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# Copyright Essentials for Librarians

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by James S. Heller

**T**he United States Constitution authorizes Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>1</sup> The first federal copyright legislation appeared in 1790 when Congress secured copyright in the authors of maps, charts and books. In the last 200 years Congress has extended copyright protection to maps, charts, designs, etchings, and engravings (1802); musical compositions (1831); photographs (1865); paintings, drawings, and sculptural works (1870); motion pictures (1912); sound recordings (1972); and computer programs (1980).

Today the Copyright Act of 1976,<sup>2</sup> along with interpretative judicial decisions, sets forth the respective rights of copyright owners and users of copyrighted materials. This article will present an overview of copyright law and how it applies to the activities of librarians and educators.

Copyright protection extends to original works of authorship "fixed in any tangible media of expression."<sup>3</sup> In limiting copyright protection to works that are "fixed," Congress mandated that there be some concreteness to the work. For example, an oral presentation may not be copyrighted, but the written speech upon which the presentation is based may be. Similarly, a live television or radio broadcast is not "fixed," but a recording of the broadcast is and may be copyrighted.

Not all works fixed in a tangible medium of expression are subject to copyright protection, however. Although works published by state or local governments may be copyrighted, publications of the United States government are in the public domain and are not copyrightable.<sup>4</sup> While facts may not be copyrighted because they lack originality, compilations of facts, such as almanacs, may qualify for copyright protection.

Ideas or themes may not be copyrighted, although the expression of an idea may. Therefore, although there can be no copyright in the theme of a romance between a northern gunrunner and a southern girl in the antebellum South, the expression of that idea in Margaret Mitchell's *Gone With the Wind* clearly is copyrightable.

In drafting the 1976 Act, Congress attempted to balance the often competing rights of owners of copyrighted works and the needs of users of those materials. Congress sought and encouraged input from various interest groups, notably educators, librarians, authors and publishers. The resulting Act was a compromise, with many of the troubling results that legislative compromises create. Some provisions were intentionally left ambiguous for later interpretation by the courts. In other instances, notably classroom copying and off-air taping, guidelines rather than legislation are provided.

Both copyright owners and users of copyrighted works have rights under the 1976 Act. Copying for teaching, scholarship,

and research purposes are mentioned specifically in the fair use provision of the Act.<sup>5</sup> Library copying,<sup>6</sup> public performances of audiovisual or musical works for instructional purposes,<sup>7</sup> and copying computer programs<sup>8</sup> also are addressed in the legislation. It is these provisions of the Copyright Act which most affect librarians and educators, and upon which this article will focus. Before discussing how librarians and educators may use copyrighted works, it is helpful to discuss the rights of copyright owners and the concept of infringement in the broader context of property law.

American law generally addresses three types of property. Personal property consists of goods, such as personal computers or books. Real property is land and things attached to land, such as houses. Intellectual property — the law of patents, trademarks, and copyrights — includes manifestations of a person's thoughts.

A property owner has the right to use his or her property within the bounds of the law. The property owner may lease, sell, or give away the property. In short, the owner has the right to dictate when and how his or her property shall be used. Like other property owners, the owner of a copyrighted work also has certain rights.

Under the Copyright Act, a copyright owner has the right to reproduce his or her copyrighted work, publicly perform or display the work, distribute the work, and prepare derivative works based on the original work.<sup>9</sup> Copyright infringement occurs when a copyright owner's rights are violated without his or her permission or absent the payment of royalties, unless the user's activity is permitted under another provision of the Act.<sup>10</sup>

**T**he fair use of a copyrighted work, including reproduction for purposes such as criticism, comment, teaching, scholarship, or research, is not an infringement. The fair use provision is designed to be a flexible rule of reason, and a determination as to whether a use is fair depends on the particular facts of each case.

To determine whether an activity involving copying is

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allowed, a librarian usually should consider whether the copying is permitted under section 107, even if the activity also appears to be addressed by another provision of the Act. Indeed, each exemption to the exclusive rights of the copyright owner is based on what is considered to be an equitable balance between the copyright owner's rights and the competing rights of users of copyrighted materials. The four factors that are considered in a fair use analysis illustrate the balancing that is done in determining whether an activity qualifies for the fair use exemption.

The first factor is the purpose and character of the use. As a general matter, non-profit educational uses are favored over commercial uses. This does not mean that all non-profit uses are fair, nor that a profit-making motive will preclude a finding of fair use. How the copyrighted work is used is simply one of several factors that will be considered in a fair use analysis.

The second factor is the nature of the work copied. Librarians and educators should understand that there is greater room for copying informational, scientific, or factual works than there is for copying entertainment works.

The third factor is how much of the copyrighted work is copied. The more that is copied, the less likely it is that the copying will be considered fair. While copying one article from a periodical, a chapter of a book, or a poem from a collective work would in most instances be within the section 107 exemption, copying several articles from a periodical issue or a substantial portion of a book probably would not.<sup>11</sup>

The final fair use factor is the effect of the use (or copying) on the potential market for or value of the copyrighted work. This "diminished value" factor is considered the most important of the four factors. It is unlikely that a use will be considered fair if the value of or market for a work has been decreased because of the copying. This can be true even for non-profit educational uses of copyrighted materials.<sup>12</sup>

Section 107 provides that the fair use of a copyrighted work for purposes such as "teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright." While much educational copying is presumptively fair, the Act does not state that all such copying is allowed. What section 107 really says is that educational copying is non-infringing when it is a fair use. Educational copying is not elsewhere addressed in the Act. Instead, there are guidelines.

The *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions* was signed in March 1976 by representatives of authors, publishers, and educational interest groups, and is included in the legislative history of the Act.<sup>13</sup> Under the *Guidelines*, a teacher may provide one copy of a copyrighted work to each pupil if certain requirements, including brevity and spontaneity, are met, and if the cumulative effect of the copying does not endanger the copyright owner's rights. (Note how the latter requirement ties in with the fourth fair use factor of harm to the copyright owner). The *Guidelines* also state that educators cannot copy for the purpose of creating anthologies, compilations, or collective works. Educators wishing to make copies for such purposes would first receive permission from the copyright owner.

Not all education groups agreed to the *Guidelines*. The American Association of University Professors (AAUP) and the Association of American Law Schools (AALS) felt that the *Guidelines* were inappropriate for post-secondary education, and refused to endorse them.<sup>14</sup> The American Library Association also believed the *Guidelines* were unrealistic in the university setting, and in 1982 published *Model Policy Concerning College and University Photocopying for Classroom Research and Library Reserve Use*.<sup>15</sup> The

*Model Policy* offers broader guidelines for educators and librarians, and provides that certain copying for library reserve is permissible.

The *Model Policy* states that at a faculty member's request a library may copy and place on reserve excerpts from copyrighted works owned by the library. The policy generally permits a library to make one copy of an entire article, chapter from a book, or a poem for reserve. Multiple copies may be made if (1) the amount of material copied and the number of copies made are reasonable; (2) each item includes a notice of copyright; and (3) the effect of the copying does not harm the market for the work. The ALA suggests that no more than six copies be made for reserve purposes, that libraries avoid repetitive copying, that institutions not profit by reserve copying, and that libraries neither create anthologies nor copy consumable works.<sup>16</sup>

While copying within the ALA *Model Policy* appears to be fair use, remember that not all copying for educational purposes is allowed under the Copyright Act. Both the *Guidelines* and the *Model Policy* place limits on educational copying. Although neither are the law, they do provide valuable guidance to librarians and educators.

Most single-copy photocopying of articles and excerpts for personal research probably is fair use. The ALA recognizes this in its *Model Policy*, which states that instructors may make a single copy of a chapter from a book, an article, short story, short essay, or short poem for the purpose of scholarly research or use in teaching or preparing to teach a class.<sup>17</sup>

Libraries and their employees are accorded special rights under section 108 of the Copyright Act. In order to qualify for section 108 privileges, three initial criteria must be met: (1) the copying must be done without a purpose of direct or indirect commercial advantage;<sup>18</sup> (2) the library's collection must be open to the public or available to other persons doing research in a specialized field;<sup>19</sup> and (3) copies must include a notice of copyright.<sup>20</sup>

Section 108 addresses a wide range of library photocopying activities, including copying unpublished works,<sup>21</sup> copying to replace lost, stolen, or damaged copies of published works,<sup>22</sup> and the possible liability of libraries for infringing copying done on library photocopy equipment.<sup>23</sup>

The library photocopying exemption permits a library to copy articles or small excerpts for patrons as long as three conditions are met:<sup>24</sup> (1) the copy becomes the property of the user; (2) the library has no notice that the copy will be used for a purpose other than private study, scholarship, or research;<sup>25</sup> and (3) the library displays at the place where orders are accepted and includes on its order form a warning of copyright.<sup>26</sup> Most single (rather than multiple) copying of articles or small excerpts for educators, students, or researchers would be permitted under section 108 if the other requirements of that section are met. The right to copy an entire work — as distinguished from copying articles or excerpts — is more limited. Such copying is permissible only if the requirements noted in section 108 (d) are met, and if a new or used copy cannot be obtained at a fair price.<sup>27</sup>

*All librarians should be aware of the prohibition against systematic copying or distribution.*



All librarians should be aware of the prohibition against systematic copying or distribution.<sup>28</sup> While single copies of the same materials (the same article, for example) may be copied and distributed if each copying transaction is unrelated, a library should not subscribe to one copy of a journal or newsletter and regularly make copies of articles for its institutional members. Neither may several libraries in a library system agree that one of the libraries subscribe to a periodical, and the subscribing library systematically copy articles from that periodical for the other libraries. This does not mean that interlibrary copying is prohibited, however.

### Interlibrary Loan Copying

Libraries may participate in interlibrary arrangements so long as the library receiving copies of copyrighted works is not using the copies as a substitute for a subscription to or purchase of the work. The *CONTU Guidelines*<sup>29</sup> provide guidance on permissible copying for interlibrary purposes. Generally:

- (1) In any one year a library should not request more than five copies of articles published within the last five years from the same journal title (the CONTU Rule of Five).
- (2) Supplying libraries should not fill requests for copies unless the requesting library represents that the request conforms to the *Guidelines* or another provision of the Act (e.g., section 107). (Always remember that the library doing the copying may be liable for infringement).
- (3) Libraries should maintain records of copies requested under interlibrary arrangements for three years.

### Non-Book Materials

Copying under section 108 is limited effectively to books, periodicals, and sound recordings. Copying a musical, pictorial, graphic, sculptural, motion picture, or other audiovisual work is permitted only under the following three circumstances: (1) for the purpose of security or to preserve an unpublished work already owned by the library; (2) to replace a lost, stolen, or deteriorating copy of a published work when an unused replacement cannot be obtained at a fair price; or (3) the work is an audio-visual work dealing with the news.<sup>30</sup>

### Videos

The owner of a copyrighted videocassette or film retains the right to copy and distribute his or her work. A library may not copy a video to change formats (e.g., from Beta to VHS) or to make an archival copy. The copyright owner also has the right to publicly perform his or her audiovisual works.<sup>31</sup> Most of the questions librarians have about copyright and videos seem to revolve around the public performance right. Many librarians want to know under what circumstances they may lend videotapes, and whether videos can be viewed by patrons within the library.

Lending videos usually poses no problem unless there is reason to believe that the borrower will engage in an unlawful public performance of the video. While allowing an individual to view a videocassette in a private viewing room within the library probably is permissible,<sup>32</sup> allowing even small groups to view a tape within the library is more problematic. Playing the tape before a large group — even if no fee is charged — clearly is infringing without the copyright owner's permission, unless the use is considered educational or instructional and is therefore permitted under section 110(1) of the Act.<sup>33</sup>

### Sound Recordings

The copyright owner of a sound recording (i.e., a record, tape, or compact disk) has the exclusive right to reproduce and distribute

the work.<sup>34</sup> Libraries clearly may lend sound recordings to their patrons. But while a library may be tempted to make copies of sound recordings for lending or archival purposes (i.e., copying a record onto tape and lending the tape but not the record), that activity clearly is infringing. Instead, a library should purchase as many copies of the work and in as many formats as it needs.

### Computer Programs

Computer programs, like other works that are original and fixed, are copyrightable.<sup>35</sup> Congress, in its wisdom, allows software owners to copy software for three specific purposes: (1) to modify the program to suit the purchaser's specific needs; (2) to create a substantially different program that arrives at the same result as the first program but uses different methods; or (3) to make an archival copy. Whether other copying is permissible would largely depend upon an application of the fair use provision. A library district may not purchase one copy of a software package and make copies for each branch in the district; such use would not be fair.

Downloading, or transmitting online data to a local storage medium, clearly entails making a copy. Downloading is permissible if it is a fair use. If the downloaded data is used in a format identical to that which appeared in the original form, the use probably is not fair. Substantial reformatting of the data might be considered a fair use, however, although one must be aware of the prohibition against creating a derivative work.<sup>36</sup>

**I**t took Congress nearly thirty years to revise the Copyright Act of 1909; it may be well into the 21st century before there is another complete revision of the 1976 Act. The 1976 Act, unfortunately, often seems to present more questions than answers. Notwithstanding the grayness of American copyright law — or perhaps because of it — librarians should be aware of the Act, pertinent legislative history materials (including the *Guidelines*), publications of the ALA and other library, author, or publisher organizations, and articles and books on copyright that illuminate the issues and offer some guidance.

Copyright owners, particularly publishers, will continue to assert what they believe to be their rights under the Act. While librarians, . . . educators, and other consumers of intellectual property must be aware of the rights of copyright owners, they should also be aware of their rights as users of copyrighted works.

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### References

1. U.S. Const. art. I, § 8, cl. 8.
2. 17 U.S.C. §§ 101-801 (1988).
3. 17 U.S.C. § 102 (1988).
4. 17 U.S.C. § 105 (1988).
5. 17 U.S.C. § 107 (1988).
6. 17 U.S.C. § 108 (1988).
7. 17 U.S.C. § 110 (1988).
8. 17 U.S.C. § 117 (1988).
9. 17 U.S.C. § 106 (1988).
10. 17 U.S.C. § 107-118 (1988).
11. Note that section 108 permits a library to copy an entire book under certain circumstances.
12. See *Encyclopaedia Britannica v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982), where the court held that copying for educational purposes was not fair because the copying supplanted the market for which the educational works were created.
13. H.R. Rep. No. 1476, 94th Cong., 2nd Sess. 68-70, reprinted in 1976 U.S. Cong. & Admin. News 5681-83.
14. See *Cong. Rec.* 31,986 (1976).

15. American Library Association, *Model Policy Concerning College and University Copying for Classroom Research and Library Reserve Use* (1982).

16. Former Register of Copyrights David Ladd has stated that reserve copying is permitted only under section 107 or with the permission of the copyright owner. He further stated that a library should receive the copyright owner's permission before it makes multiple reserve copies for multiple-term retention. U.S. Copyright Office, *Report of the Register of Copyrights: Library Reproduction of Copyrighted Works* (17 U.S.C. 108) 108-111 (1983).

17. *ALA Model Policy*, *supra* note 15, at 4.

18. According to the House Report, the "advantage" must connect to the immediate commercial motivation of the reproduction, not to the ultimate profit-making status of the institution. House Report, *supra* note 13, at 75. This means that libraries in for-profit institutions, such as corporations or law firms, may qualify for the section 108 exemption.

19. The library need not have a totally open access policy; participation in interlibrary lending arrangements with other libraries should meet the "open or available" requirement.

20. Although it is unclear whether this means the section 401 statutory notice, it is wise to include the formal notice of copyright whenever possible.

21. 17 U.S.C. § 108(b) (1988).

22. 17 U.S.C. § 108(c) (1988).

23. 17 U.S.C. § 108(f) (1988). Libraries are advised to tape to each public access copier a notice that "The making of a copy may be subject to the United States Copyright Law (Title 17 United States Code)."

24. 17 U.S.C. § 108(d) (1988).

25. For example, copying cannot be justified under section 108(d) if a library staff member knows that a for-profit information broker requested the photocopy.

26. "Notice: Warning Concerning Copyright Restrictions: The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for a purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or a reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law." 37 C.F.R. § 201.14 (1989).

27. 17 U.S.C. § 108(e) (1988).

28. 17 U.S.C. § 108(g) (1988).

29. National Commission on New Technological Uses of Copyrighted Works, *Guidelines for the Proviso of Subsection 108 (g) (2)*, published in H.R. Rep. No. 1733 (Conference) 94th Cong., 2nd Sess. 72-73 (1976).

30. 17 U.S.C. § 108(h) (1988).

31. 17 U.S.C. § 106(4) (1988).

32. The Attorney General of Ohio, however, has concluded that the display of copyrighted video tapes at a public library is an infringing public performance because of the library's accessibility to the public. Ohio Att'y Gen. Op. 87-108 (1987), 1987 Copyright L. Rep. (CHH) ¶ 26,240.

33. 17 U.S.C. § 110(1) (1988). The section 110 exception permits in-class performance of copyrighted videos under certain circumstances. See also Reed and Stanck, *Library and Classroom Use of Copyrighted Videotapes and Computer Software*, reprinted in *Am. Libr.*, Feb. 1986, at 120.

34. 17 U.S.C. § 106 (1988). Although there is no public performance right in a sound recording, there is a performance right in the underlying musical work — the song. The copyright owner of the song (i.e., the composition or lyrics) retains the right to control public performances of the work. Absent permission of the copyright owner of the musical work, public performances are permitted only for those works that are in the public domain.

35. 17 U.S.C. § 117 (1988).

36. 17 U.S.C. § 106(2) (1988).

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