Copyright Law and the Digital Library: Fair Use and the Digital Music Library

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ABSTRACT

The survival and the practical utility of digital libraries will often depend on a meaningful application of the law of fair use. Fair use is a flexible and critical doctrine in American copyright law that permits limited uses of copyrighted works. “Variations2: The Digital Music Library,” based at Indiana University, has a central objective of making music-related works available to faculty, students, and others especially to serve research and teaching needs. To that end, fair use is an appropriate and essential source of authority for many of the planned uses. This paper will examine the applicability of fair use to common scenarios, and it will demonstrate that in fact fair use can allow some activities, but only within limits. This study will also demonstrate that developers of the digital library will have responsibility to learn and apply the law and to help users of the system understand the opportunities and limits of the law.

INTRODUCTION

The survival and success of most digital libraries will often depend on a meaningful application of copyright law, and of central importance is the doctrine of fair use. The essence of a digital library is to provide for the storage and retrieval of information resources. These activities necessarily involve the reproduction, dissemination, and other uses of works that are protected by copyright law. The essence of copyright law is to grant to the owner the right to make many of those same uses of the works. Thus, a digital library may easily be a means for the widespread infringement of copyright—unless the uses may be within an exception to the rights of the owners. One of those exceptions is “fair use.” What may be a violation of copyright law can become perfectly legal, if it is within fair use.
This paper examines fair use in the context of the project known as “Variations2: The Digital Music Library” (referred to as “DML”). The DML is funded by the National Science Foundation, and its successful implementation in part depends on finding a functional interrelationship between the design and use of the digital library and the requirements of copyright law.

Possibilities for copyright infringement and fair use may apply to both the creation and management of the DML, as well as the use of the DML by students, faculty members, and others. In broad terms, the managers of the DML will seek to upload into the system, and make available to users, a potentially unlimited collection of sound recordings and other music-related content. That process alone involves the reproduction of numerous works that are likely protected by copyright; it therefore raises questions of infringement and fair use. Once a work is properly included in the system, users of the DML will then retrieve the file from a remote terminal and be able to listen to—or “perform”—the copyrighted sound recording. Depending on technical capabilities, the users may also be able to download the file, perform it for an assembled class or other group, or clip or modify the recording in order to explore its characteristics in furtherance of teaching or research. The array of possible uses is nearly limitless. Each possibility generates tension between infringement and fair use. Resolving that tension can determine whether the DML will successfully meet its objectives.

One might best envision and distinguish the situations that give rise to questions of fair use by focusing on the identification of the use, the character or other qualities of the use, and the extent of the use. The primary users of the DML will be faculty and students; librarians, technical experts, and other staff members will also use the DML in order to enhance its features in furtherance of the educational and research objectives. The content of the DML will be used principally in pursuit of teaching and research; to that end, music files will be performed privately and in classrooms and from remote computer terminals. The content may be downloaded, duplicated, clipped, and manipulated. At times, users will make new versions of the works or incorporate portions into innovative projects. The content of the DML may well have restricted access, but once a work is properly retrieved and utilized in connection with an educational aim, the professor or student will likely need to share the content with others. The professor often needs to “perform” the work for students in a classroom; the student needs to submit a finished project to the instructor. Many users will anticipate publication or other wider dissemination of the creative work.

Before exploring further the question of whether or not certain activities are fair use, the analysis must be placed in a broader context of the law. First, this paper will survey the framework and policies behind the law of fair use. Fair use can only be understood in light of the law’s purposes and by drawing analogies to seemingly unrelated court rulings. Second, the question of fair use may be compelling and ultimately demanding, but it is actually a late step in the overall analysis of copyright as applied to a digital library or another project. Fair use is a question of whether a particular use is an infringement of copyright, or whether the use fits within the exception to the rights of the copyright owner. Delving into such questions is not appropriate until determining whether the work used is in fact protected by copyright law. Many works are in the public domain and may be used without copyright restriction. Similarly, one should determine whether the planned use is an exercise of one of the rights of the copyright owner established under the copyright law. If not, then the use
cannot be an infringement, and we need not bother with fair use. Finally, fair use is a general and flexible exception to the rights of owners, but the law includes numerous more specific and detailed exceptions. If a use fits into one of the more specific exceptions, then the legal right to use the work will be more clearly established, and again one need not belabor whether fair use applies.\textsuperscript{11}

Despite these possibilities, fair use remains an important element of the copyright analysis for digital libraries. Many of the proposed functions of the DML potentially involve the reproduction and dissemination of copyrighted works in ways that implicate possible infringements. Few of the more specific exceptions to the rights owners will apply.\textsuperscript{12} Consequently, educators and researchers who may come to depend on the DML for innovative uses of existing works will turn to fair use in quest of a legal justification. If it is not within fair use, users may be stymied in their pursuits, or they will face legal risks.\textsuperscript{13}

EXAMPLE SCENARIOS

The following scenarios exemplify uses of content in the DML that give rise to fair use applications.

Scenario 1: Faculty Teaching and Research

Professor Jones is a faculty member in the School of Music, and she would like to access and use resources in the DML in connection with teaching a course and in her research. The DML is structured to permit her to create a separate “page” for her students, where they can find links to works as Professor Jones selects. Professor Jones also clips portions of various works from the DML and downloads them for use in her latest research project. In both her teaching and research, she is making the materials available to multiple individuals who will see, read, or listen to the works. In her teaching, the students may access the materials at library terminals or on their own computers. For her research, Professor Jones is making multiple copies of at least portions of the works for colleagues at other institutions to access in connection with Jones’s original studies.

Scenario 2: Student Class Project

Lawrence is a student of Communication Studies and is making an analysis of musical works in connection with a course assignment or thesis. To complete the project, he needs to download from the DML clips of various musical works, copy them onto a CD-ROM, and insert his original commentary and analysis. Lawrence submits the project only to Professor Jones. Professor Jones selects certain projects for demonstration to the entire class. Ideally, she would like to upload the best projects onto the website for the course, and the students hope to publish their projects.

Scenario 3: Enhancement of DML Services

Ingrid is the director of the DML project and would like to expand the usefulness of much of the content on the server. The files are already accessible to students and faculty in the School of Music, but Ingrid would like to adapt some of the content or make versions of them that might be more helpful. She would like to make Braille or narrated versions or
other adaptations for students with disabilities. She would like to make closed-caption versions for students with hearing deficiencies, and she would like to offer translations of some foreign works to simply overcome the language barriers that some users face. All of these efforts are intended to make the collection more useful to a larger number of students, faculty, and other users of the DML.

BACKGROUND OF FAIR USE

The law of fair use is framed in Section 107 of the U.S. Copyright Act, and numerous court rulings elaborate on its meaning. The statute sets forth four factors that decision makers must balance to determine whether an activity is inside or outside the boundaries of fair use: (1) the purpose of the use; (2) the nature of the work used; (3) the amount used; and (4) the effect of the use on the value of the work or its potential market.

These four factors provide the essential framework for applying and understanding fair use. The outcome of that process will determine whether the planned use is lawful or an infringement. The analysis will also indicate whether the plans to develop the DML have the potential of complying with the law on their own, or whether the developers will need frequent licensing or other permissions from copyright owners in order to engage in the planned use of the DML and reap the value of the system for teaching and research at the university.

One can draw an understanding of fair use in general from the vast number of court cases that have elaborated on the law through the years. On the other hand, few cases bear similarities to the ambitious plans of the DML. Few cases even have ruled on either the use of substantial quantities of works for educational purposes, or on the creation of a large-scale system such as a digital library. Few cases examine the law as applied to the individual projects of students and faculty, whether involving musical works or any other works. Indeed, the cases that shed some light on fair use in the education and research context are few and widely scattered. Like all court cases, they are directly relevant only to their own facts. Change the facts, and the cases may be instructive, but not controlling. Change the facts, and a decision that appeared generous toward finding fair use may become a stringent restraint on the use of copyrighted works.

As a result, this paper will necessarily be able to survey only that moderate number of cases that have only incidental similarities to the DML, but those cases will allow for the derivation of key concepts and principles from which one can begin to infer the meaning of fair use for the DML. The final section of this paper will examine a selection of the scenarios created by the developers of the DML in order to suggest whether and how the DML might be developed and deployed in a manner consistent with the law of fair use.

THE FOUR FACTORS OF FAIR USE

While few court rulings are directly relevant to educational uses or to the development of a digital library, American courts have handed down a tremendous number of rulings that elaborate on fair use in a variety of contexts. Even these seemingly unrelated...
cases offer some guidance for the meaning of the statutory factors in any given situation. The following is a brief summary of how American courts have interpreted and applied the factors. In reviewing these factors, one needs to keep in mind a key principle: the courts are balancing all four factors together. Thus, no one factor can direct the outcome of the analysis, whether in favor of or against fair use. If the use is clearly educational, the user still needs to work through the other factors before concluding whether the activity is fair use. If the use involves the full work and not an excerpt, it may still be within fair use based on the overall evaluation of all factors.

**Purpose of the Use.** The statutory language suggests that nonprofit educational uses are favored over commercial uses. Some educational uses, however, may have a commercial component if the works are made or sold at a monetary profit or become part of a commercial venture based at the university. The DML is a dedicated system for support of teaching and research, which should tip this factor toward fair use. Courts also favor uses that are “transformative,” rather than mere reproductions. Fair use is more likely when the copyrighted work is “transformed” into something new or of new utility, such as quotations incorporated into a paper, and perhaps pieces of a work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original. For teaching purposes, however, multiple copies of some works are specifically allowed, even if not “transformative.” “Transformative” uses of the DML might occur when faculty or students clip portions of the works and incorporate them into lesson plans or innovative analyses, and transformative uses are more likely than otherwise to be fair use. Strictly limiting access to the DML content can further strengthen the argument that this factor weighs in favor of fair use. When uses are limited to faculty, students, librarians, and others who are more likely to be making only educational or research uses of the content, the “purpose” of the uses is more likely to lean toward fair use.

**Nature of the Work Used.** This factor examines characteristics or attributes of the work being used. For example, several recent court decisions have concluded that the unpublished “nature” of historical correspondence can weigh against fair use, reasoning that copyright owners should have the right to determine the circumstances of “first publication.” The authorities are split, however, on whether a published work that is currently out-of-print should receive special treatment. Courts more readily favor the fair use of nonfiction and other fact-based works, rather than literature, art, music, and other more creative works. In the case of the DML, much of the content will be musical scores and sound recordings; these are often the works that will receive greater protection and hence be subject to less fair use. By contrast, when the content of the DML is biographical, analytical, or other nonfiction materials, this factor will more often tip in favor of fair use. Regardless of this more conventional analysis, one may be able to strengthen the claim of fair use by establishing a stronger tie between the selected content of the DML and the favored educational purposes identified earlier. For example, developers of the DML might include materials only upon specific request from an instructor, thus demonstrating clear linkage between the “nature” of the work and its necessity for meeting the favored “purpose.”

**Amount of the Work Used.** Amount is measured both quantitatively and qualitatively. No exact measures of quantity exist in the law; courts instead evaluate quantity relative to the length of the entire original and in light of the amount needed to serve a proper objective—
such as teaching and research.\textsuperscript{27} One court has ruled that a journal article alone is an entire work;\textsuperscript{28} copying an entire work usually weighs against fair use.\textsuperscript{29} Similarly most uses of images—which could include an image of a music score—involve the full image or “amount.” A court has ruled recently that a “thumbnail,” low-resolution version of the image can be an acceptable “amount.”\textsuperscript{30} By a qualitative analysis, courts have found that even a brief excerpt may constitute “the heart of the work” and weigh against fair use.\textsuperscript{31} In the context of the DML, we can surmise that brief portions of works—rather than the full work—will more likely be fair use. Yet even the use of the full work may not militate against fair use if that quantity is essential for fulfilling teaching or research objectives.\textsuperscript{32} The brief clips of sound recordings and other works are, quite simply, more likely to be within fair use, than will be uses of the full work.\textsuperscript{33}

\textbf{Effect on the Market.} This factor means fundamentally that if a use in principle substitutes for a purchase of the original—regardless of one’s personal willingness or ability to pay for such purchase—then this factor may weigh against fair use. “Effect” is closely linked to “purpose.” If the purpose is research or scholarship, market effect may be difficult to prove.\textsuperscript{34} If the purpose is commercial, then adverse market effect is often presumed. Occasional quotations or photocopies may have no adverse market effects, but reproductions of software and videotapes can make direct inroads on the potential markets for those works. Market harm in the educational context is easier to discern when the materials used are developed and marketed specifically for the educational market.\textsuperscript{35} Thus, copies from a popular magazine might have little harm, but copies from workbooks and textbooks directly erode the potential for sales to the targeted educational market. For the DML, much of the material currently included in the system might have only a modest market, and seldom is that market targeted at students and instructors. But any access to commercial sound recordings in the DML can potentially substitute for sales. Moreover, in the era before a digital library, the university might have acquired multiple copies of a work for study. The DML may make the purchase of multiple copies obsolete. If a student or professor is clipping and modifying the work for teaching and research, that particular use seldom interferes with a realistic market claimed by the copyright owner; consequently, that use likely does little harm to the market. Perhaps the most serious potential harm to a market would occur when a work is made available in full, to a wide range of users, and has the potential of further downloading, duplication, and dissemination.\textsuperscript{36} The developers of the DML may be able to limit the influence of this factor by restricting access only to authorized faculty, students, and others. Just as restricted access strengthened the claim that the uses were educational, so can restricted access minimize the potential harm to the copyright owner.

\textbf{THE OVERALL BALANCE}

This summary of the statutory factors of fair use suggests that many planned uses of the content on the DML may well fall within fair use under some circumstances. The strength of the fair-use claim, however, is based on an application of an often ambiguous law, and the meaning of the law is tied closely to the particular facts of each situation. In the end, each new situation demands a fresh analysis of fair use, and with each analysis, one may reach a new conclusion.\textsuperscript{37} Fair use is also a complex and sometimes convoluted balance of the four factors. Rarely do evaluations of all four factors tip toward fair use or tip away from fair use. The analysis usually yields a mix: some tipping in favor, some against. As a result,
courts and other decision makers are left to determine whether the factors together tip more heavily in either direction in order to determine the outcome. The problem is especially complicated, because the arguments with respect to some factors are often stronger or more persuasive than are the arguments regarding other factors. For example, a court may resolve that the clear nonprofit educational purpose of a particular use should tip that factor heavily in favor of fair use. In the same case, a court may also conclude that uses of significant amounts of a work could tip against fair use, but only slightly.\textsuperscript{38} The factors that may prove most critical in the given situations may be the nonprofit character of the use, as well as whether the use displaces a sale and therefore has a strong adverse effect on the market.

Despite its importance, and perhaps even its promise, fair use poses an enormous dilemma for the DML. The developers and users of the DML will often look to fair use for some legal validation, but they will often find little clarity or comfort. The four factors are susceptible to divergent interpretations, and no court ruling examines the fair use of substantial quantities of materials stored in and retrieved from a digital library system. Developers and users alike are left to make determinations about fair use, and in the process to evaluate whether a planned activity moves ahead or stalls.\textsuperscript{39} Consequently, reasonable people will differ in their analyses and conclusions about fair use. This paper will examine a general application of the four factors to the scenarios about the use of the DML in order to identify some possible issues and outcomes. The analysis here may guide toward a likely outcome, but the actual result in any instance will depend upon the wide variety of other factual circumstances. No real situation is actually as simple as any of the scenarios.

RETURNING TO THE SCENARIOS

Each of the scenarios actually encompasses multiple intertwined situations, with several proposals related to the use of the content in the DML. In each of them, we can see some degree of similarity of legal analysis. For example, each of the situations is couched in an academic context consistent with the objectives of the DML. The professor is engaged in teaching and scholarly research. The student is developing the project to meet course requirements. The administrator of the DML is striving to make the resources more useful—especially for education and research purposes. Under these circumstances, the first factor is likely to lean in favor of fair use. That generalization may not always be true or complete. For example, if the content is made available to any users on the Internet, the claim that it is used solely for education or research may be diluted. Further, the developer of the project may well be focused only on scholarship, but once published, it may take on some elements of a commercial purpose. The extent to which these possibilities might sway the analysis of this factor away from fair use will depend on the particular facts of each instance. Overall, however, the actual educational or research objectives in each scenario, and careful attention to accessibility and other circumstances, should keep this factor leaning in favor of fair use.

The second factor—the “nature” of the work—is perhaps the least predictable factor. The DML will store a tremendous variety of works relevant to the study of music. It will include compositions, sound recordings, text, images, and any other type of work. The materials may be historical or analytical writings, complex scores, or recordings of professional or amateur musicians. Under the legal analysis of fair use, some of these works may be “highly creative” and hence have a narrower application of fair use. Some materials are more factual or descriptive, and thus will enjoy a more lenient application of the law.
Occasionally a work may defy customary description. It may be a score, the original composition of which is in the public domain, but the particular arrangement is recent and protected by copyright. In all instances, the materials—whatever else their “nature”—should be distinctly suited to accomplishing the favored purpose of “nonprofit education” or “research” or “scholarship.” Some court rulings have tended to lean in favor of fair use when the work is intrinsically suited to such constructive purposes. How the “nature” of the work is characterized may therefore depend in large part on how the use of the work is characterized. If the work is a highly creative musical composition, but it is distinctly and uniquely suited to meeting the requirements of the instructional or research purposes, a court may at least be willing to adjust the weight it gives to this factor. In any of the scenarios, the outcome of this factor will depend on a detailed examination of the works in question, but one can also conclude that restricting the use of the DML to education and research will benefit the application of this factor as well.

Courts have been known to give seemingly greater weight to the final factor, evaluating the “effect” of the use on the market for the original work. This factor often weighs heavily against fair use when the use is a direct substitution for the purpose of an original. Whether the use in any of the scenarios has such market harm will largely depend upon whether the work is in fact marketed in a format, version, and quantity necessary to meet the user’s needs. For example, music is ordinarily sold as a sound recording of the entire work and only on discs or other portable media. Many of the uses in the scenarios are based upon the ability to copy and clip only portions of the material and use those clips in the context of a larger project. The industry may well have a schedule of fees for selling “clip licenses,” but such licenses are often marketed to other industry members for commercial purposes. The costs and terms are seldom reasonably appropriate for academic uses. Some adverse market harm becomes more realistic when the use is of the entire work, and the work is readily available through the retail marketplace at a commercially reasonable price.

**Scenario 1: Faculty Teaching and Research**

**Instructional Access:** When the professor identifies a set of materials already on the DML and lists them separately on a “page” dedicated to an individual course, the professor is simply creating links inside the digital library and is not necessarily further reproducing the works. This method for facilitating access will not itself raise direct risks of infringement, and thus analysis of fair use may not be necessary.

**Instructional Performances:** The performance of recordings as well as the displays of static images may be specifically permitted in the face-to-face classroom under another provision of the U.S. Copyright Act. But when the display or performance is received outside the classroom or by means of a “transmission” of the content from another location, the user must often look to fair use for validation. The third factor will often lean against fair use, if the performance is of the entire work. Copyright owners will also be especially concerned about performances at remote locations, because each access is potentially a lost sale of a copy of the work on CD-ROM or other medium supplied by the owner.
Research Analyses: The incorporations of clips of materials into a new project will usually involve small “amounts” of the works, and the analytical uses may be “transformative.” If the instructor limits access to the finished work only to students and faculty colleagues, she reinforces the educational “purpose” and may rein in the potential harm to the market.

Scenario 2: Student Project

The student project is much more likely than the faculty project to be within fair use. The student is also generally using only clips, is transforming the original work into something of new utility, and is submitting it to the instructor for use only by the instructor and perhaps for sharing with the class. Under these confined circumstances, the student may well conclude that most uses are “fair.” The analysis changes abruptly, however, when the instructor or student proposes uploading the finished project onto a web server—as academics are wont to suggest. Deploying the material on the web potentially alters the purpose of the use, and it greatly affects the potential for harm to the market.

Scenario 3: Versions for Persons with Disabilities

The potential here for fair use is less certain. While the purpose may remain education, and the new versions may also be transformative, other factors will often weigh against fair use. In particular, the use will most likely involve the entire work. Further, many copyrighted works are available, or may become available, in the needed formats. If the developers of the DML create, for example, a Braille version of a work, that use can interfere with a current or future market that the copyright owner may seek to exploit. Users would be well advised to investigate the market carefully before creating the new version in order to determine if such a work is already available on the market or may be forthcoming.

OTHER EXEMPTIONS AND USER RIGHTS

While fair use is a distinctly American legal development, generally analogous doctrines, such as “fair dealing,” occur in the copyright laws of nations such as the United Kingdom and Canada. Even some countries with legal structures more akin to civil-code development have found the need to devise a flexible exception to the rights of copyright owners in order to facilitate the rich diversity and unpredictable array of uses of copyrighted works. Equally significant in the law of both common-law and civil-code countries is the increasing prevalence of more detailed statutory exceptions to, or limitations on, the rights of the copyright owner. These exceptions to owner rights are often a crucial complement to a richer understanding of fair use.

Among these exceptions in American law is a provision that relatively broadly allows for the “performance” or “display” of copyrighted works in the face-to-face classroom. Thus, under this provision, an instructor would be able to play in full a sound recording of a musical work that may be available through the DML. On the other hand, each of these more specific statutes is usually limited in its scope and application. For example, the code sections that permit educational uses generally confine activities to the classroom. Thus, if the content is “transmitted” to listeners at another location, that use falls outside the scope of the detailed language. Similarly, another provision of American law permits libraries to
make and distribute copies of some works for certain specified purposes, but only under
detailed conditions and restrictions. The relatively precise language may give comfort and
predictability about the law, but that same trait also constrains the law’s breadth and limits its
practical applications.

One consequence of the confining language of these exceptions is a growing
importance of fair use. Legislative bodies such as Congress are inherently limited in their
ability to legislate for the tremendous variety of works, uses, and objectives that a digital
library will instigate. Moreover, legislators are under political pressure in crafting laws and
at best are usually only able to enact compromise language that too often fails to meet actual
needs. Thus, developers and users of the DML and any other digital library will
consequently find themselves relying more often on fair use and struggling with its meaning
in diverse circumstances.

INTERNATIONAL IMPLICATIONS

While this paper has focused on American law, it holds many implications for
activities and law in other countries. First, American law applies, of course, only inside the
territory of the United States. Although a digital library based inside the U.S. may be
governed by American law, the definitional and legal construct applicable to the digital
library will naturally shape the access and usefulness of the project for users in other
countries. Second, American law—especially the law of fair use—may be significantly
different from the laws of most other countries, but the differences are not complete. As
mentioned, “fair dealing” in some other countries is roughly analogous to fair use, and most
countries have detailed exceptions to the rights of owners, often not unlike those provisions
in the U.S. Third, copyright law in the U.S. and in nearly every country of the world is
subject to a required conformity to several multinational treaties. Most notably, the Berne
Convention established “harmonized” standards for the copyright laws of all member
countries and the Berne Convention defines parameters for permissible exceptions to the
rights of owners.

The standards of the Berne Convention are a powerful and potentially definitive force
on the shape of domestic copyright law. Therefore, a study of any exception in the law of
any country is potentially revealing about the nature of exceptions that may exist in the
copyright laws of any other nation. A study of American fair use is in some indirect manner
instructive of the possibilities for similar law within any country of the world.

CONCLUSION

In the context of teaching and research, many limited uses of copyrighted works may
well fall within the scope of fair use and thus not constitute copyright infringement. The
nature of fair use, however, is that its scope and applicability are not definitive and
reasonable interpretations of the law can differ greatly. Moreover, the meaning of fair use for
any given situation depends heavily on the particular facts; change the facts even slightly,
and the legal analysis may change entirely. Thus, an intrinsic challenge for the meaning of
fair use is the difficulty of giving advice to users of the system about the lawfulness of their
pursuits. Giving any “answer” to a question about fair use is fraught with pitfalls of contrary
interpretations, fluid circumstances, and unpredictable future applications.
Finding room for that application of fair use to the DML holds great promise for the effectiveness of digital libraries in general. If the law cannot allow users of the system to pursue their creative ambitions with the content of the system, the feasibility of digital libraries will be at risk. The survival of fair use in the case of the DML is especially reassuring. Users of the DML will most often be accessing musical works and sound recordings, and these “more creative” works generally receive from the courts a more stringent interpretation of fair use. On the other hand, the survival of fair use does not mean that all proposed uses will be perfectly lawful. Indeed, we can surmise that fair use will apply most often when instructors and students are using only clips of longer works, are incorporating those elements into an original and analytical work, and are limiting access to the new work and not distributing it widely or to the general public.

This paper offers only a general background study and initial application of the law to common situations. The next stages in the study of fair use will involve a more thorough exploration of the scope of user needs. The developers of the system should devise a policy to assist users who will be accessing content and seeking to utilize it in innovative projects. Despite some optimism about the role of fair use, developers of digital libraries will inevitably often find that they need to secure permissions for many of the planned uses. The quest for that permission will in turn bring developers of the system back to the issue that has been outside the scope of this paper: the procedures and legalities of loading the content into the DML in the first place. To the extent that permission is needed to upload the content, the effort to obtain that permission will also be the opportunity to clarify the rights of the users to access, download, manipulate, and share the works found on the digital library system. The law survives, but the license may in the end control.

NOTES

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3 For more information about the project, visit: http://dml.indiana.edu.

4 To “perform” a work for copyright purposes is defined in the Copyright Act to mean: “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in
the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101 (2003).

5 This statement is based on two assumptions: (1) that the works in question are in fact protected by copyright law; and (2) that permission from the copyright owner is either not available or is not readily forthcoming. In the case of musical works and sound recordings, these are not always valid assumptions. Many early compositions, especially of classical works, are in the public domain, but a new sound recording of that work is likely protected. Regarding permissions, experience has suggested that permissions to upload and disseminate sound recordings through a digital library are either difficult to obtain or are enormously expensive. In addition, Congress revised American copyright law in recent years specifically with respect to “digital transmissions” of sound recordings, creating an enormously complex law that “webcasters” are only now beginning to discover can lead to the end of their businesses. For a major bill that revised the U.S. Copyright Act, see Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified at 17 U.S.C. §§ 106(6) and 114). For a critique of the bill, see David Nimmer, Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right, 7 UCLA ENT. L. REV. 189 (2000).

6 Cutting, pasting, revising, and making other uses of the copyrighted works into new projects may constitute either the reproduction of the works or the making of derivative works. Making of reproductions and of derivatives are among the rights that belong to the copyright owner, and such uses can therefore be infringements. 17 U.S.C. § 106 (2003).

7 Such dissemination may be a distribution of the work, and that, too, is one of the rights of the copyright owner. Distribution can thus give rise to infringement. 17 U.S.C. § 106 (2003).

8 The purpose of fair use is described in many ways, but in American law all of copyright is intended to serve the objective of advancing knowledge as set forth in the U.S. Constitution. U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

9 Another paper in connection with the DML project examines in detail when copyrights expire and enter the public domain. See http://dml.indiana.edu/pdf/dml-copyright-duration-report.pdf.


11 Sections 107 through 122 of the U.S. Copyright Act set forth a wide range of elaborate exceptions to the rights of copyright owners. Some are potentially relevant to the development and use of digital libraries, notably section 108 (library copying), section 109 (the “first-sale” doctrine), section 110 (regarding performances and displays for education), and section 121 (copies for persons with disabilities). Most of these exceptions have one common characteristic: they are highly detailed and narrow in their potential application, and therefore many proposed uses will not be within the law.

12 See note 10.

13 Of course, users have other alternatives. For example, if a particular use of a specified work is not within fair use, one can revise the project to use alternative materials or to use the works in a different manner. Any change of the facts necessitates a new analysis of fair use, possibly with a different outcome. If the use is not fair use, one can also seek permission
from the copyright owner. In order to keep the focus on fair use, this paper is operating as if permissions are not available.

For such a rare example of litigation involving an educational institution making and retaining large quantities of copyrighted works, see *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F.Supp. 1156 (W.D.N.Y. 1982), in which a school district maintained a collection of copied educational films. The court held that the district was not acting within fair use.

A recent ruling upheld the fair-use claim made by the producer of an Internet search engine, even though the program duplicated visual images from numerous websites, stored them in memory, and displayed them to users of the engine. The finding was supported in part by the need to use the images to enable use of the program, and the displayed images were “thumbnail” size and low resolution. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002).


The following summary of the four factors is based in small part on an earlier paper by the same author: “Fair Use: Overview and Meaning for Higher Education,” available at [http://www.copyright.iupui.edu/highered.htm](http://www.copyright.iupui.edu/highered.htm).

The language of the statute notes a distinction between “nonprofit educational” uses and “commercial” uses. Indeed, the opening clauses of Section 107 specifies that fair use is for purposes such as education, research, and scholarship. While a nonprofit educational purpose does not itself lead to a finding of fair use, such a purpose can be an important start in the balancing of the statutory factors.

This is not to say that a commercial purpose precludes a finding of fair use. In fact, some clearly commercial works will even have the “purpose” factor tipping in favor of fair use, if the work also has the purpose of educating users. A key example of such a work is a trade book on history or biography, that may have strong commercial value, but it also serves the purpose of educating and informing readers. In cases of such mixed purposes, courts have leaned in favor of finding fair use.


The Supreme Court underscored that conclusion by focusing on these key words in the statute: “including multiple copies for classroom use.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 579 n.11 (1994).


*American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).
30 Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002).
37 In response to the relative uncertainty of fair use, various interest groups have developed and proposed “guidelines” that seek to interpret and apply the law to specific circumstances. Of some relevance to the use of music and other works through the DML are the so-called “Multimedia Guidelines.” For the text of these Guidelines, see Proposal for Fair Use Guidelines for Educational Multimedia, in INFORMATION INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE, November 1998, at 49-59. The present author has written extensively about the deficiencies of these guidelines in particular and the general formulation of all such fair-use guidelines. Kenneth D. Crews, The Law of Fair Use and the Illusion of Fair-Use Guidelines, 62 OHIO STATE L. J. 599 (2001). For that reason, and because the guidelines do not relate closely to the proposed deployment of the DML, the guidelines are not a focus of attention in this paper.
38 For example, see Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982).
40 For example, see Sony Corp. v. Universal Studios, Inc., 464 U.S. 417 (1984).
41 For example, see Los Angeles Times v. Free Republic, 54 U.S.P.Q.2D 1453 (C.D. Cal. 2000).
43 Performances and displays in “transmissions” for educational uses are governed by 17 U.S.C. § 110(2), also known as the “TEACH Act,” but that statute is highly specific and outside the scope of this paper. For further information, see Kenneth D. Crews, New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act, [available at http://www.copyright.iupui.edu/teach_summary.htm ].
Examples of such provisions include §108 of the Copyright Act, which applies to libraries, allowing them to make limited copies of certain types of works in connection with fulfilling specific library services such as preservation programs and interlibrary loans. More recently, Congress added §121 to the Copyright Act, authorizing certain agencies to make copies of a “previously published, nonliterary work” in special formats for use by blind persons or persons with other disabilities. Each of these provisions comes with a variety of limits and restrictions such that they will never have the broad or general applicability of fair use.

For an example of litigation involving the availability of materials through the Internet across national boundaries, see Stewart v. Vista Point Verlag & Ringier Publishing GmbH, 56 U.S.P.Q.2D (S.D.N.Y. 2000).

