



RSC22

WEB SERIES

oc.lc/rsc22

Register at oc.lc/rsc22

Date/Time	Title	Presenter(s)
Wed, April 6, 11:00 am EDT	Controlled digital lending for resource sharing: Law and policy since 2018	Kyle K. Courtney, Dave Hansen
Thurs, May 5, 12:00 pm EDT	Working smarter not harder: How to automate your holdings and configure policies to expedite fulfillment	Scott Brandwein, Helen Pinder
Tues, May 10, 1:00 pm EDT	Lightning sessions <ul style="list-style-type: none">• Resource sharing at the Internet Archive• E-book lending	<ul style="list-style-type: none">• Brewster Kahle• Krista Higham
Wed, May 25, 2:00 pm EDT	The persistence of CONTU: The results of two surveys	Cindy Kristof, Meg Atwater-Singer
Tues, June 14, 11:00 am EDT	An update on your ILL services, and a look to the future	Peter Collins, Stephanie Spires
Tues, June 21, 1:00 pm EDT	Controlled digital lending during global COVID-19 and beyond	Xuan Lily Pang, Peggy Glatthaar, Alvin Lee

Register at idsproject.org/OLI/index.aspx

Online Learning Institute



Online Learning Institute

IDS Project developed the Online Learning Institute in January 2014 in an effort to meet the needs of our members as well as provide nationwide support for resource sharing training and discussion. A growing number of courses include instructional videos, resource materials, discussion opportunities, and web conferences to enhance access to professionals in the field of resource sharing. Successful completion of courses supply students Accomplishment Certificates as well as a network of colleagues to encourage discussion, troubleshooting and innovation throughout the field of resource sharing.

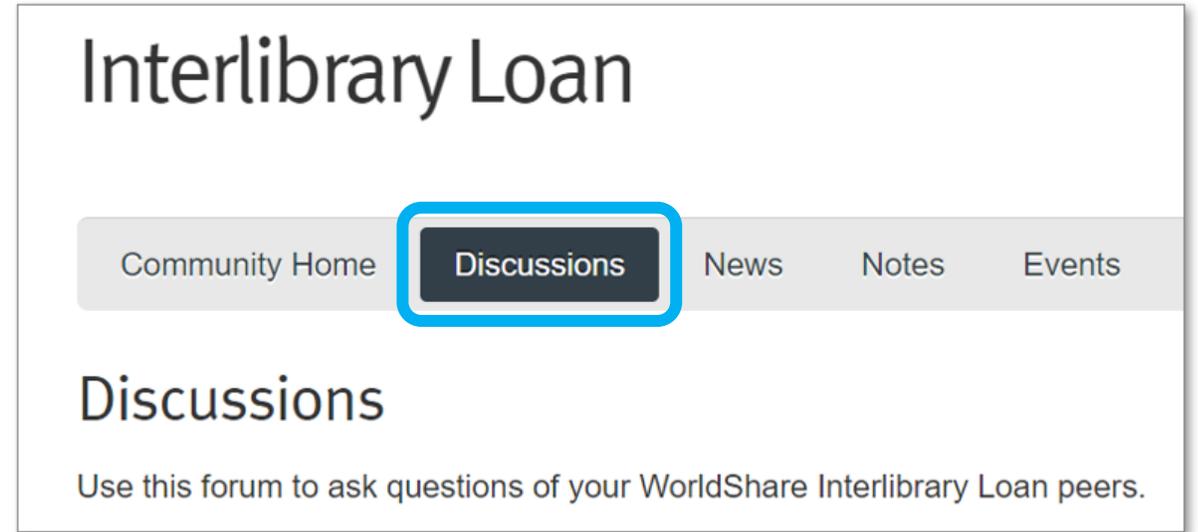
OCLC Resource Sharing Conference: ILL 101 2022

- Copyright 101 - Mar 21, 2022 02:00 PM Eastern Time - Cindy Kristof - Kent State - [Registration](#)
- Borrowing 101 - Mar 21, 2022 03:00 PM Eastern Time - Megan Gaffney - University of Delaware - [Registration](#)
- Lending 101 - Mar 22, 2022 02:00 PM Eastern Time - Silvia Cho - CUNY Graduate Center - [Registration](#)
- Assessment 101 - Mar 22, 2022 03:00 PM Eastern Time - Emily Aylward - Conn College - [Registration](#)

Continuing the conversation

Visit oc.lc/ill-discussion

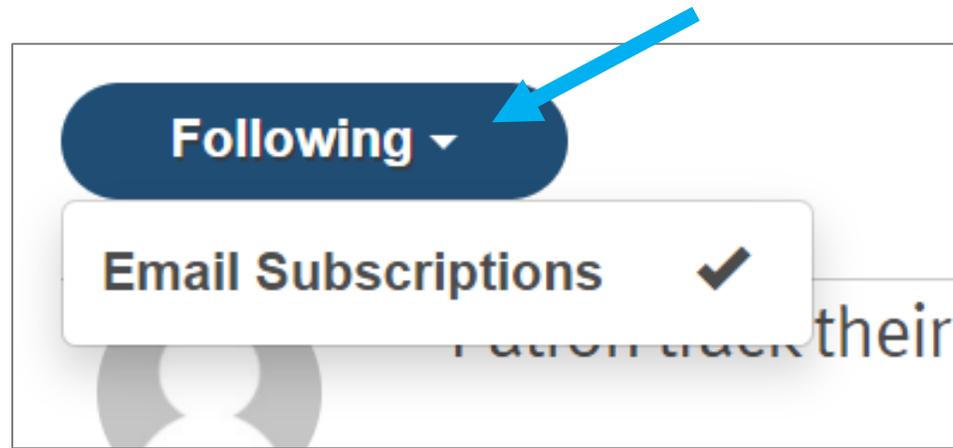
1. Sign in with your WorldShare ILL username and password.
2. Open the thread on ILL 101: [copyright/borrowing/lending/assessment](https://oc.lc/ill-discussion/threads/copyright-borrowing-lending-assessment).
3. Click **Post Reply** to **continue the conversation**.



All Tipasa, ILLiad, and WorldShare ILL users can participate in the Interlibrary Loan community. For assistance with sign-in, please contact OCLC Support (oc.lc/support).

Follow the conversation

To get email updates on this conversation, select Email Subscriptions.



RSC22

WEB SERIES



ILL 101: Copyright

CINDY KRISTOF
HEAD, COPYRIGHT & SCHOLARLY COMMUNICATION
KENT STATE UNIVERSITY LIBRARIES



#OCLCrsc22



This is not legal advice

- I am not an attorney.
- Webinar participants should contact their institutional counsel to obtain advice with respect to legal questions.
- No ILL practitioners should act, or refrain from acting, on the basis of information provided in this webinar without first seeking legal advice from counsel at their respective institutions.

Interlibrary Loan Code for the United States

ILL Code is linked from this site

<https://libguides.ala.org/Interlibraryloans>

- 4.0 Responsibilities of the Requesting Library
 - 4.8 Comply with U.S. copyright law (Title 17, U.S. Code) and be aware of related guidelines for copy requests.

Copyright's Primary Purpose

“The Congress shall have the power...to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries.”



United States Constitution
Article 1, Section 8

Copyright Law

Title 17, United States Code

- Grants a set of exclusive rights to copyright owners for a limited period of time
- Exclusive rights are balanced with exceptions
- Text of the law:
 - <http://www.copyright.gov/title17/>
 - <https://www.law.cornell.edu/uscode/text>



Exclusive Rights – Section 106

Copyright Law gives copyright holders a **limited monopoly** over their works, to serve as an incentive for authors and creators. The rights include the following:

1. Reproduce the work in copies
2. Distribute the work publicly
3. Make derivative works
4. Publicly display the work
5. Public performance
6. Public performance by means of a digital audio transmission

(Source: § 106, Title 17 U.S. Code at <http://www.copyright.gov/title17/>)

Exceptions to Exclusive Rights

- Fair Use – Section 107
- Reproduction by Libraries and Archives – Section 108
- First Sale – Section 109
- Exemption of certain performances and displays (including classroom use, TEACH Act, and exhibits) – Section 110
- Reproduction for people with print disabilities – Section 121

Section 109 – Right of First Sale

- First Sale Doctrine
- Allows us to make book trees for the holidays
- Allows us to borrow and lend returnables, or put them on Course Reserve:
 - Books
 - Theses and dissertations
 - DVDs
 - CDs
 - Whole issues or bound volumes of journals
- Applies to materials that are purchased and not licensed
 - Netflix
 - Amazon Prime movies
 - iTunes

Section 109 Example



Image source: <https://inhabitat.com/tu-delft-architecture-library-opens-with-desk-of-recycled-books/>

Section 108 - Reproduction by Libraries & Archives



Xerox founder Joe Wilson with the 914 - Image Source:

<https://www.smithsonianmag.com/history/duplication-nation-3D-printing-rise-180954332/>

17 U.S. Code § 108 - OUTLINE

<https://www.law.cornell.edu/uscode/text/17/108>

- a) Library or archive can make copies for its patrons – “one copy”
- b) Three copies of an unpublished work for preservation, security, deposit in another library
- c) Three copies of a published work – replacement, deposit in another library
- d) ILL can make a copy – “no more than one article” from an issue of a journal or portion of book; must have “notice warning” where orders are taken
- e) ILL can make an entire copy of book “not available at reasonable price”; must have “notice warning” where orders are taken
- f) The copying equipment in your library
- g) Single copies of same material on isolated, unrelated occasions is okay, but what’s NOT is related or concerted copying, systematic copying, or copying by interlibrary loan arrangements in such quantities as to substitute for a subscription or purchase.
- h) Copies of materials in the last 20 years of their copyright terms
- i) Does not apply to a music, art, or motion pictures.

Can your library use Section 108?

Section 108 (a)

- Your reproduction and distribution must be without any purpose of direct or indirect commercial advantage.
- Your collections must be open to the public or to persons unaffiliated with the institution but doing research in a specialized field.

Reproduction by Libraries & Archives

Section 108 (d)

- The copy becomes the property of the user
- Library has had no notice that the copy will be used for any purpose other than private study, scholarship, or research
- Library displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright.

Reproduction by Libraries & Archives

Section 108 (g)

- The rights to make copies extend to isolated and unrelated reproduction or distribution of a single same material on separate occasions, but the rights...
 - ...do not extend to **related or concerted reproduction** or distribution of multiple copies of the same material, whether made once or over time
 - ...do not extend to **systematic reproduction or distribution**
- Nothing in this clause prevents interlibrary arrangements, but they must not be in such aggregate quantities as to substitute for a subscription to or purchase of a work.

Notice Warning mentioned in Section 108(d)&(g)

Notice Warning Concerning Copyright Restrictions

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be “used for any purpose other than private study, scholarship, or research.” If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of “fair use,” that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

Source: *Code of Federal Regulations*

37 CFR § 201.14 - Warnings of copyright for use by certain libraries and archives

<https://www.law.cornell.edu/cfr/text/37/201.14>

Commission on New Technological Uses of Copyrighted Works (CONTU)*

- An appointed congressional commission of publishers, librarians, lawyers, people in industry, and other stakeholders, pursuant to the Copyright Act of 1976
 - Final Report – 1978
 - Chapter 4 - Guidelines on Photocopying under Interlibrary Loan Arrangements
 - <http://digital-law-online.info/CONTU/PDF/index.html>
 - <http://digital-law-online.info/CONTU/contu24.html>
 - *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973)

*Not to be confused with CONFU, which took place in the mid-1990's

CONTU Guidelines

- An attempt to provide clarification for Section 108 (g)(2)
 - What constitutes “systematic reproduction”?
 - What “... aggregate quantities...substitute for a subscription to or purchase of [a] work”?
- Attempt to mitigate the effects of library subscription patterns on publication market and sales
- “As part of the review provided for in sub-section 108(i), these guidelines shall be reviewed not later than five years from the effective date of this bill.”

CONTU Guidelines are NOT LAW

National ILL Code *Explanatory Supplement*

- 4.8 Copy Requests (Requesting Library)
 - ...responsible for complying with U.S. copyright law (Title 17, USC), in particular, 107 (Fair use) and 108 (Reproduction by libraries and archives). ...related regulations, guidelines, policies, and/or procedures...CONTU Guidelines (1979).
- 5.4 Material Format or Collection (Supplying Library)
 - ...consider providing a copy in lieu of a loan rather than giving a negative response.
 - Be aware of...license agreements for electronic resources that may either permit or prohibit...[ILL]
 - Encouraged to work with those negotiating licenses...
- 5.11 Copy Requests (Supplying Library)
 - Comply with U.S. copyright law or applicable license agreements when providing copies.

CONTU Guidelines

Suggestion of Five | Rule of Five | 5/5 Rule

- For the **BORROWING/Requesting** library to track
 - Track by Journal Title, by calendar year
 - The **LENDING/Supplying** library does not track when gets sent
- Your library may receive five articles per journal title, per year, published within the last five calendar years
- Receiving six or more articles exceeds this suggestion

CONTU Example – Requesting

The Bloomsbury Review – received articles

1. Article 1 – 10 pages from 2019
2. Article 2 – 12 pages from 2021
3. Article 3 – 6 pages from 2020
4. Article 4 – 8 pages from 2018
5. Article 5 – 16 pages from 2022

6. Article 6 – 5 pages from 2021 - \$\$\$

CONTU Guidelines – Requesting

All copy/unreturnable requests must include a copyright compliance statement by the borrowing/requesting library.

Loan/returnable requests do not need CCG or CCL.

- **CCG – “Compliance CONTU Guidelines”**
 - ILL request complies with 108 (g) (2) Guidelines
 - ILL requests for articles published within the last five years
 - May be subject to the 5/5 Suggestion
- **CCL – “Compliance Copyright Law”**
 - Indicates that the ILL request complies with other provision of copyright law
 - Applied to articles that fall outside the years of the 5/5 Suggestion

CONTU Guidelines - Requesting

Keep records of all BORROWING requests

- Filled and Unfilled
- Three years – statute of limitations in a civil copyright lawsuit
 - Your state law may require other or longer record keeping

Copyright Clearance Center

- Clearance for textual works since 1978
 - <http://www.copyright.com>
 - For ILL requesting
 - Under CONTU, pay royalties on “CCG” photocopies that exceed the Suggestion of Five
 - Not all publishers work with the Copyright Clearance Center
- What about Open Access articles?
 - Creative Commons or other licenses?
 - Elsevier User License
 - <https://www.elsevier.com/about/policies/open-access-licenses/elsevier-user-license>
 - “(but may not redistribute, display or adapt)”

If you've exceeded CONTU Guidelines

OTHER choices

- Order a copy of the article from a copyright-cleared commercial source...
 - British Library Document Supply Services
 - Get It Now
 - Reprints Desk
- Purchase a copy of the article from the publisher's web site
- Purchase the entire issue
- Borrow the entire issue or bound volume
- Refer the patron to a nearby library that has the journal
- Start a subscription to the journal
- Refuse the order/Close the title
- Evaluate for possible Fair Use

CONTU Guidelines – Lending/Supplying

1. Check for use of CCG or CCL
2. Include copyright statement on copies provided
 - Copy the copyright statement on the piece (1998 DMCA change)
 - If you cannot locate it, use a copyright “stamp”
 - Articles being delivered electronically can carry this message on an extra sheet added to the article:
 - Notice: **This material may be protected by copyright law (Title 17 U.S. Code).** (ALA wording)
 - Notice: **This material is subject to the U.S. Copyright Law; further reproduction in violation of that law is prohibited.** (Gasaway-Wiant wording)



Law vs. Guidelines

1. CONTU has been around for years and has served as a pretty good guideline.
2. It's relatively easy to follow.
3. Is CONTU out of date? Journal prices have skyrocketed since the late 1970's. Subscription practices have changed drastically since the 1970's. Licenses now play a role, as does Open Access.
4. Some ILL practitioners are beginning to rethink approaches to copyright compliance in resource sharing.
5. What are some alternatives to CONTU?

Alternatives to CONTU

Ohio State University and Georgetown University

- Brian Miller and Amanda Rudd
 - <https://www.oclc.org/en/events/conferences/resource-sharing-conference/2019/agenda.html>

ARL White Paper on CONTU

By Meg Oakley, Laura Quilter, and Sara Benson

- <https://www.arl.org/resources/modern-interlibrary-loan-practices-moving-beyond-the-contu-guidelines/>
- <https://www.arl.org/wp-content/uploads/2020/08/2020.08.31-modern-interlibrary-loan-practices-moving-beyond-the-CONTU-guidelines.pdf>

Considerations for alternatives to CONTU

- Work with your University Counsel, library administration, library copyright officer, collection management
- Journal subscription *prices* then v. now
- Journal subscription *practices* then v. now
- Look at borrowing patterns over multiple years
- Read the law
 - Look for what might be “systematic reproduction”
 - Define what “aggregate quantities substitute for a subscription or purchase” in your library
- Integrate Fair Use into your ILL practice
- What else?

Fair Use – Section 107

Four Factors of Fair Use

1. Purpose & Character of Use

- e.g., non-profit vs. for-profit

2. Nature of Work Used

- e.g., factual vs. creative; published vs. unpublished

3. Amount & Substantiality of Work Used

- e.g., small portion vs. large portion or “heart” of work

4. Effect of Use on the Market

- e.g., little effect on market vs. huge impact on market value

Fair Use Tools

Checklist (Kenneth Crews and Dwayne Buttler)

- <https://copyright.columbia.edu/basics/fair-use/fair-use-checklist.html>

Evaluator

- <https://librarycopyright.net/resources/fairuse/index.php>

Fair Use Facts

- Fair Use is used as a defense in U.S. courts of law
- Fair Use is a right...an “affirmative defense” that supports the First Amendment
- If your intended reproduction or use is not covered by a separate section of the U.S. Copyright Law, it may still be lawful under Fair Use.
 - “Fair Use Savings Clause”
- Fair Use evaluations do NOT
 - carry the weight of a legal decision
 - substitute for the advice of an attorney
- Keep records of your fair use evaluations
 - They demonstrate a “good faith effort” to comply with the law
 - Statutory damages – up to \$150,000

The Public Domain

- Works created by the U.S. Government
 - Section 105
- Some works are placed into the public domain by their creators
- They age into the public domain
 - Date of publication before **1927**
 - Life of the author + 70 years
 - Works made for hire – 95 years from the date of publication or 120 years from date of creation, whichever expires first
- Eighty percent (80%) of books published **before 1964** never had their copyrights renewed
 - <https://www.crummy.com/2019/07/22/0>

Public Domain Guide

<https://guides.library.cornell.edu/copyright/publicdomain>

Determining what is or isn't in the public domain can be a complicated and lengthy process. However, the chart below is provided to help guide you through some of the labyrinthine rules of US copyright.

Additional Resources

- ["Welcome to the Public Domain" from Stanford Libraries](#) 
-  [Copyright Term and the Public Domain in the US](#) 

Copyright Term and the Public Domain in the United States

(See [footnote 1](#))

Never Published, Never Registered Works²

Type of Work	Copyright Term	In the public domain in the U.S. as of 1 January 2022 ³
Unpublished works	Life of the author + 70 years	Works from authors who died before 1952
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1902
Unpublished works when the death date of the author is not known ⁴	120 years from date of creation ⁵	Works created before 1902 ⁵

Works Registered or First Published in the U.S.

Date of Publication ⁶	Conditions ²	Copyright Term ³
Before 1927	None	None. In the public domain due to copyright expiration
1927 through 1977	Published without a copyright notice	None. In the public domain due to failure to comply with required formalities
1978 to 1 March 1989	Published without notice, and without subsequent registration within 5 years	None. In the public domain due to failure to comply with required formalities
1978 to 1 March 1989	Published without notice, but with subsequent registration within 5 years	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1927 through	Published with notice but copyright was	None. In the public domain due to copyright expiration

International Copyright

ILL Code US - <http://www.ala.org/rusa/guidelines/interlibrary>

- 3.2 United States libraries are encouraged to engage in interlibrary loan with libraries in other countries. International transactions are governed by the International Federation of Library Associations and Institutions [IFLA].

IFLA - <https://www.ifla.org/units/copyright-a2k/>

- IFLA works to deliver copyright reforms at the global, regional and national levels to give libraries clear and enforceable legal rights to carry out their missions, as well as to promote the adoption of open practices in knowledge production and sharing.

IFLA - <https://www.ifla.org/units/digital-lending/>

- IFLA advocates for laws and practices globally that enable libraries to lend works digitally, and so support learning, research and cultural participation.

Berne Convention - <https://www.wipo.int/treaties/en/ip/berne/>

- Supports international ILL

World Intellectual Property Organization (WIPO)

A self-funding agency of the UN, WIPO is a global forum for intellectual property services, policy, information and cooperation

<http://www.wipo.int/about-wipo/en/>

Copyright Topics and Issues

<http://www.wipo.int/copyright/en/>

2013 – Marrakesh Treaty – facilitates access to works for print-disabled persons

<http://www.wipo.int/treaties/en/ip/marrakesh/>

- U.S. was the 50th member, in 2018

Licenses

- **LICENSES** *supersede* **LAW**
 - Licenses are agreements between parties for use of materials for specified purposes
 - Resource sharing is a frequent point of negotiation
 - Look for the fine print:
 - “Terms of Use”
 - “Conditions of Use”
 - “Terms and Conditions”

License Negotiation

- Communicate with your acquisitions folks, ask for what you want...
- But be understanding...ILL rights are just a portion of the negotiation process
- You want:
 - ILL lending rights
 - Rights that follow Title 17 USC
 - Rights to deliver items through current electronic delivery systems – do not name them by brand
- You DO NOT want:
 - Print-only ILL rights (but are they better than nothing?)
 - Required record-keeping beyond what CONTU suggests
 - Any mention of CONTU within the license

Open Access in ILL

<https://instantill.org/>

A powerfully simple library tool to deliver papers.

InstantILL instantly delivers papers your patrons need from your holdings, Open Access and simplifies your ILL process to save you and your patrons money and time. It's free, open source, community owned and easily set up in minutes.

[Try it now](#)

[Stay up to date](#)

A screenshot of the InstantILL website interface. It features a search bar at the top right with a magnifying glass icon. Below the search bar, there are three icons: a padlock, a library building, and a document, each with a magnifying glass icon. The entire interface is enclosed in a green border.

FAQs

- What if our journal license is silent on interlibrary loan?
- What if there is an embargo in our subscription?
- What about that weird message from the Copyright Clearance Center when I'm trying to clear copyright for requesting?
- Has a library ever been the subject of a copyright lawsuit over interlibrary loan?



Image source: <http://www.freefallingonline.com/terrified/>

Controlled Digital Lending

<https://controldigitalending.org/>

- “Lend like print...”
- Technical controls prevent copying and redistribution
- 1:1 “own-to-loan” ratio
- Ideal for older books that may never be made available commercially
- Ideal in emergencies such as COVID-19

Court Cases

Kirtsaeng v. John Wiley & Sons, Inc.

- Upheld the Right of First Sale

Google Books Search Case

- *AKA Authors Guild v. Google*
- U.S. District Court SDNY upheld Fair Use, November 2013
- Supreme Court refused to hear it
- Transformative fair use – search functions

HathiTrust

- *AKA Authors Guild v. HathiTrust*
- U.S. District Court New York upheld Fair Use – “transformative use,” October 2012 – Accessibility and search functions
- January 6, 2015 – case resolved

Georgia State Ereserves Case

- 2008 – 2020
- <https://libguides.law.gsu.edu/gsucopyrightcase>

Questions to ask yourself

1. Is the material within the Public Domain?
2. Is the material licensed for your purpose?
 - Including Open Access materials, Creative Commons Licenses
3. Is your use permitted by law?
 - Sections 108 and 109
4. Can you make a case for Fair Use?
 - Section 107
5. Do you need to seek permission/license or purchase?

Source: Smith, Kevin L., "Coaching Copyright: Rules and Strategies for the Game." *Coaching Copyright* (Kevin L. Smith and Erin L. Ellis, eds). American Library Association, 2019.

Recommended Reading

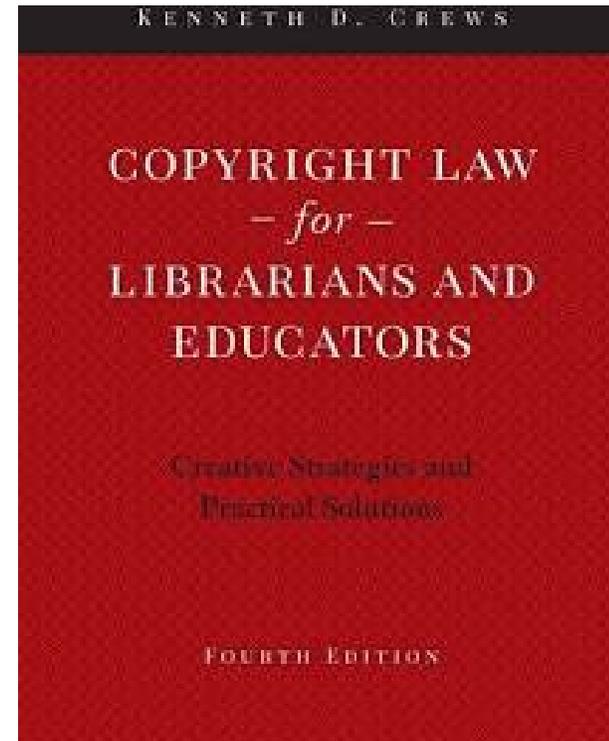
- *Legal Issues in Libraries and Archives*
 - Edited by Ruth Dukelow and Michael Robak
 - Open Access textbook
 - <https://mlpp.pressbooks.pub/librarylaw/>
 - This textbook addresses legal issues relevant to librarians, archivists, and information technologists.
 - See chapter 1-3 for **resource sharing**

Recommended Reading

Kenneth D. Crews

Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions, 4th ed.

Chicago: ALA Editions, 2020.



Questions?

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Photo: Kent State University Library from Summit Street