PRODUCTION NOTE

University of Illinois at Urbana-Champaign Library
STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

1. Title of publication: Library Trends. 2. Date of filing: 1 October 1988. 3. Frequency of issue: quarterly; no. of issues published annually: four; annual subscription price: $20. 4. Location of known office of publication: Graduate School of Library and Information Science, 249 Armory Bldg., 505 E. Armory St., Champaign, IL 61820. 5. Location of the headquarters of general business offices of the publishers: Publications Office of the Graduate School of Library and Information Science, 249 Armory Bldg., 505 E. Armory St., Champaign, IL 61820. 6. Publisher: Graduate School of Library and Information Science, Champaign, IL 61820; editor: Charles H. Davis, 410 David Kinley Hall, University of Illinois, Champaign, IL 61820; acting managing editor: James S. Dowling, 249 Armory Bldg., University of Illinois, Champaign, IL 61820. 7. Owner: University of Illinois Board of Trustees, Urbana-Champaign Campus, Urbana, IL 61801. 8. Known bondholders, mortgagees or other security holders owning or holding 1 percent or more of total amount of bonds, mortgages or other securities: None. 9. The purpose, function and nonprofit status of the organization and the exempt status for Federal income tax purposes have not changed during preceding 12 months.

10. Extent and nature of circulation

<table>
<thead>
<tr>
<th></th>
<th>Average no. copies each issue during preceding 12 months</th>
<th>Actual no. copies of single issues published nearest to filing date</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Total no. copies printed</td>
<td>5,192</td>
<td>5,550</td>
</tr>
</tbody>
</table>
| B. Paid circulation
  1. Sales through dealers [subscription agencies] and carriers, street vendors, and counter sales | 3,879                                                   | 5,547                                                         |
  2. Mail subscription [in addition to above] | 453                                                    | 558                                                          |
| C. Total paid circulation | 3,834                                                   | 4,105                                                         |
| D. Free distribution by mail, carrier or other means: samples, complimentary, and other free copies | 0                                                      | 0                                                            |
| E. Total distribution | 3,834                                                   | 4,105                                                         |
| F. Copies not distributed
  1. Office use, left over, unaccounted, spoiled after printing | 1,358                                                 | 1,445                                                         |
  2. Returns from news agents | 0                                                      | 0                                                            |
| G. Total | 5,172                                                   | 5,550                                                         |
Current Problems in Copyright

WALTER C. ALLEN
and
JEROME K. MILLER
Issue Editors

CONTENTS

Walter C. Allen 161 INTRODUCTION

Nancy H. Marshall 165 REGISTER OF COPYRIGHTS' FIVE-YEAR REVIEW REPORT: A VIEW FROM THE FIELD

Roger D. Billings, Jr. 183 FAIR USE UNDER THE 1976 COPYRIGHT ACT: THE LEGACY OF WILLIAMS & WILKINS FOR LIBRARIANS

Jerome K. Miller 199 COPYRIGHT PROTECTION FOR BIBLIOGRAPHIC, NUMERIC, FACTUAL, AND TEXTUAL DATABASES

F. William Troost 211 A PRACTICAL GUIDE TO DEALING WITH COPYRIGHT PROBLEMS RELATED TO EMERGING VIDEO TECHNOLOGIES IN SCHOOLS AND COLLEGES

Linda M. Matthews 223 COPYRIGHT AND THE DUPLICATION OF PERSONAL PAPERS IN ARCHIVAL REPOSITORIES

Carolyn Owlett Hunter 241 LIBRARY REPRODUCTION OF MUSICAL WORKS: A REVIEW OF REVISION
As most librarians surely know by now, the Congress of the United States finally passed a copyright measure in 1976. This bill, the fourth comprehensive copyright revision since the original act of 1790, had been in the legislative mill since the 1960s. When it was signed into law as Title 17 of the United States Code late in 1976, it was hailed by publishers, scholars, librarians, and others interested in copyright as a landmark measure. The act provided that it would take effect 1 January 1978. Section 108(i) also provided that the Register of Copyrights conduct a five-year review to monitor the effectiveness of that section, which, again as most librarians know, regulates library photocopying.

The Register has conducted his public hearings, and he has issued his mandated report, which, not surprisingly, has turned out to be highly controversial. In addition, there has been continuing controversy in several other areas—e.g., off-air videotaping of television programs and duplication of personal papers in archives. It seemed to the editors to be a good time to put together an issue of Library Trends on some of these problems, in the hope that measured views of them might be useful to the library and broader communications communities in assessing the current state of affairs in at least a few areas of the copyright world. Deliberately excluded is any direct consideration of areas such as the sections of the act which regulate manufacturing, imports, etc., as being only of peripheral concern to librarians.

Walter C. Allen is Associate Professor, Graduate School of Library and Information Science, University of Illinois at Urbana-Champaign.
The first paper is a librarian's view of the Register's report. Its author, Nancy H. Marshall, has been involved in copyright matters for a number of years, and has served as chairperson of the Copyright Subcommittee of the Legislation Committee of the American Library Association. In a closely reasoned paper, she reviews the events which led up to the review, including an outside study of the extent of photocopying in libraries, which was commissioned by the Register, the results of which were seen to have been largely ignored by him in writing his own report. Marshall details the portions of that report, including both statutory and nonstatutory recommendations, which at least part of the library community finds troublesome.

Roger D. Billings, Jr., Professor of Law at the Salmon P. Chase College of Law, Northern Kentucky University and formerly a publisher's attorney, reviews the celebrated Williams & Wilkins case of the early 1970s, its influence on Section 108, and that section's effectiveness. He looks briefly at subsequent legal actions against alleged infringers, the Copyright Clearance Center, the off-the-air question, computer programs and databases, public domain government and legal materials, and music. Billings concludes with a hard look at Section 107, which governs "fair use," and its place in all of these areas.

Jerome Miller, a member of the faculty of the University of Illinois Graduate School of Library and Information Science from 1975 to 1983, has long been interested in copyright matters, is a frequent writer on them, and has been a frequent speaker at conferences and workshops. Most recently, he has been operating a consulting firm, Copyright Information Services. In his paper, Miller examines in detail those provisions of the Copyright Act of 1976 which govern computer programs, databases and works derived from them. Deliberately omitted from the act originally, the present protection derives from a revision passed in 1980, subsequent to the final report of the National Commission on the New Technological Uses of Copyrighted Works (CONTU). He reviews briefly the provisions of the newly revised Section 117 governing copyright protection for computer programs, then examines copyright protection for computer databases (this is not included in Section 117), emphasizing the implications of this part of the law for libraries and information centers.

When we first planned this issue, Jerome Miller and I extended an invitation to John C. Stedman, Emeritus Professor of Law at the University of Wisconsin-Madison (UWM), to write a paper on "Reproduction of Multiple Copies of Journal Articles for Reserve Reading Collections." This was to have served as an update to his well-known article in the AAUP Bulletin and College & Research News.3 Stedman
Introduction

agreed to undertake the assignment with some reluctance, because of his precarious health. He began work on the article, but had to put it aside because of frequent and prolonged hospital stays. Nancy Marshall hoped to use his notes to complete the article, but she in turn was prevented from doing so by heavily increased responsibilities (as acting director of the UWM library). We greatly regret that this article did not materialize, and we are particularly saddened that such serious health problems have plagued one of the most outspoken and consistent advocates of the needs of library users.

William Troost has years of experience as a media specialist at the secondary and higher education levels, and has long been concerned about effects of the 1976 act on the operation of media centers. After a detailed review of effects, he concludes with an eminently practical set of guidelines for living with the present law and for seeking changes, addressed particularly to school media persons.

Archivists have long been caught up in the uncertainties of copyright. Some cases have been notable, such as the one in which heirs of President Warren G. Harding were successful in blocking, under common law, the publication of certain letters of the president to a woman friend, resulting in a book which had to be pruned in several places after it had been composed. Linda M. Matthews, an experienced archivist with an active interest in copyright, surveys the problems of duplication, quotation and even use of unpublished personal papers in archival collections.

Finally, we take a look at one of the real peculiarities of the Copyright Act of 1976—its treatment of music. Carolyn O. Hunter, an active music librarian and member of the Music Library Association’s Legislation Committee, explores the reasons for this anomaly and details MLA’s struggle to get recognition of the needs of scholars in the field of music, particularly copying privileges akin to those of scholars in other disciplines.

One of the difficulties in putting together an issue of Library Trends on a topic of great current interest and concern is that the fast flow of events often makes particular statements invalid in a very short time, even overnight. This issue is a reflection of tides and currents up to 1 August 1983 after which time the issue went into production. We hope that our readers will take this into account if they encounter any seemingly out-of-date statements.

We also wish to acknowledge the assistance of one of our colleagues, Professor D. W. Krummel, in unraveling a number of tight editorial knots.
References

1. The others were in 1831, 1870 and 1909.
Register of Copyrights’ Five-Year Review Report: 
A View from the Field

NANCY H. MARSHALL

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. 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. 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 5 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, 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.

Nancy H. Marshall is Acting Director of Libraries, University of Wisconsin-Madison, and Chairperson, ALA Legislation Committee’s Copyright Subcommittee.
NANCY MARSHALL

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 Morrissey, Special Assistant to the Register; and Robert Stevens, Chief, Cataloging Division.
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.

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.

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.
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.

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.

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. 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.

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.

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.

5. There was an overall decrease of 16 percent in library staff photocopying of all types of materials between 1976 and 1981.

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.

7. Of the total of approximately 61 million interlibrary loan requests received from libraries in 1981, only 21 percent were filled with photocopies.

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; a total of 56 percent of the library patrons were photocopying library materials, while 42 percent were photocopying their own personal materials; 85 percent of user photocopying was conducted at machines that displayed a copyright warning; 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.

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.
A View from the Field

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
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.” 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.” 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.” 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.

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. 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....

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." 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." 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." "Believing" is not statistically defensible, and the inference which could hardly be termed objective is based on one made by a publisher at the Anaheim hearings. 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...."

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:

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
A View from the Field

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\textsuperscript{41} while 5.6 of the libraries belong.\textsuperscript{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."\textsuperscript{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:

\begin{quote}
(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.
\end{quote}

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 \textit{published} should be inserted in lieu of the word \textit{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.

References


4. Copyright Act, §108(i).
10. Ibid., table 3.14, p. 3.37.
11. Ibid., table 4.6, p. 4.16.
12. Ibid., table 2.7, p. 2.13.
15. Ibid., table 3.10, p. 3.29.
16. Ibid., table 2.20, p. 2.28.
17. Ibid., table 3.15, p. 3.22.
18. Ibid., p. 5.28.
19. Ibid.
20. Ibid., p. 5.31.
24. Ibid., p. 93.
26. Ibid., p. 2.
27. Ibid., p. 2.3.
32. Report of the Register, appendix VI, part 1, p. 57.
33. Ibid., p. 160.
34. Ibid.
35. Ibid., p. 161.
36. Ibid., appendix V, part 1, p. 100.
37. Ibid., p. 358.
39. Ibid., appendix VI, part 1, p. 71.
42. Ibid., table 2.5, p. 2.10.
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.

---

¹ Roger D. Billings, Jr. is Professor, Salmon P. Chase College of Law, Northern Kentucky University, Highland Heights, Kentucky.
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 108 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 107 governing fair use in general, and discussed in the Williams & Wilkins decision. The United States Senate, in its Committee Report, 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 Committee and Conference Reports, 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.” 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-
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., the publishers 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. 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. A second suit resulted in a similar decree. 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.)

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.

When royalties did not flow in, publishers of technical and scientific journals sued American Cyanamid Company and E.R. Squibb & Sons, Inc. 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 Copying 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* 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...." 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.
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. Crook* 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. 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.

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. 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. 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. 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. Examples of compilations are credit reference books and the list of stocks that form the basis for the Dow Jones stock index. Even a telephone book (a handy item for a computer database) is copyrighted as a compilation.

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 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...
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. 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, but transcripts of
Henry Kissinger's telephone conversations are in the public domain
because the conversations were made as part of his official duties.
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. Postal stamp designs, manuals and
directories could be copyrighted, for example. Furthermore, the Standard
Reference Data Act 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 history 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*. 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. 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. 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. 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. 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, but only if copies of the music used for performance are lawfully obtained. In *F.E.L. Publications v. Catholic Bishop of Chicago* 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. Churches and nonprofit 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. In recognizing the dichotomy between commercial and noncommercial uses, courts have been creative in their character-use analysis. In *Encyclopaedia Britannica v. Crooks* 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, and found a "highly organized and systematic program for reproducing videotape on a massive scale." *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. 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...."

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. Second, BOCES' copying could have a substantial effect on the market. 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.

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.*, 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. Questionnaires were sent to a random sampling of people together with pictures or dialogue from the commercial to be studied. 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." 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. In *Key Maps, Inc. v. Pruitt* a fire marshal 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." A "public access" to information argument was successful in *New York Times v. Roxbury Data Interface*, 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. 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." In *Italian Book Corp. v. American Broadcasting Co., Inc.* 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." Further, the court said that the "[use] of the song was incidental to the overall informative purpose of the newscast." 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.* 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. Otherwise the cases appear to be inconsistent.
Fair Use Under the 1976 Copyright Act

Two cases of "public interest" infringement involved republication of articles from publications of limited circulation. *Rubin v. Boston Magazine Co.*, 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." 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".

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. The court said, "the republication was for commercial rather than educational purposes."

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." 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. This was not the first account of the accident that indicated sabotage. Hoehling presented his book as a "factual account, written in an objective, reportorial style." 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."

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. The copyright results from selecting representative stocks from the total
ROGER BILLINGS

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. In New York Times v. Roxbury Data Interface the court ruled for the defendant because he put forth "independent work...precisely the labor that an original indexer must undertake." 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. 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." 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." This amalgam is "in the nature of a collection of facts [rather] than in the nature of a creative or imaginative work." The particular expression of an idea, concept, principle, or discovery cannot be appropriated without a copyright infringement. In Rubin 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 the court said: "the admitted reprinting of approximately 92% of the plaintiff's story precludes the fair use defense under prior law." 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. the court first noted that the copying was "extremely fragmentary." 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,
Fair Use Under the 1976 Copyright Act

and if the subsequent use does not compete with the original use—such use is considered fair use.\textsuperscript{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 \textit{Rubin} case,\textsuperscript{97} is to determine the “essential part” of the work. The \textit{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.

\textbf{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 \textit{Bruzzone} court held that there was “no credible evidence” that defendant’s practices “impair(ed) the value of said advertisements.”\textsuperscript{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.\textsuperscript{99} Finally, the testing purpose was not the same purpose as that of the plaintiff advertiser.

The \textit{Quinto}\textsuperscript{100} and \textit{Iowa State University}\textsuperscript{101} cases concerned copyrighted works whose primary value was in the first use.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{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.

\textbf{Conclusion}

\textit{Williams} & \textit{Wilkins} remains the only case which deals with library copying. The \textit{Williams} & \textit{Wilkins} court recognized the four traditional factors\textsuperscript{106} but proceeded to craft its own fair-use test for libraries as follows:
ROGER BILLINGS

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.\textsuperscript{107}

It is disturbing to librarians that the Ninth Circuit in the Sony case sided with the dissent in Williams & Wilkins.\textsuperscript{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”\textsuperscript{109} and grave harm to the publishers, writers and broadcasters.

ACKNOWLEDGMENT

The author expresses appreciation to his research assistant, Keith Trumbo, J.D., Chase College of Law ’82.

References

1. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973).
2. Williams & Wilkins Co. v. United States, 420 U.S. 376, 43 L. Ed. 2d 264, 95 S. Ct. 1344 (1975).
4. Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963 (9th Cir. 1981).
6. See infra red text accompanying notes 49-91.
13. Ibid.
14. Ibid.
17. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1356-57 (Ct. Cl. 1973).
Fair Use Under the 1976 Copyright Act

21. 559 F. 2d 963 (9th Cir. 1981).
22. Id. at 967.
25. Amicus Curiae Brief Supra note 23.
32. Dow Jones v. Chicago Board of Trade, 546 F.Supp. 113 (S.D.N.Y. 1982).
33. Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937).
38. H. Rep supra note 8, at 60.
44. H. Rep. supra note 8, at 70-72.
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.
63. 470 F. Supp. at 35.
64. Id. at 38.
66. Id. at 221.
67. Id. at 221.
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.
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.
84. Id., para 17, 381.
86. Id. at 223.
87. Id. at 218-19.
88.Id. at 220.
89. Id.
90. Id. at 221.
93. Id. at 560.
95. Id. at 811.
96. Id. at 812.
99. Id. at 811.
102. 506 F. Supp at 560; and 621 F.2d at 62.
104. Id. at 224.
105. Id. at 224-25.
107. Id. at 1355.
109. Id. at 971.
Copyright Protection for Bibliographic, Numeric, Factual, and Textual Databases

JEROME K. MILLER

Introduction

Copyright protection for computer programs was specifically excluded from the Copyright Revision Act of 1976 to permit the National Commission of the New Technological Uses of Copyrighted Works (CONTU) to complete its study of the issue. The commission's final report was issued in 1978 and included a recommendation for the revision of Section 117 of the Copyright Act, governing copyright protection for computer programs. Congress accepted CONTU's recommendation and an amendment implementing the recommended changes was attached to the 1980 Patent Revision Act; the copyright portion of the act reads:

Sec. 10(a). Section 101 of title 17 of the United States Code is amended to add at the end thereof the following new language:

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

(b) Section 117 of Title 17 of the United States Code is amended to read as follows:
§117. Limitations on exclusive rights: Computer programs

Notwithstanding the provisions of §106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

Jerome K. Miller, former Assistant Professor, Graduate School of Library and Information Science, University of Illinois at Urbana-Champaign and currently President, Copyright Information Services, Champaign, Illinois.
(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.²

The issue of copyright protection for computer programs has been treated in a number of law review articles and papers presented at learned conferences.³ The court challenges to copyright protection for computer programs center on video displays and the ROM (read only memory) microchips containing programs for arcade-type games.⁴ To simplify greatly, the courts found that if the creators of the chips and visual displays fulfill the requirements for registration, deposits, and copyright notices, the copyrights are valid and may be defended in the courts, although many details remain unclear and must be resolved through legislation or litigation. Although copyright protection for computer programs and arcade-type games has been treated by the courts and the scholarly literature, little attention has been given to copyright protection for databases.⁵

Copyright Protection for Databases

Copyright protection for databases falls outside the protection for computer programs included in the new Section 117, as described previously. Databases receive their protection, or lack of protection, under the older provisions in the copyright act, including the provisions on public domain, compilations, derivative works, and original works.⁶

Public Domain Materials

There appear to be three types of public domain materials. The first, and most obvious, are works of the U.S. government which are not eligible for copyright protection. Section 105 of the copyright act states:

Copyright protection...is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.⁷
The House Report which accompanied the copyright law states:

The basic premise of Section 105...is the same as that of Section 8 of the present law—that works produced for the U.S. Government by its officers and employees should not be subject to copyright. The provision applies the principle equally to unpublished and published works.

Under this provision, the great volumes of data produced by the Bureau of the Census, the Department of Housing and Urban Development, the Department of Commerce, and others are in the public domain and may be freely used by all, including the database creators and vendors. Section 105 also places judicial decisions, executive documents, and legislative reports in the public domain where they also may be freely used by all, including database creators and vendors.

A second type of public domain materials includes materials which by their nature are not eligible for copyright protection. These may be divided into two groups: (1) older materials in which the copyright has expired, and (2) types of materials which are not eligible for copyright protection. The first of these, materials in which the copyright has expired, include historic data and texts which could be incorporated into numeric, factual, and/or textual databases. At present, few of these materials appear to be available through online databases, but, as these services expand, this may become a consideration. The second group includes items which are specifically excluded from copyright protection for their failure to meet the "originality" test. Section 102 of the copyright act states, "copyright protection subsists...in original works of authorship fixed in any tangible medium of expression...." This statement was taken from the 1909 Copyright Act and is sustained by a number of judicial decisions. The essence of originality is nicely defined in Doran v. Sunset House Distributing Corporation:

The requirements for the "originality" necessary to support a copyright are modest. The author must have created the work by his own skill, labor and judgment, contributing something "recognizably his own" to prior treatments of the same subject. However, neither great novelty nor superior artistic quality is required.

The Copyright Office uses the following criteria in rejecting registrations for lack of originality:

Short Expressions Not Copyrightable

Names, titles, and short phrases or expressions are not...[copyrightable]. The Copyright Office cannot register claims to exclusive rights in brief combinations of words, such as:
names of products or services;
-names of businesses, organizations, or groups (including the name of a group of performers);
-names or pseudonyms of individuals (including a pen name or stage name);
-titles of works; and
-catchwords, catch phrases, mottos, slogans, or short advertising expressions.

This is true even if the name, title, or short phrase is novel, distinctive, or lends itself to a play on words.\textsuperscript{11}

This would appear to exclude from copyright protection two types of information commonly found in databases: (1) commonly available data such as the height of the Eiffel Tower or the length of the Amazon River, for which one could not claim originality, and (2) cataloging information. Under the above Copyright Office guidelines, it would appear that a personal or corporate main entry is not eligible for copyright protection and neither is the title of the work. The publisher's name may be a registered trademark but neither the publisher's name, the place of publication, the date of publication, nor the pagination of work appears to be original creations eligible for copyright protection. The only parts of a bibliographic record which appear to be eligible for copyright protection are: (1) the annotation, (2) the classification number, (3) the subject headings or descriptors, and (4) tags and codes and the like. If the classification number, subject headings, or other descriptors are a product of the federal government (e.g., the Library of Congress) then they too are excluded from copyright protection, making the annotation the only part of an individual bibliographic record which is clearly and incontrovertibly eligible for copyright protection. (One should not assume from this that bibliographies and indexes are in the public domain and eligible for unlimited copying, for the organization and arrangement of a database, and especially the program which drives it, are clearly eligible for copyright protection, so wholesale copying of such a database may be culpable, while copying a small number of records from it may be acceptable.\textsuperscript{12}) This lack of protection for bibliographic databases undoubtedly contributes to the fact that many vendors do not attempt to obtain copyright protection for their databases and depend on contractual terms to regulate the use and reuse of material taken from them.

The question of eligibility for copyright protection is different from the third situation—the failure to claim copyright protection for databases. This lack of copyright protection for computer programs and databases is of concern to the vendor who has had to rely on contracts to protect computer software.\textsuperscript{13} A lack of copyright protection is apparent when one does not see a copyright notice displayed on the screen at sign
Copyright Protection for Databases

on or sign off or in the opening or closing part of a printout. The failure of the creators or vendors to employ copyright protection may be disadvantageous to them in prosecuting clients who violate the terms of their contracts, but it does not appear to give users any advantages or privileges not contained in the terms of their database contracts. In fact, the contracts employed by database producers and vendors are so powerful they can, and frequently do, prevent users from duplicating public domain materials contained in a database.

Compilations and Derivative Works

Numeric and factual databases, consisting of information gleaned from a variety of sources and arranged in an orderly fashion designed to maximize their utility to potential users, are a mixed type. Some of these facts and data may be in the public domain in which case they remain in the public domain in spite of their incorporation into a copyrighted database. The copyright law defines a *compilation* as:

[A]...work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.  

Some databases are *derivative works*, which the law defines as:

[A]...work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."  

The copyright law further states:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such a work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.  

Under the terms of the act, such a compilation or collective work does not have to display a separate copyright notice for each contribution but may use a single copyright notice. Thus, the separate contributions as well as the organizational contributions or headnotes
supplied by the developer or vendor of the database are covered by a single copyright notice. This requirement, designed to simplify copyright registration and notices, makes it impossible for the user to determine whether a database is an original work or a compilation of both copyrighted and uncopyrighted materials. Unless the user is able independently to verify that some information in a database is in the public domain, the user has little choice but to respect the copyrights claimed in the compilation.

Databases as Original Works

Although most existing databases are compilations, some may be original works of authorship and as such they receive full protection of the copyright law. Under these terms, the copyright proprietor has the right to reproduce additional copies, to prepare derivative works, to distribute copies of the work to the public by sale, rental, lease, or lending, and to publicly display or perform the work. These copyrights have a duration of life plus fifty years for works of individual authors and seventy-five years for work created by corporate bodies. These exclusive rights provided by Section 106 are modified by the users' rights contained in Section 107—on fair use.

Fair Use

Under the terms of Section 107, the user may reproduce part (rarely all) of the copyrighted work for purposes of criticism, comment, news reporting, teaching, scholarship, or research. Section 107 provides four criteria for evaluating such uses:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use on the potential market for or value of the copyrighted work.

There is an extensive literature on the application of the four fair use criteria to the duplication of printed and audiovisual works, especially their application to copying by educators. It appears that the courts have not been called upon to handle infringement cases involving databases, so there is no judicial guidance to assist in the application...
Copyright Protection for Databases

of the fair-use guidelines to their duplication. Until the courts begin to provide guidance in this matter, caution is advised. There is little doubt that one may obtain some bibliographic, factual, numeric, or textual data from a database and incorporate it into a book or article which is largely the work of the author. The problem particularly arises when a database user who has access to a minicomputer or smart terminal is able to obtain a substantial body of information from one or more databases, store it in memory, then manipulate the data to create a new work which appears at least superficially to be eligible for copyright protection as an original work. Until the courts indicate to the contrary, one must assume this is an infringement of the copyrights in the works which were duplicated.

Applying fair use to copyrighted databases centers on downloading, that is, copying information from a database onto electronic memory. Downloading can probably be divided into two categories—hardcore and softcore. Softcore downloading is the temporary retention of records for the purposes of merging files, purging duplicate records and editing to make the finished product more useful to the end user. Hardcore downloading is retaining records (with or without merging, purging or editing) to avoid paying legitimate user fees. Traditional copyright scholars and most publishers' representatives view most forms of downloading as an infringement. Their objections stem from two common downloading practices—creating local data files and merging or editing files. Merging or editing creates a derivative work, one of the creator's exclusive rights, and it is an infringement, but it is a common practice in information centers and the database creators and vendors don't seem to object to it as long as it does not deprive them of their fees. Hardcore downloading is another matter entirely. Creating a local database to avoid paying database service fees is a clearcut and unequivocal infringement of the copyrights and it undoubtedly violates the terms of the user's contract. Some database producers and vendors are beginning to offer annual downloading licenses, and libraries and information centers that want to download to create a local database should obtain downloading licenses before creating local files.

Copyright Protection for Locally Produced Databases

Securing copyright protection for locally produced databases is reasonably simple so long as three points are covered: notice, registration and deposit.

The copyright notice consists of three parts which normally appear
on a single line: (1) the word "copyright" or the © symbol, (2) the name of the copyright owner, and (3) the year of creation. This would appear as: "Copyright, North-South Data Service, 1982." If the database is revised or expanded, the notice must be updated to include the year of creation and each year the database is revised or expanded. In this instance the notice might read: "Copyright, North-South Data Service, 1982, 1983, 1984."

[The] notice of copyright...shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device. The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement. But these specifications shall not be considered exhaustive.

In the case of machine-readable copies, the Copyright Office identifies four suitable locations for the notice:

(1) A notice embodied in the copies in machine-readable form in such a manner that on visually perceptible printouts it appears either with or near the title, or at the end of the work;
(2) A notice that is displayed at the user’s terminal at sign on;
(3) A notice that is continuously on terminal display; or
(4) A [permanently] legible notice reproduced...on a gummed or other label securely affixed to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copies.

The first three are appropriate for online databases but the fourth format does not appear to meet the “visually perceived” requirement if the user is unlikely to see the box, cartridge or container. (The fourth requirement may be suitable for a database contained on a diskette designed for microcomputers, which will be handled each time it is loaded.)

Registration consists in completing “Form TX: Nondramatic Literary Works,” and submitting the completed form, the $10 registration fee, and the deposit copy to the Copyright Office. (“Literary works," is a catch-all classification for everything except sound recordings, visual arts, and performance materials.) The forms are available free of charge by calling, day or night, 202/287-9100. An answering machine records requests and the forms are mailed promptly, accompanied by a pamphlet explaining the forms and the registration procedures. If the information in the pamphlet and on the forms is unclear,
Copyright Protection for Databases

help is available from the Copyright Office by calling 202/287-8700 during office hours.27

The deposit requirements for machine-readable works are quite different from the requirements for most other works. The Copyright Office does not have the equipment to handle most machine-readable works, so such works deposited at the Copyright Office must be reproduced in printed form or on microform.28 The deposit requirements for databases depend on (1) whether this is a new or a revised work, and (2) whether it is a single- or multiple-file database. To satisfy the deposit requirement for a new, single-file database, one must prepare a single printout or microform copy of the first and last twenty-five pages or similar units of the database. These pages must include the title, copyright notice and other identifying materials (e.g., address, distributor, sources, online vendor).29 If an adhesive-label copyright notice is attached to reels, boxes, disks, cassettes, or the like, a copy of this notice must accompany the deposit copy.30

When the registration form, the check for $10 and the deposit copy are ready, these three items, plus the adhesive-label copyright notice, if any, must be packed in a single container and mailed to: The Copyright Office, Library of Congress, Washington, D.C. 20559.31 Registration should be made before release, or within three months after publication or initial online distribution.32 Either confirmation of the registration or a request for additional information should be returned in about three weeks.

The deposit requirements for multifile and revised databases are complex33 and it may be advisable to hire an attorney who specializes in copyright matters (most attorneys are unfamiliar with copyright) or a nonattorney, copyright consultant to assist with the process.

ACKNOWLEDGMENT

The author wishes to acknowledge the assistance of two colleagues, Lawrence W.S. Auld and Carol Tenopir, in preparing this article.

References


4. Several of these cases are treated in Billings, Roger D., Jr. "Fair Use Under the 1976 Copyright Act: The Legacy of Williams & Wilkins for Librarians" (in this issue of Library Trends).


6. The respective sections of the act are treated separately in later sections.

7. Copyright Act, §105.


9. Copyright Act, §102.


12. Copyright Act, §117.


14. Copyright Act, §101

15. Ibid.

16. Ibid., §103(b).

17. Ibid., §104(a).


19. Copyright Act, §106.

20. Ibid., §§202(a) and (c).

21. Ibid., §107.


23. Addressing this problem requires a careful application of the laws of copyright, contract, and unfair practices, plus a speedy and reasonably priced permission procedure offered by the database owners and vendors. As smart terminals and personal computers proliferate, the reuse of information obtained from databases is sure to become a controversial issue. It is reliably reported that OCLC’s decision to claim copyright protection for its database was prompted by widespread misuses by member libraries who permitted nonmembers to build databases without paying OCLC for the information or services. This appears to be a violation of the OCLC-user contract, but copyright protection for the database may provide additional legal support if OCLC sues infringers.

24. Copyright Act, §101(b).

25. Ibid., §§ 101(a) and (c).


29. Ibid., §202.20(c), pt. 2, vol. vii, letter A.

30. Ibid., §202.20(c), pt. 2, vol. vii, letter B.

31. Ibid., §202.3(c), pt. 2.
Copyright Protection for Databases

32. Copyright Act, §§411, 412.
This Page Intentionally Left Blank
A Practical Guide to Dealing with Copyright Problems Related to Emerging Video Technologies in Schools and Colleges

F. WILLIAM TROOST

Perhaps one of the most troublesome areas of day-to-day professional functioning for media and library educators is responding to an increasing number of questions about what is acceptable use of copyrighted audiovisual works in the educational setting. Nearly every professional convention will include at least one copyright session where the latest developments regarding copyright law are discussed, often ending in heated debate. Pressures between creators and users that never used to exist erupt into arguments that end without answers. Audiences leave confused and disgruntled. The response of turning inward and never publicly discussing what is going on in the “real world” of my school or college library for fear of legal suits or peer disapproval, is increasing. The approach of “well, I don’t care what the law says” or “I’ll do as best I can for the people I serve regardless of what’s going on in the courts or the legislature,” are other common nonconstructive responses.

Conscientious library/media educators are trying to function and exist in a period of economic downturn with faculties who often question the very reason for the existence of instructional support services. At the same time, media or library personnel have responsibility for staying abreast of copyright developments and making occasional decisions that involve saying “no” to requests for services that infringe current copyright laws. Media professionals have increasingly been thrust into the roles of lawyer, judge and jury. The problem of copyright has evolved into a situation where the development of technology has outstripped the capacity of our laws and legislature to keep up with current events.

William Troost is Associate Professor and College Media Consultant, Los Angeles Trade Technical College and is also currently chairman, Instructional Media Committee, Los Angeles Community College district.
Only through careful study, and a preplanned approach, can we be successful at dealing with the rather sizable copyright problems that confront us on a daily basis. One of the biggest challenges and responsibilities of a library media educator is to apply the maximum amount of knowledge relative to copyright laws and principles to each specific decision rendered. This article will attempt to give a comprehensive background for daily functioning. This discussion focuses on some current events and features of copyright law affecting decisions and policies daily in library media centers. Some strategies will be suggested that have proven effective in creating better understanding and receptive attitudes among school and college faculties with regard to copyright and legitimate restrictions posed by the law.

Key Ideas and Events Governing School Uses of Copyrighted Programming

Most people understand that copyright laws exist to protect the unauthorized reproduction of copyrighted works without payment to the copyright owners. Fewer observers are aware that an equally compelling right of the public to gain reasonable access also exists. Many people understand the act of stealing something tangible such as a wristwatch, but they have a harder time understanding the concept of "intellectual property" as it exists in regard to a copyrighted film. A related area of difficulty for many educators is to understand and accept that the law creates a legal distinction between classroom performances of televised works versus the reception of television programming in the privacy of one's home. Many find it difficult to understand that the act of recording a program is separate from the act of subsequently displaying a program. The law classifies school performances as outside the home and circle of one's friends, and further, such performances are "public" performances. Thus, a teacher who records at home, and later brings a show into a classroom situation, may be in violation of copyright laws depending on the full circumstances of the individual case under consideration. It is highly important for faculty and administrators to work together with mutual knowledge of the consequences of copyright problems.

Exclusive Rights of Copyright Owners

The copyright act establishes five important exclusive rights of copyright owners: (1) to reproduce the copyrighted work, (2) to distrib-
Copyright Problems Related to Video Technologies

ute it, (3) to perform it, (4) to display it, and (5) to do derivative works. The last right must be understood. In educational terms, to change the format of a copyrighted work (as to videotape a 16mm film) is an exclusive right of the copyright owner. Oftentimes, security or convenience copies of films and other media are made illegally. The making of derivative works is a troublesome area for media professionals. Prior to the passage of the 1976 Copyright Act it had been common practice for teachers to do such things as to transfer records to tape for classroom use because children frequently would damage records. Filmstrips and slide-shows are often transferred to video because of equipment shortages or breakage problems. Still, there are two ways this can be done with certainty that no infringement has occurred. First, such transfers may be made if a letter of permission to copy is secured from the copyright owners. Second, permission to make one or more film-to-video copies as a written condition of the sale contract may be stipulated. If you need a security copy, plan ahead! Telephone, or even verbal permission, cannot be stored in a file for years to come. Written records offer the only protection. Exclusive rights are counterbalanced in the law with fair use provisions.

Legal Exceptions to the Exclusive Rights of Copyright Owners

One of the most difficult areas for everyone (e.g., judges, lawyers, teachers, administrators) to understand is that portion of the law which describes what we call "fair use." Fair use is a legal concept that has resulted from years of case decisions. The fair use provisions of the law were purposely designed so that they could be applied to a variety of educational situations. Fair use provides educators a limited right to copy copyrighted works without permission from a copyright owner. In general, fair use has four key elements:

1. **Purpose and character of the use is the first factor.** The key points of this element are that spontaneous requests by instructors (not by administrators) are contributions to a fair use.

2. **Nature of works copied.** News programs are favored for fair use. Copying of musical scores or things such as consumable workbooks are forbidden and would contribute to a finding of copyright infringement.

3. **Amount and substantiality of portions used.** If a smaller proportion of a work is copied, the use is likelier to be considered fair. Larger portions, or copying whole works, reduce the potential for fair use, but courts have ruled that the copying of a whole work does not
preclude a finding of fair use.

4. Effect on the potential market. Copying that clearly removes profit from the originator of a work signals uses that are not fair. Copying materials not commercially available is more acceptable.

A key area of current debate is: How must we make decisions with regard to the four factors? Some judges and attorneys insist that all four factors must be met in order for a school use of a copyrighted work to be considered a fair use. Other judges and attorneys take the position that all “fair use” factors must be considered, but you need only to meet a predominance (not all four factors)—two or more of the elements of fair use.

In copyright discussions around the country, the author has noticed that the last factor of economic harm is the most sensitive factor to copyright owners, rightly so because it affects livelihood or profit profiles. It should always be carefully weighed in making responsible daily decisions.

A definition from Meeropol v. Nizer helps to improve educators’ understanding of fair use. In that case infringement was defined as: “those (uses) which interfere unduly with the monopoly of the copyright holder without bringing a commensurate benefit to the public.” Fair use was defined as “those (uses) which interfere but slightly with the copyright monopoly, while offering much to society.” Two good questions to ask are:

1. Can materials be supplied in a reasonable amount of time?
2. Can materials be supplied at a reasonable cost?

Unfortunately, many educators, lawyers and others will spend a lot of time copying materials that can be legitimately purchased for less (with all elements such as “time” considered). On another level, library-media supervisors are challenged by the sensitive professional task of overcoming the notion of “anything I do for my students and their learning is a fair use.”

Other parts of Copyright Law Affecting Day-to-Day Functions

Media professionals should be aware of Section 110(1) of the federal Copyright Act. It states:

the playing of lawfully made video tapes/discs of copyrighted motion pictures in a classroom setting is exempt from copyright control where the performance is in the course of face to face teaching activities in a non-profit educational institution...performance must be for
Copyright Problems Related to Video Technologies

a specific educational purpose...not for cultural or entertainment values, and must take place in a setting devoted to instruction (such as a classroom).

Many schools have begun to use rented or purchased videocassettes stamped, "For Home Use Only." More than one opinion from counsel in different parts of the country has suggested that as long as the program was lawfully made, classroom use of rental or purchased cassettes is permissible under existing law. At the time this article was written, legislation designed significantly to broaden control of copyright owners over use of this type has been introduced. Those engaged in purchase or rental of programs of educational value might be wise to describe in writing the intended classroom uses as a condition of lease or sale. It will also be necessary to follow legislation in this area.

The next area of concern must be knowledge of existing legislative guidelines that bear specifically on the practice of off-the-air videotaping. Under the direction of Representative Robert Kastenmeier (R-Wisconsin) a committee composed of representatives of program creators and users met for more than two years to develop compromise guidelines to govern school use of video recorders to capture and time-shift programming from the public airwaves for educational face-to-face teaching. It is critical to understand that guidelines are not laws, nor do they have the same force as laws. The guidelines have a much lower level of legal authority than actual parts of the law discussed earlier. Indeed, the guidelines were published several years after the Copyright Act of 1976 went into effect. A prominent legal theorist, Melville Nimmer, has suggested that because of the late publication of guidelines, the rules may have a level of assertiveness which is even less than legislative history (often cited by judges in writing their opinions on cases). The guidelines attempt to describe the conditions by which no legal actions would be filed, relative to educational uses of copyrighted programs as agreed to by copyright owners represented on the Kastenmeier Committee. It is hoped that the guidelines describe "safe harbor" for schools. It may be fully possible to exceed the guidelines without being sued, but this is a matter that should be fully explored by top administrators and counsel that represents the institution you serve.

Off-air recording is a particularly troublesome area because schools have been taping off-air for nearly twenty years without disruption. A study conducted by the National Center for Education Statistics (NCES) during 1976 found over 500,000 teachers and 11 million students involved in learning from programs taped off the air. The numbers are certain to have increased since 1976. Teachers who have become
attracted to this technology give up the traditions of past practice very grudgingly. The requirement to erase programs not available for sales creates anxiety, as does the restriction of the ability to use programs at the appropriate teaching moment. The guidelines allow for use of programs in classrooms for ten days after the show was originally aired.

Many school officials have made the guidelines available, but research surveys should be conducted to determine how the guidelines are serving student education needs, as well as the needs of copyright proprietors. Kastenmeier himself has suggested that revision of the guidelines may be required in the future.

Decisions in Court Cases Contributing to Media Center Administration

Court cases should be followed because their level of legal assertiveness is very high—especially relative to the guidelines. A difficulty with court cases is that the decisions are often limited to the specific circumstances that caused the legal action to be initiated, and usually cannot be generalized to other unique situations. One such case is referred to as the BOCES (Board of Cooperative Educational Services) case. BOCES is a single agency that serves approximately 100 schools in western New York state. The BOCES group was sued by Learning Corporation of America (LCA), Time-Life Films (TLF) and Encyclopaedia Britannica (EB). The BOCES agency was engaged in recording programs broadcast over the public airwaves, whose rights were owned by the above-mentioned companies. As of this writing, most of the issues in this case have been decided by Judge John Curtin. The ruling went mostly in favor of the copyright owners. During the course of the trial, the plaintiffs were able to convince and prove to the judge that widespread and systematic BOCES copying reduced the potential sale of films owned by LCA, EB, and TLF. The copying did not usually occur on a spontaneous basis, and it did not occur on school sites. In most every incidence, whole programs were copied, and multiple copies were made of many shows. Catalogs listing the off-air videotape holdings were widely distributed among BOCES member schools. The film distributors were able to say that BOCES catalogs offered free video copies of films the distributors had for sale. The judge limited his decision to the particular circumstances found in the BOCES operation, but denied the film companies' contention that copying entire television shows could never be "fair use." Another fact mentioned in the trial decision was that LCA reported it withdrew from the educational television market because only 1.5-2 percent of its sales were derived from this source. Encyclopaedia-
Copyright Problems Related to Video Technologies

dia Britannica reported 5 percent of its revenue derived from showing products on educational television.

The final verdict seems based on the fact that the judge found BOCES in violation of all four of the fair-use criteria. Even though the case dealt with off-air taping by schools, the nature of the BOCES' procedures are not considered by most observers to be typical of in-school, off-air recording practices across the nation.

The Betamax Trial (*Sony v. Universal City Studios, Walt Disney Productions*) is the other major case. As this article goes to press, the Supreme Court has accepted the case which attempts to determine whether off-air taping in the homes is "fair use." The Ninth Court of Appeals (Justices Kilkenny, Canby, East) ruled that fair use was not appropriate in the home. Fair use was then described as "more productive" use, such as to be found in educational or study situations. Home use of off-air tapes was labeled as a less productive, or an "intrinsic" use. Another significant result of the Betamax trials was that a "continuing royalty"—or compensation to copyright owners for shows recorded in peoples' homes—was suggested as a possible remedy for inevitable future recording. A royalty fee could be added to the cost of blank tapes and/or new video recorders sold. This idea was originated by Melville Nimmer. In both the original trial and the appeal, it was recognized that to attempt to outlaw off-air taping equipment or technology would not represent a feasible solution. Perhaps the main decision to be made by the Supreme Court is: Does recording in the home constitute infringement? If the answer is yes, some remedy will be required.

There has been a large legislative response to the Betamax issue. More than ten amendments have been introduced. At the time of this writing, most amendments have stalled in anticipation of action of the Supreme Court. Many observers feel that because of the investigative powers of the Congress, the legislature should be the institution to develop a remedy to the problems of off-the-air videotaping. Lobbyists for the consumer electronics industry or the motion picture industry will surely apply pressure if the court decision goes against their cause. Legal authorities claim that judges will sometimes design their decisions in such a way that the legislature is encouraged to modify the situation.

Satisfying the Requirements of the Copyright Law and Patron Needs

A typical school or college media person observing the foregoing information is probably frustrated. All of the information must be

FALL 1983
F. WILLIAM TROOST

applied to each decision rendered, and this can appear a bewildering task. We must learn to function with existing information. There are some techniques that have proven valuable in dealing with faculties and others as far as practical functioning under current copyright regulations.

1. Assign one person the responsibility for delivering ongoing and current information about copyright to the faculty. This normally is the media specialist or the local supervisor in charge of the video equipment. It should be that person’s function to be knowledgeable about, not only the laws, but of all activities on campus (all programs copied and/or used for instruction).

2. Develop written policies that establish procedures for the use of all video-related equipment. They should have approval from uppermost administrators, and they should be distributed and understood by all people who might use available technologies. The lessons of the BOCES trial should be incorporated in day-to-day policies. Many institutions circulate such policies to legal counsel for written approval before they are distributed. Standard forms for job requests such as off-air tapes should be available (e.g., see appendix A).

3. Maintain a file of materials including copies of the law itself, pertinent journal articles, circulars from the U.S. Copyright Office, and make it accessible to all staff. There should also be sample permission letters available for contacting copyright owners should a staff person have the need (see appendix B). The source materials may then be used to support and verify decisions relative to uses of video technologies at your campus. The address of the Copyright Office is: United States Copyright Office, Public Information Office, Library of Congress, Washington, D.C. 20559 (many of the official materials are free). A copy of the Senate and House legislative history on the copyright law is an especially recommended resource. Copies of the print and off-air guidelines should be distributed to all staff members.

4. Update and educate staff members with a newsletter on copyright. One of the best techniques is to give people information about things you are unable to do before requests are made. This takes pressure off a situation if you can show that a policy has existed and has been publicized. Strive to insure your staff is aware of current law and guidelines, as well as your local policies.

5. Invite an outside speaker to come and present a session devoted to copyright problems. A successful technique might include some examples of common requests, followed by a discussion of whether
Copyright Problems Related to Video Technologies

they do or do not constitute fair (i.e., classroom) use of materials. Relying on a speaker or a copyright consultant is especially helpful if there is discontent about copyright restrictions or newer guidelines.

6. Avoid violations or copying where there is obvious circumvention of payment to the copyright owner. The unauthorized videotaping of a film lent on preview is an example of a request that should be denied. The support of administrators responsible for the library media center should be enlisted for particularly troublesome situations. All persons involved (e.g., faculty, staff, and administrators) should be aware that penalties can be very severe if legal actions are taken. Tremendous damage to public relations of an institution are at stake if an infringement action were successful. Lawyers’ fees, confiscation of equipment, and fines (nonwillful copyright infringement may carry a fine up to $10,000) are to be considered. It should also be noted that the law provides that statutory damages are not available to a plaintiff if a teacher had reason to believe his/her act was a fair use.

7. Communicate your feelings and experiences to your elected representatives if you believe the current law needs revision. Educators must do a better job of letting legislators know their needs. Finally, after considering everything else, a quotation from Cicero is appropriate: “No one can give you better advice than yourself.”

ACKNOWLEDGMENT

The author wishes to recognize the support and assistance of the following individuals: Jane Wallace, Judge Frank Troost and Trudice A. Troost.
Appendix A

Los Angeles Trade-Technical College

Request for Off-the-Air Video Taping

Please list all information on this form exactly to insure accurate recording

Name of Show to be Recorded ...........................................

Date of Showing ......................................................

Time of Showing ................................................ Length of Program ........................................

Channel and Network ..................................................

Instructional Topic(s) Covered: ........................................

........................................................................

........................................................................

........................................................................

........................................................................

Name of Requesting person(s): ...........................................

........................................................................

........................................................................

campus Phone: ............... .College Department: ...............

Notice: Unless otherwise arranged or specified, recordings may be erased after a period of 7 days. Instructors are requested to secure and become familiar with the college off-the air taping policy - available from media services (x-502). Requests should be made at least 3 days in advance.

Release: I certify that this request is in accord with the established college policy and the program is not readily available for sale, or rental from the county contracts or local University film libraries. This information is available from Audiovisual library clerk at x491.

Signed .................................................................

requestor's signature
Copyright Problems Related to Video Technologies

Appendix B

SAMPLE REQUEST FOR PERMISSION

April 2, 1976

Permissions Department
XYZ Company
111 Main Street
Anytown, U.S.A. 11111

Dear Sir or Madam:

I would like permission to use five frames from one of your filmstrips. These frames, showing the ring-formation of a young tree, will be combined for presentation with frames from filmstrips from two other companies showing the development of the tree through the years.

Title: Trees and Their Importance
Collaborator: William M. Harlow
Color Film Number 2392

Material to be Duplicated: Frames 245, 246, 247, 248, and 249.

Type of Reproduction: Color slides will be made of each frame.

Number of Copies: Only one copy will be made of each frame.

Use to be Made of Copies: The five slides will be shown in sequence with three slides each copied from two other filmstrips.

Distribution of Copies: The slide presentation will be shown via carousel projector to three classes of sixth grade science students. Average class size is 35.

A self-addressed envelope and a copy of this letter for your files are enclosed for your convenience.

Please let us know what conditions, if any, apply to this use.

Sincerely,

John Smith
Media Director
JS:cmh

Permission granted: ____________________________ Signature ________________ Date ________________

Conditions, if any: ____________________________ ____________________________

______________________________ Signature ________________ Date ________________

This Page Intentionally Left Blank
Copyright and the Duplication of Personal Papers in Archival Repositories

LINDA M. MATTHEWS

Manuscript and archival repositories across the country hold millions of items of unpublished personal papers—letters, diaries, journals, composition books, notebooks, photographs, sermons, student papers—some harboring literary qualities, most of historical interest only. Whatever their merit, they are used by thousands of persons each year in the creation of scholarly works of history, biography, and criticism as well as for projects as eclectic as news reporting, popular exhibits, term papers, local history, historic preservation, and genealogy. The potential users and uses of such materials are almost limitless, as are the objects of their quests. Probably the majority of these researchers receive photocopies of unpublished documents, which they have requested to save time from laborious note-taking, in preventing errors, or in documenting a claim. Although repositories limit photocopying of certain documents for various reasons, thousands of pages are copied each year. Photocopying for researchers has been growing steadily and will almost certainly continue to increase. Time is short, travel expensive, and the photocopy machine convenient and sure.

Introduction

Is the photocopying of unpublished personal papers by archives and manuscript repositories at the request of individual researchers for their own research or study permitted or provided for under the Copy-
right Act of 1976, which placed unpublished manuscripts under copyright for the first time? It will no doubt be surprising to many that the question has been raised, given the requirements of historical scholarship in this age and the common practice under common law. Although the copyright law is vague on the specific question, the answer is surely yes. The general support for such photocopying lies in the broad concept of "fair use," formerly recognized in judicial doctrine only for published materials, but now embodied in statutory law covering both published and unpublished works. "Fair use" of copyrighted material provides that, in spite of the monopoly in his writings by the copyright owner, other persons have certain limited rights to their use, and these rights may be exercised without permission of the owner and without payment of a fee. To argue that fair use does not apply to the duplication of personal papers for research purposes would require acceptance of the proposition that the authors of the act did not recognize or make allowance for the legitimate needs of the large group of historians, biographers and other researchers actively engaged in the dissemination of knowledge through the writing of histories and other useful works. The record does not support this proposition.

Neither the questions nor the answers concerning the duplication of personal papers are simple, however, and an understanding of the background of the issue is essential for a proper perspective on the impact of the new copyright law for repositories and their users. Although other changes affecting unpublished materials were embodied in the law, the question of photocopying and fair use has held center stage, as it has for published materials.

**Historical Rationale for Common-Law Protection**

Copyright in unpublished works was recognized in statutory law of the United States for the first time in the 1976 copyright revision act. Until this law went into effect on 1 January 1978, protection of literary property in unpublished works (including within the scope of the term the personal letters, diaries, and other historical materials housed in archival repositories) was governed by common law. The common law literary property right gave the author of a work or his heirs the exclusive right of first publication of the work, whether it be a letter or a work of more literary or creative nature. Moreover, under common law, any unpublished work was protected in perpetuity against publication without permission of the author or his heirs. Interpretation of the common law literary property right in letters in the United States
Duplication of Personal Papers in Archival Repositories

followed the judgment first rendered in England in 1741 when Alexander Pope sued to prevent publication of letters written by him to Jonathan Swift and others. Pope’s letters, said the court, could not be published without his consent since he had a property right in them separate from the paper on which they were written.¹

The leading American case involving literary property in letters grew out of a suit, in 1912, before the Supreme Court of Massachusetts, brought by the executor of the estate of Mary Baker Eddy to prevent the advertisement and sale of a group of Eddy’s letters at auction. Two questions were before the court: (1) could the auction house publish the letters as advertisement for the sale, and (2) did the auction house have the legal right to sell the letters at all? In the suit, the court distinguished between the paper on which the letters were written and the “thoughts and ideas expressed therein.” The pieces of paper, i.e., the tangible property, belonged to the receiver; the expression of thoughts and ideas, i.e., the literary (intangible) property, belonged to the writer. Since the papers belonged to the auctioneer, the court ruled that he could dispose of the letters as he saw fit, by selling, keeping, giving away, or destroying them. But he could not advertise by publishing them verbatim without permission of Eddy’s heirs or the executor. The auctioneer argued that the common law literary property right did not apply in this case since the letters had no “literary” value. This argument was rejected by the court. Although the letters were on “indifferent subjects not possessing the qualities of literature,” the ideas “in their particular verbal expression” were protected under common law no matter what their literary merit. “The right of an author to publish or suppress publication of his correspondence is absolute,” wrote the judge.² Other cases through the years were brought before various state courts, where common law cases are heard, but none reversed or changed the judicial interpretation as it was defined in the Eddy case.

The status of unpublished writings at common law plagued manuscript repositories and frustrated scholars. Two problems were particularly onerous. The most troublesome and unreasonable was the unending control of an author’s writings by his heirs, no matter how long the author had been dead. Under this system of perpetual literary right in unpublished works, scholars wishing to use those works would never be entirely free of the nagging worry of a suit for infringement. Despite a scholar’s best efforts, heirs were often hard to locate. In reality, of course, many historians and other scholars have quoted freely from and published entire letters and other writings of long-dead persons without clearing literary rights, often because heirs were untraceable.
Personal papers held by manuscript repositories are not predominantly the products of literary persons. Letters of teachers, ministers, merchants, missionaries, lawyers, plantation mistresses, and others of the less "literary" and less famous abound. Although literary rights exist in these writings no less than in the creative writings of an author, the likelihood of lawsuits arising from the publication of historical writings is considerably less. Nonetheless, unending control of literary property, even though the control was often not exercised, was likened to a hand reaching from the grave to prevent the spread of historical knowledge.³

A second, but related, difficulty in the use of unpublished materials under common law lay in the fact that the judicial doctrine of fair use established since 1841 in this country for published works had never been explicitly applied to unpublished works. Thus, legally, the fair-use defense might not be used for publication of quotations or excerpts from unpublished letters or, probably, for photocopying. In spite of the inapplicability of the fair-use doctrine for manuscripts, repositories duplicated materials and authors made verbatim use of the letters, diaries and other manuscript writings based, at least implicitly, when heirs could not be located, on the principle of fair use. An understanding existed among scholars and curators that such limited use in historical works was necessary and would likely be considered fair by the courts. Repositories supplying photocopies did so upon request of the researcher, at the same time issuing a warning that permission of the owner of literary rights must be secured before publication. Whether, under common law, the repository was acting within the law by photocopying unpublished materials in its holdings was a question that was not publicly raised. The service to scholarship was considered a public good and the practice fair and permissible. To refuse to photocopy, within reasonable limits, would have been to impede much serious and useful research.

Over the years, under common law, users sometimes made a conscious decision not to track down heirs, when to do so would have added years to many a worthy monograph or editorial project and prevented many works from being published at all. Indeed, editorial projects such as the massive publications of correspondence sponsored by the National Historical Publications and Records Commission (formerly National Historical Publications Commission) have not attempted to trace innumerable and often elusive heirs, claiming fair use of the material and pointing to publication for the public good. The correspondence of Thomas Jefferson was published without the search for
heirs to give sanction, even though under common law the publication was technically an infringement of literary rights. Julian P. Boyd, professor of history at Princeton and editor of the Jefferson papers, testified before a House committee in copyright revision hearings in 1965 that he and his staff “believed the courts would permit the technical invasion of literary property rights posed by publishing the letters to and from Thomas Jefferson” since to find all living heirs of all authors would have been impossible. Most experts have agreed that the courts would deal leniently with users of unpublished papers of considerable age and historical interest. In the case of historical materials, economic gains from publication are usually nonexistent. Heirs who recognize that their right of first publication has been violated (and many will not know or care) will probably not bring suit because no real economic loss is involved and, often, because they are happy to see their ancestors' letters or other writings in print. Users, archivists, and publishers are likely to be much more concerned about literary rights when the writings involved are those of a literary figure or a figure of some public acclaim. Profit from publication is more likely, as are concerns over privacy.

Although suits have been brought and injunctions issued to stop publication of letters, no clear court decision has been rendered that would provide guidance in the matter of fair use of unpublished writings or the right of repositories to provide photocopies for the private use of researchers. Suits that have been brought to prevent publication of letters have often centered on the question of invasion of privacy, a different legal principle from copyright, but a common-law right that can be protected at least in part by preventing publication of unpublished materials. Questions of fair use in manuscripts, of invasion of privacy in the use of historical materials, and the liability of the repository housing the materials might have been settled, but were not, in a case in 1964 involving the Ohio Historical Society and newly discovered letters of President Warren Gamaliel Harding.

Francis Russell, a historian preparing a biography of Harding, had learned of a cache of letters written by the president to Mrs. Carrie Phillips, with whom Harding had an affair. Russell persuaded the person in possession of the letters, who had been Mrs. Phillips's guardian in her last years, to donate them to the Ohio Historical Society. In the preparation of his biography, Russell included extensive quotations from them. When Harding heirs learned of the existence of the letters and of Russell's proposed biography using portions of them, they immediately filed for an injunction to impound the letters and to
recover substantial damages on the grounds that they had been irreparably damaged by the incident. An injunction was issued against an archivist at the society, biographer Russell, *American Heritage* magazine which published excerpts from the book, and McGraw-Hill, the publisher of the book. Rather than endure a court case, the four obeyed the injunction and the biography was published with blank spaces where quotations from the letters would have appeared. Some archivists and scholars bemoaned the avoidance of what could have been a test case for the issues of fair use of unpublished historical materials, the rights of heirs vs. the rights of scholarship, and the privacy rights of heirs.5

Another suit six years later also failed to enrich case law concerning the status of personal papers held in archival repositories. The suit concerned infringement of copyright in letters of a literary figure, Khalil Gibran. A theory had been advanced by Ralph Shaw and archivist Seymour Connor that unpublished papers deposited in a repository open to the public had by implication been "published" without notice and were therefore in the public domain.6 Although there was some agreement with this theory, most archivists took the conservative view and did not accept it. No court decision has dealt with the question. In 1970, the case involving letters of poet Gibran held by the Southern Historical Collection at the University of North Carolina might have served to settle the issue. In that case a biographer of Gibran obtained photocopies of Gibran writings from the library, receiving oral and written warnings that copies were supplied for research use only and could not be published without permission of the owner of literary rights. When the biographer produced a privately published two-volume edition of Gibran's letters without obtaining written consent of the copyright owners, the Gibran estate, joined by other interested parties, filed suit against the author for infringement of copyright. The University of North Carolina was not named in the suit, the library procedures in notifying the defendant of her obligations being clear and sufficient. Unfortunately, questions relating to literary rights in manuscripts held by repositories and perhaps to photocopying of unpublished materials for researchers were not answered by the suit, which the defendant lost on procedural grounds.7

Support for Statutory Law Protection

The end to perpetual common law literary right, a part of the proposed revision of the copyright law from the first introduction in the 1950s, was generally hailed by archivists and historians as a great benefit
to their work and to scholarship. Testimony from copyright revision hearings in the mid-1960s lauded the benefit to future scholars of a definite term for copyright in unpublished works. The advantages of a uniform federal statute and the application of fair use to unpublished writings were extolled. A few keepers of personal papers, particularly those whose curatorial responsibilities and scholarly interests lay with papers of recent American history, sounded a warning. Common-law literary right, they urged, had not inhibited scholars from using unpublished materials or from reasonable quotation therefrom, and had not kept repositories from providing access to those materials or from photocopying from them. A statutory term for unpublished papers could mean that during the copyright term scholars would be unable to publish from the material and repositories unable to photocopy, thus placing an obstacle in the writing of recent American history. Unless fair use were clearly defined or the rights of scholars to use unpublished material specifically accommodated, research in the recent American past would be sadly circumscribed. Most archivists and scholars agreed, however, that the gains from abolishing perpetual control of literary rights in unpublished writings outweighed these concerns.

Testimony by archivists and historians, heard primarily in the 89th Congress in 1965, sought to effect some changes in the bill then being considered on the term of copyright and the matter of preservation copying, but were otherwise supportive of the broad intent of the revision. They supported the end of the dual system of protection for published and unpublished works, and applauded the proposed statutory recognition of “fair use.” One interesting aspect of the testimony was the concentration on what the user of unpublished materials could do and should be allowed to do. The question of photocopying by repositories for individual researchers seems never to have been discussed in testimony.

At hearings before a subcommittee of the House Committee on the Judiciary in 1965, historian Julian P. Boyd spoke on behalf of the Society of American Archivists, the Organization of American Historians, the American Historical Association, the Southern Historical Association, the Western History Association, and the American Association for State and Local History. He noted that archivists, librarians and historians, whether professional or amateur, rest their use of historical documents on the same premise—that “they are promoting the public good by advancing and disseminating a knowledge of our past and that in a democracy [the written record] must be accessible on a basis of equality....” The organizations he represented welcomed the recogni-
tion of the doctrine of fair use as developed in the courts and the end of the common law principle that literary property rights in unpublished works exist in perpetuity. He expressed concern, however, that the vast quantity of historical manuscripts in repositories, "letters, diaries, maps, business records and every other form of record upon which the historian depends and to which there adheres no commercial value whatever in their literary substance," were treated in the law on the same basis as the unpublished manuscripts of authors of creative works. He warned of the dangers that might ensue to scholarship and ultimately to the public good if historians, librarians and archivists were forbidden to use or photocopy historical materials until fifty years after the author's death.9

The Council of the Society of American Archivists proposed two changes which Boyd presented to Congress. The first requested an additional provision to allow facsimile copies of manuscript collections to be deposited in other institutions. The second proposed a reduction in the copyright term in unpublished works to twenty-five years after the author's death or fifty years from the date of the writing.10

In the same hearings, testimony by the deputy archivist of the United States expressed once again the concern of archivists with unpublished papers in historical societies and other repositories, that "have little value for publication as individual items but are of great interest for historical research use." He pointed particularly to the activities of the National Historical Publications Commission and the intention to use federal money to sponsor the "microcopying of collections of nationally significant manuscripts" in order to make them broadly available to scholars. He urged that archives be allowed by the law specifically to reproduce collections of unpublished papers "for purposes of preservation and security or for the deposit of copies thereof in other such institutions for research use."11 The president of the American Council of Learned Societies addressed in testimony several issues relating to unpublished works, particularly the hope that clearer guidelines be provided for fair use. His remarks on photocopying related only to published materials. The executive director of the American Historical Association, testifying before the ninetieth Congress in 1967, urged that the fair-use doctrine be applied "liberally and equally to both published and unpublished works." No specific reference to photocopying was made in his remarks.12

After the mid-1960s and through the wrangles over copyright revision of the early 1970s, the question of unpublished materials was not again the subject of any substantive discussion. The issues were consid-
Duplication of Personal Papers in Archival Repositories

Questions involving new technology, particularly cable television, and discussion over library photocopying as the Williams & Wilkins case proceeded, held the attention of legislators, copyright officials, publishers, and users. The passage of the law in 1976 came as a relief to many who feared that seemingly insoluble disputes might once again thwart copyright law revision. Archivists who studied the law believed that their concerns had been adequately covered in the fair use and photocopying provisions, although relatively little attention had been devoted in the long history of copyright revision to the problems of unpublished materials.

Current Statutory Protection

When the revised copyright law went into effect on 1 January 1978, all unpublished works not already in the public domain were automatically given federal copyright protection. Perpetual common-law copyright for unpublished works was ended. The term of protection provided by the statute was the same for both published and unpublished works—the life of the author plus fifty years. For unpublished works created before that day, the law provided that, no matter how long dead the author, copyright would not expire before 31 December 2002. This special provision, according to the Senate report, gave compensation for the taking away of one right and substitution with another.  

Thus, on 1 January 2003 an untold number of pages of unpublished letters, diaries, reports, poems, novels, interviews, and other varied works in which copyright could legitimately be claimed will go into the public domain, available to potential users without fear of copyright infringement.

Two avenues exist for the owner of literary rights in unpublished works to retain some measure of control of the use of the work past the automatic expiration of copyright. One of these, provided by the statute, is publication. If a work is published before copyright expires, the copyright is automatically extended for twenty-five years. Thus, if an older work, scheduled to go into the public domain on 1 January 2003 is published before that date, copyright for the published work is extended until the end of 2027. The provision for publication encourages wider dissemination of writings, as the law intended. One other avenue, troublesome to the scholar, is a donor restriction, in the form of a contract, that restricts access to materials beyond the date at which copyright would be expected to expire. Contracts restricting access are usually requested and accepted to guard against embarrassment or harm
to living persons. The fact that the materials restricted are no longer under copyright will have no bearing on the validity of the donor agreement, since the right to privacy is a separate and distinct right from copyright. Repositories accepting such stipulations should ensure that access restrictions are legitimate and will expire at a reasonable time. On the other hand, contracts that seek to extend the period of copyright, that is, whose sole purpose is to control the right of first publication beyond the time at which materials would enter the public domain, would probably not be valid, but such questions may have to be settled in the courts.14

Until 31 December 2002 archivists must be concerned with the duplication and use of every unpublished, nongovernmental writing in the repository; after 1 January 2003 attention will be narrowed to those unpublished writings not in the public domain whose authors have not been dead for fifty years. The repository's problems could be eased somewhat by requesting transfer of copyright from the donor. The new copyright law provides that transfer of copyright must be by written instrument signed by the copyright owner.15 Donors, of course, can only transfer copyright in letters and other works which they or their ancestors wrote. Donors have no copyright in letters written to them by others. Thus, a transfer of copyright by a donor of personal papers would be only a partial transfer. Any transfer would be a benefit to the repository in granting researchers full privileges in making use of the papers it has taken the pains to acquire and process, and would resolve some questions concerning photopying.

Ambiguities in the Fair-Use Provisions

What, then, does the law say specifically about the duplication of unpublished writings by persons other than the copyright holder or by repositories for their users? Specifically, it must be allowed, it says very little. The sections of the law that affect repositories' and users' rights in duplication and use, and that have been the subject of controversy since the passage of the law, are the two sections outlining the broad concept of "fair use" (sections 107 and 108) which together make up the law's treatment of the previously uncodified fair-use doctrine.16 Section 107 ("Limitations on Exclusive Rights: Fair Use") offers Congress' general statement of the doctrine as it had been previously expressed by the courts, while Section 108 ("Limitations on Exclusive Rights: Reproduction by Libraries and Archives") extends the photocopying privilege to certain specific cases that might not be legitimately claimed as fair under Section 107.17
Writers on the new copyright law have agreed that fair use is an ill-defined, nebulous, and difficult concept, and that the supporting explanations in the House and Senate reports on the law do not aid a great deal in clarification. Nowhere is this more true than in the application to unpublished works. As stated earlier, the judicial doctrine of fair use was never applied explicitly to unpublished works under common law. Since unpublished works are now covered by statute, fair use may now presumably be applied to the use of unpublished materials for the first time. This change in the law is a major benefit for users and for those who administer unpublished papers. In fact, as noted before, biographers, historians, and other scholars have long depended on the fair-use principle in their use of manuscript materials.

The Copyright Act defines fair use as a use "of a copyrighted work, including such use by reproduction for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research...." The determination of whether a particular use is fair must depend on the individual circumstances of each case, but criteria have been provided in the law to help in determining "fairness." These criteria, which will be used by the courts for determination of fair-use cases, include (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The House and Senate reports and the Conference Committee report indicate that criteria (1) and (4) will be of particular importance.

The question raised by archivists is this: Does section 107 give repositories legal sanction for the photocopying that they undertake at the request of users for study and research purposes? That is, does photocopying under 107 apply only to that undertaken by the user? Arguments may be made on both sides, but the "rule of reason" and a concern for the promotion of historical research supports a positive response to the first question. The House and Senate reports offer conflicting signals and no definite answers. The House report does not refer specifically to unpublished materials in discussing fair use, but asserts that the "doctrine has as much application to photocopying and taping as to older forms of use...." The Senate report, on the other hand, notes that the application of fair use to unpublished works would probably be very narrow; photocopying was not specifically mentioned.
Unpublished materials were given scant attention in either report, perhaps because no one wished to become involved with all of the ramifications implied by the end of the dual system of protection or because the questions were considered at most academic.

It seems reasonable to assume, as did Julian Boyd in his testimony almost twenty years ago, that the act, by placing unpublished papers under statutory copyright and by establishing statutory recognition of fair use, did by certain implication extend fair use, including photocopying, to unpublished materials. The former Register of Copyrights, Barbara Ringer, speaking before the annual meeting of the Society of American Archivists in 1977, asserted that the only part of the copyright statute on which to base archival photocopying for individual researchers was Section 107, since Section 108 included no such provision. Indeed, without Section 107, the duplication of unpublished letters, diaries, and other historical materials for the use of scholars and others would be seriously hindered, given the deficiencies of Section 108 for unpublished materials.

Section 108 has been a source of confusion, concern, and dismay to keepers of archival materials since the meeting of the Society of American Archivists in October 1977. The section was intended as an extension of the fair-use provision to give specific rights for photocopying under certain circumstances that might not otherwise be clearly legal under fair use. The general conditions for photocopying under 108, as set forth in subsection 108(f) are easily met by most archives: (1) that the reproduction not be made for profit, (2) that the collections of the library or archives are open to the public or to all "persons in a specialized field," and (3) that the reproduction includes a notice of copyright. It is true that only subsection 108(b) specifically refers to unpublished works, although other sections refer to materials held by a "library or archives." Subsection 108(b) allows for the duplication of an unpublished work by an archives from its own collections for "purposes of preservation and security or for deposit for research use in another library or archives...." This provision was added at the request of the Society of American Archivists, presented by Julian Boyd, since the duplication of entire collections and their deposit in another repository might not be considered fair use.

Archivists have also read subsection 108(d) as authority to provide photocopies from their collections for individual users, upon the users' request, since the provision for making a "copy or phonorecord of a small part of any other copyrighted work" certainly appeared to include unpublished materials, by definition of "copyrighted work" under the
new law. The Copyright Office has repudiated that interpretation, asserting that copying of unpublished manuscripts is not covered by that section. Other copyright experts have strongly argued that 108(d) does indeed apply to unpublished materials. The viewpoints of archivists on the interpretation of Section 108 have been presented in publications of the Society of American Archivists, in publications of regional archival organizations, and in testimony during the five-year review on the operation of that section.

Effects on Photocopying

The Copyright Task Force of the Society of American Archivists presented testimony before the review panels in 1980 and 1981 concerning the effects and application of 108 to the photocopying of unpublished materials. Archivists testified that their institutions have continued to make photocopies of unpublished materials for the use of individual scholars and that the law has not had a "chilling" effect on that service. Sections 107 and 108(d) were interpreted to provide that authority. Archives and manuscript repositories, it was reported, have made careful efforts to abide by the provisions of the law concerning copyright warnings and notices, and are careful to consider the nature of the request and the nature of the work before granting photocopies. Photocopies are made with the warning that no further duplication is allowed without consent of the repository and the copyright owner.

It is recognized by manuscript curators, and will doubtless be recognized by the courts, that all unpublished works are not equal. A repository might readily photocopy for a researcher fifty pages of letters of a Civil War soldier or a diary of a nineteenth-century missionary, but refuse to photocopy, without the copyright owner's consent, an entire unpublished diary of a literary figure. The age of the materials is also a potential consideration. Can the repository providing the photocopy service be held liable if the copies are later published without permission of the copyright holder? Although the law relieves library personnel from paying statutory damages for infringement of copyright if they had reason to believe that what they were doing was a fair use under Section 107, there is still the possibility of a suit. Copyright Office staff have informally recommended that repositories install self-service copiers in order to place the burden on the user. Such a practice would solve only a small part of the photocopying problem and is not acceptable to repositories holding fragile, unique unpublished materials. Most repositories continue to prohibit user copying of manuscripts, primarily
to prevent improper handling of materials. Photocopying for mail requests, of course, must of necessity involve library staff. The possible liabilities from photocopying cannot be entirely, or even largely, passed to the user.

**Survey of Manuscript Repositories on Photocopying**

A limited survey of selected manuscript repositories across the country reveals that the copyright act has affected photocopying practices in those repositories only minimally and primarily in a technical way.

All repositories surveyed have made certain that copyright notices were printed on reproduction request forms, that copyright warnings were prominently displayed near self-service machines (though these were few), and that photocopies carried a notice alerting patrons to possible copyright in the materials. Two repositories out of seventeen respondents allow self-service copying, but both began the practice before the copyright act went into effect, primarily to save staff time. Only one reported limiting the amount of copying that it will provide a researcher because of the new law. Rather, limitations that exist on photocopying have been in place for many years before the act and were instituted for a variety of reasons, including the possible violation of literary rights if entire collections or entire "works" were copied for a researcher. Other limiting factors have included lack of staff to accommodate unlimited copying, the fragile nature of certain materials, and donor restrictions on photocopying. Those not allowing self-service copying gave as their reasons that manuscripts will be carelessly handled and thus damaged, and that the arrangement of loose papers will be seriously disturbed. Care is taken to inform the user that clearance of copyright is his responsibility.

The Library of Congress did make a significant change in its regulations on photocopying as a result of the new copyright law.

Before 1 January 1978 LC would not make photocopies or allow a copy to be made (hand or photocopy) of any work (letter, diary, or other) that was less than fifty years old without clearance from the owner of literary rights. On 1 January 1978 this prohibition was removed. Since all unpublished works are now covered by federal statute and photocopying is permitted by fair use, no justification remained to prohibit users from making copies in lieu of taking notes, even from recent materials. The Library of Congress Manuscript Division instituted self-service photocopying in its manuscript reading room several years before the 1976 copyright revision law was implemented. Certain materials may
Duplication of Personal Papers in Archival Repositories

still not be copied. Donors, particularly donors of literary papers, papers of a controversial or sensitive nature, or papers of recent public figures, sometimes restrict access, or though allowing access, prohibit photocopying. In spite of any right to photocopying or other kinds of fair use under copyright law, restrictions on use in the contract accepted by the repository take precedence. Users of collections are informed by staff in the manuscript reading room that certain materials may not be copied because of donor restrictions.

Repositories holding papers of authors take special precautions since, regardless of donor restrictions, copyright infringement is more likely to be a matter of litigation. Indeed, donor contracts stipulating how papers may be used sometimes do not exist. Papers of literary figures (and historical figures, but these less often) are offered for sale in the manuscript market and purchased by research institutions. Copyright in the writings remains, since transfer must now be in writing, but no donor agreement exists to lay ground rules on use of the papers. The Humanities Research Center of the University of Texas has a long-standing policy requiring users to obtain permission of copyright owners before any photocopies will be made. The requirement is waived in the case of older materials or other items for which the reader can provide evidence that a copyright holder cannot be located. This requirement is part of the center’s policy and has not been instituted or altered because of the new copyright law.

To the question: “Do you believe that the fair use section of the copyright law (Section 107) makes adequate provision for the photocopying (or other facsimile reproduction) that you currently undertake for researchers?” 59 percent of those surveyed said yes, 23.5 percent no, and 17.5 percent were uncertain about the application of fair use to archival photocopying. Several argued strongly for the application of 108(d) to unpublished materials and stressed the need for clarification of the law to that effect.

Dissatisfaction with the Register’s Report and Threats to Scholarship

With the issuance in January 1983 of the Register of Copyrights’ five-year report on the effects of Section 108, the lines of battle on that issue appear to be drawn. One of the Register’s four statutory recommendations endorses “an amendment to sections 108(d) and (e) to make it clear that unpublished works are not within their scope.” If such an amendment should be enacted, archivists and users of unpublished materials must rely entirely on fair use. But one Copyright Office
LINDA MATTHEWS

representative has called the applicability of fair use to unpublished works a "tough little issue and the Register's report seems to deny the applicability altogether." What does fair use mean in relation to photocopying of unpublished papers by archives for researchers? For historians who wish to publish excerpts from unpublished works, how will fair use be defined? For many older historical materials, the question may mean little. Some scholars will no doubt continue to be bold enough, in the name of history and the greater good, to publish letters and other unpublished writings when heirs cannot be found, and will publish with impunity. There are others who may not wish to risk publication. One copyright expert, placing himself on the side of the historians and scholars, has urged that "college and universities not be timid in terms of asserting rights under the new copyright act, that they will not only be willing to litigate but... invite litigation in a proper case."

Testimony by Julian Boyd and others notwithstanding, it is clear now that the perplexing problems of the use of unpublished personal papers, with their long history of privacy rights and common law literary rights, have not been dramatically resolved by the revised law. The ultimate entry of unpublished materials into the public domain will in the end justify the current turmoil. For those materials still covered by statute, archivists, researchers, and librarians, those who administer and those who use unpublished materials, must assume that the rule of reason will apply and that it is liberal.

References

Duplication of Personal Papers in Archival Repositories

10. Ibid.
11. Ibid., p. 1111.

**Additional References**


Library Reproduction of Musical Works:
A Review of Revision

CAROLYN OWLETT HUNTER

ARTICLE 1, SECTION 8 of the U.S. Constitution vests in Congress the
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...."1 The wording itself has given
rise to many a discussion on actual intent, especially with regard to
subject matter. Today we speak of "intellectual property" when we
speak of authorship in the copyright sense. This reflects a clear shift in
emphasis from that of laws a hundred years ago, although the Constitu-
tional mandate remains.

Hearings and legislation, cases in court as well as out-of-court
settlements, meanwhile, have necessarily concerned themselves with
monetary aspects of copyright. Two sections of the new law (PL94-553),
however, have specifically dealt with the not-for-profit aspects of copy-
right. The concept of "fair use" has now been codified in Section 107,
although authors have not been altogether pleased with the result. Nor
for that matter have educators and librarians. The Copyright Office
itself had great difficulty in drafting this legislation, as did the House
and Senate at the time of the long years of hearings and comment.
Among the most difficult of all must have been Section 108, devoted to
"Reproduction by Libraries and Archives" and the subject of this paper.

Carolyn Owlett Hunter is an Assistant Librarian, Cornell University, Ithaca, New York
and Chairman, Music Library Association Legislation Committee.
Music has been covered by copyright protection for only a comparatively brief period, since it is not specifically mentioned in a federal copyright statute until the 1832 Act. Not until 1972 could sound recordings claim protection at the federal level (although the states had enacted legislation ad interim). Under the 1976 Act, music is seen in a special light. It can be copyrighted as before, but library photocopying is severely restricted. For some reason it was largely excluded from the King Research surveys, and thus it very nearly escaped being addressed specifically in the resulting report of the Register of Copyrights.

In the history leading up to PL94-553, music librarians typically took issue with the wording of the act's Section 108(h), which largely excludes a "musical work" from the classes of materials for which copying by libraries is permissible. Section 108 itself is a "limitation" on the rights of the copyright owner (in most cases read publisher). "Reproduction by Libraries and Archives" is available for other classes of materials, but not for "a musical work." The act states:

\[108\](h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or to a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights under subsections (b) and (c)....

In order to understand why musical works are treated specifically here and elsewhere in the law, we should ask how they have generally been dealt with under various laws, in law schools, and in the entertainment industry since the Copyright Act of 1832. The concept of music as "entertainment" is strongly reflected in the wording of Section 108(h) of the current law. Music librarians have long sought to separate the contrasting concept of music as a subject of scholarship, research and education, from the for-profit sense with which entertainment is associated. During the legislative history, through lobbying, forceful testimony, even pointing to unrelated case law involving financial harm, the publishing community was able to convince legislators that photocopying would erode the copyright in a work, even that done under the strict reading of Section 108(h). The legal staff of the Copyright Office, having most likely been exposed to the "entertainment law" concept presented by many law schools, could also have been an influential factor. In any event, music library representatives were then unable to convince either the publishing community, or the Copyright Office and House Subcommittee, that music was also a subject of research, study of
Library Reproduction of Musical Works

general scholarship. Perhaps more basic, these parties missed the important fact that the music industry is in a constant state of flux, thus making general permissions for out-of-print materials far more difficult to obtain than in any other publishing field. Virtually all case law and suits settled out of court had pointed to relatively clearcut situations. To the music library community at the time, the specifics of Section 108 seemed simply not to be addressed by any of the parties involved with the legislation except, of course, the other library associations with whom the Music Library Association had drafted testimony. PL94-553 was signed into law with Section 108 as quoted earlier.

Impact of the Copyright Act on Music Libraries

Even before passage music librarians had been coming to know the law through articles, lectures, sessions at national and local meetings, and fact sheets. Articles on 108(h) appeared in the MLA Newsletter and in Notes, the quarterly journal of the Music Library Association (MLA). In addition, publishers of serious music and Copyright Office representatives were attempting to continue the discussions of differences in outlook. The result, however, was further confusion. On the one hand, the Copyright Office representatives, who were theoretically not at liberty to offer legal advice, did indeed advise that music might well be copied by a library if "fair use" (Section 107) were invoked. The guidelines attendant to Section 107, however, do not necessarily provide for the needs of music libraries, nor were they intended to. Publishers, on the other hand, spoke of the monetary aspects and "erosion" of the copyright. Music librarians maintained once again that they saw no monetary disadvantage to such copying; in fact, they maintained, it would be to the advantage of composers and publishers to have certain music brought to light so that it could be made available—specifically, the music which the publisher might not have cared to promote due to "lack of interest" in the work. The parties still were not communicating, nor seemingly listening to one another.

Over subsequent years music libraries have gradually ceased to provide copies for interlibrary loan or for reserve for class assignments. Many felt that they were losing their ability to serve their patrons and to fulfill their role as librarians—at least as well as they had in the past. Nor did they cherish the idea of translating into practice a law which, had they been attorneys, they would have termed bad law.

When the new law became effective on 1 January 1976, music librarians were faced with the grim reality that they must come to grips
with the fact of its existence. Indeed, many would decide to alter some seemingly proper and innocent practices that had evolved, and which they had been carrying out in the interest of their patrons.

As regards library photocopying, however, the act itself recognized the difficulty of codifying both the doctrine of "fair use" and library copying. Indeed, in the particular issue of library photocopying (or, rather, "reproduction"), the difficulty is specifically recognized in one of eighteen briefing papers prepared by the Copyright Office, as cited in the Register's testimony before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice on 7 May 1975:

Related to the general question of the extent to which the "fair use" doctrine should operate as a limitation on the exclusive rights of the copyright proprietor is the specific issue of exceptions for library reproduction of copyrighted works.4

The second paragraph of the summary begins with the statement:

Section 108 of the revision bill represents an effort to provide a partial legislative solution to a most difficult issue.

Congress having recognized the thorny problems at hand, incorporated Section 108(i) in order to provide a monitoring device, as well as to ascertain where the law had fallen short of providing for acceptable practices.

The ideas of Barbara A. Ringer, then Register of Copyrights and a prime drafter of the legislation, permeate the hearings and the surrounding discussions, and ultimately were taken into account by the legislators when the law was eventually passed. This was particularly important for music. Section 108(h)5 having been passed as written, a further look would be necessary after the law had been in effect. At that time music librarians believed that Congress would clearly recognize a "stifling effect" on music scholarship, research and education, as well as other allied activities, including publishing. The provisions in Section 108(i) provided for a review, and the music library community anticipated its voice being heard in that review. Section 108(i), in paraphrase, mandates consultation by the Register of Copyrights with the various parties involved—including publishers, authors, library users, librarians, and other users of copyrighted materials—in order to evaluate Section 108.6 This was to be reported out within five years, and, in a splendid display of efficiency given the circumstances and the magnitude of the undertaking, this has now been achieved. However, the "Road to Review" (as was the so-called "Road to Revision") was fraught with problems and perhaps special prejudices concerning
Library Reproduction of Musical Works

music. King Research, Inc. (KRI), of Rockville, Maryland, was contracted for a planned survey which would provide the Copyright Office with data. Surprisingly, the questionnaires contained no specific questions on music. Nor were any representatives from the music library community invited to participate in the Copyright Office's sessions held to develop the survey questions. To many in the music library world this seemed a gross oversight. Because of exclusions of printed and recorded music from the majority of sanctions of 108, music librarians had concluded, music would necessarily be a part of any survey on the topic of reproduction by libraries. Instead, word came circuitously from the Copyright Office that since music as a class of materials was excluded from 108, it need not be a topic of study.

MLA Legislation Committee Lobby with MPA

Prompt action by MLA's Legislation Committee and officers sought to remedy the situation by meeting directly with the Copyright Office. It was then too late to adjust or augment the already expensive King survey. MLA representatives, however, were assured that any information they could obtain from a "parallel" survey addressing musical works specifically could be taken into consideration in the final report. They were advised that their survey must, for the sake of validity, include in its undertaking representatives from the music publishing community.

In order to prepare a survey in the available time, an ad hoc Working Group was formed, including MLA Legislation Committee members, board members of the Music Publisher's Association of America (hereafter cited as MPA), and sound archivists. By the autumn of 1981 questionnaires for the survey were complete and in the hands of Dr. Gustave Rabson at Clarkson College of Technology in Potsdam, New York, who generously contributed the data processing and questionnaire evaluation. The continued communication within the Working Group turned out to be of great importance.

During the survey, the MLA Legislation Committee also continued to meet. It was MLA's basic belief that there might still be some hope for concessions in line with their earlier testimony during the revision process prior to 1976. A resolution was approved in general session at the MLA Annual Meeting in Santa Monica, California on 4 February 1982. As we shall see, this resolution has largely been disregarded by the Copyright Office:
Resolution
The Copyright Law of the U.S.
PL 94-553
Section 108, Reproduction by Libraries and Archives

WHEREAS, prior to the Copyright Act of 1976, which went into effect on 1 January 1978, libraries supported research and scholarship by providing certain music materials in form of a reproduction, as did libraries in other disciplines, and
WHEREAS, since 1978 such music copying has not been permitted under Section 108 of the Law (although it has been permitted for other materials), to the detriment of music research and scholarship and the arts as a whole, and
WHEREAS, the Copyright Act has not achieved the proper balance between the rights of authors and the needs of users, as its stated intent, and
WHEREAS, music libraries, as a national resource, and their patrons, as educators, authors and scholars, have a need just as right and just as proper for access to music materials as do libraries and patrons who deal with materials in other formats, and
WHEREAS, creators and publishers themselves have often had a need to have reproductions of musical works supplied by libraries, and
WHEREAS, elimination of the exemption of a "musical work" from the library photocopying section of the Copyright Act would recognize the needs of users and restore the balance between user and author, and
WHEREAS, such elimination would have no discernable monetary effect upon either publisher or author,

THEREFORE BE IT RESOLVED that the United States Congress enact legislation permitting the reproduction of a musical work under PL 94-553, §108.


Continuing its work on the survey, the ad hoc Working Group met in the summer of 1982 at the Cornell Club of New York. Here they were able to agree on a proposal to submit to the Copyright Office. Long deadlocked over the idea of music as a topic of serious scholarly endeavor in and of itself (as apart from public performance for profit, for example), neither MLA nor MPA had been able to accept fully the other's point of view. Talks at the Cornell Club meeting, lasting a day and a half, finally gave the Working Group a much-needed chance to sit quietly and discuss the matter. The resulting joint proposal, submitted to the Register of Copyright, intended to make out-of-print material available for library copying under specified circumstances. Ultimately accepted by both MLA and MPA, it was entered for the record with the
Copyright Office. The text of the proposal, which was intended as a new paragraph of Section 108, reads as follows:

The rights of reproduction granted by subsection (e) may be exercised by libraries and archives in respect of musical works if the library or archive shall first undertake a diligent search for the copyright proprietor of such musical work, which search shall include, but not be limited to, the records of the Copyright Office. If, following such search, the copyright proprietor cannot be located, the library or archive may reproduce such musical work in accordance with subsection (e). If the search discloses the identity and location of the copyright proprietor, no such reproduction may be undertaken without the approval of the copyright proprietor.

The drawbacks to the exercise outlined in the proposal are both numerous and obvious; but this small step, it was felt, could also pave the way for further discussions, and further loosening of the law's restrictions on the reproduction of musical works under Section 108.

Another purpose of the July 1982 Cornell Club meeting was to write a joint report on the findings of the three-part survey described earlier. Unfortunately, for a variety of reasons this was not possible. The publishers for their part, did not wish to see the survey results from the publishing industry published at that time, generally feeling that the results yielded little, if anything, of value or pertinence. MLA, however, felt it mandatory that the library survey results be reported out, and did submit this portion of the survey to the Copyright Office together with a general statement from the association on the matter. Both of these documents are included in the comment volumes accompanying the Register's report. Their wide range of feelings concern a law which is greatly changed from past understanding and practice, which required them to formulate and defend new policies.

MLA/MPA Recommendation for Revision

When the Register of Copyrights reported to Congress, the joint MLA/MPA proposal was, interestingly, one of the few recommendations made for change within the law. The Register states:

The Copyright Office endorses the substance of the proposal to accord a copying privilege for out-of-print musical works after an unsuccessful, reasonably diligent search for the name and address of the copyright proprietor. The Office considers the proposal a salutory example of the positive results that can be achieved by persistent good
faith negotiations between the principal parties affected by a photocopyping practice for the Act's photocopyping provisions.

As a technical matter, it may be more appropriate to amend paragraph (e) rather than add a new subsection (j). In any case, paragraph (h) would require consequent amendment.

The Copyright Office is not prepared to support any other new "108 copying" privileges with regard to musical works. The Office believes that the adoption of the above amendment, together with the existing fair use exemption, will provide adequate copying privileges to facilitate musicological research. If the 1982 Resolution of the Music Library Association represents a broader proposal than the above amendment, the Office recommends rejection of the Resolution's proposal.

At this writing, however, there has been no further discussion between any of the parties involved in the "musical work" question. Nor does any appear to be planned for the near future.

Of major import at present, and crucial for the correct interpretation of the law as it reads today, is the relationship between Section 107 and 108, a perhaps more convoluted problem than might be imagined. How librarians themselves read the law and how they conduct their business under it will inevitably establish certain traditions. Just now music publishers do not appear to be conspicuously litigious with regard to libraries per se; music litigation is quickly settled out of court in cases which appear to be clear infringements.

The history of the actual legislative activity surrounding PL94-553 has already spanned nearly two decades, and made for a flourishing copyright bar and kept our civil servants busy indeed (to say nothing of copyrightologists-errant). But, may we say one day, as did Hazlitt: "It was a time of promise, a renewal of the world and of letters...."

References

5. Copyright Act, §108(h).
6. Ibid.
<table>
<thead>
<tr>
<th>V.</th>
<th>N.</th>
<th>Title</th>
<th>Editor</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>1</td>
<td>Library Boards</td>
<td>J. Archer Eggen</td>
<td>July 1962</td>
</tr>
<tr>
<td>11</td>
<td>5</td>
<td>Law Libraries</td>
<td>Bernta J. Davies</td>
<td>Jan. 1965</td>
</tr>
<tr>
<td>11</td>
<td>11</td>
<td>Financial Administration of Libraries</td>
<td>Ralph H. Parker</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Paxton P. Price</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>1</td>
<td>Public Library Service to Children</td>
<td>Winfred C. Ladley</td>
<td>July 1963</td>
</tr>
<tr>
<td>12</td>
<td>2</td>
<td>Education for Librarianship Abroad</td>
<td>Harold Larcouer</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>in Selected Countries</td>
<td>J. Clement Harrison</td>
<td>Oct. 1963</td>
</tr>
<tr>
<td>12</td>
<td>3</td>
<td>Current Trends in Reference Services</td>
<td>Margaret Knox Goggen</td>
<td>Jan. 1961</td>
</tr>
<tr>
<td>15</td>
<td>1</td>
<td>Research Methods in Librarianship</td>
<td>Guy Garrison</td>
<td>July 1964</td>
</tr>
<tr>
<td>15</td>
<td>2</td>
<td>State and Local History in Libraries</td>
<td>Clyde Watson</td>
<td>Oct. 1965</td>
</tr>
<tr>
<td>15</td>
<td>3</td>
<td>Regional Public Libraries Systems</td>
<td>Hanno S. Smith</td>
<td>Jan. 1965</td>
</tr>
<tr>
<td>15</td>
<td>4</td>
<td>Library Furniture and Furnishings</td>
<td>Frazer G. Poole</td>
<td>Apr. 1965</td>
</tr>
<tr>
<td>14</td>
<td>1</td>
<td>Metropolitan Public Library Problems</td>
<td>H. C. Campbell</td>
<td>July 1965</td>
</tr>
<tr>
<td>14</td>
<td>2</td>
<td>Junior College Libraries</td>
<td>Charles L. Trinkner</td>
<td>Oct. 1965</td>
</tr>
<tr>
<td>14</td>
<td>3</td>
<td>Library Service to Industry</td>
<td>Katherine G. Harris</td>
<td>Oct. 1965</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Eugene B. Jackson</td>
<td></td>
<td>Jan. 1966</td>
</tr>
<tr>
<td>14</td>
<td>4</td>
<td>Current Trends in Branch Libraries</td>
<td>Andrew Godels</td>
<td>Apr. 1966</td>
</tr>
<tr>
<td>15</td>
<td>1</td>
<td>Government Publications</td>
<td>Thomas S. Shaw</td>
<td>July 1966</td>
</tr>
<tr>
<td>15</td>
<td>2</td>
<td>Collection Development in University Libraries</td>
<td>Jerold Orne</td>
<td>Oct. 1966</td>
</tr>
<tr>
<td>16</td>
<td>1</td>
<td>Cooperative and Centralized Cataloging</td>
<td>Esther J. Piercy</td>
<td>July 1967</td>
</tr>
<tr>
<td>16</td>
<td>2</td>
<td>Library Uses of the New Media of Communication</td>
<td>Robert L. Talmaide</td>
<td>Oct. 1967</td>
</tr>
<tr>
<td>16</td>
<td>3</td>
<td>Abstracting Services</td>
<td>C. Walter Stone</td>
<td>Oct. 1968</td>
</tr>
<tr>
<td>16</td>
<td>4</td>
<td>School Library Services and Administration at the School District Level</td>
<td>Foster E. Mohhardt</td>
<td>Jan. 1968</td>
</tr>
<tr>
<td>17</td>
<td>1</td>
<td>Group Services in Public Libraries</td>
<td>Grace T. Stevenson</td>
<td>July 1968</td>
</tr>
<tr>
<td>17</td>
<td>2</td>
<td>Young Adult Service in the Public Library</td>
<td>Audrey Bie1</td>
<td>Oct. 1968</td>
</tr>
<tr>
<td>17</td>
<td>3</td>
<td>Development in National Documentation and Information Services</td>
<td>H.C. Campbell</td>
<td>Jan. 1969</td>
</tr>
<tr>
<td>17</td>
<td>4</td>
<td>The Changing Nature of the School Library</td>
<td>Mae Graham</td>
<td>Apr. 1969</td>
</tr>
<tr>
<td>18</td>
<td>1</td>
<td>Trends in College Librarianship</td>
<td>H. Vail Deale</td>
<td>July 1969</td>
</tr>
<tr>
<td>18</td>
<td>2</td>
<td>University Library Buildings</td>
<td>David C. Weber</td>
<td>Oct. 1969</td>
</tr>
<tr>
<td>19</td>
<td>1</td>
<td>Intellectual Freedom</td>
<td>Everett T. Moore</td>
<td>July 1970</td>
</tr>
<tr>
<td>19</td>
<td>3</td>
<td>Book Storage</td>
<td>Mary B. Cassata</td>
<td>Jan. 1971</td>
</tr>
<tr>
<td>19</td>
<td>4</td>
<td>New Dimensions in Educational Technology for Multi-Media Centers</td>
<td>Philip Lewis</td>
<td>Apr. 1971</td>
</tr>
<tr>
<td>20</td>
<td>1</td>
<td>Personnel Development and Continuing Education in Libraries</td>
<td>Elizabeth W. Stone</td>
<td>July 1971</td>
</tr>
<tr>
<td>20</td>
<td>2</td>
<td>Library Programs and Services to the Disadvantaged</td>
<td>Helen H. Lyman</td>
<td>Oct. 1971</td>
</tr>
<tr>
<td></td>
<td></td>
<td>The Influence of American Librarianship Abroad</td>
<td>Cecil K. Byrd</td>
<td>Jan. 1972</td>
</tr>
<tr>
<td>20</td>
<td>4</td>
<td>Current Trends in Urban Main Libraries</td>
<td>Larry Earl Bone</td>
<td>Apr. 1972</td>
</tr>
<tr>
<td>21</td>
<td>1</td>
<td>Trends in Archival and Reference Collections of Recorded Sound</td>
<td>Gordon Stevenson</td>
<td>July 1972</td>
</tr>
<tr>
<td>21</td>
<td>5</td>
<td>Library Services to the Aging</td>
<td>Eleanor Phinney</td>
<td>Jan. 1973</td>
</tr>
<tr>
<td>22</td>
<td>1</td>
<td>Analyses of Bibliographies</td>
<td>H. R. Simon</td>
<td>July 1973</td>
</tr>
<tr>
<td>22</td>
<td>2</td>
<td>Research in the Fields of Reading and Communication</td>
<td>Alice Lehner</td>
<td>Oct. 1973</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Sarah Reed</td>
<td></td>
<td>Jan. 1974</td>
</tr>
<tr>
<td>22</td>
<td>3</td>
<td>Evaluation of Library Services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>4</td>
<td>Science Materials for Children and Young People</td>
<td>George S. Born</td>
<td>Apr. 1974</td>
</tr>
</tbody>
</table>
### Partial List of Library Trends Issues in Print*

<table>
<thead>
<tr>
<th>Volume</th>
<th>Issue</th>
<th>Title</th>
<th>Editor</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>23</td>
<td>1</td>
<td>Health Sciences Libraries</td>
<td>Joan Titely Adams</td>
<td>July 1974</td>
</tr>
<tr>
<td>23</td>
<td>2</td>
<td>Library Services in Metropolitan Areas</td>
<td>William S. Budington</td>
<td>Oct. 1974</td>
</tr>
<tr>
<td>23</td>
<td>4</td>
<td>Resource Allocation in Library Management</td>
<td>Wolfgang M. Freitag</td>
<td>April 1975</td>
</tr>
<tr>
<td>24</td>
<td>1</td>
<td>Federal Aid to Libraries</td>
<td>Genevieve M. Casey</td>
<td>July 1975</td>
</tr>
<tr>
<td>24</td>
<td>2</td>
<td>Library Cooperation</td>
<td>Pease S. Grove</td>
<td>Oct. 1975</td>
</tr>
<tr>
<td>24</td>
<td>4</td>
<td>Commercial Library Supply Houses</td>
<td>Harold Roth</td>
<td>April 1976</td>
</tr>
<tr>
<td>25</td>
<td>1</td>
<td>American Library History: 1876-1976</td>
<td>Howard W. Winger</td>
<td>July 1976</td>
</tr>
<tr>
<td>25</td>
<td>4</td>
<td>Trends in the Scholarly Use of Library Resources</td>
<td>Benjamin F. Page</td>
<td>April 1977</td>
</tr>
<tr>
<td>26</td>
<td>1</td>
<td>Library Services to Correctional Facilities</td>
<td>Jane Pool</td>
<td>Sum. 1977</td>
</tr>
<tr>
<td>26</td>
<td>2</td>
<td>Trends in the Governance of Libraries</td>
<td>F. William Summers</td>
<td>Fall 1977</td>
</tr>
<tr>
<td>26</td>
<td>3</td>
<td>Institution Libraries</td>
<td>Harris C. McClaskey</td>
<td>Win. 1978</td>
</tr>
<tr>
<td>26</td>
<td>4</td>
<td>Publishing in the Third World</td>
<td>Philip G. Ablach</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Keith Smith</td>
<td>Sprg. 1978</td>
</tr>
<tr>
<td>27</td>
<td>1</td>
<td>Films in Public Libraries</td>
<td>John A. McCrossan</td>
<td>Sum. 1978</td>
</tr>
<tr>
<td>27</td>
<td>2</td>
<td>State Library Development Agencies</td>
<td>Phyllis Dixon</td>
<td>Fall 1978</td>
</tr>
<tr>
<td>27</td>
<td>3</td>
<td>Libraries and Society</td>
<td>Margaret F. Sieg</td>
<td>Win. 1979</td>
</tr>
<tr>
<td>27</td>
<td>4</td>
<td>Study and Collecting of Historical Children’s Books</td>
<td>Selma K. Richardson</td>
<td>Sprg. 1979</td>
</tr>
<tr>
<td>28</td>
<td>1</td>
<td>Economics of Academic Libraries</td>
<td>Allen Kent</td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>2</td>
<td>Emerging Patterns of Community Service</td>
<td>Jacob Cohen</td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>3</td>
<td>Library Commissions</td>
<td>K. Leon Montgomery</td>
<td>Sum. 1979</td>
</tr>
<tr>
<td>28</td>
<td>4</td>
<td>Current Trends in Rural Public Library Service</td>
<td>Margaret Monroe</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Kathleen M. Heim</td>
<td>Fall 1979</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Ellsworth E. Mason</td>
<td>Win. 1980</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>John M. Houlahan</td>
<td>Sprg. 1980</td>
</tr>
<tr>
<td>29</td>
<td>1</td>
<td>Current Library Use Instruction</td>
<td>A.P. Marshall</td>
<td>Sum. 1980</td>
</tr>
<tr>
<td>29</td>
<td>2</td>
<td>Library Services to Ethnocultural Minorities</td>
<td>Leonard Wershheimer</td>
<td>Fall 1980</td>
</tr>
<tr>
<td>29</td>
<td>3</td>
<td>Map Librarianship and Map Collections</td>
<td>Mary Lynette Langgaard</td>
<td>Win. 1981</td>
</tr>
<tr>
<td>29</td>
<td>4</td>
<td>Public Lending Right</td>
<td>Perry D. Morrison</td>
<td>Sprg. 1981</td>
</tr>
<tr>
<td>30</td>
<td>1</td>
<td>Bibliometrics</td>
<td>William Gray Potter</td>
<td>Sum. 1981</td>
</tr>
<tr>
<td>30</td>
<td>2</td>
<td>Conservation of Library Materials</td>
<td>Gerald Lundgren</td>
<td>Fall 1981</td>
</tr>
<tr>
<td>30</td>
<td>3</td>
<td>Data Libraries for the Social Sciences</td>
<td>Kathleen M. Heim</td>
<td>Win. 1982</td>
</tr>
<tr>
<td>30</td>
<td>4</td>
<td>Mental Health Information: Libraries and Services to the Patient</td>
<td>Phyllis Rubinson</td>
<td>Sprg. 1982</td>
</tr>
<tr>
<td>31</td>
<td>1</td>
<td>Standards for Library and Information Services</td>
<td>Terry L. Weech</td>
<td>Sum. 1982</td>
</tr>
<tr>
<td>31</td>
<td>2</td>
<td>Technical Standards for Library and Information Science</td>
<td>James E. Rush</td>
<td>Fall 1982</td>
</tr>
<tr>
<td>31</td>
<td>3</td>
<td>Current Trends in Reference Services</td>
<td>Bernard Vavrek</td>
<td>Win. 1983</td>
</tr>
<tr>
<td>31</td>
<td>4</td>
<td>Adult Learners, Learning and Public Libraries</td>
<td>Elizabeth J. Budge</td>
<td>Sprg. 1983</td>
</tr>
<tr>
<td>32</td>
<td>1</td>
<td>Genealogy and Libraries</td>
<td>Diane Foshill Garothers</td>
<td>Sum. 1983</td>
</tr>
<tr>
<td>32</td>
<td>2</td>
<td>Current Problems in Copyright</td>
<td>Walter Allen</td>
<td>Fall 1983</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Jerome K. Miller</td>
<td></td>
</tr>
</tbody>
</table>

*A complete list of back issues is available from *Library Trends*, Publications Office, 249 Armory Building, 506 E. Armory Street, University of Illinois, Champaign, IL 61820.

† Also available in clothbound editions.
Library Trends

Forthcoming numbers are as follows:

Winter 1984, Information Policy and Social Change Dynamics. Editor: Peter Neenan, Assistant Professor, School of Library Science, University of North Carolina at Chapel Hill.

Spring 1984, Information Practice—Atypical Careers and Innovative Services in Library and Information Science. Editors: Walter C. Allen, Associate Professor, and Lawrence W.S. Auld, Assistant Dean, Graduate School of Library and Information Science, University of Illinois at Urbana-Champaign.


Fall 1984, Protecting the Library. Editor: Alan Jay Lincoln, Associate Professor of Law and Justice, University of Lowell, Lowell Massachusetts