Making copies: fair use

In addition to reliance upon fair use in the Reserve Room, libraries may also rely on fair use to make copies for patrons in those circumstances that are not covered by Section 108. Section 108(h) indicates that the copying permitted for patrons does not apply to musical, pictorial, graphic, sculptural and audiovisual works (other than news programs). If a patron requests a copy of a videotape such as the musical performance discussed in Images, audio and audiovisual copies in the reserve room, the library will have to decide whether to make the copy as a fair use.

Libraries may also exercise fair use rights for their own benefit, just as individuals might, for example, to make a copy for the library’s collection of a work that is unattainable through normal channels. Arguably, a library might even be able to build a special collection, at least partially through copies made pursuant to the fair use statute in those cases where access to original works is limited. As will be discussed later, the holding in the Texaco case may affect this right, especially if the copyright owner makes it easy to license the work.

Patron copies excluded from Section 108

It is curious that certain media are excluded from the copies permitted by most of Section 108. The logical conclusion to draw from this is that these excluded media are subject to more restrictions on copying than the media that are not excluded (print, recordings and electronic media). This, ironically, is not the case.

Whereas the library would not be protected under Section 108 for copying a recorded musical performance for a patron, the library would be permitted under Section 107 to make the copy so long as the facts involved in the particular copying request weigh in favor of fair use. This would be exactly the same analysis that the library would apply to a reserve request. It is probably true, however, that in most cases, if the library were to consider the request for a patron copy under Section 108 and were to adhere to the limitations of subsections (d) and (e) of that Section, the resulting copying would also be a fair use under the four fair use factors analysis of Section 107. As discussed below, however, some copying that may go beyond the limits set out in Section 108 (d) and (e) and the “related or concerted” copying limitations of Section 108 (g), would be permitted under Section 107. It appears then that copying music, graphics and audiovisual programs for patrons may actually be subject to fewer restrictions by virtue of its exclusion from Section 108 than it would be if these distinctions had not been made. The legislature probably did not intend this result but this happens from time to time, especially with statutes that are as complicated and represent as high a degree of compromise as do the library and fair use sections of the copyright law.

The rare book

Many librarians may have made a copy of a book that is very hard to find, for example, one that is out of print, or whose publisher has gone out of business, one that is not available through the commonly known trade sources and even quite rarely contained in the collections of other libraries. If the librarian were to look carefully at the requirements of Section 108, she would find that only in the case where her own collection originally contained the book but her copy were damaged, deteriorating, lost or stolen would she be protected by the provisions of Section 108 from liability for infringement in making a copy of the rare book. The scope of Section 108 archival copying is not really so broad as many think it is.

The recent Texaco decision suggests that to the extent such copying can be characterized as archiving, the domino effect that such a characterization has on the other factors in the fair use analysis, even in the nonprofit context, can undermine a fair use argument. On the other hand, if it is difficult to obtain permission to copy the work, the fourth factor weighs in favor of fair use. The exercise below shows how these two facts counterbalance each other in analysis under the four factors.

The four fair use factors

Most university libraries are part of a nonprofit educational institution and so the nonprofit educational purpose of the copying would be generally favored under the first factor. But Texaco’s holding casts doubt upon this heretofore fairly certain determination. If the copying can be described as “archival,” at least in some part the first factor would no longer be so strongly supportive of fair use as would otherwise be the case. That determination (the weight of the first factor) may adversely affect the other factors.

Assuming that the work is scholarly, and thus more factual than fanciful, the second factor would weigh in favor of fair use. But, as noted above, copying all of a work will likely weigh against fair use under the third factor according to Texaco, though in the nonprofit educational context, it has been found to be a fair use.
Finally, many facts affect the fourth factor. The very nature of the rare book means that it is not commercially available and thus the impact on the market for the work would seem to be negligible. But, there may be harm to the market for permission fees. Also, consider, however, how print-on-demand electronic printing has the potential to change this entire discussion! When Google Book Search reveals interest in a book long out of print, its copyright owner now has options to make the book available again that were impossible only a decade ago.

Theoretical lost permission fees or revenues for print-on-demand are most likely to weigh against fair use where two of the first three factors already weigh against fair use and where it is easy to get permission or print-on-demand. Where it is difficult or even impossible to get permission or to print a copy, the scope of fair use should be sufficient to permit a library to make its own copy. See what a difference a ready market for permission or reprinting can make? This is quite disturbing to many people, but apparently not to the courts...

Public distribution of fair use copies

The library is permitted to distribute works to the public under Section 109. That section explicitly requires that the copy to be distributed must have been lawfully made. A fair use copy is lawfully made, but a copy made pursuant to Section 107 must be used only for “fair use purposes” which, in this context, would usually be research, private study or scholarship. Thus, libraries should include with such copies a note about the circumstances that permitted their creation and the implications for their continued use by the patron.

The special collection

This circumstance carries the rare book scenario to its logical, and some would say, extreme, conclusion. A library may have need to support a particular field of inquiry and may have acquired quite a collection of literature, both books and periodicals, on the subject. Inevitably, of course, there would be items of interest to users of the special collection that were unavailable for some or all of the reasons discussed above. Although this may seem to push the limits of fair use to the breaking point, especially after Texaco, where such materials are not available otherwise (including the possibility of licensing permission to make a copy or print-on-demand), and the purpose of the library’s copying is nonprofit and educational, and given a prudent policy of acquiring whatever can be acquired through normal channels, a reasonable fair use defense could be made. It would be helpful to document the circumstances that contributed to the decision to rely upon fair use in each case.

Footnotes:

1 For a full discussion of the library’s rights under Section 108, see discussion under the various sections of Library reproduction and distribution, below.


The subjects in this series include:

Fair Use (Section 107)

- Reserving works for limited use, generally
- Print copies in the reserve room
- Reserve rooms for images, audio and audiovisual works
- Providing access to electronic copies
- Library copying for patrons and for the library’s collection

Library reproduction and distribution (Section 108)

- Archiving
- Patron requests
- Unsupervised copying, news programs and contractual limitations on acquisitions
- Interlibrary loan

Other

- Scholarly communication
- The digital library
- Licensing access
- Is your library an Internet service provider under the DMCA?