CURRENT COMMENTS

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The New Copyright Clearance Center and the Doctrine of Fair Use

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It is early Monday morning. Professor Jones of Noname University, hurrying to meet with his graduate seminar group, stops at the photocopying machine. Quickly, he sets the dial for 10 copies and begins methodically to reproduce the pages of an article from his favorite journal. Suddenly an alarm sounds and a flashing red light comes on. Jones is last seen being escorted out of the building by two burly security guards while muttering something about "fair use."

An improbable scenario? Yes. But not an impossible one in the minds of some people since January 1, 1978. That's the day the revised United States copyright law went into effect, the newly formed Copyright Clearance Center became operational, and the controversy over what constitutes "fair use" was exacerbated.

The new law (Public Law 94-553) supersedes the Copyright Act of 1908, which has remained substantially the same since its origin. The current revisions are major. They reflect the impact that technological advances of the last 68 years have had on unauthorized reproduction of copyrighted materials. I'm not a copyright lawyer so I can't speak with complete authority. But I do know that the new law is far from perfect. At least it seems to raise as many questions as it answers. However, there is no doubt that copyright infringement is now a criminal offense.

Of most concern to scientists and science librarians is the interpretation of the new law as applied to the act of photocopying journal articles. When copyrighted journal articles are photocopied beyond the "fair use" limits set by the new law, copyright holders are now entitled to collect royalty payments. Librarians have steadfastly opposed such a royalty requirement for two reasons. First, they claim that it is almost impossible to define fair use consistently. Second, even if a workable definition were possible, librarians believe that the costs of the record keeping involved in documenting and paying royalties on millions of photocopying transactions would be prohibitive.[1]

To answer the second objection and to simplify the process of collecting and distributing royalties, the Association of American Publishers (AAP) proposed the Copyright Clearance Center (CCC). Since I am on the advisory committee for the

CCC, I am aware of some of its history.

In 1975 the National Commission on New Technological Uses of Copyrighted Works (CONTU) assessed the feasibility of a single copyright payments center that would serve all U.S. publishers and libraries. As part of this work, CONTU hired the King Research Corporation to study a variety of copyright payment systems. But publishers were not waiting for CONTU's findings: they had already decided that a copyright payments system had to be operational by January 1, 1978, the effective date of the new copyright law. Early in 1976, the AAP informed CONTU that the Copyright Clearance Center would be ready by the target date.[2]

CCC is now operating as a not-for-profit corporation. Its membership includes both for-profit and not-for-profit publishers who are primarily from the United States—although other countries are represented. Ben Weil, loaned by Exxon to direct the task force that set up the CCC, estimated back in October, 1977 that there would be 2,000 publishers participating by January 1; but at present there are less than 100. At one time there were reports that publishers were being solicited for $800,000 to support CCC operations. But near the end of 1977 Weil said only $200,000 was being sought and that the operation of CCC wasn't contingent on reaching that figure before January 1.[3]

David Waite, formerly with Information Dynamics, became CCC's president, and the Finserv Computer Corporation was contracted to process all royalty transactions. Finserv's computer installation in Schenectady, New York will receive royalty information via data terminals in CCC's offices in New York City. For each fee it processes, Finserv will receive 25¢. Finserv receives no minimum annual remuneration and its income is totally dependent on the volume of transactions it handles.

Publishers register with the CCC by completing a separate form for each publication entered in the collection system. Each form includes the publication title, International Standard Serial Number (ISSN), and copying fees. All fees are set by the publishers and, starting January 1, 1978, are printed on the first page of each article for which a copying fee is desired. Included in each article's masthead is a statement that says copying fees are to be paid through the CCC. A sample statement recommended by the CCC is shown below:[4]

> The appearance of the code at the bottom of the first page of an article in this journal indicates the copyright owner's consent that copies of the article may be made for personal or internal use, or for the personal or internal use of specific clients. This consent is given on the condition, however, that the copier pay the stated per-copy fee through the Copyright Clearance Center, Inc. for copying beyond that permitted by Sections 107 or 108 of the U.S. Copyright Law. This consent does not extend to other kinds of copying, such as copying for general distribution, for advertising or promotional purposes, for creating new collective works, or for resale.

Users of copyrighted materials who wish to make royalty payments

through the CCC must also complete a registration form. The form includes a statement that says the user intends to comply with CCC's basic requirements. Payments are usually submitted on a monthly basis.

Publishers and royalty payers are assured that all data are completely confidential. Itemized royalty payments, receipts for payments, etc., are available only to those directly involved.

Will the CCC be successful? Will it collect enough revenues to sustain its operations? It is obvious that CCC's life depends on acceptance by librarians and the public of the principle that publishers are entitled to royalties for photocopying that exceeds the fair use limits. As I pointed out earlier, what those limits are has been an issue that has aroused heated debate between publishers and librarians for over 20 years.

Many of us know of the celebrated legal case in which the publishing firm of Williams and Wilkins in 1968 sued the U.S. government for infringement of copyright. It was public knowledge that the National Library of Medicine (NLM) and National Institutes of Health (NIH) were copying journal articles without permission—as were most other libraries.

In this *cause célèbre* many library associations expended considerable effort to file briefs as "friends of the court" in support of NLM and NIH. The Authors' League and the Association of American Publishers supported Williams and Wilkins. Trial judge James Davis said of the case that it required the "judgment of Solomon" or the "dexterity of Houdini."[5] The judge ruled in favor of Williams and Wilkins, concluding that the firm was entitled to compensation for infringement of copyright.

In 1973 the case was appealed to the U.S. Court of Claims, and in a 4-3 decision the infringement holding was reversed. In a dissenting opinion, Judge Philip Nicholas, Jr. said, "...the decision will be read that a copyright holder has no rights that a library is bound to respect."[5] The majority held that NLM and NIH photocopying practices constituted "fair use" since Williams and Wilkins could not prove "unfair use." The majority also asserted it was up to Congress to define precisely what fair use is.

In 1975 the Williams and Wilkins case reached the U.S. Supreme Court. One of the nine judges disqualified himself; the other eight voted in a 4-4 deadlock; and (adding more frustration) no opinion on the case was written. So the Supreme Court's decision in no way settled the matter—and neither will the new law.

The provisions of the new law that directly affect publishers and librarians are contained in Sections 107 and 108. Section 107 merely gives statutory recognition to the common law doctrine of fair use: the nebulous doctrine under the old law remains the same; only now it is in codified form. Section 108 specifies for libraries the circumstances under which photocopying is either permitted or proscribed.

The language and structure of

Section 108 are highly complex, however—so much so that the Special Libraries Association has told its members, "...it is not necessary to become concerned with Section 108 if the proposed photocopying is reasonably within 'fair use'." The SLA also feels that because the doctrine of fair use has been preserved, "photocopying that was permissible under the old law is permissible under the new law." Section 108 "specifically exempts a public library...from liability for the unsupervised use of reproducing equipment located on its premises provided that the reproducing equipment displays a notice that the making of a copy may be subject to copyright law. Libraries in profit making organizations do not have this exemption, and must be accountable for all uses beyond fair use as defined in Section 107."[6]

The fair use doctrine has been the crux of many court cases, and, since Congress hasn't legislated a solution, it's bound to be the basis of more disputes. According to my friend Arthur Seidel, a Philadelphia lawyer who has written extensively on copyright,[7] the doctrine of fair use was introduced in American copyright law in 1841. The case involved the use of letters written by George Washington. Since that time the doctrine has taken shape through judicial interpretation, in almost *ad hoc* fashion.[8]

"Fair use" is founded on the belief that: (1) there are certain uses of a work which one should be free to make without the consent of the copyright owner, and (2) there are limitations on the exclusive nature of the copyright itself. The doctrine has come to be an affirmative defense to a charge of infringement. The new law sets forth four criteria for determining whether or not a use of copyrighted material is fair:

1. The purpose and character of the use, whether or not it is for profit,
2. The nature of the copyrighted work,
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole,
4. the effect of the use of the copyrighted work upon the potential market for or the value of the copyrighted work.

As before, the purposes for which a fair use of copyrighted material may be made under Section 107 include, but are not limited to: criticism, comment, news reporting, teaching, and scholarship and research. There are, however, very few areas in which the fair use doctrine operates without dispute.

Whatever finally comes about from the existence of the CCC, ISI® 's *Original Article Tear Sheet* (*OATS*®) service will continue unhampered. As I stated in my recent testimony before CONTU, ISI has been voluntarily paying royalties to publishers for many years and will continue to do so through our own contractual arrangements.[9,10] We believe the publisher should get fair compensation, but we also believe the public's right to access to knowledge should be protected.

In my opinion, there are several facets to that protection. One is that publishers should charge *reasonable*

fees for the right to copy their articles. How does one define what is reasonable? One of my publisher colleagues believes that a high single-copy fee will force libraries to enter subscriptions to journals which are relatively expensive by most standards. When I consulted an expert on pricing strategies, he opined that it would have the opposite effect. He believes that if reader/scientists learned that copies of articles from a given journal were very expensive, they would hestitate to ask for any articles from that journal. When the library committee got together to make subscription decisions it would never really know about the latent demand for this journal. On the other hand, publishers may justifiably fear the large-scale, systematic copying that is done at certain large centers. In England it is believed that the poor sale of scientific journals, as compared to other countries, is due to heavy use of the British Lending Library's photocopying service.

Besides charging reasonable fees, publishers should make it convenient to obtain information on copying charges and equally convenient to pay them. The CCC is a major step in that direction, but what about poor Professor Jones mentioned earlier? Even if he had wanted to pay royalties for the copies of the article he made, how would he know how much to pay? None of the publishers enrolled in CCC currently display their royalty fees for *multiple copies*. Is Jones supposed to telephone the publisher for prices every time he makes copies of an article for his class? And is it reasonable to expect him to pay ten times the single-copy fee for ten copies of the same article? It could just as easily have been 50 copies he needed!

There can be no question that the new CCC will have its difficulties. Frankly, I doubt that a single center can fully serve the varied needs of book and journal publishers—let alone those of publishers of printed music and other copyrighted works. In the field of music, the American Society of Composers and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and others have succeeded in protecting "performance" rights for composer and authors. Ironically, these organizations have never worried very much about unauthorized copying of sheet music. Perhaps music publishers thought that allowing unauthorized copying would encourage more performances! Maybe there is an analogy here. In handing out copies of a research article to students, Professor Jones is "performing" the paper. Perhaps CCC or someone else will one day figure out, as did ASCAP, how to charge for and collect reasonable fees for such performances.

Strangely enough, a comparable situation exists in the area of copyrighted musical recordings. If you want to tape-record an out-of-print record or cassette, how can you do it legally? The recording industry does nothing to make it easier for the public to satisfy specialized needs legally. Until they do, and so long as the operations of these companies are profitable, they can-

not expect the public to be concerned about any revenue they may lose through unauthorized copyings.

As the head of ISI—which is both a large-scale *producer* and *user* of copyrighted material—I am acutely aware of the need for those involved in this controversy to be reasonable. Perhaps if my deceased colleague Ralph Shaw were still with us he could serve as the impartial arbitrator. Ralph had the unique qualification of having been a librarian as well as the owner of a publishing firm, the Scarecrow Press.

According to Professor William Z. Nasri of the University of Pittsburgh's Graduate School of Library and Information Services, "...the publisher is the servant of the authors and their public, deserving a reward for his efforts but not to be made the master of the process by which knowledge is produced and utilized."[5] Professor Nasri's words deserve some consideration from those on both sides of the fair use issue. Most publishers are straddling the fence. Like most librarians, they are taking a "wait and see" attitude. Meanwhile, Professor Jones will continue to teach, and I will continue to tape-record favorite out-of-print saxophone solos!

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