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Pursuing Fair Use, Law Libraries, and Electronic Reserves*

Steven J. Melamut**

Within the last few years, libraries have begun to introduce electronic reserve services. Whether the materials are in a formal electronic reserve collection or mounted on faculty home pages, the same legal concerns exist. Mr. Melamut examines the advantages and disadvantages of electronic reserves, and discusses their copyright implications. He examines prior cases about coursepacks and considers their likely influence on possible reserve room litigation. He also discusses reserve room policies, as well as where the law in this area is likely to move and what response is necessary by law libraries.

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** Reference Librarian/Electronic Services, University of North Carolina at Chapel Hill Law Library.

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Introduction

Reserves in Academic Law Libraries

¶1 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.[1] 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. They also help faculty members 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 number of the works is actually assigned. In addition, some university faculty use reserves to avoid imposing the expense of a coursepack upon their students.[2]

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

1. *See* Scott Seaman, *Copyright and Fair Use in an Electronic Reserves System*, 7 J. INTERLIBRARY LOAN, DOCUMENT DELIVERY & INFO. SUPPLY 19, 19 (1996).
2. *See, e.g.*, Harris Hwang, *University Pushes Copyright Limits with Online Reserves*, DUKE UNIV. CHRONICLE, Sept. 15, 1995, at 5, 5. ("'Selling a coursepack 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 coursepacks. Under the 'spontaneity' and 'fair use' provisions of copyright law, students can avoid paying these additional copyright royalties.")

readings are in a single place and restricted use guarantees that everyone has access. The checkout 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.

¶3 In the past, reserve collections have been less prominent in law libraries than in 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 home pages to provide links to required class materials that function in the same fashion as the reserve collections.[3]

Disadvantages of Traditional Reserves

¶4 Libraries have encountered problems with the traditional photocopied paper reserve system. Reserve collections are time-consuming and labor-intensive for the staff. Despite encouragement to do otherwise, faculty may submit more than half of their reserve reading lists after the first day of class.[4] 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.[5] Despite the added controls of the reserve system, texts still suffer theft, mutilation, or damage.

¶5 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 out the materials, students may have to wait 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 percent of the students in a class actually retrieve the materials from reserve collections.[6]

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3. *See, e.g.*, Duke Univ. School of Law, *Curriculum: Course Home Pages* (visited Feb. 19, 2000) <http://www.law.duke.edu/curriculum/courseHomepagesFrame.html> (The public can view the list of publications on this index of class home pages, but access to the documents themselves is restricted by password.).
4. *See* Halcyon R. Enssle, *Reserve Online: Bringing Reserve into the Electronic Age*, INFO. TECHNOLOGY & LIBR., Sept. 1994, at 197, 197.
5. *See id.*
6. Laura N. Gasaway, *Library Reserve Collections: From Paper to Electronic Collections*, *in* GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION AND SOCIETY 125 (Laura N. Gasaway ed., 1997).

How many of the students actually read the material retrieved is unknown, but presumably, it is less than 40 percent.

Copyright Issues in Traditional Reserves

¶6 The copyright issues involved in the traditional paper reserve system, which relies heavily on photocopies of copyrighted works, remain largely unresolved. There is the question of whose responsibility copyright really is: the law library staff or the faculty members. Some institutions have policies in place that assign responsibility for securing copyright permissions to the faculty. However, if significant violations were found, and the case was litigated, the plaintiff would sue the faculty member, the library, and the institution in order to reach the parties with the deepest pockets.[7] One thing is clear, the institution itself is responsible, and where it places responsibility for obtaining permission for reserves is largely an administrative matter.

¶7 There is a "safe harbor" for reserve room copying contained in the so-called *Classroom Guidelines* that are part of the legislative history of the 1976 Copyright Act,[8] but it is largely unused and is held to be too restrictive by most of the library community. Many schools follow the model policy on photocopying[9] drafted by the American Library Association in 1982, despite the fact that its provisions were not negotiated by the interested parties, have not been tested in court, and are not viewed by many experts as a "safe harbor."[10] Interestingly, the ALA no longer supports this policy and has removed easy access to it from the association's Web site.[11]

¶8 Copyright royalties have become an issue in recent years as convenient means for tracking use and payment have become available. Consequently, the

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7. *See* Georgia Harper (June 19, 1998), *Why Do Libraries Do Electronic Reserves?* ARL-E-RESERVES DISCUSSION LIST. Available e-mail: arl-ereserves@arl.org. 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."
8. *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions*, *in* H. R. REP. NO. 94-1476, at 68 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681 [hereinafter *Classroom Guidelines*]. Although the words "safe harbor" cannot be found within this report, it is universally acknowledged as describing practices that are safe from successful litigation. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (E)(3)(a) (1999).
9. *See* AMERICAN LIBRARY ASS'N, MODEL POLICY CONCERNING COLLEGE AND UNIVERSITY PHOTOCOPYING FOR CLASSROOM, RESEARCH AND LIBRARY RESERVE USE (1982), *reprinted in* 4 COLL. & RES. LIBR. NEWS 127 (1982) [hereinafter ALA MODEL POLICY].
10. *See* KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION 51, 121 (1993).
11. A search of the ALA Web site reveals *ALA Standards and Guidelines* (visited Feb. 27, 1999) <http://www.ala.org/work/standards.html>, which makes no mention of the ALA Model Policy. It has

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 seems certain that they plan to do so in the future.

Electronic Reserves

¶9 Electronic 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 at all if the e-reserves are available through the Internet. Another advantage is that these materials can be "duplicated" with a computer and printer, so copiers are not required and there is no degradation to the quality of the copies. Users are no longer bound by the library's hours of operation, since it does not matter whether the library is actually open if 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.

¶10 With e-reserves, there is no longer any risk of physical damage, theft, or mutilation of 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 problems attendant with 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 determine 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.)

¶11 Electronic reserve materials usually are scanned into digital files by the library, the instructor, or another party. The works are then 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 labor-intensive, but libraries are developing systems to overcome this problem.[12] Modern computers also provide

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been relegated to a hard-to-find Gopher site at American Libr. Ass'n, *Model Policy Concerning College and University Photocopying* (visited Feb. 21, 1999) <gopher://ala1.ala.org/00/alagophix/50403001.document>. However, the *ALA Model Policy* can be easily found on the Internet at Coalition for Networked Info., *Information Policies: ALA* (visited Feb. 27, 1999) <www.cni.org/docs/infopols/ALA.html#mpup>.

12. *See* GEORGE J. SOETE, TRANSFORMING LIBRARIES ISSUES AND INNOVATIONS IN ELECTRONIC RESERVES 15 (1996).

easy access to nontext files, audio files, and multimedia presentations consisting of graphics, text, and sound.[13]

¶12 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 copyright considerations, 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 its reserves or, alternatively, may provide a link to the provider's database for e- reserves.[14] The answers to many of these questions are contractual and are found in the terms of the license. Some e-reserve software does not permit a link, and therefore copying into the reserve system would be required if the work were to be included.

¶13 Many of the materials needed for legal education are available online from the major 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.[15] The software creates an HTML (HyperText Markup Language) link that can be inserted 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 prewritten 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 its product. Using this software eliminates the copyright issue for cases, statutes, law journals, and other materials available in these databases.

Constitutional and Statutory Basis of Copyright

Constitutional Basis

¶14 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

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13. New technologies such as "streaming video" make these materials available over the Internet to anyone with a computer powerful enough to handle the software.
14. *See* Cheryl Bower (June 19, 1998), *Electronic Reserves Link to Commercial Database*, ARL-E-Reserves Discussion List. Available e-mail: arl-ereserves@arl.org ("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."); Interview with Patricia L. Thibodeau, Associate Director, Duke University Medical Center Library, in Chapel Hill, N.C. (Jan. 31, 1999). OVID Technologies, Inc. has given verbal permission to the Duke University Medical Center Library to provide links to its full-text database from the library's electronic reserves.
15. *See Lexis Link Builder* (visited Feb. 21, 1999) <http://lawschool.lexis.com/research/linking/index.html>; *CiteLink* (visited Feb. 21, 1999) <http://www.westgroup.com/products/software/legaltools/citelink.htm>.

respective Writings and Discoveries."[16] There is an inherent tension present here between ensuring access and fostering creativity by securing a limited monopoly.

¶15 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]

¶16 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, the work 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.[18]

¶17 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."[19]

¶18 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 rights and limitations of copyright holders. It is both the basis of a charge of infringement and a defense thereto.[20]

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16. U.S. CONST. art. I, § 8, cl. 8.
17. *See, e.g.,* Goldstein v. California, 412 U.S. 201 (1954) (purpose of copyright is "to encourage people to devote themselves to intellectual and artistic creation"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability to literature, music, and the other arts."); 1 NIMMER & NIMMER, *supra* note 8, § 1.03[A] ("Thus, the authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits through the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities."); Sony Corp. v. Universal Studios, Inc., 464 U.S. 417, 429 (1984) ("It is intended to motivate the creative activity of authors and inventors by the provision of special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").
18. *See, e.g.,* 1 NIMMER & NIMMER, *supra* note 8, § 1.03[A] (1999) ("Nevertheless there is nothing to indicate that the Framers in recognizing copyright intended any higher standard of creation in terms of serving the public interest than that required for other forms of personal property. We may assume that the men who wrote the Constitution regarded the system of private property *per se* as in the public interest. In according a property status to copyright, they merely extended a recognition of this public interest into a new sector.").
19. ROBERT A. GORMAN, COPYRIGHT LAW 1 (1991).
20. *See* Laura N. Gasaway, *Universities, Libraries and Fair Use in the Digital Age, in* CURRENT LEGAL ISSUES IN PUBLISHING 69, 72 (A. Bruce Strauch ed., 1996).

The Subject Matter of Copyright (Section 102)

¶19 Section 102 of the Copyright Act of 1976 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."[21] The Act is "technology neutral" because it is not limited to the technology in existence at the time of its writing.[22] Photographs, photocopies, and digital copies are all included within its scope. The Act states that "[w]orks 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.[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.

¶20 Although it used to be safe to reproduce materials that did not contain a notice of copyright, protection no longer requires that a work contain the three-element notice: (1) the word "copyright," the abbreviation "copr.," or the copyright symbol (©); (2) the date of first publication; and (3) the name of the copyright holder.[24] As part of the United States' adherence to the Berne Convention,[25] copyright is now accorded to all fixed works at the time of creation.[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, some materials such as United States gov-

21. 17 U.S.C. § 102(a) (1994).
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.
23. *Id.* § 102(a).
24. Although this notice is no longer required, there remain legal advantages to including it, such as the availability of certain damages during infringement litigation. *See id.* § 402.
25. *See id.* § 104(c).
26. *See id.* § 302(a).

ernment documents that are not protected under statute,[27] and works that were published without notice before 1978.

¶21 Copyright law gives the owner of the copyright a number of exclusive rights. The copyright holder is allowed:

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;
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[28]

An author may transfer one or more of these rights or retain them all.

¶22 These rights clearly affect all of the functions of the reserve collection, whether the system is based on the use of print or electronic materials. With print, it is often necessary to reproduce the materials and place them in folders for loaning to students. This constitutes both copying and distribution, rights accorded exclusively to the copyright holder. With an electronic system, 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.

Fair Use (Section 107)

¶23 There could be no reserve collections at all without the permission of the authors if the Copyright Act stopped at section 106, but the law provides some important exceptions to the rights of the copyright holder.[29] The most important of these is fair use,[30] under which it is not an infringement to make a copy for purposes of teaching, including multiple copies for classroom use; scholarship; or research. The act instructs the courts to consider four factors when determining whether a use qualifies as fair under this section:

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27. *See id.* § 105.
28. *Id.* § 106.
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 121." *Id.*
30. *Id.* § 107.

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.[31]

¶24 Case history has not demonstrated a "bright line" where fair use begins and ends; the courts must analyze all of the factors.[32] No one factor alone can create or destroy the existence of fair use. 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 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.

Purpose and Character of the Use

¶25 The first fair use factor deals with why the copy was created, including 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 in *Sony Corp. of America, Inc. v. Universal City Studios, Inc*. stated that there was a presumption of unfair exploitation associated with commercial use.[35] 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 its earlier finding, stating that it was not really intended to be a "bright line" test, that nonprofit status was only one factor whose weight will vary with the facts.[36]

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31. *Id.*
32. "In determining whether the use made of a work in any particular case is a fair use the factors to be considered *shall include* [the four factors]." *See id.* (emphasis added). *See also* Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984) (citation omitted) (Discussing the 1976 Copyright Act, the court states: "It establishes a minimum number of inquiries that a court must carry out, even if it leaves to the courts how to assign relative weights to each factor and how to supplement the first four factors.").
33. Examples of other factors include privacy interests, defendant's good faith or lack thereof, wrongful denial of exploitative conduct toward the work of another, commission of error, and the plaintiff's misuse of his or her copyright to suppress unfavorable comment. *See* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 569 (1995).
34. H. REP. NO. 94-1476, *supra* note 8, at 66, *reprinted in* 1976 U.S.C.C.A.N. at 5679.
35. 464 U.S. 417, 451 (1984) (dictum) ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of copyright . . . .").
36. "[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

¶26 Another question is whether the use is transformative, or productive and nonsuperseding. Does the use of the material result in the creation of a new socially useful work? 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[37] as in *Acuff-Rose*. The problem with focusing on the "quality" of the transformation is that it makes the courts responsible for deciding what is new and of value.

¶27 The courts have consistently found that coursepack copying does not result in a new creation,[38] but the Supreme Court has not previously required transformation in classroom use.[39] 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.[40] 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.[41]

¶28 This wreaks 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 clearly constitutes the creation of an archive by the institution. Some publishers currently permit this kind

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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." 510 U.S. 569, 584 (1994). *See also* American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 921 (2d Cir. 1995) ("We generally agree with Texaco's contention that the District Court placed undue emphasis on the fact that Texaco is a for-profit corporation conducting research primarily for commercial gain. 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.").

37. Other transformative uses include "criticism, comment, news reporting, teaching, scholarship, and research," all of which are found in the list of "preferred" uses in the preamble to 17 U.S.C. § 107 (1994).

38. *See* Princeton University Press v. Michigan Document Services, 99 F.3d 1381, 1389 (6th Cir. 1996) (mechanical transformation, even if it includes some editing, does not demonstrate the "creative metamorphosis" seen in *Acuff-Rose*); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1530–31 (S.D.N.Y. 1991) (repackaging excerpts from copyrighted books in anthology form is not a transformative use).

39. "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.

40. "The photocopying of these eight . . . articles may be characterized as 'archival'—i.e., done for the primary purpose of providing numerous Texaco scientists . . . each with his or her own personal copy of each article without Texaco's having to purchase another original journal." *Texaco*, 60 F.3d at 919 (footnote omitted).

41. This point remains unsettled. Many schools maintain that there is no reason that fair use should 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. Their position has not been directly addressed by the courts. The arguments against the position include the spontaneity requirements for multiple copies in classroom use found in the *Classroom Guidelines*, *supra* note 8, at 69, *reprinted in* 1976 U.S.C.C.A.N. at 5682, and restrictions written in the ALA MODEL POLICY, *supra* note 9, at 6. But, it must be remembered that both the *Classroom Guidelines* and the *ALA Model Policy* only aspire to state a minimum level for fair use.

of use if the materials are unavailable when stored, and license fees are paid when the materials are made available on the e-reserve system.[42] Some libraries are maintaining these archives, although they are not paying the license fees.

Nature or Character of the Work

¶29 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.

¶30 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 legislative history for the 1976 Copyright Act specifically indicates that educational fair use is not applicable to consumables.[43]

¶31 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 publications of the works involved. Perhaps for this reason, Congress did provide some guidance in a 1975 Senate committee report:

> 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.[44]

¶32 Consequently, the *Classroom Guidelines* prohibit copying intended to create or replace anthologies, compilations, or collective works.[45] Not all antholo-

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42. The electronic reserve guidelines proposed by a subgroup of the Conference on Fair Use (CONFU) in March 1996 stated 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 used, but in no event for more than three calendar years, including the year in which the materials are last used." Electronic Reserves Drafting Sub-Group, Fair-Use Guidelines for Electronic Reserve Systems (Apr. 19, 1996) (unpublished memorandum to Conference on Fair Use Participants, includes text of "Fair Use Guidelines for Electronic Reserve Systems" (Mar. 5, 1996), *available in* <http://www.columbia.edu/~rosedale/guidelines.html>). *See infra* ¶¶ 82–86 for discussion of the creation of, and reaction to, these guidelines.

    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.

43. H.R. Rep. No. 94–1476, *supra* note 8, at 71, *reprinted in* 1976 U.S.C.C.A.N. at 5685.
44. S. Rep. No. 94-473, at 63 (1975).
45. *Classroom Guidelines, supra* note 8, at 69, *reprinted in* 1976 U.S.C.C.A.N. at 5683.

gies are an infringement of copyright, but the fact that excerpts are placed in an anthology weighs significantly against a defendant.[46]

¶33 The Supreme Court's definitive decision about compilations occurred in 1991 in *Feist Publications, Inc. v. Rural Telephone Service Co.*[47] Until *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 copyright protection. In *Feist*, the Court explained that facts, data, or preexisting materials are not copyrightable because protection is limited to original work. 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.[48] For example, certain factual compilations and derivative works, such as the white pages of the telephone book cannot be copyrighted.[49] 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 place contractual limitations on copying and usage.

¶34 Historically, the use of scientific works by writers in the same field was an acceptable fair use and was evaluated under fair use standards.[50] This resulted in a view that "the scope of fair use is greater with respect to factual than nonfactual works."[51] In *Texaco*, the Second Circuit Court of Appeals agreed with the lower court's finding 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 it required broad copyright protection for the continued vitality of its publications.[52] Thus, it appears that the scientific nature of an article will tilt the factor toward the defendant.

¶35 Federal case reports are the work product of United States government employees[53] and as such cannot be copyrighted.[54] The United States Court of Appeals for the Second Circuit recently held in *Matthew Bender v. West Publishing Company* that the text, pagination, parallel citations, identifications of counsel, and subsequent procedural history of a court decision are not copy-

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46. *See* Basic Books Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1537 (S.D. N.Y. 1991).
47. 499 U.S. 340 (1991).
48. *Id.* at 345
49. *Id.*
50. *See* PATRY, *supra* note 33, at 528.
51. American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 16-17 (S.D.N.Y. 1992) (quoting New Era Publications Int'l, ApS v. Carol Publ'g Group, 904 F. 2d 152, 157 (2d Cir. 1990).
52. "[N]early every category of copyrightable works could plausibly assert that broad copyright protection was essential to the continued vitality of that category of works." American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 925 (2d Cir. 1994).
53. *See* 17 U.S.C. § 101 (1994) ("A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of that person's official duties.").
54. *See id.* § 105 ("Copyright protection . . . is not available for any work of the United States Government. . . .").

rightable.[55] Hyperlaw, one of the defendants in *Matthew Bender*, was copying decisions from the West-published *Federal Reporter*, deleting the headnotes and syllabi written by West editors, and adding the result to its own databases. The court found this to be an acceptable practice. In addition, court reports are public records in most states and cannot be copyrighted. In fact, many state courts place the text of their current cases on the Internet. As a result, institutions should feel reasonably safe placing court reports on their pages for e-reserve purposes so long as headnotes and other editorial features have been removed.

Amount and Substantiality

¶36 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.*, the Supreme Court found that copying an entire work (a videotape of a television movie) was not necessarily an infringement of copyright,[56] but this is the only case in which the Court has held that copying 100 percent of a work was permissible. Alternatively, in *Harper & Row, Publishers, Inc. v. Nation Enterprises,* the Supreme Court found that publication of a small amount of text taken from a yet unpublished novel could be an infringement.[57] In reaching its conclusion, the Court noted that "[t]he inquiry into the substantiality of appropriation has a quantitative and a qualitative aspect."[58]

¶37 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 limiting reproduction to no more than 10 percent of a work for reserve purposes, but this percentage is not really grounded in fair use decisions. The decision in *Texaco* highlights a problem with freely reproducing complete articles, since in that case the court held that the individual article was the copyrighted work as opposed to the complete journal issue.[59] Therefore, if *Texaco's* holding proves to be the final decision on what comprises a "work," reproducing one article from a journal can be considered copying 100 percent of a work.

Effect upon the Potential Market

¶38 Some courts have suggested that if the intended use is for commercial gain,

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55. Matthew Bender & Co. v. West Publishing Co., 158 F.3d 674 (2d Cir. 1998), *cert. denied* 119 S. Ct. 2039 (1999) (deciding all issues but pagination); Matthew Bender & Co. v. West Publishing Co., 158 F.3d 693 (2d Cir. 1998), *cert. denied* 119 S. Ct. 2039 (1999) (deciding the issue of pagination).
56. "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." 464 U.S. 417, 449 (1984).
57. 471 U.S. 539, 569 (1985).
58. *Id.* at 583 n.6.
59. American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 926 (2d Cir. 1994).

the likelihood of future harm may be presumed.[60] 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."[61] Prior to the 1976 Act, there was no requirement that this factor be given priority, in fact a court could ignore it entirely.[62] The question of the priority of the factors began with 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."[63] 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."[64]

¶39 Initially, the courts dealt primarily with the publication value of the work, that is, the income lost when copies are 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 the excerpts where the plaintiff could demonstrate their value.[65] In subsequent cases, the courts have clearly recognized the publisher's entitlement to licensing fees,[66] which is of great significance to the future of e-reserves.

¶40 The court in *Michigan Document Services* clearly expressed its support for the market harm test that had been proposed earlier in *Sony* and *Harper & Row*.[67] Under this test, there is market harm when the plaintiff can demonstrate that if the challenged use were widespread, there would be an adverse effect upon the potential market. Here's how the test might be applied to electronic reserves: it is likely that e-reserves will be widely used; most institutions will probably choose to use the Internet for maximum convenience; it is difficult to conceive of a wider distribution means than the Internet. Therefore, if no control is exercised over access to the materials, a market effect is inevitable.

¶41 Although a demonstration of harm is preferred, the courts do not always require dramatic proof of value. For example, in *Michigan Document Services* the

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60. *See Sony*, 464 U.S. at 451.
61. *Harper & Row,* 471 U.S. at 566 (citation omitted).
62. *See* PATRY, *supra* note 33, at 561.
63. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
64. *Id.* at 577.
65. *Harper & Row*, 471 U.S. at 567.
66. *See* American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930-31 (2d Cir. 1995); Princeton Univ. Press v. Michigan Document Services, 99 F.3d 1381, 1388 (6th Cir. 1996).
67. *Michigan Document Services,* 99 F.3d at 1386.

court considered the fact that the professors chose the materials for inclusion in a coursepack as sufficient evidence by itself of the value of the materials.[68]

Other Exceptions

¶42 Libraries may make single copies of copyrighted works for users under sections 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 section 108 exceptions apply to library reserve copying,[69] so reserve copying remains a section 107 fair use issue.

Performance and Display

¶43 The inclusion of audiovisual materials in the reserve collection may also raise the issue of the performance right. Under the Act, "[t]o '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." 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.[70] By these definitions, if materials are checked out and viewed by a single student, there is no public performance. However, when a student checks out an audiovisual work and shows it to a roomful of students, that fits within the definition of a public performance and is harder to defend as a fair use.

¶44 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, which allows nonprofit educational uses of a motion picture or audiovisual work in face-to-face teaching activities in a classroom.[71] Classroom is broadly defined to include the library.[72] 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.[73] The requirement for face-to-face teaching makes the use of this exemption completely unsuitable for multimedia materials that are placed in e-reserves.

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68. *Id.* at 1389.
69. *See infra* ¶58.
70. 17 U.S.C. § 101 (1994).
71. *Id.* § 110(1).
72. H.R. Rep. No. 94–1476, *supra* note 8, at 82, *reprinted in* 1976 U.S.C.C.A.N. at 5696.
73. Although instructional broadcasting is permitted, only nondramatic literary and musical works may be performed. All displays are allowed, however. 17 U.S.C. § 110(2).

Trends in Libraries and Publishing

Academic Law Library Issues

¶45 Currently, there are many pressures in academia to use computer technology for educational purposes. Legal education has long been at the forefront in this regard, including the prominent use of legal databases and computer-assisted legal research systems. As a result, there is a significant amount of material available in digital format from commercial, government, and Internet sources. Law libraries face the question of how best to provide access to these resources. Because of the advantages provided by electronic reserves, most libraries will find the lure of digital reserves difficult to resist. Given this fact, an examination of the copyright status of the materials commonly placed in law school library reserve collections is inevitable.

¶46 Faculty place a variety of materials on reserve in law schools, including such obvious items as case reports, law journal articles, and books. Many professors use the reserve collection 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 ensure access for all students to hornbooks, treatises, and loose-leaf services. Articles in more ephemeral materials such as newspapers and magazines are also frequently placed on reserve for student use.

¶47 Many of these materials are available online from the major vendors of legal information, LEXIS-NEXIS and Westlaw. As discussed earlier, LEXIS-NEXIS and Westlaw have established means of creating Internet links to materials in their databases so that copyright problems are avoided.[74] Unfortunately, these databases do not include everything that might be placed on reserve, so law libraries still must examine how to handle copyright issues for a variety of materials. Faculty work such as old exams and syllabi are protected 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 publications by faculty members; in such instances, permission must be sought from the publisher. Materials from the United States government[75] and court documents such as legal briefs cannot be copyrighted. Many documents of interest to law classes may have outlasted their copyright protection. The inclusion of audio or video materials clearly requires an examination of the rights of the copyright holder and usually a request for permission to use the materials. Because of their limited market, 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 may

74. *See supra* ¶13.
75. Notwithstanding the exception found in 17 U.S.C. § 105 regarding United States government works, *see supra* notes 53–54, there is no such exception for the work product of state employees.

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 status of the material before placing it in the e-reserve system.

¶48 Libraries must also remember that full-text digital materials available to the law school community are frequently covered by licensing agreements rather than an outright sale. The terms of the contract govern what uses are permitted. The Copyright Act seems to say that it is possible to contract away fair use rights.[76] 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" electronic version.

¶49 Downloading a portion of a database and remounting it on the library's server is generally not permitted except by a specific contractual provision. Systematic downloading of journal text, output, search results, or other information may result in loss of service. For instance, 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. 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 it is] concerned with the creation of systematic copies or caches for local mounting."[77]

¶50 Additional concerns are involved in using materials obtained by interlibrary loan for a reserve collection, especially because copies are often provided free of charge by the lending library. The claim of fair use becomes less clear when the paper materials originate in a different library. As a result, their use for reserves, paper or electronic, requires careful examination of the impact upon the copyright holder.

¶51 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 the increased availability 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 libraries to demonstrate an ability and willingness to control access.[78]

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76. 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. *See* 17 U.S.C. § 108(f)(4) (1994).
77. E-mail from Douglas LaFrenier, Director of Marketing, American Institute of Physics, to Eric Albright, Head of Public Services, Duke University Medical Center Library (July 23, 1998) (on file with author).
78. *See* Gasaway, *supra* note 20, at 70.

Concerns of Authors and Publishers

¶52 Authors are concerned about receiving proper attribution for their work.[79] Moreover, they do not want modifications or inaccurate additions to the text to affect their reputation. Author 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.,*[80] a federal district court 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).[81] 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. In *Ryan v. CARL Corp.*,[82] another federal district court judge ruled that the right to authorize individual reprints belongs to the publisher only if the contract between the author and the publisher says so; otherwise it remains with the author. This could have significant implications for e-reserves. Author groups have expressed their intention to continue pressing the publishers for payment for digital use of their work.

¶53 The primary concern of publishers is the ease with which copyrighted material can be copied to and disseminated from the World Wide Web.[83] 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.[84] Because of these concerns, many publishers maintain that there can be no fair use in e-reserves. Their claim is not completely unreasonable. If the access to a digital version is uncontrolled, paid subscriptions to both formats will decrease. Not unreasonably, this concerns publishers, since they owe a fiduciary duty to their stockholders to increase the value of the company, not to disseminate knowledge.

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79. *See* Georgia Harper, *Will We Need Fair Use in the Twenty-First Century?* (last modified Mar. 4, 1997) <http://www.utsystem.edu/OGC/IntellectualProperty/fair_use.htm>.
80. 972 F. Supp. 804 (S.D.N.Y. 1997).
81. "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." 17 U.S.C. § 201(c) (1994).
82. 23 F. Supp. 2d 1146 (N.D.Cal. 1998).
83. *See* Harper, *supra* note 79.
84. *See* Carol Risher, Int'l Publishers Copyright Council, *Libraries, Copyright and the Electronic Environment* (Apr. 22, 1996) <http://www.eblida.org/ecup/other_reports/IPCCapril96.html>.

Copyright Clearance Center

¶54 In *Williams & Wilkins,*[85] 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 appeal. In fact, this argument against considering permission fees as part of the copyright entitlement has survived to the current day,[86] but it may have lost much of its vigor now that a market for licensing fees and an easy means of paying these fees does exist.[87]

¶55 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 permission fees; but now collecting them has become practicable. CCC now represents more than 9,600 publishing houses, thousands of authors, and handles permission rights for 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.[88] Prior to the establishment of CCC, the cost of collecting 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.

¶56 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 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, or (3) by acquiring some form of photocopy license from CCC.[89] The court stated that "[i]t is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing

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85. 487 F.2d 1345 (Ct. Cl. 1973).
86. "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 Univ. Press v. Michigan Document Services, 99 F.3d 1381, 1407 (6th Cir. 1996) (Ryan, dissenting).
87. "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*." *Id*. at 1388 (citation omitted).
88. In fact, the market is lucrative enough to have bred competitors such as Carl UNCOVER.
89. American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 929 (2d Cir. 1995).

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."[90]

¶57 In a more recent case, the Sixth Circuit clearly recognized the publisher's right to receive permission fees where fair use did not apply,[91] favorably quoting *Texaco*:

> 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."[92]

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.

Current Reserve Room Policies

Classroom Guidelines

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

¶59 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 sought to reach consensus on a method of handling educational copying from books and periodicals. The "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With Respect to Books and Periodicals" was reached on March 19, 1976, and the document was published in the House Report that accompanied the Act.[93] The *Classroom Guidelines* did not have universal approval and was 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."[94] In any event, their inclu-

90. *Id.* (citations omitted).
91. *Michigan Document Services*, 99 F.3d at 1385.
92. *Id.* at 1387 (quoting *Texaco,* 60 F.3d at 931).
93. *Classroom Guidelines, supra* note 8.
94. H.R. Rep. No. 94–1476, *supra* note 8, at 72, *reprinted in* 1976 U.S.C.C.A.N. at 5685.

sion in the official legislative history clearly represents some level of congressional approval.

¶60 The *Classroom Guidelines* state that they intend to represent the minimum fair use available to institutions. This means that they should protect an institution from litigation and serve as a "safe harbor" in cases involving fair use copying. Under the *Guidelines*, multiple copies (but 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 tests of brevity, spontaneity, and cumulative effect test, and that each copy includes a notice of copyright.[95]

¶61 As to the first test—brevity—in the case of a prose work the Guidelines define brevity as: "(a) [e]ither 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."[96] In the case of an illustration, brevity is defined as "[o]ne chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue."[97] Without question, most documents in modern college or university reserve rooms exceed these limits.

¶62 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.[98]

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,[99] electronic permission services are available.[100]

¶63 The *Guidelines* further restrict multiple copying for classroom use by

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95. *Classroom Guidelines*, *supra* note 8, at 68, *reprinted in* 1976 U.S.C.C.A.N. at 5682.
96. *Id*.
97. *Id.* at 69, *reprinted in* 1976 U.S.C.C.A.N. at 5682.
98. *Id.*
99. "CCC License is currently not an option being offered by the CCC for universities, but is being offered to private organizations." Michael Homan <homan@mayo.edu>, *AAHSL; Response to Copyright Clearance Center Questionnaire,* May 6, 1997, AAMCINFO discussion list, available e-mail: aahsl@aamcinfo.aamc.org.
100. 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 per-

stating that "copying shall not be repeated with respect to the same item by the same teacher from term to term."[101] Some libraries have strictly adhered to this requirement, but others maintain that policing these requirements is not their responsibility or is not feasible. The use of computer technology in reserve rooms may eliminate that excuse. The *Classsroom Guidelines* also state that

> copying shall not be used to create or to replace or substitute for 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.[102]

Despite these explicit prohibitions in the *Guidelines*, 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.[103]

ALA Model Policy

¶64 The American Library Association's *Model Policy* was significantly more liberal than the *Classroom Guidelines*, contending that "copyright is a limited statutory monopoly" and that the academic community must assert the public's rights under copyright law.[104] Furthermore, the reserve room is an extension of the classroom and thus it is permissible to make single copies of entire articles, book chapters, and poems.[105] 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;
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;
3. the material should contain a notice of copyright;
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.)[106]

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mission is granted. *See* Copyright Clearance Ctr., *Electronic Course Content Service* (visited Feb. 16, 2000) <http://www.copyright.com/Services/ECCS.html>.

101. *Classroom Guidelines, supra* note 8, at 69, *reprinted in* 1976 U.S.C.C.A.N. at 5683.
102. *Id.*
103. "[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 HIGHER EDUC., Sept. 29, 1995, at A59.
104. ALA MODEL POLICY, *supra* note 9, at 1. The policy also admonishes the academic community "to heed the advice of a former U.S. Register of Copyrights: 'If you don't *use* fair use, you will *lose* it!'" *Id.*
105. *Id.* at 5.
106. *Id.* at 6 (citations omitted).

¶65 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."[107] The *ALA Model Policy* suggests that "the use of photocopied materials in multiple courses or successive years will normally require advance permission from the owner of the copyright."[108] 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 section 107.[109] Lastly, the *ALA Model Policy* cautions that "[i]f 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."[110]

Legal Status of Reserves

Coursepacks

¶66 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 nonprofit 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.

¶67 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.

¶68 No one has argued that it would be a copyright violation for students to go to the library and personally copy materials.[111] The use of mass-produced coursepacks is a less expensive, less labor-intensive way of achieving the same end result. It is also less wearing on library materials and ecologically sounder (since coursepacks are two pages to a sheet and most copiers only permit one page

107. *Id.*
108. *Id.*
109. "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.
110. *Id.* at 6.
111. However, the 6th Circuit left the door open by stating that the issue of fair use copying by students and professors was "by no means free from doubt." *See* Princeton Univ. Press v. Michigan Document Services, 99 F.3d 1381, 1389 (6th Cir. 1996).

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 ruled that fair use does not apply. As a result, permissions must be sought and fees must be paid if demanded by the copyright owner.

¶69 In *Basic Books, Inc. v. Kinko's Graphics Corp.,*[112] a federal district court found that Kinko's production of coursepacks was not fair use. An important holding by the court in *Kinko's* 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.[113]

¶70 The most recent case influencing this area of copyright and libraries again concerned coursepacks produced by a commercial copier. In *Princeton University Press v. Michigan Document Services, Inc.*, the Sixth Circuit reinforced many of its sister courts' determinations. The defense asserted that the use was fair because the students' use would have been fair. This argument had already failed in *Kinko's* and *Texaco,* and it failed here. The court noted that the publishers were not challenging the students' use. The challenge was to "the duplication of copyrighted 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."[114] Perhaps of greater relevance to nonprofit users, the court went 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."[115] This position invalidates any defense based on the idea that the final user is entitled to use material without permission on the basis of fair use.

The Lack of Legal Precedent

¶71 The first suit against a commercial copying center was filed in 1980, but it settled before trial.[116] 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.[117]

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112. 758 F. Supp.1522 (S.D.N.Y. 1991).
113. 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, noncommercial 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.
114. *Michigan Document Services,* 99 F.3d at 1385.
115. *Id.* at 1386 n.2.
116. Basic Books, Inc. v. Gnomon Corp., CIV. No. N-80-36, 1980 WL 1157 (D. Conn. Mar. 20, 1980).
117. *Id.* at *2. *See also* PATRY, *supra* note 33, at 219–20.

¶72 Although it lacks legal precedent, *Addison-Wesley Publishing Co. v. New York University*[118] is important to any discussion of e-reserves. In 1983, nine major publishers sued New York University, ten of its professors, and a commercial copy center, asserting that they had made regular use of substantial portions of copyrighted materials to assemble unauthorized anthologies that were sold to students. The case resulted in a settlement with NYU and the faculty members requiring NYU to seek permission for any materials not eligible under the *Guidelines* in the future. In addition, NYU agreed to adopt a copying policy based on the *Classroom Guidelines*, publicize its policies regularly, and take disciplinary action against anyone found to violate the policy.[119] This case was the first copyright infringement case against a university and revealed a potentially expensive liability for the educational community. Although NYU settled, the nature of the settlement is significant. The policy requires that faculty members seek and obtain permission for copyrighted materials used. Furthermore, the policy states that the faculty member will be individually liable for any damages arising from copyright infringement.[120] The university policy states that it will "defend and indemnify only those faculty members who act within the guidelines or upon the general counsel's advice."[121]

¶73 Regardless of *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 the decision in the federal district court and was never appealed. But as with *Addison-Wesley*, the terms of the settlement and its effects are worth noting. Kinko's agreed to comply with the *Classroom Guidelines* and use the CCC.[122] The decision caused many academic institutions to reexamine their policies and begin to solicit permissions and pay royalties when they created coursepacks for faculty. It is interesting that so many colleges and universities chose to treat themselves as if they were commercial photocopy services.

For-profit v. Not-for-profit

¶74 The first case involving noncommercial copying for educational purposes fol-

118. No. 82 CIV 8333 (ADS), 1983 WL 1134 (S.D.N.Y. May 31, 1983).
119. The settlement agreement with NYU is reproduced in CORPORATE COPYRIGHT & INFORMATION PRACTICES 167–78 (1983). The copy center involved agreed to require certification from customers that they had written permission or authorization from the copyright owner, or that the copying was being made in compliance with the *Classroom Guidelines*. *See Addison-Wesley*, 1983 WL 1134, at *2.
120. *See* New York Univ., Policy Statement on Photocopying of Copyright Materials for Classroom and Research Use, *available in Addison-Wesley*, 1983 WL 1134, at *5–7 exhibit C.
121. Eric D. Brandfonbrener, *Note: Fair Use and University Photocoying: Addison-Wesley Publishing v. New York University*, 19 U. MICH. J.L. REF. 669, 669 (1986).
122. Kinko's paid statutory damages of $510,000, the publishers' attorney fees of $1.365 million, and agreed to seek permission when copying more than one page of any copyrighted work in an anthology or coursepack. Basic Books, Inc. v. Kinko's Graphics Corp., 21 U.S.P.Q. 2d 1639, 1640 (S.D. N.Y. 1991).

lowing the passage of the 1976 Copyright Act was *Marcus v. Rowley*,[123] where the court found that failing to realize a profit from unauthorized copying was not a sufficient defense to copyright infringement. 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 section 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.[124]

¶75 It is also important to note how the court in *Texaco* dealt with the for-profit nature of the defendant accused of copyright infringement. The lower court had placed great emphasis upon the fact that the defendant was a for-profit corporation, but the court of appeals clearly felt that this had been overemphasized. Because of *Acuff-Rose*, the court was bound to say for-profit does not answer the question.[125] If the court could decrease the influence of for-profit status to the defendant's advantage in *Texaco*, nonprofit status may have correspondingly less weight in future litigation.

The Archiving Problem

¶76 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.

¶77 The first factor was the court's finding that the researcher was creating an archive of the articles that consisted of unpermitted photocopies.[126] The archival use of the articles approached the creation of a new work in the court's mind. This holding on archival use can be analogized to a library's reserve room files even though Texaco was a for-profit company. If a file folder of individually chosen research articles can be viewed as a new work, then a carefully chosen set of

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123. 695 F.2d 1171 (9th Cir. 1983).
124. *Id.* at 1175.
125. "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., 60 F.3d 913, 921 (2d Cir. 1995).
126. "The photocopying of these eight . . . articles may be characterized as 'archival'—i.e., done for the primary purpose of providing numerous Texaco scientists . . . each with his or her own personal copy of each article without Texaco's having to purchase another original journal." *Id.* at 919 (footnote omitted). 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.

articles on a common subject placed on reserve certainly might also 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.

Licensing Income and Market Harm

¶78 The second major aspect of *Texaco* that is directly relevant to the legal status of electronic reserves is the decision of the court that permission fees are a valid entitlement of the copyright holder.[127] The court felt that existence of the CCC now made it possible for users "easily" to pay for licenses to copy.[128] 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.[129] 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 a court might 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 might be seen as detrimental to the sales of the journal, in paper and full-text electronic versions, and to the permission fees that a publisher is entitled to under *Texaco*.

¶79 *Texaco*'s stance that there can be harm where the defendant makes copies and ignores an established fee system was reinforced by the *Michigan Document Services* case.[130] The court adopted this concept 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.[131] Thus it is not a sufficient defense to allege that income from book or journal sales is uninterrupted.

¶80 In *Michigan Document Services*, the Sixth Circuit invoked a Supreme Court test from *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."[132] The plaintiffs had been collecting nearly $500,000 in permission fees from other sources. The court held that interference with this stream of income would constitute substantial harm under the statute. Consequently, the court decided that a fair use analysis must

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127. "[I]t is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis." *Id.* at 930.
128. "Though the publishers still have not established a conventional market for the direct sale and distribution of individual articles, they have created, primarily through the CCC, a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying." *Id.* at 930.
129. *Id.* at 931.
130. *See supra* ¶57.
131. Princeton Univ. Press v. Michigan Document Services, 99 F.3d 1381, 1387–88 (6th Cir. 1996).
132. *Id.* at 1387.

include an examination of the loss of permission fees. This principle must be considered in handling 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 a court will say that the publisher is entitled to this income.

What Is the Entire Work?

¶81 The court in *Texaco* indicated that, at least in the Second Circuit, each article in a journal is a separate copyrighted work.[133] 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 copyright infringement. This is significant because most reserve files are primarily made up of journal articles.

Solution without Litigation

CONFU

¶82 There have been attempts to resolve some of the issues surrounding e-reserves and digital copying without litigation. Beginning with a public hearing in November 1993, the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force sought to have copyright stakeholders negotiate guidelines for the fair use of electronic materials in nonprofit educational contexts. Before the first meeting of the Conference on Fair Use (CONFU), which it had convened, the working group released the preliminary draft of its report (popularly known as the *Green Paper*) on July 7, 1994. In it, the working group expressed the belief that it would be difficult and inappropriate to apply the specific language prepared for print media to digital works and online services.[134] The *Green Paper* appeared to be calling for a reexamination of fair use, and many parties rejected it as overreaching its mandate. At the first CONFU meeting in September 1994, working groups were established on Intellectual Property Rights in the Electronic Environment, Distance Learning, Multimedia, Electronic Reserves, Interlibrary Loan, and Image Collections.

¶83 The Electronic Reserves group included representatives of copyright holders, educational institutions, and the library community.[135] The committee discussed the issues of fair use involved in digital reserves in nonprofit educa-

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133. *Texaco*, 60 F.3d at 926.

134. Working Group on Intellectual Property Rights, Info. Infrastructure Task Force, A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights 133 (1994). The group's final report was issued in September 1995 and became known as the *White Paper*. Working Group on Intellectual Property Rights, Info. Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property (1995).

135. "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

tional institutions: storage, access, display, and downloading. The negotiations reached an impasse in the fall of 1995.[136] Some members of the committee continued to work, however, preparing a draft proposal entitled "Fair Use Guidelines for Electronic Reserve Systems" in March 1996.[137] Finally, in November 1996, "at the plenary session of the Conference on Fair Use, participants concluded that there was insufficient support for the March 5, 1996 draft. CONFU participants agreed that the March draft would not be submitted for consideration as a proposal for CONFU fair use guidelines or included in the final CONFU report."[138]

¶84 It is revealing that there were members of the publishing and library communities in both the opposition and supporting groups.[139] A major objection by library and educational representatives was that the commercial publishing community would not guarantee that adherence to the proposed fair use guidelines would be a guarantee against future litigation, whereas the *Classroom Guidelines* had served as a "safe harbor" for the libraries in the past, even though those were extremely restrictive. (Neither the *ALA Model Policy* nor the Wisconsin policy, both of which appeared soon after the issuance of the *Classroom Guidelines* and which many libraries claimed to follow, had offered a safe harbor to their proponents.)

¶85 The Association of Research Libraries objected to the proposed guidelines for various reasons, including the following:

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).

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." WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INFO. INFRASTRUCTURE TASK FORCE, THE CONFERENCE ON FAIR USE: AN INTERIM REPORT TO THE COMMISSIONER 15 (1996) (hereinafter INTERIM REPORT).

136. *Id.* at 36.
137. Electronic Reserves Drafting Sub-Group, *supra* note 42.
138. Mary E. Jackson, Ass'n Research Libraries, *Electronic Reserves Fair Use Guidelines: A Summary of Concerns* (Feb. 14, 1997) <http://arl.cni.org/info/frn/copy/eres.html>.
139. Among those supporting the proposed "Fair Use Guidelines for Electronic Reserve Systems": American Association of Law Libraries, American Council of Learned Societies, Association of American University Presses, Indiana Partnership for Statewide Education, Music Library Association, National School Boards Association, and Special Libraries Association. Among those opposed to the guidelines: American Society of Composers, Authors & Publishers, American Society of Journalists and Authors, American Society of Media Photographers, Association of American Publishers, Association of Research Libraries, Authors Guild, Inc./Authors Registry, Inc., Recording Industry Association of America, and Software Publishers Association. *See* INTERIM REPORT, *supra* note 135, at 12–13.

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.[140]

ARL's objections represent a desire to liberalize the existing "safe harbor." For example, the restrictions in the *Classroom Guidelines* regarding brevity and cumulative effect are stricter than those contained in the proposed fair use guidelines of March 1996.

¶86 As discussed earlier, the function of the *Classroom Guidelines* was only to establish a safe harbor, not to represent the maximum standards of educational fair use. Perhaps part of the problem with the March 1996 proposal was that ARL and other participants sought to establish both a safe harbor and higher limits. Publishers, on the other hand, objected because the proposal permitted the reproduction of entire articles and book chapters, and they believed any new guidelines should be restricted to the word limitations contained in the *Classroom Guidelines*. They also felt that the guidelines were based on the *ALA Model Policy* for photocopy reserves, a document to which they had never agreed.

Return to the 1976 Classroom Guidelines

¶87 As a result of CONFU's inability to establish new guidelines, the only existing safe harbor for e-reserves lies in the 1976 *Classroom Guidelines*. Both section 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 *ALA Model Policy* has never been challenged in court, there may be an inference of "tacit acceptance" by the copyright holders.[141] Many universities have written policies covering copyright and reserve collections, and some of these are based on the *Classroom Guidelines* or the *ALA Model Policy*.[142] There is probably a degree of safety under either of these guidelines, although past failure by copyright holders to enforce their legal rights does not preclude present or future enforcement of those rights.[143] The electronic reserve guidelines drafted during the CONFU process may best represent the common ground between publishers and academics. It is conceivable that a court could recognize them as a good faith attempt to follow current law.

¶88 Under the *Classroom Guidelines* and the *ALA Model Policy*, a university

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140. Jackson, *supra* note 138.
141. *See* GASAWAY, *supra* note 20, at 83.
142. *See* CREWS, *supra* note 10, at 84–92.
143. "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." 3 NIMMER & NIMMER, *supra* note 8, § 12.06 (citations omitted).

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, an entire chapter of a book, or an entire poem.[144] Nonetheless, it is unlikely that anyone will convince a court that a networked digital copy available to multiple simultaneous users is "one copy." Since simultaneous access is an important feature of electronic reserve systems, it is necessary to look to the standards for multiple copies.

¶89 The *ALA Model Policy* states that "the effect of photocopying the material should not be detrimental to the market for the work."[145] 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.

¶90 Settlements of cases involving NYU and the University of Texas regarding coursepacks resulted in agreements that the universities would observe the *Classroom Guidelines*.[146] 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 place of a text. Thus, both affect the marketplace for the sale of textbooks. In addition, as discussed earlier, the decisions in *Texaco* and *Michigan Documents Service* clearly signal that permission fees are a valid form of income that must be included in section 107 fair use analysis.[147] It is obvious that the refusal to pay the permission fee for digital use decreases the profits derived from permission fees.

Market Realities

Publishers' and Educators' Concerns

¶91 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.

¶92 Since the inception of the Internet, there has been a progressive increase in the misuse of trademarks and copyrighted materials. Many trademark and copy-

144. ALA Model Policy, *supra* note 9, at 6.
145. *Id.*
146. *See supra* ¶72; Crews, *supra* note 10, at 73.
147. *See supra* ¶¶78–80.

right holders have demonstrated that the means to enforce their rights do exist.[148] As the Internet grows, it will become necessary to develop means of policing legal rights on the Internet. Copyright holders may be better served by putting their efforts into resolving those issues instead of entering a fray with the academic community.

¶93 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*. Universities maintained that copyright in the reserve collection was the responsibility of the faculty member and made no attempt to monitor fair use. In coming years, it will be easier to detect violations in electronic reserves, leading to a greater push by holders to enforce their copyrights against violations.

¶94 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, including permission income. Outside a limited area, both the *Classroom Guidelines* and the *ALA Model Policy* require that permission be obtained for works placed in a reserve collection. The fact that the right has not been enforced does not make it any less enforceable. Even the failed CONFU guidelines required permission to use materials following the first fair use.

¶95 Next, the related problem of digital copying must be considered. Libraries and their patrons often prefer full-text electronic journals. The materials require no space, less maintenance, and in many systems they can be utilized from outside the library at any time, day or night. Thus, 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.

¶96 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 to regulate electronic reserve systems. It should be recognized, however, that this will be a more stringent regimen than many libraries currently follow.

Current Library Practices with Electronic Reserves

¶97 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: Who will be allowed access to e-reserves? 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? How will royalty payments be handled?

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148. *See BMI's 'Robot' Scans the Web For Copyright Infringers*, WALL ST. J., Oct. 16, 1997, at B6 (describing how BMI is using a robot program to monitor how its music is used on the Internet, as a way of regulating copyright infringement in cyberspace); *Playboy Enterprises Inc.: Judgment of $3.74 Million Won in Web-Site Dispute*, WALL ST. J., Apr. 3, 1998, at B8 (describing $3.74 million judgment for Playboy against a California Web site operator who put 7475 photographs on the Internet without authorization).

¶98 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 use is carefully restricted to the university community.[149] At Duke University School of Law, the 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.[150] Northwestern University has also begun to allow Internet access to e-reserves, but the students must have course-specific information, such as the instructor's name, in order to access the files.[151] Many schools follow the practice seen at the University of Texas, limiting access to e-reserves to students, faculty, and administrative staff.[152] Ways suggested for restricting access have included using a password or student identification number; a password system for each class; or workstations or networks available only to students, staff, and faculty. In addition, prohibiting access to the materials through the library's online catalog system can discourage use by unauthorized patrons.

¶99 The choice of materials to place in a reserve collection can vary with a school's willingness to pay permission fees. Most libraries say that they observe the *ALA Model Policy* or the *Classroom Guidelines*, but admit that they do not pay permission fees on many items. This usually 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-reserve collection is covered by fair use, regardless of the size of the file copied or the number of semesters the material is used.

¶100 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 its involvement in producing student coursepacks. At Marist College, faculty members post their own materials, but the library regularly samples submissions to ensure copyright compliance.[153]

Conclusion

¶101 The future of academic law libraries includes electronics reserves, whether they are on a library page or a class home page. The convenience for students and

149. *See* SOETE, *supra* note 12, at 16.
150. *See* Duke Univ. School of Law, *supra* note 3.
151. *See* SOETE, *supra* note 12, at 17.
152. *See University of Texas Office of General Counsel, Fair Use of Copyrighted Materials* (Feb. 18, 1997) <http://www.utsystem.edu/intellectualproperty/copypol2.htm#reserve>.
153. *See* SOETE, *supra* note 12, at 19.

professors alike is too great to ignore. Yet using e-reserves will require institutions to face a complex problem that many have ignored for many years. Libraries have not paid permission fees to which copyright holders are legally entitled. This was accepted by 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 materials. The advent of computer technology, however, has made it easier to monitor use of protected materials and, consequently, to demand the payment of permission fees. Additionally, the potential problems associated with placing digital text on the Internet have made this issue much more important to publishers and authors than it was in the past. Libraries are going to have to pay permission fees for both their print and electronic reserve collections except where clearly excused by fair use.

¶102 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 by Congress. For example, in November 1998, the Digital Millennium Copyright Act[154] (DMCA) was signed into law with an avowed intent of adapting copyright law to the digital age. Among other things, this Act limits the copyright liability of an Internet service provider (ISP) for infringement by a user of its service. The ISP can escape monetary liability if it (1) had no actual knowledge of the infringement, (2) had no information that made the infringement apparent, and (3) expeditiously removed the infringing material upon learning of its existence.[155] This is significant because many educational institutions provide ISP services to their students and faculty. It is likely that a court also would apply these for-profit exceptions to nonprofit entities.

¶103 Another section of the Act defines the limits of a nonprofit institution's liability, and educators will not be as happy with these provisions. 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 users of its system or network with information that accurately describes and promotes compliance with copyright laws.[156] 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 cannot avoid liability by claiming ignorance. The school will be liable

154. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.)

155. 17 U.S.C.A. § 512(c) (West Supp. 1999).

156. *Id.* § 512(e).

whether the material is in a formal e-reserve collection, class home pages, 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 they 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. Copyright owners will sue everyone involved, especially those parties with the deepest pockets. In *Addison-Wesley,* the nine publishers sued ten professors, a photocopy service, and the university. Furthermore, although the DMCA is not directly applicable to other copyright litigation, it is a persuasive interpretation of university liability. Under DMCA, the universities will be excused from responsibility only after implementing stringent controls.[157] Perhaps these controls would demonstrate that the university had sought to control infringement and not merely to protect itself from a lawsuit. A toothless unenforced policy may not be seen by the court as being a good-faith attempt to control the problem.

¶104 It has been suggested that publishers will be unwilling to pursue litigation against educational institutions because damage awards are likely to be small.[158] However, the history of copyright litigation involving coursepacks, notably the case against New York University, does not demonstrate such reluctance. Coursepack litigation has been aggressively pursued, regardless of the ability of the parties to pay a large judgment.[159]

¶105 Now is the time for both sides of the fair use debate to step back from the argument, consider the valid points that exist in both camps, and then work together to create a system that will meet the needs of each in an era dominated by rapidly changing technology. The parties need to remember that they need each other to survive, and that it will be better for both to resolve the issues without lengthy and expensive litigation. If law libraries choose—or are forced—not to implement electronic reserve systems because of a failure to deal with these issues, they will relinquish an important service for both the students and the law school as a whole.

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157. *Id.*
158. *See* Stephana I. Colbert & Oren R. Griffin, *The Impact of "Fair Use" in the Higher Education Community: A Necessary Exception?* 62 ALB. L. REV. 437, 461 (1998).
159. For example, Michigan Document Service is no longer in business as a result of losing its case.