

COPYRIGHT - LIBRARIANS,
ARCHIVISTS AND OTHER THIEVES

BY

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I find myself today in very distinguished company. That my colleagues on this panel should be distinguished would be awesome enough, but it's worse, or better, than that: they're experts, both lawyers with a profound knowledge of copyright law, and by that I am truly awed, and, I must warn you, outclassed.

It would be nice to be able to say that I found the audience equally distinguished. I can't. Looking out at you now, seeing as I do a typical collection of Canadian upperbrows, it is hard to believe that I am in the company of thieves and pirates. There are so many people in here with crimes on their hands that we in the panel would be well advised to leave by any convenient exit, soon.

But perhaps I'm being too hard on you. I know of almost no one who hasn't unwittingly violated the laws of copyright, either in the letter or in the spirit. Let me describe for you briefly some of the more eminent law breakers I have encountered in recent years.

One of our most common villains is the teacher who takes a book or a journal and whips off a hundred or so copies of an article or section for distribution, or

This paper was presented as part of a panel discussion on "Copyright Infringements - Are You Guilty?" at the annual meeting of the Archives Section, C.H.A., at the University of Toronto, June 1974.

The other panelists were Mr. A.A. Keyes of the federal Department of Consumer and Corporate Affairs and Mr. Marsh Jeanneret, Director of the University of Toronto Press, with Mr. Robert S. Gordon as chairman.

even sale, to his students. Great, he thinks. They won't be competing for the one or few copies in the Library, they'll all be reading it at the same time so the next time I lecture they'll know what I'm talking about, maybe. A lot of law professors are in this category, by the way.

Then there's the demon instructor, who wants to bring the reality of primary documents to his first- or second-year students, and wishes to do this by extracting from a collection of manuscripts a selection of letters, some written by persons still living, and copying them scores of times to produce a "kit". And the demon researcher from University X who finds a collection of manuscripts in University Y to which he must have access over a period of months. He can't stay forever at University Y, so the obliging curator microfilms or xeroxes the collection for him, explaining that it's all O.K., it's called "fair dealing" in the copyright law. Eventually our demon researcher finishes his work and gives the copies to his own library. Where they are located by a demon researcher from University Z. And so on.

Last Christmas the professor's wife gave him a tape recorder, and he has found it very useful in collecting the memories of the decrepit politicians on whom his career is being carefully established. He can play the tapes back to his class, which beats lecturing anyway. Ultimately, he will give these to the Library too, because the Library obligingly bought the blank tapes for him.

And he has a younger colleague who is, as they say, really into technology. He has a videotape recorder, with which he can pick off and retain some of those fine documentaries on which broadcasting companies spend so much money for the sake of a single showing. He feels that he is performing a service to the taxpayers and all of those consumers who pay for the sponsor's advertising by saving the documentaries from oblivion and exposing them again and again to generations of students. Actually, the local school district heard about his collection, and they recognized its value even if the university didn't. So he loaned it to them for copying.

What a pack of rogues! How can they get away with it?

Let's give them the benefit of one doubt: they really don't think they're doing anything wrong. Every once in a while they might see an article in a newspaper or magazine about copyright and the new technology, but they don't read it. And they have never seen a copy of Chapter C-30 of the Revised Statutes of Canada, let alone read it. But in that these teachers are, I believe,

in the company of most librarians and archivists.

Perhaps this is the point where I should make a special plea. There is, one day, going to be a new Copyright Act. I would like to suggest that when there is, the Canadian Historical Association collaborate with any other of the learned societies, and even with some unlearned ones like the Canadian Library Association, to produce a guide to copyright for educators, librarians and archivists. It's unfortunate that such a guide hasn't been in existence, to clear up a lot of misunderstandings.

We were wondering how it was that so many violations of the law could take place without anything happening. Well, I suppose there are a couple of reasons for this. First, when there has been an infringement the onus is on the copyright owner to take this action. So he has to know about the violation. Suppose he does: then he has to show damages. It's one of those situations in which the lawyers profit. The kind of copying I have been describing, with the possible exception of the video-taping, is not the kind of thing which could result in a pay-off for someone with litigious inclinations. Of course, in the case of the copying and distribution of someone's correspondence, copyright might not be the issue at all: there are other laws to take care of the invasion of privacy. Maybe they too should be considered in that manual I just proposed.

In regard to the present law, there are a few important features to bear in mind, since much of what we as users of historical materials are legally entitled to do springs from them.

First, that the copyright is owned by the author. Naturally, he may assign ownership in whole or in part to another party, such as a publisher or an archives, an heir or even a researcher. There have been instances of literary historians actually obtaining a copyright to an author's papers.

Second, that whereas the copyright in published works endures for the life of the author plus the fifty years following his death, copyright in unpublished works is in effect perpetual, passing upon his death to his heirs and assigns.

Third, that the fair dealing clause, which vaguely permits copying for purposes of private study, research, criticism, review or newspaper summary, applies to published works, and not to unpublished works. The Copyright Law does not read that way, but there was a judgement in 1925 that settled the question. The litigants in that case were British Oxygen vs. Liquid Air, I'm told.

Seems a little far removed from scholarship, but that's the law for you.

Take these three things together, and you can see the curious situation in which librarians and archivists are placed when they receive a collection of manuscripts. They have physical possession, but they don't own the copyright. If it's a file of correspondence, it's likely that hundreds of individual copyright owners are involved. All of them hold that copyright until Doomsday, and strictly speaking, the archivist can't permit the taking of a single copy of any of those letters, by any means.

Of course a lot of repositories have recognized that this curious situation prevails, and take the precaution of obtaining from the donor some statement about rights of access and reproduction, although how the donor can sign away the rights of his own correspondents without getting their permission is a question. But there are in Canadian institutions great quantities of manuscripts for which no deposit agreements exist.

And then there's the sticky business of the thesis, which probably also falls into the category of an unpublished manuscript. It hasn't been shown, as far as I know, that the deposit of a thesis in libraries, even in several copies, constitutes publication in the sense in which it is used in the Copyright Act. Again, most institutions make it a condition of enrollment in a graduate programme, or of receipt of a degree, that the student sign a release form, stipulating the extent to which a thesis may be consulted and copied. But when it comes to real publication of all or part of the thesis, that would have to be arranged with the author, his descendants or nominees. In connection with this matter of theses, I have encountered a misconception on the part of many students and faculty members, and that is that the copyright in a thesis would somehow protect the author against the use of information or ideas embodied in his work. There is a measure of territoriality in academic inquiry these days, and as the amount of territory is diminished by increasing numbers of novice historians chasing down more and more obscure historical figures, there's a desire to cordon off a little chunk of the past for oneself. Things are tougher now, and in the seventies you'll be able to publish and perish. However, the fact is that copyright applies to the particular expression or arrangement of information and ideas, and not to the information and ideas themselves. Somewhere there's a line between plagiarism and attribution, which I won't try to draw, because it doesn't relate to copyright, but to professional ethics.

As for the issues involved in the copyright of recordings, or oral history, or videotape, the mind truly boggles. It's getting very easy and very cheap to do a lot of things with electronics. Whenever I want to lose sleep, I invent little scenarios like this one: a professor videotaping a lecture for the extension department, in the course of which he reads several long passages from Farley Mowat and holds up to the camera some pertinent photographs by Roloff Beny, which videotape is subsequently played for audiences totalling in the tens of thousands. And, by the way, who owns the copyright on that videotaped lecture? The Professor? The University?

How is the librarian and the archivist to deal with all this? First, I believe that anyone who is in the business of being a custodian should be familiar with the present Copyright Act. Read it. It's no fun, but read it anyway.

Second, drawing on the best examples one can find, and getting in addition, if possible, good legal advice, have available standard forms for the assignment of rights to quote, copy and publish. In the case of users who copy manuscripts, the custodians may also require a form on which the repository's rights and responsibilities as well as the users' are spelled out. I said get good legal advice if possible, because in my experience there aren't many lawyers who know anything about copyright law; every once in a while my university seeks expert advice on this subject, and the law firm sends out some junior partner who cracked the Statutes for the first time an hour before his appointment.

Finally, start thinking about copyright issues seriously. This is a good place to begin, because one of Mr. Keyes' functions is to listen to what it is you expect from the new copyright law. At the heart of it, copyright law is the means of reconciling public and private interest in the areas of information and expression. How far can society go in using, especially through all of the wonderful gadgets we all enjoy, the works of an individual? How much is to be permitted? What is damaging?

In closing, I must say that I sense that those of us who are librarians and archivists may have stumbled into a battlefield where we are ill-equipped to fight. In the United States, the lines of the struggle between private and public interest are perhaps more clearly drawn. Certainly, the language of statements issued by the two sides in their submissions to the U.S. Senate Subcommittee which is revising the American law, and to the Court which has been hearing the case of Williams and Wilkins vs. the National Library of Medicine, is the language of conflict.

It strikes me that the real issue is less one of principle, and more one of economics. There is emerging something which calls itself the information industry and which has a fundamental objection to institutions which give things away, which is what libraries do. Therefore they oppose any copying which looks as though it might result in a loss of revenue to them. The latest revision of Section 108 of the U.S. Copyright Bill (Senate 1361), while it permits the taking of single copies, prohibits what is called "systematic" copying. By this is meant such things as the cooperative development and joint use among libraries of specialized collections; if this were a Canadian law now, for example, the Toronto Public Library would not be able to subscribe to a journal with the intent of making photocopies for branches of articles if and when they were demanded. Presumably there will be a price if such prohibitions are to be escaped. Meanwhile, on the other side, libraries are facing their own economic difficulties, and these are forcing them into cooperative arrangements; network is the "in" word, and it means that no one will be self-sufficient and that everyone will be interdependent, which means more interlibrary loan and more copying. If this happens, will it really be the death of publishing? Should copyright laws be written that will stop it? Regrettably there is little hard information to inform the debate. But that doesn't stop people from taking strong positions on both sides of the question.

Personally, I hope that we can approach the question of Canadian copyright law in a more reasonable fashion, and find solutions to problems in a Canadian context; in other words, let us try to learn what we can from the legislation of other countries without imitating them. The last thing that this country's authors and readers need is animosity and struggle among those who make and distribute the materials of learning. I'm sure there are solutions and that archivists and librarians can work constructively with authors and publishers in finding them.