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## Special Issue of the ALA Washington Newsletter on Copyright

### Academic Library Reserves

"Does the common, and academically important, practice of photocopying copyrighted materials and putting them on 'reserve' for usage by students, constitute copyright infringement? The attention this question has received is exceeded only by the inconclusiveness of the answers. Some commentators are sure that it constitutes infringement; others are equally sure it does not." So begins the attached article, "Academic Library Reserves, Photocopying and the Copyright Law" by John C. Stedman. In it he attempts to search out the line between permissible and impermissible photocopying for such purposes and to spell out the considerations that suggest permissibility in most instances.

Stedman, Emeritus Professor of Law at the University of Wisconsin-Madison and Chair of the American Association of University Professors Committee on Copyright Law prepared the article for publication in the AAUP Bulletin September 1978. It will also appear in a fall issue of College and Research Libraries, the journal of the Association of College and Research Libraries.

### Resolutions Adopted by ALA Council

Two copyright-related resolutions were adopted by ALA Council on June 29 during the Annual Conference in Chicago. One is directed to the Register of Copyrights in connection with the five-year review called for by Section 108(i) of the new copyright law (PL 94-553), and offers ALA support to the Register. The other is a resolution on reproduction of noncommercial educational and scholarly journals. The text of both resolutions is attached.

### CONTU

Members of the Commission on New Technological Uses of Copyrighted Works (CONTU) approved the substance of the Commission's report at the final meeting on July 10. After further editorial work the report will be delivered to Congress by July 31, on which date the Commission disbands. The report will include the recommendations of CONTU's three subcommittees on photocopying, data bases, and software. The only change in the 1976 Copyright Act provisions affecting photocopying recommended by CONTU is the addition of a new 107 subsection to include wording for a copyright warning notice to be displayed by commercial copiers. The final report should be available for distribution sometime in August from CONTU, Washington, D.C. 20558. It will be a hefty volume of a couple hundred pages, and it is possible that a separate summary may also be published.

Attachments (3)

John C. Stedman

Does the common, and academically important, practice of photocopying copyrighted materials and putting them on "reserve" for usage by students, constitute copyright infringement? The attention this question has received is exceeded only by the inconclusiveness of the answers. Some commentators are sure that it constitutes infringement; others are equally sure it does not. The following comments attempt to search out the line between permissible and impermissible photocopying for such purposes, and to spell out the considerations that suggest permissibility in most instances.

"Reserves", for purposes of this discussion, are defined as making copies of selected writings available to individual and successive students for educational purposes, subject to sharp time limitations and, usually, restrictions on physical removal from the library premises. The copyright issue does not arise except with respect to copyrighted materials that have been copied without the express or implied consent of the copyright owner. Nor is the present discussion concerned with libraries that are connected with commercial organizations, or the possible liability of persons other than the libraries or teacher—for instance, students—who engage in unauthorized photocopying on unsupervised copying machines [see sec. 108(f)]. In short, we are concerned here only with the teacher—or the library acting upon the teacher's request or on its own initiative—who makes, or has made, the unauthorized copies in question and places them on reserve.

Since such practice involves a "copying" within the meaning of the copyright law, it constitutes infringement [see sec. 106(1)] unless such use is permitted by section 107 or 108 [see Appendices A and B].

#### Section 108—Library Photocopying

It is logical (if not chronological) to start with section 108 rather than 107, since it is the narrower and more specific of the two. The structure of section 108 is quite complex. Subsections (b) through (e) set out the circumstances in which photocopying is permitted, namely, for purposes of preservation or restoration [subsections (b) and (c)] or to comply with the request of a user [subsections (d) and (e)]. Subsections (b) and (c) are not relevant to the present discussion, but subsections (d) and (e) are. Subsection (d) permits a library, at the request of a user, to provide a copy from its or another library's collection "of no more than one article or other contribution to a copyrighted collection or periodical issue, or . . . of a small part of any other copyrighted work", provided (1) the copy becomes the property of the user, (2) the library has no notice that it is to be used "for any purpose other than private study, scholarship, or research", and (3) the library displays or includes a "warning of copyright". Subsection (e) permits a library to provide a copy of an "entire work or . . . a substantial part of it", subject to the same conditions plus the added condition that the library "has first determined . . . that a copy . . . cannot be obtained at a fair price".

In addition to the above limitations, subsections (d) and (e) are also subject to four important limitations set forth in subsection (a), namely, that (1) the library make "no more than one copy" (although it may repeat "on separate occasions" provided the repetitions are "isolated and unrelated"—subsection (g)); (2) the copying is done "without any purpose of direct or indirect commercial advantage"; (3) its collections are available to the public or researchers; and (4) a notice of copyright is included.

As the foregoing indicates, the conditions to be met are numerous and technical, but compliance with them in meeting the needs of individual students should cause no serious problem. The closer question, especially in view of the "one copy" limitation, is their applicability to—or perhaps, their practicability in—the "reserve" situation. Under section 108(d), an individual student could request a copy of a referenced article. But could more than one student request a copy of the article? Could a student who legally obtained a copy through this procedure, share it with others? The potentialities of these as alternatives to the traditional "reserves" system are obvious—and it is a little hard to see why a result that could be achieved by these indirect and inefficient methods should not be achievable by the more simple and efficient method of simply putting a limited number of copies on reserve.

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The premise of non-infringement runs into difficulty, however, in the face of section 108 language.

(1) Suppose the recipient turns the copy over to others, either on loan or irrevocably? In that case, does it meet the requirements of "private study, scholarship, or research"? It would seem that it does and even if it does not, the library should be free of liability if it had no notice of his intent to pass on the copy [see subsec. (d) and (e)]. But one cannot be sure. The answer may be "yes" or "no" depending on who is interpreting them.<sup>1</sup>

(2) If more than one request is filled, may the library be in violation of subsection (g), which provides that the rights to make additional copies on separate occasions

"do not extend to cases where the library . . . (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies . . . whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group?"

The murkiness of this language defies interpretation at any level short of judicial omniscience.<sup>2</sup> Nevertheless, at some point along the road of repeated photocopying in these circumstances it seems inevitable that a court would conclude that the library was, or should have been, "aware". Up to that point, however, the library would be home free.

About the most one can say regarding section 108, is that a library, acting in good faith, could fill a single student's (or teacher's) request for a single copy, but beyond that would move increasingly into deeper water as repeated reproductions occurred. All in all, section 108 provides a possible means of meeting students' needs, but the means are limited. It is a road pock-marked with pitfalls.

#### Section 107—Fair Use

Section 107, in contrast, offers greater possibilities. One must explore this section from two standpoints: (1) the language of the statute itself and (2) the gloss (a somewhat tarnished gloss) that has been put upon it by the highly publicized (and often distorted and misinterpreted) Guidelines for Classroom Copying agreed upon by the Ad Hoc Committee of Education Institutions, the Authors League of America and the Association of American Publishers [see Appendix C].

Section 107, standing alone, seems to provide considerable freedom to educational photocopiers—granted that its rather vague and general language will engender considerable uncertainty until the courts have authoritatively spoken. The section codifies an equitable doctrine that has been an unwritten part of the copyright law for over 100 years. Traditionally its application has been largely restricted to the use of excerpts as part of further writings,<sup>3</sup> but the Congress that enacted the Copyright Law of 1976 went further. It clearly viewed section 107 as, among other things, a means of balancing the respective interests of the copyright owner and the user of copyrighted materials. As the House Report puts it,<sup>4</sup> "it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users".

Section 107 prescribes four factors to be considered in determining whether a use is "fair": (1) purpose and character of the use, (2) nature of the work, (3) amount and substantiality of the portion used and (4) effect upon the market for the work. Of these four, it is the last—the effect upon the owner's market—that is likely to be given the most weight. For reasons indicated later, this consideration may well strengthen the position of one claiming freedom to photocopy for reserve purposes. A second consideration operating in his favor is the twice-expressed reference in the section to educational usage. It (1) defines "fair use" as including "purposes such as . . . teaching (including multiple copies for classroom use), scholarship, or research," and (2) refers to "the purpose and character of the use" as "including whether such use is of a commercial nature or is for nonprofit and educational purposes".

These provisions should give considerable aid and comfort to the would-be "reserve" copier. Within the area under discussion, "reserve" photocopying incontrovertibly qualifies as being "for nonprofit educational purposes". Furthermore, if it is permissible to make "multiple copies for classroom use", it would seem to follow logically that one could make a smaller number for use under the restrictive conditions that typically apply to a library program.

But what about the effect upon the market? The strong opposition of copyright owners to reserve practices apparently stems from the fear that such practices will seriously undercut their sales. As the Register of Copyrights has observed, "this practice was used as kind of a monster, an example of things that shouldn't be done".<sup>5</sup> Are these fears well-founded? If entire books or a substantial part thereof are photocopied, they may well be. If access to the material is important enough to warrant photocopying this extensively, the institution

would probably, although not necessarily,<sup>6</sup> purchase a copy rather than do without. But it is also true that, in the absence of unusual circumstances such as outrageous price, inaccessibility or long delay in obtaining the copy, it would probably purchase rather than photocopy, anyway. All in all, the cases in which book-length materials are photocopied for reserve purposes are likely to be rare, and the situations in which such practices will deprive the copyright owner of a sale, even more rare. Such statistical studies as have been made bear this out.<sup>7</sup>

The photocopying of a single chapter or excerpt, or of a single article from a periodical, involve different considerations. Here, the reserve photocopying practice is much more common. At the same time, however, it is much less likely to cut into sales. Everything else being equal, the single chapter or article generally plays a less essential role in the ongoing educational process, than does the book-length treatise. A given copy, being shorter and therefore the turnover more rapid, will normally serve more students thus reducing the number needed for reserve. The student who desires a copy for personal usage (or to pass around to others) will be more inclined to run one off undetected on an unsupervised machine than to buy a copy. Authorized purchased copies are less likely to be available promptly or at a reasonable price.<sup>8</sup> Often, the material wanted is not available at all unless one is willing to buy the larger publication in which it is contained (shades of the antitrust law ban on tie-ins!). Even if permission is given to copy articles, the charge imposed by many publishers (including non-profit publishers) may far exceed what could be deemed, by any test, a reasonable price (conceivably to induce one to purchase instead of to photocopy)<sup>9</sup>—and in excess of what the non-profit educational institution is able or willing to pay for the privilege.

Taking everything into consideration, one may suggest the following conclusions with respect to section 107: (1) An educational institution will not normally photocopy, for reserve purposes, materials that it can more economically obtain by purchase. (2) As a consequence, it will purchase, rather than photocopy, materials of a voluminous nature such as books, provided they are obtainable promptly and on reasonable terms. (3) If denied permission to photocopy shorter materials (articles, excerpts, chapters, etc.), it is unlikely to purchase additional copies, unless obtainable promptly and on clearly reasonable terms, but instead will make and distribute multiple copies for classroom use to the extent permissible or, except for copies already owned, forego usage of the material in question. Whatever alternative it adopts, the probability of any remuneration of significance to the copyright owners is slight. (4) This being so, a balancing of the burdens upon users (in terms, not only of financial costs, but also of uncertainty, delay and non-use) of denying the right to engage in reserve photocopying, against the minuscule benefits likely to accrue to copyright owners, supports a conclusion that reserve copying, within reason, should be deemed a "fair use" under section 107.

What constitutes a use "within reason", is difficult to define, and the language of section 107 gives no guidance in this respect except for the general factors previously mentioned. To a large extent the problem should resolve itself, since libraries, in the exercise of good judgment, are unlikely to photocopy if the material they want is available from authorized sources promptly, in adequate form and supply, and at a reasonable price—photocopying, after all, is not an inexpensive process. Irrespective of these considerations, if the copied materials come within the "fair use" test applied pursuant to the "multiple copies for classroom use" provision, or meet the criteria of sections 108(d) and (e), discussed above, such usages should be deemed "reasonable" for reserve purposes, both because this conclusion conforms to the basic thinking of the Congress as expressed in sections 107 and 108 (since injury to copyright owners would probably be minimal) and because a contrary holding would pose serious enforcement problems—a result that courts are unlikely to view with much enthusiasm.

#### Guidelines for Classroom Copying

There remains the question of the "Guidelines for Classroom Copying". Some might dismiss them as inapplicable to reserve practices, since they are clearly directed, and limited, to classroom activities. Inevitably, however, they will bear upon the subject of reserves for several reasons: (1) They do deal with the same materials and with practices that have the same objectives as the reserve practices. (2) Their criteria as to what practices should be acceptable under the "fair use" doctrine, were agreed upon between the copyright owners and representatives of a substantial segment of educational users—an agreement that Congress knew of and found acceptable prior to final enactment of the Copyright Law. (3) Guidelines interpretations of what may be done under the "multiple copies for classroom use" provision may well affect conclusions as to what is reasonable "reserve" activity.

The Classroom Guidelines and their pros and cons have been extensively discussed elsewhere. Hence, there is no need to discuss them here except as they bear upon the "reserves" issue. Four points should be emphasized at the outset, however. (1) They set forth only minimum rules, i.e., what teachers can do with impunity. Despite some rather misleading terminology in spots, they do not in terms, limit what a teacher can do under the law. In other words,

practices not expressly authorized by the agreement may still constitute "fair use" under the general criteria set forth in section 107. (2) Such commitments as may be contained in the Guidelines are binding only upon those who entered into the agreement, not upon others whether they be private parties, courts or Government officials. Courts are free, of course, to take them into consideration and to follow them if they see fit, just as private parties are free to do so (both with respect to practices that the Guidelines permit and practices that they purport to prohibit).<sup>10</sup> (3) As noted above, the Guidelines refer only to classroom usages and say nothing about reserves. (4) Although not limited in their phraseology to elementary and secondary schools, there are indications that these, rather than institutions of higher education, were what the drafters had in mind.<sup>11</sup> (5) Although noting with approval the existence and terms of the Guidelines, the Congress did not view them as an authoritative interpretation of section 107. As the House Committee Report puts it:<sup>12</sup>

"The Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use". (emphasis supplied)

The foregoing considerations become crucial in considering certain provisions of the Guidelines relating to brevity, spontaneity and cumulative effect—provisions that pose problems for the reserve photocopying practice.

(1) Brevity. As a condition of permissibility, the Guidelines set limits on the number of words or illustrations that a copied document may contain. For instance, poetry excerpts are not to exceed 250 words; articles are not to exceed 2,500 words; charts, diagrams, etc., are limited to one per book or periodical issue; etc. Such limits may or may not be practicable for elementary and secondary schools, but they are obviously impracticable in many higher education situations. In such cases, teachers desiring to use longer materials in their classes or wishing to put them on reserve have three choices: (a) forego usage; (b) obtain permission; or (c) contend that more extensive usage meets the more general "fair use" criteria contained in section 107, even though not within the permissible limits set in the Guidelines—a contention that should be persuasive, for reasons previously suggested, to the extent that the photocopying is "within reason", taking all factors into consideration.<sup>13</sup>

(2) Spontaneity. The Guidelines require that the copying be "at the instance and inspiration of the individual teacher" and that the decision to use be so close to the time of use as to make it "unreasonable to expect a timely reply to a request for permission". In many instances it may be easy to meet these requirements, especially the requirements of "individual inspiration"—it is the teacher, after all, who usually decides what materials to hand out to students or put on reserve for their use.<sup>14</sup> Compliance with the time element may be more difficult—teachers often follow the practice of assigning such materials in successive years, although one rarely knows at a given time of usage whether he will be using the same material next time. In any event, contrary to the implications of the Guidelines, failure to meet these requirements does not render section 107 inoperable. Existence of either or both of these conditions (teacher's initiative and pressure of time) will undoubtedly strengthen the teacher's case in a "fair use" controversy, but nothing in section 107 suggests that either of them is indispensable to a "fair use" finding. Nor do the Congressional Committee reports provide support for giving to "spontaneity" the impact suggested in the Guidelines. True, the Senate Report, adopting verbatim a 1967 comment in a House Report, refers to "spontaneity" in the sense that the initiative must come from the teacher, not from higher or outside authority, but it includes no mention of a time factor in that discussion.<sup>15</sup> The House Committee comment is even more circumspect. It merely states that its earlier discussion (from which the above Senate comment stemmed) "still has value as an analysis of various aspects of the problem".<sup>16</sup> In short, as noted previously, compliance with the Guidelines assures the teacher protection, but non-compliance may still be defended as a "fair use".

(3) Cumulative effect. The Guidelines contain rigid limitations on the frequency of classroom use. Affirmatively, they permit copying (a) "for only one course in the school", (b) not more than one article, two excerpts, or three items from the same collective work or periodical volume during one class term, and (c) no more than nine instances of "multiple copying for one course during one class term." Negatively, they state that copying "repeated with respect to the same item by the same teacher from term to term" is "prohibited". One may concede that repetitious use may, depending upon the circumstances, have an adverse effect upon the market for the copied material, and consequently be a factor to consider in determining whether a use is "fair".<sup>17</sup> There is nothing, however, in either the provisions of section 107 or the Committee reports to support the restrictive test set forth in the Guidelines or to suggest that the "fair use" defense is not available to one who goes beyond these Guideline limits in classroom use or, for reasons perviously suggested, in reserve photocopying.

## Conclusions

In the light of what has been said, the following comments are in order:

(1) One must, of course, abide by such rules and conform to such procedures as are clearly required by the new statutes and the rules and regulations developed thereunder. For instance, the inclusion by librarians of a copyright notice on materials, the posting of warning on unsupervised machines and incorporation thereof on order forms, acting passively rather than as the initiator in photocopying for class use and reserves, and so on, may seem mere technicalities to a library staff, but compliance with such conditions can spell the difference between liability and non-liability.

(2) Care should be taken to avoid unreasonable and excessive photocopying. It is one thing to photocopy in the good faith belief that it is permissible under the statutes. It is quite another to insist upon photocopying in utter disregard of the legitimate rights of copyright owners, or to persist in practices that are clearly illegal or have authoritatively been declared to constitute infringement. Such conduct could result in the award of statutory damages (typically, a much heavier penalty than the "actual damages" to which the good faith educational violator is subjected).<sup>18</sup> It might also generate in the judiciary an adverse attitude toward educational photocopying in general, to the long-range detriment of the educational community.

(3) At the same time, a practice that appears reasonable within the language and spirit of the new law—more specifically, of section 108 and especially 107—and which is important in the furtherance of higher education may, and should, be pursued up to the point where such practice is authoritatively held to constitute infringement. To refrain from practices that can reasonably be deemed permissible is a disservice to the cause of education and runs the risk of setting a pattern of conduct that ultimately grows (or degenerates) into a legal interpretation of the law. At the other extreme, continued persistence in a practice after it has been authoritatively outlawed subjects the educational community to the unpleasant results described in the preceding paragraph. In the latter situation, the only viable alternatives are to try to get the law changed by judicial or legislative means (if one feels strongly about it) or to bow to the decision.

(4) Putting materials on reserve, for educational purposes and at the request of teachers, would seem to be in accord with the foregoing principles provided proper procedures (discussed above) and good judgment as to reasonable limits are observed. The variety in circumstances makes it impossible to lay down definite rules concerning what can and cannot be done—past efforts to do so underline the futility of this approach. As benchmarks to guide one in this inherently uncertain area, however, the following observations should prove useful: (a) If users and copyright owners, singly or in groups, can voluntarily agree upon a satisfactory arrangement—fine. One can only applaud such efforts. The problems arise, not from this procedure, as such, but from private parties or groups purporting to speak for others who have not consented to such representation, or from the arrogation of such an agreement into a rule of law. (b) The Classroom Guidelines should be taken for what they are, namely, a voluntary agreement as to minimum permissible practices, with the validity of practices that go further than those approved therein still to be determined under the general "fair use" doctrine set forth in section 107. (c) "Fair use" under section 107 is to be determined by the provisions relating to educational uses and by application of the four factors listed in that section, especially the fourth factor dealing with market effects. (d) Care should be taken to keep abreast of the court determinations and to conform to the court rulings until they are overruled or the statutes are amended. (e) As a rule of thumb, it should be considered "fair use" (unless and until the courts rule otherwise) for a teacher, either directly or operating through the library, to put on reserve those materials that could be distributed to individual members of the class consistent with the "fair use" doctrine; any practice that a teacher can engage in directly, should be permissible using a library acting as an agent. (f) It goes without saying that in doubtful and marginal cases, the library should consult with appropriate legal counsel with respect to the validity of the proposed course of conduct.

(5) It is of great importance, during the period of uncertainty and development, that libraries keep full records of what photocopying they engage in, the reasons for doing so, the costs and benefits (both monetary and educational) of what they do as compared to alternative practices, what practices they refrain from engaging in (and, again the costs and benefits) as a result of the copyright law, the specific effect of their practices upon the purchase of or subscription to copyrighted materials, and so on. Such data becomes highly relevant in connection with possible specific litigation that may result, in shaping court attitudes generally, in their bearing upon the efforts of users and/or owners to amend the law, and in providing assistance to the Register of Copyrights in making the five-year reports required by section 108 (i). Such data important as they are in dealing with the difficult issues that abound in the new law, take on added importance in view of the changes in both practices and effects that

12. House Report, note 4, supra, page 72.
13. In her A.A.L.L. talk (note 11, supra), the Register of Copyrights had this to say about reserves, including repeated usage from year to year:
- "My feeling is that within the ambit of 107 and 108 it can't be stopped, and that up to a point, using photocopies of excerpts and articles is permissible under 108 and 107 combined somehow or other, but when you get to the point where you know what you are doing—you the librarian or you the professor—is taking money out of the authors' and publishers' royalties, by substituting a photocopy for a sale or purchase, then I think you may be in another dimension . . . ." Proceedings, note 2, supra, page 22.
14. The introduction of the library into the act as the mere copying-and-depositing agent of the teacher, rather than as the initiator of the practice, does not change the picture.
15. Senate Rept. 94-473, 94th Cong., 1st Sess., page 63 (11/20/75). The Senate Report, again using language taken from the earlier House Report, does comment as follows in its discussion of the "nature of the copyrighted work" (page 64):
- "A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user."
16. House Rept., note 4, supra, page 67.
17. For example, if new copies are made for successive uses, as distinguished from repeated usage of copies previously made. And see note 13, supra. But repetitious copying may also, as previously noted, cause one to opt in favor of purchasing from an authorized source instead of photocopying. On the other hand, one who planned to put a given writing to repeated use, if foreclosed from copying, might be inclined to purchase rather than to simply refrain from using. Cf. note 6, supra.
18. See section 504(c)(2) of the Act, which reads in part as follows:
- "The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a non-profit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library or archives itself, which infringed by reproducing the work in copies or phonorecords . . . ."
19. For example, developments with respect to computers, clearance centers, microfilming, reprint services, etc.

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Appendix A

§107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Appendix B

§108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their

employment, to reproduce no more than one copy or photorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if—

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request, or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: Provided, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

(3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): 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 work.

(h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

(i) Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.

#### Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely, that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

#### Guidelines

- I. Single Copying for Teachers. A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class.
  - A. A chapter from a book.
  - B. An article from a periodical or newspaper.
  - C. A short story, short essay or short poem, whether or not from a collective work.
  - D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.
- II. Multiple Copies for Classroom Use. Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion: provided that:
  - A. The copying meets the tests of brevity and spontaneity as defined below.
  - B. Meets the cumulative effect test as defined below.
  - C. Each copy includes a notice of copyright.

#### Definitions

##### Brevity:

- i. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or (b) from a longer poem, an excerpt of not more than 250 words.
- ii. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.  
(Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.)
- iii. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- iv. "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity:

- i. The copying is at the instance and inspiration of the individual teacher.
- ii. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect:

- i. The copying of the material is for only one course in the school in which the copies are made.
- ii. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- iii. There shall not be more than nine instances of such multiple copying for one course during one class term.

(The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.)

III. Prohibitions as to "I" and "II" Above. Notwithstanding any of the above, the following shall be prohibited:

- A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or are reproduced and used separately.
- B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests or test booklets and answer sheets and like consumable material.
- C. Copying shall not:
  - a. substitute for the purchase of books, publisher's reprints or periodicals;
  - b. be directed by higher authority;
  - c. be repeated with respect to the same item by the same teacher from term to term.
- D. No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed

March 19, 1976

AD HOC COMMITTEE ON  
COPYRIGHT LAW REVISION

by Sheldon Elliott Steinbach

AUTHOR PUBLISHER GROUP

AUTHORS LEAGUE OF AMERICA

by Irwin Karp Counsel

ASSOCIATION OF AMERICAN PUBLISHERS, INC

by Alexander C. Hoffman,  
Chair, Copyright Committee

RESOLUTION ON COPYRIGHT FIVE-YEAR REVIEW

WHEREAS, Section 108(i) of the Copyright Act of 1976 (PL 94-553) calls upon the Register of Copyrights to conduct a review by 1983 to determine whether the Act has achieved the intended statutory balancing of the rights of creators and users, and the statute expressly provides that representatives of library users and librarians should participate in the five-year review; and

WHEREAS, Libraries are particularly concerned that the rights of the creative members of our society are advanced equally with the rights of the public to have available the works they create; and

WHEREAS, Libraries are both major purchasers of these works and a primary source of access to them for millions of Americans; now

THEREFORE BE IT RESOLVED, That ALA call upon the Register to consult the interested parties at her earliest convenience in order to determine the data needed for an effective five-year review; and

BE IT FURTHER RESOLVED, That the five-year review should include but not be limited to the impact of the law on users of all sizes and types of libraries and information centers, the numbers and types of materials published, and on the ability of authors to retain rights in their own works and receive remuneration for them; and

BE IT FURTHER RESOLVED, That the review include an assessment of the copyright clearance centers, and other clearance mechanisms, including permissions, purchase contracts, payment schedules, and special consideration of educational copying, plus the purchase of separates in lieu of reproduction, to determine what improvements or additional services may be needed to make copyrighted materials easily accessible to the public; and

BE IT FURTHER RESOLVED, That the Register be encouraged to broaden the context of the review to consider all methods of communicating, reproducing and disseminating the written word, including microforms, computers, and video; and

BE IT FURTHER RESOLVED, That ALA offer its support to the Register of Copyrights including advice, resources, and research capability in developing some of the data needed for the five-year review.

Adopted by the Council of the  
American Library Association  
Chicago, June 29, 1978

RESOLUTION ON REPRODUCTION OF  
NONCOMMERCIAL EDUCATIONAL AND SCHOLARLY JOURNALS

WHEREAS, Authors, publishers and librarians have similar aims and interests in the wide dissemination of materials for educational advancement and scholarship; and

WHEREAS, The new copyright law of 1976 recognizes for the first time the divisibility of authors' rights in their works; and

WHEREAS, Many publishers already permit reproduction of their materials for nonprofit educational purposes; now

THEREFORE BE IT RESOLVED, That ALA, in cooperation with other education organizations, urge publishers to adopt and include in their journals or similar publications a notice of a policy for the noncommercial reproduction of their materials for educational and scholarly purposes; and

BE IT FURTHER RESOLVED, That ALA encourage authors writing primarily for purposes of educational advancement and scholarship to reserve to themselves in the publishing contracts they sign, licensing and reproduction rights to their own works.

Adopted by the Council of the  
American Library Association  
Chicago, June 29, 1978