

New statement on fair use and electronic reserves

Since the CONFU (Conference on Fair Use) discussions in the late 1990s, there have been numerous discussions concerning “best practices” of electronic reserve systems or e-reserves. The library and higher education associations did not endorse the CONFU discussions because the draft e-reserves guidelines were both highly proscriptive and did not provide the necessary flexibility characteristic of fair use. Some libraries chose to follow the CONFU guidelines that did emerge even though those guidelines—like many copyright guidelines—do not have the force or effect of law. Other libraries chose to address reserve practices based on the fair use doctrine (17 U.S.C. § 107).

With the passage of the Technology, Education and Copyright Harmonization (TEACH) Act of 2002, librarians have expressed new interest in e-reserve practices. TEACH—a copyright amendment that provides new exemptions for public performance and display of digital works protected by copyright and the use of digital technologies to transmit copyrighted works for educational purposes—does not and was not intended to address e-reserves. In response to confusion about TEACH and ongoing uncertainty regarding e-reserves, the following document—endorsed by the Association of College and Research Libraries (ACRL) and the Office for Information Technology Policy (OITP) of ALA, the Association of Research Libraries (ARL), the Association of American Law Libraries (AALL), the Medical Library Association (MLA), and the Special Libraries Association (SLA)—seeks to capture how institutions are applying fair use in the development of electronic reserves systems.

Our thanks to Georgia Harper, manager of the Intellectual Property Section of the University of Texas System Office of General Counsel and Peggy Hoon, scholarly

communications librarian at North Carolina State University, for their assistance in the drafting of and commenting on this e-reserves statement.

If you have questions about the e-reserves statement, contact Carrie Russell, copyright specialist at the Office for Information Technology Policy at crussell@alawash.org.

Applying fair use in the development of electronic reserves systems

For decades libraries have provided access to materials selected by faculty that are required or recommended course readings in a designated area of the library, with materials available to students for a short loan period and perhaps with additional restrictions to ensure that all students have access to the material. Libraries have based these reserve reading room operations on the fair use provisions of the Copyright Law (Section 107).

Within the past decade, many libraries have introduced electronic reserves (e-reserves) systems that permit material to be stored in electronic form rather than storing photocopies in filing cabinets. Depending on the particular electronic reserves system, student access may occur in the library or remotely. Students who wish to have a copy of the reading can print it from the e-reserves systems rather than having to take the original volume to a photocopy machine.

The number of electronic resources licensed by libraries has increased significantly over the past decade. The licenses to these resources often include the right to use them in e-reserves systems. In such cases, no permission is required and a fair use analysis is unnecessary.

To ensure, however, that electronic content is effectively incorporated into e-reserve systems, there must be cooperation among library staff acquiring the digital resources and those managing e-reserves operations. They must work together to be certain that the license agreements do not preclude rights to make materials available through e-reserves systems, and that no one pays addi-

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tional permission fees for uses already covered by a license.

As a result of the increase in licensed electronic resources, the percentage of print materials requested and digitized for e-reserves is diminishing. E-reserves practices for these materials vary widely and are influenced by institutional organizational structures, the information and technology infrastructure, manpower, demand, and the copyright law. The factors described below demonstrate a range of considerations when implementing fair use for e-reserves. They also distinguish the approach librarians are entitled to take when determining whether a use is fair from the approach librarians must take when determining whether a use falls within another statutory exemption. For example, Sections 108 (the library reproduction exemption) and 110 (exemption for public displays and performances including the TEACH Act) mandate a "checklist" approach: if a proposed use fails to comply with any condition, prohibition, or exclusion, the exemption does not apply.

Section 107's four-factor fair use test takes a fundamentally different approach: it simply directs that libraries assess overall whether a use is fair by considering the character of the use, the nature of the work to be used, the amount used in proportion to the whole and the impact on the market for the work. There is no fair use checklist, and there is no need to import from other sections of the law the detailed checklists of conditions, prohibitions, and exclusions that characterize their approach. Librarians balance their own interests with the copyright owners' interests. This summary illustrates ways in which libraries can apply fair use criteria in the development of best practices for e-reserves.

First factor: The character of the use.

- Libraries implement e-reserves systems in support of nonprofit education.

Second factor: The nature of the work to be used.

- E-reserve systems include text materials, both factual and creative.

- They also serve the interests of faculty and students who study music, film, art, and images.

- Librarians take the character of the materials into consideration in the overall balancing of interests.

Third factor: The amount used.

- Librarians consider the relationship of the amount used to the whole of the copy-right owner's work.

- Because the amount that a faculty member assigns depends on many factors, such as relevance to the teaching objective and the overall amount of material assigned, librarians may also consider whether the amount, even the entire work, is appropriate to support the lesson or make the point.

Fourth factor: The effect of the use on the market for or value of the work.

- Many libraries limit e-reserves access to students within the institution or within a particular class or classes. Many use technology to restrict and/or block access to help ensure that only registered students access the content.

- Libraries generally terminate student access at the end of a relevant term (semester, quarter, or year) or after the student has completed the course.

- Many e-reserves systems include core and supplemental materials. Limiting e-reserves solely to supplemental readings is not necessary since potential harm to the market is considered regardless of the status of the material.

- Libraries may determine that if the first three factors show that a use is clearly fair, the fourth factor does not weigh as heavily.

Summary

While there is no guarantee that a practice or combination of practices is fair use, such certainty is not required to safely implement e-reserves. The law builds in tolerance for risk-taking. At one end of the continuum are combinations of practices with which individuals and institutions tolerant of some risk will be comfortable. On the other end are combinations of practices with which those who are averse to risk will be more comfortable. Each institution's combination of practices reflects its tolerance for risk against the background of prevailing beliefs about fair use. Understandably, "not knowing" makes many people uncomfortable, so Congress explicitly addressed this aspect of fair use. Section 504(c)(2) of the Copyright Act provides special protection to nonprofit libraries,

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Memorial Library, automate the library catalog, and fund an Endow-A-Book program. Coughlin published a number of books and research papers in the areas of information resources management, library administration, personnel management, and issues in librarianship. She was co-editor of the official journal of the youth services division of the ALA (1974–77). In 1992 and 1997, she co-authored revisions of a standard text, *Lyle's Administration of the College Library*. She was active in ALA, serving on its Council (1976–77 and 1979–80), as well as on numerous committees. Coughlin expressed a keen interest in supporting ALA's Spectrum Initiative. To make a donation, visit www.ala.org/tribute to access a printable, mail-in form or to make an online credit card donation. Please indicate that your gift is in memory of Coughlin and in support of the Spectrum Initiative. You can also send a check, payable to ALA, to ALA Development Office, 50 E. Huron, Chicago, IL 60611. Please write "Spectrum/Caroline" in the memo section to earmark your gift.

Milton G. "Roy" Daniel, director of Brigham Young University's Learning Resource Center, died June 24. Daniel began serving at the university library in 1979 as supervisor of the Learning Resource Center. In 1982 he became manager of the Learning Resources Division and earned his M.A. in Communications from BYU. He was also instrumental in managing personnel, equipment, and scheduling during the library's recent major expansion.

Chad John Flake, curator of Special Collections at Brigham Young University, died June 18 from leukemia. He came to BYU in 1955 after earning his M.A. degree in Library Science at Denver University. While at BYU he served as general reference librarian, documents librarian and helped acquire and preserve many rare books and manuscripts as curator. He became assistant professor in 1968 and associate professor in 1973. His award-winning work, *Mormon Bibliography, 1830-1930*, serves as an important reference guide.

Mary Jane Tacchi, 61, coordinator of Young Adult Services at the New York Pub-

lic Library (NYPL) since 1998, has died. She began her career within the NYPL Branch Libraries in 1966, first working as a reference librarian at the Wakefield Branch in the Bronx. Tacchi later became the supervising borough specialist responsible for oversight of young adult work in all Bronx branches. Using that broad experience, she went on to become assistant coordinator of Young Adult Services for the Branch Libraries, and subsequently, young adult coordinator. As a longtime member of ALA's Young Adult Library Services Association (YALSA), Tacchi served on numerous committees, including, most recently, the Professional Development Planning Task Force and the YALSA Research Committee. She chaired the YALSA Selected Film and Videos for Young Adults Committee.

Egon Weiss, 84, librarian emeritus of the U.S. Military Academy at West Point, has died. He became assistant librarian at West Point in 1958, director in 1962, and retired in 1987. During his years at West Point, he oversaw the construction of a new library and introduced computerized technology to deliver integrated library services. During his tenure, the staff grew to more than 70 and he greatly expanded library services as well as the special collections on military history. ■

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educational institutions and their employees. When we act in good faith, reasonably believing that our actions are fair use, in the unlikely event we are actually sued over a use, we will not have to pay statutory damages even if a court finds that we were wrong. This demonstrates Congressional acknowledgement of the importance of fair use and *the importance of our using it!*

SPECIAL NOTE: There are now several bills in the House and the Senate seeking to "fix" some of the civil liberties problems of concern to the library community. Check out the following Web site on PATRIOT Act legislation: www.ala.org/patriotfix or contact the ALA Office of Government Relations at (800) 941-8478. ■