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Dangerous to Documentary Editing: Copyright Office Report on Section 108

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Ever since the 1976 copyright act went into effect, the Copyright Office has been interpreting the paragraphs that apply to library and archival reproduction of copyright-protected works in a way that could impair the ability of documentary editing projects to collect previously unpublished sources. In a report transmitted to Congress on 5 January this year, the Copyright Office has recommended that its interpretation be enacted into law. A brief explanation of the copyright law as it applies to unpublished written works will put the Register's report in context and illucidate the danger it poses.

Before enactment of the 1976 law (Public Law 94-553, Title 17, U.S. Code, Copyrights), protection of copyright in unpublished manuscripts in the United States was by common law, was perpetual so long as the work remained unpublished, and was administered by state governments. Under the 1976 law, the protection is statutory, is limited to the same duration as for published works, and is administered by the federal government. Protection extends through the life of the author plus fifty years (for anonymous works and works made for hire, 75 years from publication, or 100 years from creation, whichever is shorter). However, all unpublished works not in the public domain and already in existence when the act went into effect, 1 January 1978, are guaranteed at least 25 years of protection. Therefore, nonpublic letters, manuscripts, and other unpublished writings of all persons who died before A.D. 1953 will have copyright protection in the United States until A.D. 2003. Copyright resides in the author and his heirs (except in works for hire), not in the owner of the physical manuscript, unless the copyright has been transfered in writing.

Archivists can refer to either of two sections of the 1976 copyright law, sections 107 and 108, for authorization to photocopy materials for researchers. In section 107, Congress for the first time explicitly incorporated into law the doctrine of "fair use," the principle that copyright protection does not extend to quotations of relative brevity "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." Rather than precisely defining the limits of what constitutes fair use, the law provides guidelines. The factors to be considered include: "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." The Senate Judiciary Committee stated that "the applicability of the fair use provision to unpublished works is narrowly limited. . . . Under ordinary circumstances the copyright owner's 'right of first publication' would outweigh any needs of reproduction for classroom purposes" (U.S. Congress, Senate, Committee on the Judiciary, *Copyright Law Revision*, 94th Cong., 1st sess., 1976, S. Rept. 473, p. 64).

A private individual who copies or quotes, beyond the limits of fair use, a letter he owns, written by someone else, even if addressed to him infringes the copyright unless he has the copyright owner's permission. Libraries and archives do not own the copyright to manuscripts in their collections, unless the copyright has been transfered to them in writing, not by the donor or seller, but by the copyright owner. They may provide copies of these to researchers within the limits of fair use, but what those limits are for unpublished works has not been determined by statute or by the courts. Section 108 of the 1976 law, however, establishes certain exceptions for libraries and archives. Libraries and archives whose collections are open to the public may make a duplicate of a work for security, for preservation and for transfer to another library or archives whose collections are open to the public.

The controversy arises over subsections (d) and (e) of section 108, which allow libraries and archives to reproduce copyrighted works from their collections for researchers. Paragraph (d) authorizes the reproduction and distribution to a researcher "of no more than one article or other contribution to a copyrighted collection or periodical issue, or . . . of a small part of any other copyrighted work." Paragraph (e) authorizes the reproduction and distribution to a researcher of the entire work, or a substantial part of it "if the library or archives has first determined, on the basis of a reasonable investigation, that a copy . . . cannot be obtained at a fair price." When the law was first enacted most archivists assumed that these paragraphs applied to unpublished mansucript records as well as to published works, since both types of materials are protected by copyright. In

1977, however, Barbara Ringer, then Register of Copyrights, stated at a session of the Society of American Archivists that these two paragraphs apply only to published works. In 1980 the Society of American Archivists urged that the two paragraphs be clarified by Congress and that their applicability to unpublished materials be confirmed.

A provision of the 1976 law required the Register of Copyrights, five years after its implementation, to report on section 108 and make recommendations for rectifying any imbalances that may have become manifest between the rights of copyright owners and the legitimate needs of users of copyrighted materials. On 5 January 1983, in fulfillment of this requirement, David Ladd transmitted to Congress his *Report of the Register of Copyrights: Library Reproduction of Copyrighted Works (17 U.S.C., 108)* (Library of Congress: Washington, D.C., 1983). In this report, Ladd rejects the Society of American Archivist's recommendation and proposes an amendment to make it clear that 108 (d) and (e) apply exclusively to published works. He argues that Congress never intended to authorize infringement of the copyright owner's right of first publication, and that "the criticial needs of users for access to unpublished materials are provided for adequately" by the provisions that allow for libraries and archives to duplicate unpublished works for deposit in other libraries and archives (108, b), and that preempt common law by placing a statutory limit to the duration of copyright in unpublished works (section 301).

In opposition to the argument in favor of the copyright owner's right of first publication, several arguments support the contention that 108 (d) and (e) should be interpreted as applying to unpublished as well as to published works. Elsewhere in the act Congress was careful to state explicitly if a provision applied only to published or unpublished materials; these two paragraphs refer simply to a "copyrighted work," under which term unpublished works, now protected by statutory copyright, plausibly should be subsumed. The paragraphs also refer to "the collection of an . . . archives," which consists in most cases of unpublished materials. Section 108, f, 4, says that the provisions allowing library and archival reproduction do not nullify express contractual prohibitions against reproduction. The House Committee on the Judiciary explained that this regulation "is intended to encompass the situation where an individual makes papers, manuscripts or other works avilable to a library with the understanding that they will not be reproduced" (U.S. Congress, House of Representatives, Committee on the Judiciary, *Copyright Law Revision*, 94th Cong., 2d. sess., 1976, H. Rept. 1476, p. 77). The committee's explanation would make little sense unless Congress intended that paragraphs (d) and (e) apply to unpublished works.

If Congress were to adopt the Register of Copyrights' recommendation, the relationship between archivists and researchers could change substantially. Archivists might hesitate to photocopy manuscripts for researchers who visited the archives. Researchers then would have to copy manuscripts manually, unless themselves permitted to use the photocopying machines unsupervised. Archivists might hesitate to send photocopies of manuscripts directly to researchers in different parts. Then researchers who could not travel to the archives that held the required manuscripts would have to persuade a local library or archives to request copies for deposit. The impediments such arrangements would put upon research are imponderable. Examples are unnecessary.

It is unthinkable that Congress intended these ramifications when it enacted the 1976 copyright law. The likelihood of Congress' acting on the Copyright office's proposed amendment any time soon seems remote, but the threat to research is real. The present danger is that, in light of the Copyright Office's interpretation of the law, archivists and librarians may become less cooperative in supplying photocopies of manuscript materials to scholars.