

Fair Use Under the 1976 Copyright Act: The Legacy of *Williams & Wilkins* for Librarians

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IN 1975 LIBRARIANS celebrated their newly-won freedom to supply materials to library users. The *Williams & Wilkins* decision, decided by a narrow majority of 4-3 in the Court of Claims,¹ and affirmed 4-4 by a divided Supreme Court² seemed to promise liberal photocopying privileges of scholarly materials. *Williams & Wilkins* was dealt with immediately in Section 108 of the 1976 Copyright Act³ and the question remains, how well was it dealt with from the librarian's point of view? Section 108 laid down restrictive rules for photocopying. Whether the liberal privileges of *Williams & Wilkins* have lingering vitality is an unanswered question.

The 1976 Act set down for the first time in Section 107 the general factors for determining fair use that were previously found only in case law. Recent cases construing these factors give librarians an idea how far they can go in copying works in their collections. These cases do not always provide startling results. They merely continue for the most part the protection given owners in pre-1976 cases. In this discussion, cases dealing with copyrighted materials of special interest to librarians have been selected for comment. The Sony Betamax case⁴ promises to be instructive, although it is too early to know the impact of that case on libraries. Cases on computer programs and computerized information retrieval have also engendered case law worthy of comment. Cases dealing with materials intended merely for entertainment, although of incidental interest to librarians, are omitted, as are cases involving fabric designs, toys, decorative objects, and the like.

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Williams & Wilkins Today

In enacting the 1976 Copyright Act, Congress apparently meant to do away with the library photocopying privilege. It did so in Section 108 giving library photocopying a separate, narrow exemption from the rule against reproduction of copyrighted works. Section 108⁵ authorizes a library to make a single copy for private use of one article from a collection or periodical issue, or a small part of any other work, provided the copying is not systematic or concerted. The exception does not apply to a separate musical work, a pictorial, graphic, or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with the news. Contrast this limited privilege with the broad privilege in *Williams & Wilkins* under which government agency libraries reproduced articles from medical journals and systematically provided them on request to business firms, scientists and other libraries.

The narrow privilege of Section 108 seems to bypass the four factors in Section 107⁶ governing fair use in general, and discussed in the *Williams & Wilkins* decision. The United States Senate, in its Committee Report,⁷ intended this result. It said that, since *Williams & Wilkins* "failed to illuminate the application of fair use doctrine to library photocopying practices" Section 108 will provide "a balanced resolution of the photocopying issue." Yet neither of the other two major sources of legislative history, the House Committee⁸ and Conference Reports,⁹ discusses *Williams & Wilkins* at all. Do these muddled signals mean that courts are free to expand the photocopying privilege beyond Section 108 by applying the general factors of Section 107? No court has ventured so far, but the ambiguity of the legislative history could ultimately provide the ammunition to break away from some of the restrictions of Section 108.

Another unexplained thing about Section 108 is that it provides a statutory restraint on librarians whereas no special statutory restraint is placed on educators. Instead, educators' photocopying privileges are set forth in the now-familiar "Guidelines for Classroom Copying in Not-for-profit Educational Institutions."¹⁰ The drafters of the 1976 Copyright Act could not reach a consensus on a statutory provision for educational photocopying and instead urged interested parties to agree on guidelines which the drafters included in the legislative history. This was a back-door means of promulgating special rules for photocopying.

Technically, the guidelines are not the law. Judges are free to ignore them and use the general Section 107 factors in shaping privileges of fair use for educators. However, they have achieved some legiti-

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macy, for in two cases courts have incorporated them in consent judgments. Both cases resulted from a coordinated effort of the Association of American Publishers (AAP) whereby several publishers sued a commercial photocopying firm for illegally producing photocopy anthologies for use on university campuses. In *Basic Books, Inc. v. Gnomon Corp.*¹¹ the publishers¹² alleged that substantial portions of textbooks and general trade books, including whole chapters, and articles from journals were assembled for use by entire classes. In the consent judgment the copying mill was “permanently enjoined and restrained from making multiple copies of any copyrighted, published work or any part or portion of such work” without the owner’s written consent.¹³ The decree further specified that Gnomon could furnish multiple copies to faculty members of nonprofit educational institutions provided they fill out a form specifying they complied with the guidelines, kept the form on file for a year, and gave the publishers access to Gnomon’s premises to inspect the forms for compliance with the decree.¹⁴ A second suit resulted in a similar decree.¹⁵ Finally, in 1982, dismayed that the previous litigation failed to chill copying on a massive scale, the AAP financed another suit naming for the first time a university (New York University) and nine of its professors as defendants along with the off-campus photocopying service. (Editors’ note: In 1983 this case was settled out of court with the university and the faculty members agreeing to abide by a policy setting forth specific procedures based on the law and the Congressional guidelines. A separate agreement with the copying center provides that the center will require written permission and authorization from the owner of the copyright or a faculty member abiding by the policy, or the approval of the university’s general counsel.)¹⁶

Meanwhile, the AAP has been chipping away at *Williams & Wilkins*. The first step was to sponsor the nonprofit Copyright Clearance Center (CCC) in Salem, Massachusetts with authority to grant photocopying privileges to libraries and others in return for per-page royalty payments. Publishers who registered their journals with the CCC authorized users to photocopy without obtaining specific permission in advance. It was assumed the CCC would answer the argument raised in *Williams & Wilkins* that users should not have to purchase extra copies of a journal if they wished to distribute just one article, and that some older journals were no longer available for purchase at all.¹⁷

When royalties did not flow in, publishers of technical and scientific journals sued American Cyanamid Company¹⁸ and E.R. Squibb & Sons, Inc.¹⁹ for unlawfully copying articles. As in the “copy mill” cases,

these cases were settled out of court. The agreements provided that the companies would register with the CCC as users and pay copying fees. Cyanamid and Squibb declared their intention to restrict copying to designated central copying facilities or other specified equipment. The Squibb agreement allows Squibb to exclude from reporting and paying as many as 6 percent of copies made. This exclusion was based on Squibb's estimate of the amount of copying that was fair use. Squibb would not have to report to the CCC anything more than the International Standard Book or Serial Number of each publication or journal copies, the volume number, year of publication, number of copies made, and the applicable copying fee.

A few lessons may be learned from the litigation program of the AAP. The Guidelines for Classroom Copying²⁰ are viable. The AAP campaign to breathe life into the CCC has been directed so far only at for-profit corporate libraries. The inclination to settle with Squibb for even a limited exemption of six percent indicates that more liberal settlements might be available to libraries of nonprofit institutions. Finally, the inclusion of professors in the latest suit against New York University signals an end of the road for polite treatment of educators and educational libraries. Heretofore the AAP would not touch the educational establishment directly because it represented its most concentrated source of revenue. AAP member publishers stood by for almost two decades as the professors whom their representatives visited undercut their market in the name of an undefined educational photocopying privilege.

Beyond Print Media—The Sony Case

Section 108 again spells trouble for librarians in the area of off-the-air videocopying. In ruling that home videocopying constituted copyright infringement, the Court of Appeals in *Universal City Studios v. Sony*²¹ noted that Section 108(h) prohibits copying of audiovisual works, other than works dealing with the news, and that even works dealing with news could be copied only for lending and no other purpose. It concluded, "In light of this caution with respect to the limited Section 108 exemption, it is clear that Congress did not intend to create a blanket exemption for home videorecording...."²² The American Library Association (ALA) vigorously opposed this interpretation, arguing that such references tend to ignore development of rights under Section 107 by implying that section 108 defines the outer limits of a library's rights.²³

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ALA identified another device of the Court of Appeals which would relegate libraries to the Section 108 privileges. The court said that home videocopying was for an intrinsic use (entertainment), not a productive use (research). Copying should be permitted only for productive uses. Thus, if copying is for an intrinsic use (which automatically cannot be a fair use) no further reference to Section 107 factors is necessary. Rather, the factors are irrelevant.

Libraries, then, would be deprived of any relief gleaned from the Section 107 factors unless they could prove their copying was for a productive use. For libraries to prove a user was making a productive use, they would have to intrude upon the privacy of the user. This they refuse to do for ethical reasons quite apart from any legal reasons. Recall that the 1976 Act itself recognizes librarians are not required to police the use of copyrighted materials. Section 108(f) states that:

Nothing in this section shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, that such equipment displays a notice that the making of a copy may be subject to the copyright law.

One case has tested the ability of the equivalent of an educational library to copy programs off-the-air. In *Encyclopaedia Britannica v. C. N. Crooks*²⁴ the court found infringement in the Erie County N.Y. Board of Cooperative Educational Services' (BOCES) massive, unauthorized videotaping of copyrighted motion pictures for distribution to its member schools. Surely the case is an embarrassment to librarians who wish for some discretion in copying off-the-air. ALA itself seems comfortable only with copying for the convenience of users who do not own recorders or otherwise have access to programs, followed by erasure of the copies.²⁵ Furthermore, a recent set of guidelines promulgated by an advisory committee of owners and users would permit copying for replay by educators only with erasure forty-five days later.²⁶

In the BOCES case, the cooperative copied programs even though they were available for purchase, and kept some of them for ten years. In contrast, some articles from scientific journals in *Williams & Wilkins* were not readily available. In that case and others certain key phrases are discernible. They will probably serve in future cases as guideposts in determining fair use. Massive copying, indefinite retention of copies, and intrinsic use are factors militating against the privilege. Productive use for research or teaching purposes and difficulty in purchasing copies are factors tending to support the privilege.

Computer Programs and Databases

Computer programs and databases, even though expressed in numbers or symbols instead of words, are considered "literary works" regardless that they are embodied in tapes, disks, chips, or cards.²⁷ As such they are copyrighted.

Presumably, libraries may make copies of programs on the limited basis afforded in Section 108. Additionally, they may adapt programs they own to facilitate loading them into their computers, and may make archival copies to guard against damage or destruction.²⁸ It should be noted that programs may be protected alternatively under federal patent laws and state trade secret laws, but with the proliferation of personal computers, copyright protection has become the method of choice. It is easier and cheaper to register a copyright than to obtain a patent, and the term is life of the creator plus fifty years, or, in the case of an employee of a firm, 100 years from creation or seventy-five years from publication, whichever is less.

A significant problem clouds the copyright protection for computer programs. The program may be expressed in a source code or an object code and a copy of the program in source code form can be easily read by a computer expert. A copy in object code form cannot be read, as the object is a rendering of the source code into machine-readable form. A source code may give rise to several machine-readable forms. One example is the silicon chip or ROM (read-only memory). In early litigation the courts divided as to whether the ROM is a protected copy or merely a part of the computer machine.²⁹ Probably, the issue will be settled in favor of both source and object codes being copyrighted, for otherwise the future for any protection of programs seems bleak.

Computer databases are protected as if they were compilations. Compilations are collections of preexisting materials selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.³⁰ Examples of compilations are credit reference books³¹ and the list of stocks that form the basis for the Dow Jones stock index.³² Even a telephone book (a handy item for a computer database) is copyrighted as a compilation.³³

To the extent computer databases are collections of text materials, the future of copyright protection is bleak. Professor Ithiel de Sola Pool of the Massachusetts Institute of Technology writes in *Daedalus*³⁴ that computer memories will be personalized by each computer owner and no original text will remain original for long. Texts will be passed along with variations from one computer to another with the result that

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it will be practically as difficult to trace the origin of a text as it is to trace the origin of a conversation.

Government and Legal Materials in the Public Domain

Copyright protection is not available for any work prepared by an officer or employee of the U.S. Government as part of that person's official duties.³⁵ Thus, most works of the U.S. Government Printing Office are in the public domain. Off-duty speeches of the naval officer, Hyman Rickover, are his own copyrighted property,³⁶ but transcripts of Henry Kissinger's telephone conversations are in the public domain because the conversations were made as part of his official duties.³⁷ Works created by U.S. Postal Service employees may be copyrighted because, technically, under the Postal Reorganization Act of 1970, they are not government employees.³⁸ Postal stamp designs, manuals and directories could be copyrighted, for example. Furthermore, the Standard Reference Data Act³⁹ authorizes the Secretary of Commerce to secure copyright for standardized scientific and technical data.

A continuing problem has been the status of works prepared by nongovernment persons under a commission from the government. The rule stated in the legislative history⁴⁰ is that the creator of a work under a government contract may secure copyright in the work if the contract says nothing to the contrary. The leading case under the 1976 Act is *Schnapper v. Foley*.⁴¹ In that case the producer of five films about the Supreme Court entitled "Equal Justice Under Law" obtained a certificate of registration from the Copyright Office. The plaintiff brought an action to invalidate the copyright on the grounds the films were commissioned by the Administrative Office of the U.S. Courts, an agency of the government. The court held for the producer's right to own the copyright, provided that the government did not commission the films for its own use merely as an alternative to having one of its employees prepare the work.

Finally, problems recently have arisen concerning legal materials in the public domain. It has long been settled that individuals cannot hold copyright in the works of legislators or judges. Thus, judicial opinions, trial records, statutes promulgated by legislators and their debates are in the public domain, although the headnotes and commentaries of private publishers are copyrighted. Recently, litigation resulted over the question whether a privately developed model municipal building code was injected into the public domain when the Massachusetts legislature adopted it as part of its official state regulations. The

court ruled that once officially adopted, the code could be copied by anyone.⁴² In another case the question was whether the State of Georgia could control its own statutes in such a way as to give a copyright monopoly to one publishing company. In a suit against an alleged infringer, the state lost.⁴³ The court decided that the public must have free access to state laws, unhampered by any claim of copyright, even by the state. The state's argument that it needed control of its statutes to insure their accuracy was rejected.

Music

Musical works are especially susceptible to copyright infringement in schools and colleges. "Guidelines for Educational Uses of Music" were promulgated in the legislative history of the 1976 Act.⁴⁴ Recently, the Kansas State Department of Education requested a ruling from the state's attorney general on whether music educators may copy musical works for use of judges in music competitions. The attorney general advised that they may not do so because if all teachers could make copies for all judges in all music competitions the market for the music would decrease.⁴⁵ Nothing in the "Guidelines" or among the fair-use factors would sanction massive copying of entire scores (as opposed to excerpts), even if they are to be used for comment or criticism.

The 1976 Act exempts from infringement performance of music in classrooms for teaching or in churches for religious purposes,⁴⁶ but only if copies of the music used for performance are lawfully obtained. In *F.E.L. Publications v. Catholic Bishop of Chicago*⁴⁷ a music publisher sued the church for making illegal copies to be used in exempt church service performances. The publisher, F.E.L., had offered an annual license to each parish permitting unlimited copying, but no more than thirty out of 447 parishes purchased the licenses. The defendant succeeded in getting the suit dismissed in the trial court on grounds F.E.L.'s license was so restrictive as to violate the antitrust laws, but the Court of Appeals reversed the trial court, thus paving the way for F.E.L. to proceed with its copyright infringement action.⁴⁸ Churches and non-profit schools have no fair-use privilege to copy whole musical works on a massive scale, even if nonprofit performance of the music is permitted. In other words, the exemption extends only to performances at which participants perform from memory, unless they choose to purchase copies of the music.

The Four Factors of Section 107

Factor 1: The Purpose and Character of the Use

The purpose and character of the use of a work requires the consideration of whether such use is of a commercial nature or is for nonprofit educational purposes.⁴⁹

In recognizing the dichotomy between commercial and noncommercial uses, courts have been creative in their character-use analysis. In *Encyclopaedia Britannica v. Crooks*⁵⁰ owners of audiovisual works asked for a temporary injunction barring a school system from duplicating the works without permission. The court bypassed the fact the defendant was a school system, admitting the case was indistinguishable from *Williams & Wilkins* in this respect,⁵¹ and found a "highly organized and systematic program for reproducing videotape on a massive scale."⁵² *Crooks* involved the Erie Co. NY BOCES' videotaping educational television programs onto a master copy and then making a list of the programs available to teachers. The master would remain at the copying center and another copy would be made for the teacher.⁵³ Defendant's strongest argument was that the time-shifting made programs available to students "since many of the programs are televised when classes are not in session or at times that do not coincide with coverage of the subject in a particular course of study..."⁵⁴

The court pointed out two differences between this case and *Williams & Wilkins*. First, *Williams & Wilkins* limited the request to a single article and fifty pages, while in *Crooks* the whole film was copied.⁵⁵ Second, BOCES' copying could have a substantial effect on the market.⁵⁶ Significantly, the court had no problem finding infringement by an educational institution even where there was no possibility of commercial use. The court suggested that a licensing agreement could and should be arranged.⁵⁷

In *Crooks*, there was a noncommercial, educational purpose and yet an infringement was found. In contrast, no infringement was found in *Bruzzone v. Miller Brewing Co.*,⁵⁸ even though the infringer was a for-profit corporation. Bruzzone operated a market research firm which published a newsletter to the advertising and marketing community. He also did commission work to study one particular company's marketing effectiveness.⁵⁹ Questionnaires were sent to a random sampling of people together with pictures or dialogue from the commercial to be studied.⁶⁰ The court said that "Useful, reliable market research results have value for the public, assist in keeping the competitive marketplace free

from distortion and confusion, and, in general, are an essential aspect of a healthy consumer economy."⁶¹ The court gave more weight to the use made of the copyrighted material than the nature of the user.

Another criterion courts have used to determine purpose and character is whether some public interest was involved.⁶² In *Key Maps, Inc. v. Pruitt*⁶³ a fire marshall of Texas county drew the district's boundaries on a copyrighted map and distributed multiple copies to local emergency service agencies. The court said this use was a "legitimate, fair, and reasonable purpose, namely the coordination of fire prevention activities in the unincorporated areas of Harris County."⁶⁴

A "public access" to information argument was successful in *New York Times v. Roxbury Data Interface*,⁶⁵ where the defendant used the *New York Times Index* to make an index of personal names appearing in the *New York Times*. Again, the defendant's profit motive was not recognized as determinative of infringement.⁶⁶ The court said, "On its face, defendants' index appears to have the potential to save researchers a considerable amount of time and, thus, facilitate the public interest in the dissemination of information."⁶⁷ In *Italian Book Corp. v. American Broadcasting Co., Inc.*⁶⁸ the ABC evening news showed a float during the annual Gennaro Festival parade in New York's Little Italy on which the participants were performing a copyrighted song. The publisher brought suit for infringement but the court found a fair use, noting that the event was surrounded by "considerable public interest."⁶⁹ Further, the court said that the "[use] of the song was incidental to the overall informative purpose of the newscast."⁷⁰

The argument that the use is designed to fill a public need, or in some way facilitate public access to information has had mixed success. The case of *Iowa State University Research Foundation v. American Broadcasting Co.*⁷¹ bears many similarities to the *Italian Book Co.* case. A television station was held an infringer when it used segments of a copyrighted film in its coverage of the 1972 Olympics. The film portrayed the biography of an Iowa State wrestler who was participating in the Olympics and won the gold medal. There can be little doubt that the Olympics is of "considerable public interest" or that the overall purpose of the use was to inform the public. In both cases the broadcasts inform the public of the events and personalities involved. The only readily distinguishable characteristic between the two cases is that ABC made the film in *Italian Book*, while someone else made the film in *Iowa State*. ABC knew of the existence of the film and had turned it down before showing it in the *Iowa State* case.⁷² Otherwise the cases appear to be inconsistent.

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Two cases of “public interest” infringement involved republication of articles from publications of limited circulation. *Rubin v. Boston Magazine Co.*,⁷³ involved the republication of parts of a doctoral dissertation that had been copyrighted and published in a psychology journal and again in the plaintiff’s own book before the defendant published a section of it accompanying an article in a box entitled “Test of Love: How To Tell If It’s Really Real.”⁷⁴ The magazine vigorously argued that they were presenting this information for the public enlightenment but the court held that the “format and content” showed the purpose was not to “acquaint the community with research.”⁷⁵

The second case involved a Harvard law student’s article in the student newspaper, *The Harvard Law Record*. The article, documenting the experiences of Harvard law students in their summer clerkships, was reprinted verbatim in the *Legal Times of Washington* except for two deleted paragraphs.⁷⁶ The court said, “the republication was for commercial rather than educational purposes.”⁷⁷

Boston Magazine, ABC, and the Legal Times are all for-profit organizations. However, the courts attached little importance to this fact in arriving at their decisions. In all three cases the use was a mixed informative/commercial purpose. In *Williams & Wilkins* the court emphasized that “NIH and NLM are non-profit institutions, devoted solely to the advancement and dissemination of medical knowledge.”⁷⁸ Years later, characterization of the user as not for profit appears to be losing potency as a defense for libraries.

Factor 2: The Nature of the Copyrighted Work

If a work can be characterized as primarily a historical or factual account, or in the public domain, then only the *expression* of the work, and not the contents, is protected. A man Hoehling researched the Hindenburg accident and determined that the cause of the fire was sabotage.⁷⁹ This was not the first account of the accident that indicated sabotage.⁸⁰ Hoehling presented his book as a “factual account, written in an objective, reportorial style.”⁸¹ The court decided that a second author’s use of Hoehling’s material may be extensive and “significant...so long as he does not bodily appropriate the expression of another.”⁸²

If an original interpretation is given to facts in the public domain, then that interpretation is protected. For example, Dow Jones uses a list of stocks constituting public information to make its index.⁸³ The copyright results from selecting representative stocks from the total

number of stocks listed on the New York Stock Exchange. Also protected is the divisor, and the number generated by dividing the aggregate prices of the component stocks by the divisor.⁸⁴ A minimum amount of effort must be expended by the author if his work is to be protected.

In *New York Times v. Roxbury Data Interface*⁸⁵ the court ruled for the defendant because he put forth "independent work...precisely the labor that an original indexer must undertake."⁸⁶ In this case plaintiff, New York Times, already printed five indexes to its paper. The defendant noticed that the Times did not print a biographical index and proceeded to publish one. The defendant's index was really an index of names derived from the other existing indexes.⁸⁷ The court described the Times's copyright in its indexes as constituting "the correlation of data with citations to the pages and columns of the *New York Times* on which the data appears."⁸⁸ The court questioned "Whether or not millions of names scattered over more than one hundred volumes and integrated with a mass of other data can qualify as a compilation."⁸⁹ This amalgam is "in the nature of a collection of facts [rather] than in the nature of a creative or imaginative work."⁹⁰

The particular expression of an idea, concept, principle, or discovery cannot be appropriated without a copyright infringement. In *Rubin*⁹¹ the *Boston Magazine* copied verbatim Dr. Rubin's test. This was appropriation of his expression. The question arises whether there was any other way to state Dr. Rubin's theory. If there had been only one way then idea and expression merged, and no protection would have been available.

Factor 3: The Amount and Substantiality of the Portion of the Copyrighted Work Used

In one post-1978 case the substantiality element was determinative. In *Quinto v. Legal Times*⁹² the court said: "the admitted reprinting of approximately 92% of the plaintiff's story precludes the fair use defense under prior law."⁹³ Other courts have addressed the issue in terms of whether the alleged infringer used only what was needed to accomplish his purpose or used the essential part.

In *Bruzzone v. Miller Brewing Co.*⁹⁴ the court first noted that the copying was "extremely fragmentary."⁹⁵ Then it stated a test for determining substantiality:

If a subsequent user must engage in such use in order to accomplish one of the purposes set forth in 17 USC §107 (e.g., research), and if such use is the minimum amount necessary to achieve such purpose,

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and if the subsequent use does not compete with the original use...such use is considered fair use.⁹⁶

The question boils down to whether the user has abused the talents of another creator, or properly used the first work as a stepping stone to another original work.

A second approach, discussed in the *Rubin* case,⁹⁷ is to determine the “essential part” of the work. The *Rubin* case involved the use of a test that would determine how people feel about each other. The magazine-defendant only copied the test which was not a substantial part of the plaintiff’s dissertation, but nevertheless was the *essence* of the paper.

Factor 4: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The courts since 1978 have looked either for competition or similar purpose as evidence of economic harm. The *Bruzzone* court held that there was “no credible evidence” that defendant’s practices “impair(ed) the value of said advertisements.”⁹⁸ The court also noted that a commercial was not the subject of Bruzzone’s testing until a significant portion of its useful life was exploited.⁹⁹ Finally, the testing purpose was not the same purpose as that of the plaintiff advertiser.

The *Quinto*¹⁰⁰ and *Iowa State University*¹⁰¹ cases concerned copyrighted works whose primary value was in the first use.¹⁰² The first use would effectively extinguish the market. This is seldom true of materials kept in a library. Either a work has lasting value or there is no reason to keep it.

The *Roxbury* case illustrates an owner’s argument based on competition. The plaintiff argued that the defendant’s use deprived it of the right to exploit a potential market.¹⁰⁴ The court rejected this argument and held the defendant could take advantage of a market that was either unseen or untapped by the plaintiff.¹⁰⁵ Similarly, Section 108(c) of the 1976 Act permits libraries to restore lost or damaged works to their collections by copying them if an unused replacement cannot be obtained at a fair price.

Conclusion

Williams & Wilkins remains the only case which deals with library copying. The *Williams & Wilkins* court recognized the four traditional factors¹⁰⁶ but proceeded to craft its own fair-use test for libraries as follows:

The important factor is not the absolute amount, but the twin element of (i) the existence and purpose of the system of limitation imposed and enforced, and (ii) the effectiveness of that system to confine the duplication for the personal use of scientific personnel who need the material for their work.¹⁰⁷

It is disturbing to librarians that the Ninth Circuit in the *Sony* case sided with the dissent in *Williams & Wilkins*.¹⁰⁸ Apparently, the judicial attitude has changed from approving use of technology which allows library researchers to break away from the handwritten, time-consuming and error-ridden notes of the past to an attitude that reprography leads to "mass reproduction"¹⁰⁹ and grave harm to the publishers, writers and broadcasters.

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35. Copyright Act of 1976, 17 U.S.C. §§101, 105.
36. *Public Affairs Associates, Inc. v. Rickover*, 268 F.Supp. 444 (D.DC. 1967).
37. *Reporters Committee for Freedom of the Press v. Vance*, 442 F. Supp. 383 (D.DC. 1977).
38. H. Rep supra note 8, at 60.
39. 15 U.S.C. §290(e) (1976).
40. H. Rep. supra note 8, at 59.
41. 471 F. Supp. 426 (D. DC. 1979).
42. *Building Officials & Code Administrators v. Code Technology, Inc.* 628 F.2d 730, (1st Cir. 1980).
43. *State of Georgia v. Harrison Co.*, 548 F.Supp. 110 (N.D. Ga. 1982).
44. H. Rep. supra note 8, at 70-72.
45. Op Att'y. Gen. 81-202 (Kan. 1981).
46. Copyright Act of 1976, 17 U.S.C. §§110(2), (3), (4).
47. 506 F.Supp. 1127 (1981).
48. 3d. Cir. no. 81-1333 (1982), 214 U.S.P.Q. 409, cert. denied 4 Oct. 1982.
49. Copyright Act of 1976, 17 U.S.C. §107(1) (1976).
50. 447 F. Supp. 243 (W.D. NY 1977) (granting a preliminary injunction) (case decided in 1982, Copyright L. Rep. (CCH) Para. 25, 443).
51. Id. at 251.
52. Id. at 252.
53. Id. at 246.
54. Id.
55. Id. at 251.
56. Id.
57. Id., pp. 251-52.
58. 202 USPQ 809 (N.D. Cal. 1979).
59. Id. at 810-11.
60. Id. at 810.
61. Id. at 811.
62. *Key Maps, Inc. v. J.J. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978); *Italian Book Corp. v. American Broadcasting Co., Inc.*, 458 F. Supp. 65 (S.D. NY 1978); *New York Times v. Roxbury Data Interface*, 434 F. Supp. 217 (D. NJ 1977).

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63. 470 F. Supp. at 35.
64. *Id.* at 38.
65. 434 F. Supp. 217 (D. N.J. 1977).
66. *Id.* at 221.
67. *Id.* at 221.
68. 458 F. Supp. 65 (S.D. NY 1978).
69. *Id.* at 68.
70. *Id.* at 68.
71. 621 F.2d 57 (2d Cir. 1980).
72. *Id.* at 58-59.
73. 645 F. 2d 80 (1st Cir. 1981).
74. *Id.* at 82.
75. *Id.* at 84.
76. *Quinto v. Legal Times of Washington, Inc.*, 506 F. Supp. 554 (D.C. D.C. 1981).
77. *Id.* at 560.
78. 487 F.2d at 1354.
79. *A.A. Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir. 1980).
80. *Id.* at 975.
81. *Id.*
82. *Id.* at 980.
83. *Dow Jones v. Chicago Board of Trade*, Copyright L. Rep. (CCH) para 25, 411, p. 17,379 (22 June 1982).
84. *Id.*, para 17, 381.
85. 434 F. Supp. 217 (D. N.J. 1977).
86. *Id.* at 223.
87. *Id.* at 218-19.
88. *Id.* at 220.
89. *Id.*
90. *Id.* at 221.
91. *Rubin v. Boston Magazine Co.*, 645 F. 2d 80 (1st Cir. 1981).
92. 506 F. Supp. 554 (D.C. D.C., 1981).
93. *Id.* at 560.
94. 202 U.S.P.Q. 809 (N.D. Cal. 1979).
95. *Id.* at 811.
96. *Id.* at 812.
97. *Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981).
98. *Bruzzone v. Miller Brewing Co.*, 202 U.S.P.Q. 809, 811 (N.D. Cal. 1979).
99. *Id.* at 811.
100. *Quinto v. Legal Times*, 506 F. Supp. 554 (D.C. D.C. 1981).
101. *Iowa State University Research Foundation v. American Broadcasting Co.*, 621 F. 2d 57 (2d Cir. 1980).
102. 506 F. Supp at 560; and 621 F.2d at 62.
103. *New York Times v. Roxbury Data Interface*, 434 F. Supp 217 (D. N.J. 1977).
104. *Id.* at 224.
105. *Id.* at 224-25.
106. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Ct. Cl. 1973) aff'd by equally divided court 420 U.S. 376 (1975).
107. *Id.* at 1355.
108. *Universal City Studios v. Sony Corp.*, 659 F.2d 963, 974 (9th Cir. 1981).
109. *Id.* at 971.