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Recent Cases

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RECENT CASES

Copyrigbt—Fair Use—Photocopying and Distributiou of Copyrigbted Journal Articles by Governmeut Library Constitutes Actionable Infriugemeut

Plaintiff, a major commercial publisher of medical journals,[1] brought a copyright infringement action for damages against the United States[2]—specifically, the National Institutes of Health (NIH) and the National Library of Medicine (NLM), agencies of the Department of Health, Education, and Welfare—in the United States Court of Claims. Plaintiff alleged that defendant had infringed its copyrights by making unauthorized photocopies of plaintiff's medical journal articles and distributing them free of charge to library users on a no-return basis.[3] Defendant conceded that it had made photocopies of each of the articles in question and that plaintiff was the record owner of the copyright registrations on the journals, but relied on the doctrine of fair use to deny liability. The Court of Claims *held*, judgment for plaintiff. Unau-

1. Of the 37 medical specialty journals published by plaintiff, 4 are involved in the instant suit: *Medicine, Journal of Immunology, Gastroenterology*, and *Pharmacological Reviews*. The first of these is published for the profit of plaintiff alone, while the others are published in conjunction with certain medical societies which share profits with plaintiff. Article manuscripts are received by plaintiff from persons engaged in research; the manuscripts are then edited, published with copyright notice (appearing at the front of the journal and sometimes at the beginning of each article) in plaintiff's name, and circulated by journal subscriptions ranging, in the case of the journals in suit, in price from $12 to $44 per year and in number from about 3,100 to about 7,000. Revenue is supplemented to a small extent by commercial product advertising appearing in the journals.

2. Suit was brought under 28 U.S.C. § 1498(b) (1970), and is the first copyright infringement case against the United States to reach the Court of Claims.

3. The NIH is the government's principal medical research organization; it directly employs over 12,000 persons, financially aids private individuals and organizations, and maintains for its internal use a technical library composed largely of scientific journals. It subscribes to only 2 copies of each of the journals in suit, and meets its larger demand by operating a photocopy service, through which a staff researcher can obtain on request a copy of any article in the library's collection. The library neither monitors the reason for the request nor asks that the copy be returned. The volume of photocopying amounted to about 93,000 articles during 1970. The NLM is a major national repository of medical literature and serves basically as a source upon which other public and private libraries and institutions of research and education may draw by means of an "interlibrary loan" program. In the case of journal articles, such "loans" usually consist of photocopies supplied free of charge and on a no-return basis. The NLM will, however, provide only a single copy of an article per request, will not copy the entire issue of a journal, and places the following in the margin of all copied articles: "This is a single photostatic copy made by the National Libary of Medicine for purposes of study or research in lieu of lending the original." Most NLM loans are made in response to requests from other libraries or governmental agencies, but, in 1968, for example, about 12% of its requests came from private or commercial organizations. During that year, the NLM filled about 120,000 requests by photocopying a journal article. Such copies are normally given on a no-return basis to the ultimate user by the "borrowing" library. 66 PAT., T.M. & COPYRIGHT J. 1, 1-2.

thorized photocopying and cost-free distribution of an entire article from a copyrighted journal by a public, nonprofit government library amounts to actionable infringement of that journal's copyright. *Williams & Wilkins Co. v. United States*, 66 PAT., T.M. & COPYRIGHT J. 1 (Ct. Cl. Feb. 24, 1972).

The copyright clause of the Constitution grants Congress the power "[t]o 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."[4] These words imply two important ideas: first, that the interest of the United States in granting copyright protection to authors is that of promoting the arts and sciences for the welfare of the general public; and, secondly, that authors have *exclusive* rights during the period of protection. Although the copyright statute[5] nowhere expresses the constitutional policy behind the grant of a copyright monopoly, it does echo the Constitution by confirming an author's "exclusive" rights in his creations.[6] Despite this unambiguous language, courts in the United States for over a century have sanctioned certain acts of copying copyrighted material under an equitable doctrine known as "fair use."[7] It is widely held that only a "substantial" copying of a copyrighted work is an infringement, even though there is no statutory definition of the term "substantial"; consequently, fair use is said to be either an affirmative defense to, or an absence of, a "substantial" copying.[8] Whichever explanation is accepted, fair use has been defined as a privilege in someone other than the copyright owner to use the copyrighted material in a reasonable manner without the consent of the owner.[9] This doctrine has been best explained on grounds of public policy—if promotion of the progress of science and the arts is the primary reason for granting copyright protection, it follows that exclusive, absolute protection by the grant of an economic monopoly should be afforded only so far as such protection does not conflict with this basic goal.[10] The scope and applicability of the fair use doctrine are, however, quite vague. Courts often avoid analysis and definition by calling fair use a mere question of fact, each case being held to turn on its own

4. U.S. CONST. art. I, § 8.

5. 17 U.S.C §§ 1-216 (1970).

6. *Id.* § 1. The only recognition of anything less than the complete exclusivity of an author's rights in his work is the compulsory license provision in connection with the manufacture of sound recordings. *Id.* § 1(e).

7. *See* Folsom v. Marsh, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).

8. *See generally* M. NIMMER, COPYRIGHT § 145 (1971 ed.).

9. *See* Note, *Copyright Fair Use—Case Law and Litigation*, 1969 DUKE L.J. 73, 87.

10. Mazar v. Stein, 347 U.S. 201 (1954); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966); Berlin v. E.C. Publications, 329 F.2d 541 (2d Cir. 1964); Becker v. Loew's, Inc., 133 F.2d 889 (7th Cir. 1943).

particular circumstances.[11] Nevertheless, several recurring factors used in determining questions of fair use are discernible in case law. These include the type and intent of the use, its effect on the original work, the amount of the user's labor involved, the benefit gained by the user, the nature of the works involved, the relative amount and value of the material used, and the public interest in the nature of the works.[12] Many courts and commentators have concluded that the major factor to be considered in determining whether a use is "fair" is the potential or actual economic detriment to the copyright owner[13] from diminution of demand for his works.[14] Although the doctrine of fair use has been found applicable to limited copying in literary criticism or review,[15] scholarly works,[16] parody,[17] and for other generally scientific, historical, or educational purposes,[18] the courts seem unwilling to allow any substantial amount of copying, even when the challenged use might clearly be said to be in aid of the progress of the arts and sciences. For example, in the only two reported decisions dealing directly with copying by a teacher for educational purposes,[19] infringement was found, and one additionally held that the copying of all or substantially all of a copyrighted work is an infringement, regardless of the use intended by the copier.[20] Indeed, it has been almost universally held that a virtually

11. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960); Eisenschiml v. Fawcett Publications, Inc., 246 F.2d 598 (7th Cir. 1957); Matthews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943).

12. *See, e.g.*, Cooper, *Wihtol v. Crow: Fair Use Revisisted*, 11 U.C.L.A.L. REV. 56 (1963); Note, *supra* note 9; Note, *Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law*, 34 U. CIN. L. REV. 73 (1965); M. NIMMER, *supra* note 8.

13. *See, e.g.*, M. NIMMER, *supra* note 8.

14. *See, e.g.*, Note, *supra* note 9, at 89.

15. *See, e.g.*, Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956); Consumers Union of United States v. Hobart Mfg. Co., 189 F. Supp. 275 (S.D.N.Y. 1960).

16. *See; e.g.*, Holdredge v. Knight Publishing Corp., 214 F. Supp. 921 (S.D. Cal. 1963); Greenbie v. Noble, 151 F. Supp. 45 (S.D.N.Y. 1957).

17. *See, e.g.*, Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964). *But see* Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956); Leo Feist, Inc. v. Song Parodies, Inc., 146 F.2d 400 (2d Cir. 1944).

18. *See, e.g.*, Benny v.Loew's, Inc., 239 F.2d 532 (9th Cir. 1956); Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950); Matthews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943); College Entrance Book Co. v. Amsco Book Co., 119 F.2d 874 (2d Cir. 1941); Greenbie v. Noble, 151 F. Supp. 45 (S.D.N.Y. 1957); Thompson v. Gernsback, 94 F. Supp. 453 (S.D.N.Y. 1950); Karll v. Curtiss Publishing Co., 39 F. Supp. 836 (S.D.N.Y. 1940).

19. Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962) (choral director made a new arrangement of a copyrighted song, made multiple copies on a duplicating machine, and distributed them to a high school and a church choir); Macmillan Co. v. King, 223 F. 862 (D. Mass. 1914) (outlines prepared from a copyrighted book, containing quotations and paraphrases which represented the author's treatment of the subject, and given or loaned to students).

20. Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir. 1962).

complete or verbatim copying of a copyrighted work cannot be a fair use.[21] In the increasingly important area of photocopying copyrighted material for the convenience of library patrons, which libraries have considered to be fair use, no court decisions have been reported.[22] Even the time-honored practice of allowing a scholar to make handwritten copies of portions of copyrighted works has never been put to a court test.[23] With the advent of microfilm and other mass photocopying techniques, libraries became concerned over possible conflicts with the copyright statute. Consequently, in 1935, a so-called "Gentlemen's Agreement" was reached between the Joint Committee on Materials for Research and the National Association of Book Publishers.[24] This Agreement exempts libraries from infringement action if only a single photographic reproduction of a part of a book or periodical is made in lieu of a loan or manual transcription, when the copy is to be used solely for purposes of research. The library must warn the user of the copy of possible liability for infringement through misuse, the library may not make a profit on its photocopying service, and the copy made must not be so substantial that it is a substitute for the original which could cause economic detriment to the author. This Agreement, however, carries no legal weight as an interpretation of the copyright statute, and many publishers are not parties to it. Nevertheless, in 1940 the Gentlemen's Agreement was used as a basis of a Materials Reproduction Code adopted by the American Library Association.[25] Between 1957 and 1961, the Joint Libraries Committee on Fair Use in Photocopying conducted an empirical study of library practices,[26] which resulted in a recommendation "that it be library policy to fill an order for a single

21. *See, e.g.*, Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962); Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960); Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc., 105 F. Supp. 325 (S.D.N.Y. 1952).

22. *See* M. NIMMER, *supra* note 8, at 652-53.

23. *Id.* at 653-54.

24. *See* Clapp, *Library Photocopying and Copyright: Recent Developments*, 55 L. LIBRARY J. 10 (1962). Although the National Association of Book Publishers was replaced on January 1, 1938, by the Book Publishers Bureau, Inc., the latter organization adopted the Agreement as a statement of its position. *See The Gentlemen's Agreement and the Problem of Copyright*, 2 J. DOCUMENTARY REPRODUCTION 29 (1939).

25. 35 AM. LIBRARY ASS'N BULL., Feb. 1941, at 84-85. Another similar and widely used guideline for photocopying practices is the General Interlibrary Loan Code. 66 PAT., T.M. & COPYRIGHT J. 1, 2.

26. This committee is composed of representatives of the Association of Research Libraries, the Special Libraries Association, the American Library Association, and the American Association of Law Libraries. The committee reviewed the historical, theoretical, and legal bases for library photocopying. *See* Joint Libraries Committee on Fair Use in Photocopying, *Report on Single Copies*, 9 BULL. CR. SOC. 79 (1961); Clapp, *supra* note 24.

photocopy of any published work or any part thereof."[27] This concern with fair use is not limited to libraries; within the last ten years, there has been a great deal of activity in Congress directed toward a statutory recognition and definition of the doctrine. In July of 1961, the United States Copyright Office proposed to Congress that the present copyright statute be amended to include a specific recognition of the doctrine of fair use.[28] The proposal would allow a library to copy an entire journal article for a user only if he stated in writing that he needed and would use the copy solely for his own research and the library affixed a copyright warning to the copy. An entire publication could be reproduced only if an original were unavailable from the publisher.[29] The first major effort at revision of the copyright statute resulting from the proposals of the Copyright Office was H.R. 4347, introduced into the 89th Congress in 1965. This bill for the first time explicitly recognized the doctrine of fair use in its section 107: "Notwithstanding the provisions [detailing the author's exclusive rights], the fair use of a copyrighted work is not an infringement of copyright."[30] There was no provision dealing directly with copying by libraries. After lengthy hearings on H.R. 4347, the bill was finally passed with extensive change by the House as H.R. 2512.[31] In this final House version, section 107 was changed from a mere recognition of fair use to a provision detailing specific factors to be considered in determining the existence of a fair use.[32] The committee report accompanying

27. Joint Libraries Committee on Fair Use in Photocopying, *supra* note 26, at 81. The specific findings of the Committee were as follows: "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." *Id.*

28. *See First Annual Report of the Committee to Investigate Problems Affecting Communication in Science and Education*, 10 BULL. CR. SOC. 1, 14-15 (1962).

29. *Id*; STAFF OF HOUSE COMMITTEE ON THE JUDICIARY, COPYRIGHT LAW REVISION—REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961).

30. H.R. 4347, 89th Cong., 1st Sess. § 7 (1965).

31. 90th Cong., 1st Sess. (1967).

32. The final House version of § 107 reads as follows: "Notwithstanding the provisions of section 106, the fair use of copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

H.R. 2512[33] points out that section 107 "recognizes the present judicial doctrine of fair use and restates it in a way that offers guidance to users in determining when the principles of the doctrine apply,"[34] but that it is merely intended to restate the doctrine, "not to change, narrow, or enlarge it in any way."[35] H.R. 2512 also included, as section 108, a provision that would allow a library to make facsimile copies of certain works in its collection if not done for profit, but for purposes of preservation or security, or deposit for research use in another library.[36] This section applied, however, only to unpublished works, and was a specific privilege extended to libraries—not a "fair use" under section 107. The committee reporting H.R. 2512 felt that a specific exemption from liability for the copying of copyrighted material by a library for scholarly purposes was unjustified in light of the present doctrine of fair use, since any presently recognized fair use would be fair use under the bill.[37] The committee felt that each such case should be decided on its own facts, and called for more effective licensing arrangements between copyright proprietors and libraries.[38] Despite the work of the House, the Senate has taken no final action on any of its several copyright revision bills. Senate bills introduced in 1967[39] and 1969[40] contained fair use and library reproduction sections identical to those of H.R. 2512; section 107 of the present bill before the Senate, S. 644,[41] also remains unchanged. Section 108 of S. 644 has been greatly altered and expanded, however. Under this Senate version, the library may replace a published and copyrighted work in its collection by copying if

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(4) the effect of the use upon the potential market for or value of the copyrighted work. H.R. 2512, 90th Cong., 1st Sess. § 107 (1967).

33. H.R. REP. No. 83, 90th Cong., 1st Sess. (1967).

34. *Id.* at 4.

35. *Id.* at 32.

36. "Notwithstanding the provisions of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution." H.R. 2512, 90th Cong., 1st Sess. § 107 (1967).

37. "After full consideration, the committee believes that a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified. . . . Any educational uses that are fair use today would be fair use under the bill." H.R. REP. No. 83, 90th Cong., 1st Sess. 31 (1967). "As in the case of reproduction of copyrighted material by teachers for classroom use, the committee does not favor a specific provision dealing with library photocopying." *Id.* at 36.

38. *Id.*

39. S. 597, 90th Cong., 1st Sess. (1967).

40. S. 543, 91st Cong., 1st Sess. (1969).

41. 92d Cong., 1st Sess. (1971).

an original cannot reasonably be obtained at a normal price from standard trade sources. It may also make such a copy for a user if the user establishes that he cannot reasonably obtain an original, if he keeps the copy and gives the library no notice that it is to be used for other than private study, and if the library displays a proper warning of the subsisting copyright. Section 108(f) states that this privilege of copying for a user extends only to the "isolated and unrelated reproduction or distribution of a single copy" of the same work on different occasions, but does not extend to situations in which the library knows or has reason to believe that it is engaging in the wholesale reproduction of the same work, regardless of the number or the identity of the ultimate users. Section 108(e)(3) states that nothing in section 108 affects the right of fair use as provided for in section 107. S. 644, however, is still in committee and Congress has as yet passed no copyright revision bill. Thus, until the time of the instant decision, a potential copier of copyrighted material had only the judicial doctrine of fair use, and such informal agreements as the Gentlemen's Agreement of 1935 and the Materials Reproduction Code upon which to rely for protection from infringement liability.

The court in the instant case found a prima facie showing of infringement under sections 1[42] and 3[43] of the copyright statute, since defendant had conceded making photocopies of the articles in question and plaintiff was the record owner of the copyright registrations on the journals containing the articles. Following this initial determination, however, the court directed its attention to defendant's affirmative defense of fair use.[44] The court recognized that the fair use doctrine was

42. The copyright owner "shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work. . . ." 17 U.S.C. § 1 (1970).

43. "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." 17 U.S.C. § 3 (1970).

44. The court also distinguished and discussed 4 other defenses raised by defendant to deny liability for infringement: nonownership of copyright by plaintiff, real party in interest not represented in suit, noninfringement, and license by defendant to copy. These were disposed of by the court with little difficulty. Defendant argued under the nonownership defense that the presumption of ownership of the copyright by the holder of the registrations, created by §§ 3 and 209 of the copyright statute, was rebutted because the authors of the articles in question had neither assigned their proprietary rights in their manuscripts to plaintiff in writing nor received monetary compensation for the manuscripts. Consequently, it was argued that plaintiff had no standing to bring suit because it was not the "proprietor" of the copyrights. Defendant conceded at most that plaintiff had been granted licenses to publish. The court cited Dorr-Oliver, Inc. v. United States, 432 F.2d 447 (1970), for the proposition that the owner of a copyright registration is the proper party to bring an infringement action under 28 U.S.C. § 1498 and that the equitable rights of ownership of strangers to the suit cannot be raised as defenses against the legal title holder, and consequently

one of judicial creation, was imprecisely defined, and was normally applied as a defense to a technical infringement when the act of copying was deemed to be outside the legitimate reach of the statutory remedy afforded to copyright owners. On the other hand, the court pointed out that reproduction of substantial portions of a copyrighted work that provides a substitute, or diminishes the potential market, for the origi-

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found that defendant could not as a matter of law raise the nonownership defense. The court further found tbat defendant could not prevail even on the merits of this defense because of evidence in the record supporting the inferences that contributing authors customarily expected plaintiff to obtain and enforce statutory copyright in its journals in the name and for the benefit of the latter, and that the authors had impliedly assigned their proprietary rights to plaintiff *ab initio* in consideration for the opportunity to publish their work, an important professional objective.

Defendant next argued that plaintiff had no standing to sue for infringement of articles appearing in the *Journal of Immunology* and *Pharmacological Reviews* because those journals are owned by their sponsoring medical societies, which are consequently the real parties in interest. However, the court found that while the relevant contracts expressed journal ownership by these societies, they also clearly expressed the intent that plaintiff have sole responsibility for copyright matters, including the duty to acquire, own, and enforce all copyrights. The court also cited *Dorr-Oliver* for the proposition tbat plaintiff was the proper party to bring suit.

Defendant's third major argument was that the making of single copies was not an infringement; to be such, "copying" of a book or periodical must include "printing" and "publishing" of multiple copies of the copyrighted work. This argument was based upon an analysis of the evolution of terms found in past and present copyright statutes, the former having used the term "copying" only in reference to such works as photographs and paintings, while using "printing" and "publishing" in reference to books. The court found this defense neither persuasive nor relevant. The opinion saw the clear intent of all the statutes being simply to proscribe unauthorized "duplication," the terms used merely describing the then-modern means of duplication. Furthermore, the present statute was found to have obliterated any distinction between "copying" and "printing." Defendant failed to convince the court that the present statute meant something different from what it plainly says. This defense was held irrelevant by the court on the grounds that defendant in any case had in fact "printed" and "published" the works in question, "printing" meaning the making of a duplicate original, and "publishing" meaning dissemination to others. Macmillan Co. v. King, 223 F. 862 (D. Mass. 1914); M. NIMMER, *supra* note 8 § 102. The court pointed out that it was illusory and unrealistic to argue that defendant made only single copies; the record showed that the libraries would duplicate the same article over and over again, even for the same user, and that this service supplanted the need for journal subscriptions. Finally the court found, in both the statute and case law, no distinction between making single and multiple copies. *See* White-Smith Music Co. v. Apollo Co., 209 U.S. 1, 16-17 (1908); Patterson v. Century Productions, Inc., 93 F.2d 489, 493 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938); Greenbie v. Noble, 151 F. Supp. 45, 63 (S.D.N.Y. 1957).

The last defense raised was that defendant had express or implied license to copy certain of the articles in question, because they were tbe result of research funded by defendant's Public Health Service. Such grants are "conditional," being subject to the express copyright and patent policy in effect at the time of the grant. The court noted that prior to July 1, 1965, it was the express policy of the PHS not to reserve to defendant any rights in copyrighted publications stemming from grant-funded projects; after that date, the policy was modified to reserve to defendant a royalty-free license to reproduce, publish, use, and dispose of any copyrighted publications resulting from work funded by the PHS. Defendant argued that certain of the articles in suit were the result of research done after July 1, 1965, and that therefore defendant had a license to copy the articles freely. The court found, however, that all relevant research and writing was completed prior to July 1, 1965, and that the articles were completely protected by copyright.

nal has been held not to be fair use,[45] and that some decisions hold that wholesale copying of a copyrighted work is never fair use,[46] even when done for educational purposes without the intent to make a profit.[47] The court concluded that the principal factors to be used in determining fair use are those articulated by H.R. 2512,[48] with the "competitive character of the use" normally determinative of the issue. Even in light of the imprecision of such criteria, however, the court held defendant's actions to be clearly outside the bounds of fair use, as amounting to nothing less than wholesale copying. The court found that the photocopies were exact duplicates of whole articles, were intended to be substitutes for the articles, and diminished plaintiff's potential market, since they were supplied to those who would otherwise have had to subscribe to the journals. Further, although damages might be difficult to prove, the court felt that it was obvious that plaintiff was as a result of defendant's actions losing some measure of subscription or royalty income, and concluded that in any case, plaintiff need not prove actual damages to maintain a case for infringement.[49] The court then turned to several collateral arguments made by defendant under the general heading of fair use. It saw no real prospect that plaintiff would, if successful in the instant suit, seek injunctions[50] against similar photocopying by private libraries, and thereby restrict the free flow of technical and scientific information. The court indicated that plaintiff did not seek to enjoin unauthorized photocopying, since that would be an economically unrealistic means by which to increase circulation, but was willing to grant licenses to make such copies at a reasonable royalty.[51] The court next found that defendant's practice of photocopying could not be characterized as fair use simply by establishing that it was a "reasonable and customary" practice consistent with the Gentlemen's Agreement of 1935,[52] both because this Agreement never legally defined infringement or fair use, and because a "reasonable and customary" use in 1935,

45. Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914); Folsom v. Marsh, 9 F. Cas. 343 (No. 4,901) (C.C.D. Mass. 1841).

46. Public Affairs Associates, Inc., v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), *vacated and remanded*, 369 U.S. 111 (1962); Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937).

47. Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962).

48. *See* note 32 *supra*.

49. Macmillan Co. v. King, 223 F. 862 (D. Mass. 1914).

50. Such injunctive relief is available under the authority of 17 U.S.C. § 101(a) (1970).

51. The court pointed out that such a solution was undoubtedly feasible, as the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) have shown in the field of music and the performing arts. *See* Finklestein, *ASCAP as an Example of the Clearing House System in Operation*, 14 BULL. CR. SOC. 2 (1966).

52. *See* note 24 *supra*.

when photocopying was no real threat to a publisher, was vastly different from one today. Furthermore, the original book publishers' organization is no longer in existence, and neither plaintiff nor any other publisher of journals ever belonged to it in the first place. The Agreement, moreover, was found to have expressly condemned any photocopying which would serve as a duplicate or substitute for the original. The court next found unpersuasive the argument that photocopying was a mere substitute for the legitimate handcopying of a work by a scholar. Not only were the two methods found to be qualitatively different in their impact on a copyright owner, but neither the copyright statute nor case law was found to permit even the handcopying of an entire work. Finally, the court rebutted the argument that to proscribe library photocopying is to unconstitutionally restrict the copyright clause's purpose of promoting the progress of science. It concluded that Congress had indeed promoted this purpose by a system of short-term monopolies that encourages authors to write and disclose their writing, induces publishers to risk capital by publishing, and forces authors to create new material rather than to plagiarize old. The court discerned no suggestion that Congress had intended to exempt libraries from liability for wholesale copying, regardless of their purpose in so doing.

Manifest in the instant decision are two important but quite distinct areas of concern. The first, to which the court necessarily and expressly addressed itself, is that of statutory interpretation and centers upon the issue whether, under the copyright statute as read in the light of present judicial definition of fair use, defendant's activities constituted infringement. The second area of concern, although not addressed by the court, is implicit in the problems created by modern copying techniques. Drastic updating of the 63-year-old copyright statute would seem imperative. The form that these changes should take and, even more importantly, the extent to which traditional thinking about copyright protection itself must be reexamined are questions that must be faced.

Within the first major area of concern, there are two closely related problems. One is a copyright coverage problem: the tension created by the Constitution and the statute between the public interest in the free flow of information and the private interest of authors in compensation for their creations. The other is a fair use problem: given a copyright holder's exclusive statutory right to reproduce his copyrighted work, will the equitable judicial doctrine of fair use excuse an admitted infringement by one who photocopies the work? The instant decision deals expressly only with the fair use problem. Indeed, the court points out that "[w]hat defendant really appears to be arguing is that the copyright law *should* excuse libraries from liability for the kind of photocopying

here in suit,"[53] and states that this public policy decision on the copyright coverage question belongs to Congress. In refusing to provide a safe harbor for the kind of library copying at issue under the protective fair use device, the court is interpreting the present law in a logical, straightforward, and predictable manner. Wholesale and unrestricted copying is obviously not contemplated by a statute that on its face allows *no* unauthorized copying, and the fair use doctrine would have been stretched to a point of unreasonableness had it been found applicable here. Though unsurprising, the instant ruling is anything but insignificant or unfortunate. Libraries or copyright owners no longer should be in doubt as to the legal status of copying practices. In the absence of satisfactory private agreements between the parties, the only apparent remedy now available to libraries is a specific legislative exemption from copyright coverage. A positive argument for affirmance of the instant decision is that it should add impetus to congressional action of this kind. Moreover, since the defense of fair use is no longer relevant to library photocopying of an entire article, expensive and time-consuming judicial determinations of infringement or noninfringement on a case-by-case basis will no longer be necessary. Although the decision does not eliminate the virtual impossibility of detecting and proving actual damages, or make the minimal statutory damages[54] in lieu thereof more acceptable, it does reduce the advantage of these factors to potential copiers, who may well hesitate in view of the increased certainty of infringement liability. A further argument for affirmance is that there can be little doubt that present library photocopying practices are hurting copyright holders financially. While plaintiff may be atypical in that it publishes for profit[55] and relies upon commercial advertising for part of its revenue, even a nonprofit publisher of journals must sell at least enough subscriptions to break even. In view of a journal's small potential market, a small drop in demand could produce dramatic effects on continued publication.[56] Defendant in the instant case reproduced well over 200,000 photocopies of articles per year. This figure, representing

53. 66 PAT., T.M. & COPYRIGHT J. 1, 7-8.

54. The present action was instituted on Feb. 27, 1968, plaintiff asking for actual damages but not less than $1 for each infringement by defendant. Project, *New Technology and the Law of the Copyright: Reprography and Computers*, 15 U.C.L.A.L. REV. 939, 945 n.20 (1968). The court found no specific damages, but only that plaintiff was entitled to recover "reasonable and entire compensation" under 28 U.S.C. § 1498(b) (1970). Section 101(b) of the copyright statute provides only $1 per infringement of an article, in lieu of actual damages, after notice has been given to defendant. Such compensation hardly justifies litigation.

55. Project, *supra* note 54, at 945.

56. *Id.* at 944.

only two libraries, certainly indicates that photocopies are being substituted for journal subscriptions on a large scale.[57] Probably the greatest immediate significance of the instant decision is that there is no reason to suppose it will not be applicable to any library, public or private, which photocopies an entire copyrighted work under procedures similar to those used by defendant. This means, in effect, that all libraries will have to work out some sort of licensing arrangement with copyright holders in order to be free from infringement liability, at least under the present statute. Their only alternative will be to cease making copies of copyrighted works for the use of patrons—an alternative that would clearly reduce the dissemination of information, in opposition to both the purpose of the library and the copyright clause of the Constitution, and a result that is apparently not sought by either copyright owners or authors.[58] Thus the most troublesome consequence of the decision is the practical problem of devising a workable licensing system. It has been suggested that an "ASCAP" type system be instituted, under which a private clearinghouse is established to license users of copyrighted material and collect royalties for payment to copyright holders.[59] Such systems are presently limited to the field of musical performance, which is given special treatment under the copyright statute,[60] but have proved to be practical. In any case, unless and until Congress decides that a copyright proprietor should not have the exclusive right to copy, that proprietor has a right to be compensated for any copying done, and the practical difficulty of making the payment should not defeat his right. As the court puts it, "plaintiff's right to compensation . . . cannot depend on the burdens of compliance."[61]

The second major area of concern is revealed by, among other things, the presently active controversy over photocopying as exemplified by the instant case. It is the need for revision and redefinition of current copyright law. The present statute, basically unchanged since its passage in 1909,[62] is inadequate to deal with such modern technological

57. *See id. But see Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields*, 11 BULL. CR. SOC. 69 (1963), which concludes that publishers of scientific and technical journals are not being adversely affected by photocopying. This study, it should be noted, was done 10 years ago.

58. It is noted by the court, however, that some libraries, including the Library of Congress, do not at present copy copyrighted material at all without the consent of the copyright owner. 66 PAT., T.M. & COPYRIGHT J. 1, 5, n.11.

59. *See, e.g.*, Finklestein, *supra* note 51, at 2; Project, *supra* note 54.

60. *See* 17 U.S.C. § 1(e) (1970).

61. 66 PAT., T.M. & COPYRIGHT J. 1, 9.

62. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

advances as rapid and inexpensive photostatic reproduction. As the legislative history of the copyright revision bills shows, Congress has attempted to formulate a compromise of the conflicting interests involved in this area through its treatment of the fair use and copyright coverage problems. Section 107 of H.R. 2512 deals with the fair use problem by recognizing the doctrine in a limited fashion, even though some commentators believe that this kind of statutory recognition may be undesirable because it may limit and lead to an unduly mechanical application of an essentially equitable remedy.[63] Although section 108 of H.R. 2512[64] solves a common-law copyright coverage problem by expressly allowing a library to copy unpublished works in certain circumstances, it specifically declines to exempt teacher or library copying of copyrighted materials from statutory copyright coverage. The latest Senate revision of section 108,[65] however, would exclude certain limited, non-competitive library copying of copyrighted material from liability under the statute.

Compromises along these lines, in both the fair use and the copyright coverage areas, would undoubtedly be useful. Nevertheless, a clear understanding and statement of the nature and purposes of copyright protection itself would resolve many apparent conflicts and reduce the need for compromise. Distinctions must be made between the widely varying interests and the greatly dissimilar types of works to be protected by copyright. Under the Constituton, the interest of the public in any work created is the advancement of science and the arts for the general welfare. This primary purpose is implemented by granting a limited monopoly—a copyright—to a creator so that he may initially control the use made of his work. The monopoly, detailed in the copyright statute, is purely economic in nature, designed solely to prevent others from exploiting the work. Thus a major interest of an author in obtaining copyright protection is his opportunity to reap financial reward. Most controversies over copyright are framed in terms of these two often conflicting interests—the economic right of the author versus the free dissemination of knowledge. The case under discussion was decided within this basic framework, with the libraries representing the public interest in uncontrolled dissemination and the publisher representing derivative economic rights of authors. In the instant case, as in most cases dealing with copyright, however, the publisher is the major

63. *See, e.g.*, Casson, *Fair Use: The Advisability of Statutory Enactment*, 13 IDEA 240 (1969); Note, *supra* note 12.

64. *See* text accompanying notes 36 & 37 *supra*.

65. S. 644, 92d Cong., 1st Sess. (1971).

real party in interest because it is usually the owner of the copyrights on its published works. An assignment by an author to his publisher of his copyright is normally a condition precedent to publication. Thus the publisher also has an interest in copyright protection—one that is purely economic, and is fully supported by the copyright statute, which speaks both of authors and copyright "proprietors." A view that copyright protection is in practical effect a publisher's right against other publishers rather than an author's right discloses little justification for granting an economic monopoly that can last for 56 years under the present statute,[66] and for perhaps as long as the author's life plus 50 years under the revision bills.[67] It has been persuasively argued that the public interest in free dissemination far outweighs such a publisher's right and that a copyright held by a publisher should last for only a limited number of years.[68] Further, it has been suggested that it is sound, both historically and logically, to recognize inherent rights of an author in his work outside of those defined by the copyright statute.[69] If a "creative interest" or "moral right" were recognized as subsisting in an author after his assignment of copyright to a publisher, there is even less justification for the publisher's extended enjoyment of a monopoly. The author could maintain rights both to protect the integrity of his work and to receive royalties independent of the copyright of the publisher.

The factual context of the instant case offers support for the proposition that distinctions should be made between different kinds of works protected by copyright. The author of an article for a scientific journal, or for that matter, a legal journal, has virtually no economic interest in his work; his interest in fact coincides with that of the public—the desire for free dissemination of knowledge. The only interests he must protect are the integrity of the work and his professional reputation, and the copyright statute does not provide such protection in any case. In this situation there is no logical reason for granting a lengthy period of monopoly to the publisher, at least after the first five or ten years from date of publication. The case might well be different when, as with a best-selling novel or song, the sole interest of an author and a publisher in making money coincide, a circumstance in which the public interest is much less significant. Here perhaps a longer period of protection for

66. 17 U.S.C. § 24 (1970).

67. *See, e.g.*, S. 543, 91st Cong., 1st Sess. § 302(a) (1969).

68. *See* Patterson, *Copyright and the Public Interest*, in 6 ENCYCLOPEDIA OF LIBRARY AND INFORMATION SCIENCE 76 (A. Kent & H. Lancour eds. 1971).

69. *See* Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. LEGIS. 223 (1966).

the publisher would be appropriate. The point is that any revision of the present copyright law should concern itself not only with the problems created by modern technology, but should also re-analyze and redefine the theoretical foundations for copyright protection. If this is done, the necessity for decisions such as the present one will be greatly lessened.