



Against the Grain

"Linking Publishers, Vendors and Librarians"

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Op-Ed: Opinions and Editorials

Why Texaco Is Important to University Presses

by **Sanford Thatcher** (Director, Pennsylvania State University Press)

Much of the writing about the Texaco case, and about "fair use" in general as it affects universities, has encouraged the idea that there are just two sides to the debate: commercial publishers, cast in the role of greedy capitalists out to make a quick buck, versus university librarians and teachers, portrayed as impecunious and virtuous servants of the public good. Rarely is any recognition given to the position of another important set of players, which share some interest in common with each side — namely, university presses.¹ It will be my aim in this essay to suggest that understanding the role that presses play can add more

nuance to what has often been a too polarized debate.

Why should university presses be interested in the Texaco case? This is a reasonable question to ask because, at first glance, the kind of copying at issue in this case would seem to have little or no impact on what these presses do. Although forty of the regular members of the **Association of American University Presses** publish journals numbering about five hundred collectively, only about twenty percent are in the sciences, and even these are mostly in theoretical rather than applied science.² Nevertheless, the AAUP from the beginning of



the suit against Texaco in 1985 has allied itself with the **Association of American Publishers**, and two of the named eighty-three plaintiffs in this class action are indeed university presses, **MIT** and **Princeton**.³ This fact is conveniently ignored when representatives of other university-based groups, such as the **Association of Research Libraries** and the **National Humanities Alliance** (which were among the organizations that filed briefs as amici on Texaco's side), talk about what the public interest in the advancement of learning that they (correctly) see as the constitutional purpose of copyright actually requires.⁴

To show why the Texaco suit has so engaged the interest of university presses, let me go back in time to a period when the AAUP was intensely involved in the discussions leading up to the passage of the

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If Rumors Were Horses

Heard from a person from the past the other day! Who was it? **Brian Scanlan**! Brian writes that he has recently left the **Simon & Schuster/Prentice Hall** organization in London where he was heading up the European operations and will be heading back to New York where he can be reached at 286 Newtown Road, Wyckoff, NJ 07481. Phone 201-445-1634.

Hopefully, we will be meeting up with this sharp as a tack man on the circuit soon!

The **Faxon Company** has announced the appointment of **W.O. Bill Keller** as Chief Executive Officer. Keller will report directly to **Mr. Bryan Ingleby**, Group Chief Executive of **Dawson Holdings, PLC**, Faxon's parent company.

Prior to joining Faxon, Keller was the Vice Chairman, President and CEO of **Solkatronic Chemicals** in Fairfield, NJ. Keller earned his degree

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Copyright Act of 1976, especially with regard to photocopying as it would be

"They cannot have it both ways: eating their cake and having it too."

affected by sections 107 and 108. The general approach of the AAUP was spelled out in written testimony presented by **Arthur J. Rosenthal**, then director of **Harvard University Press** and chair of the AAUP Copyright Committee⁵:

"The university press in the United States has traditionally occupied a unique position between the worlds of commerce and scholarship. In fulfilling their responsibility to publish books by and for scholars that would not otherwise be published by reason of their limited marketability, the university presses of this country find themselves actively engaged in the world of business . . . fulfilling all the functions of a profit-oriented business, while at the same time maintaining a paramount interest in the editorial and scholarly integrity of their respective institutional imprints, and, hence, their reputations.

"It is this unique perspective that allows — or obliges — the university press to view the issue of copyright . . . from the viewpoints of both educator and entrepreneur. The university press has always existed to insure the systematic and orderly transfer of important scholarly information to an appropriate readership, and to act as a faithful steward of its authors' rights and interests in doing so . . . If the orderly reporting of scholarly research and thought is to continue, the medium through which it occurs must be safeguarded. A vital component of that medium is the traditional privilege and responsibility of registering and protecting an author's claim to copyright in the writings which represent his intellectual achievement, and of exercising and managing all subsidiary rights dependent on that copyright in accordance with contractual conditions agreed upon by author and publisher . . .

"In a field of endeavor where little if any financial reward accrues to the creator, every effort must be made to assure

at least that he retains control over the format and content of his creation. Without copyright, this is impossible, and without adequate protection, there is no copyright. Our purpose as stewards of scholarship is to protect the environment in which authorship happens, for without the author, there is nothing to publish, and when nothing is published,

there is nothing to read, and when there is nothing to read, the intellectual environment stagnates and ultimately dies."

The AAUP's written testimony ended with this alternative language proposed for section 107:

"Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies of phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, display or lecture in teaching, scholarship, or research, is not an infringement of copyright. Fair use does not include the reproduction of a copyrighted work for its own sake, as in an anthology or book of readings, or as a self-contained unit such as an appendix to another work, or as a substantial part of the text of another work. In determining whether the use of a work in any particular case is a fair use the principal factors to be considered shall be the market value of the use of the copyrighted work and the effect of the use upon the potential market of the work. Factors in making this determination shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; and (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole."

Note that this proposed version of section 107 would have elevated what is now the fourth factor into a position of preeminence, which is indeed what the Supreme Court itself bestowed upon it in Harper & Row v. Nation (1985), calling it "the single most important element of fair use" (471 U.S. at 566). Significantly, the Supreme Court also said in that case: "to negate fair use one need only show

that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work'" (471 U.S. at 458, quoting Sony, 464 U.S. at 451). That is indeed the worry that university presses have had over the years about rampant photocopying. In my own oral testimony at the Senate hearing in 1973, I spelled out this concern as it applied specifically to journal publishing⁶:

"... scholarly journals {published by university presses} seldom pay their own way through income received from subscriptions and advertising, at least for a very long time after publication is initiated and sometimes never It is no solution to sell the journal at a price that will insure its economic viability, however high the price may have to be. For, unlike a book, which as a more or less unified treatment of a single subject can be sold even at a high price to those individuals who have a special interest in it, a journal typically provides a general forum for the discussion of a range of issues within a broad field of inquiry, not all of which are likely to be of interest to the scholar who subscribes to it; hence, raising the price of the subscription is apt to make the alternative of photocopying those articles of particular interest to the professional relatively more attractive than continuing his subscription.

"And here is the rub, as far as publishers of specialized journals are concerned. For as the cost of printing and publishing inexorably rise, and the charges for photoreproduction increasingly become cheaper, the journal publisher finds himself unable to pass on the higher costs to the consumer, who at some point on the scale will prefer pho-

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tocopying to subscribing. The final result, if carried to its logical end, of course is self-defeating: the erosion of the journal's subscription list will sooner or later compel the publisher to cease pub-

lication of the journal altogether — and then the scholar will have nothing to copy. The publisher, the scholar, and the rest of us will be all the poorer as a result. . . . Allowing uncompensated use of copyrighted materials . . . would ultimately dry up the very wellsprings of creative and productive scholarship which it is the concern of educators and librarians themselves to promote. They cannot have it both ways: eating their cake and having it too.”

Now, aside from my failure to foresee the lengths to which librarians especially would go in maintaining journal subscriptions despite ever escalating prices, with the concomitant devastating impact upon monograph purchasing by libraries (down 23 percent since 1986, according to the latest ARL statistics), I think this analysis is basically still correct — and helps explain not only the recent rush by libraries to cancel subscriptions but also the increasing resort to document delivery services and resource sharing at the same time, as well as the efforts to explore how scholars themselves can publish in journals electronically (where articles effectively get published individually, as accepted, rather than as part of a printed “bundle”). At any rate, this view of the threat posed by massive photocopying is what has underlain the interest of university presses in the *Texaco* case. We see this as a form of “systematic” copying that essentially supplants the market for the original work, either by subscription or license — and are pleased that both the district and appeals courts have taken it to be such, too. **Judge Newman** in the appeals decision even giving it a specific name as “archival” copying. It is copying that is more than just incidental to the researcher’s immediate purpose or task; it constitutes a practice that inevitably undercuts the financial base of the original publication. As I argued in my Senate testimony, “our efforts should be concentrated on devising workable mechanisms for linking up photocopying in support of original publication, rather than permitting it to remain a free rider, a parasitical form of publishing.”

Just such a “workable mechanism” was, of course, established at the behest of Congress when the law came into

effect in 1978 — the **Copyright Clearance Center**. The publishers most involved in its creation and early support were from the commercial sector of STM journal publishing, and unlike its counterparts overseas, which were set up to license photocopying in educational institutions, the CCC concentrated almost all of its attention for the first decade of its existence on photocopying by profit-making industrial corporations like *Texaco*.⁷ But even though the CCC was not then focusing on the problems that concerned university presses the most, foremost among which was the steady growth in “coursepack” copying, we clearly recognized that the existence of the CCC was crucial to the protection of our copyright interests as well, prospectively if not immediately.⁸ And we also realized that, for the CCC to survive, it had to prevail in the legal challenge that *Texaco* was presenting. That is why, as a representative of the AAUP and its copy-

“Besides, as publishers we prefer to sell books rather than licenses for photocopying to replace them!”

right committee chair, I accepted an invitation in 1988 to join the board of directors of the Association for Copyright Enforcement, which was established to be the coordinating body for pursuit of the suit against *Texaco*.

After the *Kinko’s* case was settled in 1991, I also became a member of the CCC’s board of directors as it began turning more of its attention to the problems of photocopying within universities, eventually establishing a **University Licensing Subcommittee** on which I serve. The aftermath of *Kinko’s* has seen a lot of changes, with much photocopying activity moving back onto campuses and more of it being properly licensed, both on campus and off, in a more consciously cooperative way than theretofore had existed.⁹ And the evidence of what revenues had previously been lost has now become inescapably clear. Thus, for just one of our journals, income from coursepack copying increased dramatically in one year from being negligible to constituting a full five percent of its revenues (equivalent to fifty individual subscriptions), and

there is no reason to expect this percentage won’t become much greater as more photocopying comes under license.¹⁰ And, as for books, I can cite examples when, in the face of higher charges for photocopying than for buying a book in paperback, teachers have opted for the former, thus inhibiting sales of books and imposing a greater financial burden on their students. In these instances, of course, the press is not suffering lost income overall, but there is undoubtedly still much photocopying going on where not only do we lose the sales of books but the income from licensing as well. Besides, as publishers we prefer to sell books rather than licenses for photocopying to replace them!

The consistent theme in the position that university presses have taken on photocopying is that it must be seen as fair only in those limited circumstances where the use is clearly spontaneous or supplemental, not threatening to displace the market for the original work or to interfere with licensing uses that go beyond these types. Thus we can accommodate ourselves to the copying done under the **Classroom Guidelines** and for traditional library reserve, where the nature of the use is limited in

just this way. But we view coursepack copying as well beyond the confines of “fair use” when large chunks of our copyrighted books and journals are included, and we have to be skeptical when librarians talk about new electronic reserve projects in expansive ways that make them seem to us technological equivalents to creating full anthologies or about “resource sharing” schemes that rely heavily on the use of photocopy and electronic document delivery mechanisms.

Unfortunately, there is an all too prevalent tendency for teachers, even more than librarians, to assume that any use, so long as it is “educational” in nature, is thus fair. This is not a position that finds favor with judges.¹¹ Nor do responsible authorities in higher education circles condone such facile reasoning: “If the work is educational in nature, a fair use exception for an educational purpose might not be justified logically.”¹² That’s exactly the point that university presses want to get across: most of what we publish has no market outside of the academic community and

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is inherently "educational in nature"! Hence fair use should apply in only a very limited way to our publications; otherwise, with the market undermined, they will cease to exist.

We think this position has a solid basis in law. Remember that the notion of "fair use" first codified in the 1976

Copyright Act had its judicial antecedent in the enunciation of factors useful for arriving at

"... most of what [university presses] publish has no market outside of the academic community and is inherently 'educational in nature.'"

a correct decision laid out by Justice Joseph Story in *Folsom v. Marsh* back in 1841, a time when "reproduction" meant copying by hand (laboriously) or by a printing press (expensively), and "fair use" until late in the present century applied only to one author's embodiment of another author's expression in a newly created work for purposes of comment and criticism — not at all to complete and mechanical duplication in facsimile form such that exact copies of the original are multiplied in the marketplace. When teachers and librarians now talk about "fair use," however, they often are thinking about the latter rather than the former. That is no doubt the reason why the phrase "access to information" crops up so frequently.¹³ This language is more obfuscating than helpful as it misleadingly suggests that there is a First Amendment issue at stake here. But there isn't: copyright's "underlying objectives parallel those of the First Amendment. 'The Fathers intended copyright . . . to be the engine of free expression.'"¹⁴ Reference to "free access" is simply a red herring: no university press, I am sure, has ever denied permission to photocopy its copyrighted works unless the prospective use would amount to a complete substitution for sale of the original. We want our books and journals to be as widely disseminated as possible; we are in the business of publishing primarily to advance research and aid teaching, not to make a profit for shareholders. Our "shareholders," in fact, are our users, one and the same!

The view we take of "fair use" has been eloquently summarized in the Texaco case itself, where Judge Newman writing for the majority says (pp. 9-10): "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 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 and economical 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 this emphasis on the "transformative" nature of the use that was at the heart of Judge Leval's analysis in the *Texaco* decision in the district court (and is elaborated in his *Harvard Law Review* article cited above), and Judge Newman gave a resounding affirmation of it in his opinion for the majority on appeal.¹⁵

University presses are ready to acknowledge the "social utility" of uses

that may not be "transformative" in any strict sense, and of course section 107 itself refers to "multiple copies for classroom use" as illustrative of types of copying that *may*, within certain limits and under certain circumstances (as, for instance, defined by the Classroom Guidelines), not be infringing.¹⁶ Our only concern is that, to the extent such broadly beneficial uses have a tendency to undermine the financial foundation for scholarly publishing, some means be de-

"... we are in the business of publishing primarily to advance research and aid teaching, not to make a profit for shareholders."

vised for creating an income stream that closes the loop and allows us to continue providing *our* socially useful service. The best mechanism, to my mind, would be a blanket license between the CCC representing rightsholders and individual universities for all the copying done on their campuses, for whatever purpose — research, teaching (both classroom handouts and coursepacks), reserve room reading, administrative use, etc. CCC's sister organization in Canada, CANCOPY, is now in the process of entering into such agreements with universities in that country, and we could learn from their experience. A start could be made here with a pilot project involving a large consortium of universities, such as the **Committee on Institutional Cooperation** (the academic side of the "Big Ten") to which Penn State belongs.¹⁷ The advantages of such an arrangement would be several: a great deal of labor-intensive paperwork required in gaining permissions would no longer be necessary, for both publishers and users; universities, on their side, would benefit from having quick and certain access to a massive amount of copyrighted material, being able to budget rationally in advance for its use, and avoiding liability for unmonitored activities of its faculty and staff; and publishers, from their side, could count on getting a return from licensing fees that, even granting an allowance for "fair use" copying, would likely be significantly greater than what they are earning now, since all evidence suggests that much unlicensed copying beyond fair use is still going on. Obviously, the "price" for such a blanket li-

cence would have to strike each party as "fair," but I am more optimistic that a negotiation over price could succeed than I am that users and publishers will ever agree about a precise definition of "fair use."

Only an organization like the CCC can make this kind of licensing scheme work. And since the existence of the CCC depends on the suit against Texaco being successful, university presses have every reason to be vitally interested in the outcome of that case. In many ways our very existence, too, depends on it. ♦

Endnotes — Thatcher Op-Ed

¹ Typical is the complete absence of any reference to university presses in the section devoted to "Diverse Constituents within the University" (or even anywhere in the index) in **Kenneth Crews**, *Copyright, Fair Use, and the Challenge for Universities* (Chicago: University of Chicago Press, 1993), pp. 14-18 — even though this book was published by a university press. For an analysis of how this omission vitiates the argument of this book, frequently cited by librarians as an authoritative treatment, see my forthcoming review-essay (which will also include similar criticism of another frequently cited work. **L. Ray Patterson** and **Stanley W. Lindberg's** *The Nature of Copyright: A Law of Users' Rights* — this, too, published by a university press!) in *Scholarly Publishing*.

² I do not include here journals published by those AAUP members that have "associate" status, which include such major scientific journal publishers as the **American Chemical Society**. AAUP positions on copyright and other matters do not immediately reflect the interests of such members as they have no voting rights in the association.

³ **Cornell University** is also among the named plaintiffs, though not its press specifically. At the time the suit was filed, I was editor-in-chief at **Princeton University Press** and recommended to its management that it join the suit. Princeton has a unique status among presses in this country in being a corporation separate from the university whose name it bears; it therefore is able to take stances on issues like this independently from the university without immediately raising questions of conflict of interest. It is thus no accident that Princeton has also been involved in suits against commercial copyshops, most recently as one of the three plaintiffs suing **Michigan Document Services**. The AAUP, as a trade association not owning copyrights itself, cannot be a direct party to such suits, but has been involved numerous times with the AAP and other trade associations in filing amicus briefs at the appeals level in copyright cases.

⁴ A typically bald assertion is this statement from the amicus brief supported by the **ARL** and **NHA**: "A decision for plaintiffs in this case will interfere seriously with the 'Progress of Science' and will in no way promote that progress" (p. 9, emphasis added). It might also be noted here that, beginning from the same premise (that copyright law needs to be interpreted in the light of the general constitutional purpose it serves), **Judge Pierre Leval** found **Texaco's** use not to be fair in his ruling at the district court level, recently upheld on appeal. See **Pierre N. Leval**, "Toward a Fair Use Standard," *Harvard Law Review*, Vol. 103, No. 5 (March 1990), esp. p. 1110: "One must assess each of the issues that arise in considering a fair use defense in the light of the governing purpose of copyright law."

⁵ "Copyright Law Revision," Hearings before the **Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate**, 93rd Cong., 1st Sess., July 31 and August 1, 1973, pp. 140-142.

⁶ *Ibid.*, pp. 138-139.

⁷ This was also the principal orientation of the **AAP Copyright Committee**, which although it pursued a few infringement cases against copyshops in the early 1980s focused its primary attention on the corporate sector, thus allowing practices within universities to go unchallenged and become even more habitual and seemingly sanctioned by "natural right" — much to the frustration of a few of us on that committee whose chief concerns were with just those practices, which affected university

presses the most.

⁸ To be perfectly honest, I have to admit that getting the entire group of university presses to sign up as members of the CCC was a hard sell at this time, as many (especially those not publishing journals) didn't understand what longer-term interest they had in the CCC's success. But within a relatively short time after the **Kinko's** case was decided and the CCC's **Academic Permissions Service** was established, all university presses signed up, their immediate interest then having become abundantly clear!

⁹ Much credit here has to go to the AAP, which changed its own emphasis away from threats of litigation more toward educational efforts in setting up its **Task Force on Copyright Compliance** (on which I serve) in mid-1993 and hiring the very able and industrious **Jill Braaten** as Director of Copyright Education early the following year.

¹⁰ A good deal of the licensing revenue for this journal has come through the CCC. What is often overlooked, even by presses that know what value the CCC has for it domestically, is that the CCC has to be the principal mechanism for university presses to recover fees from photocopying of their materials in foreign countries. The CCC now has bilateral relations with reproduction rights organizations in eleven other countries, thus enabling easy repatriation of copyright fees otherwise virtually impossible for U.S. presses to obtain.

¹¹ In *Campbell v. Acuff-Rose Music* (1994) the Supreme Court once again declared that "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement" (114 S.Ct. at 1174).

¹² **Laura N. Gasaway** and **Sarah K. Wiant**, *Libraries and Copyright: A Guide to Copyright Law in the 1990s* (Washington, D.C.: Special Libraries Association, 1994), p. 29.

¹³ An example appears in the November issue of *Against the Grain*, where **Marsha Baum** in her article on fair use says: "The goal of copyright law is to balance the copyright owner's economic interests and society's interests in access to information" (p. 14).

¹⁴ **Leval**, "Toward a Fair Use Standard," p. 1135, quoting the Supreme Court in *Harper & Row v. Nation*, 471 U.S. at 558. Or, as the plaintiff's appellate brief in the **Michigan Document Services** case filed on November 15 elaborates (with reference to eight court cases), "the Supreme Court, and all other courts that have ever considered the issue, have concluded that the copyright law's distinction between protected expression and unprotected facts and ideas, allowing unrestricted access to facts and ideas, and other established copyright concepts, are sufficient to encompass any and all constitutional concerns" (p. 44).

¹⁵ Ironically, where **Judge Newman** most disagreed with **Judge Leval** — over the question of the "commercial" purpose and character of the use (the amici having argued contra **Leval** that the ultimate purpose of the use for research was what mattered, not **Texaco's** status as a for-profit entity) — the difference ended up redounding to the disadvantage of amici like the **ARL** and **NHA**, who now cannot so readily claim the protective cover of "nonprofit, educational" status to win on analysis of the first factor.

¹⁶ The Supreme Court itself, in *Campbell v. Acuff-Rose* (1994), recognizes this as the obvious statutory exception to the restriction of "fair use" to just "transformative" uses (114 S.Ct. at 1170 n. 11).

¹⁷ I broached this idea at a recent meeting of press and library directors from the CIC, and it received a sympathetic reaction.