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Copyright Law and Reserve Operations —An Interpretation

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Editor's note: This article represents one librarian's interpretation of the new copyright law as it affects library reserve book operations and is not intended to reflect the policies of his institution. Readers with differing interpretations are invited to send them to the editor of College & Research Libraries News.

The General Revision of the Copyright Law (Public Law 94-553, 15 October 1976) will have a direct and immediate effect on all academic libraries when it becomes effective on January 1. Examination of the potential impact of this law on the photocopying of all copyrighted materials done on library premises is counseled. Interlibrary loan and borrowing operations will be impacted, and modifications in their procedures will be required. The effect of the new law on copying for classroom use and reserve operations may, however, have far greater impact. One professional colleague cautioned that the implications of the copyright law revision could revolutionize a library's reserve operation. He went on to note that the monitoring process will require changes that libraries may find difficult to accomplish.

Guidelines for Classroom Copying in Not-for-Profit Educational Institutions, which are included in House Report 94-1476, require close scrutiny. Literal compliance would lead to wide-

spread alteration of current photocopying practices done in support of reserve operations. For example, the definition of *brevity* is stated such that individual teachers cannot legally make multiple copies of articles, stories, or essays in which the number of words copied exceeds 2,500. This means that the majority of articles published cannot be copied in their entirety for distribution to students except where approval has been obtained from the holder of the copyright.

The law contains many ambiguities. In terms of day-to-day library reserve operations, these ambiguities are especially troublesome. Because these operations directly support ongoing teaching functions of the instructional staff, it is important that working guidelines be promulgated that reflect the changes required by the new law. The *Federal Register* for Wednesday, August 17, 1977, states that "we urge libraries, archives and their associations, together with legal counsel, to prepare more specific material for the guidance of staff and patrons."¹ It is equally important that the instructional staff on academic campuses be informed of changes in their obligations and be prepared to modify past practices in order to comply with the law when it becomes effective.

One issue that cannot be ignored is the degree to which the *Guidelines* must be followed. Legal judgment suggests that since they are not part of the law, they do not carry the force of law. One interpretation that has been advanced is that the academic community should establish separate

procedures that conform to the intent of the fair use provisions as distinct from the *Guidelines*. In effect, this process would bypass the *Guidelines*.

In a prizewinning article, De Gennaro offers excellent advice to librarians: "It is important that librarians exercise all the rights and privileges the new law gives them, uninhibited by the fear of lawsuits or by an exaggerated or misplaced sense of fair play and justice."² This advice is based on an acceptance of the *CONTU Guidelines*, which apply to *interlibrary loan operations*. De Gennaro goes on to say, "I can foresee no real difficulties in complying with them [Section 107 and 108 and the *CONTU Guidelines*], and I do not believe they will significantly affect the way most libraries serve their readers."³ This advice does not seem appropriate in terms of *reserve operations*. Acceptance of the *Guidelines for Classroom Copying* will significantly affect these operations.

The basic purpose of this article is to offer a guide that academic librarians can follow in their efforts to develop appropriate revisions in working procedures for reserve operations. The guide includes (1) the impact of the new law on reserve operations and (2) actions that individual academic communities might be required to take in order to ensure that faculty are entirely aware of their obligations and are cognizant of the impact that the new law will have on course preparation and educational outcomes.

IMPACT OF NEW LAW ON RESERVE OPERATIONS

In order to develop appropriate working procedures, academic libraries will, in many instances, be required to obtain legal counsel from other campus administrative units. This counsel, in conjunction with the pragmatic advice of educational administrators, will help to place the problem of reserve operations in an overall, academic community context. The institution can then begin formulating policies pertaining to degrees of compliance necessary to conform with the letter of the law while still fulfilling its educational mission. The entire issue of the "requisite degree of compliance to the new law" will probably remain unresolved until test cases are tried in the federal courts.

Eventually, all campus groups affected by the new law, especially the faculty reflecting their individual departmental concerns, should be included in the consultative process. Certainly it seems unwise for librarians to conclude that the copyright law revision presents a narrow-range set of issues that can be limited to in-house library debate.

To make the most effective use of legal counsel and campus administrators, librarians should provide these officers with (1) estimates as to the nature of the problems confronting reserve operations, (2) specific areas in which interpretive

guidance is needed, and (3) suggested guidelines that libraries and instructional staff might use in order to comply with the law. This will furnish the background information so necessary to campus officials, as they try to make the most informed policy decisions.

The *Guidelines for Classroom Copying in Not-for-Profit Educational Institutions*, if followed, will require academic libraries to make substantive changes in the quantity of materials accepted for reserve status. A narrow interpretation of the new law would suggest that, until demonstrated otherwise, these *Guidelines* provide the rules that should be followed in preparing in-house working procedures. It should be noted, however, that the *Guidelines* are not addressed to reserve operations, unless one considers these operations as "simple" extensions of the face-to-face classroom process. Literal compliance with the law and the *Guidelines* would require that certain specific steps be taken.

SINGLE COPYING FOR TEACHERS

Libraries will be able to accept from instructional staff or make single copies of items for reserve under the following conditions:

1. The copy is made at the request of the individual teacher for his or her scholarly research or use in teaching or preparation to teach a class.
2. The copy is or becomes the property of the individual teacher.
3. So long as the amount and substantiality of the portion used, in relation to the copyrighted work as a whole, does not exceed the following limits: for single copies this should not exceed a single article from any one issue of a journal; a chapter from a book; a short story or

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short poem, whether or not from a collective work; and a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

4. Copying shall not:
 - (a.) substitute for the purchase of books, publishers' reprints, or periodicals;
 - (b.) be directed by higher authority;
 - (c.) be repeated with respect to the same item by the same teacher from term to term.
5. Libraries must display at the place where photocopy orders are accepted and include on its order form a warning of copyright in accordance with requirements established by regulation. The Register of Copyrights will issue a regulation on warnings.
6. The reproduction or distribution of the work includes a notice of copyright.

The preceding conditions differ from traditional reserve operations in the following areas:

1. No notice of copyright is now required on the photocopied work.
2. No warnings are now displayed at the place where photocopy orders are accepted nor are they included on the photocopy order forms.
3. The same item is frequently, if not usually, used by the same teacher from term to term. This practice would have to be discontinued.
4. Frequently, the amounts and substantiality of the portion used exceed the new limits, e.g., more than one article from an issue and the compilation of photocopied "readers."
5. The question of ownership is not currently an issue but will be in terms of the new law.
6. The stress in the new law on the isolated and unrelated reproduction of a single copy or phonorecord of the same related materials on separate occasions does not appear to blend well with the systematic and rationalized purpose of the reserve book operation.

These last two areas deserve scrutiny from the point of legal interpretation. That is, under what conditions would the teacher be assumed to have ownership of the photocopied material? Can ownership be attributed to the teacher if an individual library, at the direction of the teacher, photocopies the desired item, pays for the photocopying, stores it, and never returns the item to the teacher who originally requested it for reserve?

A question of considerable interest arises from Section 108(g), "The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction of a single copy or phonorecord of the same material on separate occasions . . ." Can an organized reserve operation consider the photocopying of articles, chapters from books, etc., to be isolated and unrelated? It seems that if the faculty do not utilize the same photocopied item from term to term, or whenever they teach the course, or request that a photocopy be made of the same work, and if li-

brary reserve units make every attempt to have the faculty member initiate reserve activity, and libraries remove themselves from any ownership position, then the sense of "isolated and unrelated" might be correct as an interpretation of the library role. Libraries will need interpretive guidance here.

MULTIPLE COPIES FOR CLASSROOM USE

Section 108(g)(1) states:

The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

- (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group

Would legal judgment state that library reserve units can accept multiple copies of an item in accord with the *Guidelines* and still meet the terms stated above? Again, specific operational guidance is needed.

Assuming multiple copies are permissible and libraries can accept and/or make multiple copies at the direction of instructional staff for reserve operations, the *Guidelines* offer explicit guidance and limits on the extent of copying permitted. Three tests are required: brevity, spontaneity, and cumulative effect. These tests signify important changes in the length of material that can be photocopied and the circumstances under which libraries can accept multiple copies.

The conditions for multiple copying include all those cited in the preceding section, "Single Copying for Teachers" (except condition number 3 beginning "So long as the amount and substantiality . . ."), as well as the three tests mentioned above. Some of the more important *Guidelines* are discussed below:

1. Libraries cannot accept multiple copies of journal articles in excess of 2,500 words (3–5 pages per copy). This means that most articles cannot be copied in their entirety.
2. Copying of portions of a monograph cannot exceed "1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words."
3. There shall not be more than nine instances of such multiple copying for one course during one class term.
4. Not more than one short poem, article, story, essay, or two excerpts may be copied [by the individual teacher] from the same author, nor more than three from the same collective work or periodical volume during one class term.

5. The copying is at the instance and inspiration of the individual teacher.
6. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

As regards this last condition on spontaneity and the preceding condition on "inspiration," are libraries effectively restrained from initiating reserve activities, since such activity does not leave the multiple copying at the teacher's inspiration? The spontaneity question is more serious, since it mandates that the individual teacher should, given the time, request copyright approval from the copyright holder if multiple copying is required.

It seems likely that it may be necessary for campuses and/or individual departments to send notices to their faculty each quarter/year, reminding them to request copyright approval well in advance of the quarter. Libraries should also include such a reminder on all their correspondence to faculty dealing with reserve operations. Skepticism has been voiced regarding faculty adherence to notices and reminders. One librarian from a nearby institution observed:

I would hazard a guess that, based on the usual faculty attitudes, large numbers of the faculty will resist any feeling of responsibility about understanding what appears to be bureaucratic nonsense. They will not want to grapple with it and will simply wave their hands saying "it's a library problem." This is rather what they do now. It is nearly ALWAYS the library's fault that we cannot process 50 books in ten minutes and order more copies within 24 hours.

NEW LAW AND THE ACADEMIC COMMUNITY

Librarians will need the advice of legal counsel in order to resolve or at least narrow the range of the new law's ambiguities. Unfortunately, the interpretations of lawyers may not be sufficiently definitive, and it is to be expected that many of the ambiguities will remain. It appears unlikely at this juncture that the U.S. Copyright Office will offer firm guidance to the academic community. Lewis I. Flacks, Copyright Office attorney, in an *American Libraries* article (May 1977), expressed surprise that some individuals and groups were expecting the Copyright Office to publish regulations governing library photocopying. His explanation was quite simple: the Copyright Office "has not been authorized by the statute."⁴ More recently, the Copyright Office has stated that its pronouncements are likely to be declarative rather than interpretative.⁵ This warning should be taken seriously.

I remember thinking in October 1976 that soon a host of agencies, associations, and individuals will be issuing all the information necessary for libraries to thread their weary way through the

new law. This has not yet occurred. It certainly would not be prudent to sit back and rely on the good faith of the faculty to abide by the new law. This would only place libraries and their employees in an extremely awkward position. The *Guidelines* mandate certain restrictions, which, if enforced by libraries, will necessitate important changes in the manner in which reserve lists are handled by both the faculty and libraries. It is incumbent upon every campus to begin an educational process regarding these restrictions, so that faculty will be aware of the changes necessary in their behavior. This should include an understanding of how libraries will handle reserve operations beginning in January. For example, faculty may be required to send to the owners of copyright for permission to engage in multiple copying for classroom use. Faculty members may not react positively to suggestions directing such behavior. How then will individual campuses meet their legal obligation? Perhaps each campus will have to establish a unit that facilitates the flow of requests for copyright approval between faculty and publishers or authors. How students will be affected and what means should be used to inform them of significant changes are also important questions that have yet to be addressed. In any case, each campus has an important stake in these deliberations.

It appears that one of the major intents of the new law is to stop systematic usage of multiple copying at educational institutions by putting the initiating act in the hands of the *individual teacher* for face-to-face classroom instruction. The *Guidelines for Classroom Copying in Not-for-Profit Educational Institutions* III(c)(b) prohibitions state, "Copying shall not be directed by higher authority." Stress on the isolated and unrelated reproduction and distribution of photocopies further points to this conclusion. A layman's reading of the new law leads one to believe that campuses, individual departments, and libraries need to take definitive actions to remove themselves from the area of liability. Internal discussions with library staff members indicate considerable concern about the legality or illegality of their actions in terms of the new law.

Obviously, librarians will be in the strongest position if they enlist the support of their respective campus administrations for help in the process of educating the academic community as to its obligations under the new law. It may well be, however, that campus administrators are relatively uninformed about the extent to which reserve operations support the teaching function. In such instances, the first part of the education process would begin by making these administrators aware of the problems anticipated and their extent. At one major undergraduate library, more than 300 reading lists are submitted each semester with an average of 20 items included on each list. In the larger research libraries, the

existence of multiple branch library systems with their own reserve operations adds to the scope and complexity of these operations. Such statistics might well impress upon academic administrators the seriousness of the problem soon to confront their campuses.

CONCLUSION

The approach taken in this article has been purposively conservative. By examining the interpretations given here and in the summary sheet following the conclusion, librarians will be able to construct a worst-possible-case scenario. This provides an important framework for action. At this stage one can begin to make policy decisions that take into consideration that *the Guidelines do not have the force of law*. Indeed, the most significant decisions may revolve around the question, "how close does any individual institution wish to come to the minimum standards set by the *Guidelines*?" Many institutions may find unreasonable the 2,500-word limitation on the length of multiply copied articles. Others may find that there is little justification for not allowing multiply copied articles to be used again when necessary. John Stedman, professor of law (emeritus) at the University of Wisconsin, Madison, and chairman of the AAUP Committee on Copyright Revision, states:

The rules with respect to classroom copying are a different matter. One engaged in classroom activities in which copying needs are minimal may find them workable. In other situations, especially at higher education levels, compliance with the strict standards set forth in the guidelines may simply not be feasible or consistent with adequate teaching performance.⁶

Campus officials and librarians should proceed to identify those subtle levels of compliance. Once this has been accomplished, the campus and the library will be in a position to offer definitive guidelines for action. These guidelines will allow the library staff to modify past practices as necessary, and it will inform the academic community as to its obligations.

Pamphlets, memos, and other forms of communication are called for. It is entirely reasonable to expect that the education process will be a slow one. As the new law is tested and revised national guidelines are promulgated, the individual interpretations of the academic community will need to be reviewed. Experience with the actual impact of the new law may alert libraries to unsuspected problems. Experience should also allay many fears.

NEW COPYRIGHT LAW—SUMMARY SHEET⁷

This sheet encapsulates the most important effects of the law and the *Guidelines for Classroom Copying*, with emphasis on reserve operations. It applies to instructional staff, departmental chairpersons, and libraries. Procedures based on the

fair use provisions could lead to entirely different effects.

A teacher MAY NOT and by extension a library for a teacher (where applicable) MAY NOT:

1. *Make multiple copies* of a work for classroom use if it has already been copied for another class in the same institution.
2. *Make multiple copies* of a short poem, article, story, or essay from the same author more than once in a class term or make multiple copies from the same collective work or periodical issue more than three times a term.
3. *Make multiple copies* of works more than nine times in the same class term.
4. *Make multiple copies* long in advance of the actual use of those copies.
5. *Make multiple copies* at the suggestion or direction of another individual.
6. *Make multiple copies* for distribution that do not contain (individually) a notice of copyright.
7. *Make a copy or copies* that imply or attribute an ownership position to the library.
8. *Make copies* for private reserve files, departmental reserve collections, or general library units if the cumulative effect exceeds the *Guidelines* in the same class term.
9. *Make a single copy or multiple copies* of any item for use from term to term.
10. *Make a copy* of works to take the place of an anthology.
11. *Make a copy* (copies) for charge in excess of costs.
12. *Direct students* to make photocopies from either an original item or a photocopy of that item for any course.
13. *Make a copy* of "consumable" materials, such as workbooks.

A teacher MAY:

1. *Make a single copy* for use in scholarly research, or in teaching, or in preparation for teaching a class of the following:

A chapter from a book.

An article from a periodical or newspaper.

A short story, short essay, or short poem, whether or not from a collected work.

A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

Information Needed

Information is being gathered for a book about the University of Chicago Graduate Library School. Anyone having information about its history, deans, faculty, and students, from its beginnings until 1951, may contact John V. Richardson, Jr., Graduate Library School, Indiana University, Bloomington, IN 47401.

2. *Make multiple copies* for classroom use only and not to exceed *one per student* in a class of the following:

A complete poem, if it is less than 250 words and printed on not more than two pages.

An excerpt from a longer poem, if it is less than 250 words.

A complete article, story, or essay, if it is less than 2,500 words.

An excerpt from a prose work, if it is less than 1,000 words or 10 percent of the work, whichever is less.

One chart, graph, diagram, drawing, cartoon, or picture per book or periodical.

A library **MAY NOT**:

1. *Make (distribute) any copy* of material that does not contain a notice of copyright.
2. *Make a single copy* of more than a single article from any one issue of a journal (except for a teacher in classroom situations).


A library **MAY**:

1. *Make copies of unpublished works* for purposes of preservation and security.
2. *Make copies of published works* for purposes of replacement of damaged copies.

3. *Make (request) copies of copyrighted material* in extension of the restrictions noted above if it owns the material but cannot provide access to it at the time.

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4. Lewis I. Flacks, "An Attorney's Advice to Librarians," *American Libraries* 8:255 (May 1977).
5. *Federal Register* 42:41437-38.
6. John C. Stedman, "The New Copyright Law: Photocopying for Educational Use," *AAUP Bulletin* 63:10 (Feb. 1977).
7. Items on the "Summary Sheet" include the author's insertions as well as material with modifications and additions from "A Sweeping Revision of the Copyright Laws," *Chronicle of Higher Education* XIV:12 (11 Oct. 1976). ■■



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