Electronic course reserves, copyright law, and Cambridge University Press v. Becker

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Libraries like ours have wrestled with the question of how to develop a legally compliant electronic course reserves policy for at least as long as such things have existed. It has never been easy to balance the interests of faculty members who want their students to have access to certain educational materials while ensuring that UNT does not incur the wrath -- and lawsuits -- of publishers for copyright infringement. Now, a case from the 11th Circuit may clarify how schools can use electronic course reserves.

Before we get into that case, however, let's take a look at UNT's current e-course reserves policy. This policy allows faculty members to make some readings available for electronic reserve, subject to a number of qualifications. These qualifications are:

1. We will only put on e-reserve excerpts from books or articles that we own.
2. We will put no more than one chapter or 10% from a single book or one article from a single issue of a journal.
3. The readings should be a small portion of the overall readings for a course.
4. The readings will be available to students behind a password wall.
5. The copies must include a copyright notice.
6. These readings are subject to the terms of use of the vendor.
7. The readings will be removed at the end of the semester.¹

Our policy is a sensible and cautious approach to electronic copying for educational purposes that tracks an agreement between publishers and universities made just before our current copyright law came into effect. Back in the 1970s, while Congress debated the 1976 Act², representatives from these groups met to discuss academic copying under the new legal regime.³ They decided that publishers would not sue as long as universities limited how they copy materials in some very specific and restrictive ways. Our e-reserves policy reflects these ways (though it is not identical to the agreement).

² You may remember that our current law, the 1976 Act, took effect in on Jan. 1, 1978.
³ You can find the full text of this agreement as well as other information about copying for educational purposes in Circular 21: Reproduction of Copyrighted Works by Educators and Librarians from the Copyright Office, [https://www.copyright.gov/circs/circ21.pdf](https://www.copyright.gov/circs/circ21.pdf).
Before going on, I need to address two things about this agreement. First, remember that it is an informal agreement and not law. As such, the agreement does not require either universities or publishers to follow it. Indeed, it is quite different than the fair use statute, even stating that the guidelines are the “minimum standards of fair use,” and not the end of the discussion in themselves. Accordingly, fair use likely permits more copying than the guidelines. Second, the agreement contemplates analog reproduction -- that is, photocopying -- and does not directly address digital reproduction and transmission like that which occurs with an e-reserves systems. So, while our current policy will likely keep us safe from copyright infringement, there is no guarantee a publisher would not find fault with it. What is more, it’s possible that educational fair use supports either more or less electronic copying for course reserves than our policy permits. We don’t know for sure because the issue hasn’t been litigated.

The reason we can’t know for certain is because our fair use statute only give us guidelines for what constitutes fair use, and not a list of what is/is not fair use. The statute holds:

> 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.4

Notice that our fair use statute asks us to balance four different factors, think about how each case fits with them, and decide whether the factors weigh more for or against fair use. In each case there will always be arguments on both sides of fair use/infringement.

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Having looked at a little bit of the legal background about e-reserves and at our own policy, I will now turn to the ongoing lawsuit involving Georgia State University’s e-reserves program. In 2008, Cambridge University Press, Oxford University Press, and Sage Publications, sued representatives from GSU because of the university’s e-reserves policy. As amended in 2009, this policy allowed faculty members to post excerpts of copyrighted materials on the course reserve system if: 1. The reading was from a journal for which the university had a license; 2. the reading was in the public domain; 3. the reading was fair use; or 4. the faculty member had received permission to use the work from the rights holder. Turning to number three, the most controversial part of the policy, the library asked faculty members to complete a form that would help them determine if the use was fair. Where the amount of copying appeared suspicious, library staff would follow up with the professor. These digital copies would then be placed behind a password wall and only available to students in the particular class.

The District Court in this case conducted a lengthy and thorough analysis of how fair use applies to these copies. Ultimately, this court found fair use in all but 5 instances. Unsurprisingly, the publishers -- having largely lost at the trial level -- appealed to the 11th Circuit Court of Appeals. The 11th Circuit found that the District Court made several errors in its analysis. One of the biggest problems the Court of Appeals had with the District Court’s analysis was that the lower court held that copying of 10% or less of a work was fair use. “By holding that the third factor favored fair use whenever the amount of copying fell within a 10 percent-or-one chapter baseline, the District Court abdicated its duty to analyse the third factor for each instance of alleged infringement individually.” So, the Court of Appeals sent the decision back down to the district court to reassess the case along the lines of the analysis presented by the Court of Appeals.

When the District Court got the case back, it went over each instance of possible fair use/infringement again, applying the guidance from the 11th Circuit, and this time found 7 instances of infringement. So, again, the publishers appealed. The 11th Circuit heard oral arguments in this case on July 27, 2017, and the Court is currently considering its next

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5 For a lot of information about this case, see http://libguides.law.gsu.edu/gsucopyrightcase.
7 Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014), https://scholarworks.gsu.edu/univ_lib_copyrightlawsuit/7/
8 Id. at 1272
9 I should mention that the Court of Appeals found several flaws with the district court’s ruling. This was only one of them, but it was one of the most significant criticisms.
10 This is called “remanding” a case.
opinion. There should be a ruling in the case in 2018, but that may not be the end of the
story. Considering how willing these parties have been to argue this case, they may appeal
all the way to the U.S. Supreme Court. And while I can't say for sure if SCOTUS will take up
the case, I wouldn't be surprised if it did.

So, considering the GSU case, what should UNT do? Should we change our electronic course
reserves policy in expectation of an adverse opinion from the 11th Circuit? My advice
would be “not yet.” While the 11th Circuit’s first decision partially favored fair use, it did
not let GSU off the hook. Still, it left open a space where some sort of e-reserves policy can
exist. Thus it’s likely the 11th Circuit will again issue a mixed decision that will permit some
sort of electronic course reserves system. And then it could go back down to the District
Court on remand or up to the Supreme Court. So this case could have a long way to go
before its done.

Ultimately, we just don’t know what the end result will be. I would guess that the court will
permit some sort of educational fair use for electronic course reserves. Indeed, I’d guess
that SCOTUS, too, would allow some sort of e-reserves policy, but it is often dangerous to
try to predict what the High Court will do. Nevertheless, while we don’t know exactly what
will happen, our current policy seems safe for now.

So at this time we should stay the course with our e-reserves policy, but we need to watch
the GSU case and act accordingly. Concurrently, we need to remember that this case is from
the 11th Circuit and is not binding on the 5th Circuit (where UNT is located).¹² Still, we
should respect it and take it into consideration when crafting a policy in the future.

¹²This of the United States Federal Courts of Appeals circuits, http://www.fedbar.org/Public-