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# Copyright and Other Legal Considerations in Patron-Use Software

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When you are working on the cutting edge of technology,  
the all-important thing is to stay behind the blade.

—Haines Gaffner

*Copyright and Technological Change:  
Hearings Before the Subcommittee on Courts,  
Civil Liberties, and the Administration of Justice (1983)*

## ABSTRACT

THE AREA OF NEW TECHNOLOGY in copyright has been justly called “a swamp” (Kastenmeier, 1989). Patron-use software and other media present practical usage issues involving both copyright and vendor contractual and license issues. Luckily, case and statutory law in the last few years has helped make a better map of library and patron rights and obligations.

The *Vault* case (Kemp, 1990) has helped to better define the use of backups, copy programs, federal preemption of state “shrinkwrap” copyright law, and user adaptations of licensed programs, and brings into question the issue of undue rights of the software producer. Other case law has indicated that contracts which enlarge a copyright owner's rights must be balanced against the public good. In those cases where exemptions 107 to 118 apply, the more likely the courts are to balance these exemptions against the rights of copyright owner.

## INTERPRETING COPYRIGHT LAW

This article will give two basic “rules of thumb” for interpreting copyright law, examine the latest developments in copyright case

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law, discuss several issues that apply to patron-use software in light of these developments, and then analyze the status of newer technology such as electronic bulletin boards and compact disks.

Generalization of copyright policy is hampered by the staggering variations among library types in materials, licensing, and contracts (Talab, 1986, p. 28). For example, a database program used for legal students in a law library is licensed for the purpose of having students copy information to a disk. A database such as this does not exist in the school library except by special licensing. Books with diskettes are typical in academic libraries but are rarely found in public libraries. Several educational software producers' licenses allow up to two copies of one microcomputer program to be used in a total of three machines for school use. This exemption does not apply to corporate libraries. Because of these variations, pertinent copyright law will be interpreted for libraries only in the most general way.

#### *A Basic Rule of Thumb*

In considering copyright information given in this or other contexts, one should keep certain basic tenets in mind. "Fair use" (Section 107 of the Federal Copyright Act), a judicial doctrine of over 100 years duration which applies exemptions for the purpose of "teaching, scholarship, criticism and comment" provides four basic criteria in determining whether a use is exempt from copyright: (1) the purpose of the use, (2) the nature of the work, (3) the amount and substantiality of the work being used, and (4) the effect of the use on the copyright owners' (real or potential) market (U.S. Congress, 1976). In general, a "fair use" is considered a "de minimus" (negligible) use (Cohen, 1955).

Legal scholars have pointed out that the first three criteria are used merely to ascertain the fourth criterion of market effect, which is the primary consideration in infringement cases (Kemp, 1990). If this is so, then viewing the nature of the work and its use on a sliding scale from profit to nonprofit helps to better determine the degree to which a certain exemption might apply to a particular library type. For example, a nonprofit (educational) use of a nonprofit (educational/scholarly) work is considered differently than a profit (business venture) use of a profit (business venture) work. In general, when profit enters into a determination, then "fair use" is reduced. This explains the great disparity in licensing, photocopying, and other charges for materials used in a corporate library from those in a school library media center. Applying this slide rule will aid in determining the applicability of "fair use" to a library type.

### NOT ALL PRODUCERS KNOW COPYRIGHT LAW: A CAVEAT

Software licenses vary greatly. The well-meaning producer may be more unfamiliar with the copyright act than is the well-meaning librarian. Large companies that produce a great deal of off-the-shelf computer software usually have the greatest lenience in their licenses (Talab, 1984). Some companies' licenses state producers' rights that are more strict than the copyright act allows. For example, a license may state that no archival copy may be made. This restriction directly violates the Computer Software Amendment as it is interpreted today. The amendment states that the user may "make or have made" an archival copy for the purposes of protection against human or mechanical failure, yet several licenses have this statement (*Copyright Law Amendment*, 1980). Application of a well-known phrase of the past few years should be put into effect—"trust but verify."

#### *Copyright Case Law: Vault Corporation versus Quaid Software Ltd.*

In the case of a software protection program, the producer claimed copyright infringement and breach of license agreement against a software producer whose software unlocks the protection program. The court decided that the defendant's copy program neither infringed the plaintiff's copyrights nor breached any licensing agreement between the parties. In so deciding, the court determined that some aspects of a state "shrinkwrap" statute protecting software producers were preempted by the Supremacy Clause of the Federal Copyright Act.

Vault produced computer disks imprinted with a program which protects the disks' contents from being duplicated in a usable form. Its purpose is to prevent unauthorized copying of programs reproduced on a Vault disk. Quaid produces and distributes computer disks imprinted with a program that unlocks Vault's protection device thereby permitting the entire contents of the Vault disk to be duplicated. Commentators have noted that this decision is a departure from past decisions which "follow the path of protectionism" for software producers (Kemp, 1990).

Several salient points from this case apply to patron-use software in libraries. The Quaid CopyWrite disk validates the use of copy programs in order to unlock other programs to produce an archival copy even if the producer states in the license that a copy may not be made. This is not a breach of the licensing agreement. However, use of a producer's backups, if supplied at a nominal fee, is suggested because these copies are usually free from bugs that can be written into a program to discourage copying.

Under the "first sale doctrine" (Section 109), the copyright holder may market copies of the work by methods other than an outright

sale and the copyright holder may, by contract, place restrictions on future disposition of a sold copy. The doctrine states that the privileges described as pertaining to the owner of a copy of the work do not extend to a person who has acquired possession of the copy by rental, lease, or loan. The Legislative Report acknowledges that the copyright owner's cause of action is not for copyright infringement but for breach of contract (Kemp, 1990). The validity of that contract depends on whether or not the contract enlarges the scope of the copyright owner's rights beyond the Copyright Act. If it does, then it is doubtful if it is enforceable (Paetzold, 1989).

Louisiana, the state in which the case was tried, has in force the Louisiana Software License Enforcement Act (SLEA). The court determined that the SLEA was preempted by the Federal Copyright Act thus invalidating the state act. By implication, all mass-marketed license agreements are invalid as preempted by federal copyright law. The Vault decision brings into question just how far a producer may extend copyright protection at the expense of advancing technology.

#### *What are Producers' Rights?*

The understandable dilemma for software producers is to encourage sales and discourage piracy. "The rule of thumb in the software industry is that at least one unauthorized copy exists for every authorized [copy]" (Neumeyer, 1989). The industry has responded to this with the establishment in 1984 of the Software Publishers Association (SPA). The association has since grown to over 350 firms in an attempt to protect software at the national and international levels. Other organizations formed for this purpose include the Association of Data Processing Service Organizations, the Association for Copyright Enforcement, and the American Copyright Council (Neumeyer, 1989).

Producers are relying increasingly on trade secret protection, patent protection, and hardware/software protection devices, such as access locks, game cartridges, key diskettes, hardware locks, registration, and tracking of serial numbers because of the failure of standard copyright protection.

While software producers should write licenses that protect their product to the furthest degree, this protection does not extend to users' forfeiture of rights reserved or granted to them in sections 107 to 118 of the act. Therefore, if the license is for a standard mass-marketed program with a shrinkwrap license, then prohibitions should be invalid such as: (1) not being able to make an archival copy, (2) not being able to loan the program as part of a library service, (3) not being able to make adaptations necessary for running

the program, and (4) not allowing borrowers to make adaptations in order to run the programs. However, in libraries where it was the case of not allowing borrowers to make adaptations, it would be wise to make a new loan copy each time it was lent in order to ensure that the program was free of these adaptations that may interfere with the next person using it.

### ISSUES FOR PATRON-USE SOFTWARE IN LIBRARIES

Barbara Quint (1989) asks several questions about patron software circulation in an article entitled "Let the Buyer be Wary." The following are her questions with this author's answers:

**1. What impact do all these (license) regulations have on library operations and service to the patron?**

As discussed earlier, the library may make an archival copy of any program that it possesses using a commercial copy program even if the copyright owner has a "lock" on it. Utility programs, which are designed to be used to build programs, would perforce need to be copied in their original state, possibly each time they are lent out, so long as the intent was not to make another copy but merely to clean up the original disk. Software "locks" should also be placed on them.

**2. What responsibility does the library staff have to enforce the provisions of these license agreements in the case of books with disks?**

Some license agreements are unclear for various reasons—sometimes deliberately—but in most instances it is because the producer could not imagine all the usage possibilities that could exist particularly within libraries. Quint (1989) gives an example of a license whose first provision was that the buyer was authorized to "use the software specified below only on a microcomputer located" within their own facilities. She questioned the extent to which "facilities" could be applied:

a. *Within the library?* Yes. *Can it be used within the college or university?* No. A site license would be needed. *Can it be used within the multicampus system?* Absolutely not without a site license.

b. *Does it mean one machine at a time, or one machine only?* It means one machine at a time.

c. *Can the machine be connected to a local network that supports more than one user?* No. A network license or permission must be obtained.

d. *What happens if the user replaces the machine—does the user have to buy a new software copy?* No, unless a machine requires a different operating system, in which case the software would

not work very well anyway so a new copy would have to be purchased.

e. *What if the user buys a new type of disk drive? Can the software be transferred to the new disks that fit the drive?* Transferring a program from one disk size to another, without creating a new derivative work as prohibited by law, would be feasible. However, there are some caveats:

(1) A simple format change of the same operating system, such as transferring a program from a 5<sup>1</sup>/<sub>4</sub>" floppy to a 3<sup>1</sup>/<sub>2</sub>" disk for a portable computer or to accommodate a PC owner's drive size, is fine, since the new product is not intended as a derivative work. Many computers now have both sizes of drives. However, both sizes of the same program cannot be lent at the same time; only one copy can be lent at a time.

(2) Obviously, this would not be possible for changing from an Apple IIE format to an older Macintosh format.

f. *Does the user have to write the publisher for new copies in another disk format?* No, the library is responsible for this.

g. *What if the publisher does not have the right size?* This situation is hard to imagine, but the library has the option of asking permission to make a copy in the needed size and only lend out one size at a time or purchasing another copy and then lending out both at the same time.

### 3. **What rights and obligations do the publishers assume beyond the initial sale?**

Generally, publishers will replace faulty disks and may offer upgrades of a program. They have an obligation to ensure that the product is in working order and that all additional manuals, documentation, etc., are present and usable. By virtue of licensing a program rather than selling it outright, publishers retain greater control of the program. This explains why over the years producers have stopped selling programs and instead have turned to licensing. According to the Software Copyright Amendment (P.L. 96-517), the producer cannot hinder the user from making a backup copy of the program or making a backup copy of the documentation, all of which are intended for archival purposes only. Also, because of the first sale doctrine (Section 109) the lessee may rent or lend the copy.

### 4. **Are there any differences between classes of companion software [disks that come with books]—e.g., program utilities versus instructional materials?**

Yes, there are differences. The Copyright Law allows greater latitude in the use of programs which are compiled, rather than written, such as most databases. If the database itself is public

domain—often noted in the book or on the disk by the absence of a *c*—then public domain software may be freely used. If the disk is specially written for this book, then it is subject to the same restrictions as that book. Sometimes the publisher will indicate how the disk is to be used, and this use will go beyond the law. The general rule is if it says you can do it and it is more lenient than the law, you can do it; if it says you cannot do it and it is more restrictive than the law, then it is possible that you can do it.

Other considerations must be taken into account. Lending \$400 programs (supposedly so costly because of their power and general use possibilities) would understandably cause a producer to scream “ouch!” if these programs were lent irresponsibly. “How can they be handled responsibly?” one might ask. Program locks can be placed on the programs by the library staff using commercial software, but, in most cases, producers of such expensive programs put their own locks on. It is also obviously unwise to lend copy programs. General utilities, databases, spreadsheets, integrated programs, and the like could be used in the library only if the library supplies computers for this purpose. Several academic libraries acquire a network license for programs that have files which generally leave much to the librarians to “clean up” afterward. By placing these programs on a network, the files can be deleted for the next user or the next day. This method, when applied to high cost utility programs, is the safest and easiest method of loan. If a library loans many expensive programs, it makes sense that the library has funding for patron-use microcomputers as well.

Typically, when a type of program is relatively new, such as books with microcomputer disks, the licensing structure can be either too loose or too rigid, and it may not anticipate all the use possibilities. This situation occurred with the first compact disks on the market. The average license was just a paragraph because general use policies could not be predicted (Talab, 1989). Now the average license extends from one page all the way up to several closely printed pages because some general use policies have been identified. Further changes in use policies will necessitate newer licenses. This is the way the market works. While the license for the use of these materials should be read thoroughly, common sense should prevail, and no statements that one does not agree with should be signed.

**5. Does the issue of public domain software affect specific situations?**

Since public domain software is by definition not copyrighted, it can be freely copied. If a book comes with a public domain

disk, then this disk may be freely copied. "Shareware" is different. Most (but not all) shareware is not copyrighted. Instead a "registration fee" is requested either for a more complete user's guide, or documentation, or updates, or in order for the recipient to merely be able to use the software adequately. The Boston Computer Society, the Berkeley Mac User's Group, the PC Shareware Exchange, Educorp, Softswap, etc., all have good to excellent shareware and public domain software. However, since some shareware is copyrighted in among the public domain programs listed in a catalog, it is best to read the license that comes with it. Quite often the shareware producer asks that the first program be paid for and all others may be copied freely. Other times the program must be treated as any other copyrighted program, although it is much less expensive. Since there is so much poor shareware, the quality is variable. Public domain and shareware programs are excellent for general checkout purposes (Schack, 1987).

#### **ELECTRONIC BULLETIN BOARDS: NEW DEVELOPMENTS AND TELEFACSIMILE**

In some libraries, electronic bulletin board systems (BBS) are used or operated. There are an estimated 3,500 to 4,000 of these electronic bulletin boards (Cangialosi, 1989) in the United States. Although most are privately run, large commercial boards have grown which offer a vast array of services at an hourly connect rate. The private bulletin board services serve two main functions: i.e., electronic message centers and/or as a software library. The latter aspect of BBSs deserves some attention. Since it is possible to upload files via modem for transfer to another person, the use of BBSs in libraries should be closely monitored. Many pirate BBSs contain, in addition to pirated software, credit card numbers, passwords to systems, and other confidential information.

Copyright signs should be posted on public use computers, particularly if they are within the library staffs control and view. Unsupervised machines, copiers, etc., actually pose less of a witness to any possible wrongdoing. An ironic twist to the law does not excuse neglect. In fact, if neglect of duty is proved, librarians are more liable than if they are just ignorant of the activity (Section 504c).

In some libraries, a fax machine is connected to a microcomputer so that patrons may exchange information, etc., to and from their offices. A fax/microcomputer/modem service should not be provided in the same area where software is checked out, if at all possible. Even so, proper copyright warnings should be posted. This situation

invites the intelligent student/patron to simply transfer files. While this may not be a problem or even a possibility in many institutions, it is a real problem already in highly technological settings.

### THE COMPUTER SOFTWARE RENTAL AMENDMENTS OF 1990

H. R. 5316, Title 8 was passed by the last Congress on October 27, 1990. This bill includes the Computer Software Rental Amendments (S 198 and HR 5498) and will regulate software rental in much the same way that the Record Rental Amendment of 1984 curtailed the rental of sound recordings in record stores. But there are exemptions. For example, if nonprofit libraries and educational institutions are renting, leasing, and lending computer software for nonprofit purposes, this use is exempt. The transfer of possession from one nonprofit educational institution to another would also be exempt. Software lent by nonprofit libraries must bear a notice of copyright, warning borrowers that unauthorized copying may violate copyright law. As of March 28, 1991, libraries are required to have a warning affixed to the package of any circulating software purchased after December 1, 1990. The Washington, D.C. Office of the American Library Association (1991) released the full text of the warning. This amendment will be reviewed in three years from the date of passage (Computer Software Rental Amendments Act of 1990. *See also*, Henderson, 1990; Flagg, 1991).

### COMPACT DISK LICENSING ISSUES

Compact disk licenses vary a great deal in negotiable clauses, printing (including photocopies), downloading, network use, and transmission (Duggan, 1990; Jensen, 1990). Many licenses allow photocopies only internally, while others caution against temporary downloading without defining "temporary." The number of stations allowed on network access can range from two to ten stations for some products up to an unlimited number of stations for others. Some licenses specify the number of photocopies per printout or movement of CD-ROM to another site.

The question many librarians are asking is "How much of this is contingent on the license agreement and how much of this is contingent upon the principle of fair use?" Again, one must be knowledgeable enough to comply with the copyright law but realize that the number of disks per site license, the site license itself, the number of stations, etc., are legitimate legal business that are stated in the site license and include these restrictions by law. This does not preclude the individual library from negotiating on these matters with the producer. This negotiation benefits all parties. The producer becomes more aware of the needs of the library community, and

the librarian may effect a license that is more in line with the library's needs.

The law recognizes the concept of temporary, intermediate, and long-term storage in much the same way that exists for online databases. No cases exist for compact disks at this writing. Temporary storage could mean saving files to disk for perusal at a later date and then discarding them or transferring them to print. Intermediate storage is the most difficult to classify. It can consist of storage within a unit or department for a month or longer without the intent to save indefinitely. Long-term storage would, for practical purposes, be indefinite. Temporary storage has simply not been addressed in any meaningful way for compact disk products. However, most temporary storage, according to previous case law for computer programs, by extrapolation, would fall within fair use.

The number of files that can be downloaded has been addressed by the courts in a most broad and relatively unusable manner for libraries in regard to online services. Downloading of one or a few records is within fair use. Downloading of an entire database is illegal. No one is sure where the line is drawn (Mills, 1989). It seems justified that minimal ("de minimus") downloading of some files for teaching, research, scholarship, criticism, and comment is within fair use regardless of the license agreement. The very real problem, however, is the extent to which the disk is engineered to allow that downloading.

However implausible the contract is, the point the producer is trying to make is not to have customers produce and save searches or hand them out so that the need for compact disk products is diminished. If photocopies are made of a search and faxed to another library or patron therein so that the receiving library does not need to purchase the product then this use is illegal. Use that siphons sales from the producer's market is to be discouraged. Use performed internally or by the librarian for patrons if they were on site would seem legitimate. LAN issues also fall into this area. While LAN uses fall into categories, most producers will not permit remote access without an additional charge (Jensen, 1991). Again, producers are concerned and undecided about the extent of access to their products.

The compact disk market is new. First and foremost, compact disks are not used in a wide enough user base for compact disk producers to have an adequate "feel" for the direction that the market will take. Multiple disks purchased from one producer should indicate negotiation is in order particularly for large purchases. As the user base grows and multiple disk situations become more common, use procedures become more solidified. As both librarians and producers become more aware of the potential of this medium, general use rules will come into being. This is a very political process borne

out of dialogue and bargaining, and it happens in each new technology as it stabilizes. A great deal of discussion is necessary since these products must be encouraged to grow. However, the industry must also accommodate the user base in order to bring this about.

## CONCLUSION

The key points for libraries are to maintain responsible lending that does not allow for the possibility of simultaneous users of one program or product; not to sign any statements that one does not agree with; to use prudence in areas which are in dispute; and place copyright statements on all machines, programs, and any accompanying materials to alert patrons to copyright law and to reduce liability on the part of library staff.

Technology drives copyright (Baumgarten, 1984). Congressman Robert W. Kastenmeier (1989), chair of the House Judiciary Committee on Courts, Intellectual Property, and the Administration of Justice, predicted recently that:

these areas of computer software, databases, and electronic publishing are ripe for congressional oversight and scrutiny. Since the enactment of the Computer Software Copyright Act of 1980 Congress has not held a single hearing on computer software developments except for Senator Hatch's field hearing on software rental...in Utah [in 1988]. (p. 23)

Librarians have succeeded in serving the patron better through lobbying and thereby challenging the public performance issue of videos in public libraries in service to the poor patron, in articulating the notion that librarians are also teachers in the integrated curriculum and therefore are also subject to Section 107 (fair use) exemptions in the schools and in teaching functions, and in lobbying for the right to make archival copies when producers were adamant about not supplying them in the past. There are a host of other issues that require dialogue with producers who are increasingly harrassed by piracy, industry competition, and new technologies that cost a great deal to harness and are quickly obsolete. Librarians are the best advertisers that software producers have, and these producers give librarians another reason for existence—materials. It is not a cozy relationship, but it is the essence of the balance between personal benefit and public good inherent in the Copyright Act, and this is the way that it was intended.

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