The Impact of Copyright on the Resource Sharing Practices of ASERL Libraries

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Introduction

Resource sharing emerged as a common library service in the mid-1960s as library automation and telecommunication technologies developed. These developments allowed library networks to grow from an already-established tradition of cooperation among American libraries. The two primary forms of resource sharing in the early days were interlibrary loan and cooperative acquisitions.\(^1\) When resource sharing involving only delivery of physical objects, libraries were only concerned with complying with the Copyright Act, primarily Section 108(g)(2), which states that libraries are not prevented from entering into sharing arrangements so long as the receiving library does not receive copies in such quantities as to substitute for a subscription of the work.

As resource sharing grew and electronic access arose as a means of quick and efficient delivery, a group of libraries and publishers known as the National Commission on New Technological Uses of Copyrighted Works – or CONTU – convened in 1976 to develop agreed-upon guidelines for what was acceptable under the newly enacted Copyright Act. The essential component of these guidelines is the “Rule of 5.” That is, within a single calendar year a library should not borrow more than five articles from the most recent five years of publication of a journal. Needing more than five articles from the five most recent years of publications would indicate a subscription to that publication is warranted and permission from the journal is required for further reproduction and sharing.\(^2\)

Today, as libraries engage in a variety of resource sharing activities involving the sharing and acquisition of both print and electronic resources domestically and abroad, and within local and global consortia of libraries, questions arise whether the nearly 40-year old CONTU guidelines reflect current assumptions about copyright law, fair use, and the scholarly communication system as it presently exists. More directly, what impact does copyright law have on the various modes of resource sharing in which libraries are engaged? What about license agreements? With libraries now collecting more digital content than print, how are libraries protecting copyright and fair use, observing the Rule of 5, and also fulfilling patron expectations for access and use of electronic content? The problem with guidelines is that they have a tendency to both narrowly construe the law and create rigidity in its application. This comes out of a need for the guidelines to be acceptable to many diverse groups with competing interests.\(^3\)

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ASERL Survey Results
To gauge current practices and attitudes about these issues among ASERL members, a survey was devised in February 2014 to determine what types of resource sharing practices were in use, what policies govern their resource sharing practices, and how copyright considerations impact lending or acquiring materials through resource sharing. Twenty-six libraries of ASERL’s 38 member libraries responded. Their responses reflect a wide range of resource sharing activities across a wide geographic area and a mix of attitudes and practices regarding the application of copyright law and negotiation of e-resource licenses to their resource sharing activities.

Not surprisingly, all the survey respondents indicated that they regularly share print books via physical delivery (e.g., U.S. Mail), as well as articles or other scanned, non-returnable materials via both physical and electronic delivery. When sharing resources by these means, most members did not discriminate by library type, lending within the state, across the country or across the globe. However, most libraries indicated that they are not presently engaged in sharing of electronic books in any way, and the few that are currently loaning electronic books indicated that only a single chapter or limited excerpts are shared. The small number of libraries loaning electronic books is likely due to license restrictions. Only three ASERL libraries indicated that they regularly include provisions to permit resource sharing when they negotiate the terms of electronic book licenses, even though nearly all other respondents regularly negotiate resource or scholarly sharing rights in licenses for electronic journals and databases.

Currently, only about 1/3 of the libraries that responded to the survey employ a system for tracking these electronic resource license terms. Sample license terms provided by respondents indicate an adherence to Section 108 of the Copyright Act and the CONTU guidelines but do not reflect fair use considerations being made in resource sharing decisions. A few of these examples are below:

- “Under the terms of this Site License, the Licensee is granted the non-exclusive right to supply (whether by post, fax or secure electronic transmission, using Ariel or its equivalent, whereby the electronic file is deleted immediately after print) to an authorized user of another USA library for the purposes of research or private study and not for commercial use, a single paper copy of an electronic original or an individual document from a journal for which a subscription has been paid at the full current subscription rate, in compliance with Section 108 of the United State Copyright Law and with guidelines developed by the National Commission on New Technological Uses of Copyrighted Works (CONTU Guidelines).”
- “The Institutions shall be permitted to use Reasonable Amounts of the Licensed Materials to fulfill occasional requests from other, non participating institutions, a practice commonly called Inter-Library Loan. Customer agrees to fulfill such requests in compliance with Section 108 of the United States Copyright Law (17 USC §108, “Limitations on exclusive rights: Reproduction by libraries and archives”) and the

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4 See the full survey results at [http://www.aserl.org/?attachment_id=4118](http://www.aserl.org/?attachment_id=4118).
Guidelines for the Proviso of Subsection 108(2g)(2) prepared by the National Commission on New Technological Uses of Copyrighted Works (CONTU)."

- "Licensee may fulfill a reasonable number of requests for Interlibrary Loan of the Licensed Materials from institutions not participating in this Agreement, provided such requests comply with Section 108 of the United States Copyright Law (17 USC §108) and clause 3 of the Guidelines for the Proviso of Subsection 108(g)(2) prepared by the National Commission on New Technological Uses of Copyrighted Works (CONTU Guidelines). Licensee may use print or electronic copies derived directly or indirectly from the Licensed Materials for the purpose of Interlibrary Loan with the same limitations that prevail for paper copies for that purpose made from print journals."

All of the responding libraries indicated that they employ the CONTU guidelines when making resource sharing decisions. Sixteen of the responding libraries indicated that their resource sharing practices have been codified into a formal written policy. Eleven of those policies specifically address copyright compliance in resource sharing. Most of the respondents have designated someone within the library to handle questions of copyright compliance as pertains to resource sharing:

<table>
<thead>
<tr>
<th>Title of Person Responsible for Copyright Compliance in Resource Sharing</th>
<th>Number of Schools</th>
</tr>
</thead>
<tbody>
<tr>
<td>Borrowing Services/ILL Librarian</td>
<td>15</td>
</tr>
<tr>
<td>Access Services Librarian</td>
<td>1</td>
</tr>
<tr>
<td>Dean or Director</td>
<td>2</td>
</tr>
<tr>
<td>Library Assistant</td>
<td>2</td>
</tr>
<tr>
<td>Scholarly Communications Librarian</td>
<td>2</td>
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</tbody>
</table>

In assuring copyright compliance, almost all responding ASERL libraries indicated that they use the Copyright Clearance Center for processing copyright permissions and fees. And although not reflected in the sample license terms provided above, almost all respondents indicated that they consider the principles of fair use when making decisions related to resource sharing. Further, about half of the respondents stated that their staff checks for an open access equivalent – whether it be in an institutional repository, HathiTrust, Internet Archive or some other OA resource – when responding to patron requests for items not owned by the library.

At the conclusion of the survey, respondents were asked to share any final thoughts they had on copyright and resource sharing. One respondent highlighted the growing complexities of international copyright laws and restrictions on interlibrary loan. This is an issue that has come up in the literature and in the news in recent years and will likely continue to cause libraries headaches as US universities establish campuses overseas, the number of online students in other countries expands, and the willingness to lend items to institutions in other countries grows. Other respondents commented on the restrictions in licenses with regard to sharing e-book content with persons outside the subscribing institution. Finally, technological hurdles were also cited as an impediment to lending electronic books.
Conclusion
Resource sharing as a library service has grown exponentially since its advent 50 years ago. Changes in technology have expanded the ability of libraries to share and acquire more information efficiently and quickly, but the failure of copyright law to similarly adapt and change has complicated policy and decision making. As a result, libraries have continued to rely on outdated guidelines and encountered difficulties in negotiating license terms that have raised questions and challenges about the future of resource sharing as a service. The experiences and practices of ASERL libraries demonstrates that the issue of copyright compliance and best practices in resource sharing requires further examination, discussion, and revision in order to meet patrons needs for ready access to scholarly information and assure the principles of fair use are preserved.

Fair use has become increasingly important to the way libraries provide information as evidenced by not only court cases testing the boundaries of fair use in libraries but also the development and promotion of best practices for fair use in libraries. However, reliance upon the outdated “Rule of 5” may hinder utilization of fair use by restricting libraries to numerical guidelines where a broader view of the principles of fair use may be, in application, more equitable to the rights of users and the rights of copyright holders as well. Further, ASERL members’ experiences demonstrate that licensing practices do not always allow libraries to utilize fair use for purposes of resource sharing. Finally, the growing availability of open access resources demands a need for staff training and workflow revision.