

RESERVES, ELECTRONIC RESERVES, AND COPYRIGHT

THE PAST AND THE FUTURE



BRICE AUSTIN

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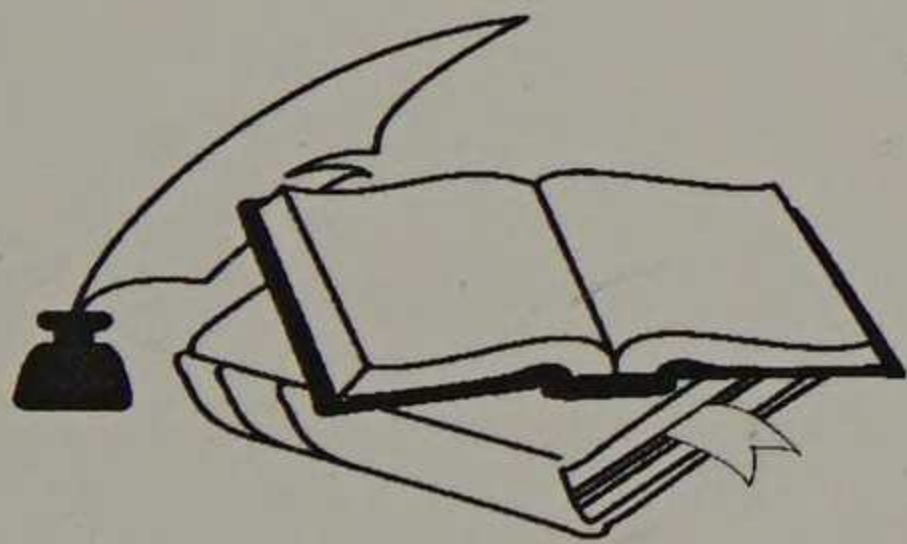
Reserves, Electronic Reserves, and Copyright: The Past and the Future

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Daniel R. Lee, MA, MLS

*Acting Team Leader
Undergraduate Services Team
University of Arizona Library*



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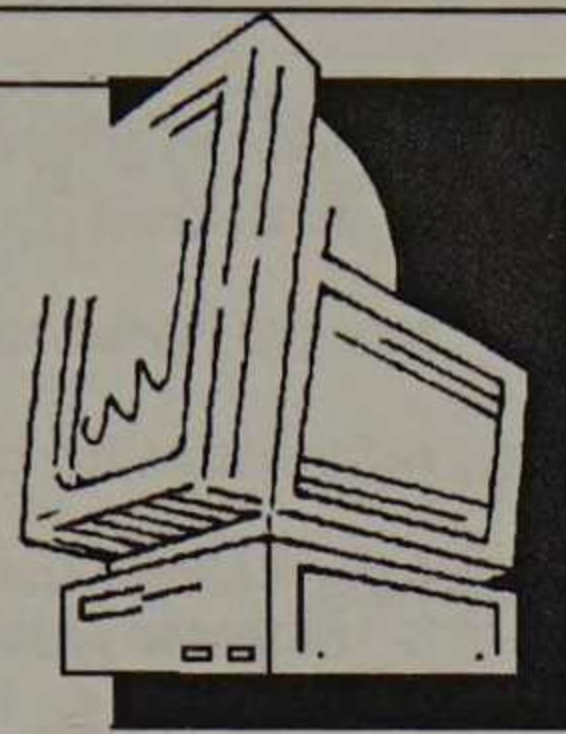
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Reserves, Electronic Reserves, and Copyright: The Past and the Future

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Brice Austin, MLIS, MA, is Head of Circulation and Interlibrary Loan Services at the University of Colorado in Boulder. His work on electronic reserves, remote storage, information retrieval, and other topics has been published in the *Journal of Interlibrary Loan, Document Delivery & Information Supply; Journal of the American Society for Information Science and Technology; Collection Management; Journal of Access Services; and The Reference Librarian*. Mr. Austin serves on the subcommittee of the American Library Association's Office for Information Technology Policy (OITP), and has contributed background material on electronic reserves and copyright to *Complete Copyright: An Everyday Guide for Librarians*.

Introduction

The practice of placing materials on course reserves at college and university libraries—that is, of setting those materials aside from the main collection for short-term use by students in particular classes—is one that has existed since the 1870s.¹ It is a practice which is still very much in vogue today, in spite of recurring skepticism as to its educational effectiveness and in spite of periodic forecasts of its demise. Whether course reserves has endured only because “traditions and patterns of library service are sometimes too deeply ingrained to undergo change,”² or whether it is an “inevitable and essential part of our contemporary system of higher education”³ is a topic that is still debated on a regular basis today. One might argue that any service (whether library-related or not) that has been continually offered and used for more than 125 years must be of value.

As undeniable as the persistence of course reserves is the fact that administering the service has become more complicated over time. When the Harvard College Library began setting aside materials from its collection in a separate section named “Special Reserves” in the late 1800s,⁴ staff had only to manage the circulation and storage of those items—books and journals which the library had purchased for the use of the institution’s faculty and students. Over the next century, however, copies would, in large part, take the place of originals on Reserve, first in the form of typed copies or photostats or mimeographs, superceded by photocopies and most recently superceded by digital files for what has come to be known as “electronic reserves.” While this migration to the use of copies on Reserve provided many obvious benefits (students were able to access the works simultaneously, originals were less likely

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to be lost or damaged, etc.), it also fundamentally changed the nature of course reserves in one very important regard: copyright law became an issue with which library staff was forced to contend.

This book chronicles the history of the relationship between reserves and copyright and outlines several possible futures for course reserves in the years ahead, as libraries and publishers alike move from an information world that is still largely print-based towards one that no doubt will eventually be mostly electronic.

Chapter 1

The Era of “Originals”: 1870-1939

Assigning the term “original” to any published work is something of a misnomer as even the first printing of a monograph, serial or any other material type generally involves the creation of duplicates for sale or distribution. But for lack of anything clearer, the word is used here to indicate those imprints of a work that were produced by a publisher, as opposed to “copies” created after publication, whether manually, by mimeograph, photocopy or any other means.

As noted above, course reserves seems to have originated in the late 19th century. Hamlin asserts that the practice dates from the 1870s and credits it to professors of history at three institutions: the Universities of Michigan, Harvard and Johns Hopkins.⁵ Koch, writing in 1938, identifies the reserve system as having its start at “the old Harvard College Library of 50 years ago.”⁶ One of the very early volumes of *Library Journal* (1878) reports that “it is the custom of the professors at Harvard to hand in at the library lists of books to which they intend to refer their classes during the term.”⁷

The reasons for setting materials aside from the main library collection for course reserves are the same today as they were then: first, as Melvil Dewey suggested, “so that each student may be sure of opportunity of consulting them.”⁸ As L. L. Dickerson more practically stated, “To reach the maximum number of readers with the minimum waste of

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time.”⁹ In addition, closed collections allow library staff to track the reserve materials more efficiently and help preserve the condition of those materials during periods of heavy use. Seen more broadly, however, there is an argument to be made that course reserves came about due to changes in teaching methods and curricula. As early as 1910, it was suggested, “One of the most notable features which differentiate pedagogical method of to-day from that of 20 years ago is the lessened reliance placed upon text-books and the increased employment of collateral reading.”¹⁰ In 1934, Johns identified “the present method of teaching, which requires students to consult many books in each course, plus the instructor’s desire to require the purchase of as few books as possible of the student”¹¹ as reasons for increased usage of reserves. A. F. Kuhlman is more expansive, offering the following reasons “why reserve book systems have become a necessity”:

1. The body of funded knowledge, with which college subjects deal, has become so vast and diversified that few subjects can now be treated satisfactorily in student-bought textbooks. Single textbook courses have yielded and should yield, to the use of many books in libraries as a substitute.
2. There has been increased registration in the social sciences. New material is produced at so rapid a rate that access to a wide range of material is essential if students are to understand our rapidly changing social scene.
3. Mass education has broken down the textbook-recitation method of teaching and a substitute is being sought in lectures and in directed extensive reading and study in the library.
4. Survey courses have been introduced as a basis for a general education. They cannot be taught successfully with a textbook, for they require a wide range of material carefully selected and organized to make orientation and mastery of subject possible.¹²

Whatever the reasons for the emergence of course reserves, the service was certainly well-established by 1929, when Richard K. Morton, in an article for the *Journal of Education* referred to the service as “this thriving monster, collateral reading.”¹³ Brown and Bousfield attribute this state of affairs to an “increase in library assignments during the last 30 years,”¹⁴ which would seem to indicate a steady growth in the use of course reserves—and by inference, perhaps, in the *new* teaching methods described above—over a period stretching back at least to the turn of the century.

Throughout this period, culminating at the end of the 1930s, librarians became increasingly concerned that the growth of course reserves was getting out of hand. Beach wrote in the *ALA Bulletin* that “during one school year, approximately 6000 volumes” were placed on reserve for a mere 50 instructors at the Berea College Library.¹⁵ Cooper warned “unless the university librarian wishes to see in the future nine-tenths of the library’s books gathering dust on the reserve room shelves, a plan must be adopted to keep the collection within the bounds of usefulness.”¹⁶ Theodore Koch, then at Northwestern, wrote in 1938: “Some professors have simply lost their sense of proportion. They feel that they could not give their favorite course unless there were from 500 to 1,000 books on reserve, specially ticketed with the name and number of their course.”¹⁷ To prove that his was not an isolated case, Koch surveyed libraries at a number of comparable institutions including Princeton, Brown, Dartmouth, the Universities of Illinois, Wisconsin, Nebraska, Michigan, Texas and Washington, as well as UCLA, USC and Berkeley, all of which reported similar experiences and frustrations.¹⁸ Comments from the Universities of Wisconsin—“One history professor reserved over 600 titles”—and Nebraska, which reported that one faculty member used 648 volumes representing 185 titles, were some of the more extreme responses received, but not so extreme as to be unrepresentative.¹⁹

Many librarians also complained that students never used the majority of items placed on reserve. Brown and Bousfield wrote, “Instructors overestimate the available time and reading capacity of their students. Many books which students do not use are placed in the assigned reading room.”²⁰ Cooper gathered circulation statistics from cards and found that of 2,806 reserves in winter quarter 1936, 434 or 15%, were not used at all and another 15% were used 9 times or less.²¹ For Koch’s 1938 symposium, the University of Nebraska reported that of the 648 volumes noted above, 220 (34%) never left the shelves.²² Alongside these complaints and concerns, however, lies evidence that many, perhaps even most reserved items were indeed being used. For example, the above anecdote recorded by Cooper not only reveals that 30% of reserved books were used 10 times or less, but also that 70% were used ten times or more during a single academic quarter. This level of interest in at least some reserved items posed a different problem for libraries: how to provide multiple users with access to the same materials during brief periods of high demand?

Initially, the only answer to this question was to buy more “originals” from the publisher and this many libraries did do, albeit reluctantly.

Brown and Bousfield ask, "Who shall pay for the books in the assigned reading room? Most libraries have suffered from a lack of funds. As the amount of assigned reading has increased, expenditures for assigned reading have made serious inroads upon the funds available for the purchase of books for other purposes."²³ This question cogently outlines the dilemma: should libraries invest limited funds in multiple copies of these high use items at the expense of other, perhaps equally critical parts of the collection? Some libraries put this difficult choice off onto the academic departments themselves, giving them the option of either purchasing additional copies of heavily used reserve items or works which the libraries did not currently own. Perhaps not surprisingly, there is no evidence in the literature to suggest that any faculty ever chose to purchase the additional copies. Another possibility was to require that the student buy these materials, but this found little support. Most librarians seemed to agree with Brown and Bousfield: "Students are accustomed to purchase textbooks, but ought not to be expected to buy 30 or 40 books, which will be used only for a short period."²⁴

Another possibility, one that briefly appeared might resolve this dilemma, was to "rent" reserved items during periods of high demand. Henry outlines the largely successful history of rental collections at the University of Chicago, which he dates to 1913.²⁵ Richards reports favorably on the use of a rental system at the University of California, Berkeley library, which charged students 3 cents per day and netted the library \$8,286 from August, 1929 to December, 1930.²⁶ Koch's 1938 survey found the University of California still using the system, claiming that "we now supply class needs almost entirely through the rental service," as well as several other academic libraries that were either renting reserve books on a smaller scale or at least considering doing so.²⁷ Kuhlman postulates that libraries may well need to "resort to rental sets in years to come," and likens this expense for students to "laboratory equipment in the natural sciences."²⁸

This practice of renting out reserve items seems to have had a relatively short life span, however. Under the sub-heading "Rental Collections" under "College and University Libraries" in the *Library Literature Index*, one finds that the number of associated articles diminishes throughout the early 1940s until the sub-heading finally disappears altogether in 1949. From that point, forward "Rental Collections" in the index is devoted solely to recreational reading, largely at public libraries. The reasons for this move away from rental collections in academic library reserve rooms are somewhat unclear. It may have been that libraries found the system difficult to manage, which is at least hinted at by

Henry when he describes a rental collection of more than 30,000 items.²⁹ King views the need to continue offering traditional reserves in addition to rentals as problematic and further argues that students, having already paid tuition fees and perhaps even library fees, would be reluctant to pay for the same services again.³⁰ It stands to reason that libraries may well have balked at or become weary of, concurrently operating two different service systems, one of which (rentals) would likely generate ill will among the student body. Another possibility is that the arrival of technology allowing one to make copies efficiently from an original rendered the need for rentals obsolete.

For the time being, however, rentals seemed to be the only viable solution to the problem, as the means for making copies cheaply and quickly simply did not exist. Indeed, the only mentions of copies in the literature of this era appear to be Brown and Bousfield's brief reference to the fact that "sometimes a certain section of a rare book is photostatted or mimeographed and duplicate pages are thus made available,"³¹ and Steinke's reference to a 1937 annual meeting of the Medical Library Association, in which one librarian reported that photostats of journals were used if duplicates were not available.³² Clearly, this process was an unusual one, reserved for special instances when all other options had been exhausted.

At the end of this period, then, debate focused not upon copies but duplicates; that is, on how many *originals* the library should purchase and, at least in some cases, whether or not a rental fee should be charged to students for use of those items. The best method for physically managing those originals was also a topic of considerable discussion, as was the question of whether reserves should or would continue to be a service that libraries offered. Many agreed with Kuhlman that reserves were essential to higher education, that it would be "a mistake to assume . . . that the reserve books system has seen its heyday and is now on the wane,"³³ but others were less certain. Dr. Henry M. Wriston, President of Lawrence College, professed to see "no justifiable niche for the reserve book room in the liberal arts college of the future."³⁴ Dr. Henry B. Van Hoesen, a librarian at Brown University and another respondent to Koch's survey, asserted, "the future of the reserve book system is doubtful."³⁵

As we shall see, however, history has proven both Dr. Henrys quite wrong.

Chapter 2

The Rise of the Copy Machine: 1940-1975

On November 22nd, 1940, an obscure article in the *New York Times* announced “a new method of photography, in which the image is recorded electrically instead of chemically and from which prints can be produced immediately without the usual development, is the subject of Patent 2,221,776, just granted to Chester F. Carlson.”³⁶ Whether or not any academic librarians took note of this particular event, we do not know, but even if some did, it seems unlikely that they could have foreseen all the changes that the invention would bring to their profession. The introduction of an actual commercial copy machine based on this patent was still nearly twenty years away. The Haloid Xerox Corporation did not begin marketing its 914 model until 1959. The forces that would contribute to America’s enthusiastic embrace of this new technology when it finally did arrive were surely already at work, not only in society but also in libraries. There was a desire for faster access to information and consequently for better ways of distributing that information, which in some sense can be seen as the primary focus of course reserves operations since their inception. In retrospect, the romance between the reserve room and the photocopy machine seems inevitable, even though there is little in the literature of the era that predicts it. The entire body of literature on the topic of reserves is slight during this period from 1940-1960, with barely twenty articles published in twenty

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years. There are a few, however, that do indicate an increased interest in making copies for course reserves.

In a practical-minded 1945 article for *Wilson Library Bulletin*, Gordon Gray suggested that if duplicate copies of journal articles were not available for purchase and there was sufficient demand, then "typewritten, mimeographed or Photostat copies" could be made.³⁷ Referencing this article in 1970, Jahoda, Hubbard, and Stursa make the claim that despite Gray's suggestion, "no published reports on actual use of mimeographed copies or photocopies in college and university reserve rooms have been found."³⁸ That statement is somewhat exaggerated, however. A review of the literature does in fact turn up other references to the practice of making copies for course reserves, including a significant article in *College & Research Libraries*, the same journal that published Jahoda et al. In 1941, Fannie Alice Coldren, a reference librarian, conducted a survey of "librarians of one hundred colleges and universities with student enrollments ranging from one thousand to over fifteen thousand representing various parts of the United States," asking the following questions:

1. Has the library supplied copies of assigned articles and if so, in what form and with what success?
2. Does the library or the departments of instruction pay the cost of duplication?
3. Do the reserve, the reference or the circulation departments administer duplicates?
4. Do library problems assigned to freshmen or other special groups create difficulties in the use of reference materials?³⁹

While Ms. Coldren's survey originates from a reference standpoint, the questions asked and answers received reveal the overlap between reference and reserve services, "how to provide and administer for the requirements of large classes certain materials often difficult to replace" being the common concern. Only sixteen institutions surveyed reported "that the problem does not exist or that it has not reached an acute point," which can also be seen as implying that for the remaining 80% the problem *did* exist. The solution that college and university libraries had found to this problem, Coldren discovered, was to provide "duplicated materials . . . in the form of typed or mimeographed copies, reprints, photostats and in two institutions, microfilms."⁴⁰

In 1950, Steinke also conducted a survey, in which she found that of 85 libraries at "schools of medicine, dentistry and pharmacy," thirty-five

had placed photostats on course reserves. While acknowledging that “librarians are using photostats for reserve purposes little more than they did in 1937,” she implies that these practices might be more widespread but for the expense (“fifty cents minimum charge per photostat”) and the limited availability of photo-duplication services. She concluded that “we might give serious consideration to the development of increased use of photostats in our libraries . . . with decreased prices and improvement of facilities in this field.”⁴¹

Considering the time elapsed between the articles by Gray and Jahoda, however, it is true that there are very few references to be found. It is difficult to know whether there was a slow, almost silent growth in the use of copies during this period or whether there was limited usage at first, followed by an explosion in the wake of the invention of the modern photocopy machine. One suspects the latter. Perhaps it was the desire and need for rapid and cheap duplication of materials that was steadily increasing during these two decades, finding an outlet at last with the arrival, in the mainstream, of the Xerox 914 and its successors and competitors. That libraries were quick to embrace this new technology is undeniable. One gross measure is the number of related articles published around the time of its introduction. In the 1958-60 volume of the *Library Literature Index*, there are six listings relating to the new Xerox machine or xerography; by the next issue (1961-63) there are twenty-four. Another indication of this trend is the tenor of publisher’s rhetoric during the years that elapsed between the time that the Xerox 914 became commercially ubiquitous and the approaching revision of the Copyright Law.

As revealed in the following sequence of headlines taken from *Publishers Weekly*, the tone of that rhetoric escalates from concerned to accusatory to sarcastic and, finally, to openly hostile: “Library photocopying: the stalemate deepens” (August 12th, 1963); “Libraries want free right to photocopy” (June 15th, 1964); “Melodramatic world of librarians and copyright” (August 1st, 1966); and “Publishers vs. librarians on copyright issues” (August 14th, 1967).

A more meaningful measure can be found within the literature itself, such as *The Bookmark*’s report that in 1964, photocopying at the University of Idaho increased 4,000% over the previous year, after purchase of a Xerox 914.⁴² In a 1972 letter to American Libraries, R. L. Paddock lamented library staff’s “bondage” to the copy machine.⁴³ In the same year, Treva Turner suggested to the *Wilson Library Bulletin* that perhaps a birth control-like pill was needed for the population explosion of paper created by this new technology.⁴⁴

Certainly, by 1970 photocopy usage within library course reserve operations was heavy. Roberts states, in no uncertain terms, that "today, publishers, as well as librarians, know all too well that an increasing number of libraries are producing multiple copies of chapters and journal articles for use in reserve reading rooms."⁴⁵ Jahoda, Hubbard, and Stursa, later in the same 1970 article referenced above, admit that "it is . . . common knowledge among librarians that the use of copies of readings is being practiced by both libraries and teaching departments, in some cases disregarding existing copyright laws."⁴⁶

One final indication of rapid growth in the usage of photocopiers for the purposes of course reserves is the many articles which appeared immediately following the formal adoption of the 1976 Copyright Law revision. Those articles, by and large, were concerned either with scaling back existing operations to meet what was perceived to be the letter of the law or somehow justifying the continuation of practices which by then were obviously well-established but which did not quite seem to fit the new legal realities.

Chapter 3

The 1976 Copyright Law Revision

On October 19th, 1976, the first major revision of the Copyright statute since 1909 was signed into law, after what Patterson and Lindberg term a “twenty-one year gestation period.”⁴⁷ Considering the number of Congressional hearings and studies that took place during those two decades, the volume of literature peripheral to the impending Copyright Law and the fierceness of the arguments, it is curious that there is so little related to course reserves in the record. One Senate Judiciary Committee Report (S.94-473) makes at least tangential reference to the service when it states “for example, if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted, under subsection (g), to reproduce copies of the article for the members of the class.”⁴⁸ Barbara Ringer, Assistant Register of Copyrights, expressed a similar opinion at a symposium sponsored by the alumni and faculty of Rutgers University’s Library Graduate School in 1972, “When you have a book on the reserve shelf in a college library and you have fifty students coming in and each one ordering a copy of the same three chapters, this is not single copying.”⁴⁹

It is important to note, however, that both her comments and those of the Senate report were made in the context of the debate over library photocopying for individual researchers, rather than course reserves per se. Both were refuting libraries’ ability to legally make copies for every student in a class, at least under the auspices of what became Section 108 of the published law. A full discussion of whether or not the reserve

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practices of the day could be sanctioned under any part of the new statute seems not to have taken place before it was passed into law, at least not in any official capacity. The precise reasons why that discussion never happened are not apparent. It may be that all or some of the parties involved assumed that copying for course reserves was a subset of some other issue, such as copying for individual researchers or more likely, classroom teaching. It is even possible, of course, that the different groups involved, having very different concerns and agendas, assumed very different things: educators and librarians that current practices would continue to be possible somehow, publishers that they would not. Another explanation is that the issue may not have been thought important enough to have its own forum, given the other issues, both titanic and contentious, of the moment: the possibility that per-page copyright charges might be assessed for all library photocopying, for instance or the future of interlibrary lending.

Whatever the reason, the finished Copyright Law, which went into effect on January 1st, 1978, contained no mention of course reserves and so librarians were left to wonder which, if any, sections were applicable. Two candidates—107 and 108—would receive the lion's share of attention, as well as a document which appears not in the law itself but in its legislative history: the *Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals*, hereafter referred to as the "Classroom Guidelines."

SECTION 107: FAIR USE

In Section 107 of the Copyright Revision, Congress for the first time codified Fair Use, which had existed previously "only as judicial law."⁵⁰ The section is so brief and so important as to warrant full reproduction here:

§ 107 Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, 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.⁵¹

Although course reserves was not mentioned specifically in the doctrine, it seemed to many librarians that the service logically would fall within a spectrum of purposes that included teaching, scholarship and research. The parenthetical addition of “including multiple copies for classroom use,” which librarians and educators fought very hard to have included in the statute, was seen by some as a further indication that copying for reserves was sanctioned. Still, there were (and still are) problems inherent in attempting to apply Section 107 to course reserves directly. As Loring points out, it means asking “librarians and front line reserve staff . . . to rely on a case-by-case application of the four fair use factors,”⁵² which according to Cardozo involves interpreting, dissecting, analyzing and applying the language “perspicaciously” (sic).⁵³ “In a production environment such as reserve, such case-by-case analyses,” argues Loring, are “completely impractical.”⁵⁴

An additional potential problem lay dormant within the Fair Use doctrine itself. During the Congressional hearings leading up to the Copyright Law, the library and education community emphasized again and again the importance of considering the four fair use factors as a whole and the dangers inherent in placing too much weight upon the fourth (market effect) alone. To this end, considerable testimony in the Senate by representatives of librarians and educators was devoted to asking for the specific rejection of an *interpretation* of the fourth factor that was included in the earlier House Report: “Where the unauthorized copying displaces what realistically might have been a sale, *no matter how minor the amount of money involved*, the interests of the copyright owner need protection” (emphasis added).⁵⁵ As librarians and their allies were quick to point out, any type of use of copyrighted material could be construed as displacing a sale of some sort. If this interpretation of the fourth factor were to prevail, especially if the fourth factor was given

primacy over the others, it would render a judgment in favor of fair use virtually impossible to attain.

Writing many years later, Patterson and Lindberg would claim that the language of the fourth factor as it was codified, even without the interpretive comments noted above, "is sufficient almost to eviscerate the doctrine [of fair use] altogether, since any copyrighted work arguably has unrealized potential market value."⁵⁶ As will be apparent later, their claim may yet prove to be prescient.

SECTION 108: REPRODUCTION BY LIBRARIES

Section 108 presents, specifically for libraries and archives, certain limitations on the copyright holder's exclusive rights. The section is reprinted in its entirety in Appendix A, but the following four paragraphs in particular have been construed by some as bearing upon course reserve operations:

108 (a) which states that it is not an infringement for libraries "to reproduce no more than one copy . . . of a work or to distribute such copy," assuming that there is no direct or indirect commercial advantage, the collections are open to the public or at least available to other researchers outside the institution and that a notice of copyright is included.

108 (c) which states that libraries may copy items "for the purpose of replacement of a copy . . . that is damaged, deteriorating, lost or stolen," assuming that the library has made reasonable efforts to find an unused replacement at a fair price.

108 (d) which states that "no more than one article or other contribution to a copyrighted collection or periodical issue or . . . of a small part of any other copyrighted work" can be made, assuming that the copy becomes the property of the user and that the library has no reason to believe that the copy is to be used for purposes unrelated to scholarship and again that a copyright notice is included.

108 (g) which states that the rights described "extend to the isolated and unrelated reproduction or distribution of a single copy . . . of the same material on separate occasions, but do not extend to cases" involving "related or concerted reproduction or distribution . . .

whether made on one occasion or over a period of time and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group.”⁵⁷

Clearly, Section 108 was primarily intended to address issues of library copying for the purposes of document preservation and providing individual scholars with research materials, yet some librarians saw it as applying to course reserves as well. The major problem with this approach (in addition to the apparent outright refutation of it contained in the 1975 Senate Report, as noted above) is the restriction upon “related or concerted reproduction.” For as John Stedman, then chair of the copyright committee of the American Association of University Professors, pointed out shortly after the 1976 law’s enactment, as time goes on any claim that reserve operations constitute unrelated copying becomes increasingly tenuous.⁵⁸ Additional claims that copying for reserves is a preservation issue and therefore sanctioned under 108 for that reason also seem tenuous. Certainly, preservation is an important concern and one that goes hand-in-hand with increased access, but the requirement in paragraph (c) that a search be conducted for an unused replacement at a reasonable price is one that few libraries would be able to meet, given the volume of most reserve operations and the short time frame involved.

THE “CLASSROOM GUIDELINES”

In September, 1975, at the urging of the Senate Judiciary Subcommittee, representatives from the Ad Hoc Committee of Educational Institutions and Organizations of the Copyright Law Revision, the Authors League of America and the Association of American Publishers (AAP) met to begin discussing exempted educational uses of copyrighted material. On March 19, 1976, they sent a joint letter to the subcommittee announcing that an agreement had been reached. This agreement, which came to be known as the “Classroom Guidelines,” is reprinted in full in Appendix B, but the important points—those that are perhaps related to course reserves—are found in Part II, Multiple Copies for Classroom Use:

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that:*

- A. The copying meets the tests of brevity and spontaneity as defined below; *and*,
- B. Meets the cumulative effect test as defined below; *and*,
- C. Each copy includes a notice of copyright.

The document goes on to define all the terms used very narrowly: e.g., brevity in prose works as a complete article, story or essay, but only if less than 2,500 words (other prose can only be copied up to 1,000 words or 10% of the entire work, whichever is less). The cumulative effect test is equally restrictive, allowing copying only for one course at a time, no more than two excerpts from the same author and no more than nine instances of such multiple copying for the same course during one class term. In addition, a third section of the document, entitled *Prohibitions*, forbids that copying, "Be repeated with respect to the same item by the same teacher from term to term," Forbids that copying be used "to create or to replace or substitute for anthologies, compilations or collective works," and disallows any copying at all from *consumables* such as workbooks, exercises and standardized tests.

While the Classroom Guidelines are not and never were a part of the law itself, as Loring suggests, they have "accrued no small amount of official imprimatur," both from their inclusion in the legislative history of Section 107 and from being referred to in subsequent case law.⁵⁹ Stedman cautioned as early as 1978 that "inevitably . . . they [the Classroom Guidelines] will bear upon the subject of reserves," offering the following as reasons why:

1. They do deal with the same materials and with the practices that have the same objectives as the reserve practices;
2. Their criteria as to what practices should be acceptable under the "fair use" doctrine were agreed upon between the copyright owners and representatives of a substantial segment of education users—an agreement that Congress knew of and found acceptable prior to the final enactment of the Copyright Law;
3. Guideline interpretations of what may be done under the "multiple copies for classroom use" provision may well affect conclusions as to what is reasonable "reserve" activity.⁶⁰

Several additional points should be kept in mind, however. First, the Classroom Guidelines, even if one accepts them as applicable to course reserves, are stated as presenting "minimum and not the maximum standards of educational fair use," a nuance, in Loring's terms, which was

quickly and “successfully glossed” over by the AAP.⁶¹ Second, the Classroom Guidelines document itself makes an explicit statement that it is not intended to limit Section 107, the fair use doctrine, in any way. This further argues that while copies, which meet the standards of the Classroom Guidelines, are safe, copies, which go beyond those standards, may also be safe. Third, not all parties with a stake in copying agreed to the Classroom Guidelines, most notably the American Association of University Professors and the American Association of Law Schools, which “separately notified the House Judiciary Committee that they thought the guidelines unworkable.”⁶² As Stedman notes, guidelines are “binding only upon those who entered into the agreement.”⁶³ Finally, as Stedman and others have pointed out, there is some reason to believe that the Classroom Guidelines were drafted primarily for elementary and secondary schools. Barbara Ringer, by then no longer the Assistant Register but the Register of Copyrights, seemed to agree with that interpretation when she stated at the 70th annual meeting of the American Association of Law Libraries (AALL): “It seems to me that this [the Classroom Guidelines agreement] was written with elementary, secondary situations in mind.”⁶⁴

LIBRARY INTERPRETATION OF THE LAW, 1977-81

In an article subtitled “What shall I tell my client?” Cardozo, a copyright lawyer looking at the finished 1976 revision, laments that “the baffled members of the Senate and House committees produced statutory language that gives legalistic comfort to practically everyone, but simple aid to no one,” offering as sarcastic consolation that at least “the Internal Revenue Code is worse.”⁶⁵ As his obviously frustrated comments were made in reference to copyright exemptions specifically mentioned in the new Law (those for teaching and scholarship), is it any wonder that librarians faced with interpreting the legal limits of course reserves (which are not mentioned in the finished statute), were perplexed and confused? Loring, also noting this lack of guidance, suggests it was the primary reason why reserve staff turned so readily to the Classroom Guidelines, in spite of their restrictive nature: they “provided clear numerical guidelines, something that made interpretation of fair use easy.”⁶⁶ He goes on to characterize librarian’s initial interpretation of the law, as it applied to course reserves, as conservative and that does appear to be the case.

Dougherty, in what is surely one of the first published reactions, only five months after the legislation was signed, direly predicts that “the

new rules will directly affect the operations of library reserve-book units . . . Hereafter, an instructor's right to make multiple copies of materials for reserve will be restricted." He further theorizes, "Some teachers in fact may have to modify their classroom methods and their use of library materials."⁶⁷ Martell, while questioning whether or not the Classroom Guidelines were binding, nevertheless seems to accept them in taking what he terms a "purposively conservative" approach, worrying that reserve operations would be forever changed.⁶⁸ Ray, Assistant Director of the Loyola-Notre Dame library, in responding to Martell went him one better, advocating the payment of permission fees for reserve materials, even if "my colleagues will think this is undue capitulation and a betrayal of academic freedom."⁶⁹ Smith, apparently having accepted the Classroom Guidelines as a definitive model, reported that on the advice of counsel he had determined that reserve copying "could not meet the three criteria established to justify multiple copies for classroom use."⁷⁰ Swinton, Chief of Lending Services at Penn State, seemed to go so far as to side ideologically with publishers, claiming that "the reserve system of the past, while an obvious convenience for teachers, epitomized just the sort of unfair royalty deprivation the new copyright law attempts to correct."⁷¹

Even the American Library Association (ALA) apparently took a conservative initial view of how the new law should be applied to course reserves. In its handbook, *The New Copyright Law: Questions Teachers & Librarians Ask*, which was published in 1977 in conjunction with the National Council of Teachers of English and the National Education Association, the following Q & A appears:

Can a teacher duplicate or have duplicated, copyrighted materials and place them on reserve for student use in the library?

Not if there is time to request permission in advance. It is conceivable that a teacher could have such material placed on reserve if the inspiration to use the material comes suddenly, there is no time to request permission and the material meets the other requirements of brevity and cumulative effect set forth in the guidelines pertaining to books and periodicals. Otherwise, permission must be sought, unless the materials copied are excerpts only.⁷²

A 1978 *Library Journal* article seems to confirm the ALA's conservative stance, when it quotes Executive Director Robert Wedgeworth as expressing the opinion that "copyright permission would be required in

most cases where a professor tried to put a quantity of photocopies on reserve."⁷³

Not surprisingly, the Association of American Publishers (AAP) moved quickly to try and solidify this point of view, releasing in 1978 its *Photocopying by Academic, Public and Nonprofit Research Libraries: a statement on library photocopying of journal articles and other short works under the new copyright law, interim guidelines and answers to questions frequently asked*. This publication was ostensibly prepared to state the AAP's "understanding of fair use and library photocopying," but under the guise of "assisting libraries in determining when copyright permission [is] required or not"⁷⁴ it attempts to define the fair use of photocopies for reserves (and many other library services) as narrowly as possible. Meredith Butler, Chair of the Association of College and Research Libraries (ACRL) Copyright Committee, professed, "Libraries have become increasingly wary of [such] advocacy documents" and maintained that those documents "contain many misrepresentations."⁷⁵ Yet her questionnaire mailed out the same year to the directors of twenty-seven libraries at institutions of higher education in New York State reveals that the interpretation of fair use for course reserves offered by the AAP was for the most part being accepted.

While a significant portion of the respondents to the survey (10 of 27) based their policies on fair use and felt "strongly that the *Guidelines . . .* do not apply to the reserve operation," a larger portion (15) did feel that the Classroom Guidelines "have direct applicability to library reserve operations." Moreover, it appears that even those libraries that did not adhere to the Classroom Guidelines took a limited view of what was allowed under Section 107. "An overwhelming majority . . . twenty-one" limited the number of photocopies to one per item and an even greater majority, twenty-three, would consider multiple copies only if permission had been requested either by the library or the instructor. Butler's own conclusion from the survey was that "most of the libraries . . . have taken a fairly conservative approach."⁷⁶

In July 1979, Charles Martell invited a number of directors and associate directors from academic libraries to submit written statements assessing the effects of the new Copyright Law and the results of that "symposium" further confirm a conservative approach.⁷⁷ Glogoff⁷⁸ and Shelton⁷⁹ described changes the new law had wrought in reserve room staff procedures at the universities of Penn State and Southern Illinois, reflecting the restrictive new policies of their respective institutions. The number of photocopied pages on reserve at Penn State, for instance, fell

from almost 90,000 in academic year 1976/77 to 35,000 after the enactment of the Copyright Law revision.⁸⁰

Thus, Stedman's argument that "a practice that appears reasonably within the language and spirit of the new law . . . and which is important in the furtherance of higher education may and should, be pursued up to the point where such practice is authoritatively held to constitute infringement" was largely ignored by reserve policy makers of the day. Also ignored was his warning that "to refrain from practices that can reasonably be deemed permissible is a disservice to the cause of education and runs the risk of setting a pattern of conduct that ultimately grows (or degenerates into) a legal interpretation of the law."⁸¹

EFFECT OF THE 1976 LAW

The effect the 1976 law had on course reserves needs to be examined in two ways: first, the effect it had upon library operations and more importantly, the effect it had upon faculty and students in higher education.

Martell, in summarizing the results of the 1979 symposium referenced above, reported "the wariness, even fear, that imbued debate on the copyright question has now faded," and suggested that the implementation of procedures to comply with the new law was "anticlimactic." Yet, the accompanying testimony of participating library directors reveals that—perhaps in large measure because of the conservative approach their libraries were taking—the implementation of new procedures for reserves (apart from other library operations) was not quite so painless as Martell implies.⁸²

Stanford University, for example, while claiming "very little adverse effect on the Librarian's services to faculty and students," admitted that the impact upon reserve operations was greater than in other areas, even though the university already had in place a system for obtaining copyright permissions for reserves several years before the passage of the 1976 law.⁸³ M.I.T. stated that changes wrought were "almost invisible to the user population," yet acknowledged "some difficulties . . . in connection with placing materials on reserve," largely related to the frustrations involved in obtaining permissions for multiple copies.⁸⁴ While the University of New Mexico reported, "the increased workload does not seem excessive," it cited additional paperwork, record keeping and time required to train staff as concerns.⁸⁵

Beyond Martell's symposium, Glogoff⁸⁶ and Shelton⁸⁷ both reported difficulties in making the transition, from a library staff perspective. Yet overall, both felt the transition had turned out to be much easier than expected, Glogoff subtitled his article "from menace to office routine," and Shelton concluding that "compliance . . . with regard to reserve photocopying has not, on the whole, been detrimental to service."⁸⁸ Glogoff even went so far as to suggest (as did the University of Michigan in Martell's symposium) that there were benefits to the new law, since the changes it brought to library policies were prompting professors to examine their reserve lists more carefully and in some cases to actually cull unessential items.⁸⁹ Still, the 1982 King Research report on library photocopying, conducted for the Register of Copyrights, found that some 68% of the more than 3,000 academic libraries surveyed felt that the new copyright law had affected their reserve operations.⁹⁰

An even more troubling matter, however, is the effect the new law may have had upon teaching. In spite of claims by some reserve staff, librarians and even library administrators that there was very little effect upon service (and by association, upon faculty and student needs) or that negative reactions to the changes wrought in reserve operations were, as Martell phrased it, "uncommon," there is at least some evidence to the contrary.

The University of Michigan, for example, reported frustration, anger and hostility among both students and faculty, with many faculty members expressing strong opinions that "the fair use section of the law should be more liberally interpreted," and others claiming "the law restricts academic freedom by throwing up barriers to the dissemination of current material."⁹¹ Glogoff tells of one professor who said he "failed to understand . . . why Congress was trying to 'destroy higher education in America,'" and another who portrayed the library's "unnecessarily strict rendition of the copyright laws" as "the most direct assault on the quality of education" that he had ever experienced.⁹² Sorenson reported the results of a case study in which the instructor could not provide multiple copies for half of the 97 articles assigned to an advanced science seminar because the cost of permissions would have been over \$3,000.⁹³ Kearney conducted a survey to "assess the impact of the new [reserve] policy on instruction" at Notre Dame, one result of that survey being "the discovery of the detrimental effect of the 1976 Copyright Law on faculty teaching methods," an effect that she goes on to label "stultifying."⁹⁴ As she explains, "significant numbers of those [faculty] who responded indicated that the new [reserve] policy had caused them to change their teaching methodology." Faculty who took the survey

commented: "The law, particularly in regard to multiple copies or multiple semesters, simply impeded the education process and caused students to suffer." Other faculty maintained, "The quality of their courses had been significantly lowered because of the constraints of the law."⁹⁵

If the 1976 Copyright Law, as it was applied—in most cases restrictively—to course reserves operations *did* in fact have detrimental effects upon teaching; it is worthwhile speculating as to the reasons why. Widespread photocopying of materials for reserves, after all, did not take hold until the late 1960s or early 1970s. Is it possible that within a period of only ten years faculty had embraced this method of teaching so completely that a return to the ways of the past was now unthinkable? There is reason to believe so. Kuhlman observed the beginnings of this radical shift as far back as 1938, when he stated that "the body of funded knowledge, with which college subjects deal, has become so vast and diversified that few subjects can now be treated satisfactorily in student-bought textbooks. Single text-book courses have yielded and should yield, to the use of many books in libraries as a substitute."⁹⁶ In 1973, before the U.S. Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights, Alfred Carr, legislative consultant in the Office of Government Relations of the National Education Association, testified to the fact that yet another step had been taken along this same path:

Teaching is no longer confined to the use of a single textbook. Creative teachers need bits and pieces of all sorts of written, pictorial and graphic materials geared to the teachable moment when students are best ready to learn. Requiring a teacher to purchase a large book in order to use a small portion would simply mean that the teacher would neither buy the book nor use the materials. Teachers today must work in a world where the very atmosphere is loaded with information that students must learn to shift and evaluate.⁹⁷

However, despite Mr. Carr's testimony that education needed assurance of "immediate access to reasonable portions of printed and non printed materials for instruction purposes without payment of royalties," Congress failed to incorporate into the law language definitively addressing that need. This failure, followed by librarians' reluctance to make liberal and reasonable interpretations of the vague language that Congress *did* set into law set the stage for a battle that would continue to be fought throughout the decades and technological advances that lay ahead.

Chapter 4

The “Model Policy,” NYU and Kinko’s: 1982-1991

While most colleges and universities initially took a conservative approach in applying the 1976 Copyright Law to reserve room operations, there appears to have been at least a minor backlash against that conservatism as the dust began to settle in the early 1980s. Harer and Huber, for instance, take an almost combative stance on the topic, noting that Section 107 “seems liberal regarding copying for purposes of academic instruction” and declaring that “until this language is clarified by future court decisions, it appears to allow considerable freedom in photocopying selected material to be retained in the library reserve room for instructional use.”⁹⁸ The authors go on to suggest that publisher’s concerns about excessive photocopying before the 1976 law centered on interlibrary loan practices rather than reserve. Furthermore, they cite a 1977 King Research report that found that most library photocopying fell within the standards of fair use and which “warned publishers not to expect library photocopying fees to produce much revenue.”⁹⁹ In the same article, Harer and Huber report the results a survey they conducted the previous year, those results indicating that, at least among academic libraries in Virginia, the Classroom Guidelines were not holding sway. More than 78% of the schools queried based their policies either totally or partially on Section 107 and more than 75% permitted copies

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to remain on reserve for longer than one term, a practice forbidden outright by the Classroom Guidelines.¹⁰⁰

Presumably, other colleges and universities had also begun to question the restrictiveness of the Classroom Guidelines, as at about the same time (March, 1982) the ALA brought forth its "Model Policy concerning College and University photocopying for Classroom, Research and Library Reserve Use" (hereafter, Model Policy) as an alternative.

THE "MODEL POLICY"

The ALA's Model Policy (reprinted in full in Appendix C) was apparently closely patterned after the University of Wisconsin's 1978 copyright policy, a local attempt to stake out a broader interpretation of fair use for research and teaching than that suggested by the Classroom Guidelines. The fact that a section specifically addressing reserve room copying was added to the draft as it made its way through various committees provides further evidence of concern among the ALA's membership regarding the application of the Classroom Guidelines to reserve services.¹⁰¹ Section III.C of the final document presents the ALA's position that use of materials on reserve is analogous to the distribution of multiple copies permitted faculty in the course of face-to-face teaching and its interpretation of what is allowed for the purposes of both reserve and teaching differs from the Classroom Guidelines in several significant ways:

1. Reserves are actually addressed in the Model Policy, while not mentioned specifically in the Classroom Guidelines.
2. The Model Policy permits entire articles and book chapters to be placed on reserve, whereas the Classroom Guidelines impose strict word and/or percentage limits.
3. The Model Policy states, "The amount of material [used for reserve] should be reasonable in relation to the total amount of material assigned," and acknowledges that the nature of the course, its subject matter and the level of the course should be taken into account when determining what is reasonable. The Classroom Guidelines decree "there shall not be more than nine instances of such multiple copying for one course during one class term."

The two documents do, however, agree on a number of topics:

1. Use of "consumable works" such as workbooks, standardized tests, etc., requires permission from the copyright holder.
2. The creation of anthologies for classroom use requires permission from the copyright holder.
3. The number of fair use copies should not exceed the number of students in the class (the Classroom Guidelines allow up to one copy per student; the Model Policy suggests a "reasonable" number, which in any imaginable circumstance would certainly be fewer).
4. Use of the same photocopied materials for multiple classes or for the same class in successive terms requires permission from the copyright holder.

This last represents what is perhaps a curious concession on the part of the ALA. Tracking usage of the same articles or book chapters by multiple classes, not to mention usage by successive classes, is very nearly as onerous a burden for library staff as policing the strict word limits proposed by the Classroom Guidelines. Additionally, there is a failure of logic inherent in such a restriction, whether imposed upon a reserve operation or directly upon a professor in a classroom setting. If an excerpt assigned by a professor qualifies as fair use for Student A in fall term, why would the same excerpt not qualify as fair use for Student B in the spring? It is the student, after all, not the professor and not the library, which is the end user. Market effect is the only possible reason, which might be used to validate such an argument, and logic dictates that for small amounts of material excerpted from longer works there would be none. Professors would simply place the original on reserve for students to make their own copies rather than require them to purchase an entire book for the use of one small selection. This becomes even more absurd when applied to older journals, to which subscription is impossible and for which reprints are not always available. Again, if the professor could not make photocopies for reserve, he or she would doubtless ask students to do their own copying from the original owned by the library.

Despite its stance on photocopying for multiple classes/multiple terms, however, the Model Policy at least offered an alternative to the restrictiveness of the Classroom Guidelines and as suggested by Loring "if the waters of copyright had remained still long enough . . . might have had its desired effect of substantially influencing policy review and development."¹⁰² As Loring goes on to note, however, those waters did *not* remain still, if indeed they ever had been.

THE NEW YORK UNIVERSITY LAWSUIT

While librarians and educators were slow to advance even a modestly liberal interpretation of fair use after passage of the Copyright Act, publishers moved very quickly to try to establish what has often been termed a "campus common law."¹⁰³ By disseminating interpretative literature favorable to their point of view, such as the AAP's *Photocopying by Academic, Public and Nonprofit Research Libraries* and through legal action, publishers strove to influence libraries' copying behavior. In 1980 and 1981 publishers (*Basic Books v. The Gnomon Corp.*) (*Harper & Row v. Tyco Copy Service*) filed suits against off-campus copy shops that provided photocopy services to area institutions of higher education and both companies settled out of court, agreeing to abide by the Classroom Guidelines.

Emboldened by these successes, publishers went one step further and in December, 1982, Addison-Wesley, backed by the AAP, sued New York University (NYU) directly, alleging that photocopies sold for classroom use were a violation of copyright. Nine faculty members and an off-campus copy shop were also named as defendants in the suit, which, like the earlier copy shop cases, was settled out of court. As part of the settlement NYU also agreed to the limitations of the Classroom Guidelines, the major difference being that it was a university itself agreeing to abide by these limitations, rather than a copy shop which provided that university with photocopying services.

Although some within the library community, most notably the ACRL Copyright Committee, argued that an out-of-court settlement set no legal precedent,¹⁰⁴ the NYU lawsuit set off a fresh wave of conservatism. As Loring suggests "the NYU case seems to have mitigated any effect the *Model Policy* might have had in opening up reserve and classroom copying policies to a more progressive approach."¹⁰⁵ This observation is confirmed by Crews' 1993 survey of College and University copyright policies, which found that more than 80% of those policies were based on the Classroom Guidelines.¹⁰⁶

POLICY vs. PRACTICE: THE "KINKO'S" CASE

While Crews' study leaves little doubt that most institutions of higher education took a conservative stance when creating copyright policies in the 1980s and early '90s, there is some question as to how closely faculty and librarians actually followed those policies. It is one thing for

an administration to set restrictive limits on photocopying for the classroom and reserve room, but quite another to expect that front line personnel—those actually confronted with student's immediate need for access to information—will abide by them. As early as 1977, the Register of Copyrights herself recognized this reality, confessing to the 70th annual meeting of the American Association of Law Librarians that she did not feel the practice of photocopying for reserve could be stopped.¹⁰⁷ The Director of Libraries at Michigan State University echoed the same sentiments, even suggesting a new legal term to describe the phenomenon (specifically in reference to faculty activities): "*de copia rectus non curat universitates*: 'universities do not care for or take notice of copyright matters.'"¹⁰⁸ An examination of what has come to be known as "the Kinko's case" serves to illustrate this dichotomy between practice and policy.

In 1989, Basic Books, Inc and seven other publishers filed a lawsuit against Kinko's Graphics Corporation, a national chain of more than 450 copyshops. Kinko's was charged with illegally duplicating large sections of various copyrighted works, anthologizing them and then reselling those anthologies to college and university students.¹⁰⁹ Clearly, behavior had not changed in the six years that had passed since the New York University settlement, for one of two representative Kinko's outlets named in the suit was a copyshop that provided anthologies for students at NYU! Thus, in the face of what Crews terms "the best known of all university copyright policies,"¹¹⁰ one which essentially mirrored the Classroom Guidelines, it appears that professors at NYU simply found another way of doing business as usual. Further evidence of practice trumping policy came after the court rendered its decision in 1991. Kinko's was ordered to pay nearly two million dollars in damages and legal fees and its course pack operation was shut down, but the copies that were being made simply migrated elsewhere: to library reserve desks. The University of Colorado, for instance, despite a copyright policy described by Crews as having "restructured the appearance of the Classroom Guidelines in a more onerous fashion,"¹¹¹ reported a 200% increase in reserve use immediately following the Kinko's decision.¹¹² At the same time, the University of Minnesota saw an 80% increase in their reserve operation.¹¹³

Assuming that other universities experienced similar reserve growth, which seems likely and given Crews' findings that the majority of university copyright policies followed the restrictive Classroom Guidelines, one is naturally led to wonder how institutions were able to reconcile the practice with the policy? The answer to this question pos-

sibly lies in the 1982 King Research report. As noted previously, the report found that 68% of college and university libraries surveyed felt the new copyright law had affected their reserve operations. When asked to elaborate by listing specific effects, most of those libraries reported placing more responsibility on faculty members to obtain permission from copyright owners.¹¹⁴ At the University of Colorado, this meant simply having faculty members sign the following statement at the bottom of each reserve request form:¹¹⁵

You are responsible for:

1. Being aware of applicable provisions of the copyright law,
2. Securing copyright clearance if necessary, and
3. Having materials copied.

Signing the copyright compliance statement below is required before any copied materials can be placed on Reserve.

The materials listed above may be protected by Copyright Law (Public Law 94-553, Title 17 U.S. Code). To the best of my knowledge, the copied materials listed on this sheet meet with the provisions of the copyright law.

Signature

Date

Staff members working the reserve desk at the University of Colorado (the author was one of them) suffered under no illusions that faculty might actually be obtaining permissions for materials submitted. It is very likely that this situation was replicated elsewhere, as reflected in Melamut's claim: "Many schools accept materials for reserve collections . . . if they are accompanied by a statement that permission has been obtained."¹¹⁶

Did publishers know of this trend towards greater reserve use in the wake of the Kinko's decision? It is hard to imagine that they did not. Why then, given what Crews terms their "overall litigation strategy"¹¹⁷ was a suit not leveled directly at a university involved in copying materials for Reserve? Perhaps, as Crews suggests, such a lawsuit would have been risky, given the non-profit status of most universities, their educational mission and the fact that students were not being charged

for reserve copies.¹¹⁸ A much safer strategy was already being pursued, after all, one that used “carefully targeted lawsuits, favorable settlements and effective publications” to push the Classroom Guidelines as an eventual firm interpretation of the law.¹¹⁹ Publishers would continue to pursue this strategy as course reserves moved inexorably into the electronic world.

Chapter 5

The Past and Present of Electronic Reserves: 1991-2004¹²⁰

ORIGIN AND RATIONALE

Writing about the broader topic of Collection Development and Electronic Resources, Miller notes, "In the late 1970s and early 1980s, one sees little awareness of the revolutionary changes ahead."¹²¹ The same can be said of the late 1980s and early '90s in regards to Reserve collections. Leading up to 1993, there was considerable discussion in the literature on "automating reserves," that is, streamlining the processing of reserve materials through automation but no hint that the landscape of reserves at academic libraries was about to change forever.

Visions of digital or virtual libraries were already commonplace by then, however, cropping up regularly in the literature from the mid-1980s on. It is out of those dreams (and sometimes actual trials and initiatives) that the notion of electronic reserves appears to have coalesced. Some academic libraries began to realize that the technological advances which made such visions possible might be used to solve some of the traditional problems of course reserves. Those problems and the promise electronic reserves (also known as e-reserves) hold for solving them have been well documented and can be summarized as follows:¹²²

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- *Loss, damage, or theft of items.* In traditional reserve, items are frequently unavailable to users because the item or specific pages from the item have been lost, damaged or stolen by previous users. Even when faculty and library staffs are promptly notified of the problem, there may be a delay of days in replacing the item. In an electronic reserves environment, missing pages or items is never an issue.
- *Access to items.* Even if items are not lost or damaged, they may be unavailable simply because they are checked out or the library is closed. Again, with electronic reserves, this is not an issue as the entire class, if necessary, may access the item simultaneously, at any hour of the day or night. Electronic reserves also have the potential to solve many of the access problems inherent in distance education.
- *Space limitations.* Traditional reserve rooms occupy considerable space within libraries for the storage of books and photocopies. Electronic reserves take up only disk space.
- *Staff workload.* While little if any labor savings are realized in the processing of materials for electronic reserves, much staff time is saved after the materials have been placed on e-reserves, as there is no longer any need to check the items in or out or re-shelve them.

As Loring notes, "The case for providing course readings electronically is compelling," but as he also points out "The question is how will copyright shape the nature of electronic reserve and libraries' abilities to provide the service."¹²³

EARLY EXPERIMENTS: 1991-1994

In July of 1994, a forum on electronic reserves (hereafter referred to as "Forum") sponsored by the Association of Research Libraries (ARL) and the National Association of College Stores (NACS) was held in Denver, Colorado. Presenting at that conference were representatives from San Diego State University, "often considered the pioneer of electronic reserves,"¹²⁴ Colorado State University and Duke, which appeared, at that time, to be the only three universities offering the service to their constituencies on any sort of systematic basis. Rice University, also in attendance, was planning to begin a pilot project later that year and the University of Pittsburgh, Northwestern University and others were seriously exploring the issue, but the membership of that club of

institutions substantially involved in “real time” operations was a decidedly small one.

The experimental nature of the times is revealed by examining the very different approaches—both philosophical and methodological—that these three pioneers took in providing an electronic reserves service, summarized in Table 1.¹²⁵

It can be seen that this experimentation extended not only to the “nuts and bolts” of electronic reserves but also to the handling of copyright, as each institution charted a distinctly different course. At SDSU, where the “Electronic Reserve Book Room” was conceived, at least in part, as a proving ground to “confront and resolve . . . intellectual property issues,”¹²⁶ permissions were asked for everything. Colorado State University, whose Reserve On-line! System was designed as an experiment in providing better service to their users (and which was open via the Internet to the world), took a conservative approach by accepting only items that required no formal copyright clearance. At Duke, where both copyrighted and non-copyrighted material was scanned and made available on a closed network, a conscious attempt seems to have been made to simply translate the traditional reserve environment into a digital format; thus Fair Use was claimed for all materials.

TABLE 1

	San Diego State University	Colorado State University	Duke University
Type of Items on Reserve	Notes, problems, exams, solutions; journal articles; book chapters	Exams, class papers, faculty papers	Notes, problem sets; journal articles; book chapters
Type of System	“Home built” network within the library	Gopher based; “home” programming	Optical jukebox built in collaboration with Xerox Corp.
Storage Format	Bit-mapped graphic images	Text files	RDO (Raster Display Object) graphic images
Access Points	6 workstations within library	On Internet with unrestricted use	3 stations in library (2 west campus; 1 east campus)
Copyright Policy	Campus bookstore seeks clearance for all copyrighted items	Unpublished papers with authors’ permission	No permission sought; considered as Fair Use
Charges for Service	Free viewing; 10 cents page charge for printing	No charge	No charge

Given the uncertainty inherent in attempting to apply Copyright Law to Reserves in general, an uncertainty made immediate by the then recent court decision in *Basic Books, Inc. v. Kinko's Graphics*, perhaps it is not surprising that the first three documented forays into electronic reserves resulted in such divergent approaches. Neither is it surprising that copyright issues figured so prominently in the 1994 Forum discussions, where it was noted, "Others have been attracted by the benefits of an ECR [electronic course reserves] system but have recoiled at the copyright dilemma."¹²⁷ Still, during this period there were a number of reasons to be optimistic about the future of the service:

- Mary Brandt Jensen, Director of the University of South Dakota School of Law and an associate professor of law, published in 1993, an article entitled "Electronic Reserve and Copyright," which appears to be the first attempt to map the 1976 Copyright Law to an electronic reserve environment. Widely referenced since that time, the article has generally been viewed as an endorsement of the legality of applying existing paper practices to e-reserves.¹²⁸
- San Diego State University's experience, reported at the 1994 Forum, seemed to suggest that even if requesting permissions proved to be necessary they would, for the most part, be granted and that the price of those permissions would not be unreasonable.¹²⁹
- Shortly after the electronic reserves Forum disbanded, the Conference on Fair Use (CONFU) convened in September, 1994, to "bring together copyright and user interests to discuss fair use issues and, if appropriate and feasible, to develop guidelines for fair uses of copyrighted works by librarians and educators." CONFU included a sub-group devoted specifically to electronic reserves.¹³⁰

As this early, experimental period came to a close then, there seemed little doubt as to the direction in which the traditional reserve room was headed, though certainly a great many questions remained regarding both the appropriate technology and the proper handling of intellectual property issues. Neither, however, appeared to present obstacles that were insurmountable and already, in spite of system crashes, "unfriendly" user interfaces and any limitations that might be imposed by copyright law, University libraries' primary constituents—the students—were making it clear that this new electronic service was something they wanted.¹³¹

PROLIFERATION OF ELECTRONIC RESERVES: 1995-1999

A survey sponsored by Association of Research Libraries reveals that between 1995 and 1999, at least 25 additional member libraries began offering electronic reserve services and at least as many more launched pilot projects.¹³² During this period, the World Wide Web emerged as an information tool, one that was particularly conducive to presenting electronic reserves, and it seems reasonable to suggest that this contributed to the proliferation of the service. Most libraries that were just wading into the waters of electronic reserves did so with a "home grown" system that included Adobe Acrobat software to capture and display files,¹³³ and many of the libraries that had preceded them (e.g., Duke and Northwestern) switched to this format as well.¹³⁴ A strong indication of the "mainstreaming" of the service is that several private companies (e.g., ERes, Nouseft) began offering electronic reserves products during the era and some Integrated Library System vendors (e.g., Innovative Interfaces, Endeavour) began creating and marketing electronic reserves modules as part of their product lines.¹³⁵

Concerns about the role of copyright in electronic reserves services proliferated during this era also, however, as there were a number of events and developments that served to intensify the debate. These can be divided up into three broad categories: Negotiation, Litigation and Legislation.

Negotiation

Any discussion of electronic reserves negotiations during this time must center upon CONFU, which spanned virtually the entire period. Convened by the Working Group on Intellectual Property Rights, a part of President Clinton's Information Infrastructure Task Force (IITF), CONFU included a sub-group devoted specifically to the topic of electronic reserves, which began work in September 1994.¹³⁶

The electronic reserves group was charged with discussing "the issues involved in the application of fair use to the creation of electronic reserves systems . . . within a non profit educational institution."¹³⁷ These discussions apparently did not go well from the beginning, however and "reached complete impasse in November, 1995."¹³⁸ Subsequently, some of the parties involved "saw among themselves signs of flexibility"¹³⁹ and began meeting informally to try to break the impasse, arriving at a draft set of guidelines in March 1996.¹⁴⁰ These draft guide-

lines met with considerable opposition from parties on both sides of the debate and thus were never officially sanctioned or published.¹⁴¹ CONFU's final report in November of 1998 could conclude no more than that "there was a general consensus that the preferred Fair Use Guidelines for Electronic Reserve had not received widespread acceptance at this time," and that they "would not be disseminated as a formal work product of CONFU." While it was acknowledged in the report that "some institutions may feel free to adopt and implement [the guidelines]"¹⁴² and some institutions since have, as Crews notes, "They are, at best, suggestions of an understanding of fair use," and certainly, "no one is bound by [them]."¹⁴³ These guidelines are reproduced in Appendix D.

Other, more localized attempts at negotiation appear to have taken place during this period also, but there is no evidence to suggest that agreements or compromises were reached.¹⁴⁴ Perhaps, as Crews has suggested, the "issues and the activities were too important to too many parties."¹⁴⁵

Litigation

Two court cases during the period, *American Geophysical Union v. Texaco, Inc.*¹⁴⁶ and *Princeton University Press v. Michigan Document Services*,¹⁴⁷ while not dealing specifically with Reserves, raised significant concerns as to Libraries' leeway in claiming Fair Use within such an environment.

In *Texaco*, American Geophysical sued on behalf of scientific journal publishers, claiming that unauthorized photocopying of articles by Texaco scientists constituted infringement of their copyrights. Although Texaco's practices did not substantially mirror what goes on within a University setting, certain aspects of the court's ruling could easily be analogized to either a print or electronic reserves operation:

1. Texaco maintained that the amount and substantiality of what was photocopied was small in relation to the whole, since the periodicals involved were traditionally marketed as an issue or volume. The court, however, recognized each individual article as a discrete and original work of authorship. Since one of the basic units of Reserves is the journal article, such a ruling makes it unlikely that the third factor, percent of the whole, in Fair Use analysis could ever weigh in a University's favor.

2. More disturbing still was the court's determination that while Texaco's practices did not conclusively affect publisher's primary subscription market, they did affect the secondary licensing market. Since Texaco could have paid such licensing fees through either a document delivery service or by negotiating a license directly with the publishers or by arrangement with the Copyright Clearance Center (CCC), the court felt that a viable secondary market did in fact exist. Since the CCC now negotiates the licensing of articles for reserve operations (and is being used for such), this could weigh against a University's claim for an exemption to such fees under Fair Use.¹⁴⁸

In *Michigan Document Services* (MDS), three publishers (Princeton University Press, MacMillan and St. Martin's Press) filed suit against MDS, a copyshop operating at the University of Michigan. MDS, much like Kinko's, had been selling course packs to U of M students without requesting or obtaining copyright permission from the rights holders. In addition to upholding previous rulings in Kinko's and Texaco in regards to the viability of the secondary market for licensing fees, the court's decision is notable for the following:

1. By turning to the fourth factor of Fair Use determination first and by stating that the four factors "may not have been created equal,"¹⁴⁰ the court seemed to narrow or perhaps completely close, the Fair Use exemption. If the presumption is that license fees that could be paid should be paid, then is there ever an instance in which this factor would weigh in favor of the defendant?¹⁵⁰
2. In assessing the third factor (amount and substantiality of the portion used), the court found that "the fact that the professors thought the excerpts sufficiently important to make them required reading" was enough to resolve the issue of whether or not the excerpts were central to the work as a whole.¹⁵¹ Again, if the presumption is that any portion of a work chosen by a professor automatically identifies that portion as central to the whole work, when can this factor ever weigh in the defendant's favor?¹⁵²

Legislation

The major piece of legislation enacted during this period was the Digital Millennium Copyright Act (DMCA), which was introduced in

Congress in mid-1997 and finally signed into law on October 28th, 1998. Perhaps the most notable thing about the DMCA is that although there was some concern among the library community that the definition of Fair Use was being narrowed in certain specific areas, in general the Act does nothing to clarify the deliberate vagueness inherent in the 1976 Copyright Law. On the one hand, this was good news for electronic reserves in that it at least *implied* that Section 107 was indeed technology neutral (since Congress chose to make no modifications to it); on the other hand, it meant that the uncertainty surrounding the application of 107 to reserves would continue to exist. While some would doubtless have preferred specific clarifications such as those proposed for distance education, it was perhaps more significant—especially in light of the intense lobbying efforts of the publishing industry on all fronts—that no additional restrictions were imposed.

Given this uncertain environment, however, perhaps it is not at all surprising that Kristof's 1999 survey also found that among those libraries that had not yet begun offering electronic reserves services, concern over copyright was cited as the most common reason.¹⁵³

RECENT DEVELOPMENTS

Throughout the early years of the new century legislation addressing distance education was proposed, discussed and finally enacted as the Technology, Education and Copyright Harmonization (TEACH) Act, which was signed into law in November of 2002. Along the way and even after implementation of the TEACH Act, there were questions as to whether this legislation would provide any guidance on electronic reserves. As the ALA has stated, however, the Act “does not and was not intended to address e-reserves,” its focus being mainly on exemptions for public performances and displays of non-print works.¹⁵⁴ Recognizing its member institution's need for clarification on the topic of e-reserves, however, the ALA introduced in November 2003, a “Statement on Fair Use and Electronic Reserves” (hereafter ALA Statement).¹⁵⁵ This document avoids (one suspects, deliberately) using the term “guidelines,” but offers an alternative to both the 1976 Classroom Guidelines and the unsanctioned CONFU agreement. The full ALA Statement is reprinted in Appendix E, but the most important points are as follows:

- ***The increasing use of electronic resources for reserves is acknowledged.*** It is suggested that library staff work together to ensure that “license agreements do not preclude rights to make materials available through e-reserves systems and that no one pays additional permission fees for uses already covered by a license.”
- ***For materials in non-electronic format, use of Section 107’s four-factor test is advocated.*** Libraries are encouraged to use the four-factor test, rather than guidelines or “checklists,” to determine fair use for materials scanned and placed on e-reserves.
- ***For each of the four factors, discussion of how libraries’ electronic reserves use might fit the requirements of the factor is provided.*** Of particular importance are the discussions accompanying the Third (Amount Used) and Fourth (Market Effect) Factors, as they represent a departure from previous approaches.
 - Third Factor. The ALA Statement acknowledges the reality that, in terms of amount, it may sometimes be appropriate to use even an entire work (e.g., a poem or an image) rather than some pre-set percentage of that work.
 - Fourth Factor. Unlike most guidelines, the ALA Statement makes no distinction between core and supplementary materials for reserve, as potential harm to the market is possible regardless of this distinction. The ALA Statement suggests that if “the first three factors show that a use is clearly fair, the fourth factor does not weigh as heavily.”¹⁵⁶
- ***Use of materials for multiple classes or in subsequent iterations of the same class is not precluded outright.*** This is a significant departure from other reserve models as the restriction on use of the same material in subsequent semesters has been included in most every previous set of guidelines. Yet, it has been the one point that has caused the most consternation among libraries and teaching faculty.
- ***The reality that different institutions have different tolerances for copyright risk is acknowledged.*** Rather than propose a “cookie-cutter” approach, the ALA Statement acknowledges that each institution has a unique situation and therefore a different tolerance for risk.

The primary goal of the ALA Statement seems to be encouraging libraries to look to the law themselves—specifically to Section 107—rather than to guidelines or checklists that represent the interpretations of others. The Statement is also clearly a call to exercise Fair Use within an electronic reserve environment, though as noted above it stops short of suggesting precisely how far libraries should go in claiming those rights. There are both strengths and weaknesses in this approach. On the positive side, the ALA Statement is vague enough that a legal challenge to it seems unlikely and it does provide a framework within which libraries with a reasonable tolerance for risk should be able to construct policies that serve their students and faculty well. On the negative side, it does not take as firm a stand on the issues as it might and does little to consolidate the diverse and fragmented approaches to electronic reserves that define the current educational environment.

Another potentially significant recent development relates to the concept of “State’s Rights,” that is, whether or not states and state institutions are immune from copyright lawsuits. Since 1999, several U.S. Supreme Court decisions strengthening the Eleventh Amendment have led some to conclude that state universities cannot be sued for copyright infringement, thus giving those institutions a much freer hand in their use of copyrighted material for electronic reserves. There is some disagreement as to how far this immunity extends. Under pressure from copyright owners, Congress has been exploring ways in which the loophole might be closed. (See Gasaway, L.N. (2004). Eleventh Amendment immunity. *Information Outlook*, v.8, p.18 for further discussion of this topic.) This has contributed to what has become a wide spectrum of approaches to copyright for electronic reserves. Some libraries are scanning almost anything in virtually any amount, while others adhere to the narrow boundaries of the original Classroom Guidelines.

Does this matter? If one imagines students and faculty from different institutions having vastly different educational experiences in terms of quality—some unhindered in their teaching and learning and research, others continually confronted by restrictions that seem to fly in the face of what was the original purpose of copyright law: “To promote the progress of science and the useful arts.”¹⁵⁷ It may depend, however, upon what sort of future one envisions for electronic reserves and course reserves in general.

Chapter 6

The Futures of Course Reserves

Academic libraries have now offered course reserves as a service to their students and faculty in three different centuries. Through various technological breakthroughs and many changes in copyright law, the service has remained a viable one but now approaches perhaps its most critical juncture. Will course reserves continue to exist as libraries, publishers and universities move from an information world that is still largely print-based towards one that will eventually be mostly electronic? If so, in what form? Technology is evolving so rapidly and copyright is still such an unsettled area of the law, that it is not much of an exaggeration to say that almost anything may happen. The only certainty in the situation is that the situation will change. Out of the fog of the perhaps innumerable futures that may lie ahead for course reserves, however, three broad categories of possibilities begin to emerge.

FUTURE 1: LIBRARIES WILL NO LONGER PROVIDE COURSE RESERVES

One possibility that must be considered is whether course reserves will continue to exist at all. If the service does indeed fade into academic history, the cause is likely to be either (1) the increasing ability and willingness of faculty members to create their own class web presences, in

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conjunction with the ongoing, inevitable growth of electronic resources or (2) ever more restrictive interpretations of copyright law.

Death by Irrelevance

In the future, why should an instructor bother with reserves if he or she can easily place all class materials on a home page or post them to a space within an educational software program such as Blackboard or WebCT? Many professors have already elected to go this route and it seems almost inevitable that even more will do so as these programs become user-friendlier. However, will this model ever replace course reserves entirely? The eventual answer to that question depends upon a number of factors.

Primarily in the current environment, there are essentially no controls over what materials faculty post to their own course sites. As Laura Gasaway suggests, this may create a potential liability for both the institution and the individual instructor.¹⁵⁸ In recent years, there has been a trend towards Universities providing checklists or decision trees to help faculty determine what is fair use and what is not,¹⁵⁹ but that trend generally does not appear to include either oversight or enforcement. If, in the future, Universities do begin to take an active oversight and/or enforcement role in faculty use of copyrighted materials, it could send instructors back to course reserves, especially if libraries have positioned themselves to manage copyright clearance. On the other hand, if faculty encounter copyright restrictions while submitting class materials to the library, but continue to face no such restrictions while managing their own course sites, then that disparity is likely to hasten the demise of reserves.

In addition to issues of copyright compliance or non-compliance, there are questions surrounding the willingness and/or ability of ALL faculty members to post their own course materials. Unless the vast majority of professors are willing and able to do so, then there will continue to be a need for someone else to provide this service. It stands to reason that libraries, as traditional providers of reserves, will continue to do so, though increasingly now there are others who also might. Campus bookstores have long provided paper course packs as an alternative to reserves and in recent years, some have taken tentative steps towards creating these in electronic format. Commercial vendors have also begun to show an interest in filling this niche and seem poised to become more of a factor in the future.¹⁶⁰ Therefore, while it seems unlikely that 100% of the faculty at any institution will ever be willing and eager to

post their own materials to personal web or courseware sites, this by itself does not guarantee the continued existence of reserves.

Death by Copyright

Assuming faculty does not abandon reserves of their own free will, there is another reason why the service may yet disappear. Increasingly restrictive copyright laws and increasingly restrictive interpretations of those laws may render reserves impossible or impractical to manage. While as of yet no library reserve operation has been the target of a copyright infringement lawsuit,¹⁶¹ cases such as *Kinko's*, *Michigan Document Services* and *Texaco* have all dealt with issues related to reserves and at least parts of all the final court rulings in those cases could easily be analogized to reserves practices. It appears that only the thin line of non-profit educational status separates the defendants in these cases from a University with a full-scale reserves operation. There is little doubt that publishers think libraries should be paying permission fees for most materials they place on reserves.¹⁶² The question is how far are they willing to go in pursuit of that aim and, if they succeed, will libraries continue to provide reserve services in spite of it?

FUTURE 2: LIBRARIES WILL OFFER ONLY VERY LIMITED COURSE RESERVE SERVICES

The extinction of reserves is possible. At present, however, it does seem somewhat unlikely, especially given the longevity of the service and the fact that its demise has been predicted so many times before. A far more likely outcome is that in the future reserves will shrink to the point of filling only a minor niche within higher education. Such a scenario is really not so very far removed from the one described above, differing only in a matter of degree, the same factors combining not to put an end to reserves but to diminish its importance to the point at which it becomes almost an afterthought:

- ***The continued growth of electronic resources.*** As more and more material becomes available on line, the value of reserves is bound to diminish, for there is little advantage in grouping lists of links at the library when students can access them directly through a syllabus. In a largely electronic world, the only reason for course re-

erves to exist might be to set aside from the main collection the fewer and fewer physical items assigned by faculty. In a sense, this might bring reserves back full-circle, to the days of the Harvard College Library of the 1870s, though with vastly reduced importance and utility.

- ***Increased faculty use of personal web pages and courseware.*** As noted above, this trend is likely to continue unless University copyright policies or procedures redirect faculty back towards reserve. While it is likely that some faculty will still prefer that reserves staff handle their course materials for them, continued improvements in the operability of courseware products and/or web page creation may eventually move reserves into the category of “last resort.”
- ***Increased role for campus bookstores and commercial vendors.*** This could significantly cut into the usage of course reserves on campus, especially if copyright law continues to become more restrictive.
- ***The future direction of Copyright Law.*** Patterson and Lindberg, in the conclusion of their 1991 treatise, *The Nature of Copyright*, outline an ideal, learning-centered approach to copyright that they hope will happen in the future.¹⁶³ In so doing, however, they also describe the opposite of that ideal, a future in which the copyright (that is, the exclusive right to copy materials in order to sell those copies for profit) has become utterly confused with the right to control access. Within that bleak view of the future, every use of an information resource would become a paid use and consequently there would be no need for course reserves except as a gathering place for those few physical items not yet available in electronic format.

**FUTURE 3:
LIBRARIES WILL OFFER EXPANDED,
MULTI-FACETED COURSE RESERVE SERVICES**

There is a third future, which may lie ahead for reserves, although libraries will have to make a conscious and concerted effort in order to make it happen. That future, in which course reserves grows rather than diminishes in importance, will likely be defined by the following inter-related characteristics: Strong Leadership, especially in copyright matters, Collaboration, both locally and nationally and Flexibility.

Strong Leadership on Copyright

For too long, libraries as a whole have allowed publishers to frame the copyright debate as it pertains to course reserves. In many respects, we have been our own worst enemy as we have established conservative policies and practices and have failed to put forth a united front. The situation today is as confused as it has ever been, with some libraries paying permission fees for virtually all materials placed on reserve, some claiming fair use for virtually everything and the rest falling somewhere on the spectrum in between. With no consistency to the model, the likelihood that publishers will gradually nudge most libraries towards ever-more conservative practices seems high, especially in light of Congress's recent tendency to view copyright in strictly economic terms. A new approach may be called for. Copyright law is sufficiently vague as to allow for any number of interpretations in regard to course reserves; perhaps it is time that libraries banded together to put forth their own interpretation, based not upon legal but economic arguments. How might this be accomplished?

First of all, libraries will need to take a stronger leadership role in copyright matters on their own campuses, to insure that we are not locked out of debates and negotiations altogether or relegated to the role of bit player. More importantly, libraries across the country need to unite and flex our economic muscle in order to create the kind of future that we wish to see. Currently, publishers often have their copyright cake and eat it, too. In regard to "out of print" materials, libraries, campus bookstores and faculty do the publisher's work for them by locating, copying and packaging information resources and they or the end users, students, are expected to pay licensing fees.¹⁶⁴ This breaks the long-standing cultural bargain at the heart of copyright law: that those holding the copyright must make materials readily available if they expect to be compensated for their use. Our collective position on the usage of copyrighted materials for course reserves should focus upon this breach of the cultural bargain and ideally should consist of the following elements:

1. Libraries should insist that the electronic resources we purchase or license may be used freely for course reserves. More and more this is already the case in today's information world. Licensing agreements for electronic databases, generally either specifically allow course reserves this use or at least do not expressly forbid it.

2. Libraries should make it clear to publishers that we intend to invest our limited acquisition dollars in new information resources, those which are either "in print," in the traditional sense of the phrase, or which are currently being marketed in electronic formats such as e-books or online databases.
3. Libraries should make it clear that we will not pay licensing fees for course reserves use of materials that are "out of print," again meaning those resources which are not commercially available either in electronic or traditional paper format. We should make it clear that we intend to scan these older print materials for use in electronic reserves, that there will be no limit as to how much of the work may be scanned and that these materials will be kept on reserve for as long as faculty request. If publishers feel that certain materials within this category are generating significant use, they should make the investment to produce them in digitized format. If publishers deem that it is not profitable to do so, that in itself argues that the usage is not significant.
4. At the same time, libraries should make a commitment to pay licensing fees (or be willing to pass those fees on to students) for materials that *are* commercially available and have not already been purchased for the use of their faculty and students. The current system of routing permission requests through the Copyright Clearance Center (CCC) should be abandoned, however, in favor of compulsory licensing which clearly outlines a reasonable fee structure for publishers.¹⁶⁵ The advantage of this arrangement for libraries, faculty and students is obvious: publishers could no longer restrict access to any of these materials. There would, however, be a balancing advantage for publishers: essentially there would be no fair use in the course reserves environment for commercially available items not already purchased or licensed by the academic institution.¹⁶⁶

Given the history of past discussions on reserves and copyright, chances are high that publishers would be resistant. Yet, a stance could lead to an arrangement that makes sense on a great many levels, one that could be beneficial to all parties involved. The focus on funneling libraries' acquisition budgets towards new resources satisfies our Constitution's mandate that copyright "promote the progress of science and the useful arts"¹⁶⁷ by providing an incentive for publishers to put forth either new work or old work in new formats that allow for expanded use. Untying libraries' hands so that older print works may be used

without restriction on electronic reserves also serves this mandate by furthering the educational mission of colleges and universities, the seedbed of much, perhaps most, scholarly information.¹⁶⁸

Libraries as a whole are publishers' best customers (in some scholarly fields, perhaps their *only* customers) and as such do have the power to enact change. But in order to do so we will have to stop quibbling over what very vague laws will or will not allow and begin working together to pressure those publishers to collaborate with us in creating a new model that better serves all our interests.

Collaboration

The best example of what could be useful collaboration on the national level has already been described above, though certainly there may be other ways in which libraries could work together to better serve their students and faculty. In addition to this, however, libraries will almost certainly need to collaborate *locally*, that is, with other campus entities, if they wish to see reserve services expand in the future. Many libraries already do this, of course, though perhaps not as intentionally or as intensively as they could. Why should faculty need to go to several different places on campus in order to get help with services that are clearly related but traditionally have been provided by different groups? In an ideal world, faculty would have the convenience of "one stop shopping." One place on campus would be the gateway to electronic and traditional reserves, media services, course pack creation, textbook ordering, courseware set-up, training and troubleshooting as well as many other campus programs which support teaching. Libraries are perhaps the most logical candidates for this role, as we have a long history of collaboration and of serving as gateways to information services that are provided by others. Building partnerships with bookstores, computing services, media centers and other such campus groups goes beyond that and may not be an easy undertaking as the inevitable turf issues are sure to arise. Yet, many of us have been doing just that for years, simply on a much smaller scale. The time may now have come for us to go several steps further, if course reserves are to remain a viable part of higher education.

Flexibility

While the need for flexibility on the part of libraries and librarians is certainly inherent in everything described above, it cannot be empha-

sized enough that this will be an essential quality for reserve staff in the future. If reserves are to survive as a service, all of us will need the ability to react quickly and efficiently to the changing needs of both faculty and students and to the changing landscape of our information world. More and more material will be digitized, of course, but it seems inevitable that other formats will also appear, as well as new methods for information delivery. In all likelihood, there will be more not fewer models for us (and faculty) to choose from. We will have to be creative, willing to change and adapt. Rather than trying to make faculty teaching methods fit our vision of what reserves is or once was, we will have to mold reserves to fit the changing face of instruction and the changing realities of student participation in the learning process.

Conclusion

In 1995, Jerry Campbell, University Librarian at Duke University, spoke at ALA's Midwinter Conference on the emerging relationship between copyright and electronic reserves, a service that was then very much in its infancy. His hope was that laws and precedents governing copyright in regard to electronic reserves would not be established too quickly, before patterns of usage had become apparent. To illustrate his point he chose sidewalk construction strategies at Duke's rival institution, the University of North Carolina, as a metaphor: whenever a new building was erected on campus, UNC officials would deliberately construct no sidewalks until students had determined with their feet the most logical pathways to and from that building. Campbell advocated for the same approach to copyright and electronic reserves: that we should step back for a while and observe the ways in which students would use this service before attempting to impose upon it restrictions which would either be ignored or would seem ill-conceived to future generations.¹⁶⁹

A decade has passed since Campbell articulated this hope and still the relationship between copyright and electronic reserves has not been definitively defined, though both publishers and libraries have certainly tried. By now, libraries have a good understanding of what students and faculty want from electronic reserves and from the broader category of reserve as a whole. However, the "sidewalks" which would finally set in stone the rules governing what can and cannot be done with electronic reserves have not yet been constructed. In our willy-nilly fragmented approach to copyright, however, patterns and precedents *are* being established whether we realize it or not. Patterns that may not be

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in the best interests of faculty and students and may eventually spell the end or the marginalization of course reserves. If the fate of course reserves were all that was at stake, perhaps it would not matter. Reserve is, after all and always has been, only one service that academic libraries provide to their parent institutions. Faculty certainly has other instructional tools at its disposal and is acquiring more all the time.

Ultimately, there are two important reasons why libraries should begin to take an active role in steering course reserves towards "future 3," expanded, multi-faceted services. The first reason is self-evident. Colleges and universities can more easily accomplish their educational mission if faculty has more methods for information delivery at its disposal. In order to be as successful as possible, faculty members need to know what those delivery methods are, they need easy access to those delivery methods and they need support. Library reserve departments are uniquely positioned now to gather those delivery methods under one umbrella and to provide that necessary support.

The second reason why libraries should pursue this course of action is less obvious but far more critical: if we continue along our current path we may eventually discover that it has, unbeknownst to us, solidified into a "sidewalk," that it is set in stone and that it is not a path that we would have chosen to take. We may discover that this path, especially in terms of copyright, is becoming ever more narrow and tortuous. If that should occur then not only will course reserves be in jeopardy, but quite possibly the future of education itself and beyond that even the future of our open and democratic society, which depends upon an informed citizenry for its very survival.

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96. Kuhlman, A. F. (1938), p. 100.
97. *Copyright law revision: Hearings before the Subcommittee on Patents, Trademarks and Copyrights, of the Senate Committee on the Judiciary, 93rd Cong.*, p. 188.
98. Harer, J. B & Huber, C. E. (1982). Copyright policies in Virginia academic library reserve rooms. *College & Research Libraries*, 43, p. 233-234.
99. Harer & Huber, p. 235.
100. Harer & Huber, p. 236.
101. Crews, K. D. (1993). *Copyright, Fair Use and the Challenge for Universities: Promoting the progress of higher education*. Chicago: The University of Chicago Press, p. 47-51.
102. Loring, C. B. (1997), p. 33.
103. Crews, K. D. (1993), p. 45.
104. Copyright: An ACRL resolution. (1984). *College & Research Libraries News*, 45, p. 237-38.

105. Loring, C. B. (1997), p. 33.
106. Crews, K. D. (1993), p. 76.
107. Proceedings of the American Association of Law Libraries. (1977, June 28), p. 462.
108. Chapin, R. E. (1979). A view from Michigan State University. *Journal of Academic Librarianship*, 5, p. 128.
109. Reid, C. (1989). Eight publishers sue photocopying chain. *Publishers' Weekly*, 235 no. 19, p. 100.
110. Crews, K. D. (1993), p. 3.
111. Crews, p. 74.
112. Seaman, S. (1995). Impact of Basic Books v. Kinko's Graphics on reserve services at the University of Colorado, Boulder. *Journal of Interlibrary Loan, Document Delivery & Information Supply*, 5 no. 3, p. 117.
113. Loring, C. B. (1997), p. 35.
114. *Library reproduction of copyrighted works* (1982), p. 2-24.
115. Reserve request form, internal document of the University of Colorado, Boulder. In use from 1992-2003.
116. S. J. (2000a). Pursuing fair use, law libraries and electronic reserves. *Law Library Journal*, 92 no. 2, and p. 192. A further indication that this practice may have been widespread appears in the testimony of Professor Neill Magaw, a faculty member in the English Department at the University of Texas, Austin, before the U.S. Copyright Office in 1980. Library of Congress, Copyright Office (1983). *Library reproduction of copyrighted works (17 U.S.C. 108): Report of the Register of Copyrights*, [Washington, DC]: Register of Copyrights, appendix 3, p. 51-85. When asked to describe reserve policies and procedures at UT Austin, he notes: "They will wink their eyes, in effect and accept as 'personal copies' multiple copies when brought to them by professors. Then they will place those on reserve" (p. 82).
117. Crews, K. D. (1993), p. 47.
118. Crews, p. 117.
119. Crews, p. 47.
120. Much of the information in this section is adapted from Austin, B. (2001). A Brief History of Electronic Reserves. *Journal of Interlibrary Loan, Document Delivery & Information Supply*, 12 (2): p. 1-15.
121. Miller, R. H. (2000). Electronic Resources and Academic Libraries, 1980-2000: A Historical Perspective. *Library Trends*, 48 no. 4, p. 646.
122. See Seaman, S. (1996). Copyright and Fair Use in an Electronic Reserves System. *Journal of Interlibrary Loan, Document Delivery &*

Information Supply, 7 no. 2, p. 19-29; Soete, G. J. (1996) *Issues and Innovations in Electronic Reserves*, Washington, DC: Association of Research Libraries, Office of Management Services, Systems and Procedures Exchange Center; Petersen, L. (1997). *What Do Students Want From Electronic Reserves?* University of North Carolina at Chapel Hill; Groenewegen, H. (1998). Electronic Reserves: Key Issues and Innovations. *AARL*, 29 no. 1, p. 1-12; and Melamut, S. J. (2000a).

123. Loring, C. B. (1997), p. 36.

124. Soete, G. J. (1996), p. 14.

125. Sources for information in Table 1: Forum sponsored by the Association of Research Libraries and National Association of College Stores (1994 July 27-29 Denver, Colo.) (1994). *Electronic reserves: Developing new partnerships to provide support in an electronic age*; Bosseau, D. L. (1993). Anatomy of a Small Step Forward: The Electronic Reserve Book Room at San Diego State University. *The Journal of Academic Librarianship*, 18, no. 5, p. 366-368; Delaney, T. and Smith, J. (1993). Technological Innovation at Colorado State University Libraries. *Colorado Libraries*, 19, p. 27-30; Delaney, T. (1994). Electronic Reserve: The Library Goes to the People. in *The Internet Library: Case Studies of Library Internet Management and Use*. Julie Still, ed. Westport: Mecklermedia Corporation.

126. Goodram, R. J. (1996). The E-RBR: Confirming the Technology and Exploring the Law of "Electronic Reserves": Two generations of the digital library system at the SDSU library. *The Journal of Academic Librarianship*, 22, p. 118.

127. Donovan in Forum (1994), p. 132.

128. Jensen, M. B. (1993). Electronic Reserve and Copyright. *Computers in Libraries*, 13 no. 3, p. 40-45. In particular, Ms. Jensen's observation that "[n]othing in section 107 or its legislative history indicates that Congress intended to limit fair use copying to facsimile form" (p. 42) was seen by many as sanctioning an electronic reserves model patterned after the paper service. For examples of favorable interpretation, see Enssle, H. R. (1994). Reserve On-line: Bringing Reserve into the Electronic Age. *Information Technology and Libraries*. 13, p. 197-201 and Kohler, S. (1997) Self-serve Reserve: a scalable prototype at Norwich University. *Journal of Interlibrary Loan, Document Delivery & Information Supply*, 7, no. 4, p. 5-19.

129. SDSU reported that 99% of permissions requested were granted and that almost all of those permissions (1039 out of 1059) were granted free of charge. Goodram (in Forum, 1994, p. 63) observed "[i]t is our

experience that IP owners, in this case publishers, are mainly concerned with *control*—not additional income” (emphasis in original).

130. CONFU. (1998). The Conference on Fair Use. Report to the Commissioner on the Conclusion of the Conference on Fair Use. November 1998. Available for view or download at <http://www.uspto.gov/web/offices/dcom/olia/confu/>. Accessed March 9th, 2004.

131. See Campbell, J. D. (1995). Copyright issues in electronic Reserves. *The Electronic Library*, 13, p. 221-3. Campbell reported that although Duke’s original electronic reserves system was not “particularly well suited for the intense traffic generated by reserved readings” and that “the interface screen . . . was not very user-friendly,” 95% of students “preferred the automated system over the manual.” Enssle (1994) noted that response to the CSU project was “very positive” (p. 201). Delaney and Smith (1993) documented the “excitement students express over Reserve On-line!” (p. 30). SDSU reported positive user response also in Bosseau (1993) and Goodram (1996).

132. Kristof, C. (1999). *Electronic reserves operations in ARL libraries: A SPEC kit*. Washington, DC: Association of Research Libraries, Office of Leadership and Management Services p. 5.

133. Kristof, p. 11-12.

134. Soete, G. J. (1996), p. 15-16.

135. Kristof, C. (1999), p. 11.

136. The electronic reserves sub-group “met under the leadership of Kenneth D. Crews, Director, Copyright Management Center, Indiana University-Purdue University at Indianapolis, representing the Indiana Partnership for Statewide Education” and also included “Laura Gasaway, Director of the Law Library at the University of North Carolina, representing the Association of American Universities, Douglas Bennett of the American Council of Learned Societies, Carol Risher, Vice President of Copyright and New Technology, Association of American Publishers and Mary Jackson of the Association of Research Libraries.” (CONFU, 1998, p. 15).

137. CONFU. (1998), p. 15.

138. Crews, K. D. (1999). Electronic Reserves and Fair Use: The Outer Limits of CONFU. *Journal of the American Society for Information Science*, 50 no. 14, p. 1342.

139. Crews, p. 1343.

140. The parties involved in these informal discussions included “representatives of educators, librarians and scholarly publishers.” Crews, who participated in these informal negotiations, also notes “[t]his renewed effort clearly differed from other CONFU discussions, because

not every interested party was at the table. The only parties convening were those ready to reach agreement and not merely explore issues” (Crews, K.D. 1999, p. 1343).

141. The guidelines were simultaneously criticized as being too restrictive and too lenient (depending upon the party doing the criticizing). See Crews, K. D. (1999), p. 1344, “Support and Opposition” for further details.

142. CONFU. (1998), p. 16.

143. Crews, K. D. (1999), p. 1344.

144. See Campbell (1995); and Freiburger, G. A. and Ralph, L. (1998). Electronic reserves: The changing landscape of instructional support. *Bulletin of the Medical Library Association*, 86 no. 1, 17-25. Each reported attempts to negotiate blanket license agreements for electronic reserves with publishers.

145. Crews, K. D. (1999), p. 1344.

146. *American Geophysical Union v. Texaco, Inc.*, 802 F. Suppl. (S.D.N.Y. 1992); 60 F.3d 913 (2d Cir. 1994). Concluded December 4, 1995 when the Supreme Court refused to review the previous decision.

147. *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996). Concluded March 31, 1997 when the Supreme Court refused to review the previous decision.

148. Texaco argued that this reasoning was “circular,” since “a copyright holder can always assert some degree of adverse affect on its potential licensing revenues as a consequence of the secondary use at issue simply because the copyright holder has not been paid a fee to permit that particular use” (*Texaco*, 60 F.3d 913 (2d Cir. 1994) footnote 17). The court, however, noted, “not every effect on potential licensing revenues enters the analysis under the fourth factor. Specifically, courts have recognized limits . . . by considering only traditional, reasonable or likely to be developed markets” (*Texaco*, 60 F.3d 913 (2d Cir. 1994) II.D.2 at 3); thus, the court did not find the circularity argument compelling.

149. While the majority decision noted that the Supreme Court “may now have abandoned the idea that the fourth factor is of paramount importance,” it maintained that “[the fourth factor] is at least *primus inter pares*” (*MDS*, 99 F.3d 1381 (6th Cir. 1996) section II at 3).

150. Judge Ryan in particular noted the illogic of this train of thought: “in my view, the majority’s market harm analysis is fatally flawed: If market harm is presumed when excerpts are selected by professors and market harm is proven when fees are not paid, we have ceded benefits entirely to copyright holders” (*MDS*, Ryan, dissenting, III.A.ii at 4).

151. *MDS*, III.C at 2.

152. Judge Ryan also noted the illogic of this argument at *MDS*, III.C.1: "... the fact that the professors required students to read the excerpts says nothing whatsoever about the 'substantiality' of the excerpted material *in relation* to the entire work . . . the professors' decision to excerpt the material . . . suggests that the excerpts stand *separate* from the entire work, not that they are central and substantial to the entire work." (Emphasis in original.)

153. Kristof, C. (1999), p. 5.

154. American Library Association. (2003). Statement on Fair Use and Electronic Reserves. <http://www.ala.org/ala/acrl/acrlpubs/whitepapers/statementfair.htm>. Accessed March 15, 2004.

155. ALA (2003).

156. Zidar, B. (1997) makes a similar argument: that the first factor should always be considered first and if there is a presumption of fair use from the outset, the weight of the fourth factor is diminished.

157. U.S. Constitution, article I, section 8, clause 8.

158. Gasaway, L. N. (2002). Copyright considerations for electronic reserves. In *Managing Electronic Reserves*, Jeff Rosedale, Ed, Chicago: American Library Association, p. 131. See also Melamut, S. J. (2000a) for further discussion of this issue.

159. Without doubt, the best known of these the University of Texas at Austin's "Crash Course in Copyright," <http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm>.

160. See O'Leary, M. (2001) New academic information model bypasses libraries. *Online (Weston, CT)*, 25, no. 4, 72-4.

161. Gasaway, L. N. (2002), p. 135, footnote 73.

162. Gasaway, L. N. (2002), p. 127. See also CONFU discussions in Austin, B. (2001), CONFU (1998), Crews, K. D. (1999) and Melamut, S. J. (2000a).

163. Patterson, L. R. & Lindberg, S. W. (1991). *The Nature of copyright: A law of users' rights*. Athens, GA: University of Georgia Press, p. 226-241.

164. "Coursepacks" are the most egregious example of this. Faculty does the work of locating and assembling the materials; and campus bookstores do the work of printing those materials (usually at rather low quality), recouping only their printing costs. Yet still copyright permission must be secured and generally a fee must be paid to publishers, who made no effort to make the materials available in any sort of quality format, in any sort of easily accessible way.

165. Compulsory licensing has been suggested by Gasaway, L. N. (2002) and others as the answer to the electronic reserves copyright dilemma, but they appear to advocate compulsory licensing for all copyrighted materials. This makes sense for materials still in print but not for those that are out-of-print, as the party paying the licensing fee must locate the material and do their own (usually low quality) copying or scanning. Compulsory licensing fees should only apply to those materials that are readily available in published-quality format, through the copyright holder (presumably the publisher in most cases).

166. There would need to be a special case for journals available only in print format. If a library subscribes to a particular periodical, there should be no restrictions as to e-reserve usage. If a library does not subscribe and the periodical is not available for licensing in electronic format, then something along the lines of the "rule of five" used in the Interlibrary Loan world should be adopted. If the journal is available in electronic format, the compulsory licensing fee scheme would apply.

167. U.S. Constitution, article I, section 8, clause 8.

168. John Stedman, then retired professor of law at the University of Wisconsin and past chair of the Copyright Committee of the American Association of University Professors, made essentially these same arguments in his testimony to the Copyright Office in 1980, Library of Congress, Copyright Office (1983). *Library reproduction of copyrighted works (17 U.S.C. 108): Report of the Register of Copyrights*, [Washington, DC]: Register of Copyrights, appendix 2, 121-145.

169. Campbell, J. D. (1995). Copyright issues in electronic Reserves. *The Electronic Library*, 13, 221-3.

APPENDICES

Appendix A: Section 108 of the United States Copyright Law (U.S.C. 1982)

§ 108. LIMITATIONS ON EXCLUSIVE RIGHTS: REPRODUCTION BY LIBRARIES AND ARCHIVES

- (a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if—
- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
 - (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with

[Haworth co-indexing entry note]: "Appendix A: Section 108 of the United States Copyright Law (U.S.C. 1982)." Austin, Brice. Co-published simultaneously in *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve* (The Haworth Information Press, an imprint of The Haworth Press, Inc.) Vol. 15, No. 2, 2004, pp. 65-68; and: *Reserves, Electronic Reserves, and Copyright: The Past and the Future* (Brice Austin) The Haworth Information Press, an imprint of The Haworth Press, Inc., 2004, pp. 65-68. Single or multiple copies of this article are available for a fee from The Haworth Document Delivery Service [1-800-HAWORTH, 9:00 a.m. - 5:00 p.m. (EST). E-mail address: docdelivery@haworthpress.com].

- the library or archives or with the institution of which it is a part, but also of other persons doing research in a specialized field; and
- (3) the reproduction or distribution of the work includes a notice of copyright.
- (b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.
- (c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.
- (d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—
- (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
- (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.
- (e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or

archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—

- (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
- (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

- (1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law;
- (2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;
- (3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or
- (4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

- (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
 - (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.
- (h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c) or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).
- (i) Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.

Appendix B: Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 106 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

[Haworth co-indexing entry note]: "Appendix B: Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals." Austin, Brice. Co-published simultaneously in *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve* (The Haworth Information Press, an imprint of The Haworth Press, Inc.) Vol. 15, No. 2, 2004, pp. 69-72; and: *Reserves, Electronic Reserves, and Copyright: The Past and the Future* (Brice Austin) The Haworth Information Press, an imprint of The Haworth Press, Inc., 2004, pp. 69-72. Single or multiple copies of this article are available for a fee from The Haworth Document Delivery Service [1-800-HAWORTH, 9:00 a.m. - 5:00 p.m. (EST)]. E-mail address: docdelivery@haworthpress.com].

GUIDELINES

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay, or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that*:

- A. The copying meets the tests of brevity and spontaneity as defined below; *and*,
- B. Meets the cumulative effect test as defined below; *and*,
- C. Each copy includes a notice of copyright.

Definitions

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 works in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the works found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher.

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts there from are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

- (a) substitute for the purchase of books, publisher's reprints or periodicals;
- (b) be directed by higher authority;
- (c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed MARCH 19, 1976.

Ad Hoc Committee on Copyright Law Revision: by SHELDON ELLIOTT STEINBACH.

Author-Publisher Group and Authors League of America by IRWIN KARP, Counsel.

Association of American Publishers, Inc. by ALEXANDER C. HOFFMAN, Chairman, Copyright Committee.

Appendix C: Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use

I. THE COPYRIGHT ACT AND PHOTOCOPYING

From time to time, the faculty and staff of this University [College] may use photocopied materials to supplement research and teaching. In many cases, photocopying can facilitate the University's [College's] mission; that is, the development and transmission of information. However, the photocopying of copyrighted materials is a right granted under the copyright law's doctrine of "fair use" which must not be abused. This report will explain the University's [College's] policy concerning the photocopying of copyrighted materials by faculty and library staff. Please note that this policy does not address other library photocopying which may be permitted under other sections of the copyright law, e.g., 17 U.S.C § 108.

Copyright is a constitutionally conceived property right, which is designed to promote the progress of science and the useful arts by securing for an author the benefits of his or her original work of authorship for a limited time. U.S. Constitution, Art. I, Sec. 8. The Copyright statute, 17

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U.S.C. § 101 *et seq.*, implements this policy by balancing the author's interest against the public interest in the dissemination of information affecting areas of universal concern, such as art, science, history and business. The grand design of this delicate balance is to foster the creation and dissemination of intellectual works for the general public.

The Copyright Act defines the rights of a copyright holder and how they may be enforced against an infringer. Included within the Copyright Act is the "fair use" doctrine which allows, under certain conditions, the copying of copyrighted material. While the act lists general factors under the heading of "fair use," it provides little in the way of specific directions for what constitutes fair use. The law states:

17 U.S.C § 107. Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of section 106, 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 whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work. (*Emphasis added.*)

The purpose of this report is to provide you, the faculty and staff of this University [College], with an explanation of when the photocopying of copyrighted material in our opinion is permitted under the fair use doctrine. Where possible, common examples of research, classroom, and library reserve photocopying have been included to illustrate what we believe to be the reach and limits of fair use.

Please note that the copyright law applies to all forms of photocopying, whether it is undertaken at a commercial copying center, at the University's [College's] central or departmental copying facilities or at a

self-service machine. While you are free to use the services of a commercial establishment, you should be prepared to provide documentation of permission from the publisher (if such permission is necessary under this policy), since many commercial copiers will require such proof.

We hope this report will give you an appreciation of the factors, which weigh in favor of fair use and those factors, which weigh against fair use, but faculty members must determine for themselves which works will be photocopied. The University [College] does not condone a policy of photocopying instead of purchasing copyrighted works where such photocopying would constitute an infringement under the copyright law, but it does encourage faculty members to exercise good judgment in serving the best interests of students in an efficient manner. This University [College] and its faculty and staff will make a conscientious effort to comply with these guidelines.

Instructions for securing permission to photocopy copyrighted works when such copying is beyond the limits of fair use appear at the end of this report. It is the policy of this University that the user (faculty, staff or librarian) secures such permission whenever it is legally necessary.

II. UNRESTRICTED PHOTOCOPYING

A. Uncopyrighted Published Works

Writings published before January 1, 1978 which have never been copyrighted may be photocopied without restriction. Copies of works protected by copyright must bear a copyright notice, which consists of the letter "c" in a circle, or the word "Copyright," or the abbreviation "Copr.," plus the year of first publication, plus the name of the copyright owner. 17 U.S.C § 401. As to works published before January 1, 1978, in the case of a book, the notice must be placed on the title page or the reverse side of the title page. In the case of a periodical the notice must be placed either on the title page, the first page of text, or in the masthead. A pre-1978 failure to comply with the notice requirements resulted in the work being injected into the public domain, i.e., unprotected. Copyright notice requirements have been relaxed since 1978, so that the absence of notice on copies of a work published after January 1, 1978 does not necessarily mean the work is in the public domain. 17 U.S.C § 405 (a) and (c). However, you will not be liable for damages for copyright infringement of works published after that date, if, after

normal inspection, you photocopy a work on which you cannot find a copyright symbol and you have not received actual notice of the fact the work is copyrighted. 17 U.S.C § 405 (b). However, a copyright owner who found out about your photocopying would have the right to prevent further distribution of the copies if in fact the work were copyrighted and the copies are infringing. 17 U.S.C § 405 (b).

B. Published Works with Expired Copyrights

Writings with expired copyrights may be photocopied without restriction. All copyrights prior to 1906 have expired. 17 U.S.C § 304 (b). Copyrights granted after 1906 may have been renewed; however the writing will probably not contain notice of the renewal. Therefore, it should be assumed all writings dated 1906 or later are covered by a valid copyright, unless information to the contrary is obtained from the owner or the U.S. Copyright Office (see Copyright Office Circular 15t).

Copyright Office Circular R22 explains how to investigate the copyright status of a work. One way is to use the *Catalog of Copyright Entries* published by the Copyright Office and available in [the University Library] many libraries. Alternatively, you may request the Copyright Office to conduct a search of its registration and/or assignment records. The Office charges an hourly fee for this service. You will need to submit as much information as you have concerning the work in which you are interested, such as the title, author, approximate date of publication, the type of work or any available copyright data. The Copyright Office does caution that its searches are not conclusive; for instance, if a work obtained copyright less than twenty-eight years ago, it may be fully protected although there has been no registration or deposit.

C. Unpublished Works

Unpublished works, such as theses and dissertations, may be protected by copyright. If such a work was created before January 1, 1978, and has not been copyrighted or published without copyright notice, the work is protected under the new act for the life of the author plus fifty years, 17 U.S.C § 303, but in no case earlier than December 31, 2002. If such a work is published on or before that date, the copyright will not expire before December 31, 2027. Works created after January 1, 1978, and not published enjoy copyright protection for the life of the author plus fifty years. 17 U.S.C § 302.

D. U.S. Government Publications

All U.S. Government publications with the possible exception of some National Technical Information Service Publications less than five years old may be photocopied without restrictions, except to the extent they contain copyrighted materials from other sources. 17 U.S.C § 105. U.S. Government publications are documents prepared by an official or employee of the government in an official capacity. 17 U.S.C § 101. Government publications include the opinions of courts in legal cases, congressional reports on proposed bills, testimony offered at congressional hearings and the works of government employees in their official capacities. Works prepared by outside authors on contract to the government may or may not be protected by copyright, depending on the specifics of the contract. In the absence of copyright notice on such works, it would be reasonable to assume they are government works in the public domain. It should be noted that state government works may be protected by copyright. *See*, 17 U.S.C § 105. However, the opinions of state courts are not protected.

III. PERMISSIBLE PHOTOCOPYING OF COPYRIGHTED WORKS

The Copyright Act allows anyone to photocopy copyrighted works without securing permission from the copyright owner when the photocopying amounts to a "fair use" of the material. 17 U.S.C § 107. The guidelines in this report discuss the boundaries for fair use of photocopied material used in research or the classroom or in a library reserve operation. Fair use cannot always be expressed in numbers—either the number of pages copied or the number of copies distributed. Therefore, you should weigh the various factors listed in the Act and judge whether the intended use of photocopied, copyrighted material is within the spirit of the fair use doctrine. Any serious questions concerning whether a particular photocopying constitutes fair use should be directed to University [College] counsel.

A. Research Uses

At the very least, instructors may make a single copy of any of the following for scholarly research or use in teaching or preparing to teach a class:

1. a chapter from a book;
2. an article from a periodical or newspaper;
3. a short story, short essay, or short poem, whether or not from a collective work;
4. a chart, diagram, graph, drawing, cartoon or picture from a book, periodical, or newspaper.

These examples reflect the most conservative guidelines for fair use. They do not represent inviolate ceilings for the amount of copyrighted material which can be photocopied within the boundaries of fair use. When exceeding these minimum levels, however, you again should consider the four factors listed in Section 107 of the Copyright Act to make sure that any additional photocopying is justified. The following demonstrate situations where increased levels of photocopying would continue to remain within the ambit of fair use:

1. the inability to obtain another copy of the work because it is not available from another library or source or cannot be obtained within your time constraints;
2. the intention to photocopy the material only once and not to distribute the material to others;
3. the ability to keep the amount of material photocopied within a reasonable proportion to the entire work (the larger the work, the greater amount of material which may be photocopied).

Most single-copy photocopying for your personal use in research—even when it involves a substantial portion of a work—may well constitute fair use.

B. Classroom Uses

Primary and secondary school educators have, with publishers, developed the following guidelines, which allow a teacher to distribute photocopied material to students in a class without the publisher's prior permission, under the following conditions:

1. the distribution of the same photocopied material does not occur every semester;
2. only one copy is distributed for each student which copy must become the student's property;

3. the material includes a copyright notice on the first page of the portion of material photocopied;
4. the students are not assessed any fee beyond the actual cost of the photocopying.

In addition, the educators agreed that the amount of material distributed should not exceed certain brevity standards. Under those guidelines, a prose work may be reproduced in its entirety if it is less than 2500 words in length. If the work exceeds such length, the excerpt reproduced may not exceed 1000 words, or 10% of the work, whichever is less. In the case of poetry, 250 words is the maximum permitted.

These minimum standards normally would not be realistic in the University setting. Faculty members needing to exceed these limits for college education should not feel hampered by these guidelines, although they should attempt a "selective and sparing" use of photocopied, copyrighted material.

The photocopying practices of an instructor should not have a significant detrimental impact on the market for the copyrighted work. 17 U.S.C §107(4). To guard against this effect, you usually should restrict use of an item of photocopied material to one course and you should not repeatedly photocopy excerpts from one periodical or author without the permission of the copyright owner.

C. Library Reserve Uses

At the request of a faculty member, a library may photocopy and place on reserve excerpts from copyrighted works in its collection in accordance with guidelines similar to those governing classroom distribution for face to face teaching discussed above. This University [College] believes that these guidelines apply to the library reserve shelf to the extent it functions as an extension of classroom readings or reflects an individual student's right to photocopy for his personal scholastic use under the doctrine of fair use. In general, librarians may photocopy materials for reserve room use for the convenience of students both in preparing class assignments and in pursuing informal educational activities which higher education require, such as advanced independent study and research.

If the request calls for only *one* copy to be placed on reserve, the library may photocopy an entire article, or an entire chapter from a book, or an entire poem. Requests for *multiple* copies on reserve should meet the following guidelines:

1. the amount of material should be reasonable in relation to the total amount of material assigned for one term of a course taking into account the nature of the course, its subject matter and level, 17 U.S.C §107(1) and (3);
2. the number of copies should be reasonable in light of the number of students enrolled, the difficulty and timing of assignments, and the number of other courses which may assign the same material, 17 U.S.C §107(1) and (3);
3. the material should contain a notice of copyright, *see*, 17 U.S.C § 401;
4. the effect of photocopying the material should not be detrimental to the market for the work. (In general, the library should own at least one copy of the work.) 17 U.S.C §107(4).

For example, a professor may place on reserve as a supplement to the course textbook a reasonable number of copies of articles from academic journals or chapters from trade books. A reasonable number of copies will in most instances be less than six, but factors such as the length or difficulty of the assignment, the number of enrolled students and the length of time allowed for completion of the assignment may permit more in unusual circumstances.

In addition, a faculty member may also request that multiple copies of photocopied, copyrighted material be placed on the reserve shelf if there is insufficient time to obtain permission from the copyright owner. For example, a professor may place on reserve several photocopies of an entire article from a recent issue of *Time* magazine or the *New York Times* in lieu of distributing a copy to each member of the class. If you are in doubt as to whether a particular instance of photocopying is fair use in the reserve reading room, you should seek the publisher's permission. Most publishers will be cooperative and will waive any fee for such a use.

D. Uses of Photocopied Material Requiring Permission

1. *Repetitive copying*: 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, 17 U.S.C § 107(3).
2. *Copying for profit*: Faculty should not charge students more than the actual cost of photocopying the material, 17 U.S.C § 107(1).

3. *Consumable works*: The duplication of works that are consumed in the classroom, such as standardized tests, exercises, and workbooks, normally requires permission from the copyright owner, 17 U.S.C § 107(4).
4. *Creation of anthologies as basic text material for a course*: Creation of a collective work or anthology by photocopying a number of copyrighted articles and excerpts to be purchased and used together as the basic text for a course will in most instances require the permission of the copyright owners. Such photocopying is more likely to be considered as a substitute for purchase of a book and thus less likely to be deemed fair use, 17 U.S.C § 107(4).

E. How to Obtain Permission

When a use of photocopied material requires that you request permission, you should communicate complete and accurate information to the copyright owner. The American Association of Publishers suggests that the following information be included in a permission request letter in order to expedite the process:

1. Title, author and/or editor, and edition of materials to be duplicated.
2. Exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material.
3. Number of copies to be made.
4. Use to be made of duplicated materials.
5. Form of distribution (classroom, newsletter, etc.).
6. Whether or not the material is to be sold.
7. Type of reprint (ditto, photography, offset, typeset).

The request should be sent, together with a self-addressed return envelope, to the permissions department of the publisher in question. If the address of the publisher does not appear at the front of the material, it may be readily obtained in a publication entitled *The Literary Marketplace*, published by the R. R. Bowker Company and available in all libraries.

The process of granting permission requires time for the publisher to check the status of the copyright and to evaluate the nature of the request. It is advisable, therefore, to allow enough lead time to obtain permission before the materials are needed. In some instances, the publisher may assess a fee for the permission. It is not inappropriate to

pass this fee on to the students who receive copies of the photocopied material.

The Copyright Clearance Center also has the right to grant permission and collect fees for photocopying rights for certain publications. Libraries may copy from any journal which is registered with the CCC and report the copying beyond fair use to CCC and pay the set fee. A list of publications for which the CCC handles fees and permissions is available from the CCC, [27 Congress Street, Salem, MA 01970].

Sample letter to Copyright Owner (Publisher) Requesting Permission to Copy:

March 1, 1982

Material Permissions Department
Hypothetical Book Company
500 East Avenue
Chicago, Illinois 60601

Dear Sir or Madam:

I would like permission to copy the following for continued use in my classes in future semesters:

Title: *Learning is Good*, Second Edition

Copyright: Hypothetical Book Col, 1965, 1971

Author: Frank Jones

Material to be duplicated: Chapters 10, 11 and 14 (photocopy enclosed).

Number of copies: 500

Distribution: The material will be distributed to students in my classes and they will pay only the cost of the photocopying.

Type of reprint: photocopy

Use: The chapter will be used as supplementary teaching materials.

I have enclosed a self-addressed envelope for your convenience in replying to this request.

Sincerely,

Faculty Member

F. Infringement

Courts and legal scholars alike have commented that the fair use provisions in the Copyright Act are among the most vague and difficult that can be found anywhere in the law. In amending the Copyright Act in 1976, Congress anticipated the problem this would pose for users of copyrighted materials who wished to stay under the umbrella of protection offered by fair use. For this reason, the Copyright Act contains specific provisions which grant additional rights to libraries and insulate employees of a non-profit educational institution, library, or archives from statutory damages for infringement where the infringer believed or had reasonable ground to believe the photocopying was a fair use of the material. 17 U.S.C § 504 (c) (2).

Normally, an infringer is liable to the copyright owner for the actual losses sustained because of the photocopying and any additional profits of the infringer. 17 U.S.C § 504 (a) (1) and (b). Where the monetary losses are nominal, the copyright owner usually will claim statutory damages instead of the actual losses. U.S.C § 504 (a) (2) and (c). The statutory damages may reach as high as [\$20,000] (or up to [\$100,000] if the infringement is willful). In addition to suing for money damages, a copyright owner can usually prevent future infringement through a court injunction. U.S.C § 502.

If the criteria contained in this report are followed, it is our view that no copyright infringement will occur and that there will be no adverse effect on the market for copyrighted works.

(Many educational institutions will provide their employees legal counsel without charge if an infringement suit is brought against the employee for photocopying performed in the course of employment. If so, this should be noted here.)

Appendix D: Fair-Use Guidelines for Electronic Reserve Systems

Revised: March 5, 1996

INTRODUCTION

Many college, university, and school libraries have established reserve operations for readings and other materials that support the instructional requirements of specific courses. Some educational institutions are now providing electronic reserve systems that allow storage of electronic versions of materials that students may retrieve on a computer screen, and from which they may print a copy for their personal study. 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. If included with permission from the copyright owner, however, the scope and range of materials is potentially unlimited, depending upon the permission granted. Although fair use is determined on a case-by-case basis, the following guidelines identify an understanding of fair use for the reproduction, distribution, display, and performance of materials in the context of creating and using an electronic reserve system.

Making materials accessible through electronic reserve systems raises significant copyright issues. Electronic reserve operations include the

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making of a digital version of text, the distribution and display of that version at workstations, and downloading and printing of copies. The complexities of the electronic environment, and the growing potential for implicating copyright infringements, raise the need for a fresh understanding of fair use. These guidelines are not intended to burden the facilitation of reserves unduly, but instead offer a workable path that educators and librarians may follow in order to exercise a meaningful application of fair use, while also acknowledging and respecting the interests of copyright owners.

These guidelines focus generally on the traditional domain of reserve rooms, particularly copies of journal articles and book chapters, and their accompanying graphics. Nevertheless, they are not meant to apply exclusively to textual materials and may be instructive for the fair use of other media. The guidelines also focus on the use of the complete article or the entire book chapter. Using only brief excerpts from such works would most likely also be fair use, possibly without all of the restrictions or conditions set forth in these guidelines. Operators of reserve systems should also provide safeguards for the integrity of the text and the author's reputation, including verification that the text is correctly scanned.

The guidelines address only those materials protected by copyright and for which the institution has not obtained permission before including them in an electronic reserve system. The limitations and conditions set forth in these guidelines need not apply to materials in the public domain—such as works of the U.S. government or works on which copyright has expired—or to works for which the institution has obtained permission for inclusion in the electronic reserve system. License agreements may govern the uses of some materials. Persons responsible for electronic reserve systems should refer to applicable license terms for guidance. If an instructor arranges for students to acquire a work by some means that includes permission from the copyright owner, the instructor should not include that same work on an electronic reserve system as a matter of fair use.

These guidelines are the outgrowth of negotiations among diverse parties attending the Conference on Fair Use (“CONFU”) meetings sponsored by the Information Infrastructure Task Force's Working Group on Intellectual Property Rights. While endorsements of any guidelines by all conference participants is unlikely, these guidelines have been endorsed by the organizations whose names appear at the end. These guidelines are in furtherance of the Working Group's objective of encouraging negotiated guidelines of fair use.

This introduction is an integral part of these guidelines and should be included with the guidelines wherever they may be reprinted or adopted by a library, academic institution, or other organization or association. No copyright protection of these guidelines is claimed by any person or entity, and anyone is free to reproduce and distribute this document without permission.

A. SCOPE OF MATERIAL

1. In accordance with fair use (Section 107 of the U.S. Copyright Act), electronic reserve systems may include copyrighted materials at the request of a course instructor.
2. Electronic reserve systems may include short items (such as an article from a journal, a chapter from a book or conference proceedings, or a poem from a collected work) or excerpts from longer items. "Longer items" may include articles, chapters, poems, and other works that are of such length as to constitute a substantial portion of a book, journal, or other work of which they may be a part. "Short items" may include articles, chapters, poems, and other works of a customary length and structure as to be a small part of a book, journal, or other work, even if that work may be marketed individually.
3. Electronic reserve systems should not include any material unless the instructor, the library, or another unit of the educational institution possesses a lawfully obtained copy.
4. The total amount of material included in electronic reserve systems for a specific course as a matter of fair use should be a small proportion of the total assigned reading for a particular course.

B. NOTICES AND ATTRIBUTIONS

1. On a preliminary or introductory screen, electronic reserve systems should display a notice, consistent with the notice described in Section 108(f)(1) of the Copyright Act. The notice should include additional language cautioning against further electronic distribution of the digital work.
2. If a notice of copyright appears on the copy of a work that is included in an electronic reserve system, the following statement shall appear at some place where users will likely see it in connec-

tion with access to the particular work: "The work from which this copy is made includes this notice: [restate the elements of the statutory copyright notice: e.g., Copyright 1996, XXX Corp.]"

3. Materials included in electronic reserve systems should include appropriate citations or attributions to their sources.

C. ACCESS AND USE

1. Electronic reserve systems should be structured to limit access to students registered in the course for which the items have been placed on reserve, and to instructors and staff responsible for the course or the electronic system.
2. The appropriate methods for limiting access will depend on available technology. Solely to suggest and not to prescribe options for implementation, possible methods for limiting access may include one or more of the following or other appropriate methods:
 - (a) individual password controls or verification of a student's registration status; or
 - (b) password system for each class; or
 - (c) retrieval of works by course number or instructor name, but not by author or title of the work; or
 - (d) access limited to workstations that are ordinarily used by, or are accessible to, only enrolled students or appropriate staff or faculty.
3. Students should not be charged specifically or directly for access to electronic reserve systems.

D. STORAGE AND REUSE

1. 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, or if the item is a standard assigned or optional reading for an individual course taught in multiple sections by many instructors.
2. Material may be retained in electronic form while permission is being sought or until the next academic term in which the material

might be used, but in no event for more than three calendar years, including the year in which the materials are last used.

3. Short-term access to materials included on electronic reserve systems in previous academic terms may be provided to students who have not completed the course.

Appendix E: Applying Fair Use in the Development of Electronic Reserves Systems, November 2003

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

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

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

To ensure, however, that electronic content is effectively incorporated into e-reserve systems, there must be cooperation among library

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staff acquiring the digital resources and those managing e-reserves operations. They must work together to be certain that the license agreements do not preclude rights to make materials available through e-reserves systems, and that no one pays additional permission fees for uses already covered by a license.

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

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

First factor: The character of the use.

- Libraries implement e-reserves systems in support of non-profit education.

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

- E-reserve systems include text materials, both factual and creative.
- They also serve the interests of faculty and students who study music, film, art, and images.
- Librarians take the character of the materials into consideration in the overall balancing of interests.

Third factor: The amount used.

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

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

- Many libraries limit e-reserves access to students within the institution or within a particular class or classes. Many use technology to restrict and/or block access to help ensure that only registered students access the content.
- Libraries generally terminate student access at the end of a relevant term (semester, quarter, or year) or after the student has completed the course.
- Many e-reserves systems include core and supplemental materials. Limiting e-reserves solely to supplemental readings is not necessary since potential harm to the market is considered regardless of the status of the material.
- Libraries may determine that if the first three factors show that a use is clearly fair, the fourth factor does not weigh as heavily.

SUMMARY

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

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

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