

**Information Services in Libraries for Printed and Digital Materials:
Selected Legal Issues**

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Keywords: Copyright, Library Services, Document Delivery Services, Photocopying, Reserve Room, Collective Management.

Mentioned Countries: Mexico, The Philippines, United Kingdom, United States of America.

Abbreviations

E&L Exceptions and Limitations
DDS Document Delivery Services
IFRRO International Federation of Reproduction Right Organizations
PDF Portable Document File
RROs Reproduction Rights Organizations
TRIPS Agreement on Trade related aspects of Intellectual Property Rights
UPD Ulrich's Periodical Directory
WCT WIPO Copyright Treaty
WIPO World Intellectual Property Organization

1. - Information services in libraries for printed & digital materials

Information and communications technologies have found in libraries an ally to test and improve many of its applications. This situation has developed as libraries manage large quantities of data that must be delivered to many information consumers. Registration of patrons, classification of materials and dissemination of information are some of the core library activities that have become dependent upon technology until it is not possible to envision libraries without photocopiers, computers, the internet or any number of electronics that improve information services. It is in the library services sector in which a paradox takes place, between the responsibility to allow library users access to information and at the same time follow copyright laws.

2. - Document Delivery Services: Digital Materials

According to Ulrich's Periodical Directory® (UPD), there are almost 280,000 periodicals. These publications include annuals, conference proceedings, academic/scholarly publications, and consumer magazines. For any library it is out of the question to subscribe to each publication, not only because of limitations of physical infrastructure, but due to the cost. During the second week of February 2008 a search was performed in the electronic version of UPD using the Dialog® system. It was found that 213,375 periodicals are currently being published. Among these periodicals 24,109 have gone through a peer-reviewed process, signifying that the documents published in them have proved their quality due to a revision by at least two recognized specialists on the topic. Although many periodicals are high-quality publications, it is not easy to search their contents until they are indexed. Nowadays, more than 400 enterprises are tasked with purchasing these publications by area and classify and capturing them in electronic indexes or databases in order to be licensed to libraries, research institutes, governments, and other entities.

The indexing companies must get from the publishers a license to fill the fields of their electronic databases, such as title, authors, source, and abstract. If these companies wish to capture the full text of the papers, including graphs and photos, it is mandatory to pay a higher price than the one paid for capturing the abstract. This situation in the information

industry results in many abstract database that cover almost all periodicals and fewer databases that allow the final user to retrieve the full version of the article.

When the final user of the database (library patron, librarian, etc.) is performing a search in a full text or abstract database, the searcher typically attempts to retrieve the most concise, accurate and up-to-date information, but normally he/she realizes that documents are not always available, just the abstract. For example, in the case of a full text database it is expected that every single retrieved record will have the complete version but this is not always true because of the embargoes that publishers impose on the producers of the databases. Publishers do not want the databases' contents which they have already licensed to compete with the latest print version of their own publications. For this reason, they do not allow the database producer to capture the last 6 or 12 months of the full texts of their periodicals.¹

As a consequence, the information consumer has to find in the shelves of a nearby library the print version of the journal and the specific issue in which the article was published. Journal costs are very high and unfortunately every year many libraries given their reduced budgets have to cancel many of their subscriptions. But librarians have never liked to ask for apologies from their patrons for not having the requested document. Instead they have been working for years to create and strengthen collaboration and to solve information needs even when they do not have in their own collections the requested papers. Among the services for retrieving information upon the request of their patrons, libraries have developed interlibrary loan services for the temporary exchange of original printed materials² and document delivery services (DDS).

Document Delivery is the reproduction and delivery or communication of literary and artistic works to remote clients upon his or her request. For example, the reproduction and delivery or scanning, storage, transmission of an article from a print journal for a client who

¹ There are some other publishers whose embargoes are longer, for example, the American Association for the Advancement of Science's well known "Science" does not allow any database producer to reproduce the full text of the journal until 36 months have passed from the date of publication.

² According to the *Interlibrary Loan Code for the United States* prepared by the "Interlibrary Loan Committee of the Reference and User Services Association" of 1994 and revised in 2000, interlibrary loan is the process by which a library requests material from, or supplies material to, another library. Available at <http://www.ala.org/ala/rusa/protocols/referenceguide/interlibrary.cfm> Last visited 17.02.08

requested to read it as a photocopy, on screen, as a temporary copy or to print it out on paper.³ As Hugenholtz mentions, DDS provide individual customers and users with copies of documents (mainly articles published in scientific journals) on demand.⁴ This means that the requested paper is not available in the local library and as a consequence it is necessary to retrieve it from another library, regardless of where the other library is located. As IFRRO's definition about DDS says this service can be conducted by two main ways:

- By photocopying the requested document and delivering it by regular mail.
- By digitizing the requested document and delivering it by electronic mail.

Both scenarios are challenging for any copyright law. In section 3.1 of this document the first one is going to be discussed.

2.1. Electronic document delivery

With current technology, the process of delivering a document in libraries without any copyright policy would be as follows: after the requesting library identifies the availability of the requested paper in the sending library's electronic catalog, the first sends an e-mail request (which includes the complete reference with the title, author, source, etc.). The sending library retrieved from its shelves the print version of the journal in which the paper was published, digitizes it as a Portable Document File (PDF) and sends it to the requesting library as an e-mail attachment.⁵ With the aim of saving delivery time, the requesting library receives the .PDF and forwards it to its patron. This process should take no more than an hour and the information need of the patron has been solved at no cost.

If the described process is followed, several rights of authors and their publishers are transgressed. From the perspective of copyright law, a published document, such as a journal article or a book chapter, is protected and is the result of a combination of rights:

³ IFRRO. *Principles for international document delivery* Available at http://www.ifro.org/upload/images/document_delivery.pdf Last visited 16.02.08

⁴ B. HUGENHOLTZ, *Copyright and electronic document delivery services*, in *Interlending & Document Supply* 1994, vol.22, no.3 p. 8-14

⁵ In 1991 the Research Libraries Group developed the Internet-based software package "Ariel" (sold to Infotrieve 2003) to facilitate the electronic delivery of documents.

the economic⁶ and moral rights⁷ of author and the economic⁸ rights of the publisher. Authors are the primary owners of their works, but with publication they transfer many of their economic rights to the publisher. As the derived owners of the works, publishers are entitled to exploit them. From an international perspective, the Berne Convention for the Protection of Literary and Artistic Works (1886) lists a series of rights that can be summarized as follows:

- Right to make adaptations: arrangements, translations, etc.
- Right to communicate to the public: broadcasts, performance, recitals,
- Right to make reproductions in any manner

Given these rights, all DDS described activities break the Berne Convention rules in many ways. Article 12 grants the Right of Adaptation, Arrangement and Other Alteration, meaning that digitization of the document for sending purposes is an alteration of the work and also a reproduction. Article 9 hints that the copyright holder shall have the exclusive right of authorizing the reproduction of his/her work, in any manner or form. Here it must be underlined that reproduction is in many cases the most important element of copyright law, given that is the main method for obtaining remuneration. Article 11 *bis* deals with communication of the work to the public by any means. Sending the requested document either to the library or to the patron is considered a communication.

In other words, every step involved in offering a DDS seems to be in violation of all of the core elements of the Berne Convention. The WIPO Copyright Treaty (WCT), as an

⁶ “Economic rights enable the copyright owner the right to make commercial gain from the exploitation of their work”. From <http://www.ipo.gov.uk/copy/c-manage/c-useenforce/c-useenforce-enforce/c-useenforce-enforce-economic.htm> Last visit 19.02.08

⁷ Article 6*Bis* of Berne Convention define moral rights as follows: “Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726 Last visit 19.02.08

⁸ In this regard Hugenholtz says: “Copyright laws protect a wide range of information products, many of which are used in DDS: journal articles, brochures, newspaper stories, books, drawings, sheet music, maps, etc. Two categories of information deserve special consideration in this context: abstracts and bibliographical data... wholesale appropriation of collections and compilations of abstracts, bibliographical data and contents is prohibited without the express authorization of the copyright owners involved” *Idem*. B. HUGENHOLTZ,

agreement under the Berne Convention, grants the right of distribution (among others).⁹ Once again, it is easy to see that DDS also affects the right of distribution protected in this treaty when the paper is sent to the requesting library and to the library's patron.¹⁰

Berne Convention, WCT and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) serve as framework to establish the minimum standards for the protection of literary works. They are ruled by a set of principles: national treatment (equal treatment to all nationals of the union), automatic protection (no need of formality to protect a work) and independence of protection (protecting a work abroad even if is not protected in its country of origin). This means that every member state that has ratified these international instruments should adhere to these principles. If we consider that DDS, by its very nature, is a method of delivering documents internationally, then it can be said that there are a few countries in which this activity would not be considered a violation of the law.¹¹

If we move to a national level things are not very different. In Civil Law countries there is a "catalog" of the rights of the author or owner of a work. For example, in Mexico article 27 of the copyright law says that:

- "The owners of the economic rights may authorize or prohibit:
- (I) the reproduction, publication, editing or material fixation of a work, in the form of copies or originals, carried out in whatever medium, whether printed, phonographic, graphic, three-dimensional, audiovisual, electronic or other;
 - (II) The communication of his work to the public;
 - (III) The public transmission or the broadcasting of their works by any process, including the transmission or retransmission;
 - (IV) The distribution of the work, including sale or other forms of transfer of the ownership of the physical material in which it is embodied, and also any form of transfer of the use of exploitation thereof
 - (V) The importation into the national territory of copies of the work made without their authorization;
 - (VI) the disclosure of derived works, in any of the forms that such works may take, including translations, adaptations, paraphrased versions, arrangements and transformations;

⁹ Art. 6 of WIPO Copyright Treaty says "Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership."

¹⁰ The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) reflects the rights given in the Berne and WCT treaties and adds an exclusive right of rental that must be recognized when dealing with computer programs and, under certain conditions, audiovisual works.

¹¹ In addition, the TRIPS Agreement imposes an obligation of "most-favored-nation treatment," under which advantages accorded by a WTO Member to the nationals of any other country must also be accorded to the nationals of all WTO Members.

(VII) Any public use of the work except in cases expressly provided for in this Law”¹²

Comparing what the law (international and national) states and what has been described as the typical way of delivering document, it appears that we are in violation of the law. But why haven't publishers or authors sued Mexican libraries or many other countries' libraries that follow these practices?

WIPO's Handbook states that “Copyright protection is above all one of the means of promoting, enriching and disseminating the national cultural heritage. A country's development depends to a very great extent on the creativity of its people, and encouragement of individual creativity and its dissemination is a *sine qua non* for progress”¹³ To reach this point, it is necessary to establish a set of Exceptions and Limitations (E&L) to copyrights that partially restricts the scope of the copyright holders. Article 9.2 of the Berne Convention allows the reproduction of works without the consent of the owner “in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”¹⁴ This concept is also known as the three-step test, because when reproducing materials it is mandatory to carry out the three elements described in the Berne Convention article concurrently. Article 9.2 is similar to article 10 of WCT and article 13 of TRIPS when it states that “Members shall confine limitation or exception to exclusive right to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder”¹⁵ It is the task of each country to interpret the three-step test and define the extent of the limitations they will consider in their national copyright laws. The “Fair Use” doctrine developed in the United States of America and the “Fair Dealing” doctrine from the United Kingdom are among the most well-known limitations derived from the three-step test which pay special attention to

¹²Federal Law on Copyright (Mexico), December, 1996. Available at http://www.wipo.int/clea/docs_new/en/mx/mx003en.html Translated by the by the International Bureau of WIPO. Last visit 16.02.08

¹³ WIPO. *WIPO Intellectual Property Handbook*. WIPO, 2004. p41

¹⁴ Berne Convention for the Protection of Literary and Artistic Works (1886). Available at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350 Last visit 19.02.08

¹⁵ Agreement on Trade Related Aspects of Intellectual Property Rights. Available at: http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm Last visit: 19.02.08

the issue of the reproduction of copyright-protected works in libraries as will be explained below.

During the late 60's William & Wilkins Co. (W&W), an important medical journal publisher, sued the National Library of Medicine and the National Institutes of Health (USA) for illegally reproducing the contents of its journals. They argued that the introduction of photocopiers in those libraries had directly decreased the number of subscriptions to W&W journals.¹⁶ After a trial that lasted many years, W&W couldn't prove substantial harm from copying and the Court of Claims (later affirmed by a *per curiam* opinion from and evenly divided US Supreme Court, with only eight justices voting)¹⁷ held that the large-scale photocopying of entire journal articles for the use of researchers, and private commercial organizations was fair use. This decision showed that E&L is not a matter of general rules, but a precept for analyzing particular circumstances case by case. Maybe this is one of the reasons why many countries haven't legislated specifically on copyright issues and have preferred to leave disputed be solved by case law.¹⁸ Another result of this trial was an economic one: every publisher bases subscription costs on who the subscriber is. If the subscriber is an individual the cost is cheaper, but if the subscriber is a library, the cost goes up two to ten times.¹⁹ Following Phillips and Phillips' comments, the institutional prices are directly related to the number of library patrons who use the journals in the library.²⁰ In other words, a "blanket license" is given to the library to allow its patrons read the journals and to benefit from the exceptions and limitations to copyright that are granted in country-based legislation.

But for many librarians, it is not well-defined if the payment of this higher subscription cost allows the library to offer DDS under the scenario described before.²¹ The final report to

¹⁶ P. GOLDSTEIN. *Copyright Highway: The law and lore of copyright from Gutenberg to the Celestial Jukebox*. Hill and Wang, 1996. p85

¹⁷ *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975)

¹⁸ Paul Goldstein devotes an entire chapter of his book *Copyright Highway* to analyze this case: *Fifty dollar to Collect Ten*. *Idem*. P. GOLDSTEIN.

¹⁹ O.R. PHILLIPS; L.J. PHILLIPS. *The market for academic journals*. in *Applied Economics*, 2002, vol. 34 p. 39-48

²⁰ *Idem*. O.R. PHILLIPS; L.J. PHILLIPS

²¹ The National (USA) Commission on New Technological Uses of Copyright Works, better known as CONTU declared in 1976 a set of rules to help understand the amount of photocopying for use in interlibrary loan permitted under the copyright law. The "rule of fives" was borne and it said that more than five copies a

the Commissioner on the Conclusion on the Conference on Fair Use (USA, November 1998) said:

“After considerable discussion, the working group unanimously agreed in March 27, 1996, that it was premature to draft guidelines for digital transmission of digital documents. Subsequent discussions throughout the spring and summer of 1996, failed to achieve agreement on guidelines for digital delivery of print originals under interlibrary loan arrangements. After considerable discussions within the working group and in general plenary sessions, it was agreed by both the copyright owner and user communities that it was not possible, at this time, to draft widely acceptable guidelines for digital delivery of print materials by libraries”²²

2.2 The role of Reproduction Rights Organizations and DDS

The William and Wilkins case was not only a precedent for libraries and judges but for publishers. In 1980, the International Publishers Association (IPA) and the International Group of Scientific, Technical and Medical Publishers (STM), concerned about photocopying and its adverse effects on their businesses created the International Federation of Reproduction Rights Organizations (IFRRO) as “an independent organization established to foster the fundamental international copyright principles embodied in the Berne and Universal Copyright Conventions. Its purpose is to facilitate, on an international basis, the collective management of reproduction and other rights relevant to copyrighted works through the co-operation of national Reproduction Rights Organizations (RROs).”²³ Through collective representation of authors and publishers they give licenses that allow libraries, individuals and others to use protected works out of the scope defined by the three-step test. Regarding DDS, many RROs have developed special licenses because as Hadley and Barrow say “with the development of fee-paid document delivery, it is increasingly hard to support the argument that library privileges comes within the permissible limits of article 9.2 of the Berne Convention, as unremunerated document

year of any article published in a particular periodical within five years of the date of the request must be understood as an indication to the requesting library to subscribe on its own to the requested journal. *Idem* P. GOLDSTEIN, p. 143

²² B.A. LEHMAN. *The Conference on Fair Use: final report to the commissioner on the conclusion of the Conference on Fair Use*. United States Patent and Trademark Office, 1998. p16

²³ IFRRO. *What is IFRRO*. Available at <http://www.ifrro.org/show.aspx?pageid=about/whatis&culture=en>
Last visit 18.02.08

delivery clearly determines the legitimate expectations of the copyright owner.”²⁴ In October of 2004, IFRRO declared its “Principles for International Document Delivery”²⁵ which indicates the procedure that must be followed for national and international DDS. In the case of national DDS, it declares:

“Any Document Delivery of copyright works be conducted:

- with the rights holders’ permission;
- with the price of the permission set by the rightsholders; or
- with the rightsholders’ authorised representative’s permission; and
- the price of the permission set by the rightsholders’ authorised representative; or
- if performed under an exception in national legislation, which complies with the Three Step Test whether or not subject to an independent or governmental authority or the jurisdiction of a tribunal, then with the price agreed to and accepted by the rightsholders in that territory or by their authorized representatives.”

In the case of International Document Delivery, the IFFRO says that:

“Any International Document Delivery of copyright works be conducted:

- with the permission of rightsholders in the country of supply and in the country of reception; and
- with the price of the permission agreed by the rightsholders in the country of supply and the country of reception; or
- with the permission of the authorised representatives of the rightsholders in the country of supply and in the country of reception; and
- with the price of the permission agreed by the authorized representatives of the rightsholders in the country of supply and in the country of reception; or
- if performed under any exception complying with the Three Step Test in national legislation in the country of supply, or the country of reception, or of both countries, whether or not subject to an independent or governmental authority or the jurisdiction of a tribunal in either country or in both countries, then at a price agreed to and accepted by the rightsholders or their authorized representatives in both countries.”

A good example of a library that follows these instructions is the British Library (BL), a well-known library not only for its vast collections, but for its excellent quality DDS.²⁶ But the BL, among other important libraries and document suppliers are the exception to the rule because the higher cost libraries pay for institutional subscriptions is not enough. If libraries want to send a DDS, they must pay extra fees for each document.²⁷ Quite a few legislatures have taken into account this situation and having the powers that TRIPS, and

²⁴ C. HADLEY; E. BARROW. *Licensed document supply: the role of IFRRO*. in *Interlending & Document Supply* 1997, vol.34. no.2 p73-76

²⁵ *Idem*. IFRRO.

²⁶ To know a little bite more about their DDS and the copyright aspects they are concern is recommended to visit their web-site at <http://www.bl.uk/reshelp/atyourdesk/docsupply/index.html> Last visit 16.02.08

²⁷ In 1996 The British Library paid to the Copyright Licensing Agency Limited (UK) £1 million

other international treaties gave them to rule about exceptions and limitations, these legislatures have decided to promote some equity in this topic. Seadle says that “the current US copyright law gives libraries an explicit right to exchange copies between libraries as long as the copy becomes the property of the person making the request.”²⁸ To support his premise he cited article 108, section d) of the copyright law of the USA.²⁹

“How then should we qualify (electronic) document delivery without the authorization of copyright owners? Is it copyright infringement or permitted use? In view of the existing differences in national copyright regimes, no general answer to this question is possible.”³⁰ Maybe the problem is not with libraries or countries that have paid attention to DDS and the exceptions and limitations that are needed to promote the correct use of information, but in the countries in which these issues are not even understood by legislators. Many other libraries will continue delivering their services with a lack of knowledge about the legal aspects of the topic and little to no support from their national Reproduction Rights Organizations. At the same time, they will increase their access to technology which if used in an improper manner can lead to a violation of the law.

3. - Library copying for the user: Printed Materials

Beyond the case of Williams & Wilkins vs. USA, the introduction in libraries of photocopiers in the late fifties is an historical event that changed dramatically the way information users behave. Instead of copying the needed information by hand or by typewriter, the photocopier allowed users to have better quality copies of the requested

²⁸ M. SEADLE. *Copyright in the networked World: international document delivery* in *Library Hi Tech*. 2007. Vol. 25, No.2 p. 298-304

²⁹ USC 108 (2004), *United States Code*, Title 17, Chapter 1, Section 108 available at: www.copyright.gov/title17/92chap1.html#108 Last visit 16.02.08

“(d) The rights of reproduction and distribution under this section apply to 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 a copy or phonorecord of a small part of any other copyrighted work, if –

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.”

³⁰ *Idem.* B. HUGENHOLTZ

information with less effort. Currently to encounter a library without a copy machine could signal a low quality service, especially as regards libraries with maps, architectural drawings or photographic collections.

The machinery for copying has considerably evolved but the result is the same: the reproduction of the work or, as it has been recently called, reprography. Materials that are in the public domain cause few concerns about reproduction, but libraries' collection do not typically contain many public domain materials (except libraries with antique book collections). As explained above, library users want the most up-to-date information and much of the information they want is protected by copyright.

Article 9 of the Berne Convention (Paris Act 1971) stipulated in its first paragraph that "authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form"³¹ As understood by indication of this law (at an international and at national level), any kind of reproduction is a violation. On the other hand, the second paragraph of article 9 allows reproduction to be made freely and without the authorization of the owner of the work under specific circumstances. The three-step-test defined in this second paragraph has been interpreted and adapted by many national legislatures. To describe the scope of the exclusive right of the owner of the work to allow or prohibit its reproduction these national legislatures have implemented the "private copy" concept in order to guide citizens and judges on the interpretation of the three-step-test.

Despite the fact that "private copy" is not defined by the Berne Convention, the WIPO Copyright Treaty or by TRIPS, it has been widely accepted as a legal concept within different national copyright laws referring to copying freely under explicit conditions. Lipszyc defines it as "the reproduction in a single sample of short fragments of certain isolated works protected by copyright included in a volume (journal, newspaper, etc.) exclusively for the personal use of the copier (for example, for studying, teaching, recreation)."³² From this definition another concept emerges: "personal use."

³¹ *Idem*. Berne Convention for the Protection of Literary and Artistic Works.

³² D. LIPSZYC. Derecho de autor y Derechos Conexos. UNESCO, 2001. p222

Personal use should be understood as a confirmation that the copy is made, by an individual and the reproduction of the work will not leave his or her private use. The word *private* might mean not only one person but a group of people that are linked by a common activity, for example, students attending a lecture. In such cases, “private” doesn’t mean personal but is rather a collective term. Art. 107 of the United States’ copyright law allows the reproduction of the work for personal and private use when considering the reproduction of copies for purposes such as teaching (including multiple copies for classroom use).³³

At this point, it seems that although copying is a violation of the law, it could be considered as legal when it is done under special circumstances by an individual or for a specific collective purpose (e.g. educational). However, as the previously quoted Article 9.2 of the Berne Convention states, these reproductions should not conflict with normal exploitation of the work and as a result should not unreasonably prejudice the legitimate interest of the author. Many book publishers have argued against this provision because it is not interpreted well by national laws or by citizens. For example, the International Intellectual Property Alliance publishes in its web page an annual country base report about the adverse economic effects on copyright-based industries due to piracy and other activities violating Intellectual Property Rights (IPR).³⁴ Reports from Argentina to Vietnam state that the reproduction of materials completed for academic purposes usually exceeds permissible levels. One of the reasons why citizens do exceed these levels could be their ignorance or misinterpretation of the law.

In the United States, lawyers, librarians and other people interested in IPR have developed guidelines to help patrons interpret the law and determine how much to copy. In March of 1982, the American Library Association published its “Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve.”³⁵ In the elements of the fair-use doctrine are considered again (purpose, nature of the copyrighted

³³ USC 107 (2004), *United States Code*, Title 17, Chapter 1, Section 107 available at: <http://www.copyright.gov/title17/92chap1.html#107> Last visit 20.02.08

³⁴ IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA web site: <http://www.iipa.com/> Last visit 22.02.08

³⁵ ALA. Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve. Available at <http://www.cni.org/docs/infopols/ALA.html> Last visit 20.02.08

work, amount and substantiality of the portion used and the effect of use) and are compared to the common activities in a university. The guideline underlines the importance of preventing any harm to the work by using less of the source document, quoting the source, asking for permission for extensive uses, buying original versions, and noticing in the copies the existence of a copyright. At the same time, this policy promotes the use of the works in order to reach a balance between the right of the copyright holders and the right of patrons to information.

A decade later Kenneth Crews published a book about copyright policies³⁶. He discusses the importance of developing and implementing copyright guidelines in libraries and universities. According to a book-review about Crews, he:

“...promotes a more balanced set of policy guidelines that embraces the inherent complexity and flexibility of the fair use doctrine. Such a perspective, the author concludes, will better balance society’s dual – but often conflicting – interest in protecting author’s copyright, on the one hand, and allowing universities greater freedom to pursue their academic mission through the fair use of copyrighted works in the other.”³⁷

As it can be read, American institutions have gone through serious analysis about the private copy topic as well as other laws, but there are still some other concerns about worldwide libraries:

- Do librarians have the ability to photocopy at the request of their patrons?
- How much are librarians able to copy for their patrons?
- Might librarians be subject to prosecution for the illegal acts of their patrons?

3.1 Printed document delivery

As defined in section 2.1 of this paper, document delivery is in itself a challenging situation for any copyright law. When discussing this topic in the analog environment, the situation is not very different in the digital environment, and may be simpler. When a library patron is willing to wait for the requested document, the digitization process defined in electronic DDS is avoided and a photocopy takes its place. Instead of sending the document by e-

³⁶ K. D. CREWS. *Copyright, Fair Use, and the Challenge for Universities: promoting the progress of higher education*. The University of Chicago Press. 1993

³⁷ ANONYMOUS. *Copyright, Fair Use, and the Challenge for Universities: promoting the progress of higher education / Book Review*. in *Harvard Law Review*. 1997 v110 p1954

mail, it is sent by regular mail. In this process, two legal elements arise: the reproduction right (article 9 of Berne Convention) and the right of communication to the public (article 11*bis* of Berne Convention and article 8 of WCT). Whether article 9.2 of the Berne Convention, article 10 of the WCT, or article 13 of TRIPS imposes E&L, the process of reproducing and sending documents by these means is dubious. Some libraries have found in DDS (both printed and digital) a source to generate income that can support the library's activities. In those cases, it is mandatory to pay a royalty fee to copyright holders, but if the service is delivered in nonprofit libraries it is allowed to simply charge the cost of the photocopy (equipment maintenance, paper, etc) and shipment. This situation is allowed by quoted section 108d of USA copyright law. In the rest of the world, such exceptions are hard to find; the only other copyright laws that allow such usage are those of the United Kingdom and Australia. Once again, the British Library's process is a good the example. They offer a service called Lexicon, by which it is possible to ask for photocopies of specific documents. Among their conditions for sending documents is the payment of a royalty that is transferred to the Copyright Licensing Agency and it is not possible to ask for more than one copy of the same document.

In other libraries, especially those in developing countries, the process of sending documents by regular mail is a tradition consolidated by friendship among librarians and not by a law decree or by a bilateral agreement. In those cases, charging a cost is to pay for performing the service, but not for the document in itself. The rare libraries that are aware about copyright issues have asked their national RROs about specific licenses that allow them continue with this service, but sometimes RROs are not able to charge a fee because they do not represent the copyright holders.

3.2 Reserve Room

This service allows a group of students access to specific documents, including journal articles and book chapters that are highly demanded because this reading is mandatory in a class and the library holds only one copy. If the requested documents are located in the library's general collection, one of the students can borrow the material, but the rest of the class will not be able to read it. For this reason professors select in advance the materials they wish to be read by the students and place them in the library's reserve room. The

materials can not leave the library and are available for all the students. Crews mentions “purchasing multiple items for only temporary use is often impossible or impractical, so many reserve facilities instead turn to photocopies of articles and book chapters³⁸” If we return to the private copy privilege it might be understood as legal for librarians, by their patrons’ requests, to reproduce the materials because as Snyder says “reserves are an extension of the classroom, and thus should be treated like classroom copying under fair use.”³⁹ From a different perspective, these photocopies come from a systematic reproduction and any copyright holder could ask to receive compensation for it. According to section 108a (USA copyright law), libraries may copy and distribute protected works only if such activities are isolated and unrelated instances. About this point Dames says:

“Section 108g establishes a two-part test that determines whether a library can use this limitation. First, if the institution or one of its employees knows that it is engaging in the concerted or distribution of multiple copies of the same material, whether made on one occasion or over a period of time, then the library loses the exemption and may be subject to infringement liability if it cannot find another exemption. Second, the library also can lose its section 108 exemption if it engages in the systematic reproduction or distribution of single or multiple copies.”⁴⁰

To summarize the American point of view it can be said that librarians are able to reproduce materials for their patrons as long as these reproductions become the property of the patron and do not turn into a systematic activity.

In the case of Mexico, Article 148 of the copyright law, when referring to the private copy privilege, says that “a legal entity may not avail itself of the provisions of this subparagraph except where it is an education or research institution, or is not devoted to trading activities.”⁴¹ This provision entitles Mexican libraries to reproduce works at the request of a patron but it doesn’t indicate how much to reproduce or if it is correct to charge a fee for reproduction in order to pay the maintenance of the equipment or the salary of the person in charge of the service. To solve these questions, some Mexican libraries have removed the photocopier from their premises. If the patron wants to copy a book, he or she has to

³⁸ *Idem.* K. D. CREWS. p. 84

³⁹ F. SNYDER. *Copyright and the Library Reserve Room* in *Law Library Journal* 1980 v73 p. 702. Cited by K. D. CREWS. p. 84

⁴⁰ K.M. DAMES. *Copyright clearances: Library copying in the digital age*. In *Online* 2005 v29(s) p.33

⁴¹ *Idem.* Federal Law on Copyright (Mexico),

borrow it from the library and make copies out of the library.⁴² Another approach taken by many libraries around the world is to place warning notices near photocopiers in which the application of the three-step test is described in a simple manner by giving some practical examples. These notices are based on the policies that universities have developed jointly with librarians, faculty, lawyers and students.

Librarians don't want to be held liable for civil or criminal sanction for the acts committed by their patrons. For this and other reasons, they have been working to instruct them in the correct use of information by teaching the ability to access, evaluate, and use effectively the needed information. In this aim the Association for College and Research Libraries (a division of the American Library Association) has developed the "Information literacy competency standards for higher education."⁴³ Its fifth standard says that "the information literate student understands many of the economic, legal, and social issues surrounding the use of information and accesses and uses information ethically and legally." To measure this standard, they propose performance indicators, based on the following premise: "The information literate student demonstrates an understanding on intellectual property, copyright, and fair use of copyrighted material."⁴⁴

Information Literacy courses are a trend among higher education programs around the world and have been given even at the primary school level. It is difficult to find a modern university program that does not offer one of these courses; this demonstrates the importance librarians give to the topic.

4.- Library copying for library uses: Printed Materials

One of the missions of any library is to preserve its collection through many methods, such as replacing original book binding with hard bindings or protecting antique materials by

⁴² In the case *Basic Books Inc. vs. Kinko's Graphics (USA)*, Kinko's owners at the end of the trial decided to allow clients to use the photocopiers by themselves rather than have Kinko's employees make the copies. In both situations (Mexican libraries and Kinko's), the problem is not solved, there is only a slight change in situation that changes the legal aspect of it.

⁴³ AC&RL. Information literacy competency standards for higher education. Association of College & Research Libraries. 2000 p.14

⁴⁴ *Idem.* AC&RL p.14

storing them in controlled atmospheric conditions (e.g. controlled temperature, humidity and free-dust environments), but these actions are not always enough when considering books that, given their contents, are always highly demanded. Frequently in libraries' collections, books are found without some pages. Entire chapters may be missing due to vandalism or excessive use. Librarians need to replace the stolen or lost pages by reproducing them, but few national laws consider this reality and the ones who permit the reproduction of the materials allow it only under specific conditions. An example is the section 188.1 of the Intellectual Property Code of the Philippines that says:

“...any library or archive whose activities are not for profit may, without the authorization of the author or copyright owner, make a single copy of the work by reprographic reproduction: (a) Where the work by reason of its fragile character or rarity cannot be lent to user in its original form; (b) Where the works are isolated articles contained in composite works or brief portions of other published works and the reproduction is necessary to supply them; when this is considered expedient, to person requesting their loan for purposes of research or study instead of lending the volumes or booklets which contain them; and (c) Where the making of such a copy is in order to preserve and, if necessary in the event that it is lost, destroyed or rendered unusable, replace a copy, or to replace, in the permanent collection of another similar library or archive, a copy which has been lost, destroyed or rendered unusable and copies are not available with the publisher”⁴⁵

The general rule for libraries is that a damaged book should be removed from the shelves and if the library wants to replace it, then it must buy another copy of it. If the library, after doing an exhaustive search to buy the book, doesn't find it because it is out of stock or out of print then it might be possible to reproduce the material. For some researchers, for example Milagros Santos, the out of the stock or out of print matter is a gray area, because “...if the book is out of print, are we [librarians] licensed to reproduce a copy? What if [the book] is just temporarily out of print and a book is needed?”⁴⁶ For librarians it is not an easy task to apply the law to these kind of cases. Despite the fact that the law is clear in its indications, some librarians do not want to wait to get a book to replace a damaged one, because as Santos continues “...the librarian has to choose between whether to provide the

⁴⁵ Section 188.1 of the Intellectual Property Code of Philippines. Available at http://portal.unesco.org/culture/es/files/30334/11422502543ph_copyright_1998_en.pdf/ph_copyright_1998_en.pdf Last visit 23.02.08

⁴⁶ M. SANTOS-ONG. *Copyright and Libraries: Updates on Issues and Challenges*. In *Intl. Inform. & Libr. Rev.* 2001. v33. p.30

needed material by reproducing it and possibly infringe copyright or to tell the client that he does not have it”⁴⁷

Some other concerns about preservation exist in libraries. When receiving materials such as CDs or DVDs librarians do not want to lend the original version because they are afraid of receiving damaged materials in return. Instead they prefer to make a back-up copy” and lend this copy. Of course this is not correct, but as Santos also mentions “...there are some libraries in which librarians are personally accountable for any loss of library material. So for expensive books, they photocopy it, keep the original and use or service the photocopy. The question is: will this reason fall under the ambit of the exception provided by the law?”⁴⁸

5. - Information access and copyright: Current situation in Mexico

When the Mexican Congress adopted the three-step-test in the late 90’s it didn’t interpret it in an exhaustive manner, but rather described some permitted acts that could be performed by individuals but not by libraries. This situation leaves Mexican libraries in difficult situations when trying to apply the law to the vast series of services they offer. In this paper the cases of Document Delivery Services, Reserve Rooms, and others were discussed, but those are not the only services that are offered every day in libraries. It seems that Mexican copyright law doesn’t understand the activities of a library. Where the law talks about the rights of authors or the rights of publishers, it is extensive, not only in its contents, but also in its scope. For example, in 2004, the lapse for protecting economic rights changed from 75 years after the death of the author to 100. There is no other national law that has implemented this many years for this protection, especially when considering that the Berne Convention and TRIPS only grants 50 years of protection.

But how was such an amendment passed? There might be several answers to this question, but at the end of the day, it must be remembered that civil society, including librarians, weren’t paying attention to the proposals made by a small number of publishers. In other

⁴⁷ *Idem.* M. SANTOS-ONG.

⁴⁸ *Idem.* M. SANTOS-ONG.

words, publishers have been lobbying constantly to obtain benefits for their industry, but at the same time these activities are increasing the accessibility barrier.

The possibility to widening the scope of the adopted three-step-test in Mexican law in favor of library services is a very difficult scenario. Mexican librarians are worried about copyrights, but still haven't found a way to make Congressmen hear their concerns. This is not due to inaccessibility to members of Congress, but a lack of consensus on what to ask. Librarians would love to find in copyright law a mathematical formula which clearly indicates how many pages one is able to copy, but history has demonstrated that these kinds of formulas do not work. Law should give a specific frame and in the case of a lawsuit; the specific case should be analyzed by a judge. However, judges are not well-trained in copyright issues in libraries, especially in relation to the digital environment. As it is possible to see, the law is not balanced between the interests of copyright holders and civil society, while librarians are in the middle of these contradictory positions. Librarians understand very well the value of information; they work in favor of authors when classifying their works in order to be easily accessible or when rebinding the books, but on the other hand, they have plenty of patrons asking them for access to information. Librarians have some technology that can help them solve patrons' needs, but when offering these services they often incur copyright violations. Many of the librarians that are worried about copyrights have been attending to learn how to implement guidelines to promote the correct use of intellectual works. However, when librarians try to obtain permission for extensive uses, they can't find the appropriate tools to do so. Centro Mexicano de Proteccion y Fomento de los Derechos de Autor (CEMPRO)⁴⁹ does not represent all the publishers or authors that are held in libraries' collections and when an author or a publisher is represented, it is not easy to get an affordable royalty price.

CEMPRO has determined a fee for libraries in order to allow them to photocopy in a rational manner and under the three-step-test indications the contents of their collections. But why should a library pay a fee when CEMPRO does not represent all the publishers that are in the library's collection?

⁴⁹ The Mexican Reproduction Right Organization advocated for representing the rights of literary works' owners.

It is not possible to say that exemption and limitations that are defined in Mexican copyright law affect or benefit libraries because its contents are not well known by librarians, even worse, the contents are not easy to interpret in every day life. Unfortunately librarians, publishers, authors, and society are not reaching a consensus about information access and copyrights. The copyright holders want to collect the most money they can; information users want the most information possible without paying. We are facing a complicated situation that will not have a solution until the representatives of these groups reach an agreement.