

OVERVIEW OF THE LIBRARIES AND ARCHIVES EXCEPTION IN THE COPYRIGHT ACT: BACKGROUND, HISTORY, AND MEANING

INTRODUCTION

This paper is intended to provide an overview of the history and general background of the exceptions and limitations for libraries and archives under the copyright law, and the provisions of 17 U.S.C. § 108 specifically. Section 108 allows libraries and archives to engage in the limited, unauthorized, reproduction and distribution of copyrighted works. This paper reviews the history of section 108, its meaning, and the rationales behind its provisions.

The purpose of copyright law, as stated in Article I, Section 8 of the U.S. Constitution, is to “Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .”¹ These exclusive rights provide incentives to authors in order to increase the publication and dissemination of intellectual works. To ensure that the public interest in dissemination of works is best served, copyright law also balances the exclusive rights of creators and publishers against the interests of subsequent users and others who provide access to works through certain exceptions and limitations on the exclusive rights, including provisions such as fair use and section 108. The exclusive rights incentives enable authors and publishers to invest both time and money in the creation and publication of creative works, while the exceptions and limitations ensure that the uses of those works are not restricted by the exclusive rights in ways that would be unreasonably detrimental to the public interest. Depending upon where they sit in this creative marketplace, rights-holders and libraries and archives have varying perspectives on how to calibrate the balance so that the purposes of copyright are best achieved.

Speaking in gross generalizations, libraries and archives place primary importance on the value of providing access to their patrons, viewing copyright issues through the lens of the public’s need for uninhibited information flow in order to fully participate in creative, intellectual, and political life. Rights-holders, on the other hand, emphasize the value of exclusive rights for creators, recognizing that without incentives and compensation to creators and their publishers, the amount and quality of creative and intellectual works available to the public will be severely diminished. Of course, for copyright law to work optimally, the core values of dissemination to the public and incentives to create should reinforce one another, not work at cross-purposes. This was the task before the drafters of the 1976 Act, as well as the Digital Millennium Copyright Act, and the Copyright Term Extension Act, each of which addressed the needs of libraries and archives in a world of changing technology. This paper traces those efforts up to the present. The task before us today is to write the next chapter.

¹ U.S. CONST. Art. I, § 8, cl. 8.

PART 1: HISTORY OF THE LIBRARY AND ARCHIVES EXCEPTIONS

COPYRIGHT AND LIBRARIES: 1909-1955

THE COPYRIGHT ACT OF 1909

The Copyright Act of 1909, which governed throughout the first three-quarters of the 20th century, contained no express exceptions or limitations – for libraries or otherwise – to the exclusive right of authors to “print, reprint, publish, copy, and vend.”² Duplication and other uses of copyrighted works by libraries and archives under the 1909 Act were governed exclusively by the common-law doctrine of fair use. Reproduction was far more cumbersome, of course, and, as a result, less prevalent in the first half of the century. Libraries and archives had always made hand-copies of works in their collections, and began to make machine reproductions at the beginning of the 20th century. But it was not until the advent of the modern photocopier machine that the activities of libraries and archives had the potential for significant economic impact on markets for copyrighted works. Indeed, it was not until 1968 that the first infringement case was brought against a library.³ The *Williams & Wilkins* case provided the first express legal authority relating to libraries’ reproductions of copyrighted works, although it was soon superseded by the Copyright Act of 1976.⁴

Certain standards of practice arose among libraries and archives in the absence of explicit legal rules. Handwritten transcriptions of written works in a library’s collection made by scholars, for instance, were generally considered fair.⁵ Photographing pages of books was a practice that arose in the early part of the century and was viewed by many in the library community (but not without dispute by publishers) as essentially the same act as hand-transcription and therefore similarly as fair use. Indeed, editions of the Library of Congress’s “Rules and Practice Governing the Use of Books” in the early part of the century explicitly allowed the photographing of copyrighted works in the Library’s collection, and stated that “photo-duplicates of books, newspapers, maps, etc. can be furnished at a reasonable rate by means of the Photostat installed in the Chief Clerk’s

² Copyright Act of 1909, Pub. L. No. 349, 35 Stat. 1075 (1909).

³ *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff’d per curiam by an equally divided court*, 420 U.S. 376 (1975). *Williams & Wilkins* was decided in favor of the publisher plaintiff by a judge of the U.S. Court of Claims in 1972. In 1973, the full Court of Claims reversed, holding for the library defendant. It is this latter opinion that is cited throughout this paper. In 1975, the Supreme Court affirmed the full Court of Claims decision, but did not issue an opinion explaining its ruling. *See infra* text pp. 16-20.

⁴ Throughout this paper, use is made of the terms “library copying,” “library photocopying,” “reproduction by libraries and archives,” and other similar terms. Unless otherwise stated, we are referring to unauthorized reproductions.

⁵ *See Williams & Wilkins*, 487 F.2d at 1350.

Office.”⁶ And, as discussed below, more specific standards of practice arose through the development of non-binding guidelines.⁷

THE “GENTLEMEN’S AGREEMENT” AND OTHER GUIDELINES

The “standard of acceptable conduct” for library and archive practice until the Copyright Act of 1976 was the 1935 “Gentlemen’s Agreement” on library duplication of copyrighted works.⁸ The voluntary agreement, struck between the National Association of Book Publishers (NABP) and the Joint Committee on Materials for Research of the American Council of Learned Societies was non-binding and limited in scope. Nevertheless, the Gentlemen’s Agreement and its progeny served as authority on what constituted “fair use” reproduction for libraries for over thirty years.

Robert C. Binkley, a young and energetic historian at Western Reserve University and chair of the Joint Committee, was the driving force behind the Gentlemen’s Agreement.⁹ He led the Joint Committee on a course to harmonize the possibilities of the new technology for researchers with the realities of copyright law.¹⁰ From the start, Binkley focused the discussions on making single, non-commercial copies for individual researchers, realizing that advocating a general educational copying privilege would, because of its potential to harm sales of textbooks, set the publishers irrevocably against the plan.¹¹

In 1933, Binkley, on behalf of the Joint Committee, wrote to the Copyright Office for advice on how to proceed, and received a pessimistic reply from the Acting Register of Copyrights (William L. Brown) stating that library reproductions of entire works were plainly infringements of the copyright owner’s exclusive rights.¹² After discussions with publishers, the Joint Committee then determined that the best course of action would be to pursue an explicit exception for libraries in the copyright law itself.¹³ Harry Lydenberg, a member of the Joint Committee and the director of the New York Public Library, met with members of the NABP, the American Library Association, and librarians from Brooklyn and Yale in March of 1935 to press for their support for such legislation.¹⁴ The NABP, while recognizing the merits of allowing single-copy

⁶ *Id.* at 1351. In addition the Library of Congress policy said, “the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright.”

⁷ It is interesting to note that, in the 1973 *Williams & Wilkins* appeal, the U.S. Attorney General argued that, based on the history of pre-1909 copyright law, “copying” under the 1909 Act should not be considered an infringement of the copyright in books and periodicals, only “printing,” “reprinting,” and “publishing.” See *Williams & Wilkins*, 487 F.2d, at 1350.

⁸ THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 14 (1983) [hereinafter 1983 REGISTER’S REPORT].

⁹ Peter Hirtle, Fair Use, Research, and Libraries: The Gentlemen’s Agreement of 1935, at 3 (September, 2004) (unpublished draft manuscript, on file with the U.S. Copyright Office). The authors of this paper thank Peter Hirtle for his enlightening study, and for permitting us to rely upon it for this discussion.

¹⁰ See Jackson S. Saunders, *Origin of the “Gentlemen’s Agreement” of 1935*, in REPROGRAPHY AND COPYRIGHT LAW 159, 162 (Lowell H. Hattery & George P. Bush eds., 1964).

¹¹ See Hirtle, *supra* note 9, at 6-7.

¹² See Saunders, *supra* note 10, at 162.

¹³ See *id.* at 164-165.

¹⁴ See Hirtle, *supra* note 9, at 17-18.

reproductions for scholars, refused to back a legislative approach, claiming that a library exception would require “so great a need of hedging it about with restriction, whereases, and provisos, as to endanger, if not nullify” its usefulness.¹⁵

The Joint Committee agreed with the publishers to pursue a voluntary agreement,¹⁶ even though it was aware that such an agreement could not bind all publishers. Any publisher would still be free to sue for infringement, even where the copying was clearly within the terms of the agreement.¹⁷ Moreover, the issues of interlibrary loan and the use of periodical articles were not addressed.¹⁸ Nevertheless, such an agreement was seen as better than nothing.

The Gentlemen’s Agreement, finalized on June 3, 1935, reads as follows:

The Joint Committee on Materials for Research and the Board of Directors of the National Association of Book Publishers, after conferring on the problem of conscientious observance of copyright that faces research libraries in connection with the growing use of photographic methods of reproduction, have agreed upon the following statement:

A library, archives office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research; provided

(1) That the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law;

(2) That such reproduction is made and furnished without profit to itself by the institution making it.

The exemption from liability of the library, archives office or museum herein provided for shall extend to every officer, agent or employee of such institution in the making and delivery of such reproduction when acting within the scope of his authority of employment. This exemption for the institution itself carries with it a responsibility to see that library employees caution patrons against the misuse of copyright material reproduced photographically.

Under the law of copyright, authors or their agents are assured of "the exclusive right to print, reprint, publish, copy and vend the copyrighted work," all or any part. This means that legally no individual or institution can reproduce by photography or photo-mechanical means, mimeograph or other methods of reproduction a page or any part of a book without the

¹⁵ Letter from Harry M. Lydenberg to Robert C. Binkley (Mar. 27, 1935), *quoted in Hirtle, supra* note 9, at 17.

¹⁶ *See* Saunders, *supra* note 10, at 165.

¹⁷ *See* Hirtle, *supra* note 9, at 12.

¹⁸ Letter from Robert C. Binkley to Harry M. Lydenberg (Apr. 1, 1935), *cited in Hirtle, supra* note 9, at 18-19.

written permission of the owner of the copyright. Society, by law, grants this exclusive right for a term of years in the belief that such exclusive control of creative work is necessary to encourage authorship and scholarship.

While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. Extensive quotation is obviously inimical to the author's interest.

The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription.

In order to guard against any possible infringement of copyright, however, libraries, archives offices and museums should require each applicant for photo-mechanical reproductions of material to assume full responsibility for such copying, and by his signature to a form printed for the purpose assure the institution that the duplicate being made for him is for his personal use only and is to relieve him of the task of transcription. The form should clearly indicate to the applicant that he is obligated under the law not to use the material thus copied from books for any further reproduction without the express permission of the copyright owner.

It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photo-copying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted. In case of doubt as to whether the excerpt requested complies with this condition, the safe thing to do is to defer action until the owner of the copyright has approved the reproduction.

Out-of-print books should likewise be reproduced only with permission, even if this reproduction is solely for the use of the institution making it and not for sale.¹⁹

(signed)

ROBERT C. BINKLEY, Chairman
Joint Committee on Materials for Research
W. W. NORTON, President
National Association of Book Publishers²⁰

¹⁹ *The "Gentlemen's Agreement" of 1935*, in *REPROGRAPHY AND COPYRIGHT LAW* 157 (Lowell H. Hattery & George P. Bush eds., 1964).

²⁰ The NABP, followed by the Book Publishers Bureau formed in 1938, in turn followed by the American Book Publishers Council, are predecessor organizations to the present-day Association of American Publishers (formed in 1970).

The Gentlemen’s Agreement was circulated throughout the library and publishing communities in late 1935.²¹ It was praised by many as a “useful clarification” of fair use standards, but some librarians had criticisms, particularly of its treatment of out-of-print works, and of its failure to address the issue of reproductions for educational use.²² Nevertheless, the agreement did serve as an acceptable standard of practice for several decades.²³ Indeed, some elements of the Agreement’s single-copy limits, warnings to users, bars on copying entire works, and emphasis on scholarship survive today in Section 108, particularly in sub-sections (d) and (e), dealing with copies made upon requests from users.²⁴

In 1941, the American Library Association (ALA) adopted the “Reproduction of Materials Code.”²⁵ The Code incorporated provisions of the Gentlemen’s Agreement concerning library reproductions of portions of copyrighted works for scholars, and includes additional guidance on uncopyrighted material and unpublished manuscripts. It also reiterated the Agreement’s assertion that it memorializes the “practical and customary” meaning of “fair use” as applied to libraries, as opposed to creating a new privilege.²⁶ The Reproduction of Materials Code, which was in effect through the 1960s, reads as follows:

- I. NON-COPYRIGHT MATERIAL (published works not copyrighted in the United States, or on which copyright has expired)
 - a. *Out-of-Print*. There appear to be no legal or ethical reasons for any restrictions on library reproduction of such materials, either for use within the institution or for sale.
 - b. *In Print*. There are no legal restrictions on reproduction of such materials, whether of foreign or domestic origin. In the case of works which have not been copyrighted in the United States, however, it is evident that it would not be in the best interests of scholarship to engage in widespread reproduction which would deprive the publisher of income to which he appears to be entitled and might result in suspension of the publication. It is recommended, therefore, that before reproducing uncopyrighted material less than twenty years old, either for sale or for use within the library, libraries should ascertain whether or not the publication is still in print and, if it is in print, should refrain from reproducing whole number or volumes or series of volumes. This recommendation does not apply to reproduction of individual articles or extracts which are to be reproduced without profit.
- II. COPYRIGHT MATERIAL

²¹ See Hirtle, *supra* note 9, at 23-24.

²² See *id.* at 24.

²³ See 1983 REGISTER’S REPORT, *supra* note 8, at 14.

²⁴ See *id.* at 15.

²⁵ A.L.A. News, *Reproduction of Materials Code*, 35 A.L.A. BULL. 84 (1941).

²⁶ See *id.*

- a. *Out-of-Print.* This material enjoys the complete protection of the Copyright Law but the courts recognize that “fair use,” which includes reasonable copying, may be made of copyright material. The final determination as to whether any act of copying is a “fair use” rests with the courts. But the practical and customary meaning of “fair use” applicable to reproduction for research purposes was agreed upon in 1935 by the National Association of Book Publishers and the Joint Committee on Materials for Research. The Book Publishers Bureau, which now exercises the functions of the old association, has acknowledged the agreement. The agreement recognizes the right of a library to make and deliver a single photographic reproduction of a part of a book or periodical volume in which copyright still subsists to a scholar who represents in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for purposes of research. The agreement requires (1) that the library give to the person receiving the reproduction due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction and (2) that the library furnish such reproduction without profit to itself. It is recommended that, in all cases which do not clearly come within the scope of the agreement, either the scholar requiring the reproduction or the library to which the request is made seek the permission of the copyright owner before reproducing copyright material. Special care is called for in the case of illustrations or articles that are covered by a special copyright in addition to the general copyright on the whole book or periodical. Attention is called to the fact that a publisher’s permission is not legal protection to the library unless the publisher is either the copyright owner or an agent of the owner duly authorized to grant such permission.
- b. *In Print.* Legally there is no distinction between in print and out-of-print copyright material. Reproduction of in print material, however, is more likely to bring financial harm to the owner of the copyright, and it is recommended that libraries be even more careful than in the case of out-of-print material.

III. MANUSCRIPTS

Manuscript material is protected by common law but the restrictions on its reproduction are probably less rigid than those on copyright material. Reproduction may probably be made to assist genuine scholarly research if no publication is involved. Libraries should, however, be careful to observe any restrictions of copying such material that have been stipulated by the donor.

It is recommended that when acquiring manuscripts, libraries seek a definite understanding regarding the publication

rights, since, in manuscripts, the literary property as distinct from the physical property, usually belongs to the author or his heirs. It is further recommended that, when consent to publication is given by the donor, evidence be secured that he has actually acquired the literary property or is authorized to act for the owner of the literary property.²⁷

In addition to its Reproduction Code, the ALA in 1952 adopted a “General Interlibrary Loan Code,” which expressly relied upon the parameters set out in the Gentlemen’s Agreement.²⁸ This Code, which continued to be cited as an authority into the 1970s, noted that reproduction of works for interlibrary loan – especially entire books and periodicals, or multiple copies – is fraught with copyright risks, and thus stated that “any request, therefore, that indicates acceptability of a photographic substitution . . . should be accompanied by a statement with the signature of the applicant attesting to his responsibility for observing copyright provisions in his use of the photographic copy.”²⁹

EARLY LEGISLATIVE EFFORTS, 1934-1944

Before delving into the next important phase – the library-copyright negotiations of the 1960s and 1970s – it may be illuminating to look at some earlier but failed legislative attempts at granting libraries and other cultural institutions special copyright exemptions. Robert C. Binkley, the prime mover behind the Gentlemen’s Agreement, was also active in seeking a legislative carve-out for library copying. In 1935 Congress was considering various pieces of legislation to ratify the Berne Convention on international copyright.³⁰ Binkley secured the cooperation of the American National Committee on International Intellectual Cooperation, chaired by James T. Shotwell, in order to insert a library provision into the ratifying legislation.³¹ The provision, written by Joint Committee member Harry Lydenberg, read:

Nothing herein set forth shall render liable to infringement of copyright any library, museum, archives office, or similar organization reproducing copyright material in its care on behalf of a scholar, student, or investigator who, in the opinion of the librarian or curator or archivist, calls for this reproduction in good faith – not for republication – for the purpose of study or scholarship or research, and who in writing orders this

²⁷ *Id.*

²⁸ See Louis Charles Smith, *The Copying of Literary Property in Library Collections*, 46 LAW LIBR. J. 197, 205-206 (1953).

²⁹ *Id.*

³⁰ See ABE A. GOLDMAN, COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS, STUDY NO. 1: THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION FROM 1901 TO 1954, at 8-9 (1955), reprinted in 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, UNITED STATES SENATE: STUDIES 1-4, at 8-9 (Committee Print 1960).

³¹ See Hirtle, *supra* note 9, at 11.

reproduction and absolves the library, museum, or archives office of responsibility for infringement.³²

Shotwell's committee approved this language, but it was never inserted into any proposed legislation.³³

The first instance of a library copying provision appearing in introduced legislation was in a 1940 general copyright revision bill,³⁴ also intended to allow the United States to join the Berne Convention.³⁵ Again, the library provision was partly based on the work of the Joint Committee on Materials for Research.³⁶ In a memo presented to the Shotwell Committee in 1938, the Joint Committee argued for much more latitude for scholars to reproduce copyrighted works than was given by the Gentlemen's Agreement, saying that "the provisions of the copyright law should leave intact the free right to copy as part of the normal procedure of research. This right to copy should never be confused with the right to publish."³⁷ The Joint Committee memo also urged that libraries be permitted to make copies of out-of-print works "as additions to library resources," perhaps under a statutory license.³⁸ Finally, in the first mention of reproduction for preservation and replacement, the Joint Committee recommended that libraries be allowed to copy damaged books for continued public access.³⁹

The language eventually inserted in the 1940 bill adopted only some of the Joint Committee's suggestions. It stated that libraries may make single copies of unpublished works for research purposes, and may also make single copies of published works, provided the works had been previously publicly offered for sale, and were currently out-of-print.⁴⁰ Copying of a published work was additionally conditioned upon the copyright owner failing to file its intention to re-publish the work within 30 days of a notice of the library's wish to copy the work.⁴¹ The Copyright Office would administer this system.⁴² In addition, the library would have to tender the original purchase price of the work to the Copyright Office, which would set up a trust fund for future claimants.⁴³ It was a complicated provision, the bill died, and the provision was never revived.⁴⁴

A far more limited library copying bill was introduced in 1944, which would have permitted the Library of Congress to make copies of any published copyrighted work for

³² Minutes of the American National Committee on International Intellectual Cooperation (Mar. 9, 1935), at 9, *quoted by* Hirtle, *supra* note 9, at 11.

³³ Hirtle, *supra* note 9, at 12. None of the general copyright revision bills introduced in the 1935-36 Congress were enacted. GOLDMAN, *supra* note 30, at 10.

³⁴ S. 3043, 76th Cong. (1940).

³⁵ GOLDMAN, *supra* note 30, at 10-11.

³⁶ BORGE VARMER, COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS, STUDY NO. 15: PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES, at 55 (1959), *reprinted in* 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, UNITED STATES SENATE: STUDIES 14-16, at 55 (Committee Print 1960).

³⁷ JOINT COMMITTEE ON MATERIALS FOR RESEARCH, MEMORANDUM ON COPYRIGHT ON BEHALF OF SCHOLARSHIP (1938), *quoted in* VARMER, *supra* note 36, at 55.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ S. 3043, 76th Cong. § 12 (1940), *reprinted in* VARMER, *supra* note 36, at 54.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See* VARMER, *supra* note 36, at 55.

members of Congress, judges, federal agencies, certain authorized federal officers, and others who certify that only fair use will be made of the copy.⁴⁵ As with the 1940 bill, no action was taken.⁴⁶

COPYRIGHT AND LIBRARIES, 1955-1976

There was relatively little action of significance regarding library photocopying during the next decade or so. As noted above, no lawsuits alleging copyright infringement via photocopying were filed – either against libraries or their patrons – until 1968. Of course, the duplication technologies of the 1930s when the Gentlemen’s Agreement was created were far from the modern copying machine, in terms of speed, ease of use and reproduction quality.⁴⁷ The threat to authors’ and publishers’ bottom line was relatively negligible compared to the havoc about to be wrought by the high-speed photocopier. By the 1960s, the technology had advanced substantially, increasing the means and ease by which libraries could serve the public, and thus, the means and ease by which copyrights could be infringed. Robert C. Binkley wisely noted in 1935 that the Gentlemen’s Agreement would “protect what libraries have done in the past, but not what they might do in the future.”⁴⁸ As the early photoduplication technology provided impetus for the Gentlemen’s Agreement, so did the modern photocopier with respect to the fifteen years of negotiations culminating in section 108 of the Copyright Act of 1976.

By 1960, publishers and libraries were finding the Gentlemen’s Agreement unworkable. Advances in copying technology had produced a dramatic increase in the instances and amounts of photocopying by libraries and their patrons. Publishers particularly objected to the increase in interlibrary loan photocopying by libraries, especially the practice of divvying up journal subscriptions among two or more institutions in a consortium, on the understanding that the institutions would share copies of the periodicals.⁴⁹ Library copying of scientific literature was another sticking point. The profit margin on scientific publishing was so small, and the amount of material being copied so large, that some publishers began to require licenses.⁵⁰ The 1960s photocopying technology was a revolutionary step in the use of copyrighted works, and this animated much of the debate over library photocopying for the next sixteen years.

⁴⁵ S. 2039, 78th Cong. § 1 (1944), *reprinted in* VARMER, *supra* note 36, at 55-56.

⁴⁶ VARMER, *supra* note 36, at 56.

⁴⁷ Library photo-reproduction in the 1930s was done via Photostat machines that photographed, developed, rinsed, and fixed copies at a rate of one to three per minute. They required special photographic paper, as well as chemicals and trained operators. See ROBERT C. BINKLEY, JOINT COMM. ON MATERIALS FOR RESEARCH OF THE SOC. SCI. RESEARCH COUNCIL AND THE AM. COUNCIL OF LEARNED SOC’YS, MANUAL ON METHODS OF REPRODUCING RESEARCH MATERIALS 71-76 (1936); DAVID OWEN, COPIES IN SECONDS: CHESTER CARLSON AND THE BIRTH OF THE XEROX MACHINE 79-81 (2004).

⁴⁸ Letter from Robert C. Binkley to James T. Shotwell (Apr. 1, 1935), *quoted in* Hirtle, *supra* note 9, at 18.

⁴⁹ See Laurie C. Tepper, *Copyright Law and Library Photocopying: An Historical Survey*, 84 LAW LIBR. J. 341, 348 (citing Louise Weinberg, *The Photocopying Revolution and the Copyright Crisis*, 38 PUB. INTEREST 99, 100-01 (1975)).

⁵⁰ See *id.* (citing Weinberg at 102-06).

THE 1959 STUDY, 1961 REGISTER’S REPORT, AND 1963 DRAFT BILL

In 1955, Congress asked the Copyright Office to prepare a series of reports on aspects of copyright law to serve as the basis for a total overhaul of the Copyright Act. Between 1955 and 1963 the Copyright Office commissioned and/or produced 35 separate studies,⁵¹ the fifteenth of which was Borge Varmer’s “Photoduplication of Copyrighted Material by Libraries.” Varmer’s study – like the Gentleman’s Agreement – focused on copying for purposes of research and scholarship. Such copying, Varmer argued, was “indispensable” to researchers, because the sheer number of publications make it impossible for libraries to serve their patrons solely through loans.⁵² Regarding copying for preservation, Varmer concluded that this was a “less urgent” matter than research copying, and suggested that, as long as copies of a work were unavailable from the publisher, preservation copying was legitimate – a conclusion he reached for interlibrary loan copies as well.⁵³

Varmer did not make explicit recommendations for research copying by non-profit libraries.⁵⁴ Instead, he set out four possible scenarios. The first was to enact a general statutory provision permitting private copying.⁵⁵ This had the advantage of simplicity, but would not provide enough protection for copyright owners.⁵⁶ Varmer’s second scenario was to enact a detailed statutory provision qualifying which types of libraries would be covered, how many of what kind of copyrighted works they could copy, and for what purposes.⁵⁷ This is the model eventually embraced in the 1976 Act – despite Varmer’s concerns that libraries would find it too restrictive and complex, and

⁵¹ The studies were numbered as follows: 1. The History of U.S.A. Copyright Law Revision From 1901 to 1954 (1955), 2. Size of the Copyright Industries (1959), 3. The Meaning of “Writings” in the Copyright Clause of the Constitution (1956), 4. The Moral Right of the Author (1959), 5. The Compulsory License Provisions of the U.S. Copyright Law (1956), 6. The Economic Aspects of the Compulsory License (1958), 7. Notice of Copyright (1957), 8. Commercial Use of the Copyright Notice (1959), 9. Use of the Copyright Notice by Libraries (1959), 10. False Use of Copyright Notice (1959), 11. Divisibility of Copyrights (1957), 12. Joint Ownership of Copyrights (1958), 13. Works Made for Hire and On Commission (1958), 14. Fair Use of Copyrighted Works (1958), 15. Photoduplication of Copyrighted Material By Libraries (1959), 16. Limitations on Performing Rights (1958), 17. The Registration of Copyright (1958), 18. Authority of the Register of Copyrights to Reject Applications for Registration (1959), 19. The Recordation of Copyright Assignments and Licenses (1958), 20. Deposit of Copyrighted Works (1960), 21. The Catalog of Copyright Entries (1960), 22. The Damage Provisions of the Copyright Law (1956), 23. The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study (1958), 24. Remedies Other Than Damages for Copyright Infringement (1959), 25. Liability of Innocent Infringers of Copyrights (1958), 26. The Unauthorized Duplication of Sound Recordings (1957), 27. Copyright in Architectural Works (1959), 28. Copyright in Choreographic Works (1959), 29. Protection of Unpublished Works (1957), 30. Duration of Copyright (1957), 31. Renewal of Copyright (1960), 32. Protection of Works of Foreign Origin (1959), 33. Copyright in Government Publications (1959), 34. Copyright in Territories and Possessions of the United States (1959), and 35. The Manufacturing Clause of the U.S. Copyright Law (1963). The studies were published as committee prints of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary between 1960 and 1963.

⁵² See VARMER, *supra* note 36, at 49.

⁵³ See *id.* at 64.

⁵⁴ He did recommend, however, that multiple copying by corporate libraries be governed by a royalty arrangement. See *id.*

⁵⁵ See *id.* at 65.

⁵⁶ See *id.*

⁵⁷ See *id.*

that advances in technology would overtake its usefulness.⁵⁸ The scenario Varmer deemed the most workable was his third one, a statutory provision mandating that nonprofit institutions could make and supply copies only for research, study, and related purposes like maintenance of a library's collections or for another library, with the details to be filled in through administrative rulemaking.⁵⁹ Varmer's fourth scenario was a new voluntary agreement between libraries and copyright owners.⁶⁰

Of the seven interest groups who commented on Varmer's study, only two thought that legislation was the best way to address library photocopying.⁶¹ This opposition to a statutory solution would predominate in both the library and owner communities until the late 1960s.

In June 1961, the Register of Copyrights published a wide-ranging report on copyright law reform, which included a recommendation of a statutory provision governing library photocopying.⁶² New statutory language, the Register said, was necessary because uncertainty about fair use limits was harming researchers, and, hence, undermining intellectual progress.⁶³ In addition, publishers needed protection from the levels of infringement facilitated by new copying technology.⁶⁴ The basic concept to be used when addressing this conflict, the Register announced, was that "photocopying should not be permitted where it would compete with the publisher's market."⁶⁵ Thus, the Register recommended a blanket license system for businesses making multiple copies,⁶⁶ and the following statutory language for non-profit libraries:

The statute should permit a library, whose collections are available to the public without charge, to supply a single photocopy of copyrighted material in its collections to any applicant under the following conditions:

(a) A single photocopy of one article in any issue of a periodical, or of a reasonable part of any other publication, may be supplied when the applicant states in writing that he needs and will use such material solely for his own research.

(b) A single photocopy of an entire publication may be supplied when the applicant also states in writing, and the library is not otherwise informed, that a copy is not available from the publisher.

⁵⁸ *See id.* at 65-66. Varmer notes that the library photocopying provision (section 7) of the United Kingdom Copyright Act of 1956 had been criticized as too complicated and restrictive. Section 7 provided separate and detailed rules for library copying for articles in periodical publications, parts of other published works, complete published works, and unpublished works, and mandated further regulations by the Board of Trade. *See id.* at 59-61.

⁵⁹ *Id.* at 66.

⁶⁰ *Id.*

⁶¹ Comments were received on behalf of the Music Publishers Association of the United States, the Curtis Publishing Company, the New York Public Library, the American Association of University Professors, attorneys who represented television and newspapers, and law professor Melville B. Nimmer. *Id.* at 73-76.

⁶² REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961) [hereinafter 1961 REGISTER'S REPORT].

⁶³ *See id.* at 25.

⁶⁴ *See id.* at 25-26.

⁶⁵ *Id.* at 26.

⁶⁶ *See id.*

(c) Where the work bears a copyright notice, the library should be required to affix to the photocopy a warning that the material appears to be copyrighted.⁶⁷

Reaction to the Register's library copying recommendations was mixed. Publishing groups supported the Register's statutory language, but proposed adding a requirement that libraries must determine whether a complete work is available from the publisher or the publisher's agent before copying it.⁶⁸ The Author's League registered extreme displeasure, stating that the Register's proposal was a "grave threat to the fundamental right to print and publish copies," and urging that library copying should continue to be governed under a common-law fair use regime.⁶⁹ Library representatives agreed with the Author's League that codification of library copying rules was a bad idea, but for completely opposite reasons. They asserted that there was "great danger" in the statutory language, because it would freeze what was allowable at the very moment that technology is advancing.⁷⁰ What the libraries advocated was allowable under fair use (specifically, "fill[ing] orders for single copies of any published work or any part thereof" as an "extension of normal and traditional library service")⁷¹ went far beyond what publishers and authors found acceptable. In a statement on the effects of this library copying impasse, a witness remarked, "if we don't recognize it, it is going to be done or, more accurately, it will be continued to be done in a clandestine manner and the publishers and their authors, who have royalty arrangements in some cases, will receive no benefit in the process."⁷²

Despite the somewhat negative response to the Register's 1961 proposal, a 1963 draft copyright revision bill included a section with very similar language.⁷³ Predictably, it met a similar fate, with author, publisher, and library groups attacking it for the same reasons they attacked the 1961 proposal.⁷⁴ The Copyright Office ultimately agreed that the time was not right for a provision in the copyright law specifically addressing library copying, saying that, "at the present time the practices, techniques, and devices for reproducing visual images and sound and for 'storing' and 'retrieving' information are in such a stage of rapid evolution that any specific statutory provision would be likely to prove inadequate, if not unfair or dangerous, in the not too distant future."⁷⁵

⁶⁷ *Id.*

⁶⁸ See *Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Printed for the Use of the House Comm. on the Judiciary*, 88th Cong. 35-36 (1963) (statement of Horace S. Manges, Counsel, American Book Publishers Council, Sept. 14, 1961).

⁶⁹ *Id.* at 256 (written statement of the Authors League of America, Feb. 23, 1962).

⁷⁰ *Id.* at 34 (statement of William H. Hogeland, Jr., Joint Libraries Comm. on Fair Use in Photocopying, Sept. 14, 1961).

⁷¹ *Id.* at 34 (statement of Edward G. Freehafer, Director, New York Public Library, Sept. 14, 1961).

⁷² *Id.* at 43 (statement of Joseph A. McDonald; Smith, Hennessey & McDonald; Sept. 14, 1961).

⁷³ SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 26 (1965) [hereinafter 1965 REGISTER'S REPORT].

⁷⁴ See, e.g., 1983 REGISTERS REPORT, *supra* note 8, at 20.

⁷⁵ 1965 REGISTERS REPORT, *supra* note 73, at 26.

LEGISLATIVE EFFORTS, 1964-1967

The 1964 and 1965-66 copyright revision bills did not include library photocopying provisions, but the issue was debated as vigorously as ever, this time in the arena of fair use. Libraries sought legislative affirmation that fair use, as encoded in the statute, would include library photocopying.⁷⁶ Authors and publishers resisted this interpretation.⁷⁷ An exchange between library and author representatives at a hearing on the 1964 bill encapsulates the debate:

GOSNELL [American Library Association]: I certainly assume that it [the fair use provision] covers photocopying as it is practiced and advocated by the library people in their statement on the doctrine of fair use.

KARP [Authors League of America]: Just so that somebody doesn't go picking over the record of these proceedings ten years hence and find that Mr. Gosnell's statement went unchallenged, let me point out that his assumptions about the relationship of fair use to photocopying are entirely gratuitous and completely erroneous. Fair use doesn't cover photocopying, and I don't think that any court would hold that it did . . . all of this discussion simply indicates that the doctrine of fair use is much better left to the courts . . .⁷⁸

At hearings on the 1965-66 revision bill, much of the discussion on unauthorized library photocopying focused on its financial effects. Library groups pointed to a study they had commissioned showing that "the present practices of libraries with respect to single copies are traditional and essential and are not damaging to the interests of copyright holders."⁷⁹ Authors and publishers painted a more ominous picture, warning that libraries that make single copies are in fact replacing the role of publishers,⁸⁰ and may ultimately destroy school and library markets.⁸¹ One publisher representative warned that library reproductions of scientific texts, by diminishing the market for those texts, could eventually force more scientific reliance on government largesse, and ultimately "direct governmental intervention in science publishing, with an authoritarian bureaucracy loosening or tightening the pursestrings and thereby deciding which

⁷⁶ See, e.g., *Copyright Law Revision Part 5: 1964 Revision Bill with Discussions and Comments, Printed for the use of the House Comm. on the Judiciary*, 89th Cong. 103 (1965) (testimony of Charles F. Gosnell, Chairman, Comm. on Library Issues, American Library Ass'n, Aug. 6, 1964).

⁷⁷ See, e.g., *id.* (testimony of Irwin Karp, Authors League of America, Aug. 6, 1964).

⁷⁸ *Id.*

⁷⁹ *Copyright Law Revision: Hearings Before Subcomm. No. 3 of the Comm. on the Judiciary, House of Representatives, on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835*, 89th Cong. 452 (1966) (testimony of Rutherford D. Rogers, Chairman, Joint Library Comm. on Copyright, Jun. 3, 1965).

⁸⁰ See, e.g. *id.* at 1431 (testimony of Bella L. Linden, American Textbook Publishers Institute, June 30, 1965).

⁸¹ See, e.g. *id.* at 86 (statement of Rex Stout, President, Authors League of America, May 26, 1965).

scientific journals, even which scientific articles, are to be allowed to publish, and which must perish.”⁸²

Two comments from the 1965 hearings are particularly interesting to note in that they reveal how some participants in the debate foresaw the possibility of the evolving technology, while others failed to. Charles Gosnell of the ALA argued that photocopying bore a minimal risk to publishers because “in these days of mass production no isolated one-at-a-time copying system can ever compete in cost or in quality with original central publications.”⁸³ When asked whether the ALA’s position on library copying would change if such a copying system came into being, Gosnell replied that the hypothetical was “impossible.”⁸⁴ On the other hand, Frederick Burkhardt of the American Council of Learned Societies (ACLS) foresaw that the use of electronic storage and retrieval systems “with quick, direct access from other locations by electronic means, could well reduce the sales to individual libraries of works such as periodicals and reference books.”⁸⁵

Burkhardt’s testimony also advocated inserting a library copying provision in the revision bill, something that the ALA and the publishers still opposed.⁸⁶ But the House Judiciary Committee took Burkhardt’s point, and in its 1966 report on the revision bill, announced that a workable library copying compromise was “overdue,” and urged “all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected.”⁸⁷

In the same report, the Judiciary Committee also added a new provision, urged in 1965 by the General Services Administration, historians, archivists, and educators, on reproduction of works in archival collections.⁸⁸ It was the first iteration of the current section 108,⁸⁹ and provided:

Notwithstanding the provisions of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution.⁹⁰

The explanation of this provision, to which the committee noted there was “little or no opposition,” said it would not permit archives to make machine-readable copies, to

⁸² *Id.* at 1511-12 (statement of Lyle Lodwick, Director of Marketing, Williams & Wilkins Co., Aug. 4, 1965).

⁸³ *Id.* at 471 (testimony of Charles F. Gosnell, Chairman, Comm. on Library Issues, American Library Ass’n, Jun. 3, 1965).

⁸⁴ *Id.*

⁸⁵ *Id.* at 1556 n.13 (statement of Frederick Burkhardt, American Council of Learned Societies, Aug. 4, 1965).

⁸⁶ *See id.* at 1555-56.

⁸⁷ H.R. REP. NO. 89-2237, at 65 (1966).

⁸⁸ *Id.* at 66.

⁸⁹ *See* DRAFT SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL ch.III p.9 (1975) [hereinafter 1975 DRAFT REGISTER’S REPORT].

⁹⁰ H.R. REP. NO. 89-2237, at 5.

distribute the copies to scholars or the public, or to override prior contractual arrangements.⁹¹

The 1967-68 copyright revision bill contained the same section 108 provision on preservation of unpublished works as the prior bill, and hearings on the legislation produced no significant discussion regarding its language. The focus of publishers, libraries, and education groups during the 1967 hearings was on computer uses of copyrighted works,⁹² but a shift in the photocopying debate emerged as well. The Joint Libraries Committee on Copyright⁹³ concluded that a voluntary agreement with publishers over the fair use parameters for single copying was impossible, and that to rely purely upon fair use would leave libraries constantly open to the threat of litigation.⁹⁴ Thus, the Joint Libraries Committee urged the adoption of a library copying provision to the revision bill. Publishers did not join the Joint Libraries Committee's call for new legislation. Instead, they recommended developing a royalty payment system,⁹⁵ or a "flat, nominal, nonpunitive tax on copying machines and their entire output."⁹⁶

The next year, the Williams & Wilkins publishing company filed suit against the National Library of Medicine and the National Institutes of Health for copyright infringement. This case – the first ever addressing libraries' copying privileges under fair use – was a "bombshell" (according to the 1983 Register's Report), which significantly influenced the legislative deliberations over section 108.⁹⁷

⁹¹ *Id.*, at 66-67.

⁹² See 1983 REGISTER'S REPORT, *supra* note 8, at 41.

⁹³ This group originated with a suggestion in 1954 by then-Register of Copyrights Arthur Fisher that libraries should take the initiative in preventing photocopying abuses. Initially named the Joint Libraries Committee on Fair Use in Photocopying in 1957, the group consisted of the Association of Research Libraries, American Association of Law Libraries, American Library Association, and Special Libraries Association. Verner W. Clapp, *Library Photocopying and Copyright: Recent Developments*, LAW LIBR. J. 10, 13 (1962). The Joint Libraries Committee's primary work was a survey of library photocopying practices, the results of which were published in 1961 – revised in 1963 – with the conclusion that library photocopying did not harm publishers, and that it should be library policy to copy entire works or portions thereof for researchers, after determining whether or not a copy was available commercially. See 1975 DRAFT REGISTER'S REPORT, *supra* note 89, at ch.III p.5. At some point between 1961 and 1965 the Committee's name changed to the Joint Libraries Committee on Copyright. See *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyright of the Comm. on the Judiciary, United States Senate, on S. 597, 90th Cong.* 614 (1967) (testimony of Prof. Erwin C. Surrency, Chairman, Joint Libraries Comm. on Copyright, Apr. 4, 1967).

⁹⁴ See, e.g. *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyright of the Comm. on the Judiciary, United States Senate, on S. 597, 90th Cong.* 617 (1967) (testimony of Prof. Erwin C. Surrency, Chairman, Joint Libraries Comm. on Copyright, Apr. 4, 1967) ("As a librarian, I can assure you that I have had publishers come into my library to investigate what materials we were photocopying and try to encourage us to stop all activity in this field. The mere enactment of the present bill will encourage threats of lawsuits over [library copying]. I cannot see institutions litigating this matter to establish the practice under the doctrine of fair use. Librarians feel that we would like to have some protection and not be forced to negotiate from a weak position.").

⁹⁵ See *id.* at 53 (statement of the Authors League of America, Mar. 15, 1967).

⁹⁶ *Id.* at 978 (testimony of Lyle Lodwick, Director of Marketing, The Williams & Wilkins Co, Apr. 11, 1967).

⁹⁷ 1983 REGISTER'S REPORT, *supra* note 8, at 27-28. *Williams & Wilkins* was the first of only a handful of published court decisions regarding copyright infringement by a non-profit library or archive (as opposed to libraries or archives in for-profit institutions). See, e.g., *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (suit against a church operating public libraries); *Bridge*

1968-1976 LEGISLATIVE EFFORTS AND THE WILLIAMS AND WILKINS CASE

In 1968 the ALA proposed an amendment to the copyright revision bill to provide that “it would not be an infringement of copyright for an academic institution or library to ‘reproduce a work or a portion thereof’ provided this was not done for commercial advantage.”⁹⁸ Book publishers responded that inclusion of such language would force them to withdraw their support from the bill.⁹⁹ The copyright revision bill introduced at the beginning of the 1969-70 Senate was identical to the prior version in its treatment of libraries and archives, and did not include the ALA amendment.¹⁰⁰ However, when the bill was reported out of the Subcommittee on Patents, Trademarks, and Copyrights in December 1969 it included a brand-new two-page Section 108 containing the basic elements of what was eventually enacted in 1976 as 108(a), (b), (c), (f), and (g).¹⁰¹ In the words of the Subcommittee report, describing the provision in part:

The bill provides that under certain conditions it is not an infringement of copyright for a library or archives to reproduce or distribute no more than one copy or phonorecord of a work. The reproduction or distribution must not be for any commercial advantage and the collections of the library or archives must be available to the public or to other persons doing research in a specialized field. The measure also specifies that the reproduction or distribution of an unpublished work must be for the purpose of preservation and security, or for deposit for research use in another library or archives. The bill further provides that the reproduction of a published work must be for the purposes of replacement of a copy that is damaged, deteriorating, lost, or stolen, and that the library or archives has determined that an unused replacement cannot be obtained at a normal price from commonly-known trade sources in the United States. The rights given to the libraries and archives by this provision of the bill are in addition to those granted under the fair-use doctrine.¹⁰²

Whether or not the 1969 section 108 originated with the ALA’s 1968 proposal, or was influenced by the filing of the *Williams & Wilkins* suit, the new measure produced a major change in the legislative deliberations, being the first time that language permitting unauthorized library or archive photocopying of published, copyrighted works appeared in active federal legislation since 1944.

Publications, Inc. v. F.A.C.T. Net, Inc., 183 F.R.D. 254 (D. Colo. 1998) (suit against non-profit corporation operating a library and archive).

⁹⁸ S. REP. NO. 91-519, at 8-9 (1969).

⁹⁹ *Id.* at 9.

¹⁰⁰ S. 543, 91st Cong. § 108 (Jan. 22, 1969).

¹⁰¹ S. 543, 91st Cong. § 108 (Committee Print, Dec. 10, 1969).

¹⁰² S. REP. NO. 91-1219, at 5-6 (1970).

The new section 108 would have to wait until 1973, however, for a full debate on its merits, as no action was taken for the remainder of the 1969-70 Congress, and copyright revision as a whole was held up during the 1971-72 term by cable TV issues.¹⁰³

Meanwhile, in 1972, U.S. Court of Claims Commissioner James Davis issued his ruling in *Williams & Wilkins*. The publisher had sued the National Library of Medicine and the National Institutes of Health for infringement by making unauthorized photocopies of Williams & Wilkins' journals for its staff and for other researchers.¹⁰⁴ Commissioner Davis found for the plaintiff, stating that:

Whatever may be the bounds of "fair use" as defined and applied by the courts, defendant is clearly outside those bounds. Defendant's photocopying is wholesale copying and meets none of the criteria for "fair use." The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market. Defendant says, nevertheless, that plaintiff has failed to show that it has been harmed by unauthorized photocopying; and that, in fact, plaintiff's journal subscriptions have increased steadily over the last decade. Plaintiff need not prove actual damages to make out its case for infringement.¹⁰⁵

Davis's ruling stunned the library community, as it essentially put single-copy photoduplication of articles outside the bounds of fair use, and rendered moot the argument that photocopies do not harm publishers. Commissioner Davis also dismissed the Gentlemen's Agreement, stating that whatever force it might have had as evidence of usual and customary practice in 1935 was of little significance in an age where photocopying was "rapid, cheap, and readily available."¹⁰⁶

Hearings on the 1973 copyright revision bill began shortly after, with libraries and publishers facing an extensive new library copying provision, as well as the 1972 *Williams & Wilkins* decision. The ALA, Association of Research Libraries (ARL), and Medical Library Association began the hearings by proposing an amendment in response to Commissioner Davis's ruling.¹⁰⁷ Section 108(d) of the 1973 bill conditioned library copies of both portions of a work or an entire work upon a prior determination that an

¹⁰³ See S. REP. NO. 92-74, at 8 (1971).

¹⁰⁴ *Williams & Wilkins*, 487 F.2d, at 1346-47. Williams & Wilkins was a major publisher of scientific and medical journals. It alleged that the National Library of Medicine (NLM) had made unauthorized copies of articles in its journals for National Institutes of Health researchers and an Army researcher, for use in their professional activities. The journals in question were Medicine, Pharmacological Reviews, The Journal of Immunology, and Gastroenterology. *Id.* at 1347, 1349. Note also that although the NLM regularly made copies of journal articles for other libraries, this was not made part of Williams & Wilkins' complaint. *See id.* at 1348.

¹⁰⁵ *Id.* at 1378 (Cowen, C.J., dissenting) (quoting trial judge's opinion).

¹⁰⁶ *Id.* at 1380 (Cowen, C.J., dissenting) (quoting trial judge's opinion).

¹⁰⁷ See, e.g., *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, United States Senate, on S. 1361*. 93rd Cong. 89 (1973) [hereinafter *1973 Hearings*] (statement of Dr. Stephen A. McCarthy, Executive Director, Ass'n of Research Libraries, Jul. 31, 1973).

unused copy could not be obtained through normal trade sources.¹⁰⁸ The library groups felt that this requirement was unnecessary for copying articles or contributions to a periodical, and thus proposed amending 108(d) so that only copying an entire work would require a library to first determine commercial unavailability.¹⁰⁹ This amendment was intended both to counter the 1972 *Williams & Wilkins* decision and to facilitate interlibrary loan services.¹¹⁰ As a representative of the ARL argued, “a reader who is from a distant library seeking to obtain library materials through interlibrary loan will be particularly penalized . . . since he will not be in a position easily without substantial loss of time to comply with the [requirement to determine commercial unavailability].”¹¹¹

Publisher and author groups objected vehemently to both the original section 108 language and the library groups’ proposed amendment. Many argued, as they had in the past, that allowing single-copy reproduction would severely harm publishers, especially those in the scientific, technical, and medical fields.¹¹² Some, such as the Association of American Publishers, pushed for a clearance and licensing system.¹¹³ Others, such as the publishing house Harcourt Brace Jovanovich, argued that the National Commission on New Technological Uses of Copyrighted Works (CONTU), to be created under the 1973 bill, should be given a chance to study and compile data on the subject before section 108 could “freeze potentially detrimental measures into our laws for years to come and to remove any impetus for thorough consideration of this issue.”¹¹⁴

While the Senate Judiciary Patent, Trademark, and Copyright Subcommittee was considering these positions, the full U.S. Court of Claims narrowly reversed Commissioner Davis’ *Williams & Wilkins* ruling, holding that the NLM’s journal copying did constitute fair use under the four-factor test, and that the “record . . . fails to show a significant detriment to plaintiff but does demonstrate injury to medical and scientific research if photocopying of this kind is held unlawful.”¹¹⁵ The majority stressed, however, that its ruling should be read narrowly, and urged Congress to take action as soon as possible.¹¹⁶ The case was immediately appealed to the Supreme Court.

In the meantime, the Senate subcommittee reported the revision bill to the full Judiciary Committee in April 1974, keeping intact the essence of the library groups’ amendment by distinguishing between copies for users of portions of works (subsection (d)) versus entire works.¹¹⁷ The subcommittee also added subsections requiring notice of copyright to be placed on copies, and specifying those works which were barred from library and archive reproduction except for the purposes of preservation or

¹⁰⁸ S.1361, 93rd Cong. § 108 (1973).

¹⁰⁹ See, e.g., 1973 Hearings, *supra* note 107, at 90 (testimony of Dr. Stephen A. McCarthy, Executive Director, Ass’n of Research Libraries, Jul. 31, 1973).

¹¹⁰ See 1983 REGISTER’S REPORT, *supra* note 8, at 46.

¹¹¹ 1973 Hearings, *supra* note 107, at 90 (testimony of Dr. Stephen A. McCarthy, Executive Director, Ass’n of Research Libraries, Jul. 31, 1973).

¹¹² See, e.g., *id.* at 114-15 (testimony of Robert W. Cairns, Executive Director, American Chemical Society, Jul. 31, 1973).

¹¹³ See *id.* at 144 (statement of W. Bradford Wiley, Chairman and Chief Executive of the Ass’n of American Publishers, Jul. 31, 1973).

¹¹⁴ *Id.* at 130 (testimony of Ambassador Kenneth B. Keating, Harcourt Brace Jovanovich, Inc., Jul. 31, 1973).

¹¹⁵ *Williams & Wilkins*, 487 F.2d, at 1362.

¹¹⁶ *Id.* at 1362, 1363.

¹¹⁷ 1983 REGISTER’S REPORT, *supra* note 8, at 47.

replacement.¹¹⁸ More controversially, the subcommittee added a new provision, subsection (g)(2), stating that “the rights of reproduction and distribution under this section . . . do not extend to cases where the library or archives, or its employee: . . . (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d).”¹¹⁹ Subsection (g)(2) was greeted by “howls of outrage” by library groups, who saw it as taking away the very interlibrary loan flexibility given by the amendments to subsection (d).¹²⁰

Publishers and authors generally accepted the new restriction, arguing that “as a technical matter, a prohibition against systematic copying was implicit in the rest of the section; however, the amendment allowing nearly unrestricted single copying of journal articles and similar works made an explicit prohibition against doing this on a systematic basis essential.”¹²¹ Achieving compromise on the “systematic copying” issue was made more difficult by the fact that the same groups debating the copyright bill were also filing amicus briefs with the Supreme Court in the *Williams & Wilkins* case, a situation that tended to make their legislative positions “increasingly inflexible and tenacious.”¹²² The Copyright Office and the National Commission on Libraries and Information Science convened a series of meetings to arrive at a proper interpretation of “systematic,” but no consensus was ever reached.¹²³

The full Senate Judiciary Committee reported the revision bill in July 1974, and the Senate passed it in September, with the same language that the subcommittee had reported,¹²⁴ adding only the exception for audiovisual news programs, which was proposed by Senator Baker. This new provision was intended to legitimize the type of activities engaged in by the Vanderbilt University Television News Archive in Tennessee,¹²⁵ which had started building a major archive of national television news programming.

An identical revision bill was introduced in both the House and the Senate at the beginning of the 1975-76 Congress.¹²⁶ One month later, the Supreme Court split 4-4 on the *Williams & Wilkins* appeal, which automatically affirmed the full Court of Claims decision in favor of the NLM, but robbed that decision of any precedential weight.¹²⁷ Thus, free of litigation concerns for the time being, the publisher, author, library, and archive interest groups refocused on the copyright revision legislation and section 108. The Senate held a gargantuan 18 days of hearings from May through December 1975, and those sessions devoted to library and archive reproduction tended to revolve around the new “systematic copying” restriction.¹²⁸ Libraries complained that “it is impossible to determine exactly what it means,” but that “it appears . . . to be potentially applicable whenever a library makes a photocopy of an article or other portion of a published work

¹¹⁸ S. REP. NO. 93-983, at 11-13, 120-123 (1974).

¹¹⁹ *Id.* at 13, 121-123.

¹²⁰ 1975 DRAFT REGISTERS REPORT, *supra* note 89, at ch.III p.14.

¹²¹ *Id.*

¹²² *Id.* at ch.III p.15.

¹²³ *See id.*

¹²⁴ S. REP. NO. 94-92, at 5 (1975).

¹²⁵ 1975 DRAFT REGISTER’S REPORT, *supra* note 89, at ch.III p.21.

¹²⁶ *See id.* at ch.III p.15.

¹²⁷ *See id.* at ch.III p.16.

¹²⁸ *See* 1983 REGISTER’S REPORT, *supra* note 8, at 49.

in the context of a ‘system,’” such as a city or county branch library system, a university, or a regional consortia.¹²⁹ The libraries’ fear was that subsection (g)(2) would bar single copying for library patrons through interlibrary loan.¹³⁰

Publishers, relying in part on the Judiciary Committee’s 1974 report language, maintained that the “systematic copying” ban was both easily understandable and necessary:

We think it unnecessary to belabor the point that unauthorized systematic copying – the kind of copying that is done at a research center, or at a central resource point for use in a library network – is the functional equivalent of piratical reprint publication. Certainly this kind of copying must be paid for if, as the National Commission on Libraries and Information Science puts it, “the economic viability and continuing creativity of authorship and publishing” are to be protected.¹³¹

Apparently convinced by the library groups’ arguments, the House Judiciary Committee in 1976 added a proviso to Section 108(g)(2) stating 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.¹³²

This proviso, the House Report cautioned, would require “more-or-less specific guidelines” in order to be workable, guidelines that CONTU was in the course of drafting.¹³³

The CONTU guidelines on photocopying and interlibrary loan were published in the Conference Report on the Copyright Act of 1976, along with the House’s 108(g)(2) interlibrary loan proviso.¹³⁴ Setting forth specific rules under which libraries and archives could make interlibrary loan copies, the CONTU guidelines gave shape to the proviso’s bar on “aggregate quantities as to substitute for a subscription to or purchase of” a copyrighted work.¹³⁵ This was the final substantive brick in the Section 108

¹²⁹ *Copyright Law Revision: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, of the Comm. on the Judiciary, House of Representatives, on H.R. 2223, 94th Cong. 206 (1976) [hereinafter 1975 Hearings]* (statement of John P. McDonald, Executive Director, Ass’n of Research Libraries, May 14, 1975).

¹³⁰ *See, e.g., 1983 REGISTER’S REPORT, supra* note 8, at 49-50.

¹³¹ *1975 Hearings, supra* note 129, at 227 (statement of Charles H. Lieb, Copyright Counsel, Ass’n of American Publishers, May 14, 1975).

¹³² H.R. REP. NO. 94-1476, at 78 (1976).

¹³³ *Id.*

¹³⁴ CONF. REP. NO. 94-1773, at 71-74 (1976).

¹³⁵ *Id.* The full text of the CONTU guidelines is reprinted in U.S. COPYRIGHT OFFICE, CIRCULAR 21, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS 18-19 (1995) available at <http://www.copyright.gov/circs/circ21.pdf>.

edifice. The House and Senate both approved the Conference Report, and the Copyright Act of 1976 was signed by President Gerald Ford on October 19, 1976.¹³⁶

COPYRIGHT OFFICE REPORTS

The 1976 Copyright Act included a requirement – subsection 108(i) – that the Copyright Office consult with stakeholders and issue a report in 1983 – and every five years thereafter – assessing whether section 108 had achieved the intended balance between the rights of copyright owners and the needs of libraries and archives.¹³⁷ This requirement indicated that, even after fifteen years of negotiations, Congress wasn't entirely sure that it had gotten the balance right. The 1983 report was an enormous seven-volume effort (including appendixes). While noting that 1982 discussions between copyright owners and libraries on photocopying issues had been marked by “dominant and unrelieved” disagreement,¹³⁸ the report concluded that, for the most part, the 1976 balance was fair and workable.¹³⁹ The report did also propose four statutory recommendations, none of which was ever adopted:

1. Pursuant to an industry-library agreement, amend § 108 to allow the reproduction of an entire musical work if the library cannot locate the copyright owner.
2. In order to encourage more participation in collective licensing agreements, enact an “umbrella statute” limiting rights-holders to reasonable copying fee damages for infringement of specialty journals under certain conditions.
3. Clarify the requirement that library reproductions bear a copyright notice. (This requirement was ultimately revised by the DMCA amendments discussed below.)
4. Clarify that unpublished works are excluded from the exemptions for patron-requested reproductions.¹⁴⁰

The Copyright Office's follow-up 1988 report on the library exemption, a much briefer three-volume survey, re-affirmed the conclusion of the 1983 report, and cited remarks from copyright owners and libraries that, it maintained, “indicate a convergence of the sharply divergent views that these parties expressed during the first five-year review.”¹⁴¹ The only statutory recommendation this time around was to expand the scope of the 108(i) reports to encompass a study on the effects of new technology on the section

¹³⁶ 1983 REGISTER'S REPORT, *supra* note 8, at 55.

¹³⁷ CONF. REP. NO. 94-1773, at 71.

¹³⁸ 1983 REGISTER'S REPORT, *supra* note 8, at 11.

¹³⁹ *Id.* at 1.

¹⁴⁰ *See id.* at 360-62.

¹⁴¹ THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108): SECOND REPORT 39-41 (1988).

108 balance. If that couldn't be accomplished, the Copyright Office recommended that the five-year reporting process be either discontinued, or modified to require reports every ten years.¹⁴² A mandate to study the effects of new technology was not added to 108(i), and the five-year reporting requirement was deleted from the statute in 1992.¹⁴³

¹⁴² *Id.* at x, 129.

¹⁴³ S. REP. NO. 102-194, at 7 (1991).

PART II: SECTION 108: THE COPYRIGHT ACT OF 1976, THE DMCA, AND THE CTEA

Since 1976 section 108 of the Copyright Act has been modified only slightly: The Digital Millennium Copyright Act of 1998 (DMCA) amended subsections 108(a), (b), and (c) by, *inter alia*, extending the single copy limit to three copies. The Copyright Term Extension Act of 1998 (CTEA) added current section 108(h) permitting libraries, archives and non-profit educational institutions to use most categories of orphan works in their last 20 years of their copyright term. The following is a brief description of the provisions of the current section 108, as elucidated by the legislative history and Copyright Office reports and clarifications. Little mention of judicial interpretations of section 108 is made below, only because there is scant published case law specifically addressing its provisions. Finally, for brevity's sake, the term "libraries" is used to refer to "libraries and archives."¹⁴⁴

GENERAL LIBRARY EXCEPTIONS

Subsection 108(a) lays out the general conditions for libraries and archives to take advantage of the section 108 exceptions. It should be noted that the text and structure of subsection 108(a) have been a source of some confusion, appearing to some as granting an independent exception allowing single copies. However, the legislative history of the 1976 Act makes clear that 108(a) instead serves as a chapeau for the specific exceptions set forth in the subsequent provisions. The House Report, after explicating the language of subsection (a) regarding commercial advantage, public access, and notice of copyright, then states that "the rights of reproduction and distribution under section 108 apply in the following circumstances:"¹⁴⁵ and goes on to discuss the remainder of section 108.

Subsection 108(a) also lays out several conditions that must be met in order to take advantage of any of the section 108 exceptions and limitations:

- Only one copy of a work can be made, unless otherwise specified in the subsections that follow.

¹⁴⁴ Section 108 does not define "libraries" or "archives." The 1976 House Report, however, states that "a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies." H.R. REP. NO. 94-1476, at 74 (1976). In addition, the Senate Report to the DMCA notes that "just as when section 108 of the Copyright Act was first enacted, the term 'libraries' and 'archives' as used and described in this provision still refer to such institutions only in the conventional sense of entities that are established as, and conduct their operations through, physical premises in which collections of information may be used by researchers and other members of the public." S. REP. NO. 105-190, at 62 (1998). *See also* Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1494 n.6 (11th Cir. 1984) (noting that a commercial organization that videotapes television news programs and sells the tapes is not an "archive" within the meaning of section 108); United States v. Moran, 757 F. Supp. 1046, 1051 (D. Neb. 1991) (indicating that a commercial video rental store does not operate as a library or archives, and thus cannot make unauthorized "replacement" copies of copyrighted works under section 108).

¹⁴⁵ H.R. REP. NO. 94-1476, at 75.

- Library copies cannot be made for direct or indirect commercial advantage. (§ 108(a)(1).) According to the 1976 House Report, this condition in itself does not preclude libraries in for-profit organizations (such as law firms or industrial research centers) from taking advantage of section 108, in that it only bars commercial advantage from attaching to the act of reproduction, not to the overall goal of the institution where the reproduction takes place.¹⁴⁶ Libraries in for-profit institutions may be excluded from section 108 privileges, however, by virtue of the following condition:
- Collections must be open to the public or to unaffiliated researchers in a specialized field. (§ 108(a)(2).) Unless a corporation is willing to make its collections open to other researchers in the field (which may include, for example, employees of a competitor), it cannot claim a section 108 privilege.¹⁴⁷ In addition, making a collection open to the public solely through interlibrary loan, does not qualify a library as “open” for the purposes of section 108.¹⁴⁸
- All library copies must bear a copyright notice identical to the one on the work being copied. If a work doesn’t have a copyright notice, the library copy must include a legend that states that the work may be protected under copyright. (§ 108(a)(3).) The 1976 Act said simply that the reproduction or distribution of a work by a library include a notice of copyright. The 1998 DMCA amendment eased this requirement by allowing libraries to state that a work “may” be protected.¹⁴⁹

Subsection 108(i) at the end of the section also sets forth another general qualifier. The reproduction and distribution of a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news is allowed only for preservation and replacement purposes. If pictorial and graphic works are published as parts of non-excluded works, then their copying is allowed. (§ 108(i).) Essentially, these provisions limit research-related copying to traditional print materials, while allowing preservation-related copying for a broader range of works.

EXCEPTIONS FOR PRESERVATION AND REPLACEMENT

Subsections 108(b) and (c) provide limited exceptions permitting libraries to make up to three copies of a copyrighted work for preservation, deposit or replacement purposes, under certain circumstances.

¹⁴⁶ *Id.* Note, however, that the Senate Report states that subsection 108(a)(1) “is intended to preclude a library or archives in a profit-making organization from providing photocopies of copyrighted materials to employees engaged in furtherance of the organization’s commercial enterprise.” S. REP. NO. 94-473, at 67 (1975).

¹⁴⁷ See 1983 REGISTER’S REPORT, *supra* note 8, at 78-79.

¹⁴⁸ See *id.* at 78.

¹⁴⁹ See S. REP. NO. 105-190, at 60 (1998).

Specifically, subsection 108(b) provides that a library may reproduce and distribute up to three copies of an unpublished work, solely for the purposes of preservation, security, or deposit for research in another library. (§ 108(b).) This provision was designed to apply to “an archival collection of original manuscripts, papers, and the like, most of which are unpublished, and for which a rigorous preservation regime serves the needs of archives and scholars.”¹⁵⁰ Libraries may not loan preservation copies of unpublished works to patrons, as this would infringe the copyright owner’s right of first publication.¹⁵¹ Initially applicable to only a single copy, the limit was raised to three copies as part of the DMCA amendments in 1998, at the same time that libraries were given the permission to make digital reproductions for preservation.¹⁵²

The rationale for raising the preservation copy limit to three, as opposed to a “limited number” as in subsection 108(f)(3), is not fully explained. The 1995 National Information Infrastructure Task Force Report – which was a foundational document for the DMCA drafters¹⁵³ – did recommend an allowance of “three copies of works in digital form,” “to accommodate the reality of the computerized library.”¹⁵⁴ But the three-copy limit more closely tracks the pre-digital (e.g., microform) preservation standard of an “iron mountain” copy, a master copy, and a use copy,¹⁵⁵ than it does the realities of digital preservation (in that digital copies are highly unstable and cannot be simply made once and for all and stored away). The DMCA Senate report does not explicitly link the three-copy expansion to the allowance of digital preservation copies, nor does it refer to the microform standard.¹⁵⁶

Triplicate reproduction and distribution of unpublished works are subject to two conditions:

1. The work must already reside in the collection of the library making the reproduction. (§ 108(b)(1).) The work does not have to reside in the collection of a library in whose collections it is deposited for research, however, according to the 1976 House Report.¹⁵⁷
2. If a work is reproduced in a digital format, the library’s right of distribution of that copy is limited to the library’s physical premises. (§ 108(b)(2).) The 1998 Senate Report states that this limitation is designed to limit the risk of digital copies of a work entering into widespread circulation and thus harming the owner’s potential market.¹⁵⁸

¹⁵⁰ 1983 REGISTER’S REPORT, *supra* note 8, at 105.

¹⁵¹ *See id.*, at 105-06.

¹⁵² *See* S. REP. NO. 105-190, at 61.

¹⁵³ *See, e.g., id.* at 2-3.

¹⁵⁴ WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 227 (1995), *available at* <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

¹⁵⁵ *See* CAROL C. HENDERSON, AMERICAN LIBRARY ASS’N, LIBRARY PRESERVATION: CHANGES INCORPORATED IN H.R. 2281 THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (PL 105-304) 1 (1998), *available at* <http://www.ala.org/ala/washoff/WOissues/copyrightb/dmca/preservation.pdf>.

¹⁵⁶ *See* S. REP. NO. 105-190, at 60-62 (1998).

¹⁵⁷ *See* H.R. REP. NO. 94-1476, at 75 (1976).

¹⁵⁸ S. REP. NO. 105-190, at 61-62.

Subsection 108(c) provides a right to create replacement copies for published works. It states that a library has the right of reproduction for up to three copies of an entire published work, so long as this right is exercised only to replace a work that is damaged, deteriorating, lost, stolen, or in an obsolete format. (§ 108(c).) Two additional conditions must be met in order to qualify for the this exception:

1. No copies can be made until the library first consults the copyright owner and standard trade sources¹⁵⁹ to determine that an unused copy cannot be purchased at a fair price. (§ 108(c)(1).)
2. If a work is reproduced in a digital format, that copy cannot be made available to the public outside the premises of a library with lawful possession of the digital reproduction. (§ 108(c)(2).)

This provision (also initially applicable only to a single copy) was designed to make sure that items in library collections are preserved in usable form despite factors – like time, chance, and technology – beyond the library’s control.¹⁶⁰ Unlike subsection 108(b), pertaining to unpublished works, this provision does not expressly provide libraries with the right to distribute the copies made.¹⁶¹ It is nevertheless implied that the library will retain the same rights of distribution to the copy as it did to the original version of the work (under the first sale doctrine), since the purpose of the provision is to permit continued access to the work.¹⁶² Also deemed implied is the ability of one library to make a replacement copy for another library, if that other library’s only copy of the work is lost or stolen, or is so badly damaged as to preclude the making of a readable copy from it.¹⁶³ Note that the ability to make a copy to replace an obsolete copy was added by the DMCA.¹⁶⁴ A format is considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace. (§ 108(c).)

EXCEPTIONS FOR PATRON RESEARCH

Sections 108(d) and (e) provide exceptions to permit reproduction and distribution of copyrighted works at the request of patrons, under certain circumstances. These rights vary depending on whether an article or contribution to a collective work is copied or the whole work is.

¹⁵⁹ H.R. REP. NO. 94-1476, at 75-76.

¹⁶⁰ See S. REP. NO. 105-90, at 62.

¹⁶¹ Note that a federal district court has ruled that “a library distributes a published work, within the meaning of the Copyright Act . . . when it places an unauthorized copy of the work in its collection, includes the copy in its catalog or index system, and makes the copy available to the public.” *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997). The meaning of this for libraries that make replacement copies under section 108 is unclear, as the *Hotaling* court declined to address the defendant’s 108(c) arguments. See *id.* at 204.

¹⁶² See S. REP. NO. 105-90, at 62 (1998).

¹⁶³ See 1983 REGISTER’S REPORT, *supra* note 8, at 114.

¹⁶⁴ See S. REP. NO. 105-90, at 62.

Pursuant to subsection 108(d), a library has the right to make one copy of a single article from a collection or a small part of a larger work at the request of a patron or other library under the following four conditions:

1. The work must be in the collection of the library where the patron makes the request, or of another library. (§ 108(d).)
2. The copy must become the property of the requesting patron, and cannot be added to the library's collections. (§ 108(d)(1).)
3. The library must have no notice that the copy will be used for anything other than research purposes. (§ 108(d)(1).)
4. The library must both display a copyright warning where copy orders are made, and attach the same warning to copy order forms. (§ 108(d)(2).)

Libraries are also allowed to make single copies of entire works, or substantial parts thereof, pursuant to patron requests, under the following five conditions: (§ 108(e).)

1. The library must first consult the copyright owner and standard trade sources¹⁶⁵ to determine that a used or unused copy cannot be purchased at a fair price. (§ 108(e).)
2. The work must be in the collection of the library where the patron makes the request, or of another library. (§ 108(e).)
3. The copy must become the property of the requesting patron, and cannot be added to the library's collections. (§ 108(e)(1).)
4. The library must have no notice that the copy will be used for anything other than research purposes. (§ 108(e)(1).)
5. The library must both display a copyright warning where copy orders are made, and attach the same warning to copy order forms. (§ 108(e)(2).)

FURTHER LIMITATIONS ON REPRODUCTIONS FOR PATRONS

Subsection 108(g) provides further limitations on the ability to make copies for library patrons. While isolated and unrelated reproductions of a single copy of the same material can be made by a library on separate occasions, such copying cannot be done if the library knows or has substantial reason to believe that it is engaged in the related or concerted reproduction or distribution of multiple reproductions of the same material, whether on one occasion or repeatedly, and whether intended for aggregate use by one or more individuals or for separate use by the members of a group. (§ 108(g)(1).) The

¹⁶⁵ H.R. REP. NO. 94-1476, at 75-76 (1976).

Senate Report, by way of example, states that “if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted . . . to reproduce copies of the article for the members of the class.”¹⁶⁶

Systematic reproduction of single articles or portions of larger works (as described in subsection (d)) is forbidden, even if the library is unaware that its reproductions are, in fact, systematic. (§ 108(g)(2).) According to the Copyright Office’s 1983 Report, whether or not reproduction is “systematic” is an objective test; if the reproduction is done via a common plan, regular interaction, organized or established procedure, then it is infringing.¹⁶⁷ The 1975 Senate Report, while saying that a specific definition of “systematic copying” is impossible, provides three examples:

(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons’ requests for articles by obtaining photocopies from the source library.

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.¹⁶⁸

A proviso to the “systematic copying” clause clarifies that it is not intended to prevent libraries from participating in interlibrary arrangements, so long as their purpose or effect is not to provide a receiving library with such aggregate quantities of material as to substitute for a subscription to or purchase of the work. (§ 108(g)(2).) In crafting this proviso, the House intended the meaning of “aggregate quantities” and “substitute for a subscription to or purchase of” to be clarified by guidelines developed by the Commission on New Technological Uses of Copyrighted Works (CONTU).¹⁶⁹ CONTU was established under separate legislation in 1974 for the purpose of studying the reproduction and use of copyrighted works by computers and other types of machine reproduction.¹⁷⁰ CONTU’s guidelines were published in the Conference Report for the

¹⁶⁶ S. REP. NO. 94-473, at 70 (1975).

¹⁶⁷ 1983 REGISTER’S REPORT, *supra* note 8, at 139.

¹⁶⁸ S. REP. NO. 94-473, at 70. In addition, the U.S. Court of Appeals for the Second Circuit has analyzed the meaning of “systematic” copying in the context of actions by a library in a for-profit corporation. This analysis, however, was within the fair use context, and did not directly address 108(g). *See American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 916, 919-20, 924-25 (2d Cir. 1994).

¹⁶⁹ *See* H.R. REP. NO. 94-1476, at 78.

¹⁷⁰ S. REP. NO. 94-92, at 15-16 (1975).

1976 Act.¹⁷¹ They do not have the force of law, but were endorsed by the conference committee as “a reasonable interpretation of the proviso of section 108(g)(2) in the most common situations to which they apply today.”¹⁷²

EXCEPTIONS FOR NEWSCASTS

Section 108 also includes a provision specific to audiovisual news programs. Section 108(f)(3) permits libraries to copy and distribute (by lending) a limited number of copies and excerpts of audiovisual news programs. The only conditions required for a library to avail itself of this exception are the general conditions set out in subsection 108(a). Distribution of audiovisual news program copies is limited to lending, in order to prevent performance or sale by the recipients.¹⁷³ Note that the House Report describes “audiovisual news programs” as “daily newscasts of the national television networks, which report the major events of the day.”¹⁷⁴

EXCEPTIONS FOR ORPHAN WORKS IN LAST TWENTY YEARS OF TERM

Subsection 108(h) was added in 1998 as part of the CTEA, which lengthened the term of copyright protection by 20 years.¹⁷⁵ Congress enacted subsection 108(h) in response to the concerns expressed about the increase in the number of older works that would be taken out of the public domain even though they are no longer available for purchase or subject to commercial exploitation.¹⁷⁶

Once a published work is in its last 20 years of copyright protection, a library or archives, including a nonprofit educational institution, may reproduce, distribute, display, or perform that work, provided that the library has determined after reasonable investigation:

1. The work is not currently subject to normal commercial exploitation. (§ 108(h)(2)(A).)
2. A new or used copy of a work is not available at a reasonable price. (§ 108(h)(2)(B).)
3. The rights-holder has not notified the Copyright Office that the work is either subject to normal commercial exploitation, or is available at a reasonable price. (§ 108(h)(2)(C).) It is interesting to note that no rights-holder has ever filed a notice under this provision.

¹⁷¹ CONF. REP. NO. 94-1733, at 72-74 (1976).

¹⁷² *Id.* at 71-72.

¹⁷³ *See* H.R. REP. NO. 94-1476, at 77 (1976).

¹⁷⁴ *Id.*

¹⁷⁵ H.R. REP. NO. 105-452, at 2 (1998).

¹⁷⁶ *See, e.g.* ARNOLD P. LUTZKER, AMERICAN LIBRARY ASS'N, PRIMER ON THE DIGITAL MILLENNIUM 24 (1999), available at <http://www.ala.org/ala/washoff/WOissues/copyrightb/dmca/dmcaprimer.pdf>.

This provision is currently modified by subsection 108(i) so that it does not apply to those categories of works listed in 108(i). This exclusion, however, was a technical error and that a bill is currently before Congress to correct it.¹⁷⁷

Note that the exception applies only to the library or archive itself and not to their patrons or other downstream users. (§ 108(h)(3).) Also note that the exception is not limited to analog reproduction, nor is there a requirement that the work already reside in the library's collection. The general subsection 108(a) conditions do apply, however.

LIABILITY

There are several provisions in the Copyright Act that limit the liability of libraries and archives, in section 108 and elsewhere. Section 108(f)(1) provides that libraries and their employees are immune from liability for copyright infringement for the unsupervised use of copying equipment located on library premises, provided that the equipment bears a notice that the user is subject to copyright law. If the equipment does not bear this notice, the library is not shielded from liability. Furthermore, employee use of a copier located in the library of a for-profit entity is presumptively "supervised."¹⁷⁸

This does not, however, limited the liability of library patrons, who engage in unsupervised use of copying equipment, or who request copies of articles or small portions or larger works, where their initial copying or subsequent use of the copy exceeds the bounds of fair use. (§ 108(f)(2).)

Another important limitation of liability is found in subsection 504(c)(2). If a nonprofit library, archive or educational institution, or any employee or agent acting within the scope of employment, is found to have infringed a copyright, but had reasonable grounds to believe that the use of the work was "fair use" under section 107, statutory damages will not be imposed.

FAIR USE AND CONTRACTS

Last, but not least, subsection 108(f)(4) contains language to clarify that nothing in section 108 nullifies or affects a library's fair use rights or contractual obligations. Libraries may still avail themselves of fair use to the extent applicable. As a matter of practice, libraries rely heavily on fair use – particularly with respect to the use of digital works, for which there is currently little clear legislative guidance.

The clarification regarding contracts ensures that libraries honor those who donate works with the understanding that they will not be reproduced.¹⁷⁹ In addition, it makes clear that nothing in section 108 frees libraries from contracts, including license

¹⁷⁷ Preservation and Restoration of Orphan Works for Use in Scholarship and Education (PRO-USE) Act of 2005, H.R. 24, 109th Cong. (2005). According to Register of Copyrights Marybeth Peters, the failure to carve out subsection (h) from subsection (i) was an oversight. *Oversight Hearing on the "Operations of the Copyright Office" Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary, United States House of Representatives*, 108th Cong. at 28 (2004) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), available at <http://judiciary.house.gov/oversight.aspx?ID=49>; Marybeth Peters, *Copyright Enters the Public Domain*, 51 J. COPYRIGHT SOC'Y U.S. 701, 713 (2004).

¹⁷⁸ See H.R. REP. NO. 94-1476, at 75.

¹⁷⁹ H.R. REP. NO. 94-1476, at 77 (1976).

agreements, that they have entered into with rights-holders that prohibit or restrict reproduction, distribution, or the exercise of any other right.

CONCLUSION

As you can see, the provisions of section 108 were the product of extensive negotiations among the various interests, all prior to the full advent of digital media as we know it today. We are optimistic that the Section 108 Study Group will find ways to ensure that section 108 continues to maintain the copyright balance so that creators and users alike will reap the full benefits of the digital age.

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