, class outlines, and handouts readily available. Some
materials, such as case briefs, lower court decisions, and audio and video tapes may not be
available elsewhere. The reserves are also used to insure access for all students to
hornbooks, treatises, and looseleafs. Articles in topical materials such as newspapers and
magazines are also frequently placed on reserve for student use.

Many of these materials are available online from the common vendors of legal
information, Lexis-Nexis and Westlaw. As discussed supra, Lexis-Nexis and Westlaw
have established means of creating Internet Links to materials in their databases.\(^{85}\)
Unfortunately, these databases are not all inclusive, so law libraries must examine how to
handle copyright issues for a variety of materials. Faculty works such as old exams and
syllabi are covered by copyright and should only be placed on reserve with the author's
permission. In contrast, the publisher frequently owns the copyright to most other faculty
publications, not the author. Many materials such as United States Government works
and court documents such as legal briefs cannot be copyrighted.\(^{86}\) Many documents of
interest to law classes may have outlived their copyright protection. The use of most

\(^{85}\) See FN52.

\(^{86}\) Notwithstanding the exception found in 17 U.S.C. § 105 regarding United States Government works,
there is no such exception for the work product of state employees.
other materials is subject to Copyright law. In addition, e-reserve technology can include features such as streaming video and audio. The inclusion of audio or video materials clearly requires an examination of the rights of the copyright holder and the availability of permission for the use. Because of the limited market for these materials, it seems unlikely that permission will be granted if access is unrestricted. Even the use of court reports that are not included in the existing digital database will involve the publisher's copyright claims regarding pagination, headnotes, and annotation. Lastly, articles from newspapers and magazines that the library owns are protected by copyright. Where the article is unavailable in Lexis-Nexis or Westlaw, the library must examine the copyright issues involved before freely using these materials in e-reserves.

Libraries must also remember that full text digital materials that are made available to the law school community are frequently covered by licensing agreements rather than an outright sale. The terms of the contract governs what uses are permitted. The Copyright Act seems to say that it is possible to contract away fair use rights. There is a question, however, as to what takes precedence, fair use or the license where the library continues its print subscription in addition to the “full text” version.

It is generally not permissible to download parts of a database and remount them on the library's server unless this is permitted by contract. Systematic downloading of journal text, output, search results, or other information may result in loss of service. The American Institute of Physics (AIP) suspended access to a few institutions in 1998 when single users tried to use the service in ways contrary to the Institutional User Agreement.

---

87 The library exemptions do not override any contrary contractual obligations such as license requirements that may have been undertaken by the library in obtaining a copy or phonorecord of a work for its collection. 17 U.S.C. § 108(f)(4) (1994).
AIP allows users to copy content from individual online journal articles for "personal research use, and for person-to-person and non-systematic scholarly exchanges of information," but they are concerned with the "creation of systematic copies or caches for local mounting." 88

There are additional concerns involved in the use of materials obtained by interlibrary loan (ILL). Law libraries frequently have agreements to provide free copies of materials to other law libraries via ILL. The issue of fair use becomes less clear when the original paper materials originate in a different library. As a result, the use of such materials for reserves, paper or electronic, requires careful examination of the impact of such use upon the copyright holder.

While libraries and library users want to move to full text, the availability of such materials is dependent upon the publishers’ willingness to make the investment in technology, business structure, and added personnel to support full text. Publishers fear that increased use of full text will increase copyright violations. Before copyright holders are willing to risk the capital required to make additional works available electronically, it will be necessary for the libraries to demonstrate an ability and willingness to control access. 89

---

88 Douglas LaFrenier, Director of Marketing, American Institute of Physics. AIP Online Journals (ojshelp@aip.org) 23 Jul. 1998. E-mail to Eric Albright (albri008@mc.duke.edu).

89 Gasaway, supra note 19, at 70.
B. Who Owns the Copyright?

Authors are concerned about receiving proper attribution for their work. Moreover, they do not want modifications or inaccurate additions to the text to affect their reputation. Authors’ groups have expressed their intention to be paid for uses of their materials when their work is included in coursepacks or digitized files without their permission. In some cases, especially in periodicals, the publisher may only have first publication rights and any subsequent use requires the permission of the author. There are ongoing arguments between publishers and authors about whether their contracts include the electronic rights in addition to the print rights. In 1997, in *Tasini v. New York Times Co.*, a New York federal district judge ruled that publishers could include entire collected works in a database without obtaining permission from authors or compensating them on the basis of the ‘revision’ privilege of section 201(c). The court held that the publisher’s selection of the articles was maintained even where the formatting and arrangement was lost as a result of the digital conversion. The case is currently under appeal. In another case, *Ryan v. CARL Corp.* in San Francisco, a judge ruled that the right to authorize individual reprints belongs to the publisher only if the contract between

---


92 17 U.S.C. § 201(c) (1998): “Contributions to Collective Works.--Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.”

the author and the publisher says so; otherwise it remains with the author. This could have significant implications for e-reserves. Authors groups have expressed their intention to continue pressing the publishers for payment for digital use of their work.

The publishers’ primary concern is the ease with which copyrighted material can be copied to and disseminated from the World Wide Web. They maintain that this destroys the value of their property forever since it eliminates the need to purchase the work. Publishers further assert that a digitized version of a work distributed under the label of “library lending,” directly competes with the original work. Because of these concerns, many copyright holders maintain that there can be no fair use in e-reserves. Their hesitancy is not completely unreasonable. If the access to a digital version is uncontrolled, paid subscriptions to both formats will decrease and the publisher are in business to make a profit. This is not unreasonable, since the publishers owe a fiduciary duty to the stockholders to increase the value of the company, not to disseminate knowledge.

C. Copyright Clearance Center

In Williams & Wilkins, the court questioned whether it could consider the value of copy permissions where there was no practical way to request the permissions from publishers. Since there are thousands of copyright holders, both publishers and authors, this argument has an appeal. In fact, this argument against considering permission fees as

---

94 Harper, supra note 87.


part of the copyright entitlement has survived to the current day, but a market for licensing fees and an easy means of paying these fees does now exist.

The Copyright Clearance Center (CCC) was created in 1978, two years after the passage of the 1976 Copyright Act in an effort to balance the rights of creators and users. Until the CCC was established, there was no practical way to pay and collect these fees, but now collecting these fees has become practicable. CCC now represents more than 9,600 publishing houses, thousands of authors, and permission rights relating to over 1.75 million works. There are currently more than 9,000 corporate users of CCC, as well as thousands of government agencies, law firms, document suppliers, libraries, academic institutions, copy shops, and bookstores within the United States. Prior to the establishment of CCC, the cost of collecting the fees was thought to exceed their value, but courts have become willing to recognize permission fees as a publisher’s entitlement since they have become easier to pay and collect.

In *Texaco*, the Second Circuit affirmed the right of the publisher to be paid for journal articles that were copied by a researcher and placed in a personal research file.

The court pointed out that the articles could be obtained legitimately: (1) from a

---

97 “Remarkably, they have limited their showing of ‘market effect’ to the loss of permission fees that they would like to receive from copyshops like MDS. But that is not a ‘market harm’ within the meaning of section 107(4). To prove entitlement to permission fees, the publishers must show market harm and the market harm they claim is the loss of permission fees. MDS’s coursepacks would inflict ‘market harm’ if they damaged the value of the original work or the value of derivative products such as coursepacks the publishers might wish to market.” Princeton University Press v. Michigan Document Services, 74 F.3d 1512 (6th Cir. 1996), rev’d en banc, 99 F.3d 1381, 1407 (6th Cir. 1996), and cert. denied, 117 S.Ct. 1336 (1997) [hereinafter *MDS*]. (Ryan, dissenting).

98 “The potential uses of the copyrighted works at issue in the case before us clearly include the selling of permission to reproduce portions of the works for inclusion in coursepacks—and the likelihood that publishers actually will license such reproduction is a demonstrated fact. A licensing market already exists here, as it did not in a case on which the plaintiffs rely, *Williams & Wilkins Co. v. United States.*” quoted in *MDS*, 99 F.3d at 1388.
document delivery service that in-turn would pay royalties to the publishers for the right to photocopy the articles, (2) by negotiating photocopying licenses directly from the publishers, and/or (3) by acquiring some form of photocopy license from CCC.\textsuperscript{100} The court stated that "[i]t is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work… and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor."\textsuperscript{101}

In a more recent case, \textit{MDS}, \textsuperscript{102} the Sixth Circuit clearly recognized the publisher’s right to receive permission fees where fair use did not apply.\textsuperscript{103} The \textit{MDS} court expressed their agreement by quoting \textit{Texaco}:

\begin{quote}
[although not conclusive, the existence of an established license fee system is highly relevant: "[I]t is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use. The vice of circular reasoning arises only if the availability of payment is conclusive against fair use."\textsuperscript{104}
\end{quote}

\textsuperscript{99} In fact, the market is lucrative enough to have bred competitors such as Carl UNCOVER.


\textsuperscript{101} \textit{Id}.

\textsuperscript{102} \textit{MDS}, 99 F.3d at 1381.

\textsuperscript{103} \textit{Id}. at 1385.

\textsuperscript{104} \textit{Id}. at 1387 (quoting \textit{Texaco}, 60 F.3d at 931).
Thus, it is fairly well established that licensing fees must be considered by the courts in examining the fourth factor and the value of the copyrighted work.

IV. CURRENT RESERVE ROOM POLICIES

A. Classroom Guidelines

The two theories under which reserve room copying may be justified are within the domain of § 107 fair use and the § 108 library exceptions. Under § 108, the library could make a single copy for each student upon request, but it does not permit the usual practice of making several copies of the material, assembling them in a folder or notebook, and placing them on reserve for the students to checkout. Thus, the only avenue for permission for traditional reserve room copying lies within § 107, but it is not clear enough to answer the question independently.

The same questions arose in 1976 when the Copyright Act was drafted and an agreement was written regarding educational copying during the Congressional hearings. A group consisting of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America, and the Association of American Publishers produced an agreement to cover educational copying from books and periodicals. The resulting guidelines are entitled the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With
Respect to Books and Periodicals” (CLASSROOM GUIDELINES). The agreement was reached on March 19, 1976, and the CLASSROOM GUIDELINES were published in the House Report that accompanied the Act. The CLASSROOM GUIDELINES did not have universal approval and were criticized by the Association of American Law Schools and the American Association of University Professors as being “too restrictive with respect to classroom situations at the university level.” In any event, their inclusion in the official legislative history clearly represents some level of Congressional approval.

The CLASSROOM GUIDELINES state that they intend to represent the minimum fair use available to the institutions. This means that the Guidelines should protect an institution from litigation and serve as a “safe harbor” in cases involving fair use copying. Under the Guidelines, multiple copies (not to exceed more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that the copying meets the following tests: brevity, spontaneity, cumulative effect test; and each copy includes a notice of copyright. An example of the brevity requirement is that for prose, the library could copy: “(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% of the work, whichever is less, but in any event a minimum of 500 words…One chart, graph, diagram, drawing, cartoon or picture per book or per

105 CLASSROOM GUIDELINES, supra note 8, at 68.
106 Id. at 68-72.
107 Id. at 72.
108 Id. at 72.
109 Id. at 69.
Without question, most documents in modern college or university reserve rooms exceed these limits. The test for spontaneity may pose an even greater problem for most libraries, since the CLASSROOM GUIDELINES require that:

(i) The copying is at the instance and inspiration of the individual teacher, and (ii) The inspiration and decision to use the work and the 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.\textsuperscript{110}

Under this guideline, it would be necessary to obtain permission for much of the materials in the reserve collection, but not all. Faculty frequently do not give the library their reserve requests until the last minute, but it would be difficult to defend an infringement charge based on the premise that all of their requests were last minute decisions. Many faculty bring their reserve lists at the beginning of the semester and there is adequate time to obtain permission. Although the CCC does not provide blanket licensure for reserves at this time,\textsuperscript{111} there are electronic permission services available.\textsuperscript{112}

The Guidelines further restrict use by stating that “copying shall not be repeated with respect to the same item by the same teacher from term to term.”\textsuperscript{113} Some libraries have strictly adhered to this requirement, but others maintain that policing these

\textsuperscript{110} Id.

\textsuperscript{111} "CCC License is currently not an option being offered by the CCC for universities, but is being offered to private organizations." <homan@MAYO.EDU>, "AAHSL: Response to Copyright Clearance Center Questionnaire," <aahsl@aamcinfo.aamc.org>, May 6, 1997.

\textsuperscript{112} CCC has a system for obtaining permission to use copyrighted materials in electronic format for electronic coursepacks, electronic reserves and distance learning called Electronic Course Content Service (ECCS). Users submit a request for permission to use a document and CCC solicits the rightsholder for permission. CCC is paid a sliding fee between $2.50 and $6.50 regardless of whether permission is granted. \textit{CCC Services – Electronic Course Content Service} (visited Feb. 20, 1999) <http://www.copyright.com/Services/ECCS.html>.

\textsuperscript{113} CLASSROOM GUIDELINES, supra note 8, at 69.
requirements is not their responsibility or is not feasible. The use of computer technology in reserve rooms may eliminate that excuse.

The CLASSROOM GUIDELINES also state that copying shall not be used to create or to replace anthologies, compilations or collective works, nor shall they substitute for the purchase of books, publishers’ reprints or periodicals. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately. Improper copying of this type has been common for many years and many faculty members place all of the materials for a course on reserve.

B. American Library Association Model Policy

Another policy was created by the American Library Association (ALA) in March of 1982. ALA’s policy was significantly more liberal than the CLASSROOM GUIDELINES. The ALA MODEL POLICY clearly stated its belief that the author’s rights under copyright law is a “limited statutory monopoly” and that the academic community must assert the public’s rights under copyright law. Furthermore, that the reserve room is an extension of the classroom and thus it is permissible to make single copies of entire articles, book

114 Id.
115 Id.
116 "[CCC] estimates that only about half of all coursepacks are developed in compliance with the law. College administrators, professors, and librarians are doing other improper copying to a lesser degree…” GOLDIE BLUMENSTYK, A License to Copy, Company Weighs Blanket Fees for Universities’ use of Copyrighted Material, CHRONICLE OF HIGHER EDUCATION, 1995, <http://www.copyright.com>.
117 The first page of the guidelines include the admonition: "If you don't use fair use, you will lose it!" ALA MODEL POLICY, supra note 9, at 1.
Although, the ALA MODEL POLICY allows multiple copies, it does impose significant restrictions:

1. The amount of material should be reasonable in relation to the total amount of material assigned for one term of a course taking into account the nature of the course, its subject matter and level, see, 17 U.S.C. § 107(1) and (3);
2. the number of copies should be reasonable in light of the number of students enrolled, the difficulty and timing of assignments, and the number of other courses which may assign the same material, see, 17 U.S.C. § 107(1) & (3);
3. the material should contain a notice of copyright, see, 17 U.S.C. § 401;
4. the effect of the photocopying of the material should not be detrimental to the market for the work. (In general, the library should own at least one copy of the work.) see, 17 U.S.C. § 107(4).

The ALA MODEL POLICY goes on to state that “[a] reasonable number of copies will in most instances be less than six, but factors such as the length or difficulty of the assignment, the number of enrolled students and the length of time allowed for completion of the assignment may permit more in unusual circumstances.” In addition, the use of copyrighted material in multiple courses or successive years normally requires advance permission from the owner of the copyright. It also requires copyright permission for the creation of an anthology that serves as basic text material for a course because this would exceed fair use under § 107. Lastly, the ALA MODEL POLICY cautions that “[i]f

118 Id. at 5.
119 Id. at 6.
120 Id.
121 Id.
122 “Creation of a collective work or anthology by photocopying a number of copyrighted articles and excerpts to be purchased and used together as the basic text for a course will in most instances require the permission of the copyrighted owners. Such photocopying is more likely to be considered as a substitute for purchase of a book and thus less likely to be deemed fair use. Id. at 7.”
you are in doubt as to whether a particular instance of photocopying is fair use in the reserve reading room, you should seek the publisher's permission.’’

C. Wisconsin Policy

Several universities responded with their own policy because they were not willing to accept the restrictions in the CLASSROOM GUIDELINES or the ALA MODEL POLICY. The University of Wisconsin adopted a particularly liberal fair use approach arguing that the copying by the faculty does not occur in quantities sufficient to have an economic effect on the publishers. Wisconsin maintains that libraries can make or accept multiple copies for reserve, and makes no statement about the types or numbers that they will allow. Wisconsin’s policy concludes that “[i]f it is ‘fair use’ to make 100 copies for the use of 100 students in a face-to-face teaching situation, it would appear equally ‘fair’ to make 5 or 10 copies to be put in a Reserve Collection for the use of those same students.” Although this logic is emotionally appealing, courts have not been receptive to the use of parallel logic in copyright cases. Commercial copiers have been unable to convince the courts that they "stand in the shoes" of the students and are entitled to the benefit of the students' fair use exceptions to copyright. It is unknown if the court would accept the idea that libraries can make multiple copies for the reserves because teachers can make multiple copies for the classroom. The Wisconsin policy also ignores

---

123 Id. at 6.
124 CREWS, supra note 11, at 86.
that the copies become the property of the student in classroom use, but this is not the case with reserve room copying where the copies remain the property of the library.

An examination of recent institutional policies about e-reserves and the posting of materials to class homepages produces a wide range of attitudes towards the issue of copyright. There is often no consistency even among different libraries at the same institution. Some schools insist that nearly everything used in the educational process is fair use. For example, an the Regents Guide to Understanding Copyright and Educational Fair Use from the University System of Georgia reveals a belief that most multimedia presentations created for educational use can be used repeatedly under fair use if access is restricted to students. In addition, the policy indicates that restricted access to an entire book chapter on e-reserves is fair use if it is used for one semester only. The policy does state that repeated use of a work that is in print requires examination of the four fair use factors before subsequent use.\textsuperscript{126}

These library policies set a background for the legal battles that may ensue, but to date no library has been sued over reserve copying. When examining the policies, it must be remembered that only the CLASSROOM GUIDELINES have received approval as a safe harbor by the publishers and by the courts. Even the parties that wrote the CLASSROOM GUIDELINES however, viewed them only as a statement of minimum fair use rights.\textsuperscript{127} The full rights afforded under the concept of fair use can only be determined during litigation in the court system.


\textsuperscript{127} “The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under section 107 of H.R. 2223.” CLASSROOM GUIDELINES, supra note 8, at 68.
V. LEGAL STATUS OF RESERVES

A. Coursepacks

Although there has been no litigation regarding the use of materials in paper or electronic reserve collections, there is significant case history involving the creation of coursepacks by both non-profit and for-profit entities. These cases are significant to the issues surrounding the use of copyrighted materials in law school reserves because they deal with the rights of the parties and the fair use exception.

Coursepacks are a set of readings provided by a professor for a given course. They frequently include journal articles, book chapters, magazine or newspaper excerpts, and the instructor’s own notes or syllabus. The primary difference between coursepacks and reserve room readings is that the coursepacks are formally packaged and the students purchase them either in lieu of a textbook or along with a published text. Reserve room readings are ostensibly less comprehensive and serve only as supplementary or complementary materials.

B. Student Copying

No one has argued that it would be a copyright violation for the students to go to the library and personally copy the materials.\(^{128}\) The use of mass-produced coursepacks is

\(^{128}\) However, the 6th Circuit left the door open in *MDS* where they stated that the issue of fair use copying by students and professors was "by no means free from doubt." *See MDS*, 99 F.3d at 1389.
less expensive, less labor intensive, less wearing on the library materials, and ecologically sounder (since coursepacks are two pages to a sheet and most copiers only permit one page per sheet). There have been several lawsuits since the 1976 Copyright Act regarding the construction of coursepacks without first obtaining permission. Where the coursepacks are assembled by commercial copiers, the courts have consistently not found fair use. As a result, permissions must be sought and fees must be paid if the copyright owner so demands.

An important case in this area of the law, Basic Books, Inc. v. Kinko’s Graphics Corp.,129 was decided in 1991 in the Southern District of New York. The court found Kinko’s production of coursepacks was not fair use. An important holding of the court in Kinko is that fairness is not determined by the ultimate destination of the copy. This means that Kinko’s could not act as a representative of the university or of the students.130

The most recent case influencing this area of copyright and libraries again concerns coursepacks produced by a commercial copier. In Princeton University Press v. Michigan Document Services, Inc.,131 the Sixth Circuit court, en banc, reinforced many of its sister courts determinations. The defense in MDS asserted that the use was fair because the students’ use would have been fair. This argument had already failed in and Texaco, and it failed here. The MDS court noted that the publishers are not challenging the students’ use. The challenge was to the “the duplication of copyrighted

130 The court refused to recognize Kinko's as a representative of the University despite a form signed by the professor to the effect that the materials to be copied were for classroom use of no more than one copy per student, constituted only a small part of the entire work, and were to be solely for nonprofit, non-commercial educational purposes in teaching. The court required the existence of a legally recognizable agency relationship before it would consider this question. Id. at 1545-46.
materials by a for-profit corporation that has decided to maximize its profits and give itself a competitive edge over other copy shops by declining to pay the royalties requested by the holders of the copyrights.”

Perhaps of greater relevance to nonprofit users, the court goes on to say that “if the fairness of making copies depends on what the ultimate consumer does with the copies, it is hard to see how the manufacture of a pirated edition of any copyrighted work of scholarship could ever be an unfair use.” This position invalidates any defense based on the idea that the final user was entitled under fair use.

C. The Lack of Legal Precedent

The first suit against a commercial copying center was filed in 1980, Basic Books, Inc. v. Gnomon Corp, but it settled before trial. The defendant agreed in a consent decree to familiarize itself with the CLASSROOM GUIDELINES, to stop making multiple copies unless they were made in full compliance with the Guidelines, to cease soliciting the lists of materials being used at the university, and not to advertise the availability of any services that would violate the judgment.

Although it lacks legal precedent, Addison-Wesley Publishing Co. v New York University is important to any discussion of e-reserves. In 1983, nine major publishers sued New York University (NYU), ten of its professors, and a commercial copy center

---

131 See MDS, 99 F.3d at 1387.
132 Id. at 1385.
133 Id. at 1386 n.2.
135 See PATRY, supra note 33, at 219, 220.
asserting that they had made regular use of substantial portions of copyrighted materials and used them to assemble unauthorized anthologies that were sold to students. The case resulted in a settlement requiring NYU to seek permission for any materials not eligible under the Guidelines in the future.\textsuperscript{137} In addition, NYU agreed to adopt a copying policy based on the \textsc{Classroom Guidelines}, publicize their policies regularly, and take disciplinary action against anyone found to violate the policy.

Regardless of \textit{Kinko’s} prominence in any discussion about coursepacks and copyright, it must be placed in perspective. It must be remembered that the case was settled after being heard in the federal district court and was never appealed. But, similarly to \textit{Addison-Wesley}, the settlement and its effects are worthy of note. \textit{Kinko’s} agreed to comply with the \textsc{Classroom Guidelines} and use the CCC.\textsuperscript{138} The decision caused many academic institutions to reexamine their policies and begin to solicit permissions and pay royalties when they reproduce coursepacks for faculty. It is interesting that so many colleges and universities chose to treat themselves as if they are commercial photocopy services.

\textbf{D. For-profit v. Not-for-profit}

The first case involving non-commercial copying for education following the

\textsuperscript{136} Addison-Wesley Publishing Co. v. New York University, No. 82-8333 (S.D. N.Y. filed Dec. 14, 1982).

\textsuperscript{137} The settlement agreement with NYU is reproduced in \textsc{Corporate Copyright \\& Information Practices} 167-78 (1983). The copy center involved agreed to require certification from customers that they have written permission or authorization from the copyright owner, or that the copying is being made in compliance with the \textsc{Classroom Guidelines}.

\textsuperscript{138} Kinko's paid statutory damages of $510,000, the publishers' attorney fees of $1,365,000, and agreed to seek permission when copying more than one page of any copyrighted work in an anthology or
passing of the 1976 Act was Marcus v. Rowley where the court found that it was not a sufficient defense to be copying the material without profit. In Marcus, a teacher in the San Diego Unified School District copied half of a book on cake decoration that she had bought from the author, added some of her own materials, and gave the resulting product away to classes that she was teaching. The original author had been selling the book to the students in her adult education classes at a profit of one dollar per copy. The court examined all of the factors in § 107 and discussed the CLASSROOM GUIDELINES before deciding that not making a profit was an insufficient defense for both the School District and the teacher.

It is also important to note how the court dealt with the for-profit nature of Texaco. The lower court had placed great emphasis upon the fact that this was a for-profit corporation, but the circuit court clearly stated that this had been overemphasized. Because of Acuff-Rose, the court was bound to say for-profit does not answer the question. If the court can decrease the influence of for-profit status to the defendant’s advantage in Texaco, nonprofit status may have correspondingly less weight in future litigation.


139 Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983).

140 Id. at 1175.

141 "Since many, if not most, secondary users seek at least some measure of commercial gain from their use, unduly emphasizing the commercial motivation of a copier will lead to an overly restrictive view of fair use." American Geophysical Union v. Texaco, Inc.,802 F. Supp. 1 (S.D.N.Y. 1992), 37 F.3d 881, 921 (2d Cir. 1994), reh’g en banc denied, 60 F.3d 913 (2d Cir. 1995), cert. dismissed, 516 U.S. 1005 (1995).
E. The Archiving Problem

Although not a case involving an educational institution, Texaco has great significance to any discussion of fair use in a research context. The Second Circuit found unfair infringement of copyright where a researcher at Texaco made single photocopies of eight articles from journals to which Texaco’s library had subscriptions. The researcher placed these articles in a personal file for use with his ongoing research at Texaco. The court provided two primary bases for the decision against Texaco.

The first factor was the court’s finding that the researcher was creating an archive of the articles consisting of unpermitted photocopies. The archival use of the articles approached the creation of a new work in the court’s mind. Holding on archival use can be analogized to reserve room files even though Texaco is a for-profit company. If a file folder of individually chosen research articles approaches the standing of a new work, then a carefully chosen set of articles on a common subject certainly might be viewed as a new work. In the case of reserve rooms, this is aggravated by the fact that some faculty members use these files as a replacement for a text or as a testing ground for a future text.

F. Entitlement to Licensing Income

The second major factor in Texaco was the decision of the court that permission

---

142 "‘[A]rchival’--i.e., done for the primary purpose of providing numerous Texaco scientists (for whom Chickering served as an example) each with his or her own personal copy of each article without Texaco's having to purchase another original journal." Id. at 919-920. The court did allow that had the original been owned by the scientist and the copies intended for laboratory use, there would have been a better argument. Id. at 920 n. 6.
fees are a valid entitlement of the copyright holder. The court felt that existence of the CCC now makes it possible for users “easily” to pay for licenses to copy. The court held that these potential licensing revenues could be considered as part of the fair use analysis in determining whether the copying impacts the copyright holder financially. Under this analysis, it is not enough to show that the copying will not influence sales of the book or journal; the defendant must also show that there is no significant effect upon licensing income. By analogy, it is easy to see that the court may require that license fees be paid for digital reserve room materials because of their effect upon publication and licensing profits. Giving the public unlimited access to these materials may be competition to the sales of the journal, in paper and full text versions, and to the permission fees that the publisher is entitled to under Texaco.

**G. Market harm**

Texaco’s stance that there can be harm where the defendant makes copies and ignores an established fee system is reinforced in MDS. The court allows this concept

---

143 ”[I]t is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis.” *Id.* at 930.

144 “In two ways, Congress has impliedly suggested that the law should recognize licensing fees for photocopying as part of the ‘potential market for or value of’ journal articles. First, § 108 of the Copyright Act narrowly circumscribes the conditions under which libraries are permitted to make copies of copyrighted works… Though this section states that it does not in any way affect the right of fair use…, the very fact that Congress restricted the rights of libraries to make copies implicitly suggests that Congress views journal publishers as possessing the right to restrict photocopying, or at least the right to demand a licensing royalty from nonpublic institutions that engage in photocopying. Second, Congress apparently prompted the development of CCC by suggesting that an efficient mechanism be established to license photocopying …It is difficult to understand why Congress would recommend establishing such a mechanism if it did not believe that fees for photocopying should be legally recognized as part of the potential market for journal articles.” *Id.* at 899

145 *Id.* at 931.

146 See *supra* note 127. “The potential uses of the copyrighted works at issue in the case before us clearly include the selling of permission to reproduce portions of the works for inclusion in coursepacks—and the
on the basis of the Supreme Court’s decision in Harper & Row stating that harm can exist in the absence of effects on book sales.\textsuperscript{147} Thus it is not a sufficient defense to allege that income from book or journal sales is uninterrupted.

The \textit{MDS} court invokes a Supreme Court test from \textit{Sony} for determining market harm: “to negate fair use, one need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work.”\textsuperscript{148} The plaintiffs in \textit{MDS} had been collecting nearly $500,000 in permission fees from other sources. On this basis, the \textit{MDS} court held that interference with this stream of money would be a substantial harm under the statute. Consequently, the court decided that a fair use analysis must include an examination of the loss of permission fees. This must be considered in the handling of permissions for e-reserves. If the structure exists to collect the fees and there is a history of the publisher receiving such income, it is likely that the court will say that the publisher is entitled to this income.

\textbf{H. What is the Entire Work?}

The court in \textit{Texaco} indicates that, at least in the Second Circuit, each article in a journal is a separate copyrighted work.\textsuperscript{149} It is not necessary to copy the entire journal, or even several articles to violate fair use. Copying one article is sufficient for a finding of likelihood that publishers actually will license such reproduction is a demonstrated fact. A licensing market already exists here, as it did not in a case on which the plaintiffs rely, \textit{Williams & Wilkins Co. v. United States.” MDS, 99 F.3d at 1388.}  

\textsuperscript{149} Id. at 1387.
copyright infringement. This is significant because most reserve files are primarily made up of journal articles.

VI. CONFU

A. New Beginnings

There are attempts to resolve some of the issues surrounding e-reserves and digital copying without litigation. Beginning in November 1993, the Working Group on Intellectual Property Rights in the Electronic Environment (the Working Group) along with the Information Infrastructure Task Force (IITF) sought to have copyright stakeholders negotiate guidelines for the fair use of electronic materials in nonprofit educational contexts.150 Before the first meeting of the resulting Conference on Fair Use (CONFU) took place, the Working Group released the preliminary draft of its report (the GREEN PAPER) on July 7, 1994, and expressed within it a belief that it would be difficult and inappropriate to apply the specific language prepared for print media to the new digital works and online services.151 The GREEN PAPER appeared to be calling for a reexamination of fair use and many parties rejected it as overreaching its mandate. The first CONFU meeting was held in September 1994 immediately before the GREEN PAPER

149 See Texaco, 37 F.3d at 926.
151 Id. at 133.
was published in its final WHITE PAPER form. At CONFU, working groups were established on Intellectual Property Rights in the Electronic Environment, Distance Learning, Multimedia, Electronic Reserves, Interlibrary Loan, and Image Collections.152

The e-reserves group included representatives of the copyright holders, the educational institutions, and the library community.153 The committee discussed the issues of fair use involved in digital reserves in nonprofit educational institutions, that is storage, access, display, and downloading. They met with difficulties in their negotiations and reached an impasse in the fall of 1995.154 Some members of the committee continued and prepared a draft proposal in March 1996,155 but in November 1996, the decision was made not to submit these guidelines for consideration as a proposal because of substantial conflicts between the parties supporting the measure156 and those opposed.157 It was


153 "The working group met under the leadership of Kenneth D. Crews, Director, Copyright Management Center, Indiana University-Purdue University at Indianapolis, representing the Indiana Partnership for Statewide Education, Laura N. Gasaway, Director of the Law Library at the University of North Carolina, representing the Association of American Universities, Douglas Bennett of the American Council of Learned Societies, Carol Risher, Vice President of Copyright and New Technology, Association of American Publishers, and Mary Jackson of the Association of Research Libraries" BRUCE A. LEHMAN, THE CONFERENCE ON FAIR USE, AN INTERIM REPORT TO THE COMMISSION 15 (Dec. 1996).

154 Id. At 36.


157 As of November 25, 1996, the following organizations are on record as opposed to the proposed Electronic Reserve Guidelines: American Society of Composers, Authors & Publishers, American Society of Journalists and Authors, American Society of Media Photographers, Association of American
suggested that the guidelines be included as a “statement of fact,” but that suggestion was defeated.\textsuperscript{158}

It is revealing that there are members of the publishing and the library community in both the opposition and supporting groups. A major objection by library and educational representatives was that the commercial publishing community would not guarantee that adherence to the proposed guidelines would be a guarantee against future litigation. Although the \textsc{Classroom Guidelines} have served as a “safe harbor” for the libraries in the past, those guidelines were extremely restrictive. The Wisconsin guidelines and the \textsc{ALA Model Policy} which quickly followed the \textsc{Classroom Guidelines}, and which many libraries claim to follow, do not offer a safe harbor.

Among the objections by the Association of Research Libraries (ARL) to the proposed guidelines were the following concerns:

1. Access restricted to students registered in the class (e.g., narrowing current access that serves all students in the institution).
2. Very restrictive technological limits on access to materials (e.g., limiting access from dedicated workstations in the library).
3. Strict limitations on the proportion of course materials included (e.g., not all course materials assigned for reserve can be included).
4. Strict limitations on the type of material (e.g., supplemental readings only, required readings can not be included).
5. Documents cannot be used in multiple courses, or in successive years without receiving permission of the copyright holder.\textsuperscript{159}


\textsuperscript{159} \textit{Id.}
The ARL’s objections represent a desire to liberalize the existing “safe harbor.” For example, the CLASSROOM GUIDELINES restrictions regarding brevity and cumulative effect are stricter than these proposed agreements. Both the CLASSROOM GUIDELINES and the ALA MODEL POLICY clearly prohibit repeated use without permission. 160 The ALA MODEL POLICY also controlled the portion of course materials by focusing on the level of the course, its subject matter and what else was assigned. 161

The function of the CLASSROOM GUIDELINES was only to establish a safe harbor, the text specifically states that it is not intended to represent the maximum standards of educational fair use. 162 Perhaps part of the problem with the new guidelines is that ARL and other participants sought both a safe harbor and higher limits. Publisher objections were primarily that: (1) the e-reserves guidelines permitted the reproduction of entire articles and book chapters and they believed it should be restricted to the word limitations contained in the CLASSROOM GUIDELINES and (2) they were based on the ALA MODEL POLICY for photocopy reserves to which they never agreed.

B. Return to the 1976 Classroom Guidelines

As a result of CONFU’s inability to establish guidelines, the only existing safe

160 "[R]epetitive copying: The classroom or reserve use of photocopied materials in multiple courses or successive years will normally require advance permission from the owner of the copyright.” ALA MODEL POLICY supra note 9, at 6.

161 Id.

162 "The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under section 107 of H.R. 2223 [this section]. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.” CLASSROOM GUIDELINES, supra note 8, at 68.
harbor for e-reserves lies is the 1976 CLASSROOM GUIDELINES. Both § 107 fair use and
the CLASSROOM GUIDELINES are technology neutral, so there is no real basis for denying
their application. It has also been suggested that since the 1982 ALA MODEL POLICY has
never been challenged in court, there may be an inference of “tacit acceptance” from the
copyright community. Many universities have written policies regarding copyright
issues and the reserve room, and some of these policies are based on the CLASSROOM
GUIDELINES or on the ALA MODEL POLICY. There is probably a degree of safety under
either of these guidelines, although it must be noted that past failure by the copyright
holders to enforce their legal rights does not preclude present or future enforcement of
those rights. The new electronic reserve guidelines produced as a result of CONFU
may best represent the common ground between publishers and academics. It is
conceivable that a court could recognize them as a good faith attempt at following the
current law.

Under the CLASSROOM GUIDELINES and the ALA MODEL POLICY, the university
can place multiple copies of a document on reserve. It is likely that the courts would
accept the “amount and substantiality” standards from the ALA MODEL POLICY. If a
request calls for one copy to be placed on reserve, the library may copy an entire article,
or an entire chapter from a book, or an entire poem. Nonetheless, it is unlikely that

163 GASAWAY, supra note 19, at 83.
164 CREWS, supra note 11, at 84-92.
165 “Mere delay on the part of a copyright owner in pursuing an infringement claim will not create a bar
on the ground of laches unless such delay is inexcusable and prejudicial to the defendant by reason of his
reliance or change of position as a result of such delay…Moreover, delay in pursuing a claim may not be a
bar against one who knew of plaintiff’s asserted rights, or as against a deliberate infringer.” MELVILLE B.
NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 12.06, at 12-115 (1994) [hereinafter NIMMER].
166 Id.
anyone will convince a court that a networked digital copy available to multiple simultaneous users is “one copy.” Since simultaneous access is an important quality of e-reserves, it is necessary to look to the standards for multiple copies.

The ALA MODEL POLICY states that “the effect of photocopying the material should not be detrimental to the market for the work.” The library must control access to the digital copy of the material if it competes with the sale of the print or digital copy, or if it deprives the copyright holder of permission revenues. Providing access in excess of that needed for the specific class may create liability. The ultimate question is how tightly must access be restricted to satisfy this requirement. Different schools have taken different approaches to restricting access to digital reserves.

There have been court settlements of cases at NYU and at the University of Texas regarding coursepacks that resulted in agreements that the universities would observe the CLASSROOM GUIDELINES. This means that they will pay permission fees for materials included in coursepacks. Future litigation about e-reserves is likely to recognize that professors frequently use both coursepacks and reserve room files in the place of a text. Thus, both affect the marketplace for the sale of textbooks. In addition, the decisions in Texaco and MDS clearly signal that permission fees are a valid form of income and must be included in § 107 fair use analysis. It is obvious that the refusal to pay the permission fee for digital use decreases the profits derived from permission fees.

167 Id.
168 CREWS, supra note 11, at 73.
169 An appeal to the Supreme Court was filed regarding the Sixth Circuit's decision in MDS. The Court refused certiorari on March 31, 1997. This may be viewed as tacit approval of the Sixth Circuit's decision, although it still leaves open the question of the application of MDS to the nonprofit environment. Michigan Document Services, Inc. v. Princeton University Press, 117 S.Ct. 1336 (1997).
VII. MARKET REALITIES

A. Publishers’ and Educators’ Concerns

Copyright holders have a valid concern about the risk of students taking digital material and posting it to the Internet. This risk exists regardless of whether digital copies originate in library reserves or in full-text collections. In addition, scanners have become common and easy to use, so problems with digital use are inevitable.

Since the inception of the Internet, there has been a progressive increase in the misuse of trademarks and copyrighted materials. Many of the trademark and copyright holders have demonstrated that the means to enforce their rights do exist. As the Internet grows, it will become necessary to develop means of policing legal rights on the Internet. Copyright holders may be better served putting an effort into resolving those issues instead of entering a fray with the academic community.

Likewise, the academic community needs to recognize that technology has once again brought an end to the world as they knew it. In the past, there was no easy means of detecting violations of the CLASSROOM GUIDELINES. The nature of the argument over the new guidelines may be an indication of how well the CLASSROOM GUIDELINES were understood and enforced. A number of universities have maintained that copyright in the reserve collection is the responsibility of the faculty member and have made no attempt to monitor fair use. In coming years, it will be easier to detect violations in electronic

170 See Broadcast Music Inc. (BMI) is using a robot program to monitor how its music is used on the Internet, as the licensing group steps up its efforts to regulate copyright infringement in cyberspace. BMI's 'Robot' Scans the Web For Copyright Infringers, Wall St. J., Oct. 16, 1997, at B6. Also See Where Playboy Enterprises Inc. won a $3.74 million judgment against a California Website operator who put
reserves and there will be a greater impetus to enforce copyrights against violations.

Both publishers and universities need to recognize that their interests are heavily intertwined. The use of e-reserves impacts the market value of a copyrighted work. That value, as stated in prior court decisions, clearly includes permission income. Outside of a limited area, both the Classroom Guidelines and the ALA Model Policy require that permission be obtained for works in the reserve collection. The fact that the right has not been enforced, does not make it any less of a right. The failed CONFU guidelines still required permission to use materials following the first fair use.

Next, the related problem of digital copying must be considered. Both libraries and many patrons prefer full text journals. The materials require no space, less maintenance, and in many systems they can be searched from the comforts of home, but no one can deny the likelihood of some of the materials being abused. It is in the best interest of both communities to protect the rights of the copyright holder. If there is no copyright protection, there will be no profit, no publishers, and no materials to digitize.

For the time being there is a workable legal basis for handling e-reserves. It is possible to use the current limitations on fair use and the existing reserve room guidelines. It must be recognized that this will be a more stringent regimen than many libraries currently use. It can be debated whether that means the law is becoming stricter or the law is finally being enforced.

**B. Existing Electronic Reserves**

In order to provide the best service to the university community and minimize
exposure to litigation, libraries must decide exactly how they will handle many questions including: How wide an access will be allowed? What materials will be placed on reserve? What search capabilities will be provided? When will permission be sought from the copyright holder? What restrictions will be implemented? And how will royalty payments be handled?

Libraries are answering these questions in different ways. In some libraries, all students may use the reserves, but only in the reserve room. At Duke University, the academic library has begun to provide access to e-reserves over the Internet, but the use is carefully restricted to the Duke University community.\textsuperscript{171} The Duke University law library does not have electronic reserves per se, but class home pages provide links to many of the required readings in digital format. Access to these readings is password protected.\textsuperscript{172} Northwestern University has also begun to allow Internet access to e-reserves, but the students must have course specific information, such as the instructors name, in order to access the files.\textsuperscript{173} Most schools, for example the University of Texas, limit access to e-reserves to students, faculty and administrative staff.\textsuperscript{174} There have been a number of other suggestions for restricting access including use of a password or student identification number, a password system for each class, or limiting access to workstations or networks only available to students, staff and faculty. In addition, the materials should

\textsuperscript{171} SOETE, supra note 13, at 16.


\textsuperscript{173} Id.

\textsuperscript{174} University of Texas Office of General Counsel, Fair Use of Copyrighted Materials (Feb. 18, 1997) <http://www.utsystem.edu/IntellectualProperty/copypol2.htm#reserve>.
not be accessible from the usual online catalogue system to discourage use by unauthorized patrons.

The choice of materials placed in the reserves can vary with the school’s willingness to pay permission fees. Most libraries say that they observe the ALA MODEL POLICY or the CLASSROOM GUIDELINES, but that they do not pay permission fees on many items. This frequently means that they are placing the onus on the faculty and the faculty is ignoring the issue. Policies regarding licensing fees differ in each institution. Some libraries are paying fees for everything on the e-reserve system, some only include documents for which free permissions can be obtained, and some are insisting that everything in their e-reserves collection is fair use, regardless of the size of the file copied or the number of semesters the material is used.

In order to facilitate the permissions process, the library at San Diego State University created a partnership with the campus bookstore for securing copyright clearances. The bookstore already had a system in place because of their involvement in producing student coursepacks. Many schools have stated clearly that at this time, they are not differentiating between paper and electronic reserve materials.\(^{175}\) At Marist College, faculty members post their own materials, but the library regularly samples submissions to ensure copyright compliance.\(^{176}\)


\(^{176}\) SOETE, supra at note 13, at 19.
VII. CONCLUSION

The future of academic law libraries includes electronics reserves whether they are on a library page or a class homepage. The convenience for students and professors alike are too great to ignore. Yet, with these advantages has come the cusp of a problem that has been delayed for many years. Libraries have not had to pay permission fees to which copyright holders are legally entitled. This was permitted by the copyright holders because the payment and permission system was cumbersome for both the library and the copyright holder. Consequently, the value of the permission fees have traditionally been built into the price of the materials. With the advent of computer technology, it is easier to pay, monitor, and collect the permission fees. More importantly, the potential problems associated with digital text on the Internet has made this issue important to publishers and authors. Libraries are going to have to pay permission fees in the future, for both their print and electronic reserve collections except where clearly excused by fair use.

The existing law will support a viable compromise if the environment can become less adversarial. If an acceptable compromise is not reached, a resolution unacceptable to both parties may be reached in Congress. In November, 1998, the Digital Millennium Copyright Act \(^{177}\) was signed into law with an avowed intent of adapting copyright law to the digital age. Among other changes, this § 512(c) limits the copyright liability of an Internet service provider (ISP) for infringement by a user of their service. The ISP can escape monetary liability if they (1) have no actual knowledge of the infringement, (2) did not have information that made the infringement apparent, and (3) expeditiously removes

the infringing material upon gaining knowledge of its existence. This is significant because many educational institutions provide ISP services to their students and faculty. It is likely that the court also will apply the for-profit exceptions to non-profit entities.

Another section of the act, § 512(e) provides additional restrictions on the liability of nonprofit institutions. The section defines what an institution is not liable for, thus inferring for what the institution is liable. Educators will not be happy with the results. Copyright infringement by a faculty member or graduate student who is an employee of the institution shall not be imputed to the institution if: (1) the infringing materials are not required or recommended for instructional purposes for a course taught at the institution within the preceding three years by the individual; (2) the institution has not received more than two notifications of infringement by said individual; and (3) the institution provides all uses with accurate informational instructions regarding copyright. As a result, an institution is not automatically liable for copyright infringements by faculty. On the other hand, if the material is for classroom purposes, the institution will not escape on the claim of ignorance. The school will be held liable whether the material is in formal e-reserves, class homepages, or a professor's private home page. Accepting the need to supervise the use of e-reserves is the best available defense. Many schools accept materials for reserve collections, both paper and electronic, if the are accompanied by a statement that permission has been obtained. It is unlikely that such a statement will protect the institution from prosecution by the copyright holder.

It has been suggested that publishers will be unwilling to pursue litigation against

178 Id. at § 512(c).
179 Id. at § 512(e).
educational institutions because damage awards are likely to be small.\textsuperscript{180} However, the history of copyright litigation involving coursepacks, notably the case against New York University, does not demonstrate this reluctance.\textsuperscript{181} Coursepack litigation has been initiated defensively, regardless of the ability of the parties to pay a large judgement.\textsuperscript{182} 

The nature of the market is undergoing a change regarding copyright and fair use. Both sides of the fair use debate need to step back from the argument for a time, consider each other's viewpoint, and then create a system that will adapt to the new technologies together. There are valid arguments on both sides, and the parties need to remember that they need each other to survive. Moreover, it would be better for both sides to resolve the issues without lengthy and expensive litigation. If law libraries choose not to work with e-reserves, they will relinquish an important service for both the students and the law school as a whole.


\textsuperscript{181} Although, it seems likely that any litigation will not be against a public institution in order to avoid concurrent arguments regarding an Eleventh Amendment exemption to federal prosecution.

\textsuperscript{182} For example, Michigan Document Service is no longer in business as a result of losing its case.