

Challenges in Employing Fair Use in Academic and Research Libraries

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Academic and research librarians are at the heart of copyright policy and practice at their institutions. The balancing features of copyright law—aspects of the law that allow use of copyrighted works without requiring payment or permission—are vitally important to these librarians as they strive to serve a variety of library users. The most flexible (and potentially the most powerful) of these balancing features is the doctrine of fair use, which judges apply to permit uses that benefit society more than they harm rightsholders. Some communities have united behind codes of best practice that help them take advantage of fair use by articulating how that flexible doctrine applies to their core practices. The flexibility of fair use can deter communities from using it, however, when users are unsure how to apply the doctrine to their practice.

With funding from The Andrew W. Mellon Foundation, ARL—in collaboration with American University's Center for Social Media and the Program on Information Justice and Intellectual Property at American University's Washington College of Law—is conducting a three-stage project to help academic and research libraries better employ fair use. The recently completed first stage consisted of confidential interviews with 65 librarians to determine how they were interpreting and using fair use in five key areas of practice: support for teaching and learning, support for faculty and student scholarship, preservation, exhibition and public outreach, and serving disabled communities. In the second stage, the project team will convene a series of round-table discussions with academic and research librarians that will serve as the basis for a code of best practices in fair use for academic and research libraries. Finally, the third stage will involve outreach to academic and research librarians, as well as related groups who influence library policy, such as administrators and university counsel, to promote the widest possible understanding and adoption of the code. This article summarizes the findings from the first stage of the project.

Mission

In general, interviewees reported a strong commitment to obeying copyright law; rarely concerned about their own liability, librarians primarily felt responsible for ensuring their institutions were in compliance with the law. Beneath this general agreement about responsibility, we found a wide variety of practice—some interviewees described a world where permissions were required for any and every use, while others reported making fair use the foundation for ambitious projects.

In many cases, however, interviewees expressed ambivalence about fair use. They were aware of the doctrine, of its status as a flexible “rule of reason,” and of some general categories of behavior it may protect, but they lacked a reliable method for applying it to particular circumstances. Instead of confidently asserting their rights, some interviewees emphasized minimizing the risk and uncertainty associated with copyright by limiting access to copyrighted materials and following arbitrary (but seemingly well-established) “guidelines” that do not have the force of law, but state clear quantitative limits. Familiarity with (and confusion about) other balancing features in copyright often added to the uncertainty surrounding fair use, leading some interviewees to reject fair use where other doctrines also fell short, or to impose unnecessarily on fair use the formalities and limitations required by other copyright provisions.

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Again, interviewees described a wide range of practice, and many were moving forward with confidence on the basis of sophisticated understandings of fair use. What follows is a summary of the cases where practice was not moving forward on that basis, and where a code

of best practices might provide significant guidance. While this article will highlight areas where some institutions could use improvement, we were more than convinced by our interviews that there is enough wisdom and good sense about these issues in the academic and research library community to form the foundation for a clear code of best practices that will help all institutions make better choices in fair use.

Teaching and Learning

In teaching and learning, the core library function where fair use was an issue for some interviewees was the provision of electronic reserves, and relatedly,

support for faculty-curated course management systems such as Moodle and Blackboard. Interviewees described a wide range of strategies for mitigating fair use concerns around these practices, but three dominant strategies emerged:

- limiting the quantity of content that could be made available electronically (e.g., by following rigid quantitative guidelines such as “no more than 10% or one chapter”);
- limiting student access to electronic resources (e.g., by requiring a password for access to electronic materials, or limiting access to course materials to students currently enrolled in that course); and
- shifting to others the responsibility for selection and placement of materials in electronic format (e.g., by deferring to faculty choices or simply allowing information technology departments to operate these resources without library input).

While many interviewees believed some combination of these strategies would help them employ fair use in good faith and avoid unwanted attention from rightsholders, some lacked a clear rationale for exactly how and why these strategies were employed at their institution. Consequently, these interviewees lacked clear answers for faculty and students who questioned their policies, and they were unable to make the case for progressive reforms that many faculty and students thought were needed.

Questions about e-reserves and course management systems were sharpened where video was involved. High-profile controversies over video streaming had put the subject at the top of many interviewees’ minds this summer. Some felt confident that they had chosen a reasonable policy that supported library mission, but others were concerned that they might place their institutions at risk if they provided access to video materials that was on par with textual materials. As a result, some interviewees applied a double standard to video or avoided electronic access to video altogether. Also, some interviewees gave privileged status to video vendors, worrying that small, specialty filmmakers would suffer if libraries used fair use rather than paying for new licenses to use material already in library collections. These interviewees felt a duty to support some vendors, and weighed the possible economic losses of these vendors more heavily than those of other rightsholders.

Finally, some interviewees described difficulty in teaching and advising faculty, staff, and students about fair use. Where interviewees were responsible for teaching classes or workshops on fair use, some said their representations of fair use left these constituencies disappointed. Some taught fair use in terms of strict quantitative guidelines, which prompted the audience to challenge the arbitrary outcomes these guidelines seemed to require. Others taught fair use as an indeterminate and even mysterious doctrine, answering questions about specific situations with probabilistic and non-committal phrases like “it’s hard to say,” and, “I think so, but you can’t be sure.” These interviewees sometimes suggested that obtaining permission is the only sure way to avoid infringing copyright. Many interviewees reported users had unrealistic expectations about the certainty of fair use determinations. However, interviewees reported that even library users with reasonable expectations often left these sessions frustrated and discouraged.

Faculty and Student Scholarship

Interviewees expressed concern about employing fair use in support of scholarship in three main areas: digitizing collections, managing access to collections, and operating interlibrary loan (ILL) programs. Those with the greatest uncertainty typically chose one of four strategies:

- favoring public domain, obscure, and licensed materials;
- limiting access to library holdings;
- deferring or canceling projects that raise copyright concerns; and
- with respect to ILL, many interviewees followed an extra-legal norm known as the “rule of five.”

Several interviewees described digitization initiatives that were downsized, cut short, or never seriously considered due to costs associated with seeking

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permission or making what seem to be tedious case-by-case determinations of fair use. Many of these librarians said they were only going forward with projects that involved works they could be sure were in the public domain, e.g., works published prior to 1923. In most of these cases, interviewees were

acutely aware that they would make different choices if they could give priority to projects that would attract more scholarly interest.

Digitization projects were also shaped by some interviewees' risk management choices. These librarians had significant difficulty judging their institution's risk exposure without a clear idea of core legal rights. These interviewees told us that they took the notoriety of the author or rightsholder into consideration when deciding whether to digitize materials. They suggested that famous rightsholders, especially entertainers, are more likely to bring lawsuits over digitized collections. So in a special collection that includes hundreds of items of correspondence, some interviewees said they would go forward with digitization without seeking permission, but only if the authors were relatively obscure. Collections that mixed items of both famous and obscure origin were edited to remove the "risky" items.

Many interviewees described concerns about allowing access to both digital and physical holdings in special or unique collections. These librarians were wary that they would be responsible if a library user were to "leak" digital versions of these holdings on the Internet. To prevent this, scholars were denied access to materials, or put to considerable hardship because of constraints interviewees imposed on the use of copyrighted materials. In some cases, access was limited to the physical site of the institution. In others, digital surrogates were intentionally degraded (scans were conducted at low resolution, images available only as thumbnails). In still others, scholars were required to sign waivers declaring their purely academic and non-commercial interest in the item at issue.

In some cases, licenses prevented interviewees from supporting scholarly fair use. Licenses that govern access to databases of journal articles, for example, sometimes prevented researchers from conducting high-volume computerized retrieval and analysis of articles, an emerging method of meta-research that is becoming well established among professors and graduate students in the sciences. Interviewees described students and professors who got these projects well underway before receiving complaints from the database operator about their activities, which are arguably fair use. Similarly, licensed materials may only be accessed in formats that prevent fair use copying or manipulation. Some interviewees described real frustration at their inability to persuade key stakeholders that some licenses need to be renegotiated to make more allowance for fair use.

Finally, several interviewees described a practice of operating ILL programs in strict obedience to the extra-legal norm known as the "rule of five." The rule was formulated in the late 1970s as a safe harbor for libraries seeking to comply

with part of Section 108 of the US Copyright Act, but it has no legal authority on its own. Still, many interviewees followed it strictly, and some even used ILL software with the rule of five “baked in,” and for every loan request that exceeded the rule, those libraries dutifully paid the rightsholder (often the Copyright Clearance Center). While this may not ultimately be a hindrance to library mission, it is noteworthy that most interviewees had not considered whether fair use could be useful in allowing a more flexible ILL practice.

Preservation

Fair use concerns in the area of preservation centered primarily on the relationship between the fair use doctrine and other specific provisions in the Copyright Act that are addressed to library preservation practices. Fundamentally, the question for some interviewees was whether they could rely on fair use to take measures for the sake of preservation that the other parts of the Copyright Act (codified in Section 108) may not specifically allow. More specifically, some interviewees wondered whether they could re-format materials under a fair use rationale in those cases. There were significant consequences for interviewees who believed they could not.

These interviewees described materials with inherent flaws and in near-obsolete formats that they currently allow to languish because of their interpretation of the limits of fair use and of Section 108. Books whose acidic paper would eventually turn yellow and brittle were not digitized because they were not yet damaged. A similar rationale was applied to analog audio and VHS tapes. Where the limits of Section 108 made format shifting untenable, these interviewees simply deferred action. As a consequence, materials were trapped in unpopular formats, and subjected to inevitable degradation.

Fair use was a factor for some interviewees in deciding whether and how to engage in capturing and saving material that is only available online, primarily sites published on the World Wide Web. Important cultural events and movements increasingly take place online or are documented there, and unlike books on a library shelf, these sites can disappear completely without notice. Many felt an ethical obligation to collect and preserve these materials. The uncertain status of the rights associated with them deterred some interviewees from going forward. Others had fairly aggressive plans to capture and collect these materials. There was little consensus, however, as to the best practices in this area, especially under fair use. Here, as in many situations where rights are

uncertain, a clearer understanding of when fair use allows libraries to proceed without permission could be helpful.

Exhibits and Public Outreach

Several interviewees expressed frustration with what they perceived as the limits of fair use for designing and mounting exhibits, either physically at their institutions or virtually online. Many of the problems they encountered in connection with supporting research through collection digitization recurred in the context of creating digital exhibits. Donated collections often include copyrighted works of third parties (for instance, correspondence) that cannot be governed by licenses or copyright transfers made by the donor. Rightsholders are often difficult or impossible to find. Some collections might be exhibited in their entirety, but this raises questions about whether the exhibit is suitably transformative to make a fair use claim.

Interviewees often hesitated over these issues in their exhibition projects. In particular, they worried that digital resources mounted in online exhibits could be downloaded from library servers and redistributed online, and they worried about their institutions' liability for this redistribution. In many cases where interviewees proceeded with exhibits, their institutions incurred extensive costs, including staff time to deliberate on copyright questions, as well as licensing costs, and there were typically significant delays associated with these efforts.

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

Access for the Disabled

In some cases, works in one format can be made accessible by creating a new, perhaps augmented, copy of the work, but creating that copy would typically violate copyright unless covered by an exception in the law. Knowledge of copyright law is thus essential to facilitating access, a core library function.

However, few interviewees dealt directly with disability policy or even with the needs of disabled patrons. Although many felt this is part of the librarian's mission, in practice another department usually handles the needs of disabled users. Some interviewees were stopped short by concern that their library or university may not satisfy Section 121 of the Copyright Act, an exception which empowers any "authorized entity" to provide accessible copies to the disabled. As with Sections 108 and 110, interviewees hesitated to apply fair use where another rule gave a simpler answer, even if the answer seemed to be, "No."

Issues arose most commonly when disabilities services departments requested materials on behalf of disabled users. In those cases, interviewees again struggled to find the principles governing appropriate fair uses. They sometimes constructed elaborate scenarios to create artificial scarcity. For instance, in cases where a student needed to use an electronic version of a book, some interviewees believed they should take the hard copy of the book off the shelf and make it unavailable to patrons. They suggested this would strengthen the "effect on the market" argument, as the library would get no additional benefit from the digital copy.

Some interviewees described problems associated with licensed materials. Confusing licenses and limitations imposed by vendors on the materials they licensed hindered these interviewees from serving disabled patrons. For some interviewees, electronic journal materials in commercial databases were not available in a format accessible to the print-disabled. In other cases, materials were protected by digital rights management technology that prevented the use of assistive technology. Even where there were no technical limitations, interviewees were sometimes hesitant to make accessible copies of materials from licensed databases because the terms of database licenses were difficult to discern and may forbid such format shifting. This difficulty could arise either because of the sheer volume of subscriptions held by an institution, or else because of the complexity of the individual license.

Conclusions

Overall, we found that a significant number of academic and research librarians were stopping short of what they believed fair use rights may allow, and they were typically aware that they could go further, but they simply did not know how to best determine their rights in particular situations. At the same time, we found that there is sufficient consensus on core library values related to copyright

and access, and there are enough model actors in the academic and research library community, that the community could productively deliberate on a set of best practices in fair use. Academic and research librarians would benefit considerably from this deliberation within their community, and from the best practices in fair use that would result.

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