



Continuing Dilemmas Surrounding Media Rights and Regulations

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THE DEVELOPMENT AND UTILIZATION of the new communication media for library purposes has produced a number of yet-to-be-solved problems in the field of rights and regulations.

Photocopying is already a standard library service. On the drawing boards are additional services made possible by the development of new electronic media. Other articles in this issue on "Newer Media" describe techniques of providing library service through existing or proposed devices.

This article will discuss problems which grow out of the ownership and uses of library materials as this ownership and these uses are adapted to emerging practice and service. The problems or dilemmas will be presented in four groups: (1) the problems of photocopying and microfilming; (2) the problems of performance, display, and recording; (3) the problems of transmission, both within a library and between libraries; and (4) the problems arising through the restrictions on derivative works.

Problems of Photocopying and Microfilming. At present both photocopying and microfilming are common library practices. There is a widespread opinion among much of the book-publishing industry that both these practices are illegal. The owner of a manuscript, article, pamphlet, or book takes the position that under our laws, both common and statutory, the original owner has the sole right to make copies. To photograph or microfilm is to make a copy.

The principal basis for the claim of the exclusive right of the owner to make copies is the Copyright Act (United States Code, Title 17). Section I(a) of that Act provides that the owner of the copyright shall have the exclusive right "to print, reprint, publish, copy, and vend the

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Continuing Dilemmas Surrounding Media Rights and Regulations

copyrighted work." To comply with this statute, the Library of Congress, of which the Copyright Office is a subdivision, has refused to allow the photocopying or microfilming of complete copyrighted works without the consent of the copyright owner.

The 1964 findings of the Joint Libraries Committee on Fair Use in Photocopying are as follows:

1. The making of a single copy by a library is a direct and natural extension of traditional library service.
2. Such service, employing modern copying methods, has become essential.
3. The present demand can be satisfied without inflicting measurable damage on publishers and copyright owners.
4. Improved copying processes will not materially affect the demand for single copy library duplication for research purposes.¹

Copyright proprietors, principally publishers, are concerned about what will happen to their market if photocopying is allowed to increase. They are afraid that the market for original material will become so small that they will have to cease publication. Eventually, they claim, there will be nothing left for the scholars to photocopy.

In a study sponsored by the National Science Foundation in 1963, investigators found that, under present practices of photocopying from scientific and technical journals, "economic damage does not exist in substance. It does exist in special circumstances, but in relation to the total picture, we do not consider it a major problem."²

A few types of library materials may be photocopied or microfilmed without infringing on the owner's rights. All *uncopyrighted published* material is in the public domain, and may be duplicated without legal liability. Materials which are *not* published and *not* copyrighted are protected by common law rather than by statute, and these may not be legally duplicated without the owner's consent.

It is also a generally accepted library practice to photocopy or microfilm *excerpts* from copyrighted works. The difficulty arises in attempting to define "excerpt." It is not uncommon for a publisher to insert a notice in a copyrighted work such as: "All rights reserved. This book may not be reproduced in whole or in part, by mimeograph or any other means, without permission in writing." The confusing phrase is "in part." There is no question but that excerpts from copyrighted works can be copied without liability in spite of the wording of the above notice.

Copying excerpts from copyrighted works is based on the doctrine of "fair use" as developed by the courts in their interpretations of the rights protected under the Copyright Act. Unfortunately, or perhaps fortunately, there are no judicial decisions applying the fair-use doctrine to library uses or library copying. Exactly what an "excerpt" is continues to be a matter of debate. No adequate definition, only examples, of fair use can be given at this time. Copying a quatrain from a ten-quatrain poem would be fair use. Duplicating three pages from a 250-page book would not be a violation. To copy the chorus of a song but not the verse would constitute an infringement. It would also probably be an infringement to duplicate an entire chapter of a ten-chapter book.

An exceedingly difficult dilemma arises when a library attempts to photocopy or microfilm a copyrighted graphic which constitutes a unit in itself such as a picture, drawing, or map. Clearly the doctrine of fair use as applied to excerpts does not apply here. Whether the doctrine of fair use would permit copying of such complete integrated units as graphics is far from clear.

An entrancing problem arises in the application of the fair-use doctrine to excerpts from compiled or composite works. Is it fair use to photocopy a complete article from a copyrighted magazine or from an encyclopedia? To what extent can a component part of a copyrighted work be duplicated? Does the copyright on a book extend to the individual maps, graphs, charts, or pictures in the book? No authoritative answers can be given to these problems, nor does the proposed Copyright Bill offer any solution.

There is one bright spot in the new Copyright Bill (Sec. 108) which permits the copying of *unpublished* works either by microfilming or photocopying for archival purposes. The complete text of the section is as follows:

Sec. 108. Notwithstanding the provisions of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such works in its collection in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution.

It was hoped that the draft of the proposed new Copyright Act³ would solve or at least clarify the photocopying and microfilming

Continuing Dilemmas Surrounding Media Rights and Regulations

problem. Unfortunately, this has not been the case. The problem has been left exactly as it was under the present Copyright Act. It will probably take a few court cases to establish the boundaries of library photocopying and microfilming.

The Problems of Performance, Display, and Recording of Library Materials. Traditionally, not many problems result from using library materials in the form of performance, display, or recording but, with the development of expanded services and the introduction of new technical devices, dilemmas over such uses of materials are bound to become acute.

The present Copyright Act, as well as the proposed new Act, contains a provision limiting the right *publicly to perform* a copyrighted work to those who have permission or clearance from the copyright owner. In the present Act, this right is limited to dramatic, literary and musical works (Title 17, Sec. 1(c), (d), and (e)). Under the proposed Act, the exclusive performance right is extended to "choreographic works, pantomimes, motion pictures and other audio-visual works." (S. 597, Sec. 106(4).)

The library of the future will undoubtedly engage in the distribution of dramatic, literary, musical and especially audio-visual works, in a form through which a "performance" may be undertaken. Recordings are a common example of this type of library service. Under the proposed Act, it would be an infringement to "perform the copyrighted work publicly." (Sec. 106(4).) The definition of "perform" (Sec. 101) is "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or audio-visual work, to show its images in sequence or to make the sounds accompanying it audible." A "public" performance is defined in the same section as "to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."

The problem is also complicated by the restriction on the performance of an audio-visual work which is defined as follows: (Sec. 101) Audio-visual works are "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied."

To what extent can a library permit showings of copyrighted re-

cordings or audio-visual works in sequence either to individuals or a group of individuals? The answer is not clear.

The present Copyright Act places no restriction on the "display" of a copyrighted work, but the proposed bill gives the copyright owner of some types of copyrighted works the right to control the display of his work. The limitation on the public display of copyrighted works extends to "literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works." (Sec. 106 (5).) To "display" a work is further defined (Sec. 101) as "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." Again, "pictorial, graphic, and sculptural works" are defined (Sec. 101) as "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints, and art reproductions, maps, globes, charts, plans, diagrams, and models."

What restrictions these limitations will place on libraries, and particularly on library use of the newer media, remain to be seen. However, it is clearly evident that these restrictions will curtail some of the present and future activities of libraries. The possession or ownership of a copy of a work no longer permits the not-for-profit public performance or display of the work. The prognosis is not bright.

Recordings, both disc and tape, are not now copyrightable under the present law, but the new law will undoubtedly extend protection to all types of sound recordings (Sec. 114). For libraries this means that they will not be able to duplicate or "dub" recordings without the permission of the proprietor of the original recordings.

The question of whether a library can build up a collection of recordings by taking them off the air is questionable. Such practice is probably illegal under the proposed copyright Bill, especially if these recordings are to be made available to the public.

"Sound recordings" are defined in the Bill (Sec. 101) as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work; regardless of the nature of the material objects, such as discs, tapes, or other phonorecords in which they are embodied."

The Bill does not give the producer of the phonorecord the right to control performance; that still remains in the hands of the original copyright owner of the recorded material. Neither does the Act recog-

Continuing Dilemmas Surrounding Media Rights and Regulations

nize any rights or control by performers who participate in the recording of the words or music.

With the elimination of the not-for-profit permission for performances, it will no longer be possible for the library to offer performances of recordings for its public. It is probably possible, although the Bill is not explicit, for an individual patron to choose recordings from the collection and play them for his own enjoyment in a carrel.

Transmission of Library Materials. The word "transmission" is new to copyright legislation, and as such it poses a number of problems not only for the current operation of the library but especially for the services which libraries are likely to develop through the use of electronic devices.

The foreseeable developments in library practices are summarized by Marke in his recent study on "Copyright and Intellectual Property":⁴

The growth of published information has fostered the invention of many new handling and searching techniques and concepts. Best known are the retrieval systems based on automatic machinery. In addition, there are imaginative new ways of listing titles (for example, permuted titles) of gaining access to the literature (citation indexes), of preparing abstracts or translations (by machine), of compacting the physical size of the record (microfilm and microfiches) of duplicating material.

The invention of the new retrieval methods is beginning to affect our traditional modes of communication. The traditional forms of the book, journal, and reprint may eventually give way to the machine storage of graphical and digital information and machine-generated copy. The technical publishing business may gradually be transformed into the information handling business in which the printing press as a means of mass communication of identical documents no longer plays a dominant role.

Under Section 101 of the Copyright Bill (S. 597), transmission is thus defined: "to 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."

There appears to be little doubt that the library of the future will "transmit" all types of information, printed, graphic, digital, and audiovisual, from one place to another. Much of this transmission will take the form of inter-library hookups, thus making available large collections of material to library users in geographical areas other than those where the material is stored.

Transmission systems today include the following: (1) broadcasting, both aural and visual; (2) closed-circuit transmission both aural and visual; and (3) computer transmission in the form of data-processing machines.

Libraries will probably not be deeply involved in broadcasting within the near future except as the producer of educational or cultural programs for the mass audience. However, all inter- as well as intra-institutional communication will be based on closed-circuit transmission.

The proposed copyright law as presently drafted makes no basic distinction between "open" and "closed" transmission. The draft provides (Sec. 110 [2]) that a governmental body or other nonprofit organization may transmit a performance of a nondramatic literary or musical work or the display of all types of works as a regular part of a systematic instructional activity. The transmission must be made primarily for reception in classrooms and "the time and content must be controlled by the transmitting organizations and 'not depend on a choice by individual recipients in activating transmission from an information and retrieval system or any similar device, machine or process.'"⁵ The above limitations apply to all types of instructional transmission, both open- and closed-circuit, and do not provide for any exemption from copyright limitations for library transmissions.

Under the proposed bill, a library which is part of an inter-library hookup could not transmit a copyrighted work electronically as an inter-library loan without securing permission from the copyright proprietor.

Such devices as teletypes, voice transmission, and facsimile could not utilize copyrighted material *between* institutions, and there is some question whether these devices could transmit copyrighted material *within* an institution. The Bill restricts the sending of copyrighted material "beyond the place from which they are sent." (Sec. 101.) Does "place" mean the actual sending room, so that a transmission to another part of the building would be a violation? Such limitations could have serious effects on the operation of a large library collection scattered over various parts of a building.

Derivative Works. A further dilemma facing libraries grows out of the copyright restrictions on "derivative works." The library of the near future will undoubtedly provide such services as indexing large quantities of material, abstracting, translating, and producing hard copies of such indexes, abstracts, and translations. Will it be necessary

Continuing Dilemmas Surrounding Media Rights and Regulations

to obtain copyright clearance before a library can undertake any of these functions? The answers are not yet clear.

A "derivative work" over which the copyright proprietor has complete control is defined (Sec. 101) as "a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'"

The problem arises from the provisions of the proposed law which will give the copyright proprietor the right to control and license any "translation . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."⁶ It would appear that the mere indexing of work would not be a copyright infringement. It is also possible that abstracting the work might come under the "fair use" exemption in the copyright law.

The most disturbing problem growing out of the limitations on "derivative works" is likely to arise through the use of copyrighted works in computers or data-processing machines. As the Bill now stands the copyright proprietor has the exclusive right to reproductions of his work for input or storage in an information system. It would appear that the translation of a copyrighted work into machine-readable form would also be an infringement.

The subject of computer uses of copyrighted material was discussed in the "Report of the Committee on the Judiciary of the House of Representatives":

Thus, unless the doctrine of fair use were applicable, the following computer uses could be infringements of copyright under section 106: reproduction of a work (or a substantial part of it) in any tangible form (paper, punch cards, magnetic tape, etc.) for input into an information storage and retrieval system; reproduction of a work or substantial parts of it, in copies as the 'print-out' or output of the computer; preparation for input of an index or abstract of the work so complete and detailed that it would be considered a 'derivative work'; computer transmission or display of a visual image of a work to one or more members of the public. On the other hand, since the mere scanning or manipulation of the contents of a work within the system would not involve a reproduction, the preparation of a derivative work, or a public distribution, performance, or display, it would be outside the scope of the legislation.⁷

Dr. Anthony G. Oettinger, president of the Association for Copying Machinery recently cited to the Senate Subcommittee on Patents, Trademarks, and Copyrights one example of how the proposed revision of the Copyright Act could threaten his own research. The proposed revision threatens

to cripple severely the very research and the very teaching necessary in order that the 'information storage and retrieval system or any similar device, machine or process' materialize fully, be understood, and be controllable. . . .

Under the provisions of the Bill as now conceived, I would have not only to acquire and evaluate materials but, in each instance, before experimenting with them, seek out the owner of a copyright, if any, make formal requests for permission to use the material, pay royalties if any are due, etc. All this before any material could actually be used and, in fact, before I could find out whether or not the material was useful! The delays, the frustrations and the chaos inherent in such a process now seem so formidable that if the Bill were passed in its present form I would be tempted to return to the safer occupation of copying out manuscripts with a goose quill pen.⁸

In summary, it should be apparent that libraries and library users are not receiving any special consideration either in photocopying, microfilming, performances, displays, or recordings, or in the transmission and computer uses of copyrighted materials. Whether these restrictions on library uses will cause serious financial problems, frustrate further research in communications technology, or curtail the expansion of modern library services remains to be seen.

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Continuing Dilemmas Surrounding Media Rights and Regulations

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