



# Copyright Act of 1976

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## **LIBRARY EXEMPTIONS AGAINST COPYRIGHT INFRINGEMENT: A GUIDE TO SECTION 108 OF THE COPYRIGHT ACT.**

Since libraries perform a public service and **do not** commercially exploit their holdings, they were given special exemptions against copyright infringement in the **Copyright Act of 1976**. These exemptions were later modified to accommodate advancing technology. Most of the exemptions in the Copyright Act deal with copying done by library staff. Libraries are also exempted from liability for self-service copying done on their premises provided they put up a suitable notice. Exemptions apply to lending as well as copying. Since the exemption provisions in **Section 108 of the Copyright Act are difficult to follow**, I thought that a guide may be useful to our librarian readers. For the sake of completeness I also mention provisions in Section 109 that permit sale, rental or lending of computer programs. **Remember** that it is also possible to seek the copyright owner's permission to copy and distribute or **try to keep to fair use** under Section 107.<sup>1</sup>

There are various circumstances set forth in §108 of the Copyright Act when a library or archives (here collectively referred to as a 'library') may make or distribute copies of copyright works.<sup>2</sup> Section 108 permits libraries to make up to three copies of works in their own collections or in other libraries' collections. Sub-section (f) of §108 provides for general exemptions from copyright infringement in particular circumstances. Those circumstances will be explained below. Sub-section (a) gives some general rules. Sub-sections (b), (c), (d) and (e) set forth specific circumstances when a library can make copies without infringing copyright. It does not matter whether the library is part of a non-profit institution or attached to a commercial corporation. Nonprofit libraries do not have greater privileges than commercial libraries to make and distribute copies without infringing copyright under §108. However, it is easier for a library attached to a nonprofit institution to show that it has no purpose of direct or indirect commercial advantage in making copies, see (b) below.<sup>3</sup>

I hope that the following explanations will provide a clear guide to librarians on when and how they may allow patrons to make copies and in what circumstances librarians themselves may copy materials. For ease of reference the lettered paragraphs below track the lettered sub-sections of §108 of the Copyright Act. I have tried to avoid legalese but sometimes this is difficult.<sup>4</sup> If I have unnecessarily used legalese may I be banished to that special part of lawyer hell reserved for users of gobbledegook.

#### **(a) Some of the General Rules**

Sub-sections (a) and (i) lay down some of the general rules applying to particular exemptions under sub-sections (b), (c), (d) and (e).

- The exemptions apply only to libraries that either are open to the public or are open to their own affiliated researchers and outside specialized researchers.
- A copyright notice on the original work must also appear on the copy. If there is no copyright notice on the work, libraries must place a note on the copy that the work may be protected by copyright.
- Sub-section (i) states that the

exemptions under sub-sections (d) and (e) do not apply to musical works, movies, audio-visual works (except for audio-visual works dealing with news), sculptures, graphic and pictorial works. However, copies may contain illustrations and diagrams that are only a minor part of the copied works.

#### **(b) First Exemption: Make and Distribute Three Copies of an Unpublished Work**

A library may, without any purpose of direct or indirect commercial advantage, make and lend/distribute up to three copies of an unpublished work from within its own collections. However, the sole purpose for making the copies shall be either preservation and security or to deposit in another library for research purposes. The first library and the second library (if applicable) must either be open to the public or be open to their own affiliated researchers plus outside specialized researchers. Digital<sup>5</sup> copies must be converted to another format before being lent or distributed. Therefore, a library patron may not take away a copy on a floppy disc since this is a digital copy. Digital copies may not be made available to the public outside the library premises. This means that digital copies may not be displayed on an easily down-

loaded Web site or an intranet accessible outside the library. For example, copies may not be available on a university intranet to faculty in their offices. A copyright notice must be placed on the copies—see the rules in (a) above.

#### **(c) Second Exemption: Make Three Copies of a Published Work**

A library may, without any purpose of direct or indirect commercial advantage, make, but not distribute, up to three copies of a published work in or outside its collections. However, the sole purpose for making the copies shall be to replace a work that is damaged, deteriorating, lost or stolen or to replace a work in an obsolete format. A format is assumed to be obsolete if the machine (e.g., a Beta VCR) used to view the work is no longer manufactured or reasonably available. The library must first make a reasonable effort to obtain an unused replacement at a fair price. Presumably “unused” means that the library is entitled to insist that the replacement is in pristine condition. Digital copies may not be made available to the public outside the library premises. Therefore, a library may not display digital copies on a web site or an intranet. A copyright notice must be placed on the copies—see the rules in (a) above.

**(d) Third Exemption: Make and Distribute One Copy of an Article or Small Part of a Work**

A library may make and distribute one copy of a small portion of a work in its collections on request by a user or by another library. This exemption does not apply to musical works, movies, audiovisual works, sculptures, graphic and pictorial works but does apply to audiovisual works dealing with news. Copies may contain illustrations and diagrams that are only a minor part of the copied works. The requested item must not be more than one article or other contribution to a copyrighted collection or periodical issue. The item may also be a small part of any other copyrighted work. The copy is the borrower's to keep. The item must be used for private study, scholarship or research or at least the library must have no notice that the copy will be used for any other purpose—a "don't ask don't tell" situation. The rules for a copyright notice are the same as above and also the library must display a prominent

copyright warning at the place where orders are accepted and on the order form. Under federal

**NOTICE: WARNING  
CONCERNING COPYRIGHT  
RESTRICTIONS**

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use" that user may be liable for copyright infringement.

The institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

accepted must be printed on heavy paper or other durable material in type at least 18 points in size. It must be displayed prominently and shall be clearly visible to a casual observer at the window. The warning on the order form must be printed within a box located prominently on the form on the front or next to the user's name box or signature box. The type shall be at least as large as the rest of the form but no smaller than 8 point. It must be clearly legible, comprehensible and readily apparent to a casual reader of the form. For the reader's convenience the full text of the warning is in figure 1.

This sub-section does not apply to self-service photocopying that is now so common in libraries. The sub-section refers to "the place where orders are taken" so the patron must order copies from the library instead of making them herself. With self-service photocopying the patron does not order

regulations (37 Code of Federal Regulations §201.14) the warning at the place where orders are

copies but makes them herself on a self-service copier. However, the library is exempt

figure 1

from liability for self-service copying under a separate provision—see (f) below.

**(e) Fourth Exemption: Make and Distribute an Entire Work**

A library may make and distribute one copy of a complete or substantial part of a work in its collection on request by a user or by another library. This exemption does not apply to musical works, movies, audiovisual works, sculptures, graphic and pictorial works but does apply to audiovisual works dealing with news. Copies may contain illustrations and diagrams that are only a minor part of the copied works. The lending library must first make a reasonable investigation to ascertain if the work can be purchased at a fair price.<sup>6</sup> If not, the library may copy the work for the user. The copy is the user's to keep. The item must be used for private study, scholarship or research or at least the library must have no notice that the copy will be used for any other purpose. The same rules for a copyright warning apply as above and the library must display a prominent copyright warning at the place where orders are taken and on the order form. See (d) above for details of these warnings.

**(f) Self-Service Copying and the Extent of the Exemptions**

(1) The library and its employees are exempt from liability for

copyright infringement for the unsupervised use of photocopiers or other reproducing equipment on its premises. Reproducing equipment includes computers and printers. Each item of equipment on which potentially infringing copies are made must display a notice that the making of a copy may be subject to copyright law. There is no copyright exemption without the notice. This is not the same warning as under sub-section (d) and there is no prescribed text for the notice.

(2) Library users are not exempt from liability for copyright infringement under §108 when they use photocopiers or other reproducing equipment on library premises or if they request a copy under the circumstances set forth in (d)<sup>7</sup> above. Users can be liable for infringement in the course of using the equipment, requesting a copy, or any later act in connection with any copy if it falls outside fair use. A user can make sure that she is not liable for copyright infringement in connection with the initial copying by getting the library to photocopy works instead of doing it herself. The library just has to make sure that it is exempt from liability under §108.

(3) A library may make and lend a limited number of copies of

audiovisual news programs. These may be extracts or in complete form. However, this must be done without any purpose of direct or indirect commercial advantage. The library must either be open to the public or be open to its own affiliated researchers plus outside specialized researchers. Any copyright notice on the work must also appear on the copy. If there is no copyright notice on the work the library must place a note on the copy that the work may be protected by copyright.

(4) Libraries may be exempt from liability under the fair use provisions of §107. Therefore libraries have two opportunities to escape liability. However, a library remains fully bound by the provisions of a contract made when it obtained any copy of a work. Libraries are still bound by restrictions contained in licensing contracts they enter into, for example, a license for a textbook on CD-ROM. Theoretically a publisher could impose restrictions on a library that purchases printed materials, although this is never done to my knowledge.<sup>8</sup>

**(g) No Systematic Multiple Copying is Permitted**

Section 108 applies only to isolated and unrelated instances of

copying and distribution of single copies except of course where three copies are allowed under (b) and (c) above (however, sub-section (c) does not permit distribution). Section 108 is not intended to permit systematic, repeated copying or distribution even if spread out over a period of time. Where library employees know or have good reason to believe that they may violate §108 they must refuse to fulfill orders for copying. They must likewise refuse copying orders when they believe it is being done on behalf of a group of people each of whom places separate copying orders with the library even if done over a period of time and even if the members of the group use their copies separately as individuals. For example, if a college professor instructs her class to read an article from a copyrighted journal, the school library would not be permitted under sub-section (g) to make copies of the article for the class.<sup>9</sup>

Sub-section (g) especially cautions libraries against potential violations in connection with copying articles

or other small parts of works (see paragraph (d) above). It warns libraries that they may not systemat-

**NOTICE:  
WARNING OF COPYRIGHT  
RESTRICTIONS**

The copyright law of the United States (Title 17, United States Code) governs the reproduction, distribution, adaptation, public performance, and public display of copyrighted material.

Under certain conditions specified in law, nonprofit libraries are authorized to lend, lease, or rent copies of computer programs to patrons on a nonprofit basis and for nonprofit purposes. Any person who makes an unauthorized copy or adaptation of the computer program, or redistributes the loan copy or publicly performs or displays the computer program, except as permitted by Title 17 of the United States Code, may be liable for copyright infringement.

This institution reserves the right to refuse to fulfill a loan request if, in its judgement, fulfillment of the request would lead to violation of the copyright law.

ically<sup>10</sup> copy or distribute articles or other small portions of works under (d) whether in single or multiple

copies. It then expressly exempts libraries that engage in interlibrary arrangements provided the ordering library does not order so many copies of a particular work for distribution that the copies substitute for a subscription to the journal or a purchase of the work.

**(h) Exemptions for Older Works**

A library<sup>11</sup> may take certain liberties with older published works. In the last twenty years of a work's copyright term a library may reproduce, distribute, display or perform it, or portions of it, in facsimile or digital form. This may only be done for preservation, scholarship or research. However, the library must first decide after a reasonable investigation that the work is out of print or production,<sup>12</sup> that it cannot be obtained at a reasonable<sup>13</sup> price, and lastly that the copyright owner or agent has not given formal notice to the Copyright Office that the work is either still in print or available at a reasonable price.

figure 2

This exemption is solely for the benefit of libraries and not for anyone else. Note that once the copyright term expires and is

not renewed the work is public domain and may be freely copied.

### Computer Programs

A nonprofit library, excluding archives, may lend a computer program for nonprofit purposes if each lent copy has a clearly legible warning of copyright securely affixed to its permanent container, §109(b)(2)(A), 37 Code of Federal Regulations §201.24. The warning is in figure 2.

A nonprofit educational institution or its library may donate, sell or lend a copy of a computer program to its faculty, staff or students or to another nonprofit educational institution or its library, §109(b)(1)(A). This rule applies even if a profit is made on the transaction.

### Conclusion

I hope that this article gives you a reasonably clear guide to the copyright exemptions enjoyed by libraries and archives. Remember that fair use may sometimes be available to both libraries and their patrons to excuse copyright infringement even if exemptions from copyright infringement under §108 do not apply. Finally, remember that works of the United States Government are public domain unless the Government acquired the copyright from someone else, see

Copyright Act §105. A work of the United States Government is a work prepared by an officer or employee of the United States Government as part of that person's official duties, see Copyright Act §101.

### References

1 Fair use exempts an infringer from liability under §107 of the Copyright Act. See my article "Tweedledum and Tweedledee - Plagiarism and Copyright" in CINAHLnews 1998 Fall/Winter Volume 17 Number 3, 4. Factors determining fair use are the purpose and character of the use, the nature of the copied work, the amount copied and, most important, the effect on the market for the copied work.

2 Section 108 also applies to what the Act calls "phonorecords" which are CD's, long playing records, etc., that record sounds only.

3 See also the following footnote.

4 The only legal term I could not avoid is "no purpose of direct or indirect commercial advantage." This appears in the rule that a library may make one copy of a work and distribute it as long as the library has no purpose of direct or indirect commercial advantage. To say that a library may not collect a fee for copying and lending does not precisely paraphrase the rule. A library may collect a fee to make a copy and lend it but there is no purpose of commercial advantage if the fee is only intended to cover the library's costs. Conversely, a library may intend to gain a commercial advantage if it copies and lends a work without charging a fee. For example, a library in a profit making organization may not make multiple copies for employees unless the copying is fair use, see 1975 Senate Report No. 94-473, pages 67-71, reprinted in Copyright Office Information Circular No. 21, page 13 and accessible at <http://www.loc.gov/copyright/circs/>. On the other hand, spontaneous making of single copies without any systematic effort to substitute photocopying for subscriptions or purchases is permitted by §108, House of Representatives Report No. 94-1476, pages 74-79, Copyright Office Information Circular 21, page 15. It is easier for a library attached to a nonprofit institution, as against a commercial organization, to prove that it has no purpose of commercial advantage in making copies. However, a commercial organization can have no purpose of commercial advantage in making copies if it has no immediate commercial motivation, Copyright Office Information Circular 21, page 15.

5 Digital copies are copies recorded on electronic media such as floppy discs, CD-ROMs, magnetic tapes and hard drives on computers. These are contrasted with analog copies such as photocopies which use a photographic-type process.

George Herrera, one of the computer experts at Cinahl Information Systems, who gave me this information, tells me that a further digital medium is "magneto optical" which is an expensive CD-ROM made of glass that is used by businesses like insurance companies who need to keep records permanently.

6 No indication is given what a fair price is. Presumably a fair price will be assessed on the last known retail price. If the work is out of print and there is a secondhand market then reference should be made to the prevailing market price range. One possible rule of thumb is that a fair price is anything less than the fee charged by the library to photocopy the work for the user. Presumably the user would prefer to purchase the work elsewhere if she can obtain it for less than the library's photocopying charge. This measure of fair price would not be applicable if the work is rare although available in the secondhand market. Collectors are usually prepared to pay higher prices for rare works. Note that the copyright in old works may have expired rendering the §108 exemptions unnecessary.

7 I do not know why (e) is excluded.

8 The restrictions would have to be tight enough to negate the "first sale" doctrine set forth in §109(a). The first sale doctrine permits the owner of a copy of a work to sell or donate it without infringing copyright, e.g., sale of secondhand books. Purveyors of textbooks on CD-ROMs escape the first sale doctrine by licensing the use of the CD-ROMs instead of selling them.

9 See Copyright Office Information Circular No. 21, page 14 and accessible at <http://www.loc.gov/copyright/circs/>. However, the professor may be able to make copies for the class under the rules applicable to classroom copying, see the fair use rules in Section 107 and the 1976 agreement between the publishing industry and educational institutions contained in Copyright Office Information Circular No. 21, at page 7.

10 See examples of systematic copying at Copyright Office Information Circular No. 21, page 12.

11 Including a nonprofit educational institution that functions as a library (or archives). I do not understand why §108 suddenly makes special mention of a nonprofit library. No mention is made of nonprofit libraries elsewhere in §108.

12 The section says that the work may not be "subject to normal commercial exploitation." In English this means out of print.

13 Sub-section (c) refers to a "fair" price in connection with damaged or lost works. "Fair" and "reasonable" mean the same thing.

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### OID Technologies

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### SilverPlatter Information Inc.

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