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Where Have You Gone, Fair Use: Document Delivery in the For-Profit Sector

In the spring of 1999, LeBoeuf, Lamb, a large New York law firm purchased a multiyear photocopying license and paid an undisclosed settlement to avoid a copyright infringement suit. Apparently, the not-for-profit Copyright Clearance Center (CCC) informed four publishers that employees of the firm were violating the publishers' copyright. The publishers banded together and threatened to sue LeBoeuf. And then, arriving on the white horse (no cloud of dust here, but perhaps some jet fumes) comes the CCC to orchestrate the settlement. What should a private sector librarian do if the CCC knocks at the door? What has happened fair use?

Fair use is alive and well, but so are copyright enforcers such as the Association of American Publishers (AAP) and the CCC. This writer is suspicious of claims by the AAP and the CCC and of other owner-oriented groups such as the Software Information Industry Association that they perform a service by "educating" librarians about U.S. copyright law. Although they usually speak in black and white terms, anyone who knows anything about copyright knows there's a lot of gray.

Gray? Is there anything gray about *American Geophysical Union v. Texaco*? The U.S. Court of Appeals for the Second Circuit affirmed a 1992 federal district court decision holding that it was infringement for a researcher in a for-profit corporation to make copies of journal articles and store them away for later use. The appellate court emphasized the archival nature of the copying. Dr. Chickering, the researcher, may not have even used the copies since he merely stored them away in a file cabinet. Significantly, the court did not adopt the lower court's statement that a corporate library has few rights under the library exemption of the Copyright Act. This devastating statement was dictum—not germane to the issues before the court and therefore can be ignored—because the parties agreed that the case would turn on fair use alone. Thus, *Texaco* was not a § 108 case.

Section 108 of the Copyright Act permits some copying by libraries for their patrons. The legislative history to the Act is clear that the exemption applies to both the non- and for-profit sectors. Section 108 also permits libraries to engage in interlibrary arrangements such as interlibrary loan/document delivery to acquire a copy of a journal article for a user.

The library first must qualify for the library exemption and comply with other requirements of § 108. (1) The library may only make or acquire a single copy of an article or excerpt for the patron who requests it; multiple copies are prohibited. (2) The copy must become the property of the requestor; the library cannot add it to the collection. (3) The library must not profit directly or indirectly from the copy; it cannot charge clients more for the reproduction than it costs to make the copy, nor can the library profit in any way from such activity. (4) The copy must include the notice of copyright from the copy reproduced, or if it's not available, a legend that reads "THIS MATERIAL IS SUBJECT TO THE UNITED STATES COPYRIGHT LAW; FURTHER REPRODUCTION IN VIOLATION OF THAT LAW IS PROHIBITED." (5) The library must include on its order form, and at the place where orders are accepted, a "warning of copyright." (6) The library also must be open to the public or to researchers in a specialized field. A library in the for-profit environment meets this requirement if it participates in reciprocal interlibrary lending/document delivery.

There is, however, another important restriction in §108(g)(2): A library cannot engage in "systematic reproduction or distribution of single or multiple copies" such that a library that receives copies under interlibrary arrangements "in such aggregate quantities as to substitute for a subscription to or purchase of such work." The Act does not specify when a library might be using ILL/document delivery as a substitute for a purchase or subscription. For this the "Guidelines for the Proviso of Subsection 108(g)(2)," more commonly called the CONTU Guidelines must be consulted.

Some people call the CONTU Guidelines the "Rule of Five," but better terminology is the "Suggestion of Five." In any single year, a library ought not acquire via ILL/document delivery, for any article published within five years of the date of the request, more than five such articles from the same journal title. The "Suggestion of Five" does not apply if the library has entered a new subscription to the journal or if it already subscribes but the item is missing from the collection. Remember, however, this is a guideline not an absolute rule. Might the sixth or seventh article from a journal title requested in a year be permissible? Possibly, especially for a short-term one-time project or if it's nearing the end of the calendar year.

by James S. Heller, director of the law library and professor of law, The College of William and Mary. For more information on Copyright Corner, please contact Laura Gasaway (laura_gasaway@unc.edu).

What about the fifteenth or twentieth article? Here, the library is well beyond the guidelines and presumably should pay royalties.

Additionally, the guidelines require the library to keep ILL records for three full calendar years. Important information to include in the records includes date of the transaction, the journal name and volume number, the title of the article, its pages in the journal and the name of the individual requestor.

Who needs to pay royalties? Presumably the requesting library. In fact, the guidelines state that a library which requests copies under § 108 should attest that the request complies with the guidelines or with another provision of the Act such as § 107 fair use. The lending library may reasonably rely on the attestation. However, the librarian should be aware that some libraries may abuse the privilege by asking repeatedly for copies of articles from the same journal title. The library should not fill such requests unless the borrowing library is paying royalties and so indicates. Moreover, libraries should avoid filling requests from for-profit document deliverers unless there is clear proof that the document deliverer is paying royalties.

For-profit document deliverers that make money from making copies must pay royalties. There is no § 108-like exemption for them, and their copying is not a fair use. Reputable document delivery companies do pay royalties, and, if they want to stay in business, they will bill royalty fees back to the requesting library or include it in their fee.

What about electronic copies? Sections 107 and 108 are format neutral. If the library can make a photocopy of an article copy from its collection for a researcher or get a photocopy or fax of the article

from another library, it should be able to send the user a digital copy. In an interlibrary transaction, one also should be able to receive a digital copy from another library. Recalling that the copy must become the property of the individual requestor, the library may not retain the digital version after delivery to the user.

Because this column began with the CCC, it also end with it. Danvers, Massachusetts-based CCC claims that more than 9,000 companies use their Annual Authorizations and Photocopy Authorizations Services. The blanket license agreement enables a company to make an unlimited number of copies of materials in the CCC's repertory of registered works for internal use. And the CCC says that if the company gets a blanket license, the participating publishers will not sue for infringement. The license does not cover materials publishers have not registered with the CCC nor does it extend to external copies such as those requested via ILL/document delivery.

The CCC collects royalties from users and returns the revenues to publishers, less a nine to twelve percent fee. It is no surprise that the CCC interprets fair use and the library exemption more narrowly than this author. A librarian should counsel corporate counsel about any statements and letters from CCC. Fair use and the library exemption exists both in the ivory-towered academic world and in the real commercial world. Justifiably, the §§ 107 and 108 exemptions are interpreted more narrowly for for-profit entities. But Congress did not limit these exemptions to the non-profit sector.

Play fair, and pay royalties when they are due. But remember that just because someone threatens to sue if royalties are not paid does not mean they are factually or legally right. 