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copyright in the library

Reserve rooms for print copies

Libraries, like individuals, have rights under [17 U.S.C. Section 107](#) ("Section 107") to make fair use of copyrighted works. They commonly exercise these rights in the Reserve Room.

Print copies in the reserve room

How does the [statutory fair use test](#) apply to copies made to go on reserve? Does it matter who makes the copies? What should we do with the copies at the end of the semester? How many copies should be made?

The four fair use factors.

Well, here we are - confronting the fair use test. Get comfortable with it. Really. Let's consider a request to place six articles and a book chapter on reserve. Keep these points in mind:

- The courts have repeatedly said that no single factor is determinative; that is, there is no one fact about the copying at issue that will, by itself, make it fair or unfair.
- All four factors must be examined, weighed and balanced.
- Nevertheless, findings as to one factor influence the weight given to other factors. This makes some factors, the first one in particular, more important than others: the character of the use under the first factor affects the way we think about the third and fourth factors.¹

Case-by-case balancing means that every fact situation, being different, conceivably results in a different outcome. It takes some practice to comfortably predict what a court might conclude in any but the most obvious situation. This imprecision and unpredictability make it difficult to determine what is and what is not a fair use, but the alternative, asking for permission in all but the most obvious cases, or ignoring the need for permission by assuming that all educational use is fair, could prove to be a costly choices, either way! So, learning to be more comfortable with the fair use analysis is an important step towards soundly operating a reserve room.

Applying the four fair use factors:

Please read [Using the four factor fair use test](#) before proceeding. It will describe generally how "weighing and balancing" works. Remember, we are analyzing articles and book chapters, each one individually.

1. **Purpose and character of the use.** The first factor usually weighs in favor of nonprofit universities because the library and faculty are making nonprofit educational uses of materials copied for classroom use.
2. **Nature of the copyrighted work.** The second factor will weigh in favor of fair use if the material to be copied is factual (texts, journal articles, treatises), rather than creative and fanciful (novels, short stories, plays or similar works).
3. **Amount and substantiality of the part copied.** The third factor may weigh against fair use if each article is considered a whole work. Generally, as the amount copied increases, fair use decreases, but our being a nonprofit entity helps us with this factor. Several courts have held that copying all of a work is not fatal to a fair use defense, especially in the nonprofit context.² If the amount copied is appropriate in light of the intended use, it will not weigh heavily against you, even if you copy the entire work.
4. **Effect of the use on the market for the copyrighted work.** This factor responds to changes in the market for permissions and reprints.³ Publishers have managed to persuade courts to consider this market, rather than the market for the original work, when assessing the economic impact of the proposed copying. The fourth factor may weigh against a finding of fair use if publishers can show that they are losing licensing and royalty fees as a result of copying.

As discussed more fully in [Using the four factor fair use test](#), a publisher's willingness to license copies or the existence of easy ways to assess and collect royalties is not by itself enough to defeat a fair use defense in a nonprofit setting.⁴

Given our example, of the first three factors, only the third factor arguably weighs against a finding of fair use, but in the nonprofit context, and with an amount that is appropriate in light of the intended use, there is ample basis under *Sony* and *Williams* for a finding of fair use nonetheless. In considering the fourth factor, the use would have to be described as an otherwise fair use so far, so we could expect that for a first time use at least, a court might disregard potential licensing or permission fees, not permitting them to convert this otherwise fair use into an unfair use. On the other hand, if these same materials were copied over and over and over again, semester after semester, by the same professor for the same course, a court might be more inclined to wish to take those lost revenues into account.

Who makes the copies.

This analysis would be the same whether the library or a faculty member makes the copies. Either would be exercising the same right under the same statute. In effect, the library acts as agent of the faculty member who is an agent of the university. The real issue may be manpower and budget.

What happens to the copies at the end of the semester.

Section 107 does not mention how long a copy may be retained, or whether at some point, a fair use copy ceases to be fair solely because of the passage of time.⁶ Nevertheless, there is a widespread belief that libraries should not retain a copy longer than one semester.

Not only the Classroom Guidelines,⁷ but every other set of negotiated guidelines, both old and new, has contained some time limit.⁸ Thus, even though it may not be logical to infer a time limit on fair use from the statute itself, it appears advisable nonetheless to obtain permission for uses beyond one semester.

Section 108 copies must become the property of the patrons, but Section 107 is silent on the issue of copy ownership.⁹ It is probably better to consider the faculty member the owner since he or she either brought the copy to the library or the library made the copy at his or her request.

How many copies may be made.

Since up to one copy per student can be made even under the restrictive Classroom Guidelines, assuming an otherwise fair use, almost any reserve request will be comparatively modest. So long as the faculty member has used reasonable judgment in determining the number of copies that are required to allow all students in the class an adequate opportunity to read the reserved materials, requests for multiple copies should not be cause for concern.

Footnotes:

¹ *American Geophysical Union v. Texaco, Inc.*, 802 F.Supp.1 (S.D.N.Y. 1992); 37 F.3d 881 (2nd Cir. 1994).

² *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (making copies for timeshifting television broadcasts for personal use is not an infringement); *Williams & Wilkins v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). But see *American Geophysical Union v. Texaco, Inc.*, 37 F.3d 881 (2nd Cir. 1994). The court was analyzing whether copying scholarly articles in their entirety for research purposes was a fair use. Most observers would have thought that copying to facilitate research would give Texaco an advantage under the first factor which would in turn affect the weight given to the third factor. But the court characterized this typical research copying as systematic, institutional and archival, that is, as creating a personal archive of interesting articles for possible future use, and decided that such copying made the first factor weigh against a finding of fair use. Without a favorable finding under the first factor, Texaco got "hung out to dry" on the third and fourth factors as well. The court held that copying **entire articles** caused the third factor to weigh against fair use. This emphasizes the importance of the interplay between the factors in the analysis.

³ The decision in *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) is generally credited with causing publishers to be more responsive to requests for permission to copy. Jane C. Ginsburg, "Reproduction of Protected Works for University Research or Teaching," 39 J. Copyright Soc'y 181, 210-211 (1992). As further evidence of this trend, the Copyright Clearance Center (CCC) has expanded its services to include electronic reserves and a subscription license, in addition to its transactional license for photocopies.

⁴ *Williams & Wilkins*, 487 F.2d; *Texaco*, 802 F. Supp. 1

⁵ *Texaco*, 37 F.3d at 897-899.

⁶ One case that touched on this issue, although tangentially, was *Sony*. *Sony*, 464 U.S. 417 (1984). The *Sony* court discussed "timeshifting" and acknowledged that sometimes copies made for more convenient viewing at another time are retained indefinitely. While indicating that temporary use for the convenience of viewers is fair use, the court did not go so far as to suggest that **only** temporary uses are fair or to put any time limit on the retention of copies. This recognition that retention occurs coupled with the absence of any specific exclusion of retention from the Court's determination of fair use, may well indicate a tacit acceptance of some amount of retention; however, such tacit acceptance, if reasonably inferred at all, is relatively weak support for the idea that there is no time limit on fair use and it might quickly disappear if the issue were addressed directly as it was in the *Texaco* case.

The *Texaco* decision addressed copy retention when it found that research copies for personal files constituted *archiving* and weighed against fair use (first factor). The implications of this holding for the reserve room are not at all clear because the contexts are so different. On the one hand, reserve room use is qualitatively distinct from building a personal collection of articles that may or may not ever be used, yet reserve room copies retained indefinitely could be characterized as archival either in the hands of the faculty member or the library.

⁷ The "Classroom Guidelines" are the product of negotiations between representatives of copyright owners and certain educational institutions. They addressed the fact that Section 107 does not give adequate guidance to educational institutions about fair use of copyright material for classroom purposes. Urged by Chairman Kastenmeier, Chairman of the Judiciary Subcommittee, The Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, Authors League of America, Inc., and the Association of American Publishers, Inc. reached this Agreement in 1976 when Congress was considering amendments to the copyright law affecting fair use. Congress included the Agreement in the House Report on the New Copyright Law (H.R. Rep. 94-1476, pages 65-74). Several courts have relied on its provisions in their analyses of copying for classroom purposes. The Association of American Law Schools and the American Association of University Professors, however, did not endorse its provisions and described them as too restrictive in the university setting (H.R. Rep. 94-1476, pages 65-74). Nevertheless, since the Guidelines are included in the House Report on the Copyright Law they have special legal significance. As a part of the legislative history of the 1976 amendments, the Guidelines can be considered in determining the intent of Congress in amending the Copyright Act in 1976.

⁸ The National Information Infrastructure Task Force Working Group on Intellectual Property Rights in the Electronic Environment convened a Conference on Fair Use ("CONFU"). The [ereserve guidelines](#) that resulted from the CONFU process, though not official CONFU guidelines, limit reserve use to one semester.

Stakeholders in the multimedia industry negotiated a set of multimedia educational fair use guidelines that limit the use of faculty and student created multimedia works to 2 years.

9 If the library had to acquire a copy for reserve through interlibrary loan or document delivery, [Section 108](#) would require that the copy become the property of the faculty member.

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](#)
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- [Unsupervised copying, news programs and contractual limitations on acquisitions](#)
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