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On the Premises and Beyond: Managing Copyright Policy Through Institutional and Technological Change

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Abstract

Copyright issues are important to every library, large and small. Libraries, librarians, and library staff are protected by a host of exceptions and copyright rules that are often not followed correctly or at all. This article discusses easy, simple compliance with the laws protecting libraries from infringements made on the traditional library premises.

Further, the library's work is increasingly off-site. From virtual consultations to delivering digitized materials off-site, copyright law can affect the depth and breadth of online services that would otherwise be equivalent to in-person patron services.

The paper describes "virtual library premises" and discusses the legal ramifications of enhancing access to collections for off-site patrons. The paper also explains how offering limited access to digitized in-copyright collections affects library liability under the Copyright Act. It explores whether library premises are restricted to actual physical spaces or whether the concept of the reading room can be extended beyond the four walls of the traditional library.

Introduction and Background

Copyright law is confusing for many libraries and librarians. It is misunderstood and misapplied in a variety of library settings. While the basic exceptions to US copyright law enable the most basic work of lending libraries—that is, the lending of copyrighted materials—many libraries act without knowledge, understanding, or the correct application of library-specific exceptions to copyright law.

These exceptions allow libraries to provide an entire building full of material plus the technology that patrons can use to copy the material in an entirely legal way (for the libraries, at least)—as long as the rules are followed. But these exceptions were drafted at a time before truly complex technologies that come with truly complex licensing agreements were available in the marketplace. Understanding and addressing how old laws apply to new technologies is extremely important in protecting libraries from liability for copyright infringement.

As the place and purpose of libraries shift without the law shifting to accommodate new purposes and methods of service, libraries and librarians

must keep careful watch over how their activities do or do not mesh with library exceptions to copyright law.

Copyright Basics for Libraries and Librarians

Librarians are sources of copyright information for their user communities. Consequently, librarians should remain informed about copyright developments, particularly those that can limit or restrict the rights of users or libraries. Librarians should develop a solid understanding of the purpose of the law and knowledge of the details of the law relevant to the activities of the library, the ability to critically analyze circumstances relying on fair use or other limits to the rights of copyright holders, and the confidence to implement the law using good judgment.

—ALA Copyright: An Interpretation of the Code of Ethics (<http://www.ala.org/advocacy/proethics/copyright>)

The ALA's Interpretation of the Code of Ethics is a tall order to fill for the average librarian, and the list of "librarians should" grows every year.

Copyright law grants to owners of copyrighted works the exclusive rights to reproduce, distribute, display, and publicly perform their works, as well as the right to create derivative works. Duration varies and takes into account a variety of factors, including the date the work was created or published, the death date, where the work was published, and whether registration was renewed, making determining copyright status difficult. The owner of the physical copy is not necessarily the copyright owner, even if there is only one copy. As is most often the case, even with rare copies, your institution may own the copy and none of the rights.

Copyright law developments are fairly rapid, and many areas of the law, especially fair use, have transformed dramatically along with the advent of technologies that allow digital copying, preservation, indexing, and search of copyrighted materials. Although copyright rights are fairly broad, litigation over the scope of owners' copyrights has highlighted the purpose of copyright: to expand public knowledge and understanding. Copyright law achieves this by granting authors exclusive rights, but limits it where the exclusive rights interfere with the purpose of copyright. In flexible areas like fair use the law can relatively rapidly accommodate technological change. Other parts of the copyright statute are not so flexible and were drafted with specific technologies in mind.

Libraries Are Special

Libraries are special under the Copyright Act. While authors and copyright owners enjoy certain rights over their works granted by the law, and users in general enjoy specific use rights that limit

authors' rights, the Copyright Act recognizes the special roles that libraries play in collecting, organizing, preserving, and providing access to copyrighted works for the public. In addition to the basic rights provided to everyone under copyright's first sale doctrine—the owner of a physical copy of the work has the right to sell it—the Copyright Act provides multiple exemptions

for libraries. Section 108 of the Copyright Act supplies a litany of exceptions granted to libraries from the exclusive copyright rights. All libraries (e.g., public, academic, K–12, government, etc.) are treated the same under the law as long as they are open to the public (or the collections are available to researchers in a specialized field even though they are not affiliated with a private library or archive) and conduct their operations via physical premises—the library exceptions do not apply to libraries that are purely digital.

Many of the special accommodations for libraries come with provisos and additional exceptions and limitations not supplied in a brief overview, but in general are outlined below. It is important to note that these exceptions do not affect in any way the fair use rights of libraries (or anyone else), and do not expand the user's rights—they may still be liable for infringement even though the library is protected from it.

Despite the gigantic exceptions to copyright law that these limitations allow, compliance can be spotty, and many libraries are surprised that they do not take advantage of these easy and cheap ways to limit liability for copyright infringement.

Statutory Exemptions for Library Copying for Library Use

- Libraries may reproduce one copy of a work (but not musical works; pictorial, graphic, or sculptural works; motion pictures; or other audiovisual works other than an audiovisual works dealing with news) so long as the reproduction or distribution is made without any purpose of direct or indirect commercial advantage. The copy must include a notice of copyright or a note that it may be protected if it is lacking a notice.
- Libraries may make three copies of an unpublished work for preservation purposes. Digital copies may be made, but the item cannot already be in a digital format, and those digital copies may not leave the library premises.*

- Libraries may also make three copies of a published work if it is damaged, deteriorating, lost, or stolen; if a replacement cannot be found at a fair price; or if the format is obsolete. The same rules apply regarding digital copies.

It's a bit obvious that these rules can be confusing and hard to manage (and again—they are highlights), even for the largest and most sophisticated libraries. So what do you do when you have a damaged or deteriorating optical disk or want to preserve it? You can make the copy, but it cannot leave the library premises.*

Best Practice Tips: Libraries should implement methods for tracking digital copies of works made under these provisions in their catalogs so that they are not loaned for use outside the premises. Copies made under these provisions should always include a notice of copyright.

Statutory Exemptions for Library Copying for Patron Use

Liability for copyright infringement may arise when libraries copy on behalf of patrons. The Copyright Act allows a library to copy on behalf of a patron or to fulfill an interlibrary loan request under either of the following conditions:

- No more than one article or other contribution to a copyrighted collection or periodical issue, or a copy or phonorecord of a small part of any other copyrighted work
- The entire work, or a substantial part of it, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy of the copyrighted work cannot be obtained at a fair price

If *all* of the following are true:

- The copy becomes the property of the user
- The library has no notice that it would be used for any purpose other than private study, scholarship, or research

The library or archives prominently displays the Register's Notice at the place where orders are accepted, *and* includes the notice on its order form (37 CFR §201.14—find it at http://www.bitlaw.com/source/37cfr/201_14.html).

The notice is very simple and although many libraries do provide adequate notice, many do not. Although parts of the notice seem patently silly—to print it on durable paper in 18-point font, or to place it inside a box on the order form—the requirements are intended to ensure that libraries actually provide notice to the user that they may be liable for copyright infringement if their purposes do not meet the exclusion's requirements. Compliance with the rules is essential to obtain the protections provided to libraries under this exception.

Best Practice Tips: All libraries that make copies on behalf of users should check that their order forms and the place that they are accepted displays the Register's Notice, including any web forms used to accept orders. Many libraries choose to have patrons confirm that the intended use is only for private study, scholarship, or research. There is no need to ask the specific purpose—only confirmation that the purpose is one of those allowed. Develop procedures to handle the “just a quick copy from the photocopier in the back” types of requests—either provide a form or do not allow it at all.

Special Best Practice Tip—A Note About Notice

The Copyright Act does not counsel libraries that they must know the purpose for which a copy has been ordered by a patron—only that they have no notice that it will be used for any purpose besides those outlined above. Unlike in the case of unsupervised copying equipment (see below) where steps may be taken to increase patron privacy and avoid taking notice of patrons' activities, notice may be unavoidable when the library processes patrons' copy requests.

When a library *does* notice that repeated requests from the same or multiple individuals may result in the copying of an entire work where it would otherwise be disallowed, it is incumbent on the

library not to fulfill further requests or inquire further as to the purpose of each request, as it now has notice that the requests for copying may not fall within the limited exception.

Statutory Exemptions for Patron Copying for Patron Use

The Copyright Act also allows libraries to supply reproducing equipment for its patrons to copy anything in the library. Although this seems routine to most libraries that have offered photocopiers since they became available, it still represents one of the largest exceptions to copyright law. Libraries can provide the material and the means by which to copy it without being liable for third-party copyright infringement as long as a one simple rule is followed: “That such equipment displays a notice that the making of a copy may be subject to the copyright law.” The law does not prescribe the form or content of the notice (and does not except the patron from infringement)—just that the equipment displays the notice.

A shocking number of libraries do not protect themselves by placing the notice on reproducing equipment—which can range from photocopiers, scanners, microfilm reproduction machines, computers, printers, and anything else provided in the library for patron use that may be used to make a copy. A good portion of libraries that have attempted compliance place notices nearby, behind, and next to the reproducing equipment—although it’s highly questionable whether that counts as the equipment itself displaying a notice. The statute is clear—the equipment itself should display the notice.

The ALA’s suggested notice (since 1977) for unsupervised reproducing equipment is:

Notice: The copyright law of the United States (Title 17 U.S. Code) governs the making of photocopies or other reproductions of copyrighted material. The person using this equipment is liable for any infringement. (<http://www.ala.org/rusa/resources/guidelines/languagesuggested>)

Although many libraries choose to have longer or shorter notices, the notice needs to be enough to convey to the user “that the making of a copy may be subject to the copyright law.”

Many libraries also forget the “unsupervised” portion of this exception. A common question: What if I notice that a patron is copying an entire book? The proper answer to that may be: Why are you looking? Libraries and librarians need not and should not be supervising in any way patrons’ reproductions on the equipment the library provides. It’s important as a matter of patron privacy, but also as the key to obtaining the protections of this exception to copyright law. However, if the librarian or library staff has taken notice of the content, amount, or type of a patron’s reproductions, the reproducing equipment can no longer be considered unsupervised, and the exception will not apply.

Best Practice Tips: Place the notice on the reproducing equipment if at all feasible, and consider screen-based notices wherever possible to reduce administrative burden. Ensure that the notice at least conveys that copying is subject to copyright law. Consider a fair use statement (e.g., “Copying is subject to copyright law. Exercise Fair Use.”). Implement a copyright notice audit program to ensure regular checks that notices remain properly placed.

Do not supervise patrons’ copying activities. If library staff cannot escape noticing patrons’ copying activity and supervising is unavoidable, consider relocating reproducing equipment so that patrons’ activities are unsupervised.

Library Exceptions and Technological Change

Section 108 notice compliance is relatively easy and following the instructions laid out in the Copyright Act is not for the most part a difficult task, although it may require complex implementations for very large institutions. To limit liability, many institutions choose not to accept routine copy orders on behalf of a patron and will only reproduce special collections items.

Following the rules for Section 108 library exemptions is absolutely the most inexpensive insurance any library can “purchase” to protect itself from copyright infringement claims.

Fortunately, the rise of personal handheld technologies has further limited library liability for patron copying (both by patrons and for patrons by the libraries) as patrons increasingly turn to self-help solutions and the copyright industries have been unsuccessful in obtaining provisions that would put libraries on the hook for patrons’ copyright infringements with their own devices. Patrons now bring their own devices into the library and copy material. Why scan when you can snap with a smartphone and process the pages with a \$2 app right into a PDF? Note that in general libraries do not induce, cause, or materially contribute to infringements performed on patrons’ own devices; the outcome is always fact-specific—while it may not be able to control patrons’ device usage, encouraging them to do so isn’t necessarily recommended.

However, the patron copying exemptions were crafted at a time when the only copying technology in the library was a photocopier or a microfilm reader/printer—if a library had them at all. Libraries are full of new technologies that enable patrons to copy anything and everything in the library: photocopiers, printers, computers, flash drives, scanners, and more. Some of these particularly flash drives—make it nearly impossible to display the required notice on the equipment.

Moreover, many libraries maintain extensive technology catalogs that can be checked out and used both in and outside the libraries. Librarians loan just about anything: from charging devices to e-readers to laptops, cameras and video recorders, gaming devices, hard drives, and more. If you can buy it, some library somewhere is lending it to patrons for use both in and outside the library. The rise of lending these types of devices brings serious questions about how the liability of libraries can be limited.

Multiple libraries have begun lending Roku devices—digital video players that stream content

onto a connected screen. While Roku streams plenty of free (ad-supported) content, some libraries lending Roku have chosen to add individual Netflix subscriptions to these devices, or redeem “free digital copy” codes that accompany the physical media they have purchased and download the digital copy onto the device. Other libraries simply subscribe to the Netflix DVD service and loan out the DVDs to patrons (or, in academic and school libraries, use them to provide media for the classroom). While the library exceptions and the first sale doctrine always apply, services like these are accompanied by contracts that limit what the library can do with the service—and the first sale doctrine doesn’t apply to digital copies at all. The Netflix service is limited to personal, non-commercial use, and there really is no bending the terms of the libraries’ agreement with Netflix to sharing with patrons. Although Netflix has not yet enforced the terms of the agreement against any library in a legal forum, it could decide to do so at any time.

Best Practice Tip: Netflix, Kindle Unlimited, and similar services aren’t any different than other media services that libraries contract with—the terms of the license must allow the library to provide the service for authorized library users. If the terms of service don’t allow loaning or sharing with patrons, consult with your legal department on the relative risks of maintaining a subscription service like Netflix for the benefit of patrons.

***Services for Off-Site Patrons**

The library’s work is increasingly off-site. From virtual consultations to delivering digitized materials off-site, copyright law can affect the depth and breadth of online services that would otherwise be equivalent to in-person patron services. Just as lending a book from a Kindle account is not the same as lending the physical copy of the book that the library owns, providing services to library patrons outside the confines of the library’s physical space isn’t the same as providing those same services off-site.

“Virtual Library Premises” can be used to describe the digital off-site services that libraries provide to

authorized patrons. The library as an institution has changed from a storehouse of books accompanied by a basic index to a vast array of services, including licensed resources, 24/7 reference assistance, and more. While many libraries provide access to licensed resources for their patrons—whether via journal databases the library is authorized to provide access to for any off-site authorized user, or OverDrive e-book lending—far fewer provide unlicensed resources for library patrons.

Recall the basic library exception outlined above that allows libraries to make limited copies in certain circumstances, including for unpublished (but still copyrighted) works. The statute notes that the work cannot be distributed in digital format, and the copy “is not made available to the public in that format outside the premises of the library or archives.” Intentional or not, “to the public” is a clear qualifier on this restriction, and it logically follows that the digital copy can be made available to users that do not constitute “the public” outside the four walls of the library.

Although the definition of premises seems clear in this instance (and has been repeatedly emphasized by Congress), what is the public? There is no real definition of public for this particular provision. Certainly hosting a digitized in-copyright yet unpublished collection on a freely accessible website would constitute making the copies available to the public. However, such collections could be protected in a variety of ways, with more or less risk. On-demand online access to researchers in need via expiring passwords would be the least risky. General access to the entire body of authorized users or patrons of the library itself would carry more risk. For general public libraries, allowing access to all patrons would probably qualify as access “to the public,” and libraries experimenting with this type of access would need to critically examine their user base and demand for these types of collections to determine a set of users that would not be considered public.

To be entirely clear, should a court determine that the congressional intent was contrary to the language of the statute and the law prohibit any

use of the digital copies outside the library premises, all of these choices would put the library outside the exception, although a fallback fair use position could save a library from liability in certain circumstances. However, the words “to the public” would be completely extraneous if the statute meant that there could be absolutely no access outside the library whatsoever, so according to the rules of statutory construction and interpretation, it seems fairly clear that there can be some although yet undefined non-public virtual access to digitized copies.

Managing Copyright Policy in the Library

Librarians should . . . take a deep breath. While the myriad exceptions can be overwhelming, developing an institutional copyright policy and audit mechanism is manageable, one bite at a time. To be clear, these exceptions aren’t new, but many libraries have failed at developing holistic copyright policies that incorporate the provision and lending of new devices, or simply fail to apprehend that innovative lending policies could put them at risk.

Libraries should ensure that they implement policies and procedures that allow them to take greatest advantage of the library exceptions to the Copyright Act, as well as implement ongoing audit procedures to ensure that compliance is maintained. An annual check of reproducing equipment along with a quick checkup of current law and changes can go extremely far in ensuring that libraries maintain the Copyright Act’s protections against infringement actions. Further, libraries should consider both copyright and contract law when considering the lending of new devices and services.

Finally, libraries—especially research and academic libraries—should consider whether or not providing not-public digital copies of works to some segment of users would be useful and valuable to their missions and to their patrons, while still remaining within the limits of the Copyright Act. Copyright law is stuffed with careful exceptions that allow libraries to engage in the crucial role of preserving information and copyrighted works and providing access to the

public (or non-public, as it were). It's unlikely that the "Next Great Copyright Act" will arrive anytime soon. As much as many libraries would wish for a Copyright Act with broad library exceptions that would allow us to preserve, archive, and digitize, as well as to provide complete public access to

unexploited or orphan works, it's unlikely to occur, which may be fortunate for libraries' sake. As we move toward ever more library services and patron interactions off-site, libraries would be wise to take advantage of existing carve-outs and potential exceptions like this one.