MEMORANDUM

TO: Robert E. Sears, Director of Library Services
FROM: Melanie Samples, Reference Librarian
DATE: July 13, 2008
SUBJECT: Legal Issues with the Fair Use of Electronic Reserves

Traditionally, budgetary restrictions at West Greenville College have limited student access to both required and supplemental course texts to print materials. Students either purchased the required texts at the bookstore or checked out originals or photocopies of the supplemental texts from the course reserves held at Circulation in the library. However, recent developments, including the increasing availability and convenience of digital texts, student and faculty demands for electronic delivery of course materials, and our observation that some faculty members were independently making selected course materials electronically available from their course websites, have prompted us to consider allocating funds for an electronic reserves (e-reserves) system supported by the library that would allow students to access and print digitalized versions of course texts from any computer connected to the Internet. Because West Greenville is a small, private college with limited resources and little desire to engage in costly copyright infringement lawsuits, this memo gives an overview of the fair use of e-reserves systems as expressed in public policy, pinpoints recent developments of special concern, and suggests resources for tracking future developments.

Applying Fair Use to Electronic Reserves

The provisions for fair use are outlined in Section 107 of the federal Copyright Act, and they include four factors for determining if the specific use of a copyrighted work for “teaching (including multiple copies for classroom use), scholarship, or research” is a fair use. This is the

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law that has allowed us to photocopy materials for faculty and student use, and the same law applies in the use of copyrighted works in e-reserves. Cornell University offers a safe set of e-reserves guidelines based on the four fair use factors and composed jointly with the Association of American Publishers.\(^2\) Since our status as a private institution puts us in a riskier position than state-supported universities, it might be safe to err on the side of caution in writing our own e-reserves policy.\(^3\)

**Recent Court Decisions that Strengthen Fair Use**

While there have not been any recent judicial decisions relating to the fair use of digital materials for educational purposes, recent fair use cases in the commercial sector set relevant precedents. *Blanch v. Koons*, *Perfect 10 v. Amazon.com*, and *Bill Graham Archives v. Dorling Kindersley* are three cases in which a use was determined to be of a fair use because it was “repurposed” and/or “recontextualized.” Consequently, both our placement of a copyrighted work intended to entertain but used in e-reserves as an educational tool and its placement within the new context of a course can be more fully justified by these precedents.\(^4\)

**DMCA’s Threat to Fair Use**

Despite these favorable recent developments, the Digital Millennium Copyright Act (DMCA) of 1998 threatens our fair use of copyrighted works by limiting our access to them.


\(^3\) Ibid.

Specifically, it prevents the “circumvention of technological measures used to protect copyrighted works.” What this means is that we may not attempt to disable any technological protections, often referred to as Digital Rights Management (DRM) systems, of a copyrighted work in order to gain complete access, even if our intended use is a fair use. A 2006 ruling currently allows for six temporary exemptions from this prohibition, but they are very narrowly defined and will expire in 2009. Only two could apply to our use of e-reserves: 1) DRM on audiovisual works may only be circumvented to create compilations for use in film and media studies classes, and 2) DRM on e-book literary works may only be circumvented when all other digital editions of the work disable the read-aloud function or text-rendering screen readers. Thus, in the implementation of an e-reserves system, we should certainly be aware that some digital materials might be DRM-protected and that it is unlawful to attempt to disable these protections, even if it is only to gain access for fair use.

**Future Developments in the Fair Use of E-Reserves**

Copyright law is certainly not set in stone, and there are three current developments that could impact our fair use of e-reserves and should be closely tracked:


This bill, supported by the Library Copyright Alliance, would not only make the six exemptions to DMCA’s anti-circumvention provisions permanent, but it would extend “the film clip exemption to all classrooms,” and add access of public domain and other works of “substantial

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public interest” as well as access for the purpose of preservation to the existing exemptions. These changes would secure important fair uses of technologically protected works.⁷

- **Legal Challenges to the Google Print Library Project**

The Google Print Library Project is a partnership between Google and several major libraries that is working to include digitalized versions of the libraries’ collections in the online Google Book Search, allowing for full-text searches. It gives users complete online access to uncopyrighted works and access to bibliographic information and a few “snippets” in copyrighted works.⁸ Lawsuits by publishers have been filed against Google for infringing copyright, and a judicial decision could set a precedent for future fair use cases involving digitalized material.⁹

- **Recent copyright infringement suit filed against Georgia State University by Cambridge University Press, Oxford University Press, Inc., and Sage Publications**

This lawsuit, filed in federal court on April 15, 2008, claims that the university violated copyright law by giving students unauthorized digitalized course materials.¹⁰ Although it has not been uncommon in recent years for publishers to threaten prominent universities with lawsuits

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over their extensive use of e-reserves, this is the first to be filed and its decision could possibly define the future of the fair use of e-reserves.

**Suggested Sources for Tracking the Issue**

The legislative bill and the lawsuit above should clearly be monitored if we want to ensure that we continue to comply with the law in our implementation of an e-reserves system. Moreover, other bills, court cases, and association guidelines could appear in the future, and it is in our best interest to stay abreast of these events. Although there are a multitude of possible resources on this issue, some are more timely, relevant, or convenient than others. For example, LexisNexis Academic may be an extensive resource for legal scholarship, but the time involved in publishing a law journal often means that such articles are not timely enough to be of use to us. In contrast, IDocket.com is an excellent way to easily stay up-to-date on a specific court case, but it charges to track information that is free on the Internet with a little more effort. More effective resources and the best ways to keep track of them are included below:

- **Copyright Blogs** ([http://fairuse.stanford.edu/index.html](http://fairuse.stanford.edu/index.html))
  
  Stanford University Libraries hosts a RSS feed entitled “Copyright Blog Posts” which uses Justia Blawg Search to feed new postings of copyright-related blogs. It is a comprehensive source for relevant blogs and extremely easy to subscribe to.

- **Newsnet** ([http://www.loc.gov/rss/copyright/newsnet.xml](http://www.loc.gov/rss/copyright/newsnet.xml))
  
  An email newsletter is available from the U.S. Copyright Office. Although a RSS feed of the same material is available, the email subscription allows the recipient to limit the information to Legislative Developments only, which will be most useful in keeping track of Copyright law.

- **Association of Research Libraries** ([http://www.arl.org](http://www.arl.org))
ARL advocates for fair use and regularly updates their website with information related to the public policy of fair use. A RSS feed subscription to Key Issues would send the latest information on copyright law, and a blog reader filter could help pinpoint the most relevant entries.

- **GovTrack (http://www.govtrack.us)**

This website allows tracking of an individual bill through a RSS feed or email updates. This is an efficient and targeted way to track FAIR USE Act 2007 and any other relative legislation that arises.

- **EBSCO Search Alert**

The EBSCO Search Alert is a valuable tool because it allows tracking of our more narrow concern in copyright law – fair use and e-reserves. It covers a vast amount of information as it scours multiple databases but can be as specific as we set the alert to be.

- **Library Journal (www.libraryjournal.com)**

*Library Journal* is following the Georgia State lawsuit closely, and it has a website which offers an email newsletter that is convenient because it is only sent out once a month but covers issues of great concern to academic librarians, including copyright and fair use. It also offers a more targeted “Copyright and Fair Use” RSS feed.

- **Watch That Page (www.watchthatpage.com)**

This is a service that gives automatic updates when a designated webpage is updated. As we write and eventually implement our own e-reserves policy, it will be useful to monitor how other schools update their e-reserves policies by putting the e-reserve policy pages of prominent schools under watch. An even easier option might be to monitor Stanford Copyright & Fair Use Center’s “Fair Use and Copyright Guidelines and Policies” webpage for updates.
Bibliography


