Legal considerations for document delivery services

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Health sciences libraries that provide fee-based information services must consider and develop policies and procedures for complying with legal requirements. This paper reviews the provisions of copyright law that pertain to document delivery, including two court decisions concerning copyright. Also discussed are recent actions by publishers to reinforce their view of libraries' responsibilities for royalty fees for articles copied and their use of licenses to impose additional restrictions on the use of and reproduction of materials.

A bewildering array of legal issues should be considered in providing document delivery or interlibrary loan (ILL) service, especially by libraries offering fee-based services. A fee-based service can be a large, aggressively marketed service of an academic library, or a hospital library filling LOANSOME DOC™ requests from unaffiliated health professionals. The following opinions and interpretations concerning these issues are solely those of the author and have not been reviewed by legal experts. Every library should make sure its proposed policies and procedures are reviewed and approved by its institution’s legal counsel.

DOCUMENT DELIVERY AND COPYRIGHT

A document delivery service has two facets: providing copies of articles from journals in the institutional library collection and obtaining articles for primary or external patrons from other information providers—either other libraries or commercial document delivery services. Two sections in the Copyright Act of 1976, enacted into law on January 1, 1978, and codified as Title 17 of the United States Code, relate specifically to the making of copies in library settings. Section 107, which concerns fair use, is subjected to widely varying interpretations, and it has been zealously defended by librarians. This section states that it is not an infringement of copyright to make a copy for scholarship, research, classroom use, and other purposes. The section does provide four measures for evaluating fair use:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work [1].

Another important part of the law is section 108, which addresses reproduction by libraries and archives. For this section to apply, three conditions must be met:

- the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- the collections of the library or archives are open to the public or available, not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
- the reproduction or distribution of the work includes a notice of copyright [2].

The first condition has been the subject of much recent discussion and controversy. The question under debate is whether a fee-based document delivery service provides an institution or library with direct or indirect commercial advantage. Most library fee-based document delivery services, especially in nonprofit institutions, are not making a profit but are recovering costs. Under these conditions, most librarians agree there is no commercial advantage. The Association of American Publishers (AAP), in its re-
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cent Statement of the Association of American Publishers on Commercial and Fee-Based Document Delivery, takes a different stance. The AAP argues that "These activities are indistinguishable in purpose and effect from those of commercial document suppliers" [3], and the association expects document suppliers to pay royalties. The majority of publishers have authorized the Copyright Clearance Center (CCC) to collect royalties for them. An institution either can pay for each individual article copied or can pay an annual fee that covers the cost of unlimited copying from publications registered with the CCC. Thus far, the annual fee approach has been used primarily by commercial companies.

If a library meets the three conditions of section 108a, a library may "make a single copy as long as the copy becomes the property of the requestor and the library has no notice that the copy will be used for any purpose other than private study, scholarship, or research" [4]. It is this author's opinion that a non-profit fee-based service does not have any obligation to pay royalties on articles copied from journals in its own collection. But some of the larger fee-based services in nonprofit academic libraries recently have begun taking a more conservative approach on this issue, and they are paying royalties to the CCC for copies they make for a client from materials in their own collections. If an institution takes this approach, it should be aware that not all articles require the payment of royalties. Quite a number of scholarly journals, the Bulletin of the Medical Library Association included, permit copying for scholarly purposes. Articles published as a result of research supported by the Public Health Service can only be copyrighted with the understanding that individuals engaged in government research may copy without payment of royalties. And, most government publications are in the public domain.

Section 108d requires the library to post copyright notices wherever requests are accepted and to include these notices on order forms. The register of copyright specifications yielded the wording and the size of the type for the notices. This requirement is one of the most straightforward and easiest to meet, yet it is often overlooked or forgotten.

If a library's fee-based service supplies clients with documents from other sources, section 108g allows "libraries to participate in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies . . . for distribution does so in such aggregate quantities as to substitute for a subscription or purchase of such work" [5]. This section allows libraries to engage in the type of ILL service that was prevalent when the Copyright Act was written in 1976. To provide further guidance, the national Commission on New Technological Uses of Copyrighted Works (CONTU) brought together libraries, publishers, and author organizations to develop guidelines and definitions for "aggregate quantities as to substitute for a subscription" [6]. The CONTU guidelines include the "guideline of five," which most libraries have followed. That is, if a library receives via ILL six or more copies of an article or articles published in a periodical within five years prior to the date of the request, then the library has exceeded the CONTU recommended limits and either should purchase a subscription for the journal or should pay royalties on the articles copied.

Library fee-based document delivery services that obtain copies of articles from other sources for its clients must consider the provisions of section 108g and the CONTU guidelines. If the library obtains copies for fee-based clients, either individuals or corporations, that are not part of a library's primary clientele, then, in this author's view, the provisions of section 108g do not apply. Many academic library fee-based services obtain documents only from one another or commercial document delivery sources, and, thus, in most cases, either the library service or the commercial service supplying the document pay royalties to the CCC. But, if a library refers to other libraries LOANSOME DOC requests received from unaffiliated health professionals, it is unlikely that the lending library is paying a royalty fee on the articles supplied. The referring library then must consider whether to pay the fee.

RECENT COURT DECISIONS CONCERNING COPYRIGHT

Two recent court decisions concerning copyright infringement have been the subject of much attention in the library community because they may have major implications for access to information and library services and may be part of a concerted effort by publishers to bring to court cases that strengthen their rights for royalty payments.

Basic Books v. Kinko's Graphic Corporation

Basic Books charged Kinko's Graphic Corporation with violation of copyright when Kinko's photocopied and subsequently sold anthologies or course reading packets to students at several New York universities. Kinko's argued that the copying was done under fair use guidelines (section 107), but the court disagreed. Referring to the four measures of fair use discussed previously in this paper, the court found that Kinko's practices violated almost every one. The purpose of the anthologies was not educational, but rather commercial and for profit; the amount copied was substantial; and the anthologies competed for sales of the textbooks from which the material was copied [7].

Library concerns about this court decision center around whether fair use measures have been severely
restricted. But, in a recent analysis, Kenneth D. Crews, associate professor of business law at San Jose State University, wrote that the decision "leaves substantial room for fair use to survive, especially when the copying is not conducted for profit" [8].

**American Geophysical Union v. Texaco Inc.**

The American Geophysical Union sued Texaco for photocopying by its employees of articles, notes, and letters to the editor for research purposes. Texaco claimed that this copying, done from journals to which Texaco subscribed, was covered by the fair use provisions of the copyright law. The court ruled the measures of fair use did not apply because "the copying was ultimately intended to promote Texaco's commercial purposes; the copies were of the full 'works' [e.g., an entire article]; and the copies had a harmful effect on the potential market value of the copyrighted work" [9].

The court noted that because the CCC offered the option of an annual license for copying, obtaining permission to copy could be arranged relatively easily. The court also decided that section 108 was not applicable. Because Texaco was a commercial corporation, it could not claim the reproductions were made "without any purpose of direct or indirect commercial advantage" [10]. The court further noted that section 108d limited the number of permissible copies to one and that it was likely Texaco's employees had made more than one copy.

The Association of Research Libraries (ARL) and the Coalition for Networked Information (CNI) arranged for ARL's attorneys to analyze the Texaco decision and its potential effect on academic libraries. The analysis notes that the decisions relating to section 107 are not applicable in the nonprofit sector. Further, ARL's attorneys contend that the court's analysis of section 108 is totally wrong. To quote from the analysis, "From the standpoint of ARL members and other nonprofit libraries, the Texaco decision can have no conceivable effect on their interlibrary loan and other reproduction and distribution activities conducted under Section 108 and within the CONTU Guidelines" [11].

The CCC has approached nonprofit educational institutions to market an annual licensing agreement to cover all copying done on site from material in library collections and individual subscriptions of faculty. The center also has completed a pilot program involving several universities but has yet to release the results of this study. Such an agreement might seem very attractive to administrators who wish to avoid potential litigation, but, as Kenneth Crews contends, such agreements "are detrimental sacrifices of fair use privileges that the law still preserves for most research libraries and universities" [12].

The Texaco case, coupled with aggressive action and threats from publishers, has led many fee-based services to begin paying royalties to the CCC for articles copied from materials in their own collections. The concern, at least as expressed in several electronic discussion groups, is that the next target of a lawsuit will be a fee-based document delivery service in a nonprofit educational institution. The Medical Library Association (MLA) has joined with other library associations to file an *amicus curiae* (friend-of-the-court) brief before the U.S. Court of Appeals. A hearing date for the appeal has not yet been set.

**PUBLISHER ACTION**

Several actions taken by commercial publishers or their agents are worth noting, in particular those directed at fee-based services. The AAP recently distributed two documents. In June 1992, AAP issued the *Statement on Commercial and Fee-Based Document Delivery* referenced earlier in this paper. In this statement, the association takes the position that fee-based services should pay royalties on all material copied; it also states that a resource-sharing agreement between libraries "exceeds the scope of interlibrary 'lending' contemplated by Congress or CONTU in permitting interlibrary loan arrangements under the proviso" [13]. In October 1992, AAP issued a *Position on Cross-Border Document Delivery*, which states that royalties on articles must be paid, regardless of whether the copies are made in the United States [14]. So, for example, if a U.S. library obtains copies from the British Lending Library, then the former must pay royalty fees to the CCC.

Some publishers also are challenging the rights of libraries to make any copies at all. One university fee-based service has received instructions from a publisher that specifically forbids copying from one of its publications for the clients of the service. Other publishers include very restrictive language in their publications, attempting to make clear to purchasers the publisher's interpretation of its rights. A recent posting on the copyright listserv provides an extreme example of this practice. A library received a package of materials with a card attached that stated, in part, "No one may make copies—for any reason or any purpose—without our permission. When you open this package, you acknowledge our rights under federal law (17 USC sec 106) and are bound by that law not to make photocopies of any of these" [15].

One of the participants on the copyright listserv, attorney Charles B. Kramer, notes that part of this statement overstates the publisher's copyright rights. Section 106 does give the copyright holder exclusive rights to authorize copying, but other sections of the law permit copying "notwithstanding section 106." However, Kramer notes that the second part of the
statement moves from the copyright law to contract law [16]: the statement tries to impose acceptance of a contract by opening the package. Kramer argues that this type of contract would not be enforceable. In any case, the statement serves to illustrate the licensing restrictions publishers attempt to impose in order to gain a level of control they feel is lacking under the copyright law. These restrictions can affect the ability of a fee-based information service to deliver documents and, in some cases, to provide reference or information services.

**LICENSING RESTRICTIONS**

Libraries first began to encounter licensing restrictions with audiovisual materials. The copyright law, in section 108h, specifically states that “the rights of reproduction and distribution under this section do not apply to . . . audiovisual work” [17]. Audiovisual publishers, however, faced with a very limited market when compared to print and an expensive product, attempted to control the licensing of audiovisual programs by requiring purchasers to accept the provisions of licensing agreements. The most common agreements require that the audiovisual program be viewed only by an institution’s primary clientele or, in some cases, within the confines of specific buildings. These restrictions, therefore, effectively preclude lending of an audiovisual to another library or an external client.

When computer software came on the scene, licensing agreements were the norm and the restrictions even more stringent, even limiting the use of the program to a specific machine. Section 117 of the copyright law, added in 1990, deals with computer software. It authorizes nonprofit libraries to lend, lease, or rent copies of computer programs to clients on a nonprofit basis and for nonprofit purposes [18]. A copyright warning statement must be included on the packaging containing the program. Until the inconsistencies between licensing agreements and the copyright law are tested in court, a definitive resolution as to which rules take precedence cannot be reached. But libraries should remember that the terms of licensing agreements can and should be negotiated, to ensure they do not impose limits that preclude the fulfillment of institutional objectives.

Lately, libraries have begun to encounter licensing agreements for some electronic publications. The recent example best known to MLA members is the agreement that came with the CD-ROM version of the American Medical Association (AMA) Directory of Physicians. The agreement tried to prevent wholesale and unlawful downloading of directory data, but it put libraries in the very difficult position of monitoring and restricting how the product was used by library patrons. Through active lobbying on the part of MLA and the Association of Academic Health Sciences Library Directors (AAHSLD), AMA agreed to some straightforward modifications of the agreement by libraries.

A fee-based information service, however, needs to be aware of the licensing restrictions of the electronic reference and bibliographic sources used to provide information to clients. It would not be legal, for example, to download and provide in convenient, machine-readable format, the addresses of all physicians in a specified geographic area to a marketing firm that wanted to develop a mailing list. Are there licensing restrictions that preclude use of a library’s CD-ROM or locally mounted MEDLINE subset to produce and sell bibliographies to clients who are not part of an institution’s primary clientele? What about the search results provided from copyrighted commercial databases?

Many database vendors have restrictions concerning the reproduction, storage in machine-readable form, transmission, or repackaging of search results. Some libraries have added a copyright warning to the letter that accompanies search results to alert the client to possible restrictions. There have been instances where a researcher who has developed a file of citations on a particular topic decides to publish a bibliography, which may be composed of citations obtained from a copyrighted database. Without the database publisher’s permission, such use of the citations could be considered a violation of copyright. If a commercial client of a fee-based service did the same thing, the violation might be considered even more serious, assuming there was a profit motive.

**FUTURE CONCERNS**

The issues faced by librarians today as they relate to copyright and other laws relating to the provision of fee-based information services will become even more complicated in the future. Publishers are becoming more aggressive because they are concerned about the way technology has and will continue to change dramatically the way in which librarians can deliver information. The AAP asserts, “The problem today is that the advent of post-1976 technologies—fax machines, computer networks, low-priced scanners and CD-ROMs—has facilitated the interlibrary delivery of photocopies of articles and chapters. . . .” [19]. For the time being, publishers are concentrating on convincing more information providers to provide payment through the CCC. The CCC, however, is only authorized to collect royalties on copies of print versions of publications. What happens when an electronic version of a publication is being distributed? Thus far, publishers have not dealt definitively with this issue. They most likely will insist on separate rules and pricing for this type of copying. Publica-
tions that appear only in electronic versions, such as the Online Journal of Current Clinical Trials, impose fees every time an article is printed, downloaded, or otherwise reproduced.

The library community needs to take an active and aggressive role in ensuring that information is available for research and educational purposes at a reasonable cost. One suggestion is for faculty and researchers to retain copyrights on their articles as a way of controlling the price of scientific publications. The model copyright policy drafted by the North Carolina Triangle Research Libraries Network also contains provisions for maintaining reasonable reproduction rights. Their recommended wording is, "Copyright to this work is retained by the author(s). Permission is granted for the noncommercial reproduction of the complete work for educational and research purposes" [20].

Many more issues remain to be addressed by lawmakers and policy makers. For example, what rights do libraries have to scan and retain in electronic form copies of articles from older journals in order to rapidly and efficiently transmit them over computer networks? This promises to be an interesting time, during which librarians need to be vigilant, strong, fair, and active in promoting policies and legislation that protect the rights of library users to access information freely.

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