January 1989

Current Copyright Law and the Archivist

Suzanne Flandreau Steel
University of Mississippi

Follow this and additional works at: http://digitalcommons.kennesaw.edu/provenance

Part of the Archival Science Commons

Recommended Citation
Available at: http://digitalcommons.kennesaw.edu/provenance/vol7/iss1/2

This Article is brought to you for free and open access by DigitalCommons@Kennesaw State University. It has been accepted for inclusion in Provenance, Journal of the Society of Georgia Archivists by an authorized administrator of DigitalCommons@Kennesaw State University. For more information, please contact digitalcommons@kennesaw.edu.
When the Copyright Law of 1976 (Title 17, U.S. Code) was passed, archivists welcomed it as a reform that would remove the distinctions and uncertainties of common law copyright and apply the provisions of the statute equally to manuscripts and published materials. Recent developments in the courts, however, and opinions expressed in two five-year reports of the Copyright Office, have indicated that the end of common law copyright may not have led to an equal treatment of published and unpublished materials in law, even though statutory copyright now applies to both. Recent legal interpretations have maintained old distinctions between published and unpublished materials with regard to "fair use," and to library and archival photocopying of unpublished materials.

In its treatment of unpublished materials, the new copyright law is confusing both for what it does not say and for what it does. It is apparent that, though the 1976 law was a radical change, changes in legal interpretation have not been radical, and there are precedents from the courts of which archivists should be
aware. Specifically, two recent cases, *Harper & Row v. The Nation* and *Salinger v. Random House*, deal with questions of fair use of unpublished materials and other matters that set precedents relevant to scholarly use of manuscripts in libraries and archives. In addition, the latest report on library photocopying by the register of copyrights takes a very hard line on photocopying of unpublished materials that, if enforced, would impede current scholarly and archival practice.

Under the 1976 law any work of authorship in a fixed form is protected by copyright, and registration of the work is no longer necessary. The court cases and the other developments to be discussed center around three sections of the copyright law.

Section 106 enumerates the rights of the copyright holder. These include the right to reproduce a work, to prepare derivative works, and to "distribute copies . . . of the work to the public by sale or other transfer of ownership." For some nonliterary types of works there are also rights of performance and display. Though "publication" is not specifically mentioned, Section 106 repeats the exact wording used to define "publication" in Section 101 of the law. The following two sections, 107 and 108, provide limits on the rights enumerated in 106.

Section 107 is the fair use provision. It codifies a judicial doctrine developed to deal with the publication of copyrighted materials. There are four tests of fair use, and these tests are always applied by the courts. The first is the purpose and character of the use. Nonprofit uses are more likely to be considered fair. The second test is the nature of the work used, and this is a very important one for archivists. The third test is

---

1 *Copyright, Title 17, U.S. Code* (1978). Section 102 defines the types of works that are covered by copyright. U.S. government works are specifically excluded in Section 105. Section 408 states that copyright protection is not dependent on registration.
the amount of the work that is used in relation to the whole, and the fourth is the effect on the potential market for the work. All of these tests should be met for the use of the work to be fair.

Section 108 applies to reproduction of copyrighted works by libraries and archives. Controversial when it was developed, it intends to set limits for library photocopying. It has numerous paragraphs and will be discussed in more detail below. Because of the judicial nature of the fair use doctrine and the controversy over library photocopying, the court cases deal with Section 107, that is, with fair use, and the two reports of the register of copyrights with Section 108.

The two recent court cases deal with unauthorized publication of manuscript materials and claims by persons who published them that for various reasons such publication was fair use. The Harper and Row case concerns the memoirs of former President Gerald Ford, which were to be published in book forms by Harper and Row. This firm had sold magazine rights to Time magazine. Before Time could publish, The Nation obtained an unauthorized copy of the book and published a story discussing the memoirs and quoting excerpts. Time canceled its plans to publish a prepublication article on the biography. Harper and Row then sued The Nation for copyright infringement. The Nation claimed that the newsworthiness of the subject made its publication of the memoirs fair use.

The case takes place out of libraries altogether. The dispute is between a publisher and a news magazine, and the most important issue at stake is newsworthiness as a factor in fair use. The case is significant because as part of their defense the attorneys for The Nation claimed that, under the 1976 law, fair use applies equally to published and unpublished materials. The case went to the Supreme Court, which did not accept this view. The Court decided that the right of first publication, an old concept from common law copyright, was more important in the case of unpublished materials than fair use:
The unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use. And under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use.\(^2\)

The Harper and Row decision says, in effect, that an author's right to first publication implied in Section 106 of the law outweighs fair use. When unpublished copyrighted materials are concerned, fair use applies more narrowly than for materials that have been published. Under common law, fair use did not apply to unpublished materials, and to some extent the decision recalls this common law principle.\(^3\) This interpretation is not the one most often expressed in the archival literature, where it has been assumed that when common law copyright was abolished fair use under statutory copyright would apply equally to all copyrighted materials.\(^4\)

The Salinger case applies more directly to libraries and archives. Salinger brought suit against his would-be biographer Ian Hamilton to prevent the publication of quotations from his unpublished letters in a biography. He was denied an injunction


\(^3\) For the legal background to Section 107 see Goroff, 336-344.

by the district court, but the ruling was overturned by the United States Court of Appeals, which ruled that even paraphrases of the passages in question infringed Salinger's copyright in his unpublished letters.  

The Salinger decision, which was upheld by the Supreme Court, cites the Supreme Court's earlier decision in Harper and Row. The Salinger decision states that Section 107 does apply to unpublished materials, that even the right of first publication is "subject to the defense of fair use," but that the law "does not determine . . . the scope of the defense as applied to such works." The court decided that this scope is narrower, and that

---

5 Salinger v. Random House, Inc., 811 Federal Reporter 2d Series 90 (1987). In an interesting and ironic development, the quotations Salinger attempted to suppress became part of the court record and are published in the decision.

6 Since this paper was written another case, New Era Publications International v. Henry Holt and Co. has been decided. New Era concerns the attempts of a publishing house connected with the Church of Scientology to enjoin publication of a critical biography of the church's founder, L. Ron Hubbard, written by Russell Miller and entitled Bare-Faced Messiah. New Era claims that Miller infringes by quoting passages from Hubbard's unpublished writings.

The case was first heard in the United States District Court for New York (695 F. Supp. 1493 SDNY 1988). In his denial of the injunction Judge Leval (whose original decision in Salinger was later overturned) broadened fair use as set forth in Salinger to allow quotation of the copyrighted expression of a subject when only the words themselves would serve the critical purpose of the biographer. The subject's exact words become facts essential to the reader's understanding of the biographer's point. Leval's decision is a mixed one, since he points out that not all the quotations in the book meet this test, and some do infringe. Nevertheless, he denied the injunction as too drastic a penalty on a serious critical study.
Salinger's would-be biographer exceeded it. In other words, published and unpublished works are not equally subject to fair use.

The Salinger case applies directly to archives because the biographer got much of his information from Salinger letters that he used in major repositories. The case therefore mentions libraries in some important contexts. The point is made almost in passing that the owner of a letter may legally place it in a library and may place restrictions on its use. The owner of the physical object, not the owner of the literary rights, may determine its physical disposition. In other words, archives and libraries are legally entitled to hold their collections and to allow research use of them. Depositing unpublished materials in a library does not amount to publication when the library's stated use policies adhere to the copyright law, and the author retains his rights to his unpublished expression.

The case mentions and validates the use agreements libraries require their users to sign. Salinger made these agreements a part of his suit, claiming that he as copyright holder in the materials used was a party to the agreements. He tried to have the use

On appeal, the United States Court of Appeals also denied the injunction, on the grounds that New Era had unnecessarily delayed its suit, causing the publisher possible additional monetary losses on the production and distribution of the volume. However, the appeals panel refused to concur with Judge Leval's interpretation on fair use, stressing again, as they did in Salinger, that the unpublished nature of the quoted material precluded its use without permission. The case as it stands now has the effect of reinforcing the Salinger decision. [1989 WL 38381 2nd Cir. (N.Y.)]

7 Salinger v. Random House, 95.

8 Salinger v. Random House, 97.
agreements enforced as contracts, claiming that by publishing without his consent his biographer had broken them. The court did not rule on this point, but did note that library use agreements are designed to acquaint researchers with copyright issues. There is a clear implication that the libraries involved had fulfilled their responsibility for instructing their users about copyright.

Neither case mentions photocopying, which is a major concern of archivists. Interpretation of Section 108 is a bone of contention between the Society of American Archivists (SAA) and the Copyright Office. Fair use is a judicially derived doctrine that initially applied to the use of copyrighted material in a publication. It did not apply to unpublished materials under common law. However, it was used to justify library photocopying, and fair use copying of unpublished materials, though illegal in theory, was widely done in practice. Archivists and historians have never equated photocopying with publication.

The assumption has been widespread in the archival profession that when the 1976 law abolished common law copyright, fair use would apply to all unpublished materials under statutory copyright. As late as 1985 an SAA publication devoted to legal concerns in archives clearly states this assumption. Apparently, when it comes to publication, the courts are not willing to interpret fair use so broadly, though they have not given specific opinions on photocopying. If photocopying of unpublished materials under Section 107 is considered a form of publication (which is not permissible), then libraries and archives wishing to photocopy manuscript materials for patrons must do so under Section 108.

---


They then tangle with the Copyright Office, which has taken a position on the right of first publication that is even narrower than that of the courts.

For Section 108 to apply to libraries and archives, paragraph (a) states that the repository must not benefit financially from the production of the copy, must be nonprofit and open to the public or at least to qualified researchers, and must warn users about the provisions of the copyright law.

One paragraph of Section 108 clearly applies to manuscripts: paragraph (b) allows a library to duplicate unpublished works in its collection in facsimile for purposes of preservation and security, and it allows copying of unpublished materials for deposit for research use in another library. The disputed paragraphs are (d), which states that a portion of a copyrighted work may be copied for an individual researcher, provided the required copyright notice is attached, and paragraph (e), which allows copying of a more substantial portion or an entire work under the same conditions if it is not otherwise available "at a fair price." SAA claims that these provisions apply to unpublished materials. The Copyright Office claims that they do not.

In Section 108 (i) the register of copyrights is required to hold hearings and to report on the effectiveness of Section 108 in balancing the needs of users against the rights of publishers and copyright holders. This provision was added to the law because Section 108 was controversial at the time it was enacted. Two reports on Section 108 have been issued, one in 1983 and one in 1988. Both reports assert that Section 108 (d) and (e) do not apply to unpublished works.

In 1980 Linda Matthews of the SAA Copyright Task Force wrote a position paper asking that in the first five-year report the register of copyrights recommend a clarification of the language of the law to make it explicit that photocopying of unpublished materials for researchers was allowed under 108 (d) and (e). This clarification would make the law support the accepted copying
practices of most archives. The recommendation SAA got was exactly the opposite. The register replied that the only permissible copying of unpublished materials is under paragraph 108 (b) because

the copy prepared under the auspices of 108 (b) is not for distribution to a library patron. There should be no suggestion that the right of first publication is somehow transferred from the owner of the copyright to the library or archive. . . .Since the copyright owner has elected never to publish the work, that election must be honored. . . .For the same reason, there is no fair use copying permitted beyond that authorized by 108 (b).

The Copyright Office’s interpretation equates copying with publication as defined in Section 101 because the copy is distributed to an individual patron, thus usurping the right of the copyright holder to distribute copies of the work. The register of copyrights recommended "an amendment to paragraphs (d) and (e) of Section 108 to make clear that unpublished works are not within the copying privileges granted therein." Congress took no action on the 1983 report.


The same recommendation is made in the 1988 report, for the same reasons, though the arguments from both sides include much more hairsplitting. The SAA case claims that the language of the sections does not exclude unpublished materials: it even allows copying of unique materials not commercially available. The register retorts that since manuscripts are not likely to have "articles" like a periodical, or to be available from trade sources, the language obviously excludes them. Linda Matthews, who again wrote the SAA statement, declares that the earlier report had no effect on archival photocopying practices: "Photocopying procedures and practices in archives have remained basically unchanged since the first five-year review." The strong implication is that this situation will not change. In effect, the archival profession is openly disregarding the opinion of the Copyright Office.

Interestingly, both SAA and the Copyright Office have ignored the existence of paragraph (h) of Section 108, which lists the specific types of materials that cannot be copied under Section 108. Musical works, pictorial, graphic or sculptural works, and films or audiovisual works are mentioned, but manuscript works are not. This would seem to lend some weight to the SAA argument.


17 Benedict makes this point in his analysis of the Copyright Office's position on Section 108. See "Fair Use of Unpublished Manuscript Materials," 878.
The question which then arises is what can archivists do, if research as currently defined is not to come to a complete halt? The conventional wisdom among historians about fair use has always favored quoting unpublished material at the risk of any penalties imposed by the law. It has been assumed that in most cases damage to the copyright owner is so slight that legal action is not worthwhile. The tendency is to apply the same attitude to photocopying.

There are possible solutions to the dilemma. One would be a legal case specifically related to library photocopying of unpublished materials for researchers. A test case would resolve the question, but it also might involve a violation so egregious that it would not help the case for archival copying. Legal precedents also do not seem to be on the side of the archivists. The whole case might hinge on whether photocopying is a form of first publication.

Another possible solution is a set of negotiated guidelines like those evolved for interlibrary loan copying from periodicals, for educational photocopying, for use of music in educational contexts, and so forth.

---

18 Benedict, 863-864.

19 Some guidelines were negotiated prior to the passage of the law. These include the "Guidelines on Educational Copying from Books and Periodicals" and the "Guidelines for Educational Uses of Music," which pertain to Section 107. Both were the result of negotiations between representatives of educators and publishers encouraged by the House Judiciary Committee in 1975. The so-called CONTU Guidelines covering photocopying for interlibrary loan were negotiated through the National Commission on New Technological Uses of Copyrighted Works (CONTU). They provide further definition of Section 108 (h)(2). All have been reproduced many times in guides for teachers and librarians. See Donald F. Johnston, Copyright Handbook (New York: R.R. Bowker, 1978), 217-223. Negotiated guidelines dating from 1979
The problem with such a course of action is that there is no group representing the interests of all the copyright holders of unpublished materials with which to negotiate. As an alternative to negotiation, SAA along with other interested groups—the Association of College and Research Libraries (ACRL), the American Historical Association (AHA), and other academic organizations—could arrive at a set of guidelines among themselves and publish them. Recognized professional guidelines might at least have the effect of cushioning the impact of a lawsuit on any individual professional who followed them.

A third alternative is to live within the provisions of 108 (b) and to use the clause allowing copying for deposit for research use in another library to develop a system that would get copies, also exist for educational taping of television programs (off-air taping) under Section 110 of the copyright law. Tapes may be used in the classroom for a ten-day period, but permanent retention of a tape requires payment of a license fee. See R.S. Talab, Commonsense Copyright: A Guide to the New Technologies (Jefferson, N.C.: McFarland & Co., 1986), 37-40. In a unilateral move, the International Association of Sound Archives has promulgated guidelines for fair use copying of sound recordings. See the IASA Phonographic Bulletin 44 (March 1986): 16-17 and 49 (November 1987): 5.

The ACRL has published statements on reproduction of archival materials. However, the latest of these was adopted in 1976, before the current copyright law took effect. In very cautious language it enumerates the conditions under which manuscripts may be copied, which include the written approval of "the holders of appropriate common law or statutory rights," but does give encouragement to "the custom and practice among libraries" of fair use copying of manuscripts for individual researchers. See "Statement on the Reproduction of Manuscripts and Archives for Noncommercial Purposes," College and Research Libraries News (November 1976): 271. The ACRL statement is currently being revised.
either through loan or purchase, to libraries to be used by their patrons on the premises. This solution would involve turning archival preconceptions about scholarly use of archival materials completely around, but it bears looking into as an alternative. The archival community would have to develop standard use policies, so that possibly sensitive materials could be used under the same rules in every library, but this might be a beneficial development.

Of course, there are also two other perfectly legal alternatives. One is to obtain permission from the copyright holder before copying, just as is done before publishing. This solution is not popular with researchers, who are accustomed to easy access to photocopies. It solves nothing when a copyright owner cannot be found. The other alternative is to try to obtain an assignment of copyright with the gift agreement when the materials come to the repository. The obvious problem with this solution is that very often (as in the Salinger case) the donor does not hold copyright in the materials being donated. Both of these alternatives, as archivists have continually pointed out, are desirable but not always possible.

The final question is, What happens in the case of a suit? Section 504 of the copyright law outlines remedies for infringement. Anyone who infringes can be sued, including a library or an individual archivist. A copyright holder can sue to recover actual damages, as Harper and Row did when their magazine contract was canceled because of earlier publication of the Ford memoirs in The Nation. They could point to a specific amount they lost from the actions of The Nation, and they got it back.

The alternative is for the court to award statutory damages. These can be as little as $100 if the infringement was not willful or even less if the infringer "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was an employee or
agent of a nonprofit educational institution, library or archives acting within the scope of his or her employment" or "such institutions, library or archives itself, which infringed by reproducing the work in copies or phonorecords." This is a professional good faith defense, but it applies only to fair use as set forth in Section 107. It make no specific reference to Section 108, which is where SAA has currently placed its emphasis: if archivists follow SAA's arguments and do copying under Section 108, can they still claim professional good faith?

Good faith is the best defense, but there are also questions of the balance of scholarship and the flow of information and ideas, to which the courts are sensitive. As yet there are no clear answers. In the absence of professional guidelines, each archivist and institution must make individual decisions and policies about copying, basing them on the best available information. It may be possible to combine approaches. For example, archivists could require the permission of a copyright holder before making photocopies, as the Copyright Office would require, except when a copyright owner cannot be located. Then, perhaps they could justify making a copy under Section 107, on the assumption that copying for the private use of a single scholar does not result in serious damage. The necessary good faith effort will certainly have been made.

The strongest opinion against such a course is expressed by the Copyright Office, and Congress has more or less ignored it. The courts have said that fair use does apply to unpublished materials, but that its application is limited. They have commended library use agreements, which usually cover copying. There is a strong possibility that fair use copying would be permissible if a good faith effort to find the holder of copyright in unpublished materials, or his or her heirs, had failed. At the

21 Copyright, Section 504.
same time, archivists should show good faith by seeking permission to copy unpublished materials when the copyright holder is known. The free and easy ways of the past should not continue, and every effort should be made to comply with the parts of the law that are clear by providing copyright notices and requiring photocopying agreements.

At the same time, the professional organizations should provide some guidance for their members, either in the form of guidelines or creative and innovative uses of the noncontroversial sections of the law, like 108 (b). This might also serve to protect the individual archivists who would follow such guidelines from statutory damages in the event of legal action. Many historical manuscripts now covered by statutory copyright under the 1976 law will enter the public domain after 31 December 2002, but the inconsistencies of the law will still be present, as it applies to more recent materials. The archival profession should make an effort to come to grips with the various interpretations of the law, and to be guided by them, when possible, in matters of professional practice.

Suzanne Flandreau Steel heads the University of Mississippi Blues Archive. She is a member of the Society of American Archivists Task Force on Copyright, but the opinions expressed here are her own and do not reflect any official positions of the task force. The article was originally presented as a paper at the Southern Archivists Conference meeting, May 1988. The author thanks Richard Turley and Robert Byrd for their comments and suggestions.