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## Archivists and the New Copyright Law

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## ARCHIVISTS AND THE NEW COPYRIGHT LAW

Carolyn A. Wallace

In October 1976 the Congress of the United States took a step of great importance for those who administer and use manuscripts when it placed unpublished literary materials under the coverage of the new copyright act.<sup>1</sup> After careful study, and in response to many requests, the Congress made a change in the American system of copyright that will have far-reaching consequences.

Archivists manifested increasing concern for copyright in the years preceding passage of the new law, and their interest was enhanced by the news that Congress was considering legislation affecting unpublished manuscripts. Many archivists tried to study the existing situation, to keep up with the discussions preliminary to change, and, as soon as the law was passed, to learn its effect on their work. In contrast, a few archivists dismissed copyright problems as illusory, saying there is little probability of lawsuits arising over use of material in the custody of archives and manuscripts repositories. So far as the past is concerned, they are right; there have been few such cases. However, this is a litigious age. American citizens seem anxious to go to court at the slightest opportunity, often bringing charges that would not have been heard a few years ago. The lack of lawsuits should not give archivists a false sense of security. Staff members of the Southern Historical Collection in the Library of the University of North Carolina at Chapel Hill are aware of the possibility of litigation, for manuscripts in their custody have been the subject of a lawsuit charging infringement of copyright.<sup>2</sup>

The suit grew out of the use of the Haskell and Gibran Series in the Minis Family Papers. The series includes letters between the poet-philosopher Kahlil Gibran and Mary Elizabeth Haskell, later Mrs. Minis, and Miss Haskell's diaries recording her meetings and conversations with Gibran. Gibran's works are now best sellers and the right to publish material by or about him is an important financial asset. To fervent admirers of Gibran,

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on the other hand, any limitation on the use of his work is equivalent to restricting use of the Bible. These conflicting considerations make the Haskell and Gibran manuscripts extremely difficult to administer.

The lawsuit involving these manuscripts followed two separate publications. One was by Annie Salem Otto, a student of Gibran's work who acquired copies for use in research for a projected biography. A member of the Collection staff warned her, by letter and in person, that the copies were supplied for research only and should not be published without permission of the copyright owners, but Mrs. Otto concluded that editing and publishing the letters and excerpts from the diary was preferable to writing the biography. She met Mrs. Minis, talked by telephone with Gibran's sister Mary, and said that they gave her permission to publish. However, Mrs. Minis died before Mrs. Otto completed her work, and the executor of the Minis estate and the representative of the Gibran estate made arrangements for an edition of the letters that was published in 1972 by Alfred A. Knopf, Inc., under the title *Beloved Prophet*. Mrs. Otto issued a two-volume edition privately published in Houston, Texas, in 1970.<sup>3</sup> Both books were registered with the Copyright Office, and in 1972 the Gibran and Minis heirs and the Knopf firm sued Mrs. Otto for infringement of copyright. The applicable law was that of Texas and the suit was brought there, but because of diversity of citizenship the case was initiated in federal court. The plaintiffs did not sue the University or charge that the staff of the Southern Historical Collection was negligent. University lawyers approved the warnings given Mrs. Otto and thought them sufficient. Staff members were naturally concerned by the suit, but began to hope that it might bring some advantages. It appeared likely that the decision would answer some of the questions archivists had been raising about their responsibilities in regard to manuscripts and copyright. Here at last was a case that should clearly define the copyright status of manuscripts given to a repository without explicit transfer of copyright and might rule on the right of a repository to make copies of such manuscripts for purposes of research. The outcome was disappointing. Mrs. Otto, after filing an initial brief raising the first of these points, proved in the end unable to sustain the defense, becoming so upset by the case that she dismissed her lawyers and finally lost the suit on procedural grounds. Because of the way the case was settled, the decision that the defendant should destroy her publication and cease to have anything to do with the Haskell and Gibran writings clarified no points of law and furnished no precedent to guide future action by copyright owners, manu-



# Wallace: Archivists and the New Copyright Law

CLERK U. S. DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
FILED

JUL 10 1974

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

V. BAILEY THOMAS, CLERK  
BY DEPUTY: *K. Williams*

MARY K. GIBRAN, ET AL

\$  
\$  
\$  
\$

VS

CIVIL ACTION

ANNIE SALEM OTTO

NO. 72-H-123

## FINAL JUDGMENT

Came on to be heard the above cause of action by the Court wherein the Court had instructed the Defendant, Annie Salem Otto, by Minute Entry of December 18, 1973, to make available certain documents, including production of documents previously requested of Defendant Otto pursuant to Rule 34, FRCP, and which Minute Entry further directed Defendant Otto to appear and be deposed on or before 5:00 p.m. February 4, 1974, and upon consideration of the affidavit of counsel for Plaintiffs which stated that Defendant Otto did not appear to give deposition when correctly and properly noticed, and did not produce documents for inspection and copying, by the deadline set by the Court, the Court being of the opinion that the sanctions of Rule 37(b)(2)(C) should be applied in this case, the Court hereby enters the following Judgment in final disposition of this matter.

1. No award of damages is granted to any party hereto, and all claims for damages are otherwise hereby denied.
2. The plates for printing and copying of a book entitled The Letters of Kahlil Gibran and Mary Haskell, and all copies of the book, shall be delivered from the bonded warehouse to counsel for Plaintiffs for destruction. Destruction shall occur after the required interval for Appeal of this Judgment has passed. Completion of destruction shall be evidenced in writing from said counsel.
3. Ten books shall be delivered to Defendant Otto to be kept in possession of Defendant Otto as personal keepsakes and for no other purpose. Said books shall not be sold, loaned, rented, leased, or otherwise transferred for value at any time thereafter.

4. Effective of even date herewith, Defendant Otto shall be perpetually enjoined from:

A. Publishing, distributing or otherwise trafficking in any book, pamphlet or other printed publication substantially similar to The Letters of Kahlil Gibran and Mary Haskell.

B. Publishing, circulating, or otherwise trafficking in any of the personal letters, diaries, or other written instruments which have been retained in the Southern Historical Collection of The University of North Carolina and which generally relate to Kahlil Gibran and Mary Haskell.

C. Otherwise quoting in whole or in part in any printed publication or other documents of general circulation any of the materials placed in the Southern Historical Collection of The University of North Carolina.

D. Otherwise copying, quoting or utilizing any portion of the publication by Alfred Knopf entitled Beloved Prophet.

5. Each party shall bear his own costs and Court costs.

6. Charges entered by the bonded warehouse for storage, to the extent they have not been paid by Southern Publishing Co. heretofore, shall be borne fifty (50%) percent by Defendant Otto and fifty (50%) percent by Plaintiffs.

7. All other claims requested in this litigation are expressly denied with prejudice.

JUDGE PRESIDING

APPROVED:

DONALD CURN  
Attorney for Plaintiffs

scripts repositories, or judges. The case was not publicized, and the effect was restricted to the point of immediate dispute and to the staff of the Southern Historical Collection, who had learned from the experience that lawsuits over copyright are not merely a subject for speculation.

Most archivists have not had this object lesson in the dangers inherent in the administration of copyrighted material, but only a few are willing to dismiss the problem as theoretical. The risk of frequent suits is slight, but there is potential for controversy over the use of manuscripts in repositories, and there is a possibility that the next suit may be directed against archivists as well as authors, editors, or publishers. The litigious spirit of the age and the publicity given to copyright by the discussion and passage of the new law enhance the prospect of such controversy and impose on archivists a need for greater caution than they have exhibited in the past.

For the staff of the Southern Historical Collection, *Gibran et al. v. Otto* produced greater concern to understand and follow copyright requirements and to provide maximum protection for staff members and the University by establishing strict procedures for all use of manuscripts, especially photocopying. Staff members prepared new forms, gave formal warnings, and required signed statements of purpose before permitting copying of manuscripts. They followed the progress of the new law with special interest and great anxiety to learn its provisions. The new law is not completely easy to understand, and it leaves many problems unsolved. Nevertheless, all archivists have an obligation to study the new law and to follow its requirements to the best of their understanding.

Copyright affects the work of the archivist in three basic ways. Copyright questions arise during negotiations with donors, during use of the manuscripts for research, and whenever such research leads to a desire to publish all or significant portions of previously unpublished manuscripts. These ways are interrelated, and whenever a problem arises in any one of them an archivist needs to be as fully informed as possible about the total situation. All of these aspects of copyright are affected to some extent by the new law.

The new law made fundamental changes in the status of unpublished manuscripts, which will hereafter be protected by the federal statute rather than by the law of each state (usually unwritten common law) as was the case before 1978. The provisions of the new statute apply to literary materials from the moment they are fixed in tangible form, when the author



finished writing, typing, or recording. In most cases that copyright protection lasts for the life of the author plus fifty years, whether the material is published or not, unless the author in some way gives the material to the public. Furthermore, the law provides the new federal copyright protection for all unpublished manuscripts not already in the public domain, ending the former "perpetual until published" status for manuscripts protected by the common law on December 31, 1977, as well as for all of those written after the effective date of January 1, 1978. For manuscripts whose authors died fifty years or more before 1978, the law provides an interim period of twenty-five years before the expiration of copyright, and thus no unpublished literary work will enter the public domain as a result of the new law until after December 31, 2002, or 2027 if published in the interim.

This means that in 2003 a large quantity of unpublished manuscripts whose authors have been dead for more than fifty years will lose copyright protection. In the future this fact will have significant consequences for archivists and scholars, but few of the effects will be felt immediately, and perhaps some cannot even be anticipated.

An important feature of the new law is that it clearly provides that manuscripts may be placed in a repository for use by scholars without a surrender or violation of copyright. In preceding years, some archivists and copyright experts, notably Ralph Shaw and Seymour Connor, argued that donation or sale of manuscripts to a repository by the person who owned both the manuscripts and the copyright in them was equivalent to general publication and therefore terminated common law copyright without substituting statutory protection, thus placing the material in the public domain.<sup>4</sup> Many archivists disagreed, insisting that ownership of the manuscripts as physical objects and ownership of copyright were two separate and distinct forms of property rights and that a transfer of physical ownership did not include a transfer of copyright unless there was an explicit statement to that effect. The staff of the Southern Historical Collection never believed that placement of manuscripts in the Collection terminated copyright, but they were disappointed that the judgment in *Gibran et al. v. Otto* was not decisive on this question. In 1976 the House Report on the pending new copyright law seemed to accept the Shaw-Connor theory as valid for past transactions, but with the statement that it would not be true under the new law.<sup>5</sup> This opinion by the Judiciary Committee of the House on the copyright status of manuscripts transferred prior to 1978 was not written into the law, and many archivists will continue to doubt

that manuscripts given to them in earlier years entered the public domain when there was no explicit surrender of copyright. After all, the courts could decide that this opinion is incorrect, and it seems safer to assume that these manuscripts are still protected by copyright. Unless a court decision clearly rules on the matter, there may continue to be conflicting views on this point among archivists and the few copyright experts concerned with unpublished manuscripts.

The Shaw-Connor thesis seems to have so many advantages for archivists and scholars that it is rather surprising more did not accept it. That all did not do so may not be entirely because they thought it bad law. The thesis has a corollary — the contention that placement of manuscripts in a repository by a person who owns only the physical objects and not the copyright (for example, incoming letters) is also equivalent to publication and is illegal. Connor himself was unwilling to reject manuscripts including important incoming letters, even though he believed that in accepting them he was technically breaking the law. However true that may or may not have been in the past, the new law clearly permits archivists to acquire, and permit fair use of, manuscripts received from persons who do not own the copyright in them.

The new law poses two potential problems for the acquisitions archivist. One of these is the possibility that the owner of manuscripts who wishes to reserve the right of first publication for his heirs indefinitely may be unwilling to give them up. After all, even though copyright has expired, if no one can get access to the manuscripts or even learn of their existence, the persons having possession and physical ownership could still prevent publication or be the first to publish, of course without copyright. Retention may be the only way to keep control. The other potential problem is that owners of copyright in unpublished manuscripts are now permitted to register their ownership, and there are some advantages in doing so. Registration is a necessary preliminary to a suit for infringement, and prior registration of unpublished manuscripts is necessary for a suit requesting statutory damages. Owners may aid archivists in preparing a photocopy for registration and deposit a condition of gift, or may request such aid quickly if they should learn of infringement and wish to register in order to sue. Archivists may find it wise to process manuscripts by separating the materials the donor can register from those for which the donor does not hold copyright — again the difficult matter of incoming letters.



Should the archivist ask the donor to give copyright along with a donation of manuscripts? Many repositories do this routinely and their staff members say that it causes no problems. Others find donors unwilling to give up copyright and sometimes even unwilling to give the manuscripts themselves once the question is raised, so that they prefer to ignore copyright transfer rather than jeopardize a gift. For many groups of manuscripts, the donor can give little beyond physical possession. If the value of the group consists largely of incoming letters, it is pointless to ask the donor for copyright, and the same is true for the person who owns the manuscripts but is only one among many heirs to copyright. Most professional writers and their heirs are quite conscious of the value of copyright and determined not to relinquish it. The answer therefore depends on the circumstances. The archivist should probably seek copyright if the donor is clearly also the owner of literary rights and if the request will not jeopardize the gift. However, the archivist who regularly does seek copyright should be aware of a new feature of the 1976 act. The right of termination, established to protect an author whose work turns out to be much more popular and more valuable than anticipated, may mean that a transfer of copyright made after 1977 can be terminated by the author later, usually thirty-five years after the initial grant. Furthermore, unless the grant is made by will, stipulated heirs of a deceased author also have termination rights. It is unlikely that termination would be applied to manuscripts in a repository, but the possibility should be considered by an archivist who seeks a transfer of copyright.

Other questions likely to arise during negotiations with owners of manuscripts are those related to use — the reverse of the questions that arise in dealing with readers. What restrictions may a donor place on the use of material, sensitive or otherwise, and what use may a scholar make of unrestricted material? Two sections of the new law deal with these problems. Unless the archivist previously accepted the Shaw-Connor thesis, these two sections do not really change a great many ideas about use of manuscripts in a repository. However, sections 107 and 108 do clarify some aspects of use and photocopying for archivists, and it is a relief to have certain uses of manuscripts written into the law.

These two sections are conveniently reprinted, along with other pertinent material, in the Copyright Office's Circular R21, *Reproduction of Copyrighted Works by Educators and Librarians*, issued in April, 1978. Every repository should have a copy and refer to it frequently, for the



provisions of these sections are complex and the details easily forgotten. Unfortunately, some of them are also difficult to understand.

Section 107 discusses what is called "fair use" of copyrighted material. Formerly a judicial doctrine not explicitly applied to unpublished works, fair use has nevertheless for many years been the justification many archivists and scholars have cited for using manuscripts in a way similar to what they thought the courts would consider fair for published materials. Therefore, the fact that the fair use of manuscripts is now clearly legal will not greatly affect the procedures of most archives. The statute does not define fair use, but it does say that reproduction, by photocopy or recording, for such purposes as scholarship and research is not an infringement and that in determining whether a specific use is fair, the factors to be considered include purpose (profit or nonprofit), the nature of the copyrighted work, the amount or proportion of the work that is used, and the effect of the use on the value and potential market of the work. Archivists may wish this section were more explicit, but it gives them clearer rights to assist scholars than did previous uncertainties. Congress understandably preferred to write general rather than detailed and limited considerations into the law.

Section 108, which relates to reproduction by libraries and archives, is the portion of the new law that seems on first reading to offer the fullest leeway to archivists who assist their readers and correspondents through supplying photocopies. It is a very complex section, and there is a possibility that archivists are interpreting it more broadly than they should. Subsection (a) states that it is not an infringement for a library or archives to supply no more than one copy of a work under conditions specified later in the section if the reproduction is not made for profit; if the collections of the library or archives are open to the public or to all persons in a specialized field, whether affiliated with the institution or not; and if the copy includes a notice of copyright. This sounds as permissive as any archivist or scholar could wish, but it must be interpreted in the light of conditions specified in other subsections. Subsection (b) applies specifically to an unpublished work and stipulates that a library or archives may duplicate such work from its own collection for purposes of preservation and security or for deposit in another library or archives that is open to the public. Subsection (c), permitting the replacement by photocopying of a lost or damaged copy if a new one is not available at a fair price, specifically relates, to published works. The fact that subsection (c) gives an archives as well as a library permission to replace an out-of-print book may cause the professional

archivist to wonder if the persons who drafted the law had in mind quite the same definition of an archives as that given by the Committee on Standards of the Society of American Archivists.<sup>6</sup>

For the next two subsections, (d) and (e), the definitions of an archives and of the collection of an archives become crucial. These are the parts of the law that librarians feel give them the broadest rights to copy for individual users, and archivists have interpreted these to apply to archives also. They have good reason to do so, for the words "archives," "collection of an archives," and "copyrighted collection," which surely includes unpublished manuscripts, run all the way through the subsections.

According to subsection (d), it is permissible to supply "a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue," or to supply "a copy or phonorecord of a small part of any other copyrighted work" under certain conditions an archives would have no trouble in meeting. Subsection (e) provides that it is permissible to provide a copy of an "entire work" or a "substantial part of it" if the "copyrighted work" cannot be obtained at a "fair price" and if conditions similar to those in subsection (d) are met. Since archival collections are chiefly unpublished manuscripts and not published works, and these manuscripts are often copyrighted materials not obtainable at a "fair price" or indeed at any price except through copies supplied by the archives, archivists had no hesitation in concluding that subsections (d) and (e) gave them great leeway to supply photocopies.

It therefore came as a shock to the large group of archivists attending a session of the Society of American Archivists in Salt Lake City in October 1977 when the Register of Copyrights informed them that the two subsections apply only to published materials. Copying of unpublished manuscripts for individual scholars, said Mrs. Ringer, must be justified by Section 107 on fair use and not by the provisions of Section 108. Archivists were grateful that Barbara Ringer, in the midst of preparation to put the new law into effect, took time to travel to their meeting and discuss their rights and responsibilities under the new law. Nevertheless, many of them left the session feeling more confused than ever and wondering whether the new law as interpreted by the Register of Copyrights had improved their situation. To some of the individuals who questioned her after the meeting, Mrs. Ringer, who apparently does not believe in the Shaw-Connor thesis, emphasized that



the law really makes no great change in what was permissible before its passage and that whatever a repository staff felt comfortable in doing before 1978, it should be able to do under the new law.

It was unfortunate that no archivist had a copy of the law at hand to ask Mrs. Ringer the meaning of specific words in subsections (d) and (e). Some of those who scrutinized the law later were still unconvinced that these passages apply only to published materials. It is true that the legislative history of the law shows that in these subsections Congress was chiefly trying to resolve the differences between publishers and librarians, but the language of the law itself encourages the belief that (d) and (e) are broad enough to cover manuscripts and that never-in-print materials may be copied under specified conditions as well as periodical articles and out-of-print books. Congress did not write the law hastily, and the care with which subsection (b) is explicitly confined to unpublished materials and subsection (c) is explicitly confined to published materials indicates that when Congress wished to exclude one or the other of these categories of copyrighted works, it took care to do so.

Dean L. Ray Patterson, of the Emory University School of Law, discussed copyright at a session of the annual workshop of the Society of Georgia Archivists in Atlanta on November 18, 1977, and during the question period offered encouragement to archivists. In response to a question on the interpretation of 108 (d) and (e), Dean Patterson relieved the audience by his opinion that these sections should not be interpreted narrowly to apply to published works only and his statement that he as a lawyer would be willing to take a case arising out of such conflicting interpretations.

The House Report on subsection (f) of 108 also gives encouragement to the belief that Congress recognized the nature of archival holdings and meant to include them in the permissive features of 108, for it referred to copying of "papers, manuscripts, and other works."<sup>7</sup> Subsection (f), however, affects copying rights only by inference, for the pertinent section is the stipulation that the rights given elsewhere in 108 do not relieve a library or archives of any "contractual obligation" made at the time of acquisition. The *Report* explained that an archives might promise a donor of manuscripts not to permit copying, and in such a case, whatever copying permission the new law gives will not protect the archivist who permits copying from being liable to a charge of violation of contract.

In spite of this support for a broader interpretation of 108 (d) and (e),

only a very rash archivist will place complete reliance on an opinion relating to copyright contrary to that of the Register of Copyrights. Except for the surer application of fair use, Mrs. Ringer's interpretation seems to leave archivists where they have always been, with the uncertain feeling that they are safe only until challenged, that a challenge may come at any time, and that such a challenge might be embarrassing and could prove dangerous. Under such circumstances, archivists could find safety in passing the responsibility on to users by setting up unsupervised self-copying equipment, displaying a warning of the obligation to observe copyright, and otherwise having nothing to do with photocopying. Such a procedure has some drawbacks and deficiencies. Not all archivists can provide such facilities, and those who do cannot assist correspondents by such means. Other archivists, even more concerned for the immediate physical safety of fragile manuscripts than for the remote danger of copyright infringement, are unwilling to subject manuscripts to unsupervised copying. If 108 (d) and (e) apply to published works only, archivists for whom unsupervised copying provides no solution must copy only for other libraries and archives or else look solely to fair use for guidance. To those who do this, another provision of the law offers some comfort, for Section 504 (c) (2) states that an individual employee of a library or archives will not be subject to statutory damages even if found guilty of infringement if he or she had "reasonable grounds" for believing the copying was warranted by fair use. To provide proof of such reasonable grounds, before filling any request for a photocopy, cautious archivists require a signed statement that the copy is requested only for fair use.

The final provision of Section 108 to affect manuscripts is subsection (g), which states that no copying privilege given in earlier sections applies to "related or concerted reproduction or distribution of multiple copies." This seems clearly to rule out microfilm or microfiche editing and publication without the consent of the copyright holder or holders and may affect some documentary projects whose editors have assumed that film is not publication.

A few details should be emphasized. Whatever rights of copying 108 may or may not give to a library or archives, it definitely does not give a user any rights beyond fair use. The copyright owner holds the right of concerted or systematic publication, and anyone reading manuscripts, taking notes on them, or acquiring photocopies, is still obligated not to exceed fair use personally or to permit use of notes or copies by others to an extent



exceeding fair use. Section 108 imposes certain obligations on a library or archives copying in accordance with its provisions; they are not difficult, but they should not be neglected. The archives should display a warning of copyright at the place where orders are taken and on all unsupervised copying machines and should include a warning of copyright on all order forms. Any reproduction made by a library or archives should include a notice of copyright. The Copyright Office has issued regulations establishing the wording of these notices and stipulating type size and method of use. These regulations are included in Circular R21 along with the text of Sections 107 and 108 and other useful information. This circular can be very useful to an archivist discussing photocopying and the specific related procedures of a library or archives with either a donor or a reader.

One aspect of the administration of manuscripts touched on slightly by the new law has been mentioned but deserves fuller consideration, and that is restricted access, the contractual obligations of 108 (f) (4). Copyright owners have in the past often used copyright to protect privacy, refusing to permit publication of materials they considered embarrassing to themselves or to others. They may still prohibit full publication if the potential publisher requests permission, or sue for infringement if the material is published without permission, but to sue they must be willing to place a deposit and registration copy of the material in the Library of Congress, with the possibility that it may be made available for use. Furthermore, their copyright protection applies only to the language of the manuscript, not to the information and facts in it. Owners of copyright who are not themselves owners of the physical manuscripts have no other recourse than to use copyright to protect privacy. It is now clearly not illegal for the manuscripts to be in a library or archives and for fair use to be made of them, unless such use may be considered contrary to state laws of invasion of privacy or libel. However, donors of manuscripts who are concerned to protect the privacy of themselves or others will have the right to impose restrictions on access as a condition of gift, and the archives accepting manuscripts with such conditions is obligated to observe the contract. Restricted access may mean complete closure for a term of years, no access without permission of the donor or some other specified person, or reading but not photocopying. It can often provide greater protection for privacy than does copyright. Archivists, whose purpose is to assist scholarship, try to ensure that restrictions on access are reasonable in duration and in other requirements but recognize that restrictions may sometimes be necessary to ensure later access or even preservation. When making such restrictions archivists

### **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 specified 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.

This 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.



should consider the copyright status of the work as well as donor wishes; some students of the subject believe that restricted access cannot be enforced once copyright expires. The copyright law naturally does not cover such a matter, and any archivist would be wise to seek legal advice before accepting restrictions designed to extend beyond the expiration of copyright.

It is probable that the most urgent questions about copyright arise when a scholar wishes to publish materials he has seen in the course of his research. Usually an order form stipulating that copies are supplied for research only and not for publication will screen out the person who requests copies knowingly intending to publish. The archivist should then refuse to supply copies until the question of permission by the copyright owner has been settled, for whatever permission to copy the new law may give applies only if the archivist has no reason to believe publication is intended. Archivists disagree as to whether the repository itself as the owner of the manuscript has the ethical right to refuse permission to publish, some contending that the holdings of an archives should be available on an equal basis to all users for all purposes. Others argue that the archives has a right and even an obligation to a donor, and often also to a parent institution, to ensure that the material, if published, is edited and presented in a scholarly and reputable manner. These persons further believe that an editor who embarks on a lengthy piece of documentary editing has a right to reasonable protection from competitive publication of the same material by another editor who begins later but works more hastily. Whatever opinion an archivist may hold on this matter, there can be no doubt that an archives must refuse to cooperate with any project dependant on copying that might damage the manuscript or on copying that the archives cannot undertake.

So far as copyright is concerned, however, the significant point about editing and publication is that even if the archives is quite willing for the publication to take place and ready to cooperate, permission of the copyright owner should be obtained before a copy is supplied to the editor or other arrangements are made. It is the responsibility of the editor to obtain this permission, but the archivist may give such information and assistance as is possible. It may be hard to determine and locate the copyright owner or multiple owners, and even when this has been done and the permission received, a cautious archivist will usually require the editor-publisher to assume all responsibility before supplying a photocopy, for publication may provoke conflicting claims to copyright.

Questions about publication are more apt to arise when a scholar wishes to quote a small portion of a manuscript in a repository, one copied by hand while taking notes or one supplied with the understanding that only fair use will be made of it. Many archives require that permission to publish must be requested of them in all cases. Such a request prior to any publication gives the archivist the opportunity to check on the observance of any stipulated restriction, to verify or correct the citation, and to renew the warning that any use beyond fair use requires the permission of the copyright owner. The insistence on permission by the repository may prove advantageous, but so far as copyright is concerned it is usually worthless, and the archivist should be sure that no permission places legal responsibility on the institution.

Many scholars today, particularly young ones, are impressed with archival warnings about copyright and ask the archivist for more information. Few archivists are lawyers, and those who are not should guard against giving legal advice in specific cases. However, as professional people concerned with the use of archival materials, archivists should be able to give general information on the meaning and ownership of copyright and on fair use. Archivists may explain the considerations — privacy, prestige, or profit — which usually influence copyright owners and may suggest the method of approaching such persons. If called on by the owner for information or advice, the archivist should supply information but should not urge that permission be given. Whether the copyright owner is a donor or not, the archivist owes courtesy and cooperation as well as careful observance of the law and protection of all legal rights. The archivist may at times seem to be walking a tightrope between the demands of a user and those of a copyright owner interested in full protection. The reputation and safety of both the archives and the archivist may depend on how wisely the conflict is resolved.

The new copyright law leaves much unsettled, and without doubt there will be requests for revision. Congress was aware of this and provided for review of several problems. The Register of Copyrights will review library and archival photocopying in consultation with interested persons and report to Congress on the situation in 1982 and every five years thereafter. As was true when the law was passed, publishers and librarians will probably be the most numerous and most vocal interested persons, but the review will provide an opportunity for archivists to explain their needs. They may wish to ask for revision applying 108 (d) and (e) to manuscripts as well as



published materials so clearly that there can be no difference in interpretation.

If future Congresses give as careful consideration to revision of the copyright act as was given to its drafting and passage, there is reason to hope that problems of interpretation will be solved. Congress made great efforts to provide a just, reasonable solution to complex problems. It is now the task of archivists to use the new law to the best of their understanding, with due regard for their professional purpose of facilitating scholarship, their moral and contractual obligations to their donors, their legal obligations to all copyright owners, and their need to protect themselves and their institutions.

Archivists may take heart that few of the manuscripts they administer have such value that controversy over them is likely to arise. For the potential best seller, the possible rivals of *A Diary from Dixie*, *Children of Pride*, or *Beloved Prophet*, it is impossible to be too careful. Most archival holdings are more humdrum, a far cry from such exciting and popular works. The law does not discriminate because of value, but the copyright owner may. Most heirs would be delighted to see in print grandpa's memoirs or Aunt Emily's family history or a few ancestral letters to a prominent person. If some of these show up in a heavy scholarly work or a documentary publication, most copyright owners will either never see them, or else will be pleased by them, or at the worst will never realize they have a right to object.

This does not mean that copyright violation is legal because the writer was obscure or wrote on a subject of little interest to the majority of readers. It does account for the fact that many historians and editors have been exceeding fair use for years with impunity. They probably could not have functioned if they had not done so, and if they are willing to take the responsibility and run the risk, archivists may on occasion have to be bold and run some risks also. Archivists should be extremely careful about copyright but not paralyzed by it.

Finally, the new copyright law gives hope for the future. Younger archivists can look forward to a benefit their elders will never experience. On January 1, 2003, the large quantity of older manuscripts now under copyright will enter the public domain, and others will follow every year thereafter. Even if the new law promised no other aid to archivists and readers, the certainty that the perpetual feature of common law copyright will eventually end makes it all worthwhile.

1 The best explanation for the archivist of the copyright status of manuscripts prior to the passage of the new law is found in Karyl Winn, "Common Law Copyright and the Archivist," *The American Archivist*, XXXVII (July 1974), 375-386. The new law itself is the starting point for any study of it; see Public Law 94-533 (Oct. 19, 1976), *General Revision of the Copyright Law*, 90, *Statutes at Large*, 2541. A convenient pamphlet, or slip law, edition is available on request from the Copyright Office. Donald F. Johnston, *Copyright Handbook* (New York and London: R.R. Bowker, 1978), discusses and reprints the new law and provides other useful information.

2 *Mary K. Gibran et al, v. Annie Salem Otto*, United States District Court for the Southern District of Texas, Houston Division, Civil Action No. 72-H-123. The original complaint was filed on January 28, 1972, and the case was closed on July 10, 1974.

3 Annie Salem Otto, ed., *The Letters of Kahlil Gibran and Mary Haskell* (Houston, Texas: Southern Printing Company, 1970); Virginia Hilu, ed., *Beloved Prophet, The Love Letters of Kahlil Gibran and Mary Haskell and Her Private Journal* (New York: Alfred A. Knopf, 1972).

4 Ralph R. Shaw, *Literary Property in the United States* (Metuchen, N.J.: Scarecrow Press, 1950), 136 - 137; Seymour V. Connor, "The Problems of Literary Property in Archival Depositories," *The American Archivist*, XXI (April, 1958), 143-152.

5 United States Congress, Committee on the Judiciary, *Copyright Law Revision*, House Report No. 94-1476, 94th Congress, 2nd Session, p. 124.

6 Frank H. Evans, et al., "A Basic Glossary for Archivists, Manuscript Curators, and Records Managers," *The American Archivist*, XXXVII (July, 1974), 417.

7 *Copyright Law Revision*, p. 77.