



# copyright crash course

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## copyright in the library

### Reserve rooms for images, audio and audiovisual works

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

#### Analog audio and video recordings and photographic images.

Academic and special libraries still receive occasional requests to reserve audio and video recordings and photographic or slide images similar to the requests described in the discussion of [print copies](#). Although these materials are quickly migrating to digital media in most libraries, it is still of value as a foundation for analysis of electronic reserves to consider a request to reserve analog excerpts from six commercially recorded musical works, a set of architectural slides and a commercial video showing a musical performance.

The audio reserve request probably will involve combining parts of the six works into a single sound recording. Visual image requests often require that slides be made from photographs or other slides. Finally, the audiovisual reserve request would typically involve making a copy of an entire video.

In addition to the exclusive right to make copies, copyright owners also have the exclusive rights to publicly perform and display their works. As with all the exclusive rights, however, these rights are limited. We will address other limitations in addition to fair use that may protect public performances and displays in the library.

#### Making a master recording.

The fair use analysis for copying six musical excerpts is exactly like the analysis for [copying six articles](#). In this case, however, the second factor, the nature of the copyrighted work, will probably weigh against fair use because the work is creative and fanciful rather than factual. Still, with the first factor in favor of fair use, an amount that is appropriate in light of the intended use, and the favorable effect those two have on consideration of the fourth factors, even though this is a harder case than a print example, it seems reasonable to expect that it would be fair.

#### Making slides from photographs in a book.

The request to make slides from a book is similar to the request to make a master recording. Again, the second factor weighs against a finding of fair use since photographic works are not factually based as are journal articles. But, given an educational use and a modest request (a small number of images to be copied from any one book), this request still should qualify as a fair use. It is encouraging to note that this would also be the result under the [Fair use guidelines for educational multimedia](#) and the [Guidelines for the use of images](#). Both sets of guidelines address the application of fair use in the electronic environment, but are helpful, by analogy, to the analog environment too.

#### Making duplicate slides.

This kind of request seems more troubling than making slides from photographs in a book for several reasons. Slides are usually images of creative rather than factual works, making the second factor weigh against fair use (as discussed above). Further, a slide is likely to be considered a whole work, not part of something, thus making the third factor weigh against fair use as well. [As discussed in connection with print copies](#), when two out of the first three factors weigh against fair use, the fourth factor can become problematic because its weight can depend upon whether the use is *otherwise fair*. Even in the nonprofit context, once the second and third factors weigh against a finding of fair use, one must seriously consider the possibility that a court would weigh the fourth factor against a finding of fair use as well. The less clearly fair the use is by the time the court considers the fourth factor, the more likely the court is to take the publisher's "lost revenues" into consideration. As most libraries are aware, slide providers often have policies against duplication and expect that the need for additional slides will be filled with additional orders. Note, however, that if the original slides are no longer available or permission to copy them cannot easily be obtained, the fourth factor tips towards fair use.

#### Making a copy of an entire video recording.

This copying request is difficult for the same reasons as discussed above in duplicating slides. As well as being an entire work, it is a creative work and so the second and third factors weigh against a finding of fair use. That would bring the fourth factor into question, making reliance upon fair use risky, were it not for the fact that permission to make a copy of a movie for nonprofit educational use is nearly impossible to obtain. Especially when

we are careful to institute limits on the use of the copied movie, we have a reasonable, if not an overwhelming fair use argument.

*Sony*, supports this result, as it would be difficult to argue that educators are not permitted under fair use to copy an entire program when individuals have the right to do so purely for entertainment purposes. <sup>1</sup> But, the differences in context make it very hard to "apply" *Sony* to this circumstance; the programs copied in *Sony* were free broadcasts, not commercially purchased videotapes (or slides). As you might have come to expect by now, it is not at all clear exactly how a court would decide this issue.

## Performing the copyrighted work.

The right to make a copy is only one of the rights we need to permit students to listen to or watch a music performance, or view slides in the library. The copyright owner has the exclusive right to publicly perform his work, so we must get his permission unless an exemption covers what we want to do. First we ask, **Is the performance public?** Section 101 of the copyright law says that a performance is public if it is

in a public place or

in any place if "a substantial number of persons outside of a normal circle of a family and its acquaintances" is gathered there. <sup>2</sup>

One must consider whether the place is public and the size and composition of the audience. For example, if the performance takes place in a place open to the public, how many and what kind of people attend is not important. By definition it is a public performance. If the public can be excluded, the size and composition of the audience determine the result.<sup>3</sup>

Most university libraries may not be open to the public, but they are open to considerably more people than a normal circle of a family and its acquaintances. Thus, the displays and performances that take place in the libraries are public performances.

**Exemptions.** Even if a performance is a public performance, it still may not be an infringement because the copyright law places limits upon the performance right of copyright owners in Sections 110(1) and (2). <sup>4</sup> Section 110(1) says that public performances that take place in the face-to-face teaching activities of a nonprofit educational institution are not an infringement.

The legislative history of Section(s) 110(1) and (2) (for distance education) indicates that the legislators thought these two exemptions would cover all performances and displays necessary to teach in public institutions. They specifically include libraries as examples of classrooms or areas devoted to systematic instructional activity. Section 110(1) covers live and recorded performances;<sup>5</sup> The teacher does not have to be in the same room as the students, only in the same general area. Thus, since our audio selections, slides and videotaped music performance would all qualify under these descriptions for the face-to-face classroom exemption, they can be displayed and performed (watched and listened to) in the library without permission.

In addition, fair use applies to all of the exclusive rights of copyright owners, not just to making copies, so a performance may also be a fair use depending upon the results of weighing the four fair use factors, just as described above for analyzing making copies of copyrighted works. Further, it seems likely that if making a copy of a recording or videotape in a particular instance is a fair use, exercising performance rights needed to utilize the copy should also be a fair use. Similarly, if the right to perform or display is covered by Section 110(1), the right to make a copy required for that permitted display or performance should be a fair use.

### Footnotes:

<sup>1</sup> *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).

<sup>2</sup> 17 U.S.C. Section 101.

<sup>3</sup> *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3rd Cir. 1984).

<sup>4</sup> 17 U.S.C. Sections 110(1) and 110(2).

### <sup>5</sup> Section 110(1) (Teaching Activities of a Nonprofit Educational Institution):

- The performance must be performed by the instructor or pupil(s) (not by a performance artist);
- The instructor and pupil(s) must be in the same place (transmissions by television, etc. do not qualify here although they may qualify under 110(2) below);
- The activity must be a teaching activity and not recreation or entertainment;
- The activity must be put on by a nonprofit educational institution;
- The activity must take place in a classroom or other area used as a classroom for systematic instructional activity; and
- In the case of performance of a videotape or movie, the copy of the work performed must have been lawfully made. For example, one could not show a copy of a videotape that failed the fair use analysis unless permission from the publisher to make the copy is obtained, since it would not otherwise have been made in accordance with the provisions of the copyright law.

## 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?

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