

In July, 1994, President Carol Billings appointed the Special Committee to Advance the Fair Use of Electronic Information Resources in Law Libraries and by Law Librarians. Dubbed the "Electronic Fair Use Committee," its charge was to develop policies/guidelines relating to the fair use of electronic information resources in law libraries and by law librarians with specific reference to networking, downloading, retransmission, re-use and combining information, and to any other relevant issues.

Comprised of both librarian and publisher/vendor members, the committee began to hold hearings to determine what AALL members believed to be fair use in the electronic environment. Publisher members were unable to speak for their companies in the development of guidelines, and ultimately they recommended that the librarian members of the Committee proceed with guidelines on their own. The following guidelines represent this effort. They were adopted to the AALL Executive Board in July, 1997. The Copyright Committee has continuing responsibility for these guidelines as well as others relating to intellectual property.

Members of the committee:

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Guidelines on the Fair Use of

American Association of Law Libraries

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1. Introduction

1.1 Preamble

Fair use is a legal principle that limits the exclusive rights² of copyright holders. The purpose of these guidelines is to provide guidance to law librarians on copying by the library and by users under fair use, rather than by authorization from the copyright owners.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act³ sets forth four fair use factors that should be considered in each instance, based on the particular facts of a given case, to determine whether a use is a "fair use": (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.

Much of the copying covered by these guidelines is permitted under §108 of the Copyright Act.⁴ The exemptions provided in §108 are available to all types of libraries that meet the requirements of §108(a). To qualify for the §108 exemptions, a library must be open to the public or to researchers doing research in a specialized field, each copy reproduced must contain a notice of copyright, and the copying must not be for direct or indirect commercial advantage. A law firm or corporate library that makes its collection available to others for research, including by interlibrary lending, may qualify for the §108 exemptions if it meets the other §108(a) requirements.⁵

These guidelines describe conditions under which fair use should generally apply. Uses exceeding these guidelines may or may not be fair use. The more one exceeds these guidelines, however, the greater the risk that fair use does not apply. AALL believes

that operation within these guidelines provides a safe harbor, although only the courts can determine authoritatively whether a particular use is fair use.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain for which there are no restrictions (such as facts, U.S. government works, or works on which copyright has expired) or to works for which the institution has obtained permission for the particular use. In some cases, license agreements or contracts may govern the uses of some works; users should refer to the applicable license or contract terms for guidance on the uses of those works.

These guidelines represent the Electronic Fair Use Committee's collective understanding of fair use in law libraries. This Preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by libraries or their parent organizations and institutions.

1.2 Background

The AALL Electronic Fair Use Committee was appointed to develop guidelines on the fair use of legal materials by U.S. law libraries. These guidelines represent recommendations for "best practices" in all types of law libraries. Because of differences in types of institutions and different uses made of copyrighted works and because certain exemptions apply only to nonprofit educational institutions, some guidelines relate only to one type of library. Government libraries, such as court, county and agency libraries, and bar association and other membership libraries, are nonprofit libraries and generally fall somewhere between law school and law firm libraries in these fair use guidelines.⁶

These guidelines cover the reproduction, distribution, and display of copyrighted works, or substantial portions thereof, whether published in print or available in digital format. Further, the copying may be analog (i.e., photocopying or microform) or electronic (i.e., scanning). What constitutes fair use may vary, however, based on the original format of the material and the reproduction and

Copyrighted Works by Law Libraries¹

distribution technology utilized. The guidelines assume that the library's "original" copy is a legal copy.

1.3 Notice of Copyright

A notice of copyright should appear on each copy reproduced.⁷

1.3.1 Printed Copies

On printed copies this may include the actual notice (©, the word "copyright," or the abbreviation "copr.,"; the name of the copyright holder and the year of first publication); the words "This material is subject to the United States copyright law; further reproduction and distribution in violation of that law is prohibited," or the words "Notice: this work may be protected by copyright."

1.3.2 Electronic Copies

On electronic copies, include the actual notice, if available, and the following notice: "No further reproduction and distribution of this copy is permitted by transmission or any other means."

2. Reproduction of Single Copies within the Firm, Law School, Court, etc.

2.1 Copying from the Library's Own Collection

Section 108(d) provides that a library which meets the §108(a) requirements may, at the request of a user, reproduce one copy of an article from a periodical issue or other contribution to a collective work either from material the library owns or from material owned by another library. The copy must become the property of the user. The library must post the warning prescribed in 37 C.F.R. §201.14 at the place where the orders are placed, and must include it on the order form. Further, the library should have no notice that the user will use the copy for other than fair use purposes.

Fair use purposes include such use as preparation in teaching, background research for drafting a court opinion, a client letter, a brief or a memorandum of law, and writing an article or book.

Attorneys may offer into evidence in court proceedings reproductions of court opinions, statutes, articles, and sections of treatises. This also includes use of a copy to file as required in an administrative proceeding.

2.1.1 Printed Copies of Printed Works

To satisfy a user, a library may make a photocopy or other printed copy of a printed work such as an article, a chapter or portions of other copyrighted works.

2.1.2 Electronic Copies of Printed Works

To satisfy a user's request for a copy described in 2.1 above, a library may scan an article from a periodical issue, a chapter, or portions of other copyrighted works and provide an electronic copy to the user in lieu of a photocopy. Because the copy must become the property of the user, the library may not retain the scanned image for later re-use. A copy may be faxed or otherwise transmitted electronically to the user, but the library should destroy any temporary photocopy made incidental to the transmission. In other words, an incidental copy made to facilitate transmission is fair use, as long as that copy is not retained.

2.1.3 Printed Copies of Digital Works

Unless prohibited or restricted by the terms of a valid license agreement under which the library obtained the digital work, a library may print a copy of an article, a chapter, or portions of other copyrighted works at the request of a user for fair use purposes.

2.1.4 Electronic Copies of Digital Works

Unless prohibited or otherwise restricted by the terms of a valid license agreement under which the library obtained the digital work, a library may download a copy of an article, a chapter, or portions of other copyrighted works to satisfy the request of a user and forward it electronically to the user.

2.2 Obtaining Copies from Another Library

2.2.1 Interlibrary Loan Photocopies

Libraries may request single copies of articles, book chapters, or portions of other copyrighted works from the collection of another library to satisfy user requests as described above. The receiving library may deliver the copy to the user in electronic format as detailed in 2.1.2 above. Libraries of all types should follow the CONTU Interlibrary Loan Guidelines⁸ suggestion of five. The more a library exceeds the suggestion of five, the less likely it is that the interlibrary loan request is fair use.

2.2.2 Receipt of Electronic Copies for Interlibrary Loan

Libraries may request electronic copies of works through interlibrary loan, but the borrowing library should follow the suggestion of five. Neither the borrowing nor lending library may retain the scanned image for subsequent use.

3. Single Copies for External Users⁹

3.1 Printed Works

3.1.1 Academic, County, and Court Libraries

Under §108(d), nonprofit libraries may provide a single copy to an external user upon request from that user. See 2.1 above. The copy provided may be either a photocopy or an electronic copy. Consistent with §108(a)(1), the library may charge a reasonable fee for making the copy as long as the charge does not exceed reasonable cost recovery.

3.1.2 Law Firm and Corporate Libraries

Firm and corporate libraries may provide a single copy of an article, a chapter, or a portion of another copyrighted work to clients to support work done for the client. The copy provided may be either a photocopy or an electronic copy.

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3.2 Digital Works

Terms of a valid license agreement may prohibit such reproduction for external users or may limit the external constituencies to which a law library may supply either print or electronic copies of digital works. If the license agreement is silent on providing copies to external users, then the library may make either printed or digital copies for external users.

4. Multiple Copying of Copyrighted Works

4.1 Generally

Multiple copying is limited under the Copyright Act and under these guidelines. Section 108 of the Act (the library exemption) is restricted to single copies. There are, however, instances in which multiple copying might be considered fair use.

4.1.1 Academic Law Libraries

Under the Classroom Guidelines,¹⁰ nonprofit educational institutions are permitted to make multiple copies of articles, book chapters, and portions of other copyrighted works for classroom use. The Classroom Guidelines restrict use to one term, plus they impose tests such as brevity, spontaneity and cumulative effects. Scholars, librarians, and publishers agree that uses within the terms of the Classroom Guidelines are fair.

The Guidelines appear designed to cover the typical situations in elementary and high schools. In higher education, however, most scholars and librarians believe that fair use encompasses copying of material considerably beyond that which is permitted in the Classroom Guidelines. The word limitations are especially problematic for legal education. These AALL guidelines address library uses specifically; they do not address the needs of legal education.

Academic libraries may make a limited number of copies of articles, chapters, and portions of other copyrighted works for library reserve collections as an extension of the classroom. Copies may be photocopies or in electronic format. Likewise for nonprofit law school-sponsored continuing legal education programs, multiple copying for participants may be permitted under the Classroom Guidelines.

4.1.2 Other Law Libraries

Multiple copying generally is not permitted. There may be instances, however, where multiple copying would be permitted under fair use. The library should carefully examine the request to reproduce multiple copies and apply the four fair use factors to determine whether making the copies qualifies for the fair use exemption.

4.2 Preservation

Under §§108(b)–(c) of the Copyright Act, a library may make a single copy of either a published or unpublished work for preservation purposes under specified conditions. It is widely accepted by both librarians and publishers that, in accordance with national preservation standards, it is also permissible to make up to three copies of the work for the same purposes and under the same conditions, as long as only one of the copies is in use at a time and the others are stored or archived. Such copies may be in analog or digital formats.

4.3 Reproduction of Newsletters

Libraries generally may reproduce only small portions of copyrighted newsletters. All types of libraries should avoid multiple copying of newsletters.¹¹

5. Reproduction of Database Search Results

5.1 Signed License Agreements

Most libraries sign license agreements to obtain access to legal databases. When such an agreement exists, the library should comply with the terms of the license.

5.2 Redistribution of Results—Single Copy to a User

Distribution of database non-public domain search results to a single user clearly is permitted under fair use. This includes providing a copy of search results to a law firm client.

5.3 Redistribution of Results—Multiple Users

Absent a license agreement that restricts redistribution of non-public domain research results, redistribution to multiple users may be permitted. Libraries should seek permission for multiple distribution of research results whether by print or via

electronic means if that use exceeds these guidelines.

Endnotes

1. Users of this policy are encouraged to reproduce and distribute the policy freely without permission. They should note, however, that because digital technology is in a dynamic phase, there may come a time when it is necessary to review the guidelines.
2. See 17 U.S.C. §106 (1994).
3. The Copyright Act of 1976, as amended, is codified at 17 U.S.C. §§101–1101 (1994).
4. In addition to §107, §§108, 109, 110, and 117 of the Copyright Act of 1976, 17 U.S.C. §§101–1101 (1994) are relevant to these guidelines.
5. H.R. Rept. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in *Omnibus Copyright Revision Legislation 75* (1977).
6. Law firm and other law libraries in the for-profit sector should be aware that the *Texaco* decision, 37 F.3d 881 (2d Cir. 1994), may apply to them and may supersede these guidelines. The 1996 AALL Model Law Firm Copyright Policy cautions against reproduction of articles for later (rather than current) use and creating personal libraries. See 1 *AALL Spectrum*, Dec. 1996, at p. 28–29, and AALL's home page.
7. See *id.* §108(a)(3).
8. H.R. Rept. No. 1733, 94th Cong., 2d Sess. (1976), reprinted in *Omnibus Copyright Revision Legislation 72–74* (1977).
9. I.e., secondary users not affiliated with the institution.
10. H.R. Rept. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in *Omnibus Copyright Revision Legislation 68–70* (1977).
11. Even single cover-to-cover copies of newsletters may be a problem. Law firms should consult the AALL Model Law Firm Policy concerning single copying of small portions of newsletters.