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Statutory Copyright Protection for Books and Magazines Against Machine Copying

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I. The Problem

Pencil and paper copying produced few pages and a copy which did not lend itself to further multiplication. The typewriter sped the operation of pencil and paper copying. The photostat did much more than speed up the basic copying operation as it copied a page at a time and produced a facsimile which lent itself to further reproduction. With the advent of the microfilm and xerox copying processes, ""Almost any markings on most types of paper produce a facsimile which lends itself to the xerox copying process."

Many book and magazine publishers fear that the growing use of copying machines is hurting sales. Libraries are receiving an increasing demand for copies. College professors are becoming copy conscious. Industry keeps current on important matters by supplying interested employees with copies of the latest articles. A graphic example of industrial copying is presented by the Du Pont Co. procedure of weekly sending a 200-page manual summarizing articles in various technical journals to 2,000 of its scientists. If a scientist desires a complete article he is supplied with a photocopy of that article. It is clear that such copying practices cut sharply across the sales of the books and magazines from which the copies are taken.

A form of copying more subtle than the direct copying of the microfilm, photostat and xerox methods is the copying done to form the massive information systems of computers. A billion dollar commercial computer business has been established giving birth to machines the capabilities of which are beyond imagination. Eastern Air Lines' use of computers to coordinate reservations and flight information presents no problem of the pirating of another author's work. Yet computers used to give assistance in the field of legal research, the information systems of which would contain material copied from ""Restatements, law journals, treatises and similar material"" take from the writings of others. Computers used to provide a running index of enactments from state legislatures take from compilations written by others.

Do compilers stand on the same footing as authors of books and magazines with respect to their rights in the literary property? Does the subject matter of the writing affect the author's rights? How does the method of copying affect the rights of an author in his work? Does the author have statutory protection or protection at common law?

These and other questions will be answered by defining the rights of authors and copiers in literary material that is: (1) copied for private research; (2) copied for commercial use. The end served by copying, whether private or commercial, is one important variable affecting the rights in literary property. Two other important variables are the subject matter of the material copied and the method by which the copying is accomplished. Copyright cases are more easily understood and

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2 "Well over 300 million high speed copies of various published material are made each month in the U.S., one maker of such machines estimates. That's some 50% more than were produced monthly as recently as 1961, he figures. By 1965, the monthly rate will top 600 million, the official predicts." Wall Street Journal, June 13, 1963, p. 24, col. 2.
3 Id. col. 3.
reconciled if these three variables are kept in mind. The rights in literary property may be more easily and more accurately forecast if an attorney thinks of his client's problem in terms of the three most important variables upon which the rights to literary property are based: (1) the end served by copying private research or commercial use; (2) the subject matter of the copied material; (3) the manner by which the copying is accomplished (hand copy, photocopy, computer copying).

II. Rights in Literary Material—Generally

A. History and Nature of Copyright.

Authorship, though several thousand years old, presented no need for a set of legal rules until a few hundred years ago when the invention of the art of printing made authorship the basis of a mass-production industry. The common law right of an author to the exclusive ownership of his literary materials was acknowledged in England in 1662. By 1700, literary piracy in England was becoming a national outrage which prompted Swift, Addison, Steele and certain publishers to petition Parliament for an Act to protect their copyrights. This resulted in the passage of an Act which granted authors protection for fourteen years against the piracy of their published works.

Statutory protection of copyrights in the United States is based on the English statute of 1709. Before the adoption of the Federal Constitution in 1787, most of the thirteen states passed acts which secured copyrights; but, in 1790 Congress passed a federal copyright act, thus pre-empting the field. The source of Congressional power for the act of 1790 and all later copyright legislation is the Constitution of the United States. Congress has plenary authority in such matters. The 1790 act was amended and revised in the 19th century. The third revision of the copyright laws in 1909 (which repealed and superseded prior laws on the subject) provided for an original copyright of 28 years with a period of renewal of 28 years and, except for minor amendments, provides the basis for copyright law as it is today.

"Copyright in any form, whether statutory or at common law, is a monopoly; it consists only in the power to prevent others from reproducing the copyrighted work." Copyright is the bundle of all separate rights in a literary work; it is an intangible right intended to protect the intellectual product of the author as it is given expression in the form of a book, article or drawing. Copyright is not a protection of the intellectual conception apart from the thing produced; it is a protection of the tangible result, the concrete form of that idea or conception.

B. Statutory Copyright as Distinguished from Common Law Copyright.

A dual system of copyright protection exists in the United States: common law protection and federal statutory protection. The copyright code expressly preserves and leaves undisturbed the common law rights of an author or proprietor in his unpublished work. The common law rights of an author exist in his unpublished manuscript. These rights include ownership of the physical manuscript, the right to its first publication, the right to prevent the unauthorized publication of the literary work.

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7 Clapp, supra note 1, at 11.
8 Copinger and JAMES, LAW OF COPYRIGHT 7 (8th ed. 1948).
9 Windsor, How to Secure Copyright 16 (1950).
10 8 Anne c. 19, § 1 (1709).
13 U.S. CONST. art. I, § 8. "The Congress shall have Power ... To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ."
17 King Features Syndicate v. Fleischer, 299 Fed. 533 (2d Cir. 1924).
18 White-Smith Music Co. v. Apollo Co., 209 U.S. 1, 16 (1908).
of the manuscript and the right to secure statutory copyright.© Once an idea is in manuscript form, it is automatically protected by common law. ¹ The author may submit it to a publisher, read it to a friend, or do anything short of general publication, and the manuscript remains the exclusive property of the author. A general publication or dissemination to the public, "[A]s implies an abandonment of the right of copyright or its dedication to the public," terminates the common law copyright. The work has fallen into the public domain and becomes public property if the author allows this general publication (offering copies for sale or distributing them to the general public) without complying with the copyright act.

Compliance with the federal statute will ensure continuous copyright protection for this statutory coverage begins where common law copyright protection ends, at the act of general publication. The common law right is a prepublication right. Upon general publication, either the work is protected by statute if the requirements of the statute are met or the work passes to the public where it can never be retrieved.© Statutory copyright is a copyright after general publication.

Section 12 of the code accords statutory protection to certain enumerated unpublished works; with this exception, the statute does not reach unpublished works. The proprietors of such works can look only to the common law for protection which means that state laws as to rights in literary property are applicable. This note deals with published material, books, and magazines that are offered to the public for sale. Since there is a general publication of these materials, all common law rights in the literary property are lost. If proprietors of books and magazines are to have rights in their literary material, the act of publishing must be done in accordance with the statute.

C. Statutory Procedure for Obtaining Copyright Protection.

Copyright may be secured for, "[A]ll the writings of an author," and shall include, but not be limited to, books, cyclopedic works, directories, compilations, periodicals, newspapers, lectures, addresses, dramatic and musical compositions, works of art, models for works of art, reproduction of a work of art, drawings of a technical nature, photographs, prints or labels and motion pictures. Writings include, "[A]ll forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression." The house of copyrightability is indeed spacious: Not only will it accommodate "the lines of the poet . . ." and . . . Joseph Conrad . . . but also directories, circus posters, "the kind of treacle that passes in a popular love song," "the grotesque and ludicrous Spark Plug cartoon," the "foolish" or "silly" Wonderman or Superman comic pictures, and even deliberately crude malapropisms. My point is that the courts have wisely refrained from making their own value judgments in this field.

Little need be shown as to originality. The author may copyright that which is distinguishable or recognizable as his own,© or where he can show a material revision of a previously copyrighted work.© The subject matter coverage of the copyright statute is so broad that this aspect of copyright law presents little difficulty to the publisher of books and magazines.

© AMDUR, COPYRIGHT LAW AND PRACTICE § 5 (1936).
1 Id. at 53.
32 Adventures in Good Eating, Inc. v. Best Places to Eat, Inc., 131 F.2d 809 (7th Cir. 1942).
The author or proprietor of any work or his executors, administrators, or assigns (not licensees) may secure a copyright in any literary matter made the subject of copyright by the code. Contrary to popular belief, the work need not be registered in Washington before it can be copyrighted. All that need be done to secure statutory copyright in the United States is to affix to each copy of the work published or offered for sale in the United States the notice of copyright required by the code.

"The notice of copyright required by section 10 of this title shall consist either of the word 'copyright,' the abbreviation 'Copr.,' or the symbol '(,) accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication." Examples of the correct form of copyright notice would be: "Copyright 1963 by the University of Notre Dame"; "© 1963 by the University of Notre Dame"; "© 1963 by John Doe." Although not definitely stated, magazines would seem to come under the classification of "printed literary" works requiring the year of publication to complete the notice requirement. Strict compliance with section 19 is essential; slight deviations may cause a proprietor to lose all rights to his work upon publication.

Section 20 provides for the place of application of the notice of copyright required by section 19.

The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music. One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

Here also there must be substantial compliance with the statute.

Books and periodicals printed in the English language shall be printed from type set within the United States or from plates made within the United States or, if produced by a lithographic or photoengraving process, then the process must be performed within the United States and the book shall be bound in the United States.

One last caveat germane to this discussion has been alluded to in footnote 33; a licensee may not obtain a copyright. Many scholars submit their articles without any reservations of rights (the rights at this stage are common law rights) in their work. It will be inferred that the whole interest in the literary property has been transferred to the publisher when the author submits his manuscript and is paid by the publisher. The publisher owns the literary property and, as an

37 Wasserstrom, supra note 30, at 163.
assignee, is the proprietor of the work; thus, the publisher may secure the copyright that, "The author or proprietor . . . or his . . . assigns," is entitled to under the code. Pursuant to section 3 of the code, the publisher-proprietor has authority to copyright with one general copyright notice for the complete periodical all separate articles or contributions thereof in which the publisher holds a proprietary or complete interest. However, if an author-contributor to a magazine merely gives the publisher the right to publish the author's work, the publisher is constituted a mere licensee, and not an assignee, of the author's entire rights in his work. In order to protect the rights of the individual contributor in a license arrangement, the publisher must insert a separate copyright notice in the name of the individual author in the proper place immediately preceding the author's article. In *Leigh v. Barnhart*, plaintiff painted and copyrighted a painting; he authorized Parade magazine to publish a single reproduction of the painting, thus constituting Parade a licensee of a particular right in the work and not an assignee of all the author's rights. Parade got a general copyright on the whole magazine but inadvertently did not put the proper notice in the name of the plaintiff-author on the reproduction of the painting itself. Defendants, as part of a union organizing campaign, published and distributed about 750 handbills which contained a reproduction of plaintiff's painting copied from the Parade publication. Plaintiff sued for infringement and was denied recovery. The court so held because Parade was a mere licensee of a right and was not the proprietor or owner of all the author's rights; thus, Parade, as publisher, was not entitled to a general copyright of the whole magazine that would protect plaintiff's individual contribution, the painting. The publisher's general copyright would protect only those articles or contributions that Parade wholly owned as a proprietor or assignee of the author's entire rights. Parade would be a proprietor as to such articles because the authors had made, "[A]n assignment of full rights." A publisher must have full rights to a literary work or else the publisher is a mere licensee and his general copyright for the entire periodical does not cover the individual contributing article and it passes into the public domain.

**D. Remedies for Infringement.**

As a condition precedent to bringing an action for infringement of copyright (assuming that a copyright has been secured by general publication of the work with proper notice of copyright), "[T]here shall be promptly deposited in the Copyright Office . . . two complete copies of the best edition thereof then published." Although the statute uses the term "promptly deposited," "[M]ere delay [fourteen

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43 The two terms are synonymous under the code. Quinn-Brown Publishing Corp. v. Chilton Co., 15 F. Supp. 213 (S.D.N.Y. 1936); Mifflin v. R. H. White Co., 190 U.S. 260 (1st Cir. 1903).
45 17 U.S.C. § 3 (1958). "Protection of component parts of work copyrighted; composite works or periodicals."

The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted. . . . The 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.

48 *Id.* at 195. See also, Kaplan v. Fox Film Corp., 19 F. Supp. 780 (S.D.N.Y. 1937).
50 17 U.S.C. § 13 (1958). "* * * No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."
months after publication and six months after infringement in making deposit of copies was not enough to cause forfeiture of the right theretofore distinctly granted. By including the statutory fee of $4 with the application for registration and, "[B]y complying with the provisions of this title," the Register of Copyrights issues a certificate of registration. A suit for infringement cannot be maintained unless a certificate has been obtained.

The remedies which the statute gives are cumulative not alternative, and as applicable to the owners of copyrights in books and contributions to periodicals, are: 1) injunctive relief against further infringement; 2) actual damages which the copyright proprietor may have suffered; 3) actual profits which the infring er made from the infringement; 4) in lieu of actual damages, such damages as to the court may appear to be just within the limits of $250 and $5,000; 5) the right to have the infringing matter delivered up for destruction; 6) the right to receive statutory damages in the discretion of the court in excess of $5,000 with no limit specified for, "[I]nfringements occurring after the actual notice to a defendant either by service of process in a suit or other written notice served upon him." 7) a criminal sanction of imprisonment up to one year or a fine not less than one hundred dollars nor more than 1,000 dollars, or both, upon the conviction of, "Any person who willfully and for profit shall infringe any copyright secured by this title," and 8) the right of a court in its discretion to award the prevailing party a reasonable attorney’s fee.

III. Rights in Books and Magazines—More specifically Section 1 of the code pertains to book and magazine publishers and provides:

Exclusive rights as to copyrighted works. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work; (b) To translate the copyrighted work or make any other version thereof; if it be a literary work; . . . (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production. . .

The statute is clear and absolute. In effect the rights conferred by a copyright constitute a monopoly, "[T]o prevent others from reproducing the copyrighted work." Although the code speaks of the "exclusive" rights of the copyright holder, as a matter of general experience it is known that some copying of copyrighted works is permitted. Book reviewers quote from copyrighted works in their criticisms; authors create works which are mimicries or parodies of copyrighted material; and newspapers often contain brief synopses of operas and plays. These three uses of copyrighted materials seem to be infringements of the "exclusive" rights granted to a copyright holder under section 1 of the code. Yet courts have found no infringement where defendants have written reviews, parodies and synopses of copyrighted works. Courts have said that such uses of the copyrighted work were "fair uses," and not infringing uses. Thus courts have implied a limitation

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57 Sheldon v. Moredall Realty Corp., 95 F.2d 48 (2d Cir. 1938), aff’d, 309 U.S. 390 (1940).
63 Amdur, op. cit. supra note 20, at 757-766.
on the exclusive rights enunciated in section 1. Because of the judicial doctrine of "fair use," which is not even mentioned in the code, copyrights are less than absolute rights. This doctrine allows some copying of the copyrighted work as long as the copying is reasonable and the rights of the author encompassed within the code's protection are not materially impaired.

Fair use has no statutory basis; it is a doctrine which enables the courts to live with a law which contains a misstatement of fact so palpable that, if interpreted and enforced literally; it would involve them in absurdities contrary to the public interest. But, since there is no way of predicting what a court might deem absurd, it is impossible to give a satisfactory definition of what constitutes fair use.64

The doctrine is a pragmatic one, and the question in each case of whether there has been a "fair use" is a pragmatic question, depending on the peculiar circumstances of each case.65 The difficulty of drawing the line between an infringing use and a "fair use" in a particular case has prompted one court to conclude that, "[T]he issue of fair use . . . is the most troublesome in the whole law of copyright, . . ."66

There are two primary bases for the doctrine. The primary purpose for copyright protection is the public good. The courts have not allowed a literal interpretation of the statute to subvert this purpose. It is for the public benefit that reasonable copying of even copyrighted works be allowed. This basic public policy purpose also is behind the courts' denial of proprietorship rights in ideas. Ideas are the common property of mankind and may be copied.67 An author acquires only the right to the manner in which he expresses ideas and even this mode of expression may be reasonably copied because of the doctrine of "fair use."68 "Fair Use is like an easement or a right of way through private property for the public's benefit."69 Another basis for "fair use" is the doctrine of de minimis non curat lex. "From numerous cases it may be concluded that in order to sustain an action for infringement of copyright, a substantial copy of the whole, or a material part, must be reproduced."70 In determining what is a substantial copy or a material reproduction the courts will look to such factors as the part of the author's work taken, the part the user contributed to his own work, the value of the author's work taken, the labor saved by using the author's work, the amount of original material added to the author's work, whether the user's work could serve as a substitute for the author's work and the interrelated factors of competition, commercial gain, loss to the copyright holder and number and quality of the copies.71

A. Copying of Books and Magazines for Private Research — The Question of Infringement.

"Does a reader of a book infringe the copyright when he makes a handcopy

64 Clapp, Library Photocopying and Copyright: Recent Developments, 55 LAW LIBRARY J. 10, 12 (1962).
65 Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943). See, DRONE, THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 386 (1879). A plaintiff demanding a jury trial must have the issue of infringement tried before a jury before the court decides the equitable aspect of the case. Bruckman v. Hollzer, 152 F.2d 730 (9th Cir. 1946).
67 Baker v. Selden, 101 U.S. 99, 103 (1879). "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains."
69 Wingo, How to Secure Copyright 38 (1950).
70 Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73, 84 (6th Cir. 1943).
71 Needham, Tape Recording, Photocopying, and Fair Use, 10 COPYRIGHT LAW SYMPOSIUM 75, 80-95 (1959).
of a passage for his own purposes? According to common understanding he does not.72 Although there are no decisions on this question,73 it is submitted that a court would allow such a private copying as a "fair use" whether for a commercial or scholarly purpose because any damage to the copyright owner is minimal and because such copying is absolutely essential to the needs of scholars and research workers, who advance science and the useful arts. Also, it has been the custom from time immemorial for scholars and others to hand copy. That no one has seriously questioned this hand copying as an infringement points to the reasonableness of such a use; and, it has been said, "Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary."74 One writer has concluded, "Anyone may copy copyrighted materials for purposes of private study and review."75 The fact that there is little or no purpose of commercial gain contributes to the conclusion that hand copying for private scholarly use is a fair use.76 In England, any fair dealing with a literary work for purposes of research, or private study is statutorily declared not to be an infringement.77 The issue will probably never be judicially resolved in the United States because of, "[T]he impossibility of controlling copying done in private78 and because publishers, rather than spending money on a court action, have attempted to solve the problem through a gentlemen's agreement.79 If the issue should be presented for decision, hand copying for private scholarly use would be

72 Kaplan & Brown, Copyright 314 (1960).
75 Cohen, Fair Use in the Law of Copyright, 6 Copyright Law Symposium 43, 58 (1955). See also, Price, supra note 73, at 350 "... copying for private study ... is permissible."

We would conclude that the purpose for which the use was made is of major importance, in consideration with various other factors, in arriving at a sound determination of the extent of fair use; that broader scope will be permitted the doctrine where the field of learning is concerned and a much narrower scope where the taking is solely for commercial gain.

77 4 & 5 Eliz. II, c. 74, s. 6 (1). To the same effect in Canada, Copyright Act, R.S.C. 1952, c. 55, s. 17 (2) (a).
79 Smith, The Copying of Literary Property in Library Collections, 46 Law Library J. 197, 202-204 (1953). The "Gentlemen's Agreement" was one entered into between the Joint Committee on Materials for Research of the American Council of Learned Societies and the Social Science Research Council, and the National Association of Book Publishers in 1935. "In substance the agreement provides that libraries or similar institutions may make single copies of a part of a book or periodical volume for a scholar who represents in writing that the copy is in lieu of a loan or in place of a manual transcription and is solely for purposes of research."

But the Agreement was not and is not subscribed to by all publishers although it has been reaffirmed by the Book Publishers' Bureau, successor to the National Association of Book Publishers. Most publishers of law books have never been members of these organizations. It has never been ratified by the present American Book Publishers' Council, which was formed in 1946. "The agreement is not a contract. * * * Also it should be pointed out, the importance of the agreement has been reduced by the fact that many publishers are not members of the publishers' organization, and librarians do not know which ones are." Price, supra note 73, at 352.

Most publishers of law books have never been members of the Book Publishers' Bureau or of the National Association of Book Publishers but the following firms were declared to be members of the more recent American Book Publishers' Council: Bobbs-Merrill Company, Inc., and Little, Brown and Company. The following law book publishers were not members: Baker, Voorhis & Company, Bancroft-Whitney Company, Dennis & Company, Inc., Lawyers Co-
deemed a "fair use." If the doctrine of "fair use" is to exist, it must have vitality here as the public good would suffer enormously if researchers could not make hand copies from copyrighted works. The second basis for the "fair use" doctrine (de minimis non curat lex) is satisfied as there is little if any damage to the copyright owner. Also, since actual profits or damages would be almost incapable of proof, a court would be compelled to assess the minimum of $250 if it found a technical infringement; and, "[T]here's been a tendency, in some cases for the courts to find no infringement in order to avoid the minimum of $250." It is submitted that a researcher copying by hand in good faith (though intention is not essential to render the infringer liable for infringement) represents just such a case where a court would be very reluctant to assess the damages of 250 dollars.

It has been submitted that hand copying for private use, although a violation of the literal words of the code, is allowable as a "fair use." Given the premise that some "infringement" is judicially permitted, the problem becomes one of determining the limits of this "fair use" doctrine.

The leading case which puts an upper limit on the area of "fair use" in this area of private or semiprivate use is MacMillan Co. v. King. In this case, the technical infringer pleading "fair use" as a defense was an economics teacher. Each of his students was expected to possess a copy of the copyrighted textbook published by the plaintiff. In advance of class, defendant-teacher would prepare for the students single sheet memoranda covering the material to be dealt with in class. All these sheets were subsequently destroyed; none were sold or leased. The understanding was that the sheets were to be used by the individual pupil and returned.

Some parts of the sheets did no more than refer to the book for its treatment of a particular topic without giving a notion of what was found in the book on the topic. "If the defendant's sheets had been constructed upon this plan throughout . . . it might be said that he had done . . . nothing which amounted to substantial reproduction of any of the author's treatment." But the defendant went further. In the sheets,

(T)here is frequent quotation of words, and occasional quotations of sentences . . . the attempt is made to reproduce in abridged and paraphrased form (so far as such reproduction is possible within the very narrow limits adopted) the author's treatment of the topics selected, . . .

The court admitted that there was a very limited reproduction but, nevertheless, held that such appropriation was a violation of the code. The court held that the sheets went beyond merely putting the students on inquiry. The court was clearly disturbed by the possibility that students might meet the requirements of the defendant by reading the sheets without using the book. On the minor issue of whether there was a "printing," the court said, "'Printing' I must regard as including typewriting or mimeographing, for the purposes of the act. . . ." The court's discussion of whether there was a "publication" by the defendant-infringer goes to the issue of whether there may be an infringement without an offer to the public


82 223 Fed. 862 (D. Mass. 1914). One comment on this case: "While the fact that the user's work cannot substitute for the author's is not enough alone to make the use fair, the point that the user's work cannot, is frequently stressed in cases holding that the use was fair. The perhaps unjustifiable strength of this factor is shown by the case of Macmillan Co. v. King. There, nearly every factor seemed to point to a finding of fair use except the substitution factor. The case should be regarded as a questionable one." Needham, supra note 71, at 84-85.


84 Id. at 866.

85 Id. at 867.
by the infringer. The court found "publication" of the infringing work as there was evidence that the agreement to return was not fulfilled in every case and that the sheets were copied before being returned. Although the court does not say that mere printing or copying by itself, without further publication, is enough to constitute an infringement, it is submitted that this is the substance of the holding because of the token publication relied on by the court.

The "further publication" issue has been resolved by later cases. Although in the usual case an infringer circulates or publishes his copy to the public to make a profit; it is clear that, "[M]ere printing or copying of a copyrighted work, without proof of sales thereof, will constitute an infringement." The court found only a possibility of future damage to plaintiff's sales because of the limited number (32) of students using the sheets. The court enjoined the defendant from such further use of plaintiff's book, stating that, "Proof of actual damage is not necessary for the issuance of an injunction, if infringement appears and damage may probably follow from its continuance." (Emphasis added.) Publishers could take a cue from such language when bringing suit in a borderline case, to sue for injunction alone under section 112 of the code and not force the court to choose between minimum damages of 250 dollars and no infringement at all.

In the English case of Novello v. Sudlow, plaintiff was publisher and proprietor of a musical periodical. Defendant was a member of the Liverpool Philharmonic Society consisting of several hundred persons established for the promotion of music and not as a source of profit to the members. Defendant copied from a monthly publication of plaintiff's the musical parts of the bass, soprano, tenor and alto for a particular work. He caused the copies to be traced and struck off impressions solely for the members of the society about to perform the concert. After the concert the copies remained in the custody of the society. The court said, "[T]he act of the defendant in multiplying copies of his work, without his consent, for extensive, though gratuitous circulation, is a violation of that right [right to print and reprint]."

Lest one begin to think that such old rulings would be overturned today in view of such policy reasons as: promoting the velocity of ideas; and promoting commercial institutions that have thrived partially because they have copied at will from books and magazines without the delay and expense of compensating the copyright owner, the case of Wihtol v. Crow, warrants examination. In that case plaintiffs owned the copyrights covering a musical composition. Defendant was the head of the vocal department at a high school. Without permission defendant copied the song incorporating in it a new arrangement. 48 copies of his new arrangement were produced by him upon one of the school's duplicating machines. The district court found that there was a "fair use" by the defendant. The court of appeals reversed and remanded speaking in terms that must be dear to book and magazine publishers:

Obviously the plaintiffs had the exclusive right to copy their copyrighted song, and obviously Nelson E. Crow had no right whatever to copy it. The fact that his copying was done without intent to infringe would be of no help to him, ... if the copying constituted an infringement.

It is submitted that there is a direct analogy between a case of infringing sheet music and a case involving the piracy from a book or magazine. The MacMillan,
Novello and Wihtol cases seem to set an upper limit on the area of private copying permitted by the doctrine of "fair use."

The area between hand copying for a private purpose and multiplying copies for very limited distribution for a scholarly or gratuitous purpose gives rise to this question: Since the scholar can hand copy for his own scholarly use, why cannot a library make him a copy on a copying machine?

(T)he theory is advanced that libraries may make single copies of extracts, or even of whole works, as the agents of scholars without incurring liability. Whether or not such a theory is valid is a question the courts have not been called upon to decide in a case involving a library.

The logic and good sense of such an argument is compelling. A researcher is allowed to copy longhand; the same end product is created if a photocopy is produced. The only material difference is a saving of time for the scholar. It is submitted that a court would allow a single photocopy in lieu of a researcher’s manual transcription for the above mentioned reasons and also because of the publisher’s “Gentlemen’s Agreement” and the effect of custom. The "Gentlemen’s Agreement" between the groups representing researchers and the National Association of Book Publishers allows for such a use. Although all publishers have not ratified the agreement it is a declaration of what many publishers agree to be a reasonable inclusion into the area of “fair use,” and would seem to be relevant in any court decision on the matter. One commentator has said, "[I]t is unlikely that an American court would find the use unfair if the central motive of the user was to advance learning. . . ."

A text writer indicates that a library assisting the reader by making a single photocopy of the passage at the reader’s request would be acting in the “fair use” area.

The law librarian at Columbia University acknowledges that there are no reported cases in the area of library reproduction of single copies for the use of scholars or for court use by lawyers because de minima non curant publishers, but goes on to express the fear of publishers that by failing to stop this practice a sort of prescriptive right will be set up. The publishers have reason to fear as it must be remembered that in this very nebulous and undefinable area of the law known as “fair use” what is “reasonable and customary” as a use will have a bearing on what is a fair use.

In this area of library photocopying for scholarly use, custom is another factor weighing against any suit the publishers might now bring. Libraries were already sufficiently aware of the problem to organize a Joint Libraries Committee on Fair Use in Photocopying in 1957. The findings of the Committee would allow photocopying of a single copy of any published work, apparently without distinction as to whether the copy is to be used for scholarly or commercial use.

It is submitted that the Register of Copyrights’ report on what a revised statute “should say” and what the present statute “does say” would be of some weight to a court in determining what the present statute “does say” in a situation where the literal words of the statute allow such an interpretation and where there are

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93 Smith, supra note 79, at 206. Price, supra note 73, at 353. “It has been assumed, without legal authority, that a reader is free to make copies for his own use, but that is by no means certain.”
94 See, note 79.
95 Needham, supra note 71, at 89.
96 Kaplan & Brown, op. cit. supra note 72, at 314.
97 Price, supra note 73, at 346.

1. The making of a single copy by a library is a direct and natural extension of traditional library service.
2. Such service, employing modern copying methods, has become essential.
3. The present demand can be satisfied without inflicting measurable damage on publishers and copyright owners.
4. Improved copying processes will not materially affect the demand for single copy library duplication for research purposes.
no precedents against such a finding. The Register of Copyrights makes a sharp
distinction between library photocopying for scholarly use, multiple copying and
copying for commercial use. The Register recommends that a library, whose collec-
tions are available to the public without charge, should be permitted to supply a
single photocopy of any reasonable part of a publication, "[When the applicant
states in writing that he needs and will use such material solely for his own re-
search."\(^{99}\) Does "research" include one researching for a commercial purpose? It
is submitted that the argument allowing a single copy for scholarly use is similar to
that argument which would permit a single copy for a commercial use except that
the commercial user is usually better able to pay for the original. Query as to whether
a court would draw this distinction in a case of a hand copy or of a single photo-
copy. It is submitted that a court should allow copying no matter what the purpose
so long as the commercial user does not overstay his welcome into the area of "fair
use" by copying material of an unreasonable length. A hand copy of any length for
even commercial purposes should be allowed. The length of a hand copy would
be regulated by the cost of obtaining the material by the hand copying process.
In most cases the cost of purchasing an original work would be exceeded by all
but the shortest hand copies.

A "reasonable part" of a photocopied book or periodical copied for any purpose,
ought be limited to the length of copy a scholar would normally make if hand
copying. This limitation is necessary because while hand copying has its strict limita-
tions of physical endurance and cost to the copier, photocopying has no such inherent
limitations that would strictly limit the number or length of copies to be turned
out. Also, it must be remembered that one of the most persuasive arguments in
favor of a single photocopy for the researcher is that this photocopy is \textit{to be in lieu of}
what the researcher would have hand copied.

In England and Canada such copying for private study, criticism, review or
research is provided for by statute.\(^{100}\) The Register of Copyrights recommends that
a photocopy of an entire publication be allowed only when a copy is not available
from the publisher. While remembering that, "Whether the courts would agree that
the present law permits photocopying under those or any other conditions is a
matter of conjecture";\(^{101}\) it is submitted that photocopying single copies for private
research is a "fair use."

The distinction between single and multiple copying would be a convenient
cutoff point for any court, especially if the copy was for a commercial use. But in
this area of number of copies any generalities become too dangerous because of the
case by case approach adopted by the courts. The number of copies made in the
\textit{MacMillan} and \textit{Wihtol} infringement cases provides the only guidelines. As soon
as more than one copy is made, the private research area is forsaken for what
begins to smack of commericality. The publisher's argument that the photocopies
are being used as a substitute for the copyrighted work becomes controlling.

Another question in this area is the right of a book owner to keep his book whole
if the book should become tattered. One may rebind and sell the used books of the
author as: "A right of ownership in the book carries with it and includes the right
to maintain the book as nearly as possible in its original condition, so far, at least,
as the cover and binding of the book is concerned."\(^{102}\) But in \textit{Ginn & Co. v. Apollo
Pub. Co.},\(^{103}\) the court found an infringement when defendant replaced missing pages
of plaintiff's book. Although defendant was a bookbinder, and in direct competition
with plaintiff, a library might also be brought under the holding of the case:

\(^{99}\) U.S. House Comm. on the Judiciary, 87th Cong. 1st Sess., op. cit. supra note 78,
at 26.
\(^{100}\) See note 77.
\(^{101}\) Smith, \textit{The Copying of Literary Property in Library Collections}, 47 Law Library J. 204,
207 (1954).
\(^{102}\) Doan v. American Book Co., 105 Fed. 772, 777 (7th Cir. 1901).
\(^{103}\) 215 Fed. 772 (E.D. Pa. 1914).
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The right given to authors and publishers should be so guarded and protected as to give them the practical benefits the law meant them to receive. This certainly calls upon us to protect them against a reproduction of any part where the reproduction of that part means to take from them the exclusive right to make a sale which otherwise would have been made by them.104

Query as to whether a library would be justified by constitutional policy to replace pages although the replacement would take a probable sale away from the publisher. The court in the Ginn & Co. case acknowledged that the owner had the right to keep the book in good condition. Microfilming to save storage space might be justified by a necessity argument but then a secondary advantage is that of preservation. If one may preserve by microfilming then why not by replacement of defaced pages? Again it must be seen that the needs and equities of a given case are decisive in this borderline area. There are no cases to help define the rights in this important area. The libraries have the advantage of the “reasonable and customary” argument and a favorable interpretation of the present law by the Register of Copyrights. The Register classifies as a fair use under present law the, “Reproduction by a library of a portion of a work to replace part of a damaged copy.”105

B. Copying of Books and Magazines For Commercial Use — The Question of Infringement.

Possibly the most important consideration in any “fair use” case is the question of whether the defendant is using the pirated work for his own commercial gain. Assuming some copying of a copyrighted work, the crucial question is whether defendant’s work is or may be used as a substitute for plaintiff’s work. In case after case in the copyright field, the court analyzes to see if there has been this unfair competition or, more broadly, “wrongful appropriation” by the user.106

Unfair competition is the, “[P]ractice of endeavoring to substitute one’s own goods or products in the markets for those of another . . . by means of imitating . . . the imitation being carried far enough to mislead the general public. . . .”107 In Int. News Serv. v. Associated Press,108 the Supreme Court held that one who gathers news at pains and expense has a quasi property right in the results of his efforts; an injunction will issue against a rival in the same business who appropriates the results of the efforts of the original news gatherer to his damage and for the profit of the pirate for this is unfair competition. The broad rationale of Int. News Serv. runs through the copyright cases whenever the issue of commercialism on substitution exists.

The first and most important question to be answered concerns the internal commercial use of copies of copyrighted material. It is well to repeat at this point

104 Id. at 779.
107 Leach & Feldman, The Relationship Between Copyright and Unfair Competition Principles, 10 Copyright Law Symposium 266, 279 (1959). “. . . the jurisprudence indicates that the concept of fair use is the same in copyright law and unfair competition . . . .”
that, "[M]ere printing or copying . . . without proof of sales thereof, will constitute an infringement."108 One text writer focuses on the problem of "fair use" in this area by posing (and leaving unanswered) this query concerning the photocopying by a library: "But we quickly come to limiting cases: suppose a request by an industrial concern for 30 photocopies destined for its employees engaged in profit-connected work."110 It is submitted that this would be an infringement of the copyright act as would copying done by the industrial concern itself for its own use. The user is clearly out of the "private research" area, with its hand copying limitations.

The cases of MacMillan, Novello and Wihtol are applicable to cases of copying by industrial concerns for profit motives with even more force than to cases where the use could be termed gratuitous or scholarly, because an industrial concern is usually better able to pay for the original. Thirty-two students had used single page sheets of "reproductions . . . within the very narrow limits adopted" by the defendant teacher in the MacMillan case; in Novello an undetermined number of copies was run off for a gratuitous circulation; in Wihtol 48 copies of the new song arrangement were run off.

In Towle v. Ross, 111 plaintiff copyrighted a map showing electric generating stations and transmission lines in the Northwest states. Defendants were employees of the federal government and members of the engineering staff of the Bonneville Administration. Photographic copies of portions of plaintiff's map were found in the drafting room of the Bonneville Administration. The only use proved by the plaintiff was that twelve 8" x 10" photostatic copies were made but never used. A negative print and three other maps were also found in the possession of the defendant. The court said:

The making of certain reproductions in part of the copyrighted map belonging to plaintiff is admitted. This constituted infringement whether defendants acted in good faith and by mistake or by design. * * * There is no fair or non-competing use of copyrighted material unless by consent.112

(Emphasis added.)

This court concluded that the factor of competition by substitution was so crucial that it equated "fair use" with "non-competing use." If the copy competes with or substitutes for the original, then the copy is an infringement. It is submitted that behind this conclusion is the determination that originals probably would have been purchased had the copies not been made. It is submitted that this determination is crucial. Without the probability of purchase of originals the copyright owner is not damaged. If no damage then public policy would seem to allow the copying as opposed to a literal reading of the statute.

The court went on to indicate that it would allow copying under the "fair use" doctrine only when one interested in advancing the same art or science commences where the prior author stopped. This use is founded upon the constitutional policy of promoting science and ultimately the general public good. Judge Yankwich would also equate "fair use" with "noncompeting use" as he states even more broadly, "If . . . the appropriation of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, regardless of quantity, is unfair."113 This statement is too broad unless "commercial" connotes nonprivate use and unless the statement includes the crucial determination that in cases of appropriation for

109 See, note 86.
110 KAPLAN & BROWN, op. cit. supra note 74, at 314.
112 Id. at 127.
113 Yankwich, supra note 68, at 209. One writer's comment on this statement is, "In the light of my analysis of the nature and scope of fair use, this is not the law." Needham, supra note 71, at 93. This writer goes on to cite two cases whose dicta indicates that competition is "unessential to infringement." Perhaps this presents a problem of mere semantics but the dicta in both cases cited means that infringement may be found even without competition which does not weaken the argument of those that contend that any competing use is an unfair use.
commercial benefit the appropriator probably would have purchased originals had it not been for the copying. As authority for his conclusion the Judge cited *Henry Holt & Co. v. Liggett & Myers Tobacco Co.* in which an infringement was found by defendant's use of three sentences from plaintiff's scholarly work in a pamphlet defendant published concerning the topic of cigarette throat irritation. The court stressed that the pamphlet was not designed to advance human knowledge but was intended for a "purely commercial purpose," this being the sale of defendant's product. Defendant could have used the scholar's idea but instead defendant desired the words of the original work. In no way could defendant come under the "private research" argument. The quote was to be broadcast to the public; the aim was to advertise; the purpose and effect were solely commercial.

Of course most of the copying done today, especially in the scientific and technical fields, both advances human knowledge and the profits of the user, thus, most modern copying could not be deemed "purely commercial." Then the question becomes: Should not the industrial concern pay its own way when its *primary* purpose is "purely commercial"? As pointed out by one commentator in the Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, photocopying in disregard of copyrights is quick and economical and "essential" as, "This is the only way we can catch up to the Russians." Yet opposing this view is the idea that, "Science, I think, exists on the basis of published works and in most instances the margin of profit is exceedingly low on these works." The financial stability of both the user and the copyright owner would certainly be a factor in a case involving copying for profit. It is submitted that in view of the literal words of the statute supported by authorities that have been cited, and will be cited, prosperous pirate copying primarily for his own profit from a less prosperous copyright owner will be found to have infringed if the delay and cost in getting the information to the pirate's employees via the book or magazine itself are not prohibitive. It is submitted that many of the present-day pirates are "fat" enough to buy additional copies rather than photocopy from an original. The crucial fact, buttressed by an ability to purchase, is that originals probably would be purchased if the copies were not allowed. There would be one original delay of perhaps as long as a week or two if an infringer stopped photocopying and started recognizing the rights of copyright holders. It is submitted that a court would allow such an insignificant setback in our defense program in order to give effect to the statute and the precedents. Query as to whether there are additional delays or other obstacles that would create a more weighty argument in favor of the photocopiars.

In *Blackburn v. Southern California Gas Co.*, plaintiff copyrighted a map. Defendant lithographed 500 copies and also possessed 12 blueprints which were used by defendant solely in its business. Because plaintiff waited seven years to enforce his rights after first learning of defendant's specific infringement, the court allowed the defendant to continue using the copies already used in the business but assessed damages for such use.

In the English case of *Ager v. Peninsular and Oriental Steam Navigation Company*, plaintiff copyrighted a book of words for use in telegraphic transmissions of messages. Defendant made about 150 copies of this book and distributed about 50 to its agents at home and abroad. Defendant argued "fair use," private use and implied consent. Defendants admitted they could not sell or even distribute gratuitously without infringing plaintiff's copyright but relied heavily on the theory of private, limited use. The court said:

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115 U.S. HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., op. cit. supra note 80, at 31, Comment by Mr. McDonald.
116 Id. at 32, Comment by Mr. Meyerhoff.
118 (1884) 26 Ch. 637.
But copyright is the right, by printing or otherwise, to multiply copies.
. . . And it has long been settled that multiplying copies for private distribution among a limited class of persons is just as illegal as if it were done for the purpose of sale. Take for example a valuable copyright like Lord Tennyson's poems. No one can print them and distribute the copies among his friends or among the boys at a school or any limited class of persons any more than he can print them for sale: *Novello v. Sudlow.* . . .

The court granted an injunction; it discussed the appropriation of plaintiff's time and labor by the defendant without compensation as a method of unfair competition.

In another English case, *Chappell & Co., Limited v. Columbia Graphophone Company,* plaintiffs owned the copyright in a song. Defendants caused the music to be recorded on graphophone discs (which they had a right to do). However, defendants recorded from an infringing copy of the song made by them for the purpose of the otherwise legal disc recording. The court said:

> It would seem to be suggested that, because there was only this one copy made, it would not constitute an infringement. . . . To my mind the end does not justify the means . . . and what they ought to have done was, by a proper arrangement with the plaintiffs, to have acquired the right to take that step, . . .

In the German case of *Exchange Ass'n. V. v. General Electricity Corp.*, the corporation copied scientific magazines for the use of its employees. The court held that such use did not come under the private use exception to infringement liability. The German court emphasized that, although a juridical person, the corporation copied for profit, for its own commercial end, and did not come within the personal use exception to liability under the statute.

Louis Smith, Senior Attorney for the Copyright Office, seems to equate "fair use" to "private use" and "noncompeting use," "the private use or fair use of the work by others must be confined to such uses as will not compete with or undercut the copyright owner's sale of copies to meet the public demand." It is submitted that Mr. Smith has uncovered the touchstone that most courts would consider outcome determinative. The private use of hand copying for scholarly use is allowed (among other reasons) because most scholars would not purchase originals. Although better able to pay for originals, it is submitted that many hand copiers for private, although commercial, use would also not purchase originals if copying was not allowed. Although ability to pay increases the possibility that originals would be purchased, also working in favor of the probability of purchase in the commercial area is the notion that the money-making purpose might overcome the obstacles of payment and procurement of originals more often than the purposes behind purely scholarly research.

The Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law deals expressly with the problem of multiple and commercial copying particularly of scientific and technical journals:

> We believe that an industrial concern should be expected to buy the number of copies it needs from the publisher, or to get the publisher's consent to its making of photocopies.

Similarly, any person or organization undertaking to supply photocopies to others, as a commercial venture would be competing directly with the publisher, and should be expected to get the publisher's consent.

It is submitted that the literal words of the statute, the case authority and most comments weigh heavily in favor of a finding of infringement when an indus-

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119 Id. at 641.
120 (1914) 2 Ch. 745.
121 Id. at 753.
123 Smith, *supra* note 101, at 206.
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trial concern multiplies copies for its own internal use. If damages were demanded for one or two infringing copies, a court might decide in favor of the user because of: *de minimis non curat lex* or because of a reluctance to impose the minimum damages of $250 dollars. To avoid this possibility, to ensure the finding of infringement even for a minimal amount of copies, the copyright owner could pray solely for an injunction, "[I]f infringement appears and damage will probably follow from its continuance." (Emphasis added.)

Offering or selling copies to the general public presents the clearer case of infringement; because direct competition with the copyrighted work results in direct damage to the copyright holder through loss of sales.

Since it is submitted that the legal noose of copyrights is tight on the neck of the copying pirate, it is only appropriate to deal here in more detail with recognized "fair uses" other than reviews, parodies and synopses of copyrighted works. Outlines of copyrighted works for guidance to students as in the *Macmillan* case, or guidance to employees as in the present Du Pont procedure of sending to its scientists a 200-page manual containing summaries of articles in various technical journals may be a "fair use" if, "It gives just enough information to put the reader upon inquiry. . .." But, as illustrated by *Macmillan*, the area of "fair use" in outline writing is very limited and is exceeded when there is the possibility that readers may "substitute" the outline for the copyrighted work.

In the area of the copying of texts, scientific and technical writings, case reports and compilations of statutes, there is little case authority. A sharp distinction must be made between the copier who uses his piracy to put out a competing work and the professional man (lawyer, doctor, teacher, engineer, architect) who copies as an aid to his work, and the student who copies in order to use the ideas of others as a starting point for the development of his own.

The copier who intends to put out a competing work may make, "[U]se of the original as a means of reference to the original sources, from which the book is subsequently written. . .." The key to "fair use" here is that the copier may use all the references in the copyrighted work but must make an original investigation of the source material.

It has been opined that the student may make a single photocopy of hand copy length, especially so in the field of scientific and technical writing.

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125 Let it be remembered that although libraries most often operate their photocopying departments at cost or at a loss, the summary of one study showed that a majority of the orders filled at libraries were requests for copies of works in the scientific and technical fields with a heavy majority of all copying done on the request of corporate and other institutional users. At the New York Public Library nearly 75% of the orders were received from large corporations. Joint Libraries Report on Photocopying, *supra* note 98. It is clear that both the library and the requesting institution are as much infringers as if the requester was doing his own copying. See, *Price, Photocopying by Libraries of Copyrighted Material, 5 Bull. Copyright Society* 345, 352-355 (1958), for possible safeguards against library liability.

126 However, in *Towle v. Ross*, 32 F. Supp. 125 (D. Ore. 1940), the court allowed $250 damages where the only proof of damages was that twelve 8" x 10" photostatic copies made but never used, one negative print used to make the copies and three other maps found in the possession of defendant.

127 *MacMillan Co. v. King*, 223 Fed. 862, 868 (D. Mass. 1914). But, in *Towle v. Ross*, 32 F. Supp. 125 (D. Oregon 1940), plaintiff prayed for both damages and an injunction. He received damages but the court held that no injunction was necessary as there was no attempt to put the map to use after plaintiff's original claim of infringement.

128 *G. Ricordi & Co. v. Mason*, 201 Fed. 182, 183 (S.D.N.Y. 1911). Defendant's outlines of plaintiff's operas were "fair uses." The court emphasized that a reader of the outline received only a vague, fragmentary and superficial idea of the plot which would have a beneficial effect upon the market of the owner of the copyright.


130 *Dun v. Lumbermen's Credit Ass'n*, 144 Fed. 83 (7th Cir. 1906), *aff'd*, 209 U.S. 20 (1908).

131 *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 Fed. 539, 541 (1st Cir. 1905). "So, also it is clear that, under some circumstances and for certain purposes, a subsequent publisher may draw from the earlier publication its identical words, and make use of them. This
In between the copier, who intends to put out a competing work, and the student, who presents no threat of competition, is the lawyer, doctor, teacher, engineer or architect who, except for the teacher, copy primarily for their own commercial gain. This is the gray area with few cases to act as guidelines. What of the case of an attorney copying materially from a legal text and submitting copies to 15 other attorneys in the firm? General experience teaches that most law firms can afford only one copy of a legal text, one set of the various case reports, and one set of statutes. It is submitted that most law firms, even if not allowed to copy, would not purchase additional texts merely to acquaint the office on one small area of the law but instead would pass the single copy around the office. If this is the case, then there is no injury to the author if copying is allowed because there is no competition (substitution). A finding of infringement would serve only to slow down the internal workings of the law office. The doctrine of "fair use" is available to the courts to avoid such an absurd result. The MacMillan case is some authority for finding infringement; however, the possibility of substituting the copy for the original was much stronger in that case than in the example presented. Photocopying of less expensive works such as magazines presents a much weaker case in favor of "fair use" as there is a greater possibility that originals would be purchased if copies were not available.

The copier of statutes and case reports has few worries. In New York, this copier enjoys constitutional protection in that "[A]ll laws and judicial opinions or decisions shall . . . be free for publication by any person." In Davidson v. Wheelock, the court declared that, although a compiler of state statutes may copyright his combination and analysis he cannot obtain a copyright for the publication of the laws alone, nor can a state legislature confer such privilege upon him. In Banks v. Manchester, the Supreme Court held that the State of Ohio could not authorize the reporter of the Ohio Supreme Court reports to copyright that court's decisions. The court stressed that only Congress could authorize a copyright and went on to say:

The question is one of public policy, and there has always been a judicial consensus, . . . that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The . . . work done by the judges . . . is free for publication to all . . .

It seems clear that the bare statute or court opinion may be copied at will whether from an official or unofficial reporter. Publishers may only copyright such part of a published decision that represents their own labor and skill such as headnotes and statements about the case. It would seem that the only value of such a copyright would be to prevent a competitor from copying without independent investigation. Any incidental copying of headnotes and other original material of the publisher that might accompany a court opinion, for example, copied for commercial use (i.e., passed out to the members of a law firm) would be allowed under the theory of de minimis, supported by an argument that the purpose and intent of the publishing was to allow copying by practitioners because of the nature of the material.

Computer copying, although a copying for commercial use, presents a unique copying problem.

is peculiarly so with reference to works in regards to the arts and sciences, using these words in the broadest sense, because, with reference to them, any publication is given out as a development in the way of progress, and, to a certain extent, by common consent, including the implied consent of the first publisher, others interested in advancing the same art or science may commence where the prior author stopped. This includes medical and legal publications, in which the entire community has an interest, and which the authors are supposed to give forth, not only for their own pecuniary profit, but for the advancement of science."

132 N.Y. Const. art. VI, § 22 (1954).
133 27 Fed. 61 (C.C.D. Minn. 1866).
134 128 U.S. 244, 253 (1888).
135 Callaghan v. Myers, 128 U.S. 617 (1888).
Is the feeding of information from copyrighted material into the memory of a computer a fair use?

Is this analogous to microfilming to save storage space? Since the computer would not merely passively record the information, e.g., the contents of an almanac or encyclopedia, but would integrate it with other information in a manner similar to the operations of the human mind, should ordinary rules apply?\footnote{Needham, supra note 122, at 102.}

This introduction presents the two large questions in the computer area. What plausible analogies would a court accept in a computer infringement case? Because of the unique nature of computers, are any analogies acceptable? Publishers have pondered over the question of whether the absorbing of copyrighted material into the information systems of computers is an infringement. Publishers have pondered while computer industry leaders have built a billion dollar industry. The computer industry has an estoppel argument that grows stronger with time and the growth of the industry. A court might find an infringement if the existing giant that is the computer industry could recognize the rights of copyright owners without unduly burdening computer operations. A court that decided in favor of non-infringement would have its strongest authority in \textit{White-Smith Music Co. v. Apollo Co.}\footnote{209 U.S. 1 (1908).} In that case defendant engaged in the sale of player pianos and perforated music rolls. Plaintiff owned the copyright in sheet music copied onto rolls by the defendant and sought to enjoin such activity. The Supreme Court affirmed the court of appeals' affirmation of the dismissal of the complaints. Plaintiff argued that the copyright act protected the intellectual conception which resulted in the compilation of notes; defendant argued that the statute only extended to the tangible results of the mental conception. The court distinguished playing an instrument from sheet music which appears to the eye and playing, "[A]n instrument with a perforated sheet which itself forms part of the mechanism which produces the music. . . ."\footnote{Id. at 14.} The court, in interpreting the copyright statute, concluded that Congress meant to deal with the concrete reproduction or duplication of a thing, not an abstract right of property in ideas. The court defined a "copy" as, "[A] written or printed record . . . in intelligible notation."\footnote{Id. at 17.} The court continued, "It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning."\footnote{Id. at 17.} The court concluded that the piano rolls were not "copies" within the act, and the reproduction of music on piano rolls was not a copying of the copyrighted sheet music.

In the year following \textit{White-Smith Music Co.}, Congress revised the copyright statute giving composers of copyrighted \textit{musical} compositions and authors of copyrighted \textit{dramatic} works\footnote{17 U.S.C. § 1 (d),(e) (1958).} the exclusive right of recording their works. One commentator has indicated that the use of copyrighted material in computers, "[I]s obviously a recording of protectable information which I should think a clear violation of 1(d) unless it be fair."\footnote{U.S. HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., op. cit. supra note 140, at 32, Comment by Mr. McDonald.} This commentator seems to accept \textit{White-Smith Music Co.} as shutting the door on the idea that copyrights protect the "intellectual conception," but, he would include the material copied into computer

\footnote{For indications of the continued vitality of this case see U.S. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., General Revision of the U.S. Copyright Law, 22 (1961) and U.S. HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 345, Comment by Mr. Sargoy (1963).}
information systems under the protection of section 1(d) of the code.\textsuperscript{143} Such a contention is contrary to the holding of Corcoran v. Montgomery Ward & Co.\textsuperscript{144} In that case plaintiff copyrighted a poem; defendant set the poem to music and sold the records to the public. Plaintiff relied on the "intellectual conception" argument; but the court, after indicating that, "If the question were one of first impression we might be inclined to agree,"\textsuperscript{145} concluded that plaintiff's argument was foreclosed by the decision in White-Smith Music Co. Speaking of the 1908 statute and the 1909 changes the court said:

We see no material difference between the working of the statute there under consideration and the phraseology of the pertinent part of the present act. In the 1909 revision Congress undertook to remedy certain deficiencies discovered in the former statute; but it is significant that in the respects we are now considering the provisions added relate only to musical compositions, 17 U.S.C.A. § 1(e), and dramatic works, 17 U.S.C.A. § 1(d). These changes were made in the light of the decision in the White-Smith Music Publishing Co. case, and they serve rather to emphasize the limited scope of subsection (a) as applied to the type of work now before us.\textsuperscript{146}

The court also rejected plaintiff's argument under section 1(b) that plaintiff had the right to make "any other version" of the poem by deciding that White-Smith Music Co. foreclosed such an argument and if (b) was construed so broadly (d) would be rendered superfluous. The court construed subsections (d) and (e) to refer to dramatic works and musical compilations only, "Congress did not see fit to give like protection to copyrighted poems, stories or works of that nature."\textsuperscript{147} In light of this decision it cannot be seriously contended that the copying of nondramatic work into computer information systems is a violation of section 1(d).

The Corcoran decision also precludes the possibility of finding a 1(b) violation; White-Smith Music Co. precludes the finding of a 1(a) violation. Publishers can still present the "intellectual conception" argument relying on King Features Syndicate v. Fleischer,\textsuperscript{148} in which the court found infringement when defendant made and sold a toy based upon plaintiff's copyrighted comic strip figures. "The protection accorded the owner of the copyright is of the intellectual product of the author. It is intended to protect any species of publication which the author selects to embody his literary product."

Reliance also could be placed on Hill v. Whalen & Martell,\textsuperscript{149} in which defendant, using characters "Nutt and Giff" in a dramatic performance, infringed plaintiff's copyrighted cartoon characters, "Mutt and Jeff." Other cases with "intellectual conception" connotations strengthen the publishers' case.\textsuperscript{150}

\textsuperscript{143} This section gives the author of a drama or a dramatic work the right to make, "any transcription or record thereof.

\textsuperscript{144} 121 F.2d 572 (9th Cir. 1941), cert. denied, 314 U.S. 687 (1941).

\textsuperscript{145} Id. at 573.

\textsuperscript{146} Id. at 575. Also 17 U.S.C. § 1 (a) (1958).

\textsuperscript{147} Id. at 574.

\textsuperscript{148} 299 Fed. 533, 556 (2d Cir. 1924).

\textsuperscript{149} 220 Fed. 359 (S.D.N.Y. 1914).


These cases also present undertones of unfair competition and the "wrongful appropriation" spoken of in Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918). See note 106 for the interrelation of the copyright and unfair competition areas.

See also, Blackburn v. Southern California Gas Co., 14 F. Supp. 553 (S.D. Cal. 1936), where the court gave damages but denied an injunction because plaintiff in suing on a copyright theory showed a lack of vigilance in bringing his action. Publishers in any action against computer copying could well be denied an injunction for the same reason. Damages under an unfair competition theory would seem to be minimal because limited to the cost of the book or magazine from which the information was taken.
Yet the copy in each of these cases is a reproduction, "[W]hich appears to the eye."\(^{151}\) It is not a reproduction in the manner of a, "[P]erforated sheet which itself forms part of the mechanism," which the Supreme Court has held to be, "[Q]uite another thing."\(^{152}\) Also, in Corcoran, the record is just part of the mechanism which reproduces the poem; the record is not a copy within the meaning of the act.

Congress, as a result of White-Smith Music Co., only amended the code with respect to musical compositions and dramatic works. It is submitted that the restricted interpretation of the word "copy" found in White-Smith Music Co. applies to such other areas as tapes or reels containing scientific and technical data, and compilations of statistics taken from copyrighted material. It applies to the tapes and reels forming part of a machine that integrates all the information in its memory to produce an answer.

It is submitted that the computer people armed with White-Smith Music Co., Corcoran and the estoppel argument present such a solid case in favor of non-infringement that only Congress, by amendment in widening the provisions of section 1(d) and 1(e) to cover the type of copyrighted material usually assimilated into computer information systems, could afford protection. Copyright protection for such appropriation is not available under the present statute.

IV. What Practical Benefits Result From a Finding of Infringement?

Is a discussion of what constitutes an infringement merely academic because the remedies afforded by the act are inadequate? Certainly a publisher would be reluctant to bring an action against the usual book or magazine infringer because of the expense of litigation, the difficulty of proof and the inadequacy of the remedy. Probably only about 25 or 30 copyright actions are litigated each year.\(^{153}\)

In a typical case of a corporate infringer, copying for internal use, the infringement would have to be noticed; then proof of copying would necessitate a witness familiar with the internal workings of the company. After going through the trouble of bringing suit and finding a case of infringement the most that could be hoped for would be a decree enjoining such copying. Even after such a decree, effective policing of it would be difficult. Even if the decree were obeyed, only one small source of lost sales would be stopped; publishers cannot afford such a piecemeal approach. Judging from the publishers' inaction it would seem such anti-infringement litigation is worthless.

In most cases, actual damages are not provable. In assessing just damages, in lieu of actual damages, a judge may speculate in his estimation, within the statutory limits (250 dollars-5,000 dollars), without the limitations of usual legal proof;\(^{154}\) or, he may use the schedule in section 101(b) of the code which provides for damages of one dollar for each infringing copy of a book or magazine made, the aggregate amount to be within the 250 dollar to 5,000 dollar limitation.\(^{155}\)

151 White-Smith Music Co. v. Apollo Co., 209 U.S. 1, 12 (1908).
152 Id. at 14.
153 Karp, Copyright Litigation, 7 Copyright Problems Analyzed 143 (1952).
154 Gross v. Van Dyk Gravure Co., 230 Fed. 412, 413 (2d Cir. 1916). The court approved this language of the district court Judge Learned Hand. "'I must assess the damages, all things considered, by the best inference I can make, even when I cannot have much basis for certainty, even when the plaintiff would fail, were the issue tried before a jury.'"
156 Where one infringes after notice the sum of the one dollar per copy damages may exceed $5,000. Schellberg v. Empiringham, 36 F.2d 991 (S.D.N.Y. 1929).
157 The one dollar per copy schedule is not followed when the court considers lesser damages to be just. 8 cents per copy. Turner & Dahmen v. Crowley, 252 Fed. 749 (9th Cir. 1918); 2 cents per copy. Zenn v. Nat'l Golf Review, Inc., 27 F. Supp. 732 (S.D.N.Y. 1939).
been held that where there is no proof of actual damages, the minimum award of 250 dollars is mandatory;\textsuperscript{156} although in one case in which no damage was suffered, a nominal one dollar was awarded.\textsuperscript{157}

The maximum award of 5,000 dollars has been awarded in only a few instances.\textsuperscript{158} Awards may be over 5,000 dollars only when actual damages are proved,\textsuperscript{159} or when there is an intentional infringement after notice.

To defer the costs of bringing suit the court may, in its discretion, award to the prevailing party reasonable attorney's fees.\textsuperscript{3} 3,500 dollars was allowed to counsel for a successful plaintiff in an action where plaintiff's attorneys had charged 8,692 dollars.\textsuperscript{160} For more typical cases such as \textit{Blackburn} with damages of 750 dollars and a partial injunction, 750 dollars in fees were allowed; in \textit{Macmillan}, there was no mention of fees; in \textit{Towle}, no fees were awarded.

Running through the cases is the theme that the total amount of money awarded is to be compensatory,\textsuperscript{161} not punitive.\textsuperscript{162} For the book and magazine publisher whose copyrighted works are being infringed on a national basis, the decree and/or damages allowed in a single suit are hardly adequate to remedy the nationwide infringement problem.

To achieve the goal of stopping substantially all the infringing photocopying in the United States, as a practical matter the case by case approach is worthless. Suggested instead is a two-barrelled approach of: 1) an intensive publicity campaign to make the government, business corporations and other institutional infringers aware of the copyright law in order to promote the institutional conscience to do its own policing; 2) a campaign to convict important infringers-for-profit under section 104 of the code with punishment up to one year and/or a fine of between one hundred dollars and 1,000 dollars.

Each aspect of this approach is complementary. The initiation and favorable disposition of infringement suits, both civil and criminal, would quickly depict publishers' advertisements, containing examples of infringing photocopying procedures, as harbingers of a campaign to enforce publishers' rights. A present obstacle to any such approach is that the criminal sanction for willful infringement for profit is only a misdemeanor and although:

\begin{quote}
[The FBI has made extensive investigations here or there . . . the local U.S. attorney turns down prosecution because it's a misdemeanor and, in his mind, it's no more important than expectorating on the sidewalk or smoking in a prohibited area.\textsuperscript{163}
\end{quote}

Recent findings of copyright infringement would provide excellent examples of the dangers attendant on copyright infringement and could be of immense value to copyright owners if properly exploited through planned advertising in the very publications being infringed.

There is evidence that a mere filing of suits would make institutions copyright-conscious. Mr. Edward Sargoy, counsel for the Copyright Committee of the Motion Picture Association of America, Inc., tells\textsuperscript{164} of the educational campaign launched

\begin{itemize}
\item \textsuperscript{156} Buck v. Bilkie, 63 F.2d 447 (9th Cir. 1933).
\item \textsuperscript{157} Rudolf Leisch Fine Arts, Inc. v. Metal, 51 F. Supp. 69 (S.D.N.Y. 1943).
\item \textsuperscript{158} Caplan, \textit{The Measure of Recovery in Actions For the Infringement of Copyright}, 37 Mich. L. Rev. 564, 585 (1939).
\item \textsuperscript{159} In Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 556 (D. Mass. 1928) the court found $23,500 of actual damages with uncustomary ease.
\item \textsuperscript{161} Towle v. Ross, 32 F. Supp. 125 (D. Ore. 1940).
\item \textsuperscript{162} Davilla v. Brunswick-Balke Collender Co., 94 F.2d 567 (2d Cir. 1938), cert. denied, 304 U.S. 572 (1938).
\item \textsuperscript{163} U.S. HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., \textit{op. cit. supra} note 140, at 181, Comment by Mr. Sargoy.
\item \textsuperscript{164} U.S. HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., \textit{op. cit. supra} note 140 at 176, Comment by Mr. Sargoy.
\end{itemize}
against theater operators in the early 1930's. Half of the theaters were abusing their exhibition licenses by holding pictures over for a day or peddling the picture to other theaters.

Such practices had existed practically from nickelodeon days. * * *

We taught the entire industry and made it copyright conscious as to the very existence of this $250 minimum damage provision. I know of only two cases, out of thousands, where we collected the $250. We were not interested in doing that . . . we wanted to deter . . . and keep the potential thousands upon thousands of infringing uses out of courts.

The result of that educational process . . . was that in the 1940's we couldn't even find a newsreel that played out of turn in any theater in the United States.

A publicity campaign based on suits filed and on infringements found might go far in activating the institutional conscience and would tend to promote enough public interest to make the U. S. attorneys more aware of the criminal sanctions imposable on willful copyright infringers for profit.

Another example, besides the one posed by Mr. Sargoy, that the institutional conscience may be made to act in this area is found in the conduct of University Microfilms, Inc., a subsidiary of Xerox Corp., which makes copies of books and other publications monthly. "[O]nly with permission of the copyright holders and pays the holders 10% 'royalty' fees." This corporation, in striving to increase its profit, has seen fit to make this payment to copyright holders and obtain permission from the holders before copying. It is submitted that other corporations which copy for resale and those institutions that copy for internal commercial use or libraries that copy for requesters, who use internally for commercial purposes, must be made aware of their violations of the law in this copyright area. Once made aware of the law and the possibility of prosecution, it is hoped that most would follow the course set by University Microfilms, Inc.

V. Conclusion

Photocopiers of books and magazines, many of whom are violating federal law, are hurting publishers' sales. The copyright statute grants absolute rights protecting writings that are published in accordance with the requirements of the federal copyright statute. The courts have put a gloss on the exclusive rights granted by the statute by allowing copying in some instances under the doctrine of "fair use."

It is submitted that a hand copy of a passage for private scholarly use is a "fair use." As a slight extension, the mechanical reproduction of a single copy of a reasonable portion for private scholarly use would also be a "fair use" and not an infringement of the federal act.

A hand copy for private commercial use is the borderline case, but if ever presented for decision, this use would probably be classified as a "fair use." A single photocopy for a private commercial purpose might well be an infringement, unless the copy be of hand copy length. Multiple copying for limited circulation or for gratuitous or scholarly use is an infringement where there is the finding that the copies may be a substitute for, and therefore in competition with, the copyrighted material. Multiple copying for internal commercial use is more clearly an infringement because of the substitution factor and the added notion that a prosperous user ought to pay its own way. Some matter such as statutes and court decisions and ideas themselves may be copied at will.

There are no judicial guidelines in the area of microfilming for storage and preservation purposes, whether by a public library or a profit making organization. The equities and needs of the times, and the parties, in a particular case would be determinative.

In the computer area, it is concluded that there is no infringement when copy-
righted material is fed into computer information systems. Whether this should be a violation or will be under any revised statute is another question.

The problem confronting publishers is to stop substantially all the infringing photocopying now going on in this country. Infringement holdings in isolated cases are of little help by themselves. Armed with past decisions, presently instituted civil suits, especially in the area of internal commercial use, and criminal prosecutions if necessary, publishers should strive to inform copiers and the public that the bulk of the photocopying in the country today is an infringement. By undertaking this educational campaign, there is evidence that institutions would police their own photocopying operations. Publishers have remained silent far too long. It is submitted that most infringers do not know they are violating federal law. The users are not going to go to the trouble of finding what the law is, if it is clear that no one is interested enough to enforce the law against them. The publishers must forcefully demonstrate their interest in the rights granted by the federal act and their readiness to protect those rights.

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