

TOPIC 3:

APPLYING SECTIONS 108 AND 107 TO THE CREATION OF DIGITAL, VERTICAL, AND CLIPPINGS FILES

Topic question

Can a library create a digital vertical file of resources, the source of which is taken from a variety of copyrighted material?

Overview

Digital vertical file is a digital presentation of the sort of material normally found in a library vertical file; libraries often create files, in the print world, actual file folders of material from various sources on a particular topic; the contents of a typical vertical file folder might include a brochure, a map, an article cut out or reproduced from another source, or a list of resources.

Electronic clippings: Libraries often create paper files of newspaper clippings; the clippings file, instead of photocopying or fiche-copying these clippings, the libraries digitize the clippings.

The library has certain rights under Section 108(b) to make digital copies for preservation and security (unpublished works) and for replacement if the work is damaged, deteriorating, lost, or stolen, or the format in which it exists is now obsolete under Section 108(c). If a digital vertical file is created in accordance with Section 108, then access must be restricted to on-site means, such as via a CD-ROM station or the library intranet (but not via general Internet access). If the library scans, samples, or otherwise reproduces material not governed by the Section 108 rights (preservation and security or replacement, for example), to use for other purposes such for general access by patrons as an electronic clippings or a vertical file, an analysis of the application of the fair-use doctrine under Section 107 must be made.

As the *Hotelling* case made clear, if the copy so distributed is not a lawfully made copy, then the distribution—in addition to its reproduction—is unlawful. In addition, the access of material through the screen of a computer workstation is arguably also a display of the work.⁸⁰

Depending on the portion and nature of the work reproduced for the digital vertical file, a fair-use analysis under Section 107 might allow for its reproduction and inclusion in the clippings and vertical file. Whether a library can use the work in this way depends on whether the use is fair under the four fair-use factors.

The four fair-use factors are:

- The nature and purpose of the use
- The nature of the work
- The amount and substantiality of the work
- The effect of the use on the market for the work

For example, if only a small portion of the work were reproduced and made a part of digital vertical file and the work was mainly factual or informational in nature and was assembled with similar information to create a new product on the topic (such as converting the material in a travel file into a digital travel log—arguably a transformative use), then at least two, and possibly three of the fair-use tenets would favor a finding of fair use. Reflecting on the nature of file contents in a traditional clipping or vertical file,

brochures, maps, resource directory lists, and so on, a court might reach this conclusion given the circumstances of the other fair-use factors. (Again, this hypothetical analysis should not be taken as legal advice or encouragement to create this sort of material without first obtaining an independent legal assessment.)

One limitation in the success of this analysis is the source of the information—this limitation is especially important for clippings files. If the source of the clippings is an online database, CD-ROM, or even a Web site, then the use of the information may be governed by a license agreement (a legally binding contract) or Web site legal notice (a legally binding click or Web wrap agreement). The subsequent incorporation of the information into the library's digital clippings or vertical file is restricted by contract, not by fair use.

What you need to know

Familiarity with the following is helpful to fully comprehend the discussion of this topic:

- A thorough understanding of Section 107 (fair use) and how it is applied in the library.

Why watch this topic?

Creating digital versions of items for library collections often troubles copyright owners. The limited reproduction and distribution involved in a vertical or clippings file, however, might be acceptable under developing fair-use standards. But creating such digital collections is not without legal risk because no case has addressed this issue. Moreover, commentators appear to disagree over such applications of fair use.⁸¹ A few cases exist on the creation of course packets for universities, but no case exists on the fair use of traditional library reserve holdings, much less electronic reserves or related materials such as clippings and vertical files.

The ability to govern all copyright uses by contract is at the heart of the contract versus copyright debate. The debate concerns whether from a policy perspective the use of information should be governed by contracts such as licenses or should be governed by a public law structure such as copyright.⁸² The ascendance of the UCITA (Uniform Computer Information Transactions Act) model for the transfer of information products and services is an aspect of this debate. UCITA is a model contract law governing information products and services; it might be called a form of information super license.⁸³ (Also covered in Topic 9.) The threat UCITA poses to libraries is that fair use might cease to exist or be significantly limited by content contracting mechanisms.

Background: Public performance

Unlike the exclusive rights of reproduction and distribution, the rights of public performance and display of copyrighted works apply to specific categories: literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works. Performance rights do not apply to pictorial, graphic, or sculptural works. By their nature, these works must be rendered through display instead of through performance. In addi-

For a fair-use checklist, see Kenneth D. Crews, *Copyright Essentials for Librarians and Educators*, p. 128-130 (2000).

tion, sound recordings have no performance or display right, but the music contained within a sound recording may be protected as a musical work. Performance rights apply to motion pictures and other audiovisual works when the images are shown sequentially, and display rights apply when the images are shown nonsequentially.

The rights of performance and display apply only to public performances and displays. Section 101(1) defines a public performance as: "To perform or display a work 'publicly' means to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."⁸⁴ The definition relates to where the performance is made and encompasses a wide range of libraries. For example, a group of people meets in the library, such as students working on an after-school project or members of the same household to watch a video, is this a public performance? Yes. It does not matter that the participant-viewers all know each other. The trigger is that the performance or display is made at a place open to the public or where people beyond the family or social acquaintances typically gather. According to this criteria, a public library then surely qualifies.

A second type of public performance or display occurs through transmission. Section 101(2) states that a performance or display is public when it is transmitted or otherwise communicated to a place specified by Section 101(1) or "to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."⁸⁵ The library might have a cable station playing in the stacks even though only one patron at a time views it while walking past. If a library allows patrons to view videos on its premises, it triggers Section 101(1) but not Section 101(2).⁸⁶ If the library, however, placed an elevated monitor in each corner of the main reading room and played a cable station channel related to various book-themed weeks, this instance triggers the action (transmission or communication) clause of Section 101(2). Under certain conditions, limited to number and size of monitors of "transmission on a single receiving apparatus of a kind commonly used in private homes,"⁸⁷ such acts might still be allowable under other provisions of the copyright law such as Section 110(5) but are beyond the scope of this Report.

Background: Contract and fair use

A recent case from the 7th Circuit Court of Appeals concerns the use of copyrighted information and can impact libraries. In *ProCD vs. Zeidenberg*,⁸⁸ the court upheld the validity of shrink-wrap and Web-wrap or click-on CD-ROM licenses. The implication for the library collection development practices and library users is clear: clicking Yes to an agreement on a Web page or CD-ROM program binds the user to the terms of the agreement. This development is not without its critics, as is the use of traditional contracting mechanisms to govern the access and use of information in the library. Under the copyright law facts are not copyrightable, so the defendant, Zeidenberg, believed that his extraction of telephone names and addresses from the plaintiff's product was lawful. Because he signed a valid license or contract, however, he was bound by the terms of the contract that prohibited licensees from excerpting information from the product without permission. With contracts governing so much of the collection, the possibility exists that a library through the license may inadvertently sign away the library's fair-use or other rights under the copyright law.

The controversial model licensing mechanism known as UCITA operates on the concept upheld in *Zeidenberg*. UCITA essentially mandates that the provisions of licenses override a buyer's other legal rights such as privacy, or in this discussion, intellectual property rights such as fair use. Whoever signs licenses or contracts should read the language carefully to be sure the fair-use rights of the library are not waived or otherwise compromised because the school or library is bound by the terms to which it assents.

Main discussion

Section 108 and digital reproductions

Section 108(b) could be used to support the incorporation of the unpublished materials into the digital clippings and vertical file. The work being incorporated, however, must first be unpublished. Suppose one item is a handout distributed from a speaker at a state library conference. The distribution of the handout is a probably a publication, as far as copyright law is concerned.⁸⁹ If the item consists of a list of favorite Web sites that one librarian received from a librarian at another library, it is probably not a publication because Section 108 states that a publication requires that distribution be "to the public by sale or other transfer of ownership, or by rental, lease or lending."⁹⁰ This resource list, like other unpublished works, can be reproduced and distributed in its entirety under Section 108(b) if the copy is made for preservation or security. No restriction exists on the format of the work. Section 108 says nothing, however, about performances. If the work is an unpublished video recording, the reproduction (digitization) and distribution of the work in the clippings or vertical file is not allowed, as its viewing by patrons in the library as part of the digital vertical file is a performance.

Also recall that any work reproduced and distributed under Section 108(b) must be made for preservation and security. The reproduction and distribution cannot occur simply because the library would like an extra copy in a different format, or to add it to the digital clippings or vertical file. But, if the initial purpose of reproduction is for preservation and security, Section 108(b) allows the library to make a copy and the copy can be in digital form. That digital copy can then be made part of the library clippings or vertical file. The only restriction in this situation is that a library cannot allow access to the digital clippings or vertical file copy to patrons off the library premises, which satisfies the in-house access requirement of Section 108(b)(2).

Suppose you are assembling a file on travel. Within that travel file, the library has a clipping from a newspaper article about a historical site in the United States, such as Gettysburg, brochures from government (the National Park Service) and commercial (bed and breakfast inns) sources, a map (National Geographic or other nonprofit group), and a resource or directory list (hotels, restaurants, and seasonal events in the southern Pennsylvania area). How could fair use be applied to determine whether or not the library could digitize these works and make them part of the library electronic clippings or vertical file?

Under Section 108(c) digital reproductions can be made of published works if the work is damaged, deteriorating, lost, or stolen, or if the format in which exists is now obsolete, and an unused replacement is not available at fair price.

Section 108(c) could be used to support a reproduction and distribution of a work in its entirety if the library's copy is damaged, deteriorating, lost, or stolen, or if the format in which it exists is now obsolete. But Section 108 also stipulates an unused version of the work must not otherwise be available at a fair price. Possibly because of this statute, some newspaper publishers, when libraries seek permission to use archival materials to create an electronic clippings file, do not allow libraries to routinely convert old (but arguably damaged or deteriorating) copies into another format such as microfiche because the newspaper's archive might be available for sale in fiche or from an database vendor. In this situation, the restriction of reproduction and distribution if an "unused copy work is still available at a fair price" provision is not satisfied.

As discussed in Topic 2, if the Section 108(c) "unused replacement" requirement means that reproduction rights rely on whether a copy of the newspaper is still available in its original rag paper format at a fair price, then reproduction is permitted because that the only unused copy of the original newspaper still for sale would be at a high cost.

Regardless of the application of Section 108, applying fair use (Section 107) to a digitization project may still allow for the reproduction and distribution of copyrighted items in a vertical or clippings file. Recall the four fair-use factors: purpose and character of the use, nature of the copyrighted work, amount and substantiality of the portion used, the effect of the use on the market for the work. The reproduction and distribution of each item in an electronic clipping and vertical file scenario can be analyzed using these four factors.

Section 108 applies only to those libraries that meet the requirements of Section 108(a). A significant requirement is that the collections of a Section 108-protected library are open to the public or to researchers in the field. This requirement often precludes the availability of Section 108 to corporate, school, or other private libraries. Section 107, fair use, is applicable to any type of library.

Fair and transformative use

What are the rights of a library that digitizes old newspaper articles in its clippings file as well as articles clipped from recent editions? (Assume Section 108(c) does not apply here; the clippings are either not damaged, deteriorating, lost, or stolen, or if they do meet one of these criteria, an unused replacement is available at fair price.)

The first factor of Section 107—the purpose or character of the use—might favor fair use (digitalization of the clipping).

Moreover, courts favor transformative uses that incorporate the existing work into a new one or use the existing work as a basis for a new work and not merely those that pose as a substitute for the work. Uses that merely change the format of the work are also not transformative.⁹¹

Placing the work in the context of related stories and other materials such as brochures, maps, and other listings as part of an edited clippings or vertical file might be considered a compilation under the copyright law. Compilations may themselves be subject to copyright protection even if the content of the compilation, such as facts or data is uncopyrightable. The selection, coordination, and arrangement of the material, however, must be in some way creative.

The conditions for compilation might be met in the creation of the clipping or vertical file, as librarians cull material from many sources, organize and relate it to other material available elsewhere or in the library collection. In previous cases, one court found that reproducing miniature versions of photographs to create a thumbnail index of Web images was a transformative use.⁹² In another case a video producer's use of a small portion of a rap song as backing audio in an antidrug documentary was also found to be transformative.⁹³

If the purpose of the use is deemed noncommercial, the burden rests with the copyright owner to demonstrate that the use negatively impacts the market for the work (the fourth fair-use factor). If the use is commercial, then the defendant has the burden of proving the use did not adversely affect the market for the work.

The recent *A&M records, Inc. vs. Napster, Inc.* litigation⁹⁴ also clarified that personal uses that do not involve an offering for sale of the reproduced work might nonetheless be deemed commercial if the copying is repeated and exploitative. So far, making a single digital copy of the work does not rise to the level of the personal yet commercially widespread and anonymous copying involved in the Napster music file-sharing system.

In the case of newspaper articles, the nature of the work being copied supports a finding of fair use because the basis of most items in the clippings file is factual. News stories, how-to or fix-it articles taken from news magazines, newspapers, and so on, are findings of fact. In the library example, the information is being assembled about a town in Pennsylvania known as Gettysburg. This material could be said to be protected by thin copyright.

The amount of the work used might not favor a finding of fair use, however, since the entire article might be reproduced. A complete reproduction (100%) of a work is not necessarily a violation of fair use because the fair use might depend on whether complete reproduction (100%) was the only way to make use of the work—such as the inability to take 10% or 20% of a photograph.⁹⁵

Finally, the impact on the market must be considered. Here, courts look here not only at the original market but also at any secondary market, if one exists. Did the library purchase the original newspaper through a subscription, or did the library obtain it elsewhere, thus depriving the copyright owner of sales or discouraging future sales of the original? If the library created a file containing a newspaper's articles immediately after the newspaper hit the stands, when the primary market for the work was still relevant, the library's use might weigh against fair use for this factor.

A second question courts ask is whether a developed secondary market exists. In this case, if there is a market for reprints of the articles the library is using, and if the digitization impacts the development of that market the library might be found in violation of fair use.⁹⁶ Depending on whether the market for the work is affected, the library has two or perhaps three of the fair-use factors on its side. This argument assumes that the material being used is factual, that the use is transformative, and that no negative market impact exists. No case law, however, has interpreted Section 107 in this context.

U.S. government works in the public domain

Suppose the library collected a handful of brochures over the years from the National Park Service (NPS). Most of the brochures have been replaced

As far as the second fair-use factor is concerned, by a weak (thin) copyright protection, as opposed to highly creative works such as novels or poems.

with newer editions that are available from the Department of the Interior NPS Web site. The old brochures, however, still contain some valuable information. Under Section 105, works of the U.S. government are not protected by copyright and exist in the public domain. The Department of the Interior and its subunits, such as the NPS, are a part of the federal government. As a result, NPS publications are not protected by copyright (unless the copyright is explicitly reserved), so such items may be reproduced and distributed, and in this example, digitized and made a part of an electronic vertical file. The lesson here is that works of state and local government are not covered by Section 105 but may be protected by copyright.⁹⁷

Suppose the library wants to add its collection of commercial brochures about bed and breakfast inns in the Gettysburg area to the electronic vertical file. Consider the four fair-use factors again: nature of work, purpose of use, amount and proportionality used, and impact on market. Although the text of the brochure might be factual (thin copyright) with short descriptions of the establishment, room rates, further contact information and so on; it might also contain a map (see discussion below) or photographs.

A photograph can be considered a creative work. Because a photograph in a travel brochure might be of the inn or of one of the guestrooms, it is more informational than creative. This means that while such a photograph may nonetheless be subject to copyright protection its protection might be considered thin under the copyright law.

In *Nunez vs. Caribbean International News Corp.*, a case involving the use of a promotional modeling photograph in a newspaper, the First Circuit seemed reluctant to rule that the photograph was creative, which would then tip the fair-use factor (nature of the work) against a finding of fair use. However, the court was not ready to deem it factual either, concluding "that the impact of their creativity on the fair use finding is neutral."⁹⁸ In other words, a copy made of a straightforward promotional photograph would at most not affect the fair use analysis in either direction. Arguably a photograph of a building made for informational or promotional purposes is not more creative than a photo of a person that is taken for the same reason (as a modeling promotion). As a result, copyright might be considered thin, fair use, or at least might be neutral.

Again, reproduction and distribution of a photo for use in the electronic vertical file could, according to the purpose factor, be a fair purpose depending on whether its new use could be considered noncommercial and transformative.

If the bed and breakfast inn owner owns the copyright of the photograph, no negative impact exists for the reproduction by the library. If the photo was taken by a freelance photographer who might be paid a commission based on the number of brochures printed each tourist season by the Gettysburg Chamber of Commerce and because the library now does not need to order the usual dozen or so for the physical (nondigital) file, you could argue that reproduction impacts the market for the photograph. In this case, one factor might favor fair use (nature of use), one might be neutral (nature of work), and the remaining factors (amount and market) might weigh in favor of the owner. One solution is to seek permission when desiring to reproduce and distribute artistic or complicated and creative graphic designs that are part of a larger work.

Simple maps and thin copyright

Maps are protected by copyright. But maps, like compilations, can contain both protected and unprotected components. The uncopyrightable portion—basic boundaries, the listing of cities and population, mileage distance, and so on—could be copied without infringement.

One court held that some of the copyrightable elements of a map could be copied as well as uncopyrightable portions as maps are subject overall to thin copyright protection.⁹⁹ Again, the library might have two fair-use factors in its favor, assuming the map is used to create a new work that is deemed transformative and that the nature of the work itself is thin. While cases involving the creation of course packets have held that the nature of the work, a scientific article, favored fair use, merely arranging the articles in a course packet was not transformative.¹⁰⁰ The use of the map, like the other works, would perhaps need to be more integrated into a multimedia tour of Gettysburg for the library using the map, the clipping, the photo, and so on.

The third factor (amount of work used) would not favor a finding of fair use if the library scanned the entire map into its electronic vertical file. The library could, however, demonstrate it is not harming the market if the library uses technology that prevents patrons from downloading copies of the map, or places a watermark on the printout that makes the map unreadable. This protection via technology would duplicate the mere reading of the map by patrons in the library.

The library may also consider referring patrons to another source of map information, should patrons want a copy of the map. Another map product (licensed CD-ROM or Web site or database) might give library patrons the right to make a copy of the map through the product's license agreement. In any event, the library should also remind patrons of their responsibilities under the copyright law. Libraries can include the traditional photocopier notice (required by law on all equipment capable of making a reproduction of a copyrighted work) on all computer stations or even activate a notice that appears in a pop-up screen when the print or download capabilities of the workstations are accessed by patrons and staff.

Fair use and factual lists

Reproduction and distribution of a resource or directory list appears to be a fair use. The nature of the work is factual, unless the listing or directory is so large and extensive that it contains creative elements—that is, the factual, unprotected material is somehow selected, arranged, or coordinated in an original way. In this case, the selection, arrangement, or coordination is protected by copyright as a compilation. The concept of compilation is what protects databases made of uncopyrightable factual material such as statistics and other facts and figures. Reproducing a protected listing in its entirety infringes on the creative aspects of the selection, coordination, or arrangement of the list.

Extracting the unprotected information, repackaging it, and reorganizing it as part of new directory or listing, however, is a fair use. The factual information extracted is not protected by copyright or is protected by a thin copyright at most. The use is transformative (depending how it is used—see the discussion earlier in this chapter) and, depending on how much is taken, the third factor (amount of material extracted) might also favor a finding of

fair use. If the list or directory is distributed at a conference, reproduction may not affect the market for the work.

The *Kelly vs. Arriba Soft Corp.*¹⁰¹ case suggests that extracting both copyrighted and uncopyrightable material for a Web site is acceptable as long as the process of copying is the most efficient way to obtain the unprotected elements of the materials—even if copying is not the only way to do so. Taking information from a database or other published directory, however, may impact the market, if what is extracted is a substitute for the work. Moreover, if the information is extended from an existing information product, such as a database or CD-ROM, the license agreement that governs the library's use of the information (even uncopyrightable information) might still restrict the library's use in what would otherwise be considered fair use.

Asking for permission is always an option

The library could consider asking for permission to reproduce items to be incorporated into electronic clippings and vertical files. In the case of material such as hotel brochure, the benefit these entities might gain in the form of free advertising might convince copyright owners to agree to digitization on a limited basis with no distribution outside the library. Many commercial entities send their information in brochures or post it on their Web site to widely distribute it. In the case of material taken from a Web site of bed and breakfast inn proprietors, check the site's legal page to find any restrictions on the use of material posted on the site.

Another way to increase the likelihood of a successful fair-use defense is to take only that portion of the material that is needed. Partial use tips the third factor (amount) in favor of fair use.

Consider placing copying restrictions or warning notices, as well as using technology that allows patrons only to view but not print material in the electronic vertical or clippings file. These actions attempt to uphold in the spirit of Congressional concern about applying the concepts of Section 108 to virtual libraries. Restrict the use of the vertical file to patrons in the library building. Doing so makes a qualifying digitization (preservation and security or replacement) compliant under Section 108. Also, in keeping with the spirit of the warning notice of Section 108 and 109 (which requires warning notice on software loaned by qualifying libraries and schools), place a warning notice on the opening screens of the vertical file material.

Also consider disabling patron ability for print or download. This method may be excessive because in the traditional vertical or clippings file, nothing prevents the patron from retrieving material from the file, walking to the photocopier, reading the warning the library has posted, and making a copy for personal use. At least the library can present the warning notice on a pop-up screen every time the patron desires to download or print from the electronic clippings or vertical file.

Proceed with caution, caution, and more caution

If clippings and vertical file digitization projects otherwise meet the requirements of Section 108 (preservation and security or replacement including obsolete format, unused replacement at a fair price, and in-house use only), no reason exists to prevent that digital copy from inclusion in a vertical

file. But if recourse to a general fair-use analysis must be made under Section 107 and the developing case law, then digitizing material that is factual or protected by thin copyright favors a finding of fair use.

Transformative second uses (using the clippings material to create an index or other location tool or adding something new to an existing work, or incorporating the item into a new work, and so on) are favored over uses that are mere substitutes for originals. But even seemingly transformative uses that take 100% of a work, or uses that impact the market for the work, are not considered fair uses. A library's decision to proceed with a digitization project should not go forward without assessment of applicable legal concepts and how each concept applies to particular works in a particular set of library circumstances.

Unresolved points or issues

- No case has applied the fair-use test to libraries that create electronic clippings, vertical files, or even electronic reserves.
- The validity in some states of the elimination of various fair-use rights in favor of contract rights.
- There is little relevant case law. For example, there is no case involving the application of fair use to nonprofit libraries, nor has there been any case involving fair use, libraries, and any of the digitalization scenarios discussed in this chapter.

Resources

Helpful URLs

<http://fairuse.stanford.edu> Sponsored by Stanford University, this site contains basic material on fair use.

www.mville.edu/library/erc/erc.htm The Electronic Reserves Clearinghouse contains numerous resources on a related topic to vertical and clippings digitalization, the creation of electronic reserves.

From the library literature

Amen, K.L., Garrison, J., & Keogh, T. (2001) "Meeting the Copyright Challenge." *College and Research Libraries News*, 62(7), 724-727. Includes discussion of distance education and electronic reserves; music and other media; course-packs; and colleges and universities as online service providers

R.S. Talab. *Commonsense Copyright: A Guide for Educators and Librarians* (1999) Several chapters provide basic information, including electronic publishing and the Internet and the Web.

From the legal literature

John W. Hazard Jr. *Copyright Law in Business and Practice* ¶¶ 8.02 and 8.03, at 8-2—8-55 (2000) (discussing fair use, including application to libraries and schools).

ENDNOTES

⁸¹ F. Lawrence street and Mark P. Grant, Law of the Internet § 5.01[3] at 5-7—5-8 (2001).

⁸² Compare, Kenneth D. Crews, Copyright Essentials for Librarians and Educators 69-71 (2000) (discussing the creation of e-reserves and other digital conversions), with Carol Simpson, Copyright for Schools: A Practical Guide 32-33 (3d ed 2001) (discussing reproduction of copies for the vertical file and for e-reserve).

⁸³ N. Elkin-Noren, "Copyright Policy and the Limits of Freedom of Contract (Symposium: Digital Content: New Products and New Business Models)," 12 *Berkeley Technology Law Journal* 93-113 (1997); D. A. Rice, "Digital Information and Property and Product: U.C.C. Article 2b" (Symposium: Copyright Owners' Rights and Users' Privileges on the Internet), 22 *University Of Dayton Law Review* 621-648 (1997); J. N. Talbot, "Facts, Copyright, Unfair Competition and Contracts; Will NBA v. Motorola Lead to Shrink Wrap Television?" 12 *The Entertainment and Sports Lawyer* 7-12 (1997); Michael J. Madison, Legal-Ware: Contract and Copyright in the Digital Age, 69 *Fordham Law Review* (1999, forthcoming) (leading to shrink-wrap books and magazines); and C. R. McManis, "Do Not Support 'Privatizing' Copyright," *The National Law Journal*, October 13, 1997, at A24 (leading to shrink-wrap books and magazines).

⁸⁴ David A. Rice, Legal-Technological Regulation of Information Access, in *Libraries Museums and Archives: Legal Issues and Ethical Challenges in the New Information Era*, 275 (Tomas A. Lipinski, ed. 2001).

⁸⁵ 17 U.S.C. § 101 (2000).

⁸⁶ 17 U.S.C. § 101 (2000).

⁸⁷ See *Columbia Pictures Industries, Inc. vs. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989).

⁸⁸ 17 U.S.C. § 110(5)

⁸⁹ 86 F.3d 1447 (7th Cir. 1996).

⁹⁰ See U.S. Copyright Office, Compendium II, U.S. Copyright Office Practices, § 905.01 (1984); and discussion in John W. Hazard, Jr. *Copyright Law in Business and Practice* § 1.03, at 1-4—1-10 (1999) (discussing the concept of publication).

⁹¹ 17 U.S.C. § 101.

⁹² *UMG Recordings, Inc. vs. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

⁹³ *Kelly vs. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Calif. 1999);

⁹⁴ *Higgins vs. Detroit Educational Television Foundation*, 4 F. Supp. 2d 701 (S.D. Mich. 1998).

⁹⁵ *A&M records, Inc. vs. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

⁹⁶ *Kelly vs. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999) (Web site of thumbnail index of photographs a fair use); *Nunez vs. Caribbean International News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (use of modeling/promotional photograph in a news story a fair use).

⁹⁷ See *Nunez vs. Caribbean International News Corp.*, 235 F.3d 18 (1st Cir. 2000) (discussing the fair use by a newspaper of a promotional photograph of a model, latter in news story about that model).

⁹⁸ *National Conference of Bar Examiners v Multistate Legal Studies, Inc.*, 495 F. Supp. 34 (N.D. Ill. 1980), aff'd 692 F.2d 478 (7th Cir. 1982), cert den. 464 U.S. 814 (1983). See also, 14 Op. Atty. Gen. Okla. 317 (1982) (No. 82-167) (copyright may be claimed in works of the Oklahoma Historical Society); 1983 La. AG LEXIS 387, at 2 (July 27, 1983) (available in the LEXIS*NEXIS LA Library) (Louisiana state agencies "may own the copyright in its capacity as a private person").

⁹⁹ *Nunez vs. Caribbean International News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).

¹⁰⁰ *Alexandria Drafting Co. vs. Amsterdam*, 43 U.S.P.Q. 2d 1247 (E.D. Pa. 1997); See also, John W. Hazard Jr., *Copyright Law in Business and Practice* ¶ 2.06[13], at 2-55—2-57 (2000).

¹⁰¹ *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *Princeton University Press v. Michigan Documents Service, Inc.*, 99 F.3d 1381 (6th Cir. 1996), cert. denied, 520 U.S. 1156 (1997).

¹⁰² *Kelly vs. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999).