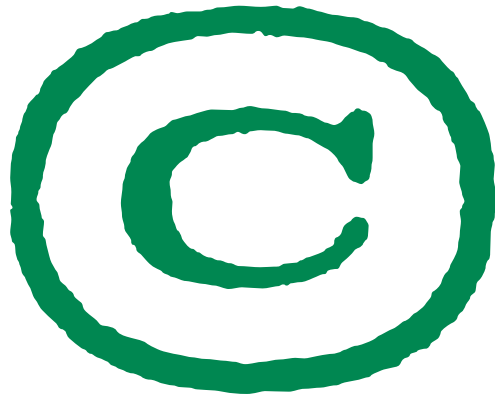


Complete Copyright

FOR K-12 LIBRARIANS AND EDUCATORS

Carrie Russell



Complete Copyright

FOR K-12 LIBRARIANS AND EDUCATORS

Carrie Russell

A PROJECT OF THE OFFICE FOR INFORMATION TECHNOLOGY POLICY

American Library Association | Chicago 2012

Published 2012 by the American Library Association



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ISBNs: 978-0-8389-1083-2 (paper); 978-0-8389-9574-7 (PDF).

Library of Congress Cataloging-in-Publication Data

Russell, Carrie.

Complete copyright for K-12 librarians and educators / Carrie Russell.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-8389-1083-2 (alk. paper)

1. Copyright—United States. 2. Fair use (Copyright)—United States. 3. School libraries—Law and legislation—United States. 4. Librarians—Legal status, laws, etc.—United States. I. Title.

KF2995.R87 2012

346.7304'820240278—dc23

2012016674

Cover illustration by Jessica Abel. Book design in Denim, Triplex Sans, and Matrix II by Kirstin Krutsch.

♻️ This paper meets the requirements of ANSI/NISO Z39.48-1992 (Permanence of Paper).

Printed in the United States of America

16 15 14 13 12 5 4 3 2 1

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PREFACE

Digital technology and networks have changed our society—how we communicate with one another, how we purchase goods, how we work together to create reference resources, how we more willingly give up anonymity and allow invasions of privacy, how we read, how we teach. Particularly in places of learning, technology is all-pervasive, and because everyone is always making copies, copyright is center stage. History shows us that during times of technological change, copyright goes through a period of adjustment as it tries to keep pace with the technology. Copyright never catches up to technology. Consistency can be found only in our dedication to professional values.

Although some predicted that the new digital environment would signal the end of libraries, it turned out to be just the opposite, because in countless ways the introduction of digital technology has been the beginning of libraries. Others argue that copyright is an outdated law that does not work in the digital environment, but it is still with us and is still important. It's just a little more complicated.


Prior to this technological change, librarians were one of the select groups even interested in copyright law. We had to be interested to protect access to information and other public policies that are central to librarianship. Today, educators should be interested in copyright to protect learning, because copyright law when misapplied or misinterpreted affects the way that you teach and even *what* you teach. This book seeks to address the concerns of librarians, teachers, and teaching librarians who work in the K–12 environment.

To tackle this task, I will use library and teaching scenarios to illustrate copyright situations. This was a key component of *Complete Copyright: An Everyday Guide for Librarians*, and people said they liked it. Many of these scenarios involve actual questions that librarians have asked me over the last several years. My “Carrie on Copyright” column in *School Library Journal* has produced a lot of fodder, and lurking on discussion lists to collect copyright stories has also been helpful in gaining an understanding of what school librarians and teachers are doing in the classroom or what they want to do. For good measure, I conducted an informal survey of librarians to gain a sense of their concerns and attitudes about copyright. More than 280 librarians responded to the survey. (The complete survey and results are in appendix A.) This data collection has supported my contention that school librarians tend to have a fear of copyright litigation, leading them to make overly conservative decisions. I also discovered that many of the copyright reference tools used by the K–12 community are either incomplete or not correct. Digging into the past, some of the copyright materials you have received over the years from vendors, publishers, and yes, ALA, have

sidestepped any mention of public policy and how librarians and educators should think about copyright. It is actually a law that seeks to help us teach and learn.

My hope is that this book will make copyright understandable and that, with newfound confidence, you will be able to make copyright decisions that are both lawful and in the best interests of your learning community. But because you are professionals with a commitment to the information rights of the public, you must be able to do more than just answer the copyright questions that come to you.

Unlike many other copyright books, this book will challenge old assumptions that you may hold dear. This book will encourage you to embrace the purpose of the copyright law and to be committed to preserving that purpose. As you develop copyright policies and educational materials, this book is going to push you to make more long-term strategic decisions that will see you through changes in the law, rather than taking the easy way out. This book will encourage you to stop running away from copyright out of some tenuous fear of litigation and instead be more involved in shaping copyright law to better serve your learning community. Your attention to copyright should be as profound as your interest in censorship—both are central to the freedom of speech.



Remember,
You can only show a
video in the classroom
once in your lifetime.

*That doesn't
sound right.*

CHAPTER 1

Staff Attend a Copyright Workshop

This year, the Copyright Permissions Corporation has sent Gary LeDuc, a copyright expert, to meet with teachers and librarians over the next few days to provide copyright advice. This is a rare opportunity for the school district to get some accurate information about copyright law.

COPYRIGHT MYTHS AND MISCONCEPTIONS

Why do librarians and teachers—the very professionals who specialize in information literacy, equitable access to information, and the advancement of learning—have so many misconceptions about copyright? I have several theories that will be explored throughout this book, but one thing is certain—school librarians have many misconceptions about copyright, and many who have a guarded approach to copyright harbor an unfounded fear of copyright litigation. Rather safe than sorry is a frequent assertion. Philosophical copyright concepts—freedom of expression, the advancement of learning, the free flow of information—are not the focus of contemplation or discussion. Instead, most K–12 librarians expect and desire definitive answers to copyright questions even when no definitive answers exist. A copyright cheat sheet with yes and no answers is preferred—even if the answers are wrong.

School librarians and teachers are not to blame. Copyright is a subject barely mentioned in library school or education programs. Most of the copyright education materials targeted to the K–12 environment are wrong or woefully incomplete.¹ And copyright law is complicated. Part of the hesitancy on the part of librarians to assert users' rights to information comes from the school environment itself. Staff are dedicated but spread thin, already overburdened with work, assignments, lesson plans, grading, and staff meetings. People lack the time to deal with copyright. Moreover, school librarians are usually on their own as the sole librarian for the school—without other professional librarians around on a day-to-day basis to talk to about copyright. Yet there is the expectation that librarians in particular should have a deeper understanding of copyright and that librarians and teachers should model lawful uses of protected works as an example to the students they teach.

How can we learn about copyright and be more confident when providing copyright advice to teachers and students? Hopefully, this book will provide some answers. The

annual copyright training session is not going to do the trick. Understanding copyright is a process, not a onetime event. Applying copyright has much to do with the “copyright attitude” of your institution. Is your institution focused on limiting risk of liability? Sometimes history, state law, school board decisions, and administrator whims influence the crafting of library copyright policy and how things are done. Entering into a continuing dialogue about copyright with teachers, staff, and administrators in your school is necessary to develop sound copyright policy. The copyright handout with “yes, you can” and usually more “no, you can’t” guidelines also will not work. The quick-and-dirty approach to copyright is shortsighted, with long-term, negative implications. It can be a disservice not only to students, by conflicting with the school’s educational mission, but also to librarians, who risk abandoning their professional values.

To manage copyright effectively in your school, begin by understanding the purpose of the copyright law. Learn basic concepts—exclusive rights, public domain, requirements for protection—and apply all available exceptions under the law to the advantage of your school community. Make informed decisions, but accept ambiguity. Consider yoga classes, breathe deeply, and clear your mind of copyright misinformation.

TOP FIVE COPYRIGHT MISCONCEPTIONS

***Misconception 1:* Copyright law exists to ensure that authors and other creators are compensated monetarily for the works they create.**

In a web-based survey I conducted of school librarians, 82.7 percent of those that responded said they believed author compensation was the purpose of the copyright law.² But the U.S. Constitution says that copyright law is created “to promote the Progress of Science and useful Arts.”³ Thus the intent of the copyright law is, first and foremost, to encourage the creation and dissemination of original, creative works that benefit the public. Copyright policy seeks to advance the public’s welfare by making works available that promote learning, inspire the creation of new works, produce well-informed citizens, and foster the pursuit of happiness.⁴ Of particular importance to the founders of the country was the goal of a well-informed citizenry. To effectively participate in a democratic system, all citizens must have the necessary access to knowledge, information, and creative works.

Creative and original works, of course, do not rise from the ether. Creative and talented people use their labor to create these works and are provided an incentive to disseminate them to the public. To encourage the creation of new works, Congress allows authors, creators, and other rights holders the legal right to a monopoly, with some limitations. This monopoly, defined by Congress, is realized by awarding to the author a set of economic rights, exclusive to the author or other rights holder. In the simplest of terms, rights holders have sole authority to market their works. This is the bargain struck between the public—who require and enjoy access to information—and the author or rights holder—who seeks compensation for creating and disseminating creative expressions.

U.S. copyright is unlike the copyright laws of civil law countries (in Europe and elsewhere) because its central focus is a *utilitarian* one. Rather than focusing on the “natural” right of authors to control works that are a result of their intellectual creativity and achievement, we focus on economic incentives to serve a specific public purpose. It is therefore incorrect to say that an author’s work innately “belongs” to her, at least in a U.S. context. Instead, copyright is granted to an author by Congress as an incentive to create and disseminate.⁵

The notion that copyright law serves the public interest may sound quaint today, when much of the public discussion and certainly much of political debate is about the monetary value of copyright. Copyright does have an important economic value in the global information economy. But the fundamental purpose of U.S. copyright law continues to be the public’s welfare. The values that underlie the copyright law are completely consistent with the professional values of teachers and librarians. Asserting those values for the benefit of your library and school communities as you interpret and apply the copyright law is appropriate because it furthers the law’s objectives.

Misconception 2: Rights holders sue libraries, teachers, and schools all the time.

Rest easy. Actual court cases involving libraries and schools are extremely rare.⁶ We tend to believe that libraries or schools are frequently in trouble with the law because we hear about schools that have been threatened with a lawsuit. Most of the time, the threat of a lawsuit is enough to make a school terminate a behavior that is an alleged infringement. A cease and desist letter and payment of a license fee is not copyright infringement. Infringement is only determined by a court hearing a real infringement claim.

Still, you may be worried about breaking the law and being held responsible for your actions or the actions of teachers or students. There are several reasons why these fears are not warranted.

First—because copyright law ultimately seeks to benefit the public, uses of protected works for teaching, research and scholarship, and learning are favored under the law. These socially beneficial uses are often reflected in the law as exceptions—limitations to the rights of the copyright holder that allow the public (or certain entities) the right to use a work in ways that would otherwise be infringing. These limitations are necessary because they aid in containing the copyright monopoly. If the monopoly created by the Congress were all-encompassing, the purpose of the law—to advance learning and culture for the public’s welfare—could not be achieved.

Socially beneficial uses tend to occur more frequently in libraries, schools, and institutions of higher education because these are places where learners gather and knowledge is shared. In particular, these institutions (occasionally along with archives, museums, historical societies, and other cultural institutions) hold special status under the law in that more limitations are created by Congress to address their unique need to serve the public, provide equitable access to information, and preserve the cultural record.



Second—in the unlikely event that a school or library is taken to court for alleged infringement, the rights holder cannot expect to win a large monetary award. Congress has set up special limits on penalties that are set at trial if a school or library is found to have infringed copyright.

The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords.⁷

These two major allowances—exceptions to exclusive rights and limits on remedies—granted by Congress to nonprofit educational institutions and libraries point to their privileged status under copyright law.

Finally—public educational institutions and libraries are protected by the Eleventh Amendment to the U.S. Constitution.⁸ The Eleventh Amendment says that state entities cannot be sued in a federal court without their consent. Again, this places a limit on the remedies that rights holders could expect to collect if they sue schools or libraries.

Misconception 3: Original, creative expressions protected by copyright law are the property of their creators or rights holders.

People are often confused or are led to believe that copyright law is the same as a property law. This confusion is compounded by the use of terms like “intellectual property,” which is a misnomer.⁹ Instead, copyright law resembles government regulation in that Congress creates the law to intervene in the free market by granting rights holders a monopoly—via exclusive rights of copyright—to achieve a public purpose. If one assumes that copyright is a property law, this can lead to the assumption that creative works are “owned” by rights holders and therefore any unauthorized use of “their property” is forbidden.¹⁰ This in turn leads to the use of words like “stealing” and “piracy” when the correct term for violating the copyright law is “infringement.” Why is this distinction so important? Because we immediately understand that stealing is immoral and wrong, while some kinds of uses of works without the authority of the rights holder are lawful and indeed necessary to promote the progress of science and useful arts.

Creative works also are unique in their nature in that they cannot be used up, and it is difficult to exclude others from them. Economists say that these traits—nonrivalry and non-exclusivity—are characteristics of “public goods.” When I listen to music, I do not consume music in the same way that I consume an apple. The music is still available to anyone else to listen to, while the apple has been eaten up. Another unique trait of creative works is that they gain value the more they are used. You cannot wear them out like a pair of shoes. The more information is shared and used, the more knowledgeable people become and the more new knowledge is created. These distinctions are not just mere curiosities. They help us better understand the benefit of creative works to the public.¹¹

Misconception 4: There are a set of legal rules that give definitive answers to copyright questions.

Not true, and this is what many librarians and teachers find vexing. Often the answer to a specific copyright query requires that one analyze the situation at hand to make a determination—in other words, determine if the use is fair. (Fair use will be discussed further throughout this book.) You could make up a set of rules that must be followed and that in essence become definitive answers by continuing practice—and there are many examples out there—but these would be arbitrary rules without the force and effect of law.¹² It is actually in our best interests to have ambiguity in the law. To set copyright rules in stone would be to “freeze” the law.¹³ The law must be malleable to serve us now and in the future, a future that we can only speculate on. Fair use will serve us well because it is more open to new technologies.

Some of the exceptions to copyright law—like section 108 (library reproductions) or section 110 (public performances for educational and other purposes) are more definite than fair use. If your use falls within these exceptions, it is always permitted. However, these exceptions are relatively rigid and don’t necessarily address all situations that may

From: Gary LeDuc <leduc@crpc.org>
 Sent: Fri 3:47 PM CST
 Subject: **Today's presentation on copyright**
 To: Lindsey Eagen Hancock <lindsey@glenvalley.miles.k-12.wi.us>

Dear Lindsey:

I am so glad to hear that you enjoyed the copyright presentation! I share your concerns about potential infringing activities taking place here at Glen Valley. You are correct—copyright compliance is everyone's responsibility. I look forward to providing any assistance that I can while I visit the school over the next two days.

Regards,

GL

.....
 Gary LeDuc, Director of Outreach Education
 Copyright Permissions Corporation
 US Department of Homeland Security
 Washington, DC

confront a teacher or librarian. Section 108 addresses preservation, replacement, interlibrary loan, copies of works for library users—but it doesn't address when you can reproduce an image on the Internet for your library home page. It doesn't address whether you can make a reproduction for a student who is learning English as a second language. It doesn't address whether you can make a copy of a page from a book to replace a missing page in your damaged copy. You get the idea.

It is not easy for some to deal with the ambiguity of fair use and the complex elements of specific copyright exceptions. Many of us like rules—can I do this or not?—but to be an effective librarian or teacher dealing with copyright requires that you bite the bullet, learn the four factors of fair use and apply them, and accept (and maybe appreciate) gaps in the law. It is a strength of our copyright law that it has both definite exceptions as well as flexible exceptions.

Misconception 5: Fair use is too difficult to understand and apply.

Not so. Once you learn the four factors of fair use, making a fair use determination comes more naturally, although it is never definitive.¹⁴ A court of law makes the final call on whether some action is fair or not, but because we aren't in litigation over every fair use, we must learn to make our own decisions, even when we cannot be absolutely certain that we are 100 percent correct. You do not have to have a law degree to conclude that a use is fair. Nor should you consult a lawyer or higher authority every time you need to determine fair use. It is your professional responsibility to understand fair use because your role is to

facilitate access to and use of information. Your underlying commitment to the public is to ensure that their rights are fully explored. Fair use is the best way to balance user rights with the interests of rights holders.

Librarians and teachers are not to blame in having these misconceptions. Information distributed to librarians over the years has been wrong or incomplete, and often conflicting. The software industry prepared several copyright education guides for librarians written with a focus, naturally, on software piracy. User rights were not a highlight of these documents, which instead highlighted the position that librarians should take the role of copyright police for the school and report software license infractions.¹⁵

In an educational video published by one coalition, the link between copyright infringement and stealing property is made at the outset.¹⁶ Copyright infringement at school is just like the driver's education teacher stealing a school car, the narrator asserts. Librarians are urged to work with their vendors on copyright compliance to keep prices low. Fair use is mentioned but described incorrectly—we are told that all four factors must be fair in order for the use to be fair. Librarians are urged to “exercise caution”—advised that it's probably best to ask permission all of the time. The threat of litigation is introduced, with the narrator warning that if the school were sued, the individuals involved in the alleged infringement would be sued as well. One would assume after watching this video that users had very few rights under the law.

Even the American Library Association, in its educational materials produced in the 1980s and 1990s, misdirected librarians to focus on guidelines rather than on a full understanding of what the copyright law is.¹⁷ Throughout the drafting of the Copyright Act of 1976, librarians asked Congress for more clarity on what they and their library users could lawfully reproduce. The gorilla in the room at the time was the photocopier machine. Most libraries had photocopier machines, and of course, the public was using them. Librarians wanted clear instructions to solve their immediate problem rather than focusing on longer-term solutions based on the interests of their user community. Of course, hindsight is 20/20, but by emphasizing compliance, many librarians demonstrated a lack of foresight and a willingness to give up decision making to the publishers. ALA and other library associations fought hard for the library exceptions included in the Copyright Act, but librarians on the front line still wanted clarity. Publishers and authors, who were concerned that libraries would start copying everything, were happy to develop “fair use guidelines” as models for libraries, but unfortunately, these guidelines were never used as Congress intended. The widespread use of fair use guidelines led in part to misconceptions about fair use. Very few librarians knew the four factors of fair use.

Another reason these misconceptions exist is because most schools still do not focus on copyright education for their librarians and teachers.¹⁸ And it can be difficult to find a copyright instructor who presents a balanced approach to the subject. Too often, when librarians do attend a copyright workshop, they note that no two copyright instructors seem to say the same thing, making it difficult to know whom to believe and what one should do. And there's a myriad of information on copyright on the Web, often also contradictory, leading to more confusion.

Finally, librarians and teachers—in part to deal with the confusion—have surrendered to reliance on checklists—hard-and-fast rules that tell you what to do, not how to think. Checklists, by their very nature, have an audit quality—when you use a checklist you look for things that are on the list or must be checked for compliance. If something is not checked off, the assumption is that the action is unlawful or, at least, against the rules of the school. Checklists, over time, become “the copyright law” to many people and greatly limit one’s ability to teach.

KEY LEARNINGS

In *The Cost of Copyright Confusion for Media Literacy*, an ethnographic study of educators that teach information and media literacy skills, the authors report that “too many teachers fear they will misinterpret fair use or are simply unaware of its expansive nature.”¹⁹ Teachers report that at least some of their copyright fears are based on what they have been told by their librarians. Librarians are described as “sticklers” or “copyright police,” taking it upon themselves to enforce copyright rules. This perception, whether true or not, should give us pause to rethink how we are managing copyright in our schools. If we are the copyright experts at our schools, we had better know what we are doing.²⁰ Our copyright misconceptions have led us to believe that copyright law is first and foremost about infringement. This is wrong. The copyright law serves our community by promoting the advancement of learning. Of course, we have a role in ensuring that copyright law is followed, but that responsibility should not lead to an overcompliance that limits the information rights of the people we serve. Instead, we should help our teachers and students use information to the broadest extent possible under the law.

NOTES

1. Some of the better copyright education materials can be found on college and university library and other websites. These resources are applicable for the K–12 school environment with minor revisions.
2. “SLMS and Copyright” was a survey sent to subscribers of the LM_NET discussion list in May 2008. Results of the survey, which garnered 284 responses, can be found in appendix A.
3. “The Congress shall have 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.” U.S. Const. art. I, § 8.
4. See L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (Athens: University of Georgia Press, 1991); Lydia Pallas Loren, “The Purpose of Copyright,” *Open Spaces Quarterly* 2, no. 1 (February 1999), www.open-spaces.com/issue-v2n1.php.
5. “The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be created and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).
6. To the best of my knowledge, there is only one—*Encyclopaedia Britannica v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982).
7. Copyright Act of 1976, 17 U.S.C. § 504(c)(2).

8. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.
9. Mark Lemley believes the term "intellectual property" became a common descriptor beginning with the World Intellectual Property Organization in the 1980s. Mark A. Lemley, "Property, Intellectual Property, and Free Riding," *Texas Law Review* 83, no. 4 (2005): 1033n4. I think intellectual property is a misnomer because exclusive rights of copyright are not the same as property rights. I do not encourage the use of the term.
10. *Dowling v. United States*, 473 U.S. 207, 216, 217 (1985). "The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections. . . . It follows that interference with copyright does not easily equate with theft, conversion, or fraud."
11. "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. . . . He who receives an idea from me, receives instructions himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature." Thomas Jefferson, *The Writings of Thomas Jefferson*, vol. 6, ed. H. A. Washington (Washington, DC, 1854), 180.
12. Such as the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals" (see appendix B) or the "Fair Use Guidelines for Educational Multimedia" (see appendix G).
13. "[Section 107] endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 94-1476, at 66 (1976).
14. Fair use will be explored in chapter 3.
15. *The K-12 Guide to Legal Software Use* (Washington, DC: Software Publishing Association, 1994), *Don't Copy That Floppy* (VHS) (Washington, DC: Software Publishing Association, 1992), and *It Could Be So Easy* (VHS) (Washington, DC: Software Publishing Association, 1995). See also "You Wouldn't Steal a Car," a 2004 advertisement by the Motion Picture Association of America.
16. The coalition was called F.A.C.T. (Folks Against Copyright Transgressions). *Copyright Law: What Every School, College and Public Library Should Know* (VHS) (Northbrook, IL: AIME, 1987).
17. American Library Association, "ALA Model Policy Concerning College and University Photocopying for Classroom, Research, and Library Reserve Use," *College and Research Library News* 43 (1982): 127-31.
18. Of the librarians I surveyed, 90.5 percent said that copyright education workshops are not required at their schools.
19. Renee Hobbs, Peter Jaszi, and Pat Aufderheide, *The Cost of Copyright Confusion for Media Literacy* (Washington, DC: American University, Center for Social Media, 2007).
20. According to my survey, librarians tend to see themselves as responsible for their schools' copyright questions (see appendix A).

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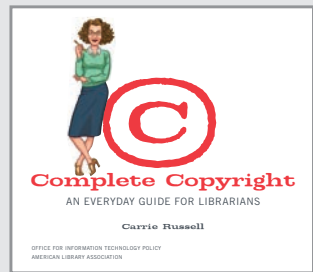
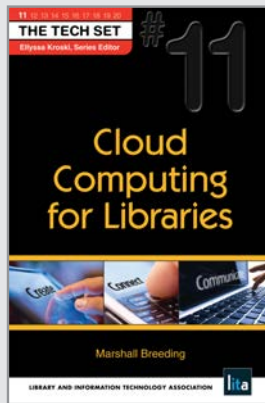
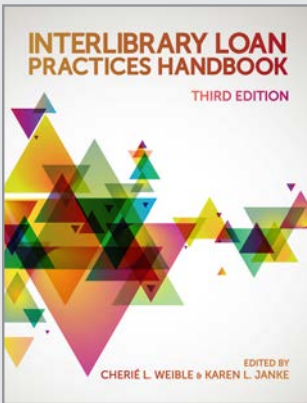
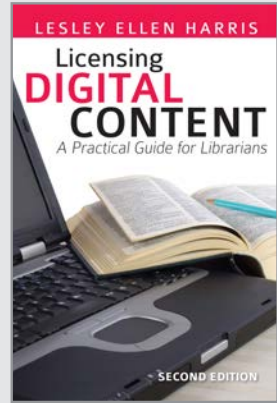
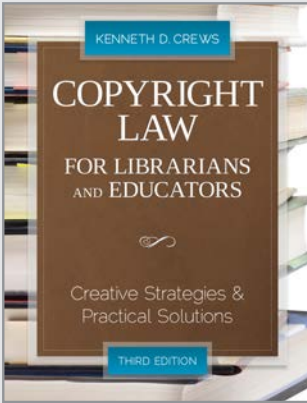
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