copyright in the library

Making copies: archiving

Generally

Libraries were at the center of an intense controversy for several decades preceding the amendment of the Copyright Act in 1976. By the time Congress began to consider codifying the fair use doctrine, it had been substantially interpreted by the courts for over a century. There had not, however, been a single case construing its application to library copying, probably because everyone thought that library copying was a fair use. Representatives of both libraries and publishers had come to an informal agreement regarding the scope of fair use in this context in 1937. 1 Ultimately the stability provided by that agreement deteriorated as a result of at least two occurrences: the rapid change in copying technology in the fifties and sixties and the *Williams & Wilkins* case 2 in the early seventies.

These events caught both libraries and publishers off guard and neither was satisfied thereafter that their rights were adequately protected solely by reliance upon a vaguely stated fair use doctrine. Over a fifteen year period preceeding amendment of the 1909 Act, several draft proposals were filed as Senate or House Bills, the parties commented upon them, and revisions were offered. Ultimately, Congress enacted both a fair use and a library reproduction provision. Reading the history of Section 108 would suggest that Congress intended to define the scope of fair use in the library context, but the section explicitly states that nothing in it affects the right of fair use under Section 107. This attempted clarification, like most, seems to have raised new, unintended issues.

More than three decades have passed since Congress enacted Section 108; the Register of Copyrights has issued two Reports addressing whether the balance Congress struck between the rights of copyright owners and libraries has been a fair one; collective licensing has become significantly more important in academic life (CCC); lawsuits have been settled that may profoundly affect libraries; publishers are threatening to sue libraries to stop activities they consider infringing, and technological change has accelerated at a pace that would have been unthinkable just twenty years ago. Actually, given the circumstances, it is amazing that we still get along as well as we do.

Following is a discussion of what the library exemption permits. We will first discuss the criteria for qualifying to exercise rights under Section 108, then the archiving provision, the provisions addressing patron copies, the relationship between Section 108 rights and contractually assumed obligations and Section 107 rights and finally, interlibrary loan operations. Please keep in mind that activities not expressly permitted by or those expressly excluded from protection under Section 108, may be protected under Section 107.

Are you the right kind of library

Not all libraries are qualified to exercise rights under Section 108. Your reproduction and distribution must be without any purpose of direct or indirect commercial advantage as required by subsection (a)(1); collections must be open to the public or to persons unaffiliated with the institution but doing research in a specialized field as required by subsection (a)(2); and your library must scrupulously include with each copy made a notice of copyright as required by subsection (a)(3). Failure to meet these requirements could jeopardize a library's rights under Section 108.

There used to be some controversy about the nature of the copyright notice that was required by subsection (a)(3) to be placed on copies. This confusion was clarified in October, 1998, when the Digital Millennium Copyright Act ("DMCA") amended Section 108. The law now clearly states that any notice on a work should be included on a copy of the work. Otherwsie, copies should contain a legend that notes that a work may be protected by copyright law.

There is still controversy over whether Section 108's protections apply to for-profit libraries or libraries operating within for-profit corporations. The House Report specifically indicates that commercial advantage refers 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." 3 Thus, it would appear that the research libraries in our country's corporations were intended to be covered. This was not, however, the understanding of the district court that heard the *Texaco* case; Judge Leval determined that Section 108 would not apply to Texaco's library because its research was done for profit. 4 Given that nearly all research in this country is done for profit, 5 the *Texaco* district court's definition of when Section 108 applies might have stripped most research libraries of the statute's protections.

Archiving

Subsection (b) gives libraries the right to archive unpublished materials; subsection (c) addresses archiving published materials. The requirements for the two kinds of materials are different: to make a copy of an unpublished work, a library's purpose must be preservation or security and it must have a copy of the work in its collection; to make a copy of a published work, a library's purpose can only be to replace a copy it has or used to have in its collection, because the copy has been damaged, is deteriorating, lost or stolen, or the format has become obsolete. Such published works also must be out of print.

Print copies

One purpose of the archiving right is to allow libraries to make one-of-a-kind and out of print books, manuscripts and periodicals available to other libraries.

Audio and video recordings

Many librarians believe that the law permits them to make back-up copies of audio and video tape recordings. After all, these media are not very easily protected in a lending environment and are are ruined pretty quickly. Thus, it seems only logical that a prudent librarian would make a copy of the recording for lending, retaining the original for the inevitable time when the lending copy fails to come back or comes back ruined. This intuitive belief, however, is not supported by the plain language of Section 108. The right to archive under subsection (c) (for published works) applies only to replacement of a damaged, deteriorating, lost or stolen copy, or when the format of the recording has become obsolete, and then only when a reasonable effort to locate an unused replacement at a fair price or a device that accommodates the format has proven unsuccessful! Live and learn.

Electronic storage and retrieval

In 1998 the DMCA revised Section 108 to permit libraries to make up to three digital copies for archival purposes, but the library cannot provide access to these archival copies off the library premises. This limitation was the publishers' idea, based on their belief that libraries should not be able to lend a digital copy, or put another way, that the first-sale doctrine does not apply to digital works.

Footnotes:

1 The so-called "Gentlemen's Agreement," 2 J. of Doc. Reproduction 31 (1939).

2 *Williams & Wilkins v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975); the publishers "won" when the case was first tried before a Commissioner at the Court of Claims in 1972, understandably alarming the libraries. Then, the libraries "won" when the case was appealed to the full Court of Claims in 1973, likewise alarming the publishers. Ultimately, the Supreme Court affirmed the appelate decision by an equally divided court.

3 H.R. Rep. No 1476, 94th Cong., 2d Sess. at 75 (1976).

4 *American Geophysical Union v. Texaco, Inc.*, 802 F.Supp. 1 at 27-28, note 1 (S.D.N.Y. 1992). Note that the discussion of Section 108 issues in *Texaco* is probably dicta in that the court was limited by stipulation of the parties to a consideration of fair use under Section 107. Nonetheless, the court did discuss Section 108 and made conclusions that seem entirely incorrect and quite troubling as a result.

5 *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1174 (1994) acknowledges this fact in its discussion of how to take profits into consideration in a fair use case.

The subjects in this series include:

Fair Use (Section 107)

- Reserving works for limited use, generally
- Print copies in the reserve room
- Reserve rooms for images, audio and audiovisual works
- Providing access to electronic copies
- Library copying for patrons and for the library's collection

Library reproduction and distribution (Section 108)

- Archiving
- Patron requests
- Unsupervised coping, news programs and contractual limitations on acquisitions
- Interlibrary loan

Other

- Scholarly communication
- The digital library
- Licensing access
- Is your library an Internet service provider under the DMCA?

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