

toward illegal file sharing. 'We are already doing pretty much everything we should do,' she said."⁷ This decision does not require monitoring, filtering, censoring, or outlawing P2P file sharing. Since universities do not ordinarily engage in active inducement of copyright infringement, they would not incur contributory liability for the acts of their students misusing file-sharing software. Furthermore, universities already engage in substantial copyright education activities, have copyright policies in place, and respond appropriately to DMCA complaints.

—Copyright 2006 Peggy Hoon

¹ A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (CA9 2001).

² Metro-Goldwyn-Mayer Studios Inc., et al., v. Grokster, Ltd., et al., 125 S.Ct 2764 (2005), opinion of the court.

³ Sony Corp. of America v. Universal City Studios, Inc., 464 US 417, 78. L.Ed2d 574 (1984).

⁴ Metro-Goldwyn-Mayer v. Grokster, opinion of the court.

⁵ Metro-Goldwyn-Mayer v. Grokster, J. Ginsburg opinion concurring.

⁶ Metro-Goldwyn-Mayer v. Grokster, opinion of the court.

⁷ Andrea L. Foster, "Colleges Split Over Effects of Court Ruling on File Sharing," *Chronicle of Higher Education* 51, no. 44 (July 8, 2005): A1, <http://chronicle.com/free/v51/i44/44a00101.htm>.

AMICUS BRIEFS IN THE GROKSTER CASE

The Metro-Goldwyn-Mayer Studios v. Grokster case is important to the library, education, technology, and consumer electronics communities as there are significant implications for future technological development and innovation. As a consequence, ARL, with four other library associations, the Internet Archive, the American Civil Liberties Union, and Project Gutenberg, filed an amicus brief before the US Supreme Court (see <http://www.arl.org/info/ctcases/GroksterSupremeCourt.pdf>). The brief includes examples of peer-to-peer applications in the education and library arenas and also focuses on free speech issues. These organizations also filed an amicus brief when the case was before the Court of Appeals (see <http://www.arl.org/info/frn/copy/groksterbrief.pdf>).

THE ROLE OF FAIR USE IN LIBRARIES AND EDUCATION

The following is testimony from the Library Copyright Alliance (LCA) before the US House of Representatives Subcommittee on Commerce, Trade, and Consumer Protection. The LCA consists of five major library associations—the American Association of Law Libraries, the American Library Association, ARL, the Medical Library Association, and the Special Libraries Association. The testimony was presented on November 16, 2005, by Prue Adler, ARL, at a hearing on "Fair Use: Its Effects on Consumers and Industry."

Fair use is central to our ability to achieve many facets of our missions. Libraries are essential to the communities that they serve and to our Nation. Libraries preserve and provide access to our cultural, historical, and scientific heritage; support and encourage research, education, and lifelong learning; and provide a venue for community engagement on a host of issues.

Libraries, like many other sectors, are undergoing significant transformation in this rapidly evolving digital environment. Today, researchers, students, and members of the public can engage in sophisticated searching and manipulation of information including ready access to data, sound and image files, and more. Increasingly, the data and information available is both current and historical as many libraries, and others, such as Google, Yahoo, Microsoft, and the Internet Archive, digitize special collections that richly reflect the cultural and political history of our Nation.

In this time of transformation, intellectual property policies have been and will continue to be central to the library community. Historically, the library community has relied on copyright law as the policy framework for balancing the competing interests of creators, publishers, and users of copyrighted works. Copyright law balances the rights of authors, publishers, and copyright owners with society's need for the free exchange of ideas. Provisions in the Copyright Act including fair use and related exemptions for libraries and educational institutions allow libraries to achieve our mission of providing effective public access to and the preservation of information in all formats.

Each day teachers teach, students learn, researchers advance knowledge, and consumers access copyrighted information due to exemptions in the Copyright Act such as fair use. Fair use permits the use of copyrighted material without permission from the copyright holder under certain circumstances. For libraries and indeed for consumers, the Fair Use Doctrine is the most important limitation on the rights of the copyright owner—the "safety valve" of US copyright law for consumers.

Fair use or Section 107 of the Copyright Act allows reproduction and other uses of copyrighted works for purposes such as criticism, comment, news reporting,

teaching, scholarship, and research. The statute sets forth four factors to be considered in determining whether a use is fair, including the character of the use, the nature of the work, the amount used in proportion to the whole, and the impact on the market for the work. Fair use has served us well because there is no fair use checklist. The four factors provide libraries and users alike with needed flexibility. And there is no need to import from other sections of the law the detailed list of conditions, prohibitions, and exclusions such as those found in the TEACH Act concerning distance education. Importantly, there is no bright line for fair use. Thus, fair use is dynamic, inherently ambiguous, and not easily defined but critically important in ensuring legitimate access to copyrighted works.

Library patrons routinely rely on fair use. A teacher, for example, might photocopy a few pages of a history text found in a library to hand out to her class. A student may include in a term paper a quotation from a novel checked out of a library while a researcher might give a copy of a journal article describing a laboratory technique to a technician who works for her. A small business owner may print out accounting tips from a Web site he accesses from a library computer. These are fair uses of copyrighted works.

In addition to fair uses by library patrons, libraries rely upon fair use in support of a number of library activities. While US copyright law does contain explicit exceptions for libraries and archives in Section 108, these exceptions do not cover every circumstance under which a library might need to use a work. Section 108 specifically provides that “[n]othing in this section...in any way affects the right of fair use as provided by section 107....” For example, library practices for both print and electronic reserves are based on fair use.

For decades, libraries have provided access to materials selected by faculty as required or recommended course readings in a designated area of the library, with materials available to students for a short loan period and perhaps with additional restrictions to ensure that all students have access to the material. These materials are important to the course but do not warrant the purchase of an entire text by the student. Libraries have based these reserve reading room operations on the fair use provisions of the Copyright Act.

More recently, as with other services, many libraries have introduced electronic reserves (e-reserves) systems that permit material to be stored in electronic form and accessed in the library or remotely by the student enrolled in the course. E-reserves systems are a more effective means to provide student

access to needed copyrighted materials. E-reserves are an excellent example of the flexibility of fair use and demonstrate that it is technologically neutral in its application.

Within the past decade, there has been a notable shift by publishers to license their works to libraries in lieu of the purchase of these works by libraries. Licensing provides publishers with greater control in the use of their works—how they are used, by whom, and at what cost. Licensing access to copyrighted works versus the acquisition of the copyrighted work by libraries presents new challenges to both libraries and their patrons. Under license agreements, a library is bound by the terms of the agreement. These agreements do not necessarily reflect the privileges and exceptions of the Copyright Act such as fair use, preservation, and interlibrary loan. For example, if libraries are unable through negotiation to include in the license terms the ability to perform preservation on copyrighted works, libraries can no longer exercise the rights that are otherwise available through the Copyright Act.

Licensing and technological controls built into a licensed database can restrict the fair use rights of library users in a number of ways. Technological controls can limit the number of copies of an article copied or the amount of text reproduced. These amounts are controlled by the printing and downloading commands of the licensed database. Once technological controls are built into a database with copyrighted materials, it becomes difficult if not impossible for libraries to negotiate exceptions.

Although libraries may preserve copyrighted works under Section 108 of the Copyright Act, there may be times that libraries choose to preserve copyrighted works under Section 107, Fair Use. If a license does not permit the preservation of copyrighted works and a library cannot exercise fair use due to the license terms and/or technological controls, copyrighted works will be lost to future generations. Publishers have not undertaken preservation of copyrighted works. Instead, it is libraries that preserve these works for future users.

In closing, fair use serves a critically important role in the library and educational arena and in all sectors, both public and private. Fair use, in addition to reflecting in copyright law First Amendment-based principles of free speech, provides the basis for our most important day-to-day activities in scholarship and education. Fair use safeguards our collective interest in the flow of information—which is, in turn, a source of culturally and economically valuable knowledge.