

College and University Archives  
Readings in Theory and Practice

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## CHAPTER 11

# Copyright Law and Unpublished Materials: Fair Use and Strategies for Archival Management

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Copyright law will often determine the ability of a college or university archivist or researcher to make practical use of manuscripts, photographs, and other unpublished materials.<sup>1</sup> Even materials that are many decades old can still be protected by copyright law, granting to the copyright owner control over duplication and many other uses of the materials. To reproduce letters, diaries, and other works, even for preservation, research, or other important pursuits, the archivist or other user may need to seek permission from the copyright owner. That owner, however, may not be easily identified or simply may not cooperate with the request.<sup>2</sup> For many common needs, seeking permission may be impracticable. The user might instead need to depend on fair use or other exceptions to the rights of copyright owners in order to make a lawful and proper use of the protected materials.

This chapter will give a general overview of relevant copyright law, framing the context of the law in which the archivist or user will often need to make decisions. Much of the background of the law will demonstrate that a vast wealth of materials in archives is indeed subject to copyright protection and that fair use

remains an essential means for allowing many possible uses of unpublished materials. This chapter will also outline strategies for working with fair use and for dealing with its uncertainties and the changes in the law that have resulted from a series of recent court rulings.<sup>3</sup>

The emphasis in this chapter is on the application of fair use in the administration of collections or individual items when the parent college or university does not own the copyright. These collections and the related legal issues typically have stirred some of the most complex copyright questions for archivists. The copyright issues also have been the subject of much misunderstanding among archivists and researchers alike. When the parent institution holds the copyright, it has the opportunity to clarify rights and grant permissions, thereby avoiding problems surrounding fair use. Archivists and officers of the parent institution should develop clear policies and guidance for managing the copyrights they hold. This chapter will focus instead on strategies for dealing with copyrights that are not held by the institution and finding a path through the complexities of fair use for unpublished materials that are important for research and education.

### **The Copyright Context of Fair Use**

Copyright law is frequently described as a balance of private and public rights. The law grants rights to creators in order to encourage originality and the public dissemination of new works. The law also recognizes the need to serve additional public interests in using, learning from, and building upon the creative efforts of others. The basic structure of the 1976 Copyright Act reflects an attempt at this balance, all in furtherance of the U.S. Constitution's provision that copyright "promote the Progress of Science and the useful Arts."<sup>4</sup> For example, Section 106 of the Copyright Act outlines the exclusive rights belonging to creators—rights that include reproduction, distribution, public performance, and public display.<sup>5</sup> Counterbalancing these exclusive rights is a set of exceptions or limitations on owners' rights. Among them is Section 107, which grants limited rights of "fair

use" to the public.<sup>6</sup> Fair use has long provided the right to quote from or to make other limited uses of copyrighted materials, especially for purposes of research, scholarship, and education.

This balancing of private rights and public rights has become increasingly important as the scope of copyright protection has expanded. Congress has restructured the Copyright Act in recent decades to define broadly the reach of copyright protection. For example, through most of American history, an unpublished work was protected under rather ill-defined "common-law" copyright protection. A work had the benefit of federal statutory copyright protection only upon publication, and then only if published with a formal copyright notice (such as "© 1975, Jane Smith"). Effective in 1978, Congress "preempted" or abolished the common law of copyright. At that time, Congress began to phase out the requirement of a copyright notice and granted automatic copyright protection to a wide variety of works that are "original works of authorship" and "fixed in any tangible medium of expression." As an overall result of these developments, federal copyright law grants legal protection to many published and unpublished writings, pictures, music, software, websites, and other works—whether created before or after 1978 and whether the works have a copyright notice or not.

The preemption of common-law copyright also brought important changes in the duration of copyright protection for unpublished works. Under former law, the common-law protection lasted in perpetuity. As long as the letter, diary, or photograph remained unpublished, it also remained protected by copyright. Once published with a notice, however, the work became subject to the limited—although long—duration of statutory copyright protection. Today, perpetual protection is gone, and a statutory term of protection applies to many older works in archival collections. How long do copyrights now last? The basic rule today is that copyrights last for the life of the author, plus seventy more years. In most cases, that same rule applies to early unpublished materials. Thus, for example, the correspondence and manuscripts created by an author who died in 1935 likely entered the public domain at the end of the year 2005.<sup>7</sup>

That is the basic rule of copyright duration. The complete law of copyright duration is enormously more complicated.<sup>8</sup> For example, special duration rules apply to materials that were created as “works made for hire” and to materials that have anonymous or pseudonymous authorship.<sup>9</sup> Of particular importance to archivists, Congress also did not extend these rules of copyright duration to pre-1978 unpublished works until 2003.<sup>10</sup> Thus, even unpublished materials by Thomas Jefferson (who died in 1826) did not actually enter the public domain until January 1, 2003. Congress then added this twist: If the materials were first published by the rightful owners between 1978 and 2003, the copyright would endure an additional forty-five years, to the end of 2047. Consequently, the issue of copyright duration, even for early manuscripts, stirs a potentially complicated analysis.

Although copyright applies automatically and the protection endures for many years, the rights will eventually expire, and archivists are likely to find that many unpublished works from the distant past are now in the public domain. Identifying the public domain is an important means for making collections available for use in connection with research, librarianship, preservation, and a host of other projects. So long as the work is protected, however, fair use is an important means for allowing archives and researchers to make practical uses of collections. As fair use and other exceptions to the rights of owners have become more important, Congress and the courts have struggled with the application of these provisions to unpublished works. This chapter will demonstrate that court rulings are the leading source for understanding the practical meaning of fair use, and archivists must follow developments in the courts in order to apply the law appropriately.

### **The Distinctiveness of Unpublished Works**

When Congress extended the federal copyright system to unpublished works in 1978, it confronted the extraordinary concerns that surround application of statutory exceptions to unpublished materials. Such works received stronger and longer protection under common-law copyright on the presumption that authors needed to retain the right of “first publication.” By this theory, only the author of a manuscript or personal

letter should decide when or whether it is ready for publication. Unpublished works may also reflect highly personal information and perhaps should not be disclosed at all; the private journal entry or business memorandum could disclose secret thoughts or competitive plans. Based on these justifications, the common law of copyright gave perpetual protection to unpublished materials, and it established a narrow—if not prohibitive—scope of fair use.

Congress has enacted a few provisions that give unusual treatment to unpublished works. One such provision of importance to archivists is Section 108 of the Copyright Act.<sup>11</sup> Like fair use, this statute is a limitation on the rights of copyright owners. Section 108 allows many libraries to make copies of materials for purposes of preservation, private research, and interlibrary lending. The preservation rules reveal something about the concerns associated with unpublished works.

For purposes of preservation, a library may make copies of published works within a detailed set of conditions. For example, under Section 108(c), a qualified library may reproduce a published work for the purpose of replacing an item in the collection that has been “damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete.” First, however, the library must search the market to determine that an “unused replacement cannot be obtained at a fair price.”<sup>12</sup>

The preservation rules for unpublished works are considerably different. Unpublished works are often unique and not replaceable on the market. Section 108(b) allows the library to copy such works for purposes of preservation or security, but the library need not check the market for obtaining replacements, and the library need not wait until the work is damaged or has suffered some other hazard. In the case of unpublished works, the library can make the copy in advance of any harm, holding the copy for “preservation and security.”<sup>13</sup> Because this provision allows copying of the work in full and can extend to preservation of works in a digital format, Section 108 can become the means for establishing a digital library of archival materials.<sup>14</sup>

Little else in the U.S. Copyright Act sets forth different rules for published and unpublished works. For example, Section 110 allows educators to make some uses of copyrighted works in the classroom and in distance education; the statute does not distinguish between published and unpublished works.<sup>15</sup> Similarly, the fair-use statute as originally enacted in 1976 also made no such distinction.<sup>16</sup> As this chapter will demonstrate, however, courts have interpreted fair use to give it a distinctly different scope when applied to manuscripts and other such materials. These developments have led to considerable confusion about the meaning of fair use and have stirred occasional fears about its survival.

### **Fair Use Takes Shape**

The earliest American court ruling that established principles analogous to fair use dates to 1841, but the law became more firmly defined when Congress adopted the first fair-use statute in 1976.<sup>17</sup> The statute specifies four “factors” for evaluation and application in determining whether a particular activity is within the law:

- 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>18</sup>

These criteria are rooted in early judicial decisions, and they have been applied to a wide variety of situations and needs. Yet the factors alone offer few specifics about whether a particular use is “fair” or is an infringement. The many court decisions about the factors offer these general understandings:

- *Purpose of the use:* The law generally favors noncommercial uses, although many commercial uses can still



be fair use. Many works of history and biography can be commercial endeavors, and the law often applies to uses of works in the context of commercial news products.<sup>19</sup> Increasingly important to the courts is the notion of “transformative” purpose. If the user is transforming the original work into something new, whether making a new version of the work or enveloping it with critical commentary, courts will generally tip this factor in favor of fair use.<sup>20</sup>

- *Nature of the work*: The law will allow greater fair use of some works, especially nonfiction and published works. The law allows less fair use of highly creative works or of unpublished materials.
- *Amount of the work*: Generally, the less one uses, the more likely that the use is fair. Brief quotations or other excerpts of a larger work are often within fair use. Courts also have allowed less fair use if one takes the “heart of the work” or the most important part.<sup>21</sup>
- *Effect on the market or value*: Uses that actually compete with the market for the original work, or with the market that the copyright owner might actually exploit in the future, will often weigh against a finding of fair use.<sup>22</sup> Most brief quotations will not erode economic interests.<sup>23</sup> Courts also allow larger excerpts as may be necessary to create a new work or to offer a critical examination of the original.

In the decade following enactment of the fair-use statute, the U.S. Supreme Court ruled twice on the substantive meaning of fair use. In 1984, the Court handed down its first ruling about fair use in the case of *Sony Corp. of America v. Universal City Studios, Inc.*<sup>24</sup> At issue was whether Sony was liable for “contributory infringement” for making and selling VCRs. In part, the Court ruled that recording broadcast television programs at home for purposes of “time shifting” was within fair use. The decision signaled a broad application of fair use for single copies of works made for personal needs.

The second decision, handed down the following year, offered important elucidation about the meaning of fair use in general and about the fair use of unpublished works in particular. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>25</sup> the Court faced unusual circumstances. *The Nation* magazine surreptitiously obtained an advance copy of President Gerald Ford's then-unpublished memoir. By publishing some of its most enticing excerpts, *The Nation* undermined the value of the memoir's scheduled publication at *Time* magazine.<sup>26</sup> It was a case of the unpermitted taking of a manuscript, the use of crucial quotations, and the direct hindrance of economic value that the author and publisher were ready to exploit. In the process, the Court declared a general rule: The scope of fair use for unpublished materials is narrower than the scope for published works.<sup>27</sup> That one resolution laid the foundation for many years of litigation and legislation about copyright and unpublished materials.

### **Salinger and Hubbard Go to Court**

The *Harper & Row* decision offered important guidance from the Supreme Court, and it greatly influenced the shape of fair use in the lower courts. It had a particularly profound effect on subsequent decisions about the use of unpublished materials. Two cases from the late 1980s involving the writings of authors J.D. Salinger and L. Ron Hubbard were especially important; they set the law on a sharply restrictive path and posed a direct threat to the traditional activities of archivists, historians, and biographers.

The first ruling came in January 1987, when the Second Circuit Court of Appeals held in *Salinger v. Random House, Inc.* that Salinger could prohibit most uses of his unpublished letters in a biographical study by Ian Hamilton.<sup>28</sup> The court barred not only reprinting and quoting from the letters—activities that frequently raise copyright questions—but even the close paraphrasing of Salinger's correspondence. Two years later, in *New Era Publications International, ApS v. Henry Holt and Co., Inc.*, the same court affirmed the analysis from *Salinger*, striking what appeared to be a sweeping blow against fair use for unpublished works.<sup>29</sup> In *New Era*, the court ruled against the use of some

writings of L. Ron Hubbard in a critical biography of the well-known founder of Scientology.<sup>30</sup>

The *Salinger* case was especially troublesome, because it went directly to the fundamental uses of archival collections. Archives are replete with documents from multitudes of correspondents, and biographers and historians customarily rely on them. The Salinger letters were openly available to Hamilton and other researchers at university libraries around the country. Salinger wrote and mailed the letters; they eventually made their way from recipients to libraries. By sending the letters, Salinger lost control of their disposition, although he retained the copyrights.<sup>31</sup> Quotations from such materials customarily appear in historical and biographical works under the aegis of fair use. The court ruling did not directly prevent donors from depositing papers or preclude archives from providing access to them. By expanding Salinger's authority under copyright law to block most quoting and even paraphrasing, however, the ruling effectively restrained publication of, and public access to, archival information. Publishers soon revised and cancelled projects that drew upon unpublished resources.<sup>32</sup>

The stringent analysis of fair use in *Salinger* and *New Era* placed heavy emphasis on the unpublished "nature" of the materials.<sup>33</sup> The court relied on two concepts: The earlier common-law right of "first publication" held by authors, and a right of privacy that was creeping into the copyright equation. Before Congress expressly terminated common-law copyright in the 1976 Copyright Act,<sup>34</sup> the common law provided that authors should retain the privilege of determining the time and circumstance of first publication. The intentions of such a doctrine have merit; authors should decide whether and when their manuscripts are fully prepared for public exposure. Despite the fact that fair use depends on so many variables, and despite the preemption of the common law by the 1976 Act, the Second Circuit applied the common-law rationale of "right of first publication" to constrain fair use.<sup>35</sup>

The relationship of copyright and privacy poses greater complications. Privacy law evolved slowly during the past century—

inspired by an 1890 article by Louis Brandeis and Samuel Warren<sup>36</sup>—and it is secured today even in constitutional principles.<sup>37</sup> Privacy is a discrete body of law with its own applicability and appropriate scope.<sup>38</sup> Privacy is a serious right to be respected, but privacy law and copyright have conflicting objectives. Privacy secures confidential actions, thoughts, and writings; copyright, by contrast, seeks to promote the growth of knowledge through public dissemination of information.<sup>39</sup>

These worthy goals must be balanced, not confused. But the *Salinger* and *New Era* cases infused fair use with privacy overtones. The court underscored Salinger's obsessive privacy and Hubbard's stringently controlled public image.<sup>40</sup> The *Salinger* decision especially noted that quotations in a biography impair the market value for publishing Salinger's letters, and the letters have a greater value due to Salinger's obsessive protection of privacy.<sup>41</sup> Privacy was shaping important considerations surrounding the fair-use factors.<sup>42</sup>

### **The 1992 Amendment and Subsequent Cases**

The *Salinger* and *New Era* cases weighed heavily on interpretations of fair use. They did not establish a *per se* rule, but they created the impression of one. At the least, these cases formulated an extraordinarily narrow understanding of fair use as applied to unpublished works. They had the practical effect of inhibiting the research value of archival collections and deterring authors and publishers from making even simple excerpts available to the general public.<sup>43</sup> Congress reacted in 1992 by adding one sentence to the fair-use statute: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."<sup>44</sup> Congress was not defining "fair use" but was instead rejecting any notion of a *per se* rule and sending users of unpublished works back to the four factors in the statute. Congress was also seeking to assure that fair use could extend to unpublished works; more recent court rulings accordingly demonstrate that fair use can find some practical meaning for archivists, researchers, publishers, and others.

The cases since 1992 may not offer the clearest possible guidance about the exact meaning of fair use, but they have revealed an openness and flexibility about the law that had been missing from earlier judicial rulings.<sup>45</sup> The case of *Sundeman v. The Seajay Society, Inc.* demonstrates the point well.<sup>46</sup> A researcher at a non-profit foundation excerpted significant quotations from a manuscript by author Marjorie Kinnan Rawlings and included those quotations in an analytical presentation delivered to a scholarly society. The court appropriately turned to the four factors of fair use and ruled that the researcher was acting within the law.

The court in *Sundeman* emphasized that the "purpose" of the use was scholarly and transformative, and the use facilitated criticism and comment about the original unpublished manuscript. All of these purposes worked in favor of fair use. The court was also satisfied that the "amount" was acceptable. The amount was consistent with the purpose of scholarly criticism and commentary, and the use did not take "the heart of the work." With regard to market "effect," the court found no evidence that the presentation displaced any market for publishing the original work, and a presentation at a scholarly conference may in fact have increased demand for the full work.<sup>47</sup>

In another recent case, *NXIVM Corp. v. The Ross Institute*, a court ruled that even more significant quotations and excerpts were permissible under fair use.<sup>48</sup> NXIVM offered business training programs and prepared elaborate manuals but cautioned participants against disclosure or further circulation of the materials. The defendant obtained a manual and wrote a critical examination of it, posting the study on a website along with approximately seventeen pages from the 500-page manual. The court was persuaded that the "purpose" favored fair use; the use was for purposes of criticism or comment, and it was transformative. The "amount" was also acceptable, and the court concluded that adverse market "effect" stemming from criticism was not a harm that copyright law should protect.<sup>49</sup>

While limited quotations in a conference proceeding, or even sizable excerpts in a critical analysis, might not reflect the many uses of manuscript collections, these recent decisions were

stretching fair use much more broadly than did the *Salinger* and *New Era* rulings. Moreover, while the more recent cases found in favor of fair use, the courts still ruled that the unpublished "nature" of the work rather summarily leaned the second factor against fair use. The *Sundeman* and *NXIVM* cases make clear that even with that one strike against fair use, researchers can nevertheless make lawful uses of unpublished materials under circumstances that create more favorable outcomes on the other three factors.

As a practical effect, most analyses of fair use begin with the "nature" factor weighing against the user of unpublished materials. When a biographer quoted from letters written by author Richard Wright, the court found "little room" for discussion of the "nature" factor.<sup>50</sup> When a magazine published a letter that had been distributed only to students enrolled in a writing course, the court resolved that it was unpublished and tipped the "nature" against fair use.<sup>51</sup> Several other cases reinforce these rather swift conclusions about this factor in the analysis of fair use.<sup>52</sup> To fit within the law, archivists, researchers, and other users of unpublished works will need to proceed with some caution to assure that the other three factors are likely to weigh securely in favor of fair use. Consequently, fair use in practical application will continue to be relatively narrow when applied to unpublished works.<sup>53</sup>

Whatever fair use may mean, the need to understand and work with fair use is clearly critical to researchers, publishers, and others who often quote from materials and occasionally reprint a photo, document, or other work in full. Fair use is also vital to the work of archivists and librarians who desire to make their collections more accessible and therefore often reproduce or make other uses of unpublished copyrighted works. The archives or manuscript repository may pursue its own publication agenda, or it may embark on the creation of a digital library. These creative ventures leave the archives to grapple with the lawfulness of digitizing and allowing wide access to the wealth of copyrighted materials in the collections. Understanding fair use and other provisions of copyright law can be imperative.

## Strategies for Action by Archivists

With copyright law becoming increasingly complicated, and with fair use applied relatively narrowly to unpublished works, archivists must adopt new strategies to minimize legal impediments to the use and worth of manuscript collections. This chapter proposes four strategies rooted in the belief that manuscript collections do not exist for their own sake but are to serve public information needs. Collections are to be open to researchers to the fullest extent allowed under law and under agreements with donors.<sup>54</sup> They are also to be available for dissemination to the public by researchers and publishers within those same limits, whether through quotations, analysis, or sometimes substantial reprinting. These strategies are flexible in order to serve widely varying donor needs, including rights of privacy and express restrictions, even though privacy and donor restrictions do not apply to every collection. But copyright applies to nearly every document; thus, a meaningful response to copyright is essential.

### *Strategy 1: Distinguish the Cases*

Why did a court rule that quoting from Salinger's letters was not fair use, while another court found that significant quotations from the manuscript in *Sundeman* was fair use? The answer lies principally in the facts and circumstances presented before the court. The early cases involving the writings of Salinger and Hubbard were unquestionably influenced by the prominence of the individuals and their obsessive protection of privacy. Their writings also had identifiable value, which they—or their heirs—might have been willing to exploit under proper circumstances. Perhaps equally important, the writers had indicated a strong desire not to allow disclosure.<sup>55</sup> Indeed, the *New Era* case emphasized that the copyright owners were planning to release the materials only under their own terms; extensive fair use would jeopardize those plans and degrade the value of future publications.<sup>56</sup>

By contrast, the manuscript in *Sundeman* was not so imbued with implications of privacy or control. The manuscript was of a book that the author had sought to publish but apparently without success. The quotations were also incorporated into a scholarly study and did not conflict with the owner's likely plans for the materials.

Realistically, most archival records lack the notoriety, value, or peculiarities of the Salinger and Hubbard papers. Many works of history and biography rely on unpublished materials from less-famous or less-sensitive writers. Writings with a non-personal content, or from little-known persons, or from authors long dead or otherwise well examined in the public light, or from writers who thrust themselves into public exposure—such as politicians or celebrities—should be subject to a broader and more flexible scope of fair use. Recent cases give reason for optimism.

### ***Strategy 2: Confirm and Exploit the Public Domain***

Copyrights expire. The former common law may have lasted in perpetuity, but since the beginning of 2003, copyrights in unpublished works are subject to expiration. Typically, the copyrighted work will enter the public domain seventy years after the death of the author.<sup>57</sup> Once in the public domain, the limits of fair use no longer apply, and the writings may be quoted and even reprinted in full without copyright restrictions. Each year will place in the public domain the unpublished writings of authors who died seventy years before.

This development in the law creates opportunities for unfettered uses of archival collections. To fully enjoy the benefits of the law, archivists will need to research and record the deaths of writers represented in their collections. Major correspondence collections include writings from numerous individuals, but the most prevalent writers are ordinarily obvious, and a full inventory or guide should include their dates of death. Repositories should also assemble biographical and genealogical resources to confirm those dates, and archivists should regularly review obituaries and other current reports. Death dates can ultimately determine copyright privileges. Archivists should record these dates and indicate when copyrights expire in a note in the collection description or finding aid.

### ***Strategy 3: Document the Ownership of Copyrights***

Ownership of the artifacts—whether letters, diaries, and other writings—does not necessarily include ownership of the copyrights.<sup>58</sup> The donation or sale of a collection—even if made by



the writer and copyright owner—does not include the transfer of copyrights, unless expressly stated in a signed writing.<sup>59</sup> Prominent individuals or authors may recognize copyright implications, but most donors probably have neither awareness nor concern about copyright. They may not know their rights or that the utility of their collections is constrained. They may in fact prefer the broadest access, without legal limits. These donors may be willing to contribute copyright ownership along with the collection but only if they are asked.

Whenever possible, archivists should include a written assignment of copyrights among their deed-of-gift forms for gifts and purchases. With few exceptions, most people do not explicitly assign copyright ownership in their wills. Consequently, securing a transfer of copyright from a living donor is almost always preferable, before copyright ownership is divided among multiple heirs. The assignee of the copyright may also record the document of transfer with the U.S. Copyright Office to make the ownership part of the public record and to clarify claims.<sup>60</sup> While these practices may be most easily and effectively carried out at the time of the gift or assignment, they can also be completed long after the fact. For example, an archivist can secure a transfer of copyright for materials that are already in the collection or record the transfer or register the claim of ownership today, even if they are based on transactions long since completed.

Archivists also have a crucial role regarding the management of rights that donors retain. The identity of copyright owners should be included in the collection files, and archivists should discuss the implications with donors. In particular, upon the death of a writer, copyrights may pass under the terms of his or her will,<sup>61</sup> although few wills include any reference to copyrights. After specific bequests of identified belongings for particular individuals, a typical will devises the "residue" of the estate to a variety of children, grandchildren, friends, or other relatives and heirs. If copyrights are not specified, they may be divided proportionately among the residue beneficiaries. Control of copyrights is thus shared among the entire group. When permission for quoting or

reprinting is required from the copyright owner, everyone might assert an interest. The impracticalities are obvious.

The challenge multiplies when these beneficiaries are unaware of their copyrights and when they in turn pass the fractional rights to the next generation. Archivists can inform donors about specific copyright bequests in their wills. If donors want multiple parties to benefit, they may name a copyright trustee to retain nominal copyright and title control. The trustee may be the one to contact for permissions, and the trustee can distribute income among the desired beneficiaries.

#### ***Strategy 4: Implement Policies That Guide Users and Assert Rights of Use***

This strategy may ultimately be the most important. Fair use of unpublished materials survives, and archivists, researchers, publishers, and others must assert the right of fair use or risk losing it. Archivists should develop policies that identify conditions affecting fair use of unpublished materials, elaborating on the four statutory factors. Policies may range from detailed position statements to simple reminders for researchers that some unspecified fair use exists. Many archives often require researchers to sign agreements acknowledging rules and principles, including limits on copying or quoting. Archivists should be equally vigilant about encouraging the fair use of collections.

Useful institutional policies could describe examples of likely fair use or at least guide researchers to sources of helpful information about the law. The policies could detail additional user rights or information about other aspects of copyright law. A policy might note the application of Section 108 of the Copyright Act and its significance for preservation and research copying. The policy could highlight that copyrights in even unpublished works are subject to expiration and may now enter the public domain. For uses that are not allowed under the law itself, a policy could assist users with the process of seeking permissions.<sup>62</sup>

#### **Conclusion**

These strategies represent opportunities for archivists to grasp the significance of copyright and fair use and to facilitate important

uses of protected works. Archivists have a duty to obey the law. They have a duty to avoid copyright infringements and liabilities. They have a responsibility to protect the legal and agreed rights of donors. They also have the challenge of making their collections as useful as possible. The law will set limits, and donors may restrict access. The reason for maintaining the collections, however, is to preserve and ultimately to provide public access to the information. Researchers use the collections and use the information, and they publish their findings to convey that information to a broader audience; fair use is essential for that information access. Archivists must comprehend the relationship of fair use to their information-access mission. Only by identifying and preserving broad fair-use rights can the keepers of manuscripts better fulfill the objective of optimizing access to valuable information resources.

## Chapter 11

<sup>1</sup> This chapter is based in part on an article by the same author: Kenneth D. Crews, "Unpublished Manuscripts and the Right of Fair Use: Copyright Law and the Strategic Management of Information Resources," *Rare Books and Manuscripts Librarianship* 5 (1990): 61–70.

<sup>2</sup> The U.S. Copyright Office recently issued a report proposing a legislative solution to the problem of "orphan works," works that are copyrighted but the owner is not reasonably found or otherwise available to grant permission. See the U.S. Copyright Office, *Report on Orphan Works*, 2006, which can be downloaded from <http://www.copyright.gov/orphan/>. As of this writing, Congress has not taken any action to address these issues.

- <sup>3</sup> The author of this article has examined the legal principles underlying these cases more fully in another article: Kenneth D. Crews, "Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright," *Arizona State Law Journal* 31 (Spring 1999): 1–93.
- <sup>4</sup> U.S. Constitution, art. I, sec. 8.
- <sup>5</sup> U.S. Copyright Act, 17 U.S.C. § 106 (2006).
- <sup>6</sup> U.S. Copyright Act, 17 U.S.C. § 107 (2006).
- <sup>7</sup> All copyrights expire at the end of a calendar year. U.S. Copyright Act, 17 U.S.C. § 305 (2006).
- <sup>8</sup> For a more detailed examination of copyright duration and the problems that stem from the complexity of the law, see Kenneth D. Crews, "Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine," *Syracuse Law Review* 55 (2005): 189–250. Peter B. Hirtle, former president of the Society of American Archivists, has prepared a tremendously helpful chart isolating a wide range of rules of copyright duration that can be important to archivists and users of archival materials. See [http://www.copyright.cornell.edu/training/Hirtle\\_Public\\_Domain.htm](http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm).
- <sup>9</sup> U.S. Copyright Act, 17 U.S.C. § 302(c) (2006).
- <sup>10</sup> U.S. Copyright Act, 17 U.S.C. § 303(a) (2006).
- <sup>11</sup> U.S. Copyright Act, 17 U.S.C. § 108 (2006). Section 108 has been an important part of the U.S. Copyright Act since 1976, but its meaning has not been tested in court. The Library of Congress has appointed a "study group" to review suggestions for possible revision of section 108, and its report is expected in 2008. See <http://www.loc.gov/section108>.
- <sup>12</sup> U.S. Copyright Act, 17 U.S.C. § 108(c) (2006).
- <sup>13</sup> U.S. Copyright Act, 17 U.S.C. § 108(b) (2006).
- <sup>14</sup> In 1998, Congress revised Section 108 to explicitly allow digital copies for preservation, but access to copies made in a digital format must be limited to the "premises" of the library or archives. U.S. Copyright Act, 17 U.S.C. §§ 108(b)–(c) (2006).
- <sup>15</sup> U.S. Copyright Act, 17 U.S.C. § 110(1)–(2) (2006).
- <sup>16</sup> U.S. Copyright Act, 17 U.S.C. § 107 (2006).
- <sup>17</sup> Often credited as the origin of fair use in American law is the decision in *Folson v. Marsh*, 9 Fed. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).
- <sup>18</sup> U.S. Copyright Act, 17 U.S.C. § 107 (2006). As noted later in this chapter, Section 107 was revised in 1992 to address questions about unpublished works, but the determination of fair use still comes back to the same four factors.

- <sup>19</sup> *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir.), cert. denied, 484 U.S. 890 (1987).
- <sup>20</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
- <sup>21</sup> *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).
- <sup>22</sup> *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).
- <sup>23</sup> *New Era Publications International, ApS v. Henry Holt and Company, Inc.*, 873 F.2d 576, 583 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990); *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir.), cert. denied, 484 U.S. 890 (1987). (These cases nevertheless pointed to unusual circumstances that had significant effects on the value of the manuscripts.)
- <sup>24</sup> 464 U.S. 417 (1984).
- <sup>25</sup> 471 U.S. 539 (1985).
- <sup>26</sup> *Id.* at 567.
- <sup>27</sup> *Id.* at 564.
- <sup>28</sup> *Salinger v. Random House, Inc.*, 811 F.2d 90, 99-100 (2d Cir.), cert. denied, 484 U.S. 890 (1987). For excellent insights into the background of this case, see David Margolick, "Whose Words Are They, Anyway?" *New York Times Book Review*, November 1, 1987, 1, 44-45.
- <sup>29</sup> *New Era Publications International, ApS v. Henry Holt and Company, Inc.*, 873 F.2d 576 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).
- <sup>30</sup> In another case soon after that decision, the Second Circuit ruled that fair use could allow a biographer to quote from Hubbard's published writings. *New Era Publications International, ApS v. Carol Publishing Group*, 904 F.2d 152, 160-161 (2d Cir.), cert. denied, 498 U.S. 921 (1990).
- <sup>31</sup> 811 F.2d at 95.
- <sup>32</sup> For examples of the constraining effects of these rulings, see David A. Kaplan, "The End of History? A Copyright Controversy Leads to Self-Censorship," *Newsweek* (December 25, 1989): 80; Ellen K. Coughlin, "After Salinger: Few Feel Sting of Ruling on Use of Papers," *Chronicle of Higher Education* (November 15, 1989): A4, A6. Indiana University Press complied with demands from a copyright owner and withdrew publication of a book that included reportedly brief quotations from unpublished manuscripts. Richard Byrne, "A Copyright Battle Kills an Anthology of Essays about the Composer Rebecca Clarke," *Chronicle of Higher Education* (July 16, 2004): A14. The author of a study of James Joyce settled an infringement claim and was allowed to make use of Joyce's manuscripts in her project. "Joyce Estate Settles Claim," *New York Times* (March 26, 2007) "Arts, Briefly": B2.

- <sup>33</sup> *New Era Publications International, ApS v. Henry Holt and Company, Inc.*, 873 F.2d 576, 583 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) (given the *Harper & Row* dictum, however, the Second Circuit could address the unpublished “nature” relatively briefly and clearly; the court examined other factors in often greater detail).
- <sup>34</sup> U.S. Copyright Act, 17 U.S.C. § 301(a) (2006).
- <sup>35</sup> 811 F.2d at 94.
- <sup>36</sup> Samuel D. Warren and Louis D. Brandeis, “The Right of Privacy,” *Harvard Law Review* 4 (December 1890): 193–220.
- <sup>37</sup> See, for example, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).
- <sup>38</sup> Marybeth Gaudette, “Playing Fair with the Right to Privacy,” *Archival Issues* 28 (2003/2004): 21–34; Sara S. Hodson, “In Secret Kept, In Silence Sealed: Privacy in the Papers of Authors and Celebrities,” *American Archivist* 67 (Fall/Winter 2004): 194–211.
- <sup>39</sup> In fact, copyright law required Salinger to register his letters with the Copyright Office before he could commence legal action. Once registered, the letters became available for public examination. Pierre N. Leval, “Toward a Fair Use Standard,” *Harvard Law Review* 103 (March 1990): 1119, 1130. See U.S. Copyright Act, 17 U.S.C. § 411(a) (2006).
- <sup>40</sup> *New Era Publications International, ApS v. Henry Holt and Company, Inc.*, 873 F.2d 578, 580 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Salinger v. Random House, Inc.*, 811 F.2d 90, 92 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).
- <sup>41</sup> 811 F.2d at 99.
- <sup>42</sup> Later cases have continued the connection between privacy and the scope of fair use. For example, in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F.Supp. 1231, 1245 (N.D. Cal. 1995), the court concluded that the steps taken by the owner to preserve the confidentiality of a work diminished fair use.
- <sup>43</sup> See the examples in note 33 above.
- <sup>44</sup> Fair Use of Unpublished Works, Public Law No. 102-492, 106 Stat. 3145 (1992).
- <sup>45</sup> At least one prominent commentator has concluded that the new flexibility of fair use following the 1992 amendment indicates that Congress “hit a homerun” by adding the statutory language to Section 107. David Nimmer, “Codifying Copyright Comprehensively,” *UCLA Law Review* 51 (June 2004): 1233, 1346.
- <sup>46</sup> 142 F.3d 194 (4th Cir. 1998).

<sup>47</sup> *Id.* at 207.

<sup>48</sup> 364 F.3d 471 (2d Cir.), *cert. denied*, 543 U.S. 1000 (2004).

<sup>49</sup> *Id.* at 477-82.

<sup>50</sup> *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991).

<sup>51</sup> *Lish v. Harper's Magazine Foundation*, 807 F.Supp. 1090, 1101-02 (S.D.N.Y. 1992).

<sup>52</sup> For additional examples, see *Norse v. Henry Holt & Co.*, 847 F.Supp. 142, 146 (N.D. Cal. 1994) (quotations from private correspondence in a biography); and *Love v. Kwitny*, 706 F.Supp. 1123, 1133-34 (S.D.N.Y. 1989) (quotations from an unpublished student paper). See also *Chicago Board of Education v. Substance, Inc.*, 354 F.3d 624, 629-30 (7th Cir. 2003) (offering little analysis, but allowing little room to find fair use of secure exams).

<sup>53</sup> Some analytical studies have been sharply critical of much of the recent development of this law. One study attacked the inconsistencies among various court rulings. Timothy Hill, "Entropy and Atrophy: The Still Uncertain Status of the Fair Use of Unpublished Works and the Implications for Scholarly Criticism," *Journal of the Copyright Society of the USA* 51 (Fall 2003): 79–100. Another study resolved that confusion and uncertainty about the law will inhibit publishers from testing fair use. Robert Spoo, "Fair Use of Unpublished Works: Scholarly Research and Copyright Case Law Since 1992," *Tulsa Law Journal* 34 (Fall 1998): 183–200.

<sup>54</sup> Many of the letters in the *Salinger* case were available for research only after users signed agreements provided by libraries and setting restrictions. 811 F.2d at 93.

<sup>55</sup> J. D. Salinger himself had disavowed any intentions to publish the letters. *Id.* at 99.

<sup>56</sup> 873 F.2d at 583.

<sup>57</sup> U.S. Copyright Act, 17 U.S.C. § 302(a) (2006). For a caution about the complexity of the law of copyright duration, see note 8 above.

<sup>58</sup> U.S. Copyright Act, 17 U.S.C. § 202 (2006).

<sup>59</sup> U.S. Copyright Act, 17 U.S.C. § 204(a) (2006).

<sup>60</sup> U.S. Copyright Act, 17 U.S.C. § 204(a) & 205 (2006).

<sup>61</sup> U.S. Copyright Act, 17 U.S.C. § 201(d)(1) (2006).

<sup>62</sup> Some of these issues have been addressed in institutional policy statements. For example, the "Terms and Conditions for Using Our Website" from the National Archives offers insights about copyright and other legal protections for materials in the collection, as well as links to guidance for obtaining permission to use some of the works. See <http://www.archives.gov/global-pages/privacy.html>.