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copyright in the library

Making copies: unsupervised use of copy machines; copying news programs; and how contracts affect your 108 rights

Patron use of photocopier machines and computers in the library

Section 108(f)(1) lets us off the hook for unsupervised patron use of copying equipment located in the library so long as the library displays a notice that making copies may be subject to copyright law. Unlike the form of warning for patrons who request that the library make a copy for them, the Copyright Office does not mandate a particular form of notice. Following is a form of warning that most universities can be comfortable using. Note that it covers computer copies as well as photocopies. Place it prominently near the machines.

"Copyright Notice"

"Copying, displaying and distributing copyrighted works, may infringe the owner's copyright. The University's policy statement on fair use can help you determine whether your use of a copyrighted work may be an infringement. Any use of computer or duplicating facilities by students, faculty or staff for infringing use of copyrighted works is subject to appropriate disciplinary action as well as those [civil remedies](#) and [criminal penalties](#) provided by federal law."

Audiovisual news programs

Section 108(f)(3) permits libraries to make a limited number of copies of audiovisual news programs. Unlike other sections of the law that permit copying for patrons, section (f)(3) does not require that the copy become the property of the patron, so the library can retain and lend its copies. Audiovisual news programs include local, regional and national network newscasts, interviews concerning current events and on-the-spot news coverage of news events. The provision was not, however, intended to apply to news-magazines and documentaries.¹

Library contracts can limit your Section 108 rights to copy!

Section 108(f) (4) says that if you enter into a contract in the process of acquiring a work for your collection, and the contract limits your rights to copy in some way, the contract prevails over your statutory rights. In other words, you can contract away your rights under Section 108 as you might, for example, in acquiring private manuscripts or electronic databases.

Even if a contract eliminates the library's rights under Section 108, **the bigger controversy is whether libraries may contractually eliminate either their own or their patrons' fair use rights.** For example, a database license may (i) require the library to prevent patrons from making copies by requiring the library to post a notice that copying is prohibited; (ii) prohibit the library's making a reserve copy or (iii) require that permitted copies include a notice that further copying is prohibited. Would these prohibitions and requirements have any legal effect upon a patron's right to make copies under Section 107? The patron, after all, is not a party to the contract and even a vociferous copyright notice should not unilaterally extinguish a statutory privilege like fair use that embodies a fundamental principal of copyright law.²

Some librarians may feel that compliance with a requirement to restrict fair use copying makes the library an agent of the vendor against its patrons, or at the least, a participant in the dissemination of misinformation if such prohibitions cannot really be enforced.³ Fortunately, libraries can avoid this unwanted result by careful attention to contracts with publishers: be sure that nothing in a contract between a library and an information provider affects a patron's or the library's right of fair use.⁴

Footnotes:

¹ Report of the Conference Committee on the new copyright law (H.R. Rep. No. 94-1733, page 73).

² A quick check of copyright notices, especially on serial publications, would lead most readers to believe that they have absolutely no right to make any copies at all. But fair use removes any requirement to ask for permission and any liability for infringement. So, a unilateral attempt to exterminate fair use appears to do no more than intimidate.

³ Regarding enforceability, it is important to distinguish

- one-sided noncontractual statements that attempt to eliminate a right (a prohibitive copyright notice),
- contractual limitations that claim to affect the rights of non-parties (the library and publisher agree to eliminate someone else's rights),
- a nonnegotiable shrinkwrap or clickwrap "I accept" license, and
- mutual, bilateral (fully negotiated) agreements.

While one sided copyright notices and limits on a third party's rights are not enforceable, the other two may be.

Shrinkwrap and clickwrap licenses have done well in the courts (ProCD v. Zeidenberg).

Aside from shrinkwraps, parties mutually agree (that is, contract) about many aspects of copyright law every day, but may they agree to waive the right of fair use? Would courts enforce a contract in which a scholar agreed to forego her right to quote from or make a copy of a scholarly article accessed through a university database for the purpose of private study, research or scholarship?

A court could address this issue by interpreting prohibitive language like "may not make, store or transmit copies..." to apply only to **infringing** copies. In effect the court would read the word "infringing" into the sentence itself.

4 Avoid ambiguity as well as broad prohibitions. If a contract is unclear about what patrons can do, insert language such as the following to clarify patron rights: "All transmitting, printing or downloading by Authorized Users shall be limited to making single copies of a reasonable number of individual articles or other items from the Materials for their personal, educational, research or scholarly use."

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 copying, 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?](#)