
Southeastern Law Librarian

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THE NEW COPYRIGHT LAW

Suppose they changed the Copyright Law and nobody cared? There may be more truth than poetry in this statement. Only twelve (12) people in the United States responded to the U.S. Copyright Office's request for comments on its proposed photocopying regulations under the new Copyright Law. PL 94-553, 90 Stat 2541 (1976) 17 USC 101 et seq (1978). The final regulations were published at 42 Federal Register 59264-265 (November 16, 1977 issue).

This issue of the SOUTH EASTERN LAW LIBRARIAN deals only with photocopying and interlibrary loaning by libraries. Even on these two subjects, I have just scratched the surface. My interest in the new law increased when I was asked by the University Librarian to chair an Ad Hoc Committee on photocopying and the new copyright law. In this capacity, I spoke to various law librarians throughout the country. Several, in the larger law libraries, took the position that I, being in a small library, way off in the boondocks, need not worry about being sued for any violation of the law. Only the big libraries will be sued. Now, I call their attention to the fact that two major copyright law cases occurred way off the Great White Way, in Pittsburgh, Penna. *Buck v Jewell Law Salle Realty Co.*, 283 U.S. 191 (1931) and *Twentieth Century Music Corp v Aiken* 422 U.S. 151 (1975). So that there is no guarantee that we, in smaller law libraries, will not be sued. Also, we should do everything possible to obey the law. Several law librarians damned me for even raising the issue with them. ✓

The major problem facing law librarians in trying to obey the new law which takes effect on January 1, 1978 is what does the law actually say and mean. Congress when it wrote it, left it purposely vague in many areas. Despite a definition section, terms and phrases such as "Concerted reproduction" s108 (g) (1) "Direct or indirect commercial advantage" 108(a)(1) are not defined. I am not sure whose commercial advantage they refer to. The library's or the patron's.

The best advice that can be given is to remain calm. Unless specifically and clearly indicated by the new law, don't change your present way of handling photocopy or inter-library loan requests. We, at University of Louisville, are taking the position that we should not give in to the publishing people (on licensing, on procedures, etc.) before we have to, if we have to. The Special Libraries Association in their November 4th newsletter wrote, "... that you consider the legal implications of any agreements or contracts with "copyright clearance" centers, publishers, or document delivery services that might deprive you of rights you hold under the law." They also urge calm.

Intellectually, there seems to be four positions regarding the new law. The first I call the Scarlett O'Hara line, "I will worry about it, tomorrow." Tomorrow will be here faithfully on January 1st. The second is that of Dean L. Ray Patterson's (Emory University School of Law.) He thinks that we should fight it out. Let's get it settled. Perhaps the only way of deciding the law is by court action. Julius Marke of N.Y.U. Law Library referred me to a story in the Chronicle of Higher Education (July 5, 1977) on Dean Patterson's position. Graciously, he sent me a copy of the outline of his speech given before the National Association of College and University Attorneys. (He did not speak from a prepared text.)

The third line is William D. North, Esq position that it may be cheaper to give in and pay royalties than to fight the issue on a case by case basis and have to pay large legal fees. I have been told the opposing sides are already lining up the possible suits. We don't know where and when they will strike. Perhaps the suits may arise from photocopying done by medical libraries. These librarians almost pride themselves on the number of pages (in the thousands and hundreds of thousands) per year that they photocopy for their users. The fourth and final position is articulated by Prof. Richard DeGenarro, director of the University of Pennsylvania Libraries. He thinks that we will not have to make drastic changes in our procedures. The sky will not cave in. His article is reproduced here with the permission both of Prof. DeGenarro and with that of "American Libraries," where the article was first printed.

I have reproduced these three men's articles, as they are not readily available. To make this a super issue, I wrote the West Publishing Co and the Lawyers Cooperative Publishing Company, to discover what their attitudes are on the new law. West said, "Until the Copyright Office makes available its regulations and practices under the new law effective in January 1978 we would prefer not to offer any interpretation of the Fair Use provisions of Sections 107 and 108 of the Act. While we have given these provisions careful study there remain questions as to their meaning and application. ..." Lawyers Coop took almost the same line, "Unfortunately, We can not respond in any detail because that policy has not yet been formulated. The matter is presently being examined by counsel but probably no firm determination can be made until the Copyright Office issues its promised regulations."

To my knowledge the Copyright Office has not spoken yet on the subject. However, I have been informed by people who know, that Barbara Ringer, the Registrar of Copyrights, takes a pro-librarian position. The Special Libraries Association and the American Library Association have sent out materials to their people. I have not received anything from AALL.

The King Research Co. which did a survey of photocopying practices in libraries for the NCLIS has not yet released its study. This data will show the scope of University copying and may reveal some insights into the problem. According to Donald King, the study has been at the GPO for the past six weeks and may someday be published.

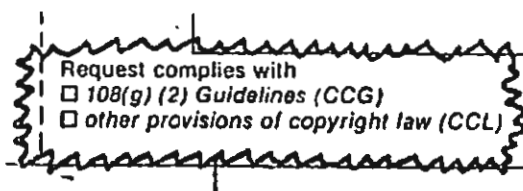
I was going to write to several of the "major" law reviews to discover their positions. But when I received the position papers from West and Lawyers Coop., I decided that the law reviews probably didn't have any position yet, either.

But what to do before the summons and complaint arrive? On the nitty gritty level, we at the University of Louisville are doing the following:

- 1) Notification of the new copyright law and its restrictions must be put on:
 - a/ the coin operated photocopying machines.
 - b/ our outward going inter-library loan requests.
 - c/ our photocopying request forms.

The Copyright Office's language must be followed. The regulations are very specific as to what the signs must say -- the type face, card stock used, etc. Our printer says that it can be put on one 8 1/2 x 11 sheet of paper.

There are several changes in the inter-library loan request form, due to the new copyright law. The most vital addition is this information, to be added to the lower left hand corner of the form. The major library supply houses are all producing new forms to conform to both the statutory changes and the ALA revisions.



Request complies with
☐ 108(g) (2) Guidelines (CCG)
☐ other provisions of copyright law (CCL)

While it may cause inconvenience and additional printing costs you must alter your photocopy request forms and interlibrary forms to conform to the new law. I suggest that you don't be the library that gets sued because you failed to follow the instructions. Better safe than sued.

2/ We must keep exact records of what we borrow to make sure that we don't exceed the fair use rule (in one year period less than six (6) copies of the same title which is less than six (6) years old.) The December issue of "American Libraries" will print the ALA's Reference and Adult Services Division's Record maintenance and Retention Guide Lines. Below are recommendations and suggestions from SLA.

1. Form of Record.

It is recommended that records for periodicals be kept by title. Two possibilities seem workable:

- a) A copy of the Interlibrary Loan Request or Photocopy Form, a copy of the teletype request, etc. could be kept; or
- b) A card could be set up for each title requested containing essential information including whatever is necessary to link this card to the library's file of request forms.

Note: A library may choose one of these methods or develop its own. Whatever is done, it is essential that the library keep a file of requests for these materials, that the file be accessible by title and that the date of the request be noted.

2. Creation of Record.

a) For periodical materials: Beginning on January 1, 1978, when a request is made for a copy of an article or articles published in a copyrighted periodical within five years prior to the date of the request, the library should either:

- i) Set up a card for the title of that periodical, or 3SELL 17.

- ii) Enter a copy of the request form in a file of forms arranged by title.

If a card is set up, it should include the date of the request and either the name of the requester or the requester's order number so that reference may be made to the complete form if necessary. All

later requests for the same periodical title should be recorded in like manner.

b) For material in any other copyrighted work: Beginning on January 1, 1978, when a request is made for a contribution to a collection or for a small part of any copyrighted work, the library should follow procedures based on those described in Item 2a above. The record may be kept by title or main entry.

3. Use of Record.

a) Making requests: Before requesting a photocopy, the record should be checked. If a library is using the card system and no card exists, one should be prepared. If a card does exist, and the number of previous requests filled complies with the CONTU Guidelines, the date and name of requester will be entered. If a library is using the copy system and the number of previous requests complies with the CONTU Guidelines, the request will be made and a copy filed.

b) Receiving material: When a request is filled, this should be noted on the card or copy. If a request is not filled, a line should be drawn through the entry on the card or the copy will be marked "not filled."

4. Contingencies.

When a request is made for loan of material rather than a copy, but the supplying library sends a photocopy, a record should be made either by marking the appropriate card or by filing a copy of the form, at the time when the material is received.

5. Retention of Records.

a) Items in this file of cards or copies of forms must be kept until the end of the third complete calendar year after the end of the calendar year in which a request has been made. Thus, for a request made on any date in 1978, the record must be retained until 31 December 1981.

b) If a library uses the card method, copies of the form on which an interlibrary loan has been requested must also be kept, in whatever order the library wishes, until the end of the third complete calendar year after the end of the calendar year in which a request is made.

c) Information contained in the records should be summarized before records are discarded after the mandated retention period. The summary may be useful for the review five-years after the effective date of the new law as mandated by Subsection 108(i) of the copyright law, as well as for internal management purposes. Suggestions for the form of the five-year review summary will be made at a later time.

We worry here about the concept "Library System." There is the University Library and four autonomous libraries -- Law, Medicine, Music and Speed Scientific School. For purposes of counting inter-library loan requests, are we one library or five? For simplicity of record keeping and greater availability of materials for our users, we are considering ourselves as five libraries.

We have taken the position that if one library uses up its five requests, it can not forward the sixth request to another library on campus. This raises the problem of an undergraduate professor requesting, for example a modern language periodical, from the Law Library to have it borrow it for him. Probably, we will deny his request.

Librarians are not accountable for what happens at the unsupervised photocopy machine, as long as you have the "NOTICE" posted there. I have reproduced it (see 3 SELL 18e) at the size the Copyright Office requires, to save you the time, energy and expense of having it enlarged from the Federal Register copy. I do not understand why the Federal Register did not set this notice in 18 point type face and save us all lots of time, energy and dollars. They will publish over 60,000 pages this year. One more page will not bankrupt them.

Our concern is what happens at the supervised photocopy machine. I feel that we must be concerned on two levels -- for whom are we doing the work and what is being photocopied. There should be no problem if the photocopying is done for a member of the law school community. There should be a problem if an attorney requests it. Those words, "Direct or indirect commercial advantage" trouble me. It is to the library's commercial advantage if it is charging fifty cents per copy. It is to the attorney's commercial advantage if he wins a case based upon the photocopies. Oh, to have some clarification of this term.

Also, what is being copied. Reported cases are in the public domain. Almost nobody is careful to avoid photocopying the West Publishing Co.'s key numbers when photocopying a case. Probably, because West puts the key numbers between the case's name and the full decision. Such copying may come within the "Adjunct" exception (s108(h)) of the statute. I hope West will not sue us.

My rule of thumb on photocopying law reviews is to do so for anyone if the law review is published by a law school or non-profit organization. Under the theory of reciprocity, I believe that the law review will want to have its law library borrow and photocopy items for it, so it will be liberal as to photocopying of its issues by others. Obviously, I may be all wet. Also, this system may not work. As to law reviews published by profit making organizations such as Warren, Gorham, and Lamont, I will not photocopy for an attorney from one of their legal journals. If the lawyer really wants the article, he-she can buy it from the publisher, directly.

Some theoretical arguments. For photocopying: If the principal (the user) can photocopy it on the unsupervised machine, then the agent (the law library) can do it for him and bill him for its costs. Against photocopying: Knowingly photocopying for a profit making organization is much like criminal facilitation (selling a pistol to someone who tells you he is going to kill "X" with it.)

What does the term "Concerted reproduction" mean? You should discover how much of your staff's time is spent photocopying and billing non-law school people. Do you have printed invoices? Do you charge a fee per copy far in excess of your actual photocopying costs? The Special Libraries Association on this topic, wrote,

" ... In order to determine whether a library must seek copyright clearance, the librarian should explore whether the library's copying is the kind authorized by the law. If it is, no clearance

of any sort is needed.

In approaching the law, relentless literalism is no substitute for good judgment and a basic understanding of the law's intent to balance the rights of creators on the one hand and the public's right to access to information on the other."

To stay up on this entire subject, you should write to the Copyright Office of the Library of Congress, Washington, D.C. 20559 to have your name added to their mailing list of those who automatically receive LC's publications in the area of copyright law.

As January 1st approaches, you should re-read the law and the House and Conference Committee reports. They are partially set out in 1976 U.S. Code Congressional and Administrative News (1977) at 5659 for the House Report 94-1476 and at 5810 for the Conference Committee's Report, House 94-1733. These reports contain the three guidelines (Multiple copies for classroom or teaching use: music; and subsection 108 (g)(2)).

The guidelines modify the statute in many places. For example, s 107 says Fair Use includes " Teaching. (including multiple copies for classroom use.)..." The Guidelines set out certain criteria to follow. See below. I would like to know what they mean by "C. Copying shall not 2. be directed by higher authority."

If a professor can hand out one copy per student, can the Law Library put ten copies of an article on reserve for a class of 150 students?

GUIDELINES

I. Single Copying for Teachers:

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use:

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below; and,
- B. Meets the cumulative effect test as defined below; and,
- C. Each copy includes a notice of copyright.

DEFINITIONS:

Brevity:

- 1. Poetry: (a) A complete poem if less than 250 words and if printed or not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.
- 2. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "1" and "2" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

- 3. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- 4. "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "2" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not

more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

1. The copying is at the instance and inspiration of the individual teacher, and
2. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

1. The copying of the material is for only one course in the school in which the copies are made.
2. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
3. There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "2" and "3" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

SOURCE: LC's Circular R21 "Copyright and the Librarian," pages 3 and 4.

CONCLUSION:

Obviously, this issue of the SOUTH EASTERN LAW LIBRARIAN is only a brief look at the new copyright law. You should read the law itself, the Congressional reports, the materials produced by other library organizations, law review comments, etc. Consult with your organization's legal counsel to make sure all units of your organization have the same policy, then exercise good judgment based upon what you have learned.

Probably, the whole problem will be solved on a national basis by a U.S. Supreme Court decision or decisions or by Congressional amendments to the 1976 Act.

Perhaps the best solution is to do what is clearly required by the Law, (the notices) use common sense and wait.

Dont lose sight of the important things in life,

HAVE A MERRY CHRISTMAS AND A HAPPY NEW YEAR!



III. Prohibitions as to I. and II. Above

Notwithstanding any of the above, the following shall be prohibited:

- A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or are reproduced and used separately.
- B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
- C. Copying shall not:
 1. substitute for the purchase of books, publisher's reprints or periodicals;
 2. be directed by higher authority;
 3. be repeated with respect to the same item by the same teacher from term to term.
- D. No charge shall be made to the student beyond the actual cost of the photocopying.

NOTICE

WARNING CONCERNING

COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

#2 PATTERSON

The Copyright Act of 1976 as It Affects Colleges and Universities

I. Introduction.

A. The Copyright Act of 1976, P.L. 94-553, 17 U.S.C. §§101, et seq., is the 4th major revision of the copyright law since the enactment of the first federal copyright act in 1790. The earlier revisions were enacted in 1831, 1870, and 1909.

B. The inexorable trend has been an increase in the copyright monopoly in terms of the subject matter and the scope of copyright.

1. In 1790, copyright was limited to books, maps, and charts, with the right to print, reprint, publish, and vend the copyrighted work, and was limited to two terms of 14 years.
2. By 1909, the subject matter of copyright included books, periodicals, dramas, musical compositions, maps, works of art, scientific and technical drawings, photographs, and prints. The general rights given were to print, reprint, publish, copy, and vend the copyrighted work. The period of copyright protection was expanded to two terms of twenty-eight years each. In 1912, motion pictures, and in 1971, sound recordings, were given protection.

C. The 1976 act continues the trend.

1. Under the new statute which becomes effective January 1, 1978, copyright exists in original works of authorship

fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and photographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings. §102(a).

2. The term of copyright is the life of the author plus fifty years. §302(a), or in the case of a work for hire, seventy-five years from date of publication, or 100 years from date of creation, whichever expires first. §302(c).
3. The major danger as I see it is the act's in terrorem effect. College and University officials will be inclined to construe the act most favorably to the copyright proprietor, and will tend to give in whenever there is a question. I suggest that it would be a serious mistake to do this. The statute, being a compromise, is ambiguous, and it does not always say what it means, and it does not always mean what it says, and how users react will be a major factor in determining how the courts interpret the act.

II. My remarks this morning will be directed principally to three sections: §107, fair use; §108, reproductions by libraries and archives, and,

as related to the classroom, §110, exemption of certain performances and displays. I shall also discuss the provisions of the statute concerning works of the U. S. Government as an illustration of the care which you should exercise in analyzing the statute.

A. Before going to the specific provisions, I should like to make some general observations about copyright generally, that may be helpful as you consider the new act.

B. First, keep in mind that Congress derives its power to enact copyright legislation from the copyright clause.

1. Congress shall have power to promote the progress of science [and useful arts] by securing for limited times to authors [and inventors] the exclusive right to their [respective] writings [and discoveries].

2. The underlying policy of copyright is the promotion of knowledge.

C. Secondly, copyright is traditionally viewed as a property concept; in fact, copyright law is a law of unfair competition.

1. Copyright is in fact the law of communication.

2. Copyright is a series of rights to which a given work is subject.

3. These rights vary according to the nature of the work and the use of the work, but they are designed to protect the profit to be gained from the communication of the work.

4. Section 106 states the exclusive right of the copyright owner:

- (a) to reproduce in copies or phonorecords;
- (b) to prepare derivative works;
- (c) to distribute copies or phonorecords;
- (d) to perform the work;
- (e) to display the work.

5. The effect of these rights is to give the copyright owner the power to control access to a given work, i.e. to determine who may acquire, view or hear the work and under what conditions. In short, the statute gives the copyright owner the power of censorship.
6. The rebuttal to the charge of censorship is that copyright protects the rights of the author who created the work. This would be a good rebuttal if it were so. But in fact the statute treats an employer for hire as an author. This means, for example, that ABC, NBC, and CBS, or Time, Inc., are authors for the purpose of the statute. To give the individual author the right to control access to his novel is one thing; to give communications corporations the right to control access to the materials they disseminate is another.
- D. When copyright is analyzed in this way, it becomes clear that copyright is not only a monopoly, it is a monopoly which may conflict with First Amendment rights. Assuming, as I do, that the essence of the First Amendment is the right of access.
1. The history of copyright demonstrates that the potential conflict is real, because copyright in England in the 16th and 17th centuries was used as an instrument of censorship.

2. The 1976 act makes this potential conflict between copyright and First Amendment rights more real than prior acts for several reasons.
3. Under the 1909 act, copyright came into existence only when a work was published, thus assuring public access.
4. Under the 1976 act, copyright comes into existence when a work is created, i.e. fixed in tangible form. No publication is necessary.
5. Modern means of communication, e.g. television, thus give the copyright owner complete and absolute control of access.

- E. While I have not seen any expression of concern about this problem, I believe the First Amendment is the main reason the statute is so complex. The five rights of the copyright owner in § 106 are said to be exclusive, but they are not. After § 106, §§ 107-112 state limitations on exclusive rights, and §§ 113-118 state the scope of exclusive rights.
- F. There are three basic methods used in the 1976 statute to limit the copyright owner's right to control access: compulsory licenses, detailed regulations, as in §§ 108 and 110, and fair use in § 107. I shall not discuss the compulsory licenses, which have only a tangential relevance to universities and colleges, but they are for CATV, § 111, for making phonorecord, § 115, and performing musical compositions on jukeboxes. §116.

III. Fair Use

A. The problem with fair use is that no one knows what it means.

1. It is a judicially created doctrine, originally developed to protect the copyright owner against competitors, not individual users.
2. The early copyright statutes in this country limited the rights of the copyright owner to the right to print, reprint, publish, and vend. The limited scope of rights meant that fair use remained an undeveloped concept.
3. The 1909 act gave the copyright proprietor the right to print, reprint, publish, copy, and vend.
4. The courts should have interpreted this language to mean to print and vend, to reprint and vend, to copy and vend. But they did not.
5. The effect was to enlarge the copyright owner's monopoly. In theory, the copyright owner could preclude anyone from any copying of the work, even an individual user for private purposes.
6. Consequently, the courts developed the doctrine of fair use as a safety valve against the absolute monopoly of copyright.
7. With the coming of Xerox, the problem took on a different dimension. Publishers have not been so concerned that Xeroxing hurt their profit as they

have been concerned about using copyright to create a new profit. The goal is to create compulsory licensing for photocopying, a point to which I shall return.

B. The fair use provision is very important, and should be carefully analyzed.

1. Fair use is not an infringement of copyright.
2. Contrast this with the notion that fair use is an infringement that is excused.
3. A good argument can be made that under the language of the statute that fair use is not a defense, as it has been traditionally viewed, but the absence of fair use is an element of plaintiff's case. The burden of proof can be important.
4. This notion is consistent with the fact that the statute specifically states purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, for which one can use a copyrighted work.
5. Attorneys for colleges and universities should take the position that fair use is a right, and a plaintiff must prove that conduct in question exceeds the right of a defendant.
6. How can you tell when you exceed that right?
 - (a) Purpose and character of use.
 - (b) Nature of the copyrighted work.
 - (c) Amount used in relation to whole work.
 - (d) Effect of use upon potential market for or value of copyrighted work.

7. These criteria are more meaningful if you view the problem as one of unfair competition, i.e. that fair use is a doctrine to insure the individual user proper access, but is not available to a competitor who seeks to use the work commercially.
 8. How you interpret § 107 in advising the university or college can be very important, apart from the court's interpretation, because of § 504(c)(2) which provides that a court shall remit damages when an infringer who is an employee or agent of a nonprofit educational institution had reasonable grounds for believing the use was a fair use.
- C. I have not mentioned the so-called agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions, which is included in the House Report on the bill. I do not think it binding in any sense of the word, and I hope that you will not consider it binding. What is or is not fair use is for the courts, not for the publishers, to say.

IV. Reproductions by Libraries and Archives, § 108

- A. This is the photocopying provision that raises serious questions of constitutionality, because it is an attempt to increase the copyright proprietor's control of access.
 1. The ultimate goal of the publishers is to obtain a compulsory license for use of copyrighted material in libraries.
 2. This goal is inconsistent with the promotion of knowledge, the basic justification of copyright.

3. The copyright owners are not seeking to protect,
but to create a profit.
- B. The provisions of the section are extremely complex.
 1. Library can make one copy or phonorecord if:
 - (a) no purpose of commercial advantage;
 - (b) the library is a public library or available
to other researchers other than those
affiliated with the institution;
 - (c) the copy includes a notice of copyright.
 2. Right applies to unpublished work for preservation
or security or for deposit for research in another
library.
 3. Right applies to published work for replacement if
replacement not available at fair price.
 4. Right available for interlibrary loan -- if (a) copy
becomes property of user for private study; and
(b) library displays warning of copyright.
 5. Right applies to entire work for interlibrary loan
if work unavailable at a fair price, and if (a) copy
becomes property of user for private study; (b) no
warning about copyright displayed.
 6. Nothing imposes liability upon library or employees
if warning of copyright displayed; or excuses a person
using equipment from liability if use exceeds fair
use; audiovisual news exception; or affects right of
fair use or any contractual obligations assumed at the
time library obtains copy for its collection.

7. This last point may be a sleeper. It is clearly intended to apply only to unpublished, not to a published work, but some publishers may attempt to use it.
8. Right of reproduction and distribution does not extend to concerted reproduction of multiple copies of same material, or to systematic reproduction of single or multiple copies.
9. Rights of reproduction do not apply to musical work, pictorial, graphic or sculptural work, or motion pictures or other audiovisual work, except audiovisual work dealing with news, and unpublished work for security, or to replace a published work, or to pictorial or graphic works published as illustrations or similar adjunct to published works.
10. Five years after date of act and at five-year intervals, Register of Copyright to report to Congress.

C. How does § 108 relate to § 107, fair use?

1. Section 108 applies to works in non-profit libraries.
2. Directed to limiting the service that a library as a center of access to learning can provide its patrons.
3. Notice that § 108 applies to library and employees; there is no liability on library for unsupervised use of reproducing equipment on the premises, provided the equipment displays a notice that the making of a copy may be subject to copyright law; but an individual

who uses the equipment to make copies in excess of fair use is liable for infringement.

4. Fair use overrides § 108, and the risk of liability for university and college libraries is minimal. The major effect of § 108, and its major intended effect, is to frighten librarians into acting as policemen for the publishers.

V. Exemption of Certain Performances and Displays, Section 110

- A. Section 110 is relevant to universities and colleges because it contains an exemption for classroom teaching for certain performances and displays. The exemption is necessary because of the right to perform or display a work publicly, and to perform or display a work publicly is to perform or display it at any place where a substantial number of persons outside of the family or its social acquaintances is gathered.

1. The performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a non-profit educational institution in a classroom is not an infringement of copyright.
2. The performance of a non-dramatic literary or musical work or display of a work, by or in the course of a transmission is not an infringement of copyright if:

- (a) The performance or display is a regular part of instructional activities of a governmental body or a nonprofit educational institution, and performance or display is

related to teaching the content of the transmission; and

- (b) the transmission is made primarily for classrooms, or reception by persons whose disabilities prevent attendance in classroom, or reception by officers or employees of governmental bodies as a part of their official duties of employment.

3. The performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature in the course of services at a place of worship or other religious assembly.

4. There are other exemptions, e.g. charitable performances, which are not particularly relevant.

B. This is a troublesome section, because it demonstrates the expanded scope of the copyright monopoly, and the chilling effect it may have on teachers in the classroom is frightening.

- 1. The 1909 act gave the right to perform music publicly for profit.
- 2. The 1976 act gives the right to perform publicly literary, musical, dramatic, choreographic works, pantomimes, motion pictures and other audiovisual works.
- 3. To perform a work means to recite, render, play, dance, or act it, either directly or by means of any device or process, or in the case of a motion picture or other audiovisual work, to show its images.

VI. U. S. Government Works.

A. One point to keep in mind is that works of the U. S. Government are not copyrighted under the new act.

- 1. Section 101 defines a work of the U. S. Government as one prepared by an officer or employee of the U. S. Government as a part of that person's official duties.**
- 2. Section 105 provides that copyright protection is not available for a work of the U.S. Government.**
- 3. Section 403 provides that whenever a work is published consisting predominantly of one or more works of the U. S. Government, the notice of copyright shall include a statement identifying those portions embodying any work or works protected under this title.**

B. The most important material within this exception is law, i.e. judicial opinions, statutes, administrative regulations, and so forth.

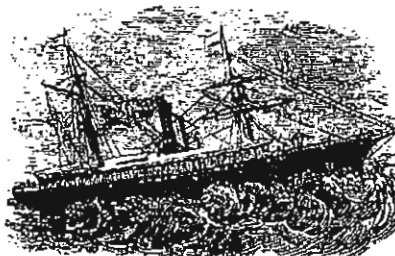
C. The big issue for colleges and universities is material prepared under a government grant or contract is a work of the U.S. Government.

- 1. The definition of a work of the U.S. Government indicates that it is not.**
- 2. The problem is one you should be cognizant of.**

VII. Most persons do not realize the extent to which the copyright monopoly has expanded.

1. Under the 1909 act, copyright required publication with notice.
To be protected, material had to be published with notice.
Material published without notice went into the public domain.
2. From the 1976 act, copyright exists from the moment of creation.
Registration is necessary for an infringement action, but after
registration, apparently an action can be brought for infringement
prior to registration.
3. The effect is to require the individual user to obtain the
permission of the copyright owner, and thus to give the copy-
right owner complete control of access.
4. It is such provisions that make section 107, fair use, so
important.
5. I think that the next few years, when courts will begin to
interpret the new statute, are vitally important. How the
statute is presented to the courts in the first few cases will
determine what effect it is going to have on educational
institutions. My own opinion is that colleges and universities
should not only be willing to litigate, but should invite
litigation in a proper case, some of the issues the statute raises.
In doing so, you may do a great service for the promotion of
knowledge.

L. Ray Patterson
Emory School of Law
NACUA Conference
June 23, 1977



#3

NORTH

AN INTERIM LOOK AT THE COPYRIGHT REVISION ACT OF 1976

William D. North

After a gestation period of nearly twenty years and a protracted period of hard labor, Congress gave birth to the Copyright Revision Act of 1976. Although signed into law on October 19, 1976, the Act will not become generally effective until January 1, 1978. Hence, it will be some time before we know whether the Congress has produced a monster which will subordinate the public's urgent need for informational access in order to satisfy the copyright proprietors' insatiable desire for protection or whether it produced a realistic, workable accommodation between producers and users of copyrighted materials. Regrettably, congenital defects in legislation, like those in babies, often show up well after the date of birth.

Yet the library community cannot afford to assume a "wait and see" attitude in respect of the Copyright Revision Act. Libraries and librarians must be prepared on January 1, 1978 to cope with the significant new obligations, responsibilities and burdens which the Revision Act will impose on them and their patrons. Since this will involve fundamental changes in many traditional library policies, practices and procedures, it is not too early for libraries to commence their preparation.

It is not the purpose of this discussion to recapitulate the victories and losses realized by the library and academic communities in the Revision Act. Now is not the time to consider "what might have been." Rather, it is the time to understand what is. Where the Revision Act has given answers, they must be recognized. Where the Act has created issues, those issues must be identified and resolved.

Nor is it the purpose of the following discussion to review all of the implications of the Revision Act for libraries, librarians, and those they serve. The scope of this discussion is focused on the impact of Section 108 of the Act which concerns those "Limitations on Exclusive Rights" involving "reproduction by libraries and archives" of those types of copyrighted materials to which Section 108 is applicable.

Section 108 is extraordinarily significant in the history of the copyright law and the revision effort of the last two decades. Section 108 represents an unequivocal, categorical statutory recognition of the right of libraries to make photocopies of copyrighted works for themselves and their patrons under certain circumstances and conditions.

The importance of "statutory" recognition of this right of library photocopying cannot and must not be underestimated. Prior to the Revision Act, library photocopying had been justified exclusively on the grounds that it was "fair use." The problem with this justification, however, was that its availability in any particular case could only be determined after protracted and costly litigation.

As a consequence, prior to the Revision Act the mere threat of a copyright infringement suit was often sufficient to deter libraries from exercising their legitimate rights to photocopy.

Early versions of the Copyright Revision Bill would have required libraries and librarians to defend the legality of all copies made by them under the doctrine of fair use. The American Library Association rejected this approach insisting that the interests of research and scholarship required not merely the safeguards of the "fair use doctrine," but, in addition, a clear and unequivocal statutory exemption for those types of library photocopying in which libraries must engage to maintain the integrity of their collections and assure access to library resources.

Section 108 is the product of this demand. It imposes a significant limitation on the exclusive rights of copyright proprietors and describes a considerable range of photocopying activities in which libraries can engage without having to invoke the doctrine of fair use. Thus, libraries have all of the rights granted by Section 108 as well as all of the rights they are able to establish under the "fair use" concept of Section 107 through litigation.

The concern of this discussion has been focused on the photocopying rights of libraries under Section 108 because these are the rights which most librarians will rely on in their photocopying activity. To the extent such activities can be brought within Section 108, the risks and costs of litigation inherent in reliance on the rights of "fair use" granted by Section 107 are avoided.

This discussion of Section 108 has been organized into essentially two parts:

The first part consists of a summary review of Section 108 subsection by subsection to identify the reproduction rights granted and the conditions and limitations to which such rights are subject.

The second part consists of a program of action which libraries might consider in preparing to bring their reproduction policies and procedures into compliance with the Revision Act when it becomes generally effective.

PART I

SUMMARY REVIEW OF SECTION 108

The Significance of Section 108

The significance of Section 108 of the Copyright Revision Act of 1976 rests in the fact that it specifically authorizes libraries and archives to reproduce copyrighted works on certain terms and conditions without permission of the copyright proprietor or payment of royalty. Section 108, thus, is the first line in the defense of library photocopying practices and policies. Where such practices and policies can be made to satisfy the terms and conditions of Section 108, it is unnecessary to undertake the far more difficult and costly task of defending them under the ephemeral concept of "fair use" recognized by Section 107. Considering that the cost of a "fair use" defense to a charge of copyright infringement will inevitably exceed the maximum statutory damages allowed, there are practical limitations on its use to defend routine photocopying activities.

Subsection 108(a) - Scope.

Subsection 108(a) of the Revision Act defines the conditions under which the rights of reproduction it grants are available to libraries and archives. These conditions are three in number;

First, the reproduction must be without purpose of direct or indirect commercial advantage;

Second, the collections of the library or archive making the reproduction must be open to the public or available to researchers unaffiliated with the institution of which the library or archive is a part; and

Third, the reproduction must include a notice of copyright.

The critical questions raised by Subsection 108(a) are the following:

First, when will a reproduction be deemed to have been made for direct or indirect commercial advantage?

Second, must the libraries of industrial, profit making, or proprietary enterprises really open up their collections to the public or to outside researchers in order to enjoy the rights afforded by Section 108?

With respect to the first question, it seems clear that the reproductions of non-profit public or educational libraries and archives will not be deemed to be for commercial advantage. On the other hand, it is clear that the libraries and archives of for-profit enterprises will be deemed to be making reproductions for commercial advantage if they

- "(a) use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or
- (b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is 'systematic' in the sense of deliberately substituting photocopy for subscription or purchase; or
- (c) use 'interlibrary loan' arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscriptions or purchase of material needed by employees in their work."

According to the Report of the House Committee, the only reproduction by a library or archive of a for-profit enterprise which will not be deemed for commercial advantage is the

"[I]solated, spontaneous making of single photocopies . . . without any systematic effort to substitute photocopying for subscriptions or purchases. . . ."*

*The distinction between non-profit and for-profit libraries and archives in respect of their rights of reproduction under Section 108 may be more illusory than real, notwithstanding the recognition of this distinction by the Congress. This is because substantially the same forms of reproduction which are prohibited to the libraries and archives of for-profit enterprises as involving "commercial advantage" are prohibited to non-profit libraries and archives as involving "systematic reproduction" prohibited by Subsection 108(g)(2).

With respect to the question of access to the collections of libraries and archives of for-profit enterprises, the answer seems to be that access by the public or outside researchers is, in fact, a condition precedent to enjoyment of the rights of reproduction granted by Section 108. This condition is stated explicitly in clause (2) of Subsection 108(a). Further, the Conference Committee Report in its discussion of photocopying by libraries and archives of for-profit organizations stressed that they could "come within the scope of Section 108" only "[A]s long as the library or archives meets the criteria in Subsection 108(a). . .," one of which criteria is the requirement of public or outside researcher access.

Subsection 108(b) - Archival Reproduction.

Subsection 108(b) specifically authorizes the reproduction of an unpublished work but only for the purposes of preservation or security or for deposit for research use in another library or archives satisfying the criteria of Subsection 108(a). It is significant to note three critical limitations on the rights granted by this section:

First, the rights extend only to unpublished works;

Second, the library or archives with which the reproduction is deposited may not, itself, reproduce the work; and

Third, the reproduction may not be made in "machine readable" form for storage in any information system, but rather must be made by microfilm or electrostatic process.

Subsection 108(c) - Reproduction for Replacement.

Subsection 108(c) permits libraries or archives within the scope of Section 108 to reproduce a published work in its collection that is damaged, deteriorating, lost or stolen but only if it has been first determined that "after a reasonable effort . . . an unused replacement cannot be obtained at a fair price."

Manifestly, the exercise of this right of reproduction is severely limited and the limitations imposed have not, to date, been clearly defined. Thus, libraries are required to make a "reasonable effort" to find an unused replacement. What will be deemed a "reasonable effort", however, is not specified. The most helpful advice Congress was willing to give on this issue was that "a reasonable investigation

(effort) . . . will vary according to the circumstances of a particular situation" but that

"It will always require recourse to commonly known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration) or an authorized reproducing service."

Nor did Congress attempt to define what would be deemed a "fair price" or to suggest how it should be determined. As to these issues, even the Committee Reports are totally silent.

Subsection 108(d) - Reproduction of Articles and Small Excerpts.

Subsection 108(d) recognizes the right of a library or archives to make copies of copyrighted articles from journals or periodicals and to use such copies in lieu of the original in "interlibrary loan" transactions. The right of reproduction under Subsection 108(d) is subject to the following limitations:

First, the copy must be requested by a patron or by another library or archives;

Second, the copy must become the property of the patron requesting it, or in the case of an interlibrary loan request, of the patron of the requesting library;

Third, no more than one copy of an article may be reproduced;

Fourth, the reproducing library or archives must have no notice that the copy will be used for any purpose other than private study, scholarship or research; and

Fifth, the reproducing library must prominently display a warning in the form prescribed by the Register of Copyrights at the place where it accepts orders for copies and on the order form itself.

Further limiting the reproduction rights granted by Subsection 108(d) is the prohibition of Subsection 108(g), discussed subsequently herein, against the "systematic reproduction or distribution of single or multiple copies or phonorecords of materials described in Subsection 108(d)." [Emphasis supplied]

Subsection 108(e) - Reproduction of Out-of-Print Works.

Subsection 108(e) authorizes a library or archives to reproduce an entire copy of an out-of-print work at the request of a user whether received directly or through interlibrary loan but only on the same conditions that Subsection 108(c) authorizes the reproduction of a work which is damaged, lost or stolen, and only if all of the conditions specified for the making of copies under Subsection 108(d) are also satisfied.

Subsection 108(f) - Miscellaneous rights of and limitations on reproductions.

Subsection 108(f) provides various rights of reproduction and limitations on rights otherwise granted by Section 108. Thus, clause (1) exempts a library or archives within the scope of subsection 108(a) from liability for any infringements arising from the "unsupervised use of reproducing equipment on the premises," provided such equipment displays a proper notice to users that the making of a copy may be subject to the copyright law. Clause (1) does not apply, however, to libraries and archives of for-profit organizations which install reproducing equipment on premises for unsupervised use by organization personnel. This appears to be the case, whether or not such library or archives of the for-profit organization is open to the public or outside researchers.

Clause (2) of Subsection 108(f) is merely a reminder that the fact that a library or archives may not be liable for an infringement of copyright arising from the use of unsupervised reproducing equipment does not excuse the person making the copy from liability.

Clause (3) of Subsection 108(f) authorizes a library or archives within the scope of Subsection 108(a) to make a limited number of copies and excerpts of audio visual news programs. The House Committee Report makes clear that this right of reproduction does not extend to documentary, magazine or public affairs broadcasts but is rather intended to be limited to "daily newscasts of the national television networks." The Report further limits the distribution of the reproductions to scholars and researchers for use in research and not for performance, sale, or further copying.

Clause (4) of Subsection 108(f) reaffirms that Section 108 is not intended as a limitation on the right of fair use granted by Section 107. Clause (4) also provides, however, that any right of reproduction granted by Section 108 may be abrogated by express contractual agreement between the copyright proprietor and the library or archives. This means that, notwithstanding Section 108, a copyright proprietor can absolutely prohibit all or any particular form of re-

production of his work (subject only to fair use rights under Section 107) if a library or archives is willing to purchase the work on those terms and if such prohibition is expressly stated.

Subsection 108(g) - Prohibition of multiple or systematic reproduction.

Subsection 108(g) prohibits libraries and archives from claiming the right under Section 108 to reproduce or distribute multiple copies of a copyrighted work and from engaging in systematic reproduction or distribution of copyrighted materials which are the subject of Subsection 108(d); i.e. articles from journals and periodicals. Subsection 108(g) means that if libraries or archives are to make multiple copies of the same copyrighted materials for aggregate use by one or more individuals or for separate use by individual members of a group, they must seek their authority under Section 107 or some provision of the Revision Act other than Section 108.*

Subsection 108(g) also seeks to prohibit what it describes as "systematic" reproduction of even single copies of copyrighted materials where such reproduction has the effect of substituting for subscription or purchase. The manifest objective of this provision is to prevent a library or archives from obtaining copies of a needed periodical or journal through interlibrary loan or other arrangement from the collection of another library instead of purchasing the work or a subscription to it.

Obviously, a total ban on any form of systematic reproduction would have effectively halted substantially all inter-library lending of journal articles and substantially impaired access to library resources. In an effort to minimize this result while at the same time affording protection from alleged interlibrary loan abuse, the Congress adopted certain Guidelines recommended to it by the National Commission on New Technological Uses of Copyrighted Materials (CONTU) relating to the interpretation of Section 108(g)(2).

Under the Guidelines as adopted by the Conference Committee, the single copy reproductions of journal or

*For example, the Congress has recognized the reproduction of multiple copies of materials in some face to face teaching situations as permissible under Section 107 under Guidelines for Classroom Copying in Not-For-Profit Educational Institutions developed by agreement between authors, publishers and educators.

periodical articles are deemed to be in ". . . such aggregate quantities as to substitute for a subscription to or purchase of a work . . ." if:

(a) a library or archives requests in any calendar year six or more copies of any article or articles in any given periodical (as opposed to a given issue of the periodical) published within five years of the date of the request; or

(b) a library or archives requests six or more copies or phonorecords of or from a given work other than periodical articles, but including fiction and poetry, within any calendar year during the entire period such work is protected by copyright.

In essence the Guidelines provide that if a library or archives needs more than five copies of articles from issues of a periodical less than five years old in any calendar year, then it needs to have that periodical in its collection. Likewise, if a library seeks to copy other materials six or more times in a calendar year it needs to purchase such materials rather than rely on outside sources.

Subsection 108(h) - Exclusion of certain forms of copyrighted works.

Subsection 108(h) further limits the rights of reproduction granted by Section 108 by excluding reproduction of musical works, pictorial, graphic or sculptural works, motion pictures, and audio visual works not dealing with news. An exception is made, however, for the reproduction of pictorial or graphic works which are reproduced as an incident or adjunct to the reproduction of periodicals or other works which may be reproduced under Subsection 108 (d) and (e). The essential effect, if not the entire purpose of Subsection 108(h), is to restrict reproduction under Section 108 to copyrighted books, periodicals, journals and phonorecords.

PART II

PROGRAM OF ACTION

The Need for a Program.

The need to develop a program of action to prepare to comply with the Copyright Revision Act is based on three basic perceptions.

First, the degree of risk and liability posed by non-compliance;

Second, the extent to which library and archival reproduction practices and policies are at variance with those sanctioned by the Revision Act.

Third, the potential complexity of making the economic and operational adjustments required for compliance.

(A) Degree of Risk Posed by Non-Compliance.

By particularizing in Section 108 the rights of reproduction of copyrighted materials by libraries and archives, the Copyright Revision Act may have substantially increased the risks to libraries and of archives reproducing copyrighted works. Heretofore, almost any form of library photocopying, short of that intended for sale or resale, was arguably within the scope of the "fair use" doctrine. When the last general Copyright Act was enacted in 1909, the science of reprography was in its infancy to the extent it existed at all. As a consequence, the 1909 Act did not attempt to cope with the problems reprography has created for copyright proprietors and those needing immediate access to information. It was not until 1968, in the case of The Williams and Wilkins Company v. United States, that the legal right of libraries to photocopy copyrighted works was even challenged by a copyright proprietor, albeit unsuccessfully.

While Subsection 108(f) preserves for libraries and archives any rights of "fair use" they may persuade a court to recognize under Section 107, "unauthorized reproductions" of copyrighted materials have been more clearly identified by the Revision Act thereby enhancing the ability of a copyright proprietor to identify potential infringements and to recover damages for them. Thus, the Guidelines adopted by Congress to aid in the definition of the right of reproduction granted by Subsection 108(d) (photocopying of journal articles), condition the making of even one copy on the receipt of a written request, and on the maintenance of such requests for three years. This means that the absence of required documentation, whether it be that required by the Guidelines or other provision of Section 108, can constitute a prima facie, and possibly irrebutable, case of infringement.

Then too there is the fact that the Copyright Revision Act now authorizes the copyright proprietor to elect to recover statutory damages at any time prior to final judgment. The statutory damages to which the copyright proprietor is entitled

range from a minimum of \$250.00 to a maximum of \$10,000 per infringement. A non-profit library or archives can escape payment of any statutory damages if it can persuade the court that it reasonably believed the reproduction was a "fair use. However, the library or archives of a for profit organization can, at most, obtain a reduction to \$100.00.

Whatever the exposure of libraries and archives to statutory damages, the real risk to them of non-compliance with the Revision Act rests in costs of defending alleged infringements resulting from reproduction unauthorized by Section 108 or undocumented as being authorized. It cannot be assumed that copyright proprietors will ignore the legal safeguards against library reproduction they have worked for twenty years to secure. It, therefore, must be assumed that they will cause infringement suits to be filed against libraries and archives. The ready availability of "contingent fee" lawyers suggests that the initiation of such suits could be "cost efficient" from the standpoint of the copyright proprietors, especially if the primary objective is to inhibit library photocopying as opposed to recovering damages.

Obviously, if any suit is filed against a library or archives for any reproduction which is arguably unauthorized by Section 108, the costs of defense will inevitably exceed the probable statutory damages, if any, which may be assessed. This cost/liability imbalance will in turn create an irresistible pressure on the library for settlement for any amount less than the cost of defense or maximum statutory liability.

It is the cost of litigation combined with the increased probability of suits against libraries which should make the risks of non-compliance with the Pension Act unacceptable to every library and archives which engages in the reproduction of copyrighted works.

(B) Extent of Variance of Reproduction Policies from those Authorized.

If a library or archives engages in any reproduction of copyrighted material or participates in interlibrary loan transactions it is probably, if not absolutely certain, that some library practices and procedures will be at variance with those authorized by Section 108. The extent of the variance will depend on a variety of factors including the size and nature of the library collection, the clientele of the library and the extent to which the library utilizes copies in lieu of loaning originals.

The greater the variance of the reproduction policies and practices from those authorized by Section 108, the greater the risks of litigation and liability and hence the greater the need for a comprehensive compliance program.

(C) Complexity of making adjustments required for compliance.

Once it is determined that the risks of non-compliance are unacceptable and that certain reproduction practices are at variance with those authorized, consideration must still be given to the economic and operational adjustments which must be made to achieve compliance. Depending on the library or archives, these adjustments can range from simple to very complex. Factors which will affect the nature and type of adjustments required will be, for example,

(1) Considerations of budget--the extent to which additional subscriptions to periodicals and other works must be purchased.

(2) Consideration of space--the extent to which reproduction functions can be avoided by installing unsupervised machines on premises.

(3) Considerations of recordkeeping--the extent to which the library can absorb the additional recordkeeping obligations imposed.

(4) Considerations of personnel and training--the number of library employees involved in reproduction activities and the nature of their functions.

In all probability the most serious problem libraries and archives will encounter in making the adjustments required for compliance with the Revision Act will be with their patrons and with their governing bodies. For this reason too the development of a Program of Action for compliance appears essential if only for its educational value.

GUIDELINES TO THE DEVELOPMENT OF A
PROGRAM OF ACTION

While Programs of Action for compliance with the Revision Act will vary from library to library and from archives to archives depending on the perceptions of need

outlined above, there are certain guidelines which may be helpful in the development of any program.

Guideline #1. The Program should be developed jointly with representatives of the organization, institution or instrumentality with which the library is affiliated and with representatives of its patrons or clientele.

Unless a Program of Action is developed in accordance with this guideline, the librarian will find himself subjected to intolerable pressures. Any program will probably limit, to some degree, client access to copies or perhaps increase the cost or time involved in obtaining them. This must be understood and accepted by professors, researchers, scholars, and even the public. Likewise, if the alternative to unauthorized reproduction involves a decision to purchase additional subscriptions or copies, it is best if the authority charged with financing such purchases participates in the decision. This means that the library trustees, university administrators or similar authorities should be involved.

The need for joint participation suggests the need for a coordinating committee representing all interests to review and approve the Program of Action developed.

Guideline #2. The Program of Action should be reviewed and approved by legal counsel.

Librarians and archivists dare not, for their own protection, decide for themselves and their institutions the reproduction policies and procedures which they will adopt and follow to comply with the Revision Act. Such decisions involve questions of law and issues of legal liability which require advice of counsel. This is particularly so in view of the significant exposure to statutory damages and legal costs which any unauthorized reproduction may entail.

Moreover, the involvement of legal counsel should assist librarians in establishing the credibility of the Program of Action to patrons, trustees, administrators and others affected by it. A legal opinion as to the consequences of failing to maintain the records of interlibrary loan transactions in the event of litigation is the best way to secure the money and personnel necessary to establish and maintain such records.

Guideline #3. The Program of Action should reconcile control of reproduction with liability.

To the extent possible, copies of copyrighted works by patrons of a not-for-profit library or archives should be accomplished by the patrons on machines which are not supervised or controlled by the library or archives. This is because non-profit libraries are not liable for the infringements of patrons on unsupervised reproduction equipment.

On the other hand, the reproduction of copyrighted works in the collection of a library of a for-profit organization by employees of that organization should, if possible, be centralized in the library to assure proper supervision and control. This is because the for-profit organization is liable for the infringements of its employees on unsupervised equipment and this liability can be limited only by centralized control by the librarian.

Guideline #4. The Program of Action should identify the "commonly known trade sources" and authorized reproducing services from which unused copies will be sought prior to reproduction of the work.

Early identification of such sources and services will permit verification of their acceptability for purposes of compliance. Representatives of copyright proprietors and library interests will doubtless reach general agreement before the effective date on the nature and extent of the search for an unused copy which the Revision Act requires. The investigative procedure must be developed into a routine which can be implemented inexpensively by clerical level employees with minimal risk of error. Clear instructions must exist as to when the investigation is to be initiated and who has the authority to initiate it.

Guideline #5. The Program of Action should involve a comprehensive analysis of interlibrary loan transaction patterns in terms of purchases and subscriptions.

The limits imposed by Subsection 108(g)(2) and the Guidelines interpreting that subsection may well require a substantial revision of purchase and subscription policies. Early review of patterns of interlibrary loan transactions should be undertaken so that the budgetary impact of the Revision Act can be ascertained. Clearly, if a library has been consistently obtaining more than five copies per year of a periodical, it will need to subscribe or "do without." If it must subscribe, it must find new money or alter existing subscription patterns. In either event, advance planning is imperative to avoid service interruptions.

Guideline #6. The Program of Action should identify and provide for all necessary recordkeeping.

The Revision Act requires all interlibrary loan requests to be in writing and maintained for three years. Implicit in the requirement of a "reasonable effort" to find an unused copy of a work at a fair price is the necessity of records evidencing such effort and maintenance of such records. The development of these records, the preparation of necessary forms and the arrangements for their storage and retrieval should be part of the Program of Action so that appropriate training and assignments of responsibility can be accomplished and necessary space facilities and personnel obtained before the Revision Act becomes effective.

Guideline #7. The Program of Action should establish continuing lines of communication with the American Library Association and other associations, committees, and consortia of libraries, archives and media centers.

Before the effective date, many of the issues, questions and problems raised by the Revision Act will be clarified, answered or resolved. Much of this will be accomplished by or through associations or committees of library users, scholars or researchers working with counterparts among the authors, publishers, copyright proprietors, and, of course, the Register of Copyrights.

Establishing lines of communication with such associations and committees will facilitate greatly the development of acceptable procedures and practices. Moreover, through such communications the library or archive may be able to initiate approaches to compliance which will be of general utility and benefit.

Guideline #8. The Program of Action of a not-for-profit library or archives should include a detailed study of the Agreement on Guidelines for Classroom Copying and the Guidelines for Educational Uses of Music recognized by Congressional Conference Committee as the minimum standards of educational fair use under Section 107 with respect to books, periodicals and music.

While the section which basically controls library reproduction of copyrighted works is Section 108 of the Revision Act, libraries affiliated with educational institutions or utilized by teachers or students will doubtless be called upon by teachers or students to provide copies of copyrighted works and to justify such requests as "educational fair use" under Section 107 of the Copyright Revision Bill.

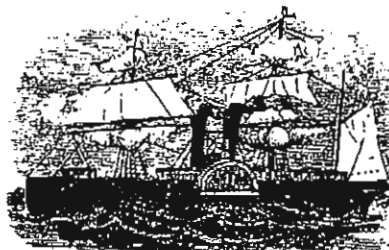
If the library desires to respond to such requests, it should assure that the request satisfies the Guidelines for Classroom Copying and for Educational Uses of Music developed by agreement between the Ad Hoc Committee on Copyright Revision and representatives of authors, publishers and copyright proprietors. These Guidelines have the approval of the Congress and copying in conformance with these Guidelines should not give rise to an actionable infringement. However, reproduction in a form or under circumstances inconsistent with these Guidelines will subject the library making the reproduction to possible suit. For this reason, library personnel who may be called upon to supply teachers or students with materials must know when the request may be safely met and when the request should be referred to legal counsel or other authority for action.

CONCLUSION

When the Copyright Revision Act of 1976 becomes effective on January 1, 1978, libraries must be ready. The statutory damages and other remedies which will be available to copyright proprietors after January 1st make "photocopying as usual" a dangerous, if not a fatal, game for libraries and archives to play. The decision to take a calculated risk that reproductions not authorized by Section 108 will be undiscovered or "excused" under Section 107 is not one which can properly be made by a librarian. It is a decision which can only be made by those who must defend the decision in court and pay the price if it is wrong.

The Congress in its wisdom believes that libraries and their patrons can function effectively with the limited reproduction rights it has granted them. Libraries owe Congress a good faith effort to make the law work and to comply with its letter and spirit.

Only with this effort Congress be able to determine when it must next consider the issue in 1983 whether Section 108 " . . . has achieved the intended statutory balancing of the rights of creators and the needs of users."



#4 DE GENNARO



Drawing by William Wil

Copyright, Resource Sharing, and Hard Times: A View from the Field

by Richard De Gennaro

The following article is the first-place, \$1,000 winner in Round II of American Libraries' Prize Article Competition. It questions the impact of the new copyright law and warns librarians against expecting too much from resource sharing.

Richard De Gennaro is director of the University of Pennsylvania Libraries. He also serves on ALA's White House Conference Planning Committee.

Another prize-winning article is scheduled for publication in November.

Remember the bumper stickers from the Vietnam peace movement that read: SUPPOSE THEY GAVE A WAR AND NOBODY CAME? We could use a slogan like that to help end the long and tedious war of words between publishers and librarians over the fair use and photocopying provisions of the new copyright act scheduled to take effect Jan. 1, 1978. Our line might read: SUPPOSE THEY GAVE A NEW COPYRIGHT ACT AND NOBODY CARED?

That is what may happen once the unfounded fears of publishers and librarians are allayed, after they live with the new law for a time and discover that it changes virtually nothing

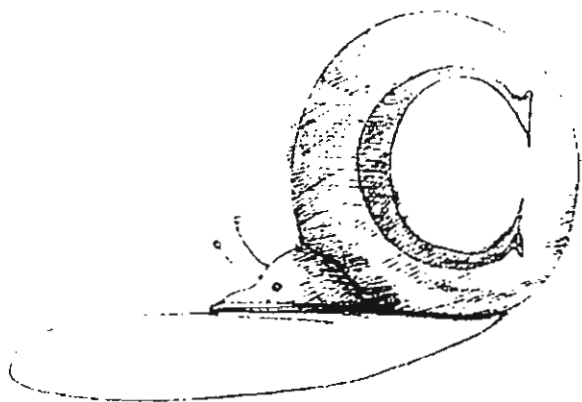
for the vast majority of them. But right now, many librarians are worried sick about complying with the new act. It is complex and unfamiliar and they are afraid of the adverse effects that its provisions, particularly sections 107 and 108(g), may have on their capacity to continue to serve their users in the usual ways. These fears stem in part from the publicity given to early proposed versions of these sections which threatened to seriously limit or even put an end to "fair use" and photocopying in interlibrary loan operations.

But that is behind us now. I believe the final versions of Sections 107 and 108 and the CONTU (National Commission on New Technological Uses of Copyrighted Works) guidelines are fair to authors, publishers, and librarians. I can foresee no real difficulties in complying with them, and I do not believe they will significantly affect the way most libraries serve their readers. Most librarians in public and academic libraries need not try to master the legal intricacies of the new law or make elaborate preparations to implement it. The leaders of library associations and their legal counsel should and will continue to monitor and influence the implementation and administration of the new law; the rest of us should set the copyright issue aside and turn our attention and energies to other more critical matters.

The continued preoccupation of the entire profession with the copyright issue will keep us from coming to grips with such pressing problems as escalating book and journal prices, mounting losses from theft and mutilation, rising personnel costs, and steadily declining budgetary support. In comparison to these and other problems facing us, the impact of the new copyright law on libraries will be relatively slight.

This article has three aims. One is to put the matter of copyright and its possible effects on libraries and publishers into better perspective by offering some data and insights based on practical experience. Another is to urge librarians to exercise freely all the considerable rights the new law grants them. They should not permit themselves to be bullied or bluffed by hard-sell publishers into buying copyright privileges they have always had and which the new law reinforces.

The third is to dispel some of the exaggerated fears and hopes that many publishers and librarians have about the harmful or beneficial effects that increasingly effective interlibrary loan, networking, and other resource sharing mechanisms will have on their finances and operations. Some publishers fear that library resource sharing will seriously diminish their sales, and some librarians hope it will save them from the crunch that is coming. Both views are quite unrealistic.



A special issue of the *ALA Washington Newsletter* on the new copyright law is a readily available and indispensable guide through the complexities of the law.¹ It contains brief highlights of the new law, a librarian's guide to it, recommended preparations for compliance, and excerpts from the law and the Congressional Reports, including the CONTU guidelines. (Also of interest is the May 1977 issue of *American Libraries*, which has two excellent articles—one by librarian Edward G. Holley and the other by attorney Lewis I. Flacks).

Our interest here is not the entire copyright law but the Fair Use provisions and CONTU guidelines.

In Section 107 of the new law, the Fair Use doctrine is given statutory recognition for the first time. Section 108 defines the conditions and limitations under which libraries can make copies for their internal use and for interlibrary loan. Nothing in Section 108 limits a library's right to fair use of copyrighted works; the new law reconfirms most of

the rights librarians had before and even extends some. It prohibits "systematic copying," but this is no problem since few academic or public libraries engage in systematic copying as defined in Section 108(g)(2) and the CONTU guidelines. Librarians are not liable for the unsupervised use of photocopying machines by the public provided certain conditions are observed. This is no change from the existing situation.

The new law changes virtually nothing for most librarians.

The most serious limitation appears not in the law itself but in the CONTU guidelines. They recommend that libraries refrain from copying for interlibrary loan purposes more than five articles a year from the last five years of a periodical title. They also stipulate that libraries must maintain records to document this use, placing responsibility for monitoring it on the requesting library.

What do these limitations really mean in practical terms?

If the University of Pennsylvania Library's experience is in any way typical, then the five-copy limitation will not seriously interfere with present interlibrary loan operations and services to users. Why not? Because interlibrary loan photocopying constitutes a relatively insignificant portion of our total library use to begin with. Once we exclude from our total interlibrary loan photocopying requests those that are from monographs, from journals more than five years old, and from journals to which we subscribe, those that are left will be a fraction of the total—probably on the order of 20 percent. As much as 90–95 percent of this remaining 20 percent will be requests for less than six articles from the same title in a year. Of the 5–10 percent that may exceed the guideline limitation, some will be for articles from journals whose authors and publishers have no interest in collecting royalties and from foreign journals which may not be part of the copy payment system. In the end, a library could simply decline to request more than five copies from any journal which required the payment of royalties.

The record keeping required by the guidelines is a trivial matter and involves only maintaining and analyzing a file of the third copy of a new three-part interlibrary loan form being developed. It could produce some interesting and unexpected consequences by reminding librarians that their subscription decisions should be based more heavily on actual rather than potential use. Librarians may identify some journals whose use will justify a subscription and a great many others whose lack of use will invite cancellation.²

These conclusions are based on statistics gathered at the University of Pennsylvania and on a report of a sampling of photocopy statistics from Cornell.

Applying the CONTU guidelines (no more than five copies in a year from the last five years of any title), the Penn Interlibrary Loan Office (excluding law and medicine) reported the following experience during the year from July 1976 through June 1977.

Articles were requested from 247 different journal titles. Of these, 173, or 70 percent, of the journals had requests for only one article. Five had five requests, two had six requests, and one had seven requests.³

In every case where five or more articles were requested from a single journal, all were requested by one person working on a specific project or an annual review article. A total of four scholars were responsible for all these requests; two of them were working on annual review articles. The authors and publishers of the papers requested for mention in annual review articles should be grateful to have their works cited and not ask for royalties. Indeed, there were only two commercial journals listed which might qualify for royalty payments. The rest were nonprofit, scholarly journals. In any event, this type of occasional use hardly justifies a library subscription.

Last year Penn circulated nearly a half million volumes from its libraries, not including periodical volumes, which

limit may seem low, our experience in interlibrary borrowing (the term covers both requests for loans and for photocopy) at Olin Library has not, for the most, borne this out. We consider a journal for which we have four or more photocopy requests to be "frequently ordered," and all such journals are considered for purchase. To give an example, in the 1975-76 fiscal year, out of a total of 188 different journal titles represented in one group of requests, only 15 involved multiple copies of four or more from one journal. (Of those 15, nine were for more than five articles.)⁵

She remarks that the five-copy limit is likely to be a problem when a single individual or research project requires a number of articles from one journal. This is Penn's view as well. In such cases some restrictions will have to be worked out, and our users will have to be more selective in what they request. In those few cases for which we need to exceed the five-copy limit, we can presumably choose to pay a reasonable royalty to a payments center or do without. The mechanism for paying such fees may be in place by next year.

Librarians should not permit themselves to be bullied or bluffed by publishers into buying privileges they have always had.

do not circulate. The total of home loans and in-building use is estimated at well over 2 million. During that year, we borrowed 2,941 volumes and received 3,726 photocopies from other libraries for a total of 6,667 items (less than one half of one percent of our total use). We lent 7,748 volumes to other libraries and filled 7,682 photocopy requests—a total of 15,430 items. The sum of all such extramural transactions—borrowings as well as loans—was 22,000, or about one percent of our intramural use.

Penn is not unusual in this regard. The median for all university members of the Association of Research Libraries in 1975-76 was 11,053 loans and 4,505 borrowings for a total of 15,558 transactions. All these libraries together borrowed a half million originals and photocopies in 1975-76 and lent about two million.⁴ Even if this traffic doubled or tripled in the next few years, it would still be relatively insignificant.

What can we conclude from these gross statistics? Simply that the total amount of interlibrary loan and photocopying in lieu of interlibrary loan is and will always remain a relatively small fraction of total library use. The point is not to denigrate the value of interlibrary loan or resource sharing but to emphasize the overriding importance of the local use of local collections. Publishers, librarians, and particularly network planners should keep this basic truth in mind.

Last year Penn spent \$1.3 million on books and journals, and we would spend considerably more if we had it. We saved virtually nothing by using interlibrary loan and photocopying; in fact, we incurred substantial additional costs using interlibrary loan channels to obtain some important little used materials for a small number of users who might otherwise have done without.

The Cornell experience with the five-copy limit is similar to Penn's. Madeline Cohen Oakley, Cornell interlibrary loan librarian, reports it as follows:

The new restrictions on photocopying pose a number of questions of policy and procedure for Cornell interlibrary loan operations. Although the five article per journal photocopy

Ben H. Weil of Exxon has been appointed to serve as program director of the Association of American Publishers/Technical-Scientific-Medical Copy Payments Center Task Force, which is expected to design and implement a payments system by Jan. 1, 1978. The center would periodically invoice the users and allocate the payment, less a processing charge, to the appropriate publisher. I wish the center luck, but my guess is that the processing charges will far exceed the royalty payments, making it a financially precarious service.

It is important that librarians exercise all the rights and privileges the new law gives them, uninhibited by the fear of lawsuits or by an exaggerated or misplaced sense of fair play and justice. Section 504(c)2 relieves employees of nonprofit libraries from personal liability in case of infringement if they had reasonable grounds for believing their use of the work was a fair use under section 107. Librarians must comply with the law as best they understand it, but they are not obliged to do more. Even the Internal Revenue Service encourages taxpayers to take all the deductions to which they are legally entitled and to pay no more taxes than the law requires.

Some librarians are already going to great lengths to establish elaborate and far more restrictive procedures than the law or the guidelines require in order to demonstrate their intent to comply with the spirit as well as the letter of the law and to show their good faith. By so doing, they appear defensive and guilty and run the risk of losing the rights they are too cautious to exercise. It is a time for boldness and courage.

Based on past performance, we can be sure that the publishers will not be cautious or diffident about exercising all the rights the law allows them—and even a bit more on occasion. Last fall, for example, one publisher misrepresented the provisions of the new law in a letter to his library customers offering to sell copying privileges that the law already gives them as a right.

Libraries that buy subscriptions with strings attached may forfeit their rights under the law. "Section 108(f)(4) states that the rights of reproduction granted libraries by Section 108 do not override any contractual obligations assumed by the library at the time it obtained a work for its collections. In view of this provision, libraries must be especially sensitive to the conditions under which they purchase materials, and before executing an agreement which would limit their rights under the copyright law, should consult with their legal counsel." (ALA *Washington Newsletter*, Nov. 15, 1978, p. 5)

Actually, urging librarians to consult legal counsel in copyright matters may not be very helpful advice. Because of its vagueness and complexity, the new copyright law is already being called the "full employment act" of the legal profession. The typical general counsel that the typical librarian can turn to will know little about copyright law and will, as lawyers customarily do when asked for advice by cautious clients on unfamiliar matters, give the most conservative opinion possible in order to be on the safe side. Librarians might be better advised in general to study the appropriate sections of the law and have the courage to make their own interpretations and decisions.

The vast majority of academic and public librarians have nothing to fear from the new copyright law. The amount and kind of copying that is done in their libraries will not require the payment of any significant amount of royalties, and the dollar amounts involved will be trivial to publishers and library users alike. I think that time and experience will show that the whole publisher-librarian controversy over copyright, interlibrary loan, and photocopying was the result of fear and misunderstanding—largely on the part of the publishers.



Resource sharing and networking give publishers nightmares and librarians hope, but both groups are seriously overestimating the impact these developments will have on their financial status and operations. Inflationary trends and market forces at work will soon change much of our current thinking about these matters.

Libraries are cutting their expenditures for books and journals because they do not have the acquisition funds, not because they are able to get them on interlibrary loan or from the Center for Research Libraries or the British Library Lending Division. Publishers still have the idea that if they can discourage interlibrary loan and photocopying, libraries will

be forced to spend more money to buy books and journals. This is bunk. Libraries can't spend money they don't have. The fact is that with or without effective sharing mechanisms, with rising prices and declining support, libraries simply do not have the funds to maintain their previous acquisitions levels. If we cannot afford to buy the materials our users need, and if the law prohibits us from borrowing or photocopying what we do not own, our users will simply have to do without. Moreover, there is an increasing recognition that librarians and faculty members alike have developed highly exaggerated notions of the size, range, and depth of the library collections that are actually needed by most library users.

All too frequently, cooperation is merely a pooling of poverty.

Studies have repeatedly shown that in general roughly 80 percent of the demands on a library can be satisfied by 20 percent of the collection. Journal use is a Bradford type distribution where a small number of journal titles account for a large percentage of the use. Eugene Garfield's numerous studies using citation analysis and the Institute for Scientific Information's *Journal Citation Reports* also corroborate it. A recent University of Pittsburgh Library School study showed that 44 percent of the books acquired by one major research library in 1969 were never used in the succeeding five-year period.⁶ A recent study at Penn produced a comparable finding. Earlier studies on library use by Fussler,⁷ Trueswell,⁸ and Buckland⁹ showed similar use patterns.

Large collections confer status and prestige on librarians and faculty members alike, but when the budget crunch comes to a library, many of these status purchases will be foregone or dropped and the essentials will be maintained. Although we will rely on interlibrary loan or a National Lending Library to obtain these missing items when needed, they will rarely be called for, for they are rarely, if ever, used.¹⁰ Libraries will continue to buy and stock as many of the high use books and journals as they can possibly afford.

It is also worth noting here that the word "research" is much overused to describe what professors do and what libraries support. This is another legacy of the affluent 1960s when there was seemingly no end to the increase in the numbers of Ph.D. candidates and professors in our universities and the wide variety of their research needs and interests. The economic decline in the 1970s is changing this attitude. Apart from those located at the major research-oriented universities, the primary mission of most academic libraries is or should be to support the instructional needs of their students and faculty. This function can be documented by a quote from the 1975 Ladd-Iijpset survey of U.S. faculty members reported by the authors in an article entitled "How Professors Spend Their Time," which appeared in the *Chronicle of Higher Education* (Oct. 14, 1975, p. 2).

The popular assumption has been that American academics are a body of scholars who do their research and then report their findings to the intellectual or scientific communities. Many faculty members behave in this fashion, but that overall description of the profession is seriously flawed.

Most academics think of themselves as "teachers" and "intellectuals"—and they perform accordingly.

Although data on the number of scholarly articles and academic books published each year testify that faculty members are producing a prodigious volume of printed words, this torrent is gushing forth from relatively few pens:

—Over half of all full-time faculty members have never written or edited any sort of book alone or in collaboration with others.

—More than one third have never published an article.

—Half of the professoriate have not published anything, or had anything accepted for publication in the last two years.

—More than one quarter of all full-time academics have never published a scholarly word.

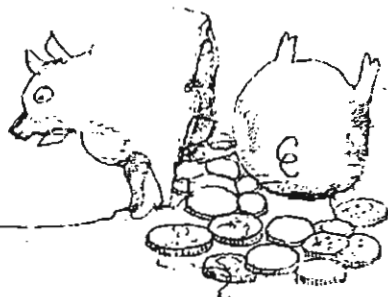
They summarize as follows:

American academics constitute a teaching profession, not a scholarly one. There is a small scholarly subgroup located disproportionately at a small number of research-oriented universities.

These conclusions about how faculty members spend their time correlate well with what library statistics show about faculty use of libraries—namely, that it is on the order of ten percent of the total and that much of it is for instructional purposes rather than research.

As for the publishers, they may make themselves feel better by blaming journal cancellations and shrinking book orders on increasingly effective library resource sharing via systematic photocopying and interlibrary loan rather than on inflation and declining library budgets, but they will be deceiving themselves.

Resource sharing will not seriously erode publishers' profits, nor will it help libraries as much as they think. Interlibrary loan will increase, but it will still continue to be a very small percentage of total library use. The high cost of interlibrary loan and the needs and demands of library users will not permit it to grow into something major. Its importance will always be as much in the capability for delivery as in the actual use of that capability. Like the Center for Research Libraries, it serves as an insurance policy. We do not justify our annual membership fee in the center by the number of items we borrow every year but by the fact that our membership gives us access—if and when we need it—to several million research items which might otherwise not be available to us.



In the long run, librarians cannot count on interlibrary loan or their regional consortia or networks for the major economies they will need to make to weather the hard times that are ahead. This is as true for the many small college library consortia as it is for the prestigious Research Libraries Group and the now defunct Five Associated University Libraries

cooperative. All too frequently, cooperation is merely a pooling of poverty. Many consortia members are vulnerable because the magnitude of the cuts they will have to make to counter inflation and declining support will far outweigh the relatively minor savings regional cooperation will yield in the end. In fact, like many automation projects, regional consortia may actually be costing their members far more than the benefits they derive if one includes the very substantial cost of staff time needed to make them work. This cost will become more apparent when the grant money that supports many consortia runs out.

Why can't consortia and resource sharing fulfill their promise? Because they focus almost exclusively on reducing expenditures for books and journals and only incidentally on reducing expenditures for personnel. But in the end, any significant savings in library expenditures must come from eliminating positions, because that is where the money goes.

Resource sharing is essential but it is not a panacea.

A typical large academic or public library spends 70–75 percent of its budget for personnel and benefits, 20–25 percent for books and journals, and only 5 percent for other purposes. Thus, the amount of cost savings that can be made through resource sharing in any one year is necessarily only a small percentage of the book and journal budget. With these costs rising at the rate of 15 percent a year, the savings will be largely absorbed by inflation.

The unpleasant fact is that we must eliminate positions if we are to make significant cost reductions to cope with inflation and no-growth budgets. To reduce staff will require a drastic curtailment of the intake of materials, reduced services, and increased productivity. There is no other way. Resource sharing is essential but it is not a panacea.

The cheap and easy victories come early in library cooperation, but what do we do that is cost effective after we have agreed to reciprocal borrowing privileges with our neighbors and saved a few positions by joining OCLC? What do we do for an encore after we have reduced our staff, journal subscriptions, and book acquisitions by five or ten percent through cooperation, resource sharing, automation, and improved management? In the year 1975–76 inflation and declining support caused a 10 percent decrease in the median number of volumes added to ARL libraries and a 5 percent decrease in the number of staff employed.

Academic libraries are sharing the financial troubles of their parent institutions, and public libraries those of the local governments that support them. These troubles come from long-term economic, social, and demographic trends; they will probably get worse in the decade ahead. The troubles that publishers have are caused by rising costs and changing market conditions and not by library photocopying or deficiencies in the copyright law. These troubles will not be resolved by the collection of royalties on a few journal articles or the sale of a few more library subscriptions.

The library market is shrinking and hardening, and publishers—both commercial and scholarly—will have to accept that fact and make adjustments. Librarians will have to accept that the savings they make through networking, cooperation,

and resource sharing in the next several years will be quickly absorbed by the continuing inflation in book and journal prices and rising personnel costs. Moreover, library budgetary support will continue to decline and the pressures to reduce expenditures will increase.

The fact is, libraries can no longer afford to maintain the collections, staffs, and service levels that librarians and users have come to expect in the last two decades. Libraries are experiencing a substantial loss in their standard of living as a result of inflation, increasing energy costs, and changing priorities in our society. We can rail against it and search for scapegoats, but it would be better if we came to terms with this painful reality and began to reduce our excessive commitments and expectations to match our declining resources.

The importance of resource sharing mechanisms, and particularly the most cost-effective ones--the centralized libraries' libraries, such as the Center for Research Libraries and the British Library Lending Division--is not so much that they will save us funds we can reallocate to other purposes, but that they will permit us to continue to have access to a large universe of materials we can no longer afford, spending our diminishing funds on the materials we need and use most. In sum, effective resource sharing will help ease the pain that will accompany the scaling-down of commitments and expectations we face in the years ahead. □

Notes

1. Special Issue *ALA Washington Newsletter* on the New Copy-

right Law, Nov. 15, 1976. (Reprinted and available from ALA Order Dept. for \$2.)

2. For more on the need for a new attitude toward journals in libraries see: Richard De Gennaro, "Escalating Journal Prices: Time to Fight Back," *American Libraries*, February 1977, p. 68-74.

3. The eight titles which had five or more requests are *American Orchid Society Bulletin*, Harvard University, Botanical Museum, Cambridge; *Flzika*, Yugoslavia; *Journal of Electroanalytical Chemistry*, Elsevier Sequoia, Lausanne; *Nukleonika*, Polska Akad. Nauk, Ars Polona Ruch, Warsaw; *Pramana*, Indian Academy of Science, Bangalore; *Revue Roumaine de Physique*, Bucharest; *Synthesis*, George Thieme Verlag & Academic Press; and *Worldview*, Council on Religion and International Affairs, New York.

4. ARL Statistics, 1975-76. Washington, D.C., Association of Research Libraries, 1976, p. 14.

5. Madeline Cohen Oakley, "The New Copyright Law: Implications for Libraries," *Cornell University Libraries Bulletin*, No. 202, October-December 1970, p. 5.

6. Stephen Bulick, and others, "Use of Library Materials in Terms of Age," *Journal of the American Society for Information Science*, May-June 1970, pp. 175-8.

7. Herman H. Fussler, *Patterns in the Use of Books in Large Research Libraries*, Chicago, Univ. of Chicago Press, 1969.

8. Richard W. Trueswell, "User Circulation Satisfaction vs. Size of Holdings at Three Academic Libraries," *College & Research Libraries*, May 1969, pp. 204-13.

9. Michael H. Buckland, *Book Availability and the Library User*. New York, Pergamon Press, 1975.

10. For a more extended discussion of these points see: Richard De Gennaro, "Austerity, Technology, and Resource Sharing: Research Libraries Face the Future," *Library Journal*, May 15, 1975, pp. 917-23.

