

Copyrights and Fair Use in For-Profit Academic Libraries

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This article explores copyright law and issues of fair use in for-profit academic libraries. For-profit academic institutions are seeing a steady increase in applicants and enrollment, and libraries related to these institutions exist in a legal gray area in terms of copyright law, specifically with regard to fair use. The law must be more clearly defined and applied with regard to these institutions, so that academic librarians can adequately enforce copyright laws and fair use within the confines of the for-profit academic library scheme.

KEYWORDS *fair use, copyright, for-profit, academic libraries*

As information providers, academic libraries are subject to many areas of law, few of which are less complicated than copyright law. However, copyright law can lead to confusion among librarians, particularly if they are working in the very gray area of a for-profit academic library. These colleges and their associated libraries are relatively new to higher education in this country and, as such, the application of fair use and copyright law to these types of academic libraries lies in a completely undefined area of copyright law.

Copyright law is an intricate area of intellectual property law that stems from Article 1, Section 8, Clause 8 of the United States Constitution, which states that Congress is empowered to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” In drafting the Copyright Act, Congress provided protection to the authors of “original works of authorship,” which include literary, dramatic, musical, artistic, and

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certain other intellectual works (U.S. Copyright Office, 2012). The protection of these works under copyright law exists from the moment the work is fixed and ensures that the creators are compensated and recognized for their works.

Because copyright law has such a direct bearing on libraries, in that they provide patrons with access to works that are either copyrighted or in the public domain (those works that are no longer protected by copyright), Congress incorporated a fact-specific, equitable rule of reason, to the Act that is known as the fair use exception (Heller, 2002). Fair use allows copyrighted works to be reproduced for educational, critical, and news reporting related purposes, including scholarship and research (Burke & Herron, 2004). However, distinctions have been made between fair use reproductions in for-profit libraries versus similar reproductions being made in non-profit academic libraries. However, an important library type has not been addressed by either the law or in court cases: for-profit academic libraries.

For-profit colleges and their associated libraries are a relatively recent addition to higher level education in the United States. Nocera (2011) stated that for-profit colleges:

... can offer class times that are convenient for students, rather than for professors. They can offer online classes, which many traditional universities have been reluctant—or unable—to dive into. They pay professors to teach, not conduct research. A well-run for-profit college could teach its nonprofit counterparts a thing or two about efficiency and innovation.

As such, for-profit colleges have seen a growth in enrollment of 225% in the past 10 years, and the libraries that support that constant influx of students are more strained to provide traditional academic library resources and services (Marklein, 2010). In determining where these for-profit academic libraries fall within the gambit of the application of fair use, it is important to consider the application of fair use to traditional for-profit libraries (such as those within large corporations) and to non-profit academic libraries.

In one of the most notorious cases that applied fair use standards to for-profit libraries, a federal district court found that “large-scale routing of journals to researchers in a for-profit company and the copying of articles by researchers who file them away to create their own mini-libraries, without using them in a transformative way, is not fair use” (Burke & Herron, 2004, p. 10). In the case, Texaco’s librarians were routing journal articles to a researcher named Dr. Chickering, at which point he would copy and file articles to create a mini-library for himself (*American American Geophysical Union v. Texaco, Inc.*, 1995). In determining whether Chickering’s mini-library, and as an extension the routing of the journal articles by Texaco’s librarians, was fair use, the court looked at four factors that are standard in any fair use case: the purpose of the use of the copyrighted materials;

the nature of the copyrighted works at issue; the amount of the copyrighted works that were copied; and the effect on the market in which the copyrighted works are bought and sold (*Campbell v. Acuff-Rose Music, Inc.*, 1994).

The first factor of fair use—the purpose of the use of the copyrighted materials—was determined by the court to fall against Texaco. Because Texaco, and therefore its library and the funneling of materials to Dr. Chickering, is for-profit, the use was considered commercial. In considering this factor, the court looked at whether the use made by the library and Dr. Chickering was transformative of the original work; however, because simple copies were being made, the use was not found to be transformative. Interestingly, the court noted that the purpose of the copies made by Dr. Chickering were neither for-profit nor non-profit educational and existed in a gray area, but Texaco was still unable to win on this point. Personal copies in a for-profit institution, the court concluded, are not fair use.

The second factor in fair use, the nature of the copyrighted work, comes into play because the copying of informational, scientific, or factual work is more favored than the copying of creative works (due to the amount of perceived effort to create the copyrighted work). The court found this factor to be in Texaco's favor because the works given to Dr. Chickering by the library were fact-oriented and not creative in nature. Texaco lost the last two fair use points by a landslide: the library (or Dr. Chickering, himself) was copying every issue of several journals that came into the company's library for Dr. Chickering, and the court found that the journals were losing money because Texaco was not purchasing multiple subscriptions, thereby adversely affecting the market for the journals. Burke and Herron (2004) were careful to point out that no court has ever said that all copying in for-profit institutions infringes fair use, but that "institutional, systematic, and archival multiplication" is likely to be found to infringe fair use in every case (p. 11).

Fair use in non-profit academic libraries is treated differently than it is in for-profit libraries, but "librarians often feel ill-equipped to make decisions about fair use and increasingly have as their primary goal avoiding litigation and harm to their institution, regardless of what the law allows and what the user community needs" (Kelley, 2011, p. 12). The Copyright Act of 1976 is seemingly clear on what is and is not fair use in an academic library setting. Section 108(a) states:

Except as otherwise provided in this title...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, except as provided in subsections (b) and (c), 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 the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
3. the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

Although the law may seem clear-cut to the Congress that drafted it and the lawyers who interpret it, it is often misread or ignored by librarians for fear of infringing the law. In the end, “failure to employ fair use affirmatively and consistently impairs the accomplishment of the academic and research libraries’ mission” (Adler, Butler, Aufderheide, & Jaszi, 2010, p. 1).

The basic rules for abiding by fair use in academic libraries are that limited copies can be made but that reproduction is not to be “used for any purpose other than private study, scholarship, or research” (Copyright Clearance Center, n.d.). Guidelines that have been frequently published in and around academic libraries state that 10% or 1,000 words (whichever is shorter) of a print resource may be copied for the above-stated purposes, but the guidelines do not allow for the copying of an entire chapter of a work, even if it falls within the guidelines. By laying out guidelines for academic library patrons such as these, academic librarians can avoid confusion regarding what falls under fair use, and the academic library can fulfill its purpose of providing open access to information to all patrons.

Therefore, where do for-profit academic libraries fall on the spectrum between the Texaco case and the Copyright Act’s Section 108(a) guidelines for libraries? Currently, no cases have been adjudicated on the matter, so it is left purely up to speculation by legal scholars and librarians. Because no court has ever said that all copying of copyrighted works by for-profit institutions and libraries, academic or otherwise, violates fair use, an interpretation of the law that weighs heavily in favor of for-profit academic libraries is reasonable. After all, they are still institutions of higher-education that seek to educate students and provide resources for faculty who are interested in research and publication (even if that is not their primary professional goal).

Because the most important purpose of copyright law is to promote the spread of knowledge, and because for-profit academic libraries are trying to do just that (even if their over-arching goal appears, to those in traditional education environments, to be turning a profit through student recruitment), librarians in these types of institutions would be wise to stay proactive in the fight against copyright infringement (*United States v. Paramount Pictures*,

1948). This proactivity can involve things such as educational seminars and fliers explaining copyright law and fair use; information on the library's Web site about the issues; prominent displays of copyright notices near all copy centers, including printers and photocopiers; and informational sessions with the faculty so they are kept abreast of fair use issues and what is and is not appropriate.

In addition, networking between these for-profit academic libraries can be an effective way to curb excessive copying; although non-profit institutions may be reluctant to share resources with for-profit libraries, a network of similarly situated for-profit libraries can help students and faculty find the information they need without necessitating excessive copying of library resources. These for-profit academic libraries should also keep the four factors used in the *Texaco* case in mind when allowing students and faculty to make copies of copyrighted materials: the purpose of the use must be educational, scholarly, or research driven; the nature of the copyrighted work being copied should be informational, scientific, or factual; the amount copied must be minimal, preferably less than 10% or 1,000 words, whichever is shorter (when dealing with printed material); and the copying should, if at all possible, have little-to-no effect on the market for the copyrighted work.

Although these guidelines may seem difficult to remember or follow, academic librarians (whether in for-profit colleges or large, non-profit universities) should be well-versed in the intricacies of the law and prepared to enforce fair use in their libraries. Educating students, faculty, and staff on the importance of using copyrighted information for educational purposes is a step in the right direction, and by upholding the standards and mission of the academic institution, librarians in for-profit libraries will automatically start their quest to maintain fair use of copyrighted materials off on the right foot. By remaining cognizant of the changes in the country's copyright laws, as well as the changes in the state of higher education in this country, academic librarians can maintain high standards of excellence within their libraries, regardless of profit status.

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