

Case Study

Access in the Time of Salinger: Fair Use and the Papers of Katherine Anne Porter

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Abstract: Manuscripts curators who wish to microfilm or otherwise duplicate a collection for preservation and access commonly confront a problem: multiple copyrights represented in a collection. It is practically impossible to obtain permission from the numerous parties who may hold such copyrights. What are the limits of fair use in such a case, particularly considering the restrictive environment after *Salinger v. Random House, Inc.*? Archival tradition and practice offer some answers more hopeful for preservation and access to materials, but the law still limits. To best serve the research community, archivists must lobby to have more liberal policies codified into law. The Papers of Katherine Anne Porter, a collection held by Archives and Manuscripts at the University of Maryland at College Park Libraries, is used as an example.

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"ARCHIVISTS HAVE A DUTY to obey the law. They have a duty to avoid copyright infringements and liabilities. They have a duty to protect the legal and agreed rights of donors. But they also have a duty to make their collections as useful as possible . . . the reason for maintaining the collections is to provide public access to the information they contain."¹

Copyright law is, fundamentally, concerned with balancing authors' rights to remuneration with the public's right to access. From one short clause in the Constitution—"The Congress shall have the power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"²—has come a panoply of considerations for archivists and manuscripts curators. Writers of the past and their descendants do have the right to benefit from and control the dissemination of their published and unpublished writings. But scholars cannot study those works and the people who created them without access to documents, nor can they publish credible studies without such access. The documents must be preserved, and access made as direct as possible through limited copying and dissemination. What, therefore, are the proper actions for archivists and manuscripts curators to balance these competing demands? How are their actions guided by the increasingly conservative interpretations of the U.S. copyright laws? The competing interests are dramatized by examining the problem of copyright and fair use encountered in microfilming the Papers of Katherine Anne Porter at the

University of Maryland at College Park (UMCP).

The Papers of Katherine Anne Porter

Porter was born in Indian Creek, Texas, but later lived in New York, Mexico, Europe, and Washington, D.C. She was awarded Guggenheim Fellowships in 1931 and 1938, elected to the National Institute of Arts and Letters in 1937, became a Fellow in Regional American Literature at the Library of Congress in 1944, was a Fulbright Lecturer at the University of Liege in 1955, won a Ford Foundation grant in 1959–60, and won the National Book Award. Her publications include *Flowering Judas and Other Stories* (1935); *Pale Horse, Pale Rider* (1939); *The Leaning Tower and Other Stories* (1944); *The Days Before* (1952); *The Never-Ending Wrong* (1977); and her only novel, *Ship of Fools* (1962). *Ship of Fools*, a best-seller, was also made into a movie.

She is known as "a writer of great clarity" and "one of America's finest stylists,"³ whose work was likened to that of Hawthorne, Flaubert, and Henry James.⁴ Her work is included in many major American literature anthologies. She has been the subject of a great deal of scholarly attention, especially since her death in 1980. Recent studies include Robert H. Brinkmeyer's *Katherine Anne Porter's Artistic Development: Primitivism, Traditionalism, and Totalitarianism* (1993); Jane Krause DeMouy's *Katherine Anne Porter's Women: The Eye of Her Fiction* (1983); Thomas F. Walsh's *Katherine Anne Porter and Mexico: The Illusion of Eden* (1992); Joan Givner's biography, *Katherine Anne Porter: A Life* (1991); Ruth Alvarez and Thomas F. Walsh's *Uncollected Early*

¹Kenneth D. Crews, "Unpublished Manuscripts and the Right of Fair Use: Copyright Law and the Strategic Management of Information Resources," *Rare Books & Manuscripts Librarianship* 5, no. 2 (1990): 68.

²U.S. Constitution, art. 1, sec. 8.

³George McMichael, *Anthology of American Literature*, 4th ed. (New York: Macmillan, 1989), 2: 1526.

⁴Paul Rosenfield, "An Artist in Fiction," *Saturday Review of Literature*, 1 April 1939, 7.

Prose of Katherine Anne Porter (1993); Isabel Bayley's edited collection, *Letters of Katherine Anne Porter* (1990); and Janis P. Stout's *Katherine Anne Porter: A Sense of the Times* (1995). Porter's work has been the subject of over thirty-nine doctoral dissertations and numerous master's theses, and she continues to be a current research interest.

In 1966, the University of Maryland at College Park offered Katherine Anne Porter an honorary doctorate in humane letters in recognition of her contributions to American literature. Porter, then well into her seventies, responded that she was too ill to attend the ceremony. In response, university officials went to her home in Spring Valley, Washington, D.C., to award the degree. She was so charmed by this gesture that on 11 October of that same year, she called Wilson H. Elkins, then University of Maryland at College Park president, and offered her papers to the university. This formed the first group of her papers, which came to the university in several groups between 1966 and 1969. After Porter died in 1980 in Silver Spring, Maryland, her nephew, Paul Porter, sold a second group of her papers to the University. The collection is under the care of Literary Manuscripts, a unit of Archives and Manuscripts at the University of Maryland Libraries.

The 121-linear-foot collection consists of correspondence; the drafts, manuscripts, notes, galleys, and proofs of Porter and others; personal papers of Porter; printed matter collected by Porter; and clippings that relate to Porter, her publications, and her interests. Letters are both to and from Porter, since she typed her correspondence and kept carbon copies of most letters. Both primary and secondary materials of Porter and others are therefore represented, but the majority of the collection consists of unpublished materials, particularly correspondence. Correspondents include Cy-rilly Abels, Elizabeth Ames, Donald Elder, Albert Erskine, William Faulkner, Janice

Ford, Ford Madox Ford, Caroline Gordon, Josephine Herbst, Seymour Lawrence, George Platt Lynes, Russell Lynes, Gertrude Stein, Flannery O'Connor, Eugene Pressly, Eudora Welty, Paul Porter, Glenway Wescott, and Monroe Wheeler.

The Papers of Katherine Anne Porter are central to the literary manuscripts collections at the University of Maryland Libraries; thirteen of the other collections are directly related to it. Porter specified no access restrictions. The Katherine Anne Porter Room, which contains some of Porter's furniture and her personal library, is open two days a week. It is staffed by docents who, with the Literary Manuscripts staff, give up to thirty-two tours of the room each month.

The Porter papers are heavily used. Between June 1993 and February 1996, 57 researchers who were not University of Maryland students or faculty visited the UMCP Libraries to use the Porter papers. Some came from as far away as Europe and stayed for up to a month. Ruth M. Alvarez, curator of Literary Manuscripts, fielded 252 telephone calls concerning the collection. Researchers requested about 5,500 photocopies from the Porter papers.⁵ Alvarez also corresponded with 301 researchers about the collection.⁶

The Porter collection is deteriorating rapidly. Portions of it already are so brittle that they can be used by researchers only in photocopy form. Much of the correspondence was typed on translucent typing paper; Porter herself typed most of her letters on blue or pink paper of a quality no higher than that of newsprint. Both types

⁵All photocopying in Archives and Manuscripts is done in compliance with the guidelines prescribed in the *Copyright Act, U.S. Code*, vol. 17, sec. 108e (1976). Photocopies are only made for on-site or remote researchers who sign an agreement that states legal limitations on photocopying.

⁶Compiled from monthly reports of Ruth M. Alvarez, curator of literary manuscripts, Special Collections, UMCP Libraries.

of paper are now delicate, and the carbon on the pink paper is blurring.

Microfilm, Copyright, and the Deed of Gift

To solve these difficulties of preservation and access, Literary Manuscripts wishes to microfilm the Papers of Katherine Anne Porter in its entirety, for preservation and greater researcher access through interlibrary loan to other facilities similar to theirs. Ideally, the department would also make microfilm copies available for sale for the convenience of remote researchers doing extensive Porter work. However, this desire raises some basic issues of copyright and fair use that create difficulties.

Porter specified in her will that Isabel Bayley was to act as literary trustee for "all of my literary works, my writings, my papers, my notes, my letters to and from others and all property rights attendant to such literary works, writings, papers, notes, and letters."⁷ For her literary trustee, she granted

The right to publish or republish any of my writings including without limitation novels, stories, poems, letters or other writings; The right to secure and to obtain copyrights, copyright renewals and copyright extensions; All of the rights attendant to such copyrights, renewal copyrights and common law copyrights, to include without limitation the rights of publication, dramatization, translation, public performance or other presentation, and motion picture, television, radio and recording rights, and whatever methods, means of presentation in any form or tech-

nique which may be devised in the future.⁸

Bayley acted as literary trustee until her death in July 1993, and the provisions of her will resulted in the appointment of Barbara Thompson Davis as her successor.

Because she appointed a trustee, Porter's will transferred to the University of Maryland only the material objects, not the literary property rights:

the sheets of paper, cards and notebooks, etc. on or in which KAP wrote or typed stories, articles, drafts, outlines, notes, comments and other works; (b) the printed volumes, periodicals and newspapers in which publishers published her works, or those of other writers, or in which she wrote notes or comments . . . The University does not have the right to publish, or authorize anyone to publish, the KAP writings.⁹

"Any KAP writing that had been created earlier than 1978, and had not been published before December 31, 1977, automatically obtained copyright on January 1, 1978 by operation of *Section 303* of the Revised Copyright Act which took effect on that date (Public Law 94-553, 94th Congress)."¹⁰

The papers came to the university under a "gentleman's agreement," though Porter took tax deductions from the donation of the first papers, an act that supports the university's legal right to the physical property. The university attempted unsuccessfully to have Porter sign a deed of gift. In partial result, ownership of the literary

⁸"Second Codicil," p. 10.

⁹Irwin Karp, Esq. Memorandum of Law to Isabel Bayley, Literary Trustee Under the Will of Katherine Anne Porter, 12 November 1984, Papers of Katherine Anne Porter, Special Collections, UMCP Libraries, 3.

¹⁰Karp to Bayley, 12 November 1984, 3.

⁷"Second Codicil to Will of Katherine Anne Porter," 25 June 1974, Papers of Katherine Anne Porter, Special Collections, UMCP Libraries, 1.

property rights were disputed by Bayley and the State of Maryland in 1985, when it was found that the conditions of Porter's will stood and that her literary trustee, not the university, still held copyright. The same condition exists for any other unpublished writings in the collection.

Neither [the literary trustee] nor the University could authorize the publication of the contents of letters written to Miss Porter by other persons, and embodied in the pages sent to Miss Porter. The authors of the letters owned the copyrights in them, and only they (or those to whom they transferred copyrights or publishing rights) can authorize publication of the letters.¹¹

Microfilming is legally defined as a form of making copies. According to the terms of the U.S. Copyright Act of 1976, "copies are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."¹² As an analog technology, microfilming is comparable to photocopying and does not raise the problems encountered in reproducing materials on digital media.

Under the 1976 law, all works are automatically copyrighted on creation. All unpublished materials are protected by copyright until fifty years after the author's death, not to expire before 1 January 2003. Porter's own unpublished works therefore are protected until 2030, and the letters included in Bayley's published edition are protected until 2040. Letters and manuscripts of others have a variety of terms of

copyright, depending on the date and conditions of their authors' deaths. Published works created before 1978 have a twenty-eight-year copyright term from the date of publication, plus a forty-seven-year renewal. Published works in the Porter collection created before and in 1921 are now in the public domain, but they form a minuscule portion of the collection.

Thus, the vast majority of the materials in the Porter collection are still under copyright protection, and the Department of Archives and Manuscripts needs permission to reproduce them. There is no difficulty with Porter's creations; Barbara Thompson Davis approves of the microfilming project, as did Isabel Bayley. The problem lies with the copyrights owned by others, which control a substantial portion of the collection. It is exacerbated by the facts of Porter's life: her correspondence was voluminous and far exceeds the volume of her relatively small corpus of published works. There are about a thousand correspondents represented in the papers.¹³ Porter and Albert Erskine, her husband from 1938 to 1942, sometimes exchanged three letters a day during their frequent separations. She also seems to have used letter writing as an artful procrastination technique, as she wrote her greatest number of, and most eloquent, letters when she was under contract to write a book and accomplishing very little on that assigned project. There are letters from individuals at book publishers and colleges and universities on business matters. Porter frequently corresponded with persons much younger than herself, and those persons hold copyright on their letters even longer than she.

Certainly the problem could be solved simply by contacting each person with literary rights to a portion of the collection to obtain his or her permission. However, this is hardly feasible, considering the time

¹¹Karp to Bayley, 12 November 1984, 6.

¹²*Copyright Act*, sec. 101.

¹³The total number is uncertain. The collection is currently being completely reprocessed.

and energy it would require to locate and contact every copyright holder or literary trustee represented, particularly since presently no such records exist for most of the collection.¹⁴

Considering the Options

What action, then, can the archives take, given its dual responsibility to serve the scholarly population and abide by the law? A careful eye to interpretation indicates that there are several options, with increasing degrees of access, under the 1976 revised copyright law. There are increasing degrees of risk given increasingly conservative attitudes, particularly toward unpublished works, since the case *Salinger v. Random House, Inc.* In this case, the reclusive author J. D. Salinger got an injunction against both the publishing company Random House, Inc., and Ian Hamilton, the author of an unauthorized biography of Salinger. The injunction prevented the defendants from publishing copyrighted material taken from some unpublished letters written by Salinger, as it was determined that such use would not be fair use under federal copyright law. This decision stated that according to the copyright law,

copying of a literary work consists in exact or substantial reproduction of the original, using original as a model as distinguished from an independent production of same thing, and a "copy" is that which comes so near to original and must be such that ordinary observation would cause it to be recognized as having been taken from the work of another.¹⁵

This microfilming project could not be considered the preparation of a derivative work, since there will be no "editorial revisions, annotations, elaborations, or other modifications" aside from the actual arrangement and indexing of the materials.¹⁶ Preparation of such a work would make the university the holder of a new, separate, copyright.

According to Roger Bruns, deputy executive director of the National Historical Publications and Records Commission (NHPRC), this very problem is common for manuscripts curators and documentary editors. But there is no case law directly pertaining to the problem of microfilming. Inquiries directed to the Copyright Office at the Library of Congress receive only vague replies, and surprisingly little is found in the professional literature on the subject. Therefore, editors at the NHPRC who are preparing editions of similar collections for publication are extremely careful about obtaining permission from every copyright owner represented in the collection.¹⁷ Since that is not feasible in this case, the problem must be examined considering related issues.

Making a single microfilm copy for preservation purposes is fully within copyright law's special exemptions for libraries and archives:

The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is . . . deteriorating . . . if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.¹⁸

¹⁴Ruth M. Alvarez, curator of literary manuscripts, Special Collections, UMCP Libraries interviewed by author. College Park, Maryland, 10 March 1994.

¹⁵Henry C. Black, *Black's Law Dictionary*, 6th ed. St. Paul: West Publishing, 1990, 336.

¹⁶*Copyright Act*, sec. 101.

¹⁷Roger Bruns, telephone interview by author, 22 April 1994.

¹⁸*Copyright Act*, sec. 108c.

Since this is a unique collection, there is no question of finding replacements, so that restriction would not apply. However, the law provides for making only one copy, a difficulty for preservation. Currently accepted standards for archival microfilming require production of at least three copies: one storage copy, one production master, and one use copy. According to one expert:

The preservation portion of [17 U.S.C., section] 108 clearly did not contemplate the large-scale, well-organized programs now under way to preserve the world's literature; it really only dealt with the reproduction of a single deteriorated volume to meet the needs of a library's own clientele.¹⁹

The need to make these three copies pushes this issue out of the fairly clear guidelines of Section 108 of the Copyright Act and into the far murkier provisions of fair use outlined in Section 107.

Fair use "can be defined as a public usage for which the copyright owner is not remunerated, presumably because it is minimal and because it is in the public interest."²⁰ It calls for consideration of four factors to determine whether copying is legal:

1. The purpose of the copying
2. The nature of the work
3. The amount and substantiality of the portion copied
4. The effect of the copying on the potential market for the work²¹

Since in this case, the purpose of the copying is merely preservation, not data base creation for wide dissemination, the project meets the first consideration. The second consideration is designed to protect consumables, like workbooks, and therefore does not apply here.²² Since the purpose here is to copy works in their entirety, legality under the third consideration is questionable. Likewise, the case's standing under the fourth consideration is unclear, since the effect on the potential market depends on both present and future publication of the works. There would be no direct financial gain for the university. However, it is generally agreed in the archival community that this sort of copying is fair use:

Preservation of library materials is widely viewed as important. The preservation exemptions now contained in [section] 108 were the first to be added to the Act when it was drafted and were never challenged. As a result, it seems likely that the three copies required by current preservation standards would be permitted provided they were for the preservation of an actually deteriorating work, not currently in print.²³

Making the number of copies necessary for preservation standards is acceptable. The university would then be the owner of those copies. The reader copy can be viewed by researchers on a standard micro-

¹⁹Robert L. Oakley, "Copyright and Preservation: An Overview," *The Bookmark* 50, no. 2 (Winter 1992): 122. Current legislation titled the "NII (National Information Infrastructure) Copyright Protection Act of 1995," introduced as S.R. 1284 IS and H.R. 2441 in the 104th Congress, September 1995, proposes to amend Section 108, subsection (a), by deleting "one copy or phonorecord" and replacing it with "three copies or phonorecords." This would make it perfectly legal for libraries to make the number of copies necessary for preservation. Last action on these bills was 7 February 1996. From the Library of Congress' legislative information site at <http://www.loc.gov/pub/thomas/c104>.

²⁰R. S. Talab, *Commonsense Copyright: A Guide to New Technologies* (Jefferson, N.C.: McFarland and Co., 1986), p.19.

²¹*Copyright Act*, sec. 107.

²²Oakley, "Copyright and Preservation," 123.

²³Oakley, "Copyright and Preservation," 123.

film reading machine under the law's provisions:

The owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.²⁴

If more than the three copies were made—one or two additional reader copies, for instance—there appears to be no provision in the law that would prevent more than one researcher from using the Porter collection on microfilm at one time. The provision of “no more than one image at a time” is unlikely to be a problem, since microfilm readers project only one image. That phrase does not lend itself to limiting multiple researchers.

The university also would be able to discard the reader copy and make a new one, should it become damaged, or to sell that copy, should the collection be transferred to another institution:

The owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.²⁵

However, the department has two aims in this project; preservation is only the first. It also would like to make microfilm available to remote researchers through interlibrary loan. Though the department has not performed any extensive study to determine the

demand for such a program, it surmises there would be some interest since researchers constantly come from other states and countries. Borrowing microfilm at their home institution would save researchers substantial travel expenses and time. The department does not expect any sort of overwhelming demand. But this moves the problem into still murkier waters of fair use because making and distributing copies in this manner legally constitutes publication:

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.²⁶

This is a right specifically reserved for the copyright holder. *Publish* literally means “to make public,” and it therefore can cause difficulties when applied to unpublished collections donated or sold to an archives or literary manuscripts collection. Before the 1976 copyright law revision, “some scholars and librarians argued that donation of unpublished materials to a repository open to the public in itself constituted publication,” if the materials could be viewed by any member of the public.²⁷ At the time, archivists and scholars could afford to be cavalier about this issue. “[B]efore the new law was passed, at least one expert advised scholars to take the risk of copying and quoting,” feeling that they

²⁶Copyright Act, sec. 101.

²⁷Michael Les Benedict, “Historians and the Continuing Controversy over Fair Use of Unpublished Material,” *American Historical Review* 91 (October 1986): 864–65.

²⁴Copyright Act, sec. 109.

²⁵Copyright Act, sec. 109.

were unlikely to be sued successfully.²⁸ They also developed legal rationales for flexible legal interpretation.

This type of microfilm distribution would constitute systematic reproduction that libraries and archives are prohibited from doing; but the same clause of the law specifies that limitations on systematic copying should not prevent interlibrary lending:

Nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.²⁹

Since the materials in the collection are not available for purchase, that prohibition would not apply. Such distribution would not interfere significantly with any author's right to gain financially from their creative works. It would have to be limited, however, as suggested by one scholar on the topic:

Although the law confirmed the right of repositories to deposit photocopies of otherwise unavailable material in other libraries and archives, it is doubtful whether this right would permit the publication of microfilm editions of manuscript collections, such as those sponsored by the National Historical Publications and Records Commission and by state historical societies. Certainly, publication of printed editions of unpublished correspondence, speeches, and

the like will infringe copyright until at least 2003.³⁰

By rather well-established archival tradition, the department could make multiple microfilm copies on demand and lend them under the fourth fair use exception, "the effect of the use upon the potential market for or value of the copyrighted work."³¹ In the correspondence series, with perhaps fifteen or twenty exceptions, each of the collections representing a single author is so small that it could not be published as an individual volume by the copyright holder.³² Therefore, the potential financial gain for any individual copyright holder is very small. This type of use would meet the first exemption; since the university would not exact any financial gain, such use would be for "nonprofit educational purposes."³³ As Michael Les Benedict notes, "The history of the [copyright] law's development indicates that the original concern was to prevent libraries from being so free with photocopies as to destroy the market for published works."³⁴ If the "work as a whole" refers to each author's entire corpus of writings, this use would be consistent with the third exemption. As has been shown before, the second consideration does not apply to these unique works.

The microfilms would need to be loaned to other archives under certain conditions, so that such lending would not encourage unauthorized distribution. Since researchers would have to obtain from the copyright holders the same permissions they would need if they were researching in

³⁰Les Benedict, "Historians and the Continuing Controversy over Fair Use," 868.

³¹*Copyright Act*, sec. 107.

³²Frank Burke, professor, College of Library and Information Services, University of Maryland at College Park, interview by author, College Park, Md., 12 April 1994.

³³*Copyright Act*, sec. 107.

³⁴Les Benedict, "Historians and the Continuing Controversy over Fair Use," 878.

²⁸Les Benedict, "Historians and the Continuing Controversy over Fair Use," 863.

²⁹*Copyright Act*, sec. 108g(2).

College Park, the researchers should be asked to sign agreements showing they understand this. Researchers would be served one microfilm reel at a time, just as they would examine only one manuscript box at a time in the Maryland Room.

The Manuscripts Division at the Library of Congress loans microfilm collections under similar, less strict, conditions. It loans only collections for which it has both the original and the negative in the library. Since some of its microfilm collections were purchased, obtained through copyright deposit, or are derived from originals housed elsewhere, this represents only a portion of its extensive microfilm collection. About a dozen of its collections have been moved to a storage facility in Landover, Maryland, and are available at the library only in microfilm. Those films are not loaned, as that would inconvenience researchers who come to the library in person. The library is the "lender of last resort" for collections that cannot be borrowed from any other institution. Microfilms of the presidential papers, for example, are not available for loan because they are readily available in at least one institution in each state. Up to ten reels may be borrowed at one time, for up to one month. Any library, or other institution that participates in the interlibrary loan system, may borrow microfilms. Requests are handled through the library's Loan Division. Researchers are allowed to make copies from the microfilm; restrictions and copyright stamping are left to the institution in which they are using the film.³⁵

The law of 1976 codified conditions of fair use, intending to preserve the status quo. But the Copyright Office's 1983 report, the first of a series called for in the

original law,³⁶ interpreted the law strictly and has serious ramifications for unpublished works. The Copyright Office wrote that subsections 108(d) and 108(e), governing interlibrary loan and photocopying for researchers, applied only to published works.³⁷ "In sum, the interpretation proposed by the Copyright Office would make it an infringement of copyright to quote unpublished materials in books or articles, to provide photocopies of unpublished materials to scholars, to circulate photocopies of collections through interlibrary loan, or to deposit photocopies for research use in other libraries or archives."³⁸

This strict interpretation obviously presents serious problems for the preceding discussion about Porter's papers. Individual scholars may choose to flout the law, but institutions—particularly large, tax-supported institutions like the University of Maryland—cannot. However, archivists hesitate to accept the Copyright Office's interpretation, as its strictness interferes significantly in their basic mission to serve scholars.

Recent Court Decisions on Copyright

Current case law also affects the issue and makes the preceding argument less clear-cut. The case of *Harper and Row v. Nation Enterprises*, concerning the Gerald R. Ford memoirs, "turned on whether the *Nation's* quotations from the [unpublished] manuscript constituted fair use,"³⁹ with the Supreme Court ruling for Harper and Row, "with part of the 6-3 decision turning on the majority's conclusion that fair use was of limited applicability to unpublished ma-

³⁵Jeffrey M. Flannery, manuscripts librarian, Library of Congress, telephone interview by author, 4 May 1994.

³⁶*Copyright Act*, sec. 108i. Repealed by Public Law 102-307, June 26, 1992. The last such report was in 1988 and has no discussion of the matters at hand here.

³⁷Les Benedict, "Historians and the Continuing Controversy over Fair Use," 869.

³⁸Les Benedict, "Historians and the Continuing Controversy over Fair Use," 869.

³⁹Les Benedict, "Historians and the Continuing Controversy over Fair Use," 873.

terials.”⁴⁰ As the Copyright Act states, “The fact that a work is unpublished is a critical part of its ‘nature’ . . . the scope of fair use is narrower with respect to unpublished works.”⁴¹ The author, it was decided, had the right to determine first publication. Though this case did not involve photocopying, it may be taken as an agreement with the Copyright Office’s restrictive interpretation: the scope of fair use for unpublished materials, though not written into the law, is narrower than the scope for published works because of that right of first publication.

The Second Circuit Court of Appeals built on that ruling in appeals involving authors J. D. Salinger (*Salinger v. Random House, Inc.*) and L. Ron Hubbard (*New Era Publications, ApS v. Henry Holt and Company, Inc.*). In January 1987, the Second Circuit ruled that Salinger could prevent use of his unpublished letters in a biography by Ian Hamilton, including even the detailed paraphrasing of Salinger’s correspondence.⁴² Even though the 1976 act preempted the common law, and even though fair use depends on many variables, the Second Circuit held to the common law right of first publication,⁴³ stating that “[I]f a biographer copies more than minimal amounts of expression, he deserves to be enjoined.”⁴⁴ The Hubbard case built on, and reaffirmed, these conclusions. The Salinger case also raised the issue of privacy; the reclusive Salinger sought legal action to protect his privacy, but he did so by focusing on the copyright law. By doing so,

he aroused more interest in his letters and increased their economic value, as Crews suggests: “[B]y endorsing a relationship between privacy and market value, and by stressing that value, the court has allowed privacy concerns to limit the scope of fair use.”⁴⁵

Wright v. Warner Books, Inc. involved unpublished letters of author Richard Wright sent to his biographer, and a lawsuit was brought by Wright’s widow. The *Harper and Row, Salinger*, and *New Era* opinions weighed heavily in the decision. However, “[t]he third factor—the amount and substantiality of the material used—and the fourth factor—the market effect of the use—were both weighed in the biographer’s favor;”⁴⁶ he won the case. However, the court specified that neither *Salinger* nor *Harper & Row* established a rule on unpublished works.

The fair use test remains a totality inquiry, tailored to the particular facts of each case. Because this is not a mechanical determination, a party need not ‘shut-out’ her opponent on the four factor tally to prevail.⁴⁷

The 102nd Congress formalized this finding by adding to the Copyright Act the phrase, “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 [the four conditions for fair use].” This became Public Law 102-492 on 24 October 1992.⁴⁸

Conclusion

Microfilming and distributing the Porter collection would usurp the copyright hold-

⁴⁰Les Benedict, “Historians and the Continuing Controversy over Fair Use,” 874.

⁴¹*Harper and Row v. Nation Enterprises*, 471 U.S. 564 (1988).

⁴²Kenneth D. Crews, “Unpublished Manuscripts and the Right of Fair Use: Copyright Law and the Strategic Management of Information Resources,” *Rare Books & Manuscripts Librarianship* 5, no. 2 (1990): 62.

⁴³Crews, “Unpublished Manuscripts,” 64.

⁴⁴811 F. 2d 96 (1987).

⁴⁵Crews, “Unpublished Manuscripts,” 64.

⁴⁶House Rept. No. 102-836, 7.

⁴⁷*Wright v. Warner Books, Inc.* 953 F. 2d 740 (1992).

⁴⁸U.S. Statutes at Large 106 (1992):3145.

ers' rights to first publication, whether there was to be any financial gain or not. Consequently, these cases are of great concern. There is the additional concern presented by the Salinger case: could the microfilm project proposed here invade the privacy of Porter's correspondents? Porter did not place any restrictions on the papers, so it can be safely assumed that she did not consider any of the material invasive to their privacy. The Society of American Archivists recent *Code of Ethics* states: "Archivists respect the privacy of individuals who created, or are the subject of, documentary materials of long-term value, especially those who had no voice in the disposition of the materials."⁴⁹ An earlier statement, "If the donor does not specifically protect the privacy rights of persons named in the donated materials, the archives should to avoid potential lawsuits,"⁵⁰ suggests the purpose. The Salinger decision, in tying fair use with privacy definitely created a more restrictive environment.

These cases have made literary manuscripts curators extremely cautious about providing additional access to the letters of correspondents contained in their collections. According to one discussion on the Archives and Archivists listserv, at least one institution no longer provides photocopies of documents of well-known contemporary authors. "Their rationale is that since the Salinger case, photocopies no longer constitute fair use. This institution imposes this restriction only on the works of fiction authors, even though non-fiction writers also have literary rights to their works."⁵¹ Several other institutions refuse

to provide photocopies of documents created by any living authors. However, the Wright case and the House report need to be considered as well. "If we err, let us err on the side of access."⁵² The need to be more cautious about copyright in literary manuscripts has had positive effects as well; the University of Texas at Austin now offers a data base of individuals holding literary rights to the works of some authors.⁵³

Marketing the microfilm commercially, so that remote researchers might purchase reels of microfilm rather than borrowing them through interlibrary loan, presents more difficult problems. Clearly, the collection cannot be commercially marketed without gaining permission from every copyright holder represented in the collection. Such marketing, with royalties to go to the university, would represent direct financial gain for the institution, and would definitely usurp the authorial right of first publication, and clearly exceed the right of fair use.⁵⁴

The archives can accomplish that permission with fair efficiency, however. Dan Helmstadter, president of Scholarly Resources, has suggested that the department survey the documents and make a "good-faith effort" to contact the better-known correspondents or those the most heavily represented. Other papers may still go under the fourth exemption, particularly letters written for business. The curator, a Porter scholar who is familiar with the collection and all of its major correspondents, could certainly make such a decision. Letters to copyright holders could set a specific deadline for reply and read, "We will assume your tacit permission if we have no word

⁴⁹Society of American Archivists, *Code of Ethics for Archivists*, (Chicago: Society of American Archivists, 1992).

⁵⁰Gary M. Peterson and Trudy Huskamp Peterson, *Archives & Manuscripts: Law*, Basic Manual Series (Chicago: Society of American Archivists, 1985) 61.

⁵¹Leon C. Miller, message on Archives and Archivists Listserv, 2 May 1994.

⁵²Mark A. Greene, "Moderation in Everything, Access in Nothing? Opinion About Access Restrictions on Private Papers," *Archival Issues* 18, no.1 (1993): 38.

⁵³<http://www.lib.utexas.edu/Libs/HRC/WATCH>

⁵⁴Greene, "Moderation in Everything," 38.

by then.” The department would then be able to show the effort was made, should there be any later legal problems.⁵⁵ That opinion was corroborated by Marilyn Pettit, assistant professor of library science in the College of Library and Information Services at the University of Maryland at College Park.⁵⁶ Others agree that it is reasonable to contact only the more important copyright holders: “Writings with a non-personal content, or from little-known persons, or from writers long dead or otherwise well-examined in the public light, or from writers who thrust themselves into public exposure—such as politicians and celebrities—should be subject to a broader scope of fair use.”⁵⁷

To ensure greater safety from litigation, the department should attempt these contacts even if they do not sell the microfilm and make it available only on interlibrary loan. Being granted such permission could protect the department from being the object of a Salinger-like suit. Considering the current environment, this is the most prudent course to take. According to Helmstadter, it is impossible for a manuscripts curator to act precisely within copyright law and still serve the needs of the research community. It is instead a matter of conscious decision, and knowing how likely one’s actions are to result in a legal suit.⁵⁸ Thus, the archives can microfilm the Katherine Anne Porter collection for preserva-

tion purposes. It can generate additional copies for interlibrary loan with similar facilities, provided that the films are used only for viewing, and that copies are made only at the University of Maryland at College Park under the same rules currently observed. The university must develop a policy about contacting those copyright holders substantially represented in the collection before they attempt to produce and market the papers.

The current, increasingly conservative, interpretations of fair use, particularly as they apply to unpublished manuscripts like those in the Katherine Anne Porter collection, are understandable in an increasingly litigious environment. They are useful in one sense: they require manuscripts curators and archivists to weigh carefully the competing interests involved and to consider the ramifications of their actions. But if those conservative interpretations restrict researchers’ access to valuable documents by preventing the limited and reasonable dissemination of those documents, the interpretations must be viewed with suspicion. Copyright laws were designed to protect authors’ rights to gain financially from their work, but archival microfilming for preservation and improved access does not infringe on this right. If anything, it helps authors by encouraging interest in their work. Is it right that a manuscripts curator is unable to offer proper service to scholars while acting in total compliance with the law? It is the duty of the archival profession to challenge these interpretations and to have more liberal policies codified into law.

⁵⁵Dan Helmstadter, telephone interview by author, 12 April 1994.

⁵⁶Marilyn Pettit, interview by author, College Park, Md., 21 April 1994.

⁵⁷Crews, “Unpublished Manuscripts,” 65.

⁵⁸Helmstadter, telephone interview.