

AALL Guidelines on the Use of Copyrighted Works by Law Libraries¹

**Approved by the Copyright Committee and AALL Executive Board, MONTH 2014
May 1997, Revised January 2001 and June 2014**

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1. Introduction

1.1 Preamble

The Copyright Act² sets out the rights of copyright ownership³ as well as the limits to those exclusive rights.⁴ Two of the most important limits for law libraries are fair use (§ 107 of the Copyright Act) and the Library Exemption (§ 108 of the Copyright Act). The purpose of these Guidelines is to provide guidance for law librarians on copying by the library and by users under fair use and the Library Exemption, rather than by authorization from the copyright owners.

These Guidelines describe conditions under which fair use and the Library Exemption should generally apply. A particular use that exceeds these Guidelines may or may not be a fair use. The more one exceeds the Guidelines, the greater the risk that fair use does not apply or an exemption is unavailable. The American Association of Law Libraries (AALL) believes that operation within these Guidelines provides a safe harbor,

¹ Formerly the AALL Guidelines on the Fair Use of Copyrighted Works by Law Libraries. The American Association of Law Libraries encourages the free reproduction and distribution of the AALL Guidelines on the Use of Copyrighted Works by Law Libraries without permission. Because digital technology is in a dynamic phase, there may come a time when it is necessary to revise the Guidelines. All institutions should review their own policies to ensure compliance with all applicable laws.

² [Title 17 of the United States Code](#).

³ [17 U.S.C. § 106](#).

⁴ [17 U.S.C. §§ 107-122](#).

although only the courts can determine authoritatively whether a particular use is a fair use or when a library's actions are exempt.

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 in which copyright has expired), or to works for which the institution has obtained permission for the particular use. License agreements or contracts may govern the uses of some works, in particular, electronic information products; users should refer to the applicable license or contract terms for guidance on the use of those works.⁵

These Guidelines represent the AALL's collective understanding of fair use and the Library Exemption 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 Intent

These Guidelines represent recommended "best practices" for all 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 law library. Government libraries, such as court, county and agency libraries, and bar association and other membership libraries, are nonprofit libraries. These types of libraries generally fall somewhere between non-profit law school and for-profit law firm libraries in these Guidelines.

These Guidelines cover the reproduction, distribution, transmission, and display of copyrighted works, or substantial portions thereof, whether published in print or digital formats, as well as audio-visual materials. Copying may be analog (e.g., photocopying or microform) or electronic (e.g., scanning or transmission). The Guidelines assume that the library's "original" copy is a legal copy.

1.3. Fair Use: § 107

Fair use is a legal principle that limits the exclusive rights⁶ of copyright owners. There is no simple test to determine what is fair use. Section 107 of the Copyright Act⁷ lists four factors that must be considered to determine whether a use is a "fair use;" other factors

⁵ [17 U.S.C. § 108\(f\)\(4\)](#).

⁶ See [17 U.S.C. § 106](#).

⁷ The Copyright Act of 1976, as amended, is codified at [17 U.S.C. §§ 101-End](#).

may also be considered based on the particular facts of a given case.⁸ Section 107 states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁹

1.4. The Library Exemption: § 108

Much of the copying covered by these Guidelines is permitted under § 108 of the Copyright Act.¹⁰ 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:

- copying must not be for direct or indirect commercial advantage
- each copy reproduced must include the notice of copyright that appears on the original work or a legend if no such notice appears on the work (see 1.4.1 for additional detail), and
- the collection must be open to the public or available to researchers doing research in a specialized field

⁸ [Campbell v. Acuff-Rose Music, Inc.](#), 510 U.S. 569 (1994).

⁹ [17 U.S.C. § 107](#).

¹⁰ [17 U.S.C. §§ 109](#), [110](#), and [117](#) may also be relevant to these Guidelines.

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.¹¹ Further, the library should have no notice that the user will use the copy for other than fair use purposes.

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

1.4.1 Notice of Copyright Under § 108

A notice of copyright should appear on each print and electronic copy reproduced.

Under § 108, copies should include the notice of copyright that appears on the copy being reproduced. In the absence of such notice, the copy should include a legend such as "This work may be protected by copyright; further reproduction and distribution in violation of United States copyright law is prohibited."¹²

¹¹ Notice Warning Concerning Copyright Restrictions

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use" that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law. [37 C.F.R. § 201.14\(b\)](#).

¹² The Digital Millennium Copyright Act amended [§ 108\(a\)\(3\)](#) to require that a library copy include the notice of copyright that appears on the work. It is not clear from the language of the statute or the legislative history whether this requirement applies to copying the copyright notice in front matter of the volume when copying independently authored articles from a journal or compilation.

2. Reproducing Single Copies within the Firm, School, Court, or Other Institutions

2.1 Copying from the Library's Own Collection

Fair Use: Fair use purposes for copying from the library's collection include teaching, scholarship, or research, such 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 reproductions of court opinions, statutes, articles, and sections of treatises into evidence in court proceedings.¹³ This also includes reproducing and distributing copies as required for administrative proceedings.

Library Exemption: 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.¹⁴ The copy must become the property of the user; it may not be added to the library's collection. The library must post the warning prescribed by the Copyright Office at the place where the orders are placed, and must include it on the order form.¹⁵ Further, the library should have no notice that the user will use the copy for other than fair use purposes.

For-Profit Library Copying for External Users: Libraries in the for-profit sector may provide a single copy of an article, a chapter, or a portion of a copyrighted work to clients to support work done for the client. The copy provided may be either a photocopy or an electronic copy, provided it includes the notice specified in 1.4.1 above.

For-Profit Library Copying for Internal Users: Law firm and other law libraries in the for-profit sector should be aware that the Texaco decision¹⁶ may apply to them. The

¹³ In 2013, the District Court of Minnesota and the Northern District of Texas extended this right in a report and recommendation and memorandum opinion and order (respectively), allowing that law firms including copies of scholarly articles with patent filings were entitled to do so under fair use. See [Report & Recommendation, Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A.](#), No. 0:12-cv-00528-RHK-JJK (D. Minn. July 30, 2013), adopted, [Order, Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A.](#), No. 0:12-cv-00528-RHK-JJK (D. Minn. Aug. 30, 2013) and [Memorandum Opinion & Order, Am. Inst. of Physics v. Winstead PC](#), No. 3:12-cv-01230-M (N.D. Tex. Dec. 3, 2013).

¹⁴ [17 U.S.C. § 108\(d\)](#).

¹⁵ See fn. 11, *supra*.

¹⁶ [American Geophysical Union v. Texaco](#), 60 F.3d 913 (2nd Cir. 1994) held that systematic copying of articles for employees by a for-profit corporate library was not protected by fair use, looking particularly at the fourth factor of impact on potential market for the works.

AALL Model Law Firm Copyright Policy¹⁷ cautions against copying and distributing articles for later (rather than current) use and creating personal libraries. Libraries are also cautioned against systematically routing journals with knowledge or reason to believe that recipients will copy the articles for later (rather than current) use and for creating personal libraries. Libraries may copy tables of contents, but should not solicit requests for copies of articles that would constitute systematic copying.

2.1.1 Copies of Printed Works

To satisfy a user's request, 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.¹⁸

To satisfy a user's request, 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.¹⁹

2.1.2 Copies of Digital Works

Unless prohibited or otherwise restricted by the terms of a valid license agreement, a library may print a copy of an article, a chapter, or portions of other copyrighted works at the request of a user.

Unless prohibited or otherwise restricted by the terms of a valid license agreement, a library may download a copy of an article, a chapter, or portions of other copyrighted works at the request of a user and forward it electronically to the user.²⁰

2.2 Obtaining Copies from Another Library

2.2.1 Interlibrary Loan Copies

A library 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.²¹ The receiving library may deliver the copy to the user in print or electronic format. Neither the borrowing nor lending library may retain the print or digital

¹⁷ [AALL Model Law Firm Copyright Policy](#). Note: as of this revision, the Model Law Firm Copyright Policy is under revision with an expected completion date of July 2015.

¹⁸ [17 U.S.C. § 108\(a\)](#).

¹⁹ [17 U.S.C. § 108\(e\)\(1\)](#).

²⁰ [17 U.S.C. § 108\(a\)](#); 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §8.03(A) (2014).

²¹ [17 U.S.C. § 108\(d\)](#).

image.²² Libraries may request print or electronic copies of works through interlibrary loan, but borrowing libraries of all types should be aware of the CONTU Guidelines (National Commission on New Technological Uses of Copyright Works) suggestion of five.²³ The more a library exceeds the suggestion of five, the less likely it is that the interlibrary loan request is exempt.

2.2.2 Access to Digital Works by External Users

Terms of a valid license agreement may prohibit access to or reproduction of digital works for external users, including interlibrary loan, or may limit the external constituencies to which a law library may supply either print or electronic copies of digital works.²⁴ 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.

3. Multiple Copying of Copyrighted Works

3.1 Multiple Copying in General

Multiple copying is limited under the Copyright Act and under these Guidelines. The Library Exemption is generally restricted to single copies. There are, however, instances in which multiple copying might be considered fair use under § 107 or exempt under § 108.

3.1.1 Academic Law Libraries

Under the Classroom Guidelines,²⁵ nonprofit educational institutions may, under certain circumstances, make multiple copies of articles, book chapters, and portions of other copyrighted works for classroom use. The Classroom Guidelines restrict use to one term, and also 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.

²² [17 U.S.C. § 108\(d\)\(1\)](#).

²³ The suggestion of five permits libraries to copy five articles from the most recent five years of a single title without paying a royalty. All copying of articles over five years old is considered permissible without paying a royalty. Records are maintained by the requesting entity. H.R. Rep. No. 1733, 94th Cong., 2d Sess. (1976), reprinted in Omnibus Copyright Revision Legislation 72-74 (1977). See also the Copyright Clearance Center, [Campus Guide to Copyright Compliance](#), Using Content: ILL (2005).

²⁴ [17 U.S.C. § 108\(f\)\(4\)](#).

²⁵ The Agreement on Guidelines for Classroom Copying in Not-for-profit Educational Institutions with Respect to Books and Periodicals, printed in H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in Omnibus Copyright Revision Legislation 68-70 (1977).

The Classroom Guidelines were designed to cover uses in primary and secondary schools. However, in higher education, including nonprofit law school-sponsored continuing legal education programs, fair use should encompass copying beyond that which is permitted in the Classroom Guidelines. The word limitations in the Classroom Guidelines are problematic for legal education due to the length of most copyrightable legal documents and scholarship.

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. The ALA Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use suggests that no more than six copies be made for reserve for any one class.²⁶ The copies may be print or electronic. In the case of electronic copies, access should be limited to no more than six simultaneous users. For electronic reserves, the institution should take reasonable steps to ensure copies are only accessible to enrolled students.

3.1.2 Other Law Libraries

Multiple simultaneous copying generally is not permitted under the Library Exemption, however there may be instances where such copying would be permitted under fair use. The library should apply the four fair use factors to determine whether making the copies qualifies for the fair use exemption.

3.2 Preservation

Under § 108, a library may make three copies of either a published or unpublished work for preservation purposes under specified conditions (see 3.2.1 and 3.2.2). These exceptions apply to both print and audiovisual works.

3.2.1 Unpublished Works

A library that has a copy of an unpublished work in its collection may make three copies of that work for either a) preservation and security or b) deposit in another library that qualifies for the Library Exemption (see 1.4 above). Digital copies cannot be distributed digitally or used outside the premises of the library.²⁷

²⁶ Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use, American Library Association, Washington Office, Washington, DC, March 1982. For discussion of the ALA Model Policy as an alternative to the Classroom Guidelines, see Kenneth D. Crews, Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education 50 (1993).

²⁷ [17 U.S.C. § 108\(b\)](#).

3.2.2 Published Works

A library that has a copy of a published work in its collection may make three copies of that work for either a) replacement of a damaged, deteriorating, lost, or stolen copy, or b) replacement of a work stored in an obsolete format. Such copies may only be made if, after a reasonable effort, the library determines that an unused replacement cannot be obtained at a fair price. Digital copies cannot be made available to the public outside of the premises of the library.²⁸

3.2.3 Obsolete Devices

Under § 108(c), a library may make three copies of a published work when the format in which the work is stored is a) obsolete and b) the library, after a reasonable effort, has determined that it cannot obtain an unused replacement at a fair price. A format is obsolete if the equipment or device necessary to perceive the work is no longer manufactured or not reasonably available in the commercial marketplace.

3.3 Copying Newsletters

Libraries generally may reproduce only small portions of copyrighted newsletters. All types of libraries should avoid multiple copying of newsletters or routing newsletters if they have knowledge or reason to believe that recipients will reproduce the newsletter or articles therein for later use or to create personal libraries.²⁹

4. Copying Database Search Results

4.1 Signed License Agreements

Most libraries sign license agreements to obtain access to legal and other databases. Because libraries must comply with the terms of a valid license agreement, they should review the terms of all licenses closely. License terms may be binding even if they conflict with copyright.³⁰

4.2 Redistribution of Results—Single Copy to a User

Distribution of database search results to a single user is permitted under fair use unless prohibited by a valid license agreement. This includes providing a copy of search results to any library patron, including a faculty member, student, judge, or law firm client. Public domain information is not subject to any of these limitations.

²⁸ [17 U.S.C. § 108\(h\)](#).

²⁹ H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 73-74 (1976).

³⁰ [17 U.S.C. § 108\(f\)\(4\)](#).

4.3 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 distributions of research results, whether by print or via electronic means, if that use exceeds these Guidelines.

5. Audiovisual Materials

5.1 Lending

The loan of videos for a patron's personal use is permitted under § 109 and the first sale exception.³¹

The loan of a video for use in a face-to-face classroom is permitted as an exception under § 110(1).³² The recording cannot be streamed over a course web page. In addition, the following conditions must be met:

- The teaching activities are conducted by a **non-profit education institution**.
- The performance is in connection with face-to-face teaching activities.
- The performance takes place in a classroom or similar place devoted to instruction.
- The person responsible for the performance has no reason to believe that the videotape was unlawfully made.

5.2 Public Performances

Patrons who check out a library video for their own viewing, or viewing with a small group of friends or family in a library study room or other semi-public space, are not engaging in a public performance of the video. Public performance occurs when a video is shown in an open, public space, or where a substantial number of persons outside a normal circle of friends or family are gathered to view it.³³ In those situations that rise to a public performance, in house or in library viewing is permitted if the video is purchased with public performance rights, or public performance rights are obtained separately from the copyright holder.

³¹ [17 U.S.C. § 109](#).

³² [17 U.S.C. § 110](#).

³³ [17 U.S.C. § 101](#).

5.3 Distance Education

Streaming video in a synchronous or asynchronous online classroom is governed by The Technology, Education, and Copyright Harmonization (TEACH) Act of 2002.³⁴ Under TEACH, performances of non-dramatic audiovisual works are permitted. Only portions of dramatic audiovisual works can be screened in the distance classroom unless a fair use exception under § 107 can be justified (when it is necessary to show the entire film to meet the teaching need), or appropriate permission is obtained from the copyright holder of the video.³⁵

5.4 Preservation

A library that is open to the public or to outside researchers may not create backup copies of a published video recording, or convert a recording from one format to another **unless** the original version is in an obsolete format (see 5.5), or the original copy is damaged, deteriorated, lost or stolen, and the item cannot be obtained at a fair price in the commercial marketplace.³⁶

5.5 Obsolete Devices

Under § 108(c), a library may make a copy of an audiovisual work if the format in which the work is stored is a) obsolete and b) the library cannot obtain an unused replacement at a fair price. A format is obsolete if the device needed to display the work is no longer manufactured or is not reasonably available in the commercial marketplace.³⁷

6. Additional Reading and Resources

For additional reading and resources, see the [Fair Use page](#) on AALLNET.

7. History of These Guidelines

In July 1994, AALL 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.

³⁴ P.L. 107-273, 116 Stat. 1909, codified at [17 U.S.C. §§ 110\(2\), 112\(f\)](#).

³⁵ [17 U.S.C. § 110\(2\)](#).

³⁶ [17 U.S.C. § 108\(c\)](#); 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §8.03(E)(1)(b) (2014).

³⁷ [17 U.S.C. § 108\(c\)](#).

The Electronic Fair Use Committee chaired by Laura N. Gasaway held hearings to determine what AALL members believed to be fair use in the electronic environment. The original Guidelines, adopted by the AALL Executive Board in July 1997, represented this effort.

The AALL Copyright Committee has continuing responsibility for these Guidelines, as well as others relating to intellectual property. The Copyright Committee updated these Guidelines in 2000-01 and 2013-14. In the 2013-14 revision, the title of the document was changed from *AALL Guidelines on the Fair Use of Copyrighted Works by Law Libraries* to *AALL Guidelines on the Use of Copyrighted Works by Law Libraries* to reflect that it covers not just fair use exemptions (§ 107 of the Copyright Act), but also the Library Exemption (§ 108 of the Copyright Act).

8. Table of Authorities

Statutes

[17 U.S.C. §§ 101-End.](#)

Pub. L. No. 107-273, 116 Stat. 1909, *codified at* [17 U.S.C. § 110\(2\)](#), [112\(f\)](#).

Cases

[Campbell v. Acuff-Rose Music, Inc.](#), 510 U.S. 569 (1994).

[American Geophysical Union v. Texaco](#), 60 F.3d 913 (2d Cir. 1994).

[American Institute of Physics, et al v. Schwegman, Lundberg & Woessner, P.A., et al.](#), No. 0:12-cv-00528-RHK-JJK (D. Minn., July 30, 2013).

Regulations

[37 C.F.R. § 201.14\(b\)](#).

Congressional Documents

H.R. Rep. No. 1733, 94th Cong., 2d Sess. (1976), *reprinted in* Omnibus Copyright Revision Legislation 72-74 (1977).

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* Omnibus Copyright Revision Legislation 68-70, 73-75 (1977).

Secondary Sources

American Association of Law Libraries, Model Law Firm Copyright Policy, <http://www.aallnet.org/main-menu/Advocacy/recommendedguidelines/model-law.html>.

American Library Association, Washington Office, Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use (Mar. 1982).

Copyright Clearance Center, Campus Guide to Copyright Compliance, Using Content: ILL (2005), <http://www.copyright.com/Services/copyrighoncampus/content/ill.html>.

Kenneth D. Crews, Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education (1993).

2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §8.03(A), §8.03(E)(1)(b) (2014).

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1. Introduction

1.1 Preamble

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~~⁵ 17 U.S.C. §106.~~

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~~⁷ 17 U.S.C. §§107-122.~~

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These Guidelines represent the ~~American Association of Law Libraries'~~AALL's collective understanding of fair use and the Library Exemption 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 and Intent

~~The AALL Electronic Fair Use Committee was appointed in 1994 to develop Guidelines on the fair use of legal materials by U.S. law libraries. The AALL 2000-2001 Copyright Committee felt it important to update the 1997 Guidelines due to subsequent federal legislation and case law.~~

~~These Guidelines represent recommendations for "best practices" in all types of law libraries.~~

1.2 Intent

These Guidelines represent recommended "best practices" for all law libraries. Because of differences in types of institutions and different uses made of copyrighted works, and

⁹ 17 U.S.C. § 108(f)(4).

because certain exemptions apply only to nonprofit educational institutions, some Guidelines relate only to one type of [law](#) library. Government libraries, such as court, county and agency libraries, and bar association and other membership libraries, are nonprofit libraries ~~and~~. [These types of libraries](#) generally fall somewhere between nonprofit law school and for-profit law firm libraries in these Guidelines.

These Guidelines cover the reproduction, distribution, transmission, and display of copyrighted works, or substantial portions thereof, whether published in print or [available in digital format. Further, the formats, as well as audio-visual materials.](#) Copying may be analog ([i.e.g.](#), photocopying or microform) or electronic ([i.e.g.](#), scanning or transmission). The Guidelines assume that the library's "original" copy is a legal copy.

1.3. Fair Use: [Section § 107](#)

Fair use is a legal principle that limits the exclusive rights^{[4011](#)} of copyright owners. There is no simple test to determine what is fair use. Section 107 of the Copyright Act^{[4213](#)} lists four factors that must be considered to determine whether a use is a "fair use;" other factors may also be considered based on the particular facts of a given case.^{[4415](#)} Section 107 states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

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

⁴⁰ ~~[See 17 U.S.C. §106-](#)~~

¹¹ ~~[See 17 U.S.C. § 106.](#)~~

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¹³ ~~[The Copyright Act of 1976, as amended, is codified at 17 U.S.C. §§ 101-End.](#)~~

⁴⁴ ~~[Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 \(1994\)-](#)~~

¹⁵ ~~[Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 \(1994\).](#)~~

copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹⁶

~~Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-~~

- ~~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.~~

~~The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.~~¹⁷

1.4. The Library Exemption: Section § 108

Much of the copying covered by these Guidelines is permitted under § 108 of the Copyright Act.¹⁸¹⁹ 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,¹⁹

- copying must not be for direct or indirect commercial advantage
- ~~19~~ each copy reproduced must include the notice of copyright that appears on the original work or a legend if no such notice appears on the work (see 1.4.1 for additional detail), and
- the collection must be open to the public or available to researchers doing research in a specialized field

¹⁶ [17 U.S.C. § 107.](#)

~~¹⁷ 17 U.S.C. §107.~~

~~¹⁸ 17 U.S.C. §§109, 110, and 117 may also be relevant to these Guidelines.~~

~~¹⁹ 17 U.S.C. §§ 109, 110, and 117 may also be relevant to these Guidelines.~~

~~. A library that makes its collection available to others by interlibrary loan or otherwise meets the "open and available" requirement.²⁰~~

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.²¹²² Further, the library should have no notice that the user will use the copy for other than fair use purposes.

Under § 108(d), libraries that qualify for the Library Exemption may provide a single copy to an external user upon request from that user.~~[(see 2.1 below)].~~ 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.

1.4.1 Notice of Copyright Under Section 108

²⁰ ~~H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in Omnibus Copyright Revision Legislation 75 (1977).~~

²¹ ~~Notice Warning Concerning Copyright Restrictions~~

~~The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.~~

~~Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.~~

~~This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law~~

~~37 C.F.R. sec. 201.14(b).~~

²² ~~Notice Warning Concerning Copyright Restrictions~~

~~The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.~~

~~Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use" that user may be liable for copyright infringement.~~

~~This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law. 37 C.F.R. § 201.14(b).~~

~~§ 108 A notice of copyright should appear on each print and electronic copy reproduced.~~

A notice of copyright should appear on each print and electronic copy reproduced.

Under § 108, copies should include the notice of copyright that appears on the copy being reproduced. ~~Absent~~In the absence of such notice, the copy should include a legend such as "This work may be protected by copyright; further reproduction and distribution in violation of United States copyright law is prohibited."²³

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²³ ~~The Digital Millennium Copyright Act amended Section 108(a)(3) to require that a library copy include the notice of copyright that appears on the work. It is not clear from the language of the statute or the legislative history whether this requirement applies to copying the copyright notice in front matter of the volume when copying independently authored articles from a journal or compilation.~~

²⁴ The Digital Millennium Copyright Act amended § 108(a)(3) to require that a library copy include the notice of copyright that appears on the work. It is not clear from the language of the statute or the legislative history whether this requirement applies to copying the copyright notice in front matter of the volume when copying independently authored articles from a journal or compilation.

2. Reproducing Single Copies within the Firm, School, Court, or Other Institutions

2.1 Copying from the Library's Own Collection

Fair Use: Fair use purposes for copying from the library's collection include teaching, scholarship, or research, such 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 reproductions of court opinions, statutes, articles, and sections of treatises into evidence in court proceedings.²⁵ This also includes reproducing and distributing copies as required for administrative proceedings.

Library Exemption: 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.^{26,27} The copy must become the property of the user; it may not be added to the library's collection. The library must post the warning prescribed by the Copyright Office at the place where the orders are placed, and must include it on the order form.^{28,29} Further, the library should have no notice that the user will use the copy for other than fair use purposes.

For-Profit Library Copying for External Users: Libraries in the for-profit sector 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, provided it includes the ~~appropriate~~ notice (~~see specified in~~ 1.4.1 above).

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²⁵ In 2013, the District Court of Minnesota and the Northern District of Texas extended this right in a report and recommendation and memorandum opinion and order (respectively), allowing that law firms including copies of scholarly articles with patent filings were entitled to do so under fair use. See Report & Recommendation, Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A., No. 0:12-cv-00528-RHK-JJK (D. Minn. July 30, 2013), adopted, Order, Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A., No. 0:12-cv-00528-RHK-JJK (D. Minn. Aug. 30, 2013) and Memorandum Opinion & Order, Am. Inst. of Physics v. Winstead PC, No. 3:12-cv-01230-M (N.D. Tex. Dec. 3, 2013).

²⁶ 17 U.S.C. § 108(d).

²⁷ 17 U.S.C. § 108(d).

²⁸ See fn. 11, supra.

²⁹ See fn. 11, supra.

For-Profit Library Copying for Internal Users: Law firm and other law libraries in the for-profit sector should be aware that the Texaco decision³⁰³¹ may apply to them. The AALL Model Law Firm Copyright Policy³² cautions against copying and distributing articles for later (rather than current) use and creating personal libraries. Libraries are also cautioned against systematically routing journals with knowledge or reason to believe that recipients will copy the articles for later (rather than current) use and for creating personal libraries. Libraries may copy tables of contents, but should not solicit requests for copies of articles that would constitute systematic copying.

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2.1.1 Printed Copies of Printed Works

To satisfy a user's request, 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

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To satisfy a user's request, 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. ~~A copy may be faxed or otherwise transmitted electronically to the user, but the library should destroy any temporary copy made incidental to the transmission. In other words, an incidental copy made to facilitate transmission is a fair use, as long as that copy is not retained.~~

2.1.3 Printed Copies of Digital Works

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2.1.2 Copies of Digital Works

³⁰ ~~American Geophysical Union v. Texaco, 60 F.3d 913 (2nd Cir. 1994).~~

³¹ ~~American Geophysical Union v. Texaco, 60 F.3d 913 (2nd Cir. 1994) held that systematic copying of articles for employees by a for-profit corporate library was not protected by fair use, looking particularly at the fourth factor of impact on potential market for the works.~~

³² ~~AALL Model Law Firm Copyright Policy. Note: as of this revision, the Model Law Firm Copyright Policy is under revision with an expected completion date of July 2015.~~

³³ ~~AALL Model Law Firm Copyright Policy: <http://www.aallnet.org>~~

³⁴ ~~17 U.S.C. § 108(a).~~

³⁵ ~~17 U.S.C. § 108(e)(1).~~

Unless prohibited or otherwise restricted by the terms of a valid license agreement, a library may print a copy of an article, a chapter, or portions of other copyrighted works at the request of a user.

2.1.4 Electronic Copies of Digital Works

Unless prohibited or otherwise restricted by the terms of a valid license agreement, a library may download a copy of an article, a chapter, or portions of other copyrighted works at the request of a user and forward it electronically to the user.³⁶

2.2 Obtaining Copies from Another Library

2.2.1 Interlibrary Loan Copies

A library 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.³⁷ The receiving library may deliver the copy to the user in print or electronic format. Neither the borrowing nor lending library may retain the print or digital image.³⁸ Libraries may request print or electronic copies of works through interlibrary loan, but borrowing libraries of all types should be aware of the CONTU [Guidelines \(National Commission on New Technological Uses of Copyright Works\)](#) suggestion of five.³⁹⁴⁰ The more a library exceeds the suggestion of five, the less likely it is that the interlibrary loan request is ~~fair use.~~

exempt.

2.2.2 Access to Digital Works by External Users

³⁶ [17 U.S.C. § 108\(a\); 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §8.03\(A\) \(2014\).](#)

³⁷ [17 U.S.C. § 108\(d\).](#)

³⁸ [17 U.S.C. § 108\(d\)\(1\).](#)

³⁹ ~~The suggestion of five permits libraries to copy five articles from the most recent five years of a single title without paying a royalty. All copying of articles over five years old is considered permissible without paying a royalty. Records are maintained by the requesting entity. H.R. Rep. No. 1733, 94th Cong., 2d Sess. (1976), reprinted in Omnibus Copyright Revision Legislation 72-74 (1977).~~

⁴⁰ ~~The suggestion of five permits libraries to copy five articles from the most recent five years of a single title without paying a royalty. All copying of articles over five years old is considered permissible without paying a royalty. Records are maintained by the requesting entity. H.R. Rep. No. 1733, 94th Cong., 2d Sess. (1976), reprinted in Omnibus Copyright Revision Legislation 72-74 (1977). See also the Copyright Clearance Center, [Campus Guide to Copyright Compliance, Using Content: ILL \(2005\).](#)~~

⁴¹

Terms of a valid license agreement may prohibit access to or reproduction of digital works for external users, including interlibrary loan, or may limit the external constituencies to which a law library may supply either print or electronic copies of digital works.⁴² 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.

3. Multiple Copying of Copyrighted Works

3.1 Multiple Copying in General

Multiple copying is limited under the Copyright Act and under these Guidelines. ~~Section 108 of the Act~~ (The Library Exemption) is generally restricted to single copies. There are, however, instances in which multiple copying might be considered fair use under § 107:

or exempt under § 108.

3.1.1 Academic Law Libraries

Under the Classroom Guidelines,⁴³⁴⁴ nonprofit educational institutions may, under certain circumstances, make multiple copies of articles, book chapters, and portions of other copyrighted works for classroom use. The Classroom Guidelines restrict use to one term, and also 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 Classroom Guidelines were designed to cover uses in primary and secondary schools. However, in higher education, including nonprofit law school-sponsored continuing legal education programs, ~~however~~, fair use should encompass copying beyond that which is permitted in the Classroom Guidelines. The word limitations in the Classroom Guidelines are ~~especially~~ problematic for legal education due to the length of most copyrighable legal documents and scholarship.

⁴¹ ~~I.e., secondary users not affiliated with the institution.~~

⁴² 17 U.S.C. § 108(f)(4).

⁴³ ~~H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in Omnibus Copyright Revision Legislation 68-70 (1977).~~

⁴⁴ The Agreement on Guidelines for Classroom Copying in Not-for-profit Educational Institutions with Respect to Books and Periodicals, printed in H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in Omnibus Copyright Revision Legislation 68-70 (1977).

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. The ALA Model Policy [Concerning College and University Photocopying for Classroom, Research and Library Reserve Use](#) suggests that no more than six copies be made for reserve for any one class.⁴⁵⁴⁶ The copies may be print or electronic. In the case of electronic copies, access should be limited to no more than six simultaneous users. For electronic reserves, the institution should take reasonable steps to ensure copies are only accessible to enrolled students.

3.1.2 Other Law Libraries

Multiple simultaneous copying generally is not permitted under the Library Exemption,⁴⁵ ~~however~~ there may be instances, ~~however~~, where such copying would be permitted under fair use. The library should apply the four fair use factors to determine whether making the copies qualifies for the fair use exemption.

3.2 Preservation

[Under § 108](#), a library may make three copies of either a published or unpublished work for preservation purposes under specified conditions.⁴⁷ ~~Such copies may be~~ [\(see 3.2.1 and 3.2.2\)](#). ~~These exceptions apply to both print and audiovisual works.~~

3.2.1 Unpublished Works

[A library that has a copy of an unpublished work in analogits collection may make three copies of that work for either a\) preservation and security or digital formats, butb\) deposit in another library that qualifies for the Library Exemption \(see 1.4 above\)](#). Digital copies ~~may not be~~ [cannot be distributed digitally or](#) used outside the premises of the library ~~nor sent to other libraries~~.

~~3.2.1.~~⁴⁸

3.2.2 Published Works

⁴⁵ ~~Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use, American Library Association, Washington Office, Washington, DC, March 1982.~~

⁴⁶ ~~Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use, American Library Association, Washington Office, Washington, DC, March 1982. For discussion of the ALA Model Policy as an alternative to the Classroom Guidelines, see Kenneth D. Crews, Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education 50 (1993).~~

⁴⁷ ~~17 U.S.C. §§108(b)-(c).~~

⁴⁸ ~~17 U.S.C. § 108(b).~~

A library that has a copy of a published work in its collection may make three copies of that work for either a) replacement of a damaged, deteriorating, lost, or stolen copy, or b) replacement of a work stored in an obsolete format. Such copies may only be made if, after a reasonable effort, the library determines that an unused replacement cannot be obtained at a fair price. Digital copies cannot be made available to the public outside of the premises of the library.⁴⁹

3.2.3 Obsolete Devices

Under § 108(c), a library may make three copies of a published work when the format in which the work is stored ~~has become obsolete~~ is a) obsolete and b) the library, after a reasonable effort, has determined that it cannot obtain an unused replacement at a fair price. A format is obsolete if the equipment or device necessary to perceive the work is no longer manufactured or not reasonably available in the commercial marketplace.⁵⁰

~~3.2.2 Unpublished Works~~

~~A library that has a copy of an unpublished work in its collection may make a copy of that work for deposit in another library that qualifies for the Library Exemption [see 1.4 above]. Such copies may only be in analog format.~~

~~3.3 Copying Newsletters~~

3.3 Copying Newsletters

Libraries generally may reproduce only small portions of copyrighted newsletters. All types of libraries should avoid multiple copying of newsletters or routing newsletters if they have knowledge or reason to believe that recipients will reproduce the newsletter or articles therein for ~~a~~-later use or to create personal libraries.⁵¹

4. Copying Database Search Results

4.1 Signed License Agreements

Most libraries sign license agreements to obtain access to legal and other databases. Because libraries must comply with the terms of a valid license agreement, they should

⁴⁹ 17 U.S.C. § 108(h).

⁵⁰ ~~17 U.S.C. §108(c).~~

⁵¹ H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 73-74 (1976).

review the terms of all licenses closely. License terms may be binding even if they conflict with copyright.⁵²

4.2 Redistribution of Results ~~---~~ Single Copy to a User

Distribution of database search results to a single user ~~clearly~~ is permitted under fair use unless prohibited by a valid license agreement. This includes providing a copy of search results to any library patron, including a faculty member, student, judge, or law firm client. Public domain information is not subject to any of these limitations.

4.3 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 distributions of research results, whether by print or via electronic means, if that use exceeds these Guidelines.

5. Audiovisual Materials

5.1 Lending

The loan of videos for a patron's personal use is permitted under § 109 and the first sale exception.⁵³

The loan of a video for use in a face-to-face classroom is permitted as an exception under § 110(1).⁵⁴ The recording cannot be streamed over a course web page. In addition, the following conditions must be met:

- The teaching activities are conducted by a **non-profit education institution.**
- The performance is in connection with face-to-face teaching activities.
- The performance takes place in a classroom or similar place devoted to instruction.
- The person responsible for the performance has no reason to believe that the videotape was unlawfully made.

5.2 Public Performances

Patrons who check out a library video for their own viewing, or viewing with a small group of friends or family in a library study room or other semi-public space, are not

⁵² 17 U.S.C. § 108(f)(4).

⁵³ 17 U.S.C. § 109.

⁵⁴ 17 U.S.C. § 110.

engaging in a public performance of the video. Public performance occurs when a video is shown in an open, public space, or where a substantial number of persons outside a normal circle of friends or family are gathered to view it.⁵⁵ In those situations that rise to a public performance, in house or in library viewing is permitted if the video is purchased with public performance rights, or public performance rights are obtained separately from the copyright holder.

⁵⁵ 17 U.S.C. § 101.

5.3 Distance Education

Streaming video in a synchronous or asynchronous online classroom is governed by The Technology, Education, and Copyright Harmonization (TEACH) Act of 2002.⁵⁶ Under TEACH, performances of non-dramatic audiovisual works are permitted. Only portions of dramatic audiovisual works can be screened in the distance classroom unless a fair use exception under § 107 can be justified (when it is necessary to show the entire film to meet the teaching need), or appropriate permission is obtained from the copyright holder of the video.⁵⁷

5.4 Preservation

A library that is open to the public or to outside researchers may not create backup copies of a published video recording, or convert a recording from one format to another **unless** the original version is in an obsolete format (see 5.5), or the original copy is damaged, deteriorated, lost or stolen, and the item cannot be obtained at a fair price in the commercial marketplace.⁵⁸

5.5 Obsolete Devices

Under § 108(c), a library may make a copy of an audiovisual work if the format in which the work is stored is a) obsolete and b) the library cannot obtain an unused replacement at a fair price. A format is obsolete if the device needed to display the work is no longer manufactured or is not reasonably available in the commercial marketplace.⁵⁹

6. Additional Reading and Resources

For additional reading and resources, see the [Fair Use page](#)

on AALLNET.

7. History of These Guidelines

In July, 1994, AALL 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

⁵⁶ P.L. 107-273, 116 Stat. 1909, codified at 17 U.S.C. §§ 110(2), 112(f).

⁵⁷ 17 U.S.C. § 110(2).

⁵⁸ 17 U.S.C. § 108(c); 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §8.03(E)(1)(b) (2014).

⁵⁹ 17 U.S.C. § 108(c).

libraries and by law librarians with specific reference to networking, downloading, retransmission, re-use and combining information and to any other relevant issues.

The Electronic Fair Use Committee, chaired by Laura N. Gasaway, held hearings to determine what AALL members believed to be fair use in the electronic environment.

The original Guidelines, ~~which were~~ adopted by the AALL Executive Board in July, 1997, represented this effort.

The AALL Copyright Committee has continuing responsibility for these Guidelines, as well as others relating to intellectual property. ~~The 2000-01 Copyright Committee revised the original Guidelines to reflect changes in the law since 1997.~~

Members of AALL's 2000-01 Copyright Committee:

~~James Heller, Chair~~

~~Wesley Cochran~~

~~Charles Cronin~~

~~Joanne Dugan~~

~~Carol Ebbinghouse~~

~~Jonathan Franklin~~

~~Susan Lewis-Somers~~

~~David Mae~~The Copyright Committee updated these Guidelines in 2000-01 and 2013-14. In the 2013-14 revision, the title of the document was changed from *AALL Guidelines on the Fair Use of Copyrighted Works by Law Libraries* to *AALL Guidelines on the Use of Copyrighted Works by Law Libraries* to reflect that it covers not just fair use exemptions (§ 107 of the Copyright Act), but also the Library Exemption (§ 108 of the Copyright Act).

8. Table of Authorities

Statutes

[17 U.S.C. §§ 101-End.](#)

[Pub. L. No. 107-273, 116 Stat. 1909, codified at 17 U.S.C. § 110\(2\), 112\(f\).](#)

Cases

[Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 \(1994\).](#)

[American Geophysical Union v. Texaco, 60 F.3d 913 \(2d Cir. 1994\).](#)

[American Institute of Physics, et al v. Schwegman, Lundberg & Woessner, P.A., et al., No. 0:12-cv-00528-RHK-JJK \(D. Minn., July 30, 2013\).](#)

Regulations

[37 C.F.R. § 201.14\(b\).](#)

Congressional Documents

[H.R. Rep. No. 1733, 94th Cong., 2d Sess. \(1976\), *reprinted in Omnibus Copyright Revision Legislation 72-74* \(1977\).](#)

[H.R. Rep. No. 1476, 94th Cong., 2d Sess. \(1976\), *reprinted in Omnibus Copyright Revision Legislation 68-70, 73-75* \(1977\).](#)

Secondary Sources

American Association of Law Libraries, Model Law Firm Copyright Policy, <http://www.aallnet.org/main-menu/Advocacy/recommendedguidelines/model-law.html>.

American Library Association, Washington Office, Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use (Mar. 1982).

Copyright Clearance Center, Campus Guide to Copyright Compliance, Using Content: ILL (2005), <http://www.copyright.com/Services/copyrightoncampus/content/ill.html>.

Kenneth D. Crews, Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education (1993).

2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §8.03(A), §8.03(E)(1)(b) (2014).

Members of AALL's 2013-14 Copyright Committee

Meg Kribble, Chair

D.R. Jones, Vice Chair

Patricia E. Barbone

Pam Brannon

Kelly Mahealani Leong

Kevin Miles

Victoria J. Szymczak

Guidelines on the Fair Use of Copyrighted Works by Law Libraries

Approved by the Copyright Committee, January 2001.

May 1997, Revised January 2001

1. Introduction

1.1 Preamble

The Copyright Act [2] sets out the rights of copyright ownership [3], as well as the limits to those exclusive rights.[4] Two of the most important limits for law libraries are fair use (Section 107 of the Copyright Act) and the library exemption (Section 108 of the Copyright Act). The purpose of these Guidelines is to provide guidance to law librarians on copying by the library and by users under fair use and the library exemption, rather than by authorization from the copyright owners.

These Guidelines describe conditions under which fair use and the library exemption should generally apply. A particular use that exceeds these Guidelines may or may not be a fair use, but the more one exceeds the Guidelines, the greater the risk that fair use does not apply. The American Association of Law Libraries believes that operation within these Guidelines provides a safe harbor, although only the courts can determine authoritatively whether a particular use is a 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 in which copyright has expired), or to works for which the institution has obtained permission for the particular use. License agreements or contracts may govern the uses of some works, in particular, electronic information products; users should refer to the applicable license or contract terms for guidance on the use of those works.

These Guidelines represent the American Association of Law Libraries' 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 and Intent

The AALL Electronic Fair Use Committee was appointed in 1994 to develop Guidelines on the fair use of legal materials by U.S. law libraries. The AALL 2000-2001 Copyright Committee felt it important to update the 1997 Guidelines due to subsequent federal legislation and case law.

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 non-profit law school and for-profit law firm libraries in these Guidelines.

These Guidelines cover the reproduction, distribution, transmission, 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 or transmission). The Guidelines assume that the library's "original" copy is a legal copy.

1.3. Fair Use: Section 107

Fair use is a legal principle that limits the exclusive rights [5] of copyright owners. There is no simple test to determine what is fair use. Section 107 of the Copyright Act [6] lists four factors that must be considered to determine whether a use is a "fair use;" other factors may also be considered based on the particular facts of a given case.[7] Section 107 states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[8]

1.4. The Library Exemption: Section 108

Much of the copying covered by these Guidelines is permitted under §108 of the Copyright Act.[9] 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, copying must not be for direct or indirect commercial advantage, each copy reproduced must include the notice of copyright that appears on the original work or a legend if no such notice appears on the work (see 1.4.1 for additional detail), and the collection must be open to the public or available to researcher doing research in a specialized field. A library that makes its collection available to others by interlibrary loan or otherwise meets the "open and available" requirement.[10]

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.[11] Further, the library should have no notice that the user will use the copy for other than fair use purposes.

Under §108(d), libraries that qualify for the Library Exemption may provide a single copy to an external user upon request from that user. [See 2.1 below] 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.

1.4.1 Notice of Copyright Under Section 108

A notice of copyright should appear on each print and electronic copy reproduced.

Under §108, copies should include the notice of copyright that appears on the copy being reproduced. Absent such notice, the copy should include a legend such as "This work may be protected by copyright; further reproduction and distribution in violation of United States copyright law is prohibited." [12]

2. Reproducing Single Copies within the Firm, School, Court, or Other Institutions

2.1 Copying from the Library's Own Collection

Fair Use: Purposes for copying from the library's collection include teaching, scholarship, or research, such 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 reproductions of court opinions, statutes, articles, and sections of treatises into evidence in court proceedings. This also includes reproducing and distributing copies as required for administrative proceedings.

Library Exemption: 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.[13] The copy must become the property of the user; it may not be added to the library's collection. The library must post the warning prescribed

by the Copyright Office at the place where the orders are placed, and must include it on the order form.[14] Further, the library should have no notice that the user will use the copy for other than fair use purposes.

For-Profit Library Copying for External Users: Libraries in the for-profit sector 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, provided it includes the appropriate notice (see 1.4.1 above).

For-Profit Library Copying for Internal Users: Law firm and other law libraries in the for-profit sector should be aware that the Texaco decision [15] may apply to them. The AALL Model Law Firm Copyright Policy cautions against copying and distributing articles for later (rather than current) use and creating personal libraries. Libraries are also cautioned against systematically routing journals with knowledge or reason to believe that recipients will copy the articles for later (rather than current) use and creating personal libraries. Libraries may copy tables of contents, but should not solicit requests for copies of articles that would constitute systematic copying.[16]

2.1.1 Printed Copies of Printed Works

To satisfy a user's request, 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, 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. A copy may be faxed or otherwise transmitted electronically to the user, but the library should destroy any temporary copy made incidental to the transmission. In other words, an incidental copy made to facilitate transmission is a fair use, as long as that copy is not retained.

2.1.3 Printed Copies of Digital Works

Unless prohibited or otherwise restricted by the terms of a valid license agreement, a library may print a copy of an article, a chapter, or portions of other copyrighted works at the request of a user.

2.1.4 Electronic Copies of Digital Works

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

2.2 Obtaining Copies from Another Library

2.2.1 Interlibrary Loan Copies

A library 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 print or electronic format. Neither the borrowing nor lending library may retain the print or digital image. Libraries may request print or electronic copies of works through interlibrary loan, but borrowing libraries of all types should be aware of the CONTU suggestion of five.[17] 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 Access to Digital Works by External Users [18]

Terms of a valid license agreement may prohibit access to or reproduction of digital works for external users, including interlibrary loan, 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.

3. Multiple Copying of Copyrighted Works

3.1 Multiple Copying in General

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 under §107.

3.1.1 Academic Law Libraries

Under the Classroom Guidelines,[19] nonprofit educational institutions may, under certain circumstances, make multiple copies of articles, book chapters, and portions of other copyrighted works for classroom use. The Classroom Guidelines restrict use to one term, and also 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 Classroom Guidelines were designed to cover uses in primary and secondary schools. In higher education, including nonprofit law school-sponsored continuing legal education programs, however, fair use should encompass copying beyond that which is permitted in the Classroom Guidelines. The word limitations in the Classroom Guidelines are especially problematic for legal education due to the length of most copyrightable legal documents and scholarship.

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. The ALA Model Policy suggests that no more than six copies be made for reserve for any one class.[20] The copies may be print or electronic. In the case of electronic copies, access should be limited to no more than six simultaneous users. For electronic reserves, the institution should take reasonable steps to ensure copies are only accessible to enrolled students.

3.1.2 Other Law Libraries

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

3.2 Preservation

A library may make three copies of either a published or unpublished work for preservation purposes under specified conditions.[21] Such copies may be in analog or digital formats, but digital copies may not be used outside the premises of the library nor sent to other libraries.

3.2.1 Obsolete Devices

A library may make three copies of a published work when the format in which the work is stored has become obsolete. A format is obsolete if the equipment or device necessary to perceive the work is no longer manufactured or not reasonably available in the commercial marketplace.[22]

3.2.2 Unpublished Works

A library that has a copy of an unpublished work in its collection may make a copy of that work for deposit in another library that qualifies for the Library Exemption [see 1.4 above]. Such copies may only be in analog format.

3.3 Copying Newsletters

Libraries generally may reproduce only small portions of copyrighted newsletters. All types of libraries should avoid multiple copying of newsletters or routing newsletters if they have knowledge or reason to believe that recipients will reproduce the newsletter or articles therein for a later use or create personal libraries.

4. Copying Database Search Results

4.1 Signed License Agreements

Most libraries sign license agreements to obtain access to legal and other databases. Because libraries must comply with the terms of a valid license agreement, they should review the terms of all licenses closely.

4.2 Redistribution of Results -- Single Copy to a User

Distribution of database search results to a single user clearly is permitted under fair use unless prohibited by a valid license agreement. This includes providing a copy of search results to any library patron, including a faculty member, student, judge, or law firm client. Public domain information is not subject to any of these limitations.

4.3 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 distributions of research results, whether by print or via electronic means, if that use exceeds these Guidelines.

1. The American Association of Law Libraries encourages the free reproduction and distribution of the AALL Guidelines on the Fair Use of Copyrighted Works by Law Libraries without permission. Because digital technology is in a dynamic phase, there may come a time when it is necessary to revise the Guidelines. All institutions should review their own policies to ensure compliance with all applicable laws.

2. Title 17 of the United States Code.

3. 17 U.S.C. §106.

4. 17 U.S.C. §§107-122.

5. See 17 U.S.C. §106.

6. The Copyright Act of 1976, as amended, is codified at 17 U.S.C. §§101-End.

7. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

8. 17 U.S.C. §107.

9. 17 U.S.C. §§109, 110, and 117 may also be relevant to these Guidelines.

10. H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in *Omnibus Copyright Revision Legislation 75* (1977).

11. Notice Warning Concerning Copyright Restrictions

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law

37 C.F.R. sec. 201.14(b).

12. The Digital Millennium Copyright Act amended Section 108(a)(3) to require that a library copy include the notice of copyright that appears on the work. It is not clear from the language of the statute or the legislative history whether this requirement applies to copying the copyright notice in front matter of the volume when copying independently authored articles from a journal or compilation.

13. 17 U.S.C. §108(d).

14. See fn. 11, *supra*.

15. *American Geophysical Union v. Texaco*, 60 F.3d 913 (2nd Cir. 1994).

16. AALL Model Law Firm Copyright Policy: <http://www.aallnet.org>

17. The suggestion of five permits libraries to copy five articles from the most recent five years of a single title without paying a royalty. All copying of articles over five years old is considered permissible without paying a royalty. Records are maintained by the requesting entity. H.R. Rep. No. 1733, 94th Cong., 2d Sess. (1976), reprinted in *Omnibus Copyright Revision Legislation 72-74* (1977).

18. I.e., secondary users not affiliated with the institution.

19. H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in *Omnibus Copyright Revision Legislation 68-70* (1977).

20. Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use, American Library Association, Washington Office,

Washington, DC, March 1982.

21. 17 U.S.C. §§108(b)-(c).

22. 17 U.S.C. §108(c).

In July, 1994, AALL 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.

The Electronic Fair Use Committee, chaired by Laura N. Gasaway, held hearings to determine what AALL members believed to be fair use in the electronic environment. The original Guidelines, which were adopted by the AALL Executive Board in July, 1997, represented this effort.

The AALL Copyright Committee has continuing responsibility for these Guidelines, as well as others relating to intellectual property. The 2000-01 Copyright Committee revised the original Guidelines to reflect changes in the law since 1997.

Members of AALL's 2000-01 Copyright Committee:

James Heller, Chair

Wesley Cochran

Charles Cronin

Joanne Dugan

Carol Ebbinghouse

Jonathan Franklin

Susan Lewis-Somers

David Mao

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