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Electronic Reserves and Fair Use

With recent changes to the U.S. Copyright Law, including the passage of the TEACH Act, there is renewed interest in identifying library best practices in applying fair use to electronic reserves operations. In the late 1990s, electronic reserves were a primary focus of the Conference on Fair Use (CONFU). Libraries and higher education associations rejected the draft CONFU electronic reserves guidelines because they were highly proscriptive and did not provide the necessary flexibility inherent in fair use. Instead of guidelines, the library community has developed a statement to serve as a framework within which libraries may assess risk in terms of applying the four fair use factors to electronic reserves operations.

"Applying Fair Use in the Development of Electronic Reserves Systems" seeks to articulate how institutions are currently applying fair use to copyrighted materials included in electronic reserves systems. In addition, the statement provides information on design and operation of systems that are both compliant with Copyright Law and take full advantage of fair use and library exemptions that are central elements of the law. The statement addresses only how U.S. Copyright Law applies to electronic reserve operations in academic institutions. The application of U.S. Copyright Law to the use of copyrighted materials in course- or learning-management systems is out of scope of this statement.

ARL thanks Georgia Harper, Manager, Intellectual Property Section, University of Texas System Office of General Counsel, and Peggy Hoon, Scholarly Communication Librarian, North Carolina State University, for their assistance in the drafting of and commenting on this document. The statement was reviewed and endorsed by the ARL Intellectual Property and Copyright Committee, chaired by Paula Kaufman (Illinois at Urbana-Champaign), and also endorsed by the American Library Association, the Association of American Law Libraries, the Association of College and Research Libraries, the Medical Library Association, and the Special Libraries Association.

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 additional 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 non-profit 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 copyright 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, 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!*

The above statement seeks to articulate how institutions are currently applying fair use to copyrighted materials included in electronic reserves systems. To view policies that are examples of how research and

academic libraries have used the fair use provisions of Section 107 of the Copyright Act as the basis for their electronic reserves policies, see <<http://www.arl.org/access/eres/erespolicies.shtml>>. Please contact Mary Jackson <mary@arl.org> if you have any questions concerning this statement.

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<<http://www.arl.org/newsltr/232/ereserves.html>>.

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