



“You Can’t Be Too Careful:” The Cost of Conservatism to Academic and Research Librarians’ Mission

When teachers bring Stacey, a librarian at a Midwestern private university, their course materials to upload on the university’s e-reserves system, she always checks to make sure that the course material has not been uploaded before—or at least, not in the last three years. If it’s fresh material, and it’s only a small fraction of the original work, she’s pretty sure that uploading it for the students to study could be considered a “fair use.” If it has been uploaded before, she tries to license the material, or have the professor find a substitute that the professor hasn’t used before. She knows that at some universities, e-reserves policies are more liberal, but her institution can’t afford a legal challenge, so she likes to err on the conservative side. After all, you can’t be too careful.

Chris is tasked with digitizing his university’s physical holdings, including a rich set of special collections in music. Some of the material is in the public domain, so he’s set his work-study students to work digitizing that. But some of it isn’t, and one of the most frequently-requested assets that is partially under copyright is the personal working library of a noted African-American composer, donated by members of her family. Chris is not going near material that is under copyright, and that means he’s resisted digitizing the composer’s library. It isn’t worth his job to find out whether it’s OK under fair use to make the copyrighted parts of this unique resource available digitally, and under what conditions. In any case, it’ll take years to process the unambiguously public domain holdings, even though it isn’t what people are most interested in. After all, you can’t be too careful.

Darren is in charge of audio-visual media at Southwest University, a large institution with a historic denominational affiliation. A professor wants to research the history of a religious group that has since disbanded, which produced a number of VHS tapes. The university's two remaining VCRs have a tendency to shred the tape, and the professor intends to view this work repeatedly. She wants Darren to make DVDs from the tapes, but Darren just isn't sure whether he'd be violating copyright by making such a transfer. He tells the professor he'll bring it up at the staff meeting next month. She complains that she's trying to apply for a grant that's due at the end of next week. Darren would like to help, but he also knows he is the place where the buck stops on copyright issues. And after all, you can't be too careful.

Stacey, Chris and Darren are all trying to be the best professionals they can be. But each of them is also eroding their own mission and the mission of their universities to generate, transmit and preserve knowledge. Stacey is in the position of telling faculty to find second-best materials to teach with, because they used the best last year. Chris is forced to deny access to research material to anyone who cannot make a physical visit to his archive. Darren is both putting his own assets at risk and frustrating faculty research with delays.

Before they created their Code of Best Practices in Fair Use for Academic and Research Libraries, librarians were often forced to make a fair use judgment without knowing the consensus of their peers. And since the fair use doctrine is phrased somewhat abstractly in the copyright statute, while applied on a case-by-case basis within cultures of use, just knowing the letter of the law was not much comfort.

Without the Code, the only tool librarians had in these situation was "risk management." In other words, they tried to decide not whether a use was justifiable under fair use, but only whether such a use might – in practice -- incur challenges or controversy. In different institutions, different levels of risk were considered tolerable, but (in general) librarians sought to assure themselves that in no way would they put themselves, their patrons or their institution into any situation that might engender a challenge or controversy—even if they were in the right.

In the process, they often curtailed, delayed or distorted their mission. They routinely looked to license and purchase, simply as a way out of having to make a fair use determination. They looked to safety at all costs. And too often the cost was the mission to generate, transmit and preserve knowledge.

Risk management is an entirely appropriate and reasonable – indeed inevitable – part of making institutional decisions about use of copyrighted material. But too often librarians made unrealistic and exaggerated risk assessments, without knowledge of the consensus of their peers and the current interpretation of fair use. Furthermore, in the area of copyright infringement, they often looked for far greater security than they did in other areas of possible legal exposure, such as defamation, indecency or even privacy. In these other areas, they and others typically acted with great confidence, knowing where the comfortable center of daily practice was.

With the academic and research librarians' code, librarians can finally make risk assessments in light of a rich understanding of their rights. Now, they can first ask how the law can help them to meet mission, and then ask how they can meet mission within a reasonable margin of safety.

Librarians should follow three basic tenets as they define and redefine policies according to their new abilities:

1. Librarians are central guardians of the core mission of the university. When policies deform, delay or block that mission, the policies need to be reconsidered.
2. Risk is a feature of daily life, and while it deserves attention, no librarian can hope to accomplish their daily tasks without undertaking some reasonable risk.
3. When risk is vanishingly low, as it is in the core situations described in the academic and research librarians' code, it is reasonable to undertake.