

From the University Presses — Georgia State and (Un)Fair Use: A Rebuttal to Kenneth Crews

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The suit brought on April 15, 2008, by three academic publishers — the presses of **Cambridge** and **Oxford** universities and the commercial house **Sage** — against **Georgia State University** is wending its way through the legal process of the federal court of the Northern District of Georgia, and it may be several months yet before any judicial opinion is forthcoming. But the case has already included an interesting intervention by **Columbia** professor **Kenneth D. Crews**, well-known to many as a frequent lecturer and writer on copyright issues and the long-time head of **Indiana University's Copyright Management Center** in Indianapolis, which produced a great deal of very useful educational material aimed at helping graduate students and faculty understand their rights and responsibilities under copyright law.

The law firm of **King & Spalding** representing the defendants in the case commissioned **Crews** to prepare an “expert report” on copyright law and fair use as it pertains to the policies and practices carried on at **Georgia State**, and initially a 72-page document was submitted to the court on June 1, 2009. After responses were provided by the plaintiffs and their attorneys, **Crews** completed a rebuttal, filed on November 2. These are the two documents that will be the main focus of this article. They are accessible at **Peter Hirtle's** LibraryLaw blog here: <http://blog.librarylaw.com/librarylaw/2009/11/crews-important-studies-on-ereserves.html>.

First it may be helpful to lay out the background to this suit, briefly. Concern among publishers about the way that e-reserve systems were developing in libraries, threatening to take the place of print coursepacks, began to grow in the early 1990s. The first formal effort to reach some consensus about how e-reserve systems should function took place within the context of the **Conference on Fair Use (CONFU)**, convened in September 1994 as part of the **Clinton Administration's National Information Infrastructure Initiative**. (A useful summary of **CONFU** is available here: <http://www.utssystem.edu/ogc/intellectualproperty/confu2.htm>.) E-reserves was one of five topics the **CONFU** participants discussed, but perhaps the most contentious, so much so that no recommendation about it was included in the final report of November 1998.

While **Crews** acknowledges his role in the **CONFU** process as someone who “participated in that subgroup” that developed the Fair Use Guidelines for Electronic Reserve Systems (*Ex-*

pert Report, p. 25), he is being far too modest. In fact, **Crews** was recruited to be the principal drafter of those guidelines. I know because I was the lead negotiator for the **AAUP** in working with **Crews** to incorporate language that would allow the **AAUP** to endorse the guidelines. (**Lolly Gasaway** was another member of the drafting committee.) Foremost among my objectives was to have the guidelines recognize explicitly that e-reserves were to function in the same fashion as traditional print reserve systems, in providing supplemental materials for a course and not constituting an entire coursepack. The key sentence in this regard is the following: “When materials are included as a matter of fair use, electronic reserve systems should constitute an ad hoc or supplemental source of information for students, beyond a textbook or other materials.” (The full text of the Guidelines is available here: <http://www.utssystem.edu/ogc/intellectualproperty/rsrvguid.htm>.) This qualification is what allowed the **AAUP** to add its name to the list of groups endorsing the Guidelines (which also included the **ACLS** plus a number of smaller library associations, but not the **ALA**, **ARL**, or **AAP**, whose political positions at the time all were based on hopes of winning the battle subsequently in **Congress**). The judge in the **GSU** case is probably not aware of **Crews' real** role in **CONFU** and his acceptance of this principle as a reasonable interpretation of fair use in application to e-reserves. The e-reserve policy as stated now at the University System of Georgia's Website (http://www.usg.edu/copyright/additional_guidelines_for_electronic_reserves) conspicuously omits this consideration of e-reserves *not* substituting for coursepacks, although **Crews' own** survey of policies in his *Expert Report* reveals this to be included in the policies at many other universities, which he admits adopted much of the approach taken in the **CONFU** Guidelines.

With the failure of **CONFU** to produce any consensus about e-reserves, publishers continued to worry and began to monitor practices as best they could be determined from Internet searches. I was a member of the Copyright

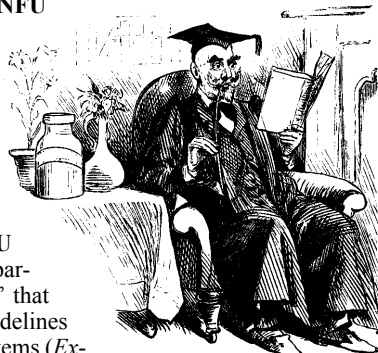
Education Committee of the **AAP** during this period, and this group was asked by the **AAP** Copyright Committee to undertake a survey of e-reserve policies. Our research produced a report in February 2003 covering 103 institutions of higher education in 23 states, from community colleges through the largest public and private universities, and

revealed that, despite the refusal of **CONFU** to adopt them, the Guidelines that **Crews** had drafted had de facto become the operating principles for many of these institutions, wherever they went beyond just a bald restatement of the law's Section 107 itself. It appears that the sentiment expressed in the **University of Texas System's** summary of **CONFU** was widespread: “the work performed by this group presents a valuable starting point for institutions wishing to develop their own electronic reserve guidelines.” In his *Expert Report*, **Crews** summarizes a similar survey he undertook, covering 37 institutions in 23 states. Although the two surveys only overlap to some degree, it was interesting to see that, when percentages were provided for amounts of material copied, the figure from our 2003 report was most often in the range of 10% to 15%, occasionally 20%, but never as much as the 25% that appears for a number of institutions in **Crews' survey** — which suggests that over the past half-dozen years libraries have gotten bolder in their assertion of fair use with respect to e-reserve practices. This is not to suggest that even the lower figure can be taken as a reliable rule of thumb: as **Crews** himself emphasizes, no one factor is determinative in any fair-use analysis, and all four factors as well as other considerations that are relevant in any given case come into play in the assessment of what is fair in the particular circumstances.

Following upon this survey by the Copyright Education Committee, the **AAP** Copyright Committee set up an E-Reserves Task Force to which I was appointed. It began its work by reviewing the **CONFU** Guidelines but agreed after lengthy discussions over many months to settle for an FAQ rather than another set of guidelines. These have been posted since the summer of 2004 here: http://www.publishers.org/main/Copyright/CopyKey/copyKey_01_02.htm. The preparation of this FAQ was spurred in part by investigations of practices at some campuses of the **University of California** where evidence had been uncovered of massive amounts of e-reserve copying that the **AAP** and **AAUP** considered to be well beyond what fair use permitted. Subsequent efforts to resolve these problems with the counsel's office for the California system proved fruitless. Greater cooperation came later from a number of other universities that were approached in 2007 by the **AAP**, including **Cornell**, **Hofstra**, **Marquette**, and **Syracuse**. **Georgia State** was among the universities the **AAP** tried to engage in these discussions, but it rebuffed every attempt. The suit was brought as a last resort.

It is very important for everyone to understand why **Georgia State** proved to be so

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intransigent. The official copyright policy of the Regents of the University System of Georgia had been based on an idiosyncratic theory promulgated by a prominent copyright expert based at the **University of Georgia Law School** named **L. Ray Patterson**. This theory is explicated in, among other places, the book he co-authored with **Stanley W. Lindberg** titled *The Nature of Copyright: A Law of Users' Rights* published by the **University of Georgia Press** in 1991. The theory allows for a distinction between "use of the work" and "use of the copyright." Use of the work, Patterson argues, is a right of "personal use" that copyright law must recognize as inherent in the Constitutional mandate for copyright to promote learning: "the personal-use principle prohibits copyright from being used to inhibit a user's efforts to learn" (p. 70). Use of the copyright, which is the proper subject of fair use, pertains to the use by a competitor in another publication. Since no "publication" is involved in the use of a work included in a coursepack or posted on an e-reserve system, according to this theory there can be no infringement, no matter how much material is duplicated. It doesn't matter to **Patterson** that this "may well enable individuals [or, presumably, their proxies in on-campus copy centers or libraries also] to make copies of copyrighted works instead of purchasing them" (p. 157).

Interestingly, the first draft of this book was presented in the guise of a "neutral" guide to fair use for faculty. I was a pre-publication reviewer of this book for the **University of Georgia Press** and, along with the other reviewer, vociferously protested to the **Press** that it was anything but and, if published, should be honestly presented as the argumentative treatise it really was. Even though the **Press** followed this advice, the authors nevertheless succeeded in their goal of having the Georgia System adopt this theory as its official policy. I cite as an authority here **Crews** himself (who was, ironically, the first recipient of the **L. Ray Patterson Award** from the **ALA** in 2005). In *Copyright, Fair Use, and the Challenge for Universities* (Chicago, 1993), **Crews** observes that while he was completing the survey of university copyright policies for this book, "the legal counsel for the **University of Georgia** replied that the university had no such policy and that copyright issues simply were not a priority concern for the institution. After the closure of surveys...the university issued the most extraordinary, the most original, and the most 'lenient' of all university policy statements." He goes on to say:

A committee of faculty, administrators, librarians, and legal counsel issued a 162-page "handbook" and a sixteen-page set of "guidelines" that survey the purpose and history of copyright, that outline the structure of the law, and that detail the law's application to numerous specific situations. Two members of the committee were professors **L. Ray Patterson** and **Stanley W. Lindberg**,

whose 1991 book tests the limits of user privileges under copyright and proffers an expansive argument. The Georgia policy is expressly based on their book. In accordance with the legal arguments of **Patterson** and **Lindberg**, the Georgia policy identifies generous opportunities of "personal use" and fair use....

The Georgia document is the most ambitious statement from any university on copyright's underlying purposes and on the law's implications for specific circumstances. The policy also tests the limits of copyright interpretation.... **Professor Patterson** is not known for conforming to the latest judicial opinions when he can argue that those opinions misinterpret the law and ignore its historical and constitutional foundation.

Few institutions share the boldness of the **University of Georgia**. The university should be commended for avoiding form policy statements and for identifying the broadest scope of user rights. The Georgia policy is worthy of close study by any university establishing its own standards, but no university should adopt those standards without a careful assessment of their full substantive implications and the possible consequences — both the beneficial and the troublesome consequences — of testing the law's limits so extensively." (pp. 117-118)

It should be perfectly clear from **Crews'** own description that the Georgia System's policy was way out at one extreme, being the most "lenient" of all university policies he surveyed for his book. In fact, it was so extreme that when the Georgia state attorney's office became involved in the case after the suit was brought, it was determined that the policy would be indefensible in court, and subsequently the old policy itself was abandoned and a new one adopted in its place. **Patterson** may not have cared much about "the latest judicial opinions," but the state attorney could hardly afford to ignore them in defending its client! **Probably few people not involved closely in this case are aware that the policy now being defended by Georgia is not the same as the policy in effect when the suit was first brought. And it is this new policy, not the old one about which Crews had expressed such doubts himself, that is the subject of Crews' own two reports to the court.**

The playing field thus has shifted during the course of this case in very significant ways. Because the plaintiffs were not seeking damages for past infringements but only an injunction against future illegal copying, the defendants' lawyers cleverly sought to avoid any responsibility for previous practices and at the same time preempt arguments about the likelihood of future infringement by changing the rules of the game with the adoption of a whole new policy and justificatory framework. Past actions were moot, they told the court, and the University should be judged only according to its promised new behavior. What

is still very much at issue, however, is whether in spite of the new policy the practices have actually changed much, if at all. **Crews** notes at one point that "since the adoption of the new policy, the library has reviewed and rejected at least one request to copy a large portion of a book" (*Expert Report*, p. 55). Considering the massive amounts of copying that had been going on under the old policy, this "one request" hardly seems like much progress. Old habits die hard.

With this review of past developments concerning e-reserves as background, it is now time to take a closer look at **Crews'** two reports. The first, called the *Expert Report*, has as its main aim an assessment of the *new* University System of Georgia policy adopted only after the publishers' suit was brought. This report summarizes the growth and evolution of e-reserve systems since the early 1990s; traces how copyright law, especially fair use, has been applied by courts over the past couple of decades; analyzes the limitations of three model policies developed for reserve readings (the Classroom Guidelines, which were included in the legislative history accompanying the 1976 Copyright Act, the 1982 ALA Model Policy, which was adopted by that library association in response to the alleged overly restrictive nature of the Guidelines, and the **CONFU** Guidelines of 1996); surveys e-reserve policies in place at 23 colleges and universities; discusses common elements of an e-reserve policy; and finally evaluates the *new* policy in light of the foregoing review. Not surprisingly, **Crews** concludes that this policy "is consistent with the copyright law of the United States, and when followed by instructors, librarians, and others at the university, the policy will provide an effective means for promoting compliance with the law at the university" (p. 69). He further notes that "the policy is consistent with, and similar to, many policies that have been in place at colleges and universities throughout the country" (p. 70).

One reason for this similarity is that the Georgia System adopted as part of the *new* policy the fair-use checklist that **Crews** himself had pioneered at **Indiana University** in 1997 (as he acknowledges on p. 58) and then instituted at **Columbia University** when he went there in 2007 to become director of its Copyright Advisory Office. **Crews** could hardly fault Georgia for practicing what he himself had preached, but this certainly makes Georgia's hiring him as an expert a very incestuous relationship. It also helps explain why **Crews'** evaluation of the checklist is very biased and hardly "objective." While emphasizing elsewhere in his *Expert Report* the situational nature of fair-use analysis and the need to be flexible in applying it, **Crews** glosses over what is the major defect of the checklist as it is applied at Georgia, viz., its highly mechanical deployment. The instructions on the checklist itself, which faculty are urged to fill out and keep as a permanent record to show their "good faith" (for the purpose of taking advantage of section 504(c)(2)'s limitations on liability), begin thus: "Where the factors favoring fair use outnumber those against it, reliance on fair use is justified.

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Where fewer than half the factors favor fair use, instructors should seek permission from the rights holder. Where the factors are evenly split, instructors should consider the total facts weighing in favor of fair use as opposed to the total facts weighing against fair use in deciding whether fair use is justified.” This additive method is contrary to the spirit of fair use, and **Crews** should have condemned it. He knows better. This passage from an article by **Robert Kasunic** in the *Columbia Journal of Law & the Arts* captures that spirit well:

Only by accepting the value of all of the factors will the promise of the multifaceted approach espoused by **Judge Leval** (and **Justice Souter** in *Campbell*) become a reality. No factor is superior, nor is any interrelationship of the factors dominant. All of the factors are perspectives of the whole picture, and the whole picture can only be understood by mining all of the information that is available from the unique perspective of each factor. The factors are guides to intensive fact gathering. None of the factors weigh in favor or against fair use. Rather, their cumulative information provides the basis for the analysis as a whole. The fair use analysis is not a tally sheet, but an examination of the interrelationships of the facts and the factors, while keeping in mind the primary purpose of copyright. (pp. 115-116)

The full article is available here: <http://www.kasunic.com/Articles/CJLA%20Kasunic%20Final%202008.pdf>. It was favorably cited by **Kevin L. Smith** on his blog at **Duke’s** library: <http://library.duke.edu/blogs/schol-comm/2009/08/13/choosing-between-reform-and-revolution>. Presumably, **Smith** would agree with this characterization of fair-use analysis, and I think **Crews**, if pressed, would agree as well. The Georgia checklist does not conform to this way of understanding fair use, and **Crews** should have criticized it in this regard.

In his *Expert Report*, **Crews** makes much of the “one time use is fair use” doctrine, claiming that it has operated to raise costs for universities because they have not exercised their fair-use rights for subsequent uses. But there is another way of looking at this doctrine. **Crews** wants to argue that there are many good reasons to consider subsequent uses fair as well as the initial uses, and he blames the widespread adoption of this rule on the concept of “spontaneity” that was incorporated into the Classroom Guidelines in 1976 and later accepted by the ALA Model Policy, too. But one could equally argue now that, with the ability to secure many permissions now almost instantaneously, this rule has outlived its original justification. The origin of this doctrine as a university policy can be traced to the University of Texas System’s copyright guidelines developed by **Georgia Harper**, which greatly influenced the way policies at other universities were written. **Harper** had herself challenged the Classroom

Guidelines’ interpretation of “spontaneous” as far too restrictive when applied to higher education, where it could often take weeks or even many months to secure permissions. Hence, she argued, first-time use should be fair use given the difficulty of obtaining permissions quickly, but then permission for use in subsequent semesters should be obtained because there would indeed be enough time to get the licenses needed. But with the development by the CCC of virtually instant permissioning processes, this rationale no longer obtains. Hence the real question to raise is not, as **Crews** would have it, whether subsequent uses should be allowed under fair use also, but rather whether even that first-time use should be permitted as fair use. **Georgia Harper** has made this case herself in an article titled “Digital Distribution of Educational Materials” in which this revealing footnote appears:

¹The recent introduction by CCC of its Blackboard tool allowing educators to obtain and pay for permission “instantly” has theoretically eliminated the logical justification underlying the Classroom Guidelines’ “spontaneity” requirement and underlying the claim for “first time fair use,” which was based on an historically significant time delay in getting permission (weeks, if not months). Before the introduction of the instant permissions tool in Blackboard, one would evaluate whether a use were fair (for example, whether it was the first time the professor used these materials for this class) before seeking permission from CCC. Now, however, with its rationale gone, first time fair use may be insupportable. It seems to make more sense to check CCC first and only if permission is not available there, consider whether the use might be fair before undertaking the still time-consuming and potentially unfruitful search for the copyright owner.

In explaining how copyright law has evolved, in Part V of the *Expert Report*, **Crews** unleashes the same seductive argument that **Jonathan Band** deployed in his white paper on educational use for the **ARL**, claiming that e-reserve and coursepack use could be seen as “transformative.” Hence, on p. 19, **Crews** says:

In some respects, the use of the materials may be transformative. For example, an article in a scholarly journal was originally written and published for purposes of advancing scholarship. If the article is about medicine, the purpose is for advancing medical treatment and improving health conditions. If that same article is part of the assigned reading in a course, its use is transformed into a teaching tool. The article may be assigned for purposes of advancing medicine, but it might also be assigned as an example of research methods or even to study trends in research funding or scholarly publishing. In an electronic environment, the instructor may add questions and references for further study, and students may add commen-

tary and observations. In the hands of the teacher and student, the article takes on a new purpose.

Without repeating all the arguments I made in response to **Band’s** white paper (in “What Is Educational Fair Use?” *Against the Grain*, v.20#2, April 2008), let me admit that there may be a point on the spectrum where “transformative” begins to make sense, as it would if a teacher really integrated all the readings into some kind of running commentary surrounding them (and maybe this is why the **Kinko’s** judge did not rule out anthologizing altogether as beyond the reach of fair use, as **Crews** notes elsewhere in a different context). But, typically, the readings are just assigned via a syllabus, which hardly offers enough by way of “transformation” to qualify as fair use. It is also disingenuous to argue that scholarly work is produced just for the “purpose” of advancing scholarship, and that teaching is a different “purpose” altogether for use of scholarly work. That distinction flies in the face of all that universities talk about in promoting the integration of teaching and research, and it certainly does not correspond with the actual activities of academic publishers in making scholarly books available in paperback precisely for use in the classroom. There is a real direct impact on the market here that **Crews** glosses over by claiming that “noncommercial” uses are likely not to have much impact on “commercial” markets. He forgets that 90% of what we university presses publish have no other market than the academy! **Crews’** attempt to argue for flexibility about determining what amount to copy, following on the **Supreme Court’s** decision in *Campbell*, depends on the notion of using whatever amount is “necessary” to serve the purpose at hand — which is an open invitation to instructors to use whatever amount they want since they can always justify it in reference to the “educational purpose” they have for any given assignment. We would here quickly get onto a slippery slope, and what judge is going to substitute his or her own understanding of “educational purpose” for the instructor’s? (It may be worth noting here, though, that applying the lessons of *Campbell* herself in a 1979 case involving a musical comedy called “Scarlett Fever” whose creators claimed it to be fair use as a parody of *Gone with the Wind*, the judge presiding in the **GSU** case found it not to contain enough elements to make it overall transformative as a work of parody, ruled it to have used much more than was necessary for that purpose, and — using a functional test developed by **David Nimmer** to determine what is a purpose different from the original purpose — held it to be harmful to the market for the original.) At any rate, **Crews** here goes beyond what the Georgia System itself claims: the e-reserve policy at the Georgia Website now does not currently make this argument about “transformative use.”

The *Rebuttal Expert Report* (hereinafter called just the *Rebuttal Report*) has a more limited aim than the initial report. It addresses just two questions: 1) is licensing of copyrighted works a substitute for the implementation of a fair-use standard and policy? 2) does the

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exercise of fair use pose risks to the survival of scholarly publishing? **Crews** answers both questions in the negative.

On the first point **Crews** argues strenuously against viewing licensing as an effective solution to the problems faced by faculty and accords it, at best, a partial role in supplementing what fair-use analysis should instead provide. Rather than try rebutting his arguments myself, I defer to **Georgia Harper**, who took up this question in her *Collectanea* blog at <http://chaucer.umuc.edu/blogcip/collectanea/> in July 2007 where she responded to **James Boyle's** essay "The Inefficiencies of Freedom" criticizing the then new CCC blanket license:

I've read many works by **Boyle** and always find his analysis to be thoughtful and thought-provoking.... As a result, I was stunned to see that he impliedly labeled as irresponsible large universities like mine that might consider including among the many sources we use to provide legal access to educational materials CCC's new academic license.... Somehow this license will sweep away all of fair use, as though one couldn't thoughtfully conclude that paying for permission was in many cases the right thing to do because a good part of what we do is not fair use. He easily equated fair use for creative uses (parody, criticism, commentary) with fair use for the massive duplication of works created, in many cases, just for our higher education market....

As much as we may dislike the fact that the market for permissions and licensed works has been held numerous times to negatively affect the exercise of fair use, that is how the cases involving systematic duplication and distribution have gone. Further, I don't believe our not making a profit on these copies will completely flip the results of those types of cases.

.... **Boyle** is singling out, as incompatible with fair use, this particular way of paying for uses we make of others' works. He's afraid that if your university just writes a check to CCC for, let's say, \$100,000, so that all the works that are covered by the license (the "repertoire") can be used in the typical ways we use such works in connection with classroom assignments without having to report how many copies were made of which particular works (that is, efficiently), it becomes easy to ignore the question of whether a particular use is a fair use. Who cares whether it's fair use or not? And **Boyle's** concern is that if we don't care about fair use here, fair use will disappear altogether.

Sounds logical, except that fair use is not a monolithic all or nothing proposition. The fair use test comes out differently depending on the facts about each use. His argument is not that different from saying that if we don't rely on fair use

to copy an entire book, we'll lose the right to quote a single line from a book. Those two things are qualitatively, not just quantitatively, different. Creative uses and duplicative, iterative, plain old copying and distributing uses are very different and the courts have consistently recognized that.

.... These cases [involving **Grateful Dead** posters and **Perfect 10's** images] say to me that creative uses have a strong claim to fair use; even duplicative uses without a market for permission have a strong claim to fair use.

But duplicative uses where there is a functional, efficient market for permission are not enjoying the same strong claim in the courts. I don't think the courts are going to begin any time soon to paint with the broad strokes that **Boyle** fears. I too believe that we have to draw a line in the sand about fair use.

.... I just don't agree with **Boyle** about which side of the line our systematic, massive copying and distribution of classroom materials falls on. In theory, maybe some time in the past, it all, or some large part of it, fell within fair use. But with today's markets for licensing and permission, and courts that are all over that concept when it comes to this kind of use, I have come to believe that that time has passed. There are cases where I still feel we reasonably rely on fair use for classroom materials, but they are a small percentage of all our uses.

Clearly, **Crews** agrees more with **Boyle** than with **Harper**. But as **Harper** points out, **Boyle** doesn't have the responsibility she does to advise the university about what risks to take. One might say the same about **Crews**, in reference to Georgia, if not **Columbia University** where, presumably, he does have the same kind of responsibility that **Harper** did. I wonder if **Columbia** has refused a CCC license on his advice?

In his cost/benefit analysis **Crews** simply ignores entirely the great savings that come from a blanket license like CCC's, which allows for storage of digital files for reuse from semester to semester whereas, under Georgia's policy and almost every other one he cites, the files must be destroyed at the end of each term and reconstituted again for use in subsequent semesters. **Crews** also vastly overstates the cost and difficulty of centralizing copyright clearance services on campus and taking that burden off of faculty, who have neither the time nor inclination to devote to learning the intricacies of copyright law (as we publishers have discovered when we observe that academic authors seldom even bother to read the contracts they sign for books and articles we publish for them, let alone educate themselves about copyright). I can cite the success that **Penn State** has had with just such a centralized service for coursepack copying, which operates to insulate faculty from liability also, as the University guarantees to protect faculty from infringement suits only when they use this service and do not go off campus to get copying done by commercial copyshops.

So it is hardly as complicated to coordinate copyright permissioning as **Crews** makes it out to be. Nor do I see why he thinks libraries can't readily charge individual students for their e-reserve services; after all, they charge them for keeping books out too long, and whatever mechanism is used for that function could be used to charge e-reserve fees also, if the university wants to treat them the same way coursepack charges are handled.

Crews further argues that copyshops do not have much incentive to apply fair use because they can simply pass extra costs of getting permissions along to publishers. But this claim flies in the face of the evidence a group of publishers uncovered when they joined in bringing a series of suits against copyshops that did not want to get permissions precisely because they could be more competitive in pricing with copyshops that did. **Crews'** argument sounds logical enough, but he cites no evidence to back it up.

Finally, I would contest **Crews'** argument in the second half of the *Rebuttal Report* that fair use has almost nothing to do with the threats to scholarly publishing today. Yes, he rightly observes that library purchasing decisions, heavily pressured by rapidly rising costs of STM journals (originally in print and then later in electronic form) have severely affected the market for books published by university presses. And, yes, the "open access" movement has led to new ways of thinking about the whole enterprise. But the reality is that income from permissions is not negligible and constitutes enough of the revenue stream for university presses to keep them from having to ask their parent universities for even higher operating subsidies. Indeed, I believe that for most presses that income is more than double or triple what the income is for eBook sales so far. There is no recognition in **Crews'** reports that universities that have presses show no signs of increasing their subsidy support for them, and that universities without presses are not willing to pay anything to support the entire system from which they benefit, as was recommended way back in 1979 by the National Enquiry into Scholarly Communication. **GSU** has, in fact, been a "free rider" on this system for years, not even paying its fair share of permission fees to support the system indirectly. It remains to be seen whether, under the revised policy, these payments will increase significantly, as they should.

My own personal view is that the idea of "transformative use," as deployed in the Second (not the Ninth) Circuit, holds a lot of promise for the way university presses should regard fair use, both as users and as publishers. Indeed, many of our presses are now using fair use to defend such practices as not seeking permission to use film stills in scholarly books about that medium of culture, which is a classic example of "transformative use." What we should continue to oppose, as basically threatening our continued survival and as constituting a parasitical form of publishing, is the mere duplication of copies with no value added, which is what mostly happens with coursepacks and e-reserves.

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This is the difference between “creative” and “duplicative” types of copying that **Georgia Harper** emphasized in her blog. **Congress**, unfortunately, opened the Pandora’s box when it included a reference to “multiple copies” in the language of Section 107, and we have been suffering from this ever since. I have no less an authority than **Crews** himself admitting, in his Chicago book, that “despite its denials, **Congress** was unquestionably changing the law” (p. 33). As **Crews** explains, “three subtle, but important, changes in Section 107 emerged during congressional reviews and hearings: fair use was expressly applied to the reproduction of materials; it permitted multiple copies for classroom use; and the nonprofit character of a use became an explicit factor in the fair use equation” (p. 32). In fact, the study of fair-use jurisprudence that **Congress** asked the Copyright Office to prepare leading up to the revision of the law in 1976 revealed that no judge had ever ruled that straightforward reproduction of a copyrighted work for its own sake was a fair use. While “multiple copies” are now referenced in Section 107 explicitly, we can reasonably argue that this should be interpreted in a *de minimis* sense because, as **Judge Newman** famously said in the **Texaco** decision, whatever social utility this kind of copying may have, it has nothing to do with what fair use traditionally meant:

We would seriously question whether the fair use analysis that has developed with respect to works of authorship



alleged to use portions of copyrighted material is precisely applicable to copies produced by mechanical means. The traditional fair use analysis, now codified in section 107, developed in an effort to adjust the competing interests of the authors — the author of the original copyrighted work and the author of the secondary work that “copies” a portion of the original work in the course of producing what is claimed to be a new work. Mechanical “copying” of an entire document, made readily feasible by the advent of xerography..., is obviously an activity entirely different from creating a work of authorship. Whatever social utility copying of this sort achieves, it is not concerned with creative authorship.

It is anyone’s guess how the **GSU** case will ultimately turn out, and it is not the purpose of this article to make any predictions. **Judge Evans**, presiding in this case, has shown herself to be well-informed about copyright and respectful of past opinions. She is no **L. Ray Patterson**, who was actually the defense attorney in one of the copyright cases she handled in her district in which he was on the losing side. And her interpretation of “transformative use” follows the functional test developed by **David Nimmer** in the authoritative treatise *Nimmer on Copyright* rather than the radically new type of functional analysis propagated by the Ninth Circuit in various of its rulings over the past several years. (For more about these types of functional tests, see my article “Is ‘Functional’ Use ‘Transformative’ and Hence ‘Fair’?” in *Against the Grain*, v.21#3, June 2009.) While I had earlier predicted

that **Judge Pierre Leval**, who is credited with greatly influencing judicial thinking about “transformative use,” would not find the Ninth Circuit’s decisions to be consistent with his own concept, only to be disabused by **Leval** himself when he gave the **Christopher Meyer** Memorial Lecture titled “Did *Campbell* Repair Fair Use?” at **George Washington University** on June 2, 2009, **Leval** in private correspondence subsequently did affirm that he does not “read **Perfect 10** as authorizing, or opening the door to, free distribution of books to students on the grounds that that is a transformative use, all the more so when the books are themselves of an educational nature. I rejected virtually the same argument in the **Texaco** case, which I had in the district court. I recall making the observation that allowing **Texaco** free access to the scientific publications of the plaintiffs on the ground that **Texaco** was using them for scientific purposes would be an appropriation of the plaintiffs’ market.” So, whatever **Judge Evans** may think about the Ninth Circuit cases, we may hope that she, like **Leval**, will still reject the kind of sweeping argument about “transformative use” that **Crews**, following **Band**, puts forward to turn fair use into a truly radical justification for merely “duplicative” copying. 🌿