A Look at Copyright: The Past and Likely Future†

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In a form letter of November, 1975, the University of Illinois Press advised its authors that a situation existed which "could seriously imperil the future of scholarly publishing and, by extension, of scholarship itself."[1] The peril to which the Director of the University of Illinois Press called attention was the revision of the copyright bill pending before the House in which "organizations of librarians and educators [are] seeking sweeping exemptions from copyright: the librarians want no effective curbs on systematic photocopying, and the educators desire complete freedom to engage in copying done for 'non-profit educational purposes'." Mr. Muntyan's letter, which I received as one of the Illinois Press's authors, was typical of the hysterical remarks which authors, publishers and others with a proprietary interest in copyright revision have uttered in the past two years. Some university presses, including Illinois, were merely adding fuel to the fire which commercial publishers like John Wiley[2] had lighted a year earlier. That there was more heat than light in this whole process is readily apparent to any objective reader.

What has happened in the course of copyright revision, and particularly the efforts to define that so-called Gentleman's Agreement of 1935 regarding "fair use" photocopying, is that publishers have drafted, with the help of their friends in the

† Speech delivered at the Graduate School of Library Science, Rosary College, April 27, 1976.

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Senate and the House, a proprietor's bill which gives copyright owners far more rights than they have ever had before. Moreover, they have convinced a large segment of the political leadership that creativity, artistic expression, and cultural advance will be seriously retarded, if not stopped altogether, unless they get everything they want out of copyright revision. In their aim they have had the tireless efforts of the former chairman of McGraw-Hill, Curtis G. Benjamin,[3] and have recently been aided and abetted by the new President of the Association of American Publishers.

The length to which all this nonsense has gone can perhaps best be illustrated by the case of Barbara Tuchman, articulate and popular twentieth century historian, who has freely admitted in the past that she could not have produced her books without the unfailing assistance of the librarians and the resources of the New York Public Library.[4] Ms. Tuchman has been one of the voices raised in protest against those librarians who want to take bread out of the mouths of authors.[5] You will forgive me if I fail to take her seriously. Nobody is apt to photocopy *The Guns of August* when you can buy it in paperback for $1.75. The same is likely to be true of any of the best-selling authors, who claim, through their legal counsel, Irvin Karp, that libraries are ruining them by their vast photocopying of standard, current works. Not surprisingly, they have the editorial support of newspapers like the Washington *Post*[6] and other units of the big media, who claim to see their hoped-for commercial gain dwindling as a result of the photocopying carried on in libraries and schools.

All I can say, as I reflect on the past eighteen months of discussions between librarians and publishers, is that we appear to be no further down the road to a compromise solution to these problems than we were when we started over ten years ago. There are legitimate fears on both sides, as Barbara Ringer, Register of Copyright, noted in her testimony before Congressman Robert Kastenmeier's committee in October.[7] The publishers fear not so much the current photocopying as a technological future where they may not control the printing and distribu-

tion of materials. As Dan Lacy, Senior Vice President of McGraw-Hill, has remarked, the publishers fear library networks, a great increase in on-demand publishing, and the lack of control over the spread of newsletters or research reports developed at great cost by the publishers.[8] Librarians fear that the new legislation will limit their ability to serve their users effectively through networks which they have developed after great effort and that the control of the document itself will pass out of their hands even though they have paid for it once, and maybe twice, if one regards the page charges a university author normally has to pay to get his or her articles published in scientific and technical journals. Lurking behind the scenes, with the recommendation that libraries pay royalties on photocopying, is their fear that this is the next step toward the so-called public lending right,[9] now imposed in the Scandinavian countries and adopted but not yet implemented in West Germany, and likely to be coming to Great Britain soon. Under such legislation libraries would be charged for each circulation of a book in addition to the basic cost for acquiring the work.

As one who started out as a moderate on the question of library photocopying, I was not easily alarmed. However, when one vigorous legal representative of a publishing house regarded the mere presence of a union list as *ipso facto* evidence of a "system" which would preclude copying for interlibrary loan, I began to see why my colleagues were so upset. If I seem unduly alarmist, it's because it's been a rough year for librarians. The message has been inescapable. Librarians are trying to torpedo poor beleaguered authors, who only want to earn a living from their writing.

What are the actual facts of the case? Library photocopying for interlibrary loan, as opposed to that copying done by users for themselves on coin-operated machines, is a relatively small part of the total copying going on in this country today. Moreover, as must be clear from William Nasri's dissertation[10] at Pittsburgh and from Line and Wood's recent study[11] of the British Lending Library Division, much of the copying involves science and technology where the evidence is that copying has

not reduced the number of library subscriptions to such journals. This was the same judgement reached by the Court of Claims in the Williams and Wilkins case.[12] There was no evidence that Williams and Wilkins had suffered a loss of subscriptions through photocopying at the National Library of Medicine. Moreover, if charges were indeed made for copying from all these journals, it is not likely that the marginal sums collected would keep the publisher in business. As Richard De Gennaro remarked in an article on "Pay Libraries and User Charges," in *Library Journal*, February 15, 1975, "The potential royalties that publishers might receive from being reimbursed from library photocopying will not make a significant difference to the successful ones, nor will it save the marginal ones from whatever fate is in store for them.... Library photocopying copyrighted materials is not the cause of the publishers' economic woes; libraries giving away free service in competition with certain commercial vendors is not the true cause of their profit problems...."[13] Messrs. Line and Wood conclude their article on a similar note: "What is important is the increasing recognition that solutions to the economic problems of publishing must be found, and that there is no evidence that they have anything to do with photocopying by libraries."[14] The fact of the matter is that librarians have been made the heavies in the copyright dispute and it's time we stopped this. Not all of virtue is on our side, of course, but neither are the publishers and authors simon-pure. If it's rhetoric we want, we can proclaim the public's right to know vs. creative expression.

Perhaps it is useful to go back to the Constitution and examine the basic reason for copyright law in this country. Article 1, Section 8 of the U.S. Constitution details among other powers granted to the Congress

> 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.

I should like to make two points here before proceeding further: (1) the intent of the Constitution was that copyright,

or patents, were designed to promote the progress of science and the useful arts, and (2) that the further intent was to limit the amount of time an author or inventor could be granted a monopoly on his or her work. Those two principles, the balancing of a public right against a private right, are at the heart of the issue. Some of us come down harder on one side of that issue than the other; but, as Barbara Ringer noted in her R.R. Bowker Memorial Lecture, it is important that the independent author be protected.[15] I guess the question is, "Can you give the author, or any other citizen, complete monopoly and still promote science and the useful arts?"

In the course of our history the United States has been much influenced by the British copyright law which began with an act in 1709 and has been altered a number of times down to the latest revision in 1959. Copyright under British law now automatically comes into existence upon publication of the work and its duration is the life of the author plus fifty years. In that respect it follows the practice of most Western European countries and that has been a powerful argument for adoption of a similar pattern in this country.

The first U.S. Copyright Act was passed in 1790. It followed British precedent and granted copyright to the author for a period of fourteen years with a renewal of fourteen years. This act was revised in 1802, and again in 1831 when the period was extended to 28 years with a fourteen year renewal. A further act in 1846 provided for two deposit copies at the Library of Congress. In 1870 the Copyright Office was established in the Library of Congress and in 1874 the stipulation was added that the notice of copyright had to appear in the book.[16]

Up until the late nineteenth century American authors fared relatively well. Congress had indeed promoted science and the useful arts by adopting copyright laws beneficial to American authors. Foreign authors, however did not fare well in the U.S., since they could not copyright their works in this country. Thus in the post-Civil War period there was a thriving publishing business in pirating Charles Dickens and other English authors by what are now some of the most prestigious American

publishing firms. They wanted to protect their American authors but foreign authors were fair game without any compensation. The British hated us for such practices, just as we now hate the citizens of Hong Kong, Singapore, and Taiwan for doing the same thing to American books.

In his recent book, *Irving to Irving: Author-Publisher Relations, 1800-1974*, Charles Madison relates a story of George Palmer Putnam trying to convince the Harper brothers that they should not bring out a competing edition of a work of Swedish authoress, Fredericka Bremmer, on the principle of "courtesy of trade."[17] Putnam himself was much interested in protecting his foreign authors' rights. Accompanied by Ms. Bremmer, he called upon Fletcher Harper, who listened politely to his plea but declared, "Mr. Putnam, courtesy is courtesy and business is business," and declined to do what Putnam asked. Putnam later commented that the brothers Harper had little respect for any right that could not be enforced by law.

In 1891 the Chace Act extended copyright protection to foreign authors provided their books were manufactured in the U.S. Presumably our authors and publishers were now sufficiently free of competition that they could stand on their own feet but manufacturers were not.

In 1909 there was a thorough revision of the U.S. copyright law which granted authors copyright for an initial term of 28 years plus provisions for renewal for another 28 years. We still operate under the provisions of this 1909 law which has worked fairly well as far as librarians are concerned. There are some librarians who believe that we can continue to operate this way, though most would say that technology has caught up with us and some new legislation is needed. That it is difficult to achieve can be seen in the fact that we've been working on new legislation since the mid-sixties before revision became entangled in the cable TV and computer controversies.

What is the situation at present? Senate bill 22 has passed the U.S. Senate twice, most recently on February 19, 1976, by a vote of 97 to 0. In the discussion on the floor, when Senator McCellan presented the bill for passage, Senator Warren Mag-

nuson indicated that he still had some reservations about the bill:

> The rights of creators and the rights of users are difficult enough to balance on the scales of equity. The rights of publishers and libraries, especially those public and nonprofit libraries, are often added to such questions making any solution more difficult.
>
> A problem that many raised with section 108 in this bill is that these provisions would treat all printed materials in the same manner, although in practice, the concerns of authors differ as they apply to different types of published materials.[18]

Senator Magnuson went on to say that, while he didn't want to delay action on the bill, he hoped Members of Congress who subsequently worked on the legislation would keep an open mind on Section 108.[19]

What are the major provisions of this bill, S. 22, which is the one the Kastenmeier Committee is marking up in the House of Representatives? Like its predecessors, the new bill in section 106, gives to the copyright owner the exclusive rights to do and authorize any of the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, and sound recordings, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Now that, ladies and gentlemen, constitutes a bundle of rights. There are certain limitations to these exclusive rights including fair use, exemption for certain performances, fees for certain secondary transmissions for cable TV, ephemeral recordings, etc. and the exclusive right is accompanied by compulsory licensing and royalty payments in the case of nondramatic musical works, etc.[20] Also the bill includes the so-called Vanderbilt amendment, section 108(e) 4, which would permit the Vanderbilt University Television News Archive to continue making videotapes of the evening news, to prepare indexes to the tapes, and lease copies of broadcasts on a limited basis for scholars and researchers.[21]

Among other provisions of the bill is the fact that manuscripts, formerly regarded under common law as the property of the owner and his heirs forever, will now be covered by statutory law, and they, along with printed works, will be eligible for a new copyright term of life of the author plus fifty years.[22] This is one of the provisions that disturbs me most about the new copyright law. The Senate Committee Report of 1975 admitted that about 85% of the currently copyrighted works are not renewed and that this new provision for "life plus fifty years" would tie up substantial bodies of material with no commercial interest but which would earlier have been available for scholarship free of copyright restrictions.[23] Admitting the difficulty, the committee nonetheless argued that most countries have "life plus fifty years" and that it would improve an author's working out copyright arrangements abroad. They did not think scholarship would be harmed. Although I find the arguments unconvincing, the Committee asserts that "the advantages of a basic term of copyrights enduring for the life of author and for 50 years after his death outweigh any possible disadvantages." As I remarked in the beginning, and you can see from this instance, it is a proprietor's bill.

S. 22 also grapples with a number of newer developments unsuccessfully. After finally recognizing that no bill could anticipate all future events, the Congress on December 21, 1974 passed a bill authorizing a National Commission on New Technological Uses of Copyrighted Works in the Library of Congress

comprised of thirteen members, representing three groups: four from authors and copyright owners, four from copyright users, and four from the general public, with the Librarian of Congress being the thirteenth member and the Register of Copyrights serving as an *ex officio* non-voting member. CONTU, as it has been called, is to "study and compile data on the use of copyrighted work of authors in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information, and by various forms of machine reproduction, not including reproduction by or at the request of instructors for use in face-to-face teaching activities; and the creation of new works by the application or intervention of such automatic systems of machine reproductions."[24] They are to make recommendations on such matters "to assure for such purposes access to copyrighted works, and to provide recognition of the rights of copyright owners." This Commission was late getting underway and has a lifetime of only three years so it has a lot of work to do quickly. Robert Wedgeworth, Alice Wilcox, and William Dix are librarian members of the Commission.[25]

S. 22 also continued the requirement of domestic manufacture of copyrighted works as a condition for U.S. copyright protection. The Mathias amendment, added in the Senate recently, would also provide public broadcasters with a compulsory licensing mechanism for all non-dramatic literary, musical, and photographic works. Not surprisingly, the authors and publishers oppose this amendment and will try to eliminate it in the House.

Where do we go from here? The Kastenmeier Committee has completed its hearings in the House of Representatives and is now marking up its bill. They are working from Senate Bill 22 instead of H.R. 2223, which is indicative of how close to passage of a revised copyright bill we may be. Recently there has been a tentative agreement on one of the most troublesome questions regarding photocopying for classroom use in not-for-profit educational institutions. Three groups, the Authors League of America, the Association of American Publishers, and the American Council on Education agreed to certain guidelines

with respect to books and periodicals. In a nutshell the guidelines permit single copying by a teacher of certain works and multiple copies for classroom use under certain conditions of brevity (less than 250 words for a poem, 1,000 words for a prose work, 2,500 words for an article), spontaneity (the teacher doesn't have time to get permission), and cumulative effect (not more than one piece from the same author during one class term and not more than nine total pieces for one class).[26] Whether or not this will achieve what teachers and school systems want can only be determined after one sees the language of the actual Committee report.

The other troublesome problem for most librarians, 108 (g) 2, the prohibition of "systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d)," is yet to be resolved. Most librarians believe 108 (g) 2 should be deleted entirely, or at least that new language should be written if deletion were not an option.[27] The AAP countered by rejecting this approach and suggested other language unacceptable to librarians. Recently the Committee staff has suggested its own wording of a phrase to be added after the present 108 (g) 2 "Provided that nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such a work."[28] In a related move the Subcommittee also voted to add a new subsection (i) to Section 108 calling on the Register of Copyrights to report to Congress at five year intervals, after consultation with copyright proprietors, library users, and librarians on the extent to which the copyright law "has achieved the intended statutory balancing of the rights of creators and the needs of users." This seems to me a great improvement on the present section and would be helpful to libraries in maintaining their present service to users under the doctrine of "fair use."

The latest press release from CONTU indicated that CONTU

has offered assistance to the Kastenmeier Committee in resolving the photocopy question and that Chairman Kastenmeier has accepted the offer provided such resolution can be completed within the next four months.[29] Meanwhile, librarians are doubtless working vigorously with their Congressmen in stressing the crippling nature of the Senate Bill's 108 (g) 2 and urging its deletion entirely. Frankly, I don't see that as a viable option for librarians, and I think the best we can hope for is modified language along the lines of the language adopted by the Kastenmeier Committee.

As a librarian who has studied this issue for some time, what do I see as the key questions in the controversy? At issue here is a conflict between two rights: the right of the author or owner to benefit financially from his or her labors vs. the right of the public to access to information without unnecessary constraints. Those rights must be kept in balance, for I agree with Barbara Ringer that we must protect the right of authors to some form of reward for their efforts if we are to continue to enjoy the contributions they make to our knowledge and enlightenment.[30] Few authors ever make much money from their efforts, but a democratic society ought to encourage native talent. Keep in mind that the Constitution says the function of copyright is to encourage science and the useful arts.

On the other hand, those who serve a democratic society, especially when they do so with limited resources, must be assured a reasonable access to the world's knowledge with a minimum of limitations. The recent communications of six library associations to the Kastenmeier Committee was right in my opinion, in stressing that the "fundamental issue separating libraries and copyright proprietors . . . . is public's right of access to materials under copyright through the nation's libraries."[31] The suggestion of the publishers that a licensing and royalty system be set up to provide remuneration for photocopying seems to me unworkable. I suspect you would spend dollars to collect pennies. To set up elaborate systems to determine what kind of rates should be set for reproduction of articles for which

one has already paid a substantial amount of money is not reasonable, and ultimately will not succeed, even in a world of endlessly whirring computers.

A key question for the scholarly community, and especially for scholarly publishing is: What will be the future of dissemination of scholarly and scientific information? There are now two national studies being conducted to determine that. Fritz Machlup, Emeritus professor at New York University, is studying the dissemination of scientific and technical knowledge under a grant from the National Science Foundation.[32] He has recently accepted additional funds from a National Endowment for the Humanities grant to extend his study to include the industry of scholarly publishing in history, literature, philosophy, and other humanistic fields. NEH, meanwhile, has funded a National Inquiry by American Council of Learned Societies with $600,000 in gifts and matching funds to study the entire system by which humanistic knowledge is produced and distributed in the United States. These two studies, along with the recently completed work of Dean Bernard Fry at Indiana University on the economics of publishing[33] should provide some answers to questions which are now answered on the basis of one's prejudices rather than facts. The scholarly journal may not be the best form in which to reproduce material and the scholarly monograph, handsomely printed for 1,500 sales, may not be the best way in which to present one's findings to the public. Collecting a few dollars to support such marginal publishing is not likely to halt the decline of such publishing nor improve its economic viability.

The question of copyright is likely to be with librarians for a long time, whatever happens to S. 22 this year. The issues are not likely to be settled by one bill. The question we need to ask is "Will this bill do what it's supposed to do?" That is, in the words of the Constitution, protect both the author and the public? No one has all the answers to this and we won't have for a long time to come. So we'll need to keep at this business with some sense of proportion. Even if S. 22 is adopted into law and even if CONTU brings in a

magnificent report, the thorny issues of future technology will not let us rest from our consideration of a proper balance between these two rights. One would hope that librarians might continue this debate with publishers and authors over how library and information services can utilize the author's work with a recognition that, as Dick De Gennaro remarked, "We are allies, not adversaries; our interests are complementary, not competing."[34]

As an author, a member of the Governing Board of a university press, and a librarian, I am interested in an accommodation which will protect all parties without the needless rancor which has been so much a part of the copyright scene in the past two years.

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