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The Impact of Recent Litigation on Interlibrary Loan and Document Delivery*

James S. Heller**

Professor Heller discusses how two recent federal copyright law decisions, Campbell v. Acuff-Rose Music in the United States Supreme Court and American Geophysical Union v. Texaco in the Second Circuit, may affect the interlibrary loan and document delivery services provided by libraries.

Introduction

Although neither directly involved libraries, two recent federal court decisions may have significant repercussions for interlibrary lending and document delivery activities by libraries. In *Campbell v. Acuff-Rose Music*,¹ the U.S. Supreme Court held that the rap group 2 Live Crew's parody of Roy Orbison's "Oh Pretty Woman" qualified as a fair use under section 107 of the Copyright Act of 1976. Most significant was the unanimous Court's analysis of the fair use doctrine itself, and the guidelines established for examining the fair use defense in future copyright infringement cases. Shortly after *Campbell*, the U.S. Court of Appeals for the Second Circuit handed down its decision in *American Geophysical Union v. Texaco*.² In a 2-1 decision, the court held that Texaco's systematic institutional policy of multiplying the available number of copies of copyrighted journal articles by circulating the journals among Texaco's scientists who then made copies of articles was not fair use.

For many years librarians have used interlibrary lending and document delivery services as methods of providing information to their patrons. Have *Campbell* and *Texaco* placed these activities in jeopardy? Focusing on the fair use³ (section 107) and library exemption⁴ (section 108) provisions of the Copyright Act of 1976, this article discusses how the *Campbell* and *Texaco* decisions may affect interlibrary loan and library document delivery activities.

Before going further, two definitions are in order. For purposes of this paper, *interlibrary lending* (or *loan*) refers to requests made by one library (A)

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1. 114 S. Ct. 1164 (1994).

2. 60 F.3d 913 (2d Cir.), *superseding* 37 F.3d 881 (2d Cir. 1995).

3. 17 U.S.C. § 107 (1994).

4. 17 U.S.C. § 108 (1994).

to another library (B) to obtain from B copies of works not held by A, for the use by A's primary clientele—the patrons it serves directly. If A is a university library, its primary clientele will be the students and faculty of the university; if a corporate or law firm library, the employees of the corporation or firm; if a court library, the judges and law clerks of the court. *Document delivery* refers to the provision of materials to patrons not affiliated with the library or its parent institution, such as a university library providing copies of articles to corporate researchers.

Staking Out Positions—Librarians and Publishers

Applying copyright law to library activities remains as difficult—and volatile—an issue today as it was two decades ago when Congress was completing its revision of the 1909 Copyright Act. When it comes to document delivery, temperatures rise a few more degrees. And when the discussion turns to transmitting documents electronically, the dialogue gets even hotter.

At one extreme, a few librarians view interlibrary lending and document delivery as an entitlement that should have few, if any, limitations. They see copyright law as an impediment that unjustly interferes with what they perceive to be a “right” to copy documents for anyone, at any time. Thankfully, few librarians fall into this category. On the other end is the Association of American Publishers (AAP), which sees document delivery as a serious threat to the economic well-being of publishers, the protection of which they apparently believe is the sole reason for the existence of copyright law.

In 1992 the AAP released a position paper stating—quite correctly—that commercial document delivery services must secure permission from, and (if requested) pay royalties to, the copyright holder.⁵ To be sure, for-profit document deliverers can only copy and deliver copyrighted works with permission. The AAP took a giant leap, however, and claimed that fee-based document delivery services in libraries “are indistinguishable in purpose and effect from those of commercial document delivery suppliers,” and also must receive permission or pay royalties.⁶ This is not supported by either the law or the legislative history.

The AAP also has expressed its concern over scanning. In a 1994 position paper, it wrote that “copyright owners are greatly concerned about the conversion of a document into digital form, since the impact of this practice differs from and goes beyond even the existing damage from unauthorized photocopying.”⁷ The AAP asserted that distributing copyrighted works among libraries already results “in lost subscription revenue and lost royalty income . . . [and

5. ASSOCIATION OF AMERICAN PUBLISHERS, STATEMENT OF THE ASSOCIATION OF AMERICAN PUBLISHERS (AAP) ON COMMERCIAL AND FEE-BASED DOCUMENT DELIVERY 1 (1992).

6. *Id.*

7. ASSOCIATION OF AMERICAN PUBLISHERS, AAP POSITION PAPER ON SCANNING 2 (1994).

that] unauthorized scanning can easily increase such losses."⁸ The publishing industry feels concerned with both the ease with which digitized versions of copyrighted works can be retransmitted to large numbers of recipients and also with how easily digitized works can be manipulated.⁹

The publishers have a strong ally in the Information Industry Association (IIA), which represents more than 500 companies that pursue business opportunities associated with the creation, distribution, and use of information. The IIA believes that libraries that provide document delivery services without paying royalties have an unfair advantage over commercial information brokers who do because libraries can price their services lower. The IIA asserts that libraries that promote and offer fee-based services beyond their primary patron base are engaged in commercial copying and are not protected by fair use or the library exemption.¹⁰

Interlibrary Lending

Section 108 permits a library, under certain circumstances, to make a single copy of a periodical article or small excerpt of a larger work (such as a book chapter) upon request of the library's patron or in response to a request from another library on behalf of *that* library's patron. This right is subject to two conditions. Subsection (g)(1) of section 108 prohibits a library from engaging in related or concerted copying or distribution of either single or multiple copies of the same material on one occasion or over a period of time.¹¹ Subsection (g)(2) prohibits a library from engaging in the systematic reproduction of single or multiple copies of articles or short excerpts. Libraries may, however, participate in interlibrary arrangements that do not have as their purpose or effect the receipt of copies in such aggregate quantities as to substitute for a subscription to or purchase of a work.¹² Section 108, therefore,

8. *Id.* at 3.

9. One commentator has suggested that telefacsimile transmission should not present a threat to publishers and authors so long as libraries observe restrictions within the Copyright Act and the CONTU Guidelines. David Ensign, *Copyright Considerations for Telefacsimile Transmission of Documents in Interlibrary Loan Transactions*, 81 LAW LIBR. J. 805, 812 (1989).

10. "I think the economic pressures on libraries to come up with additional revenues have pushed them into exercising some essentially commercial enterprises in functioning like these information retailers that I was describing. . . . What that essentially has done is create two kinds of information delivery services at that retail level: the commercial firms that recognize that they have to pay copyright, and the libraries which deny that they have to pay copyright. It creates basically unfair competition between the two entities. . . . I hope your report would foreclose the possibility that an interpretation of Section 108, or Section 107 for that matter, could lead to the sanctioning of commercial-like photocopying within mainly large research libraries." COPYRIGHT OFF., U.S. LIBR. CONGRESS, PUBLIC HEARINGS ON THE REPORT OF THE REGISTER OF COPYRIGHTS ON THE EFFECTS OF 17 U.S.C. 108 ON THE RIGHTS OF CREATORS AND THE NEEDS OF USERS OF WORKS REPRODUCED BY CERTAIN LIBRARIES AND ARCHIVES, April 8-9, 1987 app. at 142-43 (1987) (statement of Paul Zurkowski, President, IIA).

11. 17 U.S.C. § 108(g)(1).

12. *Id.* § 108(g)(2).

allows isolated and unrelated copying and distribution of single copies of the same or different materials on separate occasions, but interlibrary lending that is systematic may be viewed as substituting for a subscription or the purchase of the work.

Congress failed to provide a definition of *systematic copying* in the act, nor is there an adequate explanation in the committee reports that constitute the legislative history of the act.¹³ However, during the legislative process, the National Commission on New Technological Uses of Copyrighted Works (CONTU) submitted to the appropriate Senate and House committees guidelines adopted by the commission to govern practices under section 108(g)(2). Sometimes called the "Rule of 5," but more appropriately labeled the "Suggestion of 5," the CONTU guidelines were included in the conference report.¹⁴ They suggest that a library uses interlibrary loan as a substitute for a subscription to a journal when, in any one calendar year, it requests more than five copies of articles from the same journal title published within the last five years. To facilitate a determination under this guideline, libraries are to maintain three full calendar years of records of requests made and filled.¹⁵ Although CONTU did not specify the content of those records, they probably should include the date of the request; the title, volume, and publication date of the journal issue; the name of the article and its pagination; and the requestor's name and institutional affiliation.

The guidelines are addressed primarily to libraries that *request* copies of articles, but they also speak to libraries that *receive* requests for copies. Under the guidelines, a library should not provide a copy absent attestation by the requesting library that the request complies with the guidelines.¹⁶ A requesting library alternatively may attest that the request complies with the fair use provision of the act.

13. S. RPT. NO. 473, 94th Cong., 1st Sess. (1975); H. RPT. NO. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659; H. CONF. RPT. NO. 1733, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5810.

14. Prefatory to presenting the guidelines, the report states:

The conference committee understands that the guidelines are not intended as, and cannot be considered, explicit rules or directions governing any and all cases, now or in the future. It is recognized that their purpose is to provide guidance in the most commonly-encountered interlibrary photocopying situations, that they are not intended to be limiting or determinative in themselves or with respect to other situations, and that they deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment. With these qualifications, the conference committee agrees that the guidelines are a reasonable interpretation of the provision of section 108(g)(2) in the most common situations to which they apply today. H. CONF. RPT. NO. 1733, *supra* note 13, at 71-72, *reprinted in* 1976 U.S.C.C.A.N. at 5812-13.

15. *Id.* at 72-73, 1976 U.S.C.C.A.N. at 5813-14.

16. Guideline 3 states: "No request for a copy or phonorecord of any material to which these guidelines apply may be filled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines." *Id.* at 73, 1976 U.S.C.C.A.N. at 5814.

Document Delivery

About a decade ago some large academic research libraries began expanding their services to patrons not affiliated with the library or its parent institution by providing document delivery for a fee. Other libraries followed suit, and today a large number of libraries offer such services.¹⁷ Demand for these services expanded as new technologies—telefacsimile in the 1980s, and scanning in the 1990s—enabled remote users to receive documents from libraries in minutes, rather than days.

Just as libraries are of various sizes and types, so are document delivery operations. Although most libraries seek merely to recoup their actual costs, some hope to profit from document delivery. Some large-scale services function as a separate division within large (usually university) libraries and operate with revenues generated by the service. Less ambitious libraries usually provide document delivery through their interlibrary loan department.

Whether libraries can engage in fee-based document delivery services without permission from the copyright owner or payment of royalties depends on the answers to several questions, including who requested the copy; how the requestor will use the copy; what the nature is of the material copied and how much of it is copied; how much the library charges for the copy; how the library uses its revenue; and how much aggregate copying the library conducts. The answers to these questions will help determine whether library document delivery is permitted under either section 107 or section 108 of the act, or instead that permission for use or payment of royalties is required.

Section 108—The Library Exemption

A library must meet three threshold requirements to qualify for protection under section 108. The first requirement, which has generated much controversy, is that the copying must be done without a purpose of direct or indirect commercial advantage.¹⁸ A library that profits from its document delivery activities or that sets up a separate document delivery unit that so profits cannot qualify for the section 108 exemption. The publishing industry, as noted earlier, considers fee-based library services indistinguishable from commercial services, regardless of whether a profit is made. The publishers contend mistakenly that these libraries lose section 108 protection even if they do not profit from their activities. While it may be conceded that a library whose fees exceed its direct and indirect costs—allowing it to expand its collection, for example—loses protection under section 108, a library that merely recoups its costs

17. THE FISCAL DIRECTORY OF FEE-BASED RESEARCH AND DOCUMENT SUPPLY SERVICES (County of Los Angeles Public Library/American Library Association, 1993) lists more than one hundred library document providers.

18. 17 U.S.C. § 108(a)(1).

(including equipment, labor, utilities, supplies, postage, and other overhead) and does not profit from the service, is not automatically disqualified from the section 108 exemption.

The second threshold requirement for a section 108 exemption is that a library be open to the public or to persons doing research in a specialized field.¹⁹ There is some debate as to whether libraries in for-profit institutions closed to the general public meet this requirement. A former Register of Copyrights concluded that the open access requirement, along with the prohibition against copying for the purpose of direct or indirect commercial advantage mentioned above, limits the ability of libraries in for-profit institutions to qualify under section 108.²⁰ That interpretation seems contrary to the intent of Congress, however; Congress did not intend to limit section 108 to public or university libraries.²¹ A library that permits other researchers access to its collections through interlibrary lending should qualify for the section 108 exemption so long as it meets the other requirements of that section.²²

The final threshold requirement of section 108 is that a notice of copyright appear on all copies distributed under this section.²³ To meet this requirement, a library should either reproduce the formal notice that often appears within the publication, or alternatively, it might stamp the document with the notice recommended by the American Association of Law Libraries: "This material is subject to the United States Copyright law: Further reproduction in violation of that law is prohibited."²⁴

Under section 108(d) a library may copy articles from copyrighted works under certain circumstances. First, a library may make only a single copy at any one time, and that copy must become the property of the user. Librarians should observe this straightforward rule as if delivered from the heavens: *Never send more than one reproduction of a copyrighted work to a requestor, and never retain a copy of an article sent.* Second, the library also must have had "no notice that the copy . . . would be used for any purpose other than private study, scholarship, or research."²⁵ Although there is no affirmative duty

19. *Id.* § 108(a)(2).

20. COPYRIGHT OFF., U.S. LIBR. CONG., REPORT OF THE REGISTER OF COPYRIGHTS: LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 75-86 (1986).

21. "Similarly, for-profit libraries could participate in interlibrary arrangements for exchange of photocopies, as long as the reproduction or distribution was not 'systematic.' These activities, by themselves, would ordinarily not be considered 'for direct or indirect commercial advantage,' since the 'advantage' referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located." H.R. Rep. No. 1476, *supra* note 12 at 75, reprinted in 1976 U.S.C.C.A.A.N at 5689.

22. LAURA N. GASAWAY & SARAH K. WIAIT, LIBRARIES AND COPYRIGHT: A GUIDE TO COPYRIGHT LAW IN THE 1990's, at 45 (1994).

23. 17 U.S.C. § 108(a)(3).

24. JAMES S. HELLER & SARAH K. WIAIT, COPYRIGHT HANDBOOK 16-17 (1982).

25. 17 U.S.C. § 108(d)(1).

to ascertain the requestor's intended use of the materials, to remain safe, a library should avoid making copies for for-profit information brokers.

Some might argue that section 108 does not encompass the provision of copies to employees of for-profit companies, but that interpretation is unduly restrictive. Clearly, Congress did not intend to exclude for-profit libraries from section 108.²⁶ Moreover, the exemption applies both to libraries that supply and receive copies. The *Texaco* decision does *not* prohibit a library from copying an article for a corporate employee, nor does it limit an employee's right to receive such articles. Not only is *Texaco* limited to the specific facts of that dispute—and therefore does not directly implicate library document delivery activities—but it was decided under the fair use provision of the act rather than section 108.

As noted above, a library's right to send or receive copies of journal articles is not without limits. Section 108(g)(1) prohibits related or concerted reproduction of single or multiple copies of the same article. A library that provides single copies of the same article to a variety of independent users does not run afoul of this provision if each act of copying is isolated and unrelated.

Subsection (g)(2), which directly implicates library document delivery, prohibits the systematic copying or distribution of multiple *or single* copies of subsection (d) materials, such as articles. This proviso is designed to prevent a reduction in the value of or market for a work—a subscription to a journal, a journal issue, or a single article. From the copyright owner's standpoint there is direct or potential economic value for each.

Because subsection (g)(2) prohibits the systematic copying of the same article *or different* articles from the same journal, former Register of Copyrights David Ladd suggested that large-scale library copying services that employ full-time staff, advertise, and make lots of copies probably engage in systematic copying.²⁷ But there seems to be no clear demarcation line as to when a library's activities become "systematic." And the only reported decision involving library copying that might have implications for section 108 was decided prior to the 1976 copyright revision legislation.

In *Williams & Wilkins v. United States*,²⁸ the U.S. Supreme Court upheld by a four-to-four vote a 1973 U.S. Court of Claims decision that large-scale copying by the National Library of Medicine (NLM) and the National Institute of Health (NIH) was fair use. *Williams & Wilkins* deals with fair use (rather than with section 108, which did not exist until 1976), and it will be discussed at greater length later in this article. It is worthwhile to make one point now,

26. See H. RPT. NO. 1476, *supra* note 13, at 74–75, reprinted in 1976 U.S.C.C.A.N. at 5688–89; *infra* text accompanying notes 28–29.

27. COPYRIGHT OFF., U.S. LIBR. CONG., REPORT OF THE REGISTER OF COPYRIGHTS: LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 140 (1983).

28. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

however. Although NIH copied only for its own staff, about 12 percent of NLM's requests came from private or commercial organizations, drug companies in particular. In other words, NLM engaged in document delivery.

The National Commission on New Technological Uses of Copyrighted Works convened a few years after the *Williams & Wilkins* decision. Since large-scale fee-based document delivery services did not exist in 1978, it is not surprising that CONTU did not examine the issue in its final report.²⁹ But the commission did discuss nonprofit copying centers established for the exclusive purpose of providing copies of articles.

CONTU first questioned whether centers such as the British Library Lending Division would qualify as a library or archives under the 1976 act and, therefore, might qualify for the section 108 exemption. Concluding that they were not and did not so qualify, the commission proceeded to state that other libraries could not receive photocopies of articles from such copy centers under section 108.³⁰ In other words, not only must nonprofit centers established for the specific purpose of providing copies secure authorization prior to copying, but other libraries could not receive copies from such "document supply centers" under section 108.

The *Texaco* decision should not directly impact library copying under section 108. Because the parties agreed that the dispute would be decided under the section 107 fair use provision, any statements by the court on section 108 should be considered dictum.³¹ Still, in the trial court decision District Court Judge Pierre Laval commented that the copying by Texaco was not permitted under section 108. His analysis was mistaken for several reasons.

Judge Laval noted that Texaco makes photocopies solely for commercial advantage and therefore concluded that Texaco could not meet the section 108 requirement that copies be made without the purpose of direct or indirect commercial advantage. The legislative history to the act says otherwise—for-profit companies *may* qualify for the section 108 exemption:

Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108, even though the copies are furnished to the employees of the organization for use in their work . . . These activities, by themselves, would ordinarily not be considered "for direct or indirect commercial advantages,"

29. NATIONAL COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT (1978).

30. "If such nonprofit copying centers are not libraries or archives within the meaning of the 1976 Act, other libraries would not have the benefits of Section 108(d) and its extension in the Section 108(g)(2) proviso and the CONTU guidelines in securing photocopies of articles from them." *Id.* at 162.

31. District Court Judge Pierre Laval wrote "[I]t is questionable whether lawfulness under Section 108 comes within the scope of this trial which, by stipulation, covers only the issue [sic] fair use. Fair use is covered by Section 107. Section 108 is a separate special statutory exemption governed by an entirely different set of standards." *American Geophysical Union v. Texaco*, 802 F. Supp. 1, 28 n.26 (S.D.N.Y. 1992).

since the "advantage" referred to in this clause must attach to the immediate commercial motivation behind the reproduction and distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located.³²

Judge Laval also wrote that a "library that qualifies under § 108 could deliver a maximum of one copy of a particular item to Texaco If Chickering obtains a copy of an article, there is no procedure barring his Texaco colleagues from copying the same article."³³ Under this approach, when one Texaco scientist received a copy of an article under section 108, no other scientists could ever receive a copy of that same article. This approach cannot be justified by a reading of the act or its legislative history. The subsection (g)(1) and (g)(2) provisos prohibit related and concerted as well as systematic copying; they do not prohibit two individuals from the same organization from receiving copies of the same article. For that matter, neither do the CONTU Guidelines. Not surprisingly, the appellate court did not discuss section 108; but at the same time, it did not point out Judge Laval's mistakes.

The scope of permissible library document delivery under section 108 remains unsettled. Although CONTU provided some guidance for libraries that receive copies of articles, few objective criteria exist to determine the permissible scope of library document delivery. Any such analysis would, in all likelihood, require answers to the several questions posed earlier. Those answers—as well as a finding whether the copyright owner was harmed by the copying—also will help determine whether the copying is permitted under section 107, the fair use provision of the act.

Section 107—Fair Use

Section 107 provides that the fair use of a copyrighted work is not an infringement of copyright. Applying section 107 to library document delivery appears to warrant a two-part analysis. Because a library arguably acts as the agent for the requestor, one may contend that the library should be able to do for the requestor what the requestor him or herself may do. (Conversely, a library may be prohibited from making copies for a requestor when the requestor may not do so.)³⁴ As the entity that makes the copy, the library also must justify *its*

32. H. RPT. No. 1476, *supra* note 13, at 75, reprinted in 1976 U.S.C.A.N. at 5689.

33. *Texaco*, 802 F. Supp. at 28.

34. Note the very different analyses by the *Williams & Wilkins* judges. The majority stated that "[t]he NIH and NLM systems . . . are close kin to the current Library Of Congress Policy . . . of maintaining machines in the library buildings so that readers can do their own copying. The principal extension by NLM and NIH is to service requestors who cannot conveniently come to the building, as well as out-of-town libraries." *Williams & Wilkins*, 487 F.2d at 1355. Compare this with the statement of the dissent: "There is no showing that these alleged . . . principals have any say in the formulation of the policies and practices of the photocopying operation. . . . The essential elements of agency are wholly lacking." *Id.* at 1367 (Cowen, C.J., dissenting).

copying under fair use. In *Williams & Wilkins* the court of claims found that copying by the National Institute of Health and the National Library of Medicine aided scientific research, a purpose the court did not want to impede. The court appropriately focused its attention on the purpose of the libraries that supplied the copies; as a secondary matter they looked at the activities of the requestors. Thus, it is important to look at fair use from the perspective of both the requestor and of the supplying library.³⁵

The First Fair Use Factor: The Purpose and Character of the Use

Congress mandated that courts consider no fewer than four factors in determining whether a use is fair. The first factor examines the purpose and character of the use, including whether the use is of a commercial nature or, instead, for nonprofit educational purposes. (Nonprofit educational uses are favored over commercial uses.) Libraries provide document delivery to assist in disseminating information for the needs of distant users. When copies are made for individuals outside the library's primary client base—even when academic libraries serve the corporate sector—the purpose, although not nonprofit educational, is at worst benign.

As for the *requestor's* fair use rights, section 107 clearly favors copying by educators, students, and nonprofit researchers. (Indeed, the preamble to section 107 expressly identifies copying for scholarship or research purposes as within the ambit of fair use.) Copyright owners might argue that because *Texaco* limits the right of corporate researchers to rely on fair use for making copies of articles, it follows that libraries cannot provide those researchers the same materials through document delivery.

When examining the first factor, courts today consider whether the use is "productive" or "transformative." In *Campbell v. Acuff-Rose Music*, the Supreme Court commented that the central purpose of the first factor is whether the new work merely supplants the original (nontransformative) or, instead, whether it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."³⁶ In considering

35. The Sixth Circuit recently took this approach in *Princeton University Press v. Michigan Document Services*, 74 F.3d 1512 (6th Cir. 1996), *vacated and reh'g granted*, No. 94-1778 (6th Cir. April 9, 1996). In examining whether a commercial copyshop's making course packs for use by college students was fair, the court examined both the actions of the copyshop that made the copies, and the students who purchased (and used) them. The disposition of this case had not been resolved at the time this article went to press.

36. *Campbell*, 114 S.Ct. at 1171. Some might consider this a significant change from a decade earlier. In 1984 the Court stated that "Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance, but it cannot be wholly determinative." *Sony Corp of America v. Universal City Studios*, 464 U.S. 417, 455 n.40 (1984). Although many thought *Sony* discredited the productive use test, the Court merely clarified that it was one of several factors to be considered. In fact, both the *Campbell* and *Sony* Courts concluded that the respective uses were fair.

this element of the first factor, the *Texaco* court found that the Texaco researcher copied the articles to create his own mini-library, or archive: "[T]he dominant purpose of the use is 'archival'—to assemble a set of papers for future reference, thereby serving the same purpose for which additional subscriptions are normally sold, or, as will be discussed, for which photocopy licenses may be obtained."³⁷ The court also reasoned that copying articles to engage in *future* research was not transformative, even though the researcher who made the copy might use information from that article to create an entirely new work.³⁸

Campbell emphasizes that specific facts by themselves will not dictate whether the first factor favors the plaintiff or defendant. A commercial use by the defendant, by itself, does not mean that the first factor will favor the plaintiff. Neither will a nonproductive use, by itself, preclude a finding that this factor favors the defendant.³⁹

The *Texaco* court found that copying by a corporate researcher was for a commercial purpose and nontransformative and concluded that the first factor clearly favored the plaintiff. The court did not indict *all* corporate sector copying, however. It emphasized that its holding rested on the specific facts of the case: systematic copying and archiving that resulted from wide-scale routing of journals to which Texaco subscribed.⁴⁰ The court stated:

The parties and many of the *amici curiae* have approached this case as if it concerns the broad issue of whether photocopying of scientific articles is fair use . . . Such broad issues are not before us. Rather, we consider whether Texaco's photocopying by 400 or 500 scientists . . . is fair use. This includes the question whether such institutional, systematic copying increases the number of copies available to scientists while avoiding the necessity of paying license fees or for additional subscriptions. We do not deal with the question of copying by an individual, for personal use in research or otherwise (not for resale), recognizing that under the fair use doctrine or the *de minimis* doctrine, such a practice of an individual might well not constitute infringement.⁴¹

37. *Texaco*, 60 F.3d at 892.

38. "Moreover, the concept of a 'transformative' use would be extended beyond recognition if it was applied to Chickering's copying simply because he acted in the course of doing research. The purposes illustrated in section 107 refer primarily to the work of authorship alleged to be a fair use, not to the activity in which the alleged infringer is engaged. Texaco cannot gain fair use insulation for Chickering's archival photocopying of articles (or books) simply because such copying is done by a company doing research." *Id.*

39. A recent federal district court decision stated that in examining the "purpose" a court should consider whether the use was commercial or noncommercial, including whether the use was for one of the favored purposes mentioned explicitly in the preamble to section 107. Examining the "character" of the use requires a determination whether the use was transformative or productive. *College Entrance Examination Board v. Pataki*, 889 F. Supp 554, 567 (N.D.N.Y. 1995). The court also noted the possible tension inherent in the purpose and character elements of the first factor. Finding that the "purpose" was noncommercial, but that the "character" was nontransformative, the court concluded that the first factor favored neither party.

40. "Our ruling is confined to the institutional, systematic, archival multiplication of copies revealed by the record—the precise copying that the parties stipulated should be the basis for the District Court's decision now on appeal." *Texaco*, 60 F.3d at 931.

41. *Id.* at 916.

The *Texaco* court did *not* say that a corporate employee could not occasionally copy articles for his or her research. Nor did it say that a corporate researcher could not request from a library a single copy of an article from a journal to which the corporation does not subscribe. The court took great care to limit its holding to the specific facts of the case; librarians and their institutions ought not jump to conclusions that the court itself chose not to reach.

The Second Factor: Nature of the Work Copied

A fair use analysis also requires consideration of the nature of the work copied. In practice, one may more readily copy factual or informational works than creative works.⁴² Even the *Texaco* court concluded that this factor favored the defendant.⁴³ Document deliverers rarely copy creative works (such as fiction or poetry), and the second factor would likely work in their favor.⁴⁴

The Third Factor: The Amount Copied

Fair use also requires consideration of the amount of the work copied. As a general matter, the more that is copied, the less the use is likely to be considered fair. Because libraries typically copy and distribute entire journal articles, each of which is copyrightable, this factor leans against a fair use finding.⁴⁵ (Indeed, courts may find infringement even for the use of very small portions of copyrighted works.)⁴⁶ Noting that the *Texaco* researcher copied entire articles

42. "Under this factor, the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff's work, the broader should be the scope of the fair use defense." MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 13.05[A][2][a] (1995). See also *Campbell*, 114 S.Ct. at 1175 (brief discussion of issue in which the Court cites *Stewart v. Abend*, 495 U.S. 207, 237-38 (1990); *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455 n.40 (1984); *Feist v. Rural Telephone Service*, 499 U.S. 340, 348-51 (1991)).
43. *Texaco*, 60 F.3d at 925. A court also is likely to examine whether the original work is published or unpublished. Although a 1992 amendment to section 107 provides that the unpublished nature of a work will not bar a finding of fair use, there is less freedom to copy unpublished works under this section. However, a section 108 library may copy an unpublished work "in facsimile form solely for purposes of preservation and security or for deposit for research use in another [section 108] library . . . if the copy . . . is currently in the collections of the library or archives." 17 U.S.C. § 108(b).
44. In *Encyclopedia Britannica v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982), a Federal District Court held that large scale copying and distributing of videotapes of educational television programs by a nonprofit educational cooperative was infringement, notwithstanding the educational purpose and informational nature of the works copied. Key factors for the court included not only that there had been systematic copying of entire works by the school system (as many as ten thousand copies in one year), *Id.* at 1181, but also that in copying films prepared for the school market the defendant inhibited plaintiff's ability to sell or license the films to other educational institutions, *Id.* at 1178.
45. When an author transfers copyright to the publisher, the publisher has copyright in each individual article and also in each issue as a collective work. The *Texaco* court noted that "each of the eight articles in *Catalysis* was separately authored and constitutes a discrete 'original work of authorship.'" *Texaco*, 60 F.3d at 926.
46. Recent decisions, however, emphasize less the quantity appropriated and more the significance of the portion copied. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Basic Books v. Kinkos Graphics*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

from the *Journal of Catalysis*, the *Texaco* court concluded that this factor clearly favored the plaintiff. One suspects that a court could reach the same conclusion in a case involving library document delivery, even though Congress expressly permits libraries to copy entire articles under the section 108 library exemption.

The Fourth Factor: Harm to the Copyright Owner

A common denominator synthesizing court decisions throughout the 1980s and into the 1990s has been a determination whether the copyright owner was harmed by the copying. This fourth factor is described in the act as "the effect of the use on the potential market for or value of the copyrighted work."⁴⁷

For several years this factor was considered the most important of the four.⁴⁸ However, the *Campbell* court recently commented that courts should not attach any greater significance to any factor: "All are to be explored, and the results weighed together, in light of the purposes of copyright."⁴⁹

Both *Campbell* and *Texaco* stated that the fourth factor requires an examination of more than the market impact of the copying by the individual defendant. Courts must "consider not only the extent of market harm caused by the particular action of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."⁵⁰ Courts are much more likely to find infringement when the copyright owner incurs financial harm due to unauthorized (or uncompensated) copying. Under a two-part analysis, one would examine whether the library's activities harm the value of or market for the copyrighted work and then whether the requestor's use of that work harms the copyright owner.

Before *Texaco* one might have asserted confidently that an individual—whether a university professor or a corporate researcher—could make a single copy of journal article under fair use. As long as the individual, or his or her employer, did not profit directly from making that copy—by reselling it, for example—that single act of copying did not appear to harm the value of the work copied. Similarly, a library's copying and distributing a single copy of an article on request does not, on its face, harm the value of the *particular* work copied.

47. 17 U.S.C. § 107.

48. See *Harper & Row*, 471 U.S. at 566.

49. *Campbell*, 114 S. Ct. at 1171. In reversing the appellate court judgment, the Supreme Court stated that "[i]t was error for the Court of Appeals to conclude that the commercial nature of [the parody] rendered it presumptively unfair. No such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one." *Id.* at 1179.

50. *Id.* at 1177 (citing *NIMMER & NIMMER*, *supra* note 42, at § 13.15[A][4]). The *Texaco* court commented that . . . [t]he fourth factor is concerned with the category of a defendant's conduct, not merely the specific instances of copying. *Texaco*, 60 F.3d at 927 n.12.

The publishing industry maintains, however, that harm occurs in both instances. In *Texaco* publishers argued successfully that the copyright owner was denied royalties or license fees because Texaco should have made royalty payments through the Copyright Clearance Center for the copied articles.

It is not hard to see that every act of copying harms the copyright owner *if* recipients of articles always had to purchase reprints or pay royalties for every instance of copying. This circular reasoning makes fair use disappear.⁵¹ But fair use (and section 108, for that matter) are very real, and Congress intended those sections to have *some* teeth (if not fangs).

The fourth factor presents another element: whether the plaintiff must prove that its market was harmed by the copying or, instead, whether the defendant must show it was not. In 1982 the *Sony* court said, "If the intended use is for commercial gain, that likelihood [of harm to the market for the work] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated."⁵² The Supreme Court revised this approach in *Campbell*.

The *Campbell* court stated that the burden should not shift so quickly; a court will presume harm—and require the defendant to demonstrate that the market for the work copied was *not* harmed—only in circumstances of verbatim copying for commercial purposes.⁵³ Under either approach, a publisher that charges a nonprofit library with infringement would carry the burden of demonstrating market harm so long as the library did not profit from its document delivery activities. (By contrast, harm would be presumed in an action against a commercial information broker.)

Having concluded earlier (when examining the first factor) that Texaco's copying was for a commercial purpose, the Second Circuit found that the burden fell on Texaco to demonstrate that the market for the *Journal of Catalysis* from which their researcher made copies was not harmed. Texaco could not meet this burden. The court found that the publisher lost sales of additional journal subscriptions, back issues, and back volumes, and also licensing revenue and fees that Texaco could pay directly to them or through the Copyright Clearance Center.

51. For a thoughtful discussion of this point, see Judge Jacobs' dissent in *Texaco*:

In this case the only harm to a market is to the supposed market in photocopy licenses. The CCC scheme is neither traditional nor reasonable; and its development into a real market is subject to substantial impediments. There is a circularity to the problem: the market will not crystallize unless courts reject the fair use argument that Texaco presents; but under the statutory test, we cannot declare a use to be an infringement unless (assuming other factors also weigh in favor of the secondary user) there is a market to be harmed. At present, only a fraction of journal publishers have sought to enact these fees. I would hold that this fourth factor decisively weighs in favor of Texaco, because there is no normal market for photocopy licenses, and no real consensus among publishers that there ought to be. *Texaco*, 60 F.3d at 937 (Jacobs, J. dissenting).

52. *Sony*, 464 U.S. at 451.

53. A court should not presume market harm in "a case involving something beyond mere duplication for commercial purposes. . . . [W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly 'supersede[s] the objects,' . . . of the original and serves as a market replacement for it." *Campbell*, 114 S.Ct. at 1177.

The approach would be little different in the case of noncommercial library document delivery. *Campbell* says that a plaintiff claiming infringement must prove harm when the defendant copied for noncommercial purposes, the situation that applies in the case of nonprofit libraries. A *Texaco*-like analysis ensures that copyright owners will have little trouble meeting this burden.

One may speculate whether courts might indeed accept the AAP's argument that little distinguishes for-profit information brokers from library document deliverers. It is not inconceivable that courts might consider the for-profit/nonprofit distinction legally insignificant when analyzing the first fair use factor. The other fair use factors appear identical.

Equally plausible, courts might distinguish large document delivery operations from smaller ones. Libraries that promote their services widely to outside users—particularly the corporate sector—maintain separate records, employ a large staff whose wages are paid from document delivery proceeds, and function as a separate unit within the library might be less likely to survive a fair use analysis than libraries that receive only occasional requests from outside users.

But even large-scale library document delivery may be fair. Although the fourth fair use factor no longer remains "the single most important element of fair use,"⁵⁴ the *Texaco* court implied that the first (purpose of the use) and fourth (market harm) factors are more important than the second (nature of the copyrighted work) and third (the amount copied).⁵⁵ Nonprofit (perhaps, especially, public) libraries that provide document delivery at or below their cost ought not be likened to profit-motivated information brokers. This fundamental difference may convince a court that library document delivery—at least at some level—falls within fair use. The *Williams & Wilkins* case is also relevant here.

Because an equally divided Supreme Court affirmed the Court of Claims decision, some contend that *Williams & Wilkins* has limited precedential value; others criticize the decision or believe it no longer has continued viability.⁵⁶ The *Texaco* court implied that the copying done by NLM and NIH would not be permitted today, particularly considering the ease with which royalties may be paid through the Copyright Clearance Center.⁵⁷

54. *Harper & Row*, 471 U.S. at 566.

55. "We conclude that three of the four statutory factors, including the important first and fourth factors, favor the publishers." *Texaco*, 60 F.3d at 931.

56. See, e.g., HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 15.05[D][3] (1995); NIMMER & NIMMER, *supra* note 42, at § 13.05[e][4][c].

57. "Texaco contends that Chickering's photocopying constitutes a use that has historically been considered 'reasonable and customary.' We agree with the District Court that whatever validity this argument might have had before the advent of the photocopy licensing arrangements discussed below in our consideration of the fourth factor, the argument today is insubstantial. As the District Court observed, 'To the extent the copying practice was 'reasonable' in 1973 [when *Williams & Wilkins* was decided], it has ceased to be 'reasonable' as the reasons that justified it before [photocopying licensing] have ceased to exist.'" *Texaco*, 60 F.3d at 924.

However, *Campbell* reiterated that it was the intention of Congress to restate the common law when it enacted section 107: "Congress meant § 107 to 'restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way,' and intended that courts continue the common law tradition of fair use adjudication."⁵⁸ *Williams & Wilkins* was the common law in 1976, and Congress arguably sanctioned the type and level of copying done by NLM and NIH when it passed the 1976 act.

One also should remember that NLM and NIH employed policies that limited to some extent the number and nature of copies made (although the libraries themselves admitted that they often granted exceptions). NIH made only a single copy of an article requested, limited copying to no more than one article per issue (and never more than half of an issue), and generally limited copying to forty or fifty pages. NLM provided only one copy of an article on request, and it would not copy more than one article from an issue or three articles from a volume. NLM also would not copy from 104 journals on a "widely available" list and would not honor an excessive number of requests from one individual or institution. At the very least, libraries should develop policies that provide some limits on their document delivery activities, perhaps along the lines of those established by NLM and NIH.

Electronic Copying

The publishing industry is understandably concerned that the electronic age makes it easier for libraries to digitize materials and distribute them electronically. Publishers worry that libraries can more easily perform document delivery—which may lead to more copying—and also recognize that scanning enables libraries to create databases of digitized works. In addition, recipients of digitized documents can retain those documents indefinitely in their own databases and easily redistribute them within (and indeed outside) their organizations.

The section 108 library exemption does not address library scanning and digitizing print materials. Because the Copyright Act is technologically neutral, some contend that "[i]f it is permissible for a library to make a copy of a work under section 108, it is permissible to make an electronic copy. As libraries move beyond photocopying for a user, then it is permissible to scan a copy and transfer it electronically to the user."⁵⁹

It is important to remember that copies distributed by libraries under section 108 must become the property of the user.⁶⁰ A library should never

58. *Campbell*, 114 S.Ct. at 1170 (quoting H. Rep. No. 1476, *supra* note 13, at 66, *reprinted in* 1976 U.S.C.C.A.N. at 5680).

59. GASAWAY & WIAIT, *supra* note 22, at 43.

60. 17 U.S.C. § 108(d), (e).

retain a scanned copy in a database; it should delete the digitized copy immediately after transmission.⁶¹ This is similar to the rule libraries should apply to copies transmitted by telefacsimile: after the fax transmission, destroy the photocopy.⁶²

The possibility that recipients of lawful copies might subsequently violate copyright should not restrict activities permitted under the act.⁶³ Publishers' uneasiness that digitization makes it easier for recipients to make and distribute additional unlawful copies should not limit library and user rights under section 107 or 108.

One other matter warrants mention. The CONTU Guidelines provide that libraries that receive requests from other libraries should not send copies absent attestation that the request complies with the guidelines.⁶⁴ Even though this is a requirement that virtually defies enforcement, librarians should not neglect the attestation requirement for requests made by phone or electronically.

Possible Liability

Conceivably even large-scale document delivery is permissible under fair use or the library exemption. But what if a court concluded that the copying was *not* permitted by sections 107 or 108?

A library generally would be liable for infringing acts of its employees performed within the scope of their employment. An aggrieved copyright owner may recover actual damages and profits from the infringer or alternatively elect to recover statutory damages to be determined by the court. Statutory damages may range from \$500 to \$20,000 for each work infringed. If the infringement was willful, damages may go as high as \$100,000.⁶⁵

61. "When the library retains a scanned copy and creates a database of articles, it is the equivalent of retaining photocopies which clearly is not permitted under the Act. If the library wished to retain the scanned copy, then it must seek permission from the copyright holder to do so and pay royalties if requested. This is precisely what commercial document delivery services such as CARL/UnCover are doing." GASAWAY & WIAIT, *supra* note 22, at 51.

62. *Id.* at 50.

63. The *Sony* court refused to hold the Betamax manufacturer vicariously liable. "The Betamax can be used to make authorized and unauthorized uses of copyrighted works, but the range of its potential use is much broader than the particularly infringing use." *Sony*, 464 U.S. at 436-37. "If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted materials." *Id.* at 439. "The sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." *Id.* at 442.

64. See *supra* note 16 and accompanying text discussing guideline 3 of the CONTU guidelines. Note that CONTU guidelines focus on *interlibrary* arrangements for photocopying and therefore apply to requests received from other *libraries*.

65. 17 U.S.C. § 504(c).

However, Congress is much more forgiving of innocent infringers. If the infringer was not aware and had no reason to believe that his or her acts were infringing, statutory damages may be reduced to not less than \$200. Furthermore, a court will not award statutory damages if the infringer was an employee of a nonprofit educational institution, library, or archives who acted within the scope of his or her employment and believed and had reasonable grounds for believing that the copying was a fair use under section 107.⁶⁶

Library Practices

Notwithstanding all the literature on libraries and copyright,⁶⁷ librarians who operate fee-based document delivery services remain uncertain whether they must pay royalties. Many libraries do not, under the theory that making a single copy on request is either a fair use or permitted under section 108. Still, some of these libraries pay royalties under certain circumstances, such as when a requestor affirmatively asks that royalties be paid (in which case the requestor reimburses the library for the payment) or if the copying is excessive, such as a request for several articles from the same journal issue.

Some libraries do pay royalties. Many of these libraries have joined the Copyright Clearance Center and make royalty payments on a routine basis through the CCC. Although some libraries pay royalties for every copy made, others do so only when they can make payments conveniently through the CCC. On first glance, this appears a curious practice. One might think that when royalties are appropriate—if the copying is not permitted under the act—they are due *always* and not only when it is convenient to pay them through the CCC. However, this practice does not seem so odd when one observes the importance of the CCC to both the trial and appellate courts in the *Texaco* litigation.

In the trial court decision, Judge Laval stated, “[T]he monumental change since the decision of *Williams & Wilkins* in 1973 has been the cooperation of users and publishers to create workable solutions to the problem Most notable has been the creation of the CCC, and its establishment of efficient licensing systems.”⁶⁸ Although *Texaco* argued that the CCC was irrelevant to the action, the court disagreed. “Reasonably priced, administratively tolerable licensing procedures are available that can protect the copyright owners’ interests without harming research or imposing excessive burdens of users.”⁶⁹

66. *Id.* § 504(c)(2).

67. For example, in the last few years a number of copyright books have been published, such as: JANIS H. BRUWELHEIDE, *THE COPYRIGHT PRIMER FOR LIBRARIANS AND EDUCATORS* (2d ed. 1995); LAURA N. GASAWAY & SARAH K. WIAIT, *LIBRARIES AND COPYRIGHT: A GUIDE TO COPYRIGHT LAW IN THE 1990's* (1994); ARLENE BIELEFIELD & LAWRENCE CHEESMAN, *LIBRARIES AND COPYRIGHT* (1993); RUTH H. DUKELOW, *THE LIBRARY COPYRIGHT GUIDE* (1992).

68. *American Geophysical Union v. Texaco*, 802 F. Supp. 1, 24 (S.D.N.Y. 1992).

69. *Id.* at 25.

The appellate court concurred: "Though the publishers still have not established a conventional market for the direct sale and distribution of individual articles, they have created, primarily through the CCC, a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying."⁷⁰

Alternatively, a library might resolve the uncertainty by deciding to enforce the CONTU "Suggestion of 5" on behalf of those who use the library's document delivery service. Remember that the numerical guidelines apply to *requestors*; they suggest that when in a single year a library requests more than five copies of articles published within the last five years from the same journal title, it is likely using "ILL" as a substitution for purchase of that title. By enforcing the guidelines on behalf of its clients, the sending library would pay royalties after it copies, for the same client, five articles from the same journal title in one calendar year.

Guidelines, Please

Libraries that provide document delivery should, regardless of their size, have in place a written copyright policy. At the risk of offending everyone—libraries, their clients, and the publishing industry—this article concludes with proposed guidelines for library document deliverers.

1. The library will pay royalties whenever appropriate regardless of whether a specific title is registered with a licensing organization such as the Copyright Clearance Center. Royalties may be paid either to the licensing organization or directly to the copyright owner.
2. The library will make only one copy of a requested item at one time for a requestor without payment of royalties or permission.
3. The library will make multiple copies of the same item for the same user (including the user's institution), whether made simultaneously or over a period of time, only with permission of the copyright owner or upon payment of royalties.
4. The library will not copy more than half of a periodical issue without first receiving permission to copy or payment of royalties.
5. The library need not ask the requestor how he or she plans to use the copy. However, the library should not fill a request if it knows that the requestor plans to sell the copy for a profit, such as the case of commercial information brokers, absent permission to copy or payment of royalties.
6. If the library first photocopies materials for subsequent transmission by facsimile, the library will destroy the photocopy after the transmission is complete.

70. *Texaco*, 60 F.3d at 930.

7. If the library downloads text to disk to prepare a copy for transmission to a requestor, the library will destroy the electronic copy after the transmission is complete.
8. A library that requests materials from other libraries in order to fill its own clients' requests will follow the CONTU Guidelines regarding number of materials requested and records maintained. Records will include the name of the requestor and his or her institutional affiliation, the item copied, the number of copies made, and the date of the transaction. These records shall remain confidential and shall be destroyed three calendar years after the end of the year in which the request was made.⁷¹
9. The library may fill requests from other libraries that include an attestation that the request complies with the Copyright Act or the CONTU Guidelines. The library will not provide copies if it knows that the request exceeds fair use or the section 108 exemption absent such attestation or attestation that the requestor has received permission or will pay royalties.
10. The library will include with the copy the "notice of copyright" if that notice is readily available. The library will stamp all copies as follows: "This material may be protected by Copyright Law (Title 17, U.S. Code). Further reproduction in violation of that law is prohibited."

71. Many states have enacted legislation to ensure the confidentiality of certain library records. *See, e.g.,* VA. CODE ANN. § 2.1.342(B)(8) (Michie 1995).