Fair Use Challenges in Academic and Research Libraries

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Executive Summary

This report summarizes research into the current application of fair use to meet the missions of U.S. academic and research libraries. Sixty-five librarians were interviewed confidentially by telephone for around one hour each. They were asked about their employment of fair use in five key areas of practice: support for teaching and learning, support for scholarship, preservation, exhibition and public outreach, and serving disabled communities. Interviewees reported a strong commitment to obeying copyright law; rarely concerned about their own liability, librarians primarily felt responsible for ensuring their institutions were in compliance with the law. Practice varied considerably, from a rigid permissions culture to ample employment of fair use.

Interview subjects expressed various levels of certainty about how to interpret and apply fair use. They were aware of the doctrine, of its status as a flexible "rule of reason," and of some general categories of behavior it may protect, but some lacked a reliable, low-risk method of interpretation. Many moved immediately to "risk management" (i.e., strategizing about how to avoid litigation and other negative consequences) without first determining their fair use rights, and many followed arbitrary but familiar quantitative "guidelines" rather than taking advantage of the flexibility of fair use doctrine. Often, interviewees preferred to be guided by the more specific provisions in Sections 108, 110, and 121 of the Copyright Act, even where fair use would permit activities unsanctioned by those exemptions. Many interviewees found the terms of licenses interfered with otherwise acceptable fair uses. Finally, interviewees reported receiving varying levels of institutional support as they puzzled through copyright problems, with some describing university counsel's offices that had little time or ability to help given the range of pressing concerns competing for their time, while others reported having knowledgeable, responsive legal experts located inside the library.

Failure to employ fair use affirmatively and consistently impairs the accomplishment of the academic and research libraries' mission. Interviewees described downsizing, postponing, and shelving courses, research projects, digitization initiatives, and exhibits due to costs associated with seeking permission or making what seem to be tedious case-by-case determinations of fair use. Scholars were denied access to materials, or put to considerable hardship, because of constraints interviewees imposed on the use of copyrighted materials. Some interviewees described providing disabled students with lower levels of access than their peers for fear of violating copyright. Materials with inherent flaws (e.g., books with acidic paper, and analog tape and film that will warp and disintegrate over time) and in near-obsolete formats are languishing because some interviewees were not comfortable acting under fair use where other reformatting provisions may not apply. Interviewees were typically aware that they could go further, but felt constrained in exercising fair use in various situations.

Academic and research librarians will benefit from deliberation in order to create a code of best practices in fair use for their community. They will also benefit from greater access to legal counsel who are well-versed in copyright, as well as closer scrutiny and negotiation of licensing terms.

Background

Academic and research libraries are key players in the generation and propagation of knowledge in the U.S., and their interpretation of the balancing features of copyright is critical to the quality of research, teaching, and learning they support. Approaches and methods for research, teaching, and learning are changing rapidly with opportunities presented by digitization and Internet communication. Academic and research librarians need and use the balancing features of copyright—including exemptions listed in Sections 108 and 110 of the Copyright Act, as well as fair use (codified in Section 107)—in order to accomplish the routine tasks of their profession. Some of these balancing features are fairly clearly defined. For instance, the relatively restrictive TEACH Act provisions for digital distance learning in Section 110(2) are enumerated in detail in the statute. Others permit and indeed encourage broad interpretation. This is particularly true of fair use, the permission to use copyrighted material without permission or payment under some circumstances. The flexible doctrine of fair use can be especially helpful in this time of change, because its general terms can accommodate an indefinite number of new situations and enable important new uses where specific exemptions stop short.

Courts apply the fair use doctrine to permit uses that benefit society more than they harm copyright holders. Its origins are in nineteenth century case law, and it was written into the Copyright Act in 1976. The legislation requires the user in each case to consider the context of the use, and requires at least four kinds of consideration: the nature of the use, the nature of the original work, the amount used, and the effect on the market. These "four factors" themselves have become the source of endless speculation and debate and have been interpreted differently by courts over time. Over the last two decades, however, courts have consistently interpreted these factors to emphasize the transformative nature of the new use (did the new use put the material to a different purpose?) and the amount (was it appropriate to that new use?), considering—explicitly or implicitly—the customs and the needs of the community of practice to which the user belonged.[1] Because a transformative use by definition does not compete directly with the original work, the courts' new focus means that the relative importance of the "fourth factor"—economic harm to the rights holder—has shrunk dramatically.[2] Lost

[1] Peter Jaszi, "Copyright, Motion Pictures and Fair Use," *Utah Law Review* 3 (2007): 25. M.J. Madison, "A Pattern-Oriented Approach to Fair Use," *William and Mary Law Review* 45 (2004): 1525.

[2] Jaszi, supra n.1.

licensing revenue from scholarly and academic uses, such as quotation for criticism or review, for example, is simply not the kind of economic harm that copyright is intended to prevent. And in no case can mere loss of a potential license be decisive, since such an interpretation would vitiate fair use as an instrument of balance in copyright.

Nonetheless, many users are still reluctant to employ fair use, not only because it requires case-by-case assessment but also because U.S. law permits potentially high statutory damages in case of infringement—up to $150,000 per work infringed. High-profile lawsuits have made the dangers vividly clear and intimidated users. The Recording Industry Association of America, for example, has obtained shockingly high damages awards against non-commercial users of peer-to-peer file-sharing software. In practice, of course, it is highly unlikely that damages of this magnitude would be awarded against colleges and universities (or their components and constituents) that are working to fulfill their institutional missions. Nevertheless, threats by publishers have led to the adoption of fairly conservative policies at some academic and research institutions. These moves have been effective in part because it is less widely known that educational institutions and their employees can be shielded from these kinds of damages awards, even when they are found to have infringed copyright: state sovereign immunity generally insulates public institutions against damages awards, and Section 504(c)(2) of the Copyright Act gives additional protection to employees of non-profit educational institutions with reasonable grounds to believe they were engaging in fair use. As is demonstrated in the recent federal court decision involving Georgia State University, state sovereign immunity also plays an important role in limiting many universities' exposure. These protections are not absolute, however, and the possibility of a devastating damages award, however remote, can be a powerful deterrent to an already uncertain librarian.

Beyond higher education, some communities of practice have benefited dramatically from the emerging stability of interpretation around fair use in the courts, and the emphasis on transformativeness and appropriateness of the use. Documentarians, media literacy teachers, dance archivists, and others have created codes of best practices in fair use that have made appropriate interpretation visible to their communities. To date, academic and research librarians—one of the most influential and pervasive user communities for which fair use is a vital tool—have not done so.

This report investigates how academic and research librarians today are interpreting fair use.

Methodology

The co-principal investigators of this research built upon the methods developed in previous research to create codes of best practices in fair use.[3] This methodology is qualitative and has three stages. First, representative members of the community of practice are interviewed to get a thorough understanding of current practice and concerns. Second, members of the community are convened in confidential meetings to discuss the results of the report and their best judgment on how to interpret fair use in common situations that arise among their peers, as revealed by the research. Third, the facilitators, aided by a legal advisory team, craft a code of best practices grounded in the judgment of peers in the community of practice.

This report constitutes the conclusion of stage one. To inform the research, the authors conducted hour-long, open-ended telephone interviews with 65 academic and research librarians who had direct experience with service in at least one of five areas: teaching and learning; scholarship; preservation, collections-building and management; exhibition; and disability support. The researchers offered complete anonymity to all interviewees, thus permitting frank discussions. They generated names through discussions with research and academic librarians and through snowball sampling. They also consulted materials that the interview subjects directed them to, typically materials generated by those subjects' staff as guidance on the use of exemptions. They then analyzed the gathered materials for common themes and practices.

Findings

Mission

Academic and research librarians are dedicated to supporting research, teaching, learning, and collections care. Interviewees manifested a strong commitment to serving various constituencies with which they interacted in service of this mission. Most prominent among those constituencies were current **faculty, researchers, and students**, especially graduate students, who were often perceived as the library's core patrons. Also important to the librarians were their **administrators and general counsel**, to whom librarians ultimately defer on important policy matters, and the general public,

[3] Ad Hoc Committee on Fair Use and Academic Freedom, International Communication Association, *Clipping Our Own Wings: Copyright and Creativity in Communication Research* (Washington, DC: International Communication Association, 2010), 17. Patricia Aufderheide and Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (Washington, DC: Center for Social Media, School of Communication, American University, 2004), 38. Patricia Aufderheide and Peter Jaszi, *Recut, Reframe, Recycle: Quoting Copyrighted Material in User-Generated Video* (Washington, DC: Center for Social Media, School of Communication, American University 2008), 20.

to whom academic and research libraries are often open. Finally, there was a fourth vital constituency: **faculty, researchers, and students of the future**, who would depend on the responsible collection, curation, and preservation of materials today. Each constituency, interviewees noted, has its own priorities and concerns. Acutely aware of those many priorities, interviewees reported constantly juggling the different resulting demands in order to maintain the underlying mission: to enable teaching and research today and in the future.

Some longer-serving librarians reported that institutional concerns about copyright compliance are a relatively recent phenomenon. All indicated that today, copyright decisions come up constantly for librarians working in furtherance of library mission. One interviewee told us, "I've seen a marked shift about knowledge of copyright, that now you need to understand copyright to be an effective archivist or librarian. That wasn't as true when I joined the profession." Unlike in some communities of practice, interviewees appeared relatively unconcerned about the consequences to them personally for making a potentially infringing decision. They often exhibited clear concern, however, not to jeopardize their institutions, either by triggering adverse legal action or by harming the institution's reputation. At the same time, they often noted that their primary mission was to enable teaching, research, and learning, and that they needed to do what was necessary to make that happen, including making judgment calls about use of copyrighted material.

Many research and academic librarians also routinely act as the de facto arbiters of copyright practice for their institutions. While some interviewees were comfortable sharing or even ceding responsibility for making these decisions to faculty and graduate assistants, for example, others believed the primary responsibility for managing access to materials should continue to rest with the library. Interviewees worried that some faculty are too confident, that "if it's for education, then it's automatically fair use," and others worried faculty may not have the time or attention to devote to thinking about fair use. Some interviewees felt faculty didn't realize what they were allowed to do under fair use and other education-related copyright limitations and exemptions, and needed encouragement to take advantage of their rights. Consequently, they often assumed responsibility for determining whether a use is sufficiently related and tailored to educational purpose to satisfy the legal requirements of fair use.

When librarians have questions about copyright law, they have a variety of legal resources to which they can turn. Some reported having access to either specialized legal counsel located within the library, or staff members with specialized training who serve library copyright needs full-time. These interviewees reported making good use of such in-house expertise. Typically, however, the most important resource is university counsel. Interviewees described having varying levels of access to legal counsel, and they described counsel with varying levels of familiarity with copyright.

Some described university counsel who were fairly easy to reach, but not always fully conversant with copyright law or with library practice. Many, however, described university counsel offices that were too busy with other pressing legal concerns to answer library questions, whose answers did not necessarily give full weight to library mission, or both. In general, while greater access to advice gave interviewees significantly greater confidence in their decisions, all still served as front-line decision-makers, and most found themselves to be the de facto copyright policymakers at their institutions, as well.

Some interviewees expressed discomfort at playing this role. One interviewee described it this way: "I feel I have two roles, because on the one hand I want to shield the university from risk, but on the other hand I want to push the barriers as much as I can." Many noted that they were not lawyers, were not trained in copyright law, and could be neither prescriptive toward their patrons nor authoritative on legal judgments. Interviewees also believed that they were not as well equipped as faculty to judge whether particular material serves a valid educational purpose. Another interviewee said, "Even though this isn't my job, I end up doing it! And I feel like someone should be dealing with this. I'm no expert, but I feel like it's important..." Because they felt a duty to ensure the responsible use of library materials, interviewees found themselves in the position of internal, institutional copyright gatekeepers.

Working to balance risk exposure of the institution for copyright infringement with the obligation to enable teaching, learning, and research, librarians frequently focus their efforts on minimizing the perceived risk of a lawsuit without first considering what their rights, and those of the communities they serve, actually are. Risk management strategies included keeping what they considered risky practices obscure, following arbitrary quantitative guidelines, and discouraging the use of materials associated with litigious rights holders. One interviewee described criteria for choosing a media platform in terms of risk management: "[I]t had to be something they could hide behind a firewall so only [my university] has access—not search engines and entertainment industry spies." He continued, "It's not that we think we're doing the wrong thing. We just don't want to be the test case and drag the university through that." While some interviewees engaged in risk management reasoning without first determining their rights under fair use and other copyright limitations and exceptions, many clearly separated the considerations and took their rights into account when deciding what level of risk a particular practice involved. Interviewees who made risk management decisions without first determining their rights explained that they did not understand their rights with sufficient confidence to warrant taking them into account.

Teaching/Learning

Interviewees encountered fair use questions in making materials available for the work of teaching and learning in two general areas: curriculum material for coursework, and faculty/student copyright education.

Interviewees' most prevalent concern was "e-reserves"—finding a reliable way to assess what kinds of works, how much of a given work, and how frequently a given work could be made available for teaching electronically under fair use (e.g., in electronic reserves or via course management systems such as Blackboard and Moodle). Interviewees often found themselves in charge of decision-making. Most interviewees believed that library provision of learning materials on e-reserves or in course management systems generally should be associated with organized learning activities, but they varied on how to determine appropriate context.

Some interviewees faced challenges in helping faculty use teaching resources with uncertain copyright status. Many art and art history teachers, for example, have compiled sets of slides over the years whose origins are obscure—e.g., amateur photos of sculpture or paintings where the professor cannot recall the identity of the photographer. Science professors raise similar concerns over transparencies and illustrations long divorced from their original context.

Interviewees' strategies to deal with their uncertainties included access control (in some cases tailored to educational purpose, in others designed simply to minimize visibility), limitations on amount of use, postponement of decision-making, and the shifting of responsibility to other departments.

Access control techniques for e-reserves included requiring physical presence in the library or on campus, limiting the time materials could be available, and requiring authentication for access. While sometimes interviewees simply hoped to limit visibility of their practices, in many cases they were attempting to conform to or approximate constraints suggested by Section 108 or Section 110(2). For some interviewees it was not clear exactly which legal provision their policies were designed to follow.[4] In some places, interviewees provided an array of materials to students while they were in a course, but cut off access the moment the course ended, foreclosing informal learning or even finishing an uncompleted course. In other places, only students enrolled in a particular class could access assigned materials (and only assigned materials) in a password-protected course management system. Practice varied across the spectrum of choices, and many interviewees were uneasy about their choices and concerned that they may not be meeting the needs of patrons. Others, however, were confident that

[4] It is often advisable for librarians to look first to more specific exceptions before using a fair use rationale to accommodate their practice. Even where a librarian moves to fair use, her policy-making can be guided by common sense considerations from all sources, including other legal provisions. At the same time, the fair use doctrine exists to complement and supplement other, more specific copyright exceptions; strictly speaking, therefore, it is not subject to the limitations described in those other sections. Navigating this relationship between fair use and other provisions may be one of the most complex and interesting challenges librarians face.

their institutions had found e-reserves policies that properly took advantage of fair use to serve library mission.

Interviewees reported a wide range of policies to limit placement of materials on e-reserves. They imposed limits—sometimes based on arbitrarily precise quantitative limits, sometimes a judgment call of the librarian, sometimes on a judgment call by faculty, graduate students, or a student worker—on the amount of material that could be posted from a single book or video or CD. One interviewee described her institution's policies as evolving to become more expansive, but still bound by percentages: "When I first started this position about three years ago, 10% was the limit. Now we'll typically do 15% to 17%. Generally less than 20% of a book." Interviewees had also considered whether an item could be posted repeatedly across several quarters or semesters; policies ranged from permission to post indefinitely, to posting every other or every three semesters or years, to never permitting repeats. In one case where an institution's policy barred repeat use of the same material for a course with the same number in the catalog (e.g., "English 202"), the interviewee described faculty jubilation when a rewrite of the course catalog gave courses new numbers and faculty a second chance to use library materials. Interviewees usually regarded texts designed for the course in question as in a different category from compilations drawn from a range of materials.

The rising problem of how to share digital materials among instructors and classes, with the related problem of digitally anthologizing analog materials collected over time and often without provenance, was handled in a variety of ways. At some universities, commonly used course material was jointly shared under a fair use determination by multiple professors and their students. In one case, at Indiana University, a digital platform called Variations makes a vast body of music, scores, learning modules, and interactive study tools available to IU faculty and students enrolled in music courses. A new iteration of Variations will make the service available to many other campuses. In other places, attempts to share art, music, or bodies of scientific curriculum materials have simply been shelved "for now." Many bodies of material without provenance have simply been left in analog form, often in a single faculty member's collection.

Interviewees also noted a common trend to shift responsibility for making fair use determinations of teaching materials away from libraries toward faculty or the technical staff who manage the course management system. Some interviewees' frustrations about ambiguity in interpreting fair use left them conflicted about ceding control in this area. They worried about damage to the library's mission: If digital teaching decisions move outside the library, would users become over-cautious in their copyright decisions, since they did not share the librarian's culture of service to present and future scholarship?

In applying fair use determinations to curriculum materials, interviewees consistently treated cases differently based on medium, a distinction fair use law itself doesn't

recognize. Interviewees were most confident in applying fair use to text, less so for music, and least of all for the most novel kind of materials: video. The question of video streaming was an emerging issue for them: as faculty increasingly incorporated video snippets into their presentations and assigning videos for class, students increasingly pressed for digital and off-campus access to such course materials. Practice among the interviewees varied widely, from on-and off-campus digital access to entire films (for example, for language classes), to access to clips for a prescribed time within a course (only for students or faculty of that course), to simple postponement of any decision-making about video access.

Interviewees often displayed an intriguingly anomalous bias in favor of vendors of specialty video material, including documentaries and films made specifically for the educational sector. While interviewees were generally respectful of vendors to the educational sector, specialty video distributors were sometimes given a special place and positioned as surrogates for the independent filmmakers whose films they make available. Those interviewees who displayed this attitude described applying fair use charily to this material, suddenly emphasizing the fourth factor—effect on the market—as the most important. They repeated with some conviction the vendors' arguments that if libraries take advantage of fair use rather than pay distributors for each new use or format, specialty filmmakers (and by extension their specialty films) may cease to exist. By taking responsibility for the continued profitability of vendor business models, interviewees had, in effect, adopted vendors as one of the constituencies that they serve.

Interviewees also regularly assumed the duty of providing copyright education to patrons and staff. Since they themselves were typically working from risk management calculations that were not grounded in a full understanding of their legal rights, they were not well-prepared to share an understanding of those rights with their patrons. Instead, they shared distilled and simplified versions of their own risk management calculations. Interviewees usually correctly understood fair use as a rule of reason—a part of the law that requires interpretation on a case-by-case basis—but many of them showed anxiety over how to conduct that reasoning. Moreover, they often faced patrons who demanded certainty—"tell me exactly how much of the book I can include"—or wanted librarians (who typically did not know the teaching objectives a particular use was intended to serve) to do all the decision-making for them. Interviewees often also supervised staff, including work-study students. Even interviewees who considered checklists and quantitative guides unduly limiting commonly instructed students and staff to employ them, telling us, for example, "Staff need or want black and white rules." In some contrasting instances, however, interviewees reported simply telling staff to use common sense; in close cases, the staff members were instructed to check with the supervisor. Librarians also found it frustrating not to be able to draw on a consensus about fair use at copyright workshops for faculty (and similar settings), and regretted having instead to use phrases such as "probably ok, but different people say different things" and "you should be in the clear, but some librarians don't share my

view" or "you should probably get permission, though there are some who would say you're OK." Their advisees were frustrated as well by this lack of consensus, and some librarians felt the workshops and advice sessions did as much to discourage as to encourage the fair use of library materials in teaching. As one interviewee put it, "I call myself 'The No Lady.' I often say, 'You know, I would not encourage that, but it's up to you.'" Another said, "When I explain how complex the situation is, they unfortunately leave more confused and frustrated than when they came in."

Scholarship

Interviewees also encountered fair use decision-making when facilitating scholarship, including consulting with faculty and students on contract terms with their publishers; digitizing library collections; overseeing access to collections, especially special collections; and managing interlibrary loan.

Interviewees reported that faculty frequently looked to them for help with permissions for publications, as did graduate students working to manage permissions for theses and dissertations. Often faculty and students had postponed any copyright concerns until the moment of publication, found themselves faced with editors with strict permissions requirements, and wanted immediate help. One interviewee was saddened by the impossible position a publisher created for a scholar at her institution: "This poor guy wanted to use things so old they were long since out of copyright, [but] the publisher absolutely would not publish images for this article without permission." Interviewees expressed frustration at not being able to provide fair use alternatives to getting affirmative clearances for everything. Electronically filed dissertations also caused uncertainty and frustration for interviewees, both because quantities of third party material incorporated in dissertations are increasing and because of concerns for the ease with which others might copy or redistribute this material. Although most understood intellectually that neither doctoral candidates nor their institution were responsible for downstream uses of copyrighted material that they had quoted appropriately, doubt about what uses actually were appropriate complicated the situation. Moreover, in many cases interviewees did not see the dissertations until they were ready to be deposited—and after they had been submitted to a vendor such as ProQuest, which requires permissions for all incorporated copyrighted material (or its removal). In those cases, interviewees simply did not know what had been left out of the dissertation, and they suspected that useful material might have been excised. In some cases, they fielded questions from graduate students still in process of writing their dissertations, who confronted confusing requirements about permissions. They wanted to be able to give these students a clearer understanding of fair use determinations than they were able to provide.

In some cases, interviewees drew attention to the possibility of using open access or Creative Commons publishing models to ensure their own work is not so difficult for future scholars to use. While a move toward new models may help future generations

of scholars in some aspects of their work, interviewees understood that this long-term strategy is no substitute for confident counseling on fair use and related exemptions here and now. Not only do new distribution models not solve researchers' pressing current needs to make reasonable fair use of copyrighted material, some noted, but they will never address the problem of accessing copyrighted material that has not been disseminated under an open access model—which is the case for most work generated within commercial culture.

Potentially infringing patron use of library materials was a source of concern for many interviewees, especially at universities with active public demand for unique or special collections—for instance, where university libraries hold local newspaper records, or historical and personal records related to a topic that is of great interest to the public. Interviewees reported employing access control to mitigate this concern—for instance requiring visitors to be present on library property, even when material could easily be made available digitally. Other librarians interviewed required visitors to sign a document saying that they were using material only for research purposes. One interviewee described a long and frustrating interaction with a reporter who wanted access to a rare manuscript of a musician's lyrics: "In the end we gave them a digital scan and then had them sign a form. We were putting them off for weeks, though. And that served nobody. Now they've published a very interesting article about our collection." Imposing barriers bothered many librarians, who said they were uncomfortable with effectively discouraging people from legitimate use of library materials and imposing onerous burdens on the researchers who do use them. Some bemoaned the fact that after encountering obstacles, patrons with what they regarded as a legitimate claim to use materials simply never returned.

Increasingly, academic and research libraries strive to digitize existing holdings and make the digital versions available in some way to patrons. This goal accords with the mission of facilitating research and can be an important input into teaching and learning. Because digitization is subject to significant economies of scale, many projects will only justify investment if the subject collection is sure to reach a threshold size. The perceived ease or difficulty of determining rights questions can therefore be determinative of which projects go forward. Interviewees suggested that at least some projects have been stymied by the perception that fair use determinations would be too difficult to do at scale, or that the doctrine is too limited to support a large-scale effort. Where projects did go forward, interviewees were often concerned about how much of a given work or collection would be legal to digitize and how much access to provide to the resulting digital files.

These decisions were further complicated when interviewees faced the question of digitizing entire collections. In such cases, librarians may be doing little active curating, and perhaps might be offering materials that can be disaggregated and reaggregated at will. The challenge is particularly steep when librarians confront mixed collections that

include "orphan" works (works whose copyright-holder is unknown or unreachable) and works, such as musical recordings or video, that implicate multiple rights and rights holders.

Interviewees dealt with their concerns by a combination of limited copying and access control. Faced with the challenge of what and how much to copy, a few were simply postponing digitization. When they did digitize, as most did, they almost universally chose to digitize public domain materials first, regardless of scholarly needs, in order to avoid copyright questions in the short (or even medium) run. One interviewee gave this common characterization: "We have a lot of things in the public domain, that's the 'easy pickins' for digitization…. We haven't gotten into controversial ground." They would prefer, interviewees noted, to be able to establish priorities on the basis of patron needs and interests. One music librarian told us, "If we could choose what to do without copyright, we would do things very differently. We have astonishing holdings across the spectrum, but the holdings used most extensively are [twentieth century composers]." Some reported "cherry-picking" collections to exclude from digitization those actually or potentially copyrighted items that were perceived as riskier. One interviewee described his perception of risk in this way: "I wouldn't have much concern about digitizing the diary of a 1905 homesteader, but I would have a great deal more concern about digitizing the papers of [Elvis Presley]." Interviewees were keenly aware of and deeply disturbed by this distortion of mission and the incompleteness of resulting digital collections. Archivists expressed a particularly strong ethical obligation to present collections in their entirety and had deep misgivings about making only a portion of a collection available digitally.

Addressing the challenge of how much access to provide to digitized collections, some simply postponed that decision, leaving digitized collections inaccessible for now. Some required users to sign a release saying that they were employing this material for research purposes, and some required users to access material on site. Some permitted open access to digitized collections, with a disclaimer on the website.

Interviewees also faced frustration in meeting mission when contractually permissible uses of digitized databases stopped short of what otherwise would be allowed by fair use. For example, several interviewees had experience helping researchers conduct large-scale, "non-consumptive" research using databases of scholarly work. Using their own computer applications, scholars can retrieve and do automated textual analysis across large numbers of articles to develop useful meta-analyses and finding aids. Because these cutting-edge research projects involve automated finding and retrieval of large numbers of articles, they often run afoul of license terms that prohibit automated or large-scale retrieval of articles. Interviewees said researchers typically assume their activities are reasonable uses of the databases, and when publishers cry foul the researchers are bewildered by this limitation. One interviewee told us, "The frustration is pretty great, and I have to relive it with every researcher that enters this realm."

Neither the interviewee librarians nor the scholars they support could find a way forward when confronted with license terms that forbade these non-consumptive fair uses. The net effect has been to render promising new research methods completely off limits at some institutions.

Interviewees reported that interlibrary loan (ILL) decision-making rarely involved even a discussion of the potential applicability of fair use. Rather, they typically applied a rubric suggested by the National Commission on New Technological Uses of Copyright Works (CONTU) in the late 1970s as an interpretation of Sec. 108(g). Under this quantitative bright line test, known as the "rule of five," in any given year an institution may request through ILL no more than five copies of articles published in the previous five years by the same periodical, and may make no more than five requests for the same non-periodical work during the term of that work's copyright. If a library exceeds these guidelines, the rule requires it to pay royalties to the rights holder. This practice, which applies bright lines that do not have the force of law, can cost libraries significant sums of money and limit patron choice.[5] Several interviewees described a popular software package for implementing ILL, called Illiad, which monitors a library's requests and automatically generates a bill, payable to the Copyright Clearance Center or to individual rightsholders, for each ILL request in excess of the rule of five. While some interviewees had not considered whether the rule of five was limiting their ability to serve patrons, others decided to follow more flexible ILL practices.

The increasing amount of digitized and licensed material in library collections created new ILL questions for interviewees as well. Licenses for access to journal articles may not allow a library to provide articles through ILL to other institutions, which had been a very common way for libraries to obtain access to a single article from a journal to which they did not subscribe. For digital holdings generally, interviewees wondered whether a library could simply share a link to a digitized item, or upload a file to a shared server.

Preservation

Preservation is a core function of academic and research libraries, because it serves future generations of teachers, students, researchers, and members of the public by responsible stewardship of library materials.

Interviewees reported that their preservation decisions were shaped dramatically by concerns about copyright. Practices most strongly influenced by these concerns include format-shifting of at-risk materials and materials in obsolete and near-obsolete formats,

[5] Kenneth Crews, "The Law of Fair Use and the Illusion of Fair-Use Guidelines," *Ohio State Law Journal* 62 (2001), 98.

archiving of online materials, and acting in the shadow of large-scale digitization projects like Google Books.

Many interviewees expressed interest in using surrogates as a way to minimize wear and tear on valuable original materials. Librarians debate whether digitization can create a preservation-quality copy of an object; however, where an item has a known defect that would be exacerbated by use over time, the item could be preserved to some extent by creating an access copy (either digital or physical) to mitigate the damage caused by patron use. This could be especially useful for works (such as books printed on acidic paper) that are currently intact but whose formats have known inherent flaws that will render them unusable in due course.

Interviewees were unsure whether this kind of "preemptive preservation" could be fair use due to confusion about how fair use relates to Section 108 of the Copyright Act. Section 108 allows for the creation of replacement copies and preservation surrogates in limited circumstances, but many librarians believe that the provision is too narrow and would not protect them in important cases. Most importantly, Section 108 seems to require that published works already be damaged or deteriorating before a replacement copy can be made, necessarily precluding preemptive measures. Section 108 also limits the use of surrogate copies in ways that made many librarians question whether creating a Section 108 copy would be worth the effort. Many interviewees understood that Sec. 108 does not limit the application of Sec. 107, and one interviewee explained that her institution chose to rely on fair use rather than Section 108 because they did not want to digitize materials if the resulting copies couldn't be used in a variety of ways: "Our workflow is about publishing, not just preservation." Another took exactly the opposite approach, more comfortable with preservation practices that involved multiple digital copies but no patron access: "Our feeling is we're not infringing because we're not disseminating, we're not making available off-premises. We're just making sure our copy doesn't disappear." Interviewees routinely wished to employ fair use as a more flexible solution in these contexts, but most lacked confidence in their ability to apply multiple copyright doctrines in this way. Where Section 108 seemed to provide a clear rule, librarians tended to apply that rule, even where Section 108 would bar useful practice and fair use would enable it.

Some interviewees used the same strategy when considering ways to make materials in near-obsolete formats available for teaching, research, and learning without compromising the original. While Section 108 provides for creation of a replacement copy where a format is obsolete, many materials are stored in formats that are dying but not yet technically obsolete, such as VHS tape. For at least the time being, machines to read these formats are still commercially available, but the formats themselves are in such disfavor that patrons simply will not use them, so that institutions hesitate to put precious equipment funds toward legacy hardware. These formats typically present preservation challenges, as well, such as deterioration or warping of analog tape.

Moreover, accessing materials in these formats speeds their degradation. Interviewees told disturbing stories of rooms full of aging film and videotapes that they were neither preserving digitally nor making available, due to legal uncertainty. One interviewee said, "I'm trying to take the [physical] preservation tack—good climate control, re-housing things. But we're not comfortable with format-shifting." Another described older formats as "invisible" to users, saying IT departments typically determine what formats will be accessible by deciding which players to purchase or to keep: "Now IT says, 'No more VHS on campus,' then the librarians have no say. And we can't copy it either because it's not lost, stolen, obsolete, and so on [as Section 108 requires], or if it is and we make a digital copy, that can't circulate outside the library per Section 108."

Interviewees also expressed concerns as to how to collect and preserve ephemeral online and other digital materials. Important cultural movements and events often take place online or are documented there. Increasingly, creative and scholarly works of all kinds are released exclusively online or are released in digital editions with content or features that are not recreated in physical or offline digital formats. Unlike a book on a bookshelf, these artifacts (including topical websites) can disappear at any moment and without warning. Furthermore, many digital materials (for example albums from Apple's iTunes Store or e-books from Amazon's Kindle platform) are encumbered with licenses designed for consumers, not libraries.[6] Many interviewees expressed a professional responsibility to ensure these materials are available for future scholars, and were interested in capturing and collecting online and digital materials for that purpose, but reported being discouraged by a host of copyright concerns.

Many interviewees expressed a preference for obtaining permission from rights holders before capturing online materials, but said that this can be difficult or impossible for a host of reasons, including: site owners or administrators are difficult to contact; site owners may not have the necessary rights in the material on their site (even if they say they do); and it is difficult or impossible to determine who, other than site owners and administrators, would be able to grant permission to collect material published on the Web. At the same time, archiving online material typically involves copying entire works. Most interviewees believed—erroneously—that fair use applies primarily if not exclusively to the reproduction of small parts of a copyrighted work.

Those who were going forward with Web archiving projects reported using risk-management strategies: they documented multiple attempts to reach site owners before archiving a site, posted disclaimers indicating their willingness to work with copyright holders who discovered unauthorized copies of their work in the collection, and were willing to take down at the rights holder's request materials they had reposted online

[6] D.J. Hoek, "The Download Dilemma," *American Libraries* August/September (2009): 55.

without permission. Many were unsure whether collecting these materials would be considered fair use, even though most believed that collecting ephemeral online materials is important, even necessary, with or without permission.

Exhibition and Public Outreach

Interviewees also encounter fair use concerns in their public-facing activities in both physical and virtual spaces. Thus, for example, libraries mount exhibits in the reception area; they contribute to an anniversary display; they host an online exhibition; they publish newsletters in hard copy and/or online; and they showcase a particular holding-of-the-week in a kiosk on entry.

Interviewees' levels of concern and the types of action taken ran across a broad spectrum. Some simply assumed that fair use would permit them to make such displays, whether they were online or in person. In online displays, whether de facto or by design, the rendering of the objects was usually very far from a perfect copy. Others would not consider using anything without a license.

Judgments often differed with the medium of the copyrighted material, despite the law's agnosticism. Text and still images were typically seen as easy to display under fair use. Audio was sometimes treated similarly, but in other cases (e.g., where songs are played in the background to create a mood) librarians were wary of using audio in exhibitions without permission. Video was rarely used without licensing or—at the least—ongoing concern about licensing.

Many of the problems and anxieties they encountered in connection with supporting research through collection digitization occurred in the context of creating online exhibits. Donated collections often include copyrighted works of third parties (for instance, correspondence) that cannot be governed by licenses or copyright transfers from the donor. Rights holders are often difficult or impossible to find. Some collections might be presented in their entirety, but this raises questions about whether the exhibit is suitably transformative to make a fair use claim.

Interviewees often hesitated to go forward with their exhibition projects due to these issues. In particular, they worried that digital resources put up in legitimate online exhibits could be downloaded from library servers and redistributed online, and they worried about their institutions' liability for this redistribution.

In many cases where interviewees proceeded with exhibits, their institutions incurred extensive costs, including staff time to deliberate on copyright questions as well as licensing costs, and there were typically significant delays associated with these efforts. One interviewee described the process of clearing rights in association with a prominent exhibit, "For the three months before this opened, we had a contractor, about half time, and an intern working full time to sort out the copyright issues." These considerations also effectively limited how eager any library was to engage in outreach activities.

Interviewees reported responding to these costs and concerns, however reluctantly, by distorting their practice in ways that are similar to the responses documented in connection with support for scholarship: they favored exhibitions of public domain materials over those of more contemporary works, regardless of community interest or scholarly value; they favored exhibits involving obscure or anonymous persons over those involving high profile individuals who they feared might be more likely to litigate; they favored physical, on-site exhibits over virtual, online ones. Interviewees were painfully aware of the ways in which their choices violated their mission to serve patrons' research and learning needs.

Access for Persons with Disabilities

Few interviewees dealt directly with accessibility policy or even with the needs of disabled patrons. Although many felt that this is part of the librarian's mission, in practice another department usually handles these needs. Some interviewees were stopped short by concern that their library or university may not satisfy Section 121 of the Copyright Act, which empowers an "authorized entity" to provide accessible copies to the disabled. Many were not comfortable with the indisputable fact that fair use offers an alternative rationale for providing access to disabled users. As with practices in the shadow of Sections 108 and 110, interviewees hesitated to apply fair use where another rule may give a simpler answer, even if the answer seemed to be "No." And as with the other specific exceptions, some interviewees were unclear as to what Section 121 really requires and what it allows.

Issues arose most commonly when disabilities services departments requested materials on behalf of disabled users. In those cases where they were not confident that Section 121 would allow them to accommodate users, interviewees again struggled to find the principles governing appropriate fair uses. They sometimes constructed elaborate scenarios to create artificial scarcity, for safety's sake. For instance, in cases where a student needed to use an electronic version of a book, a minority of the interviewees wondered whether they should then take the hard copy of the book off the shelf and make it unavailable to patrons. They suggested this would strengthen the "effect on the market" argument for fair use, as the library would get no additional benefit from the digital copy than if the disabled person had checked out the hard copy.

In one striking case, a disabled patron was unable to read microfilm because of a physical condition, but would have been able to read a digital copy with the help of on-screen adjustments to typeface. Because library policy prohibited making a digital copy, the patron was given access to fragile original documents. This put the documents at risk as well as providing a suboptimal solution to the patron—to the indelible regret of the interviewee.

Some interviewees were more likely to make material available under fair use for disabled students if it was required for a course than if it was recommended, and least

likely to make it available if a student merely wanted to read it out of personal interest, even if it was in the student's research area. One interviewee described with regret having to send a blind student to the public library when the student sought material on spirituality for leisure, rather than assigned, reading. Others found this distinction offensive and discriminatory. Still others suggested that limitations on access for the print- and otherwise-disabled users might be more a function of resource limitations than of copyright constraints.

In some cases librarians went to substantial work to make material accessible, for example, creating closed-captions or audio description on video materials (typically films that are out of print or have not been released in DVD format). One interviewee was very frustrated that her library has so far been making the seemingly arbitrary distinction between creating a transcript of a video, which it would allow, and creating a captioned video, which it would not. While they were committed to the mission of making works accessible, many librarians were concerned that they might be going beyond what the law allows, and feared the wrath of vendors who sold these services for a substantial fee. They also puzzled over whether they could legally store their digitized work for the next patron's use, or whether they should destroy it and do the work all over again for the next request. Some librarians wondered if it would be legally or practically possible to create a consortium approach for storing and sharing such materials, so that each institution would not be replicating popular requests. Limited budgets and staff time were again a key issue.

Finally, vendors impose confusing and restrictive conditions, both practical and legal, on the materials they license, and these also hindered interviewees in serving disabled patrons. Some interviewees reported that electronic journal materials in commercial databases were not made available in formats potentially accessible to the print-disabled. In other cases, materials were protected by digital rights management technology that prevented the use of assistive technology. Even where there were no such technical limitations, interviewees were sometimes hesitant to make accessible copies of materials from licensed databases because the terms of database licenses were difficult to discern and may forbid such format shifting. This difficulty could arise either because of the sheer volume of subscriptions held by an institution, or else because of the complexity of individual licenses.

Conclusions

The consequences of lack of consensus about applying fair use and other copyright limitations and exceptions were evident in many of the interviews conducted for this survey. These consequences were similar across the activities of facilitating teaching and learning, facilitating scholarship, preservation, exhibition, and accessibility. They include:

- High costs, both for staff time and unnecessary licensing. Copyright indecision translates into budgetary issues.
- Misaligned priorities that deemphasize research, teaching and learning. Decisions are made on the basis of avoiding copyright difficulties rather than fulfilling mission.
- Postponed or denied service to patrons. Copyright concerns sometimes simply stall projects, and access control discourages patrons.
- Compromised integrity and utility of collections, for failure to preserve and make access copies. Copyright questions keep librarians from acting in a timely way to keep materials in a useable format.
- Limited public access to materials. Librarians are discouraged from enterprises such as digital collections and exhibits that can share library assets with a wider public.
- Missed opportunities to educate both faculty and students on their own fair use rights, in the classroom, with publishers, and online.
- Frustration in fulfilling the academic and research libraries' mission in ways that take advantage of digital capacities. Copyright concerns discourage librarians from employing digital tools to facilitate their patrons' work, including the work of disabled patrons.

In short, lack of consensus about fair use (and other exemptions) is impairing the library mission to support research, teaching, and learning. Interviewees were aware of and alarmed by the consequences.

Some of these problems can be solved with a firmer collective understanding of fair use. Interviewees displayed a wide range of knowledge of fair use. They generally understood that fair use is a flexible rule of reason. They were aware of the four statutory factors, and often used them. But a significant majority evidenced misconceptions. They included the belief that:

- the "fourth factor," effect on the market, was a dominant one, especially in regard to video;
- fair use is differently applied to different media;
- fair use can only be applicable to a small portion of a work;
- libraries incur high risks, including exposure to statutory damages, for good-faith efforts to employ fair use; and

- fair use cannot apply to activities similar to the uses (including for preservation and classroom purposes) specifically provided for in Sections 108 and 110.

In the absence of a firm shared understanding about what the law permits, and despite their passionate dedication to service, interviewees often felt ill-equipped to make important decisions about risk management. While part of sound risk management is trying to know the law and act within its limits, conservative risk management can encourage practices that stop far short of what the law allows. Some forms of risk management involve foregoing likely fair uses in an effort to avoid provoking litigious parties. Other risk management practices involve shifting responsibility to other parties who may be even less confident of their rights, such as faculty or researchers, by devolving key decisions to them or asking them to sign waivers. Still others involve taking responsibility away from those same parties in cases where they may be well suited to make key decisions, for example having librarians rather than faculty determine how much material is appropriate for pedagogical needs. Finally, risk management can involve minimizing the visibility of seemingly "risky" policies, for example by conducting them on a password-protected system. While strategies that actually curtail lawful practice may be appropriate in some limited circumstances, they are far from ideal. And these strategies are much more attractive when decision-makers act with partial or inaccurate knowledge of what the law allows. Without a clear, shared understanding of the law (and hence their ability to withstand legal challenge), the goal of risk management for libraries often becomes to avoid at all costs being sued or otherwise challenged, regardless of the merits of the challenge.

Particularly common was the choice to manage risk by following cramped but seemingly well-established "guidelines," such as those developed in the late 1970s to govern photocopying. These guidelines have an alarming continuing influence, well beyond their original context, even for librarians who know that fair use does not literally require following arbitrary page, word or percentage limits. Following those limits is perceived as "safe," and helps control the discretion of staff and patrons when librarians worry that a rule of reason is too flexible for that purpose.

When risk management is not adequately informed by the law, it can place unnecessary limits on action. For research and academic librarians, this form of risk management entails costs such as limiting access to learning materials, halting or delaying research, and delaying or denying public access to library holdings. Understanding the law helps make risk management decisions easier, as well as minimizing the impact they have on lawful activity.

Next Steps

Librarians can take action themselves to improve their situation:

- Academic and research librarians collectively need to develop a code of best practices in fair use that clearly asserts the principles and limitations under which they affirmatively apply their fair use rights. Understanding the law helps make risk management decisions easier, as well as minimizing the impact they have on lawful activity.

- Academic and research libraries and their parent institutions should do more to support librarians as they make important decisions that implicate copyright. A code of best practices in fair use is a powerful and important tool, but librarians need better education and support regarding *all* of their rights and responsibilities under copyright law, including the specific exceptions described in Sections 108, 110, 121, and the like. The creation of in-house library copyright offices and copyright counsel can be extremely helpful toward that end.

- Individual academic and research librarians need to assert their fair use rights (and other rights) when negotiating licenses with vendors, so that vendor terms of service do not unnecessarily curb important academic uses. Libraries may have good reasons to give up fair use rights in licensing, but some institutions do this in an unconsidered way. With a clearer conception of what the law normally allows under fair use and other exemptions, academic and research libraries and librarians will better understand the trade-offs involved in license terms that restrict those rights. A fair use best practices code will provide standards both for themselves and their patrons, standards that are driven first by the mission of academic and research libraries.

- Academic and research librarians' associations can organize meetings with certain key providers, such as ProQuest and key publishers in academic and research areas, to investigate how the fair use rights of scholars are being recognized in their policies.

About the Sponsoring Organizations

The Association of Research Libraries (ARL) is a nonprofit organization of 126 research libraries in North America. Its mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve. ARL pursues this mission by advancing the goals of its member research libraries, providing leadership in public and information policy to the scholarly and higher education communities, fostering the exchange of ideas and expertise, facilitating the emergence of new roles for research libraries, and shaping a future environment that leverages its interests with those of allied organizations. ARL is on the Web at http://www.arl.org/.

The Center for Social Media, led by Professor Patricia Aufderheide, showcases and analyzes media for social justice, civil society, and democracy, and the public environment that nurtures them. The center is a project of the School of Communication, led by Dean Larry Kirkman, at American University in Washington, D.C. The Center for Social Media is on the Web at http://www.centerforsocialmedia.org/.

The Washington College of Law Program on Information Justice and Intellectual Property (PIJIP) works to advance access to information for teachers, students, artists, programmers, bloggers, inventors, scientists, doctors, patients, and others who depend on it to make essential cultural and economic contributions to society. PIJIP seeks to assure that their voices are heard and interests are recognized. PIJIP accomplishes this through projects they undertake that deal with intellectual property issues across the world, by hosting events emphasizing its values, and through the advancement of information via news articles, blog entries, and a website, http://www.wcl.american.edu/pijip/.

"Fair Use Challenges in Academic and Research Libraries" is part of a three-stage project funded by The Andrew W. Mellon Foundation. In stage two the project team will facilitate development of a code of best practices in fair use for research libraries (http://www.arl.org/pp/ppcopyright/codefairuse/index.shtml). In stage three, the team will work to promote understanding and adoption of the code.

This report is also part of the Association of Research Libraries' Know Your Copy Rights campaign. Visit www.knowyourcopyrights.org for more information.