

Copyright and Access to Archives

Deborah S. Osborn

When copyright in manuscripts or other research materials does not belong to the repository which houses such materials, problems of access and photocopying provide pitfalls for the unwary archivist or librarian.

One of the major functions of the archivist is to make archival materials available for use. Although on the face of it this principle seems relatively straightforward, the logistics of implementing it are not so easy. As soon as the archivist looks closely at access to materials in the archives, he immediately becomes aware that this area is fraught with difficulties and requires sensitive handling if it is to be successfully negotiated. One of the more controversial aspects of access is that of the duplication of unpublished manuscripts. Where do the institution, user and creator stand in relation to each other and the law? Which steps can and should be taken to ensure that the institution and scholar, are both aware of potential situations where they could be at fault before the law?

Quite clearly there are some attendant advantages in being able to copy materials held in the archives. It is desirable that material which is very fragile or rare should be copied, and the copy used by the researcher to prevent items being damaged or stolen. Also for individuals who are overseas, interstate, or simply unable to go to the archives because of a physical disability, time or cost, their needs can best be served by sending them copies of the materials they have requested. This is provided the request is not judged unreasonable by the archivist, and is within the resources of the archives to provide.

The attitude of T. R. Schellenberg, that "Reproduction of records should be made on demand, whenever the demand is reasonable, and at cost for private inquiries",¹ is less likely to be reflected in the response of an archives today, to a request for material to be copied. Although Schellenberg points out that a copy will ease the researcher's burden in transcribing documents, and may obviate the need that researchers feel to make notes on documents,² he makes no mention of the various legal pitfalls that can come about through injudicious copying of materials.

The techniques by which institutions can reproduce material boomed

after the Second World War, and with this came an increase in the volume of photocopying undertaken. Inevitably the question of photocopying infringing copyright came to the courts to be tested in the case of *Williams and Wilkins vs US Government*. Williams and Wilkins believed that copying of articles published by them, without authorisation was in fact an infringement of their copyright, and they demanded compensation. The final result incorporated two findings. One was for Williams and Wilkins, that they were entitled to compensation because the copying had infringed copyright. The other was for the government, which said that it was not a violation of copyright for government libraries to make single copies.³

One of the significant points which was raised by this case and which can be applied to the duplication of materials in archives, is that of the concept of "fair use". The doctrine of fair use or fair dealing applies only for specific purposes and does not refer to published editions, films, sound recordings and so forth. Fair use sets a limit upon the rights of copyright owners and the areas of its application are for the purposes of research or study, review or in association with the reporting of news.⁴

To try to define clearly what is "fair" in the "fair use" doctrine is impossible, and it can only be approximated by drawing upon the precedents developed through criteria. Some four factors are considered. First is the purpose and character of the use made of the work. Second is the copyrighted work's nature. Third is the proportion of the work that is used in relation to the whole of the work, and fourth the effect of the work being used, on the value of the copyrighted work, or upon the work's potential market value.⁵

At the basis of the laws which relate to manuscripts and any other material for that matter within an archives, is not only access to materials, but, also, publication of material that is at present unpublished. The individual who creates a piece of writing is legally the owner of that writing and so only he or his heirs have the right to publish as the owner of the literary property inherent in the writing.⁶ The owner of the physical property of a manuscript, namely the paper and ink and so forth, does not always hold the literary rights as well. This case frequently arises when materials are donated or sold to an archives or manuscripts library which then owns the physical property but does not automatically receive the literary rights as well. The owner of the physical property is at liberty to destroy a unique manuscript if he desires, and in doing so also destroys the literary right inherent in the work. However, if another copy exists elsewhere and can be produced, the literary right continues to exist.⁷

Literary rights can be transferred or sold; and, since they may have commercial value, it is generally in the interests of the archive to obtain the literary rights to materials which are in the repository, and have this in writing. One of the difficulties which exists for the archive is obtaining the literary rights for materials of at least fifty years old, as the individuals who

may have inherited the rights frequently prove difficult to locate. If, in a case like this, the archive gives permission to publish, it means the risk, however remote it may seem, of the legal possessor of literary right popping up and demanding compensation.⁸

The copyright, literary and property rights outlined above are indicative of the pitfalls which can beset the researcher and archive, who through ignorance or laziness, fail to look beyond the first instance of duplicating an item with regard to future uses to which that item could then be put. Outside of the publishing risks which can stem from copying, are other reasons which might cause an institution to be circumspect in its production of copies. In the majority of cases, manuscript repositories are willing to make copies of material for scholars, as this aids those who are not within a reasonable distance of the repository. It should be remembered, however, that a photocopy does not always give information such as the colour of inks used in the manuscript and so forth.⁹ Very few institutions will allow a researcher to photocopy a manuscript, and this can lead to delays which range from a few days to a few months. The costs involved in producing copies with regard to time and labour can be quite high, and are usually reflected in the fee the institution charges.¹⁰

As I pointed out earlier, it is alleged by some that a photocopy of a manuscript reduces the value of the manuscript on the open market. With this in mind, some repositories allow photocopies to be made, but only on condition that they be returned after the researcher has finished. This instantly raises the ethic of requiring an individual to return a copy for which he has paid to its originating institution,¹¹ however it is not my purpose to deal with that issue here. Whilst the photocopying of manuscripts is controlled and restricted, the repository can keep tabs on who is publishing what and from where permission was obtained, and, with the permission of the researchers or donors concerned, this information can be passed onto other researchers. If copies are made without a formalised procedure being followed, it becomes easier for illicit copies to be made, creating a situation ripe for legal disputation.¹² The archivist in a manuscript repository must therefore constantly balance the fine line between literary rights and that of his fundamental duty of making material available.

In an effort to avoid responsibility for any illegal photocopying, many institutions incorporate statements of responsibility into the forms which researchers fill out when requesting copies, or when first being admitted to the reading room. At present the repository seems to carry the burden of explaining to researchers what copyright is, and the legal implications which arise from infringing it. In Australia, it must be remembered that there is no longer any common law copyright, as the Copyright Act, 1968 (Commonwealth) replaced this with the need for the author to be qualified, ie, an Australian resident, if the work is unpublished. Or, to have qualified

at the time of publication, or to have had his works first published in Australia. To ascertain any one of these three criteria places an increased burden on the repository.

The onus of obtaining permission to copy or reproduce a work should logically be upon those who wish to make the reproduction. I believe it is the duty of the repository to prepare publications making researchers aware of copyright laws, and other difficulties attendant upon making copies, but the researcher must also have done his homework and be willing to search for the correct person, from whom permission for publication can be obtained. The Society of American Archivists has prepared a statement on the reproduction of manuscripts for reference use. Incorporated in the statement are several points about which the repository should inform the researcher. These include: the conditions under which reproductions and quotations can be made from manuscripts owned by the repository; that if copyrighted materials which are to be used beyond what the doctrine of "fair use" sees as fair, then the researcher must first get permission from the copyright owner; that the researcher is responsible for any infringements on copyright; and those literary rights of whose existence the repository is aware.¹³

The position of the institution and researcher with regard to the copying of manuscripts and other unpublished materials is a complex one. The archive is constantly having to consider both the rights of the copyright owner, which have a legal basis, and the purpose of the repository which is to make its contents available and provide access to material for researchers. In making material available institutions frequently photocopy or duplicate material in an effort to facilitate the researcher's work. This brings the institution into contact with copyright laws, as the use that the researcher wishes to put the copied material to, may well involve publication of part or all of the material. It then falls upon the institution to ensure that the researcher is informed of the copyright position on the material he is dealing with, and any other legal provisions inherent in the material or related to it. I feel that if at all possible, the repository should obtain the copyright when material comes into the repository. In the long-term, this would ease their position when copying material or when permission is sought to publish. The advantages which exist with copying materials, even though they can be expensive in time and money, should not be restricted too greatly by legislation, and the criteria by which copies can be made should be broadened for archival and other educational institutions.

FOOTNOTES

1. T R Schellenberg, *Modern Archives*, University of Chicago Press, 1975, p235.
2. *Ibid*, p235.
3. P Whitestone, *Photocopying in Libraries*, Knowledge Industry Publications Inc, 1977, p13-14.

4. J C Lahore with P B C Griffiths, *Copyright and the Arts in Australia*, Melbourne University Press, 1974, P26.
5. H B Cox, "The Law and the Manuscripts Curator" in *Management of Archive and Manuscript Collections for Libraries*, Lytle, R H (ed), Society of American Archivists, 1980, p79.
6. J Thorpe, *The Use of Manuscripts in Literary Research*, Modern Language Association of America, 1974, p30.
7. Ibid, p30.
8. Cox, *op cit*, p74.
9. Thorpe, *op cit*, p21.
10. Ibid, p21.
11. Ibid, p22-23.
12. Ibid, p24-25.
13. A M Campbell, ed, "Statement on the Reproduction of Manuscripts and Archives for Reference Use", *American Archivist*, Vol 39, No 3, July 1976, p411.

REFERENCES:

Duckett, K W, *Modern Manuscripts*, American Association for State and Local History, 1975.

Kent, A, and Lancour, H, eds, *Copyright*, R R Bowker Co, 1972.