

*Williams & Wilkins Co. v. U.S.,*  
annotated trial opinion

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## Introduction by Standler

The central issue in the classic case of *Williams & Wilkins v. U.S.* is whether it is copyright infringement to photocopy an article from a copyrighted periodical without the permission of the publisher. This case arose in the context of wholesale photocopying<sup>1</sup> of many articles by the National Institutes of Health (NIH) library and by the National Library of Medicine (NLM), agencies of the U.S. Government. One publisher of medical journals, Williams & Wilkins, demanded payment of a small royalty from NLM, about \$ 1100/year, for the photocopying of articles from their journals.<sup>2</sup> The government refused to pay the royalty, and Williams & Wilkins sued the U.S. Government for damages from copyright infringement by NIH and NLM.

In 2006, when I was writing an essay on the doctrine of fair use in copyright law, I prepared a number of comments on this classic case and the subsequent appellate case. Because the quotations from this case and the subsequent appeal were so lengthy, in November 2008, I moved them from my draft essay to two separate PDF documents at my website. This document contains the entire trial court opinion, with my comments. After the Government lost in the trial court, the Government appealed to a panel of seven judges of the U.S. Claims Court. The opinion of the panel is reported at 487 F.2d 1345 and is posted at my website at URL <http://www.rbs2.com/ww2.pdf>, together with my critical analysis. Personally, I believe the analysis and conclusions by Commissioner Davis in the trial court are what the law should be, so I consider this case as an example of how law took a wrong turn on appeal.

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<sup>1</sup> The trial court mentioned the fact that in 1970, the NIH library photocopied approximately 930,000 pages. 172 U.S.P.Q. at 673. In 1968, the NLM photocopied approximately 1.2 million pages/year. 172 U.S.P.Q. at 673-674. Therefore, the total photocopying by defendants was approximately two million pages/year.

The phrase “wholesale copying” was used by the trial judge. 172 U.S.P.Q. at 679, 681. See also *Williams & Wilkins Co. v. U.S.*, 487 F.2d at 1364 (Cowen, C.J., dissenting) (“What we have before us is a case of wholesale, machine copying, and distribution of copyrighted material by defendant’s libraries on a scale so vast that it dwarfs the output of many small publishing companies.”).

<sup>2</sup> 172 U.S.P.Q. at 686. Initially, on 28 April 1967, Williams & Wilkins asked for a royalty of \$ 0.02/page. If all publishers had asked for that same royalty, the total cost to the NIH and NLM would have been approximately \$ 40,000/year. Paul Goldstein, *COPYRIGHT’S HIGHWAY*, at p. 67, Stanford University Press (revised edition, 2003).

This case is a classic in the history of copyright law. Before the invention of the photocopy machine, copies were made in a time-consuming and expensive process:

- handwriting (e.g., by medieval scribes, or by scholars in a library)
- typewriting
- Photostat (i.e., a photographic process using wet chemicals)<sup>3</sup>

The expense of making such copies meant that — in practice — nearly everyone limited their copying to a few paragraphs, which small amount was within the common law doctrine of fair use. When the photocopy machine became common equipment in offices and libraries in the mid-1960s, people could — for the first time — make copies of many pages at a low cost, typically between \$0.05 or \$0.10/page. The widespread use of photocopy machines meant that people could easily and inexpensively make copies of entire chapters of books or entire articles in periodicals, thus having the benefit of books and periodicals *without* needing to purchase them and *without* paying royalties to the copyright owner. This case is an example of how new technology caused legal problems that were difficult for judges to decide.

Copyright law is statutory. This classic case was decided under the Copyright Act of 1909. Subsequently, the copyright statutes in the USA were completely rewritten in 1976, with additional amendments when the U.S. finally agreed to the Berne Convention in 1988. This judicial opinion contains antique paragraphs — for example, where the trial judge (Commissioner Davis) wrestles with whether a photocopy is a copy<sup>4</sup> — that contain issues that were clarified by the Copyright Act of 1976.

The text of Commissioner Davis's opinion appears here as an indented, single-spaced quotation. Footnotes in Commissioner Davis's opinion are identified by [FN#] , where # is an integer. The pagination of the U.S. PATENTS QUARTERLY version appears in centered text, "page ###".<sup>5</sup> My comments appear either as (1) left-justified, 1.2 line spacing text or (2) in footnotes, identified with a superscript number, which appear at the bottom of the page.

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<sup>3</sup> The Photostat process produced copies at a cost of about \$2/page. 487 F.2d at 1388 (Nichols, J., dissenting). According to the Consumer Price Index, \$2 in 1973 is worth approximately \$10 in 2008.

<sup>4</sup> See below, at pages 12-14, 172 USPQ at 677-678.

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### List of Attorneys

Alan Latman<sup>6</sup> (Arthur J. Greenbaum of counsel) both of New York, N. Y., for plaintiff.

Thomas J. Byrnes and L. Patrick Gray, III, for defendant.

amicus curiae

Weil, Gotshal & Manges (Horace S. Manges, Marshall C. Berger, and Arthur F. Abelman of counsel) all of New York, N.Y., for Association of American Publishers, Inc., amicus curiae.

Irwin Karp, New York, N. Y., for The Authors League of America, Inc., amicus curiae.

Perry S. Patterson (William D. North, Ronald L. Engel, James M. Amend, John A. Waters, and Kirkland, Ellis, Hodson, Chaffetz & Masters of counsel) all of Chicago, Ill., for American Library Association, amicus curiae.

Cox, Langford & Brown (Philip B. Brown and John P. Furman of counsel) all of Washington, D. C., for Association of Research Libraries, Medical Library Association, and American Association of Law Libraries, amici curiae.

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<sup>6</sup> Mr. Latman was one of the two most famous copyright lawyers in the USA, the other was Prof. Melville Nimmer, the author of the famous treatise. In 1958, Mr. Latman wrote Fair Use of Copyrighted Works, reprinted as Study No. 14 in Senate Judiciary Committee, Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights, 86th Cong., 2d Sess. (1960).

**Opinion by James F. Davis**172 U.S.P.Q.<sup>7</sup> at page 672

Davis, Commissioner.

This is a copyright infringement suit under 28 U.S.C. § 1498(b). [FN1] Plaintiff alleges that defendant's Department of Health, Education, and Welfare, through its agencies, the National Institutes of Health (NIH) and the National Library of Medicine (NLM), has infringed plaintiff's copyrights in medical journals by making unauthorized photocopies of articles from such journals. This suit is one of first impression; raises long-troublesome and much-discussed issues of library photocopying of copyrighted materials; [FN2] and requires for resolution the "judgment of Solomon" if not also the "dexterity of Houdini." [FN3] The following organizations sought (and were granted) leave to file briefs as amici curiae: The Authors League of America, Inc., and the Association of American Publishers, Inc. (in support of plaintiff); and the American Library Association, the Association of Research Libraries, the Medical Library Association, and the American Association of Law Libraries (in support of defendant). Those briefs, along with the briefs filed by the parties, have been of great assistance. I hold that defendant has infringed plaintiff's copyrights and that plaintiff is entitled to recover "reasonable and entire compensation" as provided by § 1498(b).

[FN1] Prior to 1960, § 1498 provided only for patent infringement suits against the United States. In 1960, Congress amended § 1498 to make the United States liable also for copyright infringement, pursuant to title 17, U.S.C., the copyright statute. This is the first copyright case to reach trial in this court.

[FN2] See, e.g., B. Varmer, Photoduplication of Copyrighted Material by Libraries, Study No. 15, Copyright Law Revision, Studies Prepared for Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (1960) [hereinafter cited as the Varmer study]; G. Sophar and L. Heilprin, The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright — A Status Report, Final Report, Prepared by The Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc., for the U.S. Department of Health, Education, and Welfare, Project No. 70793 (1967) [hereinafter cited as Sophar and Heilprin report]; Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law to the House Comm. on the Judiciary, 87th Cong., 2d Sess. at 25-26 (1961) [hereinafter cited as the Register's Report]; Project-New Technology and the Law of Copyright: Reprography and Computers, 15 U.C.L.A. L.REV. 931 (1968) [hereinafter cited as UCLA Project]; V. Clapp, Copyright — A Librarian's View, Prepared for the National Advisory Commission on Libraries, Association of American Libraries (1968); Schuster and Bloch, Mechanical Copyright, Copyright Law, and the Teacher, 17 CLEV.-MAR. L.REV. 299 (1968); "Report on Single Copies" — Joint Libraries Committee on Fair Use in Photocopying, 9 COPYRIGHT SOC'Y BULL. 79 (1961-62).

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[FN3] To borrow a phrase from Mr. Justice Fortas in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 402, 158 USPQ 1, 6 (1968), rehearing denied, 393 U.S. 902. There, the Supreme Court grappled with another vexing copyright problem — cable antenna television (CATV).

For convenience and for orderly discussion of the many complex problems raised by this case, the opinion is divided into three parts. Part I is a synopsis of the material facts, most of which are not in dispute. Detailed facts are set out in the findings of fact.<sup>8</sup> Part II deals with the copyright law as it applies to resolution of the case. Part III deals with some ancillary matters.

## I

Plaintiff, though a relatively small company, is a major publisher of medical journals and books. Plaintiff publishes 37 journals, dealing with various medical specialties. The four journals in suit are *Medicine*, *Journal of Immunology*, *Gastroenterology*, and *Pharmacological Reviews*. *Medicine* is published by plaintiff for profit and for its own benefit. The other three journals are published in conjunction with specialty medical societies

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which, by contract, share the journals' profits with plaintiff. The articles published in the journals stem from manuscripts submitted to plaintiff (or one of the medical societies) by physicians or other scientists engaged in medical research. The journals are widely disseminated throughout the United States (and the world) in libraries, schools, physicians' offices, and the like. Annual subscription prices range from about \$12 to \$44; and, due to the esoteric nature of the journals' subject matter, the number of annual subscriptions is relatively small, ranging from about 3,100 (*Pharmacological Reviews*) to about 7,000 (*Gastroenterology*). Most of the revenue derived from the journals comes from subscription sales, though a small part comes from advertising. [FN4] The journals are published with notice of copyright in plaintiff's name. The notice appears at the front of the journal and sometimes at the beginning of each article. After publication of each journal issue (usually monthly or bimonthly) and after compliance with the requisite statutory requirements, the Register of Copyrights issues to plaintiff certificates of copyright registration.

[FN4] E.g., the November 1956 issue of *Medicine* has 86 pages, four of which carry commercial product advertising. The August 1965 issue of *Journal of Immunology* has 206 pages, nine of which carry commercial product advertising.

NIH, the Government's principal medical research organization, is a conglomerate of institutes located on a multiacre campus at Bethesda, Maryland. Each institute is concerned with a particular medical specialty, and the institutes conduct their activities by way of both intramural research and grants-in-aid to private individuals and organizations. NIH employs over 12,000 persons — 4,000 are science professionals and 2,000 have doctoral degrees. To assist its intramural programs, NIH maintains a technical library. The library houses about 150,000 volumes, of which about 30,000 are books and the balance scientific (principally medical) journals. The library is open to the public, but is used mostly by NIH in-house research personnel. The library's budget for 1970 was \$1.1 million.

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<sup>8</sup> The findings of fact were omitted from the published opinion in the U.S. PATENT QUARTERLY.

The NIH library subscribes to about 3,000 different journal titles, four of which are the journals in suit. The library subscribes to two copies of each of the journals in suit. As a general rule, one copy stays in the library reading room and the other copy circulates among interested NIH personnel. Demand by NIH research workers for access to plaintiff's journals (as well as other journals to which the library subscribes) is usually not met by in-house subscription copies. Consequently, as an integral part of its operation, the library runs a photocopy service for the benefit of its research staff. On request, a researcher can obtain a photocopy of an article from any of the journals in the library's collection. Usually, researchers request photocopies of articles to assist them in their on-going projects; sometimes photocopies are requested simply for background reading. In any event, the library does not monitor the reason for requests or the use to which the photocopies are put. The photocopies are not returned to the library; and the record shows that, in most instances, researchers keep them in their private files for future reference.

Four regularly assigned employees operate the NIH photocopy equipment. The equipment consists of microfilm cameras and Xerox copying machines. In 1970, the library photocopy budget was \$86,000 and the library filled 85,744 requests for photocopies of journal articles (including plaintiff's journals), constituting about 930,000 pages. On the average, a journal article is 10 pages long,<sup>9</sup> so that in 1970, the library made about 93,000 photocopies of articles.

NLM is located on the Bethesda campus of NIH. NLM was formerly the Armed Forces Medical Library. In 1956, Congress transferred the library from the Department of Defense to the Public Health Service (renaming it the National Library of Medicine), and declared its purpose to be “\* \* \* to aid the dissemination and exchange of scientific and other information important to the progress of medicine and to the public health \* \* \*.” 42 U.S.C. § 275 (1970). NLM is a repository of much of the world's medical literature. NLM is in essence a “librarians' library.” As part of its operation, NLM cooperates with other libraries and like research-and-education-oriented institutions (both public and private) in a so-called “interlibrary loan” program. Upon request, NLM will loan to such institutions, for a limited time, books and other materials in its collection. In the case of journals, the “loans” usually take the form of photocopies of journal articles which are supplied by NLM free of charge and on a no-return basis. The term “loan” therefore is a euphemism when journal articles are involved. NLM's loan policies are fashioned after the General Interlibrary Loan Code, which is a statement of self-imposed regulations to be followed by all libraries which cooperate in interlibrary loaning. The Code provides that each library, upon request for a loan of materials, shall decide whether to loan the original or provide a photoduplicate. The Code notes that photoduplication of copyrighted materials may raise

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copyright infringement problems, particularly with regard to “photographing *whole issues* of periodicals or books with *current copyrights*, or in making *multiple copies* of a publication.” [Emphasis in original text.] NLM, therefore, will provide only one photocopy of a particular article, per request, and will not photocopy on any given request an entire journal issue. NLM, as well as other libraries, justifies this practice on the basis of a so-called “gentlemen's agreement,” written in 1935 by the National Association of Book Publishers and the Joint

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<sup>9</sup> This is a significant fact, which together with other facts mentioned below, allows us to estimate that the NLM copied 1.2 million pages/year from journals in 1968.

Committee on Materials for Research (representing the libraries),<sup>10</sup> which states in part, “A library \* \* \* owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction<sup>11</sup> \* \* \* *of a part thereof* to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research \* \* \*.” [Emphasis supplied.] Each photocopy reproduced by NLM contains a statement in the margin, “This is a single photostatic copy made by the National Library of Medicine for purposes of study or research in lieu of lending the original.”

In 1968, a representative year, NLM received about 127,000 requests for interlibrary loans. Requests were received, for the most part, from other libraries or Government agencies. However, about 12 percent of the requests came from private or commercial organizations, particularly drug companies. Some requests were for books, in which event the book itself was loaned. Most requests were for journals or journal articles; and about 120,000 of the requests were filled by photocopying single articles from journals, including plaintiff’s journals. Usually, the library seeking an interlibrary loan from NLM did so at the request of one of its patrons. If the “loan” was made by photocopy, the photocopy was given to the patron who was free to dispose of it as he wished. NLM made no effort to find out the ultimate use to which the photocopies were put; and there is no evidence that borrowing libraries kept the “loan” photocopies in their permanent collections for use by other patrons.

Defendant concedes that within the pertinent accounting period, NLM and the NIH library made at least one photocopy of each of eight articles (designated by plaintiff as the Count I-to-Count VIII articles) from one or more of the four journals in suit. Defendant also concedes that plaintiff is the record owner of copyright registrations on the journals. That would appear to end the matter in plaintiff’s favor, for § 1 of the copyright statute (17 U.S.C.) says that the copyright owner “\* \* \* shall have the exclusive right: (a) to print, reprint, publish, copy and vend the copyrighted work \* \* \*”; and § 3 of the statute says that, “\* \* \* [t]he copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title.” Simply stated, this means that each article in plaintiff’s journals is protected from infringement to the same extent as the entire journal issue. *Advertisers Exch., Inc. v. Lafe*, 29 F.Supp. 1, 38 USPQ 93 (W.D. Pa. 1938); *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir. 1924). [FN5]

[FN5] One argument made by defendant to justify the copying of single articles from plaintiff’s journals is that each article is but “part” of a journal issue, which in turn is but “part” of a journal volume; and, accordingly, defendant says, its libraries have not copied an “entire” copyrighted work. Section 3 of 17 U.S.C. fully meets that argument, for it is undisputed that plaintiff could publish and seek copyright registration on each article separately. As stated in H.R. Rep. No. 2222, 60th Cong., 2d Sess. 10 (1909):

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<sup>10</sup> The National Association of Book Publishers and the Joint Committee on Materials for Research (representing the libraries), “The Gentlemen’s Agreement and the Problem of Copyright,” 2 *Journal of Documentary Reproduction* 29 (1939). This antique agreement was drafted by a now-defunct (in 1972) book publishing trade group and an association of libraries, and did not include either of the parties in this case. The trial judge correctly held that this “gentlemen’s agreement” was *not* law. 172 U.S.P.Q. at 680-681, see page 18 below.

<sup>11</sup> The “photographic reproduction” in the 1935 Gentlemen’s Agreement refers to the now obsolete photographic process, known by the trademark Photostat, which produced copies at a cost of about \$2/page. 487 F.2d at 1388 (Nichols, J., dissenting).



Section 3 [of the Copyright Act] does away with the necessity of taking a copyright on the contributions of different persons included in a single publication \* \* \*

**Standler's comment:** Given that the Government admitted the large amount of photocopying, including admitting copying of the plaintiff's articles, there are only a few possible defenses that could be made to plaintiff's claim of copyright infringement. The U.S. Government made every conceivable defense, in the hope that the judge would agree with at least one defense.

Despite plaintiff's prima facie showing of infringement, the Government and its amici raise a host of arguments why the libraries should not be held liable for infringement. The arguments boil down to five defenses: (a) nonownership of copyright, (b) real party in interest, (c) noninfringement, (d) fair use, and (e) license.

## II

### The nonownership defense

Defendant says that plaintiff is not the "proprietor" of copyright<sup>12</sup> in the Count I-to-Count VIII articles (17 U.S.C. § 9), and therefore does not have standing to bring this suit. As noted earlier, defendant concedes that plaintiff is the owner of record title of copyright registrations on the journals in which the articles appear; and defendant also concedes that plaintiff is entitled to a "presumption that it is the owner of the individual articles in the journals published by it." 17 U.S.C. §§ 3, 209. However, defendant says the presumption is rebutted by evidence that the authors of the articles did not make written assignment to plaintiff of their proprietary interest in the manuscripts from which the articles stemmed and that the authors were not paid monetary compensation for their manuscripts. From this, defendant urges that the authors did not

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assign to plaintiff ownership of their manuscripts, and, at most, granted to plaintiff only a license to publish the articles. Defendant relies on *Morse v. Fields*, 127 F.Supp. 63, 65, 104 USPQ 54, 55 (S.D. N.Y. 1954), which held that "\* \* \* a general copyright in an issue of a periodical (a "blanket" copyright) does not protect the rights in a particular contributed article unless such rights had been previously assigned to the publisher." Defendant also cites *Kinelow Publishing Co. v. Photography-in-Business, Inc.*, 270 F.Supp. 851, 155 USPQ 342 (S.D. N.Y. 1967), and *Brattleboro Publishing Co. v. Winmill Publishing Co.*, 250 F.Supp. 215, 149 USPQ 41 (D. Vt. 1966), *aff'd*, 369 F.2d 565, 151 USPQ 666 (2d Cir. 1966), for the proposition that, absent an express assignment, the author (rather than the publisher) of a copyrightable work retains title to the work, even though it is published as part of a composite on which there is blanket copyright in the publisher's name.

The record does not support defendant and the cited cases are not apposite. At the outset, it is pertinent to note this court's decision in *Dorr-Oliver, Inc., et al. v. United States*, 193 Ct.Cl. 187, 432 F.2d 447, 167 USPQ 474 (1970), which held that the owner of record title of a patent (and by analogy, a copyright registration) is the proper party to bring suit for infringement in this court under 28 U.S.C. § 1498, and that equitable rights of ownership of strangers to the suit cannot be raised as defenses against the legal title holder. See also *Widenski v. Shapiro, Bernstein & Co.*, 147 F.2d 909, 64 USPQ 448 (1st Cir. 1945). As a matter of law, therefore, it would seem that defendant cannot assert the ownership defense since by doing so, it seeks to raise equities of persons not parties to the suit. However, even if that issue can be raised, defendant cannot prevail on the merits. Authors of two of the articles

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<sup>12</sup> The proprietor of copyright is the owner of the copyright.

in suit testified at trial, and neither asserted an interest (legal or equitable) in their respective articles. It is reasonable to infer that testimony of the other authors would be the same, for the evidence supports the conclusion that by custom of long standing and absent any written or oral agreement to the contrary, authors who submit manuscripts to medical journals do so on the implied understanding that the publisher will obtain statutory copyright on the journal (and the individual articles therein) in the journal's name and for the journal's benefit, and that the copyright will be enforced by the copyright registrant. So far as the record shows, no author ever questioned or challenged that practice. *Geisel v. Poynter Prod., Inc.*, 295 F.Supp. 331, 160 USPQ 590 (S.D. N.Y. 1968), held that full ownership of copyrightable subject matter may, by custom, be assigned by implication from the author to a publisher. Similarly, *Best Medium Publishing Co. v. National Insider, Inc.*, 259 F.Supp. 433-34, 152 USPQ 56 (N.D. Ill. 1966), *aff'd*, 385 F.2d 384, 155 USPQ 550 (7th Cir. 1967), cert. denied, 390 U.S. 955, 156 USPQ 720 noted:

“In the absence of evidence to the contrary, the transfer by an author to a magazine publisher of a manuscript without restriction is deemed to carry with it all right, title, and interest, including all rights of copyright, therein.”

The fact that authors are not paid by plaintiff for their manuscripts is of little significance. The record shows that medical researchers, on their own volition, submit manuscripts to plaintiff's journals in consideration for the journal's screening and editing, and hopefully accepting and publishing, the manuscripts. Rarely, if ever, do medical researchers publish the results of their work at their own expense. Rather they look to medical journals to bear the expense of editing, publishing and disseminating. [FN6] In the world of academia and its all-too-frequent specter of “publish or perish,” researchers compete to get their manuscripts accepted and published by journals of high reputation and wide circulation. Acceptance and publication by a leading journal marks an article as one of importance and good quality. The record shows that over 95 percent of all published medical research appears in medical journal articles. Thus, publication of research work by medical journals, though perhaps not of immediate monetary benefit to researchers, nevertheless enhances, and may even be crucial to, their long-term professional and economic opportunities. The record also shows that, once having succeeded in getting a manuscript accepted and published by plaintiff, authors do not seek publication by others. Rather, they look to plaintiff for reprints, further publication or permission to republish elsewhere. Plaintiff, in turn, grants permission to others, often through royalty-bearing license agreements, to copy, reprint and republish individual journal articles

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in other forms, e.g., as photocopies, as parts of books or on microfilm. Cf. *Kinelow, supra*, and *Brattleboro, supra*, wherein the authors did not intend the first publisher to be the sole publisher and, in fact, intended that others republish the work without regard to the first publisher.

[FN6] Some journals require authors to pay “excess page” charges for unusually long articles and also to pay, at least in part, for certain kinds of illustrations. To this extent, therefore, authors sometimes bear part of the expense of publication. However, there is no evidence that such expenses are substantial (compared to the total cost of publication) or that such requirement discourages authors from submitting manuscripts to plaintiff in favor of publishing them themselves or elsewhere.

In sum, the only reasonable inference (there being no evidence to the contrary) is that the authors assigned to plaintiff, ab initio and by implication, the ownership rights to their manuscripts, and did not grant to plaintiff a mere license to publish.

A final point: Implicit in defendant's position on this issue is the notion that it is unfair for plaintiff to derive monetary profit from the work of medical researchers who do not share that profit directly with plaintiff. What defendant overlooks is that with respect to most of plaintiff's journals (and three of the four in suit), profits derived from the journals go in large measure to the medical societies for which the journals are published. The American Gastroenterological Association (AGA) and the American Association of Immunologists (AAI) get 50 percent of the profits from *Gastroenterology* and the *Journal of Immunology*, respectively; and the American Society of Pharmacology and Experimental Therapeutics (ASPET) gets 90 percent of the profits from *Pharmacological Reviews*. Most of plaintiff's journals, therefore, operate for the benefit of the medical profession itself, which, in the long run, is for the benefit of the public. In any event, plaintiff's profits are not great, and at best, simply compensate plaintiff for the services it renders as a publisher in a free-enterprise system where income is derived by risking capital to print and disseminate. E.g., in 1968, profit from *Pharmacological Reviews* was \$1,154.44 (on sales of about \$40,000), of which \$1,039 went to ASPET and \$115.44 went to plaintiff. In 1969, *Pharmacological Reviews* lost money. Also, in 1969, net income from *Gastroenterology* was \$21,312.08 (on sales of about \$245,000), and \$11,532.35 of that amount was offset by losses the previous year, leaving a balance of \$9,779.73. The balance was split between plaintiff and AGA, plaintiff getting \$4,889.86.

In short, absent private publishers whose efforts provide for dissemination of 95 percent of the current medical literature, most of the findings of medical research would go unpublished and undisseminated; or at least the burdens of publishing and disseminating would fall upon other organizations, one of which would no doubt have to be the Government. [FN7]

[FN7] The UCLA Project, at 956, discusses the problems which would be created if, through failure of private publishers, the Government takes up the slack in medical publishing. Among the problems might be "government influence over the content of writings," implicit in which is the " \* \* \* danger of government censorship \* \* \*. Many scientific journal articles are presently subjected to scrutiny by panels of scientists who determine 'publishability' independently of the editors of journals. Retaining such an evaluative process would allow professional scientists in the author's field, rather than bureaucrats, to decide what is published."

#### The real-party-in-interest defense

Defendant says that plaintiff is not the real party in interest with respect to the articles (Counts II to VI) in the *Journal of Immunology* and *Pharmacological Reviews*. Defendant says those journals are owned, respectively, by AAI and ASPET; and, though not expressly urged, it is apparently defendant's position that AAI and ASPET must be joined as parties-plaintiff or else must bring this suit in their own names. The record shows that plaintiff publishes the *Journal of Immunology* under contract with AAI and publishes *Pharmacological Reviews* under contract with ASPET. The contracts obligate plaintiff to secure statutory copyright on the journals in plaintiff's name. While it is true that the contracts provide that the respective societies are the "sole owner of the periodical," the clear intent of the parties is that copyright matters, including acquisition and enforcement, are plaintiff's

responsibility. Thus, the ASPET contract provides that it is plaintiff's duty to procure copyright on *Pharmacological Reviews* "in the name of the Publisher" and to oversee and act on requests by others to republish parts thereof, a right incident to the enforcement of copyright. Likewise, the AAI contract requires plaintiff to procure copyright on the *Journal of Immunology* "in the name of the Publisher," and notes that AAI "reserves the right to have the copyright assigned to the Association if at any time in the future this seems desirable." This is a clear indication that it was the parties' intent that plaintiff should own the copyright ab initio. In short, there is no evidence that ASPET or AAI intended anything other than that plaintiff, and plaintiff alone, should own the copyright in the respective journals and should enforce the copyright by bringing lawsuits, or otherwise.

In any event, Dorr-Oliver, *supra*, disposes of the issue. Plaintiff is, and always has been, the record owner of the copyright registrations and is the proper party to bring suit in this court. See also *Hedeman Prod. Corp. v. Tap-Rite Prod. Corp.*, 228 F.Supp. 630, 141 USPQ 381 (D. N.J. 1964).

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#### The noninfringement defense

Defendant contends that its acts of copying do not violate the copyright owner's exclusive right "to copy" the copyrighted work as provided by 17 U.S.C. § 1. The argument is that with respect to books and periodicals, the act of making single copies (i.e., one copy at a time) is not, in itself, sufficient to incur liability; that the "copying," to be actionable, must include "printing" (or "reprinting") and "publishing" of multiple copies of the copyrighted work. The argument is bottomed on analysis of the copyright laws as they have evolved from 1790 to the present. [FN8] The early laws distinguished "copying" from "printing," "reprinting," and "publishing," and provided that the copyright in books is infringed by "printing," "reprinting" and "publishing" while the copyright in other works (e.g., photographs, paintings, drawings, etc.) is infringed by "copying." The 1909 Copyright Act obliterated any such distinction. It provides in § 5 a list of all classes of copyrightable subject matter (including books and periodicals), and says in § 1 that the owner of copyright shall have the exclusive right "to print, reprint, publish, copy and *vend the copyrighted work*" [emphasis supplied]. Thus, the 1909 Act, unlike the earlier statutes, does not expressly say which of the proscribed acts of § 1 apply to which classes of copyrightable subject matter of § 5. Defendant says that to be consistent with the intent and purpose of earlier statutes, the "copying" proscription of § 1 should not apply to books or periodicals; rather, only the proscribed acts of "printing," "reprinting" and "publishing" should apply to books and periodicals.

[FN8] Congress enacted the first copyright statute in 1790 (Act of May 31, 1790, ch. 15, 1 Stat. 124). Thereafter, the statute was revised from time to time, notably in 1802, 1831, 1870, and 1891. In 1909, the present statute was passed (Act of March 4, 1909, ch. 320, 35 Stat. 1075) and later was codified as 17 U.S.C. (Act of July 30, 1947, 61 Stat. 652).

Defendant's argument is not persuasive and, in any event, is irrelevant. It is clear from a study of all the copyright statutes from 1790 to date that what Congress has sought to do in every statute is to proscribe unauthorized *duplication* of copyrighted works. The words used in the various statutes to define infringing acts (i.e., printing, reprinting, copying, etc.) were simply attempts to define the then-current means by which duplication could be effected. It is reasonable to infer that in 1909, when Congress included "copying" in the list of proscribed acts applicable to books and periodicals (as well as copyrightable subject matter in general), it

did so in light of the fact that new technologies (e.g., photography) made it possible to duplicate books and periodicals by means other than “printing” and “reprinting.” The legislative history of the 1909 Act says little, one way or the other, about the matter. [FN9] Nevertheless, §§ 1 and 5 are plain and unambiguous on their face; and the Supreme Court held as recently as 1968, in *Fortnightly Corp.*, supra note 3, at 394, 158 USPQ at 3:

\* \* \* § 1 of the [Copyright] Act enumerates several “rights” that are made “exclusive” to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to use *within the scope of one of these “exclusive rights,” he infringes the copyright.* [Emphasis supplied.]

[FN9] H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909) states:

Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word “copy,” practically adopts the phraseology of the first copyright act Congress ever passed — that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.

See also the Register’s Report, wherein it is noted at 21-22:

\* \* \* as several court have observed, the right embraced in the repetitive terms of section 1(a) is the two-fold right to make and publish copies.

This right is the historic basis of copyright and pertains to *all* categories of copyrighted works. \* \* \* [Emphasis supplied.]

The burden, therefore, is on defendant to show that Congress intended the statute to mean something other than what it plainly says. Defendant has not carried that burden.

It is also pertinent that the courts have liberally construed the 1909 Act to take into account new technologies by which copyrighted works can be duplicated, and thus infringed. In *Fortnightly Corp.*, supra note 3, at 395-96, 158 USPQ at 4, the Court, in dealing with copyright infringement relating to television, said:

In 1909, radio itself was in its infancy, and television had not been invented. *We read the statutory language of 60 years ago in the light of drastic technological change.* [Emphasis supplied.]

To the same effect is *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), cert. denied, 269 U.S. 556, which stated at 411:

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\* \* \* the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning. Thus it has been held both in this country and England that a photograph was a copy or infringement of a copyrighted engraving under statutes passed before the photographic process had been developed. [citations omitted] While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.

Furthermore, defendant's argument that it may "copy," short of "printing," "reprinting" and "publishing," is irrelevant under the facts of this case. **NLM and the NIH library did not merely "copy" the articles in suit; they, in effect, "reprinted" and "published" them.**<sup>13</sup> "Printing" and "reprinting" connote making a duplicate original, whether by printing press or a more modern method of duplication. *Macmillan Co. v. King*, 223 F. 862 (D. Mass. 1914); M. Nimmer, COPYRIGHT § 102 (1971 ed.). "Publishing" means disseminating to others, which defendant's libraries clearly did when they distributed photocopies to requesters and users. *Macmillan Co.*, supra; M. Nimmer, COPYRIGHT § 104 (1971 ed.).

Defendant's contention that its libraries make only "single copies" of journal articles, rather than multiple copies, is illusory and unrealistic. Admittedly, the libraries, as a general rule, make only one copy per request, usually for different users. But the record shows that the libraries duplicate particular articles over and over again, sometimes even for the same user within a short timespan. E.g., the NIH library photocopied the Count I article three times within a 3-month period, two of the times for the same requester; and it copied the Count IV and Count V articles twice within a 2-month period, albeit for different users. The record also shows that NLM will supply to requesters photocopies of the same article, one after the other, on consecutive days, even with knowledge of such facts. In short, the libraries operate comprehensive duplication systems which provide every year thousands of photocopies of articles, many of which are copies of the same article; and, in essence, the systems are a reprint service which supplants the need for journal subscriptions. The effects of this so-called "single copying" practice on plaintiff's legitimate interests as copyright owner are obvious. The Sophar and Heilprin report, at 16, puts it in terms of a colorful analogy: "Babies are still born one at a time, but the world is rapidly being overpopulated."

Finally, and in any event, there is nothing in the copyright statute or the case law to distinguish, in principle, the making of a single copy of a copyrighted work from the making of multiple copies. The first copyright statute (Act of 1790) provided in § 2 that it was infringement to make "any *copy or copies*" [emphasis supplied] of a copyrighted work. Nothing in the later statutes or their legislative histories suggests that Congress intended to change that concept. And the courts have held that duplication of a copyrighted work, even to make a single copy, can constitute infringement. *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1, 16-17 (1908); *Patterson v. Century Productions, Inc.*, 93 F.2d 489, 493, 35 USPQ 471, 475 (2d Cir. 1937), cert. denied, 303 U.S. 655, 37 USPQ 844 (1938); *Greenbie v. Noble*, 151 F.Supp. 45, 63, 113 USPQ 115, 128 (S.D. N.Y. 1957).

**Standler's comment:** The trial judge then came to the central issue of this case, the fair use defense. Previously, fair use of copyrighted works had been confined to *authors* who were quoting or paraphrasing copyrighted works by previous authors. Now, in this case, the defendant and its amici were suggesting that the doctrine of fair use could be expanded to cover exact duplication by a photocopy machine. After making a few introductory remarks about fair use, the trial judge rejected this application of fair use to wholesale photocopying.

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<sup>13</sup> Boldface added by Standler.

## The “fair use” defense

Defendant contends that its copying comes under the doctrine of “fair use” of copyrighted works. “Fair use,” a judicially-created doctrine, is a sort of “rule of reason” applied by the courts as a defense to copyright infringement when the accused infringing acts are deemed to be outside the legitimate scope of protection afforded copyright owners under 17 U.S.C. § 1. What constitutes “fair use” cannot be defined with precision. Much has been written about the doctrine, particularly its rationale and scope. See, e.g., A. Latman, Fair Use of Copyrighted Works, Study No. 14, Copyright Law Revision, Studies Prepared for Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (1960); Comment, Copyright Fair Use — Case Law and Legislation, 1969 DUKE L.J. 73; S. Cohen, Fair Use and the Law of Copyright, ASCAP COPYRIGHT LAW SYMPOSIUM (No. 6) 43 (1955); W. Jensen, Fair Use: As Viewed by the “User,” 39 DICTA 25 (1962); L. Yankwich, What Is Fair Use?, 22 U. CHI. L.REV. 203 (1954); Note, Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law, 34 U. CIN. L.REV. 73 (1965); M. Nimmer, COPYRIGHT § 145 (1971 ed.); Sophar & Heilprin Report at 15; R. Heedham, Tape Recording, Photocopying and Fair Use, ASCAP COPYRIGHT LAW SYMPOSIUM (No. 10) 75 (1959); Crossland, The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media, 20 S. CAR. L.REV. 153 (1968). Some courts have held that the doctrine is but

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an application of the principle *de minimis non curat lex* and, as plaintiff puts it, “comes into play only when a relatively small amount of copying takes place.” Principal factors considered by the courts in deciding whether a particular use of a copyrighted work is a “fair use” are (a) the purpose of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner’s potential market for his work. [FN10]<sup>14</sup> While these criteria are interrelated and may vary in relative significance, the last one, i.e., the competitive character of the use, is often the most important. E.g., it has been held “fair use” to copy excerpts from literary works for purposes of criticism or review (*Loew’s, Inc. v. CBS, Inc.*, 131 F.Supp. 165, 105 USPQ 302 (S.D. Cal. 1955), *aff’d sub nom. Benny v. Loew’s, Inc.*, 239 F.2d 532, 112 USPQ 11 (9th Cir. 1956), *aff’d* by an equally divided Court, 356 U.S. 43, 116 USPQ 479 (1958)); or to copy portions of scholarly works (*Greenbie v. Noble*, *supra*; *Holdredge v. Knight Publishing Corp.*, 214 F.Supp. 921, 136 USPQ 615 (S.D. Cal. 1963)). However, it is not “fair use” to copy substantial portions of a copyrighted work when the new work is a substitute for, and diminishes the potential market for, the original. *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D. N.Y. 1914); *Folsom v. Marsh*, 9 F.Cas. 343 (D. Mass. 1841). And it has been held that wholesale copying of a copyrighted work is never “fair use” (*Leon v. Pacific Tel. & previous hit;next hit Tel. Co.*, 91 F. 2d 484, 34 USPQ 237 (9th Cir. 1937); *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262, 127 USPQ 231 (D.C. Cir. 1960), vacated and remanded, 369 U.S. 111, 132 USPQ 535 (1962)), even if done to further educational or artistic goals and without intent to make profit. *Wihtol v. Crow*, 309 F.2d 777, 135 USPQ 385 (8th Cir. 1962).

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<sup>14</sup> These four factors are essentially the same as in the subsequent Copyright Act of 1976, 17 U.S.C. § 107, because that section was intended to codify the common law of fair use.

[FN10] H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967), which relates to revision of the copyright laws, notes that these factors are the ones used by the courts. At 29-37, there is a detailed discussion of “fair use” as applicable to photocopying for educational purposes.

Whatever may be the bounds of “fair use” as defined and applied by the courts, defendant is clearly outside those bounds. Defendant’s photocopying is wholesale copying and meets none of the criteria for “fair use.” The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to diminish plaintiff’s potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff’s market. Defendant says, nevertheless, that plaintiff has failed to show that it has been harmed by unauthorized photocopying; and that, in fact, plaintiff’s journal subscriptions have increased steadily over the last decade. Plaintiff need not prove actual damages to make out its case for infringement. Macmillan Co., *supra*. Section 1498 of title 28 U.S.C. provides for payment of “reasonable and entire compensation \* \* \* including minimum statutory damages as set forth in section 101(b) of title 17, United States Code.” See *Brady v. Daly*, 175 U.S. 148 (1899); *F. W. Woolworth & Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 95 USPQ 396 (1952). M. Nimmer, *COPYRIGHT* § 154 (1971 ed.). Moreover, damage may be inferred in this case from the fact that the photocopies are intended to supplant the original articles. While it may be difficult (if not impossible) to determine the number of subscription sales lost to photocopying, the fact remains that each photocopy user is a potential subscriber, or at least is a potential source of royalty income for licensed copying. Plaintiff has set up a licensing program to collect royalties for photocopying articles from its journals; and among the licensees have been libraries, including a Government library. [FN11] Also, there is evidence that one subscriber canceled a subscription to one of plaintiff’s journals because the subscriber believed the cost of photocopying the journal had become less than the journal’s annual subscription price; and another subscriber canceled a subscription, at least in part because library photocopies were available. Loss of subscription (or photocopying royalty) income is particularly acute in the medical journal field. The record shows that printing preparation costs are 50-65 percent of total cost of publication and that the number of subscriptions is relatively small. This simply means that any loss of subscription sales (or royalty income) has the effect of spreading publication costs over fewer copies, thus driving up steeply the unit cost per copy and, in turn, subscription prices. Higher subscription

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prices, coupled with cheap photocopying, means probable loss of subscribers, thus perpetuating a vicious cycle which can only bode ill for medical publishing.

[FN11] There is no agreement, even among libraries and Government agencies, of what constitutes “fair use” in institutionalized photocopying. The Library of Congress will not photocopy copyrighted materials without permission of the copyright owners. Many other libraries follow the General Interlibrary Loan Code and engage in “single copy” photocopying. The U.S. Office of Education, through its Education Resources Information Center (ERIC) makes available current educational and research-related materials. ERIC will not copy copyrighted materials without permission of the copyright owner. See Sophar and Heilprin report at 39-46.



Defendant's amici fear that a decision for plaintiff will be precedent for plaintiff's seeking injunctions against non-Government libraries, pursuant to 17 U.S.C. § 101(a), thereby interfering with the free flow of technical and scientific information through library photocopying.<sup>15</sup> On the basis of this record and representations made by plaintiff's personnel and counsel, that fear does not appear to be justified. Plaintiff does not seek to *enjoin* any photocopying of its journals. Rather, it merely seeks a reasonable royalty therefor. [FN12] Its licensing program would so indicate for, as far as the record shows, plaintiff will grant licenses to anyone at a reasonable royalty. No doubt, plaintiff would prefer that all of its journal users be subscribers. However, plaintiff recognizes that this is unrealistic. Some articles in its journals are in greater demand than others, and many journal users will not consider it economically justifiable to subscribe to a journal simply to get access to a few articles. Implicit in plaintiff's licensing program, therefore, is the idea that it is in the best interest of all concerned that photocopying proceed without injunction, but with payment of a reasonable fee. That would appear to be a logical and commonsense solution to the problem, not unlike the solution provided by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) in the field of music and the performing arts. For a description of how ASCAP and BMI operate in a context similar to this one, see Hearings on H.R. 4347 and other bills before Subcomm. No. 3, House Comm. on the Judiciary, 84th Cong., 1st Sess. 194, 203 (1965); Finkelstein, ASCAP as an Example of the Clearing House System in Operation, 14 COPYRIGHT SOC'Y BULL. 2 (1966).

[FN12] In his opening statement at trial, plaintiff's counsel said (emphasis supplied):

The case has nothing to do with the stopping of photocopying. The Commissioner knows that an injunction is not available in this court, *nor is plaintiff, in any case, seeking to curtail this use of its articles.*

Similarly, William M. Passano, plaintiff's Chairman of the Board, stated in a hearing before a Senate committee:

We feel that it is unrealistic and not in the public interest to consider restricting in any way the use of photocopying devices. They serve a useful purpose in the dissemination of knowledge. Since we, as publishers, are in that business, we certainly don't want to see the spread of knowledge curtailed.

To us the only solution to the problem is a simple system of royalty payments with a minimum of red tape. \* \* \*

[Hearings on Copyright Law Revision before the Patents, Trademarks and Copyrights Subcomm. of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 976 (1967).]

Defendant says that photocopying by NLM and the NIH library is "reasonable and customary" because it complies with a long-standing practice of libraries to supply photocopies of parts of scientific works to persons engaged in scholarly research, and is consistent with the terms of the "gentlemen's agreement," earlier noted. The "gentlemen's agreement," drafted in 1935, was the product of meetings and discussions between representatives of the book publishing industry and libraries. The representatives were interested in working out a practical accommodation of the conflict between (a) the legitimate interests of copyright owners not to have their works copied without compensation and (b) the

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<sup>15</sup> These fears of stopping photocopying are hyperbole by libraries. The plaintiff-publisher in the *Williams & Wilkins* case was asking for a royalty payment from NLM, which in the year 1967, would have been approximately \$ 1100/year. 172 U.S.P.Q. at 686. Moreover, a copyright owner *should* have the ability to license or prohibit the copying of work that it owns — that is the essence of copyright law.

needs of scholars and research workers for copies of parts of copyrighted works for private use in pursuit of literary or scientific investigation. The “agreement” was, in effect, a promise by the book publishers not to interfere with library photocopying under three conditions: (i) the library must warn the person for whom the photocopy is made that he is liable for any copyright infringement by misuse (presumably by making further photocopies), (ii) the photocopying must be done without profit to the library, and (iii) the amount copied must not be so substantial as to constitute an infringement. The third condition is implicit in the “agreement” which says:

While the right of quotation without permission is not provided in law, the courts have recognized the right to a “fair use” of book quotations, the length of a “fair” quotation being dependent upon the type of work quoted from and the “fairness” to the author’s interest. *Extensive quotation is obviously inimical to the author’s interest. \* \* \* It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photocopying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted.*  
[Emphasis supplied.]

The “gentlemen’s agreement” does not have, nor has it ever had, the force of law with respect to what constitutes copyright infringement or “fair use.” So far as this record

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shows, the “agreement” has never been involved in any judicial proceedings. Nevertheless, the “agreement” is entitled to consideration as a guide to what book publishers and libraries considered to be “reasonable and customary” photocopying practices in the year 1935. It has little significance, however, to this case. The agreement was drafted on behalf of a book publishers’ organization which is now defunct and to which plaintiff never belonged. In fact, it appears that no periodical publishers were represented in the organization at the time the agreement was drafted; and, consequently, the “agreement” cannot speak for their interests or problems. See the Varmer study at 51, n. 9. Furthermore, the “agreement” was drafted at a time when photocopying was relatively expensive and cumbersome; was used relatively little as a means of duplication and dissemination; and posed no substantial threat to the potential market for copyrighted works. Beginning about 1960, photocopying changed character. The introduction to the marketplace of the office copying machine made photocopying rapid, cheap and readily available. The legitimate interests of copyright owners must, accordingly, be measured against the changed realities of technology. Professor Nimmer in his treatise COPYRIGHT capsules the point at 653:

Both classroom and library reproduction of copyrighted materials command a certain sympathy since they involve no commercial exploitation and more particularly in view of their socially useful objectives. *What this overlooks is the tremendous reduction in the value of copyrighted works which must result from a consistent and pervasive application of this practice.* One who creates a work for educational purposes may not suffer greatly by an occasional unauthorized reproduction. But if every school room or library may by purchasing a single copy supply a demand for numerous copies through photocopying, mimeographing or similar devices, the market for copyrighted educational materials would be almost completely obliterated. This could well discourage authors from creating works of a scientific or educational nature. If the “progress of science and useful arts” is promoted by granting copyright protection to authors, such progress may well be

impeded if copyright protection is largely undercut in the name of fair use.  
[Emphasis supplied.]

In any event, the “gentlemen’s agreement” by its own terms condemned as “not \* \* \* fair” the making of photocopies which could serve in “substitution” for the original work, and further noted that “[o]rders for photo-copying which, by reason of their extensiveness or for any other reasons” could serve as duplicates of the original copyrighted work “should not be accepted.” Thus, the most that can be said for the “gentlemen’s agreement” is that it supported (and probably still supports) the proposition that it is “reasonable and customary” (and thus “fair use”) for a library to photocopy for a patron a part of a book, or even part of a periodical article, such as a chart, graph, table, or the like, so long as the portion copied is not practically a substitute for the entire original work. Other instances of library photocopying may also be “fair use.” E.g., a library no doubt can replace damaged pages of copyrighted works in its collection with photocopies; can make a small number of photocopies for in-house administrative purposes, such as cutting up for cataloging or the like; or can supply attorneys or courts with single photocopies for use in litigation. In all those instances, and probably many more which might come to mind on reflection, the rights of the copyright owner are not materially harmed. The doctrine of “fair use” and the “gentlemen’s agreement,” however, cannot support wholesale copying of the kind here in suit. [FN13]

[FN13] The potential pernicious effects of modern, institutionalized photocopying of copyrighted works (particularly journal articles) in the name of “fair use” is discussed at length in the Sophar and Heilprin report. The authors, at 24, characterize wholesale copying by libraries as “a non-violent form of civil disobedience.”

Defendant also contends that traditionally, scholars have made handwritten copies of copyrighted works for use in research or other scholarly pursuits; that it is in the public interest that they do so because any harm to copyright owners is minimal compared to the public benefits derived therefrom; and that the photocopying here in suit is essentially a substitute for handcopying by the scholars themselves. That argument is not persuasive. In the first place, defendant concedes that its libraries photocopy substantially more material than scholars can or do copy by hand. Implicit in such concession is a recognition that laborious handcopying and rapid machine photocopying are totally different in their impact on the interests of copyright owners. **Furthermore, there is no case law to support defendant’s proposition that the making of a handcopy by scholars or researchers of an *entire* copyrighted work is permitted by the copyright laws.**<sup>16</sup> Certainly the statute does not expressly permit it; and no doubt the issue has never been litigated because, as a practical matter, such

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copying is *de minimis* and causes no real threat to the copyright owner’s legitimate right to control duplication and dissemination of copyrighted works. The photocopying done by NLM and the NIH library, on the other hand, poses a real and substantial threat to copyright owner’s legitimate interests. Professor Nimmer discusses the point succinctly, at 653-54 of his treatise, and his language can hardly be improved upon:

It may be argued that library reproduction is merely a more modern and efficient version of the time-honored practice of scholars in making handwritten copies of copyrighted works, for their own private use. In evaluating this argument several factors

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<sup>16</sup> Boldface added by Standler. *Entire* appears in italics in the original.

must be considered. In the first place, the drudgery of making handwritten copies probably means that such copies in most instances are not of the complete work, and the quantitative insignificance of the selected passages are such as generally not to amount to a *substantial* similarity. Secondly, there would appear to be a qualitative difference between each individual scholar performing the task of reproduction for himself, and a library or other institution performing the task on a wholesale basis for all scholars. If the latter is fair use, then must not the same be said for a nonprofit publishing house that distributes to scholars unauthorized copies of scientific and educational works on a national or international basis? Finally, it is by no means clear that the underlying premise of the above argument is valid.

There is no reported case on the question of whether a single handwritten copy of all or substantially all of a protected work made for the copier's own private use is an infringement or fair use. If such a case were to arise the force of custom might impel a court to rule for the defendant on the ground of fair use. Such a result, however, could not be reconciled with the rationale for fair use suggested above since the handwritten copy would serve the same function as the protected work, and would tend to reduce the exploitation value of such work. Moreover, if such conduct is defensible then is it not equally a fair use for the copier to use his own photocopying or other duplicating device to achieve the same result? Once this is acknowledged to be fair use, the day may not be far off when no one need purchase books since by merely borrowing a copy from a library any individual will be able to make his own copy through photocopying or other reproduction devices which technological advances may soon make easily and economically available.

To the same effect is a statement in the Varmer study at 62-63:

It has long been a matter of common practice for individual scholars to make manual transcriptions of published material, though copyrighted, for their own private use, and this practice has not been challenged. Such transcription imposed its own quantitative limitations; and in the nature of the event, it would not be feasible for copyright owners to control private copying and use. But reproduction for private use takes on different dimensions when made by modern photocopying devices capable of reproducing quickly any volume of material in any number of copies, and when copies are so made to be supplied to other persons. Publisher's copies are bought for the private use of the buyer, and in some circumstances a person supplying copies to others will be competing with the publisher and diminishing his market.

Not only is such competition unfair to the publisher and copyright owner, but it may be injurious to scholarship and research. Thus, it has been pointed out that widespread photocopying of technical journals might so diminish the volume of subscriptions for the journals as to force the suspension of their publication.

Also, the Register's Report notes at 25-26:

Researchers need to have available, for reference and study, the growing mass of published material in their particular fields. This is true especially, though not solely, of material published in scientific, technical, and scholarly journals. Researchers must rely on libraries for much of this material. When a published copy in a library's collections is not available for loan, which is very often the case, the researcher's need can be met by a photocopy.

On the other hand, the supplying of photocopies of any work to a substantial number of researchers may diminish the copyright owner's market for the work. Publishers of scientific, technical, and scholarly works have pointed out that their market is small; and they have expressed the fear that if many of their potential subscribers or

purchasers were furnished with photocopies, they might be forced to discontinue publication.

Finally, defendant says that it is unconstitutional to construe the copyright law so as to proscribe library photocopying of scientific or technical writings because such photocopying  
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is consonant with the constitutional purpose of copyright “to promote the progress of science.” That argument misses the mark. Article I, section 8, clause 8, of the U.S. Constitution grants to Congress the “Power \* \* \* To Promote the Progress of Science \* \* \* by securing for limited Times to Authors \* \* \* the exclusive Right to their \* \* \* Writings \* \* \*.” The word “Science” is used in the sense of general knowledge rather than the modern sense of physical or biological science. See Rich, Principles of Patentability, 28 GEO. WASH. L.REV. 393, 394-97 (1960); H.R. Rep. No. 1923, 82d Cong., 2d Sess. 4 (1952); S. Rep. No. 1979, 82d Cong., 2d Sess. 3 (1952). Congress has exercised its constitutional power by enacting, and revising from time to time, copyright statutes which are the method of, and provide a *system* for, achieving the constitutional purpose. The system “promotes progress” by encouraging authors to write and publicly disclose their writings; by inducing publishers and entrepreneurs to invest risk capital in the dissemination of authors’ writings; and by requiring other authors to create new writings, rather than plagiarize the old, all of which is in the public interest. *Mazer v. Stein*, 347 U.S. 201, 219, 100 USPQ 325, 333 (1954), rehearing denied, 347 U.S. 949. Congress has broad discretion under the Constitution to prescribe the conditions under which copyright will be granted, the only express restriction being that any “exclusive right” must be for a “limited time.” Nothing in the present statute, its legislative history or the case law suggests that Congress intended to exempt libraries or others from liability for wholesale copying of copyrighted works, whatever be the purpose or motivation for the copying. What defendant really appears to be arguing is that the copyright law *should* excuse libraries from liability for the kind of photocopying here in suit. That, of course, is a matter for Congress, not the courts, to consider for it involves questions of public policy aptly suited to the legislative process. In an analogous context in *Fortnightly Corp.*, supra, Justice Fortas noted at 408, 158 USPQ at 8:

The task of caring for CATV is one for the Congress. Our ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish. See also *White-Smith Music Co.*, supra, where the Court noted at 18, that “considerations [of what the copyright laws should provide] properly address themselves to the legislative and not the judicial branch of the Government.” [FN14]

[FN14] There has been no dearth of activity to revise the 1909 Copyright Act. Some of that activity relates to library photocopying problems. See, e.g., Hearings on H.R. 4347 and other bills before Subcomm. No. 3, House Comm. on the Judiciary, 84th Cong., 1st Sess. 448, 459, 1133 (1965); S. 597, H.R. 2512, 90th Cong., 1st Sess. (1967); S. 543, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-1219, 91st Cong., 2d Sess. 5 (1970); S. 644, 92d Cong., 1st Sess. (1971). For a brief history of legislative activity directed toward revision of the 1909 Copyright Act, see *Fortnightly Corp.*, supra at 396, 158 USPQ at 4, n. 17; UCLA Project at 931-38.

### The license defense

Defendant says it is licensed to copy the Count I, IV V, and VI articles-by express license with respect to the Count I article and by implied license with respect to the Count IV, V and VI articles. The articles state on their faces that the research work therein reported was supported, at least in part, by grants from defendant's Public Health Service. By way of background, the Public Health Service, through its Division of Research Grants, has for many years made grants-in-aid of public funds to physicians and scientists engaged in medical research. The grants are characterized by the Public Health Service as "conditional gifts" and are made annually on the basis of research proposals submitted to the Public Health Service by prospective grantees. Once a grant is made, the grantee is free to use the funds as he sees fit. The grantees are not Government employees nor are they in the service of the United States, and the Public Health Service does not supervise the research work. Typically, grantees use the funds to purchase equipment and supplies, pay salaries of technicians, pay travel expenses, and the like. From time to time, the Division of Research Grants issues policy statements setting out the conditions of the grants, including the rights and responsibilities of grantees with respect to patent and copyright matters. All grants are awarded subject to the express patent and copyright policy in effect at the time of the grant, unless the Public Health Service indicates otherwise.

**Standler's comment:** The U.S. Government sponsors a large amount of scientific and medical research. One might wonder why the government (and taxpayers) need to pay the salaries and expenses of these scientists, and then pay *again* to photocopy the published results of that sponsored research.<sup>17</sup> The trial judge noted that for all research grants after 1 July 1965, the U.S. Public Health Service required the grant recipient to give the government a royalty-free license to reproduce any copyrighted material produced with funds from that grant. 172 U.S.P.Q. at 683-84.

Prior to July 1, 1965, it was the express policy of the Public Health Service not to reserve to the Government any rights in copyrighted publications stemming from grant-funded research. The policy statement in effect between 1956 and 1959 said that when a grant was made "without condition," any "books or related matter" could be "published privately" and the author was free to make arrangements with a publisher

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*"as if the Government had not contributed support"* [Emphasis supplied.] Subsequent policy statements, issued in 1959 and 1963, though worded differently, were to the same effect and continued the earlier policy. Then, on July 1, 1965, the policy was modified. For all grants awarded after that date, the Government reserved a royalty-free license to "reproduce \* \* \* translate \* \* \* publish \* \* \*, use and dispose of" any copyrighted publications resulting from "work supported by the Public Health Service." Grantees were still free, however, to arrange

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<sup>17</sup> One answer is that the results of the research are printed in journals published by either nonprofit professional societies or for-profit publishing companies, *not* published by the government. The private publishers of these journals need to be reimbursed for expenses of editing manuscripts, typesetting, printing, paper, and postage. Such reimbursement can either (1) come from high subscription fees or (2) come from a combination of low subscription fees and royalties from photocopying. The second alternative is better, because then more scholars and libraries can afford to purchase a subscription to the journal.

for publication and copyright, in the first instance, without approval of the Public Health Service.

The Count I article was coauthored by Dr. Victor A. McKusick who for many years received Public Health Service funds to support his research. The article reports the results of research work supported in part by such funds and in part by private funds. The manuscript for the article was submitted to the editor of *Medicine* on August 19, 1964, but was not published until December 9, 1965. Between those dates, the manuscript was edited and augmented from time to time. Defendant contends that the article reports research work done under Public Health Service funds awarded after July 1, 1965; and that consequently, the Government has an express license to copy the article pursuant to the Public Health Service's post-July 1, 1965 copyright policy.

The record does not support defendant. The evidence shows that between August 19, 1964 and mid-1965, the authors made minor changes in the manuscript to reflect continuing research on the project reported in the manuscript. However, after mid-1965 (i.e., July 1, 1965), no substantive changes were made in the manuscript. Any changes made were, at most, editorial in nature. Accordingly, defendant has failed to show that the Count I article reports research work done with Government funds granted after July 1, 1965; and the Government does not have an express license to copy the article.

There remains to decide whether the Government is impliedly licensed to copy the Count IV, V and VI articles, [FN15] published in the *Journal of Immunology* in August 1965. The manuscripts were received by the publisher in December 1964. Defendant does not contend that the articles report research work done under funds awarded by the Public Health Service after July 1, 1965, and therefore does not contend that the Government has an express license to copy. Rather, defendant says that it has an implied license to copy because the Government provided "substantial funds \* \* \* to the authors of the articles to support the very research work reported in these articles," and that a license to copy should be implied on "general equitable principles to avoid injustice."

[FN15] Though not urged by defendant, its arguments for implied license apply equally to the Count I article.

In another but analogous context, this court has held that when the Government provides funds to contractors for research and development, it is entitled to a license to use any inventions resulting therefrom, even in the absence of an express patent license clause in the contract. *Ordnance Eng'r Corp. v. United States*, 68 Ct.Cl. 301, 353 (1929); *Mine Safety Appliances Co. v. United States*, 176 Ct.Cl. 777, 789, 364 F.2d 385, 392, 150 USPQ 453, 459 (1966). This court has also held that it will liberally construe patent license clauses in Government research and development contracts so as to grant to the Government licenses to use inventions developed thereunder. *AMP Inc. v. United States*, 182 Ct.Cl. 86, 389 F.2d 448, 156 USPQ 647 (1968), cert. denied, 391 U.S. 964, 157 USPQ 720. However, an implied license to use patented inventions will not be found when a contract contains express language to the contrary. *Eastern Rotorcraft Corp. v. United States*, 181 Ct.Cl. 299, 384 F.2d 429, 155 USPQ 729 (1967). Similarly, if the Government has an established policy limiting its rights in proprietary property, that policy will not be overridden retroactively, even on equitable grounds. *Tektronix, Inc. v. United States*, 173 Ct.Cl. 281, 351 F.2d 630, 147 USPQ 216 (1965).

This case, of course, is fundamentally different from patent license cases because the Public Health Service grants, being "conditional gifts," are not contracts in the same sense as Government supply contracts or research and development contracts. Nevertheless, the rationale applicable to patent license cases would appear sound here because the grants are

made subject to compliance by grantees with express conditions and policies of the Government, through the Public Health Service. Viewed in that light, defendant cannot prevail. The Public Health Service had an established and express policy, prior to July 1, 1965, under which it reserved neither title to, nor any rights whatsoever in, publications stemming from Public Health Service grants. Copyright matters were to be dealt with “as if the Government had not contributed support.” It is hard to conceive of language which more plainly disclaims any reservation of rights to the Government. After July 1, 1965,  
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the Public Health Service expressly changed its policy; and no doubt the Government is licensed to copy, without royalty, publications stemming from awards granted thereafter. In sum, defendant has neither an express nor implied license to copy the Court I, IV, V, and VI articles.

It is pertinent to note that resolution of this issue in plaintiff’s favor should be of minor practical consequence to the Government’s future copying of articles stemming from Public Health Service-funded research. The Sophar and Heilprin report found that 85 percent of the material photocopied by U. S. libraries is less than 5 years old, and 90 percent is less than 10 years old. Since the Public Health Service’s express license policy is nearly 7 years old, most of the Government’s prospective copying (as well as its copying for the past year or so) of articles stemming from grant-funded research, will be of articles which resulted from grants awarded subsequent to July 1, 1965, and will therefore be royalty-free.

### III

Several other points raised by the parties merit comment. Defendant notes that the National Library of Medicine Act by which NLM was created (42 U.S.C. § 275, et seq.) provides at § 276(4) that the Secretary of Health, Education, and Welfare, through NLM, shall “make available, through loans, photographic or other copying procedures or otherwise, such materials in the Library as he deems appropriate \* \* \*”; and that the Medical Library Assistance Act of 1965 (42 U.S.C. § 280b-1, et seq.) provides that grants be made to medical libraries for, among other things, “acquisition of duplicating devices, facsimile equipment \* \* \* and other equipment to facilitate the use of the resources of the library.” 42 U.S.C. 280b-7. Defendant suggests that by those statutory provisions Congress intended to exempt NLM and other grantee libraries from the copyright laws. As defendant puts it, “\* \* \* the only reasonable interpretation [of the statutes] is that Congress knew that fair use would exempt such libraries from copyright infringement in the established use by libraries of such [photocopy] equipment.” There is no merit to this. Nothing in the statutes or their legislative histories says anything about the copyright laws, and it cannot be inferred that Congress intended the statutes to be in derogation of the copyright laws, absent an express indication to the contrary. [FN16] See generally, E. Crawford, *Statutory Construction* § 227 (1940). **No court has ever held that “fair use” applies to library wholesale photocopying;**<sup>18</sup> nor has there been a uniform and unchallenged policy among libraries and other institutionalized photocopiers on the bounds of “fair use.” See note 11. Thus, it makes no sense to impute to Congress an intent for which there is no sound basis in judicial decision, or otherwise. The fact that the statutes authorize the libraries to make use, generally, of photocopying equipment and procedures, is not controlling or even very significant. Much material in library collections is either not copyrighted or is material on which the copyright has expired; and in either event, the material is in the public domain and can be freely copied.

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<sup>18</sup> Boldface added by Standler.



[FN16] H.R. Rep. No. 941, 84th Cong., 2d Sess. (1956); S. Rep. No. 2071, 84th Cong., 2d Sess. (1956); H.R. Rep. No. 1026, 89th Cong., 1st Sess. (1965); S. Rep. No. 756, 89th Cong., 1st Sess. (1965).

Furthermore, the record shows that NLM, from the beginning, has been concerned about complying with the copyright laws and has never considered itself exempt therefrom. In 1957, NLM's Board of Regents discussed the library's photocopying practices and deemed them to create vexing copyright infringement problems. The Director of NLM was of the opinion that "sooner or later" the problems would bring "a test of the issue in the courts."

Defendant suggested at trial that payment of compensation to plaintiff for photocopying its journals would create a continuing undue and oppressive administrative and financial burden on NLM and the NIH library. Defendant has not pressed the point in its brief, perhaps because it is clear that plaintiff's right to compensation under 28 U.S.C. § 1498(b) cannot depend on the burdens of compliance. Nevertheless, defendant's point merits comment since courts should be mindful of the practical consequences of their decisions. Based on this record, defendant's fears are not justified. Both NLM and the NIH library already have administrative procedures by which they keep detailed records of photocopying. Both libraries require that written request slips be submitted by requesters of photocopies. The slips are a permanent record of the journals and pages photocopied. It would seem a routine, albeit tedious, matter to cull from those records the information necessary to calculate a reasonable royalty on the basis of the number of articles copied, or perhaps to come up with an acceptable formula for establishing a blanket annual royalty payment. Indeed, the evidence suggests that this is so. In 1967, NLM temporarily stopped photocopying articles from plaintiff's journals, as a result of plaintiff's charge of copyright infringement and requests

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for a reasonable royalty. NLM was able, as a practical matter, to flag all requests for photocopies from plaintiff's journals from April 27, 1967 to May 29, 1967, in order to refrain from copying them. On about May 29, 1967, photocopying was resumed and was monitored for about 90 days. Satisfied that the 90-day period was a representative sample, NLM found that it would have paid plaintiff about \$250-\$300 if it had acceded to plaintiff's request for royalty payment.<sup>19</sup> The Director of NLM testified that, in his opinion, this was "a very small sum — surprisingly small sum." Similarly, the NIH librarian testified that payment of royalties for photocopying "has nothing to do with the operation of the library in the fulfillment of \* \* \* [its] function. It is an economic and budgetary consideration and not a service-oriented kind of thing."

Nor does it appear that payment of royalties to other publishers will create an undue or oppressive administrative burden. The Sophar and Heilprin report notes, at 58-60, that based on a study of the photocopying practices of U. S. libraries, less than 1,000 publishers provide the material photocopied by libraries, and that about 5 percent of that number provide about 40 percent of the material copied. This simply means that nearly half of the materials photocopied emanate from about 50 publishers. No doubt, the materials photocopied by NLM and the NIH library come from an even smaller number of publishers since those libraries are highly specialized. In any event, by using modern management practices including computers and the like, it would appear that NLM and the NIH library can, with minimum disruption, cope with the necessary recordkeeping. [FN17]

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<sup>19</sup> This amount for 90 days (1/4 year) corresponds to approximately \$ 1100/year — \$ 275 times four.

[FN17] It has been suggested that there be established a clearinghouse for access, permissions and payments for photocopying of copyrighted materials. The clearinghouse would relieve institutional copiers of the burdens of royalty distribution and might also be instrumental in setting up blanket royalty arrangements, thus relieving the institutions from most recordkeeping requirements. See, e.g., the Sophar and Heilprin report at 82. The clearinghouse concept has also been alluded to in a congressional report:

\* \* \* Despite past efforts, reasonable arrangements involving a mutual understanding of what generally constitutes acceptable library practices, *and providing workable clearance and licensing conditions*, have not been achieved and are overdue. The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected. [Emphasis supplied.]

[H.R. Rep. No. 83, 90th Cong., 1st Sess. 36 (1967).]

And it is interesting that Sophar and Heilprin found that librarians favored, two to one, the clearinghouse approach to the problem, even though many of those in favor “indicated a desire to settle an increasingly complex matter, rather than an enthusiastic approval of the idea.” Sophar and Heilprin report, at p. v of the Summary.

**Postscript [by Commissioner Davis]:** The issues raised by this case are but part of a larger problem which continues to plague our institutions with ever-increasing complexity — how best to reconcile, on the one hand, the rights of authors and publishers under the copyright laws with, on the other hand, the technological improvements in copying techniques and the legitimate public need for rapid dissemination of scientific and technical literature. The conflict is real; the solution not simple. Legislative guidelines seem appropriate. [FN18]

[FN18] In 1969, several bills were introduced in both the Senate and House to establish a National Commission on Libraries and Information Science. Also in 1969, H.R. 8809 was introduced to provide for a “National Science Research Data Processing and Information Retrieval System.” See 1969 Register of Copyrights Annual Rep. 6. Earlier, in 1967, the Senate enacted S. 2216, 90th Cong., 1st Sess., by which there would be created a commission to study and compile data on the reproduction and use of copyrighted works. The House took no action on the bill.

The Sophar and Heilprin report, at pp. vii-ix of the Summary, capsules the problem in a statement worth quoting:

From the viewpoint of the information scientist, copyright may appear as an impediment to the most efficient flow of information. It is apparently a blockage in an information system. Our early tendency was to oppose and try to limit the protection and control granted in copyright for the sake of efficiency. After careful analysis we no longer do.

There is a philosophical reason for not wanting to see copyright destroyed and there are a number of practical reasons. The philosophical reason is simply a belief that copyright is one of a number of ways in which our society expresses its belief and hope that an individual can continue his identity in a world of mass efforts by assuring the individual, his publisher or his association sufficient income from his ideas to maintain a degree of independence. The erosion of the economic value of copyright must lead to federal support of all kinds of writing and, of course, control.

The practical reasons flow from the philosophical reasons. Publishers, nonprofit as well as commercial, will simply not be able to continue publishing under an eroded system. The scientific and other

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professional societies which, through their memberships, have done the most to develop information-handling tools and media are the ones most hurt by them. A means must be developed to assure payment to the copyright owner in return for unlimited and uncontrolled access to and duplication of the copyrighted work.

Our only concern and “vested interest” in copyright since we became interested in the problem “is to find a way to protect the ‘exclusive Right’ of an author to his ‘Writings’ while permitting the advantages of modern information dissemination systems to become as useful as they may without weakening or threatening the economic urge and the need to create.” We believe the two must become reconciled, not in the interests of compromise, but simply because both concepts are too valuable for either one to be permitted to severely harm or destroy the other.

## Appeal

The U.S. Government lost the case at trial in the U.S. Claims Court. The Government then appealed to a panel of seven judges of the same court. The panel, in a decision reported at 487 F.2d 1345, reversed the trial court. See the full appellate opinion and my comments at <http://www.rbs2.com/ww2.pdf>. Williams & Wilkins then appealed to the U.S. Supreme Court, which — without an opinion and by an equally divided court — affirmed the decision of the seven judge panel of the U.S. Court of Claims. *Williams & Wilkins v. U.S.*, 420 U.S. 376 (1975) (per curiam).

Because the trial judge’s opinion was reversed by a panel of the U.S. Claims Court, and that reversal was upheld by the U.S. Supreme Court, Commissioner Davis’ opinion is now only of historical interest. Even when Commissioner Davis made a correct statement of the law, one should look for other cases to cite for that correct statement of law.

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