

# Copyright and the Duplication of Personal Papers in Archival Repositories

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MANUSCRIPT AND ARCHIVAL repositories across the country hold millions of items of unpublished personal papers—letters, diaries, journals, composition books, notebooks, photographs, sermons, student papers—some harboring literary qualities, most of historical interest only. Whatever their merit, they are used by thousands of persons each year in the creation of scholarly works of history, biography, and criticism as well as for projects as eclectic as news reporting, popular exhibits, term papers, local history, historic preservation, and genealogy. The potential users and uses of such materials are almost limitless, as are the objects of their quests. Probably the majority of these researchers receive photocopies of unpublished documents, which they have requested to save time from laborious note-taking, in preventing errors, or in documenting a claim. Although repositories limit photocopying of certain documents for various reasons, thousands of pages are copied each year. Photocopying for researchers has been growing steadily and will almost certainly continue to increase. Time is short, travel expensive, and the photocopy machine convenient and sure.

## Introduction

Is the photocopying of unpublished personal papers by archives and manuscript repositories at the request of individual researchers for their own research or study permitted or provided for under the Copy-

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right Act of 1976, which placed unpublished manuscripts under copyright for the first time? It will no doubt be surprising to many that the question has been raised, given the requirements of historical scholarship in this age and the common practice under common law. Although the copyright law is vague on the specific question, the answer is surely yes. The general support for such photocopying lies in the broad concept of "fair use," formerly recognized in judicial doctrine only for published materials, but now embodied in statutory law covering both published and unpublished works. "Fair use" of copyrighted material provides that, in spite of the monopoly in his writings by the copyright owner, other persons have certain limited rights to their use, and these rights may be exercised without permission of the owner and without payment of a fee. To argue that fair use does not apply to the duplication of personal papers for research purposes would require acceptance of the proposition that the authors of the act did not recognize or make allowance for the legitimate needs of the large group of historians, biographers and other researchers actively engaged in the dissemination of knowledge through the writing of histories and other useful works. The record does not support this proposition.

Neither the questions nor the answers concerning the duplication of personal papers are simple, however, and an understanding of the background of the issue is essential for a proper perspective on the impact of the new copyright law for repositories and their users. Although other changes affecting unpublished materials were embodied in the law, the question of photocopying and fair use has held center stage, as it has for published materials.

### **Historical Rationale for Common-Law Protection**

Copyright in unpublished works was recognized in statutory law of the United States for the first time in the 1976 copyright revision act. Until this law went into effect on 1 January 1978, protection of literary property in unpublished works (including within the scope of the term the personal letters, diaries, and other historical materials housed in archival repositories) was governed by common law. The common law literary property right gave the author of a work or his heirs the exclusive right of first publication of the work, whether it be a letter or a work of more literary or creative nature. Moreover, under common law, any unpublished work was protected in perpetuity against publication without permission of the author or his heirs. Interpretation of the common law literary property right in letters in the United States

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followed the judgment first rendered in England in 1741 when Alexander Pope sued to prevent publication of letters written by him to Jonathan Swift and others. Pope's letters, said the court, could not be published without his consent since he had a property right in them separate from the paper on which they were written.<sup>1</sup>

The leading American case involving literary property in letters grew out of a suit, in 1912, before the Supreme Court of Massachusetts, brought by the executor of the estate of Mary Baker Eddy to prevent the advertisement and sale of a group of Eddy's letters at auction. Two questions were before the court: (1) could the auction house publish the letters as advertisement for the sale, and (2) did the auction house have the legal right to sell the letters at all? In the suit, the court distinguished between the paper on which the letters were written and the "thoughts and ideas expressed therein." The pieces of paper, i.e., the tangible property, belonged to the receiver; the expression of thoughts and ideas, i.e., the literary (intangible) property, belonged to the writer. Since the papers belonged to the auctioneer, the court ruled that he could dispose of the letters as he saw fit, by selling, keeping, giving away, or destroying them. But he could not advertise by publishing them verbatim without permission of Eddy's heirs or the executor. The auctioneer argued that the common law literary property right did not apply in this case since the letters had no "literary" value. This argument was rejected by the court. Although the letters were on "indifferent subjects not possessing the qualities of literature," the ideas "in their particular verbal expression" were protected under common law no matter what their literary merit. "The right of an author to publish or suppress publication of his correspondence is absolute," wrote the judge.<sup>2</sup> Other cases through the years were brought before various state courts, where common law cases are heard, but none reversed or changed the judicial interpretation as it was defined in the Eddy case.

The status of unpublished writings at common law plagued manuscript repositories and frustrated scholars. Two problems were particularly onerous. The most troublesome and unreasonable was the unending control of an author's writings by his heirs, no matter how long the author had been dead. Under this system of perpetual literary right in unpublished works, scholars wishing to use those works would never be entirely free of the nagging worry of a suit for infringement. Despite a scholar's best efforts, heirs were often hard to locate. In reality, of course, many historians and other scholars have quoted freely from and published entire letters and other writings of long-dead persons without clearing literary rights, often because heirs were untraceable.

Personal papers held by manuscript repositories are not predominantly the products of literary persons. Letters of teachers, ministers, merchants, missionaries, lawyers, plantation mistresses, and others of the less "literary" and less famous abound. Although literary rights exist in these writings no less than in the creative writings of an author, the likelihood of lawsuits arising from the publication of historical writings is considerably less. Nonetheless, unending control of literary property, even though the control was often not exercised, was likened to a hand reaching from the grave to prevent the spread of historical knowledge.<sup>3</sup>

A second, but related, difficulty in the use of unpublished materials under common law lay in the fact that the judicial doctrine of fair use established since 1841 in this country for published works had never been explicitly applied to unpublished works. Thus, legally, the fair-use defense might not be used for publication of quotations or excerpts from unpublished letters or, probably, for photocopying. In spite of the inapplicability of the fair-use doctrine for manuscripts, repositories duplicated materials and authors made verbatim use of the letters, diaries and other manuscript writings based, at least implicitly, when heirs could not be located, on the principle of fair use. An understanding existed among scholars and curators that such limited use in historical works was necessary and would likely be considered fair by the courts. Repositories supplying photocopies did so upon request of the researcher, at the same time issuing a warning that permission of the owner of literary rights must be secured before publication. Whether, under common law, the repository was acting within the law by photocopying unpublished materials in its holdings was a question that was not publicly raised. The service to scholarship was considered a public good and the practice fair and permissible. To refuse to photocopy, within reasonable limits, would have been to impede much serious and useful research.

Over the years, under common law, users sometimes made a conscious decision not to track down heirs, when to do so would have added years to many a worthy monograph or editorial project and prevented many works from being published at all. Indeed, editorial projects such as the massive publications of correspondence sponsored by the National Historical Publications and Records Commission (formerly National Historical Publications Commission) have not attempted to trace innumerable and often elusive heirs, claiming fair use of the material and pointing to publication for the public good. The correspondence of Thomas Jefferson was published without the search for

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heirs to give sanction, even though under common law the publication was technically an infringement of literary rights. Julian P. Boyd, professor of history at Princeton and editor of the Jefferson papers, testified before a House committee in copyright revision hearings in 1965 that he and his staff "believed the courts would permit the technical invasion of literary property rights posed by publishing the letters to and from Thomas Jefferson" since to find all living heirs of all authors would have been impossible.<sup>4</sup> Most experts have agreed that the courts would deal leniently with users of unpublished papers of considerable age and historical interest. In the case of historical materials, economic gains from publication are usually nonexistent. Heirs who recognize that their right of first publication has been violated (and many will not know or care) will probably not bring suit because no real economic loss is involved and, often, because they are happy to see their ancestors' letters or other writings in print. Users, archivists, and publishers are likely to be much more concerned about literary rights when the writings involved are those of a literary figure or a figure of some public acclaim. Profit from publication is more likely, as are concerns over privacy.

Although suits have been brought and injunctions issued to stop publication of letters, no clear court decision has been rendered that would provide guidance in the matter of fair use of unpublished writings or the right of repositories to provide photocopies for the private use of researchers. Suits that have been brought to prevent publication of letters have often centered on the question of invasion of privacy, a different legal principle from copyright, but a common-law right that can be protected at least in part by preventing publication of unpublished materials. Questions of fair use in manuscripts, of invasion of privacy in the use of historical materials, and the liability of the repository housing the materials might have been settled, but were not, in a case in 1964 involving the Ohio Historical Society and newly discovered letters of President Warren Gamaliel Harding.

Francis Russell, a historian preparing a biography of Harding, had learned of a cache of letters written by the president to Mrs. Carrie Phillips, with whom Harding had an affair. Russell persuaded the person in possession of the letters, who had been Mrs. Phillips's guardian in her last years, to donate them to the Ohio Historical Society. In the preparation of his biography, Russell included extensive quotations from them. When Harding heirs learned of the existence of the letters and of Russell's proposed biography using portions of them, they immediately filed for an injunction to impound the letters and to

recover substantial damages on the grounds that they had been irreparably damaged by the incident. An injunction was issued against an archivist at the society, biographer Russell, *American Heritage* magazine which published excerpts from the book, and McGraw-Hill, the publisher of the book. Rather than endure a court case, the four obeyed the injunction and the biography was published with blank spaces where quotations from the letters would have appeared. Some archivists and scholars bemoaned the avoidance of what could have been a test case for the issues of fair use of unpublished historical materials, the rights of heirs *v.* the rights of scholarship, and the privacy rights of heirs.<sup>5</sup>

Another suit six years later also failed to enrich case law concerning the status of personal papers held in archival repositories. The suit concerned infringement of copyright in letters of a literary figure, Khalil Gibran. A theory had been advanced by Ralph Shaw and archivist Seymour Connor that unpublished papers deposited in a repository open to the public had by implication been "published" without notice and were therefore in the public domain.<sup>6</sup> Although there was some agreement with this theory, most archivists took the conservative view and did not accept it. No court decision has dealt with the question. In 1970, the case involving letters of poet Gibran held by the Southern Historical Collection at the University of North Carolina might have served to settle the issue. In that case a biographer of Gibran obtained photocopies of Gibran writings from the library, receiving oral and written warnings that copies were supplied for research use only and could not be published without permission of the owner of literary rights. When the biographer produced a privately published two-volume edition of Gibran's letters without obtaining written consent of the copyright owners, the Gibran estate, joined by other interested parties, filed suit against the author for infringement of copyright. The University of North Carolina was not named in the suit, the library procedures in notifying the defendant of her obligations being clear and sufficient. Unfortunately, questions relating to literary rights in manuscripts held by repositories and perhaps to photocopying of unpublished materials for researchers were not answered by the suit, which the defendant lost on procedural grounds.<sup>7</sup>

### **Support for Statutory Law Protection**

The end to perpetual common law literary right, a part of the proposed revision of the copyright law from the first introduction in the 1950s, was generally hailed by archivists and historians as a great benefit

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to their work and to scholarship. Testimony from copyright revision hearings in the mid-1960s lauded the benefit to future scholars of a definite term for copyright in unpublished works. The advantages of a uniform federal statute and the application of fair use to unpublished writings were extolled. A few keepers of personal papers, particularly those whose curatorial responsibilities and scholarly interests lay with papers of recent American history, sounded a warning. Common-law literary right, they urged, had not inhibited scholars from using unpublished materials or from reasonable quotation therefrom, and had not kept repositories from providing access to those materials or from photocopying from them. A statutory term for unpublished papers could mean that during the copyright term scholars would be unable to publish from the material and repositories unable to photocopy, thus placing an obstacle in the writing of recent American history. Unless fair use were clearly defined or the rights of scholars to use unpublished material specifically accommodated, research in the recent American past would be sadly circumscribed.<sup>8</sup> Most archivists and scholars agreed, however, that the gains from abolishing perpetual control of literary rights in unpublished writings outweighed these concerns.

Testimony by archivists and historians, heard primarily in the 89th Congress in 1965, sought to effect some changes in the bill then being considered on the term of copyright and the matter of preservation copying, but were otherwise supportive of the broad intent of the revision. They supported the end of the dual system of protection for published and unpublished works, and applauded the proposed statutory recognition of "fair use." One interesting aspect of the testimony was the concentration on what the user of unpublished materials could do and should be allowed to do. The question of photocopying by repositories for individual researchers seems never to have been discussed in testimony.

At hearings before a subcommittee of the House Committee on the Judiciary in 1965, historian Julian P. Boyd spoke on behalf of the Society of American Archivists, the Organization of American Historians, the American Historical Association, the Southern Historical Association, the Western History Association, and the American Association for State and Local History. He noted that archivists, librarians and historians, whether professional or amateur, rest their use of historical documents on the same premise—that "they are promoting the public good by advancing and disseminating a knowledge of our past and that in a democracy [the written record] must be accessible on a basis of equality...." The organizations he represented welcomed the recogni-

tion of the doctrine of fair use as developed in the courts and the end of the common law principle that literary property rights in unpublished works exist in perpetuity. He expressed concern, however, that the vast quantity of historical manuscripts in repositories, "letters, diaries, maps, business records and every other form of record upon which the historian depends and to which there adheres no commercial value whatever in their literary substance," were treated in the law on the same basis as the unpublished manuscripts of authors of creative works. He warned of the dangers that might ensue to scholarship and ultimately to the public good if historians, librarians and archivists were forbidden to use or photocopy historical materials until fifty years after the author's death.<sup>9</sup>

The Council of the Society of American Archivists proposed two changes which Boyd presented to Congress. The first requested an additional provision to allow facsimile copies of manuscript collections to be deposited in other institutions. The second proposed a reduction in the copyright term in unpublished works to twenty-five years after the author's death or fifty years from the date of the writing.<sup>10</sup>

In the same hearings, testimony by the deputy archivist of the United States expressed once again the concern of archivists with unpublished papers in historical societies and other repositories, that "have little value for publication as individual items but are of great interest for historical research use." He pointed particularly to the activities of the National Historical Publications Commission and the intention to use federal money to sponsor the "microcopying of collections of nationally significant manuscripts" in order to make them broadly available to scholars. He urged that archives be allowed by the law specifically to reproduce collections of unpublished papers "for purposes of preservation and security or for the deposit of copies thereof in other such institutions for research use."<sup>11</sup> The president of the American Council of Learned Societies addressed in testimony several issues relating to unpublished works, particularly the hope that clearer guidelines be provided for fair use. His remarks on photocopying related only to published materials. The executive director of the American Historical Association, testifying before the ninetieth Congress in 1967, urged that the fair-use doctrine be applied "liberally and equally to both published and unpublished works." No specific reference to photocopying was made in his remarks.<sup>12</sup>

After the mid-1960s and through the wrangles over copyright revision of the early 1970s, the question of unpublished materials was not again the subject of any substantive discussion. The issues were consid-

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ered noncontroversial. Questions involving new technology, particularly cable television, and discussion over library photocopying as the *Williams & Wilkins* case proceeded, held the attention of legislators, copyright officials, publishers, and users. The passage of the law in 1976 came as a relief to many who feared that seemingly insoluble disputes might once again thwart copyright law revision. Archivists who studied the law believed that their concerns had been adequately covered in the fair use and photocopying provisions, although relatively little attention had been devoted in the long history of copyright revision to the problems of unpublished materials.

### **Current Statutory Protection**

When the revised copyright law went into effect on 1 January 1978, all unpublished works not already in the public domain were automatically given federal copyright protection. Perpetual common-law copyright for unpublished works was ended. The term of protection provided by the statute was the same for both published and unpublished works—the life of the author plus fifty years. For unpublished works created before that day, the law provided that, no matter how long dead the author, copyright would not expire before 31 December 2002. This special provision, according to the Senate report, gave compensation for the taking away of one right and substitution with another.<sup>13</sup> Thus, on 1 January 2003 an untold number of pages of unpublished letters, diaries, reports, poems, novels, interviews, and other varied works in which copyright could legitimately be claimed will go into the public domain, available to potential users without fear of copyright infringement.

Two avenues exist for the owner of literary rights in unpublished works to retain some measure of control of the use of the work past the automatic expiration of copyright. One of these, provided by the statute, is publication. If a work is published before copyright expires, the copyright is automatically extended for twenty-five years. Thus, if an older work, scheduled to go into the public domain on 1 January 2003 is published before that date, copyright for the published work is extended until the end of 2027. The provision for publication encourages wider dissemination of writings, as the law intended. One other avenue, troublesome to the scholar, is a donor restriction, in the form of a contract, that restricts access to materials beyond the date at which copyright would be expected to expire. Contracts restricting access are usually requested and accepted to guard against embarrassment or harm

to living persons. The fact that the materials restricted are no longer under copyright will have no bearing on the validity of the donor agreement, since the right to privacy is a separate and distinct right from copyright. Repositories accepting such stipulations should ensure that access restrictions are legitimate and will expire at a reasonable time. On the other hand, contracts that seek to extend the period of copyright, that is, whose sole purpose is to control the right of first publication beyond the time at which materials would enter the public domain, would probably not be valid, but such questions may have to be settled in the courts.<sup>14</sup>

Until 31 December 2002 archivists must be concerned with the duplication and use of every unpublished, nongovernmental writing in the repository; after 1 January 2003 attention will be narrowed to those unpublished writings not in the public domain whose authors have not been dead for fifty years. The repository's problems could be eased somewhat by requesting transfer of copyright from the donor. The new copyright law provides that transfer of copyright must be by written instrument signed by the copyright owner.<sup>15</sup> Donors, of course, can only transfer copyright in letters and other works which they or their ancestors wrote. Donors have no copyright in letters written to them by others. Thus, a transfer of copyright by a donor of personal papers would be only a partial transfer. Any transfer would be a benefit to the repository in granting researchers full privileges in making use of the papers it has taken the pains to acquire and process, and would resolve some questions concerning photocopying.

### **Ambiguities in the Fair-Use Provisions**

What, then, does the law say specifically about the duplication of unpublished writings by persons other than the copyright holder or by repositories for their users? Specifically, it must be allowed, it says very little. The sections of the law that affect repositories' and users' rights in duplication and use, and that have been the subject of controversy since the passage of the law, are the two sections outlining the broad concept of "fair use" (sections 107 and 108) which together make up the law's treatment of the previously uncodified fair-use doctrine.<sup>16</sup> Section 107 ("Limitations on Exclusive Rights: Fair Use") offers Congress' general statement of the doctrine as it had been previously expressed by the courts, while Section 108 ("Limitations on Exclusive Rights: Reproduction by Libraries and Archives") extends the photocopying privilege to certain specific cases that might not be legitimately claimed as fair under Section 107.<sup>17</sup>

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Writers on the new copyright law have agreed that fair use is an ill-defined, nebulous, and difficult concept, and that the supporting explanations in the House and Senate reports on the law do not aid a great deal in clarification.<sup>18</sup> Nowhere is this more true than in the application to unpublished works. As stated earlier, the judicial doctrine of fair use was never applied explicitly to unpublished works under common law. Since unpublished works are now covered by statute, fair use may now presumably be applied to the use of unpublished materials for the first time. This change in the law is a major benefit for users and for those who administer unpublished papers. In fact, as noted before, biographers, historians, and other scholars have long depended on the fair-use principle in their use of manuscript materials.

The Copyright Act defines fair use as a use "of a copyrighted work, including such use by reproduction for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research...." The determination of whether a particular use is fair must depend on the individual circumstances of each case, but criteria have been provided in the law to help in determining "fairness." These criteria, which will be used by the courts for determination of fair-use cases, include (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The House and Senate reports and the Conference Committee report indicate that criteria (1) and (4) will be of particular importance.<sup>19</sup>

The question raised by archivists is this: Does section 107 give repositories legal sanction for the photocopying that they undertake at the request of users for study and research purposes? That is, does photocopying under 107 apply only to that undertaken by the user? Arguments may be made on both sides, but the "rule of reason" and a concern for the promotion of historical research supports a positive response to the first question. The House and Senate reports offer conflicting signals and no definite answers. The House report does not refer specifically to unpublished materials in discussing fair use, but asserts that the "doctrine has as much application to photocopying and taping as to older forms of use...."<sup>20</sup> The Senate report, on the other hand, notes that the application of fair use to unpublished works would probably be very narrow; photocopying was not specifically mentioned.

Unpublished materials were given scant attention in either report, perhaps because no one wished to become involved with all of the ramifications implied by the end of the dual system of protection or because the questions were considered at most academic.

It seems reasonable to assume, as did Julian Boyd in his testimony almost twenty years ago, that the act, by placing unpublished papers under statutory copyright and by establishing statutory recognition of fair use, did by certain implication extend fair use, including photocopying, to unpublished materials. The former Register of Copyrights, Barbara Ringer, speaking before the annual meeting of the Society of American Archivists in 1977, asserted that the only part of the copyright statute on which to base archival photocopying for individual researchers was Section 107, since Section 108 included no such provision.<sup>21</sup> Indeed, without Section 107, the duplication of unpublished letters, diaries, and other historical materials for the use of scholars and others would be seriously hindered, given the deficiencies of Section 108 for unpublished materials.

Section 108 has been a source of confusion, concern, and dismay to keepers of archival materials since the meeting of the Society of American Archivists in October 1977. The section was intended as an extension of the fair-use provision to give specific rights for photocopying under certain circumstances that might not otherwise be clearly legal under fair use. The general conditions for photocopying under 108, as set forth in subsection 108(f) are easily met by most archives: (1) that the reproduction not be made for profit, (2) that the collections of the library or archives are open to the public or to all "persons in a specialized field," and (3) that the reproduction includes a notice of copyright. It is true that only subsection 108(b) specifically refers to unpublished works, although other sections refer to materials held by a "library or archives." Subsection 108(b) allows for the duplication of an unpublished work by an archives from its own collections for "purposes of preservation and security or for deposit for research use in another library or archives...." This provision was added at the request of the Society of American Archivists, presented by Julian Boyd, since the duplication of entire collections and their deposit in another repository might not be considered fair use.

Archivists have also read subsection 108(d) as authority to provide photocopies from their collections for individual users, upon the users' request, since the provision for making a "copy or phonorecord of a small part of any other copyrighted work" certainly appeared to include unpublished materials, by definition of "copyrighted work" under the

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new law. The Copyright Office has repudiated that interpretation, asserting that copying of unpublished manuscripts is not covered by that section.<sup>22</sup> Other copyright experts have strongly argued that 108(d) does indeed apply to unpublished materials. The viewpoints of archivists on the interpretation of Section 108 have been presented in publications of the Society of American Archivists, in publications of regional archival organizations, and in testimony during the five-year review on the operation of that section.<sup>23</sup>

### **Effects on Photocopying**

The Copyright Task Force of the Society of American Archivists presented testimony before the review panels in 1980 and 1981 concerning the effects and application of 108 to the photocopying of unpublished materials. Archivists testified that their institutions have continued to make photocopies of unpublished materials for the use of individual scholars and that the law has not had a "chilling" effect on that service. Sections 107 and 108(d) were interpreted to provide that authority. Archives and manuscript repositories, it was reported, have made careful efforts to abide by the provisions of the law concerning copyright warnings and notices, and are careful to consider the nature of the request and the nature of the work before granting photocopies. Photocopies are made with the warning that no further duplication is allowed without consent of the repository and the copyright owner.<sup>24</sup>

It is recognized by manuscript curators, and will doubtless be recognized by the courts, that all unpublished works are not equal. A repository might readily photocopy for a researcher fifty pages of letters of a Civil War soldier or a diary of a nineteenth-century missionary, but refuse to photocopy, without the copyright owner's consent, an entire unpublished diary of a literary figure. The age of the materials is also a potential consideration. Can the repository providing the photocopy service be held liable if the copies are later published without permission of the copyright holder? Although the law relieves library personnel from paying statutory damages for infringement of copyright if they had reason to believe that what they were doing was a fair use under Section 107, there is still the possibility of a suit.<sup>25</sup> Copyright Office staff have informally recommended that repositories install self-service copiers in order to place the burden on the user. Such a practice would solve only a small part of the photocopying problem and is not acceptable to repositories holding fragile, unique unpublished materials. Most repositories continue to prohibit user copying of manuscripts, primarily

to prevent improper handling of materials. Photocopying for mail requests, of course, must of necessity involve library staff. The possible liabilities from photocopying cannot be entirely, or even largely, passed to the user.

### **Survey of Manuscript Repositories on Photocopying**

A limited survey of selected manuscript repositories across the country reveals that the copyright act has affected photocopying practices in those repositories only minimally and primarily in a technical way.<sup>26</sup> All repositories surveyed have made certain that copyright notices were printed on reproduction request forms, that copyright warnings were prominently displayed near self-service machines (though these were few), and that photocopies carried a notice alerting patrons to possible copyright in the materials. Two repositories out of seventeen respondents allow self-service copying, but both began the practice before the copyright act went into effect, primarily to save staff time. Only one reported limiting the amount of copying that it will provide a researcher because of the new law. Rather, limitations that exist on photocopying have been in place for many years before the act and were instituted for a variety of reasons, including the possible violation of literary rights if entire collections or entire "works" were copied for a researcher. Other limiting factors have included lack of staff to accommodate unlimited copying, the fragile nature of certain materials, and donor restrictions on photocopying. Those not allowing self-service copying gave as their reasons that manuscripts will be carelessly handled and thus damaged, and that the arrangement of loose papers will be seriously disturbed. Care is taken to inform the user that clearance of copyright is his responsibility.

The Library of Congress did make a significant change in its regulations on photocopying as a result of the new copyright law.<sup>27</sup> Before 1 January 1978 LC would not make photocopies or allow a copy to be made (hand or photocopy) of any work (letter, diary, or other) that was less than fifty years old without clearance from the owner of literary rights. On 1 January 1978 this prohibition was removed. Since all unpublished works are now covered by federal statute and photocopying is permitted by fair use, no justification remained to prohibit users from making copies in lieu of taking notes, even from recent materials. The Library of Congress Manuscript Division instituted self-service photocopying in its manuscript reading room several years before the 1976 copyright revision law was implemented. Certain materials may

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still not be copied. Donors, particularly donors of literary papers, papers of a controversial or sensitive nature, or papers of recent public figures, sometimes restrict access, or though allowing access, prohibit photocopying. In spite of any right to photocopying or other kinds of fair use under copyright law, restrictions on use in the contract accepted by the repository take precedence. Users of collections are informed by staff in the manuscript reading room that certain materials may not be copied because of donor restrictions.

Repositories holding papers of authors take special precautions since, regardless of donor restrictions, copyright infringement is more likely to be a matter of litigation. Indeed, donor contracts stipulating how papers may be used sometimes do not exist. Papers of literary figures (and historical figures, but these less often) are offered for sale in the manuscript market and purchased by research institutions. Copyright in the writings remains, since transfer must now be in writing, but no donor agreement exists to lay ground rules on use of the papers. The Humanities Research Center of the University of Texas has a long-standing policy requiring users to obtain permission of copyright owners before any photocopies will be made. The requirement is waived in the case of older materials or other items for which the reader can provide evidence that a copyright holder cannot be located. This requirement is part of the center's policy and has not been instituted or altered because of the new copyright law.<sup>28</sup>

To the question: "Do you believe that the fair use section of the copyright law (Section 107) makes adequate provision for the photocopying (or other facsimile reproduction) that you currently undertake for researchers?" 59 percent of those surveyed said yes, 23.5 percent no, and 17.5 percent were uncertain about the application of fair use to archival photocopying. Several argued strongly for the application of 108(d) to unpublished materials and stressed the need for clarification of the law to that effect.

### **Dissatisfaction with the Register's Report and Threats to Scholarship**

With the issuance in January 1983 of the Register of Copyrights' five-year report on the effects of Section 108, the lines of battle on that issue appear to be drawn. One of the Register's four statutory recommendations endorses "an amendment to sections 108(d) and (e) to make it clear that unpublished works are not within their scope."<sup>29</sup> If such an amendment should be enacted, archivists and users of unpublished materials must rely entirely on fair use. But one Copyright Office

representative has called the applicability of fair use to unpublished works a "tough little issue and the Register's report seems to deny the applicability altogether."<sup>30</sup> What does fair use mean in relation to photocopying of unpublished papers by archives for researchers? For historians who wish to publish excerpts from unpublished works, how will fair use be defined? For many older historical materials, the question may mean little. Some scholars will no doubt continue to be bold enough, in the name of history and the greater good, to publish letters and other unpublished writings when heirs cannot be found, and will publish with impunity. There are others who may not wish to risk publication. One copyright expert, placing himself on the side of the historians and scholars, has urged that "college and universities not be timid in terms of asserting rights under the new copyright act, that they will not only be willing to litigate but...invite litigation in a proper case."<sup>31</sup>

Testimony by Julian Boyd and others notwithstanding, it is clear now that the perplexing problems of the use of unpublished personal papers, with their long history of privacy rights and common law literary rights, have not been dramatically resolved by the revised law. The ultimate entry of unpublished materials into the public domain will in the end justify the current turmoil. For those materials still covered by statute, archivists, researchers, and librarians, those who administer and those who use unpublished materials, must assume that the rule of reason will apply and that it is liberal.

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