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COPYRIGHT LAW REVISION

STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

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PURSUANT TO

S. Res. 240

STUDIES 14–16

14. Fair Use of Copyrighted Works
15. Photoduplication of Copyrighted Material by Libraries
16. Limitations on Performing Rights

Printed for the use of the Committee on the Judiciary

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FOREWORD

This committee print is the fifth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statutes enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

The present committee print contains the following three studies relating to certain limitations on the scope of copyright: No. 14, "Fair Use of Copyrighted Works," by Alan Latman, formerly Special Adviser to the Copyright Office; No. 15, "Photoduplication of Copyrighted Material by Libraries," by Borge Varmer, Attorney-Adviser of the Copyright Office; and No. 16, "Limitations on Performing Rights," by Borge Varmer.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights,
Committee on the Judiciary, U.S. Senate.

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

ABE A. GOLDMAN,
Chief of Research,
Copyright Office.

ARTHUR FISHER,
Register of Copyrights,
Library of Congress.

L. QUINCY MUMFORD,
Librarian of Congress.

STUDIES IN EARLIER COMMITTEE PRINTS

First print:

1. The History of U.S.A. Copyright Law Revision from 1901 to 1954.
2. Size of the Copyright Industries.
3. The Meaning of "Writings" in the Copyright Clause of the Constitution.
4. The Moral Right of the Author.

Second print:

5. The Compulsory License Provisions in the U.S. Copyright Law.
6. The Economic Aspects of the Compulsory License.

Third print:

7. Notice of Copyright.
8. Commercial Use of the Copyright Notice.
9. Use of the Copyright Notice by Libraries.
10. False Use of Copyright Notice.

Fourth print:

11. Divisibility of Copyrights.
12. Joint Ownership of Copyrights.
13. Works Made for Hire and on Commission.

CONTENTS

STUDY NO. 15

PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES

By Borge Varmer

May 1959

CONTENTS

PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES

I. Introduction

The various methods of photocopying have become indispensable to persons engaged in research and scholarship, and to libraries that provide research material in their collections to such persons. Effective research requires that the researcher be informed of the findings and opinions of others and have an opportunity to study the materials written by them. These materials are often very extensive and appear in a large number of publications. It is here that the libraries provide an indispensable service to research by furnishing the individual researcher with the materials needed by him for reference and study.

The need of researchers for ready access to a mass of materials is present in every field of scholarly investigation, but the problem is exemplified most clearly in the field of scientific and technical research. The body of scientific and technical literature has grown so rapidly during the last few decades that it would be extremely difficult for the individual scholar or researcher to gain access to the works he may need to consult unless he can obtain copies from a library. This is true especially of periodical literature. It would be virtually impossible for a person engaged in research to subscribe to all the periodicals which from time to time may touch upon his field of interest, and even the libraries where he lives may be unable to furnish the necessary material. Nor can libraries be expected to meet the needs of any number of researchers by loan of the copies in their collections. In response to the needs of researchers, most major libraries are equipped to provide them with photocopies of materials in the library's collections. It is invaluable to a researcher to be able to obtain from a central or specialized library photocopies of the various articles he needs for reference and study.

However, much of the materials needed for scholarship and research is of recent date and is under copyright, and the question arises whether the making and furnishing of photocopies of copyrighted material without the permission of the copyright owner is a violation of his exclusive right to copy secured by section 1(a) of the copyright law.[1] It is the purpose of this study to examine this question and to consider possibilities for its solution.

In general the justification for the photocopying of copyrighted material would seem to be founded on the doctrine of "fair use". In this connection it must be borne in mind that there are two distinct aspects of the "fair use" that researchers might make of a copyrighted work. One aspect concerns the making of copies for the sole purpose of reference and study. The other concerns the reproduction in the researcher's writing, by quotation, etc., of the writings of other

[1] 17 U.S.C.

authors. As already indicated, this study deals only with the former aspect. The latter has been examined elsewhere in connection with a general analysis of the fair use doctrine.[2]

Aside from the aforementioned practice of furnishing photocopies to researchers for their reference and study, libraries make photocopies for a variety of other purposes. Rare books and manuscripts are photocopied, usually microfilmed, to secure against their destruction or loss, and to obtain copies which may be made accessible to the public without any risk of harm to the often extremely valuable originals. Similarly, for the purpose of preservation, photocopies are made of newspapers and other items printed on fast-deteriorating pulp paper. Other similar purposes could also be mentioned.[3] Common for them all is that they mainly serve intralibrary purposes, namely the maintenance and preservation of the collections. Photocopying for these purposes may also raise some problem as to copyright infringement. This problem seems less urgent than that caused by the supplying of photocopies to library patrons, but it will be examined briefly in the following.

II. Present Law and Practice

In relation to copyright protection library collections may be divided into three groups of works: (1) published works protected by statutory copyright; (2) unpublished works protected under the common law; and (3) works in the public domain.

A. PUBLISHED COPYRIGHTED WORKS

For published works under copyright, section 1 of the copyright law provides that the copyright owner shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work.[4]

The copyright law does not specify any limitations on the exclusive right of the copyright owner to "copy" the copyrighted work. Nevertheless, this right is limited by the doctrine of "fair use" developed by court decisions. Unfortunately, there are no decisions dealing specifically with photocopying by libraries, or even with the narrower question of a person making photocopies for his own use. The courts have dealt with the other aspect of fair use referred to above, namely, that of reproducing in a new work an extract taken from the copyrighted work of another. However, the criteria of fair use developed by the courts in the latter context might furnish some general indication of the permissible scope of photocopying.

The court decisions indicate that the major criteria as to what constitutes fair use are: (1) the size and importance of the extract taken in relation to the copyrighted work as a whole; (2) the nature of the copyrighted work; (3) the purpose for which the extract is taken; and (4) the effect of the use of the extract upon the demand for the copyrighted work.[5] It can be argued, though at the risk of oversimplification, that the first three criteria are important chiefly

[2] See Latman, *Fair Use of Copyrighted Works*, Copyright Law Revision, Study No. 14, in the present committee print.
[3] See Smith, *The Copying of Literary Property in Library Collections*, 46 LAW LIB. JOURNAL 197 (1953); 47 LAW LIB. JOURNAL 204 (1954).
[4] Section 1 also specifies other exclusive rights of the copyright owner which are not germane to this study.
[5] Latman, *op cit.*, note 2, *supra*, pp. 14–18.

in their relation to the fourth one, and that the ultimate consideration is the competitive effect of the particular use on the market for the copyrighted work. And it might be observed that the courts have shown a tendency to apply the doctrine of fair use more liberally to scholarly uses than to commercial uses.[6]

It is, of course, a matter of conjecture as to how the courts would apply the doctrine of fair use to photocopying by libraries. On the basis of the foregoing summation of the criteria, it seems tenable to argue that the supplying of photocopies to individual researchers for the sole purpose of reference and study might be regarded as fair use in some circumstances; the bounds of fair use may be passed when the supplying of photocopies would operate to diminish the publisher's market. Whether the publisher's market would be affected materially would seem to depend upon a number of factors such as whether the work is in print, how much of the work is photocopied, how many photocopies of the same work are supplied to various persons, and the relative cost of a photocopy and a publisher's copy.

Text writers on copyright have rarely dealt with this problem. One text writer goes so far as to say that it would constitute an infringement "in principle, at least, * * * if an individual made copies for personal use, even in his own handwriting." [7] Another writer has gone to the other extreme in saying that the only copying restrained by copyright is the making of multiple copies for publication, and that anyone is free to make single copies of an entire work for the personal use of himself or of another person.[8] Both of these views seem dubious, with no clear support in the court decisions. It may be that copying for one's own private use, at least by hand, is sanctioned by custom; but other factors would seem to be involved in the making of copies by one person for the use of others.

In the absence of any authoritative ruling on the question, libraries have sought to formulate some practical basis for their photocopying policies.

The first attempt to formulate a uniform library policy regarding photoduplication was the informal "Gentlemen's Agreement" issued in May 1937 as a result of discussion between the Joint Committee on Materials for Research of the American Council of Learned Societies and the Social Science Research Council on the one hand, and the National Association of Book Publishers on the other. Although this "Gentlemen's Agreement" is without legal force,[9] it is not unimportant. As stated by Miles O. Price, Law Librarian and Professor of Law at Columbia University: "In effect, it gives some status to fair use, though on an informal basis, and prescribes certain minimum conditions to be observed." [10] Regardless of its informal character, the "Agreement" reflects what its draftsmen considered a fair balance between the interests of researchers and libraries and the rights of copyright owners, and therefore may serve as a convenient starting point for discussion.

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[6] *Id.* pp. 10, 11.

[7] WEIL, AMERICAN COPYRIGHT LAW, 406 (1917). That Weil may have been thinking of copies made for other persons, rather than for the maker's own use, is indicated by his next sentence: "That the copies are intended for gratuitous distribution is no defense."

[8] SHAW, LITERARY PROPERTY IN THE UNITED STATES, 98, 99 (1950).

[9] One of the parties to the so-called agreement, the National Association of Book Publishers, has since ceased to exist. The book publishers are now organized in the American Book Publishers Council. Furthermore, the periodical publishers, who publish most of the scientific and technical material of interest to researchers, were not generally members of that Association, and even many book publishers were not members.

[10] See Price, *Acquisition and Technical Processing*, 6 LIB. TRENDS 430 (1958).

The "Gentlemen's Agreement" states in part as follows:

> A library, archives office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purpose of research; provided—
>
> (1) That the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law:
>
> (2) That such reproduction is made and furnished without profit to itself by the institution making it.

The "Agreement" contains a paragraph which purports to exonerate the library from liability for possible infringement. This would not seem to absolve the library from liability (if any) to the copyright owner, but it might make it possible for a library to recover from a patron any damages paid as a result of an infringement suit.

The legal basis for permissible photocopying is stated in a subsequent paragraph of the "Agreement" as follows:

> The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription.[11]

There may be some question as to the implications of this last assumption that mechanical reproduction is equivalent to hand transcription. It may be that hand transcription created no practical problem because the extent of copying by hand was ordinarily limited by its nature, while mechanical reproduction by modern devices makes it easy to copy extensively and quickly in any number of copies. Moreover, the fact that hand transcription by a scholar himself has long been considered permissible does not necessarily justify the making of photocopies by others for scholars; thus, the supplying of photocopies as a commercial enterprise could hardly be justified on that premise. These factors were apparently recognized by the provisions of the "Gentlemen's Agreement," quoted above, referring to a "single" photocopy of a "part" of a book or periodical to be furnished "without profit."

In 1941, the American Library Association adopted a "Reproduction of Materials Code" formulated as a statement of policy to be observed by the Association members. The "Code" recognizes that "the final determination as to whether any act of copying is a 'fair use' rests with the courts." But it accepts the "Gentlemen's Agreement" as stating "the practical and customary meaning of 'fair use' applicable to reproduction for research purposes." The main portion of the "Code" is a restatement of the rules of the "Gentlemen's Agreement," but additional rules of caution are incorporated. Thus, the "Code" recommends that, "in all cases which do not clearly come within the scope of the agreement, either the scholar requiring the reproduction or the library to which the request is made should seek the permission of the copyright owner before reproducing copyright material." The "Code" further states:

> Special care is called for in the case of illustrations or articles that are covered by a special copyright in addition to the general copyright on the whole book or

[11] The "Gentlemen's Agreement" is reproduced in full in 2 JOURNAL OF DOCUMENTARY REPRODUCTION 31 (1939).

periodical. Attention is called to the fact that a publisher's permission is not legal protection to the library unless the publisher is either the copyright owner or an agent of the owner duly authorized to grant such permission.

Finally, the "Code" states:

> Legally there is no distinction between in print and out-of-print copyright material. Reproduction of in print material, however, is more likely to bring financial harm to the owner of the copyright, and it is recommended that libraries be even more careful than in the case of out-of-print material.[12]

There is little available information as to the current practices of libraries generally in making and supplying photocopies. Perhaps this much can be said: that libraries differ widely in their practices,[13] and that many of them feel that the present uncertainty as to the permissible scope of photocopying hampers their services to researchers and needs to be resolved.

B. UNPUBLISHED WORKS AND MANUSCRIPTS

In the main, the unpublished works involved in the problem of library photocopying consists of the manuscripts that have been deposited in a library. With some exceptions not pertinent here, such manuscripts are not subject to statutory copyright, but the authors or their successors have literary property rights under the common law which preclude copying without their consent. Such common law rights are recognized in section 2 of the copyright law.

The A.L.A. "Code" contains the following provision regarding manuscripts:

> Manuscript material is protected by common law but the restrictions on its reproduction are probably less rigid than those on copyright material. Reproduction may probably be made to assist genuine scholarly research if no publication is involved. Libraries should, however, be careful to observe any restrictions of copying such material that have been stipulated by the donor.

The "Code" further recommends that libraries seek a definite understanding regarding their rights at the time of each donation.

The contention of the "Code" that manuscript material protected by common law is more susceptible to photocopying than published material protected by statutory copyright may be questioned, inasmuch as the "fair use" doctrine is generally thought not to apply to unpublished works. However, in the absence of any specific restrictions, the donation of manuscripts to a public library may often imply a dedication to the public domain, or at least an authorization to the library to furnish copies of the material to scholars. In some instances, though, the situation may be complicated by the fact that the donor is not the owner of the common law literary property.[14]

The special questions involved in the photocopying of manuscripts are outside the scope of this study.

C. WORKS IN THE PUBLIC DOMAIN

Works in the public domain present no copyright problems. But for ethical reasons, the A.L.A. "Code" cautions against unrestricted reproduction of current material in print though not copyrighted. The "Code" states:

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[12] The "Reproduction of Materials Code" is reproduced in full in 35 A.L.A. Bull. 64 (1941).

[13] See Bray, *Photocopying and Copyright* in the March and Nov. 1957 issues of SPECIAL LIBRARIES.

[14] For example, the manuscripts given to a library may include letters received by the donor or his predecessor. The literary property is generally in the writers of the letters or their heirs.

In the case of works (in print) which have not been copyrighted in the United States * * * it is evident that it would not be in the best interest of scholarship to engage in widespread reproduction which would deprive the publisher of income to which he appears to be entitled and might result in suspension of the publication. It is recommended, therefore, that before reproducing uncopyrighted material less than 20 years old, either for sale or for use within the library, libraries should ascertain whether or not the publication is still in print and, if it is in print, should refrain from reproducing whole numbers or volumes or series of volumes.

III. Legislative Proposals

There seem to be only two bills which have dealt specifically with the problem of photocopying of copyrighted material by libraries. These are: the Thomas (Shotwell) general revision bill of 1940,[15] and a bill introduced by Senator Lucas in 1944.[16]

A. THE THOMAS (SHOTWELL) BILL, 1940

The Thomas bill (§12) provided in effect that the following shall not be an infringement of copyright:

(g) The making of single copies of an unpublished work lawfully acquired by a library if such copies are made and used for study or research only and not for sale or hire.

(h) The making by a library of one copy of a published work for research purposes and not for sale, exchange, or hire: *Provided*, That—

(i) such work has publicly been offered for sale in a published, limited, or general edition by or with the consent of the author or owner of the particular publication right, at a publication price under such circumstances as to pass title in and to the physical copies thereof; and

(ii) the publication and distribution of said edition has been discontinued and the library has offered by registered mail to purchase a copy from, and tendered the retail publication price plus carriage to, the Register of Copyrights on behalf of the owner of said publication right and such owner thereupon failed for a period of thirty days after written notice from the Register of Copyrights addressed to the owner's last-known address either to send a copy of said published edition to such library or to return or direct the Register of Copyrights to return the tendered payment accompanied by a designation of a place where such copy can lawfully be secured at said price; and

(iii) such owner has not filed with the Register of Copyrights a notice of intention to publish a new edition of such work and such edition has not been published within six months from the filing of such notice; and

(iv) the payment tendered by libraries, as hereinabove provided, shall be deposited with the Register of Copyrights, who shall promulgate regulations for the carrying out of this subsection.

(v) There is hereby created in the Treasury of the United States a trust fund to be known as the copyright trust fund. The Register of Copyrights shall deposit in such fund all moneys received by him from libraries as hereinbefore provided in trust for the persons entitled thereto. At least once each year the Register of Copyrights shall certify to the Secretary of the Treasury for payment through the Division of Disbursement from the copyright trust fund to each person entitled thereto all amounts theretofore received in trust for such person and not previously paid to such person * * *.

Under these complicated provisions, a photocopy of a published work was to be authorized only when the work was out of print, and then only after a time-consuming procedure had been followed to make certain that the copyright owner could not supply a copy; and payment of the established price of a publisher's copy was to be made to the copyright owner through the Register of Copyrights.

The above provisions were drafted by the Shotwell Committee after long discussions on the subject of photocopying for scholarly

[15] S. 3043, 76th Cong., 3d Sess. (1940).
[16] S. 2039, 78th Cong., 2d Sess. (1944).

purposes. The position of the scholars had been presented to the Shotwell Committee in a memorandum prepared by the Joint Committee on Materials for Research. The memorandum stated:

> The particular problems in which scholars wish to be assured that their activities are within the protection of the law are these:
>
> (1) They need the right to make copies of any material they read in order to form a part of the body of research notes with which they work. This right is probably theirs by custom, since it is not publication but transcription for use that is involved. Copying is here merely an aid to mental reproduction or digestion. Manual transcription, typescript transcription, photostat, and microcopying should be on the same footing for this purpose. The principle is not different regardless of the technique of copying that is used. The cheapness and efficiency of microcopying mean that the amount of this copying in the collection of research notes will probably be much greater in the future than it has been in the past.
>
> The provisions of the copyright law should leave intact a free right to copy as a part of the normal procedure of research. This right to copy should never be confused with the right to publish. The finished product, the book, that results from research is the object to which the copyright law applies, and not the notes and collection of material that enter into the production of the book.
>
> (2) Under some conditions a library may make, without profit to itself, a copy of some work or a part of some work, and the the research man may use the copy instead of borrowing the book from the library.
>
> A person ordering a copy made (whether in manuscript, typing, photographic, or any other form of reproduction) should bear full responsibility. So long as he uses the copy merely as research material, just as he would use a borrowed book, the matter is covered by (1) above. If he goes beyond this, and by publishing it damages the rights of the copyright owner, he and not the library should be held liable.
>
> (3) A special situation arises in connection with learned journals. The number of these journals is so large, and their availability in America so restricted, that articles in many of them are inaccessible to numerous American scholars. We feel that the authors of these articles usually want their writings to reach colleagues in the field and to be used * * *.
>
> (4) Books out-of-print but still under copyright ought not to become inaccessible to scholarship, and it should be lawful to make copies of such books not alone as research notes but as additions to library resources. In some cases, the wear and tear on a library book is so great that the library in order to protect the original, usually out of print, will photostat or microfilm it and have the public use the copy thus made * * *
>
> An equitable arrangement would be to create a statutory license for the reproduction of out-of-print books * * *[17]

The Thomas bill apparently attempted to follow the last recommendation of the Joint Committee on Materials for Research by providing a statutory licensing system for photocopying out-of-print works. The procedures required, however, would have been cumbersome and would have imposed a rather long period of delay before a photocopy could have been made. The Thomas bill would have afforded little or no help in solving the problem of photocopying in the more critical area of articles appearing in recent periodicals.

No action was taken on the Thomas bill.

B. THE LUCAS BILL, 1944

Section 1 of the Lucas bill provided that nothing in the copyright law should be construed—

> to prohibit the Librarian of Congress from making, or having made, and furnishing a copy in whole or in part of any published copyright work in the collections of the Library to the following persons.

[17] Memorandum on Copyright on Behalf of Scholarship Presented by the Joint Committee on Materials for Research, July 15, 1938, 1 Shotwell Papers 18. (The memoranda, minutes, and proposals of the Shotwell Committee are collected and paginated in the U.S. Copyright Office.)

Among the persons were Members of Congress and judges (subsec. 1), Federal agencies, and authorized Federal officers in certain circumstances (subsec. 2), and other persons (subsec. 3). This last provision stated:

> (3) To any person not acting under subsections 1 and 2 of this section, upon his certification that he cannot otherwise obtain the material and that he desires it for the purpose of private study, research, criticism, review, demonstration, litigation, comment, newspaper summary, or fair use as recognized by the courts, and that he assumes all responsibility and liability for any claim of infringement arising from the use, either by himself or another, of the copy furnished by the Librarian of Congress.
>
> The making of copies by the Librarian of Congress as hereinabove provided shall not be deemed to constitute infringement of copyright.

The Lucas bill applied only to the Library of Congress. It would not have solved the problem for the many other libraries in which much material of value to scholars and researchers is found. No action was taken on the Lucas bill.

IV. Foreign Law

Some of the more recent foreign copyright laws have provisions governing various aspects of photocopying. For the purpose of comparison, the laws of Austria, France, Mexico, and the United Kingdom, will be briefly examined. The new draft laws of Germany and the Scandinavian countries will also be mentioned.

A. AUSTRIA

The copyright law of Austria, law of April 9, 1936, as amended, provides:

> § 42. (1) Any person may produce copies of a work of literature, music, or art for his personal use * * *
>
> * * * * * * * *
>
> (3) Single copies may also be made on order for the personal use of another person. However, such a copy of a work of art may only be made without compensation therefor. The copying for compensation of a work of literature or music, for the personal use of another person ordering the copy, may not be made by means other than in longhand or by typewriter except when it concerns minor parts of a work, or an unpublished work, or a work which is out of print.

While a person who makes his own copies or who supplies copies free of charge may avail himself of any copying technique, including photocopying, certain restrictions apply when copies are supplied "for compensation." Whether a charge of the actual cost of making the copy would constitute "compensation" is not clear. Dr. Wilhelm Peter, who has written an extensive commentary on the Austrian copyright law, gives the following interpretation of the above rules as applied to public libraries that make a charge for photocopies. He says:

> Photocopies or microfilms of protected works or parts of works kept in public libraries may be made for a charge—without the permission of the author or publisher—when—
>
> (a) there is an order;
>
> (b) the person who has placed the order for a copy does not intend to make the work or the part of the work available to the public (although quotation and other fair use in a published work * * * may be permissbile);

(c) the work is unpublished (manuscripts, dissertations), or the work is out of print, or only a part of a work is wanted. Articles in periodicals are in this respect to be considered as works and not parts of works.[18]

Under this interpretation by Dr. Peter, it would seem that a library making a charge therefor may supply a photocopy of an article in a periodical only when the periodical is out of print. The basis for this conclusion is not clear.

The Austrian law does not mention intralibrary photocopying.

B. FRANCE

The French copyright law of March 11, 1957, does not provide rules for library photocopying. Private copying is permitted under article 41, which excepts from copyright protection:

(2) Copies or reproductions reserved strictly for the private use of the copyist and not intended for collective use, with the exception of copies of works of art * * *.

While this provision permits a person to make copies by any means, including photocopying, for his own private use, nothing is said about having such copies made by libraries or by other persons. The effect of the French law in this latter respect is not clear.

C. GERMAN FEDERAL REPUBLIC

The German copyright law of June 19, 1909, as amended, provides in section 15, second paragraph:

Multiplication for personal use shall be permitted, provided the multiplication does not serve the purpose of obtaining revenue from the work.

The scope of "personal use" was interpreted in a decision handed down on June 24, 1955, by the Supreme Court of the German Federal Republic (1 ZR 88/54). The case involved a situation in which an industrial corporation had made a number of photocopies of copyrighted articles for the use of its research staff. Interpreting section 15, second paragraph, the Court first stated in a dictum that it does not follow as a matter of course that photocopying, as opposed to other multiplication methods (especially hand copying or typewriting), is permissible; and the Court held that, whether or not photocopying is permissible in some instances, photocopying by or for an industrial concern is in no case "multiplication for personal use" within the meaning of the law.

To solve the problems posed by this decision, the German Publishing Association and the German Industrial Association in 1958 signed an agreement stipulating the conditions under which periodical articles may be photocopied by or for members of the Industrial Association. For articles in periodicals less than 3 years old the agreement establishes various bases for the payment of fixed royalties. For articles which are older than 3 years, no royalties are due. The agreement further states that "only a few photocopies may be made of each work," and that the photocopies may not be commercially distributed. Subscribing publishers obligate themselves to have photomechanical reproduction rights transferred to them. In cases where authors permit photocopying free of charge, each imprint is to bear a notice to that effect.

[18] PETER, DAS OSTERREICHISCHE URHEBERRECHT 123 (Vienna 1954).

The new German draft law on copyright, which has been published with an extensive report by the Federal German Ministry of Justice,[19] contains the following provision:

§47. (1) Any person may make single copies of a work for his personal use, or may have such copies made free of charge by others. Personal use does not include use for professional or trade purposes.

(2) Any person may make or have made single copies of a work, with the exception of a work of art—

1. when the copying is made by hand or typewriter;
2. when the work is unpublished or out of print;
3. when only a small part of a work is involved, or when the work is an article in a newspaper or periodical.

(3) The copies may not be distributed or used at a public reading, performance, or exhibition, or in a broadcast * * *.

According to the official report accompanying the proposal, subsection (2)2 was drafted to meet the needs of libraries and scientific institutions,[20] while subsection (2)3 is intended to serve the purposes of scholarship and research.[21] The report points out that the reproduction of articles in periodicals tends to affect publishers more than authors, since the latter usually receive only nominal fees for the type of articles of interest in this field. Based on findings by the German Research Association (die Deutsche Forschungsgemeinschaft), the report concludes that periodicals in the field of the humanities generally are in a precarious economic situation but that the same is not true of other technical journals. Consequently, since by far most photocopies are made from such technical journals, which can bear the loss, a photocopying privilege for the benefit of scholarship and research must prevail over the interests of the publishers. Conversely, a general prohibition would not aid the journals dealing with the humanities; their troubles have other sources.[22]

D. MEXICO

The Mexican copyright law of December 29, 1956, in article 15 permits:

(d) The copying by manuscript, machine, photography, photostat, painting, drawing, or microfilm of a published work, provided the copy is for the exclusive use of the person making it * * *.

The law does not provide specifically for library photocopying, but it does contain some far-reaching provisions in article 70, which provides:

ART. 70. The publication of literary, scientific, educational, or artistic works necessary or helpful to the advancement, diffusion, or improvement of science or national culture or education is a matter of public interest.

The Federal Executive may, either *ex officio* or upon application, declare a restriction upon copyright in order to permit the publication of the works referred to in the preceding paragraph in the following cases:

(I) When for a period of 1 year, there are no copies of the work in the capital of the Republic and in three of the chief cities in the country;

(II) When works are sold at such a price as considerably to impede or restrict their general use, to the detriment of culture and teaching.

Although the law does not expressly say so, it seems obvious that the Federal Executive may use its rather broad regulatory powers in this field to permit photocopying for scholarly purposes in the cases described in subsections (I) and (II).

[19] REFERENTENENTWURFE ZUR URHEBERRECHTSREFORM (Bonn 1954).
[20] *Id.* at 158.
[21] *Id.* at 159.
[22] *Id.* at 170.

E. UNITED KINGDOM

The United Kingdom Copyright Act of 1911 (which has been superseded by the recent Act of 1956) contained the following provision in section 2(1):

> * * * Provided that the following acts shall not constitute an infringement of copyright:
> (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary; * * *.

Under this provision students were allowed to copy portions of copyrighted books and other copyrighted items in library collections, but it was considered doubtful whether the "fair dealing" exemption applied to copying by libraries. A report issued in 1952 by the Copyright Committee stated:

> What comes within the "fair dealing" exemption if done by the student himself (and in this respect no alteration is proposed) would not necessarily be covered if done by the librarian.[23]

In order to resolve the doubt in one area, the Royal Society representing periodical publishers had issued in 1950 a "Fair Copying Declaration" applicable to copying from certain scientific periodicals. This declaration stated in part:

> We will regard it as fair dealing for the purpose of private study or research when a non-profit-making organization, such as a library, archives office, museum, or information service, owning or handling scientific or technical periodicals published by us, makes and delivers a single reproduction of a part of an issue thereof to a person or his agent representing in writing that he desires such reproduction in lieu of a loan or manual transcription and that he requires it solely for the purpose of private study, research, criticism, or review, and that he undertakes not to sell or reproduce for publication the copy supplied provided:
>
> 1. The recipient of the copy is given notice that he is liable for infringement of copyright by misuse of the copy and that it is illegal to use the copy for any further reproduction.
> 2. The organization making and furnishing the copy does so without profit for itself.
> 3. Proper acknowledgement is given to the publication from which the copy is made.
> 4. Not more than one copy of any one excerpt shall be furnished to any one person.

The new United Kingdom Copyright Act of 1956 provides in section 6(1):

> No fair dealing with a literary, dramatic, or musical work for purposes of research or private study shall constitute an infringement of the copyright in the work.

The new Act also contains very detailed rules governing library photocopying. These rules, which are provided in section 7, cover copying by libraries in regard to (1) articles in periodical publications, (2) parts of other published works, (3) complete published works, and (4) unpublished works.

(1) Under subsection (1), the librarian of a qualified library is entitled to make and supply a copy of an article in a periodical. "Article," as defined in subsection (10), includes an item of any description. The class of libraries qualified to exercise the privilege is to be prescribed by regulations made by the Board of Trade. Subsection (2) provides that the Board of Trade in its regulations "shall

[23] Report of Copyright Committee, Cmd. 8662, para. 43 (1952). See COPINGER AND SKONE JAMES ON COPYRIGHT 229 (9th ed. 1958).

make such provision as the board may consider appropriate for securing" (*a*) that the libraries are not established or conducted for profit; (*b*) that copies are supplied for purposes of research or private study; (*c*) that no person may get more than two copies of the same article; (*d*) that no copies extend to more than one article in any one publication; and (*e*) that the person who gets copies pays for them a sum not less than the cost of their production.

(2) Under subsection (3), qualified libraries may also make and supply copies of parts of published literary, dramatic, or musical works other than periodicals. The privilege extends to illustrations in such works (subsec. 9(c)). The conditions prescribed by the regulations of the Board of Trade under subsection (2), as outlined in the preceding paragraph, must be complied with. In addition, this class of copies may not be made or supplied if the librarian knows the name and address of a person entitled to authorize the making of the copy, or if he could ascertain such information by reasonable inquiry. According to subsection (4), the Board of Trade regulations shall make provision appropriate for securing that no copy extends to more than a reasonable proportion of the work in question.

(3) The rules applicable to complete published works are provided in subsection (5). They are similar to those governing parts of published works, except that complete copies may only be supplied to other libraries.

(4) Under subsection (6), unpublished manuscripts in libraries, museums, and other institutions open to public inspection, may be reproduced for purposes of research or private study, or with a view to publication, if more than 50 years have passed since the author died, and more than 100 years have passed since the work was created. Subsection (7) prescribes the conditions under which manuscripts may be incorporated in "new works" and published. In other words, subsection (6) permits copying of old manuscripts with a view to publication, and subsection (7) prescribes the conditions under which publication may take place. The main condition is that notice of intended publication be given as prescribed in the Board of Trade regulations. Furthermore, the identity of the owner of the copyright in the "old work" must not be known to the publisher of the "new work." If these conditions are met, the "new work" as originally published, or any subsequent edition thereof, shall in this respect not be treated as an infringement of the "old work." If subsequent editions incorporate manuscripts not published in prior editions, a new notice of intended publication is required.

In accordance with the provisions of the Copyright Act, the Board of Trade has issued the Copyright (libraries) Regulations of May 17, 1957. Leaving aside matters of detail, two provisions of the Regulations should be noted. (1) In order to assure that a photocopy is made only for the purposes stated in the Act, the person requesting the copy must declare that he needs it for purposes of research or private study, that he has not previously been supplied with a copy of the item requested, and that he will not use it for purposes other than those stated. (2) One copy only may be supplied to the librarian of any library, unless the librarian of the supplying library is satisfied that a copy previously supplied has been lost, destroyed or damaged.

The detailed provisions of section 7 of the new United Kingdom Act represent an elaborate attempt to arrive at a statutory solution

of the problems pertaining to library photocopying. As to single articles in a periodical, subsections (1) and (2) appear to adopt the principles of the earlier "Fair Copying Declaration" of the Royal Society. As to other works, the remaining subsections impose conditions that appear to be quite restrictive. They have been criticized as being too complicated and restrictive; and it has been suggested that libraries, instead of attempting to meet the conditions of section 7, may furnish photocopies to students under the more liberal "fair dealing" provision of section 6.[24]

This last suggestion seems questionable. During the discussion of sections 6 and 7 in the Parliamentary Committee, the Parliamentary Secretary to the Board of Trade (Mr. Derek Walter-Smith) made the following observation:

> Clause 6(1) gives to students the right of copying for research or private study, and, as the Committee will see, that is a very broad right which extends to the work as a whole. It is quite appropriate that the particular fair-dealing provision should be in such wide terms, because there are physical inhibitions upon what the student can do which of themselves operate so as not to require any legal reinforcement. A student copies by hand, and therefore he can be given wide rights because he will not physically be able to do more than provide for his genuine personal needs * * *.
>
> A librarian, of course, will make his copies by these new, or fairly new, mechanical processes. There is no physical limitation upon what he can do, because he has got his photocopying apparatus. The librarian is necessarily in rather a different position from that of the student, both in what should be his legitimate requirements and what is his capacity for making copies of the work. It is not suggested, therefore, that he should have such a wide right as the student. It is in this case not appropriate, I think, that the very wide powers in subsection (1) of clause 6 which apply to students should be given to the librarian for the supplying of copies * * *.[25]

After this statement by the Parliamentary Secretary, an amendment which proposed that librarians should be allowed to do for students what they could do for themselves failed to carry.

The provisions of section 7 of the new United Kingdom Act are discussed in the report issued in 1957 by the Canadian Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs.[26] The Canadian Commission recommended that the United Kingdom provisions be adopted in a new Canadian copyright law, but with several liberalizing modifications. The most important modifications suggested were: (1) that section 7(2)(d) be changed so as to permit the supplying of more than one article in any one periodical publication in cases where more than one article relates to the same subject matter; (2) that section 7(2)(e), which requires a payment for photocopies of not less than the cost of producing them, be omitted in the Canadian law; and, (3) that the provision of section 7(3) requiring permission from the copyright owner, if he can be located by reasonable inquiry, for the photocopying of parts of works other than periodicals, be omitted.

The New Zealand Library Association has recently recommended to a goverment committee, which is working on a new copyright law for New Zealand that rules similar to the United Kingdom rules, but with the modifications suggested by the Canadian Commission, be adopted.[27]

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[24] See Woledge, *Copyright and Libraries in the United Kingdom*, 14 JOURNAL OF DOCUMENTATION 45 (1958).
[25] Parliamentary Debates, House of Commons, Official Report 192 (3 July 1956).
[26] Report on Copyright 57–60 (1957).
[27] 1959 New Zealand Libraries 12.

F. THE SCANDINAVIAN COUNTRIES

The present Danish, Finnish, Norwegian, and Swedish copyright laws do not expressly provide for any right to make copies of copyrighted material. Provisions to permit the making of copies for personal use are proposed in the new draft laws which have been published recently by the respective Governments. Thus, the Swedish draft contains the following provision:

§ 11. A disseminated work may be reproduced in single copies for private use. Such copies may not be used for other purposes.

It is clear from the official reports issued with the draft laws that this provision is intended to cover the making and supplying of photocopies, etc., by libraries and similar institutions although the privilege is not limited to them. According to the Swedish report, the draftsmen considered limiting the privilege to certain types of works. They found, however, that practical conditions, the price of photocopying, etc., would establish appropriate limitations in this field.[28] The draftsmen also considered a compulsory licensing system, but they abandoned this idea, partly because it would be too complicated to administer, and partly because it might mean that Swedish users would have to pay for the use of foreign periodicals while foreign users of Swedish periodicals might not be subjected to such a burden.[29]

The Swedish draft law (but not the other Scandinavian drafts) also contains the following provision:

§ 12. Upon permission of the King, and according to the conditions he shall stipulate, archives and libraries may make photographic reproductions of a work for the purposes of their activities.

V. Summary and Analysis of the Problem

A. GENERAL OBSERVATIONS

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

Not only is such competition unfair to the publisher and copyright owner, but it may be injurious to scholarship and research. Thus, it has been pointed out that the widespread photocopying of technical

[28] UPPHOVSMANNARATT TILL LITTERARA OCH KONSTNARLIGA VERK 191 (Stockholm 1956).
[29] *Id.* at 190.

journals might so much diminish the volume of subscriptions for the journals as to force the suspension of their publication.[30]

At the same time, the availability of a growing mass of published materials is essential to persons engaged in research, and in many situations they must be able to obtain copies for study from libraries (or similar institutions) where the materials are collected. To fulfill this need, libraries must be able to supply photocopies to the extent that it is not practicable to provide published copies for the use of researchers.

The problem, in essence, may be seen as this: How can researchers be supplied with the materials they need for study, without undercutting the publisher's market? Perhaps various limitations can be placed on photocopying to preclude or minimize the potential injury to publishers or copyright owners, without depriving researchers of the materials they need.

B. PHOTOCOPIES FOR INDIVIDUAL RESEARCH

Some guides to the limitations that might be appropriate for supplying photocopies to individuals might be found in the "Gentlemen's Agreement" of 1937, the "Fair Copying Declaration" of the British Royal Society, the proposals presented to the Shotwell Committee, and the foreign laws and proposed laws, all outlined above.

These sources suggest for consideration limitations such as the following: that photocopying be limited to nonprofit institutions; that only one photocopy be supplied to any one individual or organization; that in the case of periodicals photocopies be limited to one or two articles from any issue; that in the case of other works, photocopies be limited to a reasonable portion of the work (though no mathematical formula would seem to be feasible), except that a photocopy of an entire work might be permitted where it is not available from the publisher.

Other conditions for the photocopying might also be suggested for consideration, for example: that on each photocopy the source should be shown and the copyright notice appearing on the source should be reproduced; that the person requesting the photocopy should be required to state in writing that it is to be used only for his private study; that if he requests a photocopy of an entire work, he be required to state in writing that he has made inquiry and has found that the publisher cannot supply him with a copy.

[30] See, for example, Walter J. Murphy, *Should the Copyright Law Be Abolished?* in CHEMICAL AND ENGINEERING NEWS, Oct. 6, 1958. In regard to scientific journals in particular, it may be the publishers rather than the authors who are concerned about photocopying. In a recent Report by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee (S. REP. 97, 86th Cong., 1st Sess. 12 (1959)), appears the following: "Most scientists feel that their work is not published to gain any financial reward for the authors but should provide scientific data which other scientists may freely use and build upon to advance the cause of science. On the other hand, the commercial publishers of scientific articles regard copyright protection as essential to meet their costs of publication. A clash between these authors and publishers occurs when public libraries or private industrial subscribers undertake to circulate numerous copies of scientific articles for the benefit of interested scientific personnel. The authors regard such copying as desirable. The publishers feel that it impairs their circulation and revenue."

C. MULTIPLE PHOTOCOPIES FOR CORPORATE RESEARCH

The limitations mentioned above would seem to preclude the making of multiple photocopies by or for a corporate organization for the use of its staff of research workers. This is a problem of growing importance since scientific research is being conducted increasingly by the staffs of corporate organizations. The materials needed in multiple copies for their research staffs are primarily articles in current technical journals. There is probably not the same need for supplying copies of other kinds of works (such as books or older periodicals) simultaneously to several members of a corporation's research staff. One copy of such other works, to be supplied on the same basis as to an individual researcher, might suffice.

Multiple photocopying for the use of a corporation's research staff seems more difficult to justify than the making of a single photocopy. Publishers of technical journals may well feel that such multiple photocopying of current material would seriously curtail their market, and that corporate organizations, particularly those operated for profit, should be expected to buy the publisher's copies in the number needed for their staff.[31]

As noted above, the Supreme Court of the German Federal Republic in 1955 held that such multiple photocopying by an industrial corporation is an infringement of copyright; and a practical solution to the problem has recently been worked out by an agreement between the German publishing and industrial associations, whereby industrial organizations pay royalties for photocopies they make of articles in periodicals less than 3 years old. Some such royalty arrangement appears to be a reasonable solution for this special problem. In fact, a royalty arrangement might be a solution to the photocopying problem in a broader area, as will be mentioned later.

D. PHOTOCOPYING FOR A LIBRARY'S COLLECTIONS

Mention has been made of the need of libraries to make microfilm or other photocopies of items in their collections for their preservation. Also, libraries have occasion to supply other libraries with photocopies of items not otherwise available. In either case, as long as the copies needed are not available from the publisher, photocopying for a library would not appear to prejudice the interests of the publisher or copyright owner.

VI. Approaches to a Solution

A. GENERAL ALTERNATIVES

Two alternative approaches to a solution of the photocopying problem may be considered: (1) to provide by statute for the making and supplying of photocopies for purposes of research and study, or (2) to leave the matter to the working out of practical arrangements between libraries and research groups on the one hand and publisher and author groups on the other.

1. *Statutory provisions.*—Several kinds of statutory provisions might be suggested for consideration. Possible models are found in

[31] See Walter J. Murphy, *op. cit.*, note 30, *supra*.

the laws and proposed laws of other countries outlined in part IV of this study, and perhaps in the two prior bills outlined in part III.

(*a*) The statute might provide in general terms that single photocopies may be made by or for any person for his private use only. Such provisions are found in the Austrian law (with limitations added where copies are supplied "for compensation"), in the present German law and the new draft law for the German Federal Republic (the draft law adding limitations where the copies are not made "free of charge"), and in the new draft laws for the Scandinavian countries (except for certain kinds of works).

Such a general provision would serve to establish the right to make and supply single photocopies for the sole purpose of research and study. It would not limit the persons or institutions by whom photocopies could be made and supplied, or the kinds of works or the quantity of any work that might be photocopied.

The addition of some limitations might be considered; for example, that the photocopies be supplied without profit (which may be the purport of the Austrian law and the new draft law for the German Federal Republic).

A broad provision of this character would have the merit of simplicity, but it might open the door to such extensive photocopying as to present the danger of injury to the interests of publishers and copyright owners, unless further limitations were prescribed.

(*b*) A statutory provision might prescribe precise limitations and conditions under which photocopies may be supplied. Thus, in addition to the general limitations of a single copy for private use only, a number of further limitations and conditions are found in the United Kingdom Act of 1956. It limits the privilege of supplying photocopies to nonprofit libraries. Photocopies of periodicals are limited to one article in any issue (the Canadian Commission has recommended that photocopies of more than one article be authorized where the articles relate to the same subject). Photocopies of other literary, dramatic or musical works are limited to a "reasonable proportion" of the work; and they may be supplied only where the librarian does not know and could not ascertain by reasonable inquiry the name and address of the copyright owner (the Canadian Commission has recommended deletion of this last condition). Under this last condition a photocopy of a complete work may be supplied by one library to another. The recipient must pay for the photocopy not less than the cost of its production (the Canadian Commission has recommended deletion of this requirement).

A detailed statutory prescription of this character would have the apparent advantage of fixing, with some degree of certainty, the permissible scope of photocopying. Thus, the statute could define the institutions authorized to make photocopies, the purposes for which photocopies may be made and supplied to others, the kinds of material and how much of each kind may be photocopied, and the conditions under which photocopies may be made and supplied. Precise limitations and conditions could be imposed in these respects to assure safeguarding the interests of publishers and copyright owners. But any such detailed prescription is likely to prove too complex and too restrictive from the standpoint of libraries and researchers. The new United Kingdom Act has been severely criticized on this score.

Moreover, a considerable degree of flexibility seems desirable. New methods of assembling indexes and collections of the voluminous literature in particular fields of research, new devices for the storage and photoreproduction of such materials, and new methods for providing researchers readily with indexes of the literature in their fields and with photocopies of the materials they want, are developing rapidly. A statutory prescription in precise detail may well become outmoded in a relatively short time.

(*c*) Another possibility would be to provide generally in the statute that nonprofit institutions may make and supply photocopies for research and study and for other specified purposes (e.g., for maintenance of a library's collections or for another library), with the limitations and conditions left to administrative prescription by rules and regulations. This would permit flexibility to meet changing conditions.

2. *Working arrangement.*—Instead of attempting a statutory solution of the photocopying problem, a working arrangement might be agreed upon between the groups concerned. This would have the advantage of flexibility and the further advantage of reflecting a practical accommodation between the views and interests of the several groups. Those groups might agree on a code of practice with which all concerned would be willing to experiment, and such a code could be changed from time to time as experience and changing conditions show to be necessary.

The "Gentlemen's Agreement" of 1937 and the British "Fair Copying Declaration" illustrate this approach to a solution of the problem. Efforts to work out a code of practice have already begun.. It may be desirable to await the outcome of those efforts before seeking to resolve the problem by statutory provisions.

A statutory solution would seem to be particularly difficult in the situation of multiple photocopies for the use of a corporation's research staff, and perhaps in other cases where photocopies are to be made by or for a profitmaking organization. The recent agreement between the German publishing and industrial organizations, mentioned above in part IV c, suggests a possible basis for a working arrangement between the interested groups to solve such special problems. Further, the same principle might have broader application in working arrangements for photocopying generally. Thus, in any situations where publishers are reluctant to have photocopies made without their consent, libraries might establish a sort of clearinghouse through which they would obtain permission from publishers to make photocopies or, if required, would collect and remit royalties to the publishers.

B. RECAPITULATION OF BASIC ISSUES

The following appear to be the primary questions to be considered.

1. Should the copyright statute provide expressly for the photocopying of copyrighted works by libraries? If so:

(*a*) Should the statute merely provide, in general terms, that a library may supply a single photocopy of any work to any person for his personal use in research and study?

(*b*) Should the statute specify limitations and conditions with respect to:

(1) the kinds of library institutions that may make and supply photocopies?

(2) the purposes for which they may make and supply photocopies?

(3) the conditions under which they may make and supply photocopies for such purposes?

(4) the extent to which they may photocopy, under the specified conditions, the contents of (1) periodicals and (2) other publications?

(5) the kinds of published material, if any, which they may not photocopy?

(*c*) Should the statute provide for photocopying in general terms (as in (*a*) above) subject to limitations and conditions to be prescribed by administrative regulations?

2. Instead of a statutory prescription, would it be preferable to encourage the libraries, publishers, and other groups concerned to develop a working arrangement, in the nature of a code of practice, to govern photocopying by libraries?

COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES

CONTENTS

COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES

By Philip B. Wattenberg

MAY 27, 1959.

Re: Photoduplication by libraries.

I have read the study by Mr. Varmer on photoduplication of copyrighted materials by libraries. It is my personal feeling that the second approach suggested by Mr. Varmer on page 66, to wit "a working arrangement" or "code" would be more practical than a statutory solution to the problem.

Insofar as the music industry (with which I am closely associated) is concerned, I believe the following suggestions could form the basis of a workable code that would be fair to all parties concerned:

1. The person seeking a photocopy shall have attempted to purchase a copy of the work from the publisher.

2. If the work is out of print, the applicant will be sent a "permanently out-of-print" notice by the publisher. The publisher will exercise every effort to process such orders immediately upon receipt. Upon presentation of such notice to the library, the applicant will have the right to secure one photocopy of the work in question.

3. The code would make clear that no rights (performing, mechanical, or otherwise) are embraced by or deemed to be connected with the photocopy, or the permission to obtain same.

4. On each photocopy the library will identify the work from which the copy is made and if the work bears a copyright notice the notice will be reproduced on the photocopy.

5. The cost of making the photocopy and any fees attendant thereupon would be determined in accordance with the discretion of the particular library.

I fully understand that the above suggestions may not be fair when applied to books and scientific periodicals.

Kindest regards.

Sincerely,

PHILIP B. WATTENBERG.

By Robert Gibbon (The Curtis Publishing Co.)

JUNE 15, 1959.

This is in reply to your requests for comment on the stud[y], "Photoduplication of Copyrighted Material by Libraries." * * * The problem discussed in [this] very interesting stud[y] has [no] particular application to our phase of magazine publishing. It is, therefore, very difficult to give constructive criticism.

In addition to the difficulties described in the photoduplication study is the development of portable and inexpensive photoduplicating equipment. Further technological advances along these lines will make it all the more possible to do surreptitiously that which now is generally requested of libraries. The notation that any statutory solution to this problem might quickly become outmoded is an apt one.

In the magazine business we have the satisfaction of knowing that it is cheaper to buy copies, if the issue is current or available, than to reproduce articles photographically or mechanically. If the issue is not available, the magazine publisher is not likely to be concerned by limited reproduction so long as copyright is protected.

This same solution might well serve other publishing interests. If the libraries were required or would agree to set prices for photoduplication on current or in-print material such that competition with the copyright proprietor would be discouraged, the problem would be considerably alleviated.

* * * * * * *

Sincerely,

ROBERT GIBBON.

56581—60——6

By Harry R. Olsson, Jr.

JUNE 19, 1959.

Re: Photoduplication of Copyrighted Material by Libraries—Varmer.

I have the following comments to make on the questions raised by this excellent study:

1. My initial thought was the copyright statute should provide for the photocopying, or other copying, perhaps by other methods, for research and study purposes of copyright works by a centralized library, perhaps the Library of Congress. Other libraries conveniently located should be granted the same authority but their number should be kept relatively low.

2. Copying should be permitted only where the work needed is unavailable on reasonable terms to the researcher and the statute should lay out a plan whereby the proprietor would be paid a reasonable royalty for each copy made. Perhaps the royalty should approximate what he would be paid had a copy of the original published work been purchased if the whole published work were copied or a proportion if only a portion were. I should make this provision for a royalty because I see no reason why the author of a work should have perhaps the largest part of his market for the work taken away from him without benefit to him. This might tend to dry up the supply of scientific and technical works which have at best a limited market. In cases where the author is selfless and desires the work to be freely copied, he can easily so provide by having a note to this effect accompany his copyright notice, if indeed he desires a notice at all.

3. The statute should specify the conditions under which copies may be supplied for research and study purposes. The most important condition it seems to me is that the work itself be unavailable or practicably unavailable. Included would be instances where the price set for the copyrighted material is wholly unreasonable or where the material as published is part of a greater work prohibitively expensive to him interested in only a part. I do not think the statute should attempt to discriminate among kinds of published material, for all kinds of material may serve the purposes of research and study, including even comic books that are nasty. In order to prevent abuse, however, I think the statute should provide, although probably it cannot detail, for a weighing of the need of the scholar against the legitimate need of the copyright proprietor for protection. For instance, I do not think a scholar making ready a book on the history of the motion picture art form should be sold a print of "Ben Hur" by the library merely because he wants to write about it. His scholarly needs can in all probability be satisfied by seeing the picture in a theatre or talking to a friend who did see it or looking at the scenario.

4. It would, of course, be wise to encourage libraries, publishers, and other groups to develop working arrangements to allow copying for these purposes by libraries. However, this is no real alternative to an express provision in the statute for no doubt some groups would fail to cooperate through opposition or disinterest.

5. As I said in 1 above, my initial thought was to recommend including provisions covering the above principles in the statute. But the necessary language to accomplish all this would probably have to be very complicated and technical, perhaps overly so. If the drafting of the language proved to be an impossible job or if the section in which it were contained became too unwieldy I think perhaps I should be in favor of leaving the problem to be handled by the courts under the doctrine of "fair use." I hesitate to leave it to the courts because of the statements of the text writers, and I believe judges, to the effect that it is never "fair use" to copy the whole work. Perhaps what is required is a negative in the statute of the idea that it is never "fair use" to copy or use the whole of a work. It might be possible to condition this to accomplish what I think would be a beneficial result.

Sincerely yours,

HARRY R. OLSSON, Jr.

By Elisha Hanson

JULY 28, 1959.

Re: Copyright Revision Study, "Photoduplication of Copyrighted Material by Libraries," by Borge Varmer.

Statutory treatment of the broad problem of unauthorized mechanical reproduction of copyrighted material should be avoided if possible. The authors, publishers, libraries and users of the material should be encouraged to seek a solution through specialized contractual or other types of working arrangements.

As stated by Mr. Varmer, the essence of the problem is how to supply the copyrighted material without damaging the market of the copyright proprietor. The real problem concerns the unauthorized mechanical reproduction of copyrighted works by private individuals, corporate groups or libraries, for their own use or for use by others.

The problem of extensive photoduplication understandably has been a major cause for concern with publishers of scientific and technical journals. They share the desire to advance the cause of science, but they fear the financial impact of reduced subscription lists on their ability to gather and disseminate in the printed form the very information sought to be duplicated. As a consequence, any proposal which has the practical effect of eliminating all "scholarly" uses from the exclusive right of the copyright laws should be weighed most carefully.

Since the right to make a copy of his copyrighted work is one of the fundamental rights granted to the copyright proprietor, proposals to amend the law so as to permit others to copy the copyrighted material for the use of third persons and without the permission of the copyright proprietor should be rejected.

It is not only contrary to law but to business ethics to appropriate the property of another for one's use without the permission of the owner of that property, whatever its nature may be.

Sincerely,

ELISHA HANSON.

By Melville B. Nimmer

AUGUST 5, 1959.

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With respect to the study "Photoduplication of Copyrighted Material by Libraries" by Borge Varmer, I think it would be a mistake to expressly provide by statute the detailed conditions under which the making and supplying of photocopies may be permitted. For the reasons suggested in my comment on the study of "Fair Use of Copyrighted Works" I think it wrong to attempt to codify in any detail the doctrine of fair use, whether applied to photocopying for research purposes or to other purposes. However, since photocopying for research purposes may involve the copying of an entire article or other work (which ordinarily would exceed the bounds of fair use no matter what the purpose) it might be desirable to expressly provide in the new Copyright Act that the doctrine of fair use may apply to the copying of an entire work where such copying is for the purpose of research and study. However, whether or not in fact the doctrine of fair use should be applicable in such a situation must depend upon the weighing of delicate factors which only a trial court should determine. I do not think that a satisfactory solution can be obtained through "practical arrangements between libraries and research groups on the one hand and publisher and author groups on the other." Such arrangements like any detailed statutory codification would not be sufficiently flexible to meet the demands of particular situations. Moreover, such arrangements would not solve the problem with respect to publications emanating from publisher and author groups not party to the arrangements.

Yours very truly,

MELVILLE B. NIMMER.

By Edward G. Freehafer

AUGUST 6, 1959.

Re: Copyright Revision Panel Studies "Photoduplication of Copyright Material by Libraries".

You have asked for my comments, as a member of the Panel of Consultants and as Chairman of the Joint Libraries Committee on Fair Use in Photocopying, on Borge Varmer's revised study.

The joint committee has undertaken a study of the problems involved in photocopying by libraries and has recently obtained counsel to assist it in drawing up a statement that will fully express the position of librarians. Until this work is completed, I will not be able to take a firm position on any specific proposals or on Mr. Varmer's general question of whether a statutory solution is desirable. I am also unable at this time to comment on the treatment to be given library photocopying in the event a codification of the fair use doctrine is to be attempted.

Mr. Varmer's description of the various legislative proposals and foreign statutes confirms my fear that any statutory limitations or restrictions on the making of

single copies would impair the value of an essential and traditional research technique. So far as I am aware the making of private research copies has never caused actual damage to copyright owners.

The problem exists only because modern copying processes have brought into being a new "potential" means of damaging copyright owners. Research workers are not responsible for this, and I believe the, as I understand it, unchallenged right to make a private copy must be preserved. In any case, no serious consideration should be given to restricting research techniques in the absence of a clear showing that they are in fact causing actual damage to copyright owners.

A chief job of libraries and librarians is to facilitate research. In making modern copying processes available the libraries must be sure that they do not indirectly cause the sources of research material to dry up or the established rights of research workers to be restricted. Neither of these results could occur if the use of modern copying processes by libraries does not cause actual damage to copyright owners. The joint committee has decided to find out whether libraries are causing any such damage or seem likely to do so under present practices.

The libraries are also aware that modern processes might be used by the unscrupulous or unthinking in such a way as to damage authors and publishers. It is my belief—and the belief of the joint committee—that librarians must play a leading role in devising ways to prevent that potential damage from becoming a reality. We recognize not only that damage to authors and publishers is detrimental to libraries, but also that certain suggested methods of preventing that damage would be even more detrimental by impairing the use of the very techniques we wish to facilitate.

Mr. Varmer's study is a valuable addition to our knowledge of the problem. His paper does not indicate that present circumstances warrant either restrictions on research techniques or cumbersome regulatory arrangements—whether voluntary or involuntary. But it does indicate that statutory solutions suggested in the past and attempted elsewhere have not been satisfactory.

Sincerely yours,

EDWARD G. FREEHAFER,
Chairman, Joint Libraries Committee on Fair Use in Photocopying.

By William P. Fidler

OCTOBER 30, 1959.

As copies of the various studies on the general revision of the copyright law have been received, I have sought the advice of competent scholars concerning the relationship of the academic profession to the issues raised by these studies. At this time I am presenting some of the points of view expressed by professors who are competent to judge the technicalities of copyrights, and I hope to forward other views at a later date.

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It seems to me and my advisers that definite permission to make single copies of library material for scholarly use should be enacted. The spread of photocopying is an important aid to research, and we do not think that the claims of copyright owners should be permitted to stand in the way of its full utilization. Misuse of copies so made could, we should think, be largely prevented if the copier were required to include the copyright notice on it, together with a statement that the copy was made for the research of a particular person only.

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WILLIAM P. FIDLER.