

REPORT OF THE REGISTER OF COPYRIGHTS

**LIBRARY REPRODUCTION
OF COPYRIGHTED WORKS
(17 U.S.C. 108)**

JANUARY 1988
SECOND REPORT

Library of Congress Card Number 87-063320
ISBN 0-8444-0589-2 *Key title:* Report of the Register of Copyrights
—Library Reproduction of Copyrighted Works (17 U.S.C. 108)



The Register of Copyrights
of the
United States of America

Library of Congress
Department 100
Washington, D.C. 20540

(202) 287-8350

January 5, 1988


The Vice-President
President of the Senate
United States Senate
The Capitol
Washington

Dear Mr. Vice-President:

I have the honor to send you a copy of the Second Five-Year Report on Library Photocopying of Copyrighted Works. As mandated by Section 108 of the Copyright Act, Title 17 of the United States Code, captioned "Limitations on exclusive rights: Reproduction by libraries and archives," I have analyzed current photocopying practices, and I have gauged the extent to which these practices preserve the balance between creators and users that Congress sought when it drafted the provision in 1976.

I would be pleased to elaborate on any aspect of the report.

Sincerely,


Ralph Oman
Register of Copyrights

Enclosures

RO:cjd

17 USC 108.

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

• • •

(i) Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.



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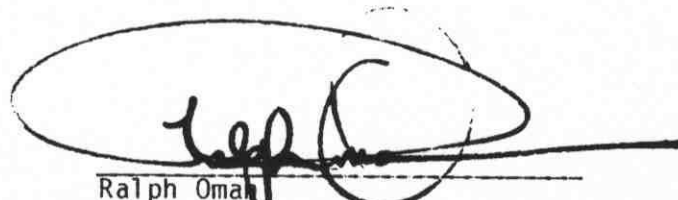
ACKNOWLEDGEMENTS

I want to thank the members of my staff who have worked on this report for the last year and a half. Several stalwarts worked on it during the entire period, and I brought in others as the project progressed. All of them made an invaluable contribution, and I would like to list their names:

Anthony Harrison, Esq.	Assistant Register
Marilyn Kretsinger, Esq.	Senior Attorney Advisor
Marybeth Peters, Esq.	Policy Planning Advisor
Winston Tabb	Chief, Information and Reference Division
Peter Young	Chief, Cataloging Division

I also want to single out for special mention CAROL DULING and RUTH GODDARD. They spent long hours typing, editing, and proofreading. We could not have put this report together without their patience and skill. I am also grateful to others in the Copyright Office who helped put this report together during the editing and production stage, especially Melissa Dadant, Lewis Flacks, Richard Glasgow, Charlotte Givens, William Jebram, Sandy Jones, Joseph Ross and Andrea Zizzi.

And, last, I also want to express my thanks to those who participated in the §108(i) hearings held in Washington, D.C. and to those who addressed written comments to the Copyright Office.



Ralph Omar
U.S. Register of Copyrights

EXECUTIVE SUMMARY

Chapter One -- Introduction

The introduction primarily serves as a bridge between the first five year report submitted to Congress in 1983 and the 1988 report. Subsection 108(i) requires the Register of Copyrights to oversee the effectiveness of §108, the provision governing reproduction by libraries and archives, in creating a balance between the rights of creators and the needs of users. The Register is charged with consulting with the interested parties, determining whether balance has been achieved, and then submitting a report to Congress at five-year intervals, beginning in 1983.

After discussing library photocopying with creators, publishers, librarians, and other interested parties, studying written comments, and examining the results of an independent empirical study on library photocopying, the Register concluded that §108 provided "a workable structural framework" for obtaining balance. But the Register also concluded that balance was not always achieved in practice. The 1983 report listed all of the proposals for legislative change and then gave Copyright Office recommendations for possible solutions to problem areas.

Although the 1983 report has been circulated and commented upon by the interested parties, no one has acted upon any of these recommendations.

To prepare for the second report, the Copyright Office published a Notice of Inquiry asking the interested parties to testify at a hearing and/or submit written comments on library photocopying and developments in specific areas since the last report.

Generally there appears to be consensus on the part of both copyright proprietors and copyright users that the statute itself, as noted in the first report, provides a framework for achieving the intended balance. Some copyright proprietors complain of substantial non-compliance with the statute, and some groups have asked for clarification or amendment to specific provisions that affect them. Continued advancements in technology both in the United States and abroad suggest that in the future the §108(i) balance may be impaired.

Therefore, unless the §108(i) review is expanded to cover the effects of new technology on the statutory balance, the Copyright Office feels that no further review is needed.

Chapter Two -- Background of Section 108 and Five-Year Report

This chapter summarizes the developments that led to the photocopying provisions found in 17 U.S.C. §108 and also recounts the major findings of the first photocopying report.

The first section provides a distillation of a much longer summary of the legislative history of §108 that appeared in the first report on photocopying.

This section traces the roots of the photocopying exemption to early recognition by courts and libraries of the fair use concept as it applied to libraries, and to a "Gentlemen's Agreement" among librarians to place limitations on copying. During the copyright law revision process, the Copyright Office studied these practices, and recommended detailed statutory limitations on library photocopying that would permit photocopying only in situations where it would not be likely to compete with the publisher's market. Although publishers and librarians argued among

themselves about the details of various draft revision bills that included provisions concerning library photocopying, ultimately the Copyright Office's recommendation was embodied in §108 of the Copyright Act of 1976.

The section also relates how the outcome of Williams and Wilkins, a landmark copyright case that held that copying by a government library for purposes of interlibrary loan was a "fair use," helped shape the final photocopying provision. It briefly discusses the role of various groups, including the interested parties themselves, and of the Conference on the Resolution of Copyright Issues and the National Commission on New Technological Uses of Copyrighted Works (CONTU).

The second section lists the non-statutory and statutory changes recommended by the Copyright Office in the first report. The non-statutory recommendations reflect the Office's view that all parties affected by library photocopying should cooperate to develop guidelines to clarify the terms of §108, to develop collective licensing arrangements, and to study the issues relating to the impact of technological developments on library reproduction. The statutory recommendations reflect the Office's view that §108 should facilitate the reproduction of out-of-print musical works, encourage collective licensing arrangements, require reproduction of the statutory notice that appears on the original work, and prohibit publication by libraries pursuant to §108(d) of unpublished works. The most noteworthy point about these recommendations from the perspective of the second report is that none of them were followed.

Chapter Three -- Update on Photocopying in the United States

This chapter contains a brief update on photocopying developments in the United States within the last five years. It does not attempt to cover everything that was discussed in the 1983 report. Instead, the chapter focuses on litigation brought to enforce rights, the growth of the Copyright Clearance Center (CCC), the problems represented by unauthorized photocopying for government agencies, and the copying practices reported in three organizations discussed in the first report.

In the last five years, publishers have brought actions against copy shops, the academic community and corporations that fostered systematic reproduction. In two actions brought against copy shops, publishers obtained consent decrees which required the shops to stop making multiple copies of copyrighted materials without getting either express permission from the copyright owner or a certification from the requestor that the copying order falls within the established guidelines for permissible copying. In an action against New York University that was settled, the University agreed to take stringent steps to avoid infringing copyrights in the future. In actions against corporations for internal copying that were settled, the corporations agreed to register as users with the Copyright Clearance Center. The CCC has experienced substantial growth in recent years. It now licenses photocopying of U.S. works by U.S. and foreign corporations and libraries, and assists U.S. publishers in achieving protection under the laws of foreign countries.

Proprietors complain that government agencies hire independent contractors to make photocopies and that these contractors do so without getting permission from the copyright proprietor. When challenged, both

respond that they are protected by 28 U.S.C. §1498(b). The Copyright Office continues to take the position that §1498(b) is not an eminent domain statute but, rather, a grant of additional rights to copyright owners and a means of protecting government employees.

Librarians and publishers testified at the Copyright Office's 1987 photocopying hearing that generally the intended statutory balance embodied in §108 has been achieved in implementation and practice in the last five years. During that time, the copying environment has improved. Copy shops and universities now work within photocopying guidelines approved by copyright proprietors. Although archivists continue to maintain that subsections 108(d) and (e) allow them to photocopy an unpublished work for a requestor's private research, the Copyright Office continues to reject that interpretation of §108.

An issue raised by representatives of libraries in for-profit organizations remains as to the extent to which these libraries qualify for §108 copying privileges.

Chapter Four -- Foreign Experience with Library Photocopying

The report makes no attempt to examine photocopying experiences in every foreign country. Instead this chapter reports on the legislative and judicial developments in selected foreign countries, summarizes the results of a survey of foreign publishers' and librarians' associations, and discusses the development of foreign collective agencies or reproduction rights organizations.

The section on legislative and judicial developments is divided into two parts: a summary of developments, if any, in those countries that already have legislation that covers photocopying, and a summary of

developments in selected countries that are attempting to enact copyright legislation that may contain photocopying provisions and may also authorize a collective agency.

The first part discusses continued efforts to compensate for photocopying of protected works in Australia, the Nordic countries, the Federal Republic of Germany, and France. Australia has been especially vigilant in enforcing its existing law. The Australian Copyright Council has issued several bulletins explaining both the exact nature of photocopying permitted in libraries and archives and the exemption permitting educational institutions to copy for teaching purposes. The Australian Copyright Council is responsible for seeing that the compensation required is made to authors and publishers.

The Federal Republic of Germany recently amended its law and introduced a statutory license system to cover photocopying where the author's consent is not needed. The law places a graduated levy on both equipment and operators; the scheme is designed to assess a higher charge based on the amount of protected material that is copied.

The second part of this section discusses amendments or proposed amendments in Singapore, Canada, and Japan. Singapore has just enacted a new copyright act that is quite similar to the Australian copyright law. Canada is ready to pass a copyright revision bill. The proposed bill does not provide a photocopying exemption; it encourages creators or copyright owners to authorize a copyright "collective" to manage access to all of their works. Japan is currently considering the feasibility of collective systems for copyright royalties.

The second section is based on responses to a letter that was sent by the Copyright Office to at least one librarians' and one publishers' association in eleven countries. The letter asked for the respondent's "general opinions and/or particular experience" with the way library photocopying has affected the rights of creators and needs of users of copyrighted works. In all, associations from five countries responded; but both publishers and librarians responded from only three countries. This lack of 100 percent response may be attributed to failure to give respondents sufficient time. In the future such surveys should give the respondents additional time and should probably also include a follow-up letter to countries from which no response has been received.

The final section of this chapter discusses the development of reproduction rights organizations that collect and distribute royalty fees for photocopying that exceeds the limits permitted by national law in fifteen countries and the creation of an international organization. It also gives brief details about specific collectives in five countries: the United Kingdom, Australia, Canada, Norway, and the Federal Republic of Germany.

Chapter Five -- Technological Advances

The first photocopying report contained a section on new technology; the second report discusses advances in technology within the last five years both in the expansion of document delivery services, networks, and consortia, and in the creation of optical disk projects.

The almost instantaneous, long-distance delivery of documents from library to user via new devices such as telefacsimile, micro-computers, and satellites, blurred the traditional dividing line between

interlibrary loan and demand publishing. While some argue that these uses of protected works for teaching and research are permissible under fair use provisions, many copyright owners fear these technologies will make it even more difficult to control and monitor their works. Similarly, the development by consortia of libraries of coordinated acquisitions and collection development programs could lead to increases in systematic copying by reprography or electronic transmission as a replacement for the purchase of materials.

The Library of Congress Optical Disk Project reflects both the hopes and potential dangers of that new technology: while it promises to work a tremendous increase in efficiency in providing information to the world and preserving that information for future generations, without creative and effective copyright protection for the creators of the information stored, the incentive to create intellectual property could be severely impaired.

A philosophical question that must be addressed at some point is: What publications will cease publication if copyright protection gets lost in the space-age communication exchanges that are now available? If only materials prepared by academics -- materials that will be produced regardless of the profit motive -- are being made available, the public interest will not necessarily be adversely affected. On the other hand, if valuable publications are lost, then the public is adversely affected.

This chapter also briefly notes three other developments in either delivery of materials or compensation for use that may affect the §108(i) balance.

Chapter Six -- Legislative Proposals and Copyright Office Recommendations

This chapter contains eight proposals or suggestions made by one or more of the interested parties and the recommendations that the Copyright Office made to each. The Copyright Office also recommends to Congress that the scope of the §108(i) report be expanded to study the effects of new technology on the §108 balance. This recommendation is made in response to the requests of nine separate organizations which include both representatives of copyright proprietors and users of copyrighted material. In the alternative, the Copyright Office proposes that if the §108(i) study is not expanded to specifically include these new technological issues, Congress either end the five-year review on library photocopying altogether or amend the law to increase the interval between reports to ten years.

I. INTRODUCTION

Congress charged the Register of Copyrights with the task of overseeing the effectiveness of the library photocopying provisions in §108 of the Copyright Act by requiring the Register to submit reports at five-year intervals detailing the extent to which §108 "achieved the intended statutory balancing of the rights of creators, and the needs of users." The Register submitted the first of these reports to Congress on January 5, 1983.

That first report reflected an attempt to investigate every facet of the relationship between the rights of creators and the needs of users in order to determine whether Congress achieved the intended balance. There were meetings with proprietary and library representatives, regional hearings to air problems, a comment period, and an independent study that investigated all aspects of library photocopying. At the completion of these events, the Copyright Office evaluated all of these materials and compiled a massive 363-page report with seven appendices.

The thrust of the first photocopying report is summed up at the very beginning:

The short answer to the question of balance is that §108, together with the rest of the Copyright Act of 1976, provides a workable structural framework for obtaining a balance between creators' rights and users' needs. Considering the complexity of the issues, the intensity of the controversies, the scope of the interests, and the rapid changes in technology before and after enactment, that is a remarkable achievement. In certain instances, however, the balance has not been achieved in practice, either because the intent of Congress has not

been carried out fully or because that intent is not clear to all the parties whose behavior lies within the ambit of the law. In some cases those deficiencies of the system in practice are serious ... 1/

The 1983 report continues for some 366 pages to explore fully the background of the problem, the creation of the photocopying exemption, the consequences for creators and users as to the nature of balance created, and the shifting relationship and needs of creators and users. It also attempts to suggest resolutions for some of the problems raised by the interested parties.

The general reaction to the publication of the 1983 report was far from earth shattering. Congress did not hold a hearing on library photocopying or attempt to amend the Copyright Act in light of the Copyright Office's suggested amendments. Some of the interested parties wrote letters or articles in which they either praised or criticized the report's conclusion. In the past five years authors of articles or books that cover fair use or photocopying have referred to this report. 2/

Since the publication of the report, the parties have not met together to discuss problem areas or work out any more guidelines. Instead, librarians have formulated separate guidelines in new areas and copyright proprietors have brought suits to enforce their rights.

1/ Report of the Register of Copyrights: Library Reproduction of Copyrighted Works (17 U.S.C. 108) 1 (1983). [Hereinafter the Register's Report on Photocopying (1983)].

2/ See, e.g., Marshall, Register of Copyrights' Five-Year Review Report: a View from the Field, Library Trends 165 (Fall 1983); Patry, The Fair Use Privilege in Copyright Law 326 (1985).

In preparing the second photocopying report, the Copyright Office attempted to elicit responses from all interested parties, including, among others, authors, publishers, librarians, library patrons, and educators. The Office wanted to determine what had been happening since the first report was issued, and it published specific questions for the parties to consider:

1. How have photocopying practices in libraries (including corporate libraries and information centers), archives, university communities, and copy shops changed since 1982?
2. Have new technological devices affected the so-called §108 balance?
3. Have changes in the options offered through the Copyright Clearance Center, Inc. changed patterns of publisher membership, copying, payment, or permission seeking? Why is publisher membership not more universal than it is?
4. Do you have any data concerning photocopying that you would like made part of the record for this report?
5. Do you feel that new legislation is needed to either clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users? If you do, please specify as precisely as possible what provisions it should contain.
6. Has there been any change in authors' income in the last five years as the result of sharing in photocopying royalties? If so, please characterize such change. 3/

Twenty-nine commentators responded to this inquiry, and twenty-three witnesses came to the two-day hearing held in Washington, D.C. The Copyright Office also conducted a letter survey of foreign publishers and libraries to determine their photocopying practices, reviewed legislative and judicial developments, and evaluated technological advancements in the past five years that have already affected or in the future may affect the §108 balance.

Generally there appears to be consensus on the part of both copyright proprietors and copyright users that the statute itself, as noted in the first report, provides a framework for achieving the intended balance. Some copyright proprietors complain that there are substantial incidences of non-compliance with the statute, and some groups have asked for clarification or amendment to specific provisions that affect them. Continued advancements in technology both in the United States and abroad suggest that in the future the §108(i) balance may be impaired.

Therefore, unless the §108(i) review is expanded to cover the effects of new technology on the statutory balance, the Copyright Office feels that no further review is needed.

II. BACKGROUND OF SECTION 108 AND FIVE-YEAR REPORT

A. Legislative History of Section 108

The more than 25-year history covering the development of the "Library Photocopying Provision," of the present law has been filled with sharp debate between participants holding strongly-felt positions. The development of this provision is a classic example of how the Congress, the courts and the Copyright Office, have had to grapple with technological advances in developing copyright law.

Advances in reprographic technology led to the expansion of rapid, yet inexpensive, reproduction of copyright-protected material through photocopying by users in libraries. For the most part this escalated copying was not accompanied by compensation to the copyright owners.

1. The early years. The history of the development of the "library photocopying exemption" has been inextricably connected to a discussion of fair use.

Although the fair use concept was recognized in the U.S. courts as early as 1841, ^{4/} the 1909 law, the predecessor to the present law, did not contain explicit provisions for either the concept of fair use or a library photocopying exemption. Over the years, the courts developed a set of criteria which could be used to determine whether a given use was fair or infringing. The 1976 Copyright Act contains the first legislative expression of this judicially developed concept. ^{5/} As a concept fair use

^{4/} Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

^{5/} Section 107 of the Copyright Act provides: In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

has been succinctly defined as "a privilege in others than the owner of the copyright, to use the copyrighted material in a reasonable manner without his consent; notwithstanding the monopoly granted to the owner by the copyright." 6/

Many librarians felt that the practice of providing a single copy of a copyrighted work for a user for the purpose of research, study, or other educational use was within the judicially developed fair use concept. However, until the early seventies, there was no definitive court decision on this issue.

2. "Gentlemen's Agreement" of 1937. In the absence of any judicial ruling or legislative pronouncement, librarians sought to bolster their established custom of providing photocopies with an agreement with publishers. 7/ This agreement, referred to as the "Gentlemen's Agreement,"

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

6/ Ball, The Law of Copyright and Literary Property 260 (1944).

7/ Negotiations were conducted between the Joint Committee on Materials for Research of the American Council of Learned Societies and the Social Research Council on the one hand and the National Association of Book Publishers on the other. Varmer, Photoduplication of Copyrighted Materials by Libraries, Copyright Law Revision Study No. 15, Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. 51 (Comm. Print 1960).

permitted a library to make and deliver a single copy to a scholar for research use as long as it was provided without profit. 8/ The agreement gives the following legal rationale for this permissible copying:

The statutes make no specific provision for a right of a research worker to make copies by hand or by transcript for 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. 9/

One can find only the beginnings of §108 in the Gentlemen's Agreement. It did attempt to deal with the core issue of systematic reproduction that is sometimes approached by interlibrary loan arrangements. Although the agreement had no binding legal effect, it was honored by the parties as an acceptable standard of conduct for library copying for many years.

8/ 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 purpose of research; provided--

- (1) That the person receiving it is given 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.

Id. at 52. See 2 J. of Doc. Reproduction 31 (1939) for the full text of the "Gentlemen's Agreement."

9/ Id.

3. Revision effort leading to 1976 Copyright Act. Through the years there were numerous attempts to amend various provisions of the 1909 copyright law; however, serious effort at general revision of the entire Act began in the late fifties.

a. Copyright Office Revision Studies and Register's Report. At the request of Congress, the Copyright Office prepared a series of studies on copyright law and practices; these were published in the 1950's and early 1960's.

In one of these studies, the author noted that advances in technology were the root of the controversy between publishers and users. He also suggested certain potential solutions, including the following limitations on library photocopying:

1. limited to only non-profit institutions;
2. limited to only one copy to any individual or organization;
3. in the case of periodicals, limited to one or two articles from any issue;
4. in the case of other works, photocopies to be limited to a reasonable portion of the work;
5. in the case of requests of the whole work, photocopy permitted as long as there is the requestor's written assurance that he has made an inquiry and the publisher cannot supply a copy;
6. the actual copyright notice be duplicated on the copy. ^{10/}

^{10/} Varmer, Study No. 15, supra note 7, at 62-63.

The study also suggested a voluntary royalty system for multiple photocopies for corporate research. The author notes the practical solution worked out between German publishing and industrial associations in the 1950's as the model for such a system. 11/

In 1961, in a report to Congress on copyright law revision, the Register observed that the application of fair use to library photocopying had not been resolved and that librarians and researchers felt that the uncertainty hampered research. 12/ The policy views and recommendations of this report are a milestone in the development of §108 of the present law. The Register concluded that, as a general premise, photocopying should not be permitted where it would compete with the publisher's market. As a caveat to that rule, he recommended that in situations, where photocopying would not be likely to compete with the publisher's market, a library should be permitted to supply a single photocopy of material in its collections for use in research. This would permit a library to provide a researcher a photocopy of a relatively small part of a publication, or a single photocopy of a work that is out of print. The Register noted in his report that a number of foreign laws correspond with that policy. 13/ This pragmatic approach to photocopying formed the basis for compromise for the library photocopying exemption. Before a final compromise was reached the interested parties made and reacted to several significant proposals.

11/ Id. at 64.

12/ Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Copyright Law Revision, 87th Cong., 1st Sess. 25 (1961).

13/ Id. at 26.

b. The preliminary draft. After issuance of the Register's 1961 Report on Revision and a period of comment and reaction to it, the Copyright Office prepared a preliminary draft for a revised copyright law. This draft contained a general fair use provision and a specific section exempting library copying under certain conditions. ^{14/} The reaction to the draft provision was sharp and equally strong on both sides; neither group favored the exemption. ^{15/} As a result of this opposition, a photocopying exemption was dropped from the 1964 and 1965 revision bills so that the bills contained only a general fair use provision. The parties strongly disagreed on the issue of whether the general fair use provision covered library photocopying. ^{16/} Publishers argued that there were no existing judicial decisions concerning the application of fair use to library photocopying and that any statute should be drawn narrowly since technology was always changing. ^{17/} Libraries wanted either a generous photocopying provision which legitimized existing practices (and confirmed their legal basis), or a general fair use provision with specific reference to library photocopying.

^{14/} Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, Copyright Law Revision, Part 3 6, 7 (1964).

^{15/} See, e.g., comments at 159, 160, 176, 337, 371-73, 376, 400, 409, 413, 418, 437, 442-43. See also Further Discussion and Comments on Preliminary Draft for Revised U.S. Copyright Law Revision, Part 4, at 273, 316-19, 380, 396 (1964).

^{16/} See 1964 Revision Bill With Discussions and Comments, Copyright Law Revision, Part 5, at 102-03 (1965).

^{17/} See generally, Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, Copyright Law Revision, Part 4, at 251, 254-55 (statement of American Book Publishers Council); 300 (statement of American Psychological Association) (1964).

For the period between 1965 through 1976, repeated amendments were offered to add photocopying provisions to copyright revision bills being considered by Congress, but no consensus was reached by the parties. Proprietors maintained support for a general statutory restatement of fair use, leaving all questions of specific application which may involve library photocopying, to the courts. Librarians, however, now revised their earlier position and sought either a specific photocopying exemption or a fair use provision containing express language to cover their photocopying activities.

4. Other events that affected development of section 108.

a. Williams and Wilkins. One of the significant events that shaped the compromise that was to become the present "library photocopying exemption" was the Williams and Wilkins case. 18/

Up until the filing of this case, no court had specifically ruled on whether "fair use" applied to library photocopying activity. In this suit, the publishers, Williams and Wilkins, charged that the National Library of Medicine (NLM) and the National Institute of Health had infringed their copyrights in certain medical journals by making unauthorized photocopies of articles from these journals for users of the NLM and patrons of other libraries throughout the country through interlibrary loan arrangements. 19/ The case was first tried before a commissioner for the Court of Claims. Commissioner Davis found for the plaintiff and asserted:

18/ Williams and Wilkins Co. v. United States, 172 U.S.P.Q. 670 (Ct. Cl. 1972), rev'd, 487 F.2d 1345 (Ct. Cl. 1973) aff'd by an equally divided court, 420 U.S. 376 (1975).

19/ 172 U.S.P.Q. 670 (Ct. Cl. 1972).

Whatever may be the bounds of "fair use" as defined and applied by the courts, defendant is clearly outside these bounds. Defendant's photocopying is wholesale copying and meets none of the criteria for "fair use." 20/

The Commissioner's decision also dealt with the defense that the 1937 Gentlemen's Agreement represented a basis for the photocopying activity. After pointing out that this agreement did not have the force of law and that it had never been tested by law, he reasoned that the changes in technology would no longer make it applicable and that "[t]he legitimate interests of copyright owners must, accordingly, be measured against the changed realities of technology." 21/

The reaction was immediate: the library community offered amendments to the copyright revision bill to add an unqualified confirmation of practice that they had previously contended was legal. A library spokesman asserted that Commissioner Davis's opinion meant "fair use can no longer be considered adequate assurance for the continuation of customary library services." 22/

The full Court of Claims reversed the Commissioner's holding and found NLM photocopying practices to constitute a fair use. 23/ In reaching its decision, the majority stressed its ruling was narrow and

20/ Id. at 679.

21/ Id. at 681.

22/ Copyright Law Revision: Hearings on S. 1361 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 93 Cong., 1st Sess. 90 (1973).

23/ 487 F.2d 1345 (Ct. Cl. 1973).

limited to the specific facts in the case. ^{24/} Both the majority and the minority opinions called for legislative action to resolve the overall problem. ^{25/}

b. Conference on Resolution of Copyright Issues. Another significant event was the convening of a Conference on the Resolution of Copyright Issues in order to attempt to reach consensus on the library photocopying questions. The Conference was jointly sponsored by the Copyright Office and the National Commission of Libraries and Information Science.

Although the conferees were unable to resolve such thorny threshold questions as what is "systematic copying," they were able to add valuable information to the overall revision effort. The Conference examined the workings of a potential copyright royalty payment system and suggested useful criteria for its development and ultimate purpose.

This Conference also served as a useful forum away from the heated debates of Congressional hearings and earlier meetings; this in turn led to a clearer exchange of views between the participants.

c. National Commission on New Technological Uses of Copyrighted Works (CONTU). The Senate established this national commission primarily to help resolve a number of computer-related copyright problems. The Commission was mandated to study computer uses of copyrighted works and various forms of machine reproductions.

^{24/} Id. at 1362.

^{25/} Id. at 1362, 1387.

From 1975 through 1978 the Commission collected data, held hearings, and carefully analyzed the questions before them. It issued a report in 1978 with its findings and recommendations. ^{26/} CONTU rendered invaluable service in helping to resolve some library photocopying issues by holding meetings in which interested parties adopted guidelines construing certain statutory language in §108. These guidelines are adhered to today. ^{27/}

5. Enactment of 1976 Copyright Act. During the decade preceding enactment of the 1976 Copyright Act, there was gradual change in how the interested parties viewed the question of inclusion of a library photocopying exemption in the general revision statute. This transformation is reflected in the differing legislative proposals considered by the Congress during this period and was undoubtedly influenced by developments outside of Congress, such as the Williams and Wilkins decision, the Conference on the Resolution of Copyright Issues, and the CONTU conclusions.

In 1965, when the general revision bill, H.R. 4347, was introduced, it did not contain any specific reference to library copying of protected works and the general fair use provision only provided "notwith-

^{26/} Final Report of the National Commission on New Technological Uses of Copyrighted Works (1978).

^{27/} See H.R. Rep. No. 1733, 94th Cong., 2d Sess. 72-74 (1976). These guidelines can be found in this report at Att. A. For other related voluntary arrangements still in force, see Agreement on Guidelines for Classroom Copying by Not-for-Profit Educational Institutions and Guidelines for Educational Uses of Music, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 68-71 (1976); Guidelines for Off-Air Taping for Educational Use, H.R. Rep. No. 495, 97th Cong., 2d Sess. 6-9 (1982).

standing the provisions of sec. 106, the fair use of a copyrighted work is not an infringement of copyright." At that time librarian representatives were satisfied this statement met their needs. 28/

When H.R. 4347 was reported out of the House Committee on the Judiciary in 1966, the bill contained a new expanded "fair use" provision, the present §107, which sets out the four criteria to determine whether a use is fair. In addition, a specific exemption was added permitting facsimile reproduction of unpublished manuscript collections in archival institutions under limited conditions. In its accompanying report, the Committee expressed the then current view when it said that it did not favor a specific photocopying provision: "Unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of the applicable criteria and the facts of the particular case." 29/

No further action was taken with respect to H.R. 4347; in 1967, both the House and the Senate introduced identical bills that were similar to H.R. 4347 in 1967. Neither bill contained a general photocopying provision, but each added a phrase to §107 referring to "such use by reproduction in copies or phonorecords or by any other means specified by sec. 106." The House Committee Report pointed out that the phrase was intended to authorize copying beyond normal and reasonable limits of fair use and that phrase's purpose was to show that §107 "has application in areas such as photocopying and analogous forms of reproduction" 30/

28/ Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Before Subcomm. No. 3 of the Comm. on the Judiciary, 89th Cong., 1st Sess. 448-49 (statement of Rutherford Rogers) (1965).

29/ H.R. Rep. No. 2237, 89th Cong., 2d Sess. 65 (1966).

30/ H.R. Rep. No. 83, 90th Cong., 1st Sess. 31 (1967).

There was sharp dissatisfaction on both sides with this statutory construction. Librarians felt that they would have to resort to litigation to establish their practices under fair use and that, therefore, they needed more specific statutory protection. ^{31/} On the other hand, copyright proprietors felt a royalty payment system was the best solution to any copying that fair use did not resolve. ^{32/}

The view had begun to shift in 1969 when the Senate introduced S. 543. This bill contained a separate library photocopying exemption in §108 that included the basic elements found in the present law's §§108(a), (b), (c), (f) and (g)(1). After so altering its approach to library photocopying, the Senate took no further action on the matter until 1973 when hearings were held on S. 1361. This revision bill contained the same fair use and library photocopying exemptions found in the earlier bill. Librarians, concerned by recent developments, now called for new explicit statutory protection. ^{33/}

The librarians' major complaint with the way §108 was drafted concerned the fact that subsection (d) would require the user requesting a copy through interlibrary loan to meet the requirement of showing that an unused copy was not available at normal price from trade sources. A librarian spokesman emphasized that a reader who is from a distant library

^{31/} Copyright Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 617 (1967).

^{32/} Id. at 976.

^{33/} Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 92 (1973).

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 requirements of 108(d)(1). ^{34/}

In 1974, the Senate Subcommittee responded to the librarians' concerns by modifying the library photocopying provision. Subsection (d) was changed to no longer require investigation to see if a copy was available when the user only sought a portion of a work. A new subsection (e) permitted the supplying of a photocopy of the entire work only if the work was not otherwise available. The subcommittee also added subsection 108(a)(3) requiring a notice of copyright to be placed on copies and subsection 108(h) specifying those works which might not be reproduced at all except for purposes of preservation and/or replacement of damaged copies.

Another key modification in the 1974 bill was the addition of subsection 108(g)(2) providing that "the rights of reproducing and distribution under this section ... do not extend to cases where the library or archives, or its employees: (2) engages in the systematic reproduction or distribution of a single or multiple copies or phonorecords of material described in subsection (d)"

The Senate bill now addressed major concerns of both parties. On behalf of the librarians, it removed the interlibrary loan user investigation requirement. On behalf of publishers and authors, it placed an overall limitation on the single copy privilege.

^{34/} Id. at 90.

In 1975 the final push to enactment began; revision bills were introduced in both Houses. A proviso was added to subsection 108(g)(2) specifically permitting library loans (as the librarians wanted) as long as they were not in such "aggregate quantities" as to "substitute for a subscription or purchase" (as the authors and publishers wanted). And finally, Congress added a new subsection 108(i) requiring a report to determine whether Congress had achieved the sought-after statutory balance between the creator's rights and the user's needs.

6. The section 108(i) process for the first five-year review.

Congress required the Register of Copyrights to submit a report in 1983, and at five-year intervals thereafter "upon the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users." To meet this responsibility, the Register of Copyrights met separately with the library-user community and the author-publisher community to discuss how to fulfill this mandate. The Register formed an advisory committee from these groups. This committee suggested that an empirical study be conducted on library photocopying in the United States. It aided in the design of the statistical study and enlisted support in conducting it.

The Copyright Office conducted five regional hearings and the testimony and comment letters from these hearings formed an essential basis of the first five-year report. King Research, Inc. of Rockville, Maryland, conducted an empirical study. Most of the data was collected in 1981 and consisted of six surveys in which King surveyed libraries, publishers, and library users. There was no separate survey of authors.

As part of the report preparation, representatives of libraries, publishers, and authors met informally to try to narrow some of the issues. After five meetings this group was unable to reach consensus on any of the issues. The Copyright Office remained committed to a process of voluntary problem-solving between the interested parties as the best way to resolve these thorny questions.

B. Major Findings of the First Photocopying Report

The Copyright Office made a number of recommendations in the 1983 report. ^{35/} These recommendations were based on consultations with the parties, statistical surveys ^{36/} prepared by a private contractor, a review of foreign library photocopying practices and applicable laws, a look at new technological developments affecting library photocopying, and a review of the legislative history of the Copyright Act.

The 1983 report asserted that these recommendations reflected the Copyright Office's best judgment about possible solutions to the issues. We should add that these recommendations were made in the context of solving problem questions as the parties saw them at that time. The non-statutory recommendations follow:

^{35/} Register's Report on Photocopying 358-360 (1983).

^{36/} See D. McDonald and C. Bush, Libraries, Publishers and Photocopying in the United States Copyright Office (1982), reprinted as App. I of the Register's Report on Photocopying (1983). A comprehensive statistical survey was not undertaken for the 1988 report because of budgetary constraints and because of disinterest on the part of essential participants. See, e.g., Att. C, Letter from Eileen Cooke, Director of Washington Office, American Library Association to Anthony P. Harrison (Dec. 8, 1986); Att. D, Letter from Richard Udell, Administrative Vice President and Counsel, Harcourt Brace Jovanovich, Inc. to Ralph Oman, Register of Copyrights (Nov. 20, 1986).

1. All parties affected by library photocopying were encouraged to participate in existing collective licensing arrangements and to develop new collective arrangements to facilitate compensated copying of copyrighted works.
2. Representatives of authors, publishers, librarians, and users were urged to hold a series of discussions to clarify any troubling terms found in the law and develop voluntary guidelines where needed in relation to present library photocopying practices and for those practices which may emerge as a result of the impact of new technology.
3. The Copyright Office suggested a study be made of a possible copyright compensation system using surcharges on photocopying equipment at certain different locations and institutions. Such a study should look into the possible experiences of other countries with such systems.
4. It also suggested a study be made of a possible compensation system based on sampling techniques of percentages of photocopying impressions made at certain locations in different types of institutions and/or organizations.
5. The Office recommended that a study be made of issues relating to the impact of new technological developments on library reproduction of copyrighted works.
6. The Office emphasized the need for a meeting among authors, publishers, and librarians/archivists to discuss new preservation techniques and practices. If the participants feel that new legislation was necessary, then they should attempt to develop a common position that everyone could support.
7. Finally, the Copyright Office called for clear recognition by all levels of government that publicly-owned libraries must be adequately funded so that these institutions will be able to pay their share of

the necessary costs attendant to the creation and dissemination of copyright protected works.

The 1983 Register's Report also contained five statutory recommendations which involved amendments to the Copyright Act of 1976. They were:

1. The Office recommended a joint proposal by the Music Library Association and the Music Publishers' Association to allow the reproduction of out-of-print musical works. ^{37/} The amendment to the statute would allow the library reproduction of an entire musical work (or substantial parts thereof) for private study, scholarship, or research following an unsuccessful, diligent search for the name and address of the copyright proprietor of the musical. If the search discloses the identity and the location of the copyright proprietor, then copying may only proceed with the permission of the copyright proprietor.
2. The Copyright Office urged Congress to act favorably on a proposal developed by a task force of librarians and publishers and submitted by the Association of American Publishers which would encourage participation in a collective licensing arrangement. Under this proposal, the copyright owners of scientific, technical, medical, or business periodicals would be limited to a single remedy for copyright infringement unless the work was entered in a qualified licensing system or program. The publisher who does not enter his/her works in a licensing system or offer a licensing program would risk the loss of injunctive relief, actual damages and lost profits, statutory damages, attorney's fees, impoundment of infringing copies or phonorecords, and loss of criminal infringement remedy and be left with only the remedy of a "reasonable copy fee."

^{37/} See App. VII Comments 152, Register's Report on Photocopying (1983).

These remedies would not be lost if the user did not participate in a qualified licensing system. ^{38/}

3. The Copyright Office recommended an amendment to clarify §108(a)(3) which requires a reproduced copy to contain "a notice of copyright." The amendment would require reproduction of the statutory notice appearing on the original work in a location authorized by the statute. Librarians had contended that only a general warning that the work reproduced may have been protected by copyright was all that was required by §108(a)(3).
4. The Copyright Office also recommended that a clarifying amendment be added to subsections 108(d) and (e) to show that copying privileges granted therein did not extend to unpublished works. A representative of the Society of American Archivists had contended that subsection 108(d) did not contain specific language limiting its provisions to only unpublished works or published works as had subsections 108(b) and (c), respectively. ^{39/} Believing that Congress had not intended to permit libraries or archives to publish when the copyright owner had not chosen to do so, the Copyright Office recommended inserting the word "published" in the appropriate places in both subsections 108(d) and (e).
5. Finally, the Copyright Office recommended changing the filing date for the five-year report from its present January date to one of March 1 of a given year to alleviate the administrative support problems in preparing the report during the end of the year holiday period.

^{38/} Id. at 44-52.

^{39/} See App. IV, Part 1, Washington Hearing Transcript 68, Register's Report on Photocopying (1983).

III. UPDATE ON PHOTOCOPYING IN THE UNITED STATES

A. Judicial Developments Post Williams and Wilkins

The first photocopying report outlined the development of §108. ^{40/} It also discussed the significance of the Williams and Wilkins decision ^{41/} on the final shape of §108. ^{42/} This significant photocopying case was finally resolved by the Supreme Court during the period that Congress was drafting the photocopying exemption. Indeed the Court of Claims deferred to a Congressional solution for this problem when it noted that issues involving copyright and photocopying were more properly resolved by Congress than by the court. ^{43/}

Congress required the Register of Copyrights to submit a report at five-year intervals setting forth whether §108 "achieved the intended statutory balancing of rights of creators, and the needs of users." ^{44/} Congress also urged that the interested parties should continue to meet and resolve their own differences by creating permissible guidelines that covered copying under both §107 and §108. ^{45/} Although guidelines were developed to guide teachers in the boundaries of fair use copying for class-

^{40/} Register's Report on Photocopying 15-64 (1983).

^{41/} Williams and Wilkins Co. v. United States, 172 U.S.P.Q. 670 (Ct. Cl. 1972), rev'd, 487 F.2d 1345 (Ct. Cl. 1973) aff'd by an equally divided court, 420 U.S. 376 (1975).

^{42/} Register's Report on Photocopying 27-36 (1983).

^{43/} See discussion, supra in text, at II. A. 4(a).

^{44/} 17 U.S.C. §108(i) (1976).

^{45/} See, e.g. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 72 (1976).

room use, 46/ some colleges and universities have asserted that these guidelines were not extensive enough to cover their needs. Model photocopying guidelines were then drafted by groups representing both publishers and librarians. 47/ Although the two groups never formally agreed on one set of guidelines, there is evidence that individual institutions either follow one of these sets of guidelines or adopt their own guidelines based in part on either the AAP or the ALA model policy. 48/ Guidelines have never been agreed upon for §108 copying other than those for interlibrary loans developed by the National Commission on New Technological Uses of Copyrighted Works (CONTU) and reported by Congress in the Conference Report. 49/ Counsel for the ALA has developed guidelines to cover new areas -- the copying of videotapes and computer software -- but they have not been approved by ALA. 50/

Although no photocopying case since Williams and Wilkins has reached the Supreme Court, copyright proprietors have been vigilant since the current photocopying exemption went into effect in enforcing their rights. In particular, publishers have brought actions seeking a judgment

46/ Id. at 68-70.

47/ AAP and the Authors League issued their model policy, Photocopying by Academic, Public and Nonprofit Research Libraries (May, 1978). ALA issued a Model Policy Concerning College and University Photocopying for Classroom, Research and Library Service Use (March, 1982).

48/ See Appendix II Transcript of Washington Hearings 50 (Nancy Marshall, American Library Association); 127-129 (Alfred Sumberg, Associate General Secretary, American Association of University Professors) (April 1987). [Hereinafter App. II Washington Hearing].

49/ H.R. Rep. No. 1733, 94th Cong., 2nd Sess. 72-74 (1976).

50/ M. Reed and D. Stanek, Library and Classroom Use of Copyrighted Videotapes and Computer Software (Feb. 1986).

that certain instances of copying constituted infringement of their copyright. They have brought these actions against individuals and organizations that fostered systematic reproduction: copy shops, the academic community (including a university and some of its faculty members), and corporations where there is extensive internal photocopying.

1. Copy shops and the academic community. Only two years after the current law went into effect, publishers became concerned about the extent of photocopying taking place, either on campus, or in copy shops near campuses that specialized in quick and relatively economic copying for students and faculty members. In 1980, in an effort to obtain judicial redress and curb this copying, two different publishers brought suits against copy shops, alleging that each shop was in effect republishing by taking massive amounts of copyright material without permission and making enough copies for a faculty member to provide classroom students with an individualized textbook. Publishers saw this multiple copying as devastating on textbook sales. In Basic Books, Inc. v. Gnomon Corp. ^{51/} and Harper & Row Publishers, Inc. v. Tyco Copy Service, ^{52/} publishers sought a judgment that the copy shop involved was infringing copyright. In both cases the publishers obtained consent decrees which required the copy shop to stop making multiple copies of the same copyrighted materials for either the same or different people without getting either express permission from the copyright owner or a certification from the requestor that the copying

^{51/} Copr. L. Rep., ¶25,145 (D. Conn. 1980).

^{52/} Copr. L. Rep., ¶25,230 (D. Conn. 1981).

order involved fell within the established guidelines. The copy shop was also required to post a copy of these guidelines in a prominent place in each of its places of business.

In December of 1982, publishers filed a more comprehensive lawsuit against a university, some of its faculty members, and an off-campus copy shop. In this action, Addison-Wesley Publishers Co., Inc. v. New York University, ^{53/} plaintiffs again asserted that copyrighted materials were copied in whole or in part without permission and then used as individualized classroom texts. For the first time the publishers sued a university and certain faculty members who were directly involved in this kind of reproduction. In the settlement of this case, the university in effect agreed to supervise the kind of copying undertaken by its faculty members. The university also agreed to adopt a photocopying policy statement, to circulate this policy widely, and to inquire into violation of it. In order to be defended by the university in any future action by copyright proprietors, the faculty members must take stringent steps to avoid infringing copyrights. Faculty members are to use the agreed upon guidelines to determine whatever permission is necessary for photocopying for research and classroom use. If permission is necessary, the faculty member must either get the permission and copy accordingly or get a determination from the university attorney that the copying involved is fair use. If the faculty member follows these steps, then the university will indemnify the faculty member in an action for copyright infringement. ^{54/}

^{53/} No. 82-8333 (S.D.N.Y. filed Dec. 14, 1982).

^{54/} This agreement is reported in Corporate Copyright and Information Practices, 167-178 (1983).

Finally, the publishers obtained a consent judgment against the copying center similar to the judgments obtained against copying shops in Gnomon and Tyco. ^{55/}

2. Internal corporate photocopying. Copyright proprietors continue to be concerned about the amount of copying done in corporate libraries and to question how this copying fits into §108. The first photocopying report detailed the concern of copyright proprietors about the extent of photocopying in special for-profit libraries and how much, if any, of this copying is exempted under §108. ^{56/} It also discussed two early cases publishers brought against corporations for internal photocopying. In both Harper & Row, Publishers, Inc. v. Squibb ^{57/} and Harper & Row, Publishers, Inc. v. American Cyanamid Co., ^{58/} the publisher alleged that the corporation was infringing its copyrights in journals that were entered in the Copyright Clearance Center (CCC). ^{59/} In both cases a settlement agreement was reached whereupon the corporation agreed to register as a user with the CCC, and the parties agreed upon a procedure for the reporting and paying for photocopies of materials from journals and other published material registered with the CCC. ^{60/} The agreement with Squibb contained an

^{55/} Copr. L. Rep. ¶125,544 (S.D.N.Y. filed May 31, 1983). For a more detailed discussion of both the settlement with the university and the consent judgment against the copy center, see Patry, Fair Use in Copyright Law 184-86 (1985).

^{56/} Register's Report on Photocopying 75-86, 156-57 (1983).

^{57/} No. 82-2363 (S.D.N.Y. filed April 14, 1982).

^{58/} No. 81-7813 (S.D.N.Y. 1981).

^{59/} See the discussion of the Copyright Clearance Center, infra in text, II. B.

^{60/} The terms of these settlements are set out in Corporate Copyright and

exemption that permitted a 6% deduction of copies reported on the basis that a certain amount of the copying would be permissible as a fair use. 61/

The Association of American Publishers (AAP) saw the procedure adopted in these early cases as a model for resolving some of the photocopying issues in companies with extensive research facilities. 62/ Soon after these cases were settled, AAP entered into similar agreements with two other corporations: Pfizer, Inc. and Texaco, Inc. Pfizer agreed to pay the CCC royalty fee for both multiple and single copying but reserved the right to assert that making single copies for researchers falls within fair use. Texaco issued a photocopying policy similar to Squibb's. 63/

Recently six publishers brought an action against Texaco on the behalf of both themselves and also on behalf of a class of other publishers in the United States and abroad. 64/ In this suit, the plaintiff charged Texaco with regularly making photocopies from their journals registered with the CCC but only making token payments to the CCC. Texaco tried to get the court to dismiss the action on the grounds that the publishers involved had failed to comply with pertinent sections of the Copyright Act on registration and transfer of copyright ownership. Texaco also asked the court to deny class action certification. Texaco asserted that plaintiffs' discovery motion was too broad; the plaintiffs responded that under the

Information Practices 149-52, 153-166 (1983).

61/ Id. See par. iv Exclusion, p.157-8.

62/ Register's Report on Photocopying 157 (1983).

63/ Both of these letter agreements are unpublished. See Patry, The Fair Use Privilege in Copyright Law 192-93 (1985).

64/ American Geophysical Union v. Texaco, Inc., No. 85-3446 (S.D.N.Y. filed May 6, 1985).

circumstances of the case, internal photocopying by company employees, they could not be anymore specific about the particular copyrighted works infringed at the present time.

At a hearing held on June 19, 1986, Judge Pierre Leval of the U.S. District Court for the Southern District of New York denied defendant's motion to dismiss for lack of specificity, but noted that the defendant may demand a more definite statement and renew a motion to dismiss at a later date. Judge Leval also denied the motion to deny class certification and ruled that plaintiffs were entitled to more discovery.

As a result of an adverse antitrust judgment in litigation with Pennzoil, Texaco has filed for bankruptcy. The bankruptcy court has said that all pending litigation is to be continued. Consequently, the case is being pursued, and, whatever the outcome, the final decision in this case will have significant consequences in resolving competing claims over the amount of and payment due for internal corporate photocopying.

B. Growth of the Copyright Clearance Center

The Copyright Clearance Center (CCC), a non-profit company, was developed in 1977 to provide a centralized authorization and payment center for photocopying. The CCC, unlike collectives in other countries, was formed through collaborative efforts of various associations 65/ and without assistance from the government. In our earlier report we noted

65/ These associations include the Association of American Publishers, the Authors League, the Industrial Research Institute, and the Information Industry Association. CCC: 60 Day Survey Procedures Manual, NM 60-7 Series: E22R4.

that in October, 1982, the CCC had only 5,367 titles, 604 publishers, and 1,399 users. Today there are more than 75,000 titles, 1,300 publishers -- of which approximately 600 are foreign -- and 2,200 users. 66/

In 1984 the CCC was struggling and it asked the then Register of Copyrights, David Ladd, to write to Congressman Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, to seek support for the introduction and early enactment of the so-called "Umbrella Statute" which would limit the remedies of copyright owners of scientific, technical, and medical materials to "a reasonable copyright fee" where they had not entered such works into a "qualified licensing program" at the time the infringing copies were made by a user who had entered into such a program. On April 19, 1984, Mr. Ladd wrote to Mr. Kastenmeier outlining the problem and offering assistance. No bill was introduced. Despite the lack of a legislative boost, the CCC survived and thrived. It has experienced dramatic growth because of a new service first offered in 1983 -- the Annualized Authorizations Service (AAS). This service provides a corporate-wide license to photocopy from all registered works for one year; that license is renewable for an additional year. A single annual payment is made; and except during the survey period, copying activity is not recorded or reported. CCC's service charge to publishers is not more than 35% of fees collected the first year a license is in effect, and not more

66/ Telephone conversation of December 14, 1987 with Virginia Riordan of the Copyright Clearance Center.

than 25% in subsequent years. The license authorizes copying of only portions of works; the copies are for corporate internal use. Distribution of copies to third parties is expressly prohibited.

The CCC took a giant step forward when it worked with econometricians at MIT and Harvard to develop a statistical model which allows for a nonintrusive survey. This new model significantly streamlines and enhances the collection process and is based upon statistical variables developed by pooling survey data for an entire industry. The previous model was company specific.

At the end of 1986, nineteen annual licenses were in effect; this was more than double the number at the end of 1985. In December, 1987, there are thirty-nine in effect. Over one million dollars has been collected through this service, and in 1987 approximately \$212,000 was distributed to more than 250 participating publishing organizations. 67/

The original system adopted by the CCC is the Transactional Reporting Service. It too has experienced substantial growth. Under this system a registered library can copy any article from a title registered with the CCC and already in its possession. A user is required to record and report each copy made beyond fair use. The CCC's service charge is \$.50 per copy for items published from 1983 to the present; for those published before 1983 the charge is \$.25. This service will continue to be the system relied on by document delivery services.

67/ Unlike other collectives, in the CCC all money flows to the publishers. Authors, however, are represented on the Board of Directors.

In the earlier report we noted that librarians had not joined in great numbers and gave some reasons. 68/ These included lack of titles, cumbersome record keeping, payment of a fee (if they dealt directly with the publisher, the fee might be waived), and no copying beyond fair use. During the April hearing, fairly extensive copying by academic research libraries was described. The CCC reports that only sixty academic research libraries are CCC registered users and of these forty-six have never reported copying. 69/ In 1986 only \$11,242 was paid in fees by research libraries; this represented only .7% of the total fees collected by the CCC. 70/

With regard to law libraries, the CCC reported that only four law libraries appear to be registered with it and two of these are university law libraries. Only one individual firm is registered. The combined total of their copying activities between 1983 and 1986 was ten copies for \$12.15. 71/ The American Association of Law Libraries stated that few legal publishers belonged to the CCC and remarked that those that did

68/ Of the 2,100 organizations and individuals that are members: 32% are corporations; 31% are documents suppliers and others; 23% are colleges and universities; 6% are foreign organizations; 4% are government agencies; 3% are academic research libraries; and 1% are public libraries.

69/ App. I Comment Letters, No. 20 (comment of Alexander C. Hoffman, Chairman of the Board, Copyright Clearance Center) (1987).

70/ Of the \$1,513,812 fees collected in 1986: 68% represented corporations; the rest were mostly commercial document delivery services. App. I Comment Letters, No. 12 (comment of Alexander C. Hoffman, Chairman of the Board and Eamon Fennessy, President, Copyright Clearance Center) (1987).

71/ App. I Comment Letters, No. 20 (comment of Alexander C. Hoffman, Chairman of the Board) (1987).

charged unreasonable fees. 72/

We also noted that publishers were slow to join the CCC. This seems to be changing. One hundred percent coverage, however, is not possible. Four reasons were given. The most important has to do with ownership of the rights -- many publishers are not sure that they own the necessary rights. 73/ This is especially true with illustrations and photographs. Second, in some cases, notably with dissertations, certain owners cannot be located. Third, with certain types of publications, e.g., catalogs, the owners are not interested in the CCC. Finally, some publishers are unwilling to be part of a collective system. 74/

The CCC reports that participating publishers are channeling more of their permission requests to the CCC.

The heavy activity at the CCC is with corporations and document delivery suppliers. Libraries and universities have generally not participated; however, the CCC is now involved in a pilot study at a northeastern university. Specifically, the CCC is designing and developing an annual license similar to the license the CCC offers corporations. This should serve as a model for the academic sector.

72/ App. II Washington Hearing 220 (statement of Marlene McGuirl, representing the Copyright Committee of the Association of Law Librarians) (April, 1987).

73/ In the AAS, publishers must certify in their agreement with the CCC that they hold all the rights.

74/ App. I Comment Letters, No. 12 (comment of Alexander C. Hoffman, Chairman and Eamon T. Fennessy, President, Copyright Clearance Center) (1987).

The CCC currently authorizes only photocopying. It is currently engaged in a pilot program which is studying the feasibility of administering rights in microcomputer software.

On the international scene, the CCC has signed authorization conveyance agreements with its counterpart organizations in a number of countries. 75/ Each of these agreements authorizes users of the CCC to copy lawfully thousands of titles owned by foreign copyright owners. 76/ Additionally, on October 7, 1987, the CCC began a new international program that will provide U.S. publishers the same protection and payment that publishers in any given country receive under that country's copyright law and procedures. The program is available to both CCC participants and organizations not registered with the CCC. 77/

C. Copying Done Under U.S. Government Contracts

At the Washington hearing, several individuals 78/ including representatives of the Association of American Publishers (AAP) urged that further attention should be given to photocopying of copyrighted materials by U.S. Government contractors. 79/ The thrust of this complaint is that government agencies hire independent contractors or commercial delivery

75/ The Copyright Licensing Agency (CLA) -- United Kingdom; the Centre Francais du Copyright (CFC) -- France; VG Wort -- Federal Republic of Germany; and the Copyright Agency Limited (CAL) -- Australia.

76/ Approximately 20-30% of the copying in the U.S. is of foreign works. CCC Press Release of October 7, 1987.

77/ Id.

78/ App. II Washington Hearing 23, 36 (statement of Eamon Fennessy, President, Copyright Clearance Center); 144 (statement of Paul Zurkowski, President, Information Industry Association) (April, 1987).

79/ App. I Comment Letters, No. 2 (comment of Myer Kutz, Chairman of the Copyright Committee, Association of American Publishers) (1987).

services to provide the agency with copies of material that may be copyrighted, and these contractors make copies of copyrighted materials without authorization from the copyright proprietor. AAP asserts that when they challenge independent government contractors who are engaged in massive and systematic photocopying in direct violation of the copyright law, these contractors respond, "Under 28 USC §1498(b), we are indemnified, so go ahead and sue us because the Government will pay all of our legal costs and we don't have to worry." 80/

When AAP tried to sue the government contractor, they found that the scope of §1498(b) was very broad. AAP reports a specific instance in 1984, wherein under contract, Informatics General Corporation systematically supplied the Food and Drug Administration's requests for photocopies of journal articles. AAP also discovered that FDA had an additional request for proposals for similar services at a later date. Bidders were purportedly instructed to copy under the CONTU guidelines in order to avoid the necessity of paying royalties. When AAP informed both FDA and Informatics that commercial delivery services did not come under the CONTU guidelines, FDA responded that the independent contractor was not infringing the copyrights of members of AAP; Informatics said that the photocopying was fair use and also claimed they were immune from suit by the terms of their government contract with FDA. 81/ Furthermore, AAP contends that §1498(b)

80/ App. II Washington Hearing 82-85 (statement of Carol Risher, Director of Copyright and Jon Baumgarten, Counsel, Association of American Publishers) (April, 1987).

81/ Letter from Carol A. Risher, Association of American Publishers, to Anthony P. Harrison, Assistant Register of Copyrights (November 16, 1987).

is being misconstrued: it was intended to protect against inadvertent copying but is now being used to excuse covert, wide scale, systematic copying. 82/

Jon Baumgarten, Counsel for AAP, asserts that "Congress has a history of dealing with the notion that §1498(b) is an eminent domain statute" that allows the government "to engage in regular systematic infringement of copyright as long as the author is granted reasonable compensation." He challenges this construction of eminent domain on the basis that eminent domain usually means you are told your property is being taken and are offered reasonable compensation for it. Mr. Baumgarten maintains that the Copyright Clearance Center, already in place, is a good vehicle for providing reasonable compensation to the copyright proprietor. 83/

The provision in question was added to provide copyright proprietors limited but reasonable compensation when the United States infringed works protected by copyright either directly or by authorizing a third party to take such action.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement,

82/ App. II Washington Hearing 83 (1987).

83/ Id. at 83-84.

including the minimum statutory damages as set forth in §101(b) of title 17, United States Code 84/

The Copyright Office position on government use of privately copyrighted material was set out in a July 15, 1976, letter that commented on a Draft Government Publication and Copyright Policy Statement. 85/ In this letter, the General Counsel observed that the Copyright Office fully concurred in the general policy of this draft statement: "Generally, it is the policy of the Government that agencies shall not infringe or authorize their grantees or contractors or other persons to infringe copyright." At the same time he asserted that the Copyright Office did not concur in the scope of stated exceptions to this general policy. Mr. Baumgarten reaffirmed the principle that the government should not intentionally infringe privately copyrighted works and that any departure from this principle should be based on "paramount government need and should be exceedingly rare." 86/

In this same letter the Copyright Office summed up its objections to a broad construction of 28 U.S.C §1498(b) as a general "eminent domain" statute:

- 1) nothing in the legislative history of Public Law 86-726, which conferred jurisdiction in the Court of Claims over copyright infringement cases against the United States, supports the view that it is an eminent domain provision; to the contrary,

84/ 28 U.S.C. §1498(b) (1987 Supp.).

85/ Letter from Jon Baumgarten, General Counsel of the Copyright Office, to Jesse E. Lasker, Office of the General Counsel, National Science Foundation (July 15, 1976).

86/ Id. at 1.

the purpose of the legislation, was to afford additional rights to holders of copyrights and to protect government employees;

- 2) the power of eminent domain is subject to abuse and injustice and should not be implied;
- 3) no decided copyright cases support the eminent domain theory and even in the case of patents, the scope of an eminent domain interpretation of §1498(a) appears to be very narrow and applies primarily to patents relating to articles of war or similar extraordinary governmental need; and
- 4) whatever the scope of the eminent domain interpretation in the case of patents, fundamental differences between patents and copyrights, make any analogy inappropriate. 87/

In the intervening years especially with the drafting of Department of Defense regulations, the Copyright Office has reexamined §1498(b). It has seen nothing, however, in the law or judicial decisions to make it change its 1976 position.

In a recent case the District of Columbia Circuit read §1498(b) as affecting a policy that government wrongdoing in the realm of copyright infringement cannot go uncompensated without obligating the government to act as a insurer for the infringement actions of any third party acting for the government. The question in that case is "By what standard must a party demonstrate that the U.S. gave its authorization or consent to a copyright infringement?" 88/ That case really does not solve the problem presented by

87/ Id. at 2.

88/ Auerbach v. Sverdrup Corp. (D.C. Cir. filed Sept. 22, 1987).

AAP, but it does strongly suggest that copyright infringement must not go uncompensated.

D. Copying Practices Reported in Selected Organizations

The central issue addressed by this report is whether or not the statutory balance between the competing interests of copyright proprietors and the users of copyrighted materials has been maintained since the last five-year review.

In the fall of 1986, the Copyright Office began its consultation with librarians and publishers in order to prepare this report; at that time, a consensus began to emerge which continued into the formal statement and hearing stages. The clear consensus among the parties on both sides of the scale, with a few exceptions, is that the intended statutory balance has not changed during the last five years.

Most of the major librarian groups felt that the balance had been achieved and maintained. Typical of this group was a representative of the American Library Association (ALA) who testified, "It is the opinion of the American Library Association today, as it was then, that the provisions of Section 108 provide for the intended statutory balance, and that in implementation and practice, Section 108 has achieved that balance." ^{89/} The Association of Research Libraries (ARL) supported this position: "[O]ur opinion on the issue of balance remains essentially the same as it was in 1982; i.e., that by-and-large, the law has achieved a reasonable and fair balance between the legitimate rights of owners and users in regard to photo-mechanical reproduction of copyrighted works by libraries and

^{89/} App. II Washington Hearing 47-48 (statement of Nancy H. Marshall) (April, 1987).

archives on behalf of their users." 90/ The Special Libraries Association (SLA) supported this consensus noting that SLA "believes section 108 strikes the proper balance between the rights of creators and the needs of users of copyrighted works." 91/ A similar statement of support for the present statutory formulation was offered by the Association of College and Research Libraries (ACRL) which asserted: "It is the consensus of the ACRL Copyright Committee that the existing law adequately deals with printed matter." 92/

Of all the librarian's groups that testified or commented, only the American Association of Law Libraries (AALL) dissented from the opinion that balance had been achieved. Its representative testified, "The American Association of Law Libraries is of one opinion, that section 108 should be re-examined and adjusted to more fairly balance the rights of creators with the rights of users of copyrighted materials." 93/

On the other side of the scale, representatives of publishers and authors have also asserted that the balance has been achieved. The representative of the American Association of Publishers (AAP) testified, "[T]he AAP continues to believe that the general structure and content of Section 108 does provide an acceptable framework for balancing the rights of crea-

90/ App. I Comment Letters, No. 7 (comment of Shirley Echelman, Executive Director) (1987).

91/ App. II Washington Hearing 174 (statement of Nicholas Mercury) (April, 1987). Although the SLA supported the proposition that the balance had been achieved in the statutory formation, they sought amendment of the law on another basis which will be discussed later in this report.

92/ App. I Comment Letters, No. 1 (comment of Mary Lee Sweat) (1987).

93/ App. II Washington Hearing 217 (statement of Marlene C. McGuirl) (April, 1987).

tors and the needs of users of copyrighted works. At this point we would offer no major amendment to that section." ^{94/} Similarly, a representative of Harcourt Brace Jovanovich, Inc., a major publishing house not affiliated with the AAP, stated, "[T]he existing provisions of section 108 remain essentially appropriate to achieve the intended statutory balancing of the rights of creators and the needs of users." ^{95/} The representative of the Authors League of America, Inc. reported, "[T]he Authors League believes that section 108 strikes a reasonable balance between the rights of creators and the needs of users" ^{96/} Although all three of these copyright proprietor representatives asserted that the statutory balance had been achieved and maintained, they felt that there was still substantial non-compliance with its provisions. ^{97/}

These statements by the representatives of interested parties indicate a convergence of the sharply divergent views that these parties expressed during the first five-year review. To illustrate how the environment has changed since the last review, this report will discuss recent developments in three problem areas.

1. Copy shops. As explained in the 1983 report, a great deal of photocopying and distributing of copyrighted material is done by commercial photocopy shops, especially those located on or near college campuses. Proprietors expressed concern that library patrons frequently obtain

^{94/} Id. at 71 (statement of Myer Kutz) (April, 1987).

^{95/} Att. D, letter from Richard Udell, Harcourt Brace Jovanovich, Inc. to Ralph Oman, Register of Copyrights (Nov. 20, 1986).

^{96/} App. I Comment Letters, No. 29 (comment of Dale Stull Demy) (1987).

^{97/} No evidence of this non-compliance was offered.

multiple copies of library materials by either checking them out or by making a single photocopy at the library and then taking the original or photocopy to a nearby copy shop for multiple copying. These commercial copy shops are not eligible for §108 exemptions.

In 1980, the publishers translated their concerns about copy shops into action by filing two suits, Basic Books, Inc. v. Gnomon Corp. and Harper & Row, Publishers, Inc. v. Tyco Copy Service. ^{98/} In each case the parties entered into consent decrees requiring the copy shop to seek permission or certification from the requestor that the copying fell within the fair use copying guidelines. And in 1983, as already mentioned, publishers obtained a similar consent decree against the copy shop in Addison-Wesley Publishers Co., Inc. v. New York University. ^{99/}

In this climate of publisher litigation against copy shops, a representative of the National Association of Quick Printers (NAQP) testified in a 108(i) hearing held in New York in 1981. ^{100/} After estimating that there were approximately 15,000 quick printers at the time with an annual growth rate of 25%, the witness warned that if these lawsuits became widespread, the entire industry would suffer. ^{101/} Although the representative of the NAQP pledged cooperation of its membership with copy-right owners, he emphasized that there were too many problems for the staff

^{98/} See discussion, supra in text, at III. A.

^{99/} Id.

^{100/} App. VI, Part I at 203 (statement of Phillip Battaglia), Register's Report on Photocopying (1983).

^{101/} Id. at 207.

of a copy shop to police possible violations of the copyright law. This was the atmosphere under which copyright proprietors and copy shops were operating at the time of the first five-year review.

At the hearing held in connection with the second five-year review, a representative of a major chain of copy shops testified. 102/ He reported that within the last five years his firm has instituted a new program of copyright compliance. 103/

Under this new program, all of the firm's workers are fully trained about copyright, with regular seminars conducted to insure their understanding of the law. The workers are instructed as a matter of company policy to turn down customer requests to reproduce materials which would violate the copyright law. In addition, all of this firm's shops now display copyright warning notices on all self-serve photocopying machines available for customer use. Each of these shops also display poster size notices indicating that the copyright law of the United States governs the reproduction of copyrighted works and setting out the fair use criteria found in §107. 104/

The witness explained that a central feature of this new program was a permission system under which the firm now obtains permission on behalf of faculty members who wish to reproduce copyrighted materials for use in their courses. Also as part of this system, faculty members are educated on how to obtain permission themselves. In conjunction with the

102/ App. II Washington Hearing 187 (statement of Kurt Koenig, representing Kinko's Copies) (April, 1987).

103/ Id. at 194.

104/ App. I Comment Letters, No. 14 (comment of Kurt Koenig, representing Kinko's Copies) (1987).

permission program, the witness's firm has established a computerized royalty payment system under which royalties are collected from faculty and students and paid directly to authors and publishers. 105/

The witness pointed out an interesting feature of his firm's permission program. Due to the firm's repeated permission requests, some of the copyright owners have granted blanket permission to reproduce these materials. These blanket permissions, primarily granted by journal publishers, are generally for all their publications at a single price 106/ and are limited to copying for "educational use only." 107/ Publishers grant these blanket permissions with the full knowledge that material copied is going to be a part of an anthology or "going to be compiled as course materials that are being prepared by a faculty member." 108/

In the typical transaction, in which the faculty member has not secured permission, but has signed a statement indicating that the materials are only for classroom use by students in their course, the witness's firm will seek an individual permission if a blanket permission has not already been obtained. This individual permission request may be made by phone, standard or express mail, facsimile transmission, or computer transmission; it notifies the publisher of the material to be copied, the person making the request, and the purpose of the use. If the faculty member has obtained the permission, then the witness's firm

105/ Id.

106/ App. II Washington Hearing 195 (statement of Kurt Koenig, representing Kinko's Copies) (April, 1987).

107/ Id. at 204.

108/ Id. at 205.

requires an actual copy of the permission grant before copying is begun. 109/ The royalty fee charged by the publisher is added to the cost of reproduction charged to the faculty member or student. Then the royalty portion is separated, and payment is made directly to the respective copyright owners through a centralized computer system. The witness reported that approximately \$100,000 in royalty fees were paid to copyright owners by his firm for the first quarter of 1987. 110/

Publishers seem pleased with this method of seeking permission and payment. 111/ Although the witness asserted that he could not speak for copy shops other than his firm, 112/ it could be reasonably expected that the witness's firm would not continue to engage in its program unless it was profitable or at least competitive with other members of the copy shop industry.

If the practices of the witness's company, which mirror the terms of the consent decrees in the Gnomon, Tyco, and New York University cases, 113/ represent a standard with which other members of the copy shop industry may soon comply, then this threat to the \$108 balance could soon abate. The combination of the statutory formulation supported by illustrative guidelines and judicial rulings, seems to have worked in this area.

109/ Id. at 188-203.

110/ Id. at 200.

111/ Id. at 206.

112/ Id.

113/ See discussion, supra in text, at III. A.

2. Archives. As detailed above, the representatives of the interested parties appear to have reached the consensus that the statutory formulation of §108 has achieved the balance Congress intended and does not require new legislation to alter or clarify that balance. Archivists again question the interpretation of certain provisions of §108.

Simply put, a representative of the Society of American Archivists (SAA) contends that subsections 108(d) and (e) allow the archivists to make a photocopy of an unpublished manuscript for a requestor for purposes of private research and study. 114/

Subsection (d) authorizes the preparation of photocopies and distribution by libraries or archives for patrons of "no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work."115/ Subsection (e) allows the reproduction and distribution of an entire work or of a substantial part of it for a user after "the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price" 116/

Archivists argue that subsections 108(d) and (e) should be interpreted to permit them to make photocopies of unpublished works for their patrons since Congress placed no specific limitation on published or unpublished works in these subsections as it did in subsection (b) on

114/ App. I Comment Letters, No. 18 (comment of Linda M. Matthews, Chair, Society of American Archivists, Copyright Task Force) (1987).

115/ 17 U.S.C. 108(d).

116/ 17 U.S.C. 108(e).

unpublished works or in subsection (c) on published works. An archive's principal holdings are unpublished works, and archives are specifically named in subsections (d) and (e) as institutions covered by the copying exemption. 117/

The Copyright Office contends now as it did at the time of the first five-year review, that Congress did not intend subsections 108(d) and (e) to apply to the photocopying and distribution of unpublished works by libraries or archives for their patrons.

If the archivists' arguments for the applicability of subsections (d) and (e) to unpublished works apply to each section, then an examination of subsection (e) first presents a clear view of Congress's intent not to include unpublished works within the ambit of the subsection. Under subsection (e) no copying may occur until the library or archive "has first determined, on the basis of a reasonable investigation, that a copy ... of the copyrighted work cannot be obtained at a fair price." The legislative history asserts that the "reasonable investigation" required under subsection (e) always requires consultation "with commonly-known trade sources in the United States" and also with the "publisher." 118/ There are no trade sources for unpublished works; moreover, the requirement that investigation means contacts with the "publisher" strongly indicates that Congress only intended this subsection to apply to published works.

117/ See App. IV, Part 2 at 95-96 (statement of Dr. Carolyn Wallace) Register's Report on Photocopying (1983). See also App. I Comment Letters, No. 18 (comment of Linda M. Matthews).

118/ See H.R. Rep. No. 1476 at 76.

Subsection 108(d) is limited in the scope of making a request to "no more than one article or other contribution to a copyrighted collection or periodical issue or to a copy ... of a small part of any other copyrighted work" Although this subsection is not explicitly limited to published works, Congress's intention to do so can be seen from the use of an "article" from a "periodical issue." As archivists' witness acknowledged, it would be "highly unusual" for an archive to have an entire unpublished periodical 119/ since the term periodical refers to the frequency of publication.

Congress was very careful in its construction of §108. It only allowed copying of unpublished works under subsection (b) for the purpose of "preservation and security" or "for deposit for research use in another library or archives." The copying permitted under this subsection is not to fill individual patron requests and would not allow distribution to such a patron. Once the copyright owner has made the choice not to publish, this choice must be honored. Photocopying and distribution of unpublished works to individual patrons could lead to publication of these works, which would violate the copyright owner's right to first publication.

The Copyright Office must again assert that Congress did not intend to authorize photocopying and distribution of unpublished works by libraries or archives to individual patrons under subsections (d) and (e). Congress carefully limited the privilege to reproduce this material to

119/ App. IV, Part 1 at 80 (testimony of Dr. Carolyn Wallace). Register's Report on Photocopying (1983).

reproduction for purposes of preservation and security or for deposit for research in another library or archive without any subsequent distribution to individual patrons.

The Copyright Office urges archives to make every attempt to secure the right to photocopy and distribute unpublished material to its patrons from the copyright owner at the time of acquisition of the material.

3. Libraries in for-profit organizations. This review revisits the issue of the extent to which special libraries in for-profit organizations qualify for §108 copying privileges.

In order to qualify for §108, certain conditions must be met; one is that the "reproduction or distribution is made without any purpose of direct or indirect commercial advantage." 120/

The Chairman of the Library Resources Advisory Committee for Chevron Corporation called for new legislation to clarify the meaning of the phrase "direct or indirect commercial advantage." She asserted that the corporation is within the law when its "libraries make one copy of a work, the reproduction or distribution is made without any purpose of direct or indirect commercial advantage, since that copy is not sold and is not part of any publication which is sold." 121/ As support for this position, she cites language in the House Judiciary Committee Report:

Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by Section 108,

120/ 17 U.S.C. §108(a)(1).

121/ App. I Comment Letters, No. 9 (comment of Margaret J. Linden) (1987).

even though the copies are furnished to the employees of the organization for use in their work. 122/

It would not appear that this language alone can be relied upon to support the position that the phrase "direct or indirect commercial advantage" only refers to the situation in which the photocopy is sold or made part of a publication that is sold. However, it may be more instructive to examine the rest of the paragraph which began with the language quoted above. After stating that for-profit libraries 123/ could participate in interlibrary arrangements so long as the reproduction and distribution was not "systematic," the House Report continues:

These activities, by themselves, would ordinarily not be considered "for direct or indirect commercial advantages," since the "advantage" referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located. On the other hand, section 108 would not excuse reproduction or distribution if there were a commercial motive behind the actual making or distributing of the copies, if multiple copies were made or distributed, or if the photocopying activities were "systematic" in the sense that their aim was to substitute for subscription or purchases. 124/

122/ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 75 (1976).

123/ We can only assume that the phrase "for-profit libraries" must refer to libraries in for-profit organizations.

124/ H. Rep. No. 1476 at 75.

One interpretation of the language of this entire paragraph could be that the phrase "direct or indirect commercial advantage" refers to additional proscribed activities other than the direct sale of the photocopy or inclusion of the photocopy in a publication which is sold. Under this interpretation, the proscribed activities would also include the making of multiple copies in order to substitute systematically for additional subscriptions or purchases. 125/

Other interpretations are possible. In its report made nearly a year before the House Report, the Senate Judiciary Committee said:

The limitation of section 108 to reproduction and distribution by libraries and archives "without any purpose of direct or indirect commercial advantage" 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, unless such copying qualifies as a fair use, or the organization has obtained the necessary copyright licenses. A commercial organization should purchase the number of copies of a work that it requires, or obtain the consent of the copyright owner to the making of the photocopies. 126/

This language is more restrictive on the amount of photocopying that would be allowed by a library in a for-profit organization than the language in the House Report.

In an attempt to resolve this ambiguity, the Conference Committee adopted the less restrictive view found in the the House Report. The Conference Report stated:

125/ Such activity is also proscribed by subsections 108(g)(1) and (2).

126/ Sen. Rep. No. 473, 94th Cong., 1st Sess. 67 (1975).

Another point of interpretation involves the meaning of "indirect commercial advantage," as used in section 108(a)(1), in the case of libraries or archival collections within industrial, profit-making, or proprietary institutions. As long as the library or archives meets the criteria in section 108(a) and the other requirements of the section, including the prohibitions against multiple and systematic copying in subsection (g), the conferees consider that the isolated, spontaneous making of single photocopies by a library or archives in a for-profit organization without any commercial motivation, or participation by such a library or archives in interlibrary arrangements, would come within the scope of section 108. 127/

Despite the interpretative language in the various congressional reports (or indeed perhaps because of it), there undoubtedly still remains some doubt as to the meaning of the phrase "direct or indirect commercial advantage." In fact, a witness representing the Special Libraries Association (SLA), an organization whose members include librarians in for-profit organizations, stated at the 1987 hearing that the SLA has been grappling with the problem and did not yet have a position on the issue. 128/

Up until the present time there has been no judicial interpretation of this phrase. In both Harper & Row, Publishers, Inc. v. Squibb and Harper & Row, Publishers, Inc. v. American Cyanamid Co., 129/ there was

127/ Conf. Rep. No. 1733, 94th Cong., 2d Sess. 73-74 (1976).

128/ App. II Washington Hearings 182-84 (statement of Sandy Morton, Director of Government Relations and Fund Development) (April, 1987).

129/ See discussion supra in text, at III. A.

a settlement agreement without interpretation of the phrase. A recently filed case, American Geophysical Union v. Texaco, Inc., 130/ may result in a definitive interpretation.

The Copyright Office feels that a call for clarifying legislation may be premature. Instead, we urge representatives of the Special Libraries Association, the American Association of Publishers, and other interested parties to meet and attempt to reach agreement on the meaning of the term, to develop examples and/or guidelines, or if this effort fails, to develop a common legislative proposal.

130/ No. 85-3446 (S.D.N.Y. filed May 6, 1985).

IV. FOREIGN EXPERIENCE WITH LIBRARY PHOTOCOPYING

A comparison of the international section of the first photocopying report 131/ and the international section of the second report reveals little progress toward compensation of authors for the photocopying of their works. Some of the countries that were considering amendments to photocopying provisions embodied in their copyright laws are still in the discussion stage; others have only progressed as far as draft legislation. 132/

Although legislators have balked at establishing systems to compensate authors for unauthorized photocopying, technological advancements may make it even more difficult to curb copying in the future. 133/ This is evident in both the national and international arena. 134/

This chapter gives a general overview of the foreign experience with photocopying during the past five years based on an examination of legislative and judicial developments, a survey of foreign publishers and library associations made by the Copyright Office, and a report on foreign reproduction rights organizations.

131/ Register's Report on Photocopying 271-319 (1983).

132/ Katzenberg, Copyright Problems of Reprography: Access to Scientific Literature for Research Purposes, 15 IIC 691 (1984).

133/ See, e.g., App. II Washington Hearing 94, 99 (statement of Jo Manning, Librarian of the General Books Division of Reader's Digest) (April, 1987).

134/ See discussion, infra. in text, at IV. B.

A. Legislative and Judicial Developments

1. Further developments in countries that already have a system.

a. Australia. As noted in the Register's first photocopying report, 135/ Australia enacted comprehensive legislation amending the Australian Copyright Act and providing specific provisions regulating photocopying on September 19, 1980.

The Australian photocopying system is based on permitting the reprography of a single copy of a "reasonable portion" of a work for private, educational, or library use. A "reasonable portion" is defined as one article in a periodical -- more if the articles being copied relate to the same subject matter -- or ten percent, or a chapter of a work, whichever is the greater. Also for the first time in Australia, the fair dealing provisions were revised to incorporate a quantification of "fair dealing." 136/

The Australian copyright law contains a separate section that covers copying by non-profit making libraries and archives. Libraries and archives may make copies for a user to the same extent that the user would be able to do so under fair dealing as long as the library or archive does not charge more than the cost of making or supplying the copy. This section permits the library to copy more than the limits set by fair dealing under conditions similar to those set out in 17 U.S.C. §108. 137/

135/ Register's Report on Photocopying 312-314 (1983).

136/ Banki, Copyright in Australia and New Zealand, 31 J. Copyright Soc'y 57, 67 (Oct., 1983).

137/ UNESCO Committee of Governmental Experts on the Printed Word, Memorandum by the Secretariat, U.N. Doc. UNESCO/WIPO/CGE/PN/3-I (Sept.

The government conducted a series of meetings to monitor the implementation of these provisions. An agency, Copyright Agency Limited, was reorganized to make applications to the Copyright Tribunal, to represent authors' and publishers' interests, to search educational records, and to make claims on behalf of owners. This is the only reprography collection society in Australia. 138/

In Copyright Agency Limited and Others v. Haines and Another, 139/ the 1980 photocopying provisions were tested. The case concerned the circulation by the Director-General of Education for New South Wales of memoranda to the principals of all state schools setting out the legal position of schools and teachers in regard to the copying of published works. In one memorandum, the Director-General attempted to distinguish between copying under the "fair dealing" provisions (§40 copying) of the 1968 Australian Copyright Act and copying under the provisions of the 1980 Copyright Amendment Act, which permitted educational institutions to make photocopies under certain conditions including the keeping of records and the making of payment as required (§53B copying). The Director-General's memorandum indicated that §40 copying and §53B copying permitted virtually the same kind of copying both as to type and amount; and, therefore, that the §53B procedure was entirely optional. It also emphasized that, if §53B procedures were elected and required records were improperly kept, criminal liability could result. If one relied on §40, only a civil action could be brought.

14, 1987) [hereinafter Secretariat's Memorandum on the Printed Word].

138/ Id. at 68.

139/ 1982 Fleet Street Reports 331 (Sup. Ct. of N.S.W.: Eq. Div.).

The plaintiffs -- four publishers, three authors, and a copyright royalty collecting agency -- asserted that this memorandum misrepresented the effects of the provisions on copying in the 1968 Act and the 1980 Amendment. They charged defendant with authorizing the infringing reproduction of their copyrighted materials. The case is interesting to us in that it tested a question unresolved at the time of the last photocopying report, namely the relationship between fair use (fair dealing in Australia) and §108 photocopying (§53B in Australia). 140/

The court found the Director-General's statement inaccurate and misleading. It noted an important distinction between §53B which permits the copying of more than a reasonable portion and §40 which permits only the copying of a reasonable portion, unless the copying otherwise constitutes a "fair dealing" with the work for the purpose of research and study. Furthermore, the court found that although there might be instances where §53B copying would constitute "fair dealing" for the purpose of research and study under §40, much of §53B copying would not. The court ordered the defendant to issue a new memorandum stating that the misleading parts of the earlier memorandum were withdrawn and not to be relied upon and that §40 does not allow the same amount and type of copying permitted under §53B or §53D. 141/

140/ Compare the conclusion reached in the last five-year report. Register's Report on Photocopying 95-104 (1983).

141/ Copyright Agency Ltd. v. Haines, 1982 Fleet Street Reports 331 (Sup. Ct. of N.S.W.: Eq. Div.).

The Australian Copyright Council (a private organization) has issued several bulletins explaining both the exact nature of photocopying permitted in libraries and archives and the provisions of the Copyright Act enabling educational institutions to copy for teaching purposes, without permission from copyright owners. 142/ Several amendments have been proposed that would affect the activities of librarians but are not directly related to the reproduction of printed materials. 143/

These efforts of the Australian courts, legislature, and Copyright Council indicate that Australia continues to be concerned about the need both to provide information and protect the copyright owner's interest.

b. Nordic countries. There do not appear to have been any major developments in the Nordic countries since the issuance of the last photocopying report. The existing statutes on copyright law in Denmark, Finland, Norway, and Sweden were enacted in 1960 and 1961. Later, a joint Nordic committee was formed to revise the national statutes and deal specifically with reprography problems. All four of these countries permit the reproduction of a single copy of a disseminated work for private use. Regulations dating back to the early 1960's also permitted libraries and

142/ Australian Copyright Council, Bulletin 52: Photocopying in Libraries and Archives (1986); Bulletin 54: Teachers and Copyright (1985).

143/ One proposal concerns making a copy of an unpublished sound recording or film and the other making a copy for preservation purposes. As of October 13, 1986, these amendments had not been brought into effect by proclamation.

archives to copy literary and artistic works or photographic pictures in certain circumstances without the consent of the author and without remuneration. 144/

In order to counter the effects of private and pirated copies, the Nordic countries developed a system that extends the ordinary collective license agreement that one expert has referred to as an extended collective license clause. 145/ The extended license allows an agreement made by an organization of authors to extend its coverage to the works of authors who are neither members of the organization nor legally affiliated with it but who become bound through the extended license. 146/

One area covered by such a clause is the right to make copies of published works, by means of reprography, for educational uses. Norway, Finland, and Sweden all have such a system. There are some differences as to the methods used to collect and distribute remuneration. Generally a sampling method is applied; but Denmark requires users to make a report giving specific data. Denmark distributes the money to authors and publishers on this basis; the other Nordic countries transfer the money to the associations representing authors and publishers in proportion to actual reproduction. 147/

144/ Karnell, The Legal Situation Concerning Reprography in the Nordic Countries, 15 IIC 685 (1984).

145/ Id. at 689.

146/ Id. at 74.

147/ Secretariat's Memorandum on the Printed Word at 29.

Although there has been some criticism about the paucity of the compensation returned to the rightholders under these systems, 148/ no change has been legislated.

c. The Federal Republic of Germany. On July 1, 1985, the Federal Republic of Germany amended its Copyright Act. These amendments did not make many changes to the system described in our first report, but did add two new provisions. One permits the copying of small parts of a printed work or of individual contributions published in newspapers for personal use, and for teaching in non-commercial institutions of education, in a quantity required for one school class or for State examinations in schools, universities and non-commercial institutions of education. The other bans reprographic reproduction without the author's consent, namely in respect of whole books or whole periodicals, graphic recordings of musical works (sheet music) and computer programs.

The new law introduces a statutory license for all cases where the author's consent is not needed. It distinguishes between copying in the home and elsewhere and establishes a hybrid levy system both on equipment and operators. This levy is graduated to assess a higher charge based on the amount of protected material that is copied. The operator levy is assessed by a sampling method. 149/

d. France. Article 41 of the French Copyright Law of March 11, 1957, provides a private copying exemption that applies to works which have been made public. This exemption benefits only those who produce and

148/ Karnell, supra note 14, at 691.

149/ Secretariat's Memorandum on the Printed Word at 26-27.

retain the copy by and for themselves. Copies produced by a third party on behalf of a private individual, or produced by the individual through the means of copying equipment belonging to a third party, do not qualify for the exemption. 150/ The Finance Law of 1976 introduced a tax of three percent on reprographic equipment produced in France or imported into France.

France was the first country that placed a levy on reprographic equipment to compensate generally authors and publishers. 151/ The proceeds of the levy do not go to the copyright proprietor but are used in part to promote the publication of valuable literature and are in part distributed among French libraries for the acquisition of new literature. Like the new French video law, this provision discriminates against foreign rightsholders.

On July 3, 1985, France enacted a law which amended the 1957 Copyright Act. The new law became effective on January 1, 1986. It made major copyright reforms but did not change the law regarding reprography. While copyright in works other than computer software does not protect against "use" of the work, nor against "private copying of the work for personal use," the July 3, 1985 provisions on computer software prohibit

150/ Francon, The Legal Situation Concerning Reprography Internationally and in France, 15 IIC 679-683 (1983). A civil court suggested researchers had greater leeway, but this was negated by a later decision that the action should have been brought in an administrative court. Id. at 684.

151/ The Federal Republic of Germany placed a levy on equipment in 1985.

both unauthorized uses and private preparation of copies for any purpose other than creation of a back-up copy as a safeguard against destruction of the original. 152/

As part of a report on copyright problems associated with reprography in research and education, Andre Francon concluded that the situation in France is not satisfactory and that "photocopying is becoming a habit, to the detriment of the interests of the author." 153/

2. Proposed or recently-enacted solutions.

a. Singapore. Singapore recently adopted a comprehensive copyright act 154/ based on the bill presented to Parliament in March of 1986. It is quite similar to the Australian Copyright Act of 1968 as amended by the Copyright Amendment Act of 1980, covering photocopying and educational institutions. 155/

The Singapore Act recognizes three types of copyright infringement:

1. doing one or more of the acts comprised in copyright;
2. authorizing someone else to do one of these acts;

152/ See Secretariat's Memorandum on the Printed Word at 32.

153/ Id.

154/ Singapore Copyright Act (1986).

155/ 7 EIPR D-127 (1986).

3. commercially exploiting an infringing copy.

Under the second type, authorizing infringement, a special provision relates to the photocopying facilities provided in libraries. Designed to mitigate the effect of an Australian case, 156/ this provision excuses a library from authorizing infringement where it affixes the prescribed notice in close proximity to the copying machine. 157/

The Singapore Copyright Act contains very detailed provisions on both fair dealing 158/ and the copying of works in libraries 159/ or educational institutions. 160/ The fair dealing provisions exempt certain uses of copyrighted works from infringement if they are for the purpose of research or study after it is determined that the use is fair based on a consideration of five criteria:

1. the purpose and character of the dealing;
2. the nature of the work or adaptation;
3. the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
4. the effect of the dealing upon the potential market for, or value of, the work or adaptation; and

156/ Moorhouse v. University of New South Wales 6 Austl. L.R. 193 (High Court of Austl. 1975); University of New South Wales v. Moorhouse, 133 CLR 1 (1974-75).

157/ 7 EIPR D-128 (1986).

158/ Singapore Copyright Act, §35 et. seq. (1986).

159/ Id. §44 et seq.

160/ Id. §51 et. seq.

5. in a case where only part of the work or adaptation is copied -- the amount and substantiality of the part copied taken in relation to the whole work or adaptation. 161/

These criteria not only mirror the Australian Copyright Act, but four of them also track the United States considerations for fair use found in 17 U.S.C. §107; the fifth is similar to the considerations for certain library photocopying found in 17 U.S.C. §§108(c) and (e).

Divisions 5 and 6 of the new Singapore Copyright Act respectively regulate the copying of works in libraries and in educational institutions. These provisions are quite detailed and seem to cover all major points raised in the Australian and United States provisions. An attempt is made to set quantitative guidelines. 162/ It is too early to determine whether the Singapore government will provide the same support for these provisions that the Australian government has.

b. Canada. At the time the last photocopying report was completed, Canadian studies on reproduction of protected works focused on two major points:

1. a revision of the law that included special provisions relative to reprography; and
2. the conclusion of agreements that indemnified authors and publishers. 163/

161/ Succeeding sections recognize fair dealing for criticism, reporting of current events, judicial proceedings, professional advice, as back-up copies of computer programs, and for inclusion of short extracts in collections for use by educational institutions.

162/ Singapore Copyright Act, §51 (1986).

163/ Register's Report on Photocopying 282 (1983).

During the intervening years, Canada has continued to examine proposals to revise its 1924 Copyright Act. In May of 1984, the Canadian government published a White Paper on Copyright, a report that discussed over one hundred issues to be decided in the revision process. 164/ In October of 1985, the Subcommittee examining copyright revision issued a second report agreeing with the assertions of the first report "that the Copyright Act is seriously outdated, that copyright must continue to be regarded as private property, that revisions must respond to technological change and that new rights and subject matter are now essential." 165/ The Subcommittee emphasized the need to reward creators.

In 1986 the new government responded to the Subcommittee's report, A Charter of Rights for Creators, and reviewed each of the Subcommittee's proposals. The government then announced it would proceed to draft revisions to copyright legislation based on its responses. 166/

On May 27, 1987, the Canadian government introduced a new copyright bill that contains several changes. This bill marks the first step of a comprehensive revision of the 1924 Act. 167/ A second bill dealing with other copyright issues is expected. The revisions are expected to go into effect in 1988. The proposed bill encourages individual creators

164/ From Gutenberg to Telidon a White Paper on Copyright (May, 1984), [hereinafter White Paper on Copyright].

165/ Subcommittee on the Revision of Copyright, A Charter of Rights for Creators 3 (Oct., 1985).

166/ Government Response to The Report of the Sub-Committee on the Revision of Copyright (Feb., 1986) [hereinafter Response to Report on Revision of Copyright].

167/ The first set of amendments adds computer programs to protected works.

or copyright owners to authorize a copyright "collective" to manage access to all of their works. 168/ Current collectives include the blanket agreement between the Quebec Ministry of Education and Quebec Writers' Union that permits teachers legally to photocopy substantial extracts from a repertoire of 17,000 titles. 169/

The 1924 Act defines the right to reproduce as the right to copy a work or any substantial part of the work in any material form, including a recording or a film. This right is presently subject to several limitations, including the §17(2) fair dealing exception. 170/ The White Paper suggested that the doctrine be called "fair use" and apply to all copyright subject matter generally made available to the public, regardless of whether such material has been published in the traditional sense. 171/ It also suggested that the definition of fair use include a prioritized list of factors to be considered in determining whether a particular use is fair:

1. The impact of the use on a copyright owner's economic reward. If copyright is so substantial as to materially reduce the demand for the original, the copyright owner's interests have been harmed.

168/ §§49 and 50.

169/ Collective Management of Copyright, Information on Amendment of Copyright Act (Spring 1987).

170/ Fair dealing with any work for the purpose of private study, research, criticism, review, or newspaper summary. Copyright Statute of Canada, R.S., c.32.S.I., Canada: Item 1, CLTW (Supp. 1972).

171/ White Paper on Copyright at 40.

2. The type of work and its purpose.
3. The amount or extent of the taking. 172/

The Subcommittee recommended:

1. The present fair dealing provisions should not be replaced by the substantially wider "fair use" concept.
2. The nature of fair dealing as a defence [sic] to an action for infringement should not be changed.
3. The purposes for which fair dealing can be a defence [sic] should be retained but should be revised to indicate that research must be private to qualify and to indicate that all media of new reporting are covered.
4. Factors to be considered by the court may be listed but should be illustrative only and not prioritized.
5. Fair dealing should not apply to unpublished works. 173/

The government agreed with the Subcommittee's recommendations. It noted that the bill would "grant the benefit of the fair dealing exception for research purposes, private or otherwise, for unpublished works deposited with archival or conservation institutions." It also noted that the government "will examine the possible impact of these recommendations on research practices in general." 174/

172/ Id. at 39-40.

173/ A Charter of Rights for Creators 65-66.

174/ Response to Report on Revision of Copyright 12-13 (Feb., 1986).

The 1924 Act provides two other limitations on the exercise of exclusive rights:

1. compulsory licensing provisions, and 175/
2. exemptions permitting the use or reproduction of a work within certain limits.

There has been considerable discussion about the best way to meet educational needs and still compensate proprietors. Publishers and authors are opposed to any exemptions for reprography preferring that access be provided through negotiating agreements. Users assert that it is difficult and time consuming to locate copyright owners to get permission. The White Paper suggests that collecting societies might be the best way to resolve this problem. Copyright owners could assign their reproduction rights to societies that would administer the rights vis-a-vis all users. The Copyright Appeal Board could mediate any competing claims between the copyright societies and users. 176/

Since the issuance of the White Paper, the Toronto Book and Periodical Development Council has published a study that details why a Canadian reprography collective should be established and how such a collective should operate. 177/

175/ The existing compulsory license provisions will be abolished in the new bill and two other compulsory licenses may be introduced: one regards unlocatable copyright owners; the other, aimed primarily at the United States and the Soviet Union, applies to translations of works published in UCC countries that do not adhere to Berne.

176/ White Paper at 40-41.

177/ Fontaine, Smith, and Grant, Developing A Reprography Collective in Canada: Final Report (Oct., 1986). See discussion, infra in text, at

The Subcommittee agreed with the government White Paper that there was no need to introduce a specific right of reprographic reproduction. It concluded that "Greater protection is offered if the Act provides a broadly-defined right of reproduction which owners can subdivide in order to exercise it as they wish." It also concluded that no exception should be provided for reproduction by libraries and that reproduction by libraries should be the subject of blanket licenses issued by collectives following negotiation. 178/

Under the proposed new law, there will not be a general exemption for the reproduction of copyright material for educational purposes. 179/ The law will provide an exemption, similar to that found in the United Kingdom, allowing educators to make copies of works for examination purposes. 180/ Educators also complain that it is difficult and time consuming to locate copyright owners of particular works in order to secure permission to reproduce such material for other purposes and the White Paper suggests that educators should be able to negotiate collectively for such permission through copyright societies. 181/

IV. C.

178/ A Charter of Rights for Creators 21-22.

179/ The fair use consideration is applicable to educational uses of copyrighted material just as they are to any other uses.

180/ Section 41(b) of the United Kingdom Copyright Act exempts "The reproduction in any material form of any work as part of the questions to be answered in any examination or in answer to such a question."

181/ White Paper on Copyright 43 (1984).

Finally, an exemption will be introduced with the Copyright Act permitting libraries and archives to make limited numbers of copies of unpublished, out-of-print, or otherwise unavailable material already in their collection for reference or presentation purposes. 182/

c. Japan. The 1983 report discussed the photocopying provisions of the 1970 Japanese Copyright Law, 183/ Article 30 provides an exemption for the private use of the copier and Article 31 provides an exemption for libraries under the conditions stated therein. 184/ The Japanese Diet amended the copyright law on May 18, 1984; the amendment came into force on January 1, 1985, and adds the following proviso:

. . . except when reproduction is made by the use of an automatic reproduction machine (that is, a machine that has a reproduction function and the whole a substantial part of which is automated) installed for use by the general public. 185/

The law thus prohibits reproduction of material for private use if an automatic copying machine is used. Also, any person who makes automatic copying machines available to the public for profit-making purposes will be liable for copyright infringement where it is proved that reproduction by the users of those machines constitutes infringement of copyright.

182/ Id.

183/ Register's Report on Photocopying 290-92 (1983).

184/ Copyright Law of Japan, Law No. 48 of 1970, §§30 and 31, Japan: Item 1 CLTW (Supp. 1972).

185/ 1 EIPR D-19 (1985).

Japan has not yet established systems for collective administration of copyright in the field of reprography. Therefore, according to Article 5 bis of the Supplementary Provisions, the words "an automatic reproduction machine" mentioned in Article 30 "shall not include for the time being those exclusively for use in copying writings or printings." Since the exemption in Article 31 only applies to limited libraries under certain circumstances, Article 30 is expected to cover most library reproduction. Japan is currently considering the feasibility of collective systems for copyright royalties, and the Japan Library Association has already conducted a survey regarding this problem. 186/

Another revision of the Japanese Copyright Law, regarding protection of computer programs came into effect on January 1, 1986. Article 47-2 provides an exception to an author's exclusive right of reproduction or adaptation. Under Article 47-2, "the owner of a copy of a program work may reproduce or adapt . . . that work to the extent deemed necessary for using the work in a computer by himself." This provision applies to reproduction of programs for libraries; however, this is not an issue yet in Japan. 187/

3. Conclusion. Countries considering changes in their copyright legislation concerning photocopying have not rushed to make those changes in the past five years. Some countries not discussed above have made

186/ Japan Library Association, Report on Reproduction of Library Materials with regard to the Amendment of Copyright Law (1986) (information provided by Aoi Nawashiro, Analyst, National Diet Library).

187/ Information provided by Aoi Nawashiro, Analyst, National Diet Library (Dec. 15, 1987).

amendments or are considering either amending their existing law or adopting a new copyright act. 188/ The United Kingdom continues to examine proposals for change. 189/ Other countries are considering the adoption of copyright acts but are not considering anything more specific than traditional fair dealing or fair use provisions that may exempt certain photocopying. The only significant recent international photocopying case is the one that arose in Australia.

B. Survey of Foreign Publishers' and Librarians' Associations

Although early on we abandoned the idea of a survey of interest groups in the United States, acting on the advice of representatives of those groups, we did decide to conduct an informal survey of selected publishers' and librarians' groups abroad. As we necessarily develop some of our domestic systems in concert with those of our trading partners and other nations facing similar situations, we believe this report would not be complete without a commentary on parallel or non-parallel evolution abroad.

In addition to discovering the actual legislation or other official governmental activities, we hoped to learn what preliminary activities, needs, hopes, or fears were perceived by those most affected by library photocopying in other countries. The letter drafted by the Register asked

188/ The Netherlands passed a Royal Decree on August 23, 1985, that requires reprography remuneration to be paid to the collecting society appointed by the Minister of Justice. The Minister appointed Foundation Reprorecht as the exclusive collecting society on February 19, 1986. WIPO Paper at 28.

189/ See Secretariat's Memorandum on the Printed Word at 33. See also discussion, infra in text at IV. B. The British Copyright Council has published new guidelines on photocopying. Reprographic Copying of Books and Journals. See New Guidelines on Photocopying, Bookseller 1620 (Oct. 19, 1985).

for the responder's "general opinions and/or particular experiences" of the way library photocopying has affected the rights of creators and needs of users of copyrighted works. 190/

The Register sent this letter to at least one publishers' association and one librarians' association in the following countries: Australia, Brazil, Canada, Denmark, Federal Republic of Germany, France, Japan, the Netherlands, Singapore, Sweden, and the United Kingdom.

The number of responses we received was disappointingly small. Only four representatives of each group sent any written response: members of publishers' associations in Sweden, Australia, Canada, and the United Kingdom; members of librarians' associations of Sweden, Australia, Canada, and the Netherlands. In addition to these, we received a 1981 publication entitled *Licenskonstruktioner og Fotokopiering* from an unidentified Danish source. The booklet is the first report of the Committee Concerned with the Revision of Copyright on establishment of COPYDAN, the Danish collecting society. The information it contains is noted in the 1983 report. 191/ We also received a report proposing a collective society in Canada. 192/

Because we opened the subject to the respondent's personal observations, or alternatively, to printed matter relating to recent studies or articles, the comments we received encompass a broad range of related (and

190/ The full text of the letter is reprinted at Att. B of this report.

191/ Register's Report on Photocopying 298 (1983).

192/ See infra text at IV. C.

unrelated) topics of concern. They do not offer a comparison of treatment of all of the same issues in various countries, but they do present some issues that might not otherwise have come to light.

1. Publisher's comments. Christine Hansson, the Manager Director of the Foreningen Svenska Laromedelsproducenter (Publishers and Manufacturers of Educational Material) in Sweden, reported on the current state of photocopying in schools. The market for schoolbooks has decreased by 40% in the last seven or eight years, apparently because of a change in policy allowing schools to loan books to children rather than give them to each pupil. This situation is accompanied by reduced funding to schools. Teachers now resort to photocopying to get materials they need.

In order to work with the schools and their need to reproduce more copies, an agreement was set up between the Swedish government and eighteen copyright holders and their organizations, allowing teachers to copy more than the "few copies for their own private use" permitted by the law. Under the terms of the agreement, the government pays the organizations a special fee per copy made, based on samplings of 5% of Swedish schools. BONUS, a body consisting of representatives of both sides, regulates these affairs.

The main problem now is the large amount of illegal copying going on outside the agreement. Her organization tries to inform teachers known to violate the law, but even informed teachers say they cannot teach if they don't copy. She emphasizes that publishers are producing and selling books, and not "originals for duplication." Because of the smaller target groups, the problem is magnified at the university level. 193/

193/ Letter from Christine Hansson to Ralph Oman, Register of Copyrights

Like her colleague in Sweden, Amanda O'Connell, Administrative Officer of the Australian Book Publishers Association, sees the greatest difficulty to be that of multiple copying for teaching purposes by libraries in educational institutions. 194/

The Australian Copyright Act was amended in 1980 to take account of widespread photocopying of copyrighted works. Following meetings between copyright owners and user groups to monitor the practical workings of the photocopying schemes set up in 1980, further amendments were made to the Act in 1984. Along with these amendments, 1984 brought the first established rate of payment under Copyright Agency Limited (CAL). After unsuccessful attempts to negotiate a fee for multiple copying in schools, colleges and universities, the Copyright Tribunal set a rate of two cents per page.

CAL apparently meets with significant opposition in its fundamental operations of inspecting copying records in educational institutions and making claims on behalf of the copyright owners for whom it acts as agent. Ms. O'Connell believes the lack of cooperation largely stems from the onerous record keeping requirements imposed by the law. As both copyright owners and educational institutions advocate changes, she believes this issue will be revisited.

(April 6, 1987).

194/ Letter from Amanda O'Connell to Anthony P. Harrison, Assistant Register (March 26, 1987).

CAL, which has been in existence since 1974, has begun to receive payments for some claims. It has not made any distribution to copyright owners due to lack of capital. 195/

John W. Irwin, President of Irwin Publishing, Inc., formerly The Book Society of Canada Limited, declined to make any personal comment. Instead, he recommended a study of copying in Canadian libraries by the Canadian Library Association, scheduled to appear in June of 1987. 196/ The publication of this article has been delayed, and it had not been published at the time of this writing.

Charles Clark, of the Publishers Association in London, responded for the United Kingdom. 197/ He sent a copy of Chapter 8 of the Government White Paper of April 1986, 198/ accompanied by his interpretations and comments. Mr. Clark relates that the main policy adopted by the British government is that "voluntarily and collectively negotiated licenses (sic) between creators and users," will strike the proper balance of rights. The government's role is to provide an arena for settlement of disputes through a new Copyright Tribunal.

The successful conclusion of an agreement between the Copyright Licensing Agency (CLA), representing copyright owners and the state school system demonstrates the efficacy of the system. The CLA is now negotiating

195/ Id.

196/ Letter from John W. Irwin to Ralph Oman (March 23, 1987).

197/ Letter from Charles Clark to Ralph Oman (March 26, 1987).

198/ Department of Trade and Industry, Intellectual Property and Innovation, Cmd. No. 9712 (April 1986).

with the Committee of Vice Chancellors and Principals over photocopying in the universities in the United Kingdom, where it is now widely accepted that multiple photocopying should be paid for, and is beginning to grapple with industry, professions, and public service sectors.

Both the White Paper and Mr. Clark present the opinion that librarians themselves are neither owners nor users, and that the role of libraries varies from constituency to constituency. They do not negotiate directly with libraries or librarians. Thus, for example, with industry, copying done in libraries should be costed into the final price of the product or service, exactly as the direct production costs and indirect costs of premises, salaries, etc. are costed. This perspective underlies the proposal in the White Paper that "library privileges" should not be available in the new Copyright Act for copying for commercial research.

Mr. Clark sees the problems of electronic document ordering and delivery as a problem looming on the horizon, more than as a present concern. He sees no reason in principle why the policy of voluntary, collective licensing should not be applied. 199/

With respect to the collecting society, Mr. Clark emphasizes that the goal is not to prevent or inhibit use of copyrighted works, but to seek just reward for the copying. He believes that the first experiences in voluntary collective licensing can be

very sensibly and economically costed. CLA is processing now the software and hardware implementation of sampling, recording, encoding, consolidating, calculating and distributing of payments to authors and publishers at reason-

199/ Letter from Charles Clark to Ralph Oman (March 26, 1987).

able cost. We are emphatically not distributing pennies at the cost of pounds. CLA will make its first distribution of nearly 1.5M pounds between October 1987 and March 1988. 200/

Indeed, this distribution began in October 1987 in the amount of 1,400,000 pounds sterling. Based on an analysis of report forms, the distribution covered 2.9 million photocopies made of works by 10,000 writers. The five most heavily copied authors received amounts ranging from 1,000 to 2,500 pounds sterling, and the five most copied publishers from 10,000 to 23,500. 201/

2. Librarians' comments. Sten Berglund responded to our letter to the Delegationen for Vetenskaplig och Teknisk Informationsforsorjning, the Delegation for Scientific and Technical Information in Sweden. Mr. Berglund reports that under an addendum to the Swedish Copyright Act, libraries are allowed to make photocopies of separate articles from compilations, newspapers and journals, and short parts of other published productions and turn them over to customers in lieu of the real journal or book. Since the number of photocopies issued under the provision is steadily increasing, authors and other creators are concerned. One author's association has approached the Ministry of Justice to investigate whether this library photocopying is performed according to the law, and if so, to change the law. The request had not, at the time of Mr. Berglund's letter, been handled. He believes it might be turned over to the Government Committee for the Revision of the Copyright Act, which has this question

200/ Id.

201/ Id.

within its terms of reference. Naturally, Sweden would wish to keep pace with the progress of corresponding legislative work in the other Nordic countries in treating this issue.

In general, Mr. Berglund points out, Sweden tries to solve the photocopying problems in different fields by general agreements between associations of authors and the government. Agreements of this nature exist in education. A recommendation to make such an agreement with industry is in progress. 202/

The Library Association of Australia responded through its director, Jenny Adams, 203/ who forwarded an unpublished article, "Copyright: the Present State of Play" by Derek Fielding, University Librarian, University of Queensland. He confines his comments to photocopying by universities and colleges. Because a rate has been set only for books, 204/ universities and colleges are rejecting claims for multiple copying from periodicals. The legislation itself exempts certain copies supplied to external students or for correspondence courses, so authors receive no remuneration from that source. Mr. Fielding pointed out a further disincentive to charging for photocopies from periodicals in universities and colleges: most of the copied works were written by academics employed by colleges and universities that give them facilities and encourage them to write in order to obtain promotion.

202/ Letter from Sten Berglund to Anthony P. Harrison (March 30, 1987).

203/ Letter from Jenny Adams to Anthony P. Harrison (March 24, 1987).

204/ See the response from the Australian Book Publishers Association above.

Mr. Fielding's article criticizes the multiple copying provisions relating to books in that they have created a large amount of time-consuming record keeping for educational institutions. Moreover, the cost of inspecting records has consumed a substantial part of the royalties that would otherwise be paid to copyright owners. It is not surprising, he finds, that Copyright Agency Ltd. is making agreements with universities and colleges to give a discount if the records are delivered in machine-readable form.

The Fielding article also briefly discusses uses of databases, which along with computer programs were brought under the Australian Copyright Act of 1984. As most of the databases used by libraries are controlled by commercial contracts on such matters as downloading, neither photocopying nor "electronic document delivery" issues have arisen. Mr. Fielding presumes that the overall permission for not more than one tenth to be copied for study or research applies. Otherwise, he believes that application of provisions of the statute relating to literary works will be interpreted easily only when the database has the characteristics of a book or periodical.

Jane Cooney, Executive Director of the Canadian Library Association (CLA), sent a letter and three articles prepared by the Canadian Library Association relating to library photocopying in Canada. She also promised to send a copy of the CLA sponsored national study of photocopying practices in Canadian libraries, which has not been published at this writing. 205/

205/ Letter from Jane Cooney to Ralph Oman (March 24, 1987).

The Canadian legislature is contemplating amendment of the Copyright Act. At present, there is no provision for development of photocopy collectives, though Ms. Cooney expects to see enabling language in the new legislation. Ms. Cooney also hopes to see two other amendments to the Act: the inclusion of a fair dealing/fair use provision, and inclusion of a provision that would immunize librarians from liability for copyright infringement for photocopying. 206/

The first article is CLA's response 207/ to the Canadian government's White Paper on Copyright. 208/ This article presents the CLA's views on the government's proposals. One suggestion is that librarians who copy works on behalf of their patrons should have access to the defense or right of fair use, if that defense or right is available to the patron. CLA also believes that libraries should not be held accountable for infringements perpetrated at unsupervised copying machines on their premises. In short, "librarians should not be put in the position of law enforcement officers...." CLA further cautions that the method of reproduction is immaterial to the question of copyright, and particular methods should not be treated separately.

206/ Id.

207/ Canadian Library Association Brief to the Sub-Committee on the Revision of Copyright (March, 1985) [hereinafter Brief to the Sub-Committee].

208/ From Gutenberg to Telidon: A White Paper on Copyright (May, 1984).

With respect to photocopying for archival purposes, CLA would like to see broad provisions for photocopying for preservation purposes. When replacement copies are not readily available on the open market, a route of appeal to the Copyright Appeal Board would help deal with exceptional cases.

The CLA proposed several changes in the proposals on collectives, seeking accreditation by the Copyright Appeal Board, restriction in number of accredited collectives, reporting requirements, fair and realistic fee schedules, as well as safeguards against unreasonable prosecution of libraries and users for use of material not covered by a society. 209/

The second article is the response of the CLA Copyright Committee 210/ to a report on collectives. 211/ The CLA's response emphasizes some of its concerns as they relate to libraries. It espouses the principle of voluntary membership in collectives, provided that legislation protects users against excessive damages from non-members of the collective. It would like to adopt the language: "that copyright owners whose works qualify for inclusion in the collective, but who choose not to join it, will be entitled to infringement remedies for the use of their works, equal only to the copyright copying fees established by the collective."

209/ Brief to the Subcommittee.

210/ CLA Copyright Committee Response to Developing a Reprography Collective in Canada: Final Report (Jan. 6, 1986) [hereinafter Response to Final Report].

211/ Fontaine, Smith, and Grant, Developing a Reprography Collective in Canada: Final Report (Oct., 1986).

The CLA understands that national treatment must be extended to foreign works, but is concerned that, because Canada does not have the broader interpretation of user access found in the copyright legislation of other countries (for example, fair use and educational exemptions), "it will be offering far better revenue potential to foreign copyright holders than Canadian authors can expect to receive from other countries." It strongly objects to the proposed fee of five cents per page on the basis that it is at least double that charged in other countries. Part of its objection arises from its belief that the money will come from library acquisition budgets more often than through user charges.

Not surprisingly, the CLA would prefer to deal with one collecting society. It cites a preference for establishing a standard fee schedule, a single sampling/reporting mechanism, and a single office with which to negotiate and pay for blanket licenses. 212/

The third article is CLA's response both to a report of the Subcommittee responsible for copyright revision 213/ and a later government response to that report. 214/ On the subject of reproduction by libraries, the government takes issue with the Subcommittee's assumption that a significant amount of the photocopying done in libraries is infringing. It believes that where photocopying is done directly by the user, a defense of fair dealing might apply. It reiterates its opinion that libraries should

212/ Response to Final Report.

213/ Subcommittee on the Revision of Copyright, A Charter of Rights for Creators (Oct., 1985).

214/ Government Response to the Report of the Sub-Committee on the Revision of Copyright (Feb., 1986).

have available to them the defense of fair dealing as well, if that defense is available to the patron. Again, it emphasizes that the legislation should clearly state that individuals making copies for themselves must assume responsibility for the consequences of their own actions, though libraries should take reasonable steps to ensure that patrons using their photocopiers are aware of copyright restrictions. It proposes the U.S. system of posting notices on or next to unsupervised machines.

The article reemphasizes the principle that fair dealing with a work lies in the impact of copying on an owner's economic reward, on the nature of the work, and on the extent of the taking, and not with where it is done, who does it, and the method of the taking. Librarians and other informed users in Canada have an understanding, per the CLA, that certain copying practices, for example, the reproduction for a single user, for study or research purposes, of a single copy of one article from an issue of a periodical or less than 10% of a book fall within the ambit of fair dealing. The understanding is based partly on the fact that these practices are considered "fair" in the United States, the United Kingdom, and Australia.

Another librarians' association to respond was the Netherlands Bibliotheek en Lektuur Centrum. D. Reumer, Director, sent a letter providing up-to-date information on photocopying activities in the Netherlands. As no statistics are kept, Mr. Reumer's statements are not based on evidence. However, he has a firm impression that the effects on the rights of creators in the Netherlands from library photocopying are very

slight. From his knowledge of daily practice, the major share of photocopying in libraries is done by users photocopying for their own private use. 215/

The Royal Decree of June 1974 deals with photocopying by libraries, not by private library users. Even to date, the remuneration under the decree "has been largely a dead letter." Mr. Reumer attributes the failure to the absence of a collecting society with power to negotiate on behalf of authors. In 1985, an amendment was made to the decree giving the Minister of Justice the power to commission such a society, to regulate, and to supervise its activities. The Minister commissioned the Stichting Reprorecht to be the exclusive collecting society.

The Bibliotheek en Lector Centrum is currently engaged in talks with the society to reach an agreement on an annual fixed sum as compensation for photocopying by public libraries. The "heart of the matter," states Mr. Reumer, is the question of finding a method of estimating reliably the amount of photocopying and the value of the material copied.

Mr. Reumer reviewed for us the available literature on electronic document ordering, but found no reference to remuneration programs. 216/

3. Conclusion. From the small number of responses, we suspect that library photocopying is not a high priority in many librarians' and publishers' minds. Among those who did respond, opinions range from the optimistic to the frustrated.

215/ Letter from D. Reumer to Anthony P. Harrison (September 14, 1987).

216/ Id.

Most seem to think that collecting societies are the answer to inequities created by widespread photocopying. In countries where they are established, however, there have been many start-up problems -- notably high administrative costs and resistance to onerous record keeping practices.

Collecting societies have been most successful in dealing with academic libraries especially those in schools, college and university libraries. Those which are succeeding on this front are beginning to approach corporate and other private libraries.

Are the collecting societies abroad making disbursements to U.S. copyright owners whose works are photocopied in their country? When asked this question at the hearing, Ms. Penick, of the Institute of Electrical and Electronics Engineers, Inc., answered that she thought Sweden and the Netherlands were going to be making a payment through the CCC. 217/ Mr. Fennessy of the CCC confirmed that Norway has tens of thousands of dollars for disbursement to American publishers. He also mentioned that the U.K. collections in universities reveals a great deal of photocopying of U.S. works. 218/

The concerns of the Canadian Library Association that Canada might be paying more to foreign copyright owners than it received back for domestic owners may be true where the United States is concerned, as so many United States copyrighted works are copied throughout the world. The establishment of collectives in countries where there are currently none could certainly be advantageous to United States copyright owners.

217/ App. II Washington Hearing 122 (April, 1987).

218/ Id.

No countries we heard from had yet approached the problem of copyright vis-a-vis electronic document delivery, a phenomenon that is growing perhaps, but not widespread. This is not surprising, in that remuneration normally lags behind new uses of copyrighted works. The experience abroad merely parallels that in the United States.

While not a comprehensive, authoritative survey by any means, the responses have given us at least a sense of some of the problems and successes of efforts at balancing "needs of users and rights of owners" abroad.

C. Foreign Reproduction Rights Organizations

Photocopying of copyrighted works poses an international problem. A study done by the International Publishers Association estimates that between 24%-40% of the works copied are of foreign origin. In a memorandum prepared by the Secretariat for the World Intellectual Property Organization (WIPO) for the meeting of Government Experts on the Printed Word (December 7-11), 1987), it was reported that these figures are "even higher in some developing countries and in some smaller countries, depending also on which languages are official or widely spoken." 219/

At their June 1975 meeting the Subcommittees of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention on Reprographic Reproduction adopted a resolution advising each state to seek a solution that best adapted to its

219/ UNESCO Committee of Governmental Experts on the Printed Word, Memorandum by the Secretariat at 14, U.N. Doc. UNESCO/WIPO/CGE/PW/3-I (Sept. 14, 1987).

"educational, cultural, social, and economic development..." 220/ However, states were encouraged to consider the establishment of collective systems to exercise and administer the right to remuneration.

Reproduction rights organizations that collect and distribute royalty fees for photocopying that exceed the limits permitted by national law have already been created in fifteen countries, and three other countries will soon have them. 221/ These national organizations created the International Forum of Reproduction Rights Organizations (IFRRO); the secretariat for this organization is Kopinor, the Norwegian RRO. Its objectives include: 1) serving as an international forum for information exchange to assist in facilitating public awareness of the need for forming effective reproduction rights organizations in most nations of the world; 2) facilitating the development of international relationships between and among reproduction rights organizations; and 3) facilitating the development of bilateral agreements between reproduction rights organizations for the equitable benefit of copyright owners and users, consistent with the principle of national treatment. 222/ At its 14th meeting (October, 1987) the IFRRO members present voted to change its name to the International Federation of Reproduction Rights Organizations (emphasis added) and to organize formally so that it will be a globally

220/ Id. at 15.

221/ CCC Press Release of October 7, 1987. 1 Rights 12 (Spring, 1987).

222/ Adopted by the 8th meeting of IFRRO May 16, 1984. International Forum for Reproduction Rights Organizations: A Presentation (1987).

recognized organization able to participate in various intellectual property meetings and fora. The ratification process for these changes should be completed by March, 1988.

Most national RRO's are concentrating on photocopying. They are, however, looking at licensing computer software, databases, and electronic reproduction. A brief description of foreign RRO's in five countries follows.

1. United Kingdom--The Copyright Licensing Agency (CLA). More than twelve years ago concern was expressed in the United Kingdom (UK) about the alarming increase in the copying of copyrighted material, and copyright owners began seeking a mechanism to control and provide compensation to writers and publishers while at the same time satisfying the needs of this information society. In 1982 the Copyright Licensing Agency was formed, and it issued its first license in May, 1984. 223/ In October of 1987 CLA reported that it would be making a first distribution of royalties to rights owners in two parts, one immediately, another in March of 1988. Succeeding distributions will be made every six months. 224/

Unlike the CCC in the United States, CLA started licensing the education sector; the first major development occurred in April 1986 when a voluntary licensing agreement with the local educational authorities came into effect. All 30,000 state colleges and schools are covered by these licenses. Individual schools are selected on a rotating basis as sample

223/ CLA -- the Licensing Bank, Bookseller 1596 (Oct. 16, 1987).

224/ Id. at 1598.

schools; these schools keep records of photocopying of all copyrighted material. CLA is currently negotiating a pilot survey agreement with a consortium of UK universities; the proposed effective date is January 1, 1988. 225/

The CLA also differs from the CCC in the composition of its membership; the members are not individual publishers but the organizations representing them. Publishers are represented through the Publishers' Licensing Society (PLS), and authors are represented through the Authors' Licensing and Collecting Society (ALCS). In the United Kingdom authors insisted that individual writers should benefit directly from the reproduction of their works and that the money collected should be paid directly to them and not through the accounting systems of their publishers. This required CLA to devise a title-based two tiered distribution system and an itemized system of accounting. CLA reports that it has been relatively simple to collect the fees but difficult to process and analyze the statistics and calculate the correct royalty payments. 226/

CLA is now turning its attention to "'trade, industry, and commerce' starting with copy shops in the vicinity of universities and then moving to industry, ... pharmaceuticals, chemicals, electronics, telecommunications, aerospace and fuel oil. After industry ... public authorities, government and libraries...." 227/

225/ CCC Press Release of October 7, 1987.

226/ CLA -- The Licensing Bank, Bookseller 1597-1598 (Oct. 16, 1987).

227/ Id. at 1599.

2. Australia--The Copyright Agency Limited (CAL). The Copyright Agency Limited (CAL) opened new offices in 1986 and has become an active organization. CAL was established by the Australian Copyright Council (ACC), the Australian Book Publishers' Association, and the Australian Society of Authors; it is a nonprofit organization owned and controlled by authors and publishers.

Like the CLA in the United Kingdom, CAL is involved with academic institutions that engage in copying that goes beyond that allowed by the copyright law. Academic institutions must keep complete records about photocopied material and these records must be kept for four years. CAL will act as agent for authors and publishers reviewing these records and making claims for payment. CAL goes to the academic institution and records the information in the detailed records onto a computerized disk; the disk is sent to CAL offices for processing and royalty determinations. 228/ The royalty fee is two cents per page (a fee determined by the Australian Copyright Tribunal after voluntary negotiations failed). 229/

3. Canada--Quebec Writers Union. Canada has no national collective for reprography. The government White Paper recommends the establishment of such a collective. 230/ The Canadian Copyright Institute agrees with this. 231/ Quebec, however, has a collective, the Union des

228/ Fontaine, Smith, and Grant, Developing A Reprography Collective in Canada: Final Report (Oct., 1986) [hereinafter cited as Fontaine].

229/ See discussion, supra in text, at IV. B.

230/ Fontaine at C-1.

231/ 1 Rights 12 (Spring, 1987).

Ecrivains Quebecois, which is an active member of IFRR0. This collective has 425 members. It includes more than 20,000 titles published in Quebec by 180 Quebec publishing houses. All authors whose works are copied are included in the distribution system. 232/ Seven thousand writers are covered; however, there are current addresses for only 3,000 of these authors. 233/ Sixty-five percent of the net revenues go to authors; 35% go to publishers. 234/ Because of a lack of addresses for 4,000 writers, less than half of the fund is distributed annually. When authors are located, payment without interest is made.

In Quebec payment of approximately \$1 million annually is unrelated to actual copying. Sampling is done only to determine the use of the various works. Eventually, surveys will be used to allow for more accurate distribution of revenues; the total revenue, however, will not increase. 235/

4. Norway--Kopinor. Kopinor was established in 1980 and has primarily been involved with elementary and secondary school copying. Like its European counterparts it is now extending its activities to universities, to the government (noneducation) sector, and finally to private enterprises. Kopinor has an exemption to what is the equivalent of our antitrust laws.

232/ Fontaine, Smith, and Grant, Developing a Reprography Collective in Canada: Final Report (Oct., 1986).

233/ Id. at C-3.

234/ Id. at C-2.

235/ Id.

Between 1980 and 1984 all of the photocopying fees were paid by the national government; annual payments amount to approximately \$4.3 million. 236/ A new system was adopted in 1985 and payment is now divided between the national government and school authorities. Kopinor determined that 39% of the material that is copied is under copyright protection. The basic per page charge is three cents. 237/

Payment will vary based on the size and type of the school. Detailed statistics are gathered. All photocopying machines in all schools are monitored. The total volume of copying is recorded and the type of the work is noted -- e.g., music, journals, textbooks, fiction. 238/

With regard to sampling, 240 schools are selected by an independent agency on a rotating basis. During a four week survey period, all material that is copied is recorded. Kopinor then determines whether the material copied is protected by copyright. Kopinor has argued that allowing users to report only that which they believe is protected by copyright leads to systematic under-reporting. 239/ Agreements for university copying are now in place.

Kopinor represents organizations of authors and publishers. The reprographic right is assigned by the associations to Kopinor. Kopinor distributes the royalties to these organizations and has no over control

236/ Id. at A-11.

237/ Id. at A-12.

238/ Id.

239/ Id.

how these organizations distribute money to their members. Percentages of royalties between authors and publishers are subject to negotiation and are apparently a source of ongoing disagreement. 240/

5. The Federal Republic of Germany--VG Wort. In West Germany the collective that covers photocopying is Verwertungsgesellschaft Wort, known as VG Wort. It also collects public lending royalties and audio and video tape levies. 241/ In 1985 West Germany eliminated the private use exemption and adopted a statutory license. Manufacturers and importers are required to pay an equipment levy; the amount -- set by law between 75 DM and 600 DM -- is determined by copying speed. Photocopying service centers, libraries, and educational institutions will be paying .05 DM per page for a school book and .02 DM per page for other copyrighted works. VG Wort is negotiating a blanket license with as many users as possible.

Unlike some other collectives, authors and publishers belong to VG Wort on an individual basis. Royalties are equally divided among authors and publishers.

6. Other reproduction rights organizations. Similar collectives exist in Austria (Literar-Mechana), Denmark (Copy-Dan), Finland (Kopiosto), France (Centre Francais du Copyright), Iceland (Fjolís), The Netherlands (Stichting Reprerecht), South Africa (Dramatic Artistic and Literary Rights

240/ Id. at 15.

241/ Several of the RRO's have broad mandates, e.g., Kopiosto (Finland) collects royalty fees for sheet music, TV and radio, and films, and DALRO (South Africa) represents owners of performing, broadcasting and mechanical reproduction as well as owners of reproduction rights in graphic, plastic and photographic arts and in literary and dramatic works.

Organization -- known as DALRO), Sweden (Bonus), and Switzerland (Pro Litteris-Teledrama). Their number is growing and so is their role and importance.

V. TECHNOLOGICAL ADVANCES

A. Expansion of New Document Delivery Services, Networks, and Consortia

Since the last Congressional mandated review five years ago, technological innovation and economic changes have resulted in reformulation of the issues related to the balance between the rights of creators and the needs of users. The first report primarily addressed concerns implicit in the last photocopying provision including the definition of library or archives and the notice of copyright. The focus of concern for the current five year review is on reprographic service capability rather than a strict focus on library photocopying of works protected by copyright. Current concerns about licensing arrangements for reprographic copying, software copying rights, and controlling unauthorized copying activities result in large part from the expanding scope of electronic publishing activities. The ability to select, manipulate, reproduce, and move information in electronic form, and to print or reproduce in a variety of formats and compositional arrangements virtually on demand from electronic storage, presents significant future challenges and opportunities in balancing the rights and interests represented by Section 108 of Title 17.

Network and consortium development over the past five years is a microcosm that reflects the same issues and trends that affect interaction among the various interested parties in the larger intellectual property rights field. Authors, publishers, libraries, and library users face similar questions of copy ownership, compensation, fair use, infringement, commercial advantage, and systematic copying activity. Various public and

private sector library networks, utilities, and consortia are using and shaping electronic information tools which support versatile access capability to a growing range of resources. These collective interest organizations recognize the quantity, diversity, and complexity of the various telecommunications networks, passwords, protocols, system features, command languages, and other "barriers" standing between the users and the needed information resources.

1. New document delivery services. In the past, automation efforts in the library community have been focused primarily on improving bibliographic access -- as exemplified by the Library of Congress' MARC tapes and OCLC's networking activities, which were described in some detail in the 1983 report. While that report acknowledges that the development of networks and consortia "raise[s] serious concerns for copyright owners," 242/ the authors could not foresee the extent to which the reliance of librarians and their patrons on automation for bibliographic access would lead inexorably to their demand for electronic delivery of documents, thus raising new questions and concerns for copyright owners.

As noted earlier in this report, parties to the Copyright Office hearing generally agree, as ARL put it, that "by-and-large, the law has achieved a reasonable and fair balance between the legitimate rights of owners and users in regard to the photo-mechanical reproduction of copyrighted works by libraries and archives on behalf of their users." 243/ A

242/ Register's Report on Photocopying 247 (1983).

243/ App. I Comment Letters, No. 7 (comment of Shirley Echelman, Executive Director, Association of Research Libraries) (1987).

major reason for this agreement is the fact that library photocopying has been relatively unaffected by new technological devices. "Photocopiers are more sophisticated in 1987 than they were in 1982, but they are essentially the same kinds of machines." 244/ New devices are, however, both multiplying and changing the means of satisfying the demand for copies of copyrighted works in libraries.

a. Telefacsimile. The most important new document delivery device being used in libraries is telefacsimile. While telefacsimile may still be "rarely used" 245/ in academic libraries, it is clearly on its way to becoming a common library tool. New directories are being published to facilitate use of telefacsimile (e.g., the spring 1987 edition of the Official Facsimile Users Directory contains 80,000 facsimile machine telephone numbers, and the summer 1987 Directory of Telefacsimile Sites in Libraries in the United States and Canada lists more than 450 libraries with telefax machines) and a Fax Owners and Users Association of America was recently formed. 246/

A recent report of a project sponsored by the American Association of Law Libraries (AALL) demonstrates both the growing use of telefacsimile machines in libraries and the copyright concerns created by

244/ Id. at 3.

245/ Id.

246/ J. Christensen, Telefacsimile Outreach by Academic Law Librarians in Mid-America: A report on the 1985-86 project sponsored by the American Association of Law Libraries and Mid-America Law School Library Consortium, Inc., 22-23 (July 4, 1987) (available from Mr. Christensen, Library Director and Professor of Law, Washburn University, Topeka, Kansas).

that use. The report describes a resource-sharing venture sponsored in 1985-86 by the AALL and the Mid-America Law School Library Consortium, Inc., involving thirteen law schools in Illinois, Kansas, Missouri, Nebraska, and Oklahoma. The project was variously described by the participating schools as a "pilot project," "experimental program," or a "new service." One school's newsletter said the project "enhanced its interlibrary loan capabilities," 247/ but the most common theme was the intention of the project to serve "practicing attorneys," or "members of the legal community as well as other law libraries." 248/ That is, it was not envisioned primarily as a new means of interlibrary loan among the libraries, but as a document delivery service to be marketed to clients outside the schools.

The project exemplifies the growing popularity of telefacsimile transmission in that the number of interlibrary loan requests filled each month during the project by telefax rather than by traditional loans tripled between February 1985 and October 1986. During the project, 244 articles were telefaxed to law firms, 53 to courts, 22 to other government agencies, and 17 to corporations and businesses. 249/ Of particular interest vis-a-vis the §108(i) balance, however, is the fact that, while the entire report describes the growing popularity of document delivery via telefacsimile and goes into great detail about all the planning required to initiate the project, nowhere does it mention the rights of copyright

247/ Id. at E3.

248/ Id. at E7.

249/ Id. at 10-19.

owners. This omission does not prove that those rights were violated, of course, but does indicate, at the least, the ease with which those rights may be ignored by those planning the use of new copying technologies.

Further buttressing our belief that the importance of telefacsimile as a document delivery device will continue to grow is the experience of the British Library Document Supply Centre, probably the largest and best-known document supply organization in the world, which announced in its most recent annual report that the demand for telefax responses by subscribers to its International Urgent Action Service in 1986 was twice that experienced in 1985. To satisfy this demand, the Centre purchased a Group IV transceiver, which is "12 times faster and produces better quality copies" than present machines. 250/

b. Micro-computer-based document delivery. As micro-computers become increasingly numerous in the workplace, more and more applications for their use are naturally being developed. This is particularly true in the academic community, where micros are being used to obtain access to local and remote resources.

A relatively new concept in the university -- but one that indicates where academia is headed -- is the "scholar's workstation," a personal computer through which faculty members and eventually many students can be "connected through networks to all of the resources necessary to conduct research and publish" the results. 251/ These resources include

250/ Annual Report 1986-87, British Library Document Supply Centre Newsletter #12 at 5 (July, 1987).

251/ M. Bonham, Library Services through Electronic Mail, C&RL News, 538 (Oct., 1987).

access to online databases, both bibliographic and textual, for which connect-time fees are charged (and royalties paid); but they may also provide for "non-commercial" document delivery. Using the campus electronic mail system, a professor may ask the university library for delivery of a copy of an article, which is then transmitted back -- perhaps via the library's optical disk system -- to the professor's computer. There is no "loan," and often no paper copy is made by the recipient.

As libraries are transformed into "media centers," even so are the reserve rooms of yore being transformed into "electronic reserve rooms." A professor's lectures and required readings may be recorded and made available to students through multiple simultaneous transmission in the library's study and/or via the personal computers that universities are beginning to require students to have.

These exciting new developments could end much of the drudgery associated with traditional research. However, while some will argue that these "local" uses for teaching and research are permissible under fair use provisions, many copyright owners fear that these new technologies will make it even more difficult to control and monitor the use of their works. 252/

Modern telecommunications capabilities easily extend the computer's reach beyond the local library/campus, as the flourishing of bibliographic networks demonstrates. For example, our previous report described the services of OCLC (which in 1982 consisted primarily of a national serials database and acquisitions and circulation systems) and

252/ App. II Washington Hearing 69-72 (Statement of Myer Kutz, Chairman of the Copyright Committee of the Association of American Publishers) (April, 1987).

presciently concluded: "Ultimately it is contemplated that articles themselves will be transmitted electronically, although to date only small, experimental programs actually have involved document transfer." 253/

Today, OCLC and the other bibliographic utilities may serve as a "gateway" to the document delivery services of University Microfilms, Inc. (UMI), whose prototype Information Delivery Module (IDM), designed as an attachment to an IBM-compatible personal computer, "converts the PC into a workstation that can retrieve information from both on-line and on-disc databases." 254/

Using the IDM, users can determine via their own computers whether their local library owns various serials, and whether the serials are in the library's optical disk database, in the stacks, or on microforms; the articles on optical disk are available instantly as printouts. Then a search of OCLC or other bibliographic utility may reveal that articles unavailable locally are accessible through UMI's Article Clearinghouse, which can "transmit the article to the IDM overnight (to take advantage of low nighttime phone rates or nighttime use of a network)." Articles thus received can be read, printed (in single or multiple copies), and/or downloaded for future reference or transmission to other terminals. Given the central role that OCLC has come to play in interlibrary loan in this country and abroad (the British Library Document Supply Centre received over 5,000

253/ Register's Report on Photocopying 245-46 (1983).

254/ S. Kennedy, The Role of Commercial Document Delivery Services in Interlibrary Loan, 15, Interlending and Document Supply 71, 72 (1987).

ILL requests via OCLC in 1986) and the demand for instantaneous access to documents, the addition of document delivery to OCLC's repertoire of services must be considered a significant development.

c. Satellites. Attempting to meet the insatiable demand for speedy delivery of documents, the British Library Document Supply Centre (BLDSC) has begun experimenting with satellite delivery of documents. In January 1987, British Telecom International transmitted digitized pages 25,000 miles to the EUTELSAT ECS-F2 satellite over West Africa and then bounced them back to Boston Spa, the location of the BLDSC, for printing. In 1988, the BLDSC expects to be providing "speedy delivery of high-quality copies to customers with a small receive station." 255/ While we are not aware that any American libraries are now using satellites to provide copies of documents, we will not be surprised if that situation changes within the next five years.

The authors of the 1983 report were prophetic when they wrote:

So long as the [document delivery] system involves the delivery of paper copies, controls over further copying will be governed by the copyright law alone. The copyright situation may become more complicated in the future, however, when documents themselves are delivered electronically and when terminals with online storage capacity, printers, local networks, and electronic mail systems become widespread. 256/

255/ Id. at 72.

256/ Register's Report on Photocopying 261 (1983).

The future is here in 1987.

2. Development of consortia and collection development agreements. The authors of the 1983 report acknowledged that libraries had undergone great changes in the preceding decade, and speculated that such changes as the growth of the bibliographic utilities were "only the beginning." They believed that "budgetary constraints and changing consumption patterns will continue the pressures on libraries to modify their operations," 257/ but could not be fully aware of the degree to which the rising costs of library materials and services would accelerate those modifications, particularly the development of consortia.

Some of the consortia and cooperatives that have begun or expanded in the past five years have focused primarily on cooperative arrangements for collection storage. A well-known example of this kind of venture is the Northern Regional Library Facility in Richmond, California; owned by the University of California, it offers high-density, low-cost housing for infrequently used materials belonging to UC's Berkeley, Davis, San Francisco, and Santa Cruz campuses. A similar project was recently announced by the Washington Library Consortium comprising eight universities in the Washington, D.C. area.

To the degree that these consortia band together only to share storage costs and a bibliographic database and to centralize ILL activities, they have little bearing on the library photocopying issue.

257/ Id. at 257.

To the degree, however, that the consortia begin also to develop coordinated acquisitions and collection development programs, as the Washington consortium is reportedly planning, this trend toward collaboration could lead to increases in systematic copying -- library photocopying or electronic transmission. If the past affords a guide to the future, we must predict that the increasing costs of library materials, especially serials, 258/ the increasing dearth of physical space, and the decreasing costs of improved technology will almost irresistably induce consortia members to rely more heavily on copying -- by reprography or electronic transmission -- than purchase for dissemination of documents. 259/ If libraries show consideration for publishers' concerns about the economic consequences of this buy fewer/copy more trend, the current balance will hold. If, however, librarians resort to an over-broad construction of §107 rights or give undue consideration to their own economic imperatives, the balance will collapse. For now, the balance, however tenuous, survives.

What publications will cease publication if copyright protection gets lost in the space-age communications exchanges that are now available? If only materials prepared by academics, materials that will be produced.

258/ Ironically one of the causes of the increased costs for specialized journals is the increased incidence of photocopying. If more institutions subscribed, the publisher could lower the per-unit cost.

259/ The representative of the Medical Library Association testified, however, that in her area, "Knowledge about one another's collections has made us all enhance our collections And so we certainly have not seen any cutback in the number of subscriptions in the libraries in our [medical] community." App. II Washington Hearing 162 (statement of Lucretia McClure) (April, 1987).

regardless of the profit-motive, is being made available, the public interest will not be adversely affected. On the other hand, if valuable publications are lost, then the public is adversely affected.

B. Optical Disk 260/ Projects

Today we frequently hear the terms "electronic publishing," "electronic libraries," and "electronic databases." These terms refer to the combination of computer (electronic and optical) technologies with advanced communications systems. The experts predict that these systems will transform publishing and library activities, and intellectual property lawyers will take a hard look at the current copyright law to see if it can meet the challenge of these new technologies.

Large volumes of information and many copyrighted works are currently being recorded on optical storage media. The most significant example is the Library of Congress Optical Disk Pilot Program. 261/ In late 1982 the Library of Congress (the Library) began research in the use of optical disk technology for image preservation and retrieval. Because

260/ The spelling of "Disk" conforms to the preferred usage in the Library of Congress. The popular press often spells it "Disc."

261/ There is a somewhat similar project TRANSDOC in France. One of the goals of the project was to sensitize users to copyright problems and to evaluate certain preliminary solutions concerning the recovery of reproduction fees and the jurisdiction of those requesting payment. There, however, a protocol of accord was signed by the National Center of Scientific Research (Le Centre National La Recherche Scientifique) and the French reproduction rights organization (Le Centre Francais du Copyright). The Transdoc Final Report on the project concluded that a blanket standard contract applicable to all relevant works was desirable and noted that this ran counter to current French law which requires separate negotiation for each work. Transdoc, Rapport Final, Annexe: Rapport Sur Les Problemes de Copyright Dans Transdoc 51 (undated).

optical disk technology affords extremely high density storage, it is potentially an efficient way to store and retrieve images. A one-sided twelve inch digital disk can store between 3,000 and 10,000 pages of text depending on the distribution of black and white on the pages. One side of a twelve inch analog videodisk can store up to 54,000 pictures. Optical storage may serve preservation needs because physical wear and tear are avoided (only a beam of light touches the medium during playback), and the lifetime of the information can be extended indefinitely if the original disk is copied before it begins to seriously deteriorate.

The Library's experiment is a significant one in that it reflects both the hopes and potential dangers of the new technology. The Library itself has characterized the project as one "which could have profound consequences for librarianship, publishing and authorship." 262/

The Library's Optical Disk Pilot Program has two aspects: print or textual materials are stored on digital optical disks; non-print or pictorial materials are stored on analog optical disks, i.e., videodisks. In its pilot stage use of the disks is extremely limited; the implications are, however, enormous. Large parts of the Library's eighty million item collection could conceivably be available by telecommunications links throughout the United States and the world. Thus, the database containing the Library's holdings in digitally encoded form could be available for

262/ Letter of The Deputy Librarian of Congress, William J. Welsh, to various publishers seeking permission to use copyrighted material.

display and reproduction in London, Paris, Melbourne, Moscow, and Beijing. Alternatively, the Library could reproduce the disks for use by other libraries or for the public.

The project has generated great excitement, for it promises to work a tremendous increase in efficiency in providing information to the world. There is concern, however, that if we fail to provide creatively, thoughtfully, and effectively for copyright protection, we could severely impair this species of the incentive to create intellectual property.

Rather than limit the project to the large amount of public domain material to which the Library has access, the Deputy Librarian of Congress, however, chose to store both copyrighted and public domain material on the optical disks. He recognized that copyright is an important consideration, and that there are a number of copyright questions that we ultimately need to resolve to be sure that a proper balance is reached between the rights of creators and the needs of users. He was cognizant of the 1983 report which said:

The bottom line in the new technologies is this; users, librarians, publishers, and authors must devote serious attention to how they can cooperate to make the system work in light of the potential benefits afforded by the new technologies.... 263/

Thus, although the Library might have argued that its use of copyrighted material for the pilot project was a fair use, this would not settle the legitimacy of a future system and the Library would have lost valuable

263/ Register's Report on Photocopying 260 (1983).

experience in learning what was involved in obtaining necessary rights. The Library sought permissions to use, on a royalty-free basis, more than ninety journals, two television news programs, excerpts from eight motion pictures, prints, photographs, several musical compositions, and sound recordings.

On the nonprint side of the project, clearing the rights proved difficult and in many cases impossible. With regard to photographs, it was generally impossible to tell whether they were published or unpublished and who might own the rights. Since photographs generally do not bear titles, searching records of the Copyright Office was useless.

The Library had difficulty clearing the rights embodied in the sound tracks in motion pictures, since no one knew who owned them. Therefore, the motion pictures were reproduced without sound. With regard to the cinematography, there was such uncertainty as to who owned the rights of reproduction and public performance that motion picture companies simply wrote a letter stating that they did not object to the Library's intended use of the films during the pilot project. 264/ Thus, these companies in essence simply agreed not to sue the Library for the limited use of the films during the pilot phase of the project. For the two television newscasts, many letters, telephone calls, and contract revisions were necessary before agreement was reached; this clearance project lasted approximately two years. Even finding the copyright owners of the music proved time consuming and difficult.

264/ See Attachment E for the language employed in these letters.

Additionally, the older the material, the more likely it was that the rights had been assigned, and locating the current owner with a current address proved difficult and frequently impossible.

This experience showed that clearing rights in older nonprint material is difficult, if not impossible. In any case, it does not appear to be administratively feasible for the Library itself to clear necessary rights.

The videodisks containing photographs, posters, and slides have been extremely popular, and there has been considerable pressure to make them available to other libraries. Because of questions concerning the copyright status of some of the material on disks, this is not possible. The Library has, however, documented the difficulty of determining the copyright status and current owners of this type of material. The issue now seems to be whether or not a compulsory license that would allow such uses with compensation should be introduced into the U.S. copyright law?

The experience on the print side of the project was vastly different. Approximately ninety high-use journals, a number of which are published by academic presses, were targeted for use in the project. The Library could easily determine the current owner of these works.

In June, 1983, the Deputy Librarian of Congress convened a meeting of publishers and representatives of their trade associations. They reacted to the project with extreme caution. ^{265/} At this and a subsequent meeting, publishers expressed concerns over the possible loss of subscriptions, the

^{265/} Publisher's Balk at LC Disc Project, Publishers Weekly 22-23 (July 8, 1983).

lack of royalty payments during the pilot stage, the choice of materials to be included on the disks, the kind and use of information collected by the library about the project, and the ultimate use of the disks.

One publisher questioned the philosophy behind the entire project:

What was conceived of as a noble, exciting preservation project seems clearly to be shifting emphasis. It now is a project to see if new technology will allow the Library to provide greater service to the citizenry. If the project is successful, the genie may be out of the bottle and rampaging around the publishing world before any of us are really equipped to negotiate or otherwise deal with the issues!

I submit that when the primary objective was preservation, the primary focus of the project could correctly be seen as technological research and development. Now that the service aspect seems to be of at least of equal importance, I feel that the technological issues, though challenging, are not nearly as important as some of the others.

The heart of this project (as presented to us) must be to examine the implications of the Library becoming a potential distributor of information via optical disc, telecommunications and electronics. Issues such as copyright protection, royalty accounting, "fair use" definitions may all need to be rethought if the experiment is successful and the direction of the Library is, indeed, toward expanded service. 266/

266/ Letter from Frederick Bowes III, Director, Publishing Operations, New England Journal of Medicine, to William J. Welsh (July 14, 1983).

Academic presses found the experiment the most troubling. They noted that they already suffered because libraries provided numerous copying machines in their facilities, facilitating the copying of copyrighted material. They noted the shaky finances of scholarly journals and pointed out that most depend on subsidies that become harder and harder to get with each passing year. A representative for one press wrote:

And then there is the principle of the thing. What does copyright mean once a country's national library plans to allow the free copying of copyrighted material? Copyright, like many other rules in our society, only operates on the basis of consent by all concerned. You and I agree not to run through red lights so we do not crash at the next corner. But if you start copying, or allowing others to copy, material that belongs to me, then the system of consent breaks down ... 267/

To address the concerns of the publishing community and to assist in resolving various issues that the project raised, an advisory committee comprised of publishers, librarians, and representatives of trade associations was formed by the Deputy Librarian of Congress. Between 1983 and 1986, the committee worked hard on resolving the various issues; in July, 1986, it presented the Library with a set of guidelines and principles for the use of current print materials. 268/ These guidelines, which represent

267/ Letter from Alain Henon, Managing Editor, Serials Division, University of California Press, to William J. Welsh (Sept. 6, 1983).

268/ These guidelines are reproduced in Attachment F. They are limited to "current" material; "current" is not defined.

a significant achievement and should serve as a model for the future, have been accepted by the Library.

The language adopted with respect to copyright is as follows:

(5) For the post-pilot operating system, the terms and conditions for accessing copyrighted print materials on the Library's optical disk system should not jeopardize a fair return to copyright owners on their investment or reasonable user access to such materials. The Library has properly accepted the principle that these copyrighted materials should not be stored on a disk or disseminated from disks by the Library without the consent of the copyright owner in a license agreement between the Library and that owner. Royalty arrangements should be proposed by the copyright owner and these should be administratively feasible. These arrangements should provide for subsidized or royalty-free public access to print materials on the disk system at the Library's facilities for browsing, similar to that provided by libraries and bookstores. To the degree practical, existing royalty collection mechanisms, such as the Copyright Clearance Center, should be used to collect royalties.

A reconstituted committee will begin work on February 2, 1988; its focus will be on effective licensing mechanisms. The Copyright Clearance Center has already been consulted; at the February meeting, the committee will hear how the Copyright Licensing Agency, the British RRO, works.

The Library ultimately received permissions for seventy-seven journals. Some publishers indicated a desire to participate but could not do so either because they did not own outright the right of reproduction or because they had some concern as to whether or not they owned the increasingly important right of public display.

The Library has learned from its experience that even with current periodicals it is not administratively feasible for the Library to locate copyright owners and negotiate licenses. Some sort of collective organization that represents authors and publishers is necessary. Yet in working with the Copyright Clearance Center, the Library found that only about 1/3 of the seventy-seven journals now in the project were part of the CCC repertory. To be effective and workable, a collective must have a substantially complete list of titles.

The pilot stage of the project was originally scheduled to end on December 31, 1985; it has been extended several times and is currently due to end on September 30, 1988. For the print project, it took much longer than anticipated to get the hardware and software up and running. Meaningful evaluation is only now taking place.

Finally, this project has shown that once copyrighted material is encoded in digital form, there is increasing pressure to expand usage.

In our earlier report we noted the ADONIS project, 269/ a proposed electronic document delivery service. It finally is in operation on a two-year trial basis. This private undertaking, with ten participating

269/ Register's Report on Photocopying 257 (1983).

publishers, 270/ supplies the 1987 and 1988 issues of 219 biomedical journals on CD-ROM to supply centers in Europe, the United States, Mexico, Australia, and Japan. These disks are used to fill requests for individual articles; the company pays royalties to the publishers. The organizers predict that by 1989 jukeboxes capable of handling 100 disks or more will be commercially available.

Patricia H. Penick, Manager of Publication Administrative Services for IEEE, reported on an experiment participated in by IEEE, University Microfilms International, and INSPEC (the abstracting and indexing service of the U.K. Institution of Electrical Engineers). 271/ All of the 1984 journals of IEEE were encoded onto optical disks with the indexing protocols from INSPEC. This material was used at workstations specially designed by University Microfilms International. "A person can perform a very sophisticated search or a very simple one, can easily look at abstracts of material he is interested in on the screen, can just as easily look at full text and then, if he wants a paper copy, a push of the button calls it forth almost instantly from a laser printer." 272/

On the subject of new technology, former Register David Ladd observed:

270/ Blackwell Scientific Publications, Butterworth Scientific, Churchill Livingstone Medical Journals, Elsevier Science Publisher, C.V. Mosby, Munksgaard International Publishers, Pergamon Journals, Springer Verlag, Georg Thieme Verlag, and John Wiley and Sons.

271/ App. I Comment Letters, No. 23 (1987).

272/ Id.

Copyright, however, is not the basic issue. The basic issue is how shall the society accommodate to the information age, how shall the creation and dissemination of information be paid for, by whom, and when? ... In that construct, copyright becomes a major tool for solving the problems and not the central problem itself. 273/

C. Other Developments.

Several additional developments should be noted. Private (home) copies are now on the market. In a memorandum prepared for the December, 1987 joint WIPO/UNESCO meeting on the printed word, 274/ the Secretariat noted that since it is not clear how widespread the operation of private machines will become, with the development of electronic delivery systems, the role of home reprography may change and become much more important. This document suggests that this development will change the legal situation considerably. 275/

Secondly, the Copyright Clearance Center reported that a number of United States document delivery services are obtaining copies from the British Library Document Supply Centre (BLDSC) in Boston Spa. 276/ The CCC

273/ Ladd, From the Curbstone: Copyright Issues in Video Disk Storage of Library of Congress Collections (Library of Congress, January, 1983).

274/ UNESCO Committee of Governmental Experts on the Printed Word, Memorandum by the Secretariat, U.N. Doc. UNESCO/WIPO/CGE/PN/3-I (Sept. 14, 1987) [hereinafter Secretariat's Memorandum on the Printed Word].

275/ Id. at 14.

276/ Meeting with Eamon Fennessy, President of the Copyright Clearance Center, and Marybeth Peters, Copyright Office (Nov. 4, 1987). This question arose because of the issue of whether states are immune from copyright liability under the Eleventh Amendment of the Constitution. See BV Engineering v. University of California, Los Angeles, 3 U.S.P.Q.2d 1054 (D.C. Ca. 1987) and similar cases and the Copyright

only receives royalties from BLDSC when copies are ordered through the Dialog "Dial On" service. If copies were made in the United States, there would be a royalty payment. The British Library has stated that under its law no payment is required. If document suppliers switch their requests for copies to libraries in countries where no royalty is required, the §108 balance could be affected. Importation of such copies into the United States would violate §602 of the copyright law. However, because importation of these copies is difficult, if not impossible, to detect, copyright owners most likely would not be compensated for the use.

Finally, the Copyright Office asked the Copyright Clearance Center about payment of royalties by state libraries and state agencies. In its response the CCC listed twelve state organizations that have joined the CCC. To date, the CCC has received no payment from any of these twelve organizations. 277/ The issue of state liability generally may also affect the §108(i) balance and should be monitored. In fact, Chairman Kastenmeier of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, has asked the Copyright Office to study the question of State liability under the federal copyright laws and to report in early 1988.

Office Request for Information published in the Federal Register on November 2, 1987 (52 Fed. Reg. 42,045) to assist it in investigating the issue.

277/ Letter from Virginia Riordan of the CCC to Marybeth Peters of the Copyright Office (December 2, 1987).

VI. LEGISLATIVE PROPOSALS AND
COPYRIGHT OFFICE RECOMMENDATIONS

The Copyright Office specifically asked whether new legislation is needed to clarify either existing legislation or to rectify any imbalance between the rights of owners and the needs of users. 278/

Most of the major library associations (the American Library Association, the Association of Research Libraries, the Special Libraries Association, and the Medical Library Association) stated that Congress has achieved a statutory balance. 279/ Representatives of proprietors (the American Association of Publishers, Harcourt Brace Jovanovich and The Authors League of America) also joined in the view that a reasonable balance between the competing interest had been struck in the statutory formation of §108. 280/

Nonetheless, several proposals to clarify the present statute and to expand the scope of §108 have emerged from the proceeding. These proposals will be discussed in this section of the report, along with a specific recommendation initiated by the Copyright Office.

278/ See 52 Federal Register 6407-6409 (March 3, 1987).

279/ See discussion, supra in text, at III. D.

280/ Id. Although there was agreement that §108 as formulated achieved the intended statutory balance, publishers and The Authors League continue to assert that the balance has not been achieved because of substantial noncompliance.

A. Interested Party Proposals

1. Exemption for "Primary Source" Legal Publications. A representative of the American Association of Law Libraries (AALL) proposed an amendment of §108 to add an exemption to allow law libraries to copy and distribute "primary source material" found in a law library collection. 281/ The AALL spokesperson identified this "primary source" legal material as state and federal statutes and codes, government reports, state and federal court decisions, administrative agency rules, regulations and decisions, and a variety of legislative materials, such as committee reports, hearings, and debates. 282/

The AALL witness testified that the problem with this material arises when government entities contract with commercial publishers to produce their official documents and copyright is claimed; the witness asserted that many decisions of federal circuit courts and state courts are only being commercially printed and bear a copyright notice. She contended that if the only source of the law is through commercially published and copyrighted formats, then the citizen's ability to know his or her legal rights and duties is constrained. 283/

The Copyright Office offers no recommendation of this proposal to Congress.

281/ App. II Washington Hearings 218-219 (statement of Marlene G. McGuirl) and App. I Comment Letters, No. 5 (comment of Marlene G. McGuirl).

282/ Id.

283/ Id.

Apart from §105 of the copyright law, which prohibits any copyright protection for works of the United States Government, it is well settled that no copyright may be claimed in state court opinions, 284/ federal court opinions, 285/ and state statutes. 286/ In those situations where a state statute or administrative regulation was privately compiled or formulated, the courts have ruled that such a statute or regulation enters the public domain once it is officially adopted into law. 287/

This law developed from the principle that the public has a due process right "to have notice of what the law requires of them so that they may obey it and avoid its sanctions." 288/ This due process right to notice may raise a fair use defense for a person who has reproduced for his own personal use a commercially produced statute or regulation that contains some copyrightable material. While it is true that some of these commercially published government documents contain copyrightable elements, (such as headnotes, compilations of keywords, and indexes), and it may be inconvenient not to copy these elements when reproducing the government document, the fact remains that judicial decisions, statutes, regulations, and similar material are in the public domain and can be readily copied.

284/ Banks v. Manchester, 128 U.S. 244 (1888).

285/ Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

286/ Building Officials & Code Administrators International, Inc. v. Code Technology, Inc., 628 F.2d 730 (1st Cir. 1980).

287/ Id.

288/ Id. at 734.

The AALL may wish to begin a dialogue with the commercial publishers of these government documents to see if some agreement, accommodation, or guidelines may be reached.

2. Problems of current legal literature. The AALL spokesperson called for a reexamination of §108 in order to provide a distinction between archival materials found in a law library's collections, which can be used effectively for legal research long after publication, and current materials, such as newsletters, which provide the latest information about current legal developments. 289/ Presumably, this witness believes that such a reexamination would lead to a special provision allowing multiple copies of current legal materials to be reproduced by law libraries.

The witness noted that in organizations employing many attorneys, law librarians are pressured to quickly disseminate the current newsletters to the legal staff, although budget constraints do not permit unlimited subscriptions. Since §108 does not permit reproduction of this material, "strict compliance with section 108 operates to obstruct the flow of current development information..." 290/

The Copyright Office does not recommend this proposal.

The legislative history of §107, the fair use exemption, which by necessity must be closely examined when considering §108 issues, is instructive on this question of newsletter copying:

It is argued that newsletters are particularly vulnerable to mass photocopying, and that most newsletters have fairly modest circulations.

289/ App. I Comment Letters, No. 5 (comment of Marlene C. McGuirl).

290/ Id.

Whether the copying of portions of a newsletter is an act of infringement or a fair use will necessarily turn on the facts of the individual case. However, as a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals. The commercial nature of the user is a significant factor in such cases. Copying by a profit-making user of even a small portion of a newsletter may have a significant impact on the commercial market for the work. 291/ (Emphasis added.)

Using the witness's example, if an organization employing many attorneys is a profit-making enterprise, then its reproduction of newsletters is the very copying Congress sought to discourage. Law libraries should investigate the possibility of licensing agreements providing for multiple copies with the various publishers of this material. Additionally, they may wish to inform the publishers of their views concerning CCC royalty rates.

The needs of users for current legal information appears no more compelling than the needs of users for current medical, scientific, or business information.

3. Section 108(a)(2) as the single definition of a library within the Copyright Act. Representatives of the Special Libraries Association (SLA) proposed that the subsection 108(a)(2) description of a library eligible for the §108 copying exemption 292/ be adopted as the

291/ H.R. Rep. No. 1476 at 73-74. See also Sen. Rep. No. 473 at 66-67.

292/ The collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the institution of which it is a part, but also to other persons doing

single definition of "a library" used throughout the Copyright Act. Specifically, the SLA proposed that the subsection 108(a)(2) description of a library be added to the definitions given in §101. 293/

The Special Libraries Association seeks this amendment to avoid any confusion which may be caused by the description of a library found in the commercial record rental amendment, 294/ which exempts only a nonprofit library from the prohibition against rental, lease, or lending of a phonorecord for non-profit purposes. When the SLA representatives were asked whether their member libraries in for-profit organizations were engaged in the practice of rental, lease, or lending of phonorecords of sound recordings of musical compositions, the response was that it was not a significant problem. 295/

The Copyright Office does not recommend this proposal.

The legislative history of this amendment reflects the reason for the choice of the term "nonprofit" in the library and school exemption:

By accepting this language, the Committee thereby intends that the legislation not interfere with the usual lending activities of nonprofit libraries or the educational programs of nonprofit educational institutions when the

research in a specialized field.... 17 U.S.C. 108(a)(2).

293/ App. I Comment Letters, No. 4 (comment of Nicholas Mercury).

294/ Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. 17 U.S.C. 109(b)(1). This section was added to the law by the Act of October 4, 1984, Pub. L. 98-450.

295/ App. II Washington Hearing 182 (statement of Sandy Morton).

rental, lease, or lending of phonorecords is part of their customary activities and not in the nature of a commercial enterprise. 296/

Thus, the term "nonprofit library" in §109(b)(1) represents a carefully considered legislative compromise added for the limited purpose of describing an institution exempt under §109(b)(1). The purposes of §109(b)(1) and 108 are entirely different, as is the balance affected. Moreover, there appears to be little likelihood of confusion, as to which libraries are eligible for the §108 copying privilege and which libraries may lend musical phonorecords. The observation by the SLA representative that the lending of phonorecords by libraries in for-profit organizations is not a significant problem would also mitigate against this proposal.

4. Repeal of subsection 108(h). The SLA representative proposed "the repeal of subsection 108(h) so that libraries have positive guidance on copying non-print media for users." 297/ The Music Library Association (MLA) also supported elimination of subsection (h), 298/ and AALL appears to support the SLA recommendation. 299/

296/ H.R. Report 987, 98th Cong., 2d Sess. 5 (1984).

297/ App. I Comment Letters, No. 5 (comment of Nicholas Mercury).

298/ App. I Comment Letters, No. 26 (comment of Lenore Coral).

299/ App. I Comment Letters, No. 5 (comment of Marlene McGuirl).

The Association of Education Media and Equipment commented that subsection 108(h) adequately addresses the needs of librarians regarding media, such as video, film, and other audio-visual works, and asked that there be no change in the subsection. 300/

The Copyright Office does not recommend elimination of or amendment to subsection 108(h). The elimination of subsection 108(h) would mean that all of the copying privileges found in §108 would apply to all kinds of copyrightable subject matter. As the legislative history of §108 makes clear, reproduction of music, pictorial and graphic works, motion pictures and most audiovisual works for private study, scholarship, and research is to be governed by fair use under section 107.

The structure of §108 represents a hard-fought compromise. Since there is no consensus for change among the interested parties and no evidence that the fair use provision is not providing the appropriate balance, the Copyright Office concludes that repeal of this subsection is unwarranted.

5. The "Umbrella Statute" Amendment. Two witnesses not representing any trade association called for the enactment of the so-called "umbrella statute." 301/

The "umbrella statute" proposal was developed by an ad hoc task force of librarians from for-profit corporations and both for-profit and non-profit journal publishers and was originally recommended by the

300/ Id., No. 27 (comment of Ivan Bender).

301/ App. I, Comment Letters, No. 8 (comment of Frederick H. Owens and Ben H. Weil).

Association of American Publishers (AAP) in 1982. The proposal would add a new §511 to the Copyright Act limiting copyright owners of scientific, technical, medical, or business periodicals or proceedings to a single remedy, a reasonable copying fee, for copyright infringement of their publications unless the work was entered into a qualified licensing system or qualified licensing program at the time the reproduction was made. A publisher would not be limited to this single remedy if the user had not also entered into such a program. 302/

The witnesses contend that the purpose of the amendment is to give statutory relief to some libraries to permit them to copy reasonably from the works of publishers that neither participate in the Copyright Clearance Center (CCC) nor offer their own copy-licensing system.

The AAP representative testified that his organization had withdrawn its support for the "umbrella statute" because the user community did not want it, because the coverage of scientific, technical, and business journals registered in the CCC has increased dramatically, and because the AAP feared that the scope of the "umbrella statute" might expand beyond this limited class of materials and thereby harm AAP members who did not have their works registered in the CCC. 303/ The proponents of the umbrella statute also acknowledged the lack of support for the provision by the library community. 304/

302/ For a fuller explanation of the provisions of the "umbrella statute" see Register's Report on Photocopying 348 (1983).

303/ App. II, Washington Hearing 78 (statement of Meyer Kutz) (April, 1987).

304/ Id. at 258 (statement of Ben H. Weil). See also App. I Comment

The Copyright Office recommended this proposal to Congress in the 1983 report because it represented a joint legislative proposal worked out by publishers and librarians. We cannot recommend it again: the withdrawal of support for it by its original publisher sponsors, the rejection of it by the general library community, and the expanded scope of the Copyright Clearance Center all mitigate against legislative enactment of the "umbrella statute" by Congress.

6. Reproduction of entire musical works. The President of the Music Library Association submitted a comment letter which called for adoption of the previous joint legislative proposal of the Music Library Association and the Music Publisher Association to add a new subsection to §108 granting copying privileges with respect to entire musical works (or substantial parts thereof) following an unsuccessful but diligent search including a search of the records of the Copyright Office, for the name and address of the copyright proprietor. 305/

The Copyright Office recommended this proposal to Congress in its 1983 Report because the proposal was developed as the result of negotiations between representatives of users (the music librarians) and copyright proprietors (the music publishers). However, the Copyright Office is not inclined to recommend this proposal again at this time. Due to the lateness of the submission, an adequate record was not developed to show continued support for the joint resolution by both of the parties or

Letters, No. 8.

305/ App. I Comment Letters, No. 26 (comment of Lenore Coral). See also Register's Report on Photocopying 342 (1983) for the full text of the proposal.

to show opposition to it by others. If, at a later time, there continues to be support for this proposal, Congress may wish to hold a hearing where composers, lyricists, and music publishers can express their views.

7. Inflationary adjustment of statutory damages. The Newsletter Association proposed adjusting the amount of statutory damages to not less than \$500 nor more than \$100,000, to reflect the increase in the cost of living. The Newsletter Association believes that such an increase would deter infringers and would encourage copyright proprietors to enforce their rights. 306/

A similar proposal was made during the first five year review and the Copyright Office declined to recommend the proposal at that time. As the Copyright Office explained in the 1983 report, the current level of statutory damages is adequate since the court can award an amount between \$250 and \$10,000 for each separate and independent work infringed. The amount of awards of statutory damages is potentially enormous in infringement actions involving multiple, independent works. 307/

The Copyright Office continues to believe that the range of statutory damages is already wide, and adequate; therefore, it again does not recommend this proposal.

8. Amend §108(i) to include a study on the impact of new technology. Nine organizations 308/ recommended that the Copyright Office

306/ Id. at No. 28 (comment of Frederick D. Goss).

307/ For a more detailed analysis of a similar proposal, see Register's Report on Photocopying 346 (1983).

308/ App. I Comment Letters, No. 1 (comment of Mary Lee Sweat, Association of College and Research Libraries); No. 4 (comment of Nicholas

study the effects of new technology on the §108(i) balance. Some recommended generally that such a study be undertaken, while others recommended that the scope of subsection 108(i) be amended specifically to require the Copyright Office to include the impact of technology as a part of the five-year review.

B. Copyright Office Proposal.

In view of this broad support and aware of the tensions caused by new technology, the Copyright Office, if so directed, would willingly undertake such a study. Consequently, the Copyright Office recommends to Congress that the §108(i) five-year review be expanded to require the Office to study the effects of new technology on the §108 "balance." If, however, Congress chooses not to expand the §108(i) study to include a study of the new technology, the Copyright Office recommends that Congress either eliminate the §108(i) report altogether, or amend the law to increase the time interval between reports to ten years or more. 309/

Mercury, Special Libraries Association); No. 28 (comment of Frederick D. Goss, Newsletter Association); No. 29 (comment of Dale Stull Demy, The Authors League of America, Inc.); No. 11 (comment of Lucretia McClure, Medical Library Association); No. 17 (comment of Dr. August Steinhilber, National School Board Association, Educators Ad Hoc Committee on Copyright); No. 10 (comment of Nancy Marshall, American Library Association); No. 5 (comment of Marlene C. McGuirl, American Association of Law Libraries); and No. 7 (comment of Shirley Echelman, Association of Research Libraries).

309/ Some of the parties suggested that the review be set at ten-year intervals. See, e.g., App. I Comment Letters, No. 4 (comment of Special Libraries Association).

PHOTOCOPYING—INTERLIBRARY ARRANGEMENTS

INTRODUCTION

Subsection 108 (g) (2) of the bill deals, among other things, with limits on interlibrary arrangements for photocopying. It prohibits systematic photocopying of copyrighted materials but permits 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."

The National Commission on New Technological Uses of Copyrighted Works offered its good offices to the House and Senate subcommittees in bringing the interested parties together to see if agreement could be reached on what a realistic definition would be of "such aggregate quantities." The Commission consulted with the parties and suggested the interpretation which follows, on which there has been substantial agreement by the principal library, publisher, and author organizations. The Commission considers the guidelines which follow to be a workable and fair interpretation of the intent of the proviso portion of subsection 108 (g) (2).

These guidelines are intended to provide guidance in the application of section 108 to the most frequently encountered interlibrary case: a library's obtaining from another library, in lieu of interlibrary loan, copies of articles from relatively recent issues of periodicals—those published within five years prior to the date of the request. The guidelines do not specify what aggregate quantity of copies of an article or articles published in a periodical, the issue date of which is more than five years prior to the date when the request for the copy thereof is made, constitutes a substitute for a subscription to such periodical. The meaning of the proviso to subsection 108 (g) (2) in such case is left to future interpretation.

The point has been made that the present practice on interlibrary loans and use of photocopies in lieu of loans may be supplemented or even largely replaced by a system in which one or more agencies or institutions, public or private, exist for the specific purpose of providing a central source for photocopies. Of course, these guidelines would not apply to such a situation.

GUIDELINES FOR THE PROVISIO OF SUBSECTION 108 (G) (2)

1. As used in the proviso of subsection 108 (g) (2), the words ". . . such aggregate quantities as to substitute for a subscription to or purchase of such work" shall mean:

(a) with respect to any given periodical (as opposed to any given issue of a periodical), filled requests of a library or archives (a "requesting entity") within any calendar year for a total of six or more copies of an article or articles published in such periodical within five years prior to the date of the request. These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical, the publication date of which is more than five years prior to the date when the request is made. These guidelines do not define the meaning, with respect to such a request, of ". . . such aggregate quantities as to substitute for a subscription to [such periodical]".

(b) With respect to any other material described in subsection 108 (d), (including fiction and poetry), filled requests of a requesting entity within any calendar year for a total of six or more copies or phonorecords of or from any given work (including a collective work) during the entire period when such material shall be protected by copyright.

2. In the event that a requesting entity—

(a) shall have in force or shall have entered an order for a subscription to a periodical, or

(b) has within its collection, or shall have entered an order for, a copy or phonorecord of any other copyrighted work, material from either category of which it desires to obtain by copy from another library or archives (the "supplying entity"), because the material to be copied is not reasonably available for use by the requesting entity itself, then the fulfillment of such request shall be treated as though the requesting entity made such copy from its own collection. A library or archives may request a copy or phonorecord from a supplying entity only under those circumstances where the requesting entity would have been able, under the other provisions of section 108, to supply such copy from materials in its own collection.

3. No request for a copy or phonorecord of any material to which these guidelines apply may be fulfilled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines.

4. The requesting entity shall maintain records of all requests made by it for copies or phonorecords of any materials to which these guidelines apply and shall maintain records of the fulfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.

5. As part of the review provided for in subsection 108 (i), these guidelines shall be reviewed not later than five years from the effective date of this bill.

ATTACHMENT B

TEXT OF LETTER TO FOREIGN PUBLISHERS AND LIBRARIANS

The United States copyright law directs the Copyright Office to report to Congress every five years on the state of library photocopying in this country. In preparing for the next report, which is due in January 1988, the Copyright Office is consulting authors, publishers, and librarians to discover whether ". . . the rights of creators, and the needs of users. . ." are appropriately balanced, as the Act intended.

The widespread use of photocopying machines capable of reproducing copyrighted works quickly, cheaply, and in their entirety, has caused concern in many countries, not just the United States. In the belief that the experiences of publishers and librarians in those countries will broaden our knowledge and therefore benefit our study, I respectfully ask for your help. Could you recount your experiences in this area in recent years?

Rather than asking specific questions, I request your general opinions and/or particular experiences pertaining to the way in which library photocopying has affected the rights of creators in your country in the last five years. If special problems or developments have had an impact on the issue, I would appreciate a description of them. Also, if any new legislation has been enacted or proposed with regard to library photocopying, I would like to know about it, and, if possible, obtain copies.

Furthermore, I would be grateful if you would send me copies of any major studies or articles published on this topic in your country within the last few years. If that is not feasible, I would appreciate it if you could send information about where I could obtain them. When our report is published, I will, of course, be pleased to send you a copy.

If possible, I would like to receive your response by March 27, 1987, so that we will have the benefit of your comments before conducting a public hearing in Washington on April 8, 1987. For your convenience, I have enclosed a label that may be used for your response.

I hope that you will be able to help us in our examination of this important issue.

Sincerely,

Ralph Oman
Register of Copyrights

Enclosure

AIRMAIL

RO:cjd

WASHINGTON OFFICE

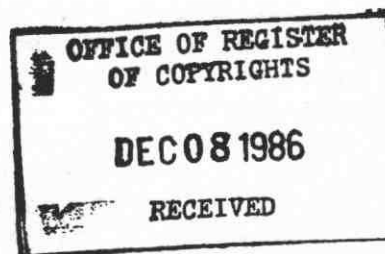
AMERICAN LIBRARY ASSOCIATION

BOX 54 • 110 MARYLAND AVENUE, N.E. • WASHINGTON, D. C. 20002 • (202) 547-4440



December 8, 1986

Anthony P. Harrison, Assistant Register
U. S. Copyright Office
Library of Congress - LM #403
Washington, D. C. 20559
HAND DELIVERED



Dear Pat:

This is a follow up to our October meeting regarding the Copyright Office plans to review Section 108 of the Copyright Law as provided in Sec. 108(i).

As we agreed, I sent copies of the two survey questionnaires, which were sent to publishers and librarians in preparation for the 1983 review of Sec. 108, to our copyright subcommittee and to our ALA research office. Allowing for everyone's meeting and travel schedules, I finally tracked down the last person just last week. The consensus is that repeating that survey process would not serve any really useful purpose, that it would only exacerbate some the same differences of opinions we experienced five years ago. Also, there wouldn't be the buffer of an outside research firm to referee and analyze the responses.

Furthermore, a little research revealed that we don't have the budget or staff to develop a proper procedure for getting the questionnaires to the appropriate sampling of your initial universe of recipients.

Upon talking to two former members of Barbara Ringer's advisory committee on the first five-year review, it was suggested that the April 8 hearing could very well serve as a practical means of getting reactions as to whether or not a balance is being achieved between the rights of creators and the needs of users, as called for in Sec. 108(i).

I think it's fair to say that there is a general feeling that library photocopying does not seem to be an issue of concern in the library community, and that since Sec. 108(i) does not call for a survey, a simple, brief report should suffice.

The greatest concern is focused on nonprint materials and new technology. But up till now, the technology has been evolving too rapidly to really get a handle on it, a feeling which also seems to have prevailed at congressional hearings throughout the 99th Congress. Accordingly, I believe it would be timely to recognize this situation in the course of the April 8 hearing and to reflect it in the 108(i) report.

Perhaps, the Copyright Office could query witnesses on April 8 to bring out the widespread concern over the burgeoning range of technological developments and subsequently put everyone on notice that this is an area that the office will want to monitor in depth and report on in the next five-year review.

We will have the five-year review on the agenda of ALA's Copyright Subcommittee at our Midwinter Meeting in Chicago on January 18.

In response to your request for some names to contact from the international library community, I suggest that you get in touch with the following people for recommendations of persons with copyright expertise or relevant concerns:

Jane Cooney, Executive Director
Canadian Library Association
151 Sparks Street
Ottawa, Ontario K 1 P-5E3

George Cunningham, Chief Executive
Library Association
Seven Ridgemont Street
London, WC 1 E 7AE

Jennifer Adams, Executive Director
Australian Library Association
376 Jones Street
Ultimo, NSW 2007

Looking forward to working with you over the coming months. Meanwhile, Happy Holidays!

Sincerely,



Eileen D. Cooke
Director
ALA Washington Office

EDC:tj

Harcourt Brace Jovanovich, Inc.

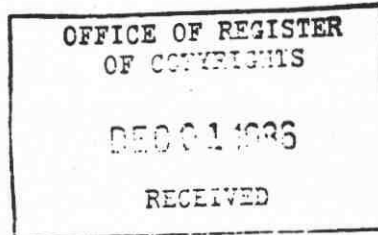
HBJ

ORLANDO, FLORIDA 32887 TELEPHONE (305) 345-3984 TELEX: 568373

RICHARD UDELL
ADMINISTRATIVE VICE PRESIDENT AND COUNSEL

November 20, 1986

Mr. Ralph Oman
Register of Copyrights
Library of Congress
Washington, DC 20540



Dear Mr. Oman:

HBJ is grateful for the invitation you extended to participate at an early stage in the process of consultation and consideration that will lead to your 1988 report under Section 108(i) of the Copyright Act.

As a major creator and publisher of textbooks, professional books, periodicals and other instructional and informational works, including approximately 200 scientific, technical and medical journals that are found in archives and libraries throughout the world, HBJ is not only vitally concerned with copyright issues in general but with Section 108 library photocopying in particular.

HBJ's present view on the question addressed by Section 108(i) review is that although there continue to be substantial numbers of violations of its letter and spirit, the existing provisions of Section 108 remain essentially appropriate to achieve the intended statutory balancing of the rights of creators and the needs of users. The problems are not in the statute but in library practices under it, which fall far short of compliance. Significantly improved understanding of and compliance with Section 108 by the library community is obviously needed. But, recalling the intensity of the conflict between libraries and publishers that Section 108 was enacted to resolve underscores our view that, as the statute itself is well structured to achieve its purpose, to rekindle a major debate at this time by proposing any significant modifications to Section 108 is likely to be counter-productive. The presumption should be that the law should remain unchanged until there is a clear and urgent need to change it. "If it ain't broke don't fix it!"

HBJ understands that there are limited budgetary resources available to the Copyright Office for the 1988 report. We believe data collection on library photocopying practices on an appropriate sampling basis across the range of issues that were originally surveyed can be important. We doubt that a new survey of the extent of the King report would result in data leading to conclusions differing significantly from those reached in the 1983 report. That data demonstrated a large amount of photocopying by libraries in violation of Section 108 limitations, but again we do not think that modification of the statute is a solution. In addition to the need for better policing by copyright owners and a more informed and better compliance by the library community, we think that the growth of library and document delivery firms use of the Copyright Clearance Center should be encouraged. This would remove or at least ameliorate what users perceive as obstacles to efficient satisfaction of their needs when these needs exceed Section 108 privileges.

Given the scant resources available to the Copyright Office for data collection, one avenue of a non-statistical nature which might yield valuable information additional to rather than repetitive of that which was gathered for the 1983 report, would be an inquiry on the extent, if any, to which the 1983 report has impacted on the library community's view of its obligations under Section 108 and the relationship of Section 108 and 107, (1983 Register's report pages 95 et seq.) and on less controversial but often ignored aspects of Section 108 limitations (e.g., as summarized on pages xi and ixx of the 1983 report).

It would also be useful, we think, for the 1988 Report to add cumulative force and independent focus and emphasis to important conclusions and clarifications made in the prior report to the extent you may agree with them. We have in mind, for example, the recommendations for encouragement of collective licensing arrangements (p. 358); study on surcharge of equipment (p. 359); clarification of the Section 108 notice (p. 361); clarification of "reserve" copying limitations (pp. 108, 114); bar to copying sought by "information brokers" (p. 120); and last but not least the significance of the "concerted reproduction" and "systematic reproduction or distribution" limitations of Section 108(g) (pp. 124 et seq.).

When we met in September there was some discussion of optical disk technology. The closely related issue of downloading of databases into magnetic or optical disk storage was also touched upon. In the 1976 Act Congress did not even attempt to address these issues in connection with Section 108 privileges. Not only do such uses present different threats to copyright owners, especially since in many instances they can simultaneously satisfy different user needs than those addressed by Section 108, but both the technology and the contractual strategies for dealing with them are still very much in flux.

Not only are these issues outside the scope of Section 108 review, but the present level of experience with computerization and optical disk technology, not to mention electronic transmission and networking issues, is, in our opinion, inadequate to form a valid basis for new legislative solutions. Given the present state of knowledge and experience we believe that case-by-case analysis employing existing copyright principles should be the basis for conflict resolution in this area until technological and practice patterns emerge clearly. To address these issues on a narrow Section 108 basis would be premature and unwise especially because they are inextricable from much broader and more fundamental issues.

HBJ agreed with much, although not everything, that appeared in the 1983 report and found it a most impressive, balanced and important document. We saw it not only as a sound basis for legislative consideration, but also as a valuable guide to clarification of asserted ambiguities in Section 108. We anticipate that despite the present budgetary limitations the 1988 report will be equally valuable. We urge that the five-year review provision of Section 108(i) be continued. As the pattern of uses and technology change over time and trends creating an imbalance in copyright owner protections and legitimate user needs to be free of copyright restrictions are discerned, legislative solutions may become desirable. These periodic examinations and reports by the Copyright Office are necessary to establish a factual and historical description of practices and policies against which legislation may usefully be considered.

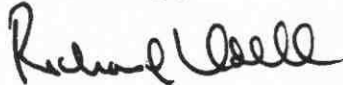
In that connection HBJ views the role of the Copyright Office under Section 108(i) as not only informative and advisory for the legislative process but also as affording much needed

Ralph Oman
November 20, 1986
Page 4

guidance to the various copyright communities. We believe that the Copyright Office, as that branch of government having the greatest depth and breadth of expertise regarding complex issues such as those relating to Section 108, should play a vigorous role in the formulation of policy on this and other important copyright matters.

HBJ will welcome the opportunity to actively participate in discussion and consideration of the issues as they emerge in the development of the 1988 report.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard Udell".

Richard Udell

RU:DH

ATTACHMENT E

Proposed language for letter of non-objection: color test disk

During the Library of Congress Optical Disk Program and its follow-up evaluation, which will end December 31, 1986, (name of company) _____ will not object to the following uses of the _____ :

1. Reproduction of the visual images of the motion picture (excerpt) on one hundred (100) copies of a laser videodisk. The motion picture's soundtrack will not be reproduced.
2. Ninety-five copies of the disk will be used exclusively for physical testing at the Library of Congress in Washington, D.C. and will be neither publicly performed nor publicly displayed.
3. One copy may be publicly performed and/or displayed in the Motion Picture and Television Reading Room in the James Madison Memorial Building of the Library of Congress. The four (4) remaining disks are to serve as back up copies. They may also be used for demonstration purposes as listed in number 5 below. These copies are to be kept under the strict custody and control of the Library of Congress.
4. The disk's video images may be used by researchers to make limited numbers of non-publication-quality convenience prints by means of the Kodak Instant-print or a similar process. No more than two copies of any image may be made by a single researcher, and all persons making copies will sign a document in which they state that they understand that the copies may not be published or reproduced further without the written permission of the copyright owner. Such researchers shall also agree that if the copies they make contain copyrighted images, these copies may not be sold or transferred.
5. Public display and/or performance of the work embodied on the disk by Library of Congress staff at educational conferences, meetings, and seminars which either deal specifically with the Optical Disk Program of the Library or deal generally with the various programs and services of the Library of Congress.

We understand that the Library of Congress agrees to retain custody and control of the videodisks and mastering materials and will not loan them to any institution or individual during this period, and, unless a new understanding has been reached with the copyright owners, the Library will withdraw the disks from public performance and display at the end of this period.

_____ signature
_____ name & title
_____ (typed)
_____ date

Library of Congress Optical Disk Program
Guidelines and Principles For Print Materials

The following guidelines and principles relating to print materials captured in optical disk format for storage and distribution have been developed by the Library of Congress Advisory Committee on the Optical Disk Program. They reflect the conclusions of the committee as of July 1986. Other issues, such as problems posed by certain older materials and the framework of royalty/licensing arrangements, will be addressed in subsequent actions by the committee. The Library of Congress has endorsed these guidelines and principles and will follow them in the pilot and operational phases of the Optical Disk Program and as a basis for continuing explorations in the use of optical disk technology, to the extent that they do not conflict with provisions of law or established regulations.

(1) Optical disk technology offers considerable promise to solve this country's problems regarding the preservation of print materials. Preservation is inseparable from the requirements of service, and optical disk technology opens new opportunities for dissemination. Since there are currently no adequate private sector mechanisms to ensure comprehensive preservation of print materials acquired by the Library, public investment in a preservation system is justifiable in order to ensure the basic availability of print materials.

(2) The Library should encourage the private sector to apply optical disk technology in ways which will aid the Library's preservation and dissemination of print materials. As the private sector applies this technology, the Library should use private sector sources to the extent practicable to obtain disks and electronic files of published print materials.

(3) The Library should seek the advice of, and cooperate with, the private sector and relevant standards organizations in connection with the Optical Disk Program.

(4) The Library's selection of print materials for inclusion in the post-pilot operations system should be as comprehensive as is practical. Appropriate selection criteria should be developed by the Library which reflect the Library's preservation role and traditional selection criteria, including demand, use, citation frequency, research potential, and condition of library materials. There may be different emphases in the selection criteria for older as distinct from current materials.

(5) For the post-pilot operating system, the terms and conditions for accessing copyrighted print materials on the Library's optical disk system should not jeopardize a fair return to copyright owners on their investment or reasonable user access to such materials. The Library has properly accepted the principle that these copyrighted materials should not be stored on a disk or disseminated from disks by the Library without the consent of the copyright owner in a license agreement between the Library and that owner. Royalty arrangements should be proposed by the copyright owner and these should be administratively feasible. These arrangements should provide for subsidized or royalty-free public access to print materials on the disk system at the Library's facilities for browsing, similar to that provided by libraries and bookstores. To the degree practical, existing royalty collection mechanisms, such as the Copyright Clearance Center, should be used to collect royalties.

(6) The Library's utilization of optical disk technology to meet its own local requirements for dissemination of print materials within the Library and to Congressional offices and the Supreme Court is an appropriate use of that technology which should be exploited. However, dissemination to other locations in disk form, or by electronic transmission from disks of print materials originally captured in disk format by the Library, should be made by private-sector commercial and not-for-profit organizations which can disseminate print materials in innovative and cost-effective ways to meet the needs of other libraries and users. The Library should consider disseminating print materials in disk form, or by electronic transmission from disks to other locations, only when the private sector, after an adequate opportunity, does not choose to disseminate certain of the print materials available from the Library in disk form. The Library should make its disks available to such private sector organizations for an appropriate manufacturing fee, subject to the approval of the copyright owners. This approach will permit the Library to justify further its expense and effort in the creation of disks for itself and to play an integral part in making print materials available to other libraries and users in optical disk form.

In addition to William J. Welsh, convenor, and Joseph W. Price (ex officio), project director, Optical Disk Pilot Program, members of the Optical Disk Advisory Committee are: Library Subcommittee-- Robert Wedgeworth (chair),

Columbia University; James Govan, University of North Carolina; Jay K. Lucker, Massachusetts Institute of Technology; Susan K. Martin, Johns Hopkins University; Peter J. Paulson, formerly of the New York State Library; Gary Strong, California State Library; John C. Broderick, Library of Congress liaison; Publisher Subcommittee-- Kurt D. Steele (chair), Standard and Poor's; Herbert S. Bailey, Princeton University Press; Frederick Bowes, New England Journal of Medicine; David Minton, Loomis, Owen, Fellman & Howe for the Magazine Publishers Association; E. Gabriel Perle of Proskauer, Rose, Goetz & Mendelsohn; Carol Risher, Association of American Publishers; John Fox Sullivan, National Journal; Peter F. Urbach, Reed Telepublishing; and Marybeth Peters, Library of Congress liaison.

Questions about these guidelines can be directed to Marybeth Peters, Office of the Register of Copyrights, Library of Congress, Washington, DC 20540; telephone (202) 287-8350.

* * *

PR 86-122

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