

# *American Archivists' Experience with Copyright*

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Coincident with the nation's bicentennial in 1976, Americans got a new copyright law from Congress. This statute ended years of deliberation and legislative impasse. This paper describes in broad terms what that law seems to mean to archivists, what anxieties it has caused, and what practical remedies archivists have taken. The discussion will be limited to textual items; it will not include graphic materials or sound recordings.

American archivists hailed the revised copyright law as relief from uncertainty and confusion. It offered unpublished works statutory protection instead of coverage under the common law of each state. Archivists now could turn to specific language, which seemed to encourage their facilitating research while protecting copyright owners.

The statute's most sweeping change has been to end the protection in perpetuity for unpublished works. Writings created after 1977 are protected for the author's life plus fifty years. Works made for hire, which might include corporate and other organizational writings, are protected for one hundred years if unpublished. The same terms of protection apply to the bulk of writings in repositories, that is, to those created before 1978. No unpublished writings, however, are to enter the public domain before 2003. Thus the law's most profound change has had no immediate effect.<sup>1</sup>

Nor does the law make any change with respect to records of the United States government. Unlike the situation in Canada, these are expressly in the public domain so long as the author prepares them as part of his or her official duties. Similarly, records of state agencies, which are governed by public records acts of the various states, are generally held to be unprotected by copyright.<sup>2</sup> It is manuscript curators or archivists working with private papers who are most directly affected by copyright law.

These archivists appreciate the guidelines for fair use, a more immediate if imprecise benefit of the new law. In Canada this is often referred to as fair dealing. Previously, fair use did not apply to unpublished writings, although some argued

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1 *Copyright Act, United States Code*, vol. 17, secs. 101-501 (1976).

2 Mary Ann Bamberger, "Copyright and the University Archivist," *Midwestern Archivist* 6 (1981), p. 23.

that it could be extended to these materials. Without defining the term, the law outlines factors, such as the amount of the whole work used and the effect on the potential market, to test whether a use in teaching, research, or news reporting is fair. Archivists have felt that this fair-use section enables them to photocopy writings for researchers, to exhibit writings and photographs in public displays, and to encourage researchers to quote for publication. Although there has been some difference of opinion among legal authorities whom archivists have consulted, the advisers generally held that fair use applies to unpublished materials. If it proves not to, archivists are left with little, for the sections on reproduction have offered mainly false hope.

The new law has also, however, created some uncertainties. The major problem has been photocopying for users. Reproduction for other libraries is clearly allowed; the law permits copying "for purposes of preservation and security or for deposit for research use in another library or archives...." No commentator has questioned this provision, and it should remove an impediment some archivists have raised to sharing archival resources in facsimile form among repositories. Copying for users, however, is quite another matter. Archivists assumed the new law encouraged this adjunct of contemporary research when they first discussed it at the 1977 annual meeting of the Society of American Archivists (SAA). At that time, the then Registrar of Copyrights, Barbara Ringer, astonished them by stating they must rely on the fair-use section, not on the reproduction-for-users section, which applies only to published works.<sup>3</sup> In a quandary thereafter, archivists sought other counsel, most of whom advised taking a liberal rather than a narrow interpretation of the law. Had not Mrs. Ringer admitted, albeit informally after the session, that archivists should be permitted to do under the new law what they had done prior to it?

For the past twenty years, archivists have done increasing amounts of photocopying for users. It is impossible to imagine research without this time-saving aid. Most scholars cannot afford to travel to the numerous distant repositories holding only a few items of possible relevance to their projects. Even when they do travel, researchers often bear the major part of their own expenses. Being able to select items to be photocopied and to have copies sent to them shortens their research visits and reduces their expenses. For local researchers, copying is a time-saving substitute for notetaking. In 1981-82, the University Archives and Manuscripts Division at the University of Washington Libraries, for example, made over 21,000 copies for users. Testifying at a Copyright Review hearing on behalf of the Society of American Archivists in 1981, Peter Parker stated that in the previous year the Manuscripts Division of the Historical Society of Pennsylvania filled over 2000 orders for photocopies.

The Copyright Review hearings required by the statute to be held five years after passage of the act provided an opportunity for archivists and others to express their concerns. Having conferred among themselves and with friendly counsel, members of SAA's Copyright Task Force decided to focus on the photocopying issue and to call for a clarification. Representatives who testified urged that the reproduction-for-users section be made clearly applicable to unpublished materials.

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3 Carolyn A. Wallace, "Archivists and the New Copyright Law," *Georgia Archive* 6 (Fall 1978), p. 9.

Early in 1983 the matter was clarified for archivists, but not as they had hoped. In a report to Congress, the Copyright Office recommended an amendment making clear that the copying-for-users section does not apply to unpublished materials. Worse yet, while continuing to explain its recommendation, the Copyright Office commented that "Traditionally, fair use has had minimal applicability to unpublished works. If authors elect not to disseminate their works to the public...libraries should not ordinarily be permitted to provide copies to the public without the permission of the author/copyright owner."<sup>4</sup>

This statement comes very close to removing any legal basis for photocopying for users. It cites a 1975 Senate report, so perhaps the decision should have been expected.<sup>5</sup> The phrasing of it and of its predecessor statement, however, suggests a misunderstanding of the nature of most archival materials and of photocopying by archival agencies. The Copyright Office's image of an author seems to be a novelist who decides not to publish an early short story rather than the more typical civic leader whose papers have been given to an archives. This latter type of author really has no opportunity to publish his files except perhaps for an occasional letter to a newspaper editor. "Disseminating" is not a conscious choice for him. Archivists cannot be held responsible for infringing on the marketability of his writings where no market exists. Even lively diaries or letters are not publishable as is; they require skilful editing to make them appealing and thus marketable. Furthermore, the phrase "providing copies to the public" suggests public disclosure rather than the very limited copying for an individual researcher for private study. Since American archivists disagree with the Copyright Office's rationale and since its comment is not part of a treatment of the fair-use section of the act, many will probably continue to rely on fair use. They will continue to copy for users, although they would prefer to feel secure in their practices rather than be surprised by an infringement suit at some future time. Michael Crawford, a documentary editor, urges archivists "to err ... on the side of service to scholarship."<sup>6</sup>

If such concern persists, Copyright Office representatives have suggested that archivists allow users to make their own copies. Most repositories for reasons of security and preservation prefer to be responsible for the copying or do not have the physical layout or the equipment which would permit careful copying by users. The suggestion also ignores the matter of numerous photocopy requests by mail.

It is to be hoped that the new Canadian copyright law will clearly encourage photocopying of archival material for users. Gina LaForce's 1980 article points out that the Association of Canadian Archivists has recommended that fair dealing should be extended to unpublished works.<sup>7</sup> Laws seldom prove to be panaceas, but it seems that they should clarify what is permitted rather than offer confusing rationale for accepted practices.

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4 U.S. Register of Copyrights, *Report: Library Reproduction of Copyrighted Works*, 17 U.S.C. 108 (1983), p. 330.

5 U.S. Senate, Report No. 473, 94th Congress, 1st Session (1975), p. 64.

6 Michael J. Crawford, "Copyright, Unpublished Manuscript Records, and the Archivist," *American Archivist* 46 (Spring 1983), p. 141.

7 Gina LaForce, "Archives and Copyright in Canada: An Outsider's View," *Archivaria* 11 (Winter 1980-81), p. 48.

What did American archivists do or fail to do to get such an unsatisfying law? The background to this situation can be stated very briefly. Revision efforts extended over twenty-five years. In the early 1950s, photocopying machines were unknown in archives. By the end of the revision process, photocopying had become a major issue, but mainly in relation to scholarly journals. Probably the directors of research libraries who represented very broad scholarly interests felt that the waters were troubled enough. They limited their concern for unpublished materials to the perpetual term of copyright and to copying for preservation. Perhaps they even believed that fair use extended to unpublished writings.<sup>8</sup>

In Canada, archivists have involved themselves more prominently in the revision process. The ACA Copyright Committee pointed out matters of concern to archivists in its *Response to the Working Paper on Copyright*. The distinctive needs of Canadian archivists should stand a better chance of being dealt with on their own merits rather than being overshadowed by copyright in published and other widely distributed materials.

A few other uncertainties produced by the U.S. statute seem minor in comparison with the photocopying issue. In the light of the Canadian situation, however, these will be touched upon briefly. Prior registration, which involves the deposit of a copy of the work in the Copyright Office, is a requirement for infringement suits for statutory damages and legal fees. This is a more demanding requirement than for published materials, in which the owner has three months after infringement to register. Furthermore, making copies of a large accession is likely to be a costly matter as well as a logistical burden, the latter because of the presence of incoming letters in which copyright belongs to correspondents. Although few accessions of historical materials may possess enough monetary value to warrant registration, those which do may create obstacles for archivists. Donors may request assistance with copying for registration as a precondition to a gift. Canadian archivists should hope, in fact insist, that the framers of any registration requirement would allow registration of an inventory or register, detailed but not to the extent of calendaring, in lieu of registration of facsimile copies. The time requirement for registration should also be extended to be the same as for publications.

Another matter lurking in the American archivist's copyright future is termination of a transfer. Many repositories have asked for and been given copyright by donors of writings. The law allows donors to revoke such transfers in the future, usually after thirty-five years, to allow for works which prove to be more profitable than anticipated. Although great problems for archivists in this provision are not foreseen, it seems contrary to the spirit of the Copyright Act that heirs may also terminate such transfers unless the transfer has been made under a will. Canadians might consider whether heirs deserve such solicitous treatment.

This matter of copyright transfers is also related to the procedural safeguards which archivists in the States have adopted in the response to the new law. Some practices were wise even without the law, and Canadian archivists may wish to consider their applicability to their own situation.

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8 For legislative history and a more optimistic interpretation than the above of the intent of the new law, see Linda M. Matthews, "Copyright and the Duplication of Personal Papers in Archival Repositories," in a forthcoming (1984) issue of *Library Trends*.

Chief among these practices has been that of asking for transfers of copyright from the copyright owner; Jean Dryden recommended this practice several years ago in *Archivaria*.<sup>9</sup> Many repositories have incorporated such a transfer provision into their standard gift agreements. The practice brings up the subject of copyright, and common experience has been that it does not jeopardize negotiations and a good percentage of donors of contemporary papers readily transfer their literary rights. It should be remembered that they cannot transfer rights of their correspondents, so that it is pointless to ask for copyright in a collection of entirely incoming letters. Even donors who hope to write about their activities are often persuaded to retain copyright only during their lifetimes. Literary authors dependent on their writings for income often want to pass on a copyright legacy to their heirs. Nonetheless, raising the subject usually causes them to clarify for the archivist who and where their heirs are.

Such transfer provisions might also be included in special agreements with voluntary organizations. Paid staff are covered under the works-for-hire doctrine, but it is unclear, even dubious, whether voluntary officers would be. It is worth the effort of phrasing the transfer broadly in terms of an organization's representatives, however. In any future court case, perhaps the organization's intention to encourage quotation of its officers' statements could be demonstrated.

A standard deed should also grant permission to photocopy. Most donors will not object to this provision. Archivists have been more careful since the law's passage to mention copyright on their user registration forms and on their photocopy request forms. They are also required to display copyright warning signs and to stamp copies with a copyright notice. All these measures serve to educate the user about his obligations. It seems that more users than formerly now ask about these and also about what risks they may assume. Others, however, do not seem at all worried about quoting writings which in a strict legal sense they may not. Those who do track down heirs often have pleasant surprises. Most heirs are gratified that an ancestor is remembered. One recent sleuth was even given a photograph by the heirs of the composer he was studying.

Another useful practice is to structure interviews with prospective users so that they are told about copyright transfers and warned about copyright retention in accessions they intend or seem likely to use. Still another device of an eastern repository is to include in a cover sheet to the inventory or to an oral history transcript a statement of the status of copyright in that accession. Oral history, by the way, still is a source of uncertainty, since tapes may differ from edited transcripts. The truly careful archivist will seek to have both covered by copyright transfers. As a matter of fact, the ACA Copyright Committee has singled out oral history for special attention.

On a somewhat peripheral note, it is important to distinguish between copyright and privacy. The two have sometimes been confused, with copyright being used as a justification for protecting privacy. The ACA Copyright Committee has objected to such confusion in the Keyes-Brunet report.<sup>10</sup> Restrictions on access, worked out by the donor and the archivist at the time of gift, should be used to satisfy privacy

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9 Jean E. Dryden, "Copyright in Manuscript Sources," *Archivaria* 1 (Winter 1975-76), pp. 44-45.

considerations. Copyright should be regarded as an insurance for authors and their heirs to profit from their writings by controlling such uses as publication, quotation, and performance.

The matter of access restrictions suggests another point which may be of interest to Canadian archivists. Contractual provisions made by the copyright owner and an archives takes precedence over provisions of the copyright statute. A contract might specify, for example, no copying of a correspondent's writings. The expiration of the copyright protection would not change their status. The repository would be bound by the contract to deny requests for copies of the designated correspondence.

Such a provision is one from which Canadians could profit. Another is the end of perpetual protection. In the long run, it will be beneficial. Some Canadian archivists have commented on the length of various terms of protection and the "life-plus" formula. Any chosen term of protection must be stated clearly to avoid serious problems, including the extent of Crown copyright. To an American, of course, fifty years seems very generous.

At all costs, Canadian archivists should try to avoid the morass in which American archivists seem to be over the basis for photocopying for users. Extending fair dealing to unpublished works seems a very wise choice. Archivists on both sides of the border can cite many examples of how this provision will enhance research without diminishing any economic interest of a copyright owner. Most archivists want to reduce bureaucratic procedures which impede research, and not simply replace old bureaucratic procedures with more current ones.

To some archivists, photocopying may not seem a terribly current issue. Indeed, the Copyright Office report to Congress claims that "photocopying technology is in its dotage."<sup>11</sup> Changes in technology already allow electronic transfer of documents and will soon permit economical video and optical disc storage of various formats of information. Unfortunately, the legislative history of the "storage for preservation" section of the US *Copyright Act* seems categorically to preclude this promising new type of storage. Electronic transmission of unpublished materials is even more of an affront to copyright owners than photocopying. While Americans are hamstrung once again, perhaps it will be possible for Canadian archivists to make some headway on these issues. Although conversion costs will be great, disc storage would certainly solve many archival preservation dilemmas.

This message from the States may not seem very encouraging or reassuring, but the truth is that the new U.S. law has caused archivists more anxiety than relief. Probably the strongest advice American archivists would give their Canadian colleagues is to take procedural safeguards now, with donors and with users, so that more flexibility and more defenses are built into the legislation than a narrow interpretation of a law may permit. Finally, Canadian archivists should fare better than archivists in the U.S. because archival concerns have been discussed while the legislation is still being considered.

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10 LaForce, "Archives and Copyright in Canada," p. 41.

11 U.S. Register of Copyrights, p. 232.