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## Copyright, fair Use and Photocopying: A Stone Conundrum

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## **Abstract**

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**KEYWORDS:** copyright, fair use, photocopying

## Copyright, Fair Use and Photocopying: A Stone Conundrum\*

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“Copyright admits of philosophic thinking more than most other parts of the law.”<sup>1</sup> While it is universally recognized that copyright is open to the objection that it burdens both competitors and the public, the monopoly is permitted and encouraged by the law for the public advantage it serves. By protecting the property rights of the author in his work, copyright attempts to assure that the public may enjoy the benefits of a continuing supply of creative works. Constant attention must be paid and adjustments made to the copyright law to assure that the burdens of such protection do not outweigh the benefits. The broad and as yet inadequately defined “fair use” doctrine<sup>2</sup> has increasingly been relied upon when considering the proper scope of the monopoly in any particular case. Due to the pervasiveness of philosophical uncertainties, the fair use doctrine has proven a difficult and ponderous area of copyright law. It has on occasion been confused with issues of initial infringement and damages.

I suggest that the fair use doctrine might better be understood after analysis of several related and more fundamental issues. Does the Constitution mandate a fair use doctrine, or, may fair use more helpfully be characterized as a defense which would arise after an initial determination of infringement? If a defense, some cases may turn on more palatable issues such as when a work is deemed “copied” or when works in question are “substantially similar.” This article shall also explore the impact of reprography<sup>3</sup> on the quantity and quality of information

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\* This article, in somewhat different form, has been entered in the 24th annual Nathan Burkan Memorial Writing Competition.

1. Chafee, *Reflections on the Law of Copyright: I* (pt. 1), 45 COLUM. L. REV. 503 (1945).

2. The most widely accepted definition is that “fair use” is a “privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . . .” BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944). The fair use doctrine now appears at §107 of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976)(to be codified as 17 U.S.C. §§101-810) [hereinafter cited as New Act]. This Act became effective on January 1, 1978.

3. “The reproduction of graphic material especially by electronic means.”

available. Further, thoughts and perspectives are offered on the relationship of educational and library photocopying to fair use. Lastly, sections 107 and 108 of the new Copyright Act<sup>4</sup> are examined in light of the legislative history<sup>5</sup> as they relate to photocopying.

## 1. FAIR USE: QUESTIONS AND PERSPECTIVES

“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.”<sup>6</sup> It has been said that the constitutional statement of purpose was intended by the framers as a preamble to the grant of congressional power and not as a limitation of its exercise.<sup>7</sup> This view is supported by the fact that the power of Congress to grant copyright has not been confined to those works which actually and undeniably promote the progress of science and the useful arts.<sup>8</sup> This broad power of Congress to grant copyright does not, however, necessarily aid in defining the scope of power granted in any particular case. For, if the statement of purpose is construed as a limitation on the exclusivity of the rights granted by Congress, is this not a constitutional mandate for the fair use doctrine?

This issue encompasses any discussion of the two basic directives within the Copyright Clause: that the rights granted be for “limited times”<sup>9</sup> and that the rights of the author be “exclusive.” The Constitu-

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BARNHART DICTIONARY OF NEW ENGLISH SINCE 1963 at 402 (1st ed. 1973).

4. New Act, *supra* note 2.

5. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47 [hereinafter cited as HOUSE REPORT] reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659; S. REP. NO. 473, 94th Cong. 1st Sess. 47 (1975) [hereinafter cited as SENATE REPORT], Conf. Rep. H.R. REP. NO. 1733, 94th Cong., 2d Sess. 65 [hereinafter cited as CONFERENCE REPORT], reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5810.

6. U.S. CONST. art. I, §8, cl. 8.

7. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.03 [A], at 1-30 (1978).

8. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), where the Court per Holmes, J. found a circus poster a suitable subject for copyright, and therefore within the constitutional statement of purpose. The arguable utility of this lithograph poster in the promotion of the useful arts is evidenced by the dissenting opinion per Harlan, J.: “A mere advertisement . . . would not be promotive of the useful arts, within the meaning of the constitutional provision . . . .” *Id.* at 252.

9. The following discussion of “exclusivity” may be applied by analogy to this constitutional limitation on the duration of the copyright, a specific discussion of which is not within the scope of this writing. See New Act, *supra* note 2, at §§302-05.

tion, be it for better or worse, does not provide guidance as to the balancing which must inevitably and constantly be performed in determining that degree of "exclusivity" which will best promote the progress of science and useful arts. It may be this "balancing" which is both the initial and ultimate dilemma in copyright law, that which has caused copyright to be called the ultimate jurisprudential area of the law.<sup>10</sup> Although it has been argued that there exists a constitutional mandate that any copyright provided by Congress be exclusive,<sup>11</sup> the survival of compulsory licensing, statutory recognition of fair use and limitations on the right found generally at 17 U.S.C. §§107-18 are evidence of the current reality that a copyright, at least in the final analysis, is something less than an exclusive right.<sup>12</sup>

Regardless of a court's final determination of the degree of exclusivity of the right in any particular case, it would seem helpful to a logical consideration of all of the issues to isolate as much as possible issues of constitutional limitations on the right. Such isolation of the issues could prove especially helpful where questions of "fair use" arise. The scope and limits of the doctrine have evaded definition for so long that the entire fair use issue is widely recognized as "the most troublesome in the whole law of copyright."<sup>13</sup> Judicial considerations of the fairness of the complained of use should be confined to situations in which it is properly raised as a defense:<sup>14</sup> that is, after plaintiff's state-

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10. Complete vindication of the creator's economic interest would logically require that the statutory monopoly be absolute. Likewise, the logic of full vindication of the *immediate* public interest in free access would require that no statutory monopoly at all be permitted. The copyright statute reflects a reasoned compromise between these competing interests.

Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1006 (1970) (emphasis added). See generally Chafee, *supra* note 1.

11. See testimony of Nathan Burkan, Esq. before a congressional committee, Hearings on S. 2328 and H.R. 10353, 69th Cong., 1st Sess. 31-32 (1926); WEIL, AMERICAN COPYRIGHT LAW 62-63 (1917): "[I]f it [Congress] determines to legislate, it may [not] give more, or less, than the only thing it is empowered to give, viz: an exclusive right."

12. See, e.g., *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 529-30 (1972) wherein the Court upheld the rule enunciated in the leading case of *Radio Corp. of America v. Andrea*, 79 F.2d 626 (2d Cir. 1935) (restricting rights of patentees in combination patents) despite plaintiff's argument that the Constitutional mandate of Article I, section 8 was not properly reflected in the prevailing law.

13. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); 3 M. NIMMER, NIMMER ON COPYRIGHT §13.05, at 13-48 (1978).

14. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). In finding

ment of his prima facie case. This would seem an appropriate and prudent time for the courts to practice some judicial parsimony, thereby forcing, if at all possible, a reduction of the fair use issue to its most fundamental elements. Assuming the work in question is both copyrightable and properly copyrighted, the fair use issue may disentangle into less complex although similarly difficult issues. Opponents of such limited application of the fair use doctrine may be found eager to point out that first amendment considerations would take precedence over the statutory copyright privilege, and that an appeal of a constitutionally based fair use defense should prove successful as a first amendment non-infringing use. Supreme Court consideration and discussion of this ripe and thorny issue could only prove helpful.

Perhaps there may never be a final resolution of the seeming conflict between Article I, section 8 and the freedom of speech and press provided by the first amendment, but an airing of the countervailing considerations is becoming overdue.<sup>15</sup> The advocates of greater public access and a constitutionally grounded fair use doctrine would be quick to remind the court that precedent exists for such a belated finding of constitutional mandate.<sup>16</sup> Defenders of the exclusive monopoly of the copyright holder would no doubt argue that the policy of public access is best served in the long run not by narrowing the scope of copyright but by assuring a continued flow of creative information by maintaining

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that the Southern District Court of New York had prematurely decided the case on the fair use issue to the prejudice of plaintiffs, the per curiam opinion of Circuit Court Judges L. Hand, Augustus N. Hand and Patterson counseled the district courts:

We doubt the convenience of dividing the trial in this way: the issue of fair use, which alone is decided, is the most troublesome in the whole law of copyright, and ought not to be resolved in cases where it may turn out to be moot, unless the advantage is very plain. At least we should regret seeing the procedure become the custom, as it is apparently tending to become in the Southern District of New York.

*But cf.* Rosenfield, *The Constitutional Dimension of Fair Use in Copyright Law*, 50 NOTRE DAME LAWYER 790, 804 (1975), where Mr. Rosenfield maintains that first amendment constitutional considerations demand that fair use be something more than an affirmative defense.

15. Sobel, *Copyright and the First Amendment: A Gathering Storm?* 19 ASCAP COPYRIGHT L. SYMP. 43, 44 (1971).

16. In *Coleman v. Alabama*, 399 U.S. 1, 22 (1970), the majority found a constitutional mandate for a criminal suspect to have the opportunity to have counsel present at a preliminary hearing. In his dissenting opinion, Chief Justice Burger characterizes this discovery, made some two centuries after the writing of the Constitution, as "an odd business."

the incentives of publication and dissemination. This position is essentially Goldstein's "second accommodative principle"<sup>17</sup> which differs from the "first accommodative principle" (identifying the accused infringer with the short range public interest) in that "it identifies the copyright owner with the long range public interest in the promotion of expression."<sup>18</sup>

Regardless of the final determination on the fair use issue in any particular case, such an orderly presentation of the issues may find the fair use issue narrowed to one less enigmatic than one of constitutional conflict. The question of what constitutes "a copy,"<sup>19</sup> or "copies,"<sup>20</sup> is one which is inextricably intertwined in the initial question of infringement in all cases yet calls to question the fairness of the use in but a limited number of situations. That "copying" is an essential element of plaintiff's prima facie case is undisputed.<sup>21</sup> Further, it is generally recognized that this burden is met by a showing that defendant had "access" to the copyrighted work and that the allegedly infringing work is "substantially similar" to the plaintiff's copyrighted work.<sup>22</sup> In cases of reprographic infringement, proof of access poses little problem to plaintiff, if indeed the court is not willing to find the access conclusively shown by the photocopy itself. One might also conclude that reprography cases also render the element of substantial similarity moot, though this would be to ignore the helpful distinction drawn by Professor Nimmer between "comprehensive nonliteral similarity" and "fragmented literal similarity."<sup>23</sup>

It is "fragmented literal similarity" which may form a defense

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17. Goldstein, *supra* note 10, at 988.

18. *Id.* at 1015.

19. Copyright Act of 1909, 17 U.S.C. §1 (1976)(substantially revised by New Act, *supra* note 2).

20. New Act, *supra* note 2, at §106. The use of the plural "copies" in the New Act does not thereby sanction singular copying, but appears to be merely a grammatical difference from the 1909 Act. Both the House and Senate Committee Reports contain the same explanatory sentence: "The references to 'copies or phonorecords,' although in the plural, are intended here and throughout the bill to include the singular." HOUSE REPORT, *supra* note 5, at 61; SENATE REPORT, *supra* note 5, at 58.

21. 2 M. NIMMER, NIMMER ON COPYRIGHT §§8.01, 13.01, 13.03 (1978).

22. Sid & Marty Kroft Television Productions, Inc. v. McDonalds Corp., 562 F.2d 1157 (C.A. Cal. 1977); Musto v. Meyer, 434 F. Supp. 32 (D.C.N.Y. 1977); 3 M. NIMMER, NIMMER ON COPYRIGHT §13.01 [B], at 13-6 (1978).

23. 3 M. NIMMER, NIMMER ON COPYRIGHT §13.03 [A], at 13-16 (1978); *see also* L. Hand's discussion of these concepts in Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930).

prior to an initial finding of infringement in reprography cases.<sup>24</sup> How much literal borrowing of a copyrighted work is "substantial" within the "substantial similarity" element of plaintiff's prima facie case? Where reprography is the alleged infringement, an answer to this question may prove as difficult of determination as convincing a court to consider the question as part of the prima facie case. In *United States v. Taxe*,<sup>25</sup> a criminal prosecution under the Copyright Act of 1909, the testimony of defendant Taxe conclusively showed that the complained of infringement was the result of re-recording or pirating phonorecords some of which were copyrighted post-1972. Although acknowledging that substantial similarity must be found prior to a finding of infringement, the district court unreasonably deduced that any re-recording is of necessity substantially similar to the initial recording and therefore found that no substantial similarity need be shown where re-recording is evident.<sup>26</sup> Professor Nimmer points out that the question of substantial similarity necessarily involves a consideration of defendant's use of the copyrighted work (its importance to or the extent to which it forms the kernel of the defendant's work), but also emphasizes that this should not be confused with factors determinative of the separate issue of "fair use."<sup>27</sup> It is helpful to an understanding of this puzzle to remain aware that the substantial similarity issue goes to the initial question of infringement: that is, has a protectible portion of plaintiff's work been misappropriated? Has the protected work been "reproduced" within 17 U.S.C. §106(1) or should the defendant's appropriation come under the legal maxim of *de minimis non curat lex*? Any such finding must, of course, be made after examining the extent of the alleged infringement both quantitatively and qualitatively from the plaintiff's

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24. *United States v. Taxe*, 380 F. Supp. 1010 (C.D. Cal. 1974) *aff'd*, 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977), although a case involving infringement of phonorecords by re-recording, invites comparison to cases of alleged photocopy infringement due to potential likeness of "fragmented literal similarity" issues and facts.

25. *Id.*

26. This confusion of "access" with "substantial similarity" and thus of copying with infringement did not, however, result in prejudice to defendants. As eloquently expressed on appeal by Circuit Court Judge Goodwin:

We believe the instruction went beyond the law insofar as it purported to characterize any and all re-recordings as infringements, but the subsequent inclusion of a comparison test permitted the jury to consider "substantial similarity" and cured any error in the earlier part of the instruction.

*United States v. Taxe*, 540 F.2d 961, 965 (9th Cir. 1976).

27. 3 M. NIMMER, NIMMER ON COPYRIGHT §13.03[A][2], at 13-28 (1978).



perspective. That is, the analysis must be the amount of the work taken and its significance not to defendant's work, but to the appropriated work as a whole.<sup>28</sup>

The question of whether personal and private use of copyrighted works is within the scope of the Copyright Act and thus subject to its restrictions is one which has yet to be dealt with by the courts. However, as early as 1960, Mr. Latman foresaw that "the increasing use of photoduplication processes will undoubtedly require continuing attention to this area."<sup>29</sup> This question is of course linked to the seeming conflict between the first amendment and the Copyright Clause,<sup>30</sup> and may be avoided by application of the fair use doctrine. Given such an approach, it is likely that any private use by photocopying, short of "publication,"<sup>31</sup> would be found "fair" by use of the now statutory factors test. It is perhaps this likelihood which has led at least one commentator to conclude that "anyone may copy copyrighted materials for the purposes of private study and review."<sup>32</sup> If this is a safe conclusion, what then is the significance of the "single copying for teachers" guidelines within the House Report?<sup>33</sup>

Does not the Conference Committee's acceptance of the House version of section 107 (1) (which includes consideration of the non-profit educational purpose of the use), when coupled with the restricted list of permissible single copying for teachers imply that even single copying by the lay public is at least an initial technical infringement? Further, what of the specific statement in both House and Senate Reports that references to "copies" are intended to include the singular?<sup>34</sup>

In the past, fair use was said to be grounded, *inter alia*, in the implied consent of the copyright proprietor. This theory seems much

28. *Mathews Conveyor Co. v. Palmer Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943). A comparison of the factors therein with those of the New Act, *supra* note 2, at §107, may indicate just how settled the understanding of this distinction is.

29. A. LATMAN, *FAIR USE OF COPYRIGHTED WORKS*, STUDY NO. 14 (1958) prepared for the Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960).

30. See text accompanying notes 6 through 14 *supra*.

31. " '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." New Act, *supra* note 2, at §101.

32. Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT L. SYMP. 43, 58 (1955).

33. HOUSE REPORT, *supra* note 5, at 68.

34. See notes 19 through 20 and accompanying text *supra*.

less fictional when applied to the determination of what constitutes a copy, more specifically whether the copying is so substantial as to be "substantially similar." The implied consent fiction has largely been replaced by factors which are presently determinative of the fairness of the use. A further reason for abandonment of this basis for the doctrine is that its logical extension may have led to the situation where, by affixing copyright notice on every page, the proprietor could prevent any quotation at all.<sup>35</sup>

On the other hand, there are publishers who are not adverse to scholarly and educational copying of their copyrighted works and who will consent to copying beyond that allowed by the 1976 Act and the fair use doctrine. A draft report released in March 1978 by the National Commission on New Technological Uses of Copyrighted Works (CONTU)<sup>36</sup> recommended several procedural steps and notice statements which might clearly communicate such nonpossessory attitudes, presumably without giving away what may effectively be the whole copyright.<sup>37</sup> There clearly should be no legal obstacle to such a practice as long as the express grant of authority is equal to or extends that already provided by the Copyright Act generally and the fair use doctrine specifically. Such a copyright holder should take care that the wording of such notice is neither too broad nor too narrow. As an example of a notice statement which is arguably too narrow, consider the following, which was presented in memorandum form by the Association of American Law Schools [hereinafter referred to as AALS]:

Except as otherwise expressly provided, the author of each article in this volume has granted permission for copies of that article to be made for classroom use in a nationally accredited law school, provided that 1) copies are distributed at or below cost, 2) author and journal are identified and 3) proper notice of copyright is affixed to each copy.<sup>38</sup>

The legal effect of such a statement is, granted, merely an assurance that if the conditions are complied with the user has a license to copy and

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35. If the basis for fair use is implied consent, a statement by the author explicitly removing any doubt as to his non-consent, such as ANY & ALL REPRODUCTION IS PROHIBITED, would effectively destroy fair use and would soon frustrate constitutional purposes behind the grant of a *limited* monopoly.

36. 371 PTCJ A-14 (March 23, 1978)(BNA).

37. *Id.* at A-19.

38. *AALS Memorandum 78-25*, Wayne McCormack, Associate Director, Association of American Law Schools, Washington D.C.

need not rely upon section 107 fair use. However, when such a statement is presented in conjunction with the legally mandated notice of copyright, does it not receive the imprimatur of legality thereby giving rise to an inference that this is the extent of the rights/privileges provided by law? Should such, albeit innocent, tampering with the public impression of legality be allowed when adherence to law is being frustrated by the encouragement of indiscriminate photocopying? The recipients of the same AALS memorandum were encouraged to include such a statement in each issue of their law journals by the suggestion that feedback as to the popularity of topics could be had for the asking merely by including the added precondition to consent that notice be provided prior to any copying.<sup>39</sup> This goes too far.<sup>40</sup> Regardless of one's position as to the constitutional basis for the fair use doctrine, it is and should remain a judicial rule of reason<sup>41</sup> unaffected either at law or in the public's eye by unilateral statements of consent by the copyright holder.

It is perhaps illuminating that the "implied consent" fiction blossomed at a time when the state of the art was such that systematic mechanical copying was simply not feasible for any but the few with access to printing facilities. In later years, the mimeograph and other stencil duplicators provided similar convenience to a wider population.<sup>42</sup>

[I]t is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use, and in the era

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39. *Id.*

40. A more sensible, and again arguably more valid, notice statement appears in an earlier AALS memorandum:

Except as otherwise expressly provided the author of each article in this volume has granted permission for copies of that article to be made and used by non-profit educational institutions provided that author and journal are identified and that proper notice of copyright is affixed to each copy.

*AALS Memorandum* 78-13. For a similar statement already in use by the American Library Association, see material cited in note 37 *supra*. Compare the more concise notice appearing in Professor Treece's recent article:

A license is hereby granted to students, teachers, librarians and journal publishers to reproduce copies of this article by any means, and to distribute copies of this article to the public, provided that copies reproduced for distribution to the public include a notice of copyright in the following form: "Copyright © 1977 by James Treece."

Treece, *Library Photocopying*, 24 U.C.L.A. L. REV. 1025 (1977).

41. HOUSE REPORT, *supra* note 5, at 65-68.

42. See I N. HENRY, COPYRIGHT—INFORMATION TECHNOLOGY—PUBLIC POLICY, 28-31 (1975).

before photoduplication it was not uncommon (and not seriously questioned) that he could have his secretary make a typed copy for his personal use and files.<sup>43</sup>

This statement was used by the narrow majority of the Court of Claims in *Williams & Wilkins Co. v. United States*<sup>44</sup> to further the proposition that under the then governing 1909 Act, the word "copy" was not to be given its ordinary meaning. Despite a rather strained argument by defendant that the exclusive right to copy granted in section 1 of the 1909 Act should not apply to books and periodicals, the Court of Claims was sufficiently confused by the legislative history to abandon the basic tenet of judicial construction that words be given their plain and literal meaning.<sup>45</sup> Chief Judge Cowen in his well reasoned dissent to the *Williams & Wilkins* opinion found the meaning of "copy" apparent from the wording of the 1909 Act and found it "not necessary to debate the statutory history in light of the changes in the 1909 Act."<sup>46</sup>

Although it is foreseeable that some photocopying cases may hinge on the relatively narrow issue of "substantial similarity," it is probable, at least in the foreseeable future, that the allegedly infringing photocopying will have been conducted on such a scale as to necessitate a weighing of the statutory factors determinative of fair use. Any analysis of the purpose and character of such wholesale photocopying would be something less than intellectually honest if it were to view machine copying as merely a substitute for hand copying and therefore fair use.<sup>47</sup> We live in a time when photocopies can be made in seconds and the demand is apparently sufficient to warrant the placing of photocopiers not only in most offices and libraries, but also in a growing number of convenience stores. One dare not hypothesize, therefore, that hand copies would have been laboriously produced in any but an infinitesimal proportion of the current photocopying explosion.

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43. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

44. 487 F.2d 1345.

45. 2A SUTHERLAND, STATUTORY CONSTRUCTION §46.01. For a good discussion of policies behind what has become known as "the plain meaning rule," see ENDLICH, THE INTERPRETATION OF STATUTES, chapter 1 (1888).

46. 487 F.2d at 1365.

47. *Id.* at 1368.

## 2. THE REPROGRAPHY EXPLOSION

In reprography cases, when weighing the decisive factors in an effort to determine whether the use is fair, or whether "the value of the original is sensibly diminished,"<sup>48</sup> one must bear in mind the cumulative economic effect of the complained of photocopying. The temptation to consider the copying in and of itself without any thought as to the broader perspective and impact of such use upon the future market of the copyright proprietor is strong. This is especially true where the use itself is non-commercial and educational in nature. Such a myopic view brushes under the carpet the effect of the reprography explosion on the educational publishing industry.

That a reprography explosion exists is indisputable; only its size is unknown. In 1962, the Fry Report, conducted for the National Science Foundation, estimated that some 3.6 billion photocopies of both copyrighted and uncopyrighted works were made annually.<sup>49</sup> The president of the Xerox Corporation reported in 1965 that roughly 9.5 billion copies were produced in the United States in 1961.<sup>50</sup> By 1967, this figure had risen to 27.5 billion.<sup>51</sup> The present annual total figure is unknown. Also unknown is the number of photocopies made of copyrighted works. It has, however, been estimated in a Dutch study that of the total volume of photocopying about 5% contain copyrighted works.<sup>52</sup> This percentage increases to 25% of all photocopying within educational institutions and to 65% of all library photocopying.<sup>53</sup> An American study found that about 60% of library photocopying was of copyrighted work.<sup>54</sup> The same study found what is now generally recognized as true in discussions of copyright and reprography: copies are made of periodi-

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48. *Folsom v. Marsh*, 9 Fed. Cas. 342, 348, No. 4901 (C.C. Mass. 1841).

49. George Fry and Associates (1962) *Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields*. Study prepared for the National Science Foundation, appearing in 11 BULL. COPYRIGHT SOC'Y. 69 (1963).

50. I N. HENRY, *supra* note 42, at 59.

51. Kolle, *Reprography and Copyright Law: A Comparative Law Study Concerning the Role of Copyright Law in the Age of Information*, 6 IIC 382, 385 (1975).

52. *Id.* But for exact figures, see Gerbrandy, *The Netherlands Solution to the Problem of Reprography*, 1975 COPYRIGHT 47, 50.

53. Kolle, *supra* note 51, at 385.

54. *Id.* See also G. Sophar and L. Heilprin, *The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as It Is Affected by Copyright — A Status Report*, Final Report: Project No. 7-0793, Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc. (1967).

cals nine times as often as they are made from books, and of those periodicals the most likely to be photocopied are scholarly, scientific and technical journals.<sup>55</sup>

What effect does such wholesale photocopying have on the potential market for or value of these copyrighted "sci-tech" journals?<sup>56</sup> And, does this inquiry differ from the one answered by the Court of Claims in *Williams & Wilkins*? It would seem that any attempted answer to the first question must conclude that the *potential* market for "sci-tech" journals is diminished by wholesale photocopying.<sup>57</sup> The risks in the "sci-tech" publishing industry are great,<sup>58</sup> and the market small. The business, when considered without subsidies, is therefore a marginal one more critically affected by drops in already low subscription levels.<sup>59</sup> There is, however, as yet no empirically shown causal relationship between falling subscription levels and photocopying.

The question resolved against plaintiffs in *Williams & Wilkins* called for a finding somewhat more certain than a mere tendency to diminish the market. As Professor Nimmer charges, "The Court [Court of Claims] fell into error by confusing the issues of damages and liability."<sup>60</sup> One of three factors listed as the core of their evaluation of the case was that "plaintiff has not . . . shown . . . that it is being or will be harmed substantially by these specific practices of NIH and NLM."<sup>61</sup> Must publishers of monographs now affirmatively show what publisher Curtis Benjamin alleged in 1972, that because of photocopying "the scientific and technical monographs will disappear by 1980?"<sup>62</sup>

That this disappearance has not occurred is not evidence of minimal impact of reprography on subscription levels, but perhaps is

55. *Id.* See also: I N. HENRY, *supra* note 42, at 62; *Soaring Prices and Sinking Sales of Science Monographs*, 183 SCIENCE 282 (1974).

56. New Act, *supra* note 2, at §107(4).

57. Fried, *Fair Use and the New Act*, 22 N.Y.L. SCH. REV. 497, 507 (1977).

58. The Library of Congress has commented that one periodical dies each day but three new ones are born. G. GIPE, *NEARER TO THE DUST — COPYRIGHT AND THE MACHINE* 94 (1967).

59. I N. HENRY, *supra* note 42, at 61; PHYSICS TODAY reports that "[I]n the past eight years the number of subscriptions to some physics journals has fallen by a factor of two." PHYSICS TODAY, October 1977, at 104.

60. 3 M. NIMMER, *NIMMER ON COPYRIGHT* §13.05[E][4][c], at 13-74 (1978).

61. *Williams & Wilkins Co. v. United States*, 487 F. 2d at 1354.

62. PUBLISHER'S WEEKLY, April 3, 1972, at 58. The necessity for such a showing would seem contrary to the function of §504(c) of the New Act which provides for statutory damages in the event such a showing is not feasible. See notes 143 through 145 and accompanying text *infra*.

informative as to the chief source of revenue of the monograph. The four monographs allegedly infringed in *Williams & Wilkins* are the exception in that they were commercial publications<sup>63</sup> and therefore presumably relied for the most part on advertising and subscriptions for revenue. Advertising revenues are not as significant a form of income for most non-profit journals due to limitations imposed by the Internal Revenue Code on the tax-exempt income of qualifying non-profit organizations.<sup>64</sup> Non-profit monographs rely in the most part, and to varying degrees, on subscription revenues and "page charges." The page charge is a fixed rate per page charged to the author of a published article which covers at least part of the cost of publication but is usually paid by the institution supporting his research.<sup>65</sup> When underwritten by the federal government, the page charge amounts to at least partial public subsidization of the journal. In 1961, the federal government, by far the largest source of research funds, endorsed the page charge principle under the rationale that research is not complete until its results are published.<sup>66</sup> That government page charge revenues are substantial is evidenced by the report that in 1970 the National Institute of Health paid out between 4 - 6 million dollars, or 1.5% of its total research awards, in page charges.<sup>67</sup> What portion of the publishing costs of non-profit monographs are met by page charges and to what extent they are reliant on subscription revenue is not known.<sup>68</sup> The question is nonetheless posed: should an organization largely supported by public monies be permitted

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63. A 1962 survey of 262 representatives [*sic*] scientific journals conducted by the National Science Foundation revealed that 211 were published by non-profit scientific societies, 18 by university presses and 33 by commercial publishing firms." 1 N. HENRY, *supra* note 42, at 66.

64. I.R.C. §§501(b), 501(c)(3), 511(a), 512(b), 513(c). Most non-profit publishers would likely qualify for tax-exempt status under §501(c)(3). §513(c) specifically includes advertising as an unrelated business activity of any such tax-exempt organization. Advertising revenues are therefore taxable as unrelated business income. The tax is, however, computed with the modifications provided in §512(b), many of which are excluded as deductions "directly connected" with the income.

65. 3 SCHOLARLY PUBLISHING 62, 62-69 (October, 1971).

66. *Id.* at 64.

67. *Id.* at 67.

68. The Editor-in-Chief of the American Physical Society publications, THE PHYSICAL REVIEW and *Physical Review Letter*, is reported as having said in 1968 that about 70% of the cost of publishing comes from page charges and 30% from subscriptions. *Id.* at 63; *see also* Sophar and Heilprin, *supra* note 54, which indicates a somewhat smaller figure in that non-profit journals surveyed reported that 41% of their incomes were derived from subscriptions.

to limit public access to their publication by asserting copyright? Any question of the copyrightability of such publication should be dealt with legislatively. For judicial attempts to account for such an equitable argument would almost certainly skew consideration of the time tested and now statutorily imposed fair use factors and would serve to lessen their usefulness when applied in more classic fair use situations.<sup>69</sup> In short, the fair use doctrine must be applied as it appears at 17 U.S.C. §107 which specifies that the inquiry to be made should be: "the effect on the potential market" and *not* whether plaintiff has successfully shown substantial harm as in *Williams & Wilkins*.<sup>70</sup> This "probable effects test"<sup>71</sup> based as it is on logic rather than on concrete evidence<sup>72</sup> has been used successfully in the past<sup>73</sup> to assure the economic incentive of copyright and will hopefully survive *Williams & Wilkins*.

### 3. PHOTOCOPYING: THE STATUTE AND THE LEGISLATIVE HISTORY

If there was ever any but the most philosophical doubt that the fair use doctrine extended to photocopying, it could not stand in the face of the language in section 107.<sup>74</sup> The House Report makes this clear. "[T]he reference to fair use 'by reproduction in copies or phonorecords or by any other means' is mainly intended to make clear that the doctrine has as much application to photocopying and copying as to older forms of use."<sup>75</sup> This appears as one of the more bold statements of

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69. See notes 13 and 14 and accompanying text *supra*.

70. 487 F. 2d at 1354; see also *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1274 (S.D. N.Y. 1970) where, after finding defendant's film on the life of Lenny Bruce infringing, the district court per Lasker, J. said, "[I]t seems as certain as it can be, *except after the fact*, that the distribution and public showing of *Dirtymouth* [defendant's film] will operate to reduce the demand for Worth's [plaintiff] film." (emphasis added).

71. Fried, *supra* note 57, at 505.

72. *Id.*

73. The probable effects test was applied in granting preliminary injunctions in: *Inge v. Twentieth Century-Fox Film Corp.*, 143 F. Supp. 294, 302 (S.D. N.Y. 1956); *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1276 (S.D. N.Y. 1970); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938); *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219 (E.D. N.Y. 1963).

74. "[F]air use . . . including such use by reproduction in copies . . ." New Act, *supra* note 2, at §107.

75. HOUSE REPORT, *supra* note 5, at 66.



congressional intent behind section 107. The desire not to “freeze” the fair use doctrine accounts both for the circumspect statement of intent as to section 107 and for the absence of a specific education section in the new Act.<sup>76</sup> Even though choosing to specifically include photocopying within the scope of fair use, Congress had provided guidance as to the permissible scope of photocopying only in the areas of teacher use, classroom and library reproduction. As the statistics would indicate,<sup>77</sup> these are the areas most ripe for confrontation between the holders and users and are most deserving of specific legislative consideration.

### A. *Guidelines for Educational Photocopying*

It should initially be made clear that the specific guidelines for educational reproduction, appearing in the House Report as an agreement between negotiating representatives of authors, publishers and educational institutions<sup>78</sup> [hereinafter “guidelines”], are twice removed from actual law. The presentation of the guidelines in agreement form<sup>79</sup> rather than as a formally adopted statement of the intention of the House of Representatives casts a peculiar light on their legal significance. Both the House Judiciary Committee and the guidelines themselves caution that the negotiated agreement is not intended in any way to interfere with the judicial application of the fair use doctrine.<sup>80</sup> Since this warning could most certainly be found to apply to those situations specifically anticipated by the guidelines, an opening is thereby created for judicial modification, hopefully without destroying the certainty and protection they were intended to provide. Another perspective on the relationship and impact of the guidelines on fair use is offered by the

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76. “[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.” Arguments on the subject of a specific educational section, presented in the 1967 House Judiciary Committee Report, are unofficially incorporated by reference in the HOUSE REPORT. After rejecting an education section, the Committee wrote, “The fullest possible use of the multitude of technical devices now available to education should be encouraged.” H.R. REP. NO. 83, 90th Cong., 1st Sess. 31 (1967). For an example of an educational section, see 46 F. L. REV. 91, 129 (1977).

77. See notes 49 through 55 and accompanying text *supra*.

78. HOUSE REPORT, *supra* note 5, at 67-70; parts of the following discussion apply equally to the similar agreement reached by representatives of music teachers, schools and publishers, appearing in the HOUSE REPORT, *supra* note 5, at 70-71.

79. *Id.* at 67.

80. *Id.* at 68, 70.

Conference Committee who "accept [the guidelines] as part of their understanding of fair use."<sup>81</sup>

The practical significance of the agreement is more clear. "Teachers kill [*sic*] know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of fulfilling the need for greater certainty and protection for teachers."<sup>82</sup> Although teachers may fairly assume that any copying within the guidelines is allowed as fair use, at what point beyond the guidelines should a teacher feel that he or she may be infringing and choose to either surreptitiously proceed with or abandon the proposed photocopying? This undoubtedly is the question being asked by teachers. The authors and publishers are perhaps happy with a compromise agreement which raises the question so acutely<sup>83</sup> in the minds of educators who, as late as 1975, were somewhat less likely to consider the rights of the copyright proprietor before photocopying. Educators, on the other hand, may appreciate the fact that the agreement provides for the first time some "minimum standards" for educational fair use.<sup>84</sup>

By distinguishing single copying for teachers from multiple copies for classroom use, the guidelines acknowledge important differences in the purpose and character of the respective uses. A single copy may be made by or for a teacher at his or her request for the purposes of scholarly research, use in teaching or preparation to teach a class.<sup>85</sup> Under the guidelines, these rights extend only to a specified list of materials.<sup>86</sup>

Multiple copies may be made for classroom use provided that tests of brevity and spontaneity are met, the cumulative effect considerations are complied with and each copy includes a notice of copyright. The brevity test(s) are specific and vary with the nature of the copyrighted work be it prose, poetry, illustration or "special" work.<sup>87</sup> "Spontaneity"

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81. CONFERENCE REPORT, *supra* note 5, at 70.

82. HOUSE REPORT, *supra* note 5, at 72.

83. *New Copyright Law: What's It To You?* 67 ENGLISH JOURNAL 16, 17 (February, 1978); Stedman, *New Copyright Law: Photocopying for Educational Use*, 63 AAUP BULL. 5 (February, 1977).

84. Although most references to the "minimum standard" language found by this researcher seem to assume benefit to educators, one definition of the word, "standard," *i.e.*, a requirement of moral conduct, suggests the possibility at least that the phrase is double-edged. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2223 (1971).

85. HOUSE REPORT, *supra* note 5, at 68.

86. See notes 31 through 34 and accompanying text *supra*.

87. HOUSE REPORT, *supra* note 5, at 68-69.

requires both that the inspiration to copy be that of the individual teacher (as opposed to a directive from administration) and that the time between the inspiration to make copies and the moment of their use is such that it would be unreasonable to expect a timely reply to a request for permission.<sup>88</sup> This time element of the spontaneity test precludes photocopying the same material for classroom use term after term.<sup>89</sup> The cumulative effects test limits the number of works which may be copied from the same author, collective work or periodical volume during one class term. The instances of such multiple copying are limited to nine for the term of each course within the school where the copies are made.<sup>90</sup>

The specific prohibitions within the agreement apply both to single copying for teachers and multiple copying for classroom use. "Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works."<sup>91</sup> There should be no copying from "consumable" works such as tests, answer sheets, workbooks and like material. General prohibitions against copying which: (1) substitutes for purchase; (2) is directed by a higher authority; (3) is repeated from term to term; or (4) is charged to the student beyond cost,<sup>92</sup> similarly apply to both single and multiple copying.

### B. Section 108: Library Photocopying

By including section 108 in the 1976 Act, Congress provided libraries with limited statutory protection against infringement actions in addition to that provided by section 107 fair use.<sup>93</sup> A library having no privilege specifically granted by section 108 may find a defense within the scope of section 107 fair use. More specifically, although section 108 details the conditions under which libraries may reproduce and distribute copies, it should be remembered that where the library is copying

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88. *Id.*

89. This practice is further specifically prohibited by the guidelines. *Id.* at 69.

90. *Id.*

91. *Id.*

92. *Id.* at 70.

93. New Act, *supra* note 2, at §108(f)(4). "Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes." HOUSE REPORT, *supra* note 5, at 78-79.

for a teacher, it, as agent, may depend on the teacher's fair use privilege.<sup>94</sup>

The section 108 privileges "to reproduce and distribute . . . no more than one copy of a work,"<sup>95</sup> are initially subject to three general conditions. The first being that "[t]he reproduction or distribution is made without any purpose of direct or indirect commercial advantage."<sup>96</sup> Problems of defining "direct or indirect commercial advantage" are allayed by the House Report which reads: "[T]he advantage referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located."<sup>97</sup> This would allow "corporate libraries" in such places as clinics, law firms and research and development corporations to single copy and distribute to their employees, provided there is compliance with the other general and specific conditions of section 108.<sup>98</sup>

The Congress evidently had such "corporate libraries" in mind when drafting the second general condition, that "the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field."<sup>99</sup> The *quid pro quo* for the privileges given these "subsection (a) libraries"<sup>100</sup> is the making of their collections "open" and "available," thereby furthering the policy of greater public access and broader dissemination of information. But what of libraries such as those of some private colleges and universities which are freely accessible to the university population, but are open to the general public only upon payment of a license fee? The plain meaning of the word "public" would indicate that such libraries should more likely be characterized as "private" and hence not granted section 108 privileges. However, the argument may be made that by the use of "open to the public," Congress intended section 108 privileges to extend to a broader category

94. Treece, *supra* note 40, at 1039.

95. These are more clearly words of limitation which, when applied to use by an entity capable of wide distribution (such as a library), do not seem to raise the same inference as to technical infringement of "single copying" as does single copying by teachers discussed in the text accompanying note 33 *supra*.

96. New Act, *supra* note 2, at §108(a)(1).

97. HOUSE REPORT, *supra* note 5, at 75.

98. CONFERENCE REPORT, *supra* note 5, at 74.

99. New Act, *supra* note 2, at §108(a)(2).

100. Treece, *supra* note 40, at 1033.

than would have been included by use of the more common phrase "public libraries."<sup>101</sup> Assuming that such private libraries are not within subsection (a) some may find the protection provided by section 108(d) sufficient incentive to open their collections to the general public.

The third general condition or prerequisite to the privileges granted by section 108 is that "the reproduction or distribution of the work includes a notice of copyright."<sup>102</sup> It is not specified whether this notice must be according to form required by the notice provision of the new Act<sup>103</sup> or whether a notice in the form of a warning would suffice. For example: **WARNING: THIS WORK MAY BE SUBJECT TO THE PROTECTION OF FEDERAL COPYRIGHT LAWS 17 U.S.C. §§ 101-810.** While not of paramount legal significance, this difference could have great impact on library photocopying of material which does not display section 401(b)<sup>104</sup> copyright notice on each page. For while it would be a simple matter to include the above warning/notice as a flap fixed to the copier which could appear along the margin of each photocopy, considerable employee time would be spent locating and properly affixing the individualized section 401(b) notice to all copies made from protected works.

In examining the conditions which accompany the various specific privileges within section 108, one must remember that the general conditions of section 108(a) discussed above are criteria which must be satisfied prior to qualification for any of the specific privileges provided by section 108.

Subsection (b) extends the rights of reproduction and distribution of one copy of an unpublished work for the purposes of preservation, security or deposit in another subsection (a) library if a copy of the unpublished work is currently in the collection of the copying library.<sup>105</sup> Subsection (c) allows reproduction of a published work solely for the purpose of replacement of a copy that is damaged, deteriorating, lost or stolen if, after a reasonable investigation, an unused replacement cannot be found at a fair price.<sup>106</sup> Both the Senate and House Reports

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101. An otherwise private college library may, by involvement in interlibrary loan programs, make its collection "available" to the public and thus arguably qualify as a subsection (a) library. 46 F. L. REV. 91, 107 (1977).

102. New Act, *supra* note 2, at §108(a)(3).

103. *Id.* §401(b).

104. *Id.*

105. *Id.* §108(b).

106. *Id.* §108(c).

provide guidance as to what constitutes a reasonable investigation,<sup>107</sup> but acknowledge that the scope of a reasonable investigation will vary according to the circumstances of a particular situation.<sup>108</sup> Both subsections (b) and (c) limit reproduction to facsimile form. "Thus a library may reproduce from its own microform holdings a microform user copy . . . ." <sup>109</sup> However, transfer from an original form (such as printed matter) to a microduplication or computerized system is not within the privileges granted by subsection (b) or (c).

Subsection (d) grants rights of reproduction and distribution of single copies of a small part of any copyrighted work<sup>110</sup> to both individual libraries and those participating in interlibrary loan arrangements.<sup>111</sup> Conditions imposed are: (1) that the copy become the property of the user; (2) that the library have no notice that the copy is to be used for any purpose other than private study, scholarship, or research; and, (3) that the library display the warning of copyright issued by the Register of Copyrights.<sup>112</sup> That the second "no notice" condition does not require the library to affirmatively seek out information as to the status and identity of the user<sup>113</sup> is significant in light of what appears to be a growing trend amongst other western countries to impose such a duty of inquiry even in situations of in-house copying performed by, instead of for, the user.<sup>114</sup>

Subsection (e) grants rights of reproduction and distribution of single copies of whole, or substantial parts of copyrighted works both

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107. "It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service." HOUSE REPORT, *supra* note 5, at 76; SENATE REPORT, *supra* note 5, at 68.

108. HOUSE REPORT, *supra* note 5, at 75; SENATE REPORT, *supra* note 5, at 68.

109. Treece, *supra* note 40, at 1050.

110. "Any copyrighted work" specifically includes articles or other contributions to collective works or periodical issues, but does not extend to those works specifically excluded from §108 by §108(h). See generally New Act, *supra* note 2, at §108(d), (h).

111. New Act, *supra* note 2, at §108(d).

112. 42 Fed. Reg. 59,264 (1977) (to be codified in 37 C.F.R. 201.14).

113. Treece, *supra* note 40, at 1050.

114. *Société Masson v. CNRS*, [1974] D.S. JUR. 337 (Trib. gr. inst. 1974) where defendant, state-operated Centre National de la Recherche Scientifique, was held liable for infringement because of its failure to practice suitable supervisory measures, such as requiring proof of user's identity and purpose, prior to allowing copies to be made on its machines. Cf. *University of New South Wales v. Moorhouse et al.*, 6 AUSTL. L. R. 193 (High Ct. 1975).

to individual libraries and those participating in interlibrary loan arrangements.<sup>115</sup> In addition to the conditions imposed by subsection (d),<sup>116</sup> a reasonable investigation<sup>117</sup> must be undertaken to find a copy at a fair price.

Subsection (f)(1) makes it clear that libraries are not liable under section 108 for any infringement resulting from unsupervised use of copiers located on library premises.<sup>118</sup> The copier must, however, display a notice that the making of a copy may be subject to the copyright law.<sup>119</sup> Subsection (f)(2) places the liability for any infringement in such a situation with the user.<sup>120</sup> Subsection (f)(4) asserts that a fair use defense is unaffected by section 108. It further provides that contractual obligations assumed at the time that the copy was obtained shall dominate the privileges granted by Section 108.

### C. Section 108(g)

Congress has responded to the call for legislative guidance made by the Court of Claims in the *Williams & Wilkins* case by the enactment of subsection (g).<sup>121</sup> Generally, subsection (g) attempts to establish limits on both in-house and interlibrary loan photocopying. Subsection (g)(1) warns that the rights of section 108 do not extend to cases where the library has actual or substantial reason to believe that it is involved in related or concerted reproduction or distribution of multiple copies of the same material, whether made at one time or over a period of time. Furthermore, it is irrelevant whether such copying is for aggregate use by one or more individuals or for individual use of members of a group.<sup>122</sup>

Addressing itself to the specific question of interlibrary loan photocopying, subsection (g)(2)

prohibits systematic photocopying of copyrighted materials but permits interlibrary arrangements "that do not have, as their purpose or effect,

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115. New Act, *supra* note 2, at §108(e).

116. See note 111 and accompanying text *supra*.

117. See note 107 and accompanying text *supra*.

118. New Act, *supra* note 2, at §108(f)(1). See note 114 *supra*.

119. New Act, *supra* note 2, at §108(f)(1).

120. *Id.* §108(f)(2).

121. *Id.* §108(g).

122. *Id.* §108(g)(1). For an example of such prohibited conduct, see SENATE REPORT, *supra* note 5, at 70 [Example 2].

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."<sup>123</sup>

To paraphrase: purposeful or effective systematic copying is prohibited, but only in such "aggregate quantities"<sup>124</sup> as to "substitute for a subscription . . . or purchase."<sup>125</sup>

Some guidance as to the meaning of the key phrases "aggregate quantities" and "substitute for a subscription . . . or purchase" is provided by the CONTU guidelines<sup>126</sup> on which there has been substantial agreement by the principal library, publisher and author organizations.<sup>127</sup> With respect to periodicals, the guidelines apply only to issues, or articles therein, published within five years prior to the date of the request for the copy. Requests filled for six or more articles from any given periodical title<sup>128</sup> within a year shall be considered such an aggregate quantity as to substitute for a subscription or purchase and thus a use not protected by section 108.<sup>129</sup> Limited protection for the subscription levels of scientific and technical journals has thus been provided.<sup>130</sup> The absence of guidelines as to quantities which will substitute for subscription or purchase of periodicals or articles published more than five years prior to the date of request indicates that libraries shall be given somewhat greater latitude in copying these materials. This is perhaps because of the minimal effect of the use upon the market and value of the copyrighted work.<sup>131</sup>

Works other than periodical articles which are also within the purview of subsection (d)<sup>132</sup> are similarly protected against copying which may substitute for purchase. The guidelines provide that filled requests of six or more copies of or from such a work within a year may be

123. CONTU *Guidelines for Inter-Library Arrangements, Circular R-21—Reproduction of Copyrighted Works by Educators and Librarians*, a Copyright Office Publication 7 (November 7, 1977).

124. New Act, *supra* note 2, at §108(g)(2).

125. *Id.*

126. CONFERENCE REPORT, *supra* note 5, at 72-74.

127. *Id.* at 72.

128. The actual language of the guideline reads "periodical (as opposed to any given issue of a periodical) . . ." *Id.*

129. *Id.*

130. See generally notes 48 through 73 and accompanying text *supra*.

131. See New Act, *supra* note 2, at §107(4).

132. Works such as fiction, poetry and collective works are contemplated by the CONFERENCE REPORT, *supra* note 5, at 73.



considered to substitute for purchase.<sup>133</sup> Further, these works are protected equally, and without prejudice as to the date of publication, throughout the copyright term.<sup>134</sup>

Subscription and purchase are further encouraged in the guidelines. If the requesting entity has within its collection, or has ordered a copy of the copyrighted work, the copying shall be treated as if performed within its own library.<sup>135</sup> Similar protection is provided to requests for copies of periodicals a subscription to which has been ordered. This policy offers the dual reward of both increasing public access and encouraging subscription. After placing five interlibrary loan requests from the same periodical within a year, a library could recognize its need for an added subscription, subscribe, and provide an interlibrary loan copy of the requested article without delay to the user or prejudice to its quota.

In the interest of enforcement, the guidelines provide two further substantive recommendations: first, that each request for a copy should be accompanied by a representation that the request is being made in conformity with the guidelines, and second, that the requesting entity should keep a record of all requests for copies covered by the guidelines and that records be maintained until the end of the third calendar year after the end of the calendar year of any particular request.<sup>136</sup>

The caution with which both Congress and CONTU approached section 108 is evidenced by subsections within both section 108<sup>137</sup> and the guidelines<sup>138</sup> calling for a re-examination of this section of the Act five years from the effective date. Reports to be solicited from authors, publishers and libraries will hopefully shed light on the extent to which section 108 has proven effective in balancing the rights of creators with the needs of users.<sup>139</sup>

Although this recognition of the need for review of the library photocopying provisions may detract from the efficacy of section 108, placing the burden for final resolution of issues therein on the concerned parties may prove to facilitate agreement.<sup>140</sup> Barbara Ringer suggests

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. New Act, *supra* note 2, at §108(i).

138. CONFERENCE REPORT, *supra* note 5, at 73.

139. New Act, *supra* note 2, at §108(i).

140. Ringer, *The Unfinished Business of Copyright Revision*, 24 U.C.L.A. L. REV. 951, 967-68 (1977).

that this burden for final resolution of the “unfinished business” of section 108 may encourage libraries to make a good faith effort to comply with both section 108 and the CONTU guidelines, thereby promoting a greater “spirit of comity”<sup>141</sup> in future negotiations. In light of prospective developments in information storage and retrieval systems,<sup>142</sup> no legislation attempting to proscribe practices in this area is likely to be of long lasting significance. Section 108 shall then hopefully prove to meet its intended purpose of complementing, at least in the interim, the fair use doctrine.

A final mention should be made of the section 504<sup>143</sup> damages provision as it applies in cases of innocent photocopying of protected works by employees or agents of educational institutions and libraries. Section 504(c)(2) mandates that statutory damages *shall* be remitted so as to protect a specified class of defendant. This does not, of course, preclude a plaintiff from obtaining a judgment in the amount of damages actually suffered (which may or may not be found to include lost profits).

The class protected by the section 504 remission of statutory damages includes not only the employees or agents of non-profit schools and libraries, if acting within the scope of their employment, but also the institutions themselves.

Any member of the protected class must have “believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107.”<sup>144</sup> This language seems to aim at situations in which an infringing use has been made of a work which has for some reason appeared without notice of copyright. However, section 405 of the new Act<sup>145</sup> (permitting as it does new latitude as to omission of notice and copyright validity) specifically removes liability for such innocent infringement not only for statutory damages but also for actual damages. Does then this language of section 504(c)(2) have an exclusive function or does this subsection generally attempt to insure that statutory damages shall be awarded in an equitable fashion?

Due to the lack of any mention in section 504(c)(2) of section 108, an analysis of this question may expose some painful questions as to the interrelationship of sections 107 and 108.

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141. *Id.*

142. Treece, *supra* note 40, at 1058-66; I N. HENRY, *supra* note 42, at 33.

143. New Act, *supra* note 2, at §504.

144. *Id.* §504(c)(2).

145. *Id.* §405.

#### 4. CONCLUSION

The problems arising from consideration of the fair use doctrine as applied to the photocopying of copyrighted works are intricate and difficult of solution. The changing state of technology, in both the areas of photoduplication and information storage and retrieval systems, contributes to the already complex problems by casting doubt on the durability of any potential solutions.

What will be the impact of already budding technological attempts to prevent photocopying?<sup>146</sup>

Will the dissemination of reprography related technology force the courts to more thoroughly address the origins and basis for the fair use doctrine? For, as Justice Cardozo has said, "Rivulets in combination make up a stream of tendency that may attain engulfing power."<sup>147</sup> Present attempts at dealing with reprography's growing "stream of tendency" are modeled to varying degrees after performing rights societies such as the American Society of Composers, Authors and Publishers (ASCAP).<sup>148</sup> The future of this area of the law depends in no small measure on the success of these clearinghouse systems.

*Brian Anderson*

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146. The Xerox Corporation at one time applied for a patent on a combination of fluorescent dyes which could render printed material uncopyable. The dyes could be sprayed on documents without affecting legibility, but would in effect "blind" copiers dependent on intense light. *TIME*, April 15, 1974, at 87. A recent telephone conversation with a representative of the Supplies Division of Xerox Corporation in Rochester, New York, revealed that research and development of this product has since been halted and the patent application withdrawn. The reason given was that the product proved ineffective inasmuch as some copier models were able to penetrate the fluorescence and produce legible copies. One wonders, however, if the potential impact of such a product on the photocopier industry did not weigh heavily in the decision to "drop" the patent application.

What perhaps is a more promising product has been patented by scientist Richard E. Reinagel. Copy-Trol is a paper coated with heat resistant material that does not reflect enough light to permit, again, *some* copiers to distinguish between the background and the lettering. *New York Times*, June 7, 1975, at 33.

147. *Holyoke Power Co. v. Paper Co.*, 300 U.S. 324, 340 (1937).

148. *Strong Start for Copyright Clearance Center*, *PUBLISHER'S WEEKLY*, February 27, 1978, at 78. An excellent discussion of alternate royalty collection schemes may be found along with an interesting proposal for compulsory licensing of educational and library photocopying in MacLean, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, 20 *ASCAP COPYRIGHT L. SYMP.* 1 (1972).