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## Copyright Law and Library Photocopying: Striking a Balance Between Profit Incentive and the Free Dissemination of Research Information

Jon Vander Ploeg  
*Indiana University School of Law*

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## COPYRIGHT LAW AND LIBRARY PHOTOCOPYING: STRIKING A BALANCE BETWEEN PROFIT INCENTIVE AND THE FREE DISSEMINATION OF RESEARCH INFORMATION

On February 16, 1972, Commissioner Davis of the United States Court of Claims reported his findings of fact and recommendations for conclusions of law in the case of *Williams & Wilkins Company v. United States*.<sup>1</sup> Commissioner Davis found that it was an infringement of copyright for two government libraries to furnish their patrons with photoduplications of copyrighted articles in lieu of loaning the originals.<sup>2</sup> The case is the first to address itself to the issue and is potentially adverse to the current and future photocopying practices of all other libraries in the United States.<sup>3</sup> Essentially, librarians fear that the Commissioner's decision may mean that

. . . any library that makes a photocopy of a copyrighted work in its collection for scientific or scholarly purposes is guilty of infringement unless it first secures the permission of the copyright proprietor.<sup>4</sup>

If this interpretation is correct, the decision may effectively eliminate photocopying by libraries for their interlibrary loan systems, and may also prevent libraries from photocopying articles for researchers who must otherwise resort to handwritten or typewritten notes.<sup>5</sup> Ultimately, this decision could mean that libraries may not transfer their collections to microform and retrieve such materials in hard copy.<sup>6</sup> Not surprisingly

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1. 172 U.S.P.Q. 670 (Ct. Cl. Feb. 16, 1972) (Davis, Commissioner, findings of fact and suggested conclusions of law). The case was brought under 28 U.S.C. § 1498(b) (1970) (exclusive jurisdiction of the Court of Claims over copyright infringement suits against the United States).

2. 172 U.S.P.Q. at 672.

3. In *Williams & Wilkins* Commissioner Davis realized that he faced a choice between two irreconcilable views of the public's interest. 172 U.S.P.Q. at 687. The defendant, representing the views of librarians, argued that greater limitations on photocopying would unduly restrict research. Plaintiff, representing publishers, argued that unrestricted photocopying threatens the publishing incentive by reducing sales. *Williams & Wilkins* represents the culmination of an ongoing debate between librarians and publishers. For an appreciation of the magnitude of this debate, see M. ROBERTS, COPYRIGHT: A SELECTED BIBLIOGRAPHY OF PERIODICAL LITERATURE RELATING TO LITERARY PROPERTY IN THE UNITED STATES (1971), containing literally hundreds of articles pertaining to the copyright implications of photocopying.

4. North, *Williams & Wilkins—The Great Leap Backwards*, 3 AM. LIBRARIES 528 (1972) [hereinafter cited as North].

5. *Id.*

6. *Id.* "Microform" refers to the product of the various processes by which a miniaturized reproduction of an original is produced on a card or film. One can read

Commissioner Davis' findings and recommendations are being strenuously contested and a final decision must be rendered by the Court of Claims,<sup>7</sup> and since no decision can satisfy both parties, it may eventually reach the Supreme Court.

The battle over library photocopying privileges is also being fought in Congress where the legislators would like to do what Commissioner Davis was unable to do—achieve a workable compromise solution<sup>8</sup> which would serve the needs of all interested parties, publishers, libraries and patrons alike. The *Williams & Wilkins* decision has thrust upon the parties the necessity of arriving at a mutually acceptable accommodation of their competing interests. This note will examine these interests, their underlying legal theories, and some proposed means of reconciling the conflicts.

#### THE COMMISSIONER'S REPORT

The facts of *Williams & Wilkins* were not in issue. The National Institutes of Health (NIH), the government's principal medical research organization, maintains a library from which a researcher could obtain photocopies of medical journal articles on request.<sup>9</sup> In 1970 the library made about 93,000 photocopies of articles on a no-return basis.<sup>10</sup> The government also operates the National Library of Medicine (NLM) which is the repository of much of the world's medical literature. It is in essence a "librarian's library," engaging in an extensive interlibrary loan program. In 1968, NLM made 120,000 photocopies of journal articles to fulfill requests made through this program.<sup>11</sup> The plaintiff published four journals from which NLM and NIH made photocopies. Plaintiff alleged that each photocopy of an article constituted an infringe-

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this material through an apparatus which projects a magnified image of the copy. To retrieve this material in hard copy is to obtain a duplicate copy from the magnified microform. Hard copy, then, would be a reprint of the material stored on the microform.

7. *Williams & Wilkins Proposal*, 3 AM. LIBRARIES 980 (1972) [hereinafter cited as *Williams & Wilkins Proposal*]. The authority of Commissioners is set out in the rules of the Court of Claims. U.S. Ct. Cl. R.13. Rule 13(a) refers to the commissioner as a trial judge to the extent of the authority prescribed by statute and the rules. In Rules 13(b) and 134 the commissioner is given authority to conduct a trial and report findings of fact and recommendations for conclusions of law. In fact many of the rules contain expressions of the broad scope of the commissioner's authority. However, Rule 141 allows dissatisfied parties to take exception to the commissioner's report and seek review by the court.

8. Letter from Thomas C. Brennan, Chief Counsel to the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, to the author, Sept. 18, 1972 (a copy of which is on file in the offices of the Indiana Law Journal) [hereinafter cited as Letter].

9. 172 U.S.P.Q. at 673.

10. *Id.*

11. *Id.* at 674.

ment of copyright.<sup>12</sup>

Three of the government's defenses went exclusively to the facts of the case.<sup>13</sup> The remaining two defenses of non-infringement and "fair use" have traditionally been relied on by libraries as the justification for their photocopying practices.<sup>14</sup> The non-infringement argument relies on a construction of the Copyright Act of 1909,<sup>15</sup> which provides that the owner of copyrighted material "shall have the exclusive right . . . to print, reprint, publish, copy, and vend the copyrighted work . . ."<sup>16</sup> Concerned associations of research libraries joined the government in arguing that the statute's use of the term "copy" contemplates only the making of multiple copies for distribution. They would make "copy," as it applies to books and periodicals, synonymous with "print," "reprint" and "publish."<sup>17</sup> The Library Associations contended that Congress never meant the word "copy" to prohibit single-copy photoduplication by libraries.<sup>18</sup> The Commissioner rejected the non-infringement argument, stating that nothing in the copyright statute or the case law distinguishes making single copies from making multiple copies.<sup>19</sup> Moreover, the Commissioner found the libraries' claim that they make only single copies to be illusory since certain articles are continually requested, sometimes even by the same user.<sup>20</sup> Thus, he found that thousands of photoduplications of articles were made, each of which supplanted the need for a copy of the medical journal.<sup>21</sup>

12. *Id.*

13. It was the government's contention: that the plaintiff was not the "proprietor" of the copyright because authors of the articles "did not assign to plaintiff ownership of their manuscripts," 172 U.S.P.Q. at 674-75; that the plaintiff was not the real party in interest as to all the articles because some were "owned" by certain specialized medical societies, *id.* at 676; and, that the defendant had a license with respect to certain articles for which defendant's Public Health Service had made grants, *id.* at 683, this note does not deal with these defenses as they do not have a wide-ranging application to common library practices.

14. *See, e.g., V. CLAPP, COPYRIGHT—A LIBRARIAN'S VIEW* (1968) [hereinafter cited as CLAPP]. Thus, it is not surprising that an amicus brief submitted on the defendant's behalf spoke only to the defenses of "non-infringement" and "fair use." Brief for Association of Research Libraries, Medical Library Association, and American Association of Law Libraries as Amicus Curiae at 1 Williams & Wilkins Co. v. United States, 172 U.S.P.Q. 670 (Ct. Cl., Feb. 16, 1972) [hereinafter cited as Brief].

15. 17 U.S.C. §§ 1-216 (1970) [hereinafter referred to as the Copyright Act or the Act].

16. *Id.* § 1(a) (1970).

17. 172 U.S.P.Q. at 677.

18. Brief, *supra* note 14, at 4-31. *See also* CLAPP, *supra* note 14, at 25-28.

19. 172 U.S.P.Q. at 677-78.

20. *Id.* at 678.

21. *Id.* Due to the highly technical nature of these journals, they already have very limited circulations and high subscription prices. *Id.* at 673. If photocopying further reduces circulation, subscription rates would be driven higher causing even more potential subscribers to resort to photocopies. Commissioner Davis describes this as "a vicious cycle which can only bode ill for medical publishing." *Id.* at 680.

Defendant also relied on the doctrine of "fair use" to justify its photoduplication policies.<sup>22</sup> The Copyright Act was adopted in the exercise of Congress' constitutional power "[t]o promote the Progress of Science and useful Arts, by securing for limited times to Authors . . . the exclusive Right to their . . . Writings, . . ."<sup>23</sup> Theoretically, the "exclusive right" to copy granted by the Act, assures authors a fair return for their work and thereby stimulates creativity. Yet the courts have found exceptions to this "exclusive right" referred to as "fair use."<sup>24</sup> These have been employed where they, rather than "exclusive rights," serve the policy of the Copyright Act.<sup>25</sup> Thus, for example, a critic or a researcher may quote from a copyrighted work without violating the Act.<sup>26</sup>

The most troublesome problem comes in deciding precisely what criteria should be used to define "fair use." Generally, the courts have pointed to four elements: (1) the nature of the use, (2) the character of the work appropriated, (3) the quantity and value of the material used, and (4) whether the use tends to diminish the demand for the original article.<sup>27</sup> It has been suggested that these criteria are reducible to the question of whether the reasonable copyright owner would consent to the use.<sup>28</sup> Since the reasonable copyright holder would be primarily con-

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22. 172 U.S.P.Q. at 678. For a discussion of the "fair use" defense as it applies to photoduplication of copyrighted materials, see CLAPP, *supra* note 14; Pforzheimer, *Historical Perspective on Copyright Law and Fair Use*, in REPROGRAPHY AND COPYRIGHT LAW 18-35 (L. Hattery & G. Bush eds. 1964) [hereinafter cited as Pforzheimer]; SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., *Study No. 15: Photoduplication of Copyrighted Material by Libraries*, in COPYRIGHT LAW REVISION 50-53 (Comm. Print 1960) (study prepared by B. Varmer) [hereinafter cited as Varmer Study]; R. SHAW, *LITERARY PROPERTY IN THE U.S.* 67-71 (1950); Nimmer, *Project—New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. REV. 931, 950-54 (1968) [hereinafter cited as *UCLA Project*].

23. U.S. Const. art. I, § 8. See H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 43 (1944) [hereinafter cited as BALL].

24. See, e.g., Cohen, *Fair Use in the Law of Copyright*, in 6 ASCAP COPYRIGHT LAW SYMPOSIUM 43 (1955); BALL, *supra* note 23, at 259-92; SENATE COMM. ON THE JUDICIARY, 86TH CONG. 2D SESS., *Study No. 14: Fair Use of Copyrighted Works*, in COPYRIGHT LAW REVISION (Comm. Print 1960) (study prepared by A. Latman) [hereinafter cited as Latman Study].

25. See Pforzheimer, *supra* note 22, at 29-30; Latman Study, *supra* note 24, at 14-18.

26. See, e.g., *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957) (use permitted where a scholarly work drew from a prior work on the same historical subject); *Columbia Pictures Corp. v. N.B.C.*, 137 F. Supp. 348 (S.D. Cal. 1955) (parody of a published work permitted); *Karll v. Curtis Publishing Co.*, 39 F. Supp. 836 (E.D. Wis. 1941) (selective copying from an earlier work as quotations in a book review permitted).

27. *Williams & Wilkins Co. v. United States*, 172 U.S.P.Q. 670, 679 (Ct. Cl. Feb. 16, 1972). *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 283-84 (5th Cir. 1970); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943). See also Latman Study, *supra* note 24 at 14-18.

28. Latman Study, *supra* note 24, at 14.

cerned with competitive uses this analysis tends to reduce the criteria to a primary determination of the potential economic detriment to the copyright holder.<sup>29</sup> In *Williams & Wilkins*, defendant argued that the "fair use" exception applied because the photocopies were used for research and educational purposes, and because the defendant did not copy entire journals, but only reproduced individual articles.<sup>30</sup> However, Commissioner Davis regarded the potential economic detriment to the copyright owner as the major consideration.<sup>31</sup> Since each copy supplanted a need for the original article, the result was undoubtedly a loss of subscriptions. In the medical journal field, where the number of subscriptions to a particular journal is generally low, this loss could drive the journals out of print.<sup>32</sup> For Commissioner Davis, these considerations were enough to outweigh the defendant's arguments.

The libraries also argued that their photocopying policies were sanctioned by the so-called Gentlemen's Agreement of 1935, which had been formulated by a group of publishers and librarians.<sup>33</sup> The Gentlemen's Agreement recognized the legitimacy of single copy duplication when done for research and without profit.<sup>34</sup> The Agreement observed that handwritten notes have never been considered an infringement of copyright, and thus mechanical reproductions which are used in their place should likewise be exempt.<sup>35</sup>

The Commissioner found that the Gentlemen's Agreement has never had the force of law and that the groups which drafted the Agreement are no longer in existence.<sup>36</sup> More importantly, he found that it was not relevant to present problems because it was drafted at a time when reprography was too expensive to pose an economic threat to copyright owners.<sup>37</sup>

29. M. NIMMER, COPYRIGHT § 145, at 646 (1971 ed.); Latman Study, *supra* note 24, at 14; Varmer Study, *supra* note 22, at 50-51.

30. 172 U.S.P.Q. at 680.

31. *Id.* at 679.

32. *Id.* at 679-80. See *UCLA Project*, *supra* note 22, at 950-51.

33. 172 U.S.P.Q. at 680. See also Clapp, *Library Photocopying and Copyright: Recent Developments*, 55 L. LIBRARY J. 10 (1962). A copy of the agreement can be found in REPROGRAPHY AND COPYRIGHT LAW app. A, at 157-58 (L. Hattery & G. Bush eds. 1964) [hereinafter cited as Gentlemen's Agreement].

34. Gentlemen's Agreement, *supra* note 33, at 157.

35. *Id.* at 158. The Materials Reproduction Code, based on the Gentlemen's Agreement, was adopted by the American Library Association in 1941 and has since served as a guideline for library photoduplication. Varmer Study, *supra* note 22, at 52-53. In 1961 the Joint Libraries Committee on Fair Use approved this single photocopy policy. CLAPP, *supra* note 14, at 23-24. This decision resulted from an empirical study of library photocopying practices carried out by the association between 1957 and 1961. The study concluded that photoduplication was necessary for traditional library services and did not harm copyright owners. 25 VAND. L. REV. 1093, 1096-97 (1972).

36. 172 U.S.P.Q. at 680-81.

37. *Id.* at 681.

## NATURE OF THE PROBLEM AND SOME PROPOSED SOLUTIONS

The problem of reconciling photocopying practices with the copyright laws has increased in proportion to the technological advances made in reprography. Photocopying may represent only the tip of the technological iceberg looming before copyright. The library of the future will utilize computer storage systems for the information contained in their collections. New means of recording, storing, reproducing, and transmitting library materials may eventually replace the book form.<sup>38</sup> It may become feasible for only one library within a system to carry a journal, sharing it through electronic transmission systems with other libraries.<sup>39</sup> Such developments presage systems for disseminating information which are entirely different from traditional publishing. One commentator has suggested that large-scale computer storage and network transmission systems may merge the functions of publishers and libraries.<sup>40</sup> Our present copyright law obviously does not contemplate such possibilities. The current state of the copying art, and its prospects for the future are such that either a judicial or legislative readjustment of the balance between competing interests must be achieved as soon as possible.

The photocopying problem is often viewed as a conflict between the right of an author to reap an economic return on his work versus the public interest in the free dissemination of information.<sup>41</sup> However, these interests must be reconciled in terms of the constitutional authorization to promote the arts and sciences.

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38. Goldman, *Copyright as it Affects Libraries: Legal Implications*, in COPYRIGHT, CURRENT VIEWPOINTS ON HISTORY, LAWS, LEGISLATION 41-42 (A. Kent & H. Lancour eds. 1964) [hereinafter cited as Goldman].

39. Experimental programs are now underway making use of telephone and microwave transmission channels to send information to a user. And, soon instantaneous transmission systems may be utilized in interlibrary loan. *UCLA Project*, *supra* note 22, at 946-47.

40. Goldman, *supra* note 38, at 42.

41. 25 VAND. L. REV. 1093, 1103 (1972). Authors have argued that theirs are natural rights in the same sense that any other creator of property is recognized, at common law, to be entitled to the exclusive use and benefit of what he has created. Karp, *Interests of Authors and Users*, in REPROGRAPHY AND COPYRIGHT LAW 77 (L. Hattery & G. Bush eds. 1964). They argue that this natural right arises independent of the Copyright Act.

However, the House and Senate Reports on the Copyright Act of 1909 make it clear that an author's monopoly rights are purely statutory.

The enactment of copyright legislation by Congress under the terms of the Constitution is not based on any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive right to their writings.

H.R. REP. No. 2222, 60th Cong., 2d Sess. 6 (1909); S. REP. No. 1108, 60th Cong., 2d Sess. 6 (1909).

Copyright proprietors contend that the public interest is best served by giving the greatest protection to their economic return. The ever increasing speed and ever decreasing cost of making photocopies may greatly diminish the market for certain published materials, especially technical journals. Publishers argue that this situation is inimical to the public interest because the widespread use of electrostatic photocopying may drive some publishers of technical journals out of business.<sup>42</sup> This could result in government agencies being forced to assume responsibility for publication of scholarly materials — a scheme with inherent problems of censorship.<sup>43</sup> Libraries contend, on the other hand, that the advancing technology which threatens publishers is a product of the public's desire to utilize the most efficient means of gathering information. Photocopying has greatly facilitated the vast expansion of research activity in universities, governments and industries. Libraries have turned to photocopying in order to fulfill their role as information banks.<sup>44</sup> The researcher has found that photocopying may be the only means by which he can gather and organize a vast array of information.<sup>45</sup> To limit photocopying would be to limit the timeliness, thoroughness, accuracy and economy of his

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42. The publishing profits of technical journals are often marginal at best. For example, in *Williams & Wilkins* the plaintiff shared the journal's profits with a medical society whose members contributed articles. Commissioner Davis concluded that the journals often operate for the benefit of the medical profession and that the plaintiff's profits are not great. 172 U.S.P.Q. at 676. Further, the commissioner found that photocopying cuts into the market for technical journals and that this competition was a critical threat to the continued publication of such journals. 172 U.S.P.Q. at 679-80. *But see Shaw, Williams & Wilkins Company v. United States—A Review of the Commissioner's Report*, 3 AM. LIBRARIES 987 (1972) [hereinafter cited as Shaw]. See *UCLA Project*, *supra* note 22 at 941-44, which explains why the electrostatic process presents such a great threat to publishers. According to this study single copy mechanical reproduction of articles was not economically feasible prior to the development of the electrostatic copier. Previously, techniques such as mimeographing, which requires the preparation of a stencil and is therefore useless for single copies, were used. The electrostatic process can produce a single copy from the original and is inexpensive because no special paper is required. Since photoduplicates are also inherently accurate duplicates, the demand for the process has been tremendous.

43. Many commentators have expressed a fear of government publishing, claiming it would inevitably lead to subconscious censorship. While this danger is perhaps less critical in the area of technical information, it would be a matter of grave concern if it was extended into other areas. See G. GIPE, *NEARER TO THE DUST* 9 (1967) [hereinafter cited as GIPE]; *UCLA Project*, *supra* note 22, at 956-57. *But see Shaw*, *supra* note 42. Mr. Shaw was the founder of Scarecrow Press, publishers of limited volume scholarly materials. In addition to questioning the assumption that medical publishing is now in a perilous state, see note 42 *supra*, Shaw attempts to discount the argument that government control is imminent.

44. See CLAPP, *supra* note 14, at 17-20; Blackburn, *Photocopying in a University Library*, 2 SCHOLARLY PUBLISHING 49 (1970); North, *supra* note 4, at 529.

45. See CLAPP, *supra* note 14, at 17, where the author notes that the problem of gathering research materials is becoming increasingly difficult since they may be scattered throughout a large library or among many libraries. For this reason researchers need more inexpensive and quickly obtainable copies.

research.<sup>46</sup>

Several plans for accommodating the competing interests have been proposed.<sup>47</sup> Most of these provide for some form of licensing of library photocopying in return for a fee paid to the copyright owner. The arguments for and against these plans reflect different assumptions about the roles of libraries and publishers in society. Supporters of the plans argue that the fees are necessary to prevent the demise of scholarly journals whose publication is already economically marginal. Librarians fear that the burden of copyright royalties and the administrative expenses of collecting them would be too costly. This, they argue, would force libraries to give up the photocopying services which they feel are necessary for the free dissemination of information.<sup>48</sup> For example, an important service endangered by increased costs is the interlibrary loan system, a program which librarians feel will become increasingly important as they are forced to cope with a mushrooming information explosion.<sup>49</sup>

Publishers do not agree that library resources must be available to patrons free of charge.<sup>50</sup> They argue that the cost of future copying and information retrieval technology will require libraries to become "pay-as-you-use" institutions.<sup>51</sup> Publishers feel that they should participate in the revenues which would be derived from the use of their copyrighted materials.<sup>52</sup> However, the idea of free access to libraries is now so

46. CLAPP, *supra* note 14, at 17. Although some have said that authorized commercial copying services could handle the researcher's needs, Clapp suggests that the use of these sources may be so prohibitively time consuming and expensive that researchers would rather resort to laborious, inaccurate and obsolete manual transcription. *Id.* at 20. Such a result would unduly hamper the researcher without any financial benefit to publishers.

47. See, e.g., GIPE, *supra* note 43, at 241-76; Doebler, *IIA Discusses the Copyright Dilemma*, PUBLISHER'S WEEKLY, July 24, 1972, at 52 [hereinafter cited as Doebler]; Sharp, *Licensing the Photocopier*, 1 SCHOLARLY PUBLISHING 245 (1970) [hereinafter cited as Sharp]; *UCLA Project*, *supra* note 22, at 959-75.

48. See North, *supra* note 4.

49. Spokesmen for librarians say that no one library can have all or even a major part of works it needs. Physical and financial limitations have compelled libraries to specialize in certain subjects and then make their specialized collections available to researchers in other libraries through an interlibrary loan system. The use of photocopies expedites such interlibrary loan systems. Mailing a photocopy is cheaper than sending a bound journal and there is no danger that the original will be destroyed or lost. A system of interlibrary loan utilizing photocopies may well be the best way to maximize the effectiveness of the nation's information resources. See, e.g., CLAPP, *supra* note 14, at 18; North, *supra* note 4, at 529. Clapp argues that the purpose of such interlibrary loan arrangements is

not to reduce duplication in acquisition for its own sake, as is claimed to be feared by some copyright proprietors, but rather to use the available funds for a wider and more useful selection of research materials.

CLAPP, *supra* note 14, at 18.

50. Doebler, *supra* note 47, at 52.

51. *Id.* at 53.

52. *Id.*

ingrained in the public mentality that anyone attempting to change it would face a formidable task. A more important reason exists for preserving free library service than mere tradition, namely, the constitutional mandate to promote research and scholarship. In sum, although one publishing industry spokesman has suggested that "Andrew Carnegie's sin when he established his libraries was putting the word 'free' on them,"<sup>53</sup> the public interest may ultimately best be served by upholding the Carnegie ideal.

Ultimately, the nature of the problem is that unprecedented demands for printed information have combined with the new technology of reprography to upset the balance established by our now antiquated copyright laws. As part of a proposed general revision of copyright law now before Congress, a section has been included which would redress the balance by allowing a library to produce no more than one copy of a work for its own collection and no more than one copy for each requesting patron.<sup>54</sup> Under the proposed legislation, before a copy can be made, the library must determine, or the patron must satisfy the library, that an unused replacement cannot be obtained at a normal price from commonly known trade sources in the United States, including authorized reproducing services. This bill also requires that the library have no notice that the copy will be used for purposes other than scholarship and research, and that the library must warn patrons of applicable copyright laws.<sup>55</sup> The proposed law seems to be a refinement of the fair use exception, designed to apply to library photocopying.<sup>56</sup> Before single-copy photocopying would be "fair use" under the bill, the library would have to determine that the above requirements had been met. The bill, however, provides no criteria for determining when an unused copy cannot be obtained at a normal price from a trade source. William D. North, counsel for the American Library Association, has expressed the fear that librarians therefore would not be adequately protected against infringement actions.<sup>57</sup> Moreover, a cautious library might interpret "normal price" to be very high and therefore refuse a copy to a patron who could not realistically be expected to purchase

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53. *Id.* at 52.

54. S. 1361, 93d Cong., 1st Sess. § 108 (1973) [hereinafter cited as S. 1361]. For a concise discussion of legislative proposals leading up to the current copyright revision bill, see 25 VAND. L. REV. 1093, at 1097-98 (1972).

55. S. 1361, *supra* note 54, §§ 108(c), (d) (1)-(3).

56. That this is intended to be a refinement of "fair use" has been indicated by the Chief Counsel of the Senate subcommittee which is considering the legislation. Thomas C. Brennan of the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee wrote that § 108 was added "to supplement the general fair use provisions contained in section 107." Letter, *supra* note 8.

57. See North, *supra* note 4, at 530.

one at that price. In addition, discovering whether such a replacement could be obtained might cause critical delays in obtaining the needed information. Either factor could force a researcher to resort to laborious and inaccurate hand copying.<sup>58</sup> Finally, one wonders why the photocopying provision of this bill should apply only to libraries. The greatest amount of photocopying may be done by individuals and corporations<sup>59</sup> with the intent of ultimately reaping a profit from the information, yet no effective plan to compel payment for this use has been submitted.

While this bill leaves many questions unanswered, it will probably undergo revision in committee before enactment.<sup>60</sup> In the meantime, a final decision in *Williams & Wilkins* will determine the legitimacy of library photocopying practices under the present copyright statute. This decision will probably not present an acceptable solution to the problem. Therefore, publishers and librarians must concentrate their efforts on arriving at a mutually acceptable solution which could be incorporated into the new copyright legislation. The Subcommittee on Patents, Trademarks, and Copyrights has indicated its willingness to supplement §§ 107 and 108 of the new copyright bill with such privately reached accommodations.<sup>61</sup> Since it recently rejected the proposal of several library associations that libraries be allowed to make single copies for each patron without regard to the quantity of the work copied or the availability of the work in the commercial market,<sup>62</sup> it seems probable that the Subcommittee will accept only a compromise between publishers and librarians which represents a fair and workable balancing of the rights of creator and user.<sup>63</sup>

An often suggested arrangement is that a private agency be established which would operate in a manner similar to the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music

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58. CLAPP, *supra* note 14, at 20.

59. See *UCLA Project*, *supra* note 22, at 943-46. Many large corporations engaged in research will maintain a single subscription to a journal and distribute as many photocopies to their staff as are needed.

60. Letter, *supra* note 8. Copyright law must cater to so many interest groups that a general revision has now been in the process for seventeen years. Nathan, *Rights and Permissions*, PUBLISHER'S WEEKLY, July 17, 1972, at 110. Active consideration of copyright revision has been held up by the cable television controversy, but it could feasibly proceed under the 93d Congress. The earliest possible effective date for a new statute would be January 1, 1975. Letter, *supra* note 8.

61. Letter, *supra* note 8.

62. *Id.*

63. *Id.* Cf. *Editorial—Negotiating Copyright*, 97 LIBRARY J. 2509 (1972) which states that librarians must forego their hardline stand on photocopying. The editors of *Library Journal* argue that librarians must be willing to faithfully negotiate to achieve a compromise. If librarians fail to do so they will have the issue decided for them by a disinterested legislature.

Incorporated (BMI).<sup>64</sup> Indeed, such a proposal was cited by the Commissioner in *Williams & Wilkins* as a logical and common sense solution.<sup>65</sup> ASCAP and BMI have operated a clearing house to collect fees for copyright owners from the use of their copyrighted music. Although the clearinghouse has faced continuous problems, it has operated successfully for half a century.<sup>66</sup> Supposedly, an analogous voluntary organization of copyright owners could be formed which would set, collect and distribute licensing fees for photocopying of printed materials. One problem which would have to be resolved by such an organization would be whether to implement collection and distribution of fees on a flat fee basis or a per use basis. Some of the success of ASCAP and BMI may be attributed to the fact that they utilize a flat fee, which is thought to be more economical in terms of administrative expense.<sup>67</sup> However, printed works may not lend themselves to the flat fee rate because the types of printed works and the uses to which they are put are so much more diverse than is the case with musical works.<sup>68</sup> Thus, an ASCAP style program might have to adopt a per use basis for collection of fees. But, under the per use system, the clearinghouse would necessarily be required to keep specific records of every copying transaction. Both librarians and publishers maintain that the cost of such record keeping would be prohibitive because of the great number of transactions involved.<sup>69</sup> Commentators have pointed out that the true cost of photocopying is already quite high, and the added cost of such bookkeeping would make photocopying no longer feasible.<sup>70</sup>

In any event, the ASCAP style system would face many other difficulties, such as the necessity for formation of a voluntary private association. If these difficulties cannot be overcome, there are several other pos-

64. See, e.g., Doebler, *supra* note 47, at 53-54; Meyerhoff, *Interests of the Researcher*, in REPROGRAPHY AND COPYRIGHT LAW 119, at 121 (L. Hattery & G. Bush eds. 1964); *UCLA Project*, *supra* note 22, at 964-67.

65. 172 U.S.P.Q. at 680.

66. Sophar, *Nature of the Problem*, in REPROGRAPHY AND COPYRIGHT LAW 3, at 5 (L. Hattery & G. Bush eds. 1964). For a discussion of the operation of ASCAP, see Finkelstein, *ASCAP as an Example of the Clearing House System in Operation*, 14 COPYRIGHT SOC'Y BULL. 2 (1966).

67. *UCLA Project*, *supra* note 22, at 965.

68. *Id.* at 965.

69. See Doebler, *supra* note 47, at 54. According to publisher, Curtis Benjamin, the number of transactions involved renders a per use system unmanageable. While ASCAP has only 15,000 to 20,000 members, there are 200,000 to 400,000 authors of books and another 2,000 book publishers. *Id.* Nonetheless, the UCLA Project suggested that such a system might work if limited to technical journal publishers since they are hardest hit by photocopying. They also argue that this would sufficiently limit the scope of the system to allow a flat fee rate as its basis. *UCLA Project*, *supra* note 22, at 966.

70. See, e.g., Doebler, *supra* note 47, at 54.

sible solutions. One is that a system of governmental collection and distribution of copyright fees be incorporated into the new copyright statute. Proposals for such government programs which might be suitable for incorporation include both flat fee and per use systems.<sup>71</sup> For example, one proposed per use system would have the user purchase stamps which would be honored for a certain amount of photocopying and then would be mailed to the copyright owner on a postcard.<sup>72</sup> The copyright owner would cash in his stamps with a government collection agent. Under this system different rates could be set according to the type of materials copied and the use for which the copy is being obtained.<sup>73</sup> Other per use proposals would utilize computerized collection systems.<sup>74</sup> However, such computerized programs are probably not yet economically feasible. Moreover, one authority has suggested that saving a few journals would not be worth the great expense of such an administrative scheme, particularly if the scheme raised the cost of copying so much as to effectively inhibit its use.<sup>75</sup> On the other hand, a governmental system imposing a flat rate could take the form of a tax on copying machines with the revenues distributed to copyright owners at a rate based on a sampling of the copying being done.<sup>76</sup> This approach would be more economical than a per use system, but costs would still be relatively high. Moreover, the system would have to be rather complex to take account of the nature and amount of the work copied, and the particular use for which the copy is sought.<sup>77</sup>

The Williams & Wilkins Company has already introduced yet another type of program under which libraries would purchase photocopying rights from the copyright owner along with the regular purchase of the journal. In line with this program, Williams & Wilkins originally proposed that, for its own journals, libraries pay the regular subscription rate plus a license fee of one-half to five cents per page.<sup>78</sup> This fee would be based on the number of pages published or the number photocopied, or based on the average number of pages photocopied as revealed by a one year sampling.<sup>79</sup> Recently, however, Williams & Wilkins has instituted a special institutional subscription rate for its own journals, at an

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71. See, e.g., *UCLA Project*, *supra* note 22, at 967-73.

72. *Id.* at 967-70.

73. *Id.* at 968.

74. See, e.g., GIFE, *supra* note 43, at 241-66; Sharp, *supra* note 47, at 250-52.

75. See Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 336-37 (1970).

76. *UCLA Project*, *supra* note 22, at 971-73.

77. *Id.* at 972-73.

78. See *Williams & Wilkins has Plan for Photocopying Rights*, 97 LIBRARY J., 1758 (1972).

79. *Id.*

increase of approximately 12.5 per cent, and has further demanded a royalty of five cents per page for photocopies used in interlibrary loan.<sup>80</sup> These actions indicate some of the problems that may be inherent in Williams & Wilkins' general plan. First, the added costs for the library are potentially quite high. Second, there would be difficulty in negotiating reasonable licensing rates with each copyright owner. At a time when libraries are faced with particularly severe budget restrictions,<sup>81</sup> they may well be unable to afford these new institutional rates and license fees. They may refuse to purchase photocopying rights or choose to not subscribe to the journal at the new higher rate. The end result would be precisely what should be avoided—an undue restriction on the dissemination of information.

#### CONCLUSION

An efficient and mutually acceptable solution is not yet in sight. One will be achieved only when each party recognizes the merit in the other's position. Librarians must realize that the free dissemination of information is still dependent upon publishing in its traditional form, and thus the publishers' economic incentive must be protected. Copyright owners, on the other hand, must realize that at some point their profit incentive must make way for the public's interest in research speed and accuracy.

JON VANDER PLOEG

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80. *Williams & Wilkins Proposal*, *supra* note 7, at 980.

81. According to the staff of *American Libraries* a reduction in library service is facing libraries of all types everywhere, due to widespread budget problems. 3 AM. LIBRARIES 1157 (1972).