Register of Copyrights' Five-Year Review Report: A View from the Field

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Prologue

DURING DEVELOPMENT OF the legislation which resulted in passage of the Copyright Act of 1976, the issue of library reproduction of copyrighted works had been the central focus of heated debate between librarians and publishers.[1] The library community was concerned that a mechanism be built into the law which would allow for periodic review of the provisions of Section 108.[2] At the urging of the library community, Congress incorporated Section 108(i) which provides for a review at five-year intervals by the Register of Copyrights, with the first report due to Congress 3 January 1983. Because the specific wording of Section 108(i) is crucial to the library community's interpretation, evaluation and commentary on the implementation of the law by libraries, the five-year review process leading up to the Register's Report,[3] and the report itself, it is quoted in its entirety:

> Section 108(i). Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.[4]

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The operative words for the library community when Section 108(i) was proposed and which remain so today are "the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users." The copyright proprietor community likewise is concerned with "balance," as is the Copyright Office. It is the divergence of opinion on interpretations of the law, what constitutes "balance," how empirical data are used and construed, and what Congress intended in Section 108 that leaves the interested parties as far apart on the issue of library photocopying after issuance of the Register's Report as they were during the decade preceding passage of the Copyright Act of 1976.

Preparation for the Register's Report

In early 1978, with the new copyright era barely in its infancy, Register of Copyrights Barbara Ringer took as her first step in the five-year review process the appointment of Ivan R. Bender, former copyright counsel to Encyclopaedia Britannica Educational Corporation, as consultant. Soon thereafter, representatives of libraries/users and copyright proprietors/authors were invited to separate meetings to begin substantive discussions on the review issues. By the end of the second meeting, each group recognized the need for a joint advisory committee and agreed to suggest five members. Appointed to the Register of Copyrights Advisory Committee for the Five-Year Review (commonly known as the 108(i) Advisory Committee) were: James Barsky, Academic Press, Inc.; Charles Butts, Houghton Mifflin Co.; J. Christopher Burns, *The Washington Post;* Efren Gonzalez, Bristol-Myers Products; Irwin Karp, the Authors' League of America, Inc.; Madeline Henderson, National Bureau of Standards; Rita Lerner, American Institute of Physics; Nancy Marshall, University of Wisconsin-Madison; August Steinhilber, National School Boards Association; and Alfred Sumberg, American Association of University Professors. The Copyright Office named nine members to an internal planning group which met with the 108(i) Advisory Committee: Barbara Ringer, Register of Copyrights; Waldo H. Moore, Assistant Register of Copyrights for Registration; Ivan Bender, Consultant; Jon Baumgarten, General Counsel; Richard Glasgow, Assistant General Counsel; Lewis Flacks, Special Legal Assistant to the Register; Michael Keplinger, Special Legal Assistant to the Register; Marlene Morrisey, Special Assistant to the Register; and Robert Stevens, Chief, Cataloging Division.

108(i) Advisory Committee

The early meetings of the 108(i) Advisory Committee were largely exploratory and informational, but it was obvious that the Register was committed to a constructive and fair review. The advisory committee's responsibilities included assistance to the Copyright Office in identification of appropriate issues and questions to be addressed, assistance in preparing the Request for Proposal (RFP) for a contractual study to collect needed statistical data, assistance in preparing the questions to be addressed by the study and providing liaison with interested organizations. Library/user representatives made it clear that any statistical study for the five-year review must address the economic impact of the law on copyright owners, just as it would address photocopying by libraries and users. Only with data from all populations could the crucial issue of "balance" be evaluated.

Hearings

The 108(i) Advisory Committee supported the scheduling of six regional hearings by the Copyright Office to gather additional information for the five-year review Report concerning the effect of the new law on library procedures, user access to information, patterns in the publishing industry, and relationships with authors. Hearings in 1980 were held in Chicago on 19 January in conjunction with the Annual Midwinter Meeting of the American Library Association (ALA), on 26 March in Houston at the time of the annual conference of the American Chemical Society (ACS), in Washington, D.C., during the annual meetings of the Special Libraries Association (SLA) on 11 June and the Medical Library Association (MLA) on 19 June, and on 8 October in Anaheim, California in conjunction with the annual meeting of the American Society for Information Science (ASIS). The sixth and final hearing was held on 28-29 January 1981 in New York City.

More than fifty librarians, as individuals as well as on behalf of their associations and institutions, publishers, lawyers, educators, and others concerned with the photocopying of copyrighted materials testified before a Copyright Office panel at the hearings on their experiences under the new law and any problems they perceived as a result of the statute's provisions.

The Copyright Office was particularly interested in receiving comments and testimony on such issues as: (1) the extent to which Section 108 may have altered library procedures and its effect on public access to information; (2) its effect on established patterns in the publishing industry and the relationship among authors, libraries and library

users; (3) its effect upon the type and amount of copying performed by the library on its own behalf or on behalf of users and any changes experienced by publishers and authors in the number of requests from libraries to reproduce works; (4) the manner in which the Copyright Clearance Center (CCC) has affected libraries, users and publishers, and the effect of a National Periodicals Center should it be created; (5) the impact, if any, of Section 108 on reproduction of nonprint materials; (6) the effect of the CONTU guidelines on library practices; (7) views concerning the relationship between Section 107 ("fair use") and 108 ("reproduction by libraries and archives"); (8) treatment of foreign copyrighted works and requests from foreign libraries; and (9) identification of problems and suggestions for their resolution.

At the final hearing in January 1981, ALA Executive Director Robert Wedgeworth summarized the position of the association on a number of key issues:

1. There is no evidence that the law, in most cases, is failing adequately to balance the interests of creators and users of copyrighted materials.
2. Most photocopying done by or in libraries falls within the protections of fair use and of Section 108 of the law.
3. There is no evidence of a causal link between any reductions in library periodical subscriptions and library photocopying practices.
4. Libraries may utilize rights under both Sections 107 and 108 to contribute to the widest possible dissemination of information to the public and to fulfill their traditional role in society as lenders and facilitators of such information.
5. Librarians are complying with the law and any lack of use of the CCC does not indicate the contrary, but merely reflects the fact that most photocopying done in libraries is within the bounds of Sections 107 and 108.
6. Publishers should not view librarians as the "enemy" in a war over photocopy profits. Libraries do not reduce the size of their collections because of the availability of photocopies. Indeed, reliance on networking to substitute for a subscription to a periodical is not only illegal, it is inefficient and expensive. Every library strives to be as comprehensive in its collection development area as it can be. The availability of photocopies for the occasional user interested in an unusual field makes possible the kind of access to information so important to our society's very foundation.
7. Since the purpose of the copyright law in rewarding publishers and authors is to stimulate creation and dissemination of intellectual works, statutory provisions should not be interpreted to impede

dissemination and access if the stimulus to creation is not thereby augmented. It is doubtful that authors would in any way benefit from any further restriction on access to information in photocopied form.

8. Librarians are neither administratively equipped, nor should they be required to police their patron's photocopying activities.
9. The CONTU guidelines are useful guides, but they do not carry the force of law. The guidelines do not purport to set maximum limits on library photocopying practices but strive only to establish a safe harbour. They should not be allowed to become firm rules which may cause librarians unnecessarily to deny their patron's rights.
10. No new restrictions are needed at this time. Certainly no changes in the law or additional guidelines should be considered prior to the completion of the five-year review and the compilation of data and other evidence clearly demonstrating the need for such restrictions. If anything, a clarification of the unique applicability of the Section 107 fair use factors to address the special concerns of college and university library patrons would be justified.[5]

At the conclusion of the hearings, it seemed clear that libraries and publishers were as far apart as ever on the issue of library photocopying.

King Research Report

In 1980, the Copyright Office awarded a contract to King Research, Inc. (KRI) to do a statistical survey of libraries, publishers and users in preparation for the Register's Report to Congress. The purpose of the study was to gather and analyze data to determine whether Section 108 had achieved a balance between the rights of creators of copyrighted works and the needs of users who receive or make copies. By the end of 1981 the data had been gathered and analyzed by KRI, and the final report was submitted to the Copyright Office in May 1982.[6]

Because of the importance of the King surveys to all interested parties, the library/user representatives on the 108(i) Advisory Committee and the major library associations urged all sampled libraries to cooperate to the fullest extent possible in responding to the survey questionnaires. The proprietor representatives on the advisory committee did likewise with the publishing community. The response rate of the library community was a gratifying 70 percent. Despite extraordinary measures taken by KRI via personal telephone contact with publishers to obtain cooperation prior to the distribution of questionnaires, the response rate for this group was a disappointing 51 percent.[7]

Libraries participated in two phases of photocopying surveys. In Phase I, questionnaires were mailed to a sample of 790 public, academic, federal, and special libraries, with a total of 554 usable responses returned. Major topics covered included a description of the library; number of photocopying machines; photocopying revenue; reserve operations; photocopying permission requests; royalty payments; interlibrary borrowing and lending; patron access; network activities; computerized database activities; record-keeping practices; replacement of lost, stolen or mutilated materials; out-of-print materials; audiovisual materials; and fair-use policies. In Phase II, 150 of the 554 responding libraries were asked to participate in on-site monitoring of photocopying activities, filling out two types of forms: an interlibrary request log and a photocopying transaction log. These forms were similar to those used by KRI in their 1977 library photocopying study.[8]

The publisher survey sampled 450 publishers from each of the following three categories: (1) books, (2) scholarly and scientific journals, and (3) general audience periodicals. Usable responses returned totaled 231. Major areas covered included journal birth and mortality rates, number of titles published, price and circulation of serials, copying royalty revenue to publishers, income changes between 1976 and 1980, membership in the Copyright Clearance Center (CCC), proportion of works in the CCC, individual *v.* institutional subscription prices, number of photocopying permission requests received, and journal reprint/tearsheet distribution licenses.

Users were surveyed on-site by trained personnel in twenty-one libraries (distributed among types) in dispersed geographic areas. Over 2000 library user responses were gathered using two questionnaire forms: (1) for interviewing users of unsupervised copying machines, and (2) for library patrons who were returning library materials.

Based on the statistical data collected and analyzed by KRI, the national library associations (American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association) believe overwhelming evidence exists that the intended statutory balance has been achieved. Perhaps more importantly, the data supports the librarians' contention that publisher accusations and fears are unfounded.

1. Publishers' revenues have increased substantially between 1976 and 1980, particularly serial publisher revenues, and, most specifically, those who publish scholarly, scientific and technical (SST) journals. All serial publishers recorded a mean gross sales revenue increase of

31 percent in constant dollars adjusted for inflation from 1976 to 1980, while SST journal publishers realized an increase of 69 percent.[9]

2. To the often heard argument voiced by publishers that library photocopying is used as a substitute for serial subscriptions, the data shows a 21 percent decrease in serial photocopying between 1976 and 1981.[10] At the same time, 85.5 percent of SST journals and 90.7 percent of other serials either maintained or increased their circulation levels between 1976 and 1980. A substantial portion of these—45.6 percent and 39.6 percent respectively—increased in circulation.[11]
3. Despite serial price increases consistently higher than the annual rates of inflation, reporting libraries managed to increase their expenditures for serials by 43 percent in current dollars, or 12 percent in constant dollars, between 1976 and 1980.[12]
4. The number of published serial titles increased by 21 percent between 1976 and 1980, with a 31 percent increase for SST journals. The birth to death ratio for SST journals was 3.8 to 1 compared to 3.2 to 1 for other serials.[13]
5. There was an overall decrease of 16 percent in library staff photocopying of all types of materials between 1976 and 1981.[14]
6. The majority (69 percent) of all photocopying transactions involved the making of only one copy, while 76 percent of all serial photocopying transactions involved the making of only one copy.[15]
7. Of the total of approximately 61 million interlibrary loan requests received from libraries in 1981, only 21 percent were filled with photocopies.[16]

In addition to this necessarily selective library and publisher data, user data also supports the library position that a balance has, indeed, been achieved.

Users reported that in 82 percent of the cases only one copy of library materials was being made;[17] a total of 56 percent of the library patrons were photocopying library materials, while 42 percent were photocopying their own personal materials;[18] 83 percent of user photocopying was conducted at machines that displayed a copyright warning;[19] less than 2 percent of users surveyed reported that libraries had refused to make photocopies for them, with less than 7 percent indicating interlibrary loan requests had been refused, not necessarily on copyright grounds.[20]

Thus, evidence presented in the King Report indicates that a "balance" has been achieved, and all indicators graphically illustrate that

publishers have prospered despite significant fiscal constraints visited upon libraries. Publishers, most often and most vocally represented by the Association of American Publishers (AAP), other members of the copyright proprietor community, and the Copyright Office do not agree.

Librarian/Copyright Proprietor Meetings

In the fall of 1981, under the auspices of the Copyright Office, discussions were initiated between producers and users of copyrighted material in an attempt to get the parties to agree on issues that were still unresolved, issues which, for the most part, were of concern to the publishing community. It was the Register's hope that some of the unresolved issues would be eliminated before his five-year review report was to be delivered to Congress. Discussions continued through all of 1982 as the group of invitees representing library, publisher and author interests met at the Copyright Office in Washington, D.C. Discussions focused on a change in the wording of the copyright statement now stamped on all photocopies made by a library for a patron or another library, the inclusion of the statutory notice of copyright with all photocopies made for users by a library, use by libraries of the copyright compliance boxes on the national interlibrary loan request form, photocopying for purposes of academic reserve, and a definition of systematic photocopying. Proposals and counter-proposals were made by the parties but no joint agreements were reached.

The major concern of the library representatives at these discussions was to protect library and user rights and to minimize the administrative and clerical burden on libraries while at the same time attempting to be sensitive to publisher and author concerns.

In an effort to resolve some of these issues, librarians representing the ALA, ARL, SLA, and MLA presented a statement to the group in which they agreed to encourage use by the library community of a revised statement to appear on all photocopies and inclusion of the statutory notice of copyright with photocopied material under certain conditions. In addition, the ALA Copyright Subcommittee would investigate how librarians use the copyright compliance boxes on the interlibrary loan request form to determine if the current instructions give librarians sufficient guidance in making a decision on which box to check. A renewed call to begin a series of discussions with copyright proprietors focusing on the future and new technologies, first proposed in 1981 by library associations, was also made in the statement.

Although publisher and author representatives did not embrace the statement, the library organizations represented believe it was a good faith effort to respond to the issues raised.

Findings of the Register's Report

Webster's New Collegiate Dictionary defines the noun *balance* as "a counterbalancing weight, force, or influence; equipoise between contrasting, opposing, or interacting elements; equality between the totals of the two sides of an account; a physical equilibrium;" the verb *balance* as "to compute the difference between the debits and credits of; to deliberate upon especially by weighing opposing issues."[21]

Given Webster's definition, plus the supporting King data reported previously, the library community believes it is justified in its assessment that the Register's report lacks objectivity, and to coin a popular term, balance.

The report treats "balance" as meaning that Section 108 allows users to use—by photocopying—works protected by copyright in a way both consistent with traditional disciplines of copyright law and library practice and not exceeding a minimal encroachment upon the rights of authors and copyright owners.[22] The entire report, then, appears to be predicated on the erroneous assumption that user rights under the law are an "encroachment" on author and copyright owner rights. The fact, of course, is that the law places limitations on what a copyright owner's "exclusive rights" are.

In his response to the Copyright Office during the final comment period on the effects of 17 U.S.C. 108, John C. Stedman, Emeritus Professor of Law at the University of Wisconsin-Madison put it bluntly:

> To start with, it should be clear that arguments for copyright protection based upon the proprietors' alleged "legal rights" and "property rights" are irrelevant. Under U.S. doctrine, their "rights" and "property" are what Congress, in its wisdom, decides to give them—the very issue under discussion. Their "rights," like the users' rights, are those that derive from §108 and other statutory provisions unless and until those "rights" are narrowed or expanded by Congress....[23]

Another point to be made is that user rights as a public good derive directly from the Constitution, whereas proprietor rights are granted by acts of Congress, not by the Constitution itself.

If the prevailing philosophy in the Copyright Office is that users do not have rights to copy under the law but are "encroaching" on proprietor rights, the blatant biases reflected in the Register's report toward

copyright proprietor/publishing community are understandable, if not defensible.

Throughout the 363-page report, the Register implies that librarians have engaged in massive photocopying that far exceeds the limits of the law. In his Executive Summary, the Register clearly points his finger at the library community as the cause of the imbalance he sees between the creator's rights and those of the user, which he consistently refers to as *needs* rather than *rights*. Despite massive evidence in the form of statistical data which proves otherwise, he strongly implies that librarians have failed "to comport with the behavior intended by Congress."[24] Time and again throughout the report, whenever the Register admits that he cannot be absolutely sure of the intent of Congress, or when data collected by King Research cannot be precisely interpreted, he comes down on the side of the copyright owners. This is hardly the balanced objectivity which the five-year review demanded.

Early on, the report states that the Copyright Act of 1976 provides "a workable structural framework for obtaining a balance between creator's rights and user's needs. Considering the complexity of the issues, the intensity of the controversies, the scope of the interests, and the rapid changes in technology before and after enactment, that is a remarkable achievement."[25] The report also acknowledges the fact that "balance" can be seen in much of the evidence contained in the record upon which the report is based. The library community strongly endorses these statements. The Register then, however, adds his own caveat to this evidence: "Thus, some may surmise that all is well. There is, however, credible evidence that present conditions call this conclusion into doubt."[26] He then lists three conditions as follows:

> —Substantial quantities of the photocopies prepared by and for library patrons are made for job-related reasons, rather than for the type of private scholarship, study, or research most favored by the law.
> —There appears to be significant confusion among many librarians about how the law works and why its enforcement is frequently *their* responsibility.
> —Some publishers declare strongly that they believe the present system is seriously unbalanced. Their efforts, both in asserting their positions and in bringing lawsuits, demonstrate the seriousness of their concerns.[27]

The Register refers above to "substantial quantities" for "job-related reasons"; the evidence shows that less than 30 percent of photocopying by users sampled fell into this category.[28] This evidence indicates that the desired balance has, indeed, been struck. More to the point is whether copying for job-related reasons should even be called

into question, as the Register strongly implies. Who is to say that photocopying which is job-related is noneducational, or is not fair use, or is not for purposes of private study, scholarship or research? Certainly not the Copyright Office, but Congress and the courts. Secondly, "confusion" among librarians does not necessarily correlate with noncompliance, and we emphatically disagree on the empirical evidence; and "enforcement" of the law by librarians is as ludicrous as a car dealer's responsibility for seeing that a customer abides by the 55 m.p.h. speed limit. Finally, the fact that publishers "declare strongly" and "believe" is hardly empirical data to justify imbalance. The "seriousness of their concerns" are readily matched by the concerns of the library community, but for very different reasons. The overall tone and lack of objectivity of the Register's report casts serious doubt on its credibility as the definitive five-year review document mandated by Congress.

The report also makes an erroneous assumption regarding library rights under both Section 107 (fair use) and Section 108 (reproduction by libraries and archives). The assumption made is that Section 108 states virtually all of the permissible copying rights granted to libraries. The report states that:

> The Copyright Office does not believe that Congress intended that there should *never* be fair use photocopying "beyond" §108. On certain infrequent occasions, such copying may be permitted....Section 108 was enacted to make lawful some types of copying which would otherwise be infringements of copyright, fair use notwithstanding. This means that much "108" photocopying would be infringing but for the existence of that section, thus leaving section 107 often clearly unavailable as a legal basis for photocopying not authorized by section 108.[29]

Congress disposed of the matter concerning the relationship between Section 107 and Section 108 during development of the law as follows: "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 materials in its collections, where the user requests the reproduction for legitimate scholarly or research purposes...."[30] Statutory language in Section 108 reinforces Congress' intent: "Nothing in this section...in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections."[31] In hearing testimony, Wedgeworth stated it this way: "There can be no better or clearer statement of the law. Rights of fair use granted under Section 107 are independent of and not limited by those rights granted under Section

108. Any other interpretation would render superfluous the language of Subsection(f)(4) of Section 108...."[32]

Much emphasis and attention is paid in the report to the photocopying of articles from scholarly, scientific and technical journals. As pointed out previously, serial subscriptions have increased significantly, and more so for SST journals than for any other type. The report acknowledges that: "Librarians emphasize that they have not decreased their serial subscriptions. The KR [King Report] bears this out."[33] Without pausing, however, the report states that: "On the other hand, over 6.5 million photocopies of serial material are sent from library to library each year; few of them (1.1 %) are paid for or authorized."[34] The issue here is not whether they are "paid for or authorized," but whether they are permissible under the law. It is the contention of the library community that in the vast majority of cases the latter is true, and the empirical evidence bears this out. In a related statement, the report argues that: "Although the KR indicates growth for SST and other journals, there was some evidence that SST publishers had suffered decreases in subscriptions they believed traceable to photocopying."[35] "Believing" is not statistically defensible, and the inference which could hardly be termed objective is based on one made by a publisher at the Annaheim hearings.[36] Given the discussion up to this point, it should be eminently understandable why the library community refutes, on the basis of empirical evidence as well as traditional principles of copyright, the Register's contention that there is serious question as to whether the balance has been struck.

Copyright Office Recommendations

At the conclusion of the report, the Copyright Office proposes seven nonstatutory recommendations and five statutory recommendations which represent its "best judgment about possible solutions to the copyright issues relating to library reproduction of copyrighted works...."[37]

The seven nonstatutory recommendations fall into two general categories: (1) voluntary agreements and guidelines, and (2) further studies in anticipation of the next five-year review. With a brief comment on each, they are as follows:[38]

Nonstatutory Recommendations

1. *Collective Licensing Arrangements Encouraged.* All parties affected by library reproduction of copyrighted works are encouraged to participate in existing collective licensing arrangements, and to develop

new collective arrangements to facilitate compensated copying of copyrighted works. *Comment:* The library community has several reservations about collective licensing systems in that they: tend to erode the fair use doctrine, are not mandatory on all copyright owners, would be subject to escalating fees, would not cover all types of materials, would be difficult to administer, and usually exclude representation of user interests in the control of the system.

2. *Voluntary Guidelines Encouraged.* Representatives of authors, publishers, librarians, and users should engage in serious discussions with a view to clarification of terms and development of guidelines, both with respect to present photocopying practices and the impact of new technological developments on library use of copyrighted works. The office recommends that the respective Congressional copyright committees or subcommittees again urge the parties to engage in serious negotiations and report back to them by a certain date. *Comment:* The present photocopying guidelines are adequate and are working well. The CONTU, classroom and music guidelines negotiated before the law was enacted and the off-air taping guidelines for educational use finalized in late 1981 are useful guides, but they do not carry the force of law. They do not purport to set maximum limits on library photocopying practices, but strive only to establish a safe harbor. As to guidelines covering uses of the new technologies, the library community supports this recommendation and has been advocating such discussions for several years.

3. *Study of Surcharge on Equipment.* In the next five-year review, a copyright compensation scheme based upon a surcharge on photocopying equipment used at certain locations and in certain types of institutions or organizations should be studied, taking into account experience with such systems in other countries. *Comment:* The library community is against any such surcharge knowing that most photocopying of copyrighted materials requires no payment, and charges, therefore, should not be assessed on equipment. We believe that any study should await the Supreme Court decision on the Sony Betamax case and until Congress has made its determination on pending legislation on surcharges for home video recording equipment.

4. *Study of Compensation Systems Based on Sampling Techniques.* In the next five-year review, various systems for copyright compensation based on a percentage of the photocopying impressions made on machines located at certain places in certain types of institutions or organizations, as determined by sampling techniques, should be studied. *Comment:* We oppose this recommendation because of the

cost of administering such a system where dollars are spent to collect dimes. Judging from previous studies aimed at developing royalty systems of one type or another, no equitable method of distribution of proceeds is likely to be devised that would satisfy all proprietor groups.

5. *Further Study of New Technology Issues.* In the next five-year review, issues relating to the impact of new technological developments on library use of copyrighted works should be studied. *Comment:* The library community heartily supports this recommendation. In fact, Robert Wedgeworth in hearing testimony stated, "publishers and authors should join librarians in planning how the electronic networks can be structured to support publishing and authorship, while providing users with greater access to published works through libraries and other agencies."[39]

6. *Archival Preservation.* Representatives of authors, publishers, users, and librarians should meet to review fully new preservation techniques and their copyright implications and should seek to develop a common position for legislative action by Congress, taking into account the respective interests of libraries and their patrons and of authors and publishers. *Comment:* We support this recommendation.

7. *Adequate Funding for Library Services.* Proper recognition of the cost of creating and disseminating protected works in our society requires concomitant understanding at all levels of government of the need for adequate funding of publicly owned libraries to enable them to pay their share of creation-dissemination costs. *Comment:* Obviously, the library community supports this recommendation, but for a very different reason. Libraries already pay their share, and more, of creation-dissemination costs as vital links in the information chain; they consistently seek higher budgets for collection development; and the latest price indexes indicate that 70 percent of the serial titles covered (in this sample) are available to libraries only at institutional prices which may be from 10 to 100 percent more than rates charged individuals.[40]

Statutory Recommendations
(All of the following recommendations concern
proposed amendments to the
Copyright Law of the United States, Title 17 U.S.C. Section 101 et seq.)

1. *Reproduction of Out-of-Print Musical Works.* The Copyright Office recommends enactment of the proposal submitted by the Music Library Association and the Music Publishers' Association (*See,* text *supra,* VIII, K. [*Report of the Register,* p. 342]), either by amendment of Section 108(e) or addition of a new paragraph (j) to Section 108, with

consequential amendment of paragraph (h). If enacted, the amendment would permit library reproduction of an entire musical work (or substantial parts thereof) for private study, scholarship or research following an unsuccessful, diligent search for the name and address of the copyright proprietor of the musical work. *Comment:* While other members of the library community are sympathetic to the plight of music librarians and agree with the principle underlying the proposed change, we are concerned with the MLA/MPA approach in relation to Section 108(e) in that it places considerable emphasis on finding the *owner* (and presumably paying a copying fee) as opposed to finding a *copy* at a *fair price*. Further, it requires a reasonably diligent search for the proprietor which may go beyond a search of Copyright Office records, as opposed to "the normal situation," i.e., a search for the owner at the address listed on the Copyright Office registration. We would support an amendment which would delete the restrictions against musical works in Section 108(h) and include them under Section 108(e) rights.

2. *"Umbrella Statute."* The Copyright Office recommends favorable action by Congress on legislation embodying the principle of the so-called "umbrella statute"—a proposal developed by an ad hoc task force of librarians (for profit) and publishers and submitted by the Association of American Publishers (the proposal and accompanying documents are set out in App. VII at 41-61 [of the *Report of the Register*]). The proposal would add a new section 511 to the Copyright Act limiting copyright owners to a single remedy—a reasonable copying fee—for copyright infringement of their scientific, technical, medical, or business periodicals or proceedings, if certain conditions are met by the user of the work, including membership in a collective licensing arrangement, unless the work was entered in a qualified licensing system or qualified licensing program. The purpose of the "umbrella statute" is to encourage publisher and user participation in collective licensing arrangements. The Copyright Office further recommends that Congress require recordation with the office of a document setting forth the basic terms and conditions of any qualified licensing program or qualified licensing system. *Comment:* The library community opposes such a statute because it requires mandatory registration by users in a collective licensing arrangement, such as the CCC and the payment of a "single, reasonable fee" for copying protected works even if that copying fell under fair use provisions of the current statute. The proposed amendment to the statute is more complex than appears here, and, in our judgment, the concept is much too complicated to be administered

effectively. It is no wonder, however, that the AAP proposed amendment attempts to encourage publisher participation in the CCC. King found that less than 5 percent of all U.S. publishers belong[41] while 5.6 of the libraries belong.[42] ALA has stated that: "The low incidence of use of the CCC is consistent with the overall decrease in photocopying, the high incidence of single-copy library reproduction (pp. 3-30 King Report), adherence to the CONTU Guidelines, and the willingness of so many publishers to grant permission without charge."[43]

3. *Clarification of the "108(a)(3) Notice."* The Copyright Office recommends enactment of a clarifying amendment to Section 108(a)(3) as follows:

> (3) the reproduction or distribution of the work includes the notice of copyright as provided in sections 401 and 402 of this title, if such notice appears on the copy or phonorecord in a position authorized by sections 401(c) and 402(c), respectively, of this title.

Publishers have generally interpreted the present Copyright Act as requiring libraries to use the statutory copyright notice on photocopies as a condition of the Section 108 copying privileges. Librarians have generally disagreed, maintaining that a warning that the work may be in copyright complies with the Act (these positions are discussed at III A(3), *supra.* [*Report of the Register* pp. 68ff]). The amendment would accept the publishers' interpretation. *Comment:* The library community opposes the enactment of such an amendment unless publishers would agree to place the copyright notice on the initial page of a serial article and on the verso of the title page of a book or monograph. Even then, the burden on the library community would be considerably more than at present with the use of the warning notice stamped on all photocopies. During the 1981-82 meetings, under the auspices of the Copyright Office, a considerable amount of time and effort was expended by both sides on this particular issue, with no resolution forthcoming.

4. *Clarification that Unpublished Works are Excluded from Paragraphs (d) and (e) of Section 108.* The Copyright Office recommends an amendment to paragraphs (d) and (e) of Section 108 to make clear that unpublished works are not within the copying privileges granted therein (these issue are discussed at IV A(4)(a) and (c). [*Report of the Register,* pp. 116, 124]). Section 108(d) governs single copying of a small part of a work or one article of a periodical: Section 108(e) establishes the conditions under which out-of-print works may be copied—either the entire work or a substantial part thereof. In the case of paragraph (d), the term *published* should be inserted in lieu of the word *copyrighted* each

time the latter appears. In the case of paragraph (e), the term *published* should be inserted between "entire" and "work" and should be inserted in lieu of the word "copyrighted." *Comment:* The library community needs to study this proposed amendment in greater depth in terms of educational scholarship and research.

5. *Change in Reporting Month for the Section 108(i) Report.* The Copyright Office recommends amendment to paragraph (i) of Section 108 to permit the filing of the periodic five-year report on or about 1 March of a given year in place of the present January reporting date. This change in the filing date is requested because of the staffing and administrative support problems inherent in preparing a major report during the year-end holiday period. *Comment:* No comment!

Epilogue

The next move is up to Congress. Whether or not hearings will be held is unknown at this writing, although Register of Copyrights David Ladd appeared before Rep. Robert Kastenmeier's House Judiciary subcommittee on 3 March 1983 and suggested that Congress hold hearings on the Copyright Office's Report. Kastenmeier did not commit the subcommittee to hold such hearings but indicated that the recommendations of the report would have to be dealt with in some form.[44]

The library community recommends that Congress not "rush to judgment" after only five years of living under the new Copyright Law, particularly in view of the balance we maintain has occurred and the data prove. Even more compelling are the issues of copyright and the new technologies which need to be addressed before any changes in the law are proposed or enacted. Waiting another five or even ten years to revise the current law would make much more sense than band-aid revisions based on the less-than-objective report issued by the Register of Copyrights.

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