

**ON AND ON WE GO WITH COPYRIGHT:  
THE ROLE OF THE ASSOCIATION OF RESEARCH LIBRARIES IN THE  
DEVELOPMENT OF THE COPYRIGHT ACT OF 1976.**

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University of Pittsburgh, 2009

The 1976 Act was the last general revision of U.S. copyright law and still forms the basis for our copyright law. The public policy development process that led to the Act lasted twenty one years, from 1955 until 1976. Librarians, including those involved with the Association of Research Libraries (ARL), were one group amongst many that sought to influence the final form of the legislation. This is a historical analysis of the ARL's role in this process based on archival sources, the primary government documents, and the contemporary professional literature. I address four research questions. 1) How and why did the ARL develop the positions it took during this copyright law revision? What were those positions and how and why did they change over time? 2) How did ARL positions on copyright revision differ from those of other interest groups, both within librarianship and in the academic research community, and how did the Association work and conflict with those other interests to further its goals in the revision process? 3) How did the ARL, its members, and active representatives articulate their policy positions? 4) How effective was the Association in achieving its policy goals? Which goals were achieved fully, partially, or not at all?

The role of the ARL in this effort changed over time as the context in which it occurred changed, and in turn this lobbying effort affected the ARL. The narrative is in three periods; 1955-1960 in which research librarians worked with the Copyright Office to organize themselves to be able to participate in revision, studied the issue of photocopying in libraries and arrived at a policy

position; 1961-67 in which research librarians proposed and reacted to various forms of legislative language, and moved away from a specific library exemption towards a reliance on fair use; and finally 1968-1976 in which three interrelated strands of legislative, judicial, and interest group negotiation resulted in the drafting of §108 and final passage of the Act. Working in concert with other library associations and with other interest groups in education, the ARL was partially successful in influencing the final legislation.

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## ACKNOWLEDGEMENTS

“On and on we go with copyright!”<sup>1</sup> The title of this dissertation comes from a letter Stephen McCarthy (Executive Director of the Association of Research Libraries) wrote to Basil Stuart-Stubbs (Director of Libraries at the University of British Columbia) thanking him for a copy of a report prepared by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) to be considered at the Inter-Governmental Copyright Committee of the Universal Copyright Convention (UCC) in Paris in December 1973. By this time McCarthy had been personally involved with copyright revision for at least a decade. The revision process itself had been making fitful progress for eighteen years. McCarthy was just one year away from retirement and, although no one knew it in December 1973, the legislation was less than three years away from enactment. McCarthy’s lament expresses what many participants in the revision process must have felt at the seemingly unending process.

I know that I, and I am sure my family, my teachers, and colleagues, have also quietly whispered this same phrase during the many years it has taken me to complete this work. The least I can do is thank my partner, Bethany, and son, Sam, the members of my dissertation

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<sup>1</sup> "Stephen A. McCarthy to Basil Stuart-Stubbs [December 18, 1973]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright – Working Group on Reprographic Reproduction 1972/1973, Manuscript Division, Library of Congress.*

committee, Professors Richard Cox, Michael Madison, and Rush Miller, and particularly Professor Toni Carbo who kept me on track and was unfailingly interested in my work, rigorous about the quality of the project, and a stickler for grammar and deadlines. I want to thank all my colleagues at the University of Pittsburgh University Library System and the Olin Library at Rollins College, and Provost Roger Casey for his support and encouragement during the writing process. Amy Knapp, Assistant University Librarian at the University of Pittsburgh tragically died far too young while I was writing this dissertation. She encouraged me to begin the PhD program, was always supportive, and is greatly missed. Finally, I want to thank two special professional colleagues, Barbara Bair, Historian/Manuscript Specialist, of the Manuscript Division at the Library of Congress and Rich Gause, Government Documents Librarian at the University of Central Florida. Both went to great lengths to help me access the government documents and archival resources I needed to complete this work. My archival research was supported in part by a Critchfield grant from Rollins College. This research would have been far easier if a complete finding aid existed for the ARL records at the Library of Congress. If the Association, or a benefactor, could be persuaded to undertake the creation of such a document I am sure more research would be undertaken on the history of the ARL. It is ironic, if all too common in librarianship, that an association so concerned with research and the organization and description of information has not made greater efforts to describe and provide intellectual access to its own history.

In the 1950's my mother was told by a fortuneteller that she would have a son who would become a doctor. Since none of her children entered the medical field, for many decades my mother thought the fortuneteller was a charlatan, but now it seems perhaps she was not.

## 1.0 INTRODUCTION

The Copyright Act of 1976 forms the basis of Title 17 of the U.S. Code. It has been amended numerous times since its passage, most notably as far as librarians are concerned in recent years, by the Digital Millennium Copyright Act, the Copyright Term Extension Act, both of 1998, and the TEACH Act of 2002. As the first general revision of copyright since passage of the Copyright Act of 1909 and coming as it did in the latter decades of the American Century,<sup>1</sup> the 1976 Act represented one of the later steps in America's transformation from a 19<sup>th</sup> Century intellectual property pirate to a 20<sup>th</sup> Century intellectual property policeman. The legislators, policy makers, and interest groups involved in the development of the Act also had to deal with the proliferation of information and communication technologies since passage of the 1909 Act including motion pictures, phonorecords, radio, television, the photocopier, and the early decades of digital computing. The 1976 Act took twenty-one years to move from inception in 1955 to passage in 1976. It was the first general revision of U.S. copyright law in which librarians, beyond the Librarian of Congress, had played a significant role. During these twenty-one years the library profession changed quite profoundly and so did the Association of Research Libraries (ARL), growing both in the number of member libraries and in terms of its organizational ability to respond to political and professional change. For all these reasons the role of the ARL in the development of the 1976 Act is worthy of study.

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<sup>1</sup> Henry R. Luce, "The American Century," *Life* (1941).

Since passage of the Copyright Act of 1976 the amount of time and money that librarians in general and the ARL in particular devote to advocating for research libraries and attempting to influence public policy has only increased. This effort will only continue to increase. As I write this introduction, the ARL is preparing to participate in what the Copyright Office has announced to be a year of exploratory discussions based on the work of the §108 Study Group. This is just one of many copyright policy initiatives that the ARL will engage in during the 111<sup>th</sup> Congress. Thus a better understanding of how research librarians engaged in the last general copyright revision and how §108 came to be will help provide a historical perspective to these issues. In a broader sense, as Goldstein<sup>2</sup> points out, the issue of photocopying in libraries was one of the first public policy debates around the issue of private copying and its relationship to copyright law. This issue has become of great importance since the advent of computers, their migration to the desktop and to private homes, the subsequent rise of the Internet, the World Wide Web, and most particularly since the widespread practice of file sharing and copying of music and the impact of these phenomena upon various markets of copyrighted works. Thus a better understanding of how the debate was framed in the earlier context of library users and the photocopier will help us better understand the current policy debate on this issue.

Founded in 1932, the ARL consisted of forty-five member libraries in 1955. By 1976 it had grown to 104 members. A National Science Foundation (NSF) grant in 1962 enabled the Association to establish a permanent secretariat in Washington D.C. The member libraries in general have always been the largest research libraries in North America and the Association's purpose has been to strengthen research libraries through coordinated action and to act as a

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<sup>2</sup> Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford, C.A.: Stanford University Press, 2003).

forum for discussion of common issues affecting member libraries.<sup>3</sup> Since its founding, because of the size and nature of its member libraries, the ARL has played a leadership role in American librarianship. It differs from other major professional associations in librarianship, such as the American Library Association for instance, in that its membership has always been institutional rather than largely individual.

These changes in the ARL happened within the context of changes within the profession of librarianship, which in turn happened within societal changes in the United States. To read the archival record of the ARL from the mid-1950's is to see the phrase "old boys club" in action.<sup>4</sup> The informally organized association relied upon a dense network of relationships between a few, almost exclusively male, librarians at elite northeastern schools and the Library of Congress. These people referred to each other by their first names, asked about family in correspondence, and had access to private clubs in New York and Washington, D.C. The American Library Association (ALA), while larger, more formally organized, and therefore more inclusive was also disproportionately influenced by a small group of white male librarians. For instance, the ALA Executive Secretary, David Clift, served from the early 1950's until 1972. This insularity was matched in the Copyright Office and in the various publisher and author interest groups. However, as we shall see, the ARL organized around a professional secretariat in 1962, by 1972 the ALA had hired Robert Wedgeworth, its first African-American Executive Director, and in 1973 Barbara Ringer had successfully sued the Library of Congress and been promoted to become the first female Register of Copyrights. At the same time the profession's attitude toward access to information also seemed to change as a result of the Civil Rights

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<sup>3</sup> Lee Ann George and Julia Blixrud, *Celebrating Seventy Years of the Association of Research Libraries, 1932-2002* (Washington, D.C.: Association of Research Libraries, 2002), 6.

<sup>4</sup> This impression is only heightened by the profession's reliance upon the "Gentlemen's Agreement" of 1935 concerning library copying with similarly insular publishing interests.

movement, the anti-Vietnam War movement, and the Watergate scandal. This influenced the rhetoric of copyright revision from a concern in the early 1960's about combating Communism through strengthening science and research to the rhetoric of freedom of information in the early 1970's.

Increased public investment in higher education and in public libraries in the post war period was boosted by the U.S. response to the USSR's launch of Sputnik in 1957. This growth, combined with the enormous growth required to meet the educational needs of the baby boom generation led to unprecedented growth in American libraries and demand for their services. This in turn led to a focus on document supply to users. A number of information technologies that came of age or were under development from the 1950's onward played a part in these developments; most importantly as far as copyright and libraries were concerned were the maturation of photocopying and the continued development of digital computing, particularly networked computing.

Copyright law is, of course, a child of technology, born of the development of the technologies of printing and the desires of states to control information dissemination in early modern Europe. The Copyright Act of 1976 replaced the Copyright Act of 1909 after perhaps the most fruitful 67 years of development of information transmission, storage, duplication, and distribution in American history.<sup>5</sup> As noted earlier, these decades also saw the United States complete its transition from net knowledge (and cultural) importer to net exporter and thus from pirate to policeman. Not coincidentally, the first seven decades of the 20<sup>th</sup> century also saw the

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<sup>5</sup> Some might argue that the most fruitful period of technological change in terms of information transmission, storage, duplication, and distribution has occurred in the last two decades with the development of HTML, graphical user interfaces to the World Wide Web, and the commercialization of the Web. This might be true; as Zhou En-Lai is supposed to have said of the French Revolution, 'it is too soon to tell.' However, I would argue that the sheer variety of storage and transmission media including film, recorded music, radio, and television, invented or commercialized between 1909 and 1976, and because the foundations of the Internet, and thus of the Web, were laid before 1976, that period is in fact more fruitful.

maturation of motion pictures and phonorecords, the invention of radio, the invention of broadcast and cable television, photocopying, microform, audio tape, and the various hardware and software technologies associated with digital computing and networking. Although the 1976 Copyright Act attempts to be technology neutral, it cannot entirely avoid considering specific technologies like phonorecords, and the individuals involved in developing the legislation were acutely aware of these technological changes and their impact on the then contemporary copyright law, even if they could not always discern the impact they might have in the future.

From the literal photographing of documents in the Library of Congress in the early twentieth century, through a number of intermediate duplicating processes, photocopying (invented in the 1930's) entered US libraries in the post war period, and mediated copying centers became common in the 1950's and 1960's. In the 1960's and 1970's photocopiers became small, cheap, and user-friendly enough to migrate from copy centers to self-service locations in offices and libraries. As we shall see, the impact of, and the appropriate response to, the widespread availability of photocopying was the most contentious issue between librarians, publishers and authors during the development of the 1976 Copyright Act. Looming on the horizon were the emerging technologies of networked computing. During the discussions of the Report of the Register of Copyrights in 1961, John Schulman (Chair of the American Patent Law Association Committee on Copyright) had the following exchange (in the context of a discussion of copyright and photocopying in libraries) with the Register of Copyrights, Abraham Kaminstein.

Mr. SCHULMAN. Mr. Kaminstein, here is one thing that troubles me. And that is that we speak only in terms of things with which we are entirely familiar at the present time. Recently there have appeared in publications like the *American Bar Association Journal*, the *New York Law Journal*, and other periodicals, articles on the use of law retrieval services. As I understand it, the American Bar Foundation in Chicago proposes to institute a law retrieval research service whereby a lawyer

may call at 9 o'clock in the morning and give the foundation a set of catchwords. He wants to know what material is available on them. By 5 o'clock in the afternoon, by an electronic process, he will be able to have all the citations and data on the legal publications. Now, if it were permissible to reproduce part of a work, the lawyer could be provided with photostatic copies or microfilmed copies not only of the citations but also of portions of opinions, portions of textbooks, and other material of that sort. Where would the publishers of lawbooks find an incentive to publish lawbooks if 1 set would serve 150,000 members of the bar. That is the type of activity with which I am concerned. If I call Chicago, and obtain the material I don't have to have a law library. I need only say that I want all references to section so-and-so of the copyright law, 2 days later I will receive photostat copies of the text from every case and every textbook in the United States and elsewhere.

Mr. KAMINSTEIN. Perhaps the new generation might be able to work under that system, but I can't imagine, John, that you or I would cite a case having read only a portion of it.<sup>6</sup>

This quotation illustrates the familiarity of photocopying and microform, the unfamiliarity of networked computing, and the recognition that they could all be made to work in combination and that such systems would have implications for publishers, libraries, researchers and therefore for the general revision of copyright law. By the mid 1960's Schulman's scenario had come into existence in the form of (amongst others) the National Institutes of Health's (NIH) MEDLARS medical information retrieval system, and in the United States Office of Education's (USOE) ERIC educational research information service amongst others. By the early 1970's libraries were taking advantage of networked computing technologies and joining together to form networked systems like the Ohio College Library Center (OCLC), the Research Libraries Group (RLG) and the Wisconsin Library Service (WILS) designed to facilitate resource sharing and make interlibrary loan more efficient. The impact of such technological developments found their way into the legislative process in many ways, most notably as we shall see in the struggle to define the word "systematic" copying in §108 in the early 1970's.

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<sup>6</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision: Report of the Registrar of Copyrights on the General Revision of the U.S. Copyright Law,." (Washington: Government printing Office, 1961), 40.



This dynamic period of change in librarianship, in technology, and in American society was accompanied by comparable dynamic change in American government. In 1955 President Eisenhower was in the White House and lost control of the Senate to the Democrats in the November elections. Democrats were to retain control of the Senate until 1980. Democrats controlled the House even longer, from 1950 until 1994. Policy positions regarding copyright are not determined by party affiliation. However, an individual member's power within a congressional committee was (and to a large extent still is) determined by majority and minority party status and by seniority, and the chairs and staff members of the two Judiciary Committees and their subcommittees had enormous power over the progress of general revision of copyright legislation during this period. In the Senate, longstanding conservative Democratic Senators from southern states dominated. James Eastland (D-MS) chaired the Committee on the Judiciary from 1956 until his retirement from the Senate in 1978, and John McClellan (D-AR), who entered the Senate in 1942, chaired that Committee's Subcommittee on Patents, Trademarks, and Copyrights until his death in 1977. A similar situation occurred in the House where Congressman Emmanuel Celler (D-NY) entered Congress in 1923 and served until 1972, and chaired the House Judiciary Committee. Congressman Robert Kastenmeier (D-WI), who was elected to Congress in 1958 and served until 1990, chaired the House Judiciary Committee's Subcommittee No.3, which managed copyright revision in the House from 1967 through passage of the bill in 1976.

This party and leadership stability belies the enormous amount of change that took place in Congress and the Presidency over these twenty-one years. These decades were of course a period of intense civil rights struggle in the United States, first by African-Americans and followed later by women. Both of these movements had an impact on the library profession and

the selection of library leaders. Normally civil rights legislation would have proceeded through the Judiciary Committee, but in the case of the Civil Rights Act of 1957, it was deliberately removed from that committee because of the power of civil rights opponents like Eastland. As noted earlier, 1957 was also the year the USSR launched Sputnik, overtaking the US in the space race and leading to a massive expansion in the federal government's role in education. 1964 saw the election of Lyndon Johnson to the Presidency and his call to create the Great Society, which again increased federal spending on education and libraries. Johnson's presidency also saw the escalation of US involvement in the Vietnam War, the growth of the anti-war movement and a fundamental shift in the way American citizens viewed their government. The public reaction to Johnson's prosecution of the Vietnam War contributed to his decision not to seek re-election and to the election of Richard Nixon in 1968. The cost of the social programs associated with the Great Society and the continued cost of the Vietnam War, combined with a more conservative governing philosophy, meant that the percentage of funding for higher education that came from federal sources began to fall<sup>7</sup>. This budgetary tightening in turn forced libraries to buy fewer materials and find ways to share resources more efficiently, thus making the disputes between libraries and publishers more acute in the final years of copyright revision. Nixon's involvement with, and cover up of, the Watergate break-ins and his subsequent resignation again contributed to the fundamental change in the way Americans viewed their government and an increased concern for freedom of information. This in turn had an impact on the rhetoric of librarians and their attitude both to access to, and sharing of, information and to copyright law.

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<sup>7</sup> W. Vance Grant and C. George Lind, "Digest of Educational Statistics, 1974 Edition," (Washington, D.C.: National Center for Education Statistics, 1975, 24, Table 25). Table 25 #767, Kenneth A. Simon and Vance W. Geant, "Digest of Educational Statistics, 1969 Edition," (Washington, D.C.: National Center for Educational Statistics, 1969. 16, table 21).

The growth in the role of the federal government during this period led to growth and change in the way Americans sought to influence government action. As the power of the political parties continued to wane, lobbying by professional associations and by single issue groups expanded. Higher education<sup>8</sup> and, as we shall see, libraries were not particularly astute in this regard. For at least the first decade of the copyright revision process, librarians, including those organized in the ARL, were not very effective in influencing the legislative and governmental process. It is only later with the Williams & Wilkins case and the active involvement of the central staff of the association that they begin to have more impact.

In this dissertation I seek to answer certain questions about the ARL role in the development of the Copyright Act of 1976. Specifically,

1. How and why did the ARL develop the positions it took during this copyright law revision? What were those positions and how and why did they change over time?
2. How did ARL positions on copyright revision differ from those of other interest groups, both within librarianship and in the academic research community, and how did the Association work and conflict with those other interests to further its goals in the revision process?
3. How did the ARL, its members, and active representatives articulate their policy positions?
4. How effective was the Association in achieving its policy goals? Which goals were achieved fully, partially, or not at all?

The following is an outline of the legislative history of the process that led to the Copyright Act of 1976. This brief outline is supplemented by the chronology found in Appendix B, which covers not just the legislative chronology, but also significant dates in the Williams & Wilkins case, in the interest group negotiations and also in the history of the ARL.

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<sup>8</sup> Constance Ewing Cook, *Lobbying for Higher Education: How Colleges and Universities Influence Federal Policy*, Vanderbilt Issues in Higher Education (Nashville, T.N.: Vanderbilt University Press, 1998).

In the Legislative Appropriations Act of 1955 Congress set aside funds for a comprehensive study under the direction of the Copyright Office of the problems associated with the current law, the Copyright Act of 1909, and possible revision of that law. Over the next five years the Senate Committee on the Judiciary's Subcommittee on Patents, Trademarks, and Copyrights published a series of 34 studies on aspects of copyright revision.<sup>9</sup> In 1961 the Copyright Office produced the *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*<sup>10</sup> and held panel discussions with interested parties on the subject of revision. In 1964, at the request of the Register of Copyrights Abraham Kaminstein, Senator John L. McClellan (D-AR), Chair of the Subcommittee on Patents, Trademarks, and Copyrights introduced S.3008, and Emmanuel Celler (D-NY), Chair of the House Committee on the Judiciary, introduced HR.11947 to the 88<sup>th</sup> Congress. The identical bills, drafted by the Copyright Office, were a general revision of the copyright law. No action was taken during that Congress.

In 1965, during the first session of the 89<sup>th</sup> Congress, McClellan introduced S.1006. The Subcommittee held three days of hearings on August 18 through 20, 1965. More hearings were held on the burgeoning "Community Antennae Television" (CATV, or cable television) issue in the second session in 1966, but no further action was taken on general revision by the Senate. More progress was made in the House where HR.4347, a partial revision of HR.11947, was introduced on February 4, 1965. HR.4347 was referred to Subcommittee No. 3 which held 22 days of hearings in May, June, August and September of that year. HR.4347 was reported out of

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<sup>9</sup> Copyright Office, "Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary United States Senate," (Washington: Committee on the Judiciary. United States Senate, 1960).

<sup>10</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 1," 35.

the House Subcommittee on October 12, 1966 and reintroduced into the first Session of the 90<sup>th</sup> Congress as HR.2512.

In the first session of the 90<sup>th</sup> Congress, McClellan again introduced a bill for general revision of copyright law, S.597, in the Senate. Subcommittee hearings were held on March 15 through 17, 20 and 21, and April 6, 11, 12, and 28, 1967. On April 11 1967 the House passed HR.2512, a bill for general revision of the copyright law. This bill was referred to the Senate, but McClellan's Subcommittee took no action on general revision during the 90<sup>th</sup> Congress because the cable television issue was still the subject of the court case, *Fortnightly Corp v. United Artists Television*.<sup>11</sup>

On October 12, 1967 the Senate passed S.2216 to establish a National Commission on New Technological Uses of Copyrighted Works (what would eventually become CONTU.) The House did not act on this legislation. On January 22, 1969, McClellan introduced S.543. Title I of this bill was identical to S.597 and Title II incorporated S.2216 to establish CONTU. On December 10, 1969 the Subcommittee reported favorably on S.543, but the Committee on the Judiciary took no action because of the ongoing CATV issue. On February 18 1971, McClellan introduced S.644 for the general revision of copyright law. S.644 was very similar to the version of S.543 reported out of the Subcommittee in the 91<sup>st</sup> Congress. No further action was taken during the 92<sup>nd</sup> Congress while the Federal Communications Commission (FCC) adopted new rules on CATV.

On March 26, 1973 Senator McClellan introduced S.1361, which was identical to S.644. Additional hearings were held on July 31 and August 1, 1973, and the bill was reported out of McClellan's Subcommittee. The bill was reintroduced into the first Session of the 94<sup>th</sup> Congress

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<sup>11</sup> *Fortnightly Corp. v. United Artists Television Inc.*, 392 390 (1968).

on January 15, 1975 as S.22 and the companion bill, HR. 2223, was introduced into the House on January 28. The House Subcommittee No.3 held eighteen days of hearings on the bill between May and December 1975. The Senate Subcommittee reported favorably on S.22 in November 1975 and the Senate debated and passed the bill in February 1976. S.22 was then referred to the House Committee on the Judiciary. HR.2223 was favorably reported out of the House Committee on September 3, 1976, and the House debated S.22 as amended by the House Subcommittee on September 22. At the end of September the Conference Committee on the two bills met and both houses approved the conference report on September 30. Finally, President Gerald Ford signed the bill into law as Public Law 94-553 on October 19, 1976, and the law went into effect on January 1, 1978.

## 2.0 LITERATURE REVIEW

This review is divided into five sections: the federal government documents that are one of the primary sources of this research; the contemporary professional literature that forms another group of primary sources for this research; the small and rather inadequate literature on the history of the ARL; the voluminous legal scholarship on the history of copyright; and finally -- and most importantly -- the archival record of the ARL.

One of the most important bodies of literature of copyright revision consists of the government publications that accompanied the legislative development process. This literature is large but reasonably well organized, certainly up to 1965. It consists of six volumes of Copyright Law Revision published as House Committee Prints between 1960 and 1965. These were preceded by thirty four studies<sup>1</sup> of various aspects of copyright that the staff of the Copyright Office thought would be important elements in the revision process. The first of the six volumes of materials on copyright revision produced by the Copyright Office was the 1961 annual report of the Register of Copyrights Abraham L. Kaminstein to Congress. His report proposed preliminary alternative solutions to various copyright problems that had developed as the 1909 Act had aged.<sup>2</sup> This report was the topic of discussions, meetings, and written comments through

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<sup>1</sup> Copyright Office, "Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary United States Senate."

<sup>2</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 1."

the first half of 1962. The edited transcripts of these meetings were published.<sup>3</sup> The staff of the Copyright Office then produced a draft bill that was again subject to discussion and comment. This discussion of the bill lasted through 1963 and the bill and transcripts of meetings were published in 1964.<sup>4</sup> It is at this stage that the legislative process began with the introduction of bills to Congress in the summer of 1964 (HR.11947 and S.3008). Hearings were held on the House bill and the transcripts of those meetings published.<sup>5</sup> In February 1965 HR.4347 was introduced to the 89<sup>th</sup> Congress and more hearings held. The final volume of the Copyright Office series on revision consists of a supplementary report by Registrar Kaminstein that summarized the process to date and delineated the still outstanding problems, including library photocopying.<sup>6</sup> The period in which the House bore most of the burden of considering copyright revision came to an end in 1967 with the passage of HR.2512. This bill was accompanied by a full report.<sup>7</sup> The Senate had failed to act to this point and thus legislative activity halted temporarily. At least in terms of library concerns, attention turned to the courts and the case of *Williams & Wilkins v. United States*<sup>8</sup> in the Court of Claims when suit was brought in February 1968. The professional literature of librarianship, and to some extent of publishing, contains many articles and a few books that shed light on various aspects of this case and how librarians and publishers thought it might influence library operations with regard to copyright. An archive

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<sup>3</sup> ———, "Copyright Law Revision Part 2. Discussion and Comments on the Report of the Registrar of Copyrights on the General Revision of the U.S. Copyright Law,," (Washington, D.C.: Government Printing Office, 1963).

<sup>4</sup> ———, "Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comments on the Draft,," (Washington, D.C.: U.S. Government Printing Office, 1964), ———, "Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law," House (Washington, D.C.: Government Printing Office, 1964).

<sup>5</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 5: 1964 Revision Bill with Discussion and Comments,," House (Washington, D.C.: Government Printing Office, 1965).

<sup>6</sup> ———, "Copyright Law Revision Part 6: Supplementary Report of the Registrar of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill," (Washington, D.C.: 89th Congress, 1st session, 1965).

<sup>7</sup> ———, "Copyright Law Revision Report to Accompany HR. 2512," (Washington, D.C.: 90th Congress, 1st Session, 1967).

<sup>8</sup> *Williams & Wilkins vs. United States*, (1972).



of the materials associated with this case is located at the National Library of Medicine.<sup>9</sup> Marilyn McCormick edited a useful documentary history of the case<sup>10</sup> and George Gipe produced a book, published by the Williams & Wilkins Company, which gives some insight into why the publisher undertook the action.<sup>11</sup>

When congressional activity again revived in the early 1970's there were more hearings, most actively in the Senate, and transcripts of those hearings have also been published.<sup>12</sup> These were followed by hearings in the house on HR.2223 in 1975.<sup>13</sup> On final passage of the two bills HR.2223 and S.22 in late 1976, another report was published<sup>14</sup> that included the recommendations of the National Commission on New Technological Uses of Copyrighted Works (CONTU).<sup>15</sup> Latman's *Kaminstein Legislative History Project*<sup>16</sup> provides access to the relevant primary government documents, including the latter years.

Librarians played a minor role in the revision process as a whole. Only one of the 34 studies commissioned by Register of Copyrights Arthur Fisher explicitly concerned library

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<sup>9</sup> "Williams & Wilkins Co. v. The United States records, 1938-1982 (bulk 1958-1982)," (Bethesda, M.D.: National Library of Medicine Archives and Modern Manuscripts Program History of Medicine Division).

<sup>10</sup> Marilyn G. McCormick, *The Williams & Wilkins Case: the Williams & Wilkins Company v. the United States* (New York: Science Associates/International, 1974).

<sup>11</sup> George A. Gipe, *Copyright and the Machine Nearer to the Dust* (Baltimore, M.D.: Williams & Wilkins, 1967).

<sup>12</sup> Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, *Copyright Law Revision: Hearings on S. 1361 Before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 93rd Congress, 1st Session (1973)*, 93rd Congress, 1st Session, July 31 and August 1 1973.

<sup>13</sup> Committee on the Judiciary, *Copyright Law Revision Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 94th Congress 1st Session, May 7 - December 4, 1975.

<sup>14</sup> Committee on the Judiciary U.S. Congress, "Senate Report No. 94-473, 94th Cong., 1st Sess.," (1975), "House Report 94-1476 accompanying S.22," (Washington, D.C. : United States Congress, House Judiciary Committee, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 1976).

<sup>15</sup> *Copyright Law Revision Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice*.

<sup>16</sup> Alan Latman and James F. Lightstone, *The Kaminstein Legislative History Project: a Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976* (Littleton, C.O.: Published for the Copyright Society of the U.S.A. and New York University School of Law by F.B. Rothman, 1981).

operations.<sup>17</sup> Of the four meetings held by Register Kaminstein between September 1961 and March 1962 to solicit discussion of his 1961 Report, only the first – on September 14, 1961 – included discussion of photocopying. Libraries are not even mentioned in the subject index to the volume.<sup>18</sup> Few of the hundreds of written comments received on the preliminary draft legislation published in 1964 or the bills actually introduced into the House (HR.11947 and HR.4347) concern libraries and their activities. This proposed legislation governed the activities of significant industries like movies, television, music, and publishing. Blaisdell calculated that as early as 1954, the affected industries accounted for 2% of the national income.<sup>19</sup> Controversial issues such as whether software was copyrightable (§102 of the 1976 Act), the jukebox exemption (§116 of the 1976 Act and §1(e) of the 1909 Act), fair use (first codified in §107 of the 1976 Act), cable TV rights to rebroadcast (§111 of the 1976 Act), classroom use of copyrighted materials (§110 and 107 of the 1976 Act), educational broadcasting (§110(2) of the 1976 Act), and the manufacturing clause (§601 of the 1976 Act and §16 of the 1909 Act) each dominated phases of the revision process and delayed action at various points in the process. Librarians may consider the 1976 Act an important piece of legislation that significantly impacts their operations, but they are not alone. Many, more influential, institutions and industries regarded it in the same way.

That being said, three of the 34 studies that Fisher commissioned in an effort to provide a common basis on which to begin the discussions that he hoped would inform and lead to draft

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<sup>17</sup> Borge Varmer, "Study No. 15. Photoduplication of Copyrighted Materials by Libraries.," in *Copyright Law Revision: Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 86th Congress, 2nd Session pursuant to S. Res. 240* (Washington: Government printing Office, 1960).

<sup>18</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 2."

<sup>19</sup> William M. Blaisdell, "Study No. 2. Size of the Copyright Industries," in *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 86th Congress, 2nd Session Pursuant to S. Res. 53* (Washington: Government Printing Office, 1960).

legislation, concerned libraries in some way. Abe Goldman's history of copyright revision in the first half of the 20<sup>th</sup> century<sup>20</sup> is of general interest and both Alan Latman's study of fair use<sup>21</sup> and Borge Varmer's study of photocopying in libraries<sup>22</sup> deal with the role of libraries in the distribution of copyrighted works and have at least some historical perspective on each issue. My research therefore concerns a small and heretofore little studied part of a wider policy development process the outlines of which are reasonably well understood.

Frank McGowan's dissertation<sup>23</sup> on the ARL from 1932 through 1962 shows how the Association grew during these thirty years. Unfortunately, even though he was writing in the early 1970's McGowan was unable to write a thorough history of the ARL up to the 1970's. His last chapter is simply a brief overview of developments since 1962. This was because McGowan, with the help of Stephen McCarthy, the Executive Director of ARL, and some other long time representatives in the Association, collected the archive from scattered papers. It is now housed at the Library of Congress but the finding aid<sup>24</sup> describes only those records through 1962, although as we will see, there are also a large number of unprocessed records from 1963 onwards in the collection.

McGowan's partial history of the ARL remains the most thorough history of the Association. He provides much detail on the formation of the group in the context of existing

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<sup>20</sup> Abe A. Goldman, "Study No. 1. The History of U.S.A. Copyright Law Revision from 1901 to 1954," in *Copyright Law Revision: Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 86th Congress, 1st Session pursuant to S. Res. 53* (Washington: Government Printing Office, 1960).

<sup>21</sup> Alan Latman, "Study No.14. Fair Use of Copyrighted Works.," in *Copyright Law Revision: Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 86th Congress, 2nd Session pursuant to S. Res. 240* (Washington, D.C.: Government Printing Office, 1960).

<sup>22</sup> Varmer, "Study No. 15. Photoduplication of Copyrighted Materials by Libraries.."

<sup>23</sup> Frank M. McGowan, "The Association of Research Libraries 1932-1962" (Dissertation, University of Pittsburgh, 1972).

<sup>24</sup> "Records of the Association of Research Libraries: A Register of its Records in the Library of Congress," (Washington, D.C.: Library of Congress Manuscript Division, n.d.).

library associations and changing nature of the Association in its first thirty years. He neatly outlines each of the major projects undertaken by the group including its conflict with the H.W. Wilson Company over that company's pricing structure, the bibliographic control of doctoral dissertations, the Library of Congress Catalog, the Public Law 480 Program (that assisted US research libraries in the acquisition of materials published overseas), and the Farmington Plan (an ambitious program of cooperative collection development on a global scale.) These last two projects show how the ARL worked with federal government agencies beyond the Library of Congress and how the Association sought to influence the government. McGowan also discusses the relationships the ARL developed with various library associations, the Library of Congress and the National Science Foundation. Since the ARL did not act in isolation with regard to copyright revision, these relationships are important background to my research. McGowan hardly mentions copyright revision. It is unclear whether this is because the subject was tangential to his major interest in the growth of the professional association *per se*, or -- because his history stops in 1962 with an extension until 1970 based on the published professional literature -- because he failed to recognize the role the ARL was playing in the, as yet, incomplete revision process. As we now know, evidence of the issue of copyright revision is certainly present in the ARL papers.

McGowan's dissertation was praised by another historian of the ARL and Director of University Libraries at Syracuse University, David Stam, who, in a speech celebrating the sixtieth anniversary of the association in 1992,<sup>25</sup> briefly outlines the history of the Association up to that point. Unfortunately his speech is all too brief and Stam is more concerned with entertaining his audience than enlightening future readers. However, he does note that 5000

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<sup>25</sup> David H. Stam, "Plus Ça Change ... Sixty Years of the Association of Research Libraries," (Washington, D.C.: Association of Research Libraries, 1992. <http://www.arl.org/arl/plus.ca.html>. Accessed August 18, 2006.).

items were added to the ARL archive at the Library of Congress in 1968, and another 50,000 in 1979. Stam, like McGowan, does not mention copyright revision. Stam's speech was reprinted in another slight history of the association, written by two ARL staffers.<sup>26</sup> The authors of this booklet, written to celebrate the Association's seventieth anniversary, concentrate most of their substantive information in the period since 1990, but do have a short section on federal relations, information policy, intellectual property, and copyright in which they mention the Copyright Act of 1976 and also outline the role played by the Executive Director in federal relations and lobbying after the reorganization of 1962.<sup>27</sup>

I have been unable to identify any other histories of the ARL in the journal literature. Thus the time is ripe for a history of the ARL that focuses on the Association's role in the public policy process that led to the Copyright Act of 1976. A history that uncovers the ways in which the Association and its member representatives organized and developed their copyright policy positions, how these positions changed over time, how they related to the positions of other interests (both within and beyond librarianship) and how the Association sought to exert influence upon Congress to further its interests and those of its member libraries.

In terms of the history of copyright revision from the perspective of legal scholars, the general history of the copyright law revision process that led to the Copyright Act of 1976 is well known. Jessica Litman has written the best general history of the negotiations that led to the law in two law review articles<sup>28</sup> and then summarized those in her book *Digital Copyright*.<sup>29</sup> However, quite properly, Litman did not spend much time on the role that librarians played in

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<sup>26</sup> George and Blixrud, *Celebrating Seventy Years of the Association of Research Libraries, 1932-2002*.

<sup>27</sup> *Ibid.*, 10.

<sup>28</sup> Jessica Litman, "Copyright, Compromise, and Legislative History," *Cornell Law Review* 72 (1987), ———, "Copyright Legislation and Technological Change," *Oregon Law Review* 68, no. 2 (1989).

<sup>29</sup> Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001).

the revision process. Instead she approached copyright revision from a legal perspective and was less concerned with the history of the process than how copyright law could be reformed in the future without what she regarded as undue influence from organized interests. As noted earlier, Alan Latman, who participated in the revision process as a lawyer in the Copyright Office and as counsel for Williams & Wilkins during that test case, wrote the *Kaminstein Legislative History Project*<sup>30</sup> that indexes the source documents that legal scholars and practicing lawyers regard as significant in the development of this legislation. Latman concentrates on the documents that are of most interest to lawyers attempting to discern congressional intent in order to aid courts in the interpretation of copyright law and while he indexes the documents, they are not reproduced in their entirety and there is no analysis of the documents. The *Kaminstein Legislative History Project* is an excellent source of information about the revision process, but it is not a history. William Patry's *The Fair Use Privilege in Copyright Law*<sup>31</sup> is also an invaluable source of detail about the development of this doctrine, that proved so central to librarians' involvement in the revision process, including its codification in §107 of the Copyright Act of 1976. Patry views §108 as an aspect of the doctrine of fair use, rather than as an entirely separate exemption from the exclusive rights of copyright holders and thus also spends considerable time on that section as well.

In his general history of American copyright, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, Paul Goldstein also devotes considerable space to the Williams & Wilkins case and library photocopying during the development of what became the Copyright Act of

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<sup>30</sup> Latman and Lightstone, *The Kaminstein Legislative History Project: a Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976*.

<sup>31</sup> William F. Patry, *The Fair Use Privilege in Copyright Law* (Washington, D.C.: Bureau of National Affairs, 1985).

1976.<sup>32</sup> Goldstein sees the resolution of the Williams & Wilkins case and the negotiations over §108 as precursors to the issue of how copyright law copes with private copying in the digital environment.<sup>33</sup> Not unreasonably in the context of a book concerned with two centuries of copyright history he does not delve into the differences between librarians during this time or how they arrived at their positions. His librarian sources for these chapters are interviews with Martin Cummings of the NLM and Robert Wedgeworth of the ALA conducted in the early 1990's, more than fifteen years after the events in question. Goldstein's use of interviews illustrates the strengths and weaknesses of oral history. Certainly his ability to quote living participants enlivens an already highly readable text and provides context and commentary that further enriches his narrative. However, although Robert Wedgeworth was very involved in the negotiations for copyright revision after 1972 and Martin Cummings was more involved than any other librarian in the Williams & Wilkins case, as we shall see, there were many other librarians also involved and concerned with these events. By interviewing only those two librarians Goldstein inevitably colors the reader's view of librarians' engagement in copyright during this period. Further, by interviewing them so long after the events in question he only has access to their memory of these events in hindsight, as contextualized by more than fifteen years of experience with the Copyright Act of 1976. By going back to the archival sources I hope to avoid these problems by making use of the participants' words as recorded at the time of the events, while fully accepting that such reliance on the contemporary archival records brings with it its own set of epistemological and historiographic problems.

Litman presents the history of copyright legislative development through the twentieth century as a case study of the overbearing influence of vested interests in the development of

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<sup>32</sup> Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, 63-116.

<sup>33</sup> *Ibid.*, 105.

legislation and of the way in which Congress failed to perform what she regards as its proper role in developing legislation in the public interest. In this, she is reflecting legal scholars' particular interest in congressional intent, which she argues cannot be discerned when Congress defers to vested interests in writing legislation. Scholars in political science and American government<sup>34</sup> accept that interest groups are, and always have been, active in legislative development. Such scholars are more interested in how to define influence, understand how influence is translated into legislation, and how to measure such influence. Unfortunately, from this perspective copyright is not a particularly useful example. The revision process was too long, the interests too complex, and the political stakes not high enough to have attracted the attention of political scientists. John Dierst's dissertation is one partial exception.<sup>35</sup> Unfortunately, he ended his study in 1971 and optimistically expected the revision process to result in successful passage of legislation in 1972. Like Litman, he takes a more general perspective and does not consider the role of librarians. He also did not extend or publish the study beyond his dissertation. Laura Gasaway has some discussion of the history of copyright revision that reflects a librarian's perspective in her wider discussion of how copyright policy, particularly fair use, and libraries should relate to each other.<sup>36</sup> Bielefield and Cheeseman<sup>37</sup> are another example of authors who take a largely contemporary perspective to copyright issues that libraries face, while outlining some of the history of how libraries and copyright have related to each other. More recently in

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<sup>34</sup> R. Douglas Arnold, *The Logic of Congressional Action*. (New Haven, CT: Yale University Press, 1990), John W. Kingdon, *Agendas, alternatives, and public policies*, 2nd ed. (New York: Longman, 2003), John R. Wright, *Interest Groups and Congress* (New York, NY: Longman, 2003).

<sup>35</sup> John Richardson Dierst, "Pre-Legislative Decision-Making: a case study of the revision of copyright legislation, 1955-1971." (Ph. D., University of Pittsburgh, 1972).

<sup>36</sup> Laura N. Gasaway, *Growing Pains: Adapting Copyright for Libraries, Education, and Society* (Littleton, C.O.: F.B. Rothman, 1997).

<sup>37</sup> Arlene Bielefield and Lawrence Cheeseman, *Libraries & Copyright Law* (New York: Neal-Schuman Publishers, 1993).



*Copyrights and Copywrongs* Siva Vaidhyanathan<sup>38</sup> uses a brief history of U.S. copyright to underpin his argument that the law has become too inflexible and unresponsive to the needs to users of creative works and too protective of the rights of creators. However, he does not provide much detail on the history of the development of the 1976 Act.

There is one exception to the absence of histories of librarians' involvement in this copyright revision process, a background paper written for the §108 Study Group organized by the Copyright Office in 2005. Rasenberger and Weston, two legal advisors to the Copyright Office, wrote the paper to help the Study Group understand the history of §108 (the library and archive exception) but the paper is short, and does not describe in detail the process by which librarians arrived at their policy positions. It also remains in draft form and is only available from the Study Group's website at <http://www.loc.gov/section108/index.html>.<sup>39</sup> Clearly the history of research librarians' involvement in the development of the 1976 Copyright Act remains to be written.

Cook, in her study of lobbying by higher education in the 1990's, has at least one chapter on the history of association lobbying before 1990.<sup>40</sup> Her focus is on the six big associations that represented the variety of institutions of higher education and she does not consider associations, like the ARL, composed of professionals from within those institutions. She characterizes the higher education lobby in the 1970's as inept, out of touch, and unable to provide the kind of policy analysis that other, increasingly professional associations were able to provide for law

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<sup>38</sup> Siva Vaidhyanathan, *Copyrights and Copywrongs: the Rise of Intellectual Property and How it Threatens Creativity* (New York: New York University Press, 2001).

<sup>39</sup> Mary Rasenberger and Chris Weston, "Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning," Section 108 Study Group, [http://www.loc.gov/section108/docs/108\\_background\\_paper.doc](http://www.loc.gov/section108/docs/108_background_paper.doc).

<sup>40</sup> Cook, *Lobbying for Higher Education: How Colleges and Universities Influence Federal Policy*.

makers.<sup>41</sup> She argues that this led to the switch from direct aid to institutions to direct aid to students (e.g., Pell Grants). Cook also argues that lobbying by higher education grew and changed from the 1950's to the 1970's when the role of the federal government in American society in general, and in higher education in particular, grew enormously and the sophistication of the ways in which these interests sought to influence federal spending and policy also grew.<sup>42</sup> Geiger also makes this argument.<sup>43</sup> However Loomis,<sup>44</sup> in a more general study of lobbying, contends that the oft-mentioned "explosion" in lobbying in the 1960's and 70's is over emphasized and instead writes about the continuity in lobbying behavior throughout the twentieth century. Perhaps not surprisingly, none of these writers make any reference to lobbying by librarians or research libraries. Professional associations of libraries and librarians were and (despite some recent success) continue to be small players in this game. However, this does not mean we cannot learn anything from their efforts.

The archive of the Association of Research Libraries is housed at the Library of Congress. A basic finding aid, a register of records, has been prepared for the records from 1932 through 1962 by the Manuscripts Division.<sup>45</sup> This finding aid consists of a simple list of the contents of each container at a very general level with some breakdown of the contents in many cases. The arrangement seems to have preserved the original administrative arrangement in which the records were received and reflects the needs of the ARL leadership during this period. The copyright law revision process with which we are concerned began in 1955 and ended in

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<sup>41</sup> Ibid., 25.

<sup>42</sup> Ibid., 15.

<sup>43</sup> Robert L. Geiger, *Research and Relevant Knowledge: American Research Universities Since World War II* (New York: Oxford University Press, 1993).

<sup>44</sup> Burnett A. Loomis, "Interests, lobbying, and the U.S. Congress: Past as Prologue," in *Interest Group Politics*, ed. Allan J. Cigler and Burnett A. Loomis (Washington, DC: CQ Press, 2002).

<sup>45</sup> "Records of the Association of Research Libraries: A Register of its Records in the Library of Congress."

1976 with passage of the Act. Therefore only the earliest records of ARL involvement in the process exist in this processed collection.

However, the Library of Congress received two more sets of records from the ARL. Five boxes of materials were received in 1974 and a much larger set (containing about 50,000 items) was received in 1982. This large set contains records created between 1965 and 1979, “including correspondence, memoranda, minutes, reports, financial records, subject files, printed matter, and other papers.”<sup>46</sup> There is no inventory of either shipment and Ms. Bair thinks that both are boxed as they were received<sup>47</sup>.

Obviously, the bulk of the raw material for this historical study that is located within the ARL archive is located within this unprocessed collection. This presented two early challenges. The first is that, in the absence of a complete finding aid, or even a register of records, it was difficult to ascertain whether or not my search for the historical evidence of the ARL’s involvement in the copyright revision process in the archive would be successful. The presence of finding aids enables those contemplating archival research to make an initial determination of whether the investment of time and money in a visit to an archive is likely to be worthwhile. In the absence of such a finding aid, I examined each box and read the contents of relevant files during two visits to the Library of Congress in January 2007 and April 2007. This research was augmented by an earlier research trip to the American Library Association (ALA) archive

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<sup>46</sup> Barbara Bair, E-mail, September 8 2006.

<sup>47</sup> Interestingly, I am the first researcher to have contacted Ms. Bair about the ARL records in the five years that she has been responsible for them. It says something about the ahistorical nature of our profession that the records of one of the most influential associations in American librarianship during what we may come to look back on as the golden age of the research library has remained untouched for so long.

housed at the University of Illinois Urbana-Champaign Libraries<sup>48</sup> and also by a review of the Verner Clapp papers, also housed at the Library of Congress.<sup>49</sup>

It clear from this review of the literature that although we have a clear understanding of the general outlines of the general revision of U.S. copyright that took place between 1955 and 1976, we do not have a detailed understanding of the ARL role in that revision process; how that role developed and changed over those two decades and what impact it had on the eventual legislation and on the Association itself. I hope this dissertation helps fill this gap.

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<sup>48</sup> "American Library Association Archive," (University of Illinois at Urbana Champaign, Archives).

<sup>49</sup> Verner W. Clapp, "Papers of Verner W. Clapp, 1901-1973 (bulk 1945-1972).", ed. Library of Congress Manuscript Division and D.C. Washington ( Washington, D.C.).

### 3.0 INTRODUCTION TO THE NARRATIVE

The history of the general revision of U.S. copyright law that resulted in the Copyright Act of 1976 can be divided into three distinct chronological phases and the final phase can be divided into three parallel tracks, one legislative, another judicial and the third consisting of the various interest group negotiations in which the ARL participated.

The first phase began in 1955 when Congress appropriated money for the Copyright Office to study the various problems associated with the law as it then stood. During this phase the various interested groups organized themselves in more or less effective ways in an attempt to maximize their influence on the nascent revision process. The ARL, as a small and somewhat disorganized group initiated (with some prodding from the register of Copyrights, Arthur Fisher) the David Committee<sup>1</sup>, that grew into the Joint Committee on Fair Use in Photocopying<sup>2</sup>. By the end of this phase in 1960, the Joint Committee had conducted a study of current copying practices in libraries and had arrived at a relatively stable policy position, shared by both the ARL and the ALA, that making a single copy of copyrighted materials for a library user was a traditional practice and necessary part of ordinary library service and did not constitute infringement. Symbolically this phase ended with Fisher's death in November 1960.

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<sup>1</sup> Named for Charles David, the University of Pennsylvania Library Director and ARL leader, who chaired the committee.

<sup>2</sup> See Appendix A for details of how the name of this committee and the library associations represented changed over time.

The second phase began in 1961 with release of Abraham Kaminstein's, (the new Register of Copyrights) report on copyright revision. This report was the subject of four meetings in late 1961 and early 1962. Edward Freehafer, Chairman of the Joint Committee, spoke at the first one in September 1961.<sup>3</sup> In 1962 the Copyright Office prepared a preliminary draft of a revised law including a section on photocopying in libraries, which was discussed at meetings during the first half of 1963. Freehafer spoke at the February 20 meeting. In 1964 a bill for General Revision of the Copyright Law (HR.11947) was introduced in the House in the 88<sup>th</sup> Congress. This bill codified the doctrine of fair use for the first time but did not contain a separate section on library photocopying. ARL was unable to effectively influence the legislative process at this time. Charles Gosnell and the ALA took the lead in representing librarians in the legislative process. During the early to mid 1960's librarians also sought to ally themselves with the education lobby that was pushing for a broad copyright exemption for educators. Bills were reintroduced in the 89<sup>th</sup> Congress in 1965 (HR.4347 and S.3008) with the barest mention of the doctrine of fair use and no mention of library photocopying. A reorganized ARL was represented by Rutherford Rogers, now chair of the Joint Committee, at hearings before the House subcommittee on June 3, 1965, and in general supported the bill.<sup>4</sup> In 1966 Rogers was replaced by Verner Clapp as ARL representative on the Joint Committee. When HR.4347 emerged from Committee the fair use provision had grown. This bill was reintroduced into the 90<sup>th</sup> Congress in 1967 as HR.2512. A companion bill S.597 was introduced into the Senate and was the subject of hearings. This second phase came to an end in 1967 when the House passed HR.2512, but the Senate did not debate S.597 because of the lack of agreement between the interested groups

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<sup>3</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 2," 33-34.

<sup>4</sup> Committee on the Judiciary. Subcommittee No. 3, *Copyright Law Revision: Hearings before Subcommittee No. 3 of the Committee on the Judiciary.*, 89th Congress, 1st Session, May 22nd to September 2nd, 1965 1965, 448-56.

involved in rebroadcasting of cable television content. The House also released Report No. 83,<sup>5</sup> which became an important element in the revision process in the years ahead. At this point ARL librarians were reasonably satisfied with their position with regard to revision and expected passage in the Senate in the near future.

The third phase of this revision process is perhaps the most significant since it was the longest phase and immediately preceded passage of the law. Up to this point library copying practices had never been challenged in court as an infringement of copyright. In 1968 a new front in the struggle for revision opened up when the journal publisher, Williams & Wilkins, sued the National Library of Medicine and the National Institutes of Health for infringement of copyright over their in-house and interlibrary loan copying practices in a case designed to test the boundaries of fair use in library copying. The ARL, amongst others, filed an *amicus curiae* brief in support of the government. Commissioner Davis issued his report finding for Williams & Wilkins on February 16, 1972 and the government immediately appealed to the full Court of Claims. The ARL again participated in the case in support of the NLM and NIH and the Court narrowly found for the NLM and NIH on November 27, 1973. Williams & Wilkins in turn, immediately appealed to the U.S. Supreme Court, which on February 24, 1975 narrowly upheld the full Court of Claims decision.

This recourse to the courts by a publisher convinced the library associations that the judicial doctrine of fair use, even if described in statute, was not sufficient to enable libraries to continue their copying practices. ALA and ARL agreed on a proposed amendment to the bill that became, by 1969, §108. §108 created an explicit exemption for library photocopying practices. In January 1969, Senator McClellan introduced S.543 to the 91<sup>st</sup> Congress. This bill was

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<sup>5</sup> \_\_\_\_\_, "Copyright Law Revision Report to Accompany HR. 2512."

amended to include S.2216, a bill that sought to create a Commission on the New Technological Uses of Copyrighted Works (CONTU) in an effort to make progress on revision by setting aside and therefore defusing the tension over photocopying and the nascent uses of computing in libraries and education. §108 was the subject of numerous rounds of negotiations that continued into 1975, often under the guidance of the Copyright Office, in which all parties sought to gain as much advantage as possible while appearing to be constructive participants in the legislative development process in the eyes of the Copyright Office and congressional staff. These negotiations ebbed and flowed based on the priorities of the specific individuals involved, progress in the Williams & Wilkins case, and technological changes in photocopying in libraries. In the final years of the revision process these negotiations became increasingly focused on specific wording of §108(g)2. The composition and role of CONTU itself became an element in these negotiations and therefore the Commission was not created until 1975.

Finally with the dispute over rebroadcasting of cable television finally settled by 1973, the Williams & Wilkins case decided in such a way that it was obvious that it was Congress' role to cut the Gordian knot of library photocopying, and hearings were held before the Senate Subcommittee on Patents, Trademarks and Copyright in 1973. S.1361 passed the Senate in September 1974. Companion bills S.22 and HR.2223 were introduced into the Senate and House of the 94<sup>th</sup> Congress in January 1975. S.22 passed the Senate in February 1976 and the House held hearings, amended the bill and passed HR.2223 in September 1976. The two bills were reconciled in conference and President Ford signed the bill on October 19, 1976 and the Copyright Act of 1976 went into effect on January 1, 1978.

Because of the complexity of this final phase, with the legislative, judicial and interest group stands intertwining and influencing each other, this part of the narrative is in three parallel



sections: first laying out the legislative developments from 1967 until passage of the Act in 1976; then describing the impact of the Williams & Wilkins case as made its way towards its ultimate resolution by the Supreme Court in 1975; and finally the continuous series of interest group negotiations that influenced, and were influenced by, the other two strands.

#### 4.0 1955-1960: ORGANIZING FOR REVISION

The Legislative Appropriations Act of 1955 authorized the Copyright Office to study problems associated with the then current United States copyright law, which was based on the Copyright Act of 1909, and to consider possible revisions to that seriously outdated law. Few if any librarians outside of some in the upper administration of the Library of Congress knew of this development and perhaps no one could foresee that this authorization would initiate a legislative revision process that would last a generation. Academic research librarians and their professional association, the Association of Research Libraries (ARL), were aware of copyright in the mid 1950's, and engaged with the federal government with regard to copyright policy. For instance, in 1954 Victor Schaefer, the Director of Notre Dame's Library, and John Moriarty, his colleague at Purdue, had joined the Executive Secretary of the ARL, Robert A. Miller, who also happened to be the Director of Libraries at Indiana University, in writing to Senator Jenner from Indiana concerning the United States' formally joining the Universal Copyright Convention (UCC).<sup>1</sup> Research Librarians were interested in the UCC because it was one step towards the United States entering the international copyright regime and thus had the potential to smooth libraries' acquisition of foreign research materials. However, the big federal issue for research librarians in 1954 was not copyright, but the contentious appointment of a new Librarian of

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<sup>1</sup> Telegram from Dan Lacy to Senator Jenner Concerning S.2559 (Universal Copyright Convention) [July 23, 1954].

Congress, L. Quincy Mumford.<sup>2</sup> At the two ARL meetings held in 1955, the 44<sup>th</sup> in Chicago and the 45<sup>th</sup> in Philadelphia, the copyright issue was not on the agenda and not mentioned in the minutes. The only legislative issue that did make it onto the agenda of the 45<sup>th</sup> meeting in July was the pending postal rate legislation. Librarians were interested in ensuring that theses could be mailed at the discounted book rate. It was only at the beginning of 1956 that the first inklings of copyright revision reached librarians beyond a small group in the Library of Congress. In January Charles W. David, the Director of Libraries at the University of Pennsylvania and an active leader in the ARL, wrote to Miller asking, "Did Verner Clapp telephone you from the Library of Congress one day last week about the problem of photocopying of published materials protected by copyright which is agitating Arthur Fisher, the Register of Copyrights?"<sup>3</sup> David was chair of the Library of Congress' Board of Resources. Fisher had brought the issue of copyright and photocopying in libraries to the Board in the summer of 1955. David realized that this was an issue for the ARL and asked Miller to add it to the agenda of the upcoming ARL meeting in Chicago.

At that meeting on January 30 1956, "Copying Copyrighted Material" was the first of eleven items on the agenda and there was a lively discussion dominated by Verner Clapp. At this time Clapp was Chief Assistant Librarian of Congress. He had been the Acting Librarian of Congress 1953-4 and a popular choice amongst research librarians to replace Luther Evans as Librarian of Congress in 1954, but he had made powerful enemies in Congress and was passed over for Mumford.<sup>4</sup> Somewhat uncharacteristically, Clapp urged further study of the photocopying issue rather than immediate action. Others suggested that the matter should be

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<sup>2</sup> Betty Milum, "Eisenhower, ALA, and the Selection of L. Quincy Mumford," *Libraries & Culture* 30, no. 1 (1995).

<sup>3</sup> "Charles David to Robert Miller [January 23, 1956]," in *Records of the Association of Research Libraries 1932-62 Box 5 Folder "ARL General 1955-56"*, Manuscript Division, Library of Congress.

<sup>4</sup> Milum, "Eisenhower, ALA, and the Selection of L. Quincy Mumford."

referred to the existing joint committee of the American Library Association (ALA) and the American Book Publishers Council (ABPC), still others wanted the Register of Copyright to prepare a code of practice for librarians, or suggested that the Association seek independent legal advice. Clapp and David were able to redirect the meeting so that Miller, the Executive Secretary, was charged with appointing a committee to study the issue and work with the Library of Congress and the Register.<sup>5</sup> Miller appointed Jack Dalton, then University Librarian at the University of Virginia who was appointed Director of the ALA's International Relations Office in 1956; and Ralph Shaw, a respected library leader and innovator who ran the U.S. Department of Agriculture's Library until 1954 and then joined the faculty of the Graduate School of Library Service at Rutgers University<sup>6</sup>. Shaw thought that there was a legal difference between fair and private use of copyrighted works, a notion with which Fisher disagreed. Miller asked Charles David to lead the committee, and thus it became known as the "David Committee."

When Clapp returned to the Library of Congress he found "the copyright pot bubbling."<sup>7</sup> Lawyers in Los Angeles had challenged special library copying practices and the Special Libraries Association (SLA) sought to deflect this challenge by studying the issue. Robert Bray, the Chairman of the SLA Committee on Photoduplication at the time, also worked at the Library of Congress and this is probably how Clapp learned of the challenge. In that same letter to Miller Clapp noted that copyright revision had begun: "The Copyright Office has a staff, the American Bar Association and other groups have committees. LC is setting up a panel of advisors. Emerson Greenaway [Director of the Philadelphia Public Library system 1951-69 and President

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<sup>5</sup> "Draft Minutes of the ARL Meeting at the Chicago at the Crerar Library [January 30, 1956]," in *Records of the Association of Research Libraries 1932-62 Box 39 Folder Minutes Jan- 1956. Manuscript Division, Library of Congress.*

<sup>6</sup> Ralph Shaw did not serve on the committee. He became president of the ALA in 1957.

<sup>7</sup> "Verner W. Clapp to R.A. Miller [February 13, 1956]," in *Records of the Association of Research Libraries 1932-62. Box 39 Folder Minutes Jan- 1956, Manuscript Division, Library of Congress.*

of the ALA 1957-58] will be the ALA member.”<sup>8</sup> Clapp suggested that while ARL “keep the lead in the studies it has approved, it would be well to coöpt members from other groups, and I would suggest that both Bray and Greenaway be brought into the discussions as soon as possible.”<sup>9</sup>

Miller agreed, as did Chester M. Lewis, President of the SLA and Chief Librarian at the *New York Times*. By the end of March 1956 the committee had added Bray, was renamed the ARL-SLA Committee, and was focusing on surveying special and research libraries about existing copying practices. David was planning to present a progress report to the ARL Miami Meeting on June 17, 1956. In Miller’s handwritten notes from the meeting, the committee’s survey had revealed “chaos as to uniform practice” and “the amount of copying is tremendous.”<sup>10</sup> ARL members at the meeting were disturbed to hear that David had turned over his results to Fisher. Librarian of Congress Mumford tried to calm their fears by pointing out that the Copyright Office was not a prosecutor. He relayed Fisher’s opinion that the publishers were inclined to a literal interpretation of the law and he suggested that the Register’s intent was to create a “uniformity & liberality of interpret.[ation].”<sup>11</sup>

On December 10 of that year the committee, now calling itself the Joint Committee on Photocopying and Copyright, met again in Bray’s office at the Library of Congress. Dalton had withdrawn from the committee since he had left the University of Virginia. David had invited Clapp, who he described as “deeply interested in this problem,”<sup>12</sup> and Fisher to the meeting.

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Robert. A. Miller, "Handwritten notes on 1956 ARL Meeting in Miami [February 23, 1956]," in *Records of the Association of Research Libraries 1932-62. Box 39 Folder ARL - Miami, 1956 Conference. Manuscript Division, Library of Congress.*

<sup>11</sup> Ibid.

<sup>12</sup> "Charles David to Robert A. Miller [November 13, 1956]," in *Records of the Association of Research Libraries 1932-62. Box 32 Folder Joint Committee on Fair Use in Copying. Manuscript Division, Library of Congress.*

Fisher dominated the meeting. He summarized the results of the questionnaire as indicating that there is, “considerable ... photocopying of copyright material,” that “there is little consistency” between libraries, that “there is no evidence from the responses that the practices now employed by libraries have given rise to ... complaints from copyright owners, but there is evidence that the whole question is troublesome and needs clarification.”<sup>13</sup> He then went on to outline the committee’s alternatives,

- a. Do nothing. Let sleeping dogs lie.
- b. Attempt to solve the problem by legislation – either by federal statute or (less likely) by State statute, or by treaty.
- c. Develop agreements with publishers’ groups.
- d. Get permissions from publishers.
- e. Organize an ad hoc operation and see how it works.<sup>14</sup>

Fisher proposed pursuing (e), “trying to get the climate from the Gentlemen’s Agreement of 1935, the broad statement of principles from the British statute [the recently enacted British Copyright Act of 1956], etc.”<sup>15</sup> He did not think that a permissions system was appropriate and did not recommend a legislative solution at this time because it would probably be, like the British statute, too complicated and would restrict library copying practices too much. He then went even further by presenting the committee with a draft of the composition and charge of a “Libraries Fair Use and Photocopying Committee.” He proposed a committee consisting of representatives of the ARL, ALA, SLA, Library of Congress, and Council on Library Resources

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<sup>13</sup> Joint Committee on Photocopying and Copyright, "Joint Committee on Photocopying and Copyright. Minutes of Meeting of December 10, 1956 in the Office of Robert S. Bray," in *Records of the Association of Research Libraries 1932-62. Box 32 Folder Joint Committee on Fair Use in Copying., Manuscript Division, Library of Congress.* (1956).

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

(CLR). The committee's charge would be to study the problems of fair use and photocopying in libraries and recommend solutions to these problems. Further it would serve as a channel for communication with publishers and authors, "owners of copyright and literary property," to consider complaints and suggest remedies. Finally, it was to consider the desirability of legislation.<sup>16</sup> Fisher was not finished. He then presented a "Proposed Policy on Photocopying by Libraries" to the committee.

The policy statement covered both published and unpublished works because, as the law then stood, statutory copyright only protected copyright in published works and common law protected literary property rights of unpublished works. The policy recommended that libraries supply photocopies of works in their collections, "in lieu of loan or manual transcription. ... Only under the following conditions:

1. Not more than one photocopy of any work will be supplied to any applicant.
2. The applicant should be required to sign a statement to the effect that:
  - a. He desires the photocopy solely for his own personal use in research and study;
  - b. He will not publish or further reproduce the material or use it for performance or exhibition without first securing either (1) the permission of the owner of the copyright or literary property right, or (2) competent advice that such publication or use is permissible; and
3. On each photocopy the library will identify the work from which the copy is made, and if the work bears a copyright notice, the notice will be reproduced on the photocopy.

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<sup>16</sup> Ibid.

4. The applicant will pay the cost of making the photocopy.
5. Donor restrictions will at all times be observed”<sup>17</sup>

It is reprinted here in full because it is the first formal policy paper of the 1955-76 revision process concerning libraries and copyright revision and contains some of the themes that will reoccur throughout the two decades of the revision process, including the single copy distinction, the nature of the use, “personal research and study,” the protection of the library from liability, and that the copy will contain a notice of copyright. The proposed policy also contains some provisions that reflect its time; most notably it reflects the state of photocopying technology as a mediated process in which library personnel made copies for users rather than users making their own.

David and Bray agreed to take the results of the meeting to their respective associations, and David also agreed to consult with Miller on arranging ALA representation on the committee, since no one from the ALA was present at the meeting in Bray’s office. Fisher intended to make Mumford aware of the results of the meeting and also discuss the proposed policy with publisher groups. The group planned to meet again to discuss developments.

If Fisher hoped that by presenting a plan of action to librarians, he would be able to nip the issue of photocopying in libraries in the bud before it could derail the nascent copyright revision process, he was mistaken. Before the 1962 reorganization, the ARL suffered from weak central leadership.<sup>18</sup> Without a full-time staff the association relied upon the voluntary leadership of working research library directors who served for two-year appointments as Executive Secretary, while much of the work of the Association was conducted by committees consisting of working directors from member libraries who served in a voluntary capacity. At about this

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<sup>17</sup> Ibid.

<sup>18</sup> McGowan, "The Association of Research Libraries 1932-1962".



time, Miller was replaced as Executive Secretary by William Dix of Princeton University. It took some time, and lunch with Fisher, for Dix to understand, “what a complex and delicate problem this is.”<sup>19</sup> David was near retirement and in the summer of 1957 resigned from the committee that had borne his name.

In what is perhaps an indication of the lack of focus on copyright and the potential revision of research librarians in the late 1950’s, Dix had some trouble finding a replacement for David. He was eventually able to persuade the reluctant Edward Freehafer, of the New York Public Library (NYPL), to take the position of chair and to replace Emerson Greenaway on Fisher’s copyright panel. Freehafer had suggested that one of his senior staff, Rutherford Rogers, be appointed instead (Rogers worked for Freehafer’s at the NYPL from 1954 until 1957, when he became Deputy Librarian of Congress until 1964). Dix was also able to expand the committee to include an ALA representative. This at least meant that there was the potential for librarians to speak with one voice in the revision process, and the committee began calling itself the “Joint Libraries Committee on Fair Use and Photocopying.” Dix bolstered Freehafer by asking Clapp to continue as a consultant from the CLR. In the face of Freehafer’s reluctance, Dix took an active role in the revision process and worked to put the joint committee on an even keel in the spring and summer of 1957. As noted above, he discussed copyright over lunch with Fisher in May, received a phone call from him in July alerting him to developments in the revision process and asking him to arrange an ALA representative for the committee. He worked with Lucille Morsch, Deputy Assistant Librarian of Congress and at that time President of the ALA, to eventually appoint Lowell Martin, Dean of the Graduate School of Library Services at Rutgers. But the most important development of the year was the lengthy correspondence between William

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<sup>19</sup> "William Dix to Charles David [May 28,1957]," in *Records of the Association of Research Libraries 1932-62*. Box 32 Folder Joint Committee on Fair Use in Copying. Manuscript Division, Library of Congress.

Locke, Director of Libraries at MIT, and Dix (who copied these letters to Freehafer.) Locke was “somewhat exercised about the code on photocopying of copyright material proposed by Mr. David’s Committee.”<sup>20</sup> He had consulted legal counsel after the January ARL meeting and remained concerned because he thought the policy was, “damaging to the interests of users of all research libraries.”<sup>21</sup> He had asked for Ralph Shaw’s help in defeating what he described as a code. Shaw was the President of ALA in 1957 and University Librarian at Rutgers. As noted earlier, he had developed a justification for library copying of copyrighted materials based on a distinction between “private” and “fair” use<sup>22</sup> that had not impressed Arthur Fisher in 1956. In a statement dated June 13, 1957 composed by Locke, presumably in advance of the June ARL Meeting, Locke very clearly placed librarians as working on behalf of users, specifically researchers. He advocated delaying action, more study of the needs of researchers, and not relying on the Library of Congress or the Copyright Office. “We research librarians can hope to get advice consonant with our aims and the interests of our users only by retaining competent independent legal advice.”<sup>23</sup>

By September of 1957 the membership of the committee had stabilized with Freehafer, Bray, and Martin, and Clapp as a consultant. Dix proposed that Freehafer should talk to Fisher, but he should not be connected to the committee, “since the interests of the Copyright Office and of librarians may not be completely identical.”<sup>24</sup> Despite this advice, Freehafer, at Fisher’s suggestion, convened the committee with Clapp and Fisher in New York City on October 31.

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<sup>20</sup> "William Locke to William Dix [May 28, 1957]," in *Records of the Association of Research Libraries 1932-62, Box 32 Folder Joint Committee on Fair Use in Copying. Manuscript Division, Library of Congress.*

<sup>21</sup> Ibid.

<sup>22</sup> Ralph R. Shaw, *Literary Property in the United States* (Washington, D.C: Scarecrow Press, 1950).

<sup>23</sup> William Locke, "Photocopying of Copyright Material [June 13, 1957]," in *Records of the Association of Research Libraries 1932-62. Box 32 Folder Joint Committee on Fair Use in Copying. Manuscript Division, Library of Congress.*

<sup>24</sup> "William Dix to Edward Freehafer [September 11, 1957]," in *Records of the Association of Research Libraries 1932-62. Box 32 Folder Joint Committee on Fair Use in Copying. Manuscript Division. Library of Congress.*

The committee decided to consider the five approaches outlined by Fisher to the David Committee. If necessary, they would draw up a code for purposes of discussion at the three library associations, “and perhaps in the American Book Publishers Council and the Authors League.”<sup>25</sup> They would also “become informed about the thinking of the Copyright Office as it prepares to deal with any proposal that may arise in Congress or elsewhere for legislation ... and give the Register of Copyrights the benefit of the Committee’s deliberations on [the question of fair use by libraries].”<sup>26</sup> Dix, after consulting a reluctant Locke, agreed to Freehafer’s request that Fisher be appointed as a consultant to the committee. The committee was quite inactive during 1958. In September of that year Lucille Morsch suggested adding an American Association of Law Libraries (AALL) representative to the committee (Julius Marke, Law Librarian at New York University, joined the committee after the meeting). This made the committee even more representative of the profession and added some much needed legal expertise.<sup>27</sup>

While the committee continued to coalesce, the use of photocopiers in research libraries changed significantly with Michigan, Minnesota and Cornell’s agreement to substitute copies of articles for the interlibrary lending of original journals. As Donald Coney (University Librarian, UC Berkeley) wrote to Dix, “This will put an official character to the problem of photocopy vs. the copyright law.”<sup>28</sup> Up to this point, photocopiers in libraries had largely been used to make individual copies on behalf of individual users, a use that librarians could, and would, justify as a

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<sup>25</sup> "Edward Freehafer to William Dix [November 1, 1957]," in *Records of the Association of Research Libraries 1932-62. Box 32 Folder Joint Committee on Fair Use in Copying. Manuscript Division, Library of Congress.*

<sup>26</sup> Ibid.

<sup>27</sup> Interestingly, the Medical Library Association (MLA) never seems to have joined the Joint Committee. This may be because, until 1968 and the Williams & Wilkins case, the MLA did not seem to be particularly active in the revision process in general. By the late 1960’s the coordinating role of the Joint Committee was diminishing and was being assumed instead by association staff and lawyers and, much later, by the Coalition of Library Associations.

<sup>28</sup> "Donald Coney to William Dix [December 5, 1958] ", in *Records of the Association of Research Libraries 1932-62. Box 12 Folder Committees and their Membership. Manuscript Division, Library of Congress.*

continuation of note taking by scholars and students using a more convenient technology. In some ways, the substitution of photocopies of articles for journals in interlibrary lending was another such continuation. The copy was still made by *a* library on behalf of an individual user. However, in another way this was different. The copy was now made primarily for the convenience of the lending library (which would retain the original for use in the library and save on postage costs. This change also meant that one journal subscription could satisfy local users *and* interlibrary loan borrowers without diminishing access to either group. As the use of copies in interlibrary loan grew, publishers would come to worry that interlibrary loan would substitute for local subscriptions.

Dix responded to Coney, telling him that he had copied his letter to Freehafer and reminding him that Freehafer chairs a “rather inactive committee on the subject.”<sup>29</sup> Dix, clearly growing impatient, asked Freehafer to report on the committee’s activities at the January 1959 ARL meeting. Fisher’s continuing influence is clear from Freehafer’s report. He outlined six possible courses of action, “a) do nothing b) secure statutory provision permitting copying c) obtain authority under statute to copy [governed by] some regulatory body d) set up a working arrangement, agreed upon statement of customary practice, or reasonable code of procedure e) establish a clearing house for getting free permissions f) through the clearing house, impose and collect a surcharge on photocopy prices”<sup>30</sup> that were very similar to Fisher’s five possible courses of action outlined at the December 1956 meeting.<sup>31</sup> The committee’s preferred course of action, (d), was also in line with Fisher’s suggestion. However, Freehafer also suggested further

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<sup>29</sup> "William Dix to Donald Coney [January 9, 1959]," in *Records of the Association of Research Libraries 1932-62. Box 6 Folder General Correspondence 1959-1960. Manuscript Division, Library of Congress.*

<sup>30</sup> Edward G. Freehafer, "Report of the Joint Libraries Committee on Fair Use in Photocopying [January 1959]," in *Records of the Association of Research Libraries 1932-62. Box 12 Folder Committees and their Membership. Manuscript Division. Library of Congress.*

<sup>31</sup> Joint Committee on Photocopying and Copyright, "Joint Committee on Photocopying and Copyright. Minutes of Meeting of December 10, 1956 in the Office of Robert S. Bray."

discussion, continued review, and that the ARL seek legal counsel. The committee had shared a revised version of Fisher's policy with the ARL membership before the meeting and Freehafer noted that reaction of the membership fell into four groups. The majority could accept the proposal. However, "a considerable number believe it should be modified. Some members feel that some kind of new approach is needed and still others that a policy of no action is to be preferred."<sup>32</sup> Freehafer then proposed that the proposal continue to be reviewed and that the Committee be authorized to seek legal counsel, "to help the committee with interpretation of the law."<sup>33</sup>

At the ARL Meeting in June of 1959, Freehafer reported the results of a study of the photocopying orders at NYPL taken in March 1959. This was then expanded to another five libraries. Freehafer informed the January 1960 ARL meeting of this study and also that the legal firm of Webster, Sheffield and Chrystie would be reviewing the study in February. "The purpose of this study is to obtain further data useful in attempting to determine the extent, if any, to which photocopying by libraries may in fact produce economic hardship to copyright owners, and to provide further data needed as a factual basis for developing recommended practice in respect to photocopying."<sup>34</sup> Freehafer expected to be able to give a full report at the June 1960 meeting.

Dix's lack of confidence in Freehafer's leadership of the committee was again apparent in March of 1960 when he wrote to him pointing out "an official looking notice from Arthur Fisher inviting all persons interested in the copyright law to submit statements not later than April 15, 1960" on page 95 of the February 23<sup>rd</sup> edition of the *Library of Congress Information Bulletin*. "I am sure that your Committee on Fair Use is already doing what needs to be done,

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<sup>32</sup> Freehafer, "Report of the Joint Libraries Committee on Fair Use in Photocopying [January 1959]."

<sup>33</sup> Ibid..

<sup>34</sup> "Letter from Webster, Sheffield, Chrystie to ARL [1959]," in *Records of the Association of Research Libraries 1932-62. Box 6 Folder General Correspondence Sept. 1959 -1960, manuscript Division, Library of Congress.*

but on the chance that you have missed this formal notice I call it to your attention. It is undoubtedly a tricky business, but it occurs to me that if librarians fail to respond to this appeal by making any statement, their position may be weaker later if they are forced to object to statements made by others. You are undoubtedly in close touch with Fisher ...”<sup>35</sup>

There is no evidence in the ARL records or in the published government records that Freehafer’s committee ever made such a statement. However, the record of the January 1961 ARL meeting indicates that Freehafer did report the results of the study of copying orders at the NYPL to the membership in June 1960. At that meeting the Committee was asked to expand this study to include a study of copying in Princeton’s libraries, perhaps because most ARL libraries were academic, and NYPL was perceived as unrepresentative of copying activity in the libraries of most Association members. By January 1961 Freehafer was able to report to the 56<sup>th</sup> ARL Meeting that, “both studies support the case for libraries making one copy of a published work or any part thereof. Counsel’s tentative opinion, however, does not endorse the making of multiple copies.”<sup>36</sup> This underwhelming conclusion was the result of three years work. It did, however, help solidify the ARL position, one common to most library associations in this period, that as Freehafer stated in a letter to Stephen McCarthy in March of 1961, “as a normal extension of library activities, libraries should be permitted to make one copy of the published materials in their collection for a user.”<sup>37</sup> Whether as a part of established professional practice, as agreed to

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<sup>35</sup> "William Dix to Edward Freehafer [March 4, 1960]," in *Records of the Association of Research Libraries 1932-62. Box 6 Folder General Correspondence Sept. 1959 -1960, Manuscript Division, Library of Congress.*

<sup>36</sup> Joint Libraries Committee on Fair Use in Photocopying, "Report of the Joint Libraries Committee on Fair Use in Photocopying [January 27, 1961]," in *Records of the Association of Research Libraries 1932-62. Box 12 Folder Committees and their Membership, Manuscript Division, Library of Congress.*

<sup>37</sup> "Edward Freehafer to Stephen A. McCarthy [March 29, 1961] ", in *Records of the Association of Research Libraries 1932-62. Box 12 Folder Committees and their Membership, Manuscript Division, Library of Congress.*

in the Gentlemen's Agreement of 1935,<sup>38</sup> or as a technological extension of traditional practice of a scholar's note-taking activity, the idea that library users, or libraries acting on behalf of individual users, could under certain circumstances make a single copy of all or part of a copyrighted work from the library collection remained a stable element in the position of the ARL throughout the revision process and was finally codified in §108 of the 1976 Copyright Act.

Freehafer's relative inactivity began to frustrate Verner Clapp and on March 23, 1961, he wrote to Freehafer and copied his letter to Stephen McCarthy (Director of Libraries at Cornell and then serving as Executive Secretary of ARL). Clapp very precisely lays out his actions between March 10, 1961 and this letter. On January 20, the committee had agreed to get the report published, Freehafer wanted to check with McCarthy. Chester Lewis wanted to publish the report in *Special Libraries*, and Freehafer was out of town. Clapp checked with McCarthy who referred the issue back to the committee, so Clapp went back to Lewis who decided to publish.

Because I was now well into this business I then repeated the process first with Samray Smith (to ascertain whether it is still possible to get the report into the May issue of the ALA Bulletin – it is) and Richard Chapin [of Michigan State University, who had recently become the ALA representative on the committee] who was already in touch with Smith, but uncertain how to proceed. It was left that Chapin would supply Smith with the final text, which he would check with you and Hogeland [of Webster, Sheffield and Chrystie] next Monday (March 27). ... I trust you will not find this meddling objectionable. It is in the interest of securing adherence to the Committee's decision of January 20, 1961 and of avoiding the loss of another six-months' or even a year's more time.<sup>39</sup>

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<sup>38</sup> Peter Hirtle, "Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935," *Journal of the Copyright Society of the USA* 53, no. 3-4 (2006).

<sup>39</sup> "Verner W. Clapp to Edward Freehafer [March 23, 1961]," in *Records of the Association of Research Libraries 1932-62. Box 12 Folder Committees and their Membership, Manuscript Division, Library of Congress*.

The study in its final form was published in *Special Libraries*.<sup>40</sup> The final recommendation of the Committee was that “it be library policy to fill an order for a single photocopy of any published work or any part thereof.”<sup>41</sup> In an appendix to the report, the lawyers of Webster, Sheffield, Fleischmann, Hitchcock & Chrystie stated “that the granting of a reader’s request for a single copy of such material is so clearly a direct and natural and necessary incident of ordinary library service and practice as to raise no serious question of copyright infringement.”<sup>42</sup> However, they explicitly did not complicate the report by offering an opinion about the making of multiple copies.

This report was the first of a number of reports designed to use current practice to bolster one position or another in the copyright revision process. Obviously biased because it was financed and written by librarians and their legal counsel, unscientific in that it was based on a convenience sample of short periods of copying orders from a few large libraries, and quickly to become outdated in that it reflected mediated copying not unmediated copying by users, or copying for interlibrary loan, the study helped the ARL and other library associations solidify their position, but it did not convince anyone outside of librarianship, including interested parties in publishing or in Congress, for example. In fact it did not even convince all librarians. Myron Jacobstein (a law librarian at University of Colorado, Boulder) wrote to Julius Marke, pointing out weaknesses in the Committee’s report and urging the AALL not to support it.

During this period, on November 12 1960 to be precise, Arthur Fisher died and was replaced as Register of Copyright by Abraham Kaminstein on December 24 of that year. This altered the nature of the relationship between the Copyright Office and the library associations.

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<sup>40</sup> Joint Libraries Committee on Fair Use in Photocopying, "Report on Single Copies," *Special Libraries* 52 (1961).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*



Fisher had been very engaged in encouraging libraries to become involved in the revision process and had sought to help them develop their positions with regard to the revision of copyright law, even in the face of some suspicion from librarians like Locke. He had particularly hoped for final agreement between librarians and publishers in an effort to neutralize the issue of library photocopying in the upcoming legislative revision process. Abraham Kaminstein was less intimately involved. He had known some leading librarians, such as Clapp and Rogers, when they were at the Library of Congress. He did not oppose libraries and their positions with regard to copyright, but he sought to play the role of neutral bureaucrat in this aspect of the revision process by bringing all parties together. His ultimate aim seems to have been to shepherd a bill through Congress that modernized U.S. copyright and went some way towards harmonizing U.S. law with developments in international copyright. In practice this meant a bill that extended copyright terms, removed trade barriers, and could handle the proliferation of copying technologies that had developed, and continued to proliferate, since the passage of the 1909 Act.

## 5.0 1961-67: FROM PRELIMINARY DRAFT TO PASSAGE OF HR 2512

Fisher's death in 1960 and his replacement with Kaminstein also coincided with the beginning of a new phase in the revision process. The process was moving from a period of study to the development of early drafts of legislation. In July of 1961 the House Judiciary Committee released *Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*.<sup>1</sup> On the first page of this report, in a summary of the highlights of the principal recommendations of the Copyright Office, both fair use and library photocopying appear. Obviously Kaminstein<sup>2</sup> and the Copyright Office attached some importance to both issues. Specifically, Kaminstein recommended that the statute should recognize the doctrine of fair use and "permit a library to make a single photocopy of material in its collections for research purposes under explicit conditions."<sup>3</sup> In the body of the report the Copyright Office recognized that the question of whether or not fair use applied to photocopying by a library, "merits special consideration"<sup>4</sup> but had not been decided by the courts. The report noted that "scholars have always felt free to copy by hand from the works of others for their own private research and study"<sup>5</sup> and, while neatly avoiding offering an opinion as to whether to not such copying is an infringement, went on to point out the importance of this element in the

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<sup>1</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 1."

<sup>2</sup> And by extension Fisher. In his preface to the report, Kaminstein credits Fisher with planning and organizing the entire general revision program including the 34 studies and this report.

<sup>3</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 1," v.

<sup>4</sup> *Ibid.*, 25.

<sup>5</sup> *Ibid.*

research process and the growing reliance of researchers on libraries and the photocopier. In the same section the Copyright Office also pointed out that “to permit multiple photocopying may make serious inroads on the publisher’s potential market.”<sup>6</sup> They balanced these two competing concerns by noting that, “when a researcher wants only a relatively small part of a publication, or when a work is out of print, supplying him with a single photocopy would not seriously prejudice the interests of the copyright owner”<sup>7</sup> but that,

where an industrial concern wishes to provide multiple copies of publications, particularly of scientific and technical journals, to a number of research workers on its staff ... [the] industrial concern should be expected to buy the number of copies it needs from the publisher, or get the publisher’s consent to its making of photocopies.”<sup>8</sup>

They also noted that a contract between companies and publishers offering blanket permission to copy might be the best solution for such commercial copying. The report made three recommendations that I reproduce here in full since they will form the basis of the public discussion of this topic that followed release of this report and eventually the draft bill. These appear as III (B)(2) in Chapter III “Rights of Copyright Owners” of the report. Where section A deals with the rights of copyright owners. Section B deals with “Special Rights, Limitations, and Exceptions” and section B(1) deals with “Fair Use in General.” It is clear from this arrangement that at this stage the Copyright Office regarded the issue of photocopying in libraries as an “application of the principle of fair use.”<sup>9</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid., 26.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., 25.

The statute should permit a library, whose collections are available to the public without charge, to supply a single photocopy of copyrighted material in its collections to any applicant under the following conditions:

- (1) A single photocopy of one article in any issue of a periodical, or of a reasonable part of any other publication, may be supplied when the applicant states in writing that he needs and will use such material solely for his own research.
- (2) A single photocopy of an entire publication may be supplied when the applicant also states in writing, and the library is not otherwise informed, that a copy is not available from the publisher.
- (3) Where the work bears a copyright notice, the library should be required to affix to the photocopy a warning that the material appears to be copyrighted.<sup>10</sup>

The ARL had no immediate reaction to this report. At the July 1961 meeting the members discussed and approved the Joint Committee's report in which the Committee recommended that libraries agree to a policy of making single copies for researchers. But at no point in that meeting did anyone raise the Copyright Office's recommendation. It is probable that no one at the meeting had yet seen the House Committee Print which was released in that same month. However, no one – including Freehafer, Clapp, or Stephen McCarthy the Executive Secretary – appeared to be aware that the Copyright Office was recommending revision that was at least partially in line with the Committee's position. In September of that year McCarthy

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<sup>10</sup> Ibid., 26.

wrote to Senator Eugene J. McCarthy thanking him for his assistance in passing an appropriation for library acquisitions in India, Pakistan, and the United Arab Republic, but there is only one indication in the ARL records that copyright was a developing issue in late 1961 through 1963. To give everyone involved their due, in October 1962 the Cuban Missile Crisis occurred and in November 1963 President Kennedy was assassinated. Copyright revision was important, but the importance of progress in revising this law paled in comparison with other events of the time.

During these years there is little evidence in the ARL records that copyright was on the agenda of the ARL. The subject did not appear on any of the semi-annual meeting agendas. The one exception in the archive is a copy of an article published in February 1962 by Clapp in *Law Library Journal* titled "Library Photocopying and Copyright: Recent developments"<sup>11</sup> that makes it clear that he was aware of Report of the Register of Copyrights. Most of the article consists, in classic Clapp style, of a discussion of the history of copying in libraries going all the way back to Sumerian archives and ending with the Joint Committee's recommendation that "it be library policy to fill an order for a single photocopy of any published work or part thereof."<sup>12</sup> At the end of the article he notes that the Register's Report makes provision for library photocopying, but does not comment upon it and lists it as one of a number of developments including the Committee to Investigate Copyright Problems Affecting Communication in Science and Education (CICP), which, according to Clapp, was "inclined to favor an ASCAP-like<sup>13</sup> arrangement,"<sup>14</sup> and the National Science Foundation (NSF), which had commissioned George Fry to study copyright and the dissemination of scientific information.

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<sup>11</sup> Verner W. Clapp, "Library Photocopying and Copyright: recent developments," *Law Library Journal* 55 (1962).

<sup>12</sup> *Ibid.*: 15.

<sup>13</sup> The American Society of Composers, Authors and Publishers, which collected (and continues to collect) licensing fees from users (like radio stations) of copyrighted works by their members and members of reciprocal organizations and distributes them as royalties to ASCAP members.

Of the four meetings held by Register Kaminstein between September 1961 and March 1962 to solicit discussion of his 1961 Report, only the first – on September 14, 1961 – included any discussion of library issues.<sup>15</sup> Freehafer was present at this meeting along with the ARL legal counsel, William Hogeland. Rutherford Rogers was also present, but only in his capacity at Chief Assistant Librarian of Congress, to welcome the participants. Freehafer was again present at the November 10 meeting that was held in New York. In this case he was the only librarian representative. Rogers is the only librarian listed as being present at the January 24, and March 15, 1962 meetings (both held in Washington, D.C.), and he does not appear in the transcript.<sup>16</sup> It would appear that, except for the first meeting, librarians simply wanted one observer present. This is reasonable since the specific issues of interest to the profession were discussed at that first meeting. However, this is another indication of how quickly librarians, for all the early talk of interest the copyright notice, duration, and the manufacturing clause, focused on the specific interests of their profession rather than the wider interests of users of copyrighted works.

At the September 1961 meeting Freehafer spoke in general terms about the 1961 study of copying practices and repeated the policy on single copies that had been accepted by the professional associations. He noted that some of the Joint Committee thought the issue of photocopying in libraries was an aspect of fair use and that, as photocopying and other copying technologies developed in the future, maximum flexibility could be found by leaving this specific form of use uncodified. Many participants at the September 1961 meeting were not convinced that the Copyright Office was right in recommending codification of the doctrine of fair use at all. This concern was not confined to explicit representatives of copyright holder

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<sup>14</sup> Clapp, "Library Photocopying and Copyright: recent developments," 15.

<sup>15</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 2," 31-34.

<sup>16</sup> Ibid.

interests. Hogeland, reinforcing Freehafer's statement, while not opposing codification of fair use, did not support the codification of photocopying in libraries as part of fair use unless the whole doctrine of fair use was to be codified in detail. He argued that to do so would take away flexibility.

The representatives of publishers and authors, most notably Horace Manges, of the ABPC, and Irwin Karp, of the Authors League of America, while not opposed to recognition of the existence of the doctrine of fair use in the statute, were opposed to the Copyright Office's recommendations on photocopying in libraries. They did not regard library copying as fair use but as infringement. As Manges stated, "The publishers' reaction to this is violent. There is nothing we disagree with more completely."<sup>17</sup> As well as speaking at some length on the issue at the September meeting, both men sent extensive written comments that included their opposition to the library photocopying recommendations to the Copyright Office (Karp sent two.) No written comments from librarians or the library associations were published in the written record of these discussions.<sup>18</sup>

During the first half of 1963 the Copyright Office held four meetings to consider a preliminary draft of a revised copyright law that the Office had prepared. The text of this draft, with transcripts of the meetings was published in September 1964. The relevant sections on fair use (§6) and copying and recording by libraries (§7) is reprinted at Figure 1.

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<sup>17</sup> Ibid., 35.

<sup>18</sup> Ibid.

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**PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW**

§6. LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE. All the exclusive rights specified in section 5 shall be limited by the privilege of making fair use of a copyrighted work. In determining whether, under the circumstances of any particular case, the use of a copyrighted work constitutes a fair use rather than an infringement of copyright, the following factors, among others, shall be considered: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use upon the potential value of the copyrighted work.

§7 LIMITATIONS ON EXCLUSIVE RIGHTS: COPYING AND RECORDING BY LIBRARIES. Notwithstanding the provisions of section 5, any library whose collections are available to the public or to researchers in any specialized field shall be entitled to duplicate, by any process including photocopying and sound recording, any work in its collections other than a motion picture, and to supply a single copy or sound recording upon request, but only under the following conditions:

(a) The library shall be entitled, without further investigation, to supply a copy of no more than one article or a contribution to a copyrighted collection or periodical issue, or to supply a copy or sound recording of a similarly small part of any other copyrighted work.



(b) The library shall be entitled to supply a copy or sound recording of an entire work, or of any more than a relatively small part of it, if the library has first determined, on the basis of a reasonable investigation that a copy or sound recording of the copyrighted work cannot readily be obtained from trade sources.

(c) The library shall attach to the copy a warning that the work appears to be copyrighted.<sup>19</sup>

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**Figure 1 §6 and §7 of the Preliminary Draft for Revised U.S. Copyright Law (1964)**

The two ARL meetings in 1962 were dominated by the reorganization of the association and the creation of a full time secretariat in Washington D.C.,<sup>20</sup> and copyright did not appear on the agenda of either meeting. The issue was not discussed in 1963 either. However, Freehafer did speak at the meeting the Copyright Office convened at the Library of Congress on February 20 1963 to discuss the Preliminary Draft. He noted that both the ALA and ARL had endorsed the “library policy to fill an order for a single photocopy of any published work or part thereof.” He noted that this policy had been amended so that, “before making a photocopy of an entire work, a library should make an effort, by consulting standard sources, to determine whether or not a copy is available through normal trade channels.”<sup>21</sup> This amendment resembled §7(b) transcribed in Figure 1. Freehafer concentrated on existing library association policy because he saw the preliminary draft for the first time the day before the meeting and the Joint Committee had had no time to respond. Irwin Karp, of the Authors League, felt no such restraint. He made the

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<sup>19</sup> ———, "Copyright Law Revision Part 3," 6-7.

<sup>20</sup> McGowan, "The Association of Research Libraries 1932-1962".

<sup>21</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 3," 161.

argument that §7 effectively made libraries into publishers and bookstores, and the limits to the section in §7 (a) through (c) were illusory.

By late 1963, David Logsdon, then President of ARL, and Director of Libraries at Columbia University, had replaced Freehafer on the Joint Committee with Charles Gosnell, Director of Libraries at New York University and Chair of the ALA Committee on Copyright because Freehafer was to be the next President of ARL. However, James Skipper, the first Executive Secretary of the ARL since the reorganization, was concerned that Gosnell was far more engaged in the ALA than ARL, and since this was a *joint* committee, he could not represent both associations. By early 1964 Clapp, from his position at the CRL, was becoming frustrated: “If you know either of these gentlemen [Gosnell and Freehafer] (and I do), nothing will be done about another meeting or the election of a Chairman until some third party like myself thumps on the table. Because I have no official right to do so, I hereby pass the thumper to you.”<sup>22</sup> Clapp urged Skipper to tell Gosnell to organize a meeting, and elect a chair soon: “You may quote my concern in the matter which also reflects an enquiry made to me by Chester Lewis.”<sup>23</sup> While Skipper continued to try and stabilize the committee and find a willing leader, Clapp continued to fulminate. In April he again wrote to Skipper, “I warned you that you might have trouble. Neither Freehafer nor Gosnell seem to have any sense with respect to committee work. You will have to make the decision and apply pressure until they are carried out.”<sup>24</sup> He suggested Gosnell as the continuing ALA representative, Freehafer as continuing ARL representative and that Skipper should “require Freehafer to call a meeting of the committee to

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<sup>22</sup> "Verner W. Clapp to James Skipper [March 31, 1964].", in *Records of the Association of Research Libraries, Unprocessed materials #17,182 Box 7 of 8 Folder ARL - Committees - Joint Committee on Fair Use in Photocopying, Manuscript Collection, Library of Congress.*

<sup>23</sup> Ibid.

<sup>24</sup> "Verner W. Clapp to James Skipper [April 16, 1964].", in *Records of the Association of Research Libraries, Unprocessed materials #17,182 Box 7 of 8 Folder ARL – Committees – Joint Committee on Fair Use in Photocopying, Manuscript Division, Library of Congress.*

elect a chairman and keep after him until he does so.”<sup>25</sup> The problem was finally resolved by replacing Freehafer with Rutherford Rogers, who had recently become the University Librarian at Stanford, and then appointing Rogers to chair the Committee.

Rogers and Gosnell both spoke at the June 1964 ARL Meeting in St. Louis. The National Educational Association (NEA) was active in lobbying for a broad exemption for copying in educational settings. Gosnell, reflecting the perspective of the ALA, pointed out that this was far more extensive than the Joint Committee’s reliance on fair use and far more threatening to publishers. However, he and Rogers both proposed that the ARL should allocate funds to join in an alliance of educational interests and for more funding for legal advice in anticipation of a draft bill from the Copyright Office.<sup>26</sup>

On July 20, 1964 Congressman Emanuel Celler, Chairman of the House Committee on the Judiciary, introduced HR.11947, a Bill for the General Revision of the Copyright Law. This bill contained no separate section limiting the exclusive rights of copyright holders and recognizing library photocopying. Instead the section on fair use had been slightly expanded (see figure 2.)

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#### **§ 6. Limitations on exclusive rights: fair use.**

Notwithstanding the provisions of section 5, the fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an

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<sup>25</sup> Ibid.

<sup>26</sup> Association of Research Libraries, "Sixty-fourth Meeting of the Association of Research Libraries Saturday June 27, 1964," in *Records of the Association of Research Libraries. Unprocessed materials #17,182 Box 1 of 8 Folder ARL Minutes to be published. Manuscript Division, Library of Congress.*

infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>27</sup>

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**Figure 2 §6 Limitations on Exclusive Rights: Fair Use (HR. 11947) 1964**

At the June 27, 1964 Meeting of the ARL Charles Gosnell informed the assembled directors that the NEA was lobbying for a general exemption from copyright for educational users of copyrighted works. Gosnell pointed out that libraries did not go this far and were satisfied that the uses of copyrighted works outlined in the policies accepted by the ARL and the ALA constituted fair use. There was no specific discussion of the language of the bill soon to be introduced to Congress. Indeed, there was no indication that Gosnell knew, or did not know, of the removal by the drafters of the bill of the explicit exemption for libraries. However, Gosnell's comments indicated that at this point librarians were satisfied to rely on fair use as protection for their activities. In an undated document that is filed with papers from this meeting Rogers noted that the Joint Committee had been less active because of his location on the west coast and because all interested parties were awaiting an opportunity to influence congressional action on a

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<sup>27</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 5," 5.

draft bill. He anticipated hearings on the draft legislation and noted that the Joint Committee was seeking legal counsel and exploring the possibility of a “united front” with the NEA.<sup>28</sup>

However, by the time Gosnell spoke at a meeting (at which he identified himself as from the ALA) organized by the Copyright Office on August 6, 1964 to discuss HR.11947 he was “disturbed by the whole tone of the bill.” He complained that “the consumer has been forgotten altogether” and doubted that the section on fair use would enable libraries to lend, never mind photocopy.<sup>29</sup> In her comments at the same meeting, Barbara Ringer (at that time Assistant Register of Copyrights for Examining and soon to be appointed Assistant Register of Copyrights in 1966, and Register in 1973) noted that §7, the library exemption, of the preliminary draft bill had been “dropped entirely because of strong opposition on both sides (or, I might say, on all sides) to any provision of that sort.”<sup>30</sup> An interesting three-way struggle developed at this meeting between Harry Rosenfield, representing the NEA, who sought to expand fair use to exempt the kind of uses made by educators of copyrighted works, Irwin Karp, representing the Authors League of America, who sought to limit fair use as much as possible, and Charles Gosnell, somewhere in the middle, who sought to ensure that what he regarded as libraries traditional practices of lending and of copying would be allowed. Kaminstein, the Register of Copyrights, sought to codify the fair use doctrine but not to limit or expand the doctrine. As he noted in response to Gosnell, “Our intention ... was to embody in this provision [§6] the present law as developed by the courts. The interpretations that have been given here really reflect the

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<sup>28</sup> Rutherford Rogers, “The Joint Libraries Committee on Fair Use in Photocopying Report to the 64th Meeting of the ARL,” in *Records of the Association of Research Libraries, Unprocessed materials #17,182, Box 1 of 8, Folder ARL Minutes to be published 65th. Manuscript Division, Library of Congress* (1964).

<sup>29</sup> U.S. Congress. House Committee on the Judiciary, “Copyright Law Revision Part 5,” 66.

<sup>30</sup> *Ibid.*

positions of people who are engaged on both sides of the current controversy over photocopying.”<sup>31</sup>

Rogers continued his effort to maintain the Joint Committee as the coordinator of librarian involvement in the revision process in 1965, arguing that the Joint Committee, “should carry the ball at congressional hearings.”<sup>32</sup> On February 4, 1965 HR.4347 and S.3008, identical copyright revision bills were introduced into the newly elected 89<sup>th</sup> Congress. On March 16, he wrote to Herbert Fuch, Counsel to Subcommittee No. 3 of the House Judiciary Committee. Taking advantage of his previous position at the Library of Congress, Rogers noted his previous relationship via “Kami.” He pointed out that the Joint Committee, consisted of the major library associations and thus represented “30,000 – 40,000 librarians” and asked to testify concerning HR.4347.<sup>33</sup>

On June 3, 1965 Rogers, Chair of the Joint Committee and Director of the University Libraries at Stanford since 1964, testified on behalf of the Joint Committee (and therefore on behalf of the ARL, ALA, AALL, SLA, and Music Library Association) before Subcommittee No. 3 of the House Committee on the Judiciary. His testimony was one of only two statements by librarians (the other being by Charles Gosnell on behalf of the ALA) out of 138 statements that the subcommittee heard in 22 days of hearings between May 26 and September 2, 1965. He noted that the library associations agreed with the approach of HR.4347, “that is, the silent approach in which no statutory reference is made to library copying.”<sup>34</sup> He explained that, “statutory provisions codifying present practices or limiting present practices in anticipation of

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<sup>31</sup> Ibid., 105.

<sup>32</sup> "Rutherford Rogers to James Skipper [March 9, 1965]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 1 of 64 Folder Copyright 1967, Manuscript Division, Library of Congress.*

<sup>33</sup> "Rutherford Rogers to Herbert Fuch [March 16, 1965]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 1 of 64 Folder Copyright 1967, Manuscript Division, Library of Congress.*

<sup>34</sup> *Copyright Law Revision: Hearings before Subcommittee No. 3 of the Committee on the Judiciary.*, 452.

new technology would crystallize with statutory permanence a subject better left to the flexible adjustment of interdependent forces.”<sup>35</sup> He noted that the associations had no position on multiple copies because they did not regard such copying as a traditional library function. Furthermore, Rogers went on to argue that the strategy of the drafters of HR.4347 to, “no more than acknowledge the existence of the judicial doctrine”<sup>36</sup> was preferable to what he described as the attempts by the drafters of HR.11947 (the previous Bill introduced in the 88<sup>th</sup> Congress) and the Register’s Preliminary Draft of 1961 to delineate in the statute, “the scope or content of the fair use doctrine.”<sup>37</sup> See figure 3 for the full text of §107 on fair use.

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### **Figure 3**

#### **§107 Limitations on exclusive rights: fair use.**

Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright.<sup>38</sup>

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#### **Figure 3 HR.4347 §107 1965**

Rogers devoted approximately two pages of his testimony to the issue of library copying and fair use. He took about twice as much time and space to explain librarians’ interest in the copyright notice and noted in his written statement that “it is probable that more librarians disagree with this suggested relaxation than with any other provision of the current bill.”<sup>39</sup> §404 of HR.4347 did away with many of the then existing formalities required to acquire copyright,

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid., 5.

<sup>39</sup> Ibid., 450.

such as requiring a notice of copyright. He explained that librarians relied on the notice of copyright in determining versions of documents to collect and in assisting library users. The Joint Committee urged that §404 be amended so that only inadvertent omission of the notice did not result in forfeiture of copyright, as had been the case in the Register's Preliminary Draft of 1961. Roger's also testified concerning the duration of copyright, in which he argued for a single fixed term of copyright for all works of 75 years from the date of publication, or 100 years from the date of creation, whichever expired first, but signaled that librarians had no strong preference in this area. Finally, he supported extension of federal copyright law to cover unpublished materials. He finished his testimony by neatly and simultaneously complementing Herbert Fuch, Counsel to the Senate Subcommittee, and the staff of the Copyright Office and reminding the Subcommittee that he had served as Deputy Librarian of Congress from 1957 until 1964.

He was questioned quite extensively about single copying in libraries and fair use, librarians' preferences for a fixed duration of copyright terms, and about the depth of librarians' support for the general educational exemption being pushed by the NEA's Ad Hoc Committee.

Later in the summer of 1965 the Senate also held hearings on the companion bill S.1006. Charles Gosnell submitted testimony at these hearings. The only other librarian to testify was Quincy Mumford, Librarian of Congress, who, despite being given ample opportunity by Senator McClellan, refused to voice any opposition to the bill. Instead, he saw his role as supporting the work of the Copyright Office, a unit within his organization.<sup>40</sup> Even though Gosnell identified himself at the Director of Libraries at New York University, he did not represent academic research libraries and submitted his testimony on behalf of the ALA.<sup>41</sup>

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<sup>40</sup> "Copyright Law Revision. Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary," (Washington, D.C.: Government Printing Office, 1967), 61.

<sup>41</sup> *Ibid.*, 136-8.



In late 1965 there was a sense within the ARL that the struggle to protect what many librarians regarded as the traditional library practice of copying excerpts and sometimes whole works for research and study, either by or on behalf of library users, was and would remain legally protected by the doctrine of fair use, the existence of which was simply noted in the legislation. Further, that the more heated struggle was now between the broader educational community and publishers. On September 15, 1965, Robert T. Jordan of the CLR reported to Clapp on a meeting between senior staff of the Copyright Office and members of the NEA's Ad Hoc Committee. He noted that the educators were pushing for a statutory exemption and that they did not feel the need to compromise with publishers. Senator McClellan and Congressman Kastenmeier were seen as allies. As Jordan noted, "no one in Congress could conceivably be friendly to the educators than McClellan and Kastenmeier."<sup>42</sup> Also that, "the publishers are in a state of acute distress."<sup>43</sup> As Skipper wrote to Douglas Bryant, University Librarian of Harvard, in a three-page memo entitled "Library Legislation as of October 5, 1965," consisting of short précis of each relevant legislative effort: "Copyright Revision. Basic dispute at present is between educators and publishers, the former insisting on their right to make and project or broadcast limited amounts of copyrighted material. The fair use concept is obviously central to the broader objective being promoted by the educators."<sup>44</sup> Eventually, the House rejected the

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<sup>42</sup> "Memo from Robert Jordan to Verner W. Clapp on Copyright - Report from Rosenfield on September 10 Meeting [September 15, 1965]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632 Box 1 of 64 Folder Copyright 1967, Manuscript Division, Library of Congress.*

<sup>43</sup> Ibid.

<sup>44</sup> James Skipper, "Memo to Douglas Bryant concerning "Library Legislation as of October 5, 1965." " in *Records of the Association of Research Libraries. Unprocessed materials #17,182 Box 3 Of 8 Folder Legislation 1968, Manuscript Division, Library of Congress (Washington, D.C.: 1965).*

idea of a broad educational exemption but “recogniz[ed] the need for greater certainty and protection for teachers,”<sup>45</sup> and amended §504 (c) to insulate teachers from excessive liability.

In 1966 Rogers withdrew from the leadership of the Joint Committee as he prepared to assume the Presidency of the ARL. He was replaced as ARL representative by Verner Clapp, just then retiring as President from the CLR. In a letter to Rogers in March of that year, Skipper states, “Verner should stay with this until revision is acted on.”<sup>46</sup> Clapp organized his first meeting of the Joint Committee on January 23<sup>rd</sup>, 1967 at New York University. Edwin Surrency represented the AALL and was elected Chair of the Committee (although the previous AALL representative, Julius Marke, also attended). Gosnell continued to represent the ALA, Harry Kownatsky represented the Music Library Association, and Chester Lewis the SLA. The meeting discussed the current state of the revision process after the 1965 hearings, the House Committee reporting of the HR.4347 in October 1966, and the issuance of the House Report 2237. Clapp, who was elected as secretary, carefully detailed in the minutes each issue that the Joint Committee was concerned with, the Joint Committee’s position, the current disposition of the issue in the legislation, and in the House Report on that issue.<sup>47</sup> Under library copying he noted that the Joint Committee had supported the “silent treatment” and “mere acknowledgement of fair use” and that the House Report had supported the librarians’ policy on single copies and indeed expanded this to teachers. However, as is clear from Figure 4, the mere acknowledgement of fair use in the version of the bill that was the subject of Rogers’ testimony in 1965, had grown

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<sup>45</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Report to Accompany HR. 2512," 31.

<sup>46</sup> "James E. Skipper to Rutherford D. Rogers Concerning ARL Committees [March 28, 1966]," in *Records of the Association of Research Libraries. Unprocessed materials #17,182 Box 1 of 8 Folder ARL Committees – general, Manuscript Division, Library of Congress.*

<sup>47</sup> Joint Libraries Committee on Copyright, "Minutes of 15th Meeting, Commerce Library, New York University, January 23, 1967," in *Records of the Association of Research Libraries. Unprocessed materials #18,632 Box 1 of 64 Folder ARL Committees Copyright, Manuscript Division, Library of Congress*

during the Subcommittee's deliberations and reverted back to a somewhat more detailed description of the doctrine that explicitly included mention of purposes like scholarship and research that were advantageous to the work of educators and librarians. According to Patry, this substantial revision of §107 came about as a result of the "Summit Meetings" chaired by Herbert Fuchs (Chief Counsel of the House Subcommittee) held at the Library of Congress in June 1966.

<sup>48</sup> There is no indication in the records of the ARL that research librarians played a part in these meetings.

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§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, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

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**Figure 4 HR.4347 §107 1966.**

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<sup>48</sup> Patry, *The Fair Use Privilege in Copyright Law*, 249.

They would appear to have gained, if they gained at all, from the influence and efforts of educators and the NEA Ad Hoc Committee. House Report No. 83 made it clear that enough groups found the “bare statement” that we see in figure 3 “vague and nebulous”<sup>49</sup> enough that the committee expanded it to provide some guidance (see figure 4.) In terms of the copyright notice, the Joint Committee had argued that the notice should be in a specific place, but this had not been achieved. More importantly they had argued that deliberate omission of the notice should invalidate the copyright, but had not achieved this either. They had also sought, but not achieved the repeal of the manufacturing clause and finally had joined with the NEA in seeking an educational exemption, and the minutes described this as “done in part.” The Committee decided to seek to present their positions at anticipated hearings in the Senate.<sup>50</sup>

The issues that the Joint Committee saw as outstanding and on which they sought to influence the legislation included duration of copyright terms, in which they still wanted a fixed term from a known date, like date of publication, instead of the death of the author. The Committee’s minutes noted partial success on the issue of the duration of copyright protection, in that librarians had sought a fixed single term at least as long as that allowed under European law. However, the legislation had laid out a fixed term from the authors’ death that matched the European model. They also noted that,

Duration has consistently lengthened since the original 14 years provided by the Statute of Anne (1714) (*sic*): it is now proposed to extend it to approximately 75 years without any compensatory advantages to the users of copyrights. How about some of the latter?<sup>51</sup>

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<sup>49</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Report to Accompany HR. 2512," 30.

<sup>50</sup> Joint Libraries Committee on Copyright, "Minutes of 15th Meeting, Commerce Library, New York University, January 23, 1967."

<sup>51</sup> *Ibid.*

In connection with duration they took note of William Locke's argument that copyright was in some sense a contract between the public and the proprietor. The latter was granted a monopoly to make works available to the former. If books went out of print, the contract was broken and, according to Locke, the copyright should expire. In the House Report 2237 that accompanied HR.4347 the Committee on the Judiciary noted that argument over duration, "burned brightly at an earlier stage of this present revision process, but had died down."<sup>52</sup> The Committee also noted that librarians had been one of the few groups opposed to life plus fifty years and that this provision had been authors' top priority. The Joint Committee's minutes noted that duration "was not paramount concern to librarians, but should be as long as Europe."<sup>53</sup>

The Joint Committee also wanted to extend the non-controversial exemption (§108) that archivists enjoyed in the bill to the preservation of deteriorating published works. Finally, they also wanted to extend the relief from liability that educators enjoyed under the bill to librarians. The meeting also discussed computer programs and computer input but decided to take no position since parallel discussions were taking place in the NEA and in EDUCOM. It was during these years 1966-67, that the implications of copyright revision for the growing field of computing began to percolate through the educational professions. At the close of the meeting the Joint Committee agreed to seek further legal counsel.

In early February 1967, Clapp organized a meeting of the Joint Committee with the Register of Copyright, Abraham Kaminstein, who Clapp knew well enough to refer to as "Kami." The only record of this meeting is Clapp's initial invitation to Kaminstein in which he lists the issues the librarians wish to discuss (display, single copies, deteriorating materials,

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<sup>52</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision report to accompany H.R. 4347," (Washington: Committee on the Judiciary, 1966), 129.

<sup>53</sup> Joint Libraries Committee on Copyright, "Minutes of 15th Meeting, Commerce Library, New York University, January 23, 1967," 2.

duration, reduction of penalties for librarians, computers). These are taken directly from the minutes of the 15<sup>th</sup> meeting.<sup>54</sup>

Early in the new 90<sup>th</sup> Congress, HR.2512, which was identical to the version of HR.4347 reported out of Committee in October of 1966, was introduced into the House. A companion bill S.597 was introduced by Senator McClellan in the Senate and the subject of hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee. Gosnell spoke at these hearings in April 1967, but he again represented the ALA, and no record or discussion of his testimony is reflected in the records of the ARL. Erwin Surrency (Law Librarian at Temple University), then Chair of the Joint Libraries Committee on Copyright, also testified on behalf of the member associations of the Joint Committee, including the ARL.<sup>55</sup> He opened his testimony by arguing for a fixed term of copyright. The issue of copying in libraries was described as the “next most important factor.”<sup>56</sup> He testified that the, “Committee urges that a provision under section 107 be included that states that making a single copy with libraries for the use of scholars is within the cope of fair use.”<sup>57</sup> He went on to urge the Senate to extend to librarians the protections afforded educators in §504(c)(2) and also the privilege of archivists (to make preservation copies of manuscripts) in §108 to make preservation copies of published materials. Finally he argued against overreach copyright claims by publishers particularly with regard to reprinting of materials now in the public domain. Despite these extensive hearings, progress in the Senate came to a halt because of continued disagreement between the parties concerned with rebroadcasting of cable television and the bill never made it out of Committee.

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<sup>54</sup> Ibid.

<sup>55</sup> "Copyright Law Revision. Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary Part 2," (Washington, D.C. : Government printing Office, 1967).

<sup>56</sup> Ibid., 616.

<sup>57</sup> Ibid., 617.

McClellan also introduced S.2216, which would eventually become the legislation that created the Commission on New Technological Uses of Copyrighted Works (CONTU). McClellan sought to ease the passage of revision legislation acceptable to both publishers and educators (including librarians) by creating a body to study the issue of photocopying of copyrighted works and the developing issues of copyright in computing. In April 1967 the House passed HR.2512 and issued House Report No. 83. Report No. 83 repeated what House Committee Report 2237 stated concerning §107 on fair use. "Section 107 recognizes the present judicial doctrine of fair use and restates it in a way that offers guidance to users in determining when the principles of the doctrine apply, but without changing its scope."<sup>58</sup> In the years to come Report No. 83 became an important indication of House intent and as we shall see was referred to frequently.

The passage of the revision bill in the House represents a high water mark for the influence of librarians in the revision process. They had ridden on the coat tails of the larger educational interest group to achieve a flexible codification of the fair use doctrine that they felt would enable librarians to continue their traditional practices while avoiding the overreach of the educators who failed to gain their broad exemption. After initially accepting the Copyright Office draft of a specific library photocopying exemption, they had joined publishers and authors in opposing it, albeit for different reasons (librarians because it was too restrictive, the publishers and authors because it was not restrictive enough). Librarians may not have achieved all they would have liked in terms of the copyright notice and a fixed duration of copyright terms, but there is a sense from the available documents that they could live with these provisions and

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<sup>58</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Report to Accompany HR. 2512."

realized that they faced a Copyright Office and publishing and author interests that, for different reasons, were not willing to seriously entertain the librarians' proposals on these issues.

After a decade of intermittent action on the part of ARL librarians, the Association had moved from a position of relative inattention and reliance on the expertise of Arthur Fisher, the Register of Copyrights. He had proposed that the copyright implications of photocopying by and in libraries be dealt with by a generally agreed upon policy supported by communication with publishers and authors through a committee of librarians. In effect an updating of the Gentlemen's Agreement of 1935.<sup>59</sup> By 1967, the Association had sought its own counsel, had developed a policy based on legal advice and a study of copying practices in select member libraries, and had become actively engaged in the legislative revision process. ARL librarians, such as Freehafer and Rogers had participated in Copyright Office meetings and testified before congressional subcommittees; the Association had sought to build alliances with other groups with congruent interests in this legislative process and had moved from support of a specific exemption, to support of brief codification of the fair use doctrine, to more descriptive codification of the doctrine. Yet for all that had changed since Fisher met with the ARL-SLA Committee on December 10 1956, his proposed strategy had proven remarkably prescient. As he had proposed, they had a widely agreed upon policy concerning copying in libraries and had avoided an overly restrictive exemption in favor of a descriptive codification of fair use. Having not been sued for infringement by publishers or authors, librarians tended to think that their activities would be regarded as fair use by the courts and that this was preferable to attempting to negotiate an overly restrictive exemption for their copying activities that would become outdated

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<sup>59</sup> Hirtle, "Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935."



and more restrictive with time and the continuing development of copying technology and library operations.

As we now know, S.597 did not make it out of Committee and legislative action on copyright revision stalled in the Senate between 1968 and 1972. The House, having passed a comprehensive bill, saw no reason to take further action until the Senate acted, and the Senate delayed action largely because of the failure of interested parties to reach agreement on the rules to govern rebroadcast of television programming on community antennae television (CATV). This disagreement was pursued in the courts through the *Fortnightly v. United Artists Television* case,<sup>60</sup> which the Supreme Court decided in 1968, and through the Federal Communications Commission rule making process that continued into the early 1970's. However, during this hiatus in legislative action, the systems and technologies of libraries continued to develop, and this created the conditions for further action concerning photocopying in libraries. In this arena interest groups also resorted to the courts in an attempt to further their aims. It is to this part of the struggle, and its impact upon the positions of the Association of Research Libraries regarding revision legislation, that we now turn.

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<sup>60</sup> *Fortnightly Corp. v. United Artists Television Inc.*

## 6.0 FROM WILLIAMS & WILKINS TO PASSAGE OF THE 1976 ACT

Up to this point the structure of this history of ARL involvement in the development of the Copyright Act of 1976 has been strictly chronological. However, as the level and breadth of the Association's activities in this process increased after 1967, such an arrangement fails to clearly illuminate the process. The ARL's involvement in copyright revision from 1967 to 1976 can be divided into three separate strands: legislative, judicial, and interest group negotiations. A clearer understanding can be achieved by teasing out these three strands from within the broader narrative. Each of these strands is dealt with in a separate section in this chapter and within each section is laid out chronologically. Although I have tried to establish clear boundaries between each of these strands it is clear that they are inextricably interconnected. In the legislative strand the ARL kept track of developments within Congress, sought to influence specific legislative language in the successive copyright revision bills in the Senate and the House, and reacted to proposed legislation. Since copyright is a statutory right, this strand is ultimately the most important. All activity during this period of copyright revision was focused on the ultimate legislative outcome. The judicial strand consists of the *Williams & Wilkins v. United States* test case. Until this case was filed library copying practices under the Copyright Act of 1909 had never been contested in court. The suit was brought specifically in response to perceived delays in legislative action and with the aim of clarifying the rules governing library photocopying. The case in turn affected librarians' positions with regard to fair use and the need for a statutory exemption from copyright infringement for library copying practices. Finally, swirling around these more formal processes were a series of negotiations between copyright interests in which

much of the real bargaining took place and which informed, and was informed by, the other two strands.

All three strands show an ever tightening focus. In 1967 Clapp wrote to Kaminstein laying out all the issues that concerned librarians about copyright revision; display of copyrighted works, single copies, deteriorating materials, duration of copyright term, reduction of penalties for librarians, and computers and copyright.<sup>1</sup> By 1976, John Lorenz was focused on the guidelines that would inform the implementation of §108(g)2 in library interlibrary loan operations and that might be inserted into the Report that would accompany the final legislation.

## **6.1 1967-1976: INFLUENCING LEGISLATIVE ACTION**

As noted above, this section is the most important strand of copyright revision activity between 1967 and passage of the Act in 1976. This section is also useful in providing a framework for understanding the process as a whole in that from 1967 until 1976 each Congress, from the 90<sup>th</sup> to the 94<sup>th</sup>, and each bill, from HR.2512 to S.22, built on the work done in the previous Congress and set the stage for the next. Everything was ultimately concentrated on the statutory language of the final bill (S.22) and in defining congressional intent in drafting that language. Therefore, this section concentrates on language in the bills before the Senate (and then the House), changes in that language, and in language in various congressional reports. This section also considers strategies by congressional staff and Copyright Office staff to hold the line

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<sup>1</sup> "Verner W. Clapp to Abraham Kaminstein [February 8, 1967]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 1 of 64 Folder ARL Committees Copyright, Manuscript Division, Library of Congress.* .

or move things forward with ARL in terms of legislative language. Finally, it also includes direct lobbying of Congress by ARL staff and members.

Librarians found themselves in a somewhat enviable position in 1967. Years later, McCarthy described his feeling about the version of the revision bill passed by the House as the “‘impossible dream’ come true.”<sup>2</sup> They had not achieved all they wanted in the House but were satisfied to rely on fair use to protect what they saw as their, and their users, traditional ways of working – updated to include the photocopier. They had not been sued over this issue. They fully expected the Senate to act as soon as the CATV issue was decided.

On March 8, 1967 HR.2512 was favorably reported out of the Judiciary Committee and accompanied by Report No. 83. In his report as Chairman of the Joint Library Committee on Copyright to the ARL Membership in December of that year, Clapp noted that this was, “a very important report from the point of view of library photocopying.”<sup>3</sup> Report No. 83 explained that,

An earlier effort to specify limited conditions under which libraries could supply photocopies of materials was strongly criticized by both librarians and copyright owners, though for opposing reasons. The effort was dropped, and at the hearings representatives of the librarians urged that it not be revived; their position was that statutory provisions codifying or limiting present library practices in this area would crystallize a subject best left to flexible adjustment.<sup>4</sup>

The House Committee recognized that some other groups, specifically the American Council of Learned Societies (ACLS) and the Department of Health and Human Welfare

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<sup>2</sup> Stephen A. McCarthy, "Notes for Speech at the National Federation of Science Abstracting and Indexing Services Annual Meeting [March 8, 1972]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632 Box 11 Folder: National Assoc. of Science Abstracting and Indexing, Manuscript Division, Library of Congress.*

<sup>3</sup> Verner W. Clapp, "Report of the Joint Library Committee on Copyright to the ARL Membership [December 12, 1967]," in *Records of the Association of Research Libraries, Unprocessed materials #17,182 Box 1 of 8 Folder ARL Committees – general, Manuscript Division, Library of Congress.*

<sup>4</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Report to Accompany HR. 2512," 36..

(HEW), thought that “the problem was too important as to be left uncertain”<sup>5</sup> but did not favor a specific provision dealing with library photocopying. They made the following observation.

Despite past efforts, reasonable arrangements involving a mutual understanding of what generally constitutes acceptable library practices, and providing workable clearance and licensing conditions, have not been achieved and are overdue. The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and rights of authors would both be respected.<sup>6</sup>

The text of §107 in HR.2512 (90<sup>th</sup> Cong., 1<sup>st</sup> Sess.), as reported out of the Committee was identical to §107 in HR.4347 (89<sup>th</sup> Cong., 1<sup>st</sup> Sess.) and is reprinted at Figure 4. In HR.2512, §108, was concerned only with non-commercial reproduction of works in archival collections for preservation and security and was uncontroversial. It had no parallel in existing U.S. law at the time and had been inserted after the introduction of the 1965 bill (HR.4347) The language of §108 became the focus of librarians’ involvement in copyright revision legislation and therefore it is reprinted, as reported out of committee, in Figure 5.

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**§108 Limitations on exclusive rights: Reproduction of works in archival collections**

Notwithstanding the provisions of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

for purposes of preservation and security, or for deposit for research use in any other such institution.<sup>7</sup>

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**Figure 5 §108, Archival Exemption, in HR.4347 House Report No.2237 (October 12, 1966)**

The House passed HR.2512 on April 11, 1967. In the meantime, S.597, an identical bill in terms of fair use and §108, had been introduced in the Senate and the Senate Subcommittee on Patents, Trademarks, and Copyrights, Chaired by Senator McClellan<sup>8</sup> (D-AR).

McClellan conducted three days of hearings on the bill in the spring of 1967. Erwin Surrency (Law Librarian and Professor of Law at Temple University and at this time the Chairman of the Joint Committee) testified on behalf of the Joint Libraries Committee on Copyright. He testified in favor of a fixed term of copyright, rather than life plus fifty years, but acknowledged that the extension in duration using this formula would probably be enacted. Only then did he move on to, “the problem of single copying,”<sup>9</sup> describing it as the “next most important factor.”<sup>10</sup> He argued that the cost of copying was higher than the cost of purchase and that copies made in libraries did not become part of the collection, “in other words, single

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<sup>7</sup> \_\_\_\_\_, "Copyright Law Revision report to accompany H.R. 4347."

<sup>8</sup> McClellan was a powerful conservative southern democrat, famous for his boycott of the McCarthy-Army Hearings, his leadership in the Mafia investigations, and his opposition to civil rights legislation. The *American National Biography* quotes McClellan's obituary in the Washington Post. "I did not become a senator," he recalled, "to transfer the United States into a socialistic, paternalistic state." (*Washington Post*, 29 Nov. 1977) This quotation illustrates his approach toward copyright in that he and his staff tended to favor copyright as property and be dubious of the public interest arguments of users of copyrighted works. According to McClellan's entry in *American National Biography*, "Few senators in the twentieth century were more powerful." Randy Finley, "McClellan, John Little," *American National Biography Online* <http://www.anb.org/articles/07/07-00608.html>. In the Senate, where seniority was paramount, McClellan was only outranked by Senator Eastland (D-MS), the Chair of Judiciary Committee. David E. Rosenbaum, "John L. McClellan, 35 Years in the Senate, Dead at 81, Headed Major Investigations," *New York Times*, November 29 1977.

<sup>9</sup> Judiciary Subcommittee on Patents, Trademark, and Copyright, *Copyright Law Revision, Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, on S 597, Ninetieth Congress, First Session, March 20, 21 and April 4 1967*, 616.

<sup>10</sup> *Ibid.*

copying in a library is a simplified form of note taking.”<sup>11</sup> He proposed, “that a provision under section 107 be included which states that making a single copy within libraries for the use of scholars is within the concept of fair use”<sup>12</sup> because librarians needed some protection against threatening letters and litigation from publishers. He proposed that §504(c) 2, which allowed courts to remit statutory damages for infringement by instructors, should be extended to librarians. He also proposed that the existing §108 be extended to librarians, “who are faced with the problem of preserving books for the use of future scholars”<sup>13</sup> and that the copyright notice, on works of texts known to be in the public domain, provide a general idea of what is covered by the registered copyright. Figure 6 includes the text of the amendment to §108 supplied by Edwin Surrency to the subcommittee.

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**PROPOSED AMENDMENT TO SECTION 108, S. 597, GRANTING TO LIBRARIES PERMISSION TO REPRODUCE BOOKS FOR PRESERVATION.**

Notwithstanding the provisions of section 106, it is not an infringement of copyright for a nonprofit institution, having custody of books of value to scholarly research, which have deteriorated and cannot be used in their present condition without further mutilation, to reproduce, without purpose of direct or indirect commercial advantage, for purposes of preservation and security.<sup>14</sup>

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**Figure 6 Proposed Amendment to §108, S. 597 (1967)**

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<sup>11</sup> Ibid., 617.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid., 618.

<sup>14</sup> Ibid.

William Passano, of the journal publisher Williams & Wilkins, also testified before the Senate Subcommittee during these hearings. Perhaps not surprisingly, in light of the suit filed in 1968 and the fact that he was soon to contact Cummings of the National Library of Medicine (NLM) about their copying practices, he was not alone in disputing the librarians' interpretation of §107: that single copying as practiced in libraries constituted fair use. Passano was, however, one of the most colorful, comparing photocopying of articles to use of alcohol during prohibition.<sup>15</sup> Other witnesses recognized that photocopying would continue in libraries and elsewhere and therefore proposed a clearinghouse.<sup>16</sup> In general, publishers and authors followed the lead of the American Textbook Publishers Institute (ATPI) and the American Book Publishers Council (ABPC) in requesting that the subcommittee, "examine the bill and any amendments that may be suggested to make sure that copyright does not become a hollow shell through grant of further exemptions."<sup>17</sup>

The issue of copyright in works stored, distributed and used in new computing technologies was a significant feature of these hearings, although librarians were not particularly involved in this testimony. Publishing interests argued that it was too soon to legislate on such issues since the technology was not mature. Instead they proposed that a study committee investigate the issues involved. McClellan accepted this proposal and soon after the hearings were complete introduced S.2216, the bill that would ultimately bring into being the Commission on New Technological Uses of Copyrighted Works (CONTU).

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<sup>15</sup> Ibid., 976.

<sup>16</sup> Ibid., 109.

<sup>17</sup> Ibid., 78.



In his report to the ARL membership of December 1967, Clapp expected that CONTU would study problems of reproduction by computers and other machines, by which he meant photocopiers. If S.2216 passed, he expected the revision bill (S.597) to be enacted “promptly.”<sup>18</sup> On April 12, HR.2512 passed the House and on October 16 S.2216 passed the Senate. From the ARL perspective it looked as though copyright might come to fruition in 1968 in the 90<sup>th</sup> Congress.

On February 6, 1968 McCarthy wrote to Philip Brown of the law firm Cox, Langford, & Brown that had recently begun representing the ARL, with a number of topics for discussion. One was simply noted as the “ASTM-CICP proposal,” which was probably a version of the clearinghouse scheme raised at the Senate hearings. McCarthy spent more time on the specific provisions of the revision bill. He noted that the ARL may join with the ALA to attempt to amend S.597.

Chapter 1 of the bill should include a new section 118 to read as follows: “Notwithstanding the provisions of section 106, it is not an infringement of copyright for a non-profit school, college, public, reference or research library to reproduce a work, or a portion thereof, in its collection, provided such reproduction is not for the direct or indirect commercial advantage of the library and provided further that nothing herein shall excuse such user of its collection from any liability for copyright infringement he might otherwise incur by reason of his use of such reproduction.

Chapter 1 of the Bill should contain a new section 117 to read as follows: “Notwithstanding the provisions of section 106, it is not an infringement of copyright for a non-profit school, college, public, reference or research library to reproduce a work, or a portion thereof, in its collection without permission of the copyright owner or owners, if such reproduction is for the purpose of replacing such work, or a portion thereof, and not for the direct or indirect commercial advantage of the library.”<sup>19</sup>

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<sup>18</sup> Clapp, "Report of the Joint Library Committee on Copyright to the ARL Membership [December 12, 1967]."

<sup>19</sup> "Memorandum from Stephen A. McCarthy to Philip Brown [February 6, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632, Box 22 of 64 Folder: Cox, Langford and Brown, Manuscript Division, Library of Congress.*

It is unclear how McCarthy arrived at those particular section numbers, since the subjects of his amendments belong more properly in §107 or §108. Be that as it may, we see here the ARL independently, not just as a member of the Joint Committee, seeking to amend the bill with specific exemptions. In this case the exemptions cover copying for non-commercial purposes on behalf of library users and for replacement. Just a few weeks later, on February 27, Williams & Wilkins filed suit, which we will discuss in detail later, opening up another front in the struggle for revision. In the meantime, in the legislative arena, the House took no action on S.2216, which was also the fate of S.597 in the Senate. Although a brief committee report (Senate Report No. 1168, 90<sup>th</sup> Cong., 2nd Sess.) was issued on June 10, 1968, the Senate took no further action on the bill. As will be discussed in the next section, the Williams & Wilkins suit against the NLM and the National Institutes of Health (NIH) contributed to the delay of legislative action on the revision bill, but more important in causing this delay was the dispute concerning rebroadcasting of cable television and another test case, *Fortnightly Corp v. United Artists Television inc.*<sup>20</sup>

As a solution to this delay Kaminstein proposed to McClellan that Congress pass a barebones version of the revision bill leaving out the controversial provisions, but McClellan thought that doing so would relieve pressure on the interested groups to reach agreement and turned down Kaminstein's proposal.

Barbara Ringer, Assistant Register of Copyrights, recognizing that the proposals put forth by Edwin Surrency and McCarthy would not be acceptable to the congressional committees (let alone the publishers), took this opportunity to draft a version of §108 to address some of the concerns of libraries. No copy of this early version of Ringer's amendment exists in the ARL records. However, figure 17 in chapter 6:3 below, provides the text of a later version of her

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<sup>20</sup> *Fortnightly Corp. v. United Artists Television Inc.*

amendment. ALA was interested in her approach and supported her draft and on April 25, 1968 North wrote to Ringer to ask whether she thought the amendment covered copying in connection with interlibrary loan and also freed libraries from liability for user infringement on library copiers.<sup>21</sup> In May, Clapp reported to McCarthy (presumably in advance of the ARL meeting to be held in Kansas City in June) on the state of the revision process. He noted that little had changed in Congress, but that ALA Council had voted unanimously at their Midwinter meeting to attempt to amend the copyright revision bill to permit libraries to copy on behalf of their users and to make replacement copies. These were the specific exemptions that McCarthy called for in his February letter to Brown. However, Clapp argued that, "the Bill is much worse (from the library point of view) than any of us thought"<sup>22</sup> and that the ARL should push for photocopying to be considered by CONTU and for §108 to be deleted until CONTU could study the issue. Clapp warned that the Copyright Act of 1909 had been passed under suspension of rules on the last day of Congress and was worried that something similar would happen this time. He need not have worried. The elections of November 1968 elected Richard Nixon to the presidency and brought the 90<sup>th</sup> Congress to an end without passage of the revision bill.

On January 10, 1969 S.543 was introduced to the Senate in the 91<sup>st</sup> Congress. Although the established opinion of legal scholars<sup>23</sup> since passage of the Copyright Act of 1976 and of copyright experts like Ringer later in the process was that legislative action stalled between 1968 and 1972, it did not seem that way to participants such as librarians at the time. As we will see

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<sup>21</sup> "William North to Barbara Ringer [April 25, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 46 of 64. Folder: Copyright Revision Bill 1968, Manuscript Division, Library of Congress.*

<sup>22</sup> "Draft Memorandum from Verner W. Clapp to Stephen A. McCarthy [May 17, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 46 of 64. Folder COPYRIGHT – Legislation, Manuscript Division, Library of Congress*

<sup>23</sup> For instance see Patry, *The Fair Use Privilege in Copyright Law*. And Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*.

when discussing the interest group negotiations during this period, the Register of Copyrights had brought together publishers and librarians for a meeting in the Copyright Office in June of 1969 to discuss a draft, perhaps Ringer's draft of §108 (figure 17 in chapter 6:3). In September 1969 that bill had been reported out of the subcommittee and had been amended by McClellan's subcommittee with a new subsection, §108(d)1 (see Figure 5), that exercised the ARL leadership greatly. McCarthy, in an ARL position paper on S.543 thought that this restriction would seriously impair traditional photocopying in libraries because scholars could not get the copy immediately. He argued that libraries have been doing this kind of copying for 60 years without legal objection (he did note one pending exception – the Williams & Wilkins case) and that “claims of losses of sales from photocopying do not stand up in light of enormous increases in sales of library materials to libraries during the period of most rapid increase in photocopying (1960 to date). Specifically, the circulation figures for periodical publications for 1968 show in general marked increases over those for 1959.”<sup>24</sup> At a minimum he argued that the ARL required a further amendment to 108(d)(1) at the end “... or has certified in writing to the library or archive that such copy will be used in accordance with provisions of Section 107.”<sup>25</sup> He warned that without this amendment library photocopying will “probably discontinue,”<sup>26</sup> users would go to commercial photocopying services instead, and that it is in the best interests of everyone to keep this activity in the library where it can be responsibly monitored. Multiple versions of this position paper exist in the Records of the ARL, one edited by Clapp, and another sent as an attachment to Senator Thomas J. Dodd (D-CT), a member of the Judiciary Committee.

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<sup>24</sup> Stephen A. McCarthy, "Position of Libraries on S. 543, Copyright Revision Bill [September 1969]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64, Folder Copyright Revision S543, Manuscript Division, Library of Congress.*

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

In late 1969 Thomas C. Brennan, Chief Counsel to McClellan's subcommittee, was seeking a way to sideline the issue of library photocopying by assigning the task of studying the issue to CONTU as well as new technological uses of copyrighted works, an idea that had been proposed by the Information Industry Association (IIA). To this end S.543 was amended with a new §117 providing for the creation of CONTU. Both the ARL and ALA regarded this proposal as too weighted towards industry and the publishers. In separate letters to Brennan, both William North and Philip Brown (representing the ALA and ARL respectively) opposed the idea unless action on the revision bill was deferred until after CONTU reported or the bill was amended to specifically recognize the "reproduction rights of libraries."<sup>27</sup> Brown pointed to a number of ways S.543 adversely affected libraries in relationship to the existing law, including that assigning library photocopying to CONTU to study without first expressly recognizing a library's right to make single copies ignored the long history and standard practice of copying and photocopying technology in libraries.<sup>28</sup>

In the fall of 1969 ARL had asked members to contact their senators urging the adoption of the ARL/ALA amendment to §108 (figure 16). At the 27<sup>th</sup> Meeting of the ARL Board in New York in November of that year, McCarthy reported an excellent response from members to this request, and the advocacy seems to have been successful. On November 5, Senate Report No. 91-519 was released and noted the need for greater study of library photocopying. On December 10 S.543 was formally amended with a new version of §108 (figure 7).

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<sup>27</sup> "William North to Thomas Brennan [October 6, 1969]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision S543, Manuscript Division, Library of Congress*.

<sup>28</sup> "Philip Brown to Thomas Brennan [October 22, 1969]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision S543, Manuscript Division, Library of Congress*.

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## **§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 phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section and if;

(4) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; and

(5) 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,

(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 in clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The rights 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 normal price from commonly-

known trade sources in the United States, including authorized reproducing services.

(d) The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audio-visual work, made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archives, if:

- (1) The user has established to the satisfaction of the library or archives that an unused copy cannot be obtained at a normal price from commonly known trade sources in the United States, including authorized reproducing services;
- (2) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and
- (3) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyrights in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) 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; providing

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 under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy, if it exceeds fair use as provided by section 107;

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

(f) The rights of reproducing or distributing “no more than one copy or phonorecord” in accordance with this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same work on separate occasions, but do not extend to cases where the library or archives or its employees, 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 work, whether on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group

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**Figure 7 §108 of S. 543 Amended (December 1969)**

This amended §108 is somewhat similar in content, if not in form, to the Register’s draft of June 1969 (Figure 17 §108 Register of Copyrights’ Draft (June 1969) in chapter 6:3). The section §108(d)(1) that the ARL thought might end copying by users in libraries, had changed



from a subsection concerned with when libraries might copy for replacement, §108(d)2, to a subsection concerned with copying by or on behalf of users. This is a very significant shift in terms of library operations. However, this latest version of §108 also included a number of points that Brown and Clapp had discussed earlier in the year. Privileges had become rights, §108(f)2 (which read, “cases where the loan of a copy is practicable but the library or archive, for purposes of its own benefit actively induces the user to order a reproduction”<sup>29</sup>) had been deleted. Interestingly, musical, pictorial, graphic or sculptural works, and motion pictures or other audio-visual works remained in §108, which librarians had been willing to forego, but tests and test answers had been deleted. Overall, these gains did not outweigh the negative potential of §108(d)1. Clearly, the ARL lobbying effort of the fall of 1969 was not entirely successful. In a draft report that he prepared for the January 1970 ARL Annual Meeting Clapp noted that, “the situation has deteriorated and could hardly be worse than it is at this moment.”<sup>30</sup> And that the leadership and legal counsels of both ALA and ARL, “have been diligent but quite unsuccessful in effecting modification of the Copyright Revision Bill.”<sup>31</sup> He pessimistically concluded that “the bill will render library photocopying services, as now performed, including copying in lieu of interlibrary loan of originals, impossible.”<sup>32</sup>

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<sup>29</sup> "Copyright Office Draft. Section 108. Limitations on Exclusive Rights: Reproduction by Libraries and Archives [June 6, 1969]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision S543, Manuscript Division, Library of Congress.*

<sup>30</sup> Verner W. Clapp, "Draft Report of the Copyright Committee to the ARL Membership Meeting [December 10, 1969]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision S543, Manuscript Division, Library of Congress.*

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

At their meeting in Chicago in January of 1970 the ARL Board voted to go on record as opposing the bill as long as it contained §108(d)1.<sup>33</sup> At the membership meeting associated with that Board meeting, Mumford, in his regular Librarian of Congress report to the ARL, informed the members that librarians had been added to §504(c)2 as had been requested by Edwin Surrency at the 1967 hearings (see Figure 8).

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**§504(c)2**

...In a case where an instructor, librarian or archivist in a nonprofit educational institution, library, or archives, who infringed by reproducing a copyrighted work in copies or phonorecords, sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under section 107, the court in its discretion may remit statutory damages in whole or in part.

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**Figure 8 Partial Text of §504(c)2 of S.543**

Mumford also informed the members that he expected the full Senate Judiciary Committee to consider the bill early in 1970.<sup>34</sup> Clapp urged members to contact their Senators to get S.543 changed. Later, in *ARL Newsletter* No. 38, January 30, 1970, Clapp gave specific instructions to the ARL members.

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<sup>33</sup> "Minutes of the Association of Research Libraries 28th Meeting of the Board of Directors. Chicago [January 16 and 19, 1970]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 56 of 64 Folder: Board Minutes 1st – 29th, Manuscript Division, Library of Congress.*

<sup>34</sup> L. Quincy Mumford, "Report of the Library of Congress to the Association of Research Libraries Meeting in Chicago, Illinois, January 17 and 18, 1970," in *Records of the Association of Research Libraries, Unprocessed materials #17,182 Box 4 of 8 Folder Library of Congress 1970, Manuscript Division, Library of Congress.*

1) Write to members of the Senate Judiciary Committee ...; get others to write. 2) Refer to S. 543 ... 3) State the damaging effect of Subsection 108 (d) (1) which would require libraries to either desist altogether from photocopying for scholarly use, including interlibrary loan, or to submit to constant risk of suit. 4) Request that this Subsection be amended by the insertion of the following words after the words "reproducing services":

".... Or has certified in writing to the library or archives that such copy will be used in accordance with the provisions of Sec. 107."

... 5) To produce maximum effect, your letters should be written by approximately February 1, 1970.<sup>35</sup>

This call for grassroots letters was part of a concerted lobbying effort in the spring of 1970. Led by Clapp and McCarthy, this effort concentrated on the members of the Senate Judiciary Committee. Clapp and the ARL staff kept scrupulous records of each meeting. On February 5, Brown, Clapp, and McCarthy met with Senator Tydings (D-MD). Between March 4 and 13, they had appointments to meet with staffers for fourteen Senators including Senators Cook (R-KY), Dodd (D-CT), Griffin (R-MI), Hruska<sup>36</sup> (R-NE) and ranking Republican), Matthias (R-MD), Kennedy (D-MA), Irvin (D-SC), Burdick (D-ND), Eastland (D-MS and Chair of the Committee), Bayh (R-IN), Scott (R-PA and minority leader of the Senate), Fong (R-HI), Hart (D-MI), and Tydings again, and wrote a letter to Senator Byrd (D-WV).<sup>37</sup> Each staff member was given a copy of McCarthy's position paper on S.543, and Clapp wrote an aide-mémoire about many of these meetings and with other Senators. These aides-mémoire offer a fascinating glimpse into the lobbying process and the conflicting information available to the ARL during this time. Michael Pullman, Legislative Assistant to Senator Strom Thurmond (R-

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<sup>35</sup> Verner W. Clapp, "Your Action is Needed Now on the Copyright Revision Bill," *ARL Newsletter*, no. 38 (1970).

<sup>36</sup> Roman L. Hruska. In this same month he was to defend Harrold Carswell, Nixon's nominee for a Supreme Court vacancy with a speech on the Senate floor. According to his obituary, the Senator said, "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Frankfurters and Cardozos." This was immediately immortalized by his Democratic opponents as "What's wrong with a little mediocrity?" " Roman L. Hruska Dies at 94; Leading Senate Conservative," *New York Times*, April 27 1999.

<sup>37</sup> "Appointments with Offices of the Senate Judiciary Comm. Regarding Copyright Revision Bill S. 543 ", in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress.*

SC) thought, “Thurmond will support our amendment if it is offered.”<sup>38</sup> Senator Hart agreed to introduce the library amendment to S.543. Senator Eastland was not going to interfere with the subcommittee and very much saw S.543 as McClellan’s bill. His staffer, Courtney Pace, and Mr. Green, a Judiciary Committee staff member, did not understand why libraries needed the amendment. Mitch McConnell, Legislative Assistant to Senator Cook understood “our position and the need for freedom from restriction in photocopying for research.”<sup>39</sup> Dan Lewis, Legislative Assistant to Senator Tydings, made it clear that S.543 was not a high priority for Tydings and that Low and Rovelstad from the ALA had also met with him two weeks ago. Lewis, however, did say, “we will give you a hand.”<sup>40</sup> Senator Dodd was categorized as supportive, as was Senator Hruska who had been visited by Dan Lacy and some medical librarians. Staff for Senator Fong reported that he was unsympathetic, but becoming more sympathetic, while Senator Kennedy remained uncommitted. When they met with Bart Holzbach of Senator Scott’s office, they were joined by the Pennsylvania State University Librarian, and Scott was sympathetic. But a constituent did not always influence the Senators. Despite the presence of the Librarian of the University of North Carolina when they met with a staff member for Senator Irvin, the Senator remained unsympathetic. Perhaps the most prescient staffer was Mr. Craydon, Legislative Assistant to Senator Griffin, who thought that, “copyright is deferred to the dim distance.”<sup>41</sup>

This lobbying effort continued by other means including coalition building. In June McCarthy wrote to Bryant, who had been the ARL President in 1969, bringing him up to date on

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<sup>38</sup> ———, "Aide-Memoires of Meetings with Legislative Assistants, McCarthy and Clapp concerning S. 543 and 108(d)(1) [March 1970]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1972, Manuscript Division, Library of Congress.*

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

revision. “One further note, the Ad Hoc Committee on Copyright Revision Law – a group representing some 15 educational and education-related organizations – at its meeting on June 2, voted to make amendment of 108(d)1 a “must” if the Copyright Revision bill is to have their support”<sup>42</sup> At that same June 2 meeting ARL joined the Ad Hoc Committee and donated \$150 to support the group.

But as we now know, S.543 did not make it out of the Judiciary Committee in the 91<sup>st</sup> Congress. As Mumford reported to the ARL Meeting in Los Angeles in January 1971, “the copyright revision bill S.543, which the Senate subcommittee had approved on December 10, 1969, made no further progress in the Senate during 1970. It has been held up principally by the issue of cable television retransmissions of broadcast programs.”<sup>43</sup>

The revision bill was introduced into the Senate in the 92<sup>nd</sup> Congress as S.644, but as Brown noted to McCarthy in a letter in May, 1971, “no action on the bill is contemplated until the FCC has taken action on the CATV issue.”<sup>44</sup> In September Harry Rosenfield, the lawyer for the Educators Ad Hoc Committee on Copyright, reported that McClellan didn’t expect any action on the bill until the spring of 1972, and it was unlikely to be acted on in the House even then.<sup>45</sup> In November of that year Brown relayed a conversation he had with Ed Williams, a staff member for the Senate Subcommittee. Williams was not expecting any activity on the bill before

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<sup>42</sup> "Stephen A. McCarthy to Douglas W. Bryant [June 5, 1970]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress.*

<sup>43</sup> L. Quincy Mumford, "Report of the Library of Congress to the Association of Research Libraries Meeting in Los Angeles, California, January 17, 1971 [December 18, 1970]," in *Records of the Association of Research Libraries, Unprocessed materials #17,182 Box 4 of 8 Folder Library of Congress 1970, Manuscript Division, Library of Congress.*

<sup>44</sup> "Philip Brown to Stephen A. McCarthy [May 4, 1971]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress.*

<sup>45</sup> "Notice from Harold Wigren of meeting of the Ad Hoc Committee on Copyright law Revision [September 22, 1971]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress.*

March or April 1972 and even then the only amendments would concern CATV.<sup>46</sup> In that same month, November 1971, in a summary of legislative action, McCarthy anticipated the next two years of legislative action,

Senator McClellan has announced that his subcommittee will take no action until the FCC has promulgated new regulations regarding CATV. The FCC has issued its proposed regulations for study by interested parties and it is understood that these regulations will be adopted in March 1972, unless there are serious objections to them. No such objections are expected.

Despite Senator McClellan's announcement, those who feel they know the mood and the attitude of Congress and the Administration, hold strongly to the view that there is little likelihood of any Senate committee or floor action in 1972 because of the November elections. If this assumption is correct, and there appears to be agreement that it is, the Bill would have to be reintroduced in the new Congress in 1973. If the Senate should proceed to reintroduce the Bill and take action on it sometime in the year 1973, it would then go to the House. The Senate Bill differs in many significant ways from the House Bill passed several years ago, and the members of the Subcommittee on Copyright [Subcommittee No. 3] are all new except for Representative Kastenmeier. Because of this, it is expected that the House will hold hearings on the Senate version of the Copyright Revision Bill. This might occur sometime late in 1973 or in 1974.<sup>47</sup>

McCarthy's sources were right about 1972. No action was taken on S.644. §108 was the same in S.644 as the version of S.543 reported out of committee in December 1969 (see Figure 7). Although 1972 was a quiet period on the legislative front as far as copyright revision was concerned, as we will discuss in later sections, a lot occurred on the judicial front in the Williams & Wilkins case and in terms of interest group negotiations. Even in this legislative hiatus, McClellan and his staff continued to try to move the bill forward. In his January 1972 report to the ARL, Mumford, perhaps overoptimistically, reported that, "prospects for enactment of the copyright revision bill, S.644 in the 92<sup>nd</sup> Congress brightened greatly when a compromise

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<sup>46</sup> "Philip Brown to Stephen A. McCarthy [November 24, 1971]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress.*

<sup>47</sup> "Stephen A. McCarthy to Douglas W. Bryant [November 22, 1971]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress.*

proposal for solution of the main issues [rebroadcast of cable TV signals] was accepted .... Senator McClellan, Chairman of the Senate subcommittee in charge of the copyright revision bill, has stated that he intends to proceed promptly thereafter to have the Senate act on the bill.”<sup>48</sup>

McCarthy took this opportunity to remind McClellan that if activity on S.644 resumed the ARL was interested in amending or deleting §108(d)1.<sup>49</sup> Just a few weeks later, on February 26, ARL concerns about relying on fair use to continue the photocopying practices of research libraries and their users combined with the restrictions imposed by §108(d)1 were heightened when Commissioner Davis’ report, finding in favor of the publisher, was released in the Williams & Wilkins case.

While legislative action did slow down in 1972, it did not stop. Brennan took the opportunity to prepare for the 93<sup>rd</sup> Congress, which would convene in 1973. On September 19 he wrote to John McDonald (Library Director, University of Connecticut and President of ARL that year. He would become Executive Director of the ARL in 1975, upon McCarthy’s retirement), informing him that Senator McClellan would be ready to move on the revision bill in the 93<sup>rd</sup> Congress. Brennan asked the ARL for new comments on library photocopying and §107 and §108 by November 30. He sent similar letters to all the other interested groups. He noted that the issue was recognized in the Senate bill in 1969, but developments in the Williams & Wilkins case had changed things. He was looking for consensus on the issue of library photocopying and

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<sup>48</sup> ———, "Semiannual Report on Developments at the Library of Congress, January 1972 " in *Records of the Association of Research Libraries, Unprocessed materials #17,182 Box 4 of 8 Library of Congress 1971/72, Manuscript Division, Library of Congress.*

<sup>49</sup> "Stephen A. McCarthy to Senator McClellan [January 19, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress.*

knew that interest groups had been meeting in the Cosmos Club round of negotiations,<sup>50</sup> which will be discussed in greater detail in chapter 6:3.

At a meeting on October 18, 1972 ARL and ALA representatives decided to propose a joint amendment to Brennan replacing the existing §108 with one based on §7 from the 1964 *Preliminary Draft for Revised U.S. Copyright Law*.<sup>51</sup> Apart from the necessary drafting changes to fit the amendment into the pattern of the existing §108, this draft was very similar to the §7 of the preliminary draft (see figure 1.) McCarthy then laid the groundwork for another personal lobbying effort, this time using the influence of the members of the Association of American Universities (AAU). On October 31 he wrote to Charles Kidd, the Executive Secretary of the AAU with copies of the new ARL/ALA amendment to §108 (see figure 16), asking that university presidents write to Senate Subcommittee members and copy Brennan. “The central points to be made are that research and scholarly work will be severely handicapped if the principle of single copy reproduction for limited use cannot be established, and that this practice is not a threat to the legitimate rights of authors and publishers.”<sup>52</sup> McCarthy collected thirteen of the letters that resulted from this effort. Most went to McClellan (from Presidents of Vanderbilt, MIT, Stanford, Cornell, Minnesota, Princeton, the University of California system, Tulane, Ohio State, Princeton, and UC Irvine). Edgar Shannon of the University of Virginia wrote to an alum, Senator Scott of Pennsylvania, and President Fleming of University of Michigan wrote to Hart, one of Michigan’s senators.

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<sup>50</sup> "Thomas Brennan to John McDonald [September 19, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1972, Manuscript Division, Library of Congress*.

<sup>51</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 3."

<sup>52</sup> "Stephen A. McCarthy to Charles V. Kidd [October 31, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright University President Correspondence 1972, Manuscript Division, Library of Congress*.



On November 7 McCarthy followed up with a letter to Brennan arguing that Davis' recommendation in the Williams & Wilkins case meant that, "it has now become essential that the time-honored right of single-copy photocopying by libraries as a means of meeting the needs of their patrons be given explicit recognition in the copyright revision bill."<sup>53</sup> He rejected the proposal that came out of the Cosmos Club meetings (see figure 18 in chapter 6:3) because "it would not meet the problem faced by libraries and would be hopelessly impractical."<sup>54</sup> Instead he proposed substituting §7 (see figure 1) from the Register's *Preliminary Draft for Revised U.S. Copyright Law*. Similar letters came to Brennan from Douglas Bryant, on behalf of the ACLS Committee on Research Libraries; the AALL had a similar but not identical amendment to §108; and Jack Ellenberger of the SLA was concerned about the exclusion of corporate libraries if §108 went back to the not-for-profit standard of the 1964 draft.

In the short term at least, none of this activity had any impact on the language of the bill. The copyright revision bill was introduced into the Senate of the 93<sup>rd</sup> Congress on March 26, 1973 as S.1361 and was identical to S.644 (see figure 7 for the text of §108). McClellan's subcommittee scheduled hearings for July of that year. Just before those hearings, McCarthy wrote again to Brennan endorsing the ALA amendment to §108, which differed slightly from the ARL original in that it excluded musical works, pictures, graphical works, or sculptures, motion pictures, or other audiovisual works.<sup>55</sup>

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<sup>53</sup> "Stephen A. McCarthy to Thomas Brennan [November 7, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1972, Manuscript Division, Library of Congress*

<sup>54</sup> Ibid.

<sup>55</sup> "Stephen A. McCarthy to Thomas Brennan [July 25, 1973]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 39 of 64 Folder: Copyright Revision 1973, Manuscript Division, Library of Congress*.

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**AMENDMENT TO COPYRIGHT REVISION BILL S. 1361**

Substitute for section 108(d) the following:

- (d) The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work, a pictorial, graphic, or sculptural work, or a motion picture or other audiovisual work, made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archive, but only under the following conditions:
1. The library or archives shall be entitled, without further investigation to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or phonorecord of a similarly small part of any other copyrighted work.
  2. The library or archives shall be entitled to supply a copy or phonorecord of an entire work, or of more than a relatively small part of it, 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 readily be obtained from trade sources.
  3. The library or archives shall attach to the copy a warning that the work appears to be copyrighted.

and renumber section 108(d)2 to make it 108 (d)4.

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**Figure 9 Amendment to §108 (d) in S.1361 (July 1973)**

On the morning of July 31 McCarthy appeared before the Senate subcommittee with William Budington (President of ARL and Director of the John Crerar Library in Chicago), Brown, and Howard Rovelstad (Director of Libraries at the University of Maryland, who had taken over from Clapp as chair of the ARL Copyright Committee). McCarthy testified that this amendment would ensure that a long established service of copying for and by users of libraries would continue, that libraries could continue to use modern technology, and that any doubt about whether or not such copying was fair use raised by Davis' opinion in the Williams & Wilkins case would be put to rest by this amendment. He questioned the effectiveness of the requirement in the existing §108(d)1 under which a user was expected to demonstrate that an unused copy was not available from a trade source. He also pointed out that a user from a distant library, trying to use interlibrary loan would be at a particular disadvantage because complying with the requirements of (d)1 would take a considerable amount of time. He was questioned by Senator McClellan about the nature of the practice in libraries and whether any profit was or could be made from it. McClellan noted that the senators received copies from the Library of Congress, implying that he did not see anything unusual or dangerous in the practice. McCarthy was also questioned by Senator Burdick (D-ND)<sup>56</sup> who gave an example of the trouble involved in complying with the existing §108(d)(1), and the value of copies requested via interlibrary loan, from a small library in North Dakota when a copy might only be obtained from the Library of Congress or the publisher in New York. Brown also spoke and reiterated the need for the amendment the ARL sought, but also that “clarification that fair use applies to the normal library

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<sup>56</sup> Actually a member of the progressive Non-Partisan League (NPL) which aligned itself after 1956 with the Democrats.

practice of making a single photocopy of copyrighted material for a user.”<sup>57</sup> Senator Burdick followed the same line of questioning with Brown.

Senator BURDICK: In other words, the material I am getting from the Library of Congress from time to time would be illegally given to me under this act?

Mr. BROWN: Unless they meet the requirements of this provision.<sup>58</sup>

Brennan asked whether §107, fair use, would enable a North Dakota library to make the copy Senator Burdick was concerned about. Brown thought it would, but that the Williams & Wilkins case had made that uncertain, and that fair use was a defense after a suit of infringement. Libraries needed certainty to conduct their operations. For librarians, Ed Low (ALA), Frank McKenna (SLA), and Jacqueline Felter (MLA) also spoke at these hearings. The ARL, ALA, and MLA, but not the SLA, all supported the amendment to S.1361. There was also a lot of testimony from other interests including opposing testimony from publishers and authors.

At the conclusion of these hearings the S.1361 (see figure 9 for §108 in this version of the bill) was reported out of Committee (S. Report 93-983). The Committee recognized that the statute could not adequately define which copying practices constitute single copies or “systematic reproduction” and that libraries and regional library systems continued to develop and change. The insertion of the concept of systematic reproduction at about this time will be discussed in greater detail in chapter 6:3. The report recommended that representatives of authors and publishers meet with the library community to formulate photocopying guidelines and develop “workable clearance and licensing procedures.”<sup>59</sup> As we shall discuss in detail in a later section, such negotiations had continued throughout 1972 and 1973 with the Cosmos Club and

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<sup>57</sup> *Copyright Law Revision: Hearings on S. 1361 Before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 93rd Congress, 1st Session (1973)*, 93.

<sup>58</sup> *Ibid.*, 94.

<sup>59</sup> U.S. Congress. Committee on the Judiciary, "Copyright Law Revision Report to Accompany S.1361," (Washington, D.C.: Senate, 1974).

Dumbarton Oaks meetings, and would continue with the Upstairs/Downstairs meeting in early 1974. McCarthy encouraged a letter writing campaign of librarians and university presidents to key senators about the 108(d)1 amendment, but there is no indication of how successful this was in the existing ARL records. At around the same time, the Association of American Publishers (AAP) organized a similar campaign amongst authors warning of the dangers of the library photocopying amendment and the general education exemption, advocated by the NEA's Ad Hoc Committee. However, the AAP letter (a copy of which found its way to the ARL files) that authors could use as a model to write to their senators, opposed only the general education exemption.<sup>60</sup>

At this point the focus of librarian concern shifted. On November 23, 1973 the Court of Claims reversed Davis' recommendation and made it clear they did not want to interfere with medical research activities while copyright revision legislation was under consideration. This decision was not final, Williams & Wilkins would appeal the decision to the Supreme Court, but it did push the decision firmly back into the legislative realm. On January 9, 1974 McCarthy and Brown met with Brennan to discuss new language recommended by Senator Hart's office. In the record of the meeting, presumably written by McCarthy, he noted that the legislation, "would declare library photocopying of [a] single article without checking on availability not an infringement of copyright. But introduces idea of 'systematic copying' which is an infringement."<sup>61</sup> Brennan was planning to define systematic copying in the Committee Report.

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<sup>60</sup> "Open Letter from the Association of American Publishers to Authors [December 5, 1973]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress.*

<sup>61</sup> "Record of a Meeting of Thomas Brennan, Philip Brown, and Stephen A. McCarthy [January 9, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 of 64 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress.*

“We are invited to submit examples that would illustrate our views on ‘systematic copying.’”<sup>62</sup> Brennan was expecting possible action by the Senate in 1974, but not by the House, which would need to hold hearings.<sup>63</sup> McCarthy followed up on January 16, 1974 with a letter to Brennan in which he stated that he was unable to provide any examples of “systematic copying” by ARL libraries. He noted that large libraries do lots of copying, posting “impressive figures,” but all of this copying consisted of, “one copy of an article for one reader, at his request and for his personal use.”<sup>64</sup> Having come close to winning the right to make single copies of articles, McCarthy refused to be drawn into defining the limits of copying by libraries.

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

- (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 employees:
- (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

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> "Stephen A. McCarthy to Thomas Brennan [January 16, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Amendment, Manuscript Division, Library of Congress*.

- (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of materials described in subsection (d) [subsection (d) reads in part, “a copy, made from the collection of a library or archives where the user makes his 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.”

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**Figure 10 § 108 (g) in S.1361 (accompanying Senate Report 93-983, July 1974)**

At the 41<sup>st</sup> Meeting of the Board of Directors of the ARL at the Palmer House Hotel, Chicago on January 17, 1974, Budington informed the board that the Senate Subcommittee on Patents Trademarks & Copyrights was expected to mark up the bill on February 1, then report to the Judiciary Committee, and then the bill would move to the full Senate for action. ARL was not expecting passage in the 93<sup>rd</sup> Congress.<sup>65</sup> The record of the meeting does not explain why. It could have been as mundane as the need for the House to conduct hearings on a whole range of issues that had transpired since passage of HR.2512 in 1967, but this was also the height of the Watergate Scandal. Pressure was mounting on Congress to impeach President Nixon throughout the winter of 1973-4. The Judiciary Committees of both houses were central to these events.

On April 3, 1974 McCarthy wrote to Brennan objecting to §108(g)2. He argued that §108(g) negated §108(d). Libraries were being asked to cooperate by other federal agencies and yet this provision prevented them from doing so.<sup>66</sup> Then on April 15 he wrote to McClellan

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<sup>65</sup> "41st Meeting of the Board of Directors of the ARL at the Palmer House Hotel, Chicago [January 17 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 11 Folder: 83rd ARL Meeting – Chicago, Manuscript Division, Library of Congress.*

<sup>66</sup> "Stephen A. McCarthy to Thomas Brennan [April 3,1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974. Manuscript Division, Library of Congress.*

expressing further concern about §108(g), the “systematic reproduction” provision, and described it as “unwarranted”. He repeated the assertion that there is no evidence of economic harm to copyright holders from library copying; “it is more likely that widened pools of potential users encourage libraries to subscribe to periodicals.”<sup>67</sup> It is sometimes difficult to work out how someone involved in lobbying really feels about a particular provision, but McCarthy made his feelings clear to a colleague, Morton Goldberg, a week later, “I guess both sides gained and lost something in the latest subcommittee draft. ‘Systematic photocopying’ which admittedly (by the subcommittee staff) can’t be defined is now forbidden to librarians who are not lawyers.”<sup>68</sup>

The Supreme Court’s decision on May 28 to review the Court of Claims decision in the Williams & Wilkins case had no discernible impact on the ARL lobbying efforts. The next day McCarthy composed a form letter for use by ARL members located in states whose senators were members of the Judiciary Committee. The letter objected to §108(g)2, systematic reproduction. ARL wanted this provision deleted as unnecessary and “inimical to the objectives of §108.” If retained, “it should be amended by adding immediately before the period at the end of Subsection (g) the following clause: ‘so as to substantially impair the market for or value of the copyrighted work’.”<sup>69</sup> McCarthy’s efforts to energize the ARL membership were successful. In June 1974 many ARL librarians wrote to their senators about §108(g)2 noting the importance of fiscal responsibility, that interlibrary loan was an established practice, and that publishers had not been harmed.

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<sup>67</sup> "Stephen A. McCarthy to Senator John McClellan [April 15, 1974.],” in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress.*

<sup>68</sup> "Stephen A. McCarthy to Morton Goldberg [April 22, 1974.],” in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright general 1974-1976, Manuscript Division, Library of Congress.*

<sup>69</sup> Stephen A. McCarthy, "Form Letter to Members of the Senate Judiciary Committee [May 30, 1974.],” in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress.*



On June 28, Senator Hart (who had inserted the language into the legislation) wrote to McCarthy and defined his understanding of the term “systematic reproduction” as the “the related or concerted reproduction of single copies.”<sup>70</sup> McCarthy responded asking him to consider inserting a statement concerning this issue into the Senate Judiciary Committee Report, but on July 22, Shirley Johnson of Senator Hart’s office called the ARL offices to tell McCarthy that it was too late to change the committee report. In Suzanne O. Frankie’s handwritten record of the conversation, she records, “that should Hart get up on Senate floor to say, ‘It is my understanding that this means ...’ that Senator Scott or McClellan who strongly support wording would do likewise and the record would not be clear. ... there was no possibility of getting action this year. Perhaps we could try to clarify meaning when House considers it. ... In subcommittee, Brennan was adamant about not changing this.”<sup>71</sup>

The bill, S.1361 passed the Senate on September 9, 1974 and action immediately moved to the House for the first time since 1967. McCarthy acted on Hart’s suggestion on September 11. He wrote to Congressman Kastenmeier, Chair of Subcommittee No. 3 of the House Judiciary Committee and the leader of action on revision in the House. “The action of the Senate which provides for fair use but prohibits ‘systematic reproduction’ which the Senate admits it cannot define, only further confuses an issue that desperately needs clarification, ... In its current form

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<sup>70</sup> "Senator Hart to Stephen A. McCarthy [June 28, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress*.

<sup>71</sup> "Record of phone conversation between Shirley Johnson and Suzanne O. Frankie [July 22, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress*.

the Bill threatens long-established, customary library services to readers and may lead to prolonged litigation.”<sup>72</sup>

As will be discussed in greater detail in the second section of this chapter, on November 27, 1974 the full Court of Claims reversed Commissioner Davis’ decision, deciding that since the issue of copyright and library photocopying was under active legislative consideration, now was not the time to overturn and disrupt the copying activities of the NLM and by extension all libraries.

On December 31, 1974 McCarthy retired. He had been involved in copyright revision as Executive Secretary at the ARL in the early 1960’s and had been a leading participant in librarians’ involvement in revision from 1967. He was particularly active in the development of the ALA/ARL proposed amendment to §108 after 1968, in the Williams & Wilkins case, and in the negotiations between librarians and publishers in the early 1970’s. He testified before the Senate Subcommittee concerning S.1361 in July 1973. On a number of occasions, certainly after passage in the House in 1967, McCarthy must have thought that the revision process – for good or ill – was going to come to fruition during his tenure at the ARL. Yet this did not happen and as McCarthy lamented to a correspondent in 1973, “on and on we go with Copyright!”<sup>73</sup>

At the beginning of the 94<sup>th</sup> Congress, on January 15, 1975, the revision bill was reintroduced into the Senate as S.22 and on January 28 as HR.2223 in the House (§108(g)2 was identical to S.1361, see figure 10). Just one month later, on February 24, the Supreme Court, through a split decision, let the Court of Claims decision stand. Everything seemed set for a final

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<sup>72</sup> "Stephen A. McCarthy to Congressman Kastenmeier [September 11, 1974.],” in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress.*

<sup>73</sup> "Stephen A. McCarthy to Basil Stuart-Stubbs [December 18, 1973]."

push towards passage of the revision bill, with most of the legislative action taking place in the House.

One March 25, the newly appointed Executive Director of the ARL, John McDonald wrote letters to the members of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice (the renamed Subcommittee No. 3); Representatives Robert Drinan (D-MA), Edward W. Pattison (D-NY), Herman Badillo (D-NY), George Danielson (D-CA), Charles Wiggins (R-CA), Robert Kastenmeier (D-WS and Chair of the House Subcommittee), and Thomas Railsback (R-IL). "It continues to be the position of the Association of Research Libraries that the provisions of Section 108(g)2 are dangerously unclear and damaging to the right of libraries to make single copies of copyrighted articles for their users."<sup>74</sup> ARL was still hoping the Senate would amend the bill. If not, the ARL hoped the House would. McDonald noted the ARL's agreement with ALA and also attached a letter to Senator McClellan indicating that the ARL wanted §108(g)2 deleted. Directors of ARL member libraries also participated in the continuing lobbying effort and kept ARL staff in the loop. For instance, there is a copy in the ARL records of a letter from Congressman Bill Chapman to William Terrell, of the University of Florida, in which Congressman Chapman states that he thinks §107 and §108 in HR.2223 are sufficient.<sup>75</sup>

McClellan responded to McDonald on April 8, agreeing that some of the language in §108 needed clarification, but stating that it was impossible to do so in the statute, or even in the report, and reiterating his support for continuing discussion between librarians and publishers to

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<sup>74</sup> "John P. McDonald to Members of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice [March 25, 1975]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 39 of 64, Folder: Copyright Revision 1975, Manuscript Division, Library of Congress.*

<sup>75</sup> "Congressman Bill Chapman to William Terrell [March 31, 1975]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Support Letters 1976, Manuscript Division, Library of Congress.*

develop workable guidelines. He hoped that such guidelines could then be represented in the legislative history.<sup>76</sup>

On May 30, 1975 McDonald provided a detailed statement to the House Subcommittee on Court, Civil Liberties, and the Administration of Justice as part of the eighteen days of hearings that the subcommittee conducted during their consideration of HR.2223. He testified that the bill ultimately approved by the committee, “must include provisions that will ensure the customary, long-established library service of providing a single photocopy of a single article or excerpt from a copyrighted periodical or book for a patron’s private use may be continued without incurring liability for copyright royalties.”<sup>77</sup> He concluded by stating that §108(g)2 was inconsistent with the constitutional objective of copyright and that the restrictions imposed on library photocopying would far outweigh the benefits. In between he argued that §108(g)2 restricts activities that the courts, in the Williams & Wilkins case had deemed to be lawful, that there was no evidence that the journal publishers had been harmed by such practices, and indeed that the public had benefited from them, that the costs associated with compliance would be too high, and that the authors of the works primarily at issue here – scholarly articles – were more interested in wide dissemination of research than in royalty payments.<sup>78</sup>

On June 13, McDonald appealed for letters and cards to be sent to Congress from the ARL membership<sup>79</sup> and during the summer of 1975 letters advocating deletion of §108(g)2

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<sup>76</sup> "Senator John McClellan to John McDonald [April 8, 1975]," in *Records of the Association of Research Libraries, Manuscript Division, Library of Congress*.

<sup>77</sup> John P. McDonald, "Statement of the Association of Research Libraries on the General Revision of the Copyright Law (H.R. 2223) to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 39 of 64 Folder: Copyright Revision 1975, Manuscript Division, Library of Congress*. (1975).

<sup>78</sup> *Ibid.*

<sup>79</sup> "Form letter from John P. McDonald to the ARL membership [June 13, 1975]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 39 of 64 Folder: Copyright Revision 1975, Manuscript Division, Library of Congress*.

continued to be sent to Congress by ARL library directors. In individual correspondence with numerous librarians, McDonald was particularly exercised by what he perceived as high profits in publishing, Charles Lieb and publisher propaganda, and the use by publishers of novelists to push their cause. On July 2, he wrote to Julius Marke, "Our best hope is in the Committee. We are losing the battle in the press, thanks to the money and influence of the publishers."<sup>80</sup> On July 3, McDonald again appealed for letters from the membership. His efforts appeared to have some impact, if not on Congress then on the publishers. A copy of an AAP letter exists in the ARL records warning that librarians had generated around 400 letters to Congress and that hardly any had been received from authors and publishers. Both sides used the lobbying activity of the other to energize their base of support. On July 15, McDonald wrote to Irene Hoadley (Director of Libraries at Texas A&M University) with some good news, "We hear that the House Committee may be preparing to amend their version of the Bill in favor of libraries."<sup>81</sup> Then on August 8 to Norman D. Stevens (Acting Director of Libraries at the University of Connecticut) with the news that, "the publishers are seeking to have any staffed copying facility included in the definition of 'systematic reproduction.' It is precisely because this term is so vaguely defined that we are so anxious to get rid of it."<sup>82</sup>

On July 8, McClellan wrote to McDonald asking for an update on the ongoing negotiations between publishers (which he described as "the copyright community") and librarians. McDonald finally responded to him on September 15, explaining that he had delayed

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<sup>80</sup> "John P. McDonald to Julius Marke [July 2, 1975]," in *Records of the Association of Research Libraries Unprocessed materials #18,632. Box 39 of 64 Folder: Copyright Revision 1975, Manuscript Division, Library of Congress.*

<sup>81</sup> "John P. McDonald to Irene B. Hoadley [July 15, 1975]," in *Records of the Association of Research Libraries Unprocessed materials #18,632. Box 39 of 64 Folder: Copyright Revision 1975, Manuscript Division, Library of Congress.*

<sup>82</sup> "John P. McDonald to Norman D. Stevens [August 5, 1975]," in *Records of the Association of Research Libraries Unprocessed materials #18,632. Box 39 of 64 Folder: Copyright Revision 1975, Manuscript Division, Library of Congress.*

responding until he had been able to consult the leaders and members of the ARL. He then proceeded to write a five-page letter to McClellan. In this, and in his statement to the House subcommittee, McDonald's style was far more like Clapp's than his predecessor, McCarthy, who tended to be more concise and practical in his communication. McDonald did not answer McClellan's request directly. Instead, he laid out the ARL's arguments in terms of copyright revision in general and §108(g)2 in particular and argued four particular points: §107 was a welcome addition to the statute, but §108 and particularly §108(g)1 and (2), "effectively remove the right of fair use."<sup>83</sup> Further, that this will mean that libraries will either be prevented from offering these customary copying services, or be forced to bear increased costs, and finally,

4. Section 108(g) must be removed from S. 22 in order that the public interest in information may be preserved and safeguarded. There can be no doubt that in American society today information is power – economic power, political power, and intellectual power. Information is the essence of education and it is as desirable that the citizens of the country have free access to information through a healthy and unencumbered system of libraries as it is each person have access to a good education at public expense. But information, like education, is costly, and not every citizen is equally able to afford it. It is crucial therefore that information be viewed as a national resource to be used for the benefit of all and not as a commodity to be sold to the highest bidder.<sup>84</sup>

In reinforcing these points, McDonald reiterated many of the same arguments he had used in his statement before the House subcommittee. But he also emphasized two more. The first, that CONTU should be allowed to discuss the issue of library photocopying and, until the Commission arrived at guidelines, §108(g) should be deleted from S.22. The second argument took advantage of the work of the relatively new National Commission on Library and Information Science (NCLIS). McDonald noted

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<sup>83</sup> "John P. McDonald to Senator McClellan [September 15, 1975]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright general 1974-1976, Manuscript Division, Library of Congress.*

<sup>84</sup> *Ibid.*

that one of the goals of NCLIS was, “that with the help of new technology and with national resolve the disparate collection of libraries and information centers in the United States can become an integrated national system.”<sup>85</sup> McDonald was not the first librarian to point out that one part of the federal government, in this case NCLIS, was encouraging library systems, while the copyright revision bill was, at least from the librarians’ perspective, discouraging systematic copying. McDonald also copied this exchange to Kastenmeier in the House and urged him to delete §108(g)(1) and (2), leave the issue to CONTU, thus guaranteeing a far smoother ride for the revision bill, HR.2223.<sup>86</sup>

McDonald also suggested a preferred amendment to §108 that is copied in full at figure 11.

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#### PREFERRED AMENDMENT

##### Strike Subsection 108(g)(2) and insert the following new Subsection 108(i)

(i) Two years from the effective date of this Act, or within six months after the submission to the president and the Congress of the final report of the National Commission on New technological Uses of Copyrighted Works, established pursuant to Public Law 93-573, whichever date shall be earlier, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted material, 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 copyright proprietors and the

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<sup>85</sup> Ibid.

<sup>86</sup> "John P. McDonald to Congressman Kastenmeier [September 23, 1975]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright general 1974-1976, Manuscript Division, library of Congress.*

needs of users. The report should also detail any problems that may have arisen, and present such legislative or other recommendations as are warranted.<sup>87</sup>

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**Figure 11 ARL Amendment substituting §108(i) for §108(g)(2) (September 1975.)**

In her annual *Report of the Register of Copyrights, 1975*, Ringer noted that, “the talk about the bill had ceased to be ‘whether’ and was becoming ‘when.’”<sup>88</sup> She also identified library photocopying and fair use in education and scholarship as two of seven issues that remained to be settled, but also insisted that, “the bulk of the bill had remained unchanged since it passed the House in 1967.”<sup>89</sup> S.22 was reported out of the Senate Judiciary Committee on November 20. The accompanying report, 94-473, spent considerable time discussing §108(g). The report made it clear that as far as the Senate was concerned this subsection did not allow a library to copy an article on behalf of an instructor for members of a class. It also gave three examples of what would constitute systematic reproduction, coordinated collection development in which a group of libraries discontinue subscriptions and instead depend on copies from a subscription maintained by one library, a research center that uses copies instead of multiple subscriptions to satisfy the needs of researchers, and coordinated collection development amongst library branches in which branch libraries discontinue subscriptions and instead depend on copies from a subscription maintained by one branch. The committee recognized that there was still uncertainty in the definition and recommended that authors and publishers work with librarians to develop guidelines, and also that they develop workable clearance and licensing

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<sup>87</sup> "Preferred Amendment. Strike Subsection 108(g)(2) and insert the following new Subsection 108(i)," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright [pencil], Manuscript Division, Library of Congress* (1975).

<sup>88</sup> Barbara Ringer, "Annual Report of the Register of Copyrights," (Washington, D.C.: Library of Congress, 1975).

<sup>89</sup> Ibid.



procedures for copying practices that exceed those authorized by the bill. The committee also addressed the recent decision in the Williams & Wilkins case, seeing the resolution of that case as providing little guidance and as more of a holding operation awaiting legislation. Finally the committee acknowledged that programs such as NCLIS would continue to bring change and development to library operations and noted that CONTU had been created to consider possible changes in copyright law and procedures to deal with such change.<sup>90</sup>

Even as the bill was reported out of committee, ARL librarians continued to lobby their congressional representatives through the winter of 1975 and to copy such letters to the ARL staff. James Henderson of the Research Libraries Group (RLG) received a response from Senator Kennedy stating that Kennedy was looking for middle ground.<sup>91</sup> Jose Cabranes of Yale University wrote to Congressman Giaimo (D-CT) concerning both §108(g)2 and §107.<sup>92</sup> On January 7, 1976, Congressman Drinan (D-MA) informed Arthur Linenthal of Boston University that he had tried to insert what he described as more liberal language into §108(g)(2).<sup>93</sup> We also see evidence that the increasingly important library systems were also worried about §108(g)(2) with Betty Feeney of the New England Regional Medical Library Service (NERMLS) also writing to Drinan on January 23 and Evan Neff of the Rochester Regional Research Library Council (RRRLC) visited his Congressman Frank Horton (R-NY) on February 6, 1976. On that same day, and then again on February 19, the Senate debated S.22, passing the bill 97-0, and

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<sup>90</sup> U.S. Congress, "Senate Report No. 94-473, 94th Cong., 1st Sess.," 70-1.

<sup>91</sup> "Senator Edward Kennedy to James Henderson [November 3, 1975]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Support Letters 1976, Manuscript Division, Library of Congress.*

<sup>92</sup> "Jose Cabranes to Congressman Robert Giaimo [November 11, 1975]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Support Letters 1976, Manuscript Division, Library of Congress.*

<sup>93</sup> "Congressman Drinan to Arthur J. Linenthal [January 7, 1976]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Support Letters 1976, Manuscript Division, Library of Congress.*

referred it to the House Committee on the Judiciary. The next day Senator Magnuson (D-WA) responded to Gerald Oppenheimer (Pacific Northwest Regional Health Sciences Library at the University of Washington) and informed him that Magnuson had raised the issue of medical library interlibrary loan during the Senate debate.<sup>94</sup> The lobbying continued in the House with Connie Dunlap (Duke University) contacting Ike Andrews (D-NC) on February 23 and Robert Cardozo contacting Congressman Drinan again on February 27. The Coalition of Library Associations, which included the ALA, ARL, AALL, SLA and both the Medical and Music Library Associations and had assumed the coordinating role previously played by the Joint Committee, reinforced this grassroots lobbying with a letter to the House subcommittee in which it reiterated the librarians' long-standing position, and described the bill as, "not acceptable", and one that would, "impose complex and confusing procedures" on libraries. The Coalition urged the subcommittee to leave this issue of library photocopying to CONTU.<sup>95</sup>

On March 3, the House subcommittee amended §107 to include the phrase "including whether such use is of a commercial nature or is for nonprofit educational purposes,"<sup>96</sup> though this amendment seems to have come about, not because of library influence, but in relationship to the ongoing negotiations of the guidelines for classroom use. On March 5 the ARL again encouraged its members to act with a mailgram to all member libraries urging them to contact their congressional representatives. On that same day the Coalition of Library Associations made a statement to the subcommittee proposing deletion of §108(g)(2) arguing that the

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<sup>94</sup> "Warren G. Magnuson to Gerald J. Oppenheimer [January 20, 1976]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Support Letters 1976, Manuscript Division, Library of Congress.*

<sup>95</sup> "Letter from the Coalition of Library Associations to the House Subcommittee on Courts, Civil Liberties and the Administration of Justice [February 23, 1976]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Support Letters 1976, Manuscript Division, Library of Congress.*

<sup>96</sup> Patry, *The Fair Use Privilege in Copyright Law*, 304.

current section would stop interlibrary loan and that the subsection should be deleted; they urged the House to let CONTU come up with guidelines and delay action until then.<sup>97</sup>

The grassroots lobbying of Congress by librarians continued and reached a crescendo during the spring of 1976. On March 9, both the ARL and the ALA asked members to contact their Representatives in the House and urge them to delete §108(g)2.<sup>98</sup> This effort resulted in at least nineteen letters to Congress over the next month or so.<sup>99</sup> In Wisconsin, Congressman Kastenmeier's home state, the Wisconsin Interlibrary Loan Services (WILS) sent a letter to all its member libraries stating, "if the language of Section 108(g)(2) remains in the Bill, your library and your patrons will not longer be in a position to legally benefit from the services WILS has been able to offer in the past."<sup>100</sup> WILS asked them to contact Kastenmeier immediately. In the spring of 1976 both NCLIS and the US Department of Health and Human Welfare also expressed positions in opposition to §108(g)2.

During the period, on March 12, the *Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals* negotiated by CONTU were released. Although since passage of the 1976 Act these guidelines have come to form the basis for the generally accepted practices in academic libraries with regard to copyright and course reserve operations, librarians were not very involved in their development. These guidelines were seen as the concern of the education lobby's Ad Hoc Committee on Copyright, and as we

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<sup>97</sup> "Statement of the Coalition of Library Associations to the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice [March, 5, 1976]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632. Box 44 of 64. Folder: Copyright 1976 Material, Manuscript Division, Library of Congress.*

<sup>98</sup> "Form Letter from the Association of Research Libraries to Members [March 9, 1976]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632. Box 51 of 64. Folder: Copyright – (Copyright 1976 Material), Manuscript Division, Library of Congress.*

<sup>99</sup> "Copyright Support Letters 1976," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64, Manuscript Division, Library of Congress.*

<sup>100</sup> "Form letter from Wisconsin Interlibrary Loan Services [March 15, 1976]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632. Box 51 of 64. Folder: Copyright (Copyright – 1977 Material.), Manuscript Division, Library of Congress.*

will see later John Lorenz (Deputy Librarian of Congress, 1965-76, Acting Librarian of Congress in 1975, and by this point the Executive Director of ARL, serving in this capacity in 1980) did not regard them as a good deal on behalf of educators.<sup>101</sup>

On April 5, the Coalition of Library Associations made another statement to the House subcommittee, addressing both HR.2223 and S.22. They opposed §108(g)(2) and noted that they had proposed alternative language on March 5, to which the publishers had responded on March 26 with what the librarians regarded as, “new broader restrictions” and “vague and ambiguous hypothetical situations” that made it impossible to advise librarians of their rights.

There is a fascinating handwritten note from an unidentified author of one of the House Subcommittee mark up meetings on April 6, 1976. The note indicates that Kastenmeier was unwilling to leave §108 out of the bill and deal with it later. Both sides were unhappy with a proposed amendment referred to as the “Ringer/Lehman amendment.” Congressman Drinan asked “what disasters will befall if House passes as is?” Ringer responded that librarians will be unhappy and Drinan asked, “would medical libraries have to change their practices?” To which Ringer responded, “they fear so.” Kastenmeier added that, “librarians feel that system of clearances etc. unwieldy and unworkable.”<sup>102</sup> Clearly, the librarians’ lobbying activity had some impact upon at least Kastenmeier and Drinan. On April 1, CONTU had offered to bring the two sides together on library photocopying and on April 7, Kastenmeier took them up on their offer. As a result of this intense lobbying the Subcommittee amended §108(g)2 to include the following,

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<sup>101</sup> "John G. Lorenz to Philip Brown [September 24, 1976]," in *Records of the Association of Research Libraries Unprocessed materials #18,632, Box 22 of 64 Folder: Copyright – Correspondence and CNLIA Drafts 1977, Manuscript Division, Library of Congress.*

<sup>102</sup> "Handwritten Notes of Mark Up Meeting of House Subcommittee on Courts, Civil Liberties, and the Administration of Justice concerning S.22 [April 6, 1976] ", in *Records of the Association of Research Libraries. Unprocessed materials #18,632. Box 51 of 64 Folder: Copyright – (Copyright 1976 Material), Manuscript Division, Library of Congress.*

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.<sup>103</sup>

At this same time the Subcommittee also added §108(i), “requiring the Register of Copyrights, five years from the effective date of the new Act and at five-year intervals thereafter, to report to Congress upon, “the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users,” and to make, “appropriate legislative or other recommendations.”<sup>104</sup>

Thus on April 14, McDonald was able to write to the ARL membership that although ARL wanted §108(g)2 deleted, at least it was amended due to pressure from librarians.<sup>105</sup> By the end of April this new language inserted to protect the interlibrary loan activities of libraries, the classroom guidelines, and the cable TV agreement meant that observers of the legislative process thought a floor fight would be avoided and the bill would pass. But the librarians were still cautious. On June 17, Brown wrote to John Lorenz, who had just replaced John McDonald as the Executive Director of the ARL, with a status report on the revision process. He regarded the House subcommittee’s amendment to §108(g)2 as positive, but warned Lorenz to watch out for publishers to try and change course in the House Report or in the full Judiciary Committee. However, he advised Lorenz that there was not need for another letter writing campaign yet.<sup>106</sup>

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<sup>103</sup> "House Report 94-1476 accompanying S.22."

<sup>104</sup> Ibid.

<sup>105</sup> "Memo from John P. McDonald to Directors of ARL Libraries. Copyright Update [April 14, 1976]," in *Records of the Association of Research Libraries. Box 44 of 64. Folder: Copyright 1976 Material, Manuscript Division, Library of Congress.*

<sup>106</sup> "Philip Brown to John Lorenz [June 17, 1976]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632 Box 44 of 64. Folder: Copyright 1976 Material, Manuscript Division, Library of Congress.*

Brown's fears turned out to be unfounded. HR.2223 was reported out of Committee accompanied by report 94-1476 on September 3, and debated in the House on September 22, where the bill passed 316 to 7. On September 29 the Conference Committee met and issued its report, which was accepted by both houses on September 30. The bill was finally signed by President Ford on October 19, 1976 and became PL 94-553. The full text of §107 of PL94-553 is reprinted at Figure 12 and the text of §108(g)2 at Figure 13.

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### **§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 of 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 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 nonprofit 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.

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**Figure 12 §107 Fair Use PL94-553 (October 19, 1976)**

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## §108(g)2

(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 –

...

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of materials described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary loan arrangements that do not have the, 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.

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### Figure 13 §108(g)2 in PL94-553 (October 19, 1976)

The next day Brown wrote to Lorenz analyzing the legislative history to determine the final disposition of §108(g)2. He noted that the House wording of the section, not the Senate’s, finally formed the §108(g)(2) so that “systematic” reproduction that could be found to infringe a copyright excluded interlibrary loan copying that did not substitute for a subscription. He also described the Conference Committee’s adoption of the CONTU guidelines for interlibrary loan (discussed at greater length in a later section of this dissertation) as, “a further major step towards predictability.” He then went on to comment on some of the implications of the guidelines for library copying operations and procedures and concluded that

Section 108 permits any interlibrary reproduction or distribution of photocopies of materials described in subsection (d), even though such reproduction or distribution is ‘systematic,’ providing only that the library receiving such copies does not do so in ‘such aggregate quantities as to substitute for a subscription to

or purchase of such works,' and all other applicable conditions established by section 108 are satisfied.<sup>107</sup>

However, he also noted that the reports issued by the House, Senate, and the Conference Report (94-1733) included examples which suggested varying congressional intent and acknowledged some uncertainty because of this. Brown's letter was an explicit political act; an attempt to "shape the battlefield" of any future judicial or legislative struggle in librarians favor. But he was not alone in this effort. On January 12, 1977 Senator McClellan wrote to Townsend Hoopes, President of the AAP, aiming to clarify the legislative history of PL94-553. He noted that the legislative history consisted of House Report 94-1476 accompanying HR.2223, Senate Report 94-473 accompanying S.22 and the Conference Report 94-1733. He noted, pointedly, that neither the House nor the Conference reports modified the Senate report with regard to systematic copying.<sup>108</sup>

## 6.2 1968-1975: WILLIAMS & WILKINS V. UNITED STATES

This dissertation is not a history of *Williams & Wilkins v. United States*. I do not intend to provide a comprehensive history of the case<sup>109</sup>. However, this one case had a huge impact upon

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<sup>107</sup> "Philip A. Brown to John Lorenz [October 20, 1976]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 51 of 64 Folder: Copyright PL 94-553, Manuscript Division, Library of Congress*.

<sup>108</sup> "Senator John L. McClellan to Townsend Hoopes [January 12, 1977]," in *Records of the Association of Research Libraries Unprocessed materials #18,632. Box 22 of 64 Folder: Copyright Gen. pre-1978, Manuscript Division, Library of Congress*.

<sup>109</sup> Apart from the many contemporary articles written about the case, readers interested in finding out more about this case should consult Nasri William Z. Nasri, *The Impact of Reprography on the Commercial Publication of Scientific and Technical Periodicals: with Particular Reference to the Case of the Williams and Wilkins Company v. the United States* ([Pittsburgh, Pa.]: Nasri, 1976)., McCormick McCormick, *The Williams & Wilkins Case: the Williams & Wilkins Company v. the United States.*, and the archives of the case at the NLM National Library of Medicine Archives and Modern Manuscripts Program History of Medicine Division, "Finding Aid to the Williams



the course of the copyright revision process and library photocopying. It convinced librarians that they could not rely on §107 and the doctrine of fair use to protect what they regarded as their customary and long-standing practices. Furthermore, the ebb and flow of decisions; from Commissioner Davis' decision in favor of Williams & Wilkins, to the reversal of this decision by the full Court of Claims, to the acceptance of that reversal by the Supreme Court, together with the various arguments made in the case at various levels, affected the relative positions and strategies of librarians and publishers, and the reactions of legislators, during the most crucial years of the revision process. Therefore it is worth taking some time to see what impact this case had on the role of the ARL in the revision process.

If librarians found themselves in an enviable position in 1967, publishers were not so happy. For instance, William Passano, Chairman of the Williams & Wilkins Company, a medical journal publisher in Baltimore, MD had hoped the S.597 would include a provision to require payment of copyright royalties on photocopies of copyrighted works and was disappointed to see that the bill would create a commission to study the issue instead.<sup>110</sup> On May 1, 1967 Passano wrote to Dr. Martin Cummings, Director of the National Library of Medicine (NLM, which had been an ARL member library since 1848), explaining the company's policy with regard to permission to make photocopies of articles published by Williams & Wilkins. They were glad to provide permission to copy, provided that the NLM paid a royalty of 2 cents per page. Without such a payment, no permission to copy was granted and the company would consider any copying an infringement of their copyright.<sup>111</sup> Cummings ordered library staff to stop

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& Wilkins Co. v. The United States Records, 1938-1982 (bulk 1958-1982)," National Library of Medicine, <http://www.nlm.nih.gov/hmd/manuscripts/ead/williams.html>.

<sup>110</sup> McCormick, *The Williams & Wilkins Case: the Williams & Wilkins Company v. the United States*, xi.

<sup>111</sup> Christopher Wright, *Libraries and Copyright: A summary of the arguments for library photocopying* (American Library Association, 1974).

photocopying all Williams & Wilkins journals until further notice and referred the matter to the General Counsel of the Department of Health, Education, and Welfare (HEW), the department that administered the NLM and the National Institutes of Health (NIH). The agency's lawyers advised Cummings that the NLM photocopying fell within the bounds of the doctrine of fair use. Cummings informed Passano of this and resumed copying the publisher's journals. On August 11, 1967 Passano meet with Cummings and again proposed permission charges. Cummings refused to seek permission to copy but (since the NLM was a public institution and its records were open) worked with Williams & Wilkins personnel over the next few months to show what copying the NLM was doing. However, this did not satisfy Passano (and he had gathered enough data to make a case in court. In early 1968, on February 27, Williams & Wilkins filed suit in the United States Court of Claims against both the National Library of Medicine and the National Institutes of Health, claiming copyright infringement.<sup>112</sup> Alan Latman, a leading copyright lawyer who wrote the original study on fair use<sup>113</sup> for the Copyright Office and went on to compile the *Kaminstein Legislative History Project*<sup>114</sup> was their counsel.

Both ARL and ALA were interested in supporting the NLM in the Williams & Wilkins suit and concerned that fair use might not be as reliable as they thought. At the 18<sup>th</sup> Meeting of the ARL Board of Directors on April 1, 1968, board members discussed the case. McCarthy and Clapp also gave an account of a meeting they attended at the New York Academy of Medicine, which had also received a cease and desist letter from Williams & Wilkins.

At the November 1968 ARL Board of Directors Meeting, Cummings summarized the current position with regard to the Williams & Wilkins suit. The Board voted to "support a

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<sup>112</sup> McCormick, *The Williams & Wilkins Case: the Williams & Wilkins Company v. the United States*.

<sup>113</sup> Latman, "Study No.14. Fair Use of Copyrighted Works.."

<sup>114</sup> Ibid.

position on copyright revision which would allow libraries to make one copy only of copyrighted material for an individual.”<sup>115</sup>

As discussed in chapter 6:1, in January 1969 S.543 was introduced in the 91<sup>st</sup> Congress. In September 1969 McCarthy summarized the ARL position in relationship to S.543, specifically the draft of §108 in the bill, and linked this legislation to the pending Williams & Wilkins case. S.543 in §108(d)(1) restricted single copy library copying for users by stipulating that the user must have, “established to the satisfaction of the library or archives that an unused copy cannot be obtained at a normal price from commonly-known trade sources in the United States, including authorized reproducing services.”<sup>116</sup> Amongst other points he made he contended that this restriction would seriously impair traditional photocopying, because the scholar could not get the copy immediately. McCarthy argued that libraries have been doing this for 60 years without legal objection, but he noted one pending exception – the Williams & Wilkins case.

The ARL leadership was increasingly concerned with the mounting cost of the Association’s involvement in this legal action. The bill for legal services in July and August 1970 from Cox, Langford, and Brown was \$1,590 for “general matters” and \$3,184.79 in connection with the Williams & Wilkins case and the *Amicus Curiae* brief Brown was preparing.<sup>117</sup> Even though there are indications elsewhere in the remaining records that Brown was discounting his fee by 50% for the ARL,<sup>118</sup> Bryant, the President of ARL described these

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<sup>115</sup> "Minutes of the 23rd Meeting of the Board of Directors [November 1, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,623, Box 56 of 64 Folder: Board Minutes 1st – 29th, Manuscript Division, Library of Congress.*

<sup>116</sup> McCarthy, "Position of Libraries on S. 543, Copyright Revision Bill [September 1969]."

<sup>117</sup> "Cox, Langford, and Brown Bill for Legal Services [September 3, 1970]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632, Box 22 of 64, Folder: Cox, Langford and Brown, Manuscript Division, Library of Congress.*

<sup>118</sup> "Cox, Langford, and Brown Bill for Legal Services May thru Sept 1968 [October 21, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632, Box 22 of 64, Folder: Cox, Langford and Brown, Manuscript Division, Library of Congress.*

fees as an, “extraordinary expense, clearly made in the national interest.”<sup>119</sup> However, by 1970, Warren J. Hass, Director of Libraries at Columbia University and the incoming President of ARL, expressed concern at the level of legal fees. He hoped other associations “will come through with some real support.”<sup>120</sup>

On September 4, 1970 Brown wrote to Clapp asking for comments on his draft of the Williams & Wilkins brief. Brown noted that, “we are becoming increasingly aware of the wisdom of your reservations about relying too heavily on the ‘fair use’ argument by itself. Also, I think we should develop the arguments we have previously discussed relating to the use of the word ‘copy’ and to the 1909 Act and its history.”<sup>121</sup> Clapp responded with detailed notes on December 30, 1970.

In January of 1971 the AALL contributed \$100 towards the cost of the *amicus curiae* brief. Later that year McCarthy wrote to leaders in ARL – Haas, Buckman, and Bryant – to alert them to the total potential legal cost of the litigation, which he estimated at \$20,000 in addition to the cost of involvement in copyright revision in Congress.<sup>122</sup> He made it clear that the ARL had adequate reserves to cover this cost.

In June of 1971, William North, the ALA lawyer, was warning of dire consequences if Williams & Wilkins succeeded in their suit against the NLM and NIH. A speech he gave to this

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<sup>119</sup> "Douglas Bryant to Stephen A. McCarthy [May 11, 1970]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress.*

<sup>120</sup> "Warren J. Hass to Stephen A. McCarthy [November 9, 1970]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632, Box 3 of 64, Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress.*

<sup>121</sup> "Philip Brown to Verner W. Clapp [September 4, 1970]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Williams vs. Wilkins, Manuscript Division, Library of Congress.*

<sup>122</sup> "Stephen A. McCarthy to Haas, Buckman, and Bryant [n.d. 1971?]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632, Box 3 of 64, Folder Williams vs. Wilkins, Manuscript Division, Library of Congress.*

effect at the ALA Annual Conference that year was circulated by Germaine Krettek, of the ALA Washington Office, to the members of the NEA-led Ad Hoc Committee on Copyright and from here found its way to McCarthy and the ARL files.

In February of 1972, Davis, Commissioner of the Court of Claims, issued his report—supporting Williams & Wilkins. He describes the NLM’s argument (based ultimately on Clapp and Shaw’s ideas about the difference between private copying and publication or printing<sup>123</sup> as “unpersuasive” and, “irrelevant,” and their distinction between single and multiple copies as “illusory and unrealistic.”<sup>124</sup> Most importantly, Commissioner Davis also found that the NLM’s copying operation fell outside the bounds of fair use in that it was, “wholesale copying and meets none of the criteria for ‘fair use’.”<sup>125</sup> Davis concluded that Williams & Wilkins, “is entitled to recover reasonable and entire compensation for infringement of copyright.”<sup>126</sup> NLM immediately appealed to the full Court.

On March 8, 1972, just a few days after Davis issued his report on the Williams & Wilkins case, McCarthy spoke to the National Federation of Science Abstracting and Indexing Services Annual Meeting. In his handwritten notes for that meeting he describes the situation in 1972 mentioning the revision bill and Williams & Wilkins. “Perhaps things seemed too good in 1966 – the ‘impossible dream’ come true. If so, the slogan in the spring of 1972 might well be ‘any dream will do’.”<sup>127</sup> In an undated handwritten note (in McCarthy’s handwriting) of a copyright meeting that seems (from both its location in the ARL papers and from internal evidence) to have taken place soon after the Davis report was issued that consists of a numbered

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<sup>123</sup> Shaw, *Literary Property in the United States*.

<sup>124</sup> *The Williams and Wilkins Company v. the United States: Report of Commissioner [Davis] to the Court*, (Bethesda, Md.: Reprinted by DfS Press, 1972).

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> McCarthy, "Notes for Speech at the National Federation of Science Abstracting and Indexing Services Annual Meeting [March 8, 1972]."

list of ARL positions that read as though they were the drafts of public positions that may have been written at or for the Cosmos Club negotiations, McCarthy notes the following,

1. We do not regard the Davis report as final.
2. Expect to oppose his recommendations as appropriate in the courts.
3. We believe our member libraries are continuing their photocopying services.
4. We are not aware of any member libraries committing themselves to licensing arrangements.

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If the Davis report does eventually become a final decision, libraries will make their own decision as to how to proceed.

Possible courses of action:

1. Discontinue staff copying services; install coin-operated copiers [deleted "and let readers make copies as they see fit."]
2. Discontinue photocopies for interlibrary loan.
3. Accept licensing arrangements + continue present services at prices high enough to cover all expenses involved.<sup>128</sup>

Clapp wrote a summary of the Williams & Wilkins case to this point and outlined the next steps for libraries in a piece he wrote for the *ARL Newsletter* of March 3, 1972 that was reprinted for a wider audience in the spring issue of the *ACLS Newsletter*. In it he notes that representatives of a number of library and other associations, including the ARL, met to discuss the reactions to the Davis decision.

"It was agreed that, until a final decision is reached in Williams & Wilkins, it is desirable that the library world should continue existing policies and practices with respect to photocopying of copyrighted materials and that, specifically, nothing is gained by libraries refusing photocopying service as a reaction to the report. ... Everyone in attendance expected that libraries will soon be deluged with offers from publishers to provide copyright protection with royalty-paying arrangements. They agreed that it would be premature to accede to any of these arrangements before Williams & Wilkins has been finally decided, and that it would severely damage the libraries' case and weaken their ranks."<sup>129</sup>

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<sup>128</sup> Stephen A. McCarthy, "Notes of a Copyright Meeting [n.d.]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632, Box 9 of 64, Folder Copyright Cosmos Meeting, Manuscript Division, Library of Congress* (1972).

<sup>129</sup> Verner W. Clapp, "The Suit of Williams & Wilkins Co. v. The United States: Recent Developments," *ACLS Newsletter* 23, no. 2 (1972).

Adding to the developing consensus, Brown wrote to McCarthy in response to a memo from Clapp about the Williams & Wilkins decision. He made the following points, “1) Davis’ report is not final it will go to the Court of Claims and maybe to the Supreme Court. 2) It does not constitute a decision on the ‘single copy’ issue because Davis found that NLM was engaging in ‘wholesale copying’ 3) Therefore it does not constitute a valid basis upon which a publisher may demand payment of license or royalty,” and he advised McCarthy to recommend that libraries contact the ARL if they are asked for payment by publishers.<sup>130</sup> In the meantime, Nasri<sup>131</sup> and Goldstein<sup>132</sup> assert that Passano approached the NLM with an offer of higher institutional subscription fees to cover in house copying and a permissions schedule for copying for interlibrary lending. NLM accepted the higher subscription fees, but explicitly rejected the notion that by accepting these they were seeking or being granted permission to copy Williams & Wilkins materials in house and refused the permissions schedule for ILL pending the outcome of the appeal.<sup>133</sup> Some other publishers followed Williams & Wilkins’ lead. Alan Latman wrote to L. Patrick Gray III (Assistant Attorney General, Justice Department) with an offer to settle Williams & Wilkins via a simple licensing deal based on a 5 cent charge per published page in a journal added to the subscription cost.

ARL advised members not to sign these agreements. This strategy pursued by journal publishers confirmed librarians’ fears that the absence of an exemption would lead to more expense for libraries. In August 1972 Williams & Wilkins retracted the offer while their case was pending.

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<sup>130</sup> "Philip Brown to Stephen A. McCarthy [February 29, 1972]," in *Records of the Association of Research Libraries, Manuscript Division, Library of Congress*.

<sup>131</sup> Nasri, *The Impact of Reprography on the Commercial Publication of Scientific and Technical Periodicals: with Particular Reference to the Case of the Williams and Wilkins Company v. the United States*.

<sup>132</sup> Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, 85.

<sup>133</sup> Nasri, *The Impact of Reprography on the Commercial Publication of Scientific and Technical Periodicals: with Particular Reference to the Case of the Williams and Wilkins Company v. the United States*, 93.

On March 28, 1972 McCarthy and Clapp met with Michael Cardozo (Executive Director of the Association of American Law Schools), Sheldon Steinbach (of the American Council on Education (ACE)) and William Woolf, who were members of the Ad Hoc Committee on Copyright Law Revision Special Subcommittee on Research and Higher Education. The group concluded that, "Williams & Wilkins shows that teachers and researchers cannot rely on the assumption that 'fair use' will be defined by the courts in the manner anticipated by the House Committee when it drafted the report that accompanied HR.4347 in 1966."<sup>134</sup> The group decided that more specific language was required and suggested some that singled out scholars' personal use in research and scholarly activity and temporary use by teachers and their students.<sup>135</sup> On June 2, 1972 the Information Industry Association held an open forum entitled "Copyright Viability in the World of Williams and Wilkins," which was billed as, "a four hour interactive session seeking workable solutions for publishers, librarians, schools and information users." Speakers included Julius Marke, Eugene Garfield of ISI, and Charles Lieb (Counsel for the Association of American Publishers, AAP).

On June 15, 1972, at the height of the anxiety about the Williams & Wilkins case, Verner Clapp died. In May of that year he had declined to be reappointed as the ARL Copyright Committee of one. He described himself as no longer, "part of the action."<sup>136</sup> John McDonald (then President of ARL) agreed to Clapp's request and noted, "that we are in a position to do this is proof of your effectiveness in educating us on copyright questions and bringing us to a point of reasonable independence in dealing with copyright problems. ... Thanks for yeoman service to

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<sup>134</sup> "Memorandum by Michael Cardozo of a Meeting with Stephen A. McCarthy ... [March 28, 1972]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632, Box 9 of 64, Folder Copyright Amendment, Manuscript Division, Library of Congress.*

<sup>135</sup> *Ibid.*

<sup>136</sup> "Verner W. Clapp to Stephen A. McCarthy [May 24, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 7 of 64 Folder Council on Library Resources 71-73, Manuscript Division, Library of Congress.*



ARL on copyright matters.”<sup>137</sup> Clapp had been central to librarians’ engagement with copyright revision from the very beginning when he worked to bring librarians into Arthur Fisher’s early efforts to solve the problems of library photocopying all the way through to the spring of 1972 when he explained the significance of Commissioner Davis’ recommendation in the Williams & Wilkins case to the readership of the American Council of Learned Societies (ACLS) and ARL newsletters. Clapp had accidentally fallen into librarianship by taking a summer job at the Library of Congress in 1922 and was quickly promoted by one of the great librarians of 20<sup>th</sup> Century American librarianship and an architect of the Copyright Act of 1909, Herbert Putnam. He remained at the Library of Congress until 1956, retiring as Chief Acting Librarian of Congress, and then was recruited to lead the Council on Library Resources (CLR) where he remained as President until 1967 and as a full time consultant until his death in 1972.

Clapp was a librarian leader in far more than just copyright, having played a part in the development and implementation of microform in U.S. libraries, the foundation of the Japanese National Diet Library after the Second World War, the response of the Library of Congress to McCarthyism, and the foundation of the Council on Library Resources. He was active in the struggle for copyright revision in each of his professional positions. He served on the Joint Committee on Fair Use in Photocopying, from 1956 to 1971. As has been noted this committee did much of the heavy lifting in terms of testimony before Congress and negotiation with publishers during the first decade of the revision process. He used his control of CLR funds to effect change by, for instance, offering to pay for legal advice for the ALA in connection with an

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<sup>137</sup> "John McDonald to Verner W. Clapp [May 30, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 7 of 64 Folder Council on Library Resources 71-73, Manuscript Division, Library of Congress.*

early draft of the legislation.<sup>138</sup> After his retirement as president of CLR in 1967, Clapp had more time and was able to publish *Copyright -- A Librarian's View* described by Germaine Krettek of the ALA Washington Office as “an important study.”<sup>139</sup> In the early 1970’s he was active in personally lobbying Congress. In 1971, although ill and in hospital, he was still very involved in the Williams & Wilkins case, writing three pages of informal notes on the case. He was an active participant in the revision process from the beginning until his death. His death is indicative of a move from librarian involvement in copyright revision being led by active, working librarians to their involvement being led by professional association staff and lawyers like Stephen McCarthy and Philip Brown (for ARL), and Robert Wedgeworth and William North (for ALA). There is no clear dividing date before which working librarians led the process and after which association staff took over. McCarthy was active in copyright revision as voluntary Executive Secretary of ARL 1960-62, before the Association’s reorganization in 1962, but his role grew after his appointment as professional Executive Director in 1967 and the documentary record indicates a definite shift towards control of the ARL’s participation in the revision process by the Association’s staff, led by McCarthy, starting in the late 1960’s and continuing through to passage of the legislation in 1976. A comparable shift can also be seen in ALA involvement when the long serving and low key ALA Executive Secretary, David Clift, retired in 1972 and was replaced by the far more high profile Robert Wedgeworth, as Executive Director. Within the ARL Charles David, Edward Freehafer, and Verner Clapp had played leading roles in revision from their positions at libraries and, in Clapp’s case, the CLR. After Clapp’s death, no single working librarian played a similar role. Instead leadership passed to the

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<sup>138</sup> "Charles Gosnell to David Clift [July 5, 1967]," in *ALA Archive, Executive Board and Executive Director Box 11 Folder Copyright 1967, University of Illinois Urbana-Champaign*.

<sup>139</sup> " Germaine Krettek to Edwin Low [September 27, 1968]," in *ALA Archive, Executive Board and Executive Director Box 11 Folder Copyright 1968, University of Illinois Urbana-Champaign*.

ARL Executive Directors McCarthy, McDonald, and finally John Lorenz, who became ARL Executive Director in the summer of 1976.

In the fall of 1972 the Williams & Wilkins case continued to be the subject of much discussion within librarianship, publishing, the medical profession, and the legal community. A review of articles indexed in *Library Literature* between 1968 and 1975 shows that at least twenty items discussed the case in 1972-3, up from just two between 1968 and 1971, and the interest continued through 1974-5, when twenty two items discussed the case. On September 13, 1972 North and McCarthy spoke on a panel with Arthur Greenbaum (of Cowan Liebowitz & Latman) and Leib. On “The Right to learn or the Right to Earn: Why not Both?” at the Federal Bar Association 1972 Convention. The panel was framed by the Williams & Wilkins case then pending before the judges of the Court of Claims. On October 28 McCarthy also appeared with Passano at New York Regional Group of the Medical Library Association.

As discussed in chapter 6:1, on September 19, 1972 Brennan wrote to John McDonald (then President of ARL) and also to the Association of American Publishers (AAP) and NEA, as well as a number of other participants in the negotiations concerning library photocopying. He noted that the issue was recognized in the Senate bill in 1969, but that Williams & Wilkins had changed things.<sup>140</sup> On November 7, McCarthy also responded to Brennan’s letter. He enclosed a copy of the ARL Williams & Wilkins *amicus* brief to the Court of Claims and argued that the Williams & Wilkins case meant, “it has now become essential that the time-honored right of single-copy photocopying by libraries as a means of meeting the needs of their patrons be given explicit recognition in the copyright revision bill.”<sup>141</sup>

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<sup>140</sup> "Thomas Brennan to John McDonald [September 19, 1972]."

<sup>141</sup> "Stephen A. McCarthy to Thomas Brennan [November 7, 1972]."

Brown filed his *amicus curiae* brief on behalf of the ARL with the Court of Claims on September 22, 1972. The ARL was joined in the brief by the MLA and AALL, as well as a variety of professional medical associations, scholarly associations, and medical schools. The ALA had filed its own *amicus* brief at the end of August. Brown's brief made the argument that a judgment for Williams & Wilkins in this case would be unconstitutional. But he concentrated on the argument (familiar from Clapp's *Copyright: A Librarian's View*)<sup>142</sup> that single photocopying by libraries on behalf of users was not an infringement because when Congress wrote the 1909 Act they used the word "copy" to mean publish or reprint, they did not mean to include private copying by or on behalf of individuals. Traditional, and to this point uncontested, library copying practices since passage of that Act show this. Brown also argued that even if the Court found this practice to be infringing in this case, the copying involved constituted fair use. Finally, Brown argued that since the Commissioner had found that although there was no contract explicitly transferring copyright from author to publisher in the examples used in this case, such assignment of copyright was based on custom. If this was the case then the established custom of single copying by libraries on behalf of users should be similarly recognized. In Brown's brief we see many of the themes from the legislative arguments being made by the ARL: that restrictions on copying practices in libraries was an unconstitutional profit grab by publishers, that a long established practice in libraries was being restricted, and that single copying by libraries on behalf of users constituted fair use. Brown's brief was not only informed by the arguments being used by the ARL in the legislative arena, but was also used to support attempts to exert influence in that arena and in interest group negotiations.

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<sup>142</sup> Verner W. Clapp, "Copyright -- A Librarian's View," (Washington, D.C.: National Advisory Commission on Libraries, 1968).

In a September 26, 1972 letter to McCarthy, Brown urged ARL to oppose the North/Sernett draft of language proposed to be added to §108(d)1 (see figure 19, in chapter 6:3.) This draft language was produced as a result of the Cosmos Club negotiations that will be discussed at greater length at a later point. He argued that the draft concentrates on scientific and technical works, where fair use is strongest, that it made the article, not the periodical issue the “whole work”, which ran counter to ARL arguments in Williams & Wilkins, and that it granted rights to the publisher not the author of the work. Brown argued that, by pushing for this language, the publishers were attempting to win the Williams & Wilkins case by other means.<sup>143</sup>

On October 18, 1972 representatives of the library associations and their lawyers met at the headquarters of the American Political Science Association in Washington to discuss the amended form of §108 (designed to amend S.644 that had been introduced in the first session of the 91<sup>st</sup> Congress in 1971) that had come out of the Cosmos Club negotiations of September 19, 1972. North, the lawyer for the ALA and the person most closely associated with the Cosmos Club draft amendment, described where the draft came from and the focus of Cosmos Club meeting on interlibrary loan. “The proposed amendment would sacrifice the fair use concept precisely in the area (scientific and scholarly research) where its application would appear most defensible; it would clearly identify a single journal article as a complete work; and it would seriously undercut the arguments made in the Williams & Wilkins case, on behalf of NLM and NIH.”<sup>144</sup> The group moved to think of alternatives. Williams & Wilkins had changed the situation. Those present concluded that Brennan thought it changed the situation as well. It had

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<sup>143</sup> "Philip Brown to Stephen A. McCarthy [September 26,1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Cosmos Meeting, Manuscript Division, Library of Congress.*

<sup>144</sup> "Minutes of a Meeting on the Copyright Revision Bill, APSA Conference Room [October 18, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1972, Manuscript Division, Library of Congress.*

“given the library community good grounds for making new representations to the Subcommittee and Congress. Libraries in effect have the support of two government agencies in this effort ... [the Departments of Justice and Health, Education, and Welfare]. Libraries would be well advised to ask for what they want, and also ask for a new hearing because of Davis’ opinion.”<sup>145</sup>

In the summer of 1972 the Williams & Wilkins proposal for permission fees for copies made in lieu of interlibrary loans led to vigorous opposition from librarians and from state departments of education because of the costs involved. The Davis decision and Williams & Wilkins’ reaction to it energized librarians and their professional associations. These developments were seen as proof that they were not secure in relying on the doctrine of fair use and an explicit exemption for library copying practices would be necessary to protect them and enable users to continue what librarians saw as long standing practices. In this case the judicial, interest group negotiations, and legislative aspects of the struggle for copyright revision are inextricably linked.

On November 8, Jack Ellenberger (librarian at the Washington D.C. law firm of Covington & Burling and Chairman, SLA Copyright Committee) in a letter he wrote to William North (copied to McCarthy) expressed his concern to protect the special issues of special libraries in for-profit institutions. He thought that the Williams & Wilkins case, whatever the outcome of the full Court of Claims would be appealed by one side or the other to the Supreme Court.<sup>146</sup>

Ellenberger was not alone in already having taken into account the probable outcome of the Williams & Wilkins case. McCarthy and the ARL had already announced their view that the

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<sup>145</sup> Ibid.

<sup>146</sup> "Note from Jack Ellenberger to Stephen A. McCarthy [November 8, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1972, Manuscript Division, Library of Congress.*

Davis decision was not the law of the land, and the government had appealed to the full Court of Claims. Whatever the intermediate decision of the Court of Claims, whichever side lost would appeal to the Supreme Court while minimizing the significance of the appeal court's decision. However, at the 39<sup>th</sup> Meeting of the ARL in May 1973, members were aware that the NLM and NIH did not have complete freedom of action in deciding whether or not to appeal to the Supreme Court. Ultimately this would be the decision of the Solicitor General of the United States, Robert Bork.<sup>147</sup> The winning side would maximize the significance of the Court of Claims decision and prepare for an appeal to the Supreme Court. By 1972 it was also clear that whatever the decision of the courts, the long-term strategy was to maximize their advantage within the legislative arena. Events within the judicial arena and also with the interest group negotiations would continue to affect that strategy and, in turn, be influenced by events within the legislative arena.

Thus by the time the Court of Claims heard oral arguments in the Williams & Wilkins case on March 7, 1973 the future outlines of the struggle were reasonably well understood by the major actors. Despite this, they continued to struggle for maximum advantage within the judicial arena because they realized the impact of this upon the negotiations and, most importantly, upon the revision legislation.

For instance, as we have already discussed in chapter 6:1, both Jacqueline Felter (of the Medical Library Association) and Stephen McCarthy testified before the Senate Subcommittee on Patents, Trade-Marks, and Copyright of the Committee on the Judiciary concerning S.1361 in July 1973. Felter explained the difficulties of complying with §108(d)(1) in practice and

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<sup>147</sup> "Minutes of the 39th Meeting of the Board of Directors of the ARL New Orleans [May 9,10,13, 1973]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632, Box 31 of 64 Folder: Board Meetings – 1973, Manuscript Division, Library of Congress.*

supported the ARL substitute for §108(d)(1), which was the same proposal that they had made with regard to S.644 in the 92<sup>nd</sup> Congress – to go back to the 1964 text of what was then §6 (see figure 2.) Brown spoke for the ARL and concentrated his testimony on Williams & Wilkins, which was still pending before the Court of Claims. Librarians needed a new §108(d)1 if Davis’ report was upheld by the full Court of Claims. He also wanted Congress to, “clarify and endorse the application of the doctrine of fair use to library photocopying practices” because the Williams & Wilkins case had cast doubt on this long held assumption.<sup>148</sup>

On November 27, 1973 the full Court of Claims overruled the Davis decision and found that the NLM and NIH copying constituted fair use. They also discussed at some length Clapp’s argument about the meaning of the word “copy” and his distinction, lost in the 1909 Act, between copying and printing, reprinting, and publishing. Ultimately, however, they decided that, “the hitherto uncodified principles of ‘fair use’ apply to printing, reprinting, and publishing, as well as to copying, and therefore the collocation of general words Congress chose for Section 1 is necessarily inadequate, by itself, to decide this case.”<sup>149</sup> Their decision was based on three propositions.

First, plaintiff has not in our view shown, and there is inadequate reason to believe that it is being or will be harmed substantially by these specific practices of NIH and NLM; second, we are convinced that medicine and medical research will be injured by holding these particular practices to be infringement; and third, since the problem of accommodating the interests of science with those of the publishers (and authors) calls fundamentally for legislative solution or guidance, which has not yet been given, we should not, during the period before congressional action is forthcoming, place such a risk of harm upon science and medicine.<sup>150</sup>

Williams & Wilkins immediately appealed the case to the US Supreme Court.

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<sup>148</sup> *Copyright Law Revision: Hearings on S. 1361 Before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 93rd Congress, 1st Session (1973).*

<sup>149</sup> *Williams & Wilkins Company v. The United States*, 203 Ct. Cl. 74 (1973).

<sup>150</sup> *Ibid.*



In another example of librarians understanding the linkages between the legislative and judicial strands in this struggle for revision and the probable outlines of future developments in the Williams & Wilkins case, on November 29, McCarthy received a letter from Peyton Neal (of Washington and Lee School of Law.) Neal congratulated McCarthy on the Court of Claims' decision. However, he also recognized that it may be reversed by the Supreme Court and that, whatever the outcome, it would present difficulties for librarians' influence over S.1361 because publishers would be energized, just as librarians had been by the Davis decision, to clarify their rights and librarians' responsibilities in the legislation.<sup>151</sup>

On December 13 McCarthy sent copies of the Court of Claims opinion to all ARL member libraries. In the attached note he announces victory in that the Court's decision was now law, at least until Congress passed a general revision to copyright law or the Court of Claims decision was reversed by the Supreme Court. McCarthy reminded member libraries that it was ARL policy to allow single copies for research and scholarship and asked them not to relax their individual rules against multiple copying. In response to a request for guidance from John Michlowski of the Campus Print Shop at Minona State College in Minnesota, McCarthy wrote: "Our recommended policy and the position we have taken in Copyright Revision hearings and in the Williams and Wilkins case is that a library may make a single photocopy of a periodical article or of a portion of a book for the personal use of a reader without infringing copyright. We consider this practice to constitute 'fair use'."<sup>152</sup>

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<sup>151</sup> "Peyton R. Neal to Stephen A. McCarthy [November 29, 1973]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632, Box 31 of 64 Folder: Williams & Wilkins – Brown Correspondence, Manuscript Division, Library of Congress.*

<sup>152</sup> "John Michlowski to Stephen A. McCarthy [January 29, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright general 1974-1976, Manuscript Division, Library of Congress.*

On May 28, 1974 the U.S. Supreme Court agreed to review the Court of Claims decision in *Williams & Wilkins* and on June 19 McCarthy asked Brown to prepare another *amicus* brief for that court. He estimated the cost to be between \$20,000 and \$25,000 and expected the cost to be split with the Medical Library Association.<sup>153</sup> On December 17 the Supreme Court heard oral arguments and on December 24, just seven days before his retirement, McCarthy wrote to the ARL membership. “The [*Williams & Wilkins*] case was heard by the Supreme Court last week. The decision is not expected for several months. When it comes, it will settle the matter for the present. The new copyright law which is expected to be adopted in 1975 or 1976 might make further changes.”<sup>154</sup>

As noted in an earlier section, on December 31, 1974 McCarthy retired. The court issued their decision on February 25, 1975. Justice Blackmun took no part in the decision and thus “the judgment is affirmed by an equally divided Court.”<sup>155</sup> The Court provided no further guidance and this resolution is perhaps indicative that the Justices agreed that the issue was best left undisturbed and that the judiciary, as the Court of Claims had argued, “should not, during the period before congressional action is forthcoming, place such a risk of harm upon science and medicine.”<sup>156</sup>

As noted earlier, the struggle to find the balance between librarians and users of copyrighted works and the publishers and authors of those works in the copyright revision process proceeded on three tracks – judicial, legislative, and in terms of interest group

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<sup>153</sup> "Stephen A. McCarthy to Philip Brown [June 19, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632, Box 31 of 64 Folder: Williams & Wilkins – Brown Correspondence, Manuscript Division, Library of Congress.*

<sup>154</sup> "Stephen A. McCarthy to ARL member libraries [December 12, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright general 1974-1976, Manuscript Division, Library of Congress.*

<sup>155</sup> *Williams & Wilkins Company v. The United States*, 420 U.S. 376 (1975).

<sup>156</sup> *Williams & Wilkins Company v. The United States.*

negotiation. Each of these tracks influenced the other. Having delineated the judicial track, we will now turn to the progress of the various interest group negotiations between 1968 and 1976.

### **6.3 1968-1976: INTEREST GROUP NEGOTIATIONS**

The period after passage of the bill in the House was not only an optimistic time for librarians engaged in the copyright revision process, it was also a period of both leadership change and continuity in terms of the ARL. Verner Clapp, who had been involved in the revision process from the beginning, retired from the presidency of the CLR and became instead a consultant to that organization. This gave him more time to pursue some of his personal interests, including copyright revision and, with Rutherford Roger's resignation as the Chair of the Joint Libraries Committee on Copyright, Clapp became the ARL representative, and then the Chair, of this committee. He also had time to write two quite substantial essays on copyright.<sup>157</sup> At around this same time, Stephen McCarthy resigned from Cornell University Libraries and replaced Donald Cameron as ARL Executive Director. McCarthy had served in the voluntary position of ARL Executive Secretary from 1960 until the reorganization of 1962 and so was familiar with the progress of the revision process both from a staff position and as a working library director and ARL member at Cornell. Over the coming years, until Clapp's death in 1972, these two men would work closely together and lead ARL's involvement in the revision process.

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<sup>157</sup> Clapp, "Copyright -- A Librarian's View.", Verner W. Clapp, "The Copyright Dilemma: A Librarian's View," *Library Quarterly* 38, no. October (1968).

Litman has argued convincingly that much of the legal regime of copyright is the result of bargains struck between competing business interests that are subsequently ratified by Congress.<sup>158</sup> This section deals specifically with the negotiations between competing business interests which involved the Association of Research Libraries from 1968 until passage of the Copyright Act of 1976. These negotiations took many forms; from formal negotiations sponsored by the Copyright Office, to somewhat less formal meetings independently organized by the participating interest groups, to panel discussions and conversations at professional meetings all the way to written exchanges with congressional staff or in the professional literature. Some of these interactions were simple binary negotiations with librarians on one side and publishers on the other. Others were intra-interest group negotiations, for instance, between library associations. Still others involved wider coalitions that coalesced around the interests of users or proprietors of copyrighted works, and others are better characterized as confused multipart conversations in which the diversity of opinion within each of these broad groups was represented. Some, particularly towards the latter part of the process, were very focused on specific legislative language and were occasionally quite productive, others less so. For the participants at the time it often seemed difficult to distinguish the productive from the unproductive. Productive did not only mean emerging with legislative language that supported your interests, it could also mean appearing to Copyright Office or congressional staff to be a reasonable, cooperative, consensus seeker, while avoiding being committed to legislative language that did not support your interests.

In 1966 the Committee to Investigate Copyright Problems Affecting Communication in Science and Education (CICP) produced one of the major studies of copying practices from this

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<sup>158</sup> Litman, "Copyright, Compromise, and Legislative History."

period of revision.<sup>159</sup> The report, written by Gerald Sophar (a prominent information scientist at the National Agricultural Library, President of ASIS in 1961, and later a staff member at NCLIS) and Laurence Heilprin (of the Council on Library Resources, who went on to join the faculty of the College of Library and Information Services at the University of Maryland in 1967), assumed that the most equitable way in which the needs of both creators and users of copyrighted works could be accommodated was by the creation of a permissions scheme. In January of 1967, Sophar wrote to Forster Mohrhardt, who was then President of the ARL, asking the Association to support the work of the CICIP, which was also seeking a grant from the U.S. Office of Education (USOE). On behalf of the Association, Mohrhardt declined to support the continuing work of the CICIP. In 1968 the USOE did not renew the CICIP's grant, perhaps because the committee was perceived as working against HEW's position with regard to the Williams & Wilkins suit.<sup>160</sup> The idea of a permissions system as a solution to resolve the issue of copying in and by libraries had been a constant throughout the revision process. In the period 1968-76 we continue to see it play a part in the negotiations. Usually librarians resisted the idea, but privately regarded it as a fall back position, should their copying activities be found to be infringing, as McCarthy did during the Dumbarton Oaks talks in a letter to Dix.<sup>161</sup> The Senate had shown some

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<sup>159</sup> Gerald J. Sophar et al., "The Determination of legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright -- A Status Report," (Washington, D.C.: U.S. Office of Education Bureau of Research, 1967).

<sup>160</sup> Philip M. Boffey, "Copyright Problems: Did Suit over Photocopying Kill Research Project?," *Science* New Series 160, no. 3834 (1968).

<sup>161</sup> "Stephen A. McCarthy to William Dix [March 19, 1973]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632, Box 39 of 64 Folder: Copyright Revision 1973, Manuscript Division, Library of Congress.*

interest in a clearinghouse or permissions system in the hearings on S.597 in 1967.<sup>162</sup> Librarians were not the only ones to oppose the idea. The NEA had also been fiercely opposed.

In two documents that bracket 1967, Clapp laid out his understanding of the current state of the copyright revision process. At the 15<sup>th</sup> meeting of the Joint Libraries' Committee held in New York on January 23, as discussed at the end of chapter 5, he carefully outlined the legislative situation after Roger's testimony on HR.4347 in 1965 with regard to library copying, the duration of the term of copyright, the notice of copyright, the manufacturing clause, and the educational exemption.<sup>163</sup> By the time he prepared a committee report to be presented by McCarthy to the ARL directors in December of 1967, he still noted the passage of HR.2512 (the successor bill in the 90<sup>th</sup> Congress to HR.4347 in the 89<sup>th</sup> Congress) in the house, "accompanied by House Report 83, 90<sup>th</sup> Congress, a very important report from the point of view of library photocopying." He went on to note that legislative action had now moved to the Senate where McClellan had introduced S.597, the general revision bill and S.2216, a bill to create what would become the Commission on New Technological Uses of Copyrighted Works (CONTU). Clapp expected that CONTU would study problems of reproduction by computers and other machines, like photocopiers. He also reported on his meeting with the Executive Board of ALA at their San Francisco meeting in the summer of 1967. At this meeting he had argued for seeking legal assistance (which resulted in bringing William North of the Chicago law firm Kirkland, Ellis, Hodson, Chaffetz & Masters into the revision process). "This has been done, and several

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<sup>162</sup> Subcommittee on Patents, Trademarks and Copyright of the Senate Committee on the Judiciary, *Copyright Law Revision: Hearings on S. 597 Before Subcommittee on Patents, Trademarks and Copyright of the Senate Committee on the Judiciary, 90th Congress, 1st Session, 90th Congress, 1st Session, 1967.*

<sup>163</sup> Joint Libraries Committee on Copyright, "Minutes of 15th Meeting, Commerce Library, New York University, January 23, 1967."

meetings have been held (in Washington on July 26 and August 14, and in Chicago on December 4 – I was present at the first and last of these) but no visible progress has been made.”<sup>164</sup>

At the January 1968 meeting of the ARL Board of Directors in Bal Harbor, Florida, the ARL again declined a CICIP offer for an annual membership fee that would authorize extended copying privileges. At this same meeting the Board also authorized McCarthy to engage legal counsel, which resulted in bringing Philip Brown of the Washington law firm of Cox, Langford, & Brown into the revision process.<sup>165</sup> On January 31 of that year, ARL signed the formal agreement with Cox, Langford, & Brown and on February 6, McCarthy wrote to Philip Brown with a list of topics for discussion. In addition to non-copyright topics like association by-laws and insurance, and what he referred to as “the ASTM<sup>166</sup>-CICIP proposal,” presumably another version of a permissions system, McCarthy also noted that the ARL may join with the ALA to amend S.597 (see chapter 6:1 for more details).

From this it is clear that at least some discussion had taken place before Williams & Wilkins filed suit on February 27 of that year about amending the revision bill to include a specific library exemption with the aim of protecting library copying on behalf of users (McCarthy’s proposed §118) and for preservation (see the use of the word “replacing” in McCarthy’s proposed §117). It appears that the ALA had initiated this amendment.

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<sup>164</sup> "Memorandum from Stephen A. McCarthy to ARL Directors [December 15, 1967]," in *Records of the Association of Research Libraries, Unprocessed materials #17,182 Box 1 of 8 Folder ARL Committees – general, Manuscript Division, Library of Congress.*

<sup>165</sup> "Minutes of the Meeting of the ARL Board of Directors [January 6 and 7, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 56 of 64 Folder: Board Minutes 1st – 29th, Manuscript Division, Library of Congress*

<sup>166</sup> American Society for Testing and Materials, now known as ASTM International.

In 1968 the National Advisory Commission on Libraries<sup>167</sup> asked Dan Lacy (of McGraw-Hill and the ABPC) and Clapp to write opposing papers (and Ralph Brown, Professor of Law at Yale, to write an introductory paper) on current copyright concerns for publication in their resource book *Libraries at Large*.<sup>168</sup> While he discussed “reprography” Brown concentrated most of his discussion on the nascent field of computing as it related to the input and output of copyrighted works. He argued for patience on the part of publishers and librarians as these technologies develop and ultimately thought that an efficient permissions clearinghouse, based on agreement from all sides that enabled these technologies to continue to encourage the wide dissemination of research should be developed. Lacy, in a conciliatory style, pointed to the many areas of agreement between publishers and librarians. Then, after outlining the disagreement over extending the duration of copyrights, he noted that,

The most crucial point of difference between librarian and proprietor views would probably relate to the systematic duplication of recent journal articles on a large scale, providing a service on which recipients may rely in lieu of subscribing to the journal. Many librarians, at least, appear to conceive this to be a fair use; few proprietors would do so. A legal action now pending [the Williams & Wilkins case] may throw light on this issue.<sup>169</sup>

It is interesting to note Lacy’s use of the word “systematic.” This is the earliest use of this word that I have been able to identify in the revision process. The word would eventually find its way into §108(g)2 and be the subject of much controversy in the early 1970’s. In Clapp’s paper for this book he succinctly laid out his historical argument for the distinction between copying

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<sup>167</sup> Established by Executive order in September 1966, the NACL was active until October 1968. One of its recommendations was to lead to the formation of the NCLIS. Douglas M. Knight and E. Shepley Nourse, eds., *Libraries at Large: Tradition, Innovation, and the National Interest. The Resource Book Based on the Materials of the National Advisory Commission on Libraries* (New York: Bowker, 1969), ix.

<sup>168</sup> Ibid.

<sup>169</sup> Dan Lacy, "Copyright: A Proprietor's View," in *Libraries at Large: Tradition, Innovation, and the National Interest*, ed. Douglas M. Knight and E. Shepley Nourse (New York: Bowker, 1969), 239.



and other forms of reproduction and distribution and how that distinction was lost in the Copyright Act of 1909.

Under the copyright law in force in 1901 ... the infringement of copyright in books and other works reproduced from type was specified, as it had been since the earliest copyright act, an Act of Parliament of 1710, as consisting in unauthorized printing, publishing, importing, or offering for sale of copies of the copyrighted work. Merely to copy did not infringe.

But this situation was changed by the Copyright Act of 1909 ... . With a view to precision and economy of statutory expression, that act abandoned the traditional specification of actions constituting infringement.<sup>170</sup>

As noted in chapter 6:1, in the spring of 1968 Barbara Ringer, then Assistant Register of Copyrights, reached the conclusion that the proposed §118 would be unacceptable to Congress and drafted a version of §108 (see figure 17); from this point on, negotiations focused on §108. On April 25, North wrote to Ringer, and copied McCarthy, supporting her draft and asked if it covered copying for interlibrary loan purposes and whether it freed libraries from liability for copying by users of library copiers that was found to infringe the rights of the copyright holder.<sup>171</sup> On May 10, McCarthy responded to North telling him that the ARL was not prepared to support this proposed amendment in its present form because a “one copy” provision had been inserted and the requirement under (3) made coin-operated or self serve photocopying services no longer permissible in libraries.<sup>172</sup> On May 28 North responded, indicating again that the ALA supported Ringer’s draft and arguing that it, “represents a very

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<sup>170</sup> Verner W. Clapp, "Copyright: A Librarian's View," in *Libraries at Large: Tradition, Innovation, and the National Interest*, ed. Douglas M. Knight and E. Shepley Nourse (New York: Bowker, 1968).

<sup>171</sup> "William North to Barbara Ringer [April 25, 1968]."

<sup>172</sup> "Stephen A. McCarthy to William North [May 10, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,623 Box 46 of 64. Folder: Copyright Revision Bill 1968, Manuscript Division, Library of Congress*.

significant gain not only over present law but over the ‘Gentlemen’s Agreement’.”<sup>173</sup> The ARL at this time pinned its hopes on assigning the issue of copying in libraries to CONTU, which was expected to be created very soon. S.2216, the bill to create CONTU, had passed in the Senate in October of 1967 and was still pending in the House. If CONTU was created quickly, then the Association would support the bill without §108, and leave the final negotiations over library copying to that commission. As the 1968 election and last few months of the 90th Congress approached, there was a sense of urgency in the library community that the Senate might act on revision very quickly. In his report to ARL in the summer of 1968, Clapp noted that the 1909 Act had been passed under a suspension of the rules on the last day of the Congress.<sup>174</sup>

At the 22nd Meeting of the ARL Board of Directors in Kansas City in June of 1968, in an attempt to bridge the gap between the ARL and the ALA, Clapp urged, “a common approach to the problem [of revision].”<sup>175</sup> He apparently presented one possible amendment, but unfortunately no copy of that amendment exists in the ARL records. In August Brown responded to Clapp’s draft and warned Clapp of the danger of arguing that the doctrine of fair use set out in §107 did not provide sufficient protection to libraries. If librarians ultimately had to rely on that doctrine, their case would be undermined by Clapp’s argument. There is a document in the ARL records written by Clapp dated October 15, 1968 (see figure 14) that presumably incorporates the points Brown made.

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<sup>173</sup> "William North to Stephen A. McCarthy [May 28, 1968]," in *American Library Association Archive. 2/4/6 Box 11 Copyright 1968. University of Illinois Urbana-Champaign Archives.*

<sup>174</sup> "Draft Memorandum from Verner W. Clapp to Stephen A. McCarthy [May 17, 1968]."

<sup>175</sup> "Minutes of the 22nd Meeting of the ARL Board of Directors, Kansas City [June 21, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 56 of 64 Folder: Board Minutes 1st – 29th, Manuscript Division, Library of Congress.*

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ASSOCIATION OF RESEARCH LIBRARIES

Copyright Committee

LIBRARY USE OF COPYRIGHTED MATERIALS – PROPOSED  
PROVISION FOR COPYRIGHT LAW

Notwithstanding the provisions of section [106 of HR. 2512, S. 597, 90<sup>th</sup> Congress], it is not an infringement of copyright for a library to use a copy or phonorecord of a copyrighted work, the possession of which it has lawfully obtained, in not-for-profit public exhibits, displays, performances and transmissions, or to lend, sell, give, or otherwise transfer such copy or phonorecord to another person, or to make no more than one copy or phonorecord of such copy or phonorecord for any given user for purposes of study, investigation, research, preservation or security, or to lend, sell, give or otherwise transfer any copy or phonorecord so made to another person.

VWC:10/15/68.<sup>176</sup>

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**Figure 14 Clapp's Proposed Amendment to HR. 2512 and S.597 (October 15, 1968)**

In November of 1968, the ARL Board of Directors, “voted to support a position on copyright revision which would allow libraries to make one copy only of copyrighted material for an individual.”<sup>177</sup> They also learned that McCarthy and Clapp were seeking

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<sup>176</sup> "Association of Research Libraries, Copyright Committee, Library Use of Copyrighted material -- Proposed Provision for Copyright Law [October 15, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 46 of 64. Folder: Copyright Revision Bill 1968, Manuscript Division, Library of Congress.*

<sup>177</sup> "Minutes of the 23rd Meeting of the Board of Directors [November 1, 1968]."

to build a coalition with other library associations and scholarly groups around the issue of copyright revision.

The results of Clapp and Brown's work and the decision of the Board can be seen in figure 15, which was drafted by Brown and dated November 5, 1968.

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REVISED DRAFT OF ARL COPYRIGHT PROVISION

Notwithstanding the provisions of section [106 of HR. 2512, S. 597, 90<sup>th</sup> Congress] and in addition to any other authority provided under this title, it is not an infringement of copyright for a library which has lawfully obtained possession of a copy or phonorecord of any copyrighted work to do any of the following, provided it is not done for the direct or indirect commercial advantage of the library:

- (1) to use such copy or phonorecord in public exhibits, displays, performances, and transmission;
- (2) to make no more than one copy or phonorecord of such copy or phonorecord to any given user for purposes of study, investigation, or research;
- (3) to make copies or phonorecords of such copy or phonorecord for purposes of preservation and security; or

(4) to lend, sell, give, or otherwise transfer to any person any copy or phonorecord made in accordance with this section.<sup>178</sup>

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**Figure 15 Brown's Proposed Amendment to HR.2512 and S.597 (November 5, 1968)**

McCarthy had asked the ARL member library directors to vote on whether or not they approved of Brown's draft proposed amendment. It was by no means clear that the ARL membership thought that working closely with ALA was in the best interests of the ARL. Douglas Bryant (University Librarian at Harvard University, and soon to be President of ARL in 1969) reluctantly approved. "I still wish that I did not have the feeling that we were being pushed into a corner by ALA which admittedly does not have an effective chairman of its Copyright Committee [Gosnell] and whose only voice we apparently hear is that of Ed Low [Recently retired as Head Librarian at Oklahoma A&M College, and then teaching at the University of Michigan. He was active in ALA.] How official and authoritative is his view that ALA is really meaning to go for multiple copying?"<sup>179</sup> On December 24, 1968 Brown presented McCarthy with a new, and far more extensive, draft of the amendment (figure 16)

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<sup>178</sup> "Revised Draft of ARL Copyright Provision [November 5, 1968]," in *Records of the Association of Research Libraries, Records of the Association of Research Libraries. Box 46 of 64. Folder: Copyright Revision Bill 1968, Manuscript Division, Library of Congress.*

<sup>179</sup> "Douglas Bryant to Stephen A. McCarthy [November 19, 1968]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632. Box 46 of 64. Folder: Copyright Revision Bill 1968, Manuscript Division, Library of Congress.*

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December 24, 1968

Further Revised Draft of 12/20/68 Redraft of Copyright

Amendment

Sec. 108 Limitations on exclusive rights: Reproduction of

works by libraries and archival institutions.

(1) Notwithstanding the provisions of Section 106, it is not an infringement of copyright for a library or archives whose collections are available to the public or to researchers in any specialized field, to reproduce or permit to be reproduced in any manner no more than one copy or phonorecord of a copyrighted work or portion thereof in its possession and to distribute such copy or phonorecord if –

(1) Such copy or phonorecord consists of a facsimile of a manuscript, document, or other unpublished work, and is made solely for purposes of replacement, preservation and security, or for deposit for research use in any other such library or archives; or

(2) Such copy or phonorecord of a copyrighted published work is made solely for purposes of replacement, preservation or security;  
or

(3) Such copy or phonorecord is made by, or at the request of, a user of the institution's collections, including a user who employs a reproduction device located on the premises of the institution and a

user who makes his request through another library of archives, if

–

(A) such copy or phonorecord is not made for the purpose of increasing the collections of the institution but becomes the property of the user; and

(B) the institution had no notice that such copy or phonorecord would be used for any purpose other than study, scholarship or research; and

(C) with respect to a copy or phonorecord made by the institution at the request of a user, the institution shall insert on its order form an appropriate warning of copyright; and

(D) with respect to a copy or phonorecord made by a user employing a reproduction device located on the premises of the institution made available by the institution for unsupervised use, the institution displays prominently on or adjacent to such device an appropriate warning or copyright.

(2) Subsection (a)(3) shall not excuse the user from any liability for copyright infringement which may otherwise result from his use of the copy or phonorecord.<sup>180</sup>

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**Figure 16 Brown's Revised Amendment to HR.2512 and S.597 (December 24, 1968)**

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<sup>180</sup> "Further Revised Draft of 12/20/68 Redraft of Copyright Amendment [December 24, 1968]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 46 of 64. Folder: Copyright Revision Bill 1968, Manuscript Division, Library of Congress.*

In his letter to McCarthy, Brown pointed out the emphasis upon no more than one copy, the inclusion of both unpublished manuscripts and published works, and copies made by or at the request of the user (thus including copying in furtherance of interlibrary loan). The proposed amendment also makes it clear that, except in the case of replacement, preservation, or security, the copy becomes the property of the user, the library or archive has no notice of any use other than study, research, and scholarship, and that an “appropriate warning of copyright” will be inserted in the library or archives order form or next to the unsupervised “reproduction device.”<sup>181</sup>

Both Clapp and McCarthy recognized the importance of the ALA and ARL presenting a united front in proposing this amendment and on December 27, 1968 McCarthy sent Brown’s draft to Edmon Low, Chair of the Chair of the ALA Subcommittee on Copyright. Throughout January Clapp and Brown worked with the ALA to reach agreement and finally, after a year spent developing various versions of a library and archive exemption, the *ARL-ALA Agreed Text of Copyright Amendment* was released (figure 17). In figure 17 I have emphasized the differences between Brown’s text of December 24, 1968 (figure 16) and this final agreed form of the amendment. Text added to Brown’s draft is italicized and text deleted is shown in brackets.

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ARL-ALA Agreed Text of Copyright Amendment – January 27, 1969

Sec. 108. Limitations on exclusive rights. Reproduction of works by libraries and archives.

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<sup>181</sup> Ibid.



(a) Notwithstanding the provisions of Section 106, it is not an infringement of copyright for a library or archives whose collections are available to the public or to researchers in any specialized field, to reproduce or permit to be reproduced in any manner no more than one copy or phonorecord of a copyrighted work or portion thereof *which is or was in its collections* [possession] and to distribute such copy or phonorecord *if there is no purpose of commercial advantage and if –*

(1) such copy or phonorecord consists of a facsimile of a manuscript, document, or other unpublished work, and is made [solely] for purposes of preservation and security, or for deposit for research use in any other such library or archives; or

(2) such copy of phonorecord of a [copyrighted] published work is made solely for *the* purpose of replacement [preservation and security, or for deposit for research use in any other such library or archives] *in the library or archives' own collections of a copy or phonorecord that is physically damaged or deteriorating, and the library or archives has determined that an unused replacement cannot be obtained readily and at a normal price from commonly-known trade sources;* or

(3) such *a* copy or phonorecord is made by, or at the request of, a user of [the institution's] *a* collection[s] *of the library or archives*, including a user who employs a reproduction device located on the premises of the [institution and] *library or archives*

or a user who makes his request through another library or archives, if –

(i) such copy or phonorecord is not made for the purpose of increasing the collections of the [institution] *library or archives* but becomes the property of the user; and

(ii) the [institution] *library or archives* had no notice that such copy or phonorecord would be used for any purpose other than study, scholarship or research; and

(iii) with respect to [a] *the single* copy or phonorecord made by the [institution] *library or archives* at the request of [a] *the* user, the [institution] *library or archives* [shall] inserts *prominently* on its order form and displays *prominently at the place which orders are accepted* an appropriate warning of copyright; and

(iv) with respect to [a] *the single* copy or phonorecord made by a user employing a reproduction device [located on the premises of the institution] made available by the [institution] *library or archives on its premises* for unsupervised use, the [institution] *library or archives* displays prominently on or adjacent to such device an appropriate warning of copyright.

(b) Subsection (a) (3) shall not excuse the user from any liability for copyright infringement which may otherwise result from his use of the copy or phonorecord.<sup>182</sup> [Emphasis added.]

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**Figure 17 ARL-ALA Agreed Text of Copyright Amendment (January 27, 1969)**

Both of these versions are much more comprehensive than Clapp's early version (figure 13) that had only included libraries, not archives, and exempted from infringement not-for-profit exhibit, display, performance, and transmission and the making of one copy for a user for research purposes. Most of the changes are changes in drafting language (for example, "library and archives" replaces "institution" throughout and "collections" replaces "possession"). It is striking how much of Brown's draft both in form and content, and by extension the ARL's policy goals, remained intact. The major changes are, in subsection (a), the startling addition of, "is or was in its collections," the re-emergence of the not-for profit principle (previously seen in Clapp's draft and Brown's draft of November 5) in the phrase "no purpose of commercial advantage" and, in subsection (a)(2), the limitation on replacement by requiring that, "the library or archives has determined that an unused replacement cannot be obtained readily and at a normal price from commonly-known trade sources."<sup>183</sup>

In chapter 6:1 of this dissertation I went into the details of how this proposed amendment was used in the legislative process. In terms of interest group negotiations, up to this point the negotiations had been intra-interest group, within librarianship, and in fact between just two of the associations – the ALA and the ARL. It is remarkable that an association as small as ARL (at

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<sup>182</sup> "ARL-ALA Agreed Text of Copyright Amendment -- January 27, 1969," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision S543, Manuscript Division, Library of Congress.*

<sup>183</sup> Ibid.

this time it consisted of just 88 members) could be so successful in setting the terms of the debate within librarianship. This is due to the importance of the library copying issue to the members of the Association, and to the nature of the ARL itself, which represented the largest and most prominent libraries at the most prestigious institutions of higher education in North America. Copying for and by researchers, and interlibrary loan were central to the activities of these research libraries. The ALA, at this time representing approximately 30,000 individual member librarians and a far more diverse variety of libraries, was prepared to accept ARL leadership on this issue.

As I have noted earlier, Ringer thought that the ARL/ALA amendment would not prove acceptable to either the publishers and authors, or to Congress, and so proposed another version. After the June 13, 1969 meeting, Brown and Clapp discussed a response. They regarded Ringer's amendment as a step forward, but they regarded certain revisions as essential. They thought the §108(b)2 was too restrictive and that this exemption should be available to libraries and archives and restricted to only those affiliated with the library, archive, or institution. They regarded §108(f)2 as unacceptable to research libraries, institutions for which interlibrary copies in lieu of loaning the original was becoming a standard practice. They proposed that §108(d)3(A) should be restricted to tests and test answers. They proposed that "privilege(s)" be replaced with "right(s)" throughout, that in §108(d)3(E) "and a place for the user's name and address" replace "and other statements," and they were prepared to accede to the publishers' request at the meeting that the word "readily" be deleted from §108(d)2. If the bill contained the section as amended, then the ARL could endorse it.<sup>184</sup> There is no copy of Ringer's original amendment in

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<sup>184</sup> "Draft of Proposed Letter for ARL to Send to the Register of Copyrights [July 10, 1969]," in *Records of the Association of Research Libraries, Manuscript Division, Library of Congress*.

the existing ARL papers. However, there is a later edition dated June 1969 (see figure 18) that seems to have taken some of Clapp and Brown's comments into account.

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**§108 Limitations on Exclusive Rights: Reproduction by Libraries and Archives**

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 or authorize the reproduction of, no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section.

- (a) The privileges prescribed by this section extend only to reproduction or distribution made without any purpose of direct or indirect commercial advantage. No such purpose shall be found to exist merely because the library or archives collects reasonable fees for the location or use of coin-operated reproducing devices on its premises, or because the library or archives furnishes the copy or phonorecord at a charge based upon and substantially equivalent to the cost of reproducing and distributing it.
- (b) The privileges prescribed by this section are applicable only if the collections of the library or archives are either –
  - (1) open to the public; or

(2) 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.

(c) Except where the reproduction is made to replace a damaged, deteriorating, lost, or stolen copy or phonorecord formerly in its collections, the privilege of reproduction under this section is limited to the duplication of a copy or phonorecord that is currently in the collections of the library or archives.

(d) The privileges prescribed by this section are in addition to, and in no way diminish or supersede, the privilege of fair use as provided by section 107. They are also subject to any contractual obligations assumed by the library or archives when it obtained a copy or phonorecord of the work for its collections. The applicability of the privileges is limited to the situations prescribed by this subsection.

(1) ARCHIVAL PRESERVATION. The privileges 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 of deposit for research use in another library or archives of the type described in subsection (b).

(2) REPLACEMENT. The privileges 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

(3) RESEARCH SERVICE. The privileges of reproduction and distribution under this section apply to a copy made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archives, under the following conditions:

(A) the work reproduced is not a test or answer material for a test and, except where it is a relatively small contribution to a collective work, it is not a musical work, a pictorial, graphic, or sculptural work, or a motion picture or other audio-visual work;

(B) the copy consists of a reproduction of less than the entire copy containing the work in the physical form in which that copy exists in the collections of the library or archives, unless the work comprises the entire copy and is relatively short;

(C) the copy is not made for the purpose of increasing the collections of the library or archives but becomes the property of the user;

(D) the library or archives has had no notice that the copy would be used for any purpose other than study, scholarship, or research, and;

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

(4) REPRODUCTION DEVICES. The privileges prescribed by this section apply to authorization or acquiescence by the library or archives with respect to the reproduction of a work in its collections by a user employing a reproduction device made available by the library or archives on its premises for unsupervised use, if a warning of copyright, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, is prominently displayed on or adjacent to such device.

(e) Nothing in this section –

(1) Excuses the user of a reproducing device located on the premises of the library or archives from liability for copyright infringement if his reproduction exceeds fair use as provided by section 107;

(2) Excuses the user of a copy or phonorecord reproduced and distributed under this section from any liability for copyright



infringement that would otherwise result from his use of the copy or phonorecord;

(3) Affords any greater or lesser rights with respect to the reproduction of a copyrighted work for purposes of input, storage, or processing in an information storage and retrieval system, or any similar device, machine, or process, than those afforded to such copyrighted works under the law in effect on December 31, 1970.

(f) The privileges of reproducing or distributing “no more than one copy or phonorecord” in accordance with this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same work on separate occasions, but do not extend to –

(1) Cases where the library or archives or its employees, 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 work, whether on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group; and

(2) Cases where the loan of a copy is practicable but the library or archives, for purposes of its own benefit, actively induces the user to order a reproduction.<sup>185</sup>

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**Figure 18 §108 Register of Copyrights' Draft Amendment to §108 (June 1969)**

Most of the activity during 1968 and 1969 was in the judicial arena in connection with the Williams & Wilkins suit and, in the wider arena of copyright revision, the case of *Fortnightly Corp v. United Artists*.<sup>186</sup> There was also some activity in the Senate, as discussed in earlier sections, although this legislative effort ultimately proved to be inconclusive.

In 1970, however, there was an interesting exchange in the letters page of *Publisher's Weekly* between Clapp and McCarthy, and Dan Lacy. Clapp and McCarthy initially challenge the accuracy of a report made to a joint meeting of the ABPC and the (newly renamed) AAP, reprinted in *Publisher's Weekly*.<sup>187</sup>

The foregoing account clearly implies (1) that the bill [§108 of S.543] extends ample authorization to libraries to make copies of copyrighted material for their users, with only reasonable exclusions and conditions; but (2) that library associations seek the removal of these and other restrictions; and (3) that the effect of such removal would be so damaging that no law at all would be preferable to a law so amended.

We submit that not one of these propositions can be sustained.<sup>188</sup>

Clapp and McCarthy argued that the existing §108 was “so restrictive as to be absurd” and would, “drive the copying of copyrighted library materials underground to become a bootleg

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<sup>185</sup> "Copyright Office Draft. Section 108. Limitations on Exclusive Rights: Reproduction by Libraries and Archives [June 6, 1969]."

<sup>186</sup> *Fortnightly Corp. v. United Artists Television Inc.*

<sup>187</sup> Verner W. Clapp and Stephen A. McCarthy, "ARL Disputes Publishers' View on Copyright Revisions," *Publishers Weekly* 198, no. 5 (1970).

<sup>188</sup> *Ibid.*

operation.”<sup>189</sup> They argued that library associations had sought to amend the law to permit current and long standing copying practices (previously approved in the Gentlemen’s Agreement) of libraries, that the fair use doctrine might not apply to library copying and libraries should, “not be required to submit to threat of litigation to find out whether their practices are legal.”<sup>190</sup> Finally they argued that no study of the effect of library photocopying on sales had found evidence of harm and that the Fry study<sup>191</sup> had even shown evidence that library copying stimulated sales. They ended their letter by outlining the library associations’ position on §108: it should be deleted or amended. Lacy responded to Clapp and McCarthy by arguing that, “any copying a library may legally do now under the doctrine of “fair use” or otherwise, it can continue to do under Section 107.” He argued that §108, “is something *added* to the present rights of libraries, not something taken away.”<sup>192</sup> More importantly he articulated the real fear of publishers and authors

The present copyright law has been on the books for sixty years; its successor may remain the law for longer. In that epoch there are likely to be further revolutionary changes in the devices, costs, and practices of reprography that might well allow the uncontrolled making of single copies (and that’s the way books are sold and royalties earned, one copy to a customer) to *become* not only damaging but destructive. It is that future that most concerns us. For that future we are perfectly willing to trust the common sense and fairness of librarians and courts to apply a doctrine of “fair use” that takes into account changing technological and economic realities, but we obviously must oppose legislation that would abandon the concept of “fair use” for libraries and permit almost unlimited single-copy photocopying.<sup>193</sup>

In March 1970, during a period of intense personal lobbying by Clapp, Brown, and McCarthy of the Senate members of the Judiciary Committee concerning S.543, Clapp met Dan

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<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> George Fry and Associates, "Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields," (Washington, D.C: National Science Foundation, 1962).

<sup>192</sup> Dan Lacy, "Mail: Clarifying Some Views Of Copyright Revision," *Publishers Weekly* 198, no. 9 (1970).

<sup>193</sup> Ibid.

Lacy in the Senate hallways. Lacy reiterated his argument that §107, the codification of the doctrine of fair use, was sufficient. He did not understand why libraries needed the certainty of specific rights or exemptions. He also made the point that the act of copying was infringement by the library, and saw no way to move liability for that act on to the user as he perceived William North wanted, and as we can see reflected in the text of the ARL-ALA amendment in figure 17.

Earlier, on August 14, Lacy had written in a private letter to McCarthy detailing how the ABPC and he had, “done my damndest to try and see that there is a reasonable bill that doesn’t injure libraries or hamper scholarship.” He listed ten different points. He thought non-injurious copying by libraries was fair use and did not think ARL or ALA want to legalize “unfair uses”. The only thing he could not agree to was a blanket statutory right to copy regardless of fair use; “for as long as the law is on the books through decades of unforeseeable technical change.”<sup>194</sup> This last point was based on the common understanding of the trouble caused by the “jukebox exemption” to the 1909 Act which had initially enabled the jukebox industry to play music without paying royalties and then enabled them to negotiate a favorable compulsory license as music playing technology developed in unforeseen ways after passage of the act. As we will see with regard to the information industry, Lacy’s comments also reflected the growing concern about the future development of networked computing technologies. Then, just before the publication of his reply in *Publishers Weekly*, Lacy again wrote to McCarthy. He saw no chance that the current revision bill, S.543, would pass in the 91st Congress and offered the olive branch of possible agreement. “Perhaps it would be possible between now and the introduction of

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<sup>194</sup> "Dan Lacy to Stephen A. McCarthy [August 14,1970]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Williams vs. Wilkins, Manuscript Division, Library of Congress*

legislation in the next Congress to come to some sort of agreement.”<sup>195</sup> This exchange is an interesting example of the intersection of legislative and interest group negotiation strands of revision and the difference in tone between the public and private rhetoric of revision.

There is one element of the legislative process that should be addressed at this point because it represents a legislative attempt to create a forum for formal negotiation and hopefully resolution of some of these thorny issues. This was the creation of the Commission on New Technological Uses of Copyrighted Works (CONTU). As we have seen, Senator McClellan first proposed the idea of a commission to handle the issues associated with copyright and computing and also reproduction devices like photocopiers in a separate bill, S.2216, in 1967. The early focus was on computing, the ramifications of which were not well enough understood by legislators, or many of the interest groups, in the late 1960’s to enable them to confidently legislate in this area. A commission could gather expertise and devote significant time to the issue, lower the heat in Congress, and perhaps enable them to make progress on general revision in the meantime. The issue of photocopying in libraries was either added or subtracted from the proposed charge of the Commission depending on the relative standing of the various interest groups and the confidence of the Copyright Office and congressional staffers in their ability to force the interests to reach consensus within the main revision process, instead of tabling the issue with the commission. In the 91<sup>st</sup> Congress, in 1969, McClellan incorporated S.2216 in the main revision bill, S.543. There the unborn CONTU remained the subject of much talk about what it could potentially investigate or not, how many commissioners there would be, and who

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<sup>195</sup> "Dan Lacy to Stephen A. McCarthy [August 26, 1970]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1970-71, Manuscript Division, Library of Congress*.

they should be, until its final creation on the last day of the 93<sup>rd</sup> Congress, December 31, 1974 when S.3976 became Public Law 93-573 and the Commission came into existence.

The impetus for the creation of CONTU was the growing appreciation amongst policy makers that the nascent information industry would have a significant and as yet unclear, impact upon the storage, transmission, and distribution of information in general, and copyrighted works in particular, and therefore would have to be considered in the development of copyright legislation. The industry itself was also aware of this and in the late 1960's we see the formation of the Information Industry Association (IIA) and its appearance in the struggle for copyright revision. In October 1969 Brennan had asked North for comments on an IIA proposal concerning S.543 and CONTU. North shared his response with the ALA Washington Office and with ARL, which in all likelihood shared his views. North viewed IIA as a stalking horse for the publishers. He objected to the IIA proposal that CONTU study photocopying. At that point the ALA opposed CONTU doing this unless the revision bill was deferred until after CONTU reported or the revision bill specifically recognized the, "reproduction rights of libraries." Finally, he regarded CONTU as proposed to be weighed towards industry and against users.<sup>196</sup>

The summer of 1971 was another point at which significant personnel changes took place, this time in the Copyright Office. Abraham Kaminstein, Register of Copyrights since Arthur Fisher's death in 1960, retired in 1971 because of ill health. George Cary, Deputy Register of Copyrights, was appointed by L. Quincy Mumford as the Register of Copyrights. Barbara Ringer, Assistant Register of Copyrights, was to assume the primary responsibility for the general copyright revision process and Abe Goldman, General Counsel of the Copyright Office, was to continue as chief legal officer with continuing responsibility for drafting

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<sup>196</sup> "William North to Thomas Brennan [October 6, 1969]."

legislation. This at least was Mumford's plan, but in a sign of the changing times since the revision process had begun and Mumford had been appointed in the mid-1950s, Ringer was not satisfied to play a secondary role to Cary. She pushed for a reexamination of Mumford's decision by a federal hearing examiner who found that she, "was denied the post because of her sex and because she advocated the appointment of blacks to higher positions."<sup>197</sup> Ringer also sued in U.S. District Court, arguing that Mumford had not properly considered other candidates before appointing Cary. The Court agreed and ordered Mumford to rescind and reconsider the appointment. Despite this, Mumford later reappointed Cary.<sup>198</sup> Finally, a U.S. District Court ordered Mumford to vacate Cary's appointment and make no final appointment until he had complied with the Library's own regulations.<sup>199</sup> Cary retired in March 1973 and was replaced as Acting Register by Abe Goldman.

Finally, in November of 1973, Barbara Ringer was appointed Register and served until 1980. The appointment of an African-American, Robert Wedgeworth, to the position of Executive Director of the ALA, and Ringer's ultimately successful fight to become Register of Copyrights are emblematic of the societal changes in American government, law, and the professions in the 1960's. Mumford, the first professionally certified librarian as Librarian of Congress, who had been so successful in rebuilding relationships with Congress and overseeing the growth and development of the modern Library of Congress, found it difficult to cope with this changing profession. He became increasingly remote and finally retired at the end of 1974.

Two other points that relate to how intimately the ARL engaged with copyright revision are worth noting. First, that the three news reports cited here were all carefully copied to the

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<sup>197</sup> Claudia Levy, "Federal Examiner Gives Opinion: Library of Congress is Found to Discriminate Against Woman," *Washington Post*, August 10 1972.

<sup>198</sup> "U.S. Librarian Sues to Get Promotion," *Washington Post*, October 30 1972.

<sup>199</sup> "Library Fight Won by Woman," *Washington Post*, March 1 1973.

ARL files, to a folder titled "Library of Congress 1970/71". Secondly, that Mumford was replaced as Acting Librarian of Congress in 1974 by John Lorenz, who would go on to serve as Executive Director of the ARL in the last few months of the revision process after MacDonald's retirement in 1976. Because of the close institutional links between the Library of Congress, the Copyright Office, and the member libraries of the Association of Research Libraries, research librarians had access to the revision process and opportunities to influence that process unavailable to other interest groups.

Not all the interest group negotiations were as formal or as fruitful as CONTU finally turned out to be. In October 1971, Ben Weil, of ESSO Research and Engineering and a leader in the National Federation of Science Abstracting and Indexing Services, organized a series of meetings called the Parliament on Copyright, or more formally the "Parliament on New Technological Uses of Copyrighted Works." These meetings were sponsored by the American Society for Information Science (ASIS), the IIA, and the National Federation of Science Abstracting and Indexing Services. McCarthy agreed to represent the ARL at the first meeting on October 28, 1971. Low and Paul Howard (both of the ALA Committee on Legislation, Copyright Committee) completed the representation from libraries. In all there were approximately 40 participants. The agenda consisted of, "planning for a National Commission" and the participants aimed, rather vaguely, "to grapple with [issues] ... of the dynamic future."<sup>200</sup> The parliament proved to be little more than a talking shop. Weil produced a report on the parliament. They decided that a commission would be useful and their discussions should continue. He planned a second parliament for spring 1972, which took place on March 9 and attracted 36 participants.

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<sup>200</sup> "Agenda for a Parliament on New Technological Uses of Copyrighted Works [October 28, 1971]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Parliament, Manuscript Division, Library of Congress.*



Weil tried to keep the effort going. In September of 1972, he was still writing to the participants of the earlier meetings, but by this time the negotiations had moved on. As we have seen, by late 1972 most people engaged in the library photocopying portion of copyright revision had a relatively clear idea of the possible outcomes of the Williams & Wilkins case and the Senate was beginning to contemplate action on the bill in 1973 with the CATV controversy having been ruled on by the FCC. Negotiations were becoming far more focused than was possible in the diverse forum of the parliament. The first example of this is the series of meetings that came to be known as the Cosmos Club Meetings in the spring, summer and fall of 1972. The Cosmos Club was and still is a well established private club for men in Washington and a convenient location, on Massachusetts Avenue, for such meetings. Patry publishes an account of the Cosmos Club meetings originally written for CONTU by Robert Frase, a Vice-President and economist at the AAP.<sup>201</sup>

The first meeting took place at the Cosmos Club on April 4, 1972. The participants included Albert Batik (of the American Society for Testing and Materials), Irwin Karp (lawyer for the Authors' League of America and a participant in revision since at least 1961), Charles Lieb (Counsel for the Association of American Publishers), Robert Marks (of the American Institute of Physics), McCarthy, North, Robert Saltzstein (lawyer for the American Business Press), Robert Frase (of the Association of American Publishers.) and Robert Gould (of the American Chemical Society). The group met again on June 7 and on August 30. Neither Brown nor McCarthy were able to make those meetings. The participants discussed possible agreement among the attorneys for authors, publishers and libraries on language for a photocopying provision in the Copyright Revision Act. From the documentary record in the ARL papers, it

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<sup>201</sup> Patry, *The Fair Use Privilege in Copyright Law*, 265-8.

seems as though librarian participation in this group had fallen to the ALA and North in particular. At the final Cosmos Club meeting on September 19, 1972 (that rather confusingly met at the Players Club in New York) the participants considered a draft of §108 prepared by Richard Sernett (of the publishers Scott, Foresman & Co) and North. The perspectives of the initial participants include greater representation from organizations involved in the publication of scholarly scientific journals than in past negotiations. Obviously, such journals were at the center of the Williams & Wilkins case and most critical to research library activities associated with copying (interlibrary loan and copying by and for researchers in the academic sciences). However, the absence of McCarthy and Brown and this emphasis upon scientific, technical, and medical journal copying ultimately doomed these negotiations. The proposed §108 that resulted from these negotiations is printed in full in figure 19. This version of §108 is even more extensive than previous drafts and is far more specific and restrictive. It is slightly more than one thousand words long, in comparison with the 414 words of the ARL-ARL Draft (figure 17) or the 102 words of Clapp's first draft (figure 14). It is a good illustration of Litman's point that "broad expansive rights were balanced by narrow, stingy exceptions."<sup>202</sup>

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

(g) Notwithstanding the provisions of section 106, and not in any way affecting the right of fair use as provide by section 107, 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 phonorecord of a work, or distribute such

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<sup>202</sup> Litman, "Copyright Legislation and Technological Change," 281.

copy or phonorecord, under the conditions specified by this section and if:

- (1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; and
  - (2) The collection 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,
- (h) 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 this type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.
- (i) 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 reasonable effort, determined that an unused replacement cannot be obtained at a normal price from commonly known trade sources in the United States, including authorized reproducing services.
- (j) The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work, a pictorial, graphic or

sculptural work, or a motion picture or other audio-visual work, made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archives, if:

(1) The user has established to the satisfaction of the library or archives that an unused copy cannot be obtained at a normal reasonable price from commonly known trade sources in the United States including authorized reproduction services; provided, however, that if the work is a scientific, technical, or scholarly article published in a periodical,

(A) A copy may be made by the library or archives at the request of a user of the library or archives, including a user who makes his request through another library or archives, unless the copyright proprietor or his authorized agent (i) shall have published a notice in such periodical that a copy or reproduction of such article is available from a specified source in the United States at a reasonable price within 31 days from receipt of an order together with the required purchase price, (ii) shall have notified the Register of Copyrights or his designee of such source and price, and (iii) shall, in fact, supply a copy in response to such order in accordance with such notice.

(B) Nothing in subsection (1)(A) shall preclude any copyright proprietor or his authorized agent from entering into any license agreement with a library or archives under which such library or archives may make a copy of an article otherwise available under subsection (1)(A).

(C) A copyright proprietor or his authorized agent may, by 120 days' advance written notice to the Register of Copyrights, change the specified source of the specified price or may permanently withdraw the notice.

(D) In the event that the Register of Copyrights, in his discretion, determines that a copyright proprietor or his authorized agent, having given the notice required by subsection (1)(A) or subsection (d), has willfully or negligently failed to provide copies of a work in accordance with such notice, then for a period of three (3) years after the date of such determination all issues of the periodical which was the subject of the determination shall be conclusively presumed unavailable from a commonly-known trade source.

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

(3) 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.

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

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

(l) The rights of reproducing and distributing “no more than one copy or phonorecord” in accordance with this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same work on separate occasions, but do not extend to cases where the library or archives, or its employee, 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 work, whether on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group.<sup>203</sup>

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**Figure 19 North/Sernett Version of §108 from Cosmos Club Meetings (September 19, 1972)**

On the same day that the final Cosmos Club meeting took place, September 19, Brennan wrote to John McDonald (then President of ARL) informing him that Senator McClellan was ready to move on the revision bill in the 93<sup>rd</sup> Congress, which would meet beginning in January 1973. Brennan noted that the issue of library photocopying had been dealt with in the revision bill of 1969, but that the Williams & Wilkins case has changed the situation since then and that the interest groups involved had been meeting. He wanted new comments on library photocopying and §107 and 108 by November 30, 1972. It is clear from this letter that Brennan was interested in consensus and was using subtle pressure to encourage the groups to reach a consensus.<sup>204</sup> On that same day he had also written a similar letter to the Association of American Publishers (AAP).<sup>205</sup> Brennan had also written to Edmon Low as the representative of the ALA applying more pressure for agreement. He noted that the “Subcommittee has already determined its basic position on photocopying and fair use, and does not wish to reopen these issues unless it is clearly necessary.”<sup>206</sup>

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<sup>203</sup> "1972 -- Proposal resulting from Cosmos Club meetings: Section 108 [September 19, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright revision 1972, Manuscript Division, Library of Congress.*

<sup>204</sup> "Thomas Brennan to John McDonald [September 19, 1972]."

<sup>205</sup> "Thomas Brennan to American Association of Publishers [September 19, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 3 of 64 Folder Copyright Revision 1972, Manuscript Division, Library of Congress.*

<sup>206</sup> "Edwin Low to Thomas Brennan [September 28, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright – Working Group on Reprographic Reproduction 1972/1973, Manuscript Division, Library of Congress.*

On September 26, Brown wrote to McCarthy urging him to oppose what had come to be called the “North/Sernett” draft amendment (figure 19). According to Brown the proposed §108(d)(1), which is the core of the changes proposed to §108 by the Cosmos Club Group, “would carve a large chunk out of what we believe the courts, in applying the new legislation, would hold to be ‘fair use.’ The strangest part of the proposal is that it would affect precisely that category of publications – scientific, technical, and scholarly publications – where ‘fair use’ is supposed to be at its maximum.”<sup>207</sup> Brown was also concerned that the proposed language defined the article, not the periodical issue, as the entire copyrighted work. He argued that the existing legislative language from the House bill and Report No. 83 define the periodical issue as an “entire collective work.” His concern was that it was far more difficult to argue that the use of an entire copyrighted work was fair use, rather than a portion of a work. He also linked this proposal to the Williams & Wilkins case. “Indeed, the primary purpose of the copyright interests who are pushing the proposal may be to be sure that we lose that case even before it is finally decided.”<sup>208</sup> Brown argued that in his *amicus curiae* brief in that case, and also in the actions of the NLM and NIH, the periodical issue had always been regarded as the copyrighted work, not the article. He had also argued in Williams & Wilkins that the privilege of fair use was most extensive in connection with scientific information, but that the proposed amendment singled out scientific, technical and scholarly articles for special restrictions under the guise of providing special assurance. “We do not believe any significant price should be paid for this assurance.”<sup>209</sup>

In marshalling the ARL response, McCarthy did not rely only on Brown’s legal advice, his staff also quickly gathered input from a number of ARL library directors by phone in early

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<sup>207</sup> "Philip Brown to Stephen A. McCarthy [September 26,1972]."

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.



October. The existing documents indicate that staff managed to contact Fred Wagman (University of Michigan), Porter Kellam (University of Georgia), Leslie Dunlap (University of Iowa), Cecil Byrd (Indiana University), Richard Chapin (Michigan State), Jerrold Orne (North Carolina), and John Humphry (New York State Library). These directors were concerned about the problems of definition of a “scientific, technical, or scholarly” journal or article and a “reasonable price” in the amendment. All of them “noted the serious effect of the twenty-one-day supply period built into the amendment.”<sup>210</sup> Humphry noted that, “it would set their service in New York State back by many years.”<sup>211</sup> These directors were being realistic; they recognized the need for compromise, and some thought this might be as good a deal as they could get. However, the staff member noted, “all of them predict that this compromise is essentially unworkable, cumbersome, expensive and awkward.”<sup>212</sup>

McCarthy and Brown, closer to the fray than these directors, were not prepared to accept this compromise. On October 18, they (along with Howard Rovelstad, University of Maryland and John Furman from Brown’s law firm) met at the American Political Science Association in Washington, D.C. with representatives from ALA (Edmon Low, Germaine Krettek, William North, and Edward Holley), Harry Rosenfield from the educators’ Ad Hoc Committee on Copyright, and James Sharaf, an attorney from the General Counsel’s Office of Harvard University.

North explained that the language of the draft had come from discussions concerning, “means by which access to materials, particularly journal articles, could be assured, with some

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<sup>210</sup> "Draft Memorandum on the Paragraph 108 of the Current Copyright Bill Before Congress [October 11, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Amendment, Manuscript Division, Library of Congress.*

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

sanction to require publishers to make copies available or to acquiesce in library photocopying.”<sup>213</sup> In North’s opinion §108(e) of S.644 made provision for copying by library users themselves, so the Cosmos Group had focused on interlibrary loan. The North/Sernett language was designed to provide for provision of copies via a publisher’s reprint service, or by interlibrary loan of copies. It is clear from the notes of the meeting that North was unpersuasive. Brown’s arguments about the strength of fair use in the area of scientific, technical and scholarly works and the arguments put forth in the Williams & Wilkins case carried the day and the group quickly moved on to discussing alternatives to the North/Sernett language. They noted that Brennan had opened the door to further changes in the legislative language, that developments in the Williams & Wilkins case had also strengthened their hand in proposing new language, and that they had the support --because of that case – of two government departments, HEW and Justice. The group then looked back to the language of the 1964 bill (see figure 2) and agreed that they should return to the provisions of the 1964 bill, “in which it was provided that a library might make a single photocopy of an article for a user upon request without any further checking and that a copy of a monographic work might be made after determining that it was not readily available through normal channels.”<sup>214</sup> They agreed that Brown and Furman should rephrase that language to fit into the S.644 as §108(d)1. “North and McCarthy would communicate immediately with the members of the Cosmos Club Group indicating that the library associations did not consider the proposed draft amendment acceptable and stating that it seemed doubtful that further discussions along the lines developed in the proposed draft amendment would serve a useful purpose.”<sup>215</sup> In doing so they had skipped back over eight years of legislative wrangling: a

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<sup>213</sup> "Minutes of a Meeting on the Copyright Revision Bill, APSA Conference Room [October 18, 1972]."

<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

period during which the libraries associations (amongst others) had at first rejected a separate exemption and decided to rely on the simple codification of fair use, then reversed course and developed and lobbied for such an exemption, and finally participated in making that exemption ever more complex until it became, “essentially unworkable, cumbersome, expensive and awkward.”<sup>216</sup> They had also dealt a death blow to the Cosmos Group negotiations, something that would need to be explained to Brennan. More positively, at least as far as the ARL was concerned, the drafting of proposed language was once again back in the hands of the ARL lawyers.

Jim Sharaf’s presence at the meeting is unexplained. He was appointed as an Attorney in the Harvard University Office of the General Counsel in 1971. Douglas Bryant, the University Librarian at Harvard was not only a leader in the ARL but also chair of the ACLS Committee on Research Libraries. McCarthy and the ARL, as noted earlier, was actively attempting to build a coalition to support libraries’ lobbying efforts. It is probable that Bryant’s ability to move between the two organizations aided in this effort. On January 10, 1973 Bryant wrote to Brennan in his capacity as Chair of the ACLS Committee on Research Libraries supporting the ARL/ALA amendment to S.644 §108(d). In late 1972, McCarthy achieved even greater success in demonstrating significant support for the ARL/ALA amendment to S.644 when, as detailed in an earlier section, he worked with Charles Kidd, Executive Secretary of the American Association of Universities (AAU), to organize a letter writing campaign by presidents of some of the most important universities in the United States.

On November 7, 1972 McCarthy, having rejected the Cosmos amendment and reached agreement to substitute §7 from the 1964 Preliminary draft bill, responded to Brennan’s

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<sup>216</sup> "Draft Memorandum on the Paragraph 108 of the Current Copyright Bill Before Congress [October 11, 1972]."

September request for further comments on §107 and 108. He copied Brennan on the ARL Williams & Wilkins *amicus* brief and explained how that case had changed the situation for libraries. “It has now become essential that the time-honored right of single-copy photocopying by libraries as a means of meeting the needs of their patrons be given explicit recognition in the copyright revision bill.”<sup>217</sup> He proposed substituting the Register’s §7 from 1964 *Preliminary Draft for Revised U.S. Copyright Law* (figure 1) in place of the existing §108 and specifically rejected the proposal from the Cosmos meetings arguing that, “it would not meet the problem faced by libraries and would be hopelessly impractical.”<sup>218</sup>

In a sign of the heightened tension around this issue in the fall of 1972, Charles Lieb wrote to Brennan on December 5 laying the blame for the failure of the Cosmos Club negotiations on the librarians. He proposed that since these negotiations had failed, Congress should go ahead in the 93rd Congress with the existing §108 in S.644 or with the bill, HR.2512, that had passed the house.<sup>219</sup> On December 13, McCarthy wrote angrily to Lieb disagreeing and asking him to set the record straight with Brennan.<sup>220</sup> Lieb refused and so McCarthy wrote directly to Brennan giving him the ARL side of the story. Finally, by mid January McCarthy was able to tell Brown that Lieb had called him on the phone to apologize. One is left to wonder what Brennan made of the whole episode.

In May of 1973 the ARL Board was informed that, “a working group has been formed to develop a proposed system for payment of royalties to copyright holders for materials

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<sup>217</sup> "Stephen A. McCarthy to Thomas Brennan [November 7, 1972]."

<sup>218</sup> *Ibid.*

<sup>219</sup> "Charles Lieb to Thomas Brennan [December 5, 1972]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Cosmos Meeting, Manuscript Division, Library of Congress.*

<sup>220</sup> "Stephen A. McCarthy to Charles Lieb [December 13, 1972] ", in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Cosmos Meeting, Manuscript Division, Library of Congress.*

photocopied, should the courts decide such payment is required. William Dix is a member of this working party. To date, no report has been received from this group.”<sup>221</sup> The working party consisted of the Chairman, Sharaf, who had brought the group together, and the proprietor’s representatives Richard Kenyon of the American Chemical Society, Irwin Karp of the Authors’ League of America, and Lieb of the AAP. On the librarians’ side were Ed Low, William North and Russell Shank of the Smithsonian Institution for the ALA and William Dix, representing ARL. This group met at Dumbarton Oaks, a research center and library managed by Harvard (this location may be explained by Jim Sharaf chairing the group) in the Washington suburbs, on March 2-3, 1973 and thus this round of talks came to be called “Dumbarton Oaks.” At around this same time the Court of Claims heard oral arguments in the Williams & Wilkins case on March 7, George Cary retired as Register of Copyrights on March 9, and S.1361 was introduced in the Senate of the 93<sup>rd</sup> Congress on March 26. At this stage the bill was identical to S.644 from the 91<sup>st</sup> Congress.

Few records of what happened at Dumbarton Oaks have survived. However, Lieb’s notes were published in Patry.<sup>222</sup> Of course Lieb was a highly partisan participant in these talks, but his notes are confirmed in part by less complete materials in the ARL records. According to Lieb, the discussions focused on single copy photocopying of scientific, technical, and scholarly journal articles, since publishers and authors could accept §108 of S.644 and librarians could accept §108 in S.644 if satisfactory provision could be made for this kind of copying. The group first discussed why Cosmos was not acceptable to the librarians and the three alternatives the librarians could pursue. According to Lieb these were:

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<sup>221</sup> "Minutes of the 39th Meeting of the Board of Directors of the ARL New Orleans [May 9,10,13, 1973]."

<sup>222</sup> Patry, *The Fair Use Privilege in Copyright Law*, 269-71.

- i) Fight for ARL-ALA amendment or be prepared to accept no bill at all; or
- ii) Accept Section 108 as is; or
- iii) Agree with publishers and authors on mutually satisfactory statutory systems for payment to copyright owners.<sup>223</sup>

The working group then discussed (iii), statutory systems. These were of two types: differential pricing so that libraries paid more for subscriptions that enabled them to copy in various ways, and a transactional system in which libraries paid for each copy made. In terms of this latter system, the group outlined a voluntary licensing system that would cover both in house and “out of house” (or interlibrary and intra library system copying). The working group members were expected to take these ideas back to their associations. Dix did this and on March 19, McCarthy responded addressing Dix’s alternatives. He proposed fighting for the ARL/ALA amendment in the Senate, then in what was perceived as the more favorable House, and only then falling back on charges or licensing. He explained,

I should report to you that the Executive Committee expressed grave concern over the plan which seemed to be developing in the Dumbarton Oaks talks to the effect that libraries would be required to pay royalties for photocopying and it was merely a matter of figuring out the best way in which to do it. The Executive Committee took a very strong view against this and felt that this view should be opposed. ... it would be difficult to gain ARL approval of a plan which accepted in advance a system of royalty payments.

I hope that in the Working Party, Jim Sharaf can be made to realize that it is not a matter of persuading Steve McCarthy to change his position, but that it is the ARL membership among whom McCarthy’s views on photocopying are rather conservative.<sup>224</sup>

Patry quotes Lieb, describing the outcome. “Unfortunately, the working party never left the launching pad and that was the end of Dumbarton Oaks.”<sup>225</sup> As in the late 1960’s, when

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<sup>223</sup> Ibid., 269.

<sup>224</sup> "Stephen A. McCarthy to William Dix [March 19, 1973]."

<sup>225</sup> \_\_\_\_\_, *The Fair Use Privilege in Copyright Law*, 271.

presented with the various CICIP proposals, and as in their response to the Williams & Wilkins case and Passano's offer of differential pricing or a licensing arrangement, the ARL once again was determined to fight such schemes as long as possible. With the future of S.1361 and the eventual outcome of the Williams & Wilkins case unsettled, they did not see early 1973 as the time to capitulate on this point.

As we discussed in an earlier section, McClellan scheduled hearings concerning S.1361 for the summer of 1973. As McClellan noted when he introduced the bill to the Senate, hearings "tend to polarize positions on some issues where efforts to secure accommodations are still in progress."<sup>226</sup> This proved to be the case with the negotiations concerning §108. The interested parties, including librarians, prepared for the hearings and negotiations came to halt. Then on November 27, 1973 the full Court of Claims reversed Commissioner Davis' recommendation, and the tide turned so that instead of being forced to defend themselves from a transactional licensing scheme, librarians were able to negotiate on the specific wording of a section §108 that, in the bills before Congress, had remained relatively stable from S.543 in 1969 (figure7).

On January 9, 1974 McCarthy and Brown met with Brennan to discuss new language that originated in Senator Philip Hart's office. Senator Hart, a Democrat from Michigan and member of the Senate Judiciary Committee, had long been a supporter of libraries in terms of copyright. For instance, he was prepared to introduce the ARL/ALA amendment in 1970. According to the record of the meeting, Hart's legislative language, "would declare library photocopying of single articles without checking on availability not an infringement of copyright. ... but would introduce idea of 'systematic copying' which is an infringement."<sup>227</sup> The phrase "systematic copying" would then be defined in the Committee Report. "We are invited to submit examples

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<sup>226</sup> U.S. Congress, "Congressional Record," 119 (1973).

<sup>227</sup> "Record of a Meeting of Thomas Brennan, Philip Brown, and Stephen A. McCarthy [January 9, 1974]."

that would illustrate our views on ‘systematic copying’.”<sup>228</sup> They then moved on to discuss legislative tactics. If the current draft of S.1361 passed, it covered library copying, and therefore CONTU would not discuss the technology. If S.1361 did not pass, then there might be a bill creating CONTU, and photocopying would be one of the new technologies discussed by the Commission. Brennan foresaw possible action by the Senate in 1974, but not by the House, which in his estimation would need to hold further hearings.

Although Lacy<sup>229</sup> had used the word in his contribution to *Libraries at Large*, this is the earliest legislative use of the word “systematic” in the revision process as an adjective to describe some portion of the copying conducted by and in libraries that many publishers deemed to cross the line from legitimate use, or fair use, into infringement or illegitimate copying. It is interesting that the word should arise at this time. On March 24, 1974 *The New York Times* published a story concerning the establishment of what would become the Research Libraries Group (RLG), “a sweeping and controversial program of combined operations [of the New York Public Library, Yale, Columbia, and Harvard] that will entail cutting back purchases of many publications and systematically exchanging photocopies of previously published writings.”<sup>230</sup> “It will enable the libraries to save money by buying only one copy among them, and not four copies, of expensive sets of volumes, for instance, of little-used journals.”<sup>231</sup> The article reported criticism from publishers and authors with, “heated controversy ... centered on the prospect of systematic copying of printed materials.”<sup>232</sup> Both Lieb and Karp are quoted. Lieb, speaking on behalf of the AAP argued that, “if this is done without payment to publishers and authors for the

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<sup>228</sup> Ibid.

<sup>229</sup> Lacy, "Copyright: A Proprietor's View."

<sup>230</sup> Eric Pace, "Four Major Libraries Combine Research Operations," *New York Times*, March 24 1974.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.



systematic reproduction of the material, it will inhibit the further production of material.”<sup>233</sup> Unnamed public library officials, however, were quoted as saying that, “there is no plan for the participating libraries ... to [pay royalties]. They cite a recent United States Court of Claims decision, in a case known as Williams & Wilkins, as supporting their position.”<sup>234</sup> On April 12, Townsend Hoopes, President of the AAP, denounced the RLG plan in a letter to the Senate subcommittee that was reported on in another *New York Times* article. “The decision wholly ignores the rights of copyright owners, and indeed seems to have been taken with the deliberate intention of avoiding the payment of royalties even for avowed systematic and unlimited photocopying.”<sup>235</sup> The debate resurfaced in the paper of record later in the year when Richard Lingeman, an author, wrote a two-part article on copyright and the Williams & Wilkins case, then before the Supreme Court, in the *New York Times Book Review*. He argued that, “the specter of large library conglomerates operating as quasi-reprint houses is not a paranoiac fantasy. Already the New York Public Library and the Yale, Harvard and Columbia University Libraries are talking merger on the strength of the Williams & Wilkins decision.”<sup>236</sup> He argued for libraries to accept a transactional licensing scheme similar to the well established examples in the music recording industry. James Skipper, then Executive Director of the newly created RLG, responded with a letter to the editor on January 12, 1975 that was reported on in a *Library Journal* article.<sup>237</sup>

Librarians have been castigated for not rushing forward to embrace [a type of licensing or fee system] which is nebulous as to cost, lacking specificity in detail, and with no indication of the administrative expense involved in shuffling nickels and dimes between thousands of libraries and publishers. It should be apparent

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<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> "4 Libraries Scored on Copying Plan," *New York Times*, April 12 1974.

<sup>236</sup> Richard R. Lingeman, "Copyright and the Right to 'Copy' -- Part II," *New York Times*, November 24 1974.

<sup>237</sup> "Skipper of RLG Defends Resource Sharing," *Library Journal* 100 (1975).

that library book budgets are painfully finite. Any diversion of book budgets to pay a tax on photocopying will do nothing more than deplete the funds which might be available to purchase new books. In providing supplemental income for publishers, licensing photocopying is a circular and self-defeating argument. No one benefits except the bureaucrats employed to shuffle the coins.<sup>238</sup>

Throughout the summer of 1974, while the constitutional crisis of Watergate and the resignation of President Nixon on August 9 roiled Washington, the controversy about the meaning of “systematic” continued, and a significant gap developed between the ALA’s more conciliatory stance and the ARL’s harder line. On June 21 McCarthy wrote to Ben Weil, who was to represent the views of libraries and users at a small professional meeting of engineers. McCarthy restated the long-standing position of the ARL on single copies and added, “We reject the concept of ‘systematic reproduction’ because it cannot be defined and merely invites a period of chaos in which inefficiency would appear to be legal and efficiency illegal. This is nonsense.”<sup>239</sup> On July 11, the ALA Copyright Subcommittee attempted to define systematic reproduction as “copying in a system or network where one library agrees to discontinue its subscription to a journal and depend on another library in the network to supply photocopies of articles from this journal when needed.”<sup>240</sup> The subcommittee also urged more negotiations with publishers under the auspices of the Copyright Office because they regarded Ringer as a trusted expert.

As has been discussed in an earlier section, the Senate passed S.1361 with §108 on September 9, 1974 and legislative action immediately returned to the House. On September 11, McCarthy wrote to Congressman Kastenmeier, Chair of the House subcommittee, warning that

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<sup>238</sup> James Skipper, "Letter to the Editor: Copyright," *New York Times Book Review*, January 12 1975.

<sup>239</sup> "Stephen A. McCarthy to Benjamin Weil [June 21, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright general 1974-1976, Manuscript Division, Library of Congress*.

<sup>240</sup> "Minutes of the ALA Subcommittee on Copyright [July 11, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress*.

“the action of the Senate which provides for fair use but prohibits ‘systematic reproduction’ which the Senate admits it cannot define, only further confuses an issue that desperately needs clarification, ... In its current form the Bill threatens long-established, customary library services to readers and may lead to prolonged litigation.”<sup>241</sup>

Back in April 1974 Ringer, now installed as Register of Copyrights, reported to the Federal Library Committee that, in her opinion, nothing would happen legislatively until the Supreme Court had ruled on the Williams & Wilkins case. Ringer was perhaps a little premature in her assessment since the Court did not even agree to hear the case until a month later on May 28 1974 and, as we have just seen, the Senate passed the bill in September 1974, nine months before the Supreme Court ruled on Williams & Wilkins. In terms of interest group negotiation she was just as definite. “It is imperative that suitable channels be found to provide for resumption of dialogue between librarians and publishers. The Copyright Office might have a role in this if funds were made available for the purpose.”<sup>242</sup> Since this was an area in which she, as Register, had some control, her prediction proved to be more accurate.

The move from the Senate, where McClellan and Brennan were somewhat more sympathetic to the copyright proprietors than to librarians and were determined to move forward to revision, to the House and Kastenmeier’s subcommittee, which librarians regarded as somewhat more sympathetic to their concerns, also encouraged both sides to try another round of negotiation if only to show the House that they were willing participants in compromise. These negotiations were formally called the Conference on Resolution of Copyright Issues and were

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<sup>241</sup> "Stephen A. McCarthy to Representative Kastenmeier [September 11, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress.*

<sup>242</sup> Barbara Ringer, "Report to the Federal Library Committee [April 24, 1974]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 13 Folder: Copyright Revision 1974, Manuscript Division, Library of Congress.*

cosponsored by the Copyright Office and the National Commission on Libraries and Information Science (NCLIS). The conference was convened in the Wilson Room of the Library of Congress on Saturday November 16, 1974. There were forty one participants, six of whom represented the ARL or member institutions (Brown, Bryant, Chapin, Dix, McCarthy, and McDonald). Ringer opened the conference by asking whether the Dumbarton Oaks negotiations could be taken as a starting point for this conference. Everyone agreed that Dumbarton Oaks should be disregarded since those negotiations never got off the ground. The participants also agreed that the Cosmos Club negotiations had also failed. Ringer noted that the situation had changed with the Court of Claims decision in the Williams & Wilkins case and that the “Senate amended the bill to add two rather radically new subsections to section 108”. At that point Ringer suggested that in order to appoint a working group that would do the actual work of the conference, that they divide into two interests, go to two rooms and select representatives. The publishers and authors moved downstairs to the Librarian of Congress’ office and the librarians moved upstairs. Thus this round of negotiations came to be called the “Upstairs/Downstairs Talks.” The discussion coalesced around §108(g), particularly (2), a licensing scheme, and how to create a working party that would formulate agreement on these. The working group was to consist of publishers/downstairs: Mike Harris, Dick Kenyon, Al Batik, Charles Lieb, Irwin Karp, Bella Linden (alternates Alex Hoffman and Paul Zurkowski of the IIA); the librarians/upstairs group: North, Brown, Low, McKenna, McCarthy, and Marke (alternates Wedgeworth and McDonald.) The group then discussed the charge of the working group. Brown and the ARL did not accept that it was only about how to implement 108(g) with a licensing scheme. ARL still wanted to delete 108(g). The working group was to meet on December 3, at the ACLS in New York. No

complete record of these negotiations was ever published; however, a transcript of the first meeting exists in the remaining records of the ARL.<sup>243</sup>

As McCarthy prepared for his upcoming retirement at the end of the year, he felt more able to express his personal view. In a response to a letter from Gert Kolle, a librarian at the Max Planck Institute in Germany, he indicated that he was, “disposed to consider ‘Variable pricing’ [higher institutional subscription prices] as the best, workable solution that has yet been suggested. ... Libraries will either pay the price or cancel the subscription.”<sup>244</sup> He didn’t like, but accepted, such pricing. On that same day he wrote a letter to the ARL membership and noted, “The [Williams & Wilkins] case was heard by the Supreme Court last week. The decision is not expected for several months. When it comes, it will settle the matter for the present. The new copyright law which is expected to be adopted in 1975 or 1976 might make further changes.”<sup>245</sup> It is perhaps an indication of the importance McCarthy attached to copyright revision that on Christmas Eve, just one week before his retirement on December 31, he continued to communicate and strategize about copyright. In fact on his very last day as Executive Director, December 31, he wrote to Brown noting that McDonald, the incoming Executive Director, had asked him to continue to work on copyright. He intended to be at meetings associated with the Upstairs/Downstairs talks on January 10 in New York and February 5 in Washington.<sup>246</sup>

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<sup>243</sup> "Transcript of the Conference on Resolution of Copyright Issues [November 16, 1974] ", in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 16 Folder LC Copyright 1978, Manuscript Division, Library of Congress.*

<sup>244</sup> "Stephen A. McCarthy to Gert Kolle [December 24, 1974]," in *Records of the Association of Research Libraries, Unprocessed Materials #18,632 Box 9 of 64 Folder Copyright general 1974-1976, Manuscript Division, Library of Congress.*

<sup>245</sup> "Stephen A. McCarthy to ARL Member Libraries [December 24, 1974]," in *Records of the Association of Research Libraries, Unprocessed Materials #18,632 Box 9 of 64 Folder Copyright general 1974-1976, Manuscript Division, Library of Congress.*

<sup>246</sup> "Stephen A. McCarthy to Philip Brown [December 31, 1974]," in *Records of the Association of Research Libraries Unprocessed materials #18,632, Box 31 of 64 Folder: Williams & Wilkins – Brown Correspondence, Manuscript Division, Library of Congress.*

After the February 5 meeting, the Library of Congress issued a press release noting that the Conference had accepted the proposal of the working group, that the full Conference should charge the working group with investigating workable clearance and licensing procedures, and the full Conference was expected to meet again on April 24, 1975.<sup>247</sup> Patry reprints a section of the transcript of the February 5 meeting that goes into more detail on the conclusions of the working group which indicate that the Library of Congress was casting the discussions in the most positive possible light. His transcript indicates that it was “impossible to achieve any meaningful consensus concerning the obligation of libraries to compensate copyright proprietors for photocopies” and that all parties reserved “their respective rights and positions.”<sup>248</sup> Only once those caveats had been made, did the Working Group propose investigating clearance procedures. In another later reference to these negotiations McDonald, in a letter to Senator McClellan, noted that the investigation of clearance procedures had come about only because librarians wanted a fact finding study of the impact of library photocopying on publishing and that publishers had only agreed to this if a study of a clearance mechanism was added to the study.<sup>249</sup> Patry records that the working group met three times and spawned various subcommittees that produced various documents before the April 24 meeting of the full conference. However, the work of the Conference and its working group and subcommittees was overtaken by events. First, the long awaited CONTU was finally created with passage of PL93-573 on December 31, 1974, in January 1975 HR.2223 and its identical companion bill S.22 were

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<sup>247</sup> Library of Congress, "Press Release: Second Conference on Resolution of Copyright Issues [February 5, 1975]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632 Box 9 of 64 Folder Copyright, Manuscript Division, Library of Congress.*

<sup>248</sup> Patry, *The Fair Use Privilege in Copyright Law*, 281.

<sup>249</sup> "John P. McDonald to Senator McClellan [September 15, 1975]."

introduced into the House and Senate of the newly elected 94<sup>th</sup> Congress, and on February 24, 1975 the Supreme Court affirmed the Court of Claims decision in the Williams & Wilkins case.

CONTU consisted of twelve members, appointed by President Ford, and the Librarian of Congress (Mumford having retired effective December 31, 1974, this was John Lorenz for the first few months of the Commission's existence until Daniel Boorstin was confirmed in September and took the oath of office in November 1975). Barbara Ringer, as Register, served as an *ex-officio* non-voting member. The twelve members (down from the 23 originally proposed) were carefully balanced between representatives of proprietor interests, librarians, consumers, and technologists. Librarians were represented by Dix for the ARL, Wedgeworth for the ALA, and Alice Wilcox (Director of the Minnesota library network, MINITEX). Publishers were presented by Lacy, E. Gabriel Perle of Time inc., Hershel B. Sarbin of Ziff-Davis Publishing, and authors by John Hersey, a distinguished author and then serving as president of the Authors' League of America. Rhoda Karpatkin represented the Consumers Union and Arthur R. Miller, as well as being a Harvard Professor of Law, was also heavily involved in EDUCOM, the precursor to EDUCAUSE. Copyright legal expertise was provided by George Cary, recently retired as Register of Copyrights, Stanley Fuld, who chaired the Commission, and Melville Nimmer, who served as Vice Chairman. The main purpose of the Commission was to study and compile data on:

(1) the reproduction and use of copyrighted works of authorship in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information, and by various forms of machine reproduction, .... and (2) the creation of new works by the application or intervention of such automatic systems or machine reproduction.<sup>250</sup>

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<sup>250</sup> Office of the Whitehouse Press Secretary, "CONTU Press Release," in *ALA Archive Executive Board and Executive Director Box 29 Folder Copyright 1975* (1975).

As the summer of 1975 passed and McDonald began to feel more comfortable in this new role as Executive Director, he began to take a more militant tone when talking about the role of publishers in the revision process. He also assumed the role that McCarthy had grown into since Clapp's departure from the scene as the preeminent spokesman on copyright for the ARL. In a letter to Virginia P. Whitney (University Librarian, Rutgers) he complained of the publishers' "militant tone" and their "basic dishonesty" when crying hardship, while enjoying spectacular financial success. He described the attempt to institute a transactional licensing scheme as a "royalty grab" by publishers.<sup>251</sup> In other correspondence that summer he was particularly exercised about high publisher profits and what he described as Charles Lieb's propaganda. On July 2, he lamented that, "our continuing talks with the publishers are not really producing anything useful" in a letter to Jim Sharaf.<sup>252</sup>

As discussed in chapter 6:1, in July of 1975 McClellan wrote to McDonald (and to all the interests that participated in the Senate subcommittee's hearings on photocopying in 1973) asking for an update on the negotiations between the various interests. He ended the letter by warning that, "the best interests of the parties in a dispute are usually served by the parties jointly recommending solutions. If the parties are unable or unwilling to undertake such efforts, the Congress may find it necessary to provide additional legislative history as to the interpretation of

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<sup>251</sup> "John McDonald to Virginia P. Whitney [June 21, 1975]," in *Records of the Association of Research Libraries Unprocessed materials #18,632. Box 39 of 64 Folder: Copyright Revision 1975, Manuscript Division, Library of Congress.*

<sup>252</sup> "John McDonald to James Sharaf [July 2, 1975]," in *Records of the Association of Research Libraries Unprocessed materials #18,632. Box 39 of 64 Folder: Copyright Revision 1975, Manuscript Division, Library of Congress.*



the provisions of section 108.”<sup>253</sup> McDonald’s long and discursive response came in September, and his response is discussed in detail in chapter 6:1.

As discussed in an earlier section, S.22 was favorably reported out of the Judiciary Committee on November 20, and accompanied by Senate Report No. 94-473, which went on to be the Senate, not just the committee, report that accompanied the Copyright Act of 1976. In that Report the Committee, in their discussion of §107 (fair use) noted that,

The doctrine of fair use applies to library photocopying, and nothing contained in section 108 ‘in any way affects the right of fair use.’ No provision of section 108 is intended to take away rights existing under the fair use doctrine. To the contrary, section 108 authorizes certain photocopying practices which may not qualify as fair use.

The criteria of fair use are necessarily set forth in general terms. In the application of the criteria of fair use to specific photocopying practices of libraries, it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users.<sup>254</sup>

In January 1976 Ringer again tried to bring the two sides together for more negotiations, this time at the NLM. By this stage the groups had moved well beyond attempts to actually insert or delete language from the legislation, or even the language of the committee report. Instead, as Ringer put it, the purpose of these meetings was to, “explore further some of the issues underlying the legislative language and interpretation of section 108(g)2 of the revisions bill, not to reach conclusions or consider the actual wording of the statute or the committee report”. She presented the participants with five hypotheses, based on various assumptions and used those to frame the issues.<sup>255</sup>

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<sup>253</sup> "Senator McClellan to John P. McDonald [July 8, 1975]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright general 1974-1976, Manuscript Division, Library of Congress.*

<sup>254</sup> U.S. Congress, "Senate Report No. 94-473, 94th Cong., 1st Sess.."

<sup>255</sup> Barbara Ringer, "Memorandum to Participants in January 7 1976 Meeting on Library Photocopying ay NLM [January 20, 1976]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Support Letters 1976, Manuscript Division, Library of Congress.*

On February 16, at the final meeting of these NLM negotiations, despite her earlier assurances that they would not be negotiating about language in S.22, Ringer came with a replacement version §108(d) and (g). This last ditch effort went nowhere. The publishers urged retention to the existing S.22 or replacement with a very long and complicated version of §108. The Coalition of Library Associations (ALA, ARL, AALL, SLA, MLA, and the Music Library Association) rejected Ringer's draft in a letter to the House subcommittee on February 23, noting that it was "not acceptable" and "would impose complex and confusing procedures."<sup>256</sup> They also argued that CONTU was already looking into this area, and Congress should leave this issue of library photocopying to the Commission.<sup>257</sup> As we have seen, February 19 the Senate passed the bill by a vote of 97-0 and the bill was referred to the House Committee on the Judiciary.

On March 12 the educators and publishers and authors reached agreement on the *Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals*.<sup>258</sup> They had gained some certainty that they could make fair use of copies during a "teachable moment" but the guidelines were a far cry from the comprehensive exemption that the Ad Hoc Committee had sought in the mid 1960's. In April CONTU offered to broker agreement between librarians, publishers and authors on guidelines to deal with copying associated with interlibrary loan activities. On April 7 Kastenmeier accepted CONTU's offer and the focus of negotiations for the ARL, working in concert with the other five library associations, turned to influencing the Commission. On May 27 the library associations provided comments to the Commission. They wanted the "aggregate quantity [of articles copied] to be 10 or more requests for copies from a serial title per subscription period." They also argued that the burden

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<sup>256</sup> "Letter from the Coalition of Library Associations to the House Subcommittee on Courts, Civil Liberties and the Administration of Justice [February 23, 1976]."

<sup>257</sup> Ibid.

<sup>258</sup> U.S. Congress, "H.R. Report 94-1476," (1976).

of proof should be on the publishers to show that copying quantities affected subscriptions. Finally they underlined the importance of §108(i), which required an annual review and a report by the Register of Copyrights five years after passage of the bill.<sup>259</sup> On July 7, John Lorenz, who had now assumed the position of Executive Director of ARL, wrote to the other leaders of the library associations: Julius Marke (AALL), Frank McKenna (SLA) John Lo Sasso (Medical Library Association) Susan Sommer (Music Library Association) and Robert Wedgeworth (ALA), and copied to Eileen Cooke of the ALA Washington Office concerning the draft guidelines. He noted that the CONTU library photocopying subcommittee consisted of Hersey, Nimmer, and Wilcox, and they were meeting to discuss 108(g)2. He speculated, correctly, that CONTU may be targeting the House-Senate conference committee report and suggested that Wilcox, as a librarian from MINITEX, was the best channel for library association input. He suggested a conference call on July 13. No record of that conference call exists in the ARL records and he was probably too late anyway. On June 9 and 10, CONTU had met and agreed on draft guidelines that were considerably less than the library associations had hoped for. They proposed an aggregate quantity of five copies of articles from the last five years of a periodical title and released their draft guidelines on June 17. On that same day, Brown wrote to John Lorenz and gave his interpretation of the status of the revision process. The House subcommittee amendment to §108(g)2 was positive. But he warned Lorenz to watch out for the publishers to try and change course in the House report, or in the Judiciary Committee. Brown did not think the time was ripe for a letter writing campaign from the ARL membership. The publishers responded to CONTU's guidelines on July 1, agreeing to the aggregate quantity of five articles,

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<sup>259</sup> "Comments from AALL, ALA, ARL, MLA, MLA, SLA to CONTU on suggested guidelines for 108(g) [May 27, 1976]," in *Records of the Association of Research Libraries Unprocessed materials #18,632. Box 22 of 64 Folder: Copyright – CONTU Guidelines, Manuscript Division, Library of Congress.*

but not to the limit of five years. Effectively CONTU had split the difference between the two sides.

In her annual report as Register of Copyrights that year, Ringer noted six areas of controversy in the draft legislation: the size of the mechanical royalty, the jukebox exemption, CATV compulsory licenses, royalty upon broadcasting of sound recordings, exemption for public broadcasting, and photocopying in education and libraries. She noted that each of these controversies were, “settled harmoniously if not to the entire satisfaction of all the special interests.”<sup>260</sup> In the case of library photocopying one might quibble with her use of the word harmonious, but not with the overall thrust of her conclusion. In terms of the interest group negotiations, publishers, authors, and librarians have struggled for many years in many different forums, sometimes acrimoniously, as in the spat between Charles Lieb and Stephen McCarthy on who was responsible for the collapse of the Cosmos Club talks, and sometimes at a stultifying remove from actual legislative language, as in Ringer’s negotiations at the NLM in early 1976.

As noted in an earlier section, the House passed the HR.2223 by 316-7 on September 22, 1976. Two days later Lorenz wrote to Brown enclosing a copy of the CONTU guidelines, and noting that he expected them to be included in the Conference Report. “I believe it is a good agreement from which to proceed and in any event, better than the agreement with the education group.”<sup>261</sup>

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<sup>260</sup> Barbara Ringer, "79th Annual Report of the Register of Copyrights," (Washington, D.C: Copyright Office, 1976), 8.

<sup>261</sup> "John G. Lorenz to Philip Brown [September 24, 1976]."

In perhaps a final coda to the interest group negotiations, in September 1977 the King Report,<sup>262</sup> formally titled *Library Photocopying in the United States and Its Implications for the Development of a Copyright Royalty Payment mechanism*, was released by NCLIS. Growing out of the Upstairs/Downstairs talks and based on 1976 data on copying in all library types, it sought to provide a factual basis for discussions about the nature and extent of photocopying in libraries and could possibly have formed the basis for a permissions system, the development of which had been a constant theme (albeit one resisted by librarians) throughout these negotiations, but it came too late to influence the legislation.

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<sup>262</sup> Donald W. King, *Library Photocopying in the United States: With its Implications for the Development of a Copyright Royalty Payment Mechanism* (Washington, D.C.: National Commission on Libraries and Information Science, 1977).

## 7.0 CONCLUSION AND FUTURE RESEARCH

In his contribution to *Libraries at Large*, written in 1969, Ralph Brown compared the copyright revision process to war. “Behind the skirmish lines, sniping away from one outpost or another, two main bodies of opinion may be forming. The martial analogy is closer to Vietnam than to Waterloo, but two main-force positions can be identified amidst the swirl of debate.”<sup>1</sup> With hindsight, and the benefit of knowing the history of the latter years of the revision process, the analogy to Vietnam can be seen as reflecting America’s contemporary preoccupations rather than as an accurate analogy to the copyright revision process. Having read this far, one might be forgiven for thinking that a more apt military analogy would be to the trench warfare of the First World War’s western front in which two forces seemed to fight interminably over the same ground and later generations are left to wonder why so much blood and treasure was wasted for so little result. However, if we refer back to my original research questions we can reach some conclusions about how much was, and was not, achieved over those twenty-one years.

1. How and why did the ARL develop the positions it took during this copyright law revision? What were those positions and how and why did they change over time?
2. How did ARL positions on copyright revision differ from those of other interest groups, both within librarianship and in the academic research community, and how did the Association work and conflict with those other interests to further its goals in the revision process?

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<sup>1</sup> Ralph S. Brown, "Copyright: An Overview," in *Libraries at Large: Tradition, Innovation, and the National Interest*, ed. Douglas M. Knight and E. Shepley Nourse (New York: R.R. Bowker, 1969), 232.

3. How did the ARL, its members, and active representatives articulate their policy positions?
4. How effective was the Association in achieving its policy goals? Which goals were achieved fully, partially, or not at all?

It is clear that the librarians of the ARL were poorly positioned to participate in the revision process during the 1950s and early 1960s. The Register of Copyrights, Arthur Fisher, had to seek them out to involve them in the process and Fisher was extremely involved, some felt too involved, in developing their positions. Very early on, the ARL joined with other library organizations in the Joint Committee, and this coalition building and the joint development of positions was a constant, and quite successful, feature of the Association's participation in copyright revision. Until the mid-1960's, the ARL was still giving at least token attention to issues other than photocopying in libraries and library liability for such activities. As late as 1967, Edwin Surrency, representing the Joint Libraries Committee on Copyright,<sup>2</sup> was still testifying about librarians' concerns regarding the duration of copyright and the copyright notice. However, by that point it was clear that librarians would have little impact on those issues, and librarians were focusing their attention ever more closely on the issue of photocopying. This issue was a constant from the very beginning when, in 1956, Charles David contacted Robert Miller about, "the problem of photocopying of published materials protected by copyright."<sup>3</sup> The Association was able to quite quickly arrive at its basic position on this issue, that libraries could legally, "fill an order for a single photocopy of any published work or part thereof."<sup>4</sup> This remained remarkably consistent, although it was eventually limited to journal articles, as in

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<sup>2</sup> This committee was the main vehicle for coordinating the library associations' responses to copyright revision from 1956 until 1967. See "Joint Committee" in appendix A for more details.

<sup>3</sup> "Charles David to Robert A. Miller [November 13, 1956]."

<sup>4</sup> Joint Libraries Committee on Fair Use in Photocopying, "Report on Single Copies."

McDonald's 1975 comment to the congressional members of House Subcommittee No. 3 concerning what he described as the, "right of libraries to make single copies of copyrighted articles for their users."<sup>5</sup> Obviously the policy would change as technology and library systems developed and as the copyright revision progressed, but the basic policy would remain consistent.

However, the ARL was less consistent in what legislative language it argued could best achieve this policy goal. In her testimony before Kastenmeier's Subcommittee in 1975, Ringer described the issue of library photocopying in general, presumably including both librarian and proprietor interests, as "startlingly subject to zig-zagging."<sup>6</sup> In the early 1960s the ARL opposed the library exemption drafted by the Copyright Office in the preliminary draft (see figure 1) and they generally believed that simple codification of the doctrine of fair use would provide them with enough protection. However, this belief in the sufficiency of fair use began to crumble in the late 1960's. It disappeared when Williams & Wilkins filed suit and the association's fears were confirmed when Commissioner Davis issued his report in 1972. In 1969 the ARL reached agreement with the ALA on a preferred amendment (see figure 17) that would eventually become, as §108, an explicit library exemption to the exclusive rights of a copyright holder. Even then the Association was not consistent. When they recognized how narrow such an exemption would have to be to satisfy the publishing and author interests, they sought to bring back the relevant legislative language of the Register's preliminary draft. In the final years of copyright revision, as the struggle increasingly revolved around §108 and specifically (g)2 of that section, ARL positions did not so much change, as become more and more focused on the

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<sup>5</sup> "John P. McDonald to Members of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice [March 25,1975]."

<sup>6</sup> *Copyright Law Revision Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 1794.



specific language of that provision, the legislative intent as expressed in congressional reports, and the construction of guidelines concerning issues like classroom copying and interlibrary loan.

The ARL positions were developed in a number of ways. Significant work in this regard was done by the formal and informal leadership of the association. Often this was supplemented with input from the wider membership, including people like William Locke of MIT and Douglas Bryant of Harvard. Outside expertise was also a significant factor. Early on Arthur Fisher provided legal expertise, but eventually the ARL sought its own legal counsel from William Hogeland and most importantly from Philip Brown. Verner Clapp and Ralph Shaw also had a significant impact with their ideas about the changing definition of “copy” and the distinction between private copying and publishing. As far back as 1960, Alan Latham had cited Shaw’s article<sup>7</sup> in *College & Research Libraries* as arguing vigorously that the private use of copies was outside the purview of copyright in his study of fair use<sup>8</sup> written for the Copyright Office. Ultimately this private use argument would prove to be ineffective and the argument was dismissed by the Court of Claims in the Williams & Wilkins case. Finally, the ARL (along with many other groups) sought to use evidence in the form of the various studies of copying practice that were made throughout the decades of revision from the 1961 Report on Single Copies<sup>9</sup> to the King Report<sup>10</sup> of 1977. These were used to bolster their case and to marshal data concerning the economics of the journal publishing business with the goal of developing persuasive positions in the legislative struggle and in interest group negotiations.

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<sup>7</sup> Ralph R. Shaw, "Publication and Distribution of Scientific Literature," *College & Research Libraries* 17 (1956).

<sup>8</sup> Latman, "Study No.14. Fair Use of Copyrighted Works.."

<sup>9</sup> Joint Libraries Committee on Fair Use in Photocopying, "Report on Single Copies."

<sup>10</sup> King, *Library Photocopying in the United States: With its Implications for the Development of a Copyright Royalty Payment Mechanism*.

This focus by the ARL on photocopying, first on behalf of library users, then by users themselves, and finally as part of the interlibrary loan process was because, as Clapp so forcefully argued, photocopying had replaced note taking by hand as part of the research process of library users. Librarians, like William Locke at MIT, felt a professional responsibility to represent the needs of their users. They were also anxious to take advantage of new technologies in libraries and new ways of working together in library networks and systems to maximize their usefulness to researchers. They also recognized that photocopying of library materials would continue and thus sought to limit their liability for the actions of users.

ARL positions on copyright revision differed from those of other interest groups, both within librarianship and in the academic research community, and the Association worked both in concert and conflict with those other interests to further its goals in the revision process. Although the ARL managed to join with other associations of librarians very early in the revision process and maintain those alliances throughout the process, there were moments at which there were significant differences. For instance, there were significant differences of emphasis between the ALA and the ARL. The copying practices of researchers were so central to the ARL that they were strongly opposed to the proposed North/Sennett amendment (see figure 19) that came out of the Cosmos Club negotiations and, later, unlike the ALA, the ARL was not prepared to provide examples of systematic copying at Brennan's request. There was also one specific difference between the SLA and the other library associations, including the ARL. Since the ARL represented libraries at not-for-profit institutions and a significant number of SLA members worked at corporate, for-profit libraries, the limitation of the library exemption to non-profit institutions was a significant problem for the SLA.

The issue of the differences in positions between library associations is complicated by the fact that many librarians were members of, and leaders in, more than one association. As leaders of large research libraries, university librarians or directors at ARL institutions quite often assumed leadership positions in professional associations, and it was not always clear when they identified with the ARL or with another group. Charles Gosnell is perhaps the best example of this phenomenon. He served as Director of Libraries at New York University (an ARL member since 1936) from 1962 until his retirement in 1974 but was most active in the ALA as chair of the Copyright Committee. This led to some confusion on the Joint Committee when for a short time he represented the ALA but was the only ARL librarian as well. While this can cause some confusion for the historian and for association staff or leaders who were seeking to advance the organizational interests of association, for librarians as a profession it could actually be a strength since these multiple memberships and loyalties facilitated more effective communication within the profession.

Library associations in general also parted ways with the NEA in the mid-1960's over whether or not to push for an exemption for multiple, as opposed to single, copies. The NEA pushed hard in this period for a general exemption for copying of all kinds by teachers. Librarians, including the ARL, thought they were overreaching in this regard (although Douglas Bryant at least was concerned that the ALA may have been considering this idea in 1968).<sup>11</sup> With hindsight, when we compare the NEA efforts of 1965 when the NEA lobbied for a general exemption for the copying practices of teachers from copyright to the eventual Classroom Guidelines which were and remain far more restrictive, we are able to determine that this NEA effort was an overreach.

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<sup>11</sup> "Douglas Bryant to Stephen A. McCarthy [November 19, 1968]."

The ARL, its members, and active representatives articulated their policy positions in every way open to them, although it must be said that in the early years they did not make use of all available channels. Edward Freehafer was present and spoke at the early discussion meetings organized by the Copyright Office; Rutherford Rogers, Edwin Surrency, and Stephen McCarthy, testified before Congress; association leaders wrote to congressional representatives and to committee staff and encouraged their members to do likewise. Clapp and McCarthy participated in focused lobbying efforts in which they targeted the members of relevant committees. The association staff and leaders encouraged members to contact their representatives, especially if those members sat on key committees. Individuals like Verner Clapp produced a series of publications for the professional literature keeping the membership abreast of developments and encouraging them to participate in the effort. Finally, leaders like McCarthy and Clapp, amongst others, responded to the letters and publications of opponents in the struggle, like Dan Lacy.

Eventually the ARL was at least partially successful in achieving its legislative goals. Edward Freehafer was too reluctantly involved to effectively influence the developing revision process in librarians' interests, and Rutherford Rogers was too isolated at Stanford on the west coast to effectively engage in the process. However, once the Association was reorganized in 1962, Verner Clapp became even more heavily involved, and particularly once Stephen McCarthy became the Executive Director in 1968, the Association was more effective in influencing developments. It is somewhat unfair to impugn the effectiveness of Freehafer and certainly of Rogers. They were active very early in the revision process. Legislation was only introduced in 1964; Rogers was an effective advocate for libraries in the 1965 hearings, and librarians in general were well pleased with their legislative position with passage of the House bill in 1967. However, when one reads the transcript of the early discussions of revision led by

the Copyright Office it is striking that most of the representatives of the publishers and authors were copyright lawyers while the library representatives were practicing librarians. It is possible that the contentious issue of library photocopying could have been settled early in the process of revision if librarians had been organized enough to be represented by expert legal advice early in the revision process. As we have seen, once language is agreed upon, Congress and the Copyright Office exert great pressure to maintain the agreement and not to revisit the language.

The Williams & Wilkins case would appear at first glance to have been a negative influence for libraries in the revision process. After all, Commissioner Davis found for the publisher and against the NLM and NIH, and although both the full Court of Claims and the Supreme Court found for libraries, they did so with the understanding that revision was imminent and that it would be best to leave substantial change to Congress. On the other hand the case energized librarians to seek an explicit exemption and provided the first convincing evidence that the doctrine of fair use might not be a firm enough legal foundation on which to base library photocopying operations.

Once the librarians had generally agreed that an exemption was necessary, around the time the ALA and ARL agreed on their amendment (see figure 17 in chapter 6:3) in the late 1960's, their concerns about the duration of the copyright term and the copyright notice fell away. This might be taken as evidence that ARL librarians failed to achieve their goal of a fixed duration of copyright based on a known date of creation and a requirement to place a standard notice of copyright on a copyrighted work. However, a careful reading of the archival evidence shows that although librarians frequently wrote and testified in public about these two issues, in private the librarians who were leading the effort to influence copyright revision rarely discussed

the issues of duration and notice. They recognized that these two issues were core issues, not open to compromise by the publishers and authors and also the Copyright Office.

Although the ARL and librarians in general were successful in securing an explicit exemption for libraries in the final Copyright Act of 1976, they were only partially successful in influencing the language of that exemption. They failed to achieve their stated goal of returning the language of the bill to the 1964 language, and the existing evidence in the archival ARL records indicates that they regarded the language of §108(g)2 as “dangerously unclear and damaging”<sup>12</sup> as McDonald wrote to the members of the House subcommittee. However, there was an element of hyperbole in this statement to legislators designed to influence their actions. In private correspondence, McDonald’s successor as Executive Director John Lorenz, just eighteen months later described the CONTU guidelines as, “a good agreement from which to proceed and in any event, better than the agreement with the education group.”<sup>13</sup> Certainly in terms of interlibrary loan, the ARL achieved more than the journal publishers wanted. Publishers sought to severely limit copying without permission in interlibrary loan. They were forced to compromise on the language in §108 and in the CONTU guidelines on what has become commonly known as the “rule of five.”<sup>14</sup>

In general, when the ARL concentrated on the specific issue of library photocopying they were, at least partially, effective in influencing legislative language. However, when they addressed issues of board interest to many other groups, like the issues of the duration of

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<sup>12</sup> "John P. McDonald to Members of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice [March 25, 1975]."

<sup>13</sup> "John G. Lorenz to Philip Brown [September 24, 1976]."

<sup>14</sup> The CONTU guidelines sought to clarify the language in §108(g)2, “such aggregate quantities as to substitute for a subscription to or purchase of such work.” They did so by defining the aggregate quantity as more than five filled interlibrary loan requests in any one year for articles published in a single periodical during the last five years. For more details, see National Commission on New Technological Uses of Copyrighted Works, "CONTU Guidelines," (Washington D.C.: 94th Congress, 2nd Session, 1976).

copyright terms or the presence or not of the copyright notice, they were less successful. Focused advocacy, on a topic about which librarians were recognized by Congress, staffers, and the Copyright Office, as having a legitimate interest and some expertise to contribute, was more successful than lobbying on issues in which librarians were not perceived to have a specific interest.

The overall legislative goal of librarians in general and the ARL in particular --like all copyright interest groups -- was something greater than any of these issues; it was predictability. Many librarians had argued in various situations throughout the revision process that libraries simply could not afford and were too risk averse to take a chance on the uncertainty of, for instance, being sued and being forced to rely on the doctrine of fair use as interpreted by a court, or to be liable for the unpredictable actions of their users. Again, they did not gain perfect predictability, but one day after passage of the Act, Philip Brown was able to write to John Lorenz about the CONTU guidelines that they represented, “a further major step towards predictability.”<sup>15</sup>

In one of those coincidences of history, the ARL held its 89<sup>th</sup> Membership Meeting on the same day that Brown wrote to Lorenz, October 20, 1976; just one day after President Ford signed the revision bill into law. However, in the record of the meeting housed in the ARL papers there is no mention of copyright. The participants were consumed with projects and preparations concerning the celebration of the country’s bicentennial.<sup>16</sup> Copyright, an issue that had occupied so much of the Association’s time and energy over the previous two decades, just seemed to disappear from the ordinary business of the Association. This was not the case in the

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<sup>15</sup> "Philip A. Brown to John Lorenz [October 20, 1976]."

<sup>16</sup> "Minutes of the 89th Membership Meeting [October 20-21, 1976.]," in *Records of the Association of Research Libraries Unprocessed materials #18,632. Box 29 of 64 Folder: 89th Membership Meeting – 1976 Ramada Inn Oct 20-21. Manuscript Division, Library of Congress.*

professional literature, however. Between passage of the act at the end of 1976 and the new law going into effect on January 1, 1978 numerous articles and books were published by lawyers, librarians, and by a variety of professional organizations, on the implications of the new law for various aspects of librarianship and how to comply with its provisions.<sup>17</sup>

On June 23, 1977, L. Ray Patterson, a well-known copyright historian, spoke to the National Association of College and University Attorneys (NACUA) Conference, and a copy of his speech is preserved in the ARL records.<sup>18</sup> He urged universities to look for opportunities to litigate the new law because he regarded §108 as a “profit grab” by publishers in an effort to seek a compulsory license for copying in libraries. It is clear from the notes associated with this copy of the speech that Wedgeworth at the ALA, Lorenz at ARL and the Council of National Library Associations (CNLA) were all interested in this idea.

However, Richard De Gennaro, University Librarian at the University of Pennsylvania, writing in *American Libraries* perhaps more closely reflected the opinions of his colleagues in the ARL who had so quickly moved on to other topics at their 1976 Membership Meeting. Like

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<sup>17</sup> Treece, "Library Photocopying," *UCLA Law Review* 24 (1977), American Library Association, National Council of Teachers of English, and National Education Association, *The New Copyright Law : Questions Teachers and Librarians Ask* (Washington, D.C. : National Education Association, 1977), Marcia Fallon, *An Examination of the 1978 Copyright Law's Photocopying Regulations and Effect they will have on Library Copying Services*. (Fort Lauderdale, FL: Nova University, 1977), Illinois State Library. Task Force on Copyright Guidelines for the Illinois Library and Information Network, *A Fair Shake : Photocopying Rights for ILLINET Participants under the Copyright Revision Act of 1976* (Springfield, IL: Secretary of State, Illinois State Library, 1977), "Transcript of the Conference on Resolution of Copyright Issues [November 16, 1974] ", Medical Library Association, *Interlibrary Loan and Copyright* (Chicago, IL: Medical Library Association, 1978), Special Libraries Association. Special Committee on Copyright Law Practice and Implementation, *Library Photocopying and the U.S. Copyright Law of 1976 : an Overview for Librarians and Their Counsel* (New York: Special Libraries Association, 1978), American Association of School Librarians and American Library Association. Washington Office, *Copyright, Media, and the School Librarian : a Guide to Multimedia Copying in Schools* (Chicago IL American Association of School Librarians, 1978), Elsie Cerutti and Jane C Tucker, *Impact of the New Copyright Law on Interlibrary Loan in a Research Library* (Washington, DC: National Bureau of Standards, Library Division, 1978).

<sup>18</sup> L. Ray Patterson, "Speech to NACUA Conference [June 23, 1977]," in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 51 of 64 Folder: Copyright CONTU Testimony (Copyright 1977 material), Manuscript Division, Library of Congress* (1977).



Patterson's speech, a copy of De Gennaro's article is preserved in the ARL records.<sup>19</sup> De Gennaro wrote, "I foresee no real difficulties in complying with them [the provisions of the new law], and I do not believe they will significantly affect the way most libraries serve their users."<sup>20</sup>

While libraries have certainly continued to serve their users and comply with the various provisions of the Copyright Act of 1976, the Act has had a significant impact on library operations. Most public photocopiers in libraries now have a notice, required by the 1976 Act, warning users that materials may be subject to copyright. Library course reserve operations are generally governed by the Classroom Guidelines<sup>21</sup> and would be significantly different if managers were simply seeking to maximize the satisfaction of their users. Interlibrary loan operations have also been significantly affected by the need to comply with the CONTU guidelines. As Litman has argued, as the Act ages and technology advances the narrow exemptions written into the law become less relevant to library operations. We are already seeing the beginnings of a reconsideration of §108 and the photocopier has long been superseded by the Internet as a disruptive technology. The extension of the copyright term has affected the extent of the public domain and thus impeded mass digitization activities in libraries. Hopefully a deeper understanding of how research librarians participated in the development of current copyright law will help us effectively participate in future changes in that law as technology and libraries continue to change.

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<sup>19</sup> "Photocopy of De Gennaro's American Libraries (September 1977) article, "Copyright, Resource Sharing and Hard Times", in *Records of the Association of Research Libraries, Unprocessed materials #18,632. Box 51 of 64 Folder: Copyright CONTU Testimony (Copyright 1977 material), Manuscript Division, Library of Congress.*

<sup>20</sup> Richard De Gennaro, "Copyright, Resource Sharing and Hard Times: A View from the Field," *American Libraries* (1977).

<sup>21</sup> U.S. Congress, "H.R. Report 94-1476."

## 7.1 FUTURE RESEARCH

During the research and writing of this dissertation I have often thought about future research. In the introduction I outlined the work necessary to publish this work. I would have to expand the scope beyond the ARL to include other library associations' involvement in the revision process and also to consider in greater detail the strategies of other interests like publishers, authors, the information industry and the education and higher education groups. Beyond that there are other related topics that can usefully be elucidated using such an archival approach. Such topics include the role of librarians in transnational and international copyright development from the Berne Convention, through the UCC, into the present age of the World Intellectual Property Organization (WIPO), librarians' involvement in the passage of the Digital Millennium Copyright Act, the Copyright Term Extension Act, and the TEACH Act as well as the various contemporary copyright issues (for instance §108 and Orphan Works). Looking further back, no one has written a history of the extent of librarians' involvement in the development of the Copyright Act of 1909, or indeed earlier legislation. Studying more contemporary events will also provide an opportunity to use other methods of investigation including interviews with participants and observation of events. As is clear from the biographical listing at Appendix A, a number of the participants in the revision process that led to the 1976 Act are still alive. Another future research topic could be interviews with these participants concerning their memories of this general revision to the copyright law.

This dissertation concerns the intersection of three phenomena: the development of professional associations within librarianship, the efforts of a profession to influence public policy, and copyright. So far I have only considered future research concerning copyright. However, librarians have been concerned with a variety of public policy issues including but not

limited to privacy, freedom of information, access to government information, Internet access, the system of scholarly communication, and the collection, preservation, and access to information published in other countries. How librarians organized to impact public policy in areas other than copyright would also be a fruitful area for future research.

Another possible avenue for future research involves the impact of the photocopier on how librarians conceptualized their profession. Before the photocopier, did librarians think of themselves as professionals who organized documents, as containers of information, and after the advent of the photocopier did we see ourselves as managers of the information within those containers? One can theorize this as an early example of the increasingly *granulization* of information that has occurred with the migration to digital formats in which the unit of interest of researchers, and users of information is not the journal but the article, not the album, but the song, and not the book, but the chapter. This process is unlike to end at the smallest unit of information container that has migrated from the analog to the digital environment. We are likely to see this continue as researchers, and the organizations that seek to meet their needs, break apart the scientific article into abstract, method, results, and discussion, and books morph into databases. In the popular culture version of the same phenomena we will see companies break songs into samples and ringtones. Was the advent of the photocopier in libraries an early example of this, in which the reader and the librarian, now able to copy a few pages of relevant information from a much larger document, instead of circulating the whole document, began to conceptualize information in a different way? To investigate such a question one would have to review the professional literature before (pre 1950), during (1950-1970) and after (post 1970) the advent of the photocopier. It is also important to investigate whether the documentation movement in the first part of the twentieth century and early information scientists had already

made this conceptual shift and whether other earlier copying technologies, like microform, had already led to this change in American librarianship.

My work on this dissertation has already generated one article.<sup>22</sup> During my research I came across a book written in 1967 by Julius Marke called *Copyright and Intellectual Property*<sup>23</sup>. I assumed this would be about the revision process. In fact it concerned the United States Office of Education's policy concerning copyright on federally funded research. It proved fruitful to compare this episode with the contemporary debate that revolves around the National Institutes of Health public access policy.

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<sup>22</sup> Jonathan Miller, "Publishers Did Not Take the Bait: a Forgotten Precursor to the NIH Public Access Policy," *College & Research Libraries* (forthcoming).

<sup>23</sup> Julius J. Marke, *Copyright and Intellectual Property* (New York: Fund for the Advancement of Education, 1967).

## APPENDIX A

### BIOGRAPHICAL LIST OF PEOPLE AND ORGANIZATIONS

AALL *see* American Association of Law Libraries.

AAP *see* Association of American Publishers.

AAU *see* American Association of Universities.

AAUP *see* Association of American University Presses.

ABPC *see* American Book Publishers Council.

ACLS *see* American Council of Learned Societies.

Ad Hoc Committee on Copyright Revision Law. A coalition of educational groups organized by the NEA to lobby for educational interests in copyright revision. Particularly active in mid 1960's in seeking a general copyright exemption for educators. ARL was a member of this group.

ALA *see* American Library Association.

Aleinikoff, Eugene. Public Broadcasting attorney. Interested in institutional broadcasting exemption *ca.* 1972.

American Association of Law Libraries (AALL). Founded 1906, represented law librarians working in law firms and law schools. Often provided much needed legal expertise to librarians during the revision process.

American Association of Universities (AAU.) Founded 1900. Association of the largest and most prestigious North American Universities. In 1970 there were 47 members. In 1972 McCarthy worked with the Executive Secretary, Charles Kidd, to organize a letter writing campaign by university presidents.

American Book Publishers Council. Became Association of American Publishers in 1970. Trade and professional association for general book publishers. Founded in 1946, by 1967 it had 197 members. One of the major organizations representing publishing interests in the copyright revision process. See also the American Textbook Publishers Institute, the Association of American University Presses, Association of American Book Publishers, the Author's League of America, and Dan Lacy.

American Council of Learned Societies (ACLS). Founded 1919. Actively lobbied during the revision process. Clapp sought to energize the membership to support the interests of librarians, which he saw as congruent with academic researchers

American Library Association (ALA.) largest professional association for librarians in the United States. During the decades of copyright revision it claimed around 30,000 members from all branches of librarianship.

American Society for Testing and Materials (ASTM). Involved with CICP in developing a clearinghouse scheme to collect copyright permissions fees on photocopiers. See also Albert Batik.

American Textbook Publishers Institute (ATPI). Founded in 1942. The ATPI represented textbook and encyclopedia publishers. In 1967 it had 110 members. One of the major organizations representing publishing interests in the copyright revision process. See also the American Book Publishing Council, the Association of American University Presses, and the Author's League of America.

ARL *see* Association of Research Libraries.

Association of American Publishers (AAP.) Grew out of the ABPC in 1970. Continued the ABPC role as a leading advocate for publisher interests in the copyright revision process. However, Charles Lieb was far more confrontational than Dan Lacy.

Association of American University Presses (AAUP). Gradually became a more formal group between the 1930's and 1959 when it organized a permanent staff. In 1967 it had 35 members. Played a minor role in the copyright revision process

Association of Research Libraries (ARL.) Founded 1932. Represented the largest and most prestigious research (usually academic) libraries in North America.

ATPI *see* American Textbook Publishers Institute.

Authors League of America. Founded in 1912. Has been renamed the Authors Guild. Describes itself as, "the nation's leading advocate for writers' interests in effective copyright protection, fair contracts and free expression."<sup>24</sup>

Batik, Albert L. American Society for Testing and Materials (ASTM.) Described by Richard Sernett as a "Cosmos Club Colleague."<sup>25</sup>

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<sup>24</sup> Authors Guild, "About: History of the Authors Guild," <http://authorsguild.org/about.html>.

<sup>25</sup> "Notice from Harold Wigren of meeting of the Ad Hoc Committee on Copyright law Revision [September 22, 1971]."

Benjamin, Curtis. President of McGraw-Hill and Chair of the Copyright Committee of the AAP.

Instrumental in enabling Passano to appeal the Williams & Wilkins case to the Supreme Court.

Blackmun, Harry A. Associate Justice of the Supreme Court 1970-94. Took no part in the Court's decision concerning the Williams & Wilkins case in 1974. This resulted in an even split amongst the remaining justices and thus the Court of Claims decision stood.

Boorstin, Daniel. Author and historian. Librarian of Congress 1975-1987. Replaced John Lorenz who had been Acting Librarian since Mumford's retirement in 1974. Died 2004.

Bork, Robert H. Solicitor General of the United States, June 1973-77. Would have had to make the decision to appeal the decision of the full Court of Claims in the Williams & Wilkins case if the Court had found for Williams & Wilkins. Argued the case before the Supreme Court.

Bray, Robert. Chief of the Technical Information Division, Library of Congress *ca.* 1956 and Chairman of SLA Committee on Photoduplication. Joined the Joint Committee in 1956.

Brennan, Thomas C. Chief Counsel, Senate Subcommittee on Patents, Trademarks and Copyrights, late 1960's through passage of the Copyright Act of 1976.

Brown, Philip. Partner in law firm of Cox, Langford, & Brown. Provided legal counsel to the ARL from 1968 through to passage of the Copyright Act of 1976. Wrote the *amicus curiae* brief in the Williams & Wilkins case.

Brown, Ralph S. Jr. Simeon E. Baldwin Professor of Law, Yale Law School. Spoke at the discussion of the preliminary draft law on February 20, 1963.<sup>26</sup> Contributed to *Libraries at Large*.<sup>27</sup>

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<sup>26</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 3," 170.



Bryant, Douglas W. Harvard University Librarian 1965-72. Director of the Library System 1972-9. President of ARL 1969. Chair of the ACLS Committee on Research Libraries *ca.* 1971. Died 1994.

Brynes, Thomas. Lawyer with the Justice Department who handled the Williams & Wilkins case, his first copyright case. Before becoming a lawyer, Brynes had worked as a research chemist.<sup>28</sup> Philip Brown coordinated with him during the Williams & Wilkins case.

Buckman, Thomas R. Director, University of Kansas libraries 1961-8. President of ARL 1971. University Librarian Northwestern University 1968-71. President of the Foundation Center 1971-91. Cabeen, S.K. (Director Engineering Societies Library attended 2<sup>nd</sup> Copyright Parliament for SLA)

Budington, William S. Director of the John Crerar Library in Chicago 1965-84. ARL President 1973. Appeared with McCarthy at the Senate subcommittee hearings on July 31, 1973.

Burdick, Quentin N. Democratic-NPL Senator from North Dakota 1960-92. Questioned Philip Brown at the July 31, 1973 subcommittee hearings. Died 1992

Burkhardt, Fredrick H. Vice-Chairman of the National Advisory Commission on Libraries 1966-68. Chairman of NCLIS 1971-8. President of the American Council of Learned Societies *ca.* 1972.) Died 2007.

Byrd, Cecil. University Librarian, University of Indiana 1964-1972. Contacted by Gull concerning North/Sernett amendment. Died 1997.

Cameron, Donald F. (Scotty.) Interim Executive Director ARL, April to July 1967. Recently retired from Rutgers where he had been Library Director 1945-66. Died 1974

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<sup>27</sup> Brown, "Copyright: An Overview."

<sup>28</sup> Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, 76-7.

Cardozo, Michael H. Law Professor Cornell University, 1952-63. Executive Director

Association American Law Schools, 1963-73. Lobbied Congressman Drinan in 1975. His entry in *Who's Who* lists him as a consultant to the House Subcommittee on Patents, Trademarks and Copyrights.<sup>29</sup> Wrote a letter to the *New York Times* criticizing their stance on the 1974 Senate draft of the copyright revision bill.<sup>30</sup>

Cary, George D. Jointed Copyright Office in 1947. Deputy Register of Copyrights 1961-71.

Register of Copyrights 1971-73. Retired 1973. Served on CONTU 1975-78. Died 1987.

CATV *see* Community Antenna Television

Cellar, Emmanuel. Congressman (Democrat, New York). Chair of House Committee on Judiciary. Served in Congress 1923-72.

Chapin, Richard E. Director of Michigan State University Libraries 1959-88. Member of the Joint Committee in 1960. ALA, Library Administration Division, Federal Relations Committee 1961. He Surveyed membership and ALA Council on Copyright. He was also actively involved in copyright revision in the 1970's. In 1987 he became Director of MSU Press.

CICP *see* Committee to Investigate Copyright Problems Affecting Communication in Science and Education.

Clapp, Verner W. Various positions Library of Congress 1922-1947. Chief Assistant Librarian of Congress 1947-56. Acting Librarian of Congress 1953-4. President of the Council on Library Resources 1956-67. Chair Joint Committee on Copyright 1967-72. Consultant to

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<sup>29</sup> "Michael Hart Cardozo," *Who's Who on the Web*, <http://search.marquiswhoswho.com>.

<sup>30</sup> Michael H. Cardozo, "Copyright vs. Scholars," *New York Times*, July 20 1974.

CLR until his death in 1972. Author of a number of articles, books, and pamphlets on copyright.<sup>31</sup>

Clift, David. Executive Secretary of ALA 1952-72. Played an active background role in the ALA's involvement in copyright revision.

CNLA *see* Council of National Library Associations.

CNLIA *see* Council of National Library Associations.

Coalition of Library Associations (CLA). Included the ALA, ARL, AALL, SLA and both the Medical and Music Library Associations. In the latter years of revision, the CLA assumed a weak coordinating role for the library associations in their relationship to the revision process.

Committee to Investigate Copyright Problems Affecting Communication in Science and Education (CICP). 1965-8. Led by Laurence B. Heilprin and Gerald Sophar. The committee conducted research into copying practices.<sup>32</sup> CICP was interested in a royalty clearinghouse system or a membership organization that would enable libraries to copy without permission.

Community Antenna Television (CATV.) Also known as cable television. The copyrights issues associated with the retransmission of broadcast television via this technology delayed progress on revision in the early 1970's. See also Federal Communication Commission.

Coney, Donald. University Librarian UC Berkeley 1945-68. He corresponded with Dix in 1959 about the impact of photocopying in ILL on copyright and *vice versa*. Died 1973.

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<sup>31</sup> Clapp, "Copyright: A Librarian's View.", ———, "The Copyright Dilemma: A Librarian's View.", ———, "Library Photocopying and Copyright: recent developments.", ———, "The Suit of Williams & Wilkins Co. v. The United States: Recent Developments."

<sup>32</sup> Sophar et al., "The Determination of legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright -- A Status Report."

Cooke, Eileen. Director ALA Washington Office 1972-94. Died 2000.

Cosmos Club. Private club located in Washington D.C. Location of interest negotiations in 1972.

Many of the participants in the revision process were members, including Verner Clapp. Council of National Library Associations (CNLA). Founded 1942, represented fourteen associations. Became the Council of National Library and Information Associations (CNLIA) *ca.* 1966. Disbanded in 1980.

Cox, Langford, & Brown. Philip Brown's law firm. Washington, D.C. law firm.

Cummings, Martin M. Director of the National Library of Medicine (NLM) 1964-84. As Director he was closely involved with the Williams & Wilkins case.

Dalton, Jack. Member of the David Committee 1956. University Librarian, University of Virginia 1950-6. Director of the ALA's International Relations Office 1956-9. Dean, Columbia University School of Library Service, 1959-1970. Died 1976.

David Committee. *See* Joint Committee.

David, Charles W. 1940-1955, Professor of History and the first fulltime Director of the University of Pennsylvania Library. ARL Executive Secretary 1947-51. Member of the Library of Congress Board of Resources *ca.* 1955. First Chair of the ARL Committee on Photocopying and Copyright, known as the "David Committee", renamed the ARL-SLA Committee on Photocopying and Copyright 1956-7.

Davis, James F. Commissioner of Court of Claims who initially heard and decided Williams & Wilkins case. 2/16/72.

Davis, James. Commissioner, U.S. Court of Claims. Wrote the initial report (decision) in the Williams & Wilkins case, 1972.<sup>33</sup>

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<sup>33</sup> *The Williams and Wilkins Company v. the United States: Report of Commissioner [Davis] to the Court.*

Davis, Oscar H. 1914? – 1988. Chief Judge on Federal Court of Claims that decided Williams & Wilkins case.

Dix ,William S. Princeton University Librarian 1953-75. ARL Executive Secretary 1957-9 and President 1962. Member of CONTU until his death in 1978.

Drinan, Robert F. (S.J.) Congressman from Massachusetts 1970-80. Member of the Judiciary Committee where he called for the impeachment of President Nixon over the bombing of Cambodia. Died 2007.

Dumbarton Oaks. Private home near Washington D.C. given to Harvard in 1940. Used for meetings, research, and scholarship. Site of copyright negotiations 1972.

Dunlap, Leslie. Dean of Library Administration 1958-81. Contacted be Gull concerning the North/Sernett amendment. Member of the National Commission on Libraries and Information Science (NCLIS.)

Eastland, James. Senator (Democrat, Mississippi) Chaired the Senate Committee on the Judiciary from 1956 until his retirement from the Senate in 1978.

Ellenberger, Jack S. Law librarian at the Department of Health, 1957, Carter, Ledyard & Milburn, 1957-60, Jones, Day, Reavis & Pogue 1960, Bar Association of D.C.1961-63, Covington & Burling, 1963-78. Chairman, SLA Copyright Committee *ca.* 1972.

FCC *see* Federal Communication Commission.

Federal Communication Commission (FCC.) The agency responsible for the regulation of television. Rule making by this agency in the early 1970's concerning the retransmission of broadcast television signals in the early 1970's following the Fortnightly case<sup>34</sup> delayed progress on copyright revision.

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<sup>34</sup> *Fortnightly Corp. v. United Artists Television Inc.*

Feeney, Betty. Director, New England Regional Medical Library Service (NERMLS) 1970-77.

Director of Yale Medical Library 1977 until her retirement in 1985. Lobbied

Congressman Drinan (D-MA) in 1975. Died 2000.

Felter, Jacqueline W. Director, Medical Library Center of New York, 1967-74. President of the

Medical Library Association (MLA) 1968-9. Chairman, MLA Subcommittee on

Copyright *ca.* 1972. Spoke at the Senate subcommittee hearings on July 31, 1973. Died

1974.

Fisher, Arthur. Joined the Copyright Office in 1946. Register of Copyrights 1951 until his death

in 1960. He initiated the general revision of copyright that resulted in the Copyright Act

of 1976.

Ford, Gerald R. 38th President of the United States. Took the oath of office on August 9, 1974.

Signed copyright revision bill (S.22) into law as the Copyright Act of 1976 on October

19, 1976. Lost the Presidential election in November 1976. Died 2006.

Frankie, Suzanne O. ARL Associate Executive Director 1973-9

Frase, Robert W. Vice-President and economist at the Association of American Publishers.

Attended the April 4, 1972 meeting at the Cosmos Club. Described by Richard Sernett as

“Cosmos Club Colleague.”<sup>35</sup>

Freehafer, Edward. Director of the New York Public Library 1954-71. Chairman of the Joint

Libraries Committee on Fair Use in Photocopying 1957-64. Led committee during

research and publication of *Report on Single Copies*.<sup>36</sup> ARL President 1965. Spoke at the

September 14, 1961 meeting on 1961 Registrar’s Report. Died 1985.

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<sup>35</sup> "Notice from Harold Wigren of meeting of the Ad Hoc Committee on Copyright law Revision [September 22, 1971]."

<sup>36</sup> Joint Libraries Committee on Fair Use in Photocopying, "Report on Single Copies."

Fuch, Herbert. Counsel to House Subcommittee No. 3 of the House Judiciary Committee during that subcommittee's most active consideration of copyright revision.

Furman, John. Lawyer with Cox, Langford & Brown. Associate of Philip Brown.

Goldberg, Morton. Correspondent of McCarthy in 1974.

Goldman, Abe A. Author of *Study No. 1. The History of U.S.A. Copyright Law Revision from 1901 to 1954* and editor of the *34 Copyright Revision Studies..* He joined the Copyright Office in 1952 and was promoted to General Counsel. He replaced George Cary as Acting Register in 1973.

Gosnell, Charles. Head of the New York State Library 1945-62 when he was appointed Director of Libraries at New York University and Professor of Library Administration. He held those posts until his retirement in 1974. Chair of the ALA Committee on Copyright Issues 1962-8 and also the ALA representative on the Joint Committee. Died 1993.

Gould, Robert. American Chemical Society. Attended the Cosmos Club meeting on April 4, 1972.

Gray, L. Patrick III. Partner in law firm Suisman, Shapiro, Wool, Brennan, Gray, & Greenberg, 1961-69. Executive Assistant to the Secretary U.S. Department Health Education & Welfare, 1969-70. Assistant Attorney General, Civil Division U.S. Department Justice, 1970-72 during which we negotiated with Latman concerning the Williams & Wilkins case. Acting Director of the FBI, 1972-3. Died 2005.

Greenaway, Emerson. Director of the Philadelphia Public Library 1951-69. President of ALA 1957-8. Served on Fisher's Copyright Panel in 1956.

Gribben, John H. Director Tulane University Libraries *ca.* 1970. Director University of Missouri Libraries 1977-1982. Correspondent of Louis Martin.

Gull, Mr. [no first name.] Staff member at ARL 1972. Wrote a memo after talking to ARL directors about North/Sernett amendment.<sup>37</sup>

Haas, Warren J. Associate Librarian, Columbia University, 1961-66. Director of Libraries, 1970-72, Vice-President for Information Services and University Librarian, 1972-77. Vice-President Council on Library Resources, 1976-78. President Council on Library Resources, 1978-90. President of ARL 1970.

Harris, Mike. Publisher representative on the Upstairs/Downstairs working group, 1974.

Hart, Philip A. Senator from Michigan, Democrat, 1959-76. Member of the Judiciary Committee. Proposed "systematic copying" language. Called by some, "the conscience of the Senate."<sup>38</sup> Died 1976.

Heilprin, Laurence B. Physicist and information scientist. Documentation Inc., 1956-57. Council on Library Resources. 1958-67. ASIS President 1965. Worked on CICP with Gerald Sophar. Professor Library School and Computer Center, University Maryland, 1967-76. Died 1993.

Hoadley, Irene. Director of Libraries, Texas A&M University 1974-92.

Hoffman, Alex. Alternate member of the Upstairs/Downstairs working group, 1974. Representing publishers.

Hogeland, William H. Jr. Consultant to the Joint Committee under Freehafer. Present at September 14, 1961 meeting on the 1961 Registrar's Report. Attorney at Webster, Sheffield, Fleischmann, Hitchcock & Chrystie. Wrote the single copies study<sup>39</sup> and the

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<sup>37</sup> "Draft Memorandum on the Paragraph 108 of the Current Copyright Bill Before Congress [October 11, 1972]."

<sup>38</sup> Michael O'Brien, *Philip A. Hart: the Conscience of the Senate* (East Lansing, M.I.: Michigan State University Press, 1995).

<sup>39</sup> Joint Libraries Committee on Fair Use in Photocopying, "Report on Single Copies."



associated legal opinion, on the legality of making single copies, for the Joint Committee on copying in libraries.

Hoopes, Townsend. Partner in the management consultancy firm Cresap, McCormick & Paget, 1958-64. Vice president and Director of the Washington office of the Association of American Publishers (AAP), 1969-71. President AAP 1973-86. Died 2004.

Humphrey, John. New York State Library *ca.* 1970-2. Contacted by Gull concerning the North/Sernett amendment.

IIA *see* Information Industry Association.

Information Industry Association (IIA.) Founded *ca.* 1970 to represent the interests of the nascent information industry in public policy. Viewed by some librarians as an ally of the publishers during copyright revision. Merged with Software Publishers Association in 1999 to form the Software & Information Industry Association.

Jacobstein, J. Myron. Law Librarian at the University of Colorado at Boulder. Corresponded with Marke<sup>40</sup> on the weakness of the single copies report.<sup>41</sup> This letter was published in 1971 in *Kalends* the house journal of the Williams & Wilkins Company.

Jenner, William E. Republican Senator from Indiana 1947-59. Worked on S.2559 to ratify the Universal Copyright Convention in 1954. Died 1985.

Johnson, Shirley. Staff member in Senator Hart's office *ca.* 1974.

Joint Committee on Fair Use in Photocopying. *See* Joint Committee.

Joint Committee on Photocopying and Copyright. *See* Joint Committee.

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<sup>40</sup> "J. Myron Jacobstein to Julius Marke [May 29, 1961]," in *Records of the Association of Research Libraries. Box 12 of 64. Folder Committees and their Membership. Manuscript Division, Library of Congress.*

<sup>41</sup> \_\_\_\_\_, "Report on Single Copies."

Joint Committee. Commonly used name for the entity library associations used to coordinate their attempts to influence copyright revision between 1956 and 1968. The committee began as an ARL Committee and, reflecting the informality and closeness of library leaders at this time, membership was somewhat fluid in the early years. The SLA was invited to join in 1956 and the CLR was added as a consultant in 1957. The Library of Congress was also invited to attend. ALA representation was added in 1957. By 1960 the committee had added AALL representation and by 1964 the Music Library Association was also represented. Known formally at various times as “David Committee” (1956), “ARL-SLA Committee on Photocopying and Copyright” (1956-7), “Joint Committee on fair Use in Photocopying” “Joint Committee on Photocopying and Copyright” “Joint Libraries Committee on Fair Use in Photocopying” (1957-62), “Joint Committee on Fair Use in Photocopying” (1964), “Joint Libraries Committee on Copyright” (1967). After 1968, with the growth in influence of association staff and lawyers, the centrality of the Joint Committee declined. Its coordinating role was eventually assumed by the Coalition of Library Associations (CLA.)

Joint Copyright Committee of the American Book Publishers Council Inc. and American Textbook Publishers Institute. *see* Horace Manges

Joint Libraries Committee on Copyright. *See* Joint Committee.

Joint Libraries Committee on Fair Use in Photocopying *see* Joint Committee.

Jordan, Robert T. – Organized the library at the Highlander Folk School in Tennessee in 1957.

Deputy to Verner Clapp at Council on Library Resources 1960-68. Library Director at the Federal City College (DC). 1968-83. Retired 1983. Died 2007.

Kaminstein, Abraham L. "Abe" or "Kami." Chief of the Examining Division, Copyright Office, 1947-1960, Register of Copyrights 1960-71, Died 1977.

Karp, Irwin. Lawyer for the Authors League of America. Present at September 14 1961 meeting on the 1961 Registrar's Report. A participant in many of the interest group negotiations of the late 1960's and 1970's.

Kastenmeier, Robert W. Democratic Congressman from Wisconsin (1959-91.) Member (1959-69) and later Chair (1969-90) of Subcommittee No. 3 (subsequently renamed the Subcommittee on Courts, Intellectual Property, and the Administration of Justice) of the House Committee on the Judiciary through passage of the Copyright Act of 1976.

Kellam, W. Porter. Director of University of Georgia Libraries 1950-? Contacted by Gull concerning the North/Sernett amendment.

Kenyon, Richard. American Chemical Society. Representative of proprietor interests at Dumbarton Oaks negotiations.

Kidd, Charles. Executive Secretary of the Association of American Universities (AAU) 1969-77. Assisted McCarthy in 1972 lobbying effort. Died 2004

Kirkland, Ellis, Hodson, Chaffetz & Masters. Chicago law firm. Represented ALA. See also William North.

Kownatsky, Harry. Represented the Music library Association on the Joint Committee 1967. Director of the Fleisher Collection at the Free Library of Philadelphia.

Krettek, Germaine. Director, ALA Washington Office 1957-72. Died 1994.

Lacy, Dan M. Assistant to the Archivist at the National Archives, 1942-43, Director of Operations, 1943-46, and Assistant Archivist of the United States, 1947. Assistant Director Processing Department, Library of Congress, 1947-50, Deputy Chief Assistant

Librarian, 1950-51. Assistant Administrator of the International Information Administration at the Department State, 1951-53. Managing director of the American Book Publishers Council (ABPC), 1953-66. Senior Vice-President at McGraw Hill Book Co. 1966-74, Senior Vice-President and Executive Assistant to the Chairman McGraw-Hill, Inc., 1974-83. Served on CONTU 1975-8.

Latman, Alan. Founding partner of the New York law firm of Cowan, Leibowitz, & Latman. Passano's lawyer during the Williams & Wilkins case and argued the case before Davis and subsequently the Supreme Court. Joined New York University Law Faculty in 1976. Author of *Study No.14. Fair Use of Copyrighted Works* and the *Kaminstein Legislative History Project*. Died 1984.

Lewis, Chester L. Chief Librarian at the *New York Times* 1947-64 where he introduced microfilming. He was promoted to General Services Manager until 1969, when he became Head of Archives until his retirement in 1979. President of SLA 1955-6. Died 1990.

Lieb, Charles. Counsel for the Association of American Publishers (AAP.). Director of John Wiley & Sons. Very active in negotiations for copyright revision 1970-76. Involved in the Cosmos Club negotiations. Thorn in the side of McCarthy and then McDonald. Appeared before CONTU. Member Copyright Society of the U.S.A. Died 1999.

Linden, Bella L. Counsel on Copyright for the American Textbook Publishers Institute. Active participant throughout the revision process. Present at January 16, 1963 meeting on the preliminary draft law. Participant in the Upstairs/Downstairs talks in 1974.

Lingeman, Richard. Author. Wrote a to-part article on copyright and the Williams & Wilkins case published in the *New York Times Book Review*.<sup>42</sup> James Skipper responded with a letter to the editor.<sup>43</sup>

Locke, William. Head of Department of Modern Languages, MIT 1945-56. Director of the MIT Libraries 1956 until 1974, when he retired. Locke was an early advocate of computer use in library operations and an advocate for the interests of the academic researcher in copyright. Died 2000.

Lorenz, John G. Deputy Librarian of Congress, 1965-76, Acting Librarian of Congress in 1975. Executive Director of ARL, 1976-79.

Low, Edmon. 1902-83. Head Librarian Oklahoma A&M College 1940-67, Professor Library Science, Michigan 1967-72, Director New College Library 1972-79. Chair of ALA Subcommittee on Copyright *ca.* 1975.

Magnuson, Warren G. Washington Senator, Democrat 1944-81. Raised the issue of medical library interlibrary loan during the Senate debate on S.22. Died 1989.

Manges, Horace S. Counsel, Joint Copyright Committee of the American Book Publishers Council Inc. and American Textbook Publishers Institute. Partner in the law firm of Weil, Gotshal & Manges. Present at September 14, 1961 on copyright revision and at many subsequent meetings. A leading advocate for publishing interests during the revision process. He was a founding member and a trustee of the Copyright Society of the U.S.A. Died 1986.

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<sup>42</sup> Richard Lingeman, "Copyright and the Right to 'Copy'; The Last Word " *New York Times*, November 17 1974. Lingeman, "Copyright and the Right to 'Copy' -- Part II."

<sup>43</sup> Skipper, "Letter to the Editor: Copyright."

Marke, Julius. Professor of Law and Law Librarian at New York University 1948-83. Served on the Joint Committee 1960. President of the AALL 1962-3 and a prominent librarian leader during most of the copyright revision process that led to the 1976 Act. Died 2004.

Marks, Robert. American Institute of Physics. Attended the Cosmos Club meetings on April 4, 1972.

Martin, Louis E. Associate University Librarian, University of Rochester 1962-68, ARL Associate Director 1968-1972, Librarian of Harvard College 1972-9. Died 2004.

Martin, Lowell. Dean of the Graduate School of Library Services at Rutgers 1954-59. Resigned to accept a position at Groliers. Appointed by Morsch as ALA representative to the Joint Committee in 1957.

McCarthy, Stephen A. Cornell University Librarian 1945-68, ARL Executive Secretary 1960-62, ARL Executive Director 1968-74, Died 1980.

McClellan, John D. Senator (Democrat, Arkansas) Chairman of the Senate Judiciary Committee Subcommittee on Patents, Trademarks, and Copyrights until his death in 1977. Entered Senate 1942.

McDonald, John P. Library Director, University of Connecticut. 1963-87. President of ARL 1971-2. ARL Executive Director 1975-6.

McKenna, Francis "Frank" E. Editor *Special Libraries*, 1967-70, SLA President 1966-7. SLA Executive Director 1970-78. Spoke at Senate hearings in 1973, 1974 and 1975. Died 1978.

Medical Library Association (MLA.) Founded 1898. Represents health science librarians in diverse libraries, academic, and hospitals. Because of the importance of the journal

literature to health science librarianship and the Williams & Wilkins case the MLA was particularly interested in copyright revision. Represented on the Joint Committee.

Meyerhoff, Howard A. Scientific Manpower Commission. Committee to Investigate Copyright Problems Affecting the Dissemination of Scientific Information. Present at September 14, 1961 meeting on 1961 Registrar's Report, though not introduced. Concerned with protection of publisher and official distribution of scientific info.

Michlowski, John. Manager of the Campus Print Shop, Minona State College, Minnesota. Asked McCarthy for copyright guidance in 1973.

Miller, Robert A. Dean of University Libraries at Indiana University 1942-72. Executive Secretary of ARL 1952-6.

MLA *see* Medical Library Association.

MLA *see* Music Library Association

Mohrhardt, Foster E. Director Department of Agriculture Library 1954-68, Council on Library Resources 1968-75. ARL President 1966. Died 1992.

Moriarty, John. Library Director at Purdue University *ca.* 1954. Wrote a letter on the Universal Copyright Convention to Senator Jenner.

Morsch, Lucile M. Deputy Chief Assistant Librarian, Library of Congress, she was also President of ALA 1958-9.

Mumford, L. Quincy. Librarian of Congress 1954-74. Died 1982.

Music Library Association (MLA.) Founded 1931. Usually represented on the Joint Committee and in the CLA and CNLA.

National Commission on Libraries and Information Science (NCLIS.) Established in 1970 by Congress (PL 91-345) with responsibility for developing or recommending plans for

library and information services adequate to meet the needs of the American people.

During the early 1970's NCLIS seriously considered creating a national periodical center and later took a position on §108(g)2. In 1977, NCLIS released the King report.<sup>44</sup>

National Education Association (NEA.) Founded 1857. Joined with American Teachers Association in 1966. Lobbied, most intensively during 1965-7, for a general exemption to the exclusive rights of copyright holders for K-12 educators

National Federation of Science Abstracting and Indexing Services (NFSAIS.) Founded 1958. A non-profit organization of government and non-profit publishers of abstracting and indexing services. In the 1960's and early 1970's the members were in the early stages of building computer files to replace print indexes. In 1972 the Federation dropped the word "science" from its titles and in 1981 accepted for-profit members and became the National Federation of Abstracting and Information Services. It is currently called the National Federation of Advanced Information Services.

National Institutes of Health (NIH). Created by Congress in 1930. NLM became a component of NIH in 1968. NIH describes itself as, "the steward of medical and behavioral research for the Nation."<sup>45</sup>

National Library of Medicine (NLM). Founded as the Library of the Office of the Surgeon General of the Army in 1835. Developed in a national medical library after 1865. Became NLM in 1956. Medical Library Assistance Act of 1965 charged NLM with helping medical libraries in America and created the Regional Medical Library Network. In 1968

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<sup>44</sup> King, *Library Photocopying in the United States: With its Implications for the Development of a Copyright Royalty Payment Mechanism*.

<sup>45</sup> "About NIH: NIH Mission," National Institutes of Health, <http://www.nih.gov/about/index.html#mission>.



NLM became part of NIH.<sup>46</sup> Also in 1968, sued by Williams & Wilkins Company over copyright infringement.

National Science Foundation (NSF). Federal agency founded 1950 to "to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense."<sup>47</sup> Provided the grant that enables the ARL to set up a permanent secretariat in Washington D.C. in 1962. Funded George Fry's study of copying practices.<sup>48</sup>

Naughton, Francis G. National Science Foundation. Present at January 16, 1963 meeting in draft law. Concerned with "Nation" and rapid communication of scientific information.

NCLIS *see* National Commission on Libraries and Information Science.

NEA *see* National Education Association.

Neal, Peyton R. Dean of Washington & Lee University School of Law Library 1970- 78 and on AALL standing committee on Copyright Law. Correspondent of McCarthy in 1973.

Neff, Evan. Rochester Regional Research Library Council (RRRLC). Lobbied Congressman Horton (R-NY) in person in 1975.

NFSAIS *see* National Federation of Science Abstracting and Indexing Services.

NIH *see* National Institutes of Health

NLM *see* National Library of Medicine

North, William. Lawyer for Kirkland & Ellis, 1959-65 and partner, 1965-78. Member of the Copyright Society U.S.A. Lawyer for the ALA from 1968 through passage of the Copyright Act of 1976.

NSF *see* National Science Foundation.

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<sup>46</sup> "Milestones in NLM History," National Library of Medicine, <http://www.nlm.nih.gov/about/nlmhistory.html>.

<sup>47</sup> "About the National Science Foundation ", National Science Foundation, <http://www.nsf.gov/about/>.

<sup>48</sup> George Fry and Associates, "Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields."

Oliver, Mary W. Law Librarian UNC and President of AALL *ca.* 1972

Oppenheimer, Gerald. Director, Pacific Northwest Regional Health Sciences Library, University of Washington (1963-87). Active in MLA 1974-77. Founding President of the Association of Academic Health Sciences Library Directors (AAHSLD) 1978. Lobbied Senator Magnuson in 1975.

Orne, Jerrold. Library Director North Carolina State University 1957-73. Contacted by Gull concerning the North/Sernett amendment.

Passano, William M. Chairman of the Williams & Wilkins Company 1963-72. Sued NLM and NIH for copyright infringement in 1968.

Players Club. Private club in New York City. Location of the final meeting of the “Cosmos Club Group” on September 19, 1972.

Putnam, Herbert. Librarian of Congress 1899-1938. Responsible for the revision of the copyright law of 1870 with the Copyright Act of 1909. Died 1955.

Research Library Group (RLG.) Founded 1974 by Harvard, Yale, Columbia, and the New York Public Library to encourage resource sharing of low use periodical titles and shared cataloging. Expanded in late 1970's and 80's to include other research libraries. James Skipper was the first Executive Director of the RLG.

Ringer, Barbara. Joined Copyright Office in 1949 as Examiner, serving in increasingly responsible posts, Register of Copyrights, 1973 – 1980, Retired, 1980. Acting Register 1993-4.

RLG *see* Research Library Group.

Rogers, Rutherford David. Various professional librarian positions throughout New York state 1937-57. Deputy Librarian of Congress 1957-64. Director of University Libraries,

Stanford 1964-1969. Yale University Librarian 1969-1985. Chair, Joint Committee on Fair Use in Photocopying 1964-66. Testified before the House Subcommittee No. 3 in 1965.<sup>49</sup> ARL President 1967.

Rosenfield, Harry N. Lawyer for the National Education Association (NEA) Ad Hoc Committee on Copyright Revision.

Rovelstad, Howard. Director of University of Maryland Libraries 1946-75. Lobbied Senator Tydings (D-MD) in person concerning copyright revision in 1970. Attended the October 18, 1972 meeting at the APSA on the North/Sernett amendment. Appeared with McCarthy at Senate subcommittee hearings on July 31, 1973. Retired 1975. Died 2004.

Saltzstein, Robert A. Lawyer for the American Business press. Attended the Cosmos Club meeting of April 4, 1972. Described by Richard Sernett as a, "Cosmos Club Colleague."<sup>50</sup>

Schaefer, Victor. Director of the Library, Notre Dame, *ca.* 1954. Wrote letter about Universal Copyright Convention to Senator Jenner.

Sernett, Richard. (Associated with the Cosmos Group.) Counsel and Assistant Secretary for Scott, Foresman & Co. 1963-70, Secretary and Legal Officer, 1970-80. Member U.S. Department State Advisory Panel on International Copyright, 1972-75. Active on copyright in the ABA in the 1960's and 1970's. Helped draft North/Sernett amendment at Cosmos Club meetings. North and Sernett were both Chicago lawyers.

Shank, Russell. Director of Libraries, Smithsonian Institution. Attended October 18, 1972 Meeting at the American Political Science Association on behalf of the ALA.

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<sup>49</sup> *Copyright Law Revision: Hearings before Subcommittee No. 3 of the Committee on the Judiciary.*

<sup>50</sup> "Notice from Harold Wigren of meeting of the Ad Hoc Committee on Copyright law Revision [September 22, 1971]."

Sharaf, James Attorney, Harvard University Office of the General Counsel. Chaired Dumbarton Oaks meetings. Died 1998.

Shaw, Ralph R. Wrote his doctoral dissertation, *Literary Property and the Scholar*, on copyright, subsequently published as *Literary Property in the United States*.<sup>51</sup> Started Scarecrow Press in 1950 and lead the company until it was sold to Grolier Educational Corp. in 1968. Maintained that there was a legal difference between copies made for private purposes and copies made for publication. This theory interested Clapp and Philip Brown, but was dismissed by Fisher and later by the Court of Claims in Williams & Wilkins. Director of Libraries at the U.S. Department of Agriculture 1940-54. Founding member of the faculty of Graduate School of library Services at Rutgers University 1954-9 and Dean 1959-64. President of ALA 1956-7. Dean of Library Activities at the University of Hawaii, 1964-8. Published an analysis of the Williams & Wilkins case in 1972.<sup>52</sup> Died 1972.<sup>53</sup>

Skipper, James. First ARL Executive Secretary after the reorganization in 1962-7. On the faculty of the Department of Library Science at the University of Michigan 1954-9. Director of Libraries University of Connecticut 1959-63. Associate Librarian at Princeton 1967-8. Chief Librarian at UC Berkeley 1968-71. Executive Vice-President Kraus-Thomson Organization, 1971-74. Director, Research Libraries Group, 1974-79. Died 2005.

SLA *see* Special Libraries Association.

Sophar, Gerald J. Information scientist. ASIS President 1961 and worked with Heilprin on the CICP in late 1960's. Authored major report on copying practices while involved with

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<sup>51</sup> Shaw, *Literary Property in the United States*.

<sup>52</sup> Robert R. Shaw, "Williams & Wilkins v. the U.S.: a Review of the Commissioner's Report," *American Libraries* 3 (1972).

<sup>53</sup> Eugene Garfield, "Current Comments: To Remember Ralph Shaw," *Current Contents* 23 (1978).

CICP.<sup>54</sup> Worked at the National Agricultural Library *ca.* 1971. Chaired Copyright Parliament on October 28, 1971. Witness at 11<sup>th</sup> CONTU meeting 1977. Died 2007.

Special Libraries Association (SLA.) Founded 1909. Represented on the Joint Committee.

Represents librarians in diverse settings – corporate, non-profit, and research libraries.

Because of this interest in library and information services for profit institutions, the SLA often diverged from other library associations during revision in terms of the issue of the making of copies in for-profit contexts.

Stevens, Charles H. Executive Director NCLIS *ca.* 1972.

Stevens, Norman D. Acting Director of Libraries at the University of Connecticut during John McDonald's tenure at the ARL. University Librarian 1975-86. Director of University Libraries 1986-1994.

Stuart-Stubbs, Basil. University Librarian, University of British Columbia 1964-1982.

Correspondent of Stephen McCarthy.

Surrency, Irwin C. Law Librarian, Temple University, 1950-78. Law Librarian, University of Georgia, 1979 until his retirement in 1995. Chair of the Joint Committee 1967. Testified before the Senate in that year.<sup>55</sup>

Upstairs/Downstairs Talks. Informal name for the interest group negotiations sponsored by the Copyright Office between publishers and librarians held at the Library of Congress, 1974.

Varmer, Borge. While an attorney in the Copyright Office he wrote *Study No. 15*.

*Photoduplication of Copyrighted Materials by Libraries*.<sup>56</sup> By 1961 he was an attorney in the General Counsel's Office of the Department of Health, Education and Welfare.

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<sup>54</sup> Sophar et al., "The Determination of legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright -- A Status Report."

<sup>55</sup> *Copyright Law Revision, Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, on S 597.*

Vosper, Robert. University Librarian UCLA 1961-73. President of ARL 1963. Died 1994.

Wedgeworth, Robert. After a diverse library career in public, academic, and library education, he became Executive Director of ALA 1972-85. Served on CONTU 1975-8.

Weil, Benjamin H. ESSO Research and Engineering. 1957-83. Spoke at Copyright Parliament. Described by Richard Sernett as "Cosmos Club Colleague."<sup>57</sup> "Weill" *sic* noted as participant in "Frase group" Cosmos Club meeting of August 1, 1972.<sup>58</sup> Died 1997.

Wilcox, Alice. Director of the Minnesota Library Network, MINITEX. Member of CONTU 1975-8.

Williams & Wilkins Company. Medical and scientific periodical publisher in Baltimore Maryland since 1892. Imprint of Waverley Press, later Waverley Inc. Sued NLM and NIH over copyright infringement in 1968. Privately owned by the Passano family until Waverley Inc. went public in 1972.

Zurkowski, Paul G. Legislative Assistant to Congressman Kastenmeier 1964-9. Founding President of the Information Industry Association 1970. Spoke at Copyright Parliament 1972. Alternate member of the Upstairs/Downstairs working group in 1974 in which he was defined as representing the publisher interests.

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<sup>56</sup> Varmer, "Study No. 15. Photoduplication of Copyrighted Materials by Libraries.."

<sup>57</sup> "Notice from Harold Wigren of meeting of the Ad Hoc Committee on Copyright law Revision [September 22, 1971]."

<sup>58</sup> "Handwritten Notes of Meeting by Unidentified Author, perhaps Stephen A. McCarthy [August 1, 1972]," in *Records of the Association of Research Libraries. Unprocessed materials #18,632 Box 9 of 64 Folder Copyright Cosmos Meeting. Manuscript Division, Library of Congress.*

## **APPENDIX B**

### **CHRONOLOGY OF EVENTS DURING REVISION 1955-1976**

- **1955**
  - First session 84<sup>th</sup> Congress.
  - In the Legislative Appropriations Act of 1955 Congress sets aside funds for the Copyright Office to conduct studies of the problems associated with the current copyright law.
- **1956**
  - Second session 84<sup>th</sup> Congress.
  - January 18. Arthur Fisher writes to David Clift of ALA seeking librarian input into revision process.
  - February 26. Charles David asked to create the ARL Committee on Photocopying and Copyright, the precursor to the Joint Committee.
  - March 6. SLA agrees to join the David Committee, renamed the Joint SLA-ARL Committee on Photocopying and Copyright.

- December 10. ARL-SLA Committee on Photocopying and Copyright meet with Verner Clapp and Arthur Fisher. Fisher presents his proposed strategy and procedures to the committee.<sup>59</sup>
- Robert Miller retires as ARL Executive Secretary, having served since 1952.
- **1957**
  - First session 85<sup>th</sup> Congress.
  - January 29. ARL proposes expanding the SLA-ARL Committee to include representatives of ALA and the CRL.
  - February. Joint SLA-ARL Committee on Photocopying and Copyright sends questionnaire on copying practices to member libraries.
  - June 27. Freehafer assumes chairmanship of the Joint Committee upon David's retirement.
  - October 4. U.S.S.R. successfully launches Sputnik 1 the first artificial satellite.
  - William Dix takes over as ARL Executive Secretary. He serves until 1959.
- **1958**
  - Second session 85<sup>th</sup> Congress.
  - March. *Study No. 14*<sup>60</sup> on the doctrine of fair use, released.
  - December. Universities of Minnesota, Michigan, and Cornell University begin supplying photocopies instead of loaning original periodicals in interlibrary loan.
- **1959**

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<sup>59</sup> Joint Committee on Photocopying and Copyright, "Proposed Policy to Photocopying by Libraries. Preliminary Draft. Minutes of Meeting of December 10, 1956. Appendix B.," in *Records of the Association of Research Libraries. Box 32, Folder, Joint Committee on Fair Use in Copying.* (Washington, D.C.: 1956), ———, "Joint Committee on Photocopying and Copyright. Minutes of Meeting of December 10, 1956 in the Office of Robert S. Bray."

<sup>60</sup> Latman, "Study No.14. Fair Use of Copyrighted Works.."



- First session 86<sup>th</sup> Congress. Robert Kastenmeier enters Congress.
  - January. Freehafer releases a version of his committee's report on copying in research libraries.
  - May. *Study No. 15*,<sup>61</sup> on library photocopying, released.
  - June 29. AALL representative added to Joint Committee.
  - William Dix retires as ARL Executive Secretary.
- **1960**
    - Second session 86<sup>th</sup> Congress.
    - November. John F. Kennedy elected President.
    - November 12. Arthur Fisher, Register of Copyrights, dies.
    - December 24. Abraham Kaminstein appointed as Register of Copyrights.
    - Stephen McCarthy takes over as ARL Executive Secretary, serving until the reorganization of 1962.
- **1961**
    - First session 87<sup>th</sup> Congress.
    - April 1. According to Patry, Kaminstein issues a tentative Register's report on revision. It remains unpublished.<sup>62</sup>
    - May. Joint Committee's report on copying in libraries published in *Special Libraries*.<sup>63</sup>

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<sup>61</sup> Varmer, "Study No. 15. Photoduplication of Copyrighted Materials by Libraries.."

<sup>62</sup> Patry, *The Fair Use Privilege in Copyright Law*, 215 n.12.

<sup>63</sup> Joint Libraries Committee on Fair Use in Photocopying, "Report on Single Copies."

- July 8. 57<sup>th</sup> Meeting of the ARL accepts policy that, “as a normal extension of library activities, libraries should be permitted to make one copy of the published materials in their collection for a user.”<sup>64</sup>
- July 10. House Committee on the Judiciary publishes *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*.<sup>65</sup>
- September 14. Edward Freehafer and William Hogeland participate<sup>66</sup> in one of the meetings organized by the Register of Copyrights on the *Report of the Register*.<sup>67</sup>
- November 10. Second meeting organized by the Register of Copyrights on the *Report of the Register*.<sup>68</sup>
- **1962**
  - Second Session 87<sup>th</sup> Congress.
  - January 24. Third meeting organized by the Register of Copyrights on the *Report of the Register*.<sup>69</sup>
  - February. Clapp publishes “Library Photocopying and Copyright: Recent developments.”<sup>70</sup>
  - March 15. Fourth and final organized by the Register of Copyrights on the *Report of the Register*.<sup>71</sup>

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<sup>64</sup> Association of Research Libraries, "Minutes of the Fifty-Seventh Meeting of the Association of Research Libraries. Cleveland, Ohio.," in *Records of the Association of Research Libraries. Box 46 of 64. Folder: Copyright Revision Bill 1968* (Washington D.C.: 1961).

<sup>65</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 1."

<sup>66</sup> ———, "Copyright Law Revision Part 2," 33-4.

<sup>67</sup> ———, "Copyright Law Revision Part 1."

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Clapp, "Library Photocopying and Copyright: recent developments."

- October 8-28. Height of the Cuban missile crisis.
- ARL reorganizes, creating a permanent secretariat in Washington, D.C. led by an Executive Director and a President.
- William Dix elected ARL President.
- James Skipper appointed as first ARL Executive Director. He served until 1967.
- **1963**
  - First session 88<sup>th</sup> Congress.
  - February 15. House Committee on the Judiciary releases *Copyright Law Revision Part 2*.<sup>72</sup>
  - November 22. President Kennedy assassinated. Lyndon Johnson becomes President.
  - Robert Vosper elected ARL President.
- **1964**
  - Second session of 88<sup>th</sup> Congress.
  - April 17. Rutherford Rogers asked to chair the Joint Committee.
  - May 22. President Johnson gives his “great Society” speech at the University of Michigan.
  - July 20. House Committee on the Judiciary releases *Copyright Law Revision Part 3*.<sup>73</sup>
  - July 20. S.3008 and HR.11947, identical versions of the revision bill, introduced into the Senate and the House.

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<sup>71</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 1."

<sup>72</sup> ———, "Copyright Law Revision Part 2."

<sup>73</sup> ———, "Copyright Law Revision Part 3."

- August 6-7. In meeting with the Register of Copyrights, the NEA's Ad Hoc Committee pushes for a general exemption for educators.
  - November. Lyndon Johnson elected President.
  - December 1. House Committee on the Judiciary releases *Copyright Law Revision Part 4*.<sup>74</sup>
  - Richard Logsdon elected ARL President.
- **1965**
    - First session 89<sup>th</sup> Congress.
    - January 22. CACP issues interim report on study of feasibility of a copyright clearinghouse. Final report published in 1967.<sup>75</sup>
    - February 4. HR.4347 and S.1006, identical bills, introduced. 22 days of hearings held by House Subcommittee No. 3 in May, June, August and September.
    - April 11. President Johnson signs the Elementary and Secondary Education Act of 1965, part of his Great Society program.
    - May 26. House Committee on the Judiciary releases *Copyright Law Revision Part 6*.<sup>76</sup> Includes an appendix comparing the text of the 1965 revision bill (S.1006 and HR.4347) with the present law and the 1964 revision bill.
    - June 3. Rutherford Rogers (for the Joint Committee) and Charles Gosnell (for the ALA) testify on HR.4347 before the House Judiciary Subcommittee No. 3.

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<sup>74</sup> \_\_\_\_\_, "Copyright Law Revision Part 4."

<sup>75</sup> Sophar et al., "The Determination of legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright -- A Status Report."

<sup>76</sup> U.S. Congress. House Committee on the Judiciary, "Copyright Law Revision Part 6."

- August 18-20. Senator McClellan holds three days of hearings of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee on S.1006.
  - September 2. House Committee on the Judiciary releases *Copyright Law Revision Part 5*.<sup>77</sup> Includes identical versions of the 1964 revision bill (S.3008 and HR.11947.)
  - September 15. NEA again pushes for an educational exemption to the exclusive rights of copyright holders.
  - November 8. President Johnson signs the Higher Education Act of 1965, increasing federal funding to higher education.
  - Edward Freehafer elected ARL President.
  - U.S. combat forces deployed to South Vietnam.
- **1966**
    - Second session 89<sup>th</sup> Congress.
    - June. "Summit Meetings" held at the Library of Congress and chaired by Herbert Fuchs to reach agreement between educators and proprietors on §107. No indication in the archival record that ARL librarians are involved in these meetings.
    - October 12. HR.4347 reported favorably out of the House Committee on the Judiciary.
    - Foster Mohrhardt elected ARL President.

- **1967**

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<sup>77</sup> ———, "Copyright Law Revision Part 5."

- First session 90<sup>th</sup> Congress.
- March 8. HR.2512 introduced, identical to the version of HR.4347 reported out of committee on October 12, 1966.
- March 8. House issues Report No. 83
- March 8. S.597 introduced. Senate subcommittee hearings were held in March and April.
- April 4. Gosnell testifies before the Senate Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee on S.597.
- April 6. House debates HR.2512.
- April 11. House passes HR.2512, a bill for general revision of copyright law.
- October 12. Senate passes S.2216, a bill to establish a National Commission on New technological Uses of Copyrighted Works.
- Rutherford Rogers elected ARL President.
- Donald Cameron briefly serves as ARL Executive Director.
- Clapp retires from CLR.
- **1968**
  - Second session 90<sup>th</sup> Congress.
  - January 31. Philip Brown of Cox, Langford, & Brown agrees to legally represent ARL.
  - January 31. Tet Offensive begins. This marks the high watermark of U.S. involvement in the Vietnam War.
  - February 27. Williams & Wilkins file suit in the U.S. Court of Claims for copyright infringement against the NIH and NLM.

- October. Clapp publishes *The Copyright Dilemma*.<sup>78</sup>
- November. Richard Nixon elected President.
- Andrew Eaton elected ARL President.
- Stephen McCarthy appointed as ARL Executive Director. He served until 1974.
- **1969**
  - First session 91<sup>st</sup> Congress.
  - January 22. S.543 introduced, incorporating S.597 and S.2216.
  - January 27. ARL-ALA Agreed Text of Copyright Amendment [§108] released.
  - December 10. S.543 reintroduced with an amended §108.
  - Douglas Bryant elected ARL President.
- **1970**
  - Second session 91<sup>st</sup> Congress.
  - March. Clapp and McCarthy personally lobby members of the Senate Judiciary Committee.
  - Warren Haas elected ARL President.
- **1971**
  - First session 92<sup>nd</sup> Congress.
  - February 18. S.644 introduced.
  - August 31. Kaminstein retired due to ill health.
  - September 1. George Cary appointed Register of Copyrights.
  - Thomas Buckman elected ARL President.

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<sup>78</sup> Clapp, "The Copyright Dilemma: A Librarian's View."

- John McDonald elected ARL President to replace Buckman. He serves through 1972.
- **1972**
  - Second session 92<sup>nd</sup> Congress.
  - February 16. Commissioner Davis issues his report, finding for Williams & Wilkins, in the Williams & Wilkins case.
  - April 4. First Cosmos Club meeting.
  - May 24. Clapp withdraws from ARL copyright committee and active involvement in revision.
  - June 15. Verner Clapp dies.
  - September. Final Cosmos Club meeting at Players Club in New York. Stephen McCarty makes it clear he will not recommend approval of the North/Sernett amendment to ARL.
  - November/December. Letter writing campaign from university presidents aimed at Senate in support of library opposition to §108.
  - David Clift retires and Robert Wedgeworth appointed as first African-American ALA Executive Secretary.
- **1973**
  - First session 93<sup>rd</sup> Congress.
  - March 2-3. Dumbarton Oaks meetings.
  - March 9. George Cary retires from Copyright Office.
  - March 26. S.1361 introduced, identical to S.644.
  - July 3. S.1361 reported out of Committee.



- July 31. McCarthy and Brown testify at Senate Subcommittee Hearings held on S.1361.
- October 20. “Saturday Night Massacre” in which President Nixon ordered the firing of Watergate Special Prosecutor Archibald Cox. Robert Bork complied with the order.
- November 19. Barbara Ringer appointed Register of Copyrights and serves through 1980.
- William Budington elected ARL President.
- **1974**
  - Second session 93<sup>rd</sup> Congress.
  - January 9. Introduction of the phrase “systematic copying” to §108.
  - March. Columbia, Harvard, the New York Public Library, and Yale create Research Library Group to encourage resource sharing and shared cataloging.
  - June. Letter writing campaign from librarians to the Senate, objecting to §108.
  - July 27-30. House Judiciary Committee approves articles of impeachment against Richard Nixon.
  - August 8. President Nixon resigns. Gerald Ford becomes President.
  - November 16. Upstairs/Downstairs talks.
  - November 27. Full Court of Claims reverses Commissioner Davis recommendations.
  - December 31. S.3976 passed and signed into law as PL 93-573 creating CONTU.
  - December 31. McCarthy retires to be replaced by John McDonald.

- December 31. Mumford retires. John Lorenz is appointed as Acting Librarian of Congress.
- Ralph Hopp elected ARL President.
- **1975**
  - First session 94<sup>th</sup> Congress.
  - January 15. S.22 introduced.
  - January 28. HR.2223 introduced
  - February 24. Supreme Court affirmed Court of Claims decision in the Williams & Wilkins case.
  - April 29. Last U.S. diplomatic and military personnel leave Vietnam.
  - May-December. House Subcommittee holds 18 days of hearings.
  - Summer. McDonald successfully appeals for letters to congressional representatives from member librarians.
  - July 25. CONTU members appointed.
  - September 24. Last meeting of the Upstairs/Downstairs working group cancelled.
  - October 9. Ringer testifies before the House Subcommittee.
  - November 20. S.22 reported out of committee.
  - Richard De Gennaro elected ARL President.
  - John McDonald appointed as ARL Executive Director. He served until 1976.
- **1976**
  - Second session 94<sup>th</sup> Congress.
  - January 7-26. Ringer organizes negotiations over §108 at NLM.
  - February 6-18. Senate debates S.22.

- February 19. Senate passes S.22 and refers the bill to the House Committee on the Judiciary.
  - March. ARL urges member librarians to contact House members about deleting or amending §108.
  - March 12. *Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals* released by CONTU.
  - April 7. Congressman Kastenmeier agrees to CONTU's offer of help in negotiating interlibrary loan guidelines.
  - April 14. §108(g)2 amended in the House subcommittee so that the onus for reporting is on the borrowing library, and that the amount of copying in the aggregate should not substitute for a subscription.
  - June 17. CONTU releases draft interlibrary loan guidelines.
  - September 3. HR.2223 favorably reported out of committee.
  - September 22. House debates S.22 and passes it 316 to 7.
  - September 30. Conference Report accepted by both Houses.
  - October 19. President Ford signs PL 94-553 Copyright Act of 1976, into law.
  - November. Jimmy Carter elected President.
  - Virginia Whitney first woman elected ARL President.
  - John Lorenz appointed as ARL Executive Director. He serves until 1979.
- **1977**
    - September 10. Abraham Kaminstein dies.

- September 30. NCLIS publishes *King Report*.<sup>79</sup>
- Fall. Copyright Clearance Center established by publishers and author interests.
- **1978**
  - January 1. Copyright Act of 1976 goes into effect.
  - January 1. Copyright Clearance Center opens for business.
  - July 31. CONTU issued final report.

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<sup>79</sup> King, *Library Photocopying in the United States: With its Implications for the Development of a Copyright Royalty Payment Mechanism*.

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