



Copyright for Educators

Miss Misbah Saboohi¹

¹Lecturer at Prince Sultan University (PSU), Riyadh KSA

ABSTRACT

New avenues are being opened in the search for knowledge and for easy access to subjects, materials, topics and now even teaching the student through online methods. This needs a new analysis of copyright law and rights & safeguards of authors and those who need to use materials for their need based education i.e. students and teachers. University education has become very dynamic due to the fact that many online degree and diploma programs have been started by universities across the world. Now without travelling, many professionals and students in various parts of the world can obtain educational certificates from accredited universities. The challenge is now to see how the knowledge is being imparted without breaching major legal rights of genuine holders of those rights.

The sources of knowledge have now brought digital libraries to our home fronts. Major sources are accessible by students and teachers on line. This poses a threat to copyrights of the scholars and authors. Their books, writings, etc can be downloaded in many parts of the world in the name of "fair use" defense in education. Electronic books are also easily available and are being used, copied, and distributed without knowledge of the authors. Hence commercial rights, sometimes even moral rights are not protected. But Fair use defense is available in field of education for teachers and students. Due to expansion on online education processes this defense is to be understood properly by users so that works protected by copyright is not used without due rewards and acknowledgement of the hard working authors.

This article shall explore the following through various legal instruments :

- Copyrights for the authors
- Challenges to copyright after technology revolution in education
- Librarian duties to protect copyrights
- Students and fair use defense
- Remedies and recommendations for protection of copyrights in the field of education.

1. Introduction

The education systems and educational institutions have undergone many changes and over-hauling in the last 20 years. Unlike traditional methods of books and workbook teaching manuals, now University faculty members are under increased pressure to use computers to disseminate information. Students also now want access to class notes, overheads, and assignments though not books, but learning systems over the web based tools of teaching. Administrators of the educational institutions demand courses to be taught over the Internet or through the learning management systems (LMS). Whether posting information on a personal web page, posting to a server, or creating an Internet course, in all these areas and scenarios 'copyright law' must be considered². Although most universities have a copyright policy, but few offer copyright knowledge, information or even training to their faculty.³ Many faculty members know that copyright law exists, but they have not been informed fully of its scope or how it applies to them. Interesting part is that educational institutions struggling with funding woes can't afford to ignore the potential windfalls they might receive from their intellectual property. Many teachers

¹ The author is the Law graduate from International Islamic University Islamabad Pakistan and LLM from University of Cambridge UK. She has 20 years experience of teaching Law subjects in various international universities. She specializes in Commercial law, Public International Law and Intellectual property Law. Currently she is Faculty member in PSU, Saudi Arabia; in its Law department.

² Draska, Van., S, Meridee.. "Copyright in the digital classroom." Journal of Allied Health 3(2003):185.

³ Cate FH, Gumpert PJ, Hauser RK, et al. Copyright issues in colleges and universities. Academe. 1998;84:39-45.

prepare valuable study materials for the institution and the students which remains property of the university. It can be used to generate revenue for the institution. But no one is aware of this benefit of copy rights. Most institutions are not aware of their valuable intellectual property, and some believe they have intellectual property when they don't, which can lead to expensive lawsuits or licensing fees.⁴

Another part of this pending problem of intellectual property in education system is the role of the libraries. Clearly, academic library patrons are lacking in fundamental knowledge about Intellectual property law and the concepts of defense of fair use or other exceptions. Faculty and students are increasingly demanding instant access to everything they need online, and are upset when it is unavailable.⁵ This can be problematic because course readings, books, and journal articles, while serving an educational purpose, are still subject to copyright law. Due to lack of effective role of the libraries, publishers of these books are more likely to take action against academic institutions for copyright violations to preserve the shrinking profit margins brought on by the tightening markets.⁶ Hence this article will show a direction about the legal issues that can arise for the educational institutions in modern times of technical educational resources, for the teachers and the students alike about copyright Law and how to resolve them in case the matter ends up in Law court.

What is copyright? In this study, it will be sought to analyze rules and case law to legal issues related also to Internet use and to determine the implications of those laws for educational institutions e.g.⁷:

- What legal use can educators make of protected information on the Internet?
- What are the consequences of copyright infringement?
- What are the consequences of improper use of information on the Internet?
- How do "fair use" and "public domain" exceptions to copyright law apply to educational use of the Internet?
- How can educational organizations avoid infringement of protected information?
- How can liability for educational use of information on the Internet be avoided?
- Is it legal for schools to set computer usage policies that restrict access to certain Internet sites?

It is important to first know what the concept of Copyright is. Copyright is a kind of intellectual property, which means:⁸

2. Expression of an Original Idea

A work is original under copyright law when it is an independent creation and not copied from another work. The subject of the work does not need to be new or unique, nor is the inclusion of information quoted from other sources prohibited for the work to be original under copyright law. It is only necessary that the completed work be the author's work based on his or her own idea.⁹

3. Expression is in a Fixed Form

A work is fixed when the manner in which it has been expressed "*is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration*". Examples of original works expressed in fixed form are books, notes but now also include any e-mail message; e-newsletters, magazines, or newspapers, whether placed in part or in whole on the Internet; the content of an Internet conference or seminar.

The protected rights of an author in his or her work under copyright law include the exclusive rights to:¹⁰

1. Reproduce the work.
2. Distribute copies of the work through selling, leasing, giving away, or any method of transferring or passing one or more copies of the work to another.
3. Prepare derivative works based on the work by revising, modifying, arranging, or otherwise preparing a new or different version of the work.

⁴ Stroder, S. Rebecca.. "What Every School Should Know About Intellectual Property." Education Digest, The. 01 Feb. 2006: 35.

⁵ Bay, T, Mark.. "Libraries and the need to educate users about copyright and fair use." Library Hi Tech News. 01 Jun. 2001: 10.

⁶ Wagner, K.I. (1998), "Intellectual property: copyright implications for higher education", Journal of Academic Librarianship, Vol. 24, pp. 11-19

⁷ Johnson, Kevin., Groneman, Nancy.. "Legal and illegal use of the internet: Implications for educators." Journal of Education for Business 3(2003):147

⁸ Ibid

⁹ Feist Publication, Inc. v. Rural, Telephone Service Co., 499 U.S. 340, 1991

¹⁰ www.wipo.org

4. Perform the work publicly by reading, singing, or otherwise expressing the content of the work in front of at least one other person.
5. Display the work publicly by posting, showing, advertising, or otherwise presenting the work in some manner that allows it to be seen by at least one other person.¹¹

The Copyright remains for lifetime of the author and 50 years after his/her death.¹²

There are also some exceptions to this right of the authors. The law specifically lists items that are not protected are :¹³

- a. Words and short phrases such as names, titles and slogans; familiar symbols or designs;
- b. Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in writing.
- c. Blank forms, such as time cards, graph paper, account books, diaries, scorecards, address books, report forms, order forms which are designed for recording information and do not themselves convey information.
- d. Works consisting entirely of information that is common property containing no original authorship, such as, for example, standard calendars, height and weight charts, schedules of events, and lists or tables taken from public documents or other common sources.
- e. Typeface as typeface.

There is also widespread photocopying of notes, chapters by teachers every day .A teacher is allowed to make only enough photocopies of a journal article to provide one for each class member. He or she cannot keep a file of extra copies. "The nature of the work" deals with whether the material is fact or fiction. Facts are not protected by copyright, but one must use his or her own words to express those facts. However, the law does not protect teachers or graduate students working for the institution. Any work produced by them is the property of the institution and only it can use it for any commercial or distribution needs. If a teacher or graduate student posts infringing material on the college's website, he or she may be liable for damages to the copyright owner.¹⁴ The main liability under Copy right infringement is award of monetary damages equal to market loss of customers. Also cancellation of the license of the institution and restraining orders from the courts.

The other part of this law of interest to educators is the portion that studies issues associated with distance education.¹⁵ The case of Basic Books, Inc. v. Kinko's Graphic Corp is an example in which the courts ruled for the copyright owner. In this case, Basic Books along with eight other publishers sued Kinko's claiming copyright infringement for copying excerpts of publications in course packs sold to college students without permission. The same course packs were used semester after semester. The court ruled in favor of the publishers and against the users .¹⁶

Part of the problem is that students, faculty, and staff of academic institutions show a serious misunderstanding and even sometimes a willful flouting of copyright restrictions. On October 6, 2000, the Indiana Daily Student, the daily student newspaper of Indiana University-Bloomington, reported that Metallica (a rock band) sued Indiana University, Yale University, and the University of Southern California for providing access to Napster (an online music trading service) and facilitating the theft of their intellectual property. IU, Yale, and USC blocked access to the Napster Web site to avoid the lawsuit, drawing loud cries of protest from the student bodies. One man said at IU, according to the story, "... *I do not see anything wrong with sharing files, so I don't think [Napster] should have been banned.*" Similar responses were reported from the other institutions named in the suit. Faculty misconceptions about copyright law are also common.

We all should know that there are some exceptions to the copyrights of the original author which need to be balanced while applying the law. These are called "defenses of Fair use" . What is allowed to be copied for the following reasons is not infringement.:

1. Criticism and comment. It is permissible to copy portions of a copyrighted work when the purpose of the copying is to use the copied portions in a criticism of or a comment about the work.

¹¹ The owner's right to reproduce the work; this may be in the form of paper copies, audio recordings, film, or other media. The right of the owner to prepare derivative works are those based on the original. For example, a person cannot write and publish a book using characters from a favorite television show. The production company owns the copyright for that program and controls use of the characters. The fourth right applies to literary works, music, choreographic works, or motion pictures. Here the owner controls the right to perform or show them publicly. Finally, the owner controls the right to display literary works, music, choreographic works, motion pictures, still pictures, graphics, and sculptures. This includes display of works on the computer.

¹² In USA this time is 70 years.

¹³ Supra 2 ; "Copyright in the digital classroom."

¹⁴ Lide C. What colleges and universities need to know about the Digital Millennium Copyright Act. Cause/Effect. 1999;22:13-16

¹⁵ Lutzker AP. Primer on the digital millennium. Association of Research Libraries. Available at: <http://www.arl.org/info/frn/copy/ primer.html>. 1999

¹⁶ Basic Books, inc. v. Kinko's Graphic Corp. 758 F. Supp. 1522 (1991).

2. Teaching. The use of copyrighted works for teaching purposes is fair use, but it does not include unlimited use. The copying must be for instructional purposes only.¹⁷
3. Parody and satire. Satire is a type of criticism, and parody is an extension of satire. Because both satire and parody have their roots in criticism, and because criticism is a permitted exception to an author's rights in his or her copyrighted work, the use of a copyrighted work for the purposes of parody and satire is allowed as an exception to copyright law.
4. Scholarship and research. The copying of a copyrighted work for the purpose of scholarship and research has long been recognized as fair use of a work. Only those portions of a work actually needed for research purposes may be copied. Proper credit must also be given by the researcher to the author of the work copied and used in the research.
5. News reporting. Facts as reported or described in a copyrighted work can be copied for the purpose of reporting news. However, neither a educational institution nor a news-reporting agency can simply copy the report of another news-reporting agency. For example, students in a journalism class cannot simply copy news from the New York Times Web site and place it on their own school's Web site without giving credit to the New York Times.

Copies of the works described above can be made for distribution in the classroom if there is a legitimate educational need and to make the copies is time sensitive and there is not enough time to acquire permission from the copyright owner. Also NO part of the decision to make the copies is motivated by:

1. a desire to avoid purchasing the work from which the copies are being made.
2. if such copying is not done more than nine times by a teacher in the same academic year.
3. if each copy contains the proper copyright notice showing the author's name, the title of the original work, and the year of the copyright.

The decision to copy any work cannot come from an administrator or anyone other than the teacher himself who is making the copies. Students may not be charged for being given copies of a copyrighted work, except for the actual copying cost, and the same work can only be copied once by the teacher. Otherwise the work will be deemed to be used for commercial end which is the sole right of the Rights owner. But any piece of information that is in the public domain is no longer protected and can be freely used by anyone¹⁸. It must be kept in view that now due to significant increases in the use of electronic media many national laws of Intellectual property give publishers the right to protect their property through some technical means too e.g. encryption, putting passwords, and other technological means. Libraries and other nonprofit organizations are able to treat materials in the last 20 years of their protection as if they are in the public domain, as long as the uses are 'noncommercial' and a reasonable investigation is made of the 'commercial value of the use'.¹⁹

Broadly speaking the FAIR USE is the defense against copyright law suits mainly for the teachers in teaching and research activities in the educational institutions. But many faculty members are unaware that 'fair use' does not apply to all materials used for an educational purpose. Certain conditions must be met for fair use to apply to protected materials. Therefore it is obvious that teachers, students, library staff and the users of academic libraries need to be taught about copyright and how this complicated and important issue affects them.²⁰ Administrators of education institutions and their librarians have a professional responsibility to educate users on these important issues. The basics of copyright law are extremely important in academia, but especially for librarians as academic personnel most likely to be on the "front lines" of copyright infringement battles. But they are not doing enough to educate patrons about copyright and how it affects the higher education community.

While a basic knowledge of the legal ramifications of copyright is becoming absolutely essential to thrive in the digital environment, staff and users of academic libraries, by and large, display a distinct lack of knowledge of how copyright laws affect them. Such a lack of understanding can and very commonly does lead to copyright infringement, which can result in costly litigation between copyright owners and colleges or universities where the violations occur.²¹ But it has to be understood too that Copyright law is supposed to be about balance. It was designed to balance the rights of the copyright owners and the rights of users. Giving authors exclusive rights to their writings indicates that authors have rights to control and

¹⁷ E.g. Copying a single chapter from a book; an article from a magazine or newspaper; a short story, essay, or poem; and a chart, graph, diagram drawing, cartoon, or picture from a book, magazine, or newspaper, if the sole intent is to use the work in the teacher's own scholarly research or in class preparation. This use does not allow copying for distribution to students or to others.

¹⁸ Supra 7, "Legal and illegal use of the internet: Implications for educators."

¹⁹ Marley, J.L. (1999), "Guidelines favoring fair use: an analysis of legal interpretations affecting higher education", *Journal of Academic Librarianship*, Vol. 25, pp. 367-71

²⁰ Supra 5 "Libraries and the need to educate users about copyright and fair use."

²¹ Ibid "Libraries and the need to educate users about copyright and fair use."

benefit from their works. But that balance has ebbed and flowed over the years. Most scholars and commentators view the most recent adoptions and interpretations of copyright as having shifted the balance toward copyright owners. Hence we need to understand 'fair use' defense parameters more clearly. Books have become very expensive. Web based data bases have also become money making system.

Indeed, a review of 'fair use' case law as well as respective industry practice over the years reveals that what uses may qualify as fair uses continue to evolve and expand, both in response to changes in education, use of technology in education technology as well as changes in societal and consumer expectations and demands.²² Let us see two categories of Fair Use defense.

Classic Fair Use²³

The first category of fair use encompasses what one might describe as "classic fair use" purposes, including commentary, criticism, news reporting, teaching, scholarship, research, and parody.

Artistic Fair Use

This category involves what might be characterized as "artistic fair use" purposes. Here, the user uses an Original Work, in whole or in part, as a component of, or as raw material but without necessarily seeking to communicate anything about the Original Work to the public.

As mentioned before, fair use does not apply to all materials used for an educational purpose. Certain conditions must be met for fair use to apply to protected materials. "Determination of fair use is to be made on a case-to-case basis, with an examination of the particular circumstances of each use".²⁴ It is obvious that library staff and the users of academic libraries need to be taught about copyright, fair use and how this complicated and important issue affects them.²⁵ The overall impression of academicians and academic library patrons is that, since they are at an educational institution, all copying from the books and distributing to students or teachers is fair use.²⁶ This impression is widespread, and is wrong.²⁷ Truly, libraries and universities must fight for scholarly access to information, but they need to balance this against publishers' needs to remain in business with a reasonable profit. "It is essential that the public understand that creativity would suffer without the protection that the copyright provides".²⁸ The concept of fair use has been developed only to facilitate the free use of intellectual property for educational and research purposes, but does not give complete protection from prosecution for infringement to every member of the academic community.²⁹ E.g. in educational settings, the term "plagiarism" is used more frequently by teachers than the term "copyright infringement," but it is the same thing, and the consequences of plagiarism are found in copyright law.³⁰ An educational institution will be liable for infringement committed by its staff and teachers. A teacher commits infringement by his or her own actions but also by allowing his or her students to commit acts of infringement.³¹

> *What is fair use?*

The Copyright Laws sets out the four factors for determining whether a given use of a copyrightable work is a fair use:

1. The nature of the use, whether educational, personal, or commercial;
2. The amount and substantiality of the portion used in relation to the entire work;
3. The character of the work, whether published or unpublished; and
4. The effect of the use on the market for the work (that is, whether the use displaces a sale or avoids payment of a license fee in an established licensing market).³²

> *Fair use and education*

²² Kogan, Jay. "Fair Use in an Evolving Copyright Environment." *Computer and Internet Lawyer*. 01 Nov. 2012: 22

²³ *ibid*

²⁴ Schockmel, R.B. (1996), "The premise of copyright, assaults on fair use, and royalty use fees", *Journal of Academic Librarianship*, Vol. 22, pp. 15-25

²⁵ *Supra* 5.

²⁶ One UCLA student demonstrated this in an interview with the San Francisco Chronicle published September 9, 2000: "We're college students; we should have access to everything..."

²⁷ Marley, J.L. (1999), "Guidelines favoring fair use: an analysis of legal interpretations affecting higher education", *Journal of Academic Librarianship*, Vol. 25, pp. 367-71

²⁸ (Wagner, 1998, p. 12).

²⁹ *Supra* 5,6 "Libraries and the need to educate users about copyright and fair use." *Library Hi Tech News*. 01 Jun. 2001: 10

³⁰ *Supra* 7. "Legal and illegal use of the internet: Implications for educators."

³¹ *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 1963

³² *Supra* 4 . "What Every School Should Know About Intellectual Property."

While authors are granted protection for their work, the courts have realized the value of allowing 'limited use' of protected materials for research and educational purposes for a balance between ownership and use for the advancement of knowledge. This balance was first affirmed in US courts in 1841. Courts have connected the concept of fair use to the right of free access to information to be the basic foundation of the freedom of inquiry.³³ In one case of *Wright v. Warner Books, Inc.*,³⁴ the court held that reproduction of excerpts from several unpublished letters and journal entries by author Richard Wright in a biography of Wright were fair uses as the purpose of the use was informational and a very small percentage of Wright's unpublished materials were quoted by the user. In another case of *Bill Graham v. Dorling Kindersley*,³⁵ the publisher used copyrighted images of posters and tickets to provide visual context for accompanying text. Applying the fair use factors, the court found that:

- i. the use of the posters and tickets was transfer-matively different from the original purpose of the images - the original purpose was to promote sales, while the new use was to remember moments in history. (education)
- ii. the images were all original creative images, but the weight of this factor was limited because the Plaintiffs did not exploit the value of the images.
- iii. the size of the images was reduced.
- iv. Defendant's use did not harm the market for the copyright holder's artwork, and there was no market harm suffered due to lost licensing fees.³⁶

It shows that the fair use exemption is a legal doctrine that is comprised of a four-factor test in the field of education that must be applied to the use of the work. Each factor is weighed equally.³⁷ If a use can be classified as 'fair use', then permission is not needed to use the work. These factors are :

1. Educational use is important and weighs in favor of fair use and commercial use weighs against fair use.
2. Factual works are given less protection than creative works.
3. large amount copying weighs against fair use, whereas a copying small amount would be considered fair use.
4. If the intended use would negatively impact sales of the work, then the use would generally weigh against fair use.

In the first factor, educational use weighs in favor of fair use, as does the second factor, since the books consist primarily of facts. The third factor, the amount, would more than likely weigh in favor of fair use. As for market effect, it is likely that the professor's use would not impact the market; few students would purchase a book to read three chapters. Four factors are for fair use.³⁸ Let us understand the issues through a hypothetical study.

A professor wants to place in the e-reserve collection ten chapters of a book, published in 1980 and now out of print. Is this fair use? The first and second factors remain the same, which favor fair use. However, the third factor has changed. More than likely the amount is too great so the use would not be fair. The fourth factor could go either way because even though the book is out of print, someone still owns the copyright to the work. Let's say that the book is out of print and the copyright owner could not be located after a diligent search. There could be a market effect, but it would probably be minimal. Here, three factors weigh in favor of fair use and one against.³⁹

Let's change the scenario one more time. A book has recently been published and is a best seller. A professor wants to place on e-reserve ten chapters of a 20 chapter book. Is this fair use? First and second factors still weigh in favor of fair use but the third and fourth factors now weigh against, making it a tie. What do we do? In this case, the students should probably either purchase the book or the professor should request permission.

So it is important to remember that all educational use is not fair use. All four factors need to be applied and balanced.⁴⁰ Fair use "is a privilege (not a right) to be used for the copyrighted material in a reasonable manner without owner's consent ". Courts in passing upon particular claims of infringement

³³ Supra 24. (Schockmel, 1996).

³⁴ *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).

³⁵ *Bill Graham v. Dorling Kindersley*, 448 F.3d 605 (7th Cir. 2006)

³⁶ (Of particular note in the Graham case was the court's statement that each reproduced image need not be accompanied by comment or criticism related to the artistic nature of the image to constitute a fair use. This statement has since been cited by defendants in artistic fair use cases to support the position that an artistic fair use need not comment on the underlying work used.)

³⁷ Fair use is about balancing the rights of the copyright holder with the public's right to use the material.

³⁸ Ferullo, L, Donna. "The challenge of e-reserves." *Library Journal* 12(2002):33.

³⁹ Ibid

⁴⁰ Ibid

must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.⁴¹

It is now established that the use of copyrighted works for teaching purposes is fair use, but it does not include unlimited use. The copying must be for instructional purposes only. For example, under the fair use doctrine, a teacher of computer systems may download several Web sites and show them to students to illustrate principles of effective Web design. However, the following exceptions exist:

> *It is not fair use when*

(a) a teacher, without prior written permission, makes copies of another teacher's work for use in his or her own article or book⁴² or

(b) A teacher puts together his or her own anthology of works by others and has it copied for distribution and use in his or her classes;⁴³ or

(c) A teacher videotapes educational programs or other broadcasts for later use in the classroom, if specific permission for such videotaping has not been given.⁴⁴

Copying a single chapter from a book; an article from a magazine or newspaper; a short story, essay, or poem; and a chart, graph, diagram drawing, cartoon, or picture from a book, magazine, or newspaper is not infringement if the sole intent is to use the work in the teacher's own scholarly research or in class preparation.⁴⁵

Copies of the works described above can be made by the teacher for distribution in the classroom if the legitimate educational need to make the copies:

- i. Is time sensitive and there is not enough time to acquire permission from the copyright owner.
- ii. If no part of the decision to make the copies is motivated by a desire to avoid purchasing the work from which the copies are being made.
- iii. If such copying is not done more than nine times by a teacher in the same academic year,
- iv. If each copy contains the proper copyright notice showing the author's name, the title of the original work, and the year of the copyright.

As stated above that the decision to copy any work cannot come from an administrator or anyone other than the teacher who is making the copies.⁴⁶ The law of copyright and fair use is complex, but it strives to balance the rights of copyright holders with the rights of the public, especially the students. Copyright law recognizes that the creators of works should have the right to determine if and how their works are used. However, the law also takes into consideration that there are times when the public should have access to the works without obtaining permission from the copyright holder or paying royalties. There are library and educational exemptions to the law for uses of copyrighted materials.⁴⁷

> *New Categories of materials and works:*

Faculty and students are increasingly demanding instant access to everything they need online, and are upset when it is unavailable. Course readings, books, and journal articles, while serving an educational purpose, are still subject to copyright law. Institutions and librarians must work with the academic community in order to prevent the implications infringement of copyright law and fair use. The following materials may be understood .

a. Anything in public Domain is not protected by Copyright and its free use is allowed.

b. E-reserves. Due to increased use of web based or internet learning systems, new dimension has emerged in University educational resources.

Traditional reserves incorporate all types of materials. However, e-reserves must differentiate between materials because of the copyright law. Generally, it is the fair use exemption that is relied upon for e-reserves. Photocopies of journal articles are usually placed in a file folder for print reserves. In e-reserves most articles are scanned and posted. Increasingly, full-text journal articles are available electronically via licensing mechanisms.⁴⁸

c. Audiovisual works are different. Only very minimal amounts should be placed on e-reserves, and the use must comply with fair use. The distance education exemption strictly prohibits the transmission of audiovisual works, so fair use is the only applicable exemption. Images may be scanned and posted as part of e-reserves, but again the fair use test must be applied.⁴⁹

⁴¹ Lish v. Harper's Magazine Foundation, 807 F. Supp. 1090, 1992

⁴² Marcus v. Rowley, 695 F.2d 1171, 1983

⁴³ Supra 16. Basic Books, Inc. v. Kinko's Graphics Corp.

⁴⁴ Encyclopedia Britannica Educ. Corp. v. Crooks, 558 F. Supp. 1247, 1983

⁴⁵ This use does not allow copying for distribution to students or to others.

⁴⁶ Supra 7. "Legal and illegal use of the internet: Implications for educators."

⁴⁷ Supra 38. Ferullo, L, Donna.. "The challenge of e-reserves."

⁴⁸ the wise librarian will negotiate such licenses to include e-reserves.

⁴⁹ 1. The nature of the use, whether educational, or commercial;

d. Digitized work , it is deemed to be ‘ reproduced’. When it is posted, it is ‘distributed’. If the material is accessed in front of a class, then an argument can be made that the work has been displayed. Again, it is the fair use doctrine that comes to the rescue.⁵⁰

e. Licenses for databases and other materials that specifically allow use for e-reserves are the best route.

f. WebCT, Blackboard, MOODLE or other course management soft wares are now many universities use. The professor and librarian can collaborate in taking the responsibility of posting the materials. The liability shifts to the professor if the professor goes it alone. However, the institution very rarely escapes liability.⁵¹ It is also wise to limit access to only those students enrolled in the class. The material should be available for the duration of the course, be it a semester, quarter, etc. After the designated period has expired, the material should be removed or access denied.⁵²

g. In terms of access to Internet sites, an educational entity has the legal right to set and enforce the conditions under which its property is to be used. This legal right is based on the fact that the school owns the computers, owns or leases use of a Web server, and pays for the lease of the line that allows students, faculty, and staff to have access to the Internet. Although an educational institution has the legal right to restrict use of the Internet, institutional administrators may consider the rights to freedom of the press and freedom of speech and decide not to restrict Internet use, especially at the university level.⁵³ In case of *Harper & Row v. Nation*,⁵⁴ the Nation magazine published excerpts from President Ford's memoirs taken from a manuscript for a book that was scheduled to be published by the Plaintiff. The court held the publication of the excerpts infringed the Plaintiff's copyright and was not a fair use because: (1) while news reporting was the general purpose, this publication had a secondary purpose of supplanting the Plaintiff's right of first publication for commercial gain; (2) the taking of copyrighted expressions exceeded what was required to disseminate the facts, and infringed on the copyright owner's confidentiality and creative control; (3) although the amount of text used was a small portion of the complete manuscript, the portion used was the heart or essence of the work used; and (4) there was direct and actual market harm as Time magazine cancelled its plans to publish the work in serial form and refused to pay \$12,500 to the copyright holder.

h. Libraries are allowed to make single copies of a copyrighted work, if a replacement for a damaged or lost copy is needed , or where a replacement copy is not available for a reasonable price, or a copy is limited to a small portion of a larger work and the patron plans to use it for research or scholarship. The duplication of books or journals to avoid purchasing them, as well as providing copies for teachers without regard for their intended use of the copies, is prohibited. Guidelines allowing libraries to make copies for inter-library loan programs are there, as long as these copies did not replace the need for a subscription in the borrowing library.⁵⁵

A major issue that libraries face is what to do with ‘repeated use’. If a work is used each semester, then fair use gets weaker with each subsequent use. If different professors request the work, then the fair use argument might fly. But if the same professor uses the same work semester after semester, then the argument can be made that the use exceeds fair use and denies the copyright holder revenue. If the library owns a copy of the work, then the fair use argument is certainly a stronger one. However, the amount and market effect can still impact the fair use determinations.⁵⁶

One could also claim that by retaining the ‘electronic copies’ , a new work was created. Since creating a derivative work is one of the exclusive rights of a copyright holder, then it can be a potential infringement. However, the argument can also be made that if access to the material is removed after the semester is over, then there should be no infringement. The library and the institution must make a conscious decision as to how much risk they are willing to assume.⁵⁷ In *Georgia State University (GSU) lawsuit* ,GSU was sued by a coalition of academic publishers for its practices of scanning book chapters, then posting them for classroom use using course- web software or the GSU Library's e-reserve system. GSU policy required faculty members to evaluate their use with a fair use checklist and to limit access to

2. The amount and substantiality of the portion used in relation to the entire work;

3. The character of the work, whether published or unpublished; and

4. The effect of the use on the market for the work

⁵⁰ Linking to the materials is preferable to digitizing and scanning. At present, linking is still legal. The optimal situation is to link to materials either owned or licensed by the library.

⁵¹ Access to e-reserves should always be protected through passwords or other means

⁵² Ferullo, L, Donna. "The challenge of e-reserves." *Library Journal* 12(2002):33

⁵³ *Supra* 7

⁵⁴ *Harper & Row v. Nation*, 471 U.S. 539 (US Sup. 1984).

⁵⁵ Wagner, 1998

⁵⁶ *Supra* 38. Ferullo, L, Donna.

⁵⁷ *Ibid*

students with proper passwords. A federal court in Atlanta found that most of GSU's practices were permitted under the Fair Use doctrine. The court made a very clear statement that academic use "strongly favors" fair use. Of 99 specific infringement claims that the publishers pursued, 94 of them were either found to be fair use or the publishers had not clearly established that they held a legally enforceable copyright in the works.⁵⁸

It is interesting to know that in USA two major guidelines were introduced to resolve the rights of publishers and the educational institutions.⁵⁹ For 'face to face class room' education, the guidelines allow copying of teaching materials for the students but for distance education it does not allow many works from being transmitted to students. TEACH attempts to equalize somewhat the disparities between the physical classroom and the virtual classroom. No consumables such as workbooks or standardized tests should be used for e-reserves unless permission from the copyright holder has been obtained.⁶⁰ They generally do not qualify for fair use. There are two legal issues in student papers or projects that need to be addressed if a professor requests that such materials be placed on e-reserves. Educational records are subject to the protection of privacy and confidential information, and so students must grant permission.

All materials placed on e-reserves must be directly related to the course curriculum and should be requested by the professor. All materials used should be legally acquired copies. For example, a copy of an article from a journal that the library subscribes to is acceptable, whereby a copy of a book chapter from unknown sources is not legal use.

It is advisable in these situations that the library either own or get a licensed copy of the work. The e-reserves material should support the basic texts for the course. All the materials should be directly related to the course. There should also be no charge for access to the materials. If it becomes a commercial venture, then potentially the fair use argument is no longer valid. It is recommended that a copyright notice stating that the material is protected by the copyright law be posted on a screen prior to accessing the e-reserves material.

> *The Digital dilemma*

In the recent past, Google's ambition to digitize the world's books, make the books fully searchable, and many copyright lawsuits emerged as most important subject matter in the field of competing interests of authors, publishers and the fundamental right to know, education and Fair use defense. "Google Book Search case" is used as an example for discussing the broader issue of the desirability of and mechanisms for introducing an affirmative defense of Fair use into copyright law⁶¹ How does Google book search work? Basically there are two pronged things Google did.

4. Publisher Program

When a book has been submitted by the publisher and digitized by Google, a user may perform full-text searches on its content and view a chapter excerpt (typically 3-7 pages).⁶² The user is also provided with links to the book's table of contents, bibliographic information, the book's copyright notice, and the index. A search box allows users to search for additional terms that appear in the book, although limits are placed on the total amount of the book that can be viewed.

5. Library Project

In December 2004, Google reached agreements with the libraries at Harvard University, The University of Michigan, Stanford University, Oxford University, and the New York Public Library to scan parts of their collections of books and make the digitized contents searchable online.⁶³ This will save the libraries substantial copying costs as they attempt to integrate electronic access with their existing service offerings. Users can read the complete book. Google will scan the entire book. When a user searches for a term that appears in the book, a page is returned indicating the number of times that that term appears in the work, up to three instances of the search term including a sentence or two on either side of the particular word or phrase. Google has maintained that it does not need to obtain permission

⁵⁸ Pike, H, George.. "Shifting Balance in Copyright." Information Today. 01 Oct. 2012

⁵⁹ i. CONFU, the Conference on Fair Use, was convened in 1994. Participants included librarians, publishers, and educators. ii. TEACH" (Technology, Education and Copyright Harmonization Act of 2001)

⁶⁰ Consumables are meant to be purchased and used individually

⁶¹ Ganley, Paul. "GOOGLE BOOK SEARCH: FAIR USE, FAIR DEALING AND THE CASE FOR INTERMEDIARY COPYING." Journal of Internet Law. 01 Nov. 2006

⁶² <http://www.print.google.com/googleprint/publisher.html>

⁶³ Google Checks out Library Books, Google Press Release (14 Dec. 2004)

from rights holders to make use of books in the manner described. Many publishers take a different view. The lawsuits followed which alleged that

“ Google has infringed copyright by scanning and making available for commercial purposes copies of books provided by the University of Michigan library and written by the named authors or the unnamed authors represented by the Author's Guild.

The lawsuit also accuses Google of "reproducing for itself a copy of those works not in the public domain" without having obtained authorization from the holders of the copyrights in the works and "reproducing digital copies . . . for its own commercial use and for the use of others" on its commercial Web site.

It further specifies that authors have suffered harm including "depreciation in the value and ability to license and sell their works," "lost profits and/or opportunities," and "damage to their goodwill and reputation..."

Interestingly McGraw-Hill, Pearson, Penguin (USA), Simon & Schuster and John Wiley also filed a lawsuit against Google.⁶⁴ The publishers were not seeking damages from Google. Instead, they requested injunction relief against the operation of the Library Project and an order requiring Google to delete copies of their works from its servers.

Courts considered other factors because fair use is an "equitable rule of reason" to be applied in light of the overarching purpose of copyright law. They analyzed as follows :

stage 1: Nature of the Work:

Despite the fact that a large number of the works made available are factual and descriptive (e.g., reference works), many of the works, including those of the authors were found to be highly creative. In one decision, the District Court found that this factor weighed in favor of the defendant (the copyist) because use of factual works is better "tolerated" by copyright law.⁶⁵

Stage 2: Amount of the Work Used:

The portion of the work copied and then displayed during the second stage is tiny. On average, this factor is likely to favor Google. If it was the case that the entire work is copied it would appear have to strongly favor the plaintiffs. but the overall market for the sale of physical copies of books is unlikely to diminish. In fact it was mentioned that sales of searchable titles have increased by 9 percent relative to non-searchable titles, and sales of searchable reference works have risen even further after launch of Google's programs.

This important case shows us that Courts are trying to find balance between the rights and interests of parties in the field of education and knowledge, but authors have to be more vigilant to be pro-active in the current age of technology.

It is appropriate now, after the whole discussion above, to see what can be the possible protections and solutions available to all in this critical matter. How can educational institutions and libraries resolve the situation, providing their patrons with the services they want while complying with copyright law?

First, there has to be a basic understanding of copyright law and its application. While the copyright law certainly has limitations, it also has tremendous opportunity and flexibility, particularly with the fair use exemption.⁶⁶ Educating teachers, students, library users and library staff about the many facets of copyright law and fair use will give them more of an understanding of the law and how to work with copyright owners to protect their rights, while preserving fair and free access to information.

Know the Rules! By and large, teachers and librarians should know the rules. But not so widely understood is the nature of a university's own copyrightable intellectual property that the teachers create themselves also during preparing their lessons or lectures i.e.-the lectures, teaching aids, musical works, dramatic works, photographs, and computer software etc. Ownership of copyright lies initially with the author, which means the university or school owns all rights in all copyrightable works produced by its faculty.⁶⁷

Someone in the academic community must work to educate the community about copyright. As the group of professionals most often caught in the middle of copyright infringement disputes, librarians have a duty to teach their patrons about these issues and avoid these disputes.

Academic libraries need to start teaching library users about Copyright law, and it is not before time to begin researching and developing instructional experiences and tools on copyright and fair use.

⁶⁴ Publishers' Complaint, 2006

⁶⁵ Basic Books, 758 F. Supp. 1532-1533

⁶⁶ Supra 38

⁶⁷ Supra 4. "What Every School Should Know About Intellectual Property."

Equipping the academic community to understand and appreciate the issues associated with copyright is valuable service that librarians can provide to the academic community as a whole.⁶⁸

The next most important solution is to have an “institutional policy”. Each organization should set a policy that defines infringement, prohibits acts of infringement, and describes how students, teachers can address specific inquiries about an intended use of protected information. It is also necessary then to monitor academics, teachers, students, and others who will have access to protected information to ensure that they use the information according to organizational policy. Anyone found not to be in compliance with organizational policy should be confronted and dealt with appropriately.⁶⁹

School administrators, faculty members, staff, and students must understand when and how they can use information legally that is obtained in the library or lectures or over the Internet. We have to remember that every communication, message, bit of information, image, sound, or design that is in books or library, or appears on the Internet is owned by someone. Therefore, each educational institution should establish a policy for use of the library and Internet facilities by its employees, students, faculty members, and administrators, as well as a specific policy for how information owned by another and taken from the Internet can be used. These policies, which should include uses of Web sites and searches on the Internet, then they must be enforced consistently.⁷⁰ (Having a policy on copyright offers the single best method for avoiding liability for infringement of copyright) The policy must also include recommendations for photocopying in the library and copying materials to the Internet. The policy should be available to all faculty and students through student and faculty handbooks, a separate publication, or at a website.⁷¹ Being familiar with institutional policies helps the teacher understand what is allowed or not allowed on his or her campus.

The university or the library must carefully and consciously make decisions on its copyright policies for e-reserves. Some libraries have determined that all use is fair use. Some maintain that all first-time use for a specific course is fair use but each subsequent use requires permission. Others obtain permission for each use of a work whatever policy is adopted, it is important to be consistent in its implementation. Passwords can be used to restrict access to class members. There is also a suggestion of terminating access to course materials at the end of the semester.

But last but not the least important recommendation is that It is always good to review the policy with the institution's legal counsel !

⁶⁸ Supra 5.

⁶⁹ Supra 7.

⁷⁰ Ibid

⁷¹ Belastock TN. Writing a copyright policy for the campus, College and Research Library News. 1996;297-299.