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"Current Comments"

Libraries Need a Copyright Clearinghouse--ISI Has One They Can Use!

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In 1972 as most readers must know, the Williams & Wilkins Company (W&W), a Baltimore publisher of scientific journals, sued the United States for infringement of copyright. The target defendant was the National Library of Medicine (NLM), alleged by the publisher to "have infringed plaintiff's copyrights in medical journals by making unauthorized photocopies of articles from such journals." NLM readily admitted the copying, but argued that the copied material was (or *should be*) in the public domain since Government had paid for the research written up in the copied articles. With truly admirable aplomb, the Solicitor General contended that the concept of 'fair use' perhaps could be (or again *should be*) stretched to an improbable length that might have provided an impregnable defense.

Aside from its basic issue, the case was intensely interesting for a while, because in the end Williams & Wilkins appealed to the Supreme Court. Would substantive or procedural justice triumph?

Most students of philosophy or political science must at some time in their schooling write an essay discussing substantive and/or/vs procedural justice. Many adopt one of two extreme positions--idealism or cynicism. They forget, if they ever knew, that substantive justice is not the business of the courts. Whose business it is, at least in the United States, seems as yet not completely defined. Ultimately, only one Court, the Supreme Court, dares address itself to issues of substantive justice. Only there can one expect from the bench such a devastating question as, "Yes, but is it fair?" in response to some counsel's letter-perfect recapitulation and construction of precedent and law. The Supreme Court exercises an historic prerogative to interpret the Constitution of the United States, that is, to determine what is substantively good and just, under the Constitution.

Thus, the Court's decision in the case of *Williams & Wilkins vs. the United States* was anticipated both with trepidation and delight by many interested parties. Many preempted the Court's decision--either for plaintiff or defendants--with doleful predictions. If NLM got off scot-free, no copyright would be safe. If W&W won, no scientific library in the country--indeed in the world--would be able to operate without an intolerable burden of record keeping to pay either trivial or substantial royalties to uncountable authors and publishers.

What did the Supreme Court do when handed this "hot potato"? It split four-to-four, rendered no opinion, and thus made no comment on either prediction of the doomsayers. In splitting four-to-four, the Court seems collectively to have recognized that it wasn't a hot potato at all. It was a badly peeled and somewhat bruised potato. In effect, the Court's even division seems to have acknowledged the undoubted rights of the plaintiff publisher, while at the same time recognizing the reasonableness of the defendants' difficult position. The Court threw the "hot potato" back at them, with the silent implication that

they should have settled the problem to their common satisfaction within existing copyright law. The Court also made plain, it seems to me, that any ruling on its part might serve only to enlarge a cause of antagonism between parties who should be friends.

Needless to say, the Court's eloquent silence was also an admonition that the Congress should amend the present statute or enact a new one. Congress is expected to take some action in 1976.

The Supreme Court's silence let stand a decision against the plaintiff in a lower court. Too many people who *should* probably *won't* read that decision, which by and large grudgingly accepts NLM's contention of fair use. But the written opinions of both majority and minority members all but enjoin under penalty of contempt that anybody anywhere dare use the decision as precedent in any action, no matter the circumstances. Clearly the mandate is: *Do it yourself! Work it out!* Just as clearly, the reminder is: *A cure sometimes can be worse than the disease.*

'Fair use' has a place, no doubt. A single copy of an article from a learned journal *seems* fair enough to some people. But it is the thin end of the wedge. Does *single copy* mean single copies made one at a time for twenty or thirty different people?

All the talk of burdensome record-keeping and accounting by libraries is hogwash. Libraries make and often keep the necessary records now. Indeed such record-keeping is trivial in comparison with that necessary for the network systems and resource centers these same libraries are undertaking. As far as copy requests are concerned, the records kept now aren't used in any system to recompense the publishers and authors. They are used only to fulfill the requests that generate them.

Anyone familiar with the history of musical copyright knows that this same record-keeping argument was used to discourage a system for royalties for performance and other rights in the case of composers, arrangers, music publishers, etc. At the time many musicians feared they would be personally liable for royalty payments, just as librarians fear today that they may be personally liable for a royalty when they copy copyrighted material for a user.

I find it somewhat amusing that 'rapid technological advance' in copying methods has been cited as a major cause of the problem--it's simply so easy to make copies now. On the other hand, I seldom hear it equally stressed that this same rapid technological advance can provide very useful components of the obvious solution. At ISI® , we solved the payment problem long ago in operating our *OATS®* (*Original Article Tear Sheet*) service.

Subscribers send us orders for articles. A copy of the order, with a little help from a computer, becomes a royalty check to the publisher. The pertinent data is cumulated, and then at the end of each year, we send off one check to each publisher who has signed an agreement with us. In most cases we recompense publishers for our use of tear sheets as well as photocopies, since the former represent the largest part of our service.

Any small or large library could use the same system. The payment method could be simplified, just as it is in placing journal subscriptions, by sending a single check to a copyright clearinghouse. Payments would be accompanied by a simple record of the articles requested. This idea is not new, and was discussed in a comprehensive study by Gerald Sophar, a former president of the American Society for Information Science.[1]

Some time ago, I suggested a simple plan for implementing such a payment system, but neither publishers nor libraries appeared to be ready for it. I wonder if a few stalwart pioneers from both camps might now come forward and

adopt the scheme before Congress shoves down their throats a system neither would like. Some routine method of royalty payment is necessary whenever libraries are expected to provide instantaneous service. Those who can wait a few days use an outside service, since it probably still costs the average library far more than it charges to supply a photocopy. At the present time, however, ISI is the only source that passes along part of its charges to the publishers. Thus, in effect, ISI is already a copyright clearinghouse. A large-scale use of the *OATS* system by IBM was described recently.[2] But our users are by no means limited to industrial firms.

In the scheme I originally proposed stamps would be used--stamps that ISI would supply--not unlike the stamps now used to make *OATS* payments. The publisher would indicate on the first page of each article the per-page or per-article payment expected. A copy of those few lines of bibliographic and publisher information is all we need to assign proper credit to even the smallest publisher or author.

In concluding this proposal, let me say that I do not believe that most scientific publishers are suffering so badly from photocopy copyright infringement that it alone is causing a decline in new journal ventures. However, one fact is clear. It is impossible to draw the line between scientific and non-scientific work. In the long run, continued small-scale infringement of scientific copyrights is of minor importance when compared with the violation of non-scientific copyrights *which it encourages.*

The protection of authors' copyrights cannot be maintained without a strong copyright system. Without it, we will undermine not only the economic and professional standing of authors, but our freedom of the press as well. This has been proved in the case of music. Most minor composers are only too happy if someone copies their work, but they would never sacrifice the copyright system, for it guarantees them protection in the event that they become major composers. And so it is with science. Most scientists know that few people will ever copy their articles. But there are scientists who, in the course of time, become heavily read and widely published. Such authors--like novelists, playwrights, science-fiction writers--and their publishers must be protected. I cannot believe that the library profession can want to be party to an undermining of something which they, as much as any group, have fought to uphold. Copyright protection and freedom of reading choice are inseparable in a democracy.

An alternative to the type scheme I've discussed is, in other countries, a general tax on all library budgets. I doubt that American librarians prefer this alternative. But, as the eloquent silence of the Supreme Court in *Williams & Wilkins vs. the United States* has indicated, someone had better decide soon how to handle the problem, or others with too little understanding of its ramifications will 'solve' the problem for us.

1. Sophar G J & Halprin L B. *The determination of legal facts and economic guideposts with respect to the dissemination of scientific and educational information, as it is affected by copyright.* Washington, D.C.: Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc., December 1967, 199 pp., NTIS PB 178463.
2. Brooks W E Jr. How IBM's TIRC fills requests for copyrighted journal articles. *Sci-Tech News* 28(1/3): 34, 1974.