

**Expert Report of
Kenneth D. Crews, J.D., Ph.D.**

Cambridge University Press v. Patton, et al.
Civil Action No. 1:08-CV-1425-ODE

In the United States Federal District Court
Northern District of Georgia

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Part I: Background of the Report

I have been retained by the law firm of King & Spalding to prepare this report in connection with the case of Cambridge University Press v. Patton, et al., filed in the Federal District Court for the Northern District of Georgia, Civil Action No. 1:08-CV-1425-ODE (hereinafter the “Current Case”).

King & Spalding represents the defendants in the Current Case. The allegations against the defendants center on claims of copyright infringement in connection with the copying of articles from periodicals and excerpts from books (the “Instructional Materials”) in furtherance of the teaching needs of Georgia State University (“GSU”). In particular, the defendants are accused of making copies of the Instructional Materials and making them available to students, for reading in connection with the courses at GSU, through a library service known as “electronic reserves” (hereinafter “E-Reserves”).

Certain named officials of GSU are accused of infringing copyrights held by the plaintiffs in certain specified works. Copyright infringement, in the context of E-Reserves, may occur if the library, for example, makes a digital scan of the Instructional Materials and allows students to access and perhaps to download, copies of the Instructional Materials through the networked E-Reserve system. Such activities are not copyright infringement if they are within fair use. Fair use is a statutorily established exception to or limitation on the rights of copyright owners. Uses that are within fair use are deemed by statute not an infringement of copyright. In response to that possibility, GSU had adopted a policy for the use of materials, including uses on E-Reserves, and the university has revised that standard in light of the Current Case.

This report will examine the circumstances of E-Reserves at GSU and the current state of the law of copyright as applied to E-Reserves. Any attempt to make a mere “snapshot” of current conditions would be misleading. This report will instead place these issues in the context of the changing state of education, publishing, technology, and the law. All of these circumstances will likely remain in steady transition. This report will demonstrate that E-Reserves and the law of fair use today are not necessarily the same as they have been in the recent past. One can infer that the near future will likely bring further change. This report will accordingly demonstrate that a flexible understanding of fair use better reflects the law and can better serve future needs.

Part II: Background and Credentials of Expert

Kenneth D. Crews is the director of the Copyright Advisory Office at Columbia University. He has held that position since December 2007, and for approximately 20 years much of his work as a researcher, teacher, and university administrator has been centered on the copyright issues that are important to the work of colleges and universities. Fair use is one of those issues. Much of his work also has encompassed issues such as ownership and works made for hire, the structure and terms of agreements between authors and publishers, and the role of international agreements on the development of copyright law in countries around the world. Dr. Crews has been an invited speaker at educational institutions and conferences in more than 40 states, and in countries on five continents. He has been the guest of the U.S. State Department to discuss copyright issues and legal developments with officials in Chile, Kuwait, and the United Arab Emirates. He has been the guest of the U.S. Copyright Office to mediate discussion of fair use guidelines on the use of digital images. Dr. Crews has testified in public hearings and in information sessions before the U.S. Copyright Office.

Dr. Crews began his study of these copyright issues while writing his Ph.D. dissertation at the University of California, Los Angeles. In 1990, he was awarded his doctoral degree from the UCLA Graduate School of Library and Information Science. He had previously studied history at Northwestern University and earned his law degree at Washington University in St. Louis. He practiced law in Los Angeles before enrolling in graduate studies at UCLA. His dissertation won early recognition. He received a scholarship award from the UCLA alumni association, and his dissertation was selected as the one dissertation to receive an annual award from the Association of College & Research Libraries and from the Association for the Study of Higher Education.

His dissertation was a study of fair use policies at major research universities in the United States. Dr. Crews identified characteristics of the policies, trends in their development, and their relationship to changes in copyright law. He began his academic career at an associate professor in the business school at San Jose State University. During those years, Dr. Crews revised his dissertation for publication by the University of Chicago Press, and he completed other publications relevant to copyright law. In 1990, copyright was attracting little attention at universities, but that quickly changed. In 1994, Indiana University launched the first office in the country focused on copyright issue of importance to the university. Dr. Crews was recruited to assume directorship of the new office, to give it an innovative direction, and to join the faculties of the IU School of Law-Indianapolis and the IU School of Library and Information Science. He held that combined administrative and faculty appointment from 1994 until the end of 2007 when he relocated to Columbia University.

Dr. Crews has become well known throughout the country and the world for his work on copyright issues. Examples of his recognition:

- Invited guest to lead workshops and programs at colleges and universities throughout the United States. These visits most often focus on educating faculty,

librarians, and other members of the academic community about the copyright. Dr. Crews is widely recognized for his ability to teach colleagues about making decisions and acting responsibly with regard to respecting and managing copyrights and exercising fair use in a meaningful and proper manner.

- Author of several publications on copyright and fair use. His books on copyright law have been widely respected and frequently studied by scholars, librarians, and many others. Two of his scholarly articles have been singled out as among the best writings in the field and republished in collective works.
- Invited to direct and lead numerous programs, including initiatives coordinating the interests of publishers and academics. For example, Dr. Crews moderated discussion among international publishers and academic organizations, meeting in The Netherlands in 2008, to develop a form of an agreement for publication of scholarly articles.
- Recipient of awards and formal recognition. Dr. Crews was the first recipient of the L. Ray Patterson Award from the American Library Association in 2005. The award is given annually to a person recognized for his or her contributions to the understanding of copyright law.
- Commissioned to prepare an international study of copyright limitations and exceptions for the World Intellectual Property Organization. WIPO is an agency of the United Nations, and it selected Dr. Crews to conduct a survey and study of copyright exceptions applicable to libraries and archives in the copyright laws of all 184 member countries. That report has been made available on the WIPO website and has led to important discussion worldwide about these issues and the problems with some laws. Dr. Crews also made a presentation based on the study to the worldwide delegates to WIPO in Geneva, Switzerland, in November 2008.

Additional details about many of these activities, particularly publications and presentations by Dr. Crews, are included in his curriculum vitae attached at Appendix A.

Dr. Crews has had a role in litigation related to copyright law:

- Consultant to the law firm of Bingham McHale LLP of Indianapolis, Indiana in a case involving alleged infringement of computer software. The case settled. Dr. Crews provided consulting advice, but did not serve as an expert witness.
- Consultant to the law firm of Bamberger, Foreman, Oswald and Hahn, LLP of Evansville, Indiana in a case involving alleged infringement of art images. The case settled. Dr. Crews provided consulting advice, but did not serve as an expert witness.
- Advisor to library associations in connection with the preparation and filing of amicus briefs in cases of interest, including the proposed settlement of the

litigation involving Google Books, and the appeal to the Second Circuit in the *Texaco* decision described below.

Dr. Crews has been deposed on one previous occasion, as a witness the following bar disciplinary case unrelated to copyright law:

In the Matter of Christopher E. Haigh, Respondent, Indiana Supreme Court
98S00-0608-DI-317. Deposition held on April 17, 2007.

The compensation to Dr. Crews for preparation of this report is a fee of \$250.00 per hour, plus expenses.

Part III: Resources and Documents Reviewed

I was retained by King & Spalding to prepare this report on April 22, 2009. Because of the immediacy of the deadline for completion, this report focuses on the following available resources:

Documents Related to the Current Case

I reviewed the following documents relevant to the Current Case:

- Complaint for Declaratory Judgment and Injunctive Relief.
- Defendants' Answer to Complaint for Declaratory Judgment and Injunctive Relief.
- University System of Georgia Copyright Policy, available at <http://www.usg.edu/copyright/>, as visited on May 7, 2009.
- Draft of University System of Georgia Copyright Policy, reviewed during January and February 2009.
- Transcript of the deposition of William Gray Potter, conducted on March 9, 2009.
- Transcript of the deposition of Nancy Seamans, conducted on March 10, 2009.
- Unedited and uncertified transcript of the deposition of Laura Burtle, conducted on April 24, 2009.
- Unedited and uncertified transcript of the deposition of James Daniel Palmour, conducted on April 23, 2009.
- Realtime transcript of the deposition of Diane Belcher, conducted on May 7, 2009.
- Realtime transcript of the deposition of Jodi Kaufmann, conducted on May 6, 2009.

Legal Research

Review of legal primary and secondary source literature, particularly: (1) searches of full-text databases of journals for published articles related to the subject of E-Reserves and copyright; (2) analysis of relevant cases and statutes. Relevant materials are cited in this report.

Library Science Research

Review of the literature of library science, particularly searches of full-text databases of journals for published articles related to the subject of E-Reserves and copyright. Relevant articles are cited in this report.

Review of Sample Copyright Policies

Review of examples of policies in effect at diverse colleges and universities in the United States. Most of these policies were located through conventional searches of the Internet.

Others were located through references in the published literature noted above. This study is not a scientific sampling of policies, but it does represent an overview of diverse policy positions at a wide range of college and universities of different sizes and geographic locations.

Discussions with University Officials and Attorneys

On October 3, 2008 I participated in meetings in Atlanta, Georgia to discuss the Current Case with the following individuals:

- Ms. Kerry Heyward, University Attorney, Georgia State University
- Ms. Cynthia V. Hall, Assistant Legal Advisor, Georgia State University
- Ms. Mary Jo Volkert, Assistant Attorney General, State of Georgia
- Mr. Stephen M. Schaetzel, King & Spalding
- Ms. Kristen Swift, King & Spalding

On various other occasions before and after that date, I have had telephone conversations with Ms. Volkert and with the following attorneys from King & Spalding: Mr. Schaetzel, Ms. Swift, Ms. Laura Gary, and Mr. Anthony Askew.

Part IV: The Growth and Importance of E-Reserves

Through the last decade, E-Reserves have rapidly become a standard service to students at colleges and universities. A primary purpose of E-Reserves is to provide students with access to readings and other materials that are important for their education. Regardless of the technology or other circumstances, a reserves service at an educational institution is fundamentally a service whereby instructors may select materials for students to review in connection with a particular course. Reserves are a critical component of higher education, and they enable students to have access to a variety of materials that might not otherwise be realistically or affordably available by any other means. Reserves are not a means of generating wholesale access. Instead, they center on providing access to selected materials, individually identified by instructors, to meet the educational needs of a particular course.

E-Reserves are essentially a technological enhancement of “reserve room” services that have been part of familiar in education for many decades. E-Reserves have definite advantages over traditional reserves. They facilitate access to materials, increasing the ability of students to do their assigned reading. They reduce the risk of loss of or damage to library materials. They also reduce the physical library space needed to conduct reserve services.¹

The simplest version of reserves would be a collection of books and other materials maintained at one location for students to request, read, and return. From the earliest incarnation of reserves, libraries have usually taken up responsibility for this service. Placing original books and journals at a reserve desk did not pose serious copyright questions. Libraries are allowed to lend materials from their collections consistent with the “first sale” doctrine of copyright law.²

These simple reserve operations may not have had serious copyright implications, but they posed other important risks. They did not serve educational needs well, and the risk was a lost opportunity for learning. Students were continuously frustrated by the need to wait in line at the library for another student to return materials. The heavy use of individual works also meant that the materials were also damaged, marred, or lost before everyone could complete the reading assignment. The other risk was to the library budget. Libraries were dedicating staff members to reserve services, and they were contending with the expense of steadily replacing materials. By the time a replacement was needed, the work may have become out of print or otherwise not available for repurchase from the publisher.

The availability of photocopiers in many libraries, beginning especially in the 1960s and 1970s, shifted the dynamic of reserve services. In many situations, even today, libraries continue to place original books and other materials on reserve. However, the availability of photocopiers yielded some critical changes. Most important, libraries were

¹ Brice Austin, “A Brief History of Electronic Reserves,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 12 (2001): 3.

² Copyright Act, 17 U.S.C. § 109(a).

able to place on reserve photocopies of articles, book excerpts, and other materials. Photocopying was never free. Libraries bore the expense of copiers, and they devoted staff to the task, but they were able to protect the original works from excessive wear and loss.

The importance of making an advance photocopy can be underscored by one simple example: An instructor requests that the library place a particular journal article on reserve. Without making a copy, the library can only place the original journal at the reserve desk. The library has probably paid a substantial “institutional” subscription price for the journal and has paid to have the issues bound for permanent shelving.³ If, as a result of placing the bound volume on serve, the article is damaged or lost, the library is faced with the additional large expense of replacing the volume, or the library is left with making a photocopy of the article from another source and attempting to replace it neatly into the volume. Either way, the expense and the interruption to the use of the article and journal are significant.

The availability of photocopiers also meant that students were often making copies. Students were sometimes reading materials at the reserve desk, but they were also spending their own money to make copies of materials in order to read them at a time and place of their choosing. Photocopying was overall expensive for the library and for students, but it allowed for improved services. Photocopying allowed the library to better preserve collections for all future users, and the library could avoid the disproportionate expense of replacing materials. The photocopying may have raised questions of copyright and fair use, but no litigation arose from it.

The introduction of digital technologies for reserve services, especially in the 1990s, led to the systems now known as E-Reserves.⁴ Instructors still select specific readings, and the reserve service makes them available to students enrolled in the appropriate courses. In substance, today’s E-Reserves are in many respects similar to the traditional print reserves of the past. Yet, E-Reserves have stirred more questions about copyright and fair use.⁵ For example, students can access materials from remote locations and not necessarily from inside the library building, and digital materials may be downloaded for further study.

At the same time, E-Reserve systems commonly serve the interests of copyright owners. For example, E-Reserves do not necessarily include copies of materials, but instead have

³ Studies long have suggested that the higher price, the institutional subscription, paid for journals in print and now electronic form, is an additional fee that covers at least in part the effects of copying for purposes such as education and research. *See, for example*, Wendy J. Gordon, “An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory,” *Stanford Law Review* 41 (1989): 1418-1419.

⁴ The history of E-Reserves is traced at Brice Austin, “A Brief History of Electronic Reserves,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 12 (2001): 4-7.

⁵ For an example of an early overview of copyright issues, see Scott Seaman, “Copyright and Fair Use in an Electronic Reserves System,” *Journal of Interlibrary Loan, Document Delivery & Information Supply*, 7 (1996): 19-28. *See also* Mary Brandt Jensen, “Is the Library Without Walls on a Collision Course with the 1976 Copyright Act?” *Law Library Journal* 85 (1993): 619-642.

links to the readings. Those links are to databases or websites where the copyright owner makes the original work available. Linking is not an act of copying and does not raise serious copyright concerns. Linking in fact supports the economic interests of the copyright owners. Linking brings traffic to the database, potentially boosting its value.

E-Reserves offer further support for the interests of copyright owners through the use of password restrictions on access. Students are able to access only the materials for courses in which they are currently enrolled. In print reserve systems, anyone entering the library could ordinarily retrieve and use any of the materials at the reserve desk. Similarly, in the case of printed coursepacks, anyone entering the store may buy a copy. The technology of E-Reserves further offers the potential to track uses, to communicate copyright information to users, and perhaps to constrain further reproduction of works. In an E-Reserve system, libraries can disable access to materials at the end of the academic term or when a student withdraws from a course.

The technological potential of E-Reserves has made reserve services more useful for education. Electronic access has allowed for greater integration of educational materials and improvement of the learning experience. The traditional journal articles and book excerpts were once almost the entirety of reserve readings. Today they are only a portion. Course materials, accessible through E-Reserves or comparable systems, include links to studies and reports on websites, court rulings and statutes from the public domain, art collections in museum archives, manuscripts from library special collections, links to videos on YouTube, downloads of papers under “Creative Commons” provisions, and much more.

No one set of copyright standards can encompass the following rich extraordinary range of materials included on E-Reserves. All of the following materials are subject to copyright protection and to widely varying measures of fair use; all have been included in E-Reserves:

- Political campaign literature.
- Kidnapping ransom notes and criminal admission statements.
- Pages from family scrapbooks.
- Early photographs of city scenes, with no identified copyright owner.
- Photographs of sculpture gardens.
- Opinions from state courts.
- Statutes from foreign countries.

The systems that are generally labeled “E-Reserves” are today more than a means for sharing existing works. They are part of a forum for the exchange of information that is critical to modern education. Because of the networked connections among students, instructors have been able to restructure the educational experience to allow students to share their own papers and to enable students to contribute critiques and reviews. E-Reserves are in use in colleges and universities and increasingly in elementary and

high schools.⁶ Because E-Reserves are accessible from outside the library building, they are a crucial adjunct to distance education programs. Distance education is today part of the curriculum at nearly 90% of some types of educational institutions.⁷

Some of the functions of E-Reserves are at present migrating to course management systems (“CMS”). These systems allow instructors and students enrolled in courses to communicate with one another, and for instructors to direct students to readings. Within the CMS, an instructor may provide links to individual readings in databases or on websites. An instructor may also post original papers or copies of existing works. Some of these systems address copyright by offering guidance to instructors, and many colleges and universities are beginning to establish policies, helping instructors understand the importance of copyright and the principles of fair use. At many educational institutions, instructors have options for reaching students. They may turn to the library for E-Reserves, or they may use the CMS. Indeed, it would not be unusual to find that the college or university further offers coursepack services and photocopy machines for common handouts. A mix of alternatives allows instructors and students to find the most effective means for meeting educational needs.

⁶ By 1999, E-Reserves were available in more than half of the libraries that are members of the Association of Research Libraries. Steven J. Melamut, et al., “Fair Use or Not Fair Use: That Is the Electronic Reserves Question,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 11 (2000): 4.

⁷ By the year 2000, distance education courses were offered at 89% of public two-year institutions, such as community colleges. Of undergraduate programs nationwide, 64.3% have distance education offerings, and among graduate programs the number rises to more than 78%. Kathryn Ann Loggie, et al., “An Analysis of Copyright Policies for Distance Learning Materials at Major Research Universities,” *Journal of Interactive Online Learning* 5 (Winter 2006): 224.

Part V: The Law of Copyright and Fair Use

Much has been written about copyright and fair use. This report focuses on only those aspects of the law that are importantly related to the formulation of institutional policies related to E-Reserves.

Rights of the Copyright Owner

The fundamental rights of the copyright owner include the right to make reproductions and to distribute copyrighted works in copies.⁸ This report does not explore the question of whether or not the alleged activities of the defendants encompassed any of the rights of the copyright owners.⁹ Based on the assumption that the activities do affect the rights of owners, this report focuses on the application of fair use to the use of copyrighted materials, particularly journal articles and book excerpts, in the context of E-Reserves.

Fair Use and Education

Fair use has been part of American copyright law since at least 1841, and in 1976, for the first time, fair use was explicitly made a part of the U.S. Copyright Act. The full text of the fair use statute specifies at the outset that fair use applies to uses of works for teaching, and it allows multiple copies for teaching purposes:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

⁸ Copyright Act, 17 U.S.C. § 106.

⁹ This report does not address whether the uses of materials are in fact infringements. Among other possibilities, many of the works on E-Reserves may be in the public domain.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹⁰

Other statutory provisions could apply to library services, notably Section 108 of the Copyright Act,¹¹ but E-Reserves is not addressed specifically in any statute.¹² As a result, the copyright exception of greatest importance for E-Reserves is fair use.

No court has ruled on the question of fair use for reserve uses, whether in the traditional print context or in E-Reserves. Although American courts have handed down many hundreds of decisions on fair use, only a few court rulings have examined fair use in any situation that is even analogous to E-Reserves. Therefore, this report will give particularly emphasis to those few cases and put them in the context of some significant trends in the development of fair use. Much of the evolution in the law of fair use has been appropriately led by the United States Supreme Court.

Fair Use in the Supreme Court

The U.S. Supreme Court has expounded at length on the matter of fair use in only three decisions. The first such ruling was *Sony Corporation v. Universal Studios, Inc.*, in which the Court held in 1984 that individuals were within fair use when they used a VCR, then an innovative technological device, to record a copy of a television broadcast for later viewing.¹³ The Court affirmed the rights of individuals to engage in “time shifting” by making a copy of an entire work for later use. The Court was not deterred by the fact that the television program was a commercial product, that the user was copying the entire work, and that the use might be for education as well as for entertainment.

The following year, in 1985, the Supreme Court handed down its decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.¹⁴ The Court was considering the fair use of an excerpt from the then-unpublished memoirs of President Gerald Ford quoted in an article in *The Nation* magazine. Although the quotation was brief, the Court ruled that it was not fair use. The Court seemed influenced by the distinctive facts of this case. First, the book manuscript was at that time not yet published, and copyright law has a long history of granting greater protection to unpublished works. Second, the quotation went directly to the most compelling part of Ford’s memoirs (his pardoning of Richard Nixon), undercutting substantial interest in the book. Third, the use directly led to the

¹⁰ Copyright Act, 17 U.S.C. § 107.

¹¹ See Copyright Act, 17 U.S.C. § 108 (permitting libraries to make copies of some works for preservation and replacement and for individual research and study).

¹² Congress enacted the TEACH Act in 2002, permitting the use of some copyrighted works in distance education. However, the statute, codified at 17 U.S.C. § 110(2), does not encompass the use of works akin to E-Reserves. For a study of the TEACH Act and the potential for possibly interpreting it to serve library needs, see Kate Irwin, “Copyright Law—Librarians Who Teach: Expanding the Distance Education Rights of Libraries by Applying the Technology Education and Copyright Harmonization Act of 2002,” *Western New England Law Review* 29 (2007): 875-914.

¹³ *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984).

¹⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

cancellation by *Time* magazine of its commitment to pay a large fee to reprint excerpts of the memoir. The Court was able to point to concrete evidence of economic harm. Fourth, the Court appeared influenced by the unseemly circumstances. The unpublished version of the book became available to *The Nation* under circumstances that remained unexplained and that stirred suspicions. The Court did not seem inclined to allow fair use to a possibly unscrupulous use.

Although the facts are peculiar, the *Harper & Row* decision was important for its approach to fair use. Unlike the opinion in *Sony*, the 1985 ruling was a clearly structured and formalistic analysis of the four factors as set forth in the fair use statute. The Court examined the factors in an orderly fashion, considering each one individually and then evaluating overall if the factors leaned in favor of or against fair use. It was a structure of fair use decisionmaking that continued in lower courts.

Nevertheless, the Supreme Court made some important alterations in its approach to fair use in 1994. That year, the Court ruled in *Campbell v. Acuff-Rose Music, Inc.* that a rap parody version of the popular song *Oh, Pretty Woman* could be within fair use.¹⁵ While the Court continued to apply the four factors, and looked at an overall balancing of the factors in the end, the Court made a few profound revisions of the conventions of fair use:

- First, the Court abandoned most “presumptions” and other conventions that had grown up around most of the four factors. For example, the Court made clear that a use for commercial purposes, such as the sales of the parody recording, would not be presumptively against fair use. The Court ruled that the “amount” of the use was not merely a measure of quantity, but that a person could use as much of the work as was appropriate to serve the favored purpose.
- Second, the Court resisted analyzing the four factors in isolation from one another. Instead, the Court stated that they must be examined with reference to one another. The favorable ruling on the purpose of the use (in this case a parody is a form or criticism or comment) should be used to determine the appropriate meaning and application of the other factors.
- Third, the Court gave new emphasis to the “transformative” use as part of the purpose of the use. In this case, the Court characterized the purpose of the use as criticism and as transformative. A transformative use is not essential, but can be important. In this case, the making of a new song transformed the existing song into a new creative work. A transformative use can also arise from using a work without changing the work, but by giving it a new purpose or usefulness.

The *Campbell* case from 1994 is the most recent word from the Supreme Court on fair use. Lower courts accordingly have relied heavily on *Campbell*, and they have used its principles to bring fresh meaning to fair use. An evolving understanding and application

¹⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

of fair use is critical as individuals make new and diverse uses of a rich variety of copyrighted works.

Fair Use, the Courts, and Education

Although the federal courts have handed down many rulings on fair use, few are directly about education or involve facts that are closely analogous to educational needs and E-Reserves in particular.¹⁶ This report will focus on a few cases that are foundational to these issues. It will also examine more recent cases that demonstrate a shifting approach to fair use in light of the *Campbell* ruling and in the context of diverse uses and diverse copyrighted works.

Basic Books, Inc. v. Kinko's Graphics Corporation, 758 F.Supp. 1522 (S.D.N.Y. 1991).

Kinko's, the commercial copy shop, offered the service of making coursepacks of photocopied book chapters assembled at the request of university professors. Kinko's sold the coursepacks to students. The publishers of the books filed this action, and Kinko's asserted that its use was fair use. The court examined the four factors and held against a finding of fair use. The copying was not transformative, and the purpose of the copying was commercial when undertaken by Kinko's. The court did note: "The use of the Kinko's packets, in the hands of the students, was no doubt educational."¹⁷ The works copied were nonfiction, and the second factor thus weighed in favor of fair use.

Regarding the amount factor, the court held to relatively rigid standards. The court was persuaded that Kinko's copied too much from each book, an amount ranging from about 5% to 25%. The court also noted that the copies were of entire chapters, which the court saw as "stand alone" works, suggesting that the coursepacks were not supplemental reading, but were central to the course assignments. On the fourth factor, the court determined that especially the copies from textbooks interfered directly with prospective sales of those works.

One of the most important aspects of the *Kinko's* case is its examination of the Classroom Guidelines from 1976 (examined in greater detail in Part VI of this report). The guidelines offer a minimalist definition of photocopying of materials for classroom handouts. Given that tight definition of fair use, the court declined to adopt the guidelines as a legal standard. Moreover, the court rejected the urgings of the publishers to adopt one particular provision of the guidelines that would bar all "anthologies" of

¹⁶ Courts ruled on education-related matters in a few cases that preceded enactment of the fair use statute in 1976 and the first Supreme Court decision in 1984. Because those developments in the law broadly restructured judicial approaches to the issues, the early cases are not examined here in detail. See *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983) (duplicating competing instruction manual for sale); *Whitol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (multiple copies of music); *William & Wilkins v. United States*, 487 F.2d 1345 (Ct.Cl. 1973) (library copies of individual works for study); *Encyclopaedia Britannica v. Crooks*, 542 F.Supp. 1156 (W.D.N.Y. 1982) (duplicating entire films to build collection).

¹⁷ 758 F.Supp. at 1531.

copied materials. The court instead held: “it is not clear that Congress intended strict application of this prohibition without fair use balancing.”¹⁸ The court in *Kinko’s* in fact did not apply that element of the Classroom Guidelines to facts of that case. The court instead determined that the fair use of each item must be evaluated individually; the fact that they are assembled into a coursepack is not determinative of fair use.

American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994).

Princeton University Press v. Michigan Document Services, 99 F.3d 1381 (6th Cir. 1996) (en banc).

These two cases reflect an extension of the reasoning in *Kinko’s*. Both cases involved photocopying of either journal articles or book chapters. Both cases also involved photocopying undertaken by a commercial enterprise in connection with its for-profit activities. These cases allow the following observations about fair use:

- Photocopying by a commercial enterprise in furtherance of its commercial activity will weigh against fair use on the first factor, the purpose of the use. Neither of these cases ruled on the question of photocopying by a nonprofit educational institution. The implication of the cases, and the clear language of the fair use statute, indicate that the outcome may be considerably different if photocopying were made by the educational institution.
- As in the *Kinko’s* decision, the court in *Texaco* examined the Classroom Guidelines from 1976, but the court ultimately refused to adopt them as a legal standard. Further, the court in *Princeton* did not adopt the Classroom Guidelines, but did raise them as a reference point to assert that the defendant’s copying was far beyond those purported limits.

These two cases, combined with the *Kinko’s* ruling, became the source of a common perception that photocopying of copyrighted materials for coursepacks is an infringement. The courts in fact held that the standard of fair use must be applied, and a blanket prohibition against coursepacks was inappropriate. Nevertheless, many publishers and photocopy shops advanced the simple prohibition and did not apply the factors of fair use. These cases made clear that fair use existed, but in the marketplace of coursepacks the law was seldom used.

For many shops, the decision to not use fair use was straightforward economics. Photocopy shops often had little incentive to work with the law. Applying fair use requires staff time and specialized training, and most shops were not inclined to assume that responsibility and expense. Such expenses would be borne by the general overhead of the shop. Moreover, if the shop did not apply fair use and instead paid fees to the copyright owners or to the Copyright Clearance Center, those fees would be added to the purchase price of the coursepack. The copy shop would in the end not carry the expense. The students, or their parents or their scholarship funds, would bear the expense. Under

¹⁸ 758 F.Supp. at 1537.

this business model, the copy shop has little need to pursue fair use. In fact, the absence of fair use might be better for the shop, even if failing to apply fair use becomes an enormous burden on educational programs and on student savings.

Sundeman v. The Seajay Society, Inc., 142 F.3d 194 (4th Cir. 1998).

By the late 1990s, judicial analyses of fair use began to migrate from the familiar application of rules associated with the four factors, to a more flexible standard of allowable uses. This change occurred for a few reasons. The most important reason is the flexible interpretation of fair use that the Supreme Court established in *Campbell*. Courts also had been applying a rigid view of fair use for unpublished works, leading Congress to revise the statute in order to drive courts back to a broader view of fair use. Finally, courts were beginning to confront the great variety of works that were subject to fair use and the diverse ways that people were using them.

The *Sundeman* case reflects this more flexible approach to the law. A literature scholar presented at a conference her analysis of an unpublished novel by Marjorie Kinnan Rawlings. The analysis included quotations of approximately 4% to 6% of the original work. The representative of Rawlings's estate filed this lawsuit, claiming copyright infringement based on the copies that researchers made of the manuscript, and based on the quoting and paraphrasing of the manuscript in the conference presentation. The court held that the defendant acted within fair use.

In large part, this case addresses fair use in a familiar manner. For example, it held that the first factor was in favor of fair use, because the scholarly and critical purpose outweighed any possible financial benefit from royalties. The second factor leaned against fair use, because the original work was an unpublished manuscript of a creative novel. But on the third factor, the amount of the work, the court relied on *Campbell* and other cases to avoid "absolute rules" about quantity and to evaluate quantity in light of the scholarly objectives. The court ruled that the lengthy quotations and the copies of the entire manuscript were consistent with the purposes of scholarship and criticism. On the fourth factor, the court was not persuaded that the use harmed the market. In fact, the court resolved that the use could well have stimulated interest in the manuscript and increased sales of the work upon its publication.

Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).

Many cases have addressed the fair use of quotations of text in published books, but this case ruled that copying of full artistic posters, that had commercial potential, could be within fair use. The Archives owns the rights to psychedelic concert posters from the 1960s, and DK Publishing included images of the posters in a book about rock music history. In previous years, a court might have been persuaded to rule against fair use. The publisher was a commercial enterprise, the posters were reproduced in full, and the posters were highly artistic and creative.

The Second Circuit ruled that the use of posters was for the scholarly purpose of examining the history of modern music. Further, the use was transformative. The original posters served the purpose of advertising concerts. In the context of the book, the use served as “historical artifacts” and to represent and document historical events. While the book reprinted the posters in full, they were a reduced size and reproduced in a low-quality copy. The court found these conditions relevant to the “amount” of the work used. Moreover, the amount so used was consistent with satisfying the scholarly and transformative purpose. Finally, while the copyright owner was offering the posters for sale, this reproduction was not likely to compete with sale. The court determined that reprinting the posters might actually boost sales of the full-size works.

Current Directions in Fair Use for E-Reserves

This sequence of court rulings tells us much about the substance of fair use as applied to E-Reserves. With particular reference to the four factors in the statute, court rulings are providing these indications about the meaning of the law:

- *Purpose of the Use:* The use by a nonprofit educational institution, using the materials for educational purposes, should strongly favor fair use. Unlike the cases involving coursepacks, the use of materials for reserves and E-Reserves is undertaken by the university. The circumstances of E-Reserves can actually strengthen the weight of this factor. For example, on E-Reserves, as opposed to print reserves, materials are customarily maintained behind password access. Limiting access to enrolled students evidences that use of the materials is for educational purposes. In some respects, the use of the materials may be transformative. For example, an article in a scholarly journal was originally written and published for purposes of advancing scholarship. If the article is about medicine, the purpose is for advancing medical treatment and improving health conditions. If that same article is part of the assigned reading in a course, its use is transformed into a teaching tool. The article may be assigned for purposes of advancing medicine, but it might also be assigned as an example of research methods or even to study trends in research funding or scholarly publishing. In an electronic environment, the instructor may add questions and references for further study, and students may add commentary and observations. In the hands of the teacher and student, the article takes on a new purpose.
- *Nature of the Work:* The Supreme Court in *Campbell* ruled that this factor may have no particular importance in the context of parody and criticism, because any type of work may be susceptible to being used for such purposes. The same is true about teaching. E-Reserves encompass much more than scholarly articles and book excerpts. They now include videoclips, music, art, photography, software code, archival correspondence, poetry, and much more. Fair use may apply differently to different types of works, but the cases are clearly telling us that fair use in fact allows uses of all such works under appropriate conditions.

- *Amount of the Work:* The early case, such as *Kinko's*, relied principally on a quantitative measure of fair use. The court in *Kinko's* was strongly persuaded by the percentage of each book that was photocopied. Similarly, the *Texaco* court viewed a journal article as an independent work and was therefore influenced by its vision that the copying encompassed 100% of the work. Later courts, however, have not been so formulaic. *Bill Graham* allowed reproduction of entire posters, and courts are generally pegging the amount that may be copied to the amount necessary to achieve the appropriate purpose. That flexible standard is derived directly from the Supreme Court's decision in *Campbell*. An E-Reserve system cannot include all copies of all works, but it can adhere to a flexible measure of fair use, especially if the amount allowed is appropriate to serving the educational purposes.
- *Effect on the Market:* The Supreme Court in 1985 called this factor the most important factor, but even in that case, the Court did not seem to give this factor unusual weight. The Court's later ruling in *Campbell*, and rulings from the lower courts, have shifted far from that statement and from any approach to fair use that is built on immutable standards. The *Sundeman* and *Bill Graham* cases are an example of courts finding that some uses might actually stimulate the market for the original work. In *Campbell*, the Supreme Court acknowledged significant market harm, but declared that copyright owners cannot control all markets, and some market harm is not germane to fair use. E-Reserves have at most limited effects on the market. Materials are behind password controls and are usually only narrowly selected materials. E-Reserve systems may even support the market for copyrighted works. Linking to resources creates traffic in databases and on websites. Libraries often include materials only if the library already has purchased the original work. When libraries reach the limits of fair use, regardless of the measure, they in turn often purchase or license further uses of the works. Finally, educational programs and E-Reserves give students access to materials that they may in turn use in their future study and careers.

In broadest terms, the law of fair use has moved far from the more formalistic approach of the early cases. The Supreme Court has led the way to a more flexible interpretation of the law.¹⁹

The Importance of Good Faith

A good faith understanding and application of fair use is critical for many reasons, and it has been recognized by Congress and the courts as a vital part of the law. The clearest indication is in the language of the Copyright Act itself. Section 504 sets for the

¹⁹ A similar trend is occurring in Canada, where the Supreme Court in 2004 handed down a broad ruling about "fair dealing," leading many Canadian librarians to reconsider their previous approaches to copyright law. Joan T. Dalton, "Electronic Reserves and the Copyright Challenge in Canada," *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 17 (2007): 114-115.

framework for recovery of damages in an infringement case, including recovery of statutory damages. Statutory damages can be the most serious financial consequence of an infringement, but the Copyright Act further provides:

The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords. . . .²⁰

The statute establishes that a librarian or instructor, and the library or educational institution, will be protected from statutory damages if the person in a good faith manner acted within an interpretation of fair use. By implication, the statute is encouraging such parties to learn about the law and apply it in a reasonable and good faith manner.

Good faith may be more than protection from damages. It may be part of the interpretation of fair use itself. In the *Kinko's* decision, the court inferred bad faith from the fact that Kinko's shops had not responded to copyright allegations and did not review or revise its standards for photocopying of copyrighted works. By contrast, another court ruled that acting in good faith will weigh in favor of fair use on the "purpose" factor. That court found good faith in the fact that the user credited the source of a photograph, used a lawfully obtained copy, and believed that it was using the copyrighted work in a lawful manner.²¹ Many E-Reserves policies include similar concepts. They often require a citation to the original source and require that any copies be made from a lawfully obtained source. Moreover, by conscientiously adhering to appropriate standards of fair use, instructors and librarians will be acting with the belief that they are within the law.

²⁰ Copyright Act, 17 U.S.C. § 504(c)(2).

²¹ *Nunez v. Caribbean International News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).

Part VI: Model Policies for Fair Use and Reserves

The fact that the law has not addressed directly the question of copies of materials on print reserves or E-Reserves, some interested parties have attempted to shape perceptions and understandings of the law through model policies or interpretative guidelines.²² These efforts, however, have found no support in the law. They are often not closely related to the factors in the fair use statute or in the interpretations from courts. Moreover, no court has adopted any of these proposals as a rule of law. They deserve some examination here because of their prominence in the discussion of fair use and reserves, and because courts and policymakers should exercise considerable caution when using any of them.

The three model policies of importance are:

- Classroom Guidelines (1976) (copy attached at Appendix B)
- ALA Model Policy (1982) (copy attached at Appendix C)
- CONFU E-Reserves Guidelines (1996) (copy attached at Appendix D)

Classroom Guidelines, 1976

When Congress enacted the fair use statute in 1976, educators, publishers, and authors expressed some concern that the law of fair use might not be adequately defined. Congress signaled that it was not willing to pursue more exact standards, and it encouraged these groups to negotiate an agreed interpretation. The result was the drafting of the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals,” better known as the “Classroom Guidelines.”²³ These guidelines explicitly “state the minimum and not the maximum standards of educational fair use. . . .”

The guidelines are a narrow interpretation of the law. They permit single copies of book chapters, articles, and other short works for an instructor to use in preparing for a class. Multiple copies for classroom handouts are allowed, but only within meticulous defined standards of “brevity,” involving the counting of words for an excerpt from a work. The instructor must also adhere to requirements of “spontaneity” and “cumulative effect.” The guidelines further attempt to set complete bars on some uses, notably the creating of

²² The Current Case focuses on the fair use of print or textual materials, as do the three model policies examined in this section of the report. This report does not examine closely any suggested models for other types of works. An example of such a model is the “Statement on the Digital Transmission of Electronic Reserves” issued by the Music Library Association. See: <http://www.lib.jmu.edu/Org/MLA/Guidelines/Accepted%20Guidelines/Digital%20Reserves.aspx>.

²³ *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals*, H.R. REP. NO. 94-1476, at 68-70 (1976).

collections of materials or “anthologies.” That provision later arose and was rebuffed in the litigation of the *Kinko’s* case (explained in Part V of this report).

In my own research, I was able to demonstrate that the Classroom Guidelines were incorporated into university policies in the years after enactment of the Copyright Act of 1976. They gained wider acceptance after New York University settled a copyright infringement claim in 1983 on terms that were based on the guidelines. That same study further showed that the language of “minimum” standards was stripped from the guidelines in the settlement, and the result was a policy on fair use that was confined to the narrowest aspects of the standard.²⁴

Through the intervening years, the Classroom Guidelines have played a lessened role in the application of fair use. A review of policies for this report revealed little indication that colleges and universities were using the Classroom Guidelines for E-Reserves.²⁵ According to one study, “This set of guidelines is widely considered by libraries to be too impractical and restrictive to use.”²⁶ However, some elements of the guidelines have persisted and have affected later interpretations.

ALA Model Policy, 1982

The ALA Model Policy was among the first efforts to address fair use for print reserves, and it set forth a few guideposts that continue to shape some perceptions of the law.²⁷ The document is from 1982, so naturally some of the provisions are pertinent only to paper copies at the reserve desk. The document opens with a helpful overview of materials that may be copied and used without restriction, such as works of the U.S. government, and works on which the copyrights have expired. Like the Classroom Guidelines, this document outlines some materials of which the instructor may make a single copy.

With respect to multiple copies for handouts, the ALA Model Policy reviews the Classroom Guidelines and concludes: “These minimum standards normally would not be realistic in the university setting.” The document next suggests standards for reserve room copies. Among the provisions of these standards are the following:

²⁴ Kenneth D. Crews, *Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education* (Chicago: The University of Chicago Press, 1993).

²⁵ The E-Reserves policy at William Patterson University is reported based on the Classroom Guidelines. See Victoria H. Wagner, “Processing Reserves, Seeking Permissions and Engaging the Campus: How the Library Serves as the Copyright Touchstone,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18 (2008): 250. A review of the current policy at that institution reveals that it does not include the rigorous word counts and other details of the guidelines. See: <http://www.wpunj.edu/Library/reservinfo.shtml#fairuse>.

²⁶ Steven J. Melamut, et al., “Fair Use or Not Fair Use: That Is the Electronic Reserves Question,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 11 (2000): 12.

²⁷ American Library Association, *Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use* (1982).

- The library may photocopy an entire article or book chapter or poem.
- The amount of material copied should be “reasonable” in relation to the total reading for the course.
- Use of photocopied materials in multiple courses or in successive years “will normally require” permission.
- Duplication of consumable works “normally” requires permission.
- The creation of anthologies “will in most instances” require permission.

The ALA Model Policy and the Classroom Guidelines predate any rulings by any courts on facts that are closely akin to library reserves or E-Reserves. These interpretative standards may be well-meaning, but they are certainly not the law, and the details are not necessarily based on the law of fair use. As one commentator observed about the ALA Model Policy, it was not the result of negotiations, or apparently even discussions from diverse views. For many years after its issuance, the document stirred no legal challenge or even critical commentary from the publishing industry.²⁸ Nevertheless, the ALA Model Policy is sometimes regarded as “strict.”²⁹ In fact, the ALA has distanced itself from the guidelines and has removed them from the ALA website.³⁰

Nevertheless, the standards of the ALA Model Policy found their way into the language of university policies. At least one university recently began to adopt the ALA model, but ultimately rejected its restrictive terms. In 2002, the library at Colorado State University-Pueblo began the long process of drafting a policy on fair use and E-Reserves. Librarians consulted legal counsel, and they relied heavily on the ALA Model Policy. On further review, the librarians rewrote the policy to reflect the approach adopted by the University of Colorado. That policy was based directly on the four factors. Because such a standard has been adopted at various universities, legal counsel at Colorado State University was comfortable with it. The ALA Model Policy was dropped, and revised and more flexible standards became the new E-Reserves policy at Colorado State University-Pueblo.³¹

²⁸ Laura Gasaway, “Values Conflict in the Digital Environment: Librarians Versus Copyright Holders,” *Columbia-VLA Journal of Law & Arts* 24 (2000): 149-150.

²⁹ Steven J. Melamut, et al., “Fair Use or Not Fair Use: That Is the Electronic Reserves Question,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 11 (2000): 13.

³⁰ Steven J. Melamut, et al., “Fair Use or Not Fair Use: That Is the Electronic Reserves Question,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 11 (2000): 13.

³¹ Sandra L. Hudock and Gayle L. Abrahamson, “Embracing Fair Use: One University’s Epic Journey into Copyright Policy,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 15 (2004): 70-71. Legal counsel at the University of Colorado had also approved its broader policy. Brice Austin and Karen Taylor, “Four Scenarios Concerning Fair Use and Copyright Costs: Electronic Reserves at the University of Colorado, Boulder,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18 (2007): 12.

CONFU E-Reserves Guidelines, 1996

The Conference on Fair Use (“CONFU”) was an initiative, headed by officials of the U.S. Patent and Trademark Office, to convene interested parties to negotiate “guidelines” for the interpretation and application of fair use for the needs of education and research. The topic of E-Reserves was a major area of focus. After three years of meetings and negotiations, CONFU failed to reach consensus on any standard of fair use for E-Reserves.

Before the CONFU process was concluded, however, a subgroup of participants met separately and developed in 1996 a document that has become known as the “Fair Use Guidelines for Electronic Reserve Systems.”³² Drafters of the final CONFU report did not include these guidelines, noting that they “had not received widespread acceptance at this time.”³³ Indeed, the guidelines were heavily criticized in 1996 and since. One study concluded that the library groups opposed the CONFU Guidelines because they set a restrictive standard; publishers opposed the guidelines because they lacked the rigorous word limitations of the Classroom Guidelines.³⁴

Various writers have challenged the appropriateness of the CONFU Guidelines on many grounds. For example, one study questioned the provision that E-Reserves readings should be only a small proportion of the total reading for a course. “If placing a reading on e-reserve is a fair use, then it should not matter whether each week’s reading is likewise copied and placed on reserve.”³⁵ Nevertheless, in the absence of many alternative interpretations of fair use, elements of the CONFU Guidelines have been incorporated into policy statements at some educational institutions.³⁶

Current Status of the Model Policies

While the model policies may offer some insights about the evolution of understandings of fair use, all three have severe flaws. Most important, all three of them include substantive standards of fair use that are not justifiable under the law of fair use. Moreover, if implemented, these model policies would lead to practices and procedures that would severely constrain the application of fair use and as a result burden or even prohibit appropriate application of fair use in service to teaching and learning.

³² The writer of this report participated in that subgroup and has written about the process and the resulting guidelines. See Kenneth D. Crews, “Electronic Reserves and Fair Use: The Outer Limits of CONFU,” *Journal of the American Society for Information Science* 50 (December 1999): 1342-1345.

³³ Information Infrastructure Task Force, *Working Group on Intellectual Property Rights, Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use* (Washington: November 1998).

³⁴ Steven J. Melamut, “Pursuing Fair Use, Law Libraries, and Electronic Reserves,” *Law Library Journal* 92 (2000): 187.

³⁵ Thomas H.P. Gould, Tomas A. Lipinski, and Elizabeth A. Buchanan, “Copyright Policies and the Deciphering of Fair Use in the Creation of Reserves at University Libraries,” *Journal of Academic Librarianship* 31 (May 2005): 184.

³⁶ Steven J. Melamut, et al., “Fair Use or Not Fair Use: That Is the Electronic Reserves Question,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 11 (2000): 14.

One could debate many aspects of these model policies.³⁷ One particular aspect of these model policies is perhaps most problematic. The Classroom Guidelines introduced the concept of “spontaneity” and defined it as requiring that the instructor’s intention to use the work must arise so close in time as to preclude seeking permission. The Classroom Guidelines took that notion further and proposed a sweeping rule that the copying allowed under the guidelines shall not “be repeated with respect to the same item by the same teacher from term to term.”³⁸

The ALA Model Policy from 1982, and the CONFU Guidelines from 1996 reiterate the point in slightly different language for reserves. Under this “one-time” use rule, once an instructor uses the work, a later use would be immediately proscribed under fair use. Nothing in the law of fair use requires or even suggests such a standard. One could rationalize that it is related to the fourth factor, the effect of the use on the market for the work. Even accepting that argument, the standard fails as matter of law. First, a finding of market harm is only evidence about one of four factors. Market harm does not mean that the use cannot be fair use. Indeed, the factors may overall militate in favor of fair use, even in the face of market harm. Second, many fair uses may be repeated or continuing, and the ongoing use is not interpreted as a compounding activity that eventually undermines the fair use. Consider the examples of a book with quotations or a motion picture that captures background images of photographs. Assume the original uses are fair use. Few would argue that fair use ceases when the books is issued in paperback or the motion picture is shown on television or sold on DVD.

In the context of E-Reserves, the one-time use rule is particularly problematic. Consider uses that are easily within fair use. Realistic examples include a single page from a lengthy book or a still image from a motion picture. Most analyses would result in a strong argument in favor of these uses. However, adopting a one-time use rule would instantly foreclose even a second use of these materials. That would be an inaccurate application of fair use, and it would leave the educational institution to face the choice of either removing the materials and losing the educational opportunity, or seeking permission and possibly incurring permission fees.

Examples such as these are actually occurring in libraries. Northwestern University employs a one-time use rule. It reported the example of a request to reuse a single chapter from a book that was 18 years old and out of print. The fee for the use in E-Reserves through the Copyright Clearance Center was \$241.95. The price was beyond

³⁷ The author of this report has written at length on some of these model policies. See Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” *Ohio State Law Journal* 62 (2001): 599-702.

³⁸ An example of the perception that the actual law of fair use includes this restriction is found in a published overview of copyright that states “the law does not allow us to make copies of the same article for other classes in the next semester. . . .” Barbara Ludlow, “Understanding Copyright and Intellectual Property in the Digital Age: Guidelines for Teacher Educators and their Students,” *Teacher Education and Special Education*, 26 (Spring 2003): 133.

the budget of the library or the professor. “The professor chose another reading. The piece was not read and the author and/or copyright holder was not compensated.”³⁹

Northwestern also faced the challenge of using, in a second semester, small excerpts that could easily be fair use. The fair use policy there precluded reuse, so the library was compelled to seek permissions. “In 2005, Thompson Gale requested a \$23.10 fee for a one-page table from a 333-page book, and Doubleday, through the Copyright Clearance Center, wanted \$84.78 for three pages from a 593-page book, both for a class of 154 students. The high costs merely discourage faculty use and encourage them to organize alternate course readings.”⁴⁰

A study based at Washington State University Vancouver demonstrates the high cost of a one-time use rule. The library started with a reading list of 49 items. Sixteen of them were linkable from full-text databases, and four other items were dropped from the assigned reading. Of the remaining 29 items, the library determined that all required permission because they had been used on reserves in previous semesters. The library sought permission and found these results: Permission was denied for 12 items. Publishers did not respond at all for seven items. Permission was granted for the remaining ten items, but at an average cost of \$58.40 per item. Of all 49 items on the reading list, a license was available through the CCC for only seven.⁴¹ A second study produced similar results. The library sought permission for 17 items. Although eight of the works were licensable for some uses through the CCC, the library was able to secure permission for only seven items total for E-Reserves. The average cost was \$86 per item. “In almost all cases, the instructor decided not to use the article once they discovered how expensive they would be.”⁴²

The University of Colorado carefully evaluated the advantages and disadvantages of different policy positions. When examining the implications of adopting the one-time use rule, the library noted the likelihood of serious user frustration and escalating expenses. Instructors and students will not understand why a work was available one semester, but removed from E-Reserves the next term. Moreover, the restriction will lead to greater monitoring of the system and payment of fees. The library estimated an annual cost of \$7,000 in staff time to track fair use claims and reuse of works. The library also estimated that permission fees would be \$60,000 per semester for the use of materials that were deemed to be fair use in only the first semester.⁴³ For many reasons,

³⁹ Charlotte Cabbage, “The Changing Cost Environment of Managing Copyright for Electronic Reserves,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 13 (2003): 63.

⁴⁰ Charlotte Cabbage, “The Changing Cost Environment of Managing Copyright for Electronic Reserves,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 13 (2003): 63

⁴¹ Rachel Bridgewater, “Shifting Responsibility for Electronic Reserves Copyright Permissions from the Academic Departments to the Library: From Confusion to Cooperation,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18 (2008): 146.

⁴² Rachel Bridgewater, “Shifting Responsibility for Electronic Reserves Copyright Permissions from the Academic Departments to the Library: From Confusion to Cooperation,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18 (2008): 148-149.

⁴³ Brice Austin and Karen Taylor, “Four Scenarios Concerning Fair Use and Copyright Costs: Electronic Reserves at the University of Colorado, Boulder,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18 (2007): 8.

restrictions on repeat use are falling out of favor at large universities and at small colleges.⁴⁴

⁴⁴ Astrid Oliver, "Current Practices and Philosophy on Electronic Reserves, Course Management Systems, and Copyright Compliance: A Survey of the Council of Public Liberal Arts Colleges Libraries," *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18 (2008): 429.

Part VII: Copyright and Fair Use Policies at Colleges and Universities

The growth of E-Reserves throughout the country, and the various related developments in the law, have drawn wide attention to questions of copyright and fair use. As a result, many educational institutions have developed policies addressing relevant issues of fair use.⁴⁵ The following is a survey of example policies from diverse colleges and universities. These educational institutions are large and small, private and public. This review is limited to information that is publicly available. As is true at GSU, some universities may supplement the formal policy statement with additional guidance and procedures to implement the policy, to offer additional information, and perhaps to refine its application of fair use.⁴⁶

This review of policies will reveal some similarities as well as differences among the policies. Most important overall is the strong evidence that in fact educational institutions are striving to develop policies on copyright and fair use in a context where the law has not given clear direction.

One could describe or categorize the policies in many ways. For this report, the policies are grouped according to the measure of the quantity of a work that may be made available on E-Reserves. The quantity of the work has been an issue in the Current Case, and the quantity has been articulated in the policies in some important ways. That said, any characterization of a standard of fair use solely by measure of quantity would be a distortion of the policies surveyed here and not an accurate reflection of fair use. Just as the law of fair use depends on an evaluation of all four factors in the statute, an evaluation of a university policy must take into consideration all of its relevant elements.

With that caution, the policies reviewed here may be generally grouped into three categories:

Type I: Policies With Quantified Limits Based on Percentage of a Work

Type II: Policies With Quantified Limits Based on Chapters or Articles

Type III: Policies With Quantified Limits Based on Fair Use Factors

Type I: Policies With Quantified Limits Based on Percentage of a Work

The following policies state prominently a percentage limit on the amount of an original work that may be included in E-Reserves under fair use. Although nothing in fair use

⁴⁵ This report does not address the question of what constitutes a “policy” and whether it has binding authority. This report examines any available and relevant resource that appears to give specific guidance or direction on the relevant issues.

⁴⁶ For purposes of this review, the concept of a “policy” is broadly and generally defined to encompass any substantive statement of fair use applicable to E-Reserves.

law sets such a quantity limit,⁴⁷ an independent study of policies revealed that approximately 80% of the libraries surveyed used some form of quantity limit.⁴⁸ The author of that study challenges the wisdom of these limits in light of the flexibility of fair use and the potential for inconsistent application of even percentage limits. For example, a limit of 10% could be interpreted as 10% of the pages or 10% of the chapters, and the outcome of those alternative measures will not always be the same.⁴⁹ Nevertheless, such standards remain common.

Webster University (Missouri)

http://www.webster.edu/fdc/fairuse/ereserves_fairuse.html

- Review of the four factors of fair use.
- Materials on E-Reserves at the request of instructors.
- Materials must be lawfully possessed by library, instructor, or university.
- Copying limited to 25% of a work.
- Permission required when copying entire works.
- No charge to students, other than printing.
- Copyright notice on screens.
- Access limited to students in specific courses.
- Materials deleted when no longer needed for instruction.
- Materials may be reused in subsequent semesters for different classes.
- Repeat use also allowed if the library has the work in a subscription database, but linking is not practical.
- University will monitor developments in the law.

American University (Washington, D.C.)

<http://www.library.american.edu/about/services/reserves/faculty.html>

- Permission required for materials used in repeat semesters.
- Library will assist with permissions and have a budget for fees.
- Citation on all materials.
- Copying limited to 25% of a book.
- Articles from journals or newspapers, but limited to three articles from a title by varying authors.
- No more than 25 items per course.

⁴⁷ Thomas H.P. Gould, Tomas A. Lipinski, and Elizabeth A. Buchanan, "Copyright Policies and the Deciphering of Fair Use in the Creation of Reserves at University Libraries," *Journal of Academic Librarianship* 31 (May 2005): 182.

⁴⁸ Thomas H.P. Gould, Tomas A. Lipinski, and Elizabeth A. Buchanan, "Copyright Policies and the Deciphering of Fair Use in the Creation of Reserves at University Libraries," *Journal of Academic Librarianship* 31 (May 2005): 192.

⁴⁹ Thomas H.P. Gould, Tomas A. Lipinski, and Elizabeth A. Buchanan, "Copyright Policies and the Deciphering of Fair Use in the Creation of Reserves at University Libraries," *Journal of Academic Librarianship* 31 (May 2005): 192.

University of Colorado

<http://ucblibraries.colorado.edu/reserves/copyright.htm>

<http://ucblibraries.colorado.edu/reserves/guidelines.htm>

- Review of the four factors.
- Materials on reserve only at request of instructor for nonprofit educational purposes.
- Library will purchase materials whenever possible.
- No charge to students for access.
- Copyright warning notice on screen.
- Password restriction to students enrolled in specific course.
- Materials removed when no longer needed for instruction.
- Copying limited to 25% of most works.
- Larger amounts possible based on individual review.
- Articles limited to one article per journal issue.
- Linking to articles in databases.
- Not allowed are textbooks, workbooks, and coursepacks currently marketed to students.
- Limited to 50 items per course.
- Materials are retained for more than one semester only at the request of instructor.
- University will monitor developments in fair use.

University of California, Riverside

<http://library.ucr.edu/?view=services/reserves/ereservesfaculty.html>

- Password restriction to the specific course.
- Review of the four factors of fair use.
- Materials are for instructional purposes only.
- Citation on all materials.
- Books copied, limited to 50% of the text, not to exceed 30 pages.
- Journals copied, limited to 50% of the journal issue, not to exceed 30 pages.
- No coursepacks that are prepared by the university printing office.
- Permission required for repeat use by the same instructor for the same course.
- Library will request permissions.

Indiana University, Northwest

<http://www.iun.edu/~eris/copyright.shtml>

http://www.iun.edu/~eris/faculty_checklist.shtml

- “This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.”
- Books limited to 50%.
- Articles limited to 50%.
- Materials removed at the end of semester.

Clark Atlanta University (Georgia)

<http://www.auctr.edu/rwwl/Home/ReserveGuidelines/tabid/317/Default.aspx>

- Full citation on all materials.
- Use in repeat semesters requires permission.
- One article per journal issue may be scanned and placed on E-Reserves.
- Books may be copied, limited to one chapter or not more than 20%.
- Linking to articles is not limited unless prohibited by license.
- No consumable works.
- No coursepacks or materials in coursepacks available for purchase.
- Student works require permission.

Brown University (Rhode Island)

http://www.brown.edu/Facilities/University_Library/services/reserves/

- Instructor is responsible for copyright compliance.
- Coursepacks will not be placed on E-Reserves.
- Linking to materials in subscription databases.
- Works must be owned by the library or instructor; library will purchase a digital copy if available.
- Digitize only small portions of materials.
- Digitize only reasonable amount, and not more than needed for educational objectives.
- Articles limited to one from a journal issue.
- Single short poem.
- Books limited to two chapters or 20%.
- Password restriction for individual courses.
- Permission required for unpublished works.
- E-Reserves may not include material from textbooks or coursepacks for the course.

West Texas A&M University

<http://www.wtamu.edu/library/circulation/ereserves.shtml>

- Password restriction.
- Fair use is based on the four factors.
- Library will not post materials that the library determines to be outside fair use.
- Allowable works include journal articles and poetry.
- May not copy a substantial portion of a work, deemed to be 15% of the work.
- May not include more than one chapter of a book.
- Repeat use by same instructor for same course requires permission.
- Warning notice about copyright posted in system.

Bucknell University (Pennsylvania)

<http://www.bucknell.edu/x12136.xml>

- Fair use is based on the four factors.
- Factors are used to make a good-faith judgment on a case-by-case basis.
- E-Reserves are treated the same as print reserves.
- Must include a citation on all works.
- Workbooks and consumable works are not permitted.
- Packets of materials are not allowed; only individual items.
- Password restriction; only students enrolled in specific courses.
- No charge for printing or access.
- Notice of copyright on all materials.
- Students must assent to a statement about copyright and fair use.
- Complete works allowed only with permission or if all avenues for purchase of the materials have been exhausted.
- In most cases, fair use copies will be limited to about 10% to 15%.
- Materials are removed at the end of the semester.

Salisbury University (Maryland)

<http://www.salisbury.edu/library/copyright/ereserves.html>

- Copying from books typically limited to a single chapter or between 10% and 20% of the entire work.
- Copying from journals typically only a limited number of articles from a journal, especially in the most recent five years.
- Copying limited to a portion of the reading for a course.
- Materials only as requested by instructor.
- Materials related to educational goals of the course.
- Library or instructor owns copy.
- No permission needed for first use on reserves.
- Access limited to students enrolled in the course.

- Materials retained only for duration of course.
- Library will retain a copy on a CD for one semester for students who need to complete the course.
- No cost to students.
- Copyright warning notice and copy of copyright notice on materials.
- Citations to all materials.
- Library will help instructors secure permissions as needed.

Pennsylvania State University

<http://www.libraries.psu.edu/psul/reserves/copyright.html>

- Same standards generally apply to print reserves and to E-Reserves.
- Materials on reserve only at the request of instructor for noncommercial educational use by students.
- Library or instructor must possess a lawful copy.
- No charge to students for access; charge only made for reproductions.
- Citation on all materials on E-Reserves.
- Copyright warning notice on all materials on E-Reserves.
- Password restriction for enrolled students.
- Linking to licensed sources will be used whenever possible in lieu of copying.
- Materials removed at the end of the course.
- Materials copied will not exceed 15% of the original work.
- Not more than two articles from a single issue of a journal.
- Repeat use for the same course and instructor may require permission.
- Library staff will seek permissions through the Copyright Clearance Center.

Carlow University (Pennsylvania)

<http://library.carlow.edu/pdf/ereservespolicy.pdf>

- Materials on reserve only for nonprofit, noncommercial, educational purposes.
- Uses must be within fair use or the “TEACH Act.”
- Library will not include materials on reserve if the library deems them to be beyond fair use.
- For uses beyond fair use, instructors must obtain permission and present permissions in writing to the library. The library will not obtain permissions.
- E-Reserves are password protected and limited to the university community.
- No limit on the total number of items on E-Reserves.
- Copies from books limited to one excerpt per semester per course, not to exceed 15% of the book.
- Only one article scanned from a journal issue per course. No more than three articles from a journal volume per course.
- No consumables such as workbooks.
- Print (text) materials only on E-Reserves.

- Materials scanned for one course will not be placed on reserve for another instructor's course.

Alabama State University

<http://www.lib.alasu.edu/library/ereserve2.html>

- Materials may be on E-Reserves for no more than one semester unless with permission.
- Copies from books generally limited to one chapter or less than 15% of the book.
- Copies from journals generally limited to one article from a journal issue or no more than three articles from a journal volume.
- Copies of poetry generally limited to one poem from a collected work.
- Instructors must secure permissions and provide the library with written permission.
- Library has no liability for compliance with copyright regulations.
- Policy refers instructors to the Copyright Clearance Center for permission.
- Copyrighted works will be password restricted to enrolled students.
- All materials are archived at the end of the academic term.

San Diego State University

<http://infodome.sdsu.edu/about/depts/reserve/copyright.shtml>

- Bases fair use on the four factors.
- Materials routinely retained on E-Reserves for no more than one semester.
- Continued use requires permission for materials from books and journals that are not owned by the library.
- Copies from books generally limited to 15%.
- Copies from journals generally limited to 15% of any single journal issue.
- Citations on all materials, except works created by the instructor.
- No charge to students for access; cost recovery only for photocopying.
- Students are informed that they may make no more than one photocopy of materials from E-Reserves for personal educational use.
- Materials are accessible only by the name of the instructor and course number.
- E-Reserves may include only a small percentage of the total assigned reading for the course. Larger amounts of materials are recommended for coursepacks.
- E-Reserves are limited to verified students, faculty, and staff.
- Use of student works and unpublished works requires written consent.
- Library will pay copyright fees up to \$40 per item per semester; larger amounts considered in individual cases.
- Library will submit letters requesting permissions and outlining safeguards in the E-Reserve system.

Ashland University (Ohio)

http://www.ashland.edu/library/about/eres_full.html

- Focus on the four factors; the library will apply the four factors to determine whether uses are within fair use.
- E-Reserves staff will consult with the library director to determine whether materials are within the policy.
- Library will provide links to materials in databases, unless prohibited by the license agreement.
- Instructors are encouraged to provide links to websites for readings.
- Copied materials must be lawful copies held by the instructor, library, or university.
- Materials owned by the library may be copied for E-Reserves; only selected chapters and articles will be digitized; whole issues or volumes of journals will not be placed on E-Reserves.
- Small portions of books owned by the instructor may be digitized for E-Reserves.
- Books may be copied, typically limited to a single chapter or not more than 20%.
- Articles may be copied, typically limited to a single article from an issue of a journal.
- An article or a chapter obtained through interlibrary loan for an instructor may be placed on E-Reserves.
- Audio, video, and graphic images will not be placed on E-Reserves without permission.
- Copyright warning notice in the E-Reserve system.
- Users must indicate agreement with terms of notice.
- Limited to single semester.
- When materials have been used in a previous semester, the library will seek permission from the Copyright Clearance Center or the publisher and will pay fees.
- Materials may be placed on E-Reserves while waiting for permission, but will be removed if permission is denied or if the fee exceeds campus limits.
- Instructors may seek permissions, but must submit letters of permission to the library.
- Permission is required for use of student materials.
- Password restriction to students enrolled in specific courses.
- No consumable works and workbooks.
- Materials on E-Reserves under fair use should be small portion of total reading for the course.
- Copyright owners may contact E-Reserve staff if they believe their materials have been posted without appropriate permission; items in violation will be removed.

University of Vermont

<http://library.uvm.edu/services/reserves/ereserveguide.php>

- Limited to single semester only.
- Instructor, library, or university must possess a lawful copy.
- Books may be copied, limited to two chapters.
- Articles may be copied, limited to 25% of an issue of a journal. Newspapers are held to the same standard.
- Instructors submitting material must acknowledge compliance with policy.
- Users of E-Reserve system may make single copies of materials for personal reading.
- Questions referred to E-Reserve staff.

Auburn University Montgomery (Alabama)

<http://aumnicat.aum.edu/libinfo/policies/ereserves.html>

- Each item on E-Reserves requires “copyright clearance.”
- Library will obtain permissions.
- Library will cover fees up to \$40 per article per course; additional fees are covered by instructor or department.
- Chapters of books are allowed; entire books are not.
- Amount of material on reserve is reasonable in relation to total reading for the course.
- Books limited to two chapters without permission.
- Articles limited to two articles and not more than 25% of an issue of a journal, without permission. Newspapers are held to the same standard.
- No consumable works.
- Referrals to external websites for information about copyright.

Type II: Policies With Quantified Limits Based on Chapters or Articles

The policies in this category measure the quantity of a work that may be used based on a reference to the number of chapters or articles. Some policies in the previous category may also have includes such a measure, but they did so in tandem with a percentage limit. The policies here refer foremost to “journal articles” or “book chapters.” The policies do not offer definitions of those concepts. The policies differ in the number of such works that may be copied.

Yale University

<http://www.library.yale.edu/dpip/ereserves/copyright.pdf>

- Link to materials that the library owns.
- Digitizing books allowed, limited to one chapter.
- Digitizing articles allowed, limited to one article from a journal issue.
- Poems limited to one poem from a collection.
- One item from other type of collective work, such as an encyclopedia.
- Library will handle limited requests for copyright permission.
- Copyright statement on all materials.
- Copyright warning on E-Reserves system and forms.
- Library has the right to determine whether posting materials would violate copyright.

The Yale policy begins with an overview of the four factors of fair use, then offers this assessment of its own interpretation of the law: “The vagueness of the four factors of fair use has made this a hard law to put into practice with confidence that the law is being followed. Therefore, some libraries have adopted conservative guidelines, which help them to ensure compliance under the most conservative interpretation of copyright law. Adherence to these conservative guidelines (outlined in D below) allow the Yale Library to confidently offer an electronic reserves service, and to give unambiguous guidance to faculty. However, these guidelines are probably more stringent than ‘fair use’ entails.”

George Mason University (Virginia)

<http://furbo.gmu.edu/OSCRweb/>

- Overview of the four factors of fair use.
- Limited number of articles per course.
- Entire out-of-print books will not be copied.
- Articles limited to 3 articles from a journal volume, but not of the articles have been previously on reserve, are in a coursepack, or are in a library database.
- Password restricted access to specific course.
- Materials searchable by instructor name and course.
- Citation on all materials.
- No access after end of semester.
- For information about copyright, contact University Libraries Copyright Office.

University of Pennsylvania

<http://www.library.upenn.edu/reserves/copyright.html>

- Refers to the four factors.
- The library may decline to place on reserve copies of several articles from a journal issue or several chapters from a book.
- Warning notice on materials.
- Instructors are responsible for securing permissions.

University of Chicago

<http://www.lib.uchicago.edu/copyrightinfo/fairuse.html>

- General guidance about fair use.
- Focus on the four factors.
- Interprets the four factors in a manner relevant to E-Reserves
- Purpose of the use: educational; no charge to students.
- Nature of the work: Portions tailored to educational purpose; limited use of creative works; no consumable works.
- Amount of the work: Generally limited to brief portions, such as single chapter or individual articles.
- Effect on the market: Consider possible market effect; citation to original works; reasonable availability for purchase.
- Reference to Fair Use Checklist for support.
- Reference to websites for copyright information.
- Reference to the CONFU Guidelines, but parties did not reach consensus.

University of Oklahoma

<http://libraries.ou.edu/content/dynpage.asp?pid=24&eid=64&uid=7&page=0>

- Refers to CONTU guidelines, although not clearly relevant.
- Adopts the text of the CONFU guidelines.
- Materials included at the request of instructor.
- May include short items, such as articles, chapters, poem.
- Excerpts of longer works.
- Library, instructor, or university must own a lawful copy.
- Total amount of material on reserve should be a small proportion of total reading.
- Warning notice on screen.
- Notice of copyright on materials.
- Citations on all materials.
- Access limited to students enrolled in the course.
- Students are not charged for access.
- Permission required for use in subsequent semesters.
- Electronic files may be retained for one year pending permission.

University of Alabama at Birmingham
<http://www.uab.edu/lister/reserves/lhlcopyright.php>

- Materials on reserve at request of instructor.
- Instructors are responsible for obtaining permissions.
- Materials in library databases may be used for reserves.
- Library staff can facilitate permissions and handle the process of paying fees.
- Materials not owned by the library will be purchased or requested through interlibrary loan.
- Materials must be within fair use; no longer works beyond 50 pages.
- Access limited to students in specific courses.
- No charge for access.
- Access includes a click-through acknowledgement of copyright notice.
- Materials removed at the end of the semester.
- Permission needed again when the course is taught again.

Type III: Policies With Quantified Limits Based on Fair Use Factors

Policies at many colleges and universities measure the scope of fair use based not on percentages or counts of chapters and articles, but turn instead to the general parameters of fair use.

Emory University (Georgia)
<http://web.library.emory.edu/services/circulation/reserves/copyright.html>

- Materials may be on E-Reserves only if they are in public domain, or with permission, or within fair use.
- Library will assist with determinations of fair use.
- Overview of the four factors of fair use.
- Purpose of the use: Materials at the request of instructor and for educational purposes.
- Nature of the work: Factual works are more likely within fair use than are creative works.
- Amount of the work: Amount appropriate for educational purposes; entire journal article likely within fair use; brief excerpts of works.
- Effect on the market: Access limited to students, faculty, and staff; access restricted to students in specific course; access terminated at end of semester; library will not provide copies of materials to instructors or students by any other means; materials may be used only for educational purposes.

Mercer University (Georgia)

<http://tarver.mercer.edu/circ/cpy.php>

- Focus on the four factors of fair use.
- Materials at the initiative of instructor.
- For noncommercial educational purposes only.
- Lawful copies held by library, instructor, or university.
- Complete books or substantial parts of works not copied without permission.
- No charge for access; charge allowed for printing.
- Copyright warning notice on screen.
- Copyright notice on materials.
- Citations on materials.
- Access limited to students in specific course.
- Electronic files removed when no longer needed.

University of Wisconsin-Madison

<http://www.library.wisc.edu/reserves/copyright-policy.html#section-one>

<http://www.library.wisc.edu/reserves/copyright-policy.html#section-two>

<http://www.library.wisc.edu/reserves/fair-use-determinations.html>

<http://www.library.wisc.edu/reserves/fair-use-checklist.pdf>

- Focus on the four factors of fair use.
- Materials at the initiative of instructor.
- For noncommercial educational purposes only.
- Lawful copies held by library, instructor, or university.
- No charge for access; charge allowed for printing.
- Copyright warning notice on screen.
- Copyright notice on materials.
- Citations on materials.
- Access limited to students in specific course.
- Electronic files removed when no longer needed.
- University will monitor developments in the law.
- Library staff will make determinations about whether materials are within fair use based on the four factors.
- Relies on a version of the fair use checklist for determinations.
- If use is not within fair use, alternatives are explored with the instructor.

University of Illinois at Urbana-Champaign

http://www.library.illinois.edu/administration/services/policies/electro_reserve.html

- Review of the four factors of fair use.
- Purpose of the use: Nonprofit educational purposes; materials posted only at request of instructor.
- Nature of the work: Consideration of whether the work is factual or creative.
- Amount of the work: Amount related to educational purpose.
- Effect on the market: Restricted access for specific course; materials accessible by course; library will purchase materials at reasonable price whenever possible.

Princeton University

<http://lib-terminal.princeton.edu/ereserves/logon.asp>

- Password restricted to students enrolled in specific course.
- Referral to general university statement about fair use. The university relies on a general interpretation of fair use and does not have available on its website any indication of specific standards for E-Reserves.

Cornell University

<http://www.library.cornell.edu/svcs/serve/res/resinfo>

http://www.copyright.cornell.edu/policy/Copyright_Guidelines.pdf

http://www.copyright.cornell.edu/policy/Fair_Use_Checklist.pdf

- Review of the four factors of fair use.
- Materials are for noncommercial, educational purposes only.
- Access restricted to students enrolled in specific courses.
- Access terminated when students complete the course.
- Linking to articles and other materials in databases or open access.
- Retain attribution and copyright statement on scanned materials.
- Materials may be digitized from the library collection or if owned by the instructor.
- Coursepacks may not be made available digitally, but a print copy may be placed on reserves.
- Music may be placed on reserve consistent with the Music Library Association statement.
- Focused on the four factors and notes that many uses may not be fair use.
- Materials may be posted only with permission or if “concluding after reasonable inquiry, with the benefit of resources made available by the university for these purposes, that the use qualifies as a fair use or other exempt or licensed use for which permission is not required.”
- Employs a version of the fair use checklist.
- Students should not be encouraged to print unauthorized copies.

Duke University (North Carolina)

<http://library.duke.edu/research/reserves/policy.html>

- Overview of the four factors.
- Users may make one copy of materials for research, scholarship, or education.
- Books allowed, but not complete books or excerpts beyond fair use.
- Journal issues allowed, but not complete issues or excerpts beyond fair use.
- Copyright warning notice on screen.
- Library will not post materials, “if it judges that the nature, scope or extent of the material is beyond the reasonable limits of fair use.”
- Materials removed at the end of the course.
- Library and University Counsel will monitor developments in the law.

University of Tennessee

<http://www.lib.utk.edu/reserve/copyright.html>

- Overview of the four factors.
- Materials only at the request of instructors.
- Library will purchase materials when possible.
- No charge for access.
- Copyright warning notice on screen.
- Copyright notice on materials.
- Access restricted to students enrolled in specific courses.
- Library will follow principles of fair use.
- Library will not post materials, “if it judges that the nature, scope or extent of the material is beyond the reasonable limits of fair use.”
- Complete books are not allowed.
- Consumables such as workbooks are not allowed.
- Materials must be legally obtained.
- Access to materials removed at the end of each course.
- Questions about copyright are referred to legal counsel.

University of North Carolina, Greensboro

<http://library.uncg.edu/depts/cpr/eres/policy.html>

- Overview of the four factors.
- Users may make one copy of materials for research, scholarship, or education.
- Books and longer works allowed, but not complete copies.
- Copyright warning notice on screen.
- Library will not post materials, “if it judges that the nature, scope or extent of the material is beyond the reasonable limits of fair use.”

- Materials removed at the end of the course.
- Library and University Counsel will monitor developments in the law.

Colorado State University, Ft. Collins

<http://lib.colostate.edu/reserve/ERcopyrightpolicy.pdf>

- Overview of the four factors of fair use.
- Materials included at the initiative of instructor for noncommercial educational purposes.
- Library will purchase materials whenever possible.
- Longer works, such as complete books, are not copied.
- No charge to students for access; charge allowed for printing.
- Copyright notice on materials.
- Access restricted to students in specific course.
- Materials removed at the end of semester.
- Electronic files of materials are not reused.
- Materials included only within fair use.
- Library will monitor developments in the law.

University of Washington

<http://www.lib.washington.edu/types/course/copyright.html>

- Review of the four factors of fair use.
- Materials on reserve at request of instructors.
- Library will review purchasing materials if possible.
- Library will negotiate licenses to acquire materials, including use in reserves and coursepacks.
- Access limited to instructors, students, staff.
- No charge for access.
- Notice on materials and on screen.
- Remove materials when no longer needed.
- Library will comply with copyright law.
- Library will secure permissions and pay fees.
- Citations on all materials.
- Limit materials on reserve to necessary readings in order to “make appropriate use of state resources.”

Austin Peay State University (Tennessee)
http://library.apsu.edu/library/3_5res.htm#copye

- Materials included at the initiative of instructor for noncommercial educational purposes.
- Longer works, such as complete books, are not copied.
- Library will not post materials without permission, “if it judges that the nature, scope or extent of the material is beyond the reasonable limits of fair use.”
- No charge to students for access; charge allowed for printing.
- Copyright notices on screen and on materials.
- Citations on materials.
- Access restricted to authenticated users.
- Materials removed when no longer used.
- Library will purchase materials whenever possible.

University of Alaska, Fairbanks
<http://eres.uaf.edu/CopyrtInstructors.html>

- References the ALA Model Policy.
- Access restricted to students enrolled in specific course.
- Permission required for subsequent terms.
- Instructors have responsibility to secure permission.
- Copyright notice on all course pages.
- Complete books or journal articles will not be scanned.
- No workbooks, standard tests, coursepacks.
- Purpose limited to materials for classroom use.
- No charge for access; charge permitted for printing.

Pace University (New York)
http://www.pace.edu/page.cfm?doc_id=33070

- Review of the four factors of fair use.
- Allowed materials: journal articles, newspaper articles, book chapters.
- Not allowed: complete or longer works, such as books or monographs.
- Materials beyond fair use may be placed on reserve provided permission is being sought.
- Instructors are responsible for securing permission.
- Library reserves the right not to accept materials it judges to be beyond fair use.
- Articles may not be used for the same course in consecutive semesters.
- Materials are archived at the end of the semester.
- Restricted access to individual courses.

Part VIII: Common Elements of an E-Reserve Policy

The foregoing survey of E-Reserves policies offers insights into the terms of the policies, and many of the provisions of these policies are at least as important as the quantity of a work that may be used. This section of the report identifies and examines some of those provisions. A few are examined in detail.

Some common provisions of the policies do not need extensive elaboration in this report:

- Materials should be included on E-Reserves only at the request of the instructor.
- Students should not be charged for access to E-Reserves, although they may incur ordinary charges for printing.
- The library should include some form of copyright warning or notice on the screen when students use E-Reserves.
- The library should include some form of copyright notice on individual materials in E-Reserves.
- All materials should include a proper citation to the source.
- Access to materials on E-Reserves should be restricted (by password or otherwise) to students enrolled in specific courses.
- Students should not have access to materials on E-Reserves after completion of the course or the academic term.
- Special limits on using certain works, such as consumable works and student works.

Works without Copyright Protection or Restrictions

The ALA Model Policy from 1982 included helpful guidance for identifying some works that are in the public domain. Many policies generally mention that some works are without any copyright protection and may be freely used. For example, the Yale policy notes that works produced by the U.S. government have no copyright, and that copyrights have expired for works published in the U.S. before 1923.

Many policies also clarify that instructors may post their own materials, including lesson plans, handouts, exams, slides, and other materials. These materials are not usually without copyright protection, but they may be used because the instructor or the university is probably the copyright owner. The Dartmouth University policy makes that point, while cautioning that instructors who have authored published materials may have transferred the copyrights to the publisher. In that case, the articles need to be treated the same as other copyrighted works.

Limit on Repeat Use of Materials

As explained at Part VI of this report, the restriction on repeat use of materials finds its origin in the Classroom Guidelines and the ALA Model Policy. The close examination of that “one-time” use provision demonstrates that it may be common among the policies, but it is not part of the law. Moreover, the provision has unduly constrained the educational process and has led to extraordinary expense for the library and to the removal of many copyrighted works from the curriculum.

Linking to Databases and Other Electronic Resources

Linking to available electronic resources in the library collection is important for many reasons. Users become familiar with the growing availability of database collections of journals and other materials; the publishers and producers of the resources gain the traffic and are better able to assess the value of their materials. Most important for this report, linking does not raise serious copyright concerns. In fact, it can avoid copyright concerns. Linking is not an act of copying and therefore does not implicate fair use. For that reason, many policies not only encourage linking, but also state that the library will acquire needed materials in electronic form if at all possible. If the library links to such materials acquired from publishers and other suppliers, the library is supporting the market for copyrighted works and maintaining fair use for situations when it is more essential for meeting educational needs.

According to a study of E-Reserves at Northwestern University, approximately 20% of the materials on E-Reserves are provided through links directly to the articles and other works in four particular databases. Linking to these databases is especially effective because the technology employed by the database provider facilitates direct linking, and the licenses for the acquisition of the materials permit linking.⁵⁰ However, not all materials are available in electronic form, and sometimes the publishers structure the technology in manner that hinders linking: “Unfortunately, the majority of Northwestern’s electronic reserves content consists of scanned materials, either chapters from books or journal articles not available in electronic format. Ironically, the electronic books available to libraries from Netlibrary do not support electronic reserves use, lessening their value to the user community.”⁵¹

However important linking may be, it cannot completely replace some combination of fair use and permissions. Some publishers have indicated a desire to rely on access to databases for educational uses and not to address individual permission requests. Commented one researcher who studied publisher services: “This plan illustrates an assumption by publishers that all libraries have access to and the capability to provide electronic journals and that only journals in electronic format need to be selected for

⁵⁰ Charlotte Cabbage, “The Changing Cost Environment of Managing Copyright for Electronic Reserves,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 13 (2003): 59.

⁵¹ Charlotte Cabbage, “The Changing Cost Environment of Managing Copyright for Electronic Reserves,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 13 (2003): 60.

electronic reserves services. Such policies jeopardize the ability of libraries to provide access via electronic reserves to older print journal articles.”⁵²

Guidance for Seeking Permission and Payment of Fees

Some universities supplement their policies with guidance for seeking permissions from copyright owners, and perhaps some discussion about payment of any fees charged for that permission. On these points, educational institutions take widely differing approaches. For E-Reserves, the library may seek permission, or the duty may fall to the instructor. Sometimes the institution has a budget for payment of fees, and in other situations responsibility for payment falls to the instructor. Wherever the responsibility may lie, basic guidance and directions are important.

Although seeking permission from copyright owners can be necessary, it is also often labor intensive, unsuccessful, and expensive. Educators and libraries cannot count on permissions to meet the needs of E-Reserves. Many copyright owners, whether they are authors, estates, or publishers, in fact are generous when granting permissions. Permissions may be available directly from the copyright owner, but the process usually involves tracking down the rightsholder, making a contact, explaining the need, and hoping for an eventual and positive reply.

The Copyright Clearance Center has made the quest for permissions for some materials much easier. However, seldom is the process both easy and affordable. It will probably never be comprehensive. The CCC may be easy to use, but it charges fees, usually based on the number of copies or the number of students enrolled. A modest fee for a single copy becomes a large fee when multiplied by the number of students in a course.⁵³ The CCC is an important part of the copyright equation, and its services are now integrated into software packages for operating E-Reserves.⁵⁴ Nevertheless, it has not resolved the challenges of fair use, staffing, and costs at colleges and universities.

A study of E-Reserves at Northwestern University noted that few publishers were equipped to deal with permissions in the 1990s. More publishers may today accept requests for digital uses, “but no standardized approach has materialized. Instead, libraries face a variety of responses from publishers, ranging from outright refusal to permit electronic copies, flat fee structures to unrealistic charges per page times the number of students enrolled in the class”⁵⁵

⁵² Karen J. Graves, “Electronic Reserve: Copyright and Permissions,” *Bulletin of the Medical Library Association* 88 (January 2000): 21.

⁵³ Charlotte Cabbage, “The Changing Cost Environment of Managing Copyright for Electronic Reserves,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 13 (2003): 62.

⁵⁴ For example, “ERes” is a software product produced by the Docutek company. The software includes connections to the CCC for licensing. Rosemary Burgos-Mira, “Implementing Electronic Reserves at Hofstra University,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 17 (2007): 16.

⁵⁵ Charlotte Cabbage, “The Changing Cost Environment of Managing Copyright for Electronic Reserves,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 13 (2003): 61.

That study also reveals much about rising fees for copyright permissions. Between 1992 and 1993, the fees paid for reserve copies jumped from \$42 to \$545 total for the entire service. By 2004, the fees paid reached an average of \$56 per work used. The library was by then refusing to pay requested fees that were even higher. In 2005, among the permission fees that the library refused to pay, the average had reached \$110 per work. When the library refused to pay such fees, it referred the matter back to the academic department, giving it right option to cover costs. No department has exercised that option. As a result, the materials are not made a part of E-Reserves, the students do not get the benefit of the materials, and the copyright owners do not get any revenue at all from this possible use of the works.⁵⁶

The erratic nature of copyright permissions is evident in other studies. In an experiment at the University of Colorado in 2001, librarians sought permission for a total of seventy-five journal articles and book chapters. Working through the Copyright Clearance Center, the average fee per work was \$35. For two items, permission was denied. For one item, the fee was in excess of \$1,000 and the work was not included on E-Reserves. The librarians found, however, that the CCC was unable to process permission for twenty items. The library succeeded in securing permission for ten of the items from publishers. For the other ten, the library received no response to its requests and inquiries.⁵⁷

Guidance and Advice Regarding Copyright Questions

Many of the policies indicate the persons and resources available for further information or advice about copyright questions. No matter how detailed the policy, questions are certain to arise. Educational institutions seldom have legally trained support for their decisions about copyright. Not all colleges and universities have in-house legal counsel, and the institutions that have counsel will not realistically be able to call the lawyers for common questions about fair use. In a study of reserve policies, only one library reported that all decisions are cleared by a "University Copyright Office."⁵⁸

In the absence of legal counsel, libraries long have taken on the role of copyright interpreter for library functions. Increasingly, libraries also assume the role of copyright advisor to university officials. According to one study: "The library also needs to educate administrators and attorneys about copyright and fair use."⁵⁹

⁵⁶ Charlotte Cubbage, "The Changing Cost Environment of Managing Copyright for Electronic Reserves," *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 13 (2003): 62-63.

⁵⁷ Brice Austin and Karen Taylor, "Four Scenarios Concerning Fair Use and Copyright Costs: Electronic Reserves at the University of Colorado, Boulder," *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18 (2007): 3.

⁵⁸ Thomas H.P. Gould, Tomas A. Lipinski, and Elizabeth A. Buchanan, "Copyright Policies and the Deciphering of Fair Use in the Creation of Reserves at University Libraries," *Journal of Academic Librarianship* 31 (May 2005): 192.

⁵⁹ Steven J. Melamut, et al., "Fair Use or Not Fair Use: That Is the Electronic Reserves Question," *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 11 (2000): 17.

A study of policy and practices at William Patterson University of New Jersey made this observation: “As faculty members become more aware of copyright law and issues pertaining to teaching and learning, they turn to the Library for guidance more frequently. This has powerful implications for library staff training most especially since library staff members are not attorneys and are uncomfortable interpreting laws and guidelines for others.” The librarians at this university nevertheless take an active role: “The Library has a dual role on campus, providing access to materials in compliance with fair use guidelines and informing teaching faculty about these guidelines and how they impact classroom teaching and beyond.”⁶⁰ The library even goes further: “All public service staff must be well versed in policies and comfortable discussing the grey areas of the complex copyright laws.”⁶¹

The following is a sampling of policy statements further demonstrating the leading role of librarians in addressing the copyright needs of educational institutions.

Bucknell University

<http://www.bucknell.edu/x12136.xml>

“The arena of copyright and library reserve systems is one that is regularly visited but seldom settled. Bertrand Library staff will strive to stay abreast of the decisions that are made that concern copyright and reserves and will make changes in policies and procedures as these changes might become necessary over time.”

Salisbury University

<http://www.salisbury.edu/library/copyright/ereserves.html>

The library’s Head of Public Service is named in the policy as the person who may be able to assist with copyright questions related to E-Reserves.

University of Pennsylvania

<http://www.library.upenn.edu/reserves/copyright.html>

“Due to the complexities of copyright law and inconsistencies in interpretation,” the policy invites instructors to speak with a librarian who is specifically identified by name in the policy.

⁶⁰ Victoria H. Wagner, “Processing Reserves, Seeking Permissions and Engaging the Campus: How the Library Serves as the Copyright Touchstone,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18 (2008): 248.

⁶¹ Victoria H. Wagner, “Processing Reserves, Seeking Permissions and Engaging the Campus: How the Library Serves as the Copyright Touchstone,” *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18 (2008): 251.

Part IX: Overview and Evaluation of the University System of Georgia Copyright Policy

For purposes of this section of the report, the meaning of the “Georgia University Policy” will be defined to encompass the following documents, most recently reviewed at the designated websites on May 7, 2009:

- *“Policy on the Use of Copyrighted Works in Education and Research”*
- *“Copyright Generally”*
- *“The Fair Use Exception”*
- *“Additional Guidelines for Electronic Reserves”*
- *“Introduction to the Fair Use Checklist”*
- *“Fair Use Checklist”*

The “Georgia University Policy,” for purposes of this review, also includes the practices and procedures for implementation of the policy as evidenced from the documents reviewed for this report and as listed in Part III of this report. The following section of this report itemizes provisions of the Georgia University Policy and notes their relationship to the law of copyright and fair use.

“Policy on the Use of Copyrighted Works in Education and Research”
<http://www.usg.edu/copyright/>

- “[T]he University System of Georgia is committed to respecting the rights of copyright holders and complying with copyright law.”

Manifests the leading goal of adhering to the law and is relevant to the good faith of the university. Evidence of the lawful purpose of the university related to the first factor of fair use.

- “The University System of Georgia recognizes that the exclusive rights of copyright holders are balanced by limitations on those rights under federal copyright law, including the right to make a fair use of copyrighted materials and the right to perform or display works in the course of face-to-face teaching activities.”

Communicates to users an understanding that copyright owners have rights, and those rights have to be considered in association with the application of fair use and other exceptions.

- “The University System of Georgia facilitates compliance with copyright law and, where appropriate, the exercise in good faith of full fair use rights by faculty and staff in teaching, research, and service activities.”

States the position of the university to adhere to the law. States that fair use will be exercised in good faith, which is relevant to fair use. States that fair use is will be exercised in furtherance of teaching, research and service, concepts central to the first factor of fair use.

- “[T]he University System of Georgia . . . informs and educates students, faculty, and staff about copyright law, including the limited exclusive rights of copyright holders as set forth in 17 U.S.C. § 106, the application of the four fair use factors in 17 U.S.C. § 107, and other copyright exceptions. . . .”

This statement gives primary focus on education of the university community about copyright, including rights of owners as well at the application of exceptions. The depositions reveal that this requirement is already in effect. At GSU, legal counsel has been conducting training sessions for faculty, librarians, and others. The director of the university library testified in deposition that she had attended such a session, as did the librarian with oversight of the E-Reserves operation. Professor Diane Belcher testified that she attended a program along with as many as 25 or 30 participants. Following the training session conducted by legal counsel, Laura Burtle testified that she has reviewed copyright issues with the staff of the E-Reserves services on perhaps as many as ten occasions.

- “[T]he University System of Georgia . . . develops and makes available tools and resources for faculty and staff to assist in determining copyright status and ownership and determining whether use of a work in a specific situation would be a fair use and, therefore, not an infringement under copyright law. . . .”

A commitment by the university to provide resources to help members of the community make informed and responsible decisions about copyright.

- “[T]he University System of Georgia . . . facilitates use of materials currently licensed by the University System of Georgia and provides information on licensing of third-party materials by the University System. . . .”

Licensed works are increasingly important for teaching, research, and other purposes. The depositions in the Current Case include testimony that an individual university can spend in excess of \$11 million dollars per year for the licensing of full-text journal databases. Many of these databases allow linking and other uses of the content. The policy commits the university to facilitating these opportunities. In doing so, the policy is also committing the university to continue to spend enormous amounts of money for the acquisition of such materials. As a result, the policy is about much more than fair use. The policy is also about supporting the market for published works.

- “[T]he University System of Georgia . . . identifies individuals at the University System and member institutions who can counsel faculty and staff regarding application of copyright law.”

This statement is a commitment to identify support staff who will assist with providing copyright information and possibly making copyright decisions. This commitment is repeated frequently in the depositions. In some situations, librarians offer guidance. In other situations, the questions are referred to other officials including legal counsel. The matter of professional guidance and advice on copyright matters is addressed more fully in Part VIII of this report.

“Copyright Generally”

http://www.usg.edu/copyright/site/copyright_generally/

This document is a succinct and helpful summary of the basics of copyright law. It offers a quick understanding of the fundamentals of the law, and it has a tone that is interesting and helpful. It is well suited to provide an introduction to copyright concepts for instructors, librarians, and other members of the university community. Naturally, the law of fair use is much more complicated and nuanced than any brief summary can encompass. Yet this statement meets the goals of introducing the subject. Readers facing complicated needs will surely know to study the subject more thoroughly. Many universities do not provide even such a basic introduction, and its inclusion in the Georgia University Policy is appropriate.

“The Fair Use Exception”

http://www.usg.edu/copyright/site/the_fair_use_exception/

- “All four factors should be evaluated in each case, and no one factor will determine the outcome.”

This statement reminds readers that they need to consider all four factors and resist reaching a conclusion based on a single factor. The policy further emphasizes that point by including the opening words, “All four factors,” in a bold font.

- “While fair use is intended to apply to teaching, research, and other such activities, an educational purpose alone does not make a use fair.”

This statement addresses one of the common myths of fair use is that all uses that are for nonprofit education are within the law. The policy therefore pushes back against the myth and to replaces it with an accurate statement.

- “Working through the four factors is important. Simple rules and solutions may be compelling, but by understanding and applying the factors, users receive the benefits of the law’s application to the many new needs and technologies that continue to arise at member institutions within the University System of Georgia.”

This statement is an expression of the flexibility of fair use and its adaptability to new needs. Just as courts have needed to apply a flexible understanding of fair use to new

needs—such as critical versions of songs and the incorporation of art posters into historical study—so must universities maintain the flexibility of fair use for new research and teaching needs.

- “Purpose and Character of the Use”

This section is an accurate summary of the fundamentals of the law. The policy offers insights into the law and examples that are relevant to the university community. The summary also helps readers avoid some of the misunderstandings of fair use. For example, the policy states, “Activities that are truly confined to the university in support of nonprofit education are likely to receive favorable treatment.” This is a true statement. The policy makes it in the context of the one “purpose” factor. It is in the process turning away from the myth that all nonprofit uses are fair use.

- “Nature of the Copyrighted Work”

The law does treat some works differently from others, and the policy accurately identifies such distinctions. The policy focuses on the types of works that are likely to be of greatest interest to the academic community.

- “Amount of the Work Used”

This summary is an accurate assessment of the law. It also emphasizes that amount can be measured in many ways, including a quantitative and qualitative measure. This factor may be the most challenging to summarize in a short paragraph. While a reader might be yearning for additional explanation, this provision of the policy is accurate and helpful.

- “Effect on the Value of or Market for the Work”

Courts in recent years have linked this factor to the first factor and often have analyzed them together. The policy statement provides a clear summary of the law. The summary also states that market harm may be “less likely” if the use is for nonprofit education. The policy is not stating that educational uses cannot cause market harm.

- “All four factors must be considered in determining whether a use of a work is a fair use.”

This section of the policy concludes with this statement, and it is presented in a bold font. While the policy has already made this point, it is worth stating again. One of the strengths of the Georgia University Policy is that it consistently and helpfully presses the community to understand and apply all four of the factors.

“Additional Guidelines for Electronic Reserves”

http://www.usg.edu/copyright/site/additional_guidelines_for_electronic_reserves/

This document elaborates on the principles and policies set forth in the other elements of the Georgia University Policy, and it applies them in the context of E-Reserves.

- “The University System of Georgia supports instruction with electronic reserves and similar electronic systems.”

This term makes clear that the purpose of E-Reserves is to support the educational mission of the university.

- “The primary function of these services is to assure that students and teachers will have timely access to course-related library resources.”

This provision emphasizes that the purpose is to support education, specifically the improvement of the quality of education through access to resources when needed in connection with education.

- “Course materials authored by professors, such as syllabi, lecture notes, or exams, may be made available on electronic reserves”

In most cases, the copyrights in these materials, authored by instructors, will be held by the instructors or perhaps by the university. Ordinarily, these materials may be made freely available. This statement is not directly about fair use, but it will clarify that instructors may not need to apply and evaluate fair use for such works.

- “Instructors are responsible for evaluating, on a case-by-case basis, whether the use of a copyrighted work on electronic reserves requires permission or qualifies as a fair use.”

This statement places squarely on the instructor the responsibility for evaluating the fair use of E-Reserves materials. The greatest significance of this statement may be its bringing the instructor directly into the copyright analysis. Without fulfilling this responsibility, the instructor will presumably not be able to place materials on E-Reserves. An additional consequence of this statement is the expectation that instructors will become informed about copyright and fair use, which will likely have positive implications for other projects and publications that raise copyright questions.

The statement does not provide that the library must accept the instructor’s evaluation and conclusion. In the deposition of Laura Burtle, she confirmed that in fact library staff will examine requests from faculty members that appear to be beyond fair use, and since adoption of the new policy, the library has reviewed and rejected at least one request to copy a large portion of a book.

- “If relying upon the fair use exception, instructors must complete a copy of the fair use checklist before submitting material for electronic reserves.”

In addition to being responsible for evaluating fair use, instructors must specifically complete the fair use checklist. Specifically requiring the checklist, the policy is directing instructors to an instrument that provides a broad view of fair use, and the policy is leading all instructors to use the same resource on repeated occasions. With routine use, the process of evaluating fair use should become easier and clearer. By using a common instrument, application of fair use should also become relatively consistent over time. The Georgia University Policy elsewhere states that the instructor must keep a copy of that checklist.

Combined with the additional review of materials by library staff, use of the checklist can become an especially effective means for implementing fair use. In her deposition, Laura Burtle said that she favored the use of a checklist for fair use, noting that percentage limits in some E-Reserves policies cannot be “a proxy for a fair use analysis.” Yet she added that percentage limits may be effective as “a quick way” for library staff “to see whether or not they have a problem that needs to be pursued with a request.” In other words, the checklist may be a better measure of fair use and a better standard for a policy, but a percentage limit may be a helpful way for staff to identify materials that need additional scrutiny. A request for a large portion of a work may be within fair use, but it justifies a closer look. The librarians at GSU are evidently supplementing the policy with a standard for internal review that is sometimes more conservative than fair use requires.

- “Inclusion of materials on electronic reserves will be at the request of the instructor for his or her educational needs.”

Such a statement is common among E-Reserves policies and it is importantly relevant to the first factor, the purpose of the use. Allowing only instructors to include materials, and requiring that the purpose of the material is for educational needs are important facts in the evaluation of the first factor.

- “Materials made available on electronic reserves should include a citation to the original source of publication and a form of copyright notice.”

See the discussion above about the significance of including attribution on materials.

- “The instructor, library or other unit of the institution must possess a lawfully obtained copy of any material submitted for electronic reserves.”

This requirement provides that E-Reserves are not to include works drawn from unlawful source materials. In addition to avoiding illicit copies, this statement will in practical effect likely result in the library or the instructor purchasing an original work from which the copy is made. As a result, this standard may have the effect of supporting the market for the copyrighted works.

- “Access to course material on electronic reserves should be restricted by password to students and instructors enrolled in and responsible for the course.”

Password restriction is common among E-Reserves policies. This one requirement is important to at least two of the four factors of fair use. First, by limiting access to students enrolled in specific courses, the requirement reinforces that the materials are available on E-Reserves only for the educational needs of the students. Second, by limiting access, the requirement is also limiting any possible adverse effect on the market for the works. Controlling the number of students who may access and use the materials restricts any potential market harm caused by the access on E-Reserves. Limited access also reduces the likelihood that the materials will be misused in any manner.

- “Access should be terminated as soon as the student has completed the course.”

Such a provision is common among E-Reserves policies. Some policies include variations on the provision. For example, a library might terminate access at the end of the academic term or allow a brief extension beyond the term for student review of materials. Regardless of the detailed form of the provision, this clause is relevant to at least two factors. It reaffirms that the materials are for the purpose of supporting education and not for later reading. It also limits possible market harm by precluding access of the materials by former students in lieu of their purchasing or acquiring them from another source.

- “Library reserves staff should check to see whether materials submitted for electronic reserves are available through an electronic database or are otherwise legally available. If so, staff should provide a link rather than scanning and posting the material.”

The merits of linking to databases and other appropriate materials have been examined in greater length in Part VIII of this report. By requiring linking, the policy is supporting the market for copyrighted works by the appropriate use of the databases. The policy is also reducing any harm to the market by limiting the exercise of fair use to materials that are not otherwise available in databases and other digital sources. The Georgia University Policy goes further. The general policy, examined above, further requires that the university facilitate uses of the licensed materials. As noted, that requirement may have the practical effect of leading to additional purchases of electronic sources, all in support of the market for copyrighted works.

Laura Burtle, in her deposition demonstrated the practical functioning of this requirement. GSU has an E-Reserves intake form on its website, and instructors are asked to complete it when submitting materials. Although instructors are asked, for example, whether the work is available in electronic form, the library staff independently checks for such sources. If an electronic source is available, the library creates link to it from the E-Reserves system.

- “Library reserves staff should delete materials available on electronic reserves at the conclusion of each semester.”

This provision is common among E-Reserves policies. The policy separately bars access to materials at the end of the course; this provision apparently further requires deletion of the digital files from the E-Reserves system. This clause evidently serves the purpose of further reducing the possibility of any access to the materials outside the context of the educational program. Thus, the provision strengthens the educational purpose of the use, and it reduces the possibility of unwarranted uses that might harm the copyright owner’s market.

- “Institutions at the University of Georgia System will impose no charge to students for access to materials on electronic reserves.”

This policy statement reaffirms that E-Reserves are for nonprofit purposes, and the library will not charge any fees that could possibly diminish the strength of the nonprofit purpose. This provision is also common among E-Reserves policies.

“Introduction to the Fair Use Checklist”

http://www.usg.edu/copyright/site/introduction_to_the_fair_use_checklist/

Understanding the adoption of a fair use checklist at the University System of Georgia can benefit from an overview of the background and objective of such a checklist. The writer of this report, working with a colleague, developed the original fair use checklist in about 1997 and posted it to a website at Indiana University.⁶² The checklist was developed in response to the need for a tool that would allow individuals to assess a given situation in the context of the actual law of fair use. The checklist embodies elements of fair use that are drawn from the statute or that have been articulated in court rulings. The checklist is not comprehensive, but instead focuses on aspects of fair use that are likely to arise in the context of teaching and research.

In the 1990s, fair use was heavily driven by the concept of “guidelines” and “model policies” that are examined in Part VI of this report. Some elements of those guidelines are reflected in some versions of the checklist. However, the checklist was developed in part in response to the failure of the “Conference on Fair Use” to develop workable guidelines on issues of important to educators. Because the need to address fair use was, and still is, growing faster than the law can address, the checklist was intended to be a general and flexible instrument to meet changing needs.

The checklist gained immediate and positive attention. It has been adopted at many educational institutions, by private companies, and even by the Copyright Clearance Center. The CCC posts a version of the checklist on its website, urging readers to use it

⁶² The website was for the Copyright Management Center, of which Kenneth Crews was then the director. The colleague working with Dr. Crews was Dwayne Buttler, who now holds a position with copyright responsibilities at the University of Louisville.

in order reach a responsible conclusion about fair use: “This tool provides an important means for recording your fair use analysis, which is critical to establishing ‘reasonable and good-faith’ attempts to apply fair use.”⁶³

I often receive requests from interested parties for permission to use or adopt the checklist. I am happy to give permission. I am also happy to see the checklist used without my permission. Many people evidently see it as I had hoped: As a tool for applying the law of fair use to a given situation, ultimately assisting with the decision about whether a use of a copyrighted work is or is not fair use. Some organizations even revise the checklist to meet changing needs and local perspectives on the application of fair use.

The University System of Georgia has adopted its own version of the fair use checklist. I routinely urge users of the checklist to include a set of instructions for the proper use of the checklist, and the policy in the Current Case includes a helpful and accurate set of instructions. The instructions are also correct in stating that the user of the checklist is “probably best positioned” to reach a reasoned conclusion about fair use, principally because the user is most closely familiar with the facts. At the University System of Georgia, that statement is reinforced by allowing users to contact legal counsel for assistance. That assistance may come in the form of further explanation of the law or assistance with utilizing the checklist.

Another important aspect of this document is the explanation of uses that are allowed without application of fair use. The explanation of public domain materials, licensed materials, and uses within other exceptions is clear and useful to readers. The reminder about these possibilities is not essential in the context of this document, but placing it here is appropriate and helpful.

- “All uses of copyrighted materials, whether a ‘fair use,’ under a license, or use under other exceptions, should include a proper copyright notice and attribution.”

This statement is important in many respects. While a copyright notice and attribution are not a required part of fair use, compliance with this policy requirement can be a relevant fact in the application of fair use. The use of a notice can help protect the copyright owner’s interests; attribution can demonstrate good faith. More important, attribution is a simple and effective means for meeting the requirements of intellectual honesty that are crucial to the scholarly community.

- “Complete and retain a copy of this checklist for each ‘fair use’ of a copyrighted work in order to establish a ‘reasonable and good faith’ attempt at applying fair use should any dispute regarding such use arise.”

This statement is correct. The checklist is principally a tool to help users reach informed and accurate conclusions about fair use. The checklist is also a demonstration that at a minimum the user was aware of fair use, learned something about fair use, and applied

⁶³ http://www.copyright.com/Services/copyrightoncampus/basics/fairuse_list.html.

fair use to a particular situation. That alone may demonstrate reasonableness and good faith. Retaining a copy of the checklist for future reference is important.

“Fair Use Checklist”

http://www.usg.edu/copyright/site/fair_use_checklist/

http://www.usg.edu/copyright/documents/fair_use_checklist.pdf

The checklist that forms a part of the Georgia University Policy, like many other versions of the checklist, provides an overview of relevant elements of fair use. Because one of the purposes of the original checklist was to allow users to apply aspects of actual statutory and case law to a given situation, the merit of the checklist can be evaluated by relating each element to the law. The following chart restates the elements of the checklist and provides a summary of relevant law.

Factor 1: Purpose and Character of the Use

<i>Weights in Favor of Fair Use</i>	<i>Weights Against Fair Use</i>
<p>“Nonprofit Educational”</p> <ul style="list-style-type: none"> • Verbatim quotation from 17 U.S.C. § 107(1). • The nonprofit educational purpose must be focused upon the actual activity itself, not just the end use. <i>Princeton University Press v. Michigan Document Services</i>, 99 F.3d 1381, 1386 (6th Cir. 1996). <p>“Teaching (including multiple copies for classroom use)”</p> <ul style="list-style-type: none"> • Verbatim quotation from 17 U.S.C. § 107. • The U.S. Supreme Court noted the importance of this language and stated that multiple copies for teaching is an “obvious exception” to a focus on transformative use. <i>Campbell v. Acuff-Rose Music</i>, 510 U.S. 569, 579 n. 11 (1994). <p>“Research or Scholarship”</p> <ul style="list-style-type: none"> • These two purposes are included in the language of 17 U.S.C. § 107. • The ruling in <i>Texaco</i> affirmed the favored purpose of research or scholarship. <i>American Geophysical Union v. Texaco Inc.</i>, 60 F.3d 913, 920-22 (2d Cir. 1994). <p>“Criticism, Comment, News Reporting, or Parody”</p> <ul style="list-style-type: none"> • The purposes of criticism, comment and news reporting are stated explicitly in 17 U.S.C. § 107. 	<p>“Commercial activity”</p> <ul style="list-style-type: none"> • A “commercial” purpose is suggested in 17 U.S.C. § 107(1) as a use that might be disfavored. • Although the U.S. Supreme Court once called commercial use “presumptively unfair,” <i>Sony Corp. v. Universal City Studios, Inc.</i>, 464 U.S. 417, 451 (1984), this presumption was overruled (or at least significantly tempered) by the <i>Campbell</i> Court. <i>Campbell v. Acuff-Rose Music</i>, 510 U.S. 569, 585 (1994). • Whether an activity is commercial depends on the challenged activity, not a subsequent use of the materials. <i>Princeton University Press v. Michigan Document Services</i>, 99 F.3d 1381, 1386 (6th Cir. 1996). <p>“Profiting from use”</p> <ul style="list-style-type: none"> • Fair use is generally not available “when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material.” <i>American Geophysical Union v. Texaco Inc.</i>, 60 F.3d 913, 922 (2d Cir. 1994). • “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” <i>Harper & Row v. The Nation Enterprises</i>, 471 U.S. 539, 562 (1985).

<ul style="list-style-type: none"> • The purpose of parody was determined by the U.S. Supreme Court to be a form of criticism or comment and is a favored purpose. <i>Campbell v. Acuff-Rose Music</i>, 510 U.S. 569, 579 (1994). <p>“Transformative (use changes work for new utility or purpose)”</p> <ul style="list-style-type: none"> • The Supreme Court has ruled that transformative uses support fair use, but are not required. <i>Sony v. Universal</i>, 464 U.S. 417, 455 n.40 (1984) (using the phrase “productive use”). • The more transformative the use, the less will be the significance of other factors that may weigh against a finding of fair use. <i>Campbell v. Acuff-Rose Music</i>, 510 U.S. 569, 578-81 (1994). • A use can be transformative if accompanied by commentary, or if the original is altered or used in a new context. <i>Bill Graham Archives v. Dorling Kindersley Ltd.</i>, 448 F.3d 605, 611 (2d Cir. 2006). <p>“Personal Study”</p> <ul style="list-style-type: none"> • Personal use and even scheduling convenience could be the basis fair use according to the U.S. Supreme Court. <i>Sony v. Universal</i>, 464 U.S. 417, 455 n.40 (1984). <p>“Use is necessary to achieve your intended educational purpose”</p> <ul style="list-style-type: none"> • The Supreme Court permitted copying as “reasonable” in light of the purpose. <i>Campbell v. Acuff-Rose Music</i>, 510 U.S. 569, 588 (1994). “Reasonable” is a more lenient standard than the standard of “necessary.” 	<p>“Entertainment”</p> <ul style="list-style-type: none"> • The U.S. Supreme Court suggested that entertainment received less fair use protection in noting that “copying a news broadcast may have a stronger claim to fair use than copying a motion picture.” <i>Sony v. Universal</i>, 464 U.S. 417, 455 n.40 (1984). • The Supreme Court nevertheless held that time-shifting copies, even for personal entertainment could be within fair use. <i>Sony v. Universal</i>, 464 U.S. 417, 454-55 (1984). <p>“Non-transformative”</p> <ul style="list-style-type: none"> • Although simply migrating a journal article from the paper original to a photocopy is insufficient to claim transformative use, the added utility of that photocopy (such as its easier use in the lab) should be considered as possibly transformative. <i>American Geophysical Union v. Texaco Inc.</i>, 60 F.3d 913, 923-24 (2d Cir. 1994). <p>“For publication”</p> <ul style="list-style-type: none"> • This fact would suggest that further publication by the user of the work could undercut author’s right to control publication or markets. <i>See, e.g., Harper & Row v. The Nation Enterprises</i>, 471 U.S. 539, 549 (1985) (noting importance of “right of first publication”). <p>“For public distribution”</p> <ul style="list-style-type: none"> • This fact may be closely related to effect on the market; the wide distribution beyond class use could interfere with the market. <p>“Use exceeds that which is necessary to achieve your intended educational purpose”</p> <ul style="list-style-type: none"> • This fact reinforces the point that educators and others should use only the amount appropriate to serve the favored purpose. • However, the limiting standard for nexus with favored purpose appears to be “reasonableness,” and not strictly that which is “necessary.” <i>Campbell v. Acuff-Rose Music</i>, 510 U.S. 569, 588 (1994).
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Factor 2: Nature of the Copyrighted Work

<i>Weighs in Favor of Fair Use</i>	<i>Weighs Against Fair Use</i>
<p>“Published work”</p> <ul style="list-style-type: none"> • Just as courts have ruled that fair use applies narrowly to unpublished works, some courts have ruled that the published nature of the work allows greater fair use. For example: “this factor does not weigh heavily in Plaintiff’s favor because Plaintiff’s work was previously published by distribution of recordings of it.” <i>Higgins v. Detroit Educational Television Foundation</i>, 4 F.Supp.2d 701, 707 (E.D. Mich. 1998). <p>“Factual or nonfiction work”</p> <ul style="list-style-type: none"> • In both the Kinko’s and the Texaco cases, the courts ruled that the nonfiction nature of the work weighed in favor of fair use. <i>American Geophysical Union v. Texaco Inc.</i>, 60 F.3d 913, 925 (2d Cir. 1994); <i>Basic Books, Inc. v. Kinko’s Graphics Corp.</i>, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991). <p>“Important to educational objectives”</p> <ul style="list-style-type: none"> • This fact is based on the premise in the Campbell case that a work may be used under fair use if it is the type that is suited for a favored purpose, such as parody. <i>Campbell v. Acuff-Rose Music</i>, 510 U.S. 569, 586 (1994). • The Kinko’s court indicated that it wanted to see evidence that educators “would be disabled from teaching effectively” if the uses were not allowed. <i>Basic Books, Inc. v. Kinko’s Graphics Corp.</i>, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991). • Including this fact on the checklist also underscores the importance of limiting activities to works that are related to education or other purposes. 	<p>“Unpublished work”</p> <ul style="list-style-type: none"> • The U.S. Supreme Court has taken a strong position against fair use of unpublished works. <i>Harper & Row v. The Nation Enterprises</i>, 471 U.S. 539, 564 (1985). • More recent decisions have tempered this position and allowed fair use under some circumstances. <i>Sundeman v. The Seajay Society, Inc.</i>, 142 F.3d 194, 204-05 (4th Cir. 1998). • Congress also softened the rule by adding “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors” to 17 U.S.C. § 107. <p>“Highly creative work (art, music, novels, films, plays, poetry, fiction)”</p> <ul style="list-style-type: none"> • Just as courts have allowed broader fair use of nonfiction works, so have some courts applied fair use narrowly for highly creative works: “the creative nature of artistic images typically weighs in favor of the copyright holder.” <i>Bill Graham Archives v. Dorling Kindersley Ltd.</i>, 448 F.3d 605, 612 (2d Cir. 2006). • However, courts have ruled that some uses of creative or artistic works can be within fair use. <i>Higgins v. Detroit Educational Television Foundation</i>, 4 F.Supp.2d 701, 707 (E.D. Mich. 1998). <p>“Consumable work (workbook, test)”</p> <ul style="list-style-type: none"> • This fact is stated as a complete prohibition in the Classroom Guidelines from 1976: “There shall be no copying of or from works intended to be ‘consumable’ in the course of study or of teaching.” However, it has never been established as a rule of law.

Factor 3: Amount and Substantiality of Portion Used

<i>Weighs in Favor of Fair Use</i>	<i>Weighs Against Fair Use</i>
<p>“Small portion of work used”</p> <ul style="list-style-type: none"> • Brief portion of the original work, or excerpt from it, will weigh in favor of fair use. <i>Higgins v. Detroit Educational Television Foundation</i>, 4 F.Supp.2d 701, 707-08 (E.D. Mich. 1998). <p>“Portion used is not central or significant to entire work as a whole”</p> <ul style="list-style-type: none"> • The U.S. Supreme Court has ruled that the use of the “heart of the work” can weigh against fair use. <i>Harper & Row v. The Nation Enterprises</i>, 471 U.S. 539, 564-66 (1985). • However, the Court more recently ruled that even the “heart of the work” may be used if it is important to serving the favored purpose. <i>Campbell v. Acuff-Rose Music</i>, 510 U.S. 569, 588-89 (1994). <p>“Amount taken is narrowly tailored to educational purpose, such as criticism, comment, research, or subject being taught”</p> <ul style="list-style-type: none"> • The Supreme Court has ruled that fair use allows use of an appropriate amount of a work to meet the needs of the favored purpose. <i>Campbell v. Acuff-Rose Music</i>, 510 U.S. 569, 588 (1994). 	<p>“Large portion or entire work used”</p> <ul style="list-style-type: none"> • Courts have looked to a quantity measure, for example ruling that reproducing 5% to 30% of a book is “not insubstantial.” <i>Princeton University Press v. Michigan Document Services</i>, 99 F.3d 1381, 1389 (6th Cir. 1996). <p>“Portion used is central to work or ‘heart of the work’”</p> <ul style="list-style-type: none"> • See the discussion of the “heart of the work” in the column at left. • This fact has been inferred from the use itself; the fact that certain works were selected for copying has suggested “evidence of the qualitative value of the copied material.” <i>Princeton University Press v. Michigan Document Services</i>, 99 F.3d 1381, 1389-90 (6th Cir. 1996). <p>“Amount taken is more than necessary for criticism, comment, research, or subject being taught”</p> <ul style="list-style-type: none"> • Mirrors the point in the column at left regarding tailoring the amount used to serve the favored purpose.

Factor 4: Effect on Market for Original

<i>Weighs in Favor of Fair Use</i>	<i>Weighs Against Fair Use</i>
<p>“No significant effect on market or potential market for copyrighted work”</p> <ul style="list-style-type: none"> • “Only an impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets should be legally cognizable when evaluating a secondary use’s ‘effect upon the potential market for or value of the copyrighted work.’” <i>American Geophysical Union v. Texaco Inc.</i>, 60 F.3d 913, 930 (2d Cir. 1994). <p>“Use stimulates market for original work”</p> <ul style="list-style-type: none"> • Some uses may draw new attention to a work and encourage sales of the original work. <i>Bill Graham Archives v. Dorling Kindersley Ltd.</i>, 448 F.3d 605, 615 n.5 (2d Cir. 2006); <i>Sundeman v. The Seajay Society, Inc.</i>, 142 F.3d 194, 207 (4th Cir. 1998). <p>“No similar product marketed by the copyright holder”</p> <ul style="list-style-type: none"> • Using a work in a manner that competes with an actual product from the copyright owner will weigh against fair use. <i>Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.</i>, 342 F.3d 191, 202-03 (3d Cir. 2003). • Use of a work to create a competitive derivative will weigh against fair use. <i>Warner Bros. Entertainment Inc. v. RDR Books</i>, 575 F.Supp.2d 513, 550-51 (S.D.N.Y. 2008). <p>“No longer in print”</p> <ul style="list-style-type: none"> • The Senate Report to the 1976 Act states: “If the work is ‘out of print’ and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case.” <i>Cited in 4-13 Nimmer on Copyright</i> § 13.05 A.2.a. • The fact that a book was out of print contributed to a court allowing extensive quoting under fair use. <i>Maxtone-Graham v.</i> 	<p>“Significantly impairs market or potential market for copyrighted work or derivative”</p> <ul style="list-style-type: none"> • This fact is a counterpoint to the statement in the column at left about no significant market harm. <p>“Licensing or permission reasonably available”</p> <ul style="list-style-type: none"> • The reasonable availability of a license to use the work will weigh against fair use. <i>American Geophysical Union v. Texaco Inc.</i>, 60 F.3d 913, 929 (2d Cir. 1994). <p>“Numerous copies made or distributed”</p> <ul style="list-style-type: none"> • Counterpoint to statement in the column at left about one or few copies made; presumably the more copies made the greater the possible effect on the market. • The ALA Model Policy from 1982 includes this statement about photocopies placed on print reserves: “the number of copies should be reasonable in light of the number of students enrolled.” <p>“Repeated or long-term use that demonstrably affects the market for the work”</p> <ul style="list-style-type: none"> • The Classroom Guidelines from 1976 provide that any copies made shall not “be repeated with respect to the same item by the same teacher from term to term.” • The ALA Model Policy from 1982 tempered the statement somewhat: “The classroom or reserve use of photocopied materials in multiple courses or successive years will normally require advance permission from the owner of the copyright.” This document cited the “amount” factor as the relevant provision. • The CONFU Guidelines from 1996 provide: “Permission from the copyright holder is required if the item is to be reused in a subsequent academic term for the same course offered by the same instructor.”

<p><i>Burtchaell</i>, 803 F.2d 1253, 1264 n.8 (2d Cir. 1986).</p> <ul style="list-style-type: none"> • However, one court has ruled that photocopying of out-of-print books may interfere with the market for licensing reproduction rights. <i>Basic Books, Inc. v. Kinko's Graphics Corp.</i>, 758 F. Supp. 1522, 1533-34 (S.D.N.Y. 1991). <p>“Licensing or permission unavailable”</p> <ul style="list-style-type: none"> • Reasonable availability of licensing can be a major fact in the fair use analysis. <i>American Geophysical Union v. Texaco Inc.</i>, 60 F.3d 913, 929 (2d Cir. 1994). • However, the failure of the user to successfully secure a license to use the work is not relevant to fair use. <i>Castle Rock Entertainment v. Carol Publishing Group</i>, 150 F.3d 132, 146 (2d Cir. 1998). <p>“Supplemental classroom reading”</p> <ul style="list-style-type: none"> • The CONFU Guidelines of 1996 included this statement: “When materials are included as a matter of fair use, electronic reserve systems should constitute an ad hoc or supplemental source of information for students, beyond a textbook or other materials.” This statement has never been adopted as a rule of law. • In <i>Kinko’s</i>, the court noted that the book chapters were readings for the course and were not supplemental, although the court offered no analysis of this point. <i>Basic Books, Inc. v. Kinko's Graphics Corp.</i>, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991). <p>“One or few copies made or distributed”</p> <ul style="list-style-type: none"> • This statement appears to reflect the notion of single copies of materials noted in the Classroom Guidelines of 1976. That point has never been adopted as a rule of law. <p>“User owns lawfully acquired or purchased copy of original work”</p> <ul style="list-style-type: none"> • The CONFU Guidelines from 1996 include this statement: “Electronic reserve systems should not include any material unless the 	<ul style="list-style-type: none"> • None of these statements has been adopted as a rule of law. As demonstrated in this report, the concept of one-time use has been a costly burden on E-Reserves and has limited the use of many works in education. <p>“Required classroom reading”</p> <ul style="list-style-type: none"> • This statement is a counterpoint to the statement in the column at left about supplemental reading. <p>“User does not own lawfully acquired or purchased copy of original work”</p> <ul style="list-style-type: none"> • This statement is a counterpoint to the statement in the column at left about lawfully acquired copies. • The U.S. Supreme Court appeared to be influenced in one case by the fact that the user obtained the copyrighted manuscript through inappropriate means. <i>Harper & Row v. The Nation Enterprises</i>, 471 U.S. 539, 564 (1985). <p>“Unrestricted access on the web or other public forum”</p> <ul style="list-style-type: none"> • This statement is a counterpoint to the statement in the column at left about limiting access to students enrolled in the course.
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<p>instructor, the library, or another unit of the educational institution possesses a lawfully obtained copy.” That statement has never been adopted as a rule of law.</p> <p>“Restricted access (to students or other appropriate group)”</p> <ul style="list-style-type: none"> • Limiting access to students demonstrates an educational purpose, and by limiting access, the potential for abuse or market harm is constrained. 	
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Evaluation of the Fair Use Checklist

In almost all respects, the version of the fair use checklist that is made a part of the Georgia University Policy includes elements that are, in almost all cases, a suitable reflection of the law. To the extent that the checklist does not reflect the law of fair use, it is in almost all instances evidencing a more cautious view of fair use than the law requires. For example, the checklist includes reference to the “one-time use” rule. However, in doing so, the policy adds a proviso that repeat use is not favored if it “demonstrably affects the market for the work.” Moreover, like all elements of the checklist, they are to be evaluated overall. No one element, or even one factor, should properly determine the outcome of the fair use analysis.

Another strength of the checklist is its inclusion of many of the common elements found in E-Reserves policies (see Part VIII of this report). For example, the checklist includes mention of password restriction, and it reiterates the significant relationship between fair use and licensing. More important, particularly for E-Reserves, the checklist does not stand alone. The additional document in the Georgia University Policy on E-Reserves (summarized earlier in this report) specifies that E-Reserves will include a variety of procedures and conditions above and beyond the elements of the checklist.

Implementation of the Policy: Access to Legal Advice

The “policy” at a university is usually more than the formal statements on written documents. The interpretations and common practices of the individuals who work with the policy are an important part of the overall effectiveness of the copyright standards. One particularly important aspects of the Georgia University Policy is the commitment to provide information resources and guidance to the university community about copyright and fair use. As an example of implementation, according to the deposition of William Gray Potter, faculty members at the University of Georgia are directed to send questions about fair use and the policy to legal counsel for the university.

Referrals to counsel also arise in other situations. At GSU, staff members at the reference desk, according to the deposition of Nancy Seamans, review materials and watch for questionable situations. They are allowed to bring their questions to the library director or to the associate director. Instructors may also take their questions to legal counsel for the university.

The deposition of Laura Burtle confirmed this process. Ms. Burtle explained that anytime the library received a request for materials in a quantity that “sets of an alarm” the staff will refer the matter to her: “The reserves unit would question it, they would talk to me. I would probably talk to the faculty member first, and if they insisted that this was fair use, I would refer them to legal. If legal said it was fair use, I would go ahead. But I think that’s a legal decision, not a decision the library would make.” She would follow that procedure with large excerpts from books and with smaller excerpts in some cases.

As set forth in Part VIII of this report, at many colleges and universities, librarians are the leading source of guidance on copyright issues. At the University System of Georgia, the policy provides that questions may be directed to legal counsel, and counsel already has taken the lead in providing guidance and education programs. This is an extraordinary commitment, and one that should help improve understanding of copyright and help assure accurate adherence to the law. Many librarians do an exemplary job handling copyright questions. Assuring legal counsel’s participation strengthens the legal standing of the Georgia University Policy.

Part X: Conclusion

The Georgia University Policy, as examined in this report, is consistent with the copyright law of the United States, and when followed by instructors, librarians, and others at the university, the policy will provide an effective means for promoting compliance with the law at the university. In fact, evidence already demonstrates that the new policy, and its implementation, have led faculty members and others to revise their evaluation and application of fair use. Based on the analysis in this report, I reach the following observations about the Georgia University Policy:

- The policy is consistently an accurate statement of the law.
- The policy is written in clear and direct language that should be understandable by instructors, librarians, and many others who will use it.
- The policy avoids myths and misperceptions of fair use that have appeared in some policies and literature.
- The policy includes a standard of fair use is based soundly on the four factors in the statute and is consistent with case law.
- The policy directs instructors to use the fair use checklist, giving them an overview of many aspects of fair use.
- The policy directs instructors to keep a copy of the checklist as documentation of the fair use decision.
- The policy respects the ability of instructors, librarians, and others to make responsible and informed decisions.
- The policy includes safeguards and reviews of decisions to reduce the risk of noncompliance.
- The policy supports the purchase of materials for the library collections and for E-Reserves before relying on fair use to make reproductions.
- The policy directs users to secure permission when the use is not within fair use or other copyright exception.
- The policy includes a standard of fair use that preserves the law's flexibility to meet new needs and changing circumstances; as a result, the policy will be easily extended to innovations in education, such as the adoption of course management systems.
- The policy gives instructors and others access to legal counsel for assistance with copyright questions.

- The policy requires that the university provide information resources and educational programs related to copyright.
- The policy in fact has had real consequences; faculty members have testified that they have attended information programs at the university on copyright law.
- The policy in fact has had real consequences; faculty members have testified that they have revised their use of copyrighted works based on the newly issued policy.
- The policy in fact has had real consequences; librarians have testified that they have reviewed and even rejected some claims of fair use submitted by instructors.
- The policy is consistent with, and similar to, many policies that have been in place at colleges and universities throughout the country.

Because of these characteristics and qualities of the Georgia University Policy, I believe that the policy is an appropriate policy for adoption by and implementation at the University System of Georgia. I believe that the Georgia University Policy is an essential part of the ongoing effort of the university to meet its responsibilities under copyright law, and it deserves recognition as such.

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