

On fair use and library photocopying

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The doctrine of fair use is being applied to reproduction of the original for itself rather than as part of a new creation. The threat to publishers stems from the growing scale and economy of copying and the organization being built to support it

For most of us in the publishing business, copyright for a long time existed on the fringes of our consciousness as something we knew vaguely to be important but did not very often have to concern ourselves with in our daily affairs. In the United States, the new copyright law has changed all that overnight, and press personnel are now scrambling to educate themselves in the intricacies of the new law's provisions regarding such matters as registration, deposit, transfers, and termination. But in the rush to understand what revisions need to be made in contracts and procedures in order to comply with the law, it is all too easy to pass over quickly those sections of the law that do not appear to demand immediate action. The sections on fair use and library photocopying, for example, look, innocently enough, to be merely codifications of commonly accepted rules governing present practices; they may be thought to require no special attention since the staff member who handles rights and permissions can be expected to know what is current in these areas, which seem too tangential to the everyday lives of most of us in publishing to be worth worrying about.

But to adopt such a casual attitude toward these matters is to view the import of the U.S. new copyright law in a very myopic fashion. Although publishers – in any country, not just America – may feel little immediate cause to be aware of how fair use and library photocopying affect their business, there is no question that in the long run what happens in these

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areas will impinge in critical ways on what publishers do. It was not for nothing that these were among the most hotly disputed and long debated issues in the whole process of revising the copyright law. And the explanation has to do with more than just the intrinsic appeal of their complexity to legal minds welcoming the chance to perform intellectual gymnastics. For reasons that I shall try to make clear in this essay, it behooves all scholarly publishers to become familiar at least in a general way with the problems and challenges posed by fair use and library photocopying.

To show how fair use and photocopying relate to publishing – and to each other – it is first necessary to say something about how they fit into the conceptual world of copyright. Fair use is actually a key to understanding what copyright is all about. The basic aim of a system of copyright, at least as it has been conceived since the Statute of Anne in 1710 first gave it explicit recognition, is to support the public interest in the production and dissemination of knowledge in all its forms by providing an economic incentive in the first instance to the producers of that knowledge and by extension to those agents – publishers – who disseminate their works. Thus Article I of the U.S. Constitution grants Congress the power ‘to promote the progress of science ... by securing for limited times to authors ... the exclusive right to their ... writings.’ It is important to recognize that this right is a means to an end, not an end in itself; the author has no natural or perpetual right on which a claim to economic reward can rest, but merely this statutory right of limited duration that is extended to help bring about a state of affairs desirable for society as a whole. As the House Report accompanying the 1909 Copyright Act put it, ‘not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.’¹ It is for this reason that the author’s control of the use of his work can never be absolute; in this way, the author’s statutory ‘exclusive right’ differs from what is recognized, in some countries, as his ‘moral right,’ which is a kind of natural right exercised in perpetuity by the author or his heirs to ensure that the intellectual integrity of his work is not violated through distortion, bowdlerization, or any other kind of misrepresentation. The limitation on the author’s statutory right that exists as part and parcel of the copyright system itself was developed in the courts over a period of many years, starting in the United States with a famous case in 1841,² and has come to be known generally under the rubric ‘fair use.’ The Copyright Act of 1976 is the first statute to incorporate it explicitly in

legislation, but the doctrine has been with us a long time as a judicial 'rule of reason.'

'Fair use' is the device courts have instituted to keep the copyright mechanism working as it should, on the one hand to ensure that the public has reasonable access to the work of authors for the benefit of all and on the other hand to safeguard against the possibility that the authors' economic incentive to create will be undermined by uses that unfairly compete with or supplant their own. The notion is familiar to most of us in the form in which it governs the use made by one author in his work of another author's work, for accurate citation of authority or for criticism, review, or evaluation, as we see it stated in the AAUP Resolution on Permissions.³ In handling requests for permission not automatically granted by this resolution, university presses deal, implicitly at least, with 'fair use' questions every day; their staff members should have a rough-and-ready idea of where the boundaries in this area are drawn, even if they have not studied any of the court cases that have helped define them.

One feature of the new law that may create some initial uncertainty, however, has to do with the federal pre-emption of common law protection of unpublished works, which theoretically could not before be quoted or used in any other way, in even minimal amounts, without permission of the author. Now fair use will apply to unpublished works as well, but as the Senate Report emphasizes, its applicability 'is narrowly limited since [the unavailability of the work] is the result of a deliberate choice on the part of the copyright owner.'⁴ Thus, if reliance is placed on a rule-of-thumb to decide how much material can be quoted from a published work before the danger of infringement arises, there is reason to be a good deal more cautious in making this estimate for unpublished works, where the right of privacy also comes into play.

As this example well illustrates, fair use is designed to guarantee a certain degree of access to *any* work, even if the author has withheld it from general circulation to the public. There is all the more reason, then, to be suspicious of the claim that some publishers have tried to make for their ability to deny any use without permission by including on the copyright page a notice like the following: 'No part of this book may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage or retrieval system, without permission in writing from the publisher.' As one copyright

authority has said, commenting on the theory of 'implied consent' that would seem to underlie such a claim, 'although there are no cases on this point, it would hardly seem that this is the law,' whereas 'the doctrine of fair use is a part of our law.'⁵

What we begin to see here, in the concern that has motivated publishers to print such notices in their books whatever their real legal effect might be, is the looming threat of another type of use that is quite different in nature from the kind to which the doctrine of fair use has traditionally been applied. Instead of reproducing an extract from one work in another that is then disseminated as a separate contribution to knowledge, this new type of use reproduces the original without embedding it in some independently valuable creation and thus merely multiplies the number of copies of the original without adding to it in any way. Moreover, when facilitated by modern technology, such reproduction can easily jeopardize the author's ability to control the circumstances affecting the availability of his work to the public, which is one of the fundamental linchpins of the whole copyright system. With the decisions about how much duplication to allow now made by people who are not directly his agents and who have no contractual responsibility towards him, monetary or otherwise, the author foresees competitive pressures on the market for his work arising from an external source and no longer can be sure of the normally expected economic reward to which he is entitled by constitutional design in return for the donation of his work to the public benefit. The question naturally arises, 'Can any use that so disrupts the smooth functioning of the copyright system be fair?'

This is the challenge that photocopying poses. As Leon Seltzer observes, in his illuminating essay in the *Bulletin of the Copyright Society*, 'the advent of such technology, introducing a new and unsettling dimension into the whole copyright scheme, required of Congress a reexamination of fundamental copyright principles, a careful analysis in general terms of the internal dynamics of the copyright mechanism, the making of distinctions among the various elements to be considered, and the ordering of these considerations in a coherent way' – a job, he compellingly argues, that Congress to a large extent botched.⁶ There was little guidance to be had from the courts. At the time a special study on this problem was prepared for the Senate Judiciary Committee considering copyright law revision, in 1959, there were 'no decisions dealing specifically with photocopying by libraries,' as the author of this study noted.⁷ The first and only case to arise

before the new copyright law was passed by Congress was the suit brought by the Williams & Wilkins Company against the U.S. government in 1968 for the unauthorized photocopying of eight of its journals by the National Institutes of Health and the National Library of Medicine, but as we shall see, it provided no basis for firm conclusions about anything. Left to its own devices, Congress came up with a solution that divides the issue of photocopying into two parts, treating educational photocopying within the structure of fair use doctrine while relegating library photocopying to the special status of an exemption (thereby, as Seltzer notes, effectively cutting the ground out from under the *Williams & Wilkins* decision where library photocopying was considered in the context of fair use, despite Congress's expressed intention not to change present judicial doctrine in any way).⁸ The result, as Seltzer persuasively shows, was a conceptual can of worms. His summary of the extent of Congress's failure is a thoroughgoing indictment indeed: 'It has failed to articulate a coherent rationale for copyright, it has failed to define fair use, it has introduced confusions between fair use and exempted use, and it has in the end tossed the fair use question, now thoroughly enmeshed in contradictions, back to the courts.' Woe to the judges who have to deal with this mess!⁹

Whether we accept this analysis or not, we all can appreciate the problem that photocopying has raised for our business. It is obviously not just the substitution for the original that photocopying makes possible which is the source of the problem, for in this respect the traditional practice of copying by hand for private use is structurally the same and no one ever objected to that practice.¹⁰ 'Such transcription imposed its own quantitative limitations; and in the nature of the event, it would not be feasible for copyright owners to control private copying and use,' the Senate special study noted.¹¹ But not even the existence of the technology itself causes the problem. Back in 1935, when the so-called Gentlemen's Agreement about library photocopying was negotiated between representatives of the publishing industry and libraries, as the chief trial judge in the *Williams & Wilkins* case pointed out in his dissenting opinion, 'photocopying was relatively expensive and cumbersome; was used relatively little as a means of duplication and dissemination; and posed no substantial threat to the potential market for copyrighted works. Beginning about 1960, photocopying changed character. The introduction to the marketplace of the office copying machine made photocopying rapid, cheap, and readily available. The legitimate interests of copyright owners must, accordingly, be

measured against the changed realities of technology.¹² Thus the scale of photocopying operations, as well as their decreasing cost relative to original publication, came to be a critical factor in its impact on copyright.

What is the situation we now face? It is summed up well by Louise Weinberg: 'One may estimate that in the United States today Xerox-type photocopying alone produces some 50 billion pages of copy annually. Costs vary with allocation of staff, space, and equipment per photocopy made, but are said to be theoretically reducible to less than half a cent per page for single copies – well below the usual cost of copyrighted materials to consumers ... over 50 per cent of photocopying is thought to be of copyrighted materials. Although some of this is done in store-front photocopying centers, most copying of copyrighted materials can fairly be assumed to take place where those materials are stored – at libraries, public and private, independent and in-house.'¹³ A statistical survey undertaken, after this article was published, at the request of the library-publisher Conference on Resolution of Copyright Issues, gives us a more reliable and refined picture. According to the executive summary of the King report, as it is called, 'there were an estimated 114 million photocopy items made of library materials by library staff in 1976,' of which 54 million were of copyrighted material. 'This averages 5,400 photocopy items per library and 2,500 copyrighted photocopy items per library in the population of 21,280 libraries from which the sample was chosen.' The report goes on to point out that 'most of the materials photocopied were serials' (48 million items, of which 38 million were copyrighted). 'It is estimated,' again quoting the report, 'that there are 36.8 thousand paper-to-paper photocopying machines in U.S. libraries. 35.3 thousand of these are regularly used by library staff or patrons for photocopying library materials. 15.4 thousand of these are used exclusively by patrons for photocopying library materials, leaving 19.9 thousand used by library staff for library materials. Approximately 160,000 exposures per library are made on paper-to-paper photocopying machines. Academic libraries have the largest average volume of exposures per machine, 347,000.' Another interesting statistic is that the average annual income from photocopying operations for academic libraries was \$11,544, whereas the cost involved was \$16,260. Obviously, libraries do not have any *financial* incentive to stay in the photocopying business! (Perhaps, however, if libraries were to cut down on the photocopying done for faculty, they might find their budgets reduced under faculty pressure and thus lose even more overall.)

But even the scale of photocopying evident from these figures would not be so worrisome if it were not for the organizational structure that is building up rapidly to facilitate maximum effective use of this technology. Louise Weinberg wrote about the proliferation of 'secondary services' that go well beyond the familiar cumulative indexes in making information about what is being published in current journals quickly and readily available. She cited the example, on a small scale, of the Harvard Law School, whose library circulates weekly a publication entitled 'Tables of Contents' to all the school's faculty members and, on a much larger scale, the publication called *Current Contents* issued weekly by the Institute for Scientific Information in Philadelphia. Her analysis of the effect such services have is worth quoting in full:

Although these new secondary services facilitate browsing through the literature, they ultimately encourage shopping for copies rather than for original journals. Many of the journals are available only by subscription, and can be purchased as single back issues only at great delay and inconvenience. Thus the underlying assumption of these secondary services is that their users will be able to obtain photocopies from libraries. The services also make it very easy to order reprints from authors: Current Contents carefully furnishes an address index of all cited authors in the back of each issue. The inevitable result of this new information distribution system is the creation of a huge demand both for reprints and for photocopies of articles. With these resources readily available, the new system can create only negligible additional circulation for the original journals. Presumably new circulation is generated only when it is perceived from use of the secondary services that one particular journal is repeatedly helpful to the reader. The new demand for reprints and copies differs from the response of the reader group which the journals would have reached in any event with the aid of the old-style cumulative indices. There is a new group of readers whose demand has been stimulated — who, like other consumers, are responding to advertising rather than primary need. This business is obviously profitable to 'advertisers' like Current Contents; but it is only a negligible source of profit to the original publications. Only after an author's gratis stock of

*reprints is exhausted are reprints purchased from the publisher by authors or readers, and there comes a point where reprint requests are in lieu of subscriptions. Although the market for copies which this new business stimulates is not the creation of original publishers, who probably could not have reached such a market themselves, it is, of course, a business wholly dependent on the existence of the original publications.*¹⁴

Growing alongside the secondary services, whose success has in part created the need, are the co-operative arrangements among libraries that are now developing in the United States well beyond the basic supplementary level long served by the interlibrary loan program. There are already quite a few intrastate and regional systems in operation as well as some, like the MEDLARS service run by the National Library of Medicine, that attempt to fulfil particular needs nation-wide. One may recall the announcement made in 1974 that the New York Public Library was joining with the libraries of Columbia, Harvard, and Yale in what the *New York Times* termed (perhaps a bit sensationally) 'a sweeping and controversial program of combined operations that will entail cutting back purchases of many publications and systematically exchanging photocopies of previously published writings.'¹⁵ Above and beyond these currently functioning operations lies the ambition of the National Commission on Libraries and Information Science to bring them all together along with the many libraries and other information services still outside any system into an interlinked program of national scope; one of the commission's basic assumptions in drafting its proposals for such a program, indeed, has been that, 'with the help of new technology and with national resolve, the disparate and discrete collections of recorded knowledge in the United States can become in due course an integrated nation-wide network.'¹⁶

The spectre of a totally integrated network of libraries, perhaps with the Library of Congress at its pinnacle, using sophisticated technology like telefacsimile equipment to relay printed material instantaneously to any point in the system from a central source, is at least worrisome and potentially nightmarish for publishers, particularly those heavily involved in the publication of scholarly journals, from which the bulk of copying is done. The NCLIS plan in fact includes a National Periodicals Center, to be operated by the Library of Congress for the supply of copies of articles from

some fifty-five thousand journals, an idea already officially endorsed by the full commission at a meeting last June.

What is the nature of the threat in all this to American university presses in particular? For them, who collectively publish 348 journals according to AAUP's 1977 survey of member presses, the immediate threat is obvious: systematic photocopying on the scale outlined above may well seriously affect – if it has not already – the ability of presses to sustain publication particularly of their more highly specialized journals. Raising subscription prices, at least for individuals, offers no solution. Why? Because, as I tried to explain in a U.S. Senate hearing on library photocopying in 1973, 'unlike a book, which as a more or less unified treatment of a single subject can be sold even at a high price to those individuals who have a special professional interest in it, a journal typically provides a general forum for the discussion of a range of diverse issues within a broad field of inquiry, not all of which are likely to be of interest to the scholar who subscribes to it; hence, raising the price of the subscription is apt to make the alternative of photocopying those articles of particular interest to the professional relatively more attractive than continuing his subscription.'¹⁷ The dynamic that inevitably follows, with lowered subscriptions leading to higher prices leading in turn to lowered subscriptions and so on, presents a depressing scenario indeed.

I cannot resist making a slight digression here to note a parallel to this phenomenon in an earlier age:

In the latter half of the eighteenth century, William Lane, himself a publisher of fiction on a large scale, also organized circulating libraries. He was anxious to show the reading public how much easier and cheaper it was to borrow books rather than to buy them. Publishers generally did not take kindly to the notion. The reading public was comparatively small and the circulating library meant that, instead of each reader of the book being a potential purchaser of it, several would club together to buy the book and this seemed to mean that the potential circulation would be smaller. The only possible means of counteracting this tendency that occurred to the publishers was to raise prices and, as novels were the books most frequently borrowed, the published prices of these rose higher in proportion to their cost of production than other kinds of books.

*A vicious circle was created. The higher the price of the novel, the fewer people bought it and the greater became the tendency to borrow it from a library. This tended to lower the circulation still more and published prices rose again. And so it went until it became the almost invariable custom to publish all novels in three volumes and to charge a guinea and a half for them. At this price, of course, very few readers bought novels at all – almost everyone borrowed them.*¹⁸

Well, the publishing of novels did not come to an end, as we all know, and there may be some moral lesson in this tale for us to learn; for the solution in this case merely demanded a change in old habits, and if publishers keep themselves flexible and open to new ways of doing business, no doubt they will survive the currently looming trauma, too.

At the risk of deepening the pessimism, we can gain another interesting perspective on the situation by looking at what Fry and White had to say in their 1975 NSF report. Among the many sobering statistics from this survey of the period 1969–73, we find a reported 12.9% decrease in individual domestic subscriptions for university press journals, not fully offset by the 6.3% increase in institutional subscriptions. The authors commented: 'The pattern of discontinuing individual subscriptions for presumed reasons of economic constraints, and combining these into either existing or new institutional subscriptions ... is most clearly evident for university press journals.'¹⁹ Another discouraging pattern perceived is summed up in these observations from the report: 'University presses, in a consistent pattern at least since 1969, and in a pattern which is worsening, are failing to meet operational cost requirements out of revenues, and are incurring substantial and sharply rising operational deficits ... University presses will shortly either have to reverse the present deficit trends, receive subsidy funding to underwrite their losses, or undergo sharp and as yet undefinable changes in their operations.'²⁰ Meanwhile, as the report elsewhere stated, 'publishers are forced to rely increasingly on subscriptions revenue to supply the necessary operating capital,' and 'particularly for university presses, the most financially troubled of all reporting publisher groups,' the percentage of revenue derived from subscriptions is rising.²¹ Now the report did say also that 'there is [sic] no firm data relating declining subscriptions to increased interlibrary lending.' But in the same breath the authors went on to admit that 'recent trends in large scale library

cooperation, specifically the continued increase in borrowing of journals or photocopies as a means of reducing pressures on library budgets, could have quite serious side effects on the already unstable economic mechanism which has allowed the publishers of limited circulation, scholarly and research journals to maintain a narrow margin of economic viability.²² If a purely *laissez-faire* approach were to be taken to the problem of deciding which journals were to survive through the process of attrition, the report contended, 'it is likely that ... the publications of university presses and the small and scattered other not-for-profit sector would be hardest hit.'²³ Wanting to avoid panic, perhaps, or just to accent the positive in this thoroughly depressing picture, the authors offered this overview of the present situation:

There can be little doubt that such practices of interlibrary cooperation in acquisitions, lending, and copying do affect the decisions of whether to purchase specific titles, and therefore affect the economics of specific publishers. However, quite independently of the legal and ethical questions raised by photocopying with or without publisher permission and with or without the payment of royalties, there is little if any evidence to substantiate whether at least through 1973 these practices affected adversely the community of scholarly and research journal publishers as a whole, or that increased lending is a factor of declining subscriptions. This conclusion is supported by the evidence that, in order to continue to fund acquisitions of journals, libraries are heavily engaged in budget transfers from the book budget to the periodicals budget, and that they have done this, in virtually all kinds and sizes of libraries, to a degree which is both startling and disturbing.²⁴

If this last-cited evidence is supposed to offer some comfort to university presses that publish journals, it hardly achieves its aim: small consolation it is to presses to know that if subscriptions to their journals are still being maintained by libraries, at the same level, orders for their books are rapidly declining!²⁵ For presses this is just a no-win situation.

If there were sincere and serious efforts being made to work the publishing community into the design of the proposed national system for sharing and use of information resources, we might all be a bit more sanguine about

the future than we are now, confronted by the kind of evidence the Fry-White report presents. But as far as I know, there are not. Another of the basic assumptions of the NCLIS plan is that 'the rights and interests of authors, publishers and other providers of information can be incorporated into the national program in ways which maintain their economic and competitive viability.'²⁶ However good its intentions may be, though, the commission does not appear to be acting upon them – at least not yet. A report in *The Bookseller* last August said: 'Based on a national three-tiered arrangement of library systems, the NCLIS proposal would provide national access to journal articles or photocopies of these. Although still very preliminary, the NCLIS plan does not indicate compensation for publishers whose serials are to be copied (nor were publishers represented on the task force).'²⁷ It may also be worth pointing here to the Fry-White report finding that 'respondent libraries do not generally request permission to photocopy,'²⁸ perhaps out of fear that they may be asked to help contribute to increasing the linkages in the system.

In a very real sense the underlying story of the *Williams & Wilkins* case was the plea by the publisher to have his business integrated into the national system of the government-run medical libraries in just the way the NCLIS assumes can be done. A month after the suit was filed in March 1968, the chairman of the board of Williams & Wilkins made a statement explaining the reasons for taking such drastic action in which he said, among other things:

Uncontrolled photocopying is largely responsible for the death of two journals which were published by The Williams & Wilkins Company, and, if the condition is allowed to continue, many more will either go out of business or be published under government subsidy ... We do not wish to prohibit or to interfere with the photocopying of articles which appear in the journals which we publish. Quite the contrary, since the more widely our material is disseminated the greater is its benefit to humanity. We only wish in some manner to be paid a royalty on each copy made to offset the loss in the sale of subscriptions, reprints and back volumes which photocopying brings about ... When it became obvious that the Copyright Revision Bill would not contain a royalty provision, we communicated with the National Library of Medicine and the Medical Library of the

*National Institutes of Health in an effort to explore all possible means of obtaining a mutually satisfactory solution to the problem. Much to our disappointment we found that no meaningful dialogue was possible since we were bluntly told that they would continue present practice until instructed otherwise by the courts.*²⁹

So the suit was brought, reluctantly, in the U.S. Court of Claims. Early in 1972 the commissioner of that court ruled that the plaintiff was entitled to compensation for infringement of copyright. The decision was reversed late in 1973 by the full Court of Claims by a 4–3 vote. The case was appealed to the Supreme Court, where it reached a frustratingly inconclusive end on 25 February 1975, with the justices (one having disqualified himself) dividing right down the middle, 4–4. The effect was to leave the ruling of the Court of Claims standing but to provide no basis for legal precedent. In any case, the Court of Claims had insisted that its decision should be construed narrowly, as based only on the facts of the particular case involved: ‘We do not pass on dissimilar systems or uses of copyrighted materials by other institutions or enterprises, or in other fields, or as applied to items other than journal articles, or with other significant variables.’³⁰ Even so, that decision was subjected to strong legal criticism, not least of all by two of the dissenting judges, one of whom warned that the court was ‘making the Dred Scott decision of copyright law.’³¹ In particular, the first and most crucial of the three interrelated propositions on which the court’s majority had based its argument – that the ‘plaintiff has not in our view shown, and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices of NIH and NLM’³² – has been called ‘the weakest part of its opinion.’³³ By insisting that the plaintiff prove *actual* economic harm, the court not only went well beyond the usual judicial standard of requiring only that the *probable* effect of the use be shown to be economically harmful but also ignored the provision in the law (echoed, by the way, in the new law) that statutory damages, ‘in lieu of actual damages,’ could be sought, as Charles Lieb pointed out in the *amicus curiae* brief filed on behalf of the Association of American Publishers and the Association of American University Presses.

Whatever the legal niceties of the issue might be, for practical purposes it does not really make much difference whether the publisher can prove actual damages or not. As anyone who has studied decision-making in

theory and practice knows, it is *perception* that counts, and evidently the Williams & Wilkins Company suspended publication of two of its journals because it *believed* photocopying to be seriously undercutting their subscription base. What really matters, after all, is what happened, not whether this belief may or may not have been justified by whatever facts may have been available. And where action is determined by perception, the atmosphere of opinion in the general environment of publishing is all-important. That opinion currently is that photocopying does erode the economic foundation of scholarly journal publishing. I can produce one piece of direct evidence of the force of this opinion from the recent experience of my own press in considering whether to revive a now defunct but very prestigious journal of Asian studies that involved a considerable amount of quite expensive typesetting: the decision not to go ahead turned crucially on our estimate of the likelihood that the cost of producing the journal could not be recouped because of the expected interference of photocopying with the market for individual subscriptions (combined with the belief that libraries simply are not any longer in a position to start subscriptions to new and expensive journals of a highly specialized nature). So the call for proof of actual harm that comes from some corners of the library community really misses the point; if publishers believe they are being harmed – and the attitude of some library association representatives can only reinforce this belief – then they will take the kind of action that will narrow the range and impoverish the variety of resources on which libraries will be able to draw in serving their users in the future. Who is the winner in this kind of game? Obviously, no one.

But I am getting a little ahead of myself here because I want to pursue the story up to the present before speculating further about the future and asking what might be done to avoid catastrophe. The *Williams & Wilkins* case, as we have seen, essentially resolved nothing, and the basic problem in the United States was left for Congress to wrestle with; indeed, one of the other three propositions on which the Court of Claims depended involved the assumption that this was a matter for 'legislative solution.' The question of 'systematic' photocopying came to be the major source of dispute between library associations and their author and publisher counterparts in the final round of haggling that preceded adoption of the bill by Congress, as the discussions in the Conference on Resolution of Copyright Issues made abundantly clear. Librarians could not stomach Section 108(g)(2) in its penultimate form, which simply prohibited 'systematic reproduction or

distribution of single or multiple copies' of contributions to collective works and small portions of other works, which Section 108(d) entitled them to supply one at a time, for they understandably took this to be a direct threat to their present and future operations in library networks. Publishers, on the other side, could not see supporting any bill that did not carry some such restrictive language. The House Committee accepted the librarians' call for qualification of an outright prohibition and appended the following proviso to section 108(g)(2): 'That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.' This addition still left room for uncertainty about what constituted 'such aggregate quantities.' So, through the good offices of CONTU, library and author/publisher associations worked out a set of guidelines specifying five as the limit for the number of copies that could be made during a single calendar year from any collective or other work published within five years before the date of the request. (Other sets of guidelines, for classroom copying of books and periodicals and for educational uses of music, had already been accepted and were included in the House Report.) The library photocopying guidelines were expressly intended to cover only the ordinary practice of interlibrary loan; to emphasize this point, the introduction to the guidelines states that they would not apply to 'a system in which one or more agencies or institutions, public or private, exist for the specific purpose of providing a central source for photocopies.' The agreement was reached just in time to be considered and accepted by the Conference Committee before the bill was sent for final passage to the floor of Congress on 30 September 1976. It is printed in the Conference Report.

Anticipating the need to develop some unified way of dealing with permissions and payments for photocopying beyond what the new law would permit, and wishing to demonstrate the sincerity of their promise to develop 'workable clearance and licensing procedures' in response to Congressional urging to that effect,³⁴ the AAP had already in February 1976 co-sponsored a Copyright Clearinghouse conference to provide a forum for the useful exchange of information between publishers and other groups (like ASCAP) that had extensive experience with clearinghouse operations in other fields. Following this initial effort, the Technical, Scientific and Medical Division of AAP sponsored a series of meetings beginning in August

of that year which led, finally, to the establishment of the Copyright Clearance Center, which began operating on 1 January 1978, the effective date of the new law. The system can be used for symposia volumes and other kinds of collective works, as well as journals, so long as the appropriate code is printed on the first page of each item in the collection. As Ben Weil informed the AAUP Scholarly Journals Workshop in February of this year, there were then some 200 institutions registered with the CCC from the user side, 48% non-profit and 25% academic; figures in late March showed 309 institutions registered. The CCC in February distributed a booklet to 22,000 libraries containing a list of 900 serial titles entered in the system; by late March this list had grown beyond 1,300 titles, from over 140 participating publishers. The CCC should have plenty of transactions to keep it busy. As we learn from the King report, 'filled serial interlibrary loan requests for domestic serials account for 3.8 million photocopy items of which 3.1 million are copyrighted. When CONTU guidelines are applied to the 3.1 million, it is estimated that 2.4 million are under six years old and 2.0 million are under six years old and not used for replacement or classroom use. If the rule of six copies or more is applied, there are about 500 thousand photocopies remaining that are subject to royalty payment. This total increases to 1.9 million items if all photocopy items from serials over five years old are considered to be eligible.' A further substantial amount of copying requiring authorization, some of which may be cleared through the CCC mechanism, comes from library copying for local patrons and for branch libraries within a municipal system, estimated in CONTU's draft report on photocopying to total 3.6 million and 3.2 million items respectively. The CCC will also be getting some business from the National Technical Information Service, which is setting up its own Journal Article Copying Service to supply its regular fourteen thousand subscribers. The NTIS expects to have some eight to nine thousand journals incorporated in its system by June. Payments will be made directly to publishers that have signed contracts with NTIS for a standard 50-cent per article fee and indirectly to other publishers through the Institute for Scientific Information, which has licensing agreements with the publishers of the five thousand journals in its system for supplying tear sheets or photocopies, and of course through the CCC for publishers of journals not covered under either of these other arrangements.

The NTIS co-operation with the CCC is an encouraging sign because it is a move towards an integrated system of the kind that the NCLIS has talked a

lot about but done little for, at least from the publishing community's point of view. Meanwhile, from all appearances, the major library groups are taking a 'wait-and-see' position, resisting co-operation in developing any further guidelines to cover areas of significant photocopying activity left untouched by the CONTU guidelines and advising their members to be very conservative in their approach to co-operating with the CCC and with publishers offering licences. Typical is this statement circulated in November 1977 by the Special Libraries Association:

Librarians are advised to be sure that they are fully exercising the rights available to libraries and their users before entering into a fee-paying copyright clearance arrangement. Libraries are advised not to enter agreements or contracts prematurely. Such agreements could result in libraries paying fees which are not necessary. Subsequent decisions (judicial or Congressional) relating to the scope of 'fair use' may cite the acceptance of such agreements and payment practices followed thereunder against the interests of libraries and their users. For most library photocopying it is simply not necessary to request permission or pay a fee to the copyright proprietor.

Not long before the memorandum in which this statement appears was sent to SLA members, the National Council of Library Associations indicated to CONTU that the library community would not negotiate any further guidelines to Section 108. With this door closed, the AAP and the Authors League decided to issue joint guidelines unilaterally in response to the many requests for guidance received from individual librarians. As reported in the 16 January 1978 issue of *Publishers Weekly*, the guidelines for corporate library photocopying have already been prepared and circulated, and similar guidelines for academic and public libraries will follow shortly. Essentially, in the corporate library guidelines, the CONTU 'rule of five' is extended to apply equally to copying from periodicals older than five years, and, for in-house copying, a limit of two copies of one article or one copy each of two articles from any single periodical issue in any one calendar year for all users is set. These guidelines, which have other provisions as well, are purposely made more rigorous than those for academic and public libraries in line with what is seen to be Congress's intent in limiting reproduction to that 'without any purpose of direct or indirect commercial

advantage' and defining what libraries qualify for the exemption in Section 108(a) (1 and 2).

As Leon Seltzer points out in his analysis, there are good grounds for doubting whether Congress has succeeded in making any viable distinctions at all here:

Whatever the limitations implied by so ambiguous a term as 'open to the public,' the sole requirement that a collection be 'available ... to other persons doing research in a specialized field' is wide enough, for practical purposes, to leave no institution or collection of works outside it. There are no enforceable limitations on 'specialized fields,' no encumbrances on the meaning of 'available,' no requirement that the collection be publicly owned or nonprofit, and accordingly no definition of the terms 'library or archives' that imposes workable restrictions on the agency itself.³⁵

There are other rather distressing ambiguities and loopholes in the law, too. For instance, under Section 108(b), permitting reproduction of unpublished works for 'research use' in other libraries, a library theoretically could supply as many libraries with copies of a dissertation deposited with it as it wanted, thereby exhausting the library market for a work that might otherwise qualify for publication by a university press – unless the author signed an agreement with the library upon depositing his thesis expressly forbidding such distribution.³⁶ There is also the worrisome tension between Section 108(g) (1), which prohibits the making of multiple copies, 'whether made on one occasion or over a period of time,' and the classroom copying guidelines relating to Section 107 that allow multiple copies to be made 'by or for' the teacher. What does this mean for the practice of libraries making multiple copies and putting them on reserve for students' use at a teacher's request? Can they or can they not continue this practice without running afoul of the law? These are hardly the only troublesome questions about photocopying and fair use that the new law provides for us to ponder; for the rest I shall simply refer the interested reader to Leon Selzer's book.

In view of such disturbing problems, caution may well be the best strategy to pursue, as the library groups are urging. But I detect something more than simple risk avoidance in the face of uncertainty in the statements

these groups are issuing. In a letter dated 23 February 1978 sent to AAP members by the executive director of the American Library Association, it is stated 'We believe that pending the report of the Register of Copyrights on library photocopying mandated by Section 108(i) of the new law, we have negotiated all issues necessary for the implementation of the law.' That is a revealing admission, I think. Beyond a basic stubborn refusal to recognize the existence of the real needs of librarians to know what they can safely do in those areas not covered already by guidelines, what this suggests to me is a political strategy for fighting and winning the battle the next time around, when the mandated review comes to be undertaken. If the CCC can be shown not to work effectively and little progress towards an integrated system of library-publisher relationships demonstrated, the hope may be, Congress will be inclined to throw up its hands in despair and abandon any attempt to impose restrictions on photocopying. If this guess is correct – and I sincerely hope it is not – I think the strategy is very shortsighted and wrongheaded, and I doubt very much that it can succeed.

According to Leon Seltzer, if the newly installed copyright scheme fails to work in controlling photocopying, as he predicts it will because of its inherent conceptual confusions, Congress will have only two options: 'either greatly to expand the exemption for photocopying so as to leave a narrow area protected by the author's exclusive-rights control under copyright, or to in effect require an accounting, by compulsory or voluntary licensing, of all photocopying of copyrighted works permitted by the statute.'³⁷ The latter would deal with the economic imbalances introduced into the copyright mechanism through photocopying by adjusting the mechanism itself and relying on its efficient internal workings; the former would seek a solution to the reallocation of costs outside the copyright system, in much the way that European governments have done by subsidizing the funding of a 'public lending right' for authors while continuing to promote the unencumbered development of public libraries. If Congress is pressed to choose between these options, then I predict that it will take the second route, perhaps even insisting on compulsory licensing, as it has in the new law for cable television and other areas, and as some European countries have done. Under those circumstances libraries will be held strictly accountable for all the photocopying they do, and they will be forced to help set up the kind of interlinked system the library associations seem to be resisting now.

The other alternative, especially if Congress is persuaded that there are

no costs that need to be reallocated, poses a bleak future for university presses, which depend heavily on the library market for books and journals. If that market is much further eroded both by the financial squeeze on libraries and by the photocopying that they help proliferate, the days ahead will be hard indeed. The publishers' misfortune will be the libraries', too, for as publishers find themselves forced to retrench and to retreat from issuing the more specialized products of scholarship, the libraries will have less to offer their users, even through interlibrary photocopying. Eventually the point might even be reached where regular scholarly journal publication in the form we know it now would become totally unfeasible, and publishers would be reduced to putting out journals containing only abstracts or tables of contents, then taking orders and filling them on demand with photocopies of the original typescript. There would be some irony in that happening inasmuch as the distribution operation would become just what the secondary services and libraries between them provide today! The critical role of editorial selection would remain about the only thing distinguishing traditional scholarly publication from this other kind. And it would only be a short step beyond to see the acquisitions editor and the acquisitions librarian merged in the same individual. Is this what integration might ultimately come to?³⁸

I do not want to leave the wrong impression about my attitude towards libraries and librarians. Although I have had much to say about them that sounds critical, I cannot really blame them for the unhappy situation in which we all find ourselves. There is no villain in this tale of woe. As Fry and White repeatedly stressed in their report, there is no hope for the future of the library-publisher relationship if it remains within the confines of a closed economic system. Libraries, just like scholarly publishers, are being forced by ever-increasing costs and tighter budgets to cut back on the services they can render to their customers, and they are struggling just as hard to resist this trend and find ways of adapting new techniques and technologies to continue meeting their goals in maintaining and, if possible, improving the dissemination of knowledge. Photocopying has been a boon for them, perhaps just as photocomposition and photo-offset printing have been for publishers, and it is understandable that they are reluctant to see their use of it, on which they have come to depend in crucial ways, restrained or impeded if not actually prohibited. Royalty payments they view as yet another onerous burden on budgets already stretched to the limit. Only if aid comes from outside the publisher-library system – from

private foundation support, from government subsidization of users, or directly from the government itself – can the system survive for long into the future. So why cannot publishers and librarians set aside their inter-mural squabbles and join hands, as they are naturally meant to do, in seeking a common political solution to their mutual problems? They have already had much experience in working together in the defence of free speech and the liberty of the press. Why must photocopying be the issue that tears their friendly family relationship asunder? Is this really a 'zero-sum' game?

An earlier version of this paper was prepared for delivery at a Copyright Workshop sponsored by the Association of American University Presses in New York City, 30–31 March 1978.

1/ House Report No. 2222, 60th Cong., 2d Sess.; quoted in Leon E. Seltzer, 'Exemptions and fair use in copyright: the "exclusive rights" tensions in the new copyright act,' *Bulletin of the Copyright Society of the U.S.A.*, vol. 24, nos. 4 and 5 (April and June 1977), p. 223

2/ *Folsom v Marsh*, where Justice Story spoke of 'justifiable use' and 'fair and reasonable criticism.' The first reported use of the term 'fair use' itself occurred in a case heard in England in 1839. See Saul Cohen, 'Fair use in the law of copyright,' in *Copyright and Related Topics* (Berkeley and Los Angeles: University of California Press, 1964), pp. 110–11; and Seltzer, p. 245

3/ This agreement, which was adopted by member presses of the Association of American University Presses in its original form in 1947 and underwent several revisions before taking its present form in 1961, is currently still in force among the majority of member presses (fifty-two at latest count). But since its main function of giving the doctrine of fair use explicit formal recognition has been superseded by the codification of the doctrine in Section 107 of the new law, it has no further value and should be given a decent burial.

4/ Senate Report no. 94–473, 94th Cong., 1st Sess., p. 64

5/ Cohen, p. 113. There may be other reasons for taking a notice seriously, however, as one may gather from the following notice that actually appeared in a published book (Jan Adkins, *Toolchest*, New York: Walker & Co., 1973): 'We have gone to considerable difficulty and expense to assemble a staff of necromancers, sorcerers, shamans, conjurers, and lawyers to visit nettlesome and mystifying discomforts on any ninny who endeavors to reproduce or transmit this book in any form or by any means, electronic or mechanical, including information storage and retrieval systems, without permission from the publisher. Watch yourself.' Use under these circumstances might be hazardous, but it would not cease to be fair!

6/ Seltzer's essay was originally published in two instalments in the April and June 1977 issues of the *Bulletin*; it is now available as a book from Harvard University Press. The quotation here is taken from page 234 of the essay as it appears in the *Bulletin*, to which all citations in this article refer.

7/ Borge Varmer, 'Photoduplication of copyrighted material by libraries,' *Copyright Law Revision*, Studies Prepared for the Senate Judiciary Committee, 86th Cong., 2d Sess., Study no. 15, May 1959

8/ Seltzer, p. 238

9/ *Ibid.*, p. 230

- 10/ Nor, as Melvin Nimmer testifies in his authoritative treatise, has there ever been a 'reported case on the question of whether a single handwritten copy of all or substantially all of a protected work made for the copier's own private use is an infringement or fair use' (quoted on p. 22 of the Report of Commissioner James F. Davis to the U.S. Court of Claims, filed 16 February 1972, in *The Williams & Wilkins Company v The United States*, reprinted in *The Williams & Wilkins Case*, compiled by Marilyn G. McCormick [New York: Science Associates/International, Inc., 1974], p. 10).
- 11/ Varmer, p. 62
- 12/ Decision of the U.S. Court of Claims (27 November 1973), pp. 57-8, reprinted in *The Williams & Wilkins Case*, p. 211
- 13/ 'The photocopying revolution and the copyright crisis,' *The Public Interest*, no. 38, Winter 1975, p. 100
- 14/ *Ibid.*, pp. 104-5
- 15/ 24 March 1974
- 16/ *A National Program for Library and Information Services: A Synopsis of the Second Draft Proposal*, June 1974, p. 1
- 17/ *Copyright Law Revision*, Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 93d Cong., 1st Sess., 31 July and 1 August 1973, p. 139
- 18/ P.H. Muir, *Book-Collecting as a Hobby* (New York: Knopf, 1947) p. 88
- 19/ Bernard M. Fry and Herbert S. White, *Economics and Interaction of the Publisher-Library Relationship in the Production and Use of Scholarly and Research Journals*, Office of Science Information Services, U.S. National Science Foundation, November 1975, p. 196
- 20/ *Ibid.*, p. 206
- 21/ *Ibid.*, p. 17
- 22/ *Ibid.*, p. 39
- 23/ *Ibid.*, p. 9
- 24/ *Ibid.*, pp. 12-13
- 25/ According to the Draft Report of the Subcommittee on Photocopying of the National Commission on New Technological Uses of Copyrighted Works (CONTU), issued on 15 March 1978, the library market accounts for probably '75% or more of university press sales within the U.S.' (p. 70).
- 26/ *A National Program*, p. 1
- 27/ 20 August 1977, p. 1570
- 28/ Fry and White, p. 153
- 29/ Statement made before the Conference on Proposed Moratorium on Copyright Liability, Washington, D.C., 18 April 1968, printed in *The Williams & Wilkins Case*, p. xi
- 30/ Decision of the U.S. Court of Claims, pp. 28-9, reprinted *ibid.*, pp. 200-1
- 31/ Decision, p. 69, reprinted *ibid.*, p. 215
- 32/ Decision, p. 14, reprinted *ibid.*, p. 195
- 33/ Stephen Fried, 'Fair use and the new act,' in 'Copyright symposium - part II,' *New York Law School Law Review*, vol. 22, no. 3, 1977, p. 504
- 34/ Senate Report no. 94-473, 94th Cong., 1st Sess., p. 71
- 35/ Seltzer, p. 316
- 36/ *Ibid.*, p. 313
- 37/ *Ibid.*, pp. 333-4
- 38/ Interestingly, the CONTU Draft Report on Photocopying evoked just such a future possibility in commenting that the proposed Library of Congress National Periodicals Center might 'provide a means for the on-demand publishing of short documents as an alternative to, or a supplement to, traditional journal publishing' (p. 39).