



WASHINGTON NEWSLETTER



BOX 54, 110 MARYLAND AVENUE, N.E. • WASHINGTON, D. C. 20002 • TEL. 202-547-4440
TWX 710-822-1976 ISSN: 0001-1746

Vol. 34

August 27, 1982

No. 10

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Special Copyright Issue of the ALA Washington Newsletter

Home Recording of Copyrighted Works

Another chapter in the off-air taping saga was written August 11 when the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, chaired by Rep. Robert Kastenmeier (D-MI), held a hearing on bills dealing with home recording of copyrighted works. Nancy Marshall, ALA's Ad Hoc Copyright Subcommittee Chair, and Gus Steinhilber, Chair of the Educators' Ad Hoc Committee on Copyright Law, of which ALA is a member, testified in opposition to HR 5705, a bill which would impose a royalty tax on video recorders and blank video tapes. In addition, it would also levy taxes on audio recorders and blank audio tapes. As the lead-off panel, covering educational issues, both Steinhilber and Marshall voiced concern that the royalty tax would pose a threat to fair use and completely disregard the guidelines for off-air taping endorsed by the House Judiciary Committee and recently made part of the copyright law's legislative history (H. Rept. 97-495).

Enclosed with this Newsletter is the full text of Marshall's testimony, highlighting eight major areas of concern which were raised in the previous Subcommittee hearing on June 24 -- ten days after the Supreme Court agreed to hear the so-called Sony Betamax case -- when the Register of Copyrights testified. Going into considerable detail on non-infringing uses of recorders and cassettes, Marshall pointed out that there are many uses other than off-air recording. She said that on the University of Wisconsin Madison campus, where she is Associate Director of Libraries, \$155,000 is spent annually for recording equipment and \$132,000 for blank tapes for uses ranging from collecting scientific data from the space shuttle and weather satellites on audio tapes, to taping patient interviews for diagnostic purposes, to placing video-taped lectures on reserve in the library for student use. None of the uses she describes has anything to do with taping programs off the air.

Other witnesses who appeared in opposition to the royalty tax proposals and the erosion of the first sale doctrine, also addressed by Marshall, represented video software retailers and the Audio Recording Rights Coalition. Chairman Kastenmeier stated that the Subcommittee plans to hold another hearing in September.

ALA's Response to King Research Report and for Five-Year Review

In preparation for his five-year review of Section 108 of the Copyright Law (Title 17, U.S. Code) -- due January 1, 1983 -- the Register of Copyrights, David Ladd, invited written final comments to nine questions which appeared in the May 26 Federal Register, pp. 23061f, with a July 15 due date. The subject of the report is the extent to which Section 108 has achieved the intended balance between the rights of creators and the needs of users of copyrighted works which are reproduced by certain libraries and archives. At the same time, availability of the King Research Report on library photocopying was announced and comments invited. On June 22, the comment deadline was extended to August 2 (FR, pp. 26951f). Also enclosed herewith is the complete text of ALA's response to these issues.

Statement of
Nancy Marshall
for the American Library Association
before the
Subcommittee on Courts, Civil Liberties and the Administration of Justice
of the House Judiciary Committee
on HR 5250 and HR 5705

August 11, 1982

My name is Nancy Marshall and I am testifying on behalf of the American Library Association. I am Associate Director of Libraries at the University of Wisconsin-Madison, and Chair of ALA's Ad Hoc Copyright Subcommittee. The American Library Association, a nonprofit educational organization of almost 40,000 librarians, trustees, educators, and other friends of libraries, is dedicated to the improvement of library services for all the American people.

Our Concerns

Is off-air taping of copyrighted television programs in one's own home an infringement of copyright? The Ninth Circuit Court of Appeals has declared that it is. The American Library Association strongly disagrees. As librarians and educators, we are concerned that the decision of the Ninth Circuit Court of Appeals, if allowed to stand, would have serious implications for the educational community. If a recording in the privacy of one's home is an infringement and not a fair use, how can we be certain that an off-air recording made for instructional or educational use by a school or library would not also be considered an infringement?

Your House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice in 1979 appointed a negotiating committee composed of representatives of education organizations (including ALA), copyright proprietors and creative guilds and unions to develop fair use guidelines for off-air recordings of television programs for educational use. On September 28, 1981, the negotiating committee presented its agreed-upon guidelines, developed after two and a half years of work, to your Subcommittee for inclusion in the Congressional Record and to become part of the legislative history of the Copyright Act of 1976. Subsequently, we were pleased to see the fair use guidelines reprinted and endorsed in the House Judiciary Committee report (H. Rept. 97-495) on HR 3530, the Copyright Piracy Act. We are concerned, therefore, that these guidelines would be invalidated if the Ninth Circuit Court of Appeals decision is allowed to stand.

In this testimony, the ALA wishes to comment briefly on the bills currently before your Subcommittee and then set forth our viewpoints on several of the issues raised in the hearings held by your Subcommittee on June 24, 1982. Specifically, we will discuss eight issues:

1. The Application of the Fair Use Doctrine to Off-Air Recording
2. Congress or the Supreme Court: Who Should Act First?
3. Compensation/ Compulsory Licensing/ Double Payment
4. The Copyright Royalty Tribunal
5. Libraryng vs. Time-Shifting
6. Non-Infringing Uses of Videocassettes and Videorecorders
7. Abolition of the First Sale Doctrine
8. Sound Recordings

Perhaps the most troubling of all of these issues is the last one -- sound recordings -- an issue we thought had been settled long ago but which has received renewed attention in your Subcommittee hearings.

Our Views on Bills Before Your Subcommittee

The ALA has reservations about the bills which are under consideration by your Subcommittee (HR 5705, HR 5250, and similar bills). We are pleased that HR 5250 and similar bills provide that it is not an infringement of copyright for an individual to record copyrighted works on a video recorder if --

- (1) the recording is made for a private use or in a private home; and
- (2) the recording is not used in a commercial nature or for purpose of direct or indirect commercial advantage

We heartily agree with the above. What concerns us, however, is that when the law says that something is "not an infringement of copyright" this implies that other uses are infringements (such as school and library uses!) We would request, therefore, that a third clause be added that would exempt school and library uses that meet the educational guidelines approved by your Subcommittee.

HR 5705 is the most onerous and burdensome to us. This bill would impose an indirect value-added tax (or royalty fee) on the consumer who purchases a home video-recorder or blank videocassettes and tapes for home use. This tax would also apply to audio recorders and audio tapes and cassettes. The proposed tax would be paid by all consumers engaged in any audio or video recording irrespective of the material taped or recorded. If the consumer does not record off-air programming at home and uses the tape and machine for many personal, family or training purposes, he or she still would have to pay the royalty tax when purchasing the machine or the blank tape. Our Association is unalterably opposed to the imposition of a compulsory license on manufacturers of audio-video devices and media and is especially concerned with the complicated procedure for collection and distribution of the royalty fees which the bill prescribes.

A major difficulty we see is that consumers will not realize they are paying the royalty tax because it is added to the purchase price. Consumers will assume that the increased price of the machine or tape is due to inflation or overpricing of the product. The tax is therefore a hidden tax and many purchasers will be unaware they are subsidizing an industry unrelated to their own use of the product.

1. The Application of the Fair Use Doctrine to Off-Air Recording

The ALA contends that the doctrine of fair use applies to the off-air recording of television and radio programs in the privacy of one's own home.

The 1976 U.S. Copyright Law codified fair use for the first time. It took the amorphous doctrine of fair use -- which had existed in the law since 1909 as a judicially interpreted doctrine to be applied in individual cases -- and made it statutory. It then specified four criteria to be considered in determining whether or not a particular instance of copying or other reproduction is fair. It is our contention that home recordings of copyrighted works, if used in the home or other nonprofit situations, do not violate the four criteria for determining fair use. Because no commercial use is involved, the copyright owner is not harmed economically. Adoption of the exemption for home recording of copyrighted works for private noncommercial viewing would serve the provisions of the copyright law and

the First Amendment and would prevent copyright holders from exercising monopolistic powers beyond the intent of the copyright system. In fact, excessive pursuit of the copyright holder's interests may severely hinder full and efficient dissemination of information to the public.

As for criterion #3 in determining fair use (the amount and substantiality of the portion used in relation to the copyrighted work as a whole), members of the writer and performer guilds have argued forcefully that the entire work should be copied rather than excerpts or portions in order to maintain the integrity of the work and not take any part out of context. Also, the viewer would need to see the program in its entirety in order to ascertain which portion would be an appropriate fair use sample. In home recordings, this is most always the practice.

Simply stated, fair use is the right to use -- or ability to copy copyrighted materials -- without permission or payment where the use is reasonable and not harmful to the copyright holder. It is a basic right of users -- not merely a privilege. The mere act of copying or recording off the air is in and of itself not an infringement of copyright. It is the use of the copy which may or may not constitute an infringement. Only when the copy is used in a manner which is inconsistent with fair use can an infringement be identified.

Under HR 5705, the nature of the use is not considered. Consumers are not actually "exempted" from liability since they will inevitably pay license fees on video and audio recorders and blank tapes. To place a value-added tax on both the recorders and blank tape is to place a "hidden" tax on the consumer for use of the material. This would erode and eventually destroy fair use and violate First Amendment guarantees to broadcasting that the interest of the public in receiving information is paramount to the interests of disseminators of programming. These guarantees are fundamental to library service to the American people.

The educators' position is that the fundamental purpose of copyright is to ensure use. The limited right provided to creators in the Constitution was given to promote the progress of science and the useful arts. The rights of consumers (librarians, teachers, researchers, students) are constitutional rights as well. They originate in the First and Ninth Amendments and are inalienable. The First Amendment guarantees reasonable access to hear, to learn, to know and to receive information and ideas. Librarians are in the information business; hence, this guarantee is fundamental to our service to the American people.

2. Congress or the Supreme Court -- Who Should Act First?

At the Subcommittee's June 24 hearing, each witness was asked whether Congressional action should be postponed on these bills until the Supreme Court acted on the *Universal City v. Sony Corporation of America* case which the Court has agreed to hear. We would like to express our point of view on this question. In view of the fact that the Supreme Court has already agreed to review this matter, ALA believes that it would be premature for Congress to act without the benefit of the data and information which would be supplied to the Court during the hearing on this case. Not enough information is currently available regarding certain aspects of the controversy for the Congress to act hastily. Information is needed on a number of points: How many owners of video recorders are actually recording TV programs off the air? What is the nature and pattern of such recording? How many

libraries and schools have VCRs? What standards of VCR equipment are most in use in homes, schools and libraries (e.g., 1-inch; 3/4-inch, 1/2-inch)? What is the frequency of recording for purposes other than recording TV programs off the air? These questions and their answers would shed light on how much video recording off-air is being done and to what extent proprietors are being harmed. It would also be instructive to members of your Subcommittee to have the benefit of the facts and findings of the Court's proceedings and the arguments of the Justices.

We therefore urge that your Subcommittee postpone action until the Supreme Court has made its determination in the case. Because Constitutional rights are involved, the Supreme Court needs first to be heard on the subject.

Should your Subcommittee feel, however, that you should proceed with your hearings and make a legislative determination on the matter -- and not wait for the Supreme Court -- we then would feel there needs to be an amendment to whichever bill you adopt that clearly states that it would not be an infringement of copyright for schools and libraries to tape off-the-air for educational purposes, provided that they adhere to the agreed-upon guidelines on educational use which your Subcommittee has endorsed as "reaching an appropriate balance between the proprietary rights of copyright owners and the instructional needs of educational institutions."

3. Compensation/ Compulsory Licensing/ Double Payment

One of the basic issues before your Subcommittee is whether the Congress should impose a compulsory license fee on video recorders (VCRs) and blank video and audio tape in order to compensate copyright holders for home recording of television and radio programs that are lawfully received and paid for by the public. ALA feels that no such compulsory license is warranted.

There is an existing mechanism for compensating copyright holders for home taping. Home recording is measured by existing audience measurement services -- Arbitron and Nielsen. Proprietors can include home tapers in the audiences sold to advertisers who are ultimately paying for the broadcast. Currently, each home taping is counted by the rating services as equivalent to a single real-time viewing of the program. A program's rating is now based, in fact, on the sum of real-time and time-shift viewing, and the two categories are not broken out in the ratings sent to the rating services' clients. When taping raises the ratings of a program, the compensation paid for that programming rises. It follows, then, that if tape viewers are counted as though they were real-time viewers, the program suppliers, in turn, are receiving compensation. Thus, copyright holders can negotiate with broadcasters for adequate compensation for home taping when they license their programming for broadcast distribution.

Because copyright holders are already compensated by an existing market mechanism, a compulsory licensing system would amount to double payment for viewing the program. The consumer would be paying twice.

A good case in point is the recent announcement by the ABC Network that a new service would soon be initiated wherein special programs would be distributed in a scrambled signal format in the middle of the night by existing broadcast stations and would be recorded for later viewing on home VCRs. Viewers would not only pay for this service but they would also pay a compulsory license fee on blank tape even though

that tape was used to record programming for which a copyright payment had already been made. Since the copyright holder has already been compensated, the compulsory license compensates the copyright holder twice.

In its testimony, the Motion Picture Association of America argues that the royalty tax will not be paid by the public -- but instead will be absorbed by manufacturers of video equipment. Experience has shown the contrary to be true. Cost increases are passed on to consumers -- and often are subject to retail mark-ups that increase the cost even further!

4. The Copyright Royalty Tribunal

Considerable discussion took place at the June 24 House hearing on the feasibility of designating the Copyright Royalty Tribunal as the administrator of the licensing system mechanism, should it be enacted. The Edwards bill makes provision for this. ALA would have serious reservations as to the advisability of this move, considering the fact that the Tribunal is already overloaded with work and has been involved in litigation on royalty fee distribution for cable television and jukeboxes. A sizeable additional staff would be needed to undertake this added work load and responsibility. This would add unnecessary federal regulatory activities rather than reduce them, which is contrary to both the President's and the Congress' stated objectives.

If a compulsory licensing system were to be established by the Congress (which we would vigorously oppose), we would opt for a private agency as the administrator of the system. ASCAP would be a likely candidate for such an assignment because it has already demonstrated its competency in this area. We do not look favorably on the idea of the federal government operating an ASCAP operation. A mechanism should be chosen, or developed if none exists, which is outside the Legislative or Judicial branches of the government. We stress, however, that any licensing system which is created should be for uses over and above fair use -- not in lieu of fair use.

ALA feels that the proposal to establish a copyright tax or royalty fee is a call to create a new and unwieldy, as well as unnecessary, regulatory bureaucracy and is a wrong response to the problem.

5. Librarying vs. Time-Shifting

Repeatedly during the House hearing members of the Subcommittee expressed concern about the "librarying" of videocassettes and tapes -- the building of video cassette libraries of television programs or movies recorded from advertiser-supported program services. As an association of librarians and libraries, we believe the term "librarying" carries negative and pejorative connotations. A library is a collection of materials and services to benefit the public and the use of the word "librarying" in this context is a negative one.

Nina W. Cornell, President, Cornell, Pelcovits and Brenner, in her testimony before the Senate Judiciary Committee on "Copyright Aspects of Home Videotaping" on April 21, 1982 stated:

The vast majority of home video recording is done for the purpose of time-shifting -- to watch a program at a time other than when it is transmitted. Such tapes are made when he is watching some other program but does not want to miss viewing the programming of another channel. Material taped for time-shift viewing is later erased so the tape can be reused.

In a footnote to her testimony (on page 4) she documents her research as follows:

While no one statistic from any single survey is beyond reproach or conclusive in itself, the same pattern -- more recording for time-shifting than for librarying -- reappears consistently in many surveys. In 1978 the Arbitron Company asked a group of VCR owners what they planned to do with each of the three programs they had most recently recorded: 66.2 percent said erase the program while only 18.1 percent said keep the program (and another 15.7 percent gave no answer). A 1978 "Survey of Betamax Owners", prepared by Crossley Surveys, Inc., asked respondents whether the last program they taped was recorded over a previous recording they had made: 87.6 percent said it was and in 66.4 percent of those cases they said the program had been watched only once before it was erased. A survey by Field Research Corporation, also in 1978, found that 75.4 percent of videorecorder owners used their machines for time-shifting half or more of the time and 38.8 percent said they used their videorecorders "almost always to shift viewing time." In 1981 MART Magazine asked 2,000 owners of videorecorders, "What is your primary use of the VCR?" Only 10.2 percent said building a library of recorded programs, while 56.7 percent said recording while away from home or asleep or while watching another program, and 20.3 percent said playing prerecorded tapes.

The evidence shows that consumers are "librarying" programs only to a very small extent. The number is very small compared with the deluge of programs distributed during the year by broadcast networks and stations.

6. Non-Infringing Uses of Videocassettes and Videorecorders

Home viewers use videocassettes for many purposes other than recording programs off the air. One of the chief uses is for taping special family events and occasions (birthdays, retirements, children's parties, Christmas festivities, capturing baby's first steps, etc.). It cannot therefore be assumed that everyone who buys a tape is planning to use it to record television programs off the air. A large percentage of videocassette owners use their equipment to play prerecorded tapes which they have purchased or have borrowed from libraries who have purchased them. Why, then, should these users be required to pay a tax for blank tapes or recorders which are used for these noninfringing purposes?

Recently the Educators' Ad Hoc Committee on Copyright Law, of which ALA is a member, invited representatives of both sides in the videorecording controversy to state its case before the Committee. One of the members of the proprietary group noted that his group had no objection to exempting 1-inch and 3/4-inch videocassette uses. He was, however, adamant about not exempting 1/2-inch tape uses and declared that these should be considered infringements. To the Ad Hoc Committee members this was not only a curious distinction to make but an inconsistent and absurd differentiation. To base the exempt use on the size of tape or standard of the recorder used would mean that a recording is an infringement only when made on a 1/2-inch machine. This again proves our point that the act of recording itself is

not an infringement. We argue that the use made of the recording determines whether the use is a fair use or an infringement. The proprietary groups seem to be arguing that it's not the nature of the use but the size of the tape or model of the recorder which makes the difference!

Informal surveys of libraries and schools also indicate that videocassette equipment is used primarily for non-infringing uses of tapes rather than for recording television programs off the air for later use. Typical non-infringing uses by schools and libraries include the following:

- ... Band and orchestra rehearsals prior to a concert
- ... Student-made films and tapes of school and community events
- ... Tapes for self-evaluation purposes in speech and drama classes, physical education, management training, etc.
- ... Staff development programs for teachers on various teaching skills
- ... Recordings of sports events in which the school participates
- ... Instructional tapes in learning a foreign language

The medical profession makes wide use of videotapes and cassettes both for internship training and for diagnostic purposes. Several hospitals are producing tapes for patient information and for self-help to patients recuperating from an operation. Doctors use cassettes to show the patient the nature of his medical problem or to teach him stress management techniques or specific coping skills. Theological schools also use tapes in the training of student ministers in homiletics and in recording sermons for distribution to parishioners who are homebound.

Uses of tapes with which I am most familiar are those at the University of Wisconsin-Madison. With 459 degree-granting programs (150 Bachelor's, 188 Master's and 121 Ph. D. programs) serving the needs of 40,000 students, the University's yearly expenditure for blank cassette tapes is approximately \$132,300. At an average cost of \$17.00 per 1/2-inch and 3/4-inch tape, approximately 7,780 tapes are purchased. The majority of uses to which these tapes are put have nothing to do with off-air recording of broadcast programming. There is time this morning to give only a sampling of these uses, but they will serve to illustrate the diverse fields of research, study, scholarship and training which benefit from these non-infringing applications.

- The Space Science and Engineering Center, which is one of the tracking stations for the space shuttle program, uses audio tapes to collect data sent from the shuttle, weather satellites and planet probes.
- The Instructional Media Distribution Center in the College of Education uses video tapes to record its own productions of instructional programs for student teacher training and is the major source of video training materials for the State Department of Public Instruction.
- The Labs For Recorded Instruction use both audio and video tapes to serve the teaching needs of virtually every department in the University. Heavy users include over 30 foreign language departments and scientific laboratory experiments in the biological and physical sciences, to name just a few.
- The School of Nursing makes use of tapes to produce teaching units for its students on "How To Give An Injection," "How To Deal With Snake Bites," or "How To Apply CPR."

- The Department of Psychiatry tapes patient interviews and consultation sessions for diagnostic purposes.
- The walls of the University of Wisconsin are the boundaries of the state. One of the heaviest uses of tapes is made by returning students who hold full time jobs. Their ability to listen to or view lectures in their free hours is crucial to their progression toward a degree.
- The dozens of libraries on the Madison Campus put taped lectures on reserve for the convenience of these and on-campus students. In addition, libraries produce video tapes on how to use their resources most effectively.

To impose a royalty tax as proposed in HR 5705 is not only inappropriate, it places a totally unnecessary and unneeded financial burden on the University which has been reeling over the past decade from the ravages of inflation coupled with a more recent sluggish state economy.

None of the uses described here have anything to do with recording broadcast programs off the air. They are legitimate non-infringing uses of tapes or cassettes; yet, under the provisions of HR 5705 each of the recorders and blank tapes used for these purposes would be subject to a royalty tax. We feel that such a tax would be highly unfair. These uses are not minor, or few in number, as some of the witnesses before your Subcommittee have pictured them. They are primary uses of tapes which would be affected by this legislation.

7. Abolition of the First Sale Doctrine

HR 5705 would make serious inroads in -- if not abolish -- the "First Sale Doctrine" in the copyright law. Under the "First Sale Doctrine," a copyright owner's right to control the product ceases with respect to a particular copy once he or she has parted with ownership of it. The purchaser is entitled to resell, lease, or even destroy the object. The purchaser may not, however, copy it, except for fair use purposes. The "First Sale Doctrine" recognizes that the copyright owner's interest in controlling the distribution of a particular work is generally fulfilled upon consent to the first sale of the work.

HR 5705 (Section 6, amending sec. 109(a) of Chapter 1 of Title 17) would allow the copyright owner to prohibit or otherwise regulate the rental or loan of copies of its product. Thus, a copyright owner could even forbid exchanges or swaps of prerecorded tapes between families! This provision applies not only to video recordings but to sound recordings as well.

This proposal has serious implications for libraries in the circulation and use of materials. If the historic "First Sale Doctrine" were abolished, anyone who sells or rents a cassette without permission would be liable. One person has pointed out, in fact, that it would be illegal to sell an old cassette at a garage sale or perhaps even bequeath it at death without the permission from the copyright holder!

The library community has been increasingly disturbed in recent months by the growing practice by manufacturers and distributors of packaging videocassettes with warning labels which caution against using the videocassettes in any situation other than for home use. Several libraries have reported to ALA that when they received shipments of videocassettes they had purchased, the shipments arrived with a label

which read, "Not To Be Used in Libraries." This is clearly a violation of the First Sale Doctrine -- the right to buy and lend videocassettes and tapes to borrowers. When libraries purchase videocassettes, tapes and discs they have the right under the First Sale Doctrine to use them in their libraries as well as circulate them to the public for use in their homes. We are therefore alarmed at the implications of this practice. It should appear logical to copyright proprietors that if libraries cannot use or loan materials they will not buy them. This would certainly be a selfdefeating practice for copyright proprietors and have a substantial impact on their financial status.

8. Sound Recordings

The last -- but not the least -- important concern to ALA in the current off-air recording controversy is the attempt which is being made to revoke the exemption on sound recordings in the home which has been in the law since 1971. The House Committee Report accompanying the Sound Recording Amendment of 1971 contains the following pronouncement:

"In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." (House Report 92-487, p. 7)

HR 5705 (Section 3, providing a new section 120 to Chapter 1 of Title 17), includes an entire section on Home Audio Recording and provides for a Compulsory License for Audio Recording Devices and Media. This bill, if enacted, would nullify and remove from the law the above exemption and abrogate the philosophy articulated by the House Judiciary Committee in the Sound Recording Amendment of 1971.

Unlike HR 5705, HR 5250 and similar bills do not provide for a compulsory license for either audio or video recordings made at home but simply grant an exemption for video recordings to match the exemption provided audio recordings in the Sound Recording Amendment of 1971. We feel this is a far more reasonable and realistic provision.

The major focus of the legislation before your Subcommittee started out to be on the recording of copyrighted television programs broadcast into the home. HR 5705 has broadened the scope of this legislation unduly to include both video and audio recordings. In so doing, an issue -- sound recordings -- which we thought had been settled long ago and is widely accepted as legitimate in the privacy of one's own home, is now being re-visited. At times one even gets the feeling that this issue is now on center stage, overshadowing the main event. We feel this is very unfortunate. If HR 5705 were enacted into law, it could be pointed to as a showcase example of the federal government's unwarranted interference in the private and professional life of its citizens!

Thank you for the opportunity to present the views of the American Library Association.

INTRODUCTION

The American Library Association comprises 40,000 librarians, authors, publishers, and libraries of all types in North America and seventy countries around the world. Since its founding in 1876, the Association has promoted the advancement of libraries and librarianship in many different ways. Consistent with its basic purposes, the Association sought, following the enactment of the Copyright Revision Act of 1976 (Public Law 94-553), to prepare the library community and the educational community at large for the changes that this law required.

Those changes were focused primarily on new technological uses of copyrighted works, many on photocopying practices within libraries for library users. Prior to the effective date of the law, January 1, 1978, the Association developed a guide to the copyright law, excerpting portions of the statute and the Congressional Committee reports in order to provide librarians and others with a broad based understanding of the law. In addition, the Association revised the Interlibrary Loan Form to comply with the documentation requirements of the law with regard to photocopying for fulfillment of interlibrary loans. The ALA also produced an advisory statement on records to be maintained to assure compliance with Public Law 94. 553 and to provide

RESPONSE
OF THE
AMERICAN LIBRARY ASSOCIATION
TO
THE 1982 KING RESEARCH REPORT ON
PHOTOCOPYING IN LIBRARIES

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July 30, 1982

documentation for the five-year review of the effects of the law (Section 108 (i)).

The ALA also provided specific directions to the library community on when and how to seek permission to reproduce copyrighted material and the procedures they should follow to obtain replacement copies of copyrighted works unavailable from normal trade sources. In addition, ALA supplied sample statements of the warning of copyright to be posted on photocopying machines in libraries or on photocopies received by users. These recommendations were brought together in a Copyright Kit, which the Association promoted as a librarian's guide to what they must know about the new copyright law.

In addition to these educational efforts, seminars were held in various parts of the country. In February 1978, the Association sponsored a satellite video-teleconference featuring the Register of Copyrights, several well known copyright attorneys, and librarians in a live presentation to an audience of approximately 2,000 librarians and educators, providing them with an opportunity to have their questions answered by experts on the new copyright law. The Association monitored the effects of the statute and provided a detailed summary to the Register of Copyrights in testimony in January 1981.

With the receipt of the 1982 King Research Report on Photocopying in Libraries, based on data collected in 1980, we can now respond again to the directions of the Register of Copyrights regarding the five-year review. We are gratified to see that 71% of the libraries surveyed responded to the Copyright Office's request for information sought by the King Report. We believe the report illustrates the success of our efforts to educate librarians and others and the success of the procedures we have urged our members to adopt.

We recognize that no study as extensive as King's can be totally satisfactory to all who examine it in detail, but we commend King's efforts. Our major disappointments with the study, aside from its sometimes subjective characterizations of the data, are three: 1) the lack of attention to the experience of creators themselves, as mandated by §108(i); 2) the fact that the data does not quantify the amount of photocopying from foreign and public domain materials, which we know is substantial and 3) perhaps most importantly, the failure to focus as much attention on publishing practices as on library practices.

The over-emphasis on library activities may stem from an assumption that libraries are in some sense ripping off the publishers through networks and other consortia as

well as interlibrary loan and photocopying. Nothing could be further from the truth. Networks were designed to supplement the publisher's inefficient and geographically concentrated distribution systems in order to provide fuller access to information for geographically dispersed users.

Many publishers, especially SST publishers, remain dependent on libraries for their primary source of income, and as library serial expenditures have risen, so have serial circulations. Libraries have attempted to keep pace with new technologies, including photocopying, which improve efficiency in access to information, but we have no evidence that the publishers have also made such an effort. The King Report provides no information concerning the changes publishers have made in their procedures to exercise control over their materials. We do not know to what extent, if any, publishers have implemented dual pricing systems, circulation-based library pricing structures, text storage and retrieval systems or electronic delivery systems which may well provide them with the control over their publications their spokesmen seek. Instead, their focus, as that of the Report, has been on library practices, as if to suggest that libraries, already stressed by budget deficits and cutbacks, should assume for publishers the burden of controlling their materials. The ALA believes that library photocopying practices should be reviewed with caution in

order to avoid the imposition of unnecessary administrative burdens on libraries. Such burdens most often result in the imposition of user charges which never benefit the proprietor or author since the administrative costs barely cover the collections, and which do not promote ease of access to information. Publishers have the ability to deal meaningfully with their true problems concerning control of copyrighted works and should be encouraged to be creative in their solutions.

Moreover, the publishing community currently has the unilateral power to make more effective use of the notice of copyright and its placement in a consistent manner, and yet has failed to take even this small step, while at the same time calling for the microscopic scrutiny of a library's every practice relevant to copyright.

The publishing community's failure to respond in substantial numbers to the Copyright Office's request for the information called for by the King Report leads us to suspect that the photocopying issues examined in such detail by King are not as important to most publishers as the spokesmen who have previously addressed the Copyright Office would have us all believe. Indeed, it may be time for those "silent" publishers and users of copyrighted materials to work together to find mutually acceptable ways of insuring

greater technological control of their publications while providing access to information through the nation's most precious storehouses of knowledge -- libraries.

SUMMARY

The King Report provides a solid statistical basis for the conclusion that the Copyright Revision Act of 1976 is achieving the intended balance between the rights of creators on the one hand and the needs of users of copyrighted materials on the other. It demonstrates overwhelming compliance by librarians and sustains the views of the American Library Association described in the testimony of Nancy Marshall on January 19, 1980 and Robert Wedgeworth on January 28, 1981. Most importantly, the Report demonstrates that the publishing community's worst fears for its economic viability were unfounded. The projected death of serial publishing has not come to pass; in fact, the industry is flourishing with the support of libraries.

The King Research reports of both 1977 and 1982 clearly support the ALA's belief that it is time to lay to rest unsubstantiated allegations and baseless assumptions that librarians are abusing or violating the copyright law and to begin instead to work together on the very real and truly difficult questions which ever-increasing changes in technology pose for all of us.

The questions to which librarians, publishers and users have addressed themselves over the past several years can now be empirically answered, and suspicions put to rest:

- 1) The evidence demonstrates that the law, in most cases, is serving the interests of copyright proprietors, whose revenues have increased, and of users, who have not been denied access to information.
- 2) Most photocopying done by or in libraries falls within the protections of fair use and Section 108 of the law, since most of it is single-copy reproduction and is done by or for users whose motivations are educational or job-related.
- 3) The accusation that there is a causal link between reductions in library periodical subscriptions and library photocopying practices is unfounded. Periodical circulations have increased; library expenditures for periodicals have increased; publishers revenues have increased, and photocopying of serials has declined.

- 4) Libraries have a legal basis for utilizing §107 and §108 rights, and overwhelming evidence indicates that utilization of both of these rights promotes the widest possible dissemination of information to the public.
- 5) Virtually all librarians are complying with the new Act--placing copyright notices on ILL requests filled with photocopies, posting warning signs, and requesting reproduction permission where required. The lack of participation in CCC by most libraries is explained by the relatively small number of journals registered there, the substantial number of journals which do not claim copyright, the unavailability of hard copies at the CCC, the fact that the vast majority of in-house photocopying is single-copy reproduction and the fact that many publishers grant permissions without charge.
- 6) Libraries have not reduced the size of their collections due to the availability of photocopying. At the same time that library consortia and networking have increased, both book and serial expenditures, as well as serial circulations, have increased.

- 7) Librarians do not now know why particular patrons request certain materials, and they should not be required to monitor the photocopying activities of their patrons. Libraries have discharged their responsibilities under the new law when they have advised users of the applicability of the copyright law to their activity, and the report demonstrates that libraries have placed the required warning on virtually every coin operated machine.
- 8) The CONTU Guidelines provide useful guidance to libraries, which only infrequently must invoke them to deny a patron access to information. While the Guidelines do not have the force of law and should not become absolute, they do provide a reasonable interpretation of the law.
- 9) No legislative changes are needed at this time. While the ALA would support a clarification of the applicability of fair use to library reserve room use of photocopied materials, we believe there are major issues related to more sophisticated text storage

and retrieval systems to which we must address our immediate attention.

The following discussion will address some of the particular questions which have been presented by the Copyright Office. We are hopeful that these comments will contribute to the Copyright Office's analysis of King's extensive research.

DISCUSSION

I

The first question posed by the Copyright Office is to what extent Section 108 has changed library procedures, and what effect there has been on users' access to information. The King report emphatically demonstrates that libraries have complied with the law: 85% of all photocopying machines and 93% of coin-operated machines in all libraries bear a warning of copyright, as do 100% of coin-operated copiers in academic libraries (p. 2-16). Since the majority of photocopies are made by or for the public at coin-operated machines in public and academic libraries, it is clear that libraries have changed their procedures to comply with the new Act. Moreover, of the 61 million Interlibrary Loan requests received by libraries, only 12

million, or 21%, were filled with photocopies (p. 2-27); of these, 77.6% bore a copy of the original copyright notice or a notice of possible copyright application supplied by the library, or both (p. 3-20). Ninety-seven percent (97%) of serial requests bore such a notice. (p. 3-20). Ninety-five percent of all libraries retain original ILL forms for some period of time (p. 2-26). The data does not disclose whether other records are kept at the time the original forms are discarded. The busiest libraries, 60% of academic libraries and 49% of Federal libraries, even keep track by journal title of the number of times articles are requested (p. 2-26), which is consistent with the fact that 61% and 75% of their respective requests are for serials (Table 3.3(a)).

All of the public libraries and two-thirds of the academic libraries which have reserve rooms reported changes in their procedures due to the new Act, primarily requiring faculty members to obtain permission if photocopies are to be put on reserve (p. 2-24). In all, 45% of all libraries impose photocopying restrictions based on the copyright status of the work. Other factors related to copyright concerns, such as the number of copies, are addressed by other restrictions imposed by 41% of all libraries (p. 2-21).

Such procedural changes, whether or not actually required by the new Act, have not seriously impeded users' access to information. Very few patrons reported an inability to have a library fill a request (p. 5-24) and indeed most libraries have been able to serve their patrons' needs. Only 16.6% of all Level One and Level Two libraries surveyed reported having to refuse a patron's request (p. 2-25), although 38.3% of academic libraries at one time or another denied a request. As King points out, the actual numbers may be higher, but since public libraries received the most requests (76%) and only filled 7.4% with photocopies (p. 2-27), the effect on consumers must be minimal, since only 10% of public libraries reported ever denying a request (p. 2-25). Thus access to information has not been a major problem under the new Act.

II

The next question is how "established patterns" in the publishing industry have been affected. Here, the King Report presents overwhelming evidence that there has been no adverse effect on publishers, even SST publishers, due to library photocopying practices, and in fact libraries have not substituted photocopies for subscriptions. The best evidence of this is that 39.6% of SST journals increased their circulations at least 5% from 1976 to 1981 (p. 4-16).

In addition, 21% more journals were published in 1980, including 31% more SST serials and 16% more other serials (p. 4-14); the birth-to-death ratio was 3.4 to 1 (p. 4-13). King concluded that despite only modest growth in the number of libraries and the reported budget difficulties of most libraries, "serial circulation growth was substantial between 1976 and 1980" (p. 4-20). Indeed, serial expenditures by libraries increased 43% in constant dollars from 1976 to 1980 (p. 3-13).

This data correlates with the study's report that there is good reason to believe "that ILL requests are not being used as replacements for serial subscriptions," because of the correlation between serials received and computer searches and ILL requests (p. 2-38). This is also consistent with the fact that only 21% of all ILL requests were filled with photocopies, that public libraries filled 76% of the requests and filled 7.4% of those with photocopies (p. 2-28), and that in general public libraries experienced a 22% decrease in the number of serial ILL requests filled with photocopies (p. 3-21).

Finally, the study indicates that much of the traditional cooperation between publishers and libraries is still intact. Even though photocopying has declined, the number of requests received by publishers for permission to

photocopy increased about 25% (p. 4-29). Publishers in general granted in full 68% of all requests (p. 4-30). No payment whatsoever was required by 62% (p. 4-30). SST serial publishers granted 73% of the requests, and 56% required no payment (p. 4-30). Publishing revenues have not declined: publishers' mean gross sales revenue for serials increased 31% in constant dollars and SST serials' mean gross sales revenue increased 59% in real terms (p. 4-33). Serials publishers increased 100% their revenues from reprints sold, and SST serials publishers increased theirs 125% (p. 4-32). While permissions revenue per publisher was relatively low (p. 4-27), many publishers grant permissions without charge, and have increased the availability of reprints. In addition, most photocopying is single-copy and ILL photocopying which falls within the bounds of §§107 and 108.

It is also interesting to note that the traditional dual-pricing system, under which libraries and other institutions pay more for serial subscriptions than individuals, has not been affected by the new Act. Indeed, one of the criteria used by King for determining that a journal was an SST serial was whether there were two prices (p. 4-18).

III

The third question posed by the Copyright Office is addressed most directly by the Report--the amount and type of copying by libraries, and the effect on permissions. Taken together, the following indicate that libraries are copying less, on their own behalf and for others, and that §108 has had an effect:

- There has been a decrease of 16% in photocopying transactions by library staff (p. 3-36).
- Photocopying by academic libraries increased, but there was a decrease in serial photocopying (p. 3-37).
- 33% of public libraries and 42% of academic libraries reported a decrease in the number of ILL requests sent to other libraries (p. 3-21).
- Public libraries reported a 22% decrease in the number of ILL serial requests filled with photocopies, while the overall increase for all libraries was 9% (p. 3-22).
- While relatively few ILL requests (5%) were not transmitted due to reasons cited by the library as the

CONTU "rule of 5" (p. 3-16), at least 16% of libraries did at some point refuse to transmit ILL requests due to copyright concerns. (p. 2-25).

- 45.5% of all libraries restrict photocopying in some way, based on their interpretations of the copyright law (p. 2-21).

- 76% of all serial transactions involved only 1 copy (p. 3-30).

Despite the decrease in photocopying by library staff, (p. 3-36), 25% of all publishers and 32% of all SST serials publishers reported receiving more requests for permission, and only 5% and 20% respectively, reported fewer requests. About one-half of each group believed the number had stayed the same. Twelve percent of all libraries surveyed had had an occasion to request permission--23% of the academic libraries, 13% of the federal, 12% of the special and 7.5% of the public (Table 2.21). This correlates with the fact that 69% of the photocopying transactions in all libraries were single-copy transactions (p. 3-26), and that academic, federal and special libraries more frequently copied serials, while only one-third of public library photocopy transactions were serials (p. 3-26). (Copying several pages from a book for library

patrons is more likely to be fair use and thus not require permission). Especially since so many publishers required no payment for permissions, it is not surprising to find that overall, only 6% of all libraries paid royalties, although almost 20% of special for-profit libraries did so (p. 2-31).

IV

The Copyright Office also has inquired as to how the establishment of the CCC affected libraries' experiences under §108. The King study showed that only 5.5% of all libraries belong to CCC, but that 15.7% of those libraries most active in photocopying belong (Table 2.5). More surprisingly, however, only 525 of the 10,685 U.S. publishers, less than 5%, belong (p. 4-11), representing only 3,800 of 20,412 titles, or about 18% (p. 4-14). The lack of substantial membership generally by libraries is attributable to several factors, not the least of which is the inability of the CCC to provide access to copies of works when inter-library loan materials are needed and the low rate of publisher membership.

The low incidence of use of the CCC is consistent with the overall decrease in photocopying, the high incidence of single-copy library reproduction (p. 3-30), adherence to

the CONTU Guidelines, and the willingness of so many publishers to grant permission without charge. Moreover, CCC's rates, not discussed in the King report, vary greatly, and tend to be much more expensive than dealing directly with the publisher, which 62% of the time will not require any payment whatsoever (p. 4-30). It should be noted that just over half of the 20,412 serial titles published in 1980 bore a notice of copyright; 9,314 did not (p. 4-14), and, therefore, normally can be copied without permission of any kind.

V

The Copyright Office has also asked how the CONTU Guidelines have worked in practice, and how periodicals more than five years old should be treated. There is no doubt but that serials more than five years old enjoy the same protections of the copyright law as newer volumes. The only issue is whether similar administrative and bookkeeping burdens should be imposed on libraries with respect to the older materials.

The King data substantiates that bookkeeping by libraries is most appropriate for journals less than five years old. About 74% of the serial photocopying by libraries was of journal material less than five years old (p. 3-29). This kind of photocopying is the subject of the CONTU

Guidelines, which librarians have utilized in determining whether a periodical subscription is in enough demand that it should be purchased. At the same time, utilization of the rule has caused relatively few patrons to be denied access to information for copyright reasons. When viewed with the fact that library serials expenditures have increased and periodical circulations have increased, it is clear that photocopying within the CONTU Guidelines has not constituted systematic substitution of photocopies for serial subscriptions.

It is thus apparent that the CONTU Guidelines are workable and both serve user needs and protect the interests of publishers. Since less than 26% of photocopying involves journals more than five years old, it is apparent that the burden of keeping track of annual volumes of 20,000 U.S. journals going back many years should not be imposed on libraries. Such reproduction of isolated articles from disparate years of specific titles cannot possibly be thought to impact on the market for subscriptions to current volumes of such works or to constitute systematic substitution for such subscriptions. We believe the CONTU Guidelines have been useful to librarians and should not be changed.

VI

The King data also illustrates, from a practical point of view, why §107 (Fair Use) and §108 are, and must

remain two separate, though sometimes overlapping rights. This is clear when one considers the kinds of photocopying done by users exercising their fair use rights. Thirty-five percent of all library patrons photocopied library materials for job-related reasons; another 46% for school-related reasons; 16% for personal or entertainment reasons (p. 5-17). More than half copied only one to five pages (p. 5-21); more than 85% made only 1 copy (p. 5-22). Twenty-two percent had requested interlibrary loan services during the previous six months. There is no doubt but that where the library does not provide coin-operated machines or where the nature of the materials to be copied requires special handling or equipment, the library, on the demand of the patron, may photocopy the material for the user under the doctrine of fair use. This is distinguishable from other library photocopying rights under §108, such as those granted for archival or replacement purposes.

In addition, the library patron does not lose fair use rights when requesting an interlibrary loan simply because a library may have exceeded, in a given instance, CONTU Guidelines. We must assume that the requestor's reasons for seeking the material in question are no different than for photocopying the material himself. In an unusual case, copies in excess of the rule of five may be justified by fair use, particularly in circumstances which indicate

that demand for the requested item is not sufficient to justify expansion of the library collection, e.g., a graduate student ordering highly specialized journals through the local public library while home on vacation. There may be other such exceptional cases where photocopying in excess of the CONTU Guidelines does not suggest systematic reproduction is being used to replace a subscription. In such cases, libraries must have the flexibility under fair use to serve their patrons. Since the Act so clearly states that §108 shall not effect §107 rights, we believe the King data simply reinforces the wisdom of that legislative mandate.