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A study on copyright policy and interlibrary loan

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Abstract

Sharing materials between academic libraries, whether lending or borrowing, is critical to meeting the content needs of patrons. Many interlibrary loan (ILL) transactions involve sending or transmitting materials such as journal articles and photocopies that are not returned. Section 108 of the Copyright Act of 1976 addresses reproduction of copyrighted materials by libraries and archives for several purposes, including ILL. Qualifying libraries may send portions of copyrighted works to other qualifying libraries, as long as the "aggregate quantity" doesn't replace a purchase of or subscription to the work. But Section 108 does not define "aggregate quantity," leaving librarians to interpret the spirit of the law.

Keywords: Interlibrary loan, copyright policy, section 108, license.

Introduction

Interlibrary loan (ILL) is a service that allows your institution's library to borrow books, journals and other copyrighted material from other libraries. This type of service has been extended at most institutions to include the making and sending of copies even where no actual "loan" is involved.

Section 108 of the Copyright Act allows ILL copying under certain terms and conditions. Specifically, Section 108 allows a qualifying library to copy and send to another library portions of copyrighted materials as part of its ILL service, provided the "aggregate quantities" of copied items received by the borrowing library do not substitute a periodical subscription or purchase of a work.

Unfortunately, Section 108 does not define "aggregate quantities" – creating some ambiguity in interpreting the ILL provision. To help resolve this uncertainty, the National Commission on New Technological Uses of Copyrighted Works (CONTU) developed guidelines during the 1970s with specific allowable amounts for ILL photocopying. The CONTU guidelines are not law and have never been reviewed or revised despite the many changes in technology; however, they still serve as suggestions that help librarians interpret the ILL provision in the Copyright Act. They also help reassure copyright holders that ILL will not replace periodical subscriptions and book purchases by libraries.

Under the CONTU guidelines for delivering photocopies through ILL, the borrowing library tracks patron requests and, once the guidelines are exceeded, the borrowing library reports the usage and pays the required royalty fees.

ILL In the Digital Realm

With the use of digital technology, ILL is evolving and becoming almost indistinguishable from ordinary "document delivery". As a result, new guidelines may have to be developed for the digital environment. At the Conference on Fair Use (CONFU) convened by the U.S. Department of Commerce in the mid-1990s, an attempt was made to develop such guidelines, but nothing relevant to ILL was agreed upon. At the same time, libraries are increasingly transitioning their journal subscriptions from print to digital collections. With the move to digital, the collections are managed through license arrangements with the copyright holders or aggregators. These individual licenses vary widely by content, publisher, type of use and more.

The license accepted by the library is a binding contract. If the library has agreed to the limitations on the use of materials in ILL, then the library is bound by its agreement.

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Most libraries set internal rules for the kinds of licenses that they will accept, and it is important for libraries to be familiar with the terms of their various licenses. Some licenses are restrictive in terms of access to, and use of, the content by library patrons. For example, content may be accessible to patrons of the library only through a range of IP addresses or on a single workstation within the library. Once the material is accessed, some licenses state that it may only be viewed and printed by the patron.

Some libraries have been successful in negotiating broader terms of use into their licenses – terms that expand the institution's and patrons' rights to use their digital collections. For example, some licenses may allow links to the material for e-reserve purposes or from a course management system on campus. At the same time, these or other licenses may restrict other types of use, particularly interlibrary loan.

In yet other cases, the library may be allowed to use its digital collection to fulfill interlibrary loan requests, but only on a limited basis. For example, the library may be permitted to use content from an electronic journal to fulfill ILL requests, but only after the material is printed and scanned or printed and then delivered to the patron via fax or mail. Publishers allowing delivery directly from the digital collection are rare and licenses may even restrict delivery to only faculty, staff and students on the campus.

Reporting ILL

Many libraries report interlibrary loan transactions for copyright clearance at the end of the calendar year, however, more frequent reporting makes it easier for the library to track its ILL and helps ensure that permission is recorded on a timely basis. The responsibility for determining compliance falls on the borrowing library and as long as the copyright transaction is reported on a reasonably timely basis, the borrowing library is fulfilling its copyright obligation.

Once copyright permission is granted, it is a standard practice to retain records for three years, although individual institutions' record retention policies may dictate longer or shorter retention periods.

Library Services VS. For-Profit Information Services

The term ILL is now deemed by most academic institutions to include the delivery of materials, such as photocopies and digital content that are not returned to the lending library. Therefore, in the broadest sense, ILL has become a type of document delivery.

Traditionally, as its name indicates, ILL has been a library-to-library transaction. However, newer ILL systems that provide copies directly to end-users - especially corporate users - blur this distinction. Many libraries add to the confusion by performing ILL and document delivery in the same section of the library, often called the document delivery service (DDS).

In an effort to distinguish traditional, exempt library services (as defined by section 108 of the Copyright Act) from for-pay information services such as document delivery, copyright holders have suggested that if a library charges for an ILL transaction then the fees received create a commercial benefit for that library because they help pay the library's costs, and the library should pay appropriate royalty fees. On the other hand, many libraries claim that fees received for ILL transactions result in no commercial gain because they cover just a portion of the copying, mailing and staff costs. Section 108(g) attempts to balance the interests of publishers and libraries regarding interlibrary loan arrangements.

During the years preceding amendment of the copyright law in 1976, publishers lobbied hard for the strongly worded clauses in sections (1) and (2).¹ Libraries, fairly certain that such language would prevent normal and customary interlibrary loan arrangements, lobbied hard for additional language to clarify that the systematic copying the statute outlawed was *not* that which was customary so long as it did not substitute for subscriptions or purchases of the affected works.

Later, the members of the National Commission on New Technological Uses of Copyrighted Works ("CONTU") negotiated guidelines that described what amounts of copying would substitute for a subscription to or purchase of such work, a critical measurement in the balance. The CONTU Guidelines appear to have been much more successful than their Classroom counterparts³ in fixing realistic or reasonable limitations in that the library community seems comfortable with the limitations even 30 years later.

But when it comes to libraries using their licensed digital database materials to send electronic copies in interlibrary loan, publishers have not been willing to compromise. Most database contracts flatly prohibit the practice. Those few that allow it insist that only an analog copy of the digital material can be transferred to the borrower. Others expect the lending institution to pay the borrower's fees for works borrowed that exceed the suggestion of 5. All in all, this is an area where libraries and publishers have not been able to agree on much of anything.

Interlibrary Loan Operations

The guidelines listed below apply when interlibrary loan (ILL) requests are being processed for library users. NOTE: Section 108 was amended in late 1998 by the Digital Millennium Copyright Act, Pub.

L.105-304, 112 Stat. 2860, and the Sonny Bono Term Extension Act, Pub. L. 105-298, 112 Stat. 2827. Those revisions have been incorporated into this document.

Interlibrary Borrowing Procedures

Notice of copyright regulations

- A Warning Concerning Copyright Restrictions sign will be prominently posted at every library location where ILL borrowing requests are accepted.
- To obtain the user's affirmation of his or her awareness of the copyright law and intention to comply with it, the Warning Concerning Copyright Restrictions will be printed within a box located prominently on the ILL borrowing request form.

Copyright compliance indication on borrowing requests sent

- On each borrowing request for photocopies, the ILL unit will clearly indicate whether the request Conforms to the CONTU Copyright Guidelines (CCG) or Conforms to the Copyright Law (CCL).
- CCG will be indicated when the UCLA Library does not currently subscribe to a periodical title and the material requested was published within five years of the date of request.
- CCL will be indicated on requests for material which will become the property of the library user when:
- The material requested was published earlier than five years prior to the date of the request, or the Library

believes because of the circumstances of the request that the reproduction and distribution of the copy is fair use according to Title 17, Sect. 107.

Borrowing Records and Review of Borrowing

Each UCLA Library interlibrary borrowing unit (Biomedical, Law, Research, and Science and Engineering libraries) will maintain records of all filled photocopy requests in title order. The records will be retained for three years beyond the calendar year in which the request was filled.

- At the end of each calendar year, each UCLA Library interlibrary borrowing unit will prepare a list of journal titles from which photocopy requests have been filled. The lists will be compiled to determine if there are any periodical titles for which the number of filled photocopies is deemed to exceed the spirit of the law and the CONTU Interlibrary Loan Guidelines.
- The compiled list will be submitted to the Associate University Librarian for Collection Development and Technical Services by March 31 each year. The AUL for Collection Development and Technical Services will take appropriate action on titles that appear on the list.
- In cases in which the amount of borrowing exceeds UCLA Library guidelines, the appropriate UCLA Library unit will either enter a subscription for the journal title or begin to pay copyright fees via the Copyright Clearance Center (CCC).

Interlibrary Loan

Interlibrary loan is a service through which you can obtain journal articles and loans of material not available at the Stony Brook University Libraries. Document Delivery is a service that provides PDF files of book chapters and journal articles from material available at the Stony Brook University Libraries.

Scope of Copyright Protection

Copyright protection does not extend to any idea, process, concept, discovery or the like, but only to the work in which it may be embodied, illustrated, or explained. For example, a written description of a manufacturing process is copyrightable, but the copyright only prevents unauthorized copying of the description; the process described could be freely copied unless it enjoys some other protection, such as patent.

Subject to various exceptions and limitations provided for in the copyright law, the copyright owner has the exclusive right to reproduce the work, prepare derivative works, distribute copies by sale or otherwise, and display or perform the work publicly. Ownership of copyright is distinct from the ownership of any material object in which the work may be embodied. For example, if one purchases a videotape, one does not necessarily obtain the right to make a public showing for profit.

The term of copyright in works created on or after January 1, 1978, is the life of the author plus seventy years. Copyright in works-for-hire is for ninety-five years from the date of first publication or one hundred twenty years from creation, whichever period first expires.

Interlibrary Loan (abbreviated ILL) is a service whereby a user of one library can borrow books or receive photocopies of documents that are owned by another library. The user makes a request with their local library, which, acting as an intermediary, identifies owners of the desired item, places

the request, receives the item, makes it available to the user, and arranges for its return. The lending library usually sets the due date and overdue fees of the material borrowed. Although books and journal articles are the most frequently requested items, some libraries will lend audio recordings, video recordings, maps, sheet music and microforms of all kinds. In many cases, nominal fees accompany interlibrary loan services.

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