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### Copyright and the Library Reserve Room

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# Copyright and the Library Reserve Room

By FRITZ SNYDER\*

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## I. INTRODUCTION

The modern photocopy machine has been a tremendous boon to the university. It has permitted cheap and quick reproduction of several copies of an article from a popular or academic periodical for placement on library reserve—thereby saving from destruction the subscription copy that students might otherwise remove or deface in their zeal to prepare an assignment.<sup>1</sup> However, the unauthorized reproduction for scholarly or educational purposes of limited numbers of copies of copyrighted works has come to present one of the major problems of fair use.<sup>2</sup>

Photocopying in general, and more particularly classroom and library reproduction of copyrighted material, commands a certain sympathy since it generally involves no commercial exploitation and helps achieve socially useful objectives. What this overlooks is the tremendous reduction in the value of copyrighted works which may result from a consistent and pervasive application of this practice.<sup>3</sup> Publishers have become increasingly concerned that the widespread use of photocopying machines by teachers and researchers significantly diminishes the market for their publications.<sup>4</sup> The key issue, then, is the manner in which the fair use doctrine

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<sup>1</sup> Donnell, *Fair Use by University Faculty Members under the Copyright Revision Act of 1976*. 16 AM. BUS. L. J. 17 (1978).

<sup>2</sup> M. NIMMER, 3 NIMMER ON COPYRIGHT 13-63 (1978).

<sup>3</sup> *Id.* at 13-64.

<sup>4</sup> *Educators, Fair Use, and the New Act: All Concerned Are Not Protected*, 9 U. TOUL. L. REV. 130 (1977).

can be applied so as to equitably compensate the publishers of journals so frequently reproduced while preserving for educators broad access to current articles of interest in their fields.<sup>5</sup>

## II. THE TYPICAL LIBRARY RESERVE OPERATIONS

Many library reserve operations allow faculty members to put as many photocopies as they want of anything (usually periodical articles though occasionally parts of books) on reserve in the university library. If the faculty member requests, the library will itself often make one or more photocopies of the item desired for reserve use. With such reserve requests in mind, this paper will discuss what changes in the reserve operation must be made (if any) to protect the library against legal action for copyright infringement.

## III. PRESENT STATUTORY LAW DEALING WITH COPYRIGHT

Photocopying is done despite the fact that most of the material copied has been copyrighted under a statute that declares that the owner of copyright has the exclusive right to reproduce the copyrighted work.

Those conscious of copyright law have made and used reproduction, claiming such copying was "fair use." Section 107 of the new law says:

. . . the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as . . . teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include

- (1) the purposes and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>6</sup>

It is significant, in view of the strong disagreement between educators and publishers in Congressional committee hearing testimony, that the statutory language expressly authorizes the making of multiple copies for classroom use.<sup>7</sup>

### A. Court Interpretation

Williams & Wilkins, perhaps the most significant recent case involving the fair use defense, was in fact decided before the present copyright law was passed.<sup>8</sup> In that case, the Court of Claims held that the library photocopying under attack fell within the doctrine of fair use, emphasizing that the libraries involved were non-profit institutions and that they had established and enforced what the court con-

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<sup>5</sup> *Id.* at 151.

<sup>6</sup> Pub. L. 94-553; 90 Stat. 2541 (effective as of January 1, 1978); rules governing infringement proceedings: F.R.C.P. Title 28; Supreme Court Rules of Practice: 17 U.S.C.A. 501 *et. seq.*

<sup>7</sup> Donnell, *supra* note 1, at 26.

<sup>8</sup> Williams & Wilkins vs. U.S., 172 U.S.P.Q. 670 (Comm'r, Ct. Cl. 1972); 487 F.2d 1345 (Ct. Cl. 1973); 420 U.S. 376 (1975).

sidered to be reasonable limitations on their copying activities. The Court of Claims majority disagreed with the trial court's finding that there had been a loss of potential subscribers to the Williams & Wilkins journals due to the photocopying by the defendants, declaring that the record did not sustain such a finding. However, the majority declared that the record did support the finding that if the allegedly infringing photocopying were stopped, medical science would be hurt. The majority did not consider relevant to fair use that Williams & Wilkins would license photocopying of the journals for low fees. The court concluded with a plea to Congress to resolve the fair use questions through legislation. (However, according to the Senate Committee Report for the new Copyright Act, section 107 is intended to restate the present judicial doctrine of fair use—not to change, narrow or enlarge it in any way!<sup>9</sup>) The Supreme Court wrote no opinion in affirming by a four to four decision.

### B. *Reproduction by Libraries and Archives*

Section 108 of the Copyright Law says the right of reproduction by a library applies to a copy of a published work that is deteriorating if the library has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price. However, this is not to affect the right of fair use. Using the fair use rationale<sup>10</sup> or the library-as-agent rationale (discussed later), a library could arguably make one photocopy of anything a faculty member wishes to put on reserve.

### C. *Remedies for Infringement of Copyright*

Section 502 provides for injunctions and section 503 provides for the impounding and disposition of infringing articles. One court commented that in copyright infringement cases, the standard for a preliminary injunction is less rigorous and a copyright holder may be presumed to suffer irreparable harm when his right to exclusive use of copyright material is invaded. Probable success on the merits or a *prima facie* case of infringement is enough.<sup>11</sup>

Section 504 provides for statutory damages for all infringements with respect to any one work of amounts from \$250 to \$10,000. If done willfully, the amount could be raised to \$50,000. But if the infringer was not aware of the infringement and had no reason to believe there was an infringement, the court at its discretion could lower the amount to \$100. Statutory damages can be remitted altogether if:

(c)(2) infringer believed and had reasonable grounds for believing his use . . . was a fair use under section 107, if the infringer was: (i) an employee . . . of a library, or archives acting within the scope of his or her employment. . . .

The Executive Director of the American Library Association, Robert Wedgeworth, has warned libraries that the mere possession of illegal copies could be illegal infringement. To guard against this, said Wedgeworth, "it would be my advice that in accepting . . . copies, the librarian ought to have a clear record of the source of those copies, so as not to be made liable for an infringement merely because of possession of unauthorized copies."<sup>12</sup> Wedgeworth said that if

<sup>9</sup> S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975).

<sup>10</sup> Treece, *Library Photocopying*, 24 U.C.L.A. L. REV. 1025, 1038 (1977).

<sup>11</sup> *Encyclopedia Britannica, Etc. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978).

<sup>12</sup> *Copyright and Reserve Shelf: Library Liability*, 103 LIB. J. 310 (1978).

photocopies were not made on the library premises but were merely delivered for placing in the reserve collection, the library would not be liable for the copyright infringement. But the university could be liable if photocopying took place on its premises.<sup>13</sup>

However, another commentator noted that in the unlikely event that a library infringes a copyright by reproducing classroom copies at the request of a teacher, 504(c)(2) instructs the court to remit (reduce to zero) any statutory damages recoverable by the copyright proprietor. The likelihood that a proprietor could show that substantial actual (as opposed to statutory) damages occurred by a library's good faith copying of his work or complying with a teacher's request for classroom copies is remote enough to be beyond reasonable concern.<sup>14</sup>

#### D. Guidelines for Classroom Copying

At the Judiciary Subcommittee hearing in June 1975, Chairman Kastenmeier and other members urged publishers, writers and teachers to reach an agreement on permissible educational use of copyrighted materials.<sup>15</sup> In a joint letter to Chairman Kastenmeier, dated March 19, 1976, the representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision and of the Authors League of America, Inc., and the Association of American Publishers, Inc., stated:

You may remember that in our letter of March 8, 1976, we told you that the negotiating teams representing authors and publishers and the Ad Hoc Group had reached tentative agreement on guidelines to insert in the Committee Report covering educational copying from books and periodicals under section 107 of the H.R. 2223 and S. 22 . . .

We are now happy to tell you that the agreement has been approved by the principals. . . . We had originally intended to translate the agreement into language suitable for inclusion in the legislative report dealing with section 107, but we have since been advised by committee staff that this will not be necessary.<sup>16</sup>

The Conference Committee report<sup>17</sup> said:

The conferees accept as part of their understanding of fair use the Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with respect to books and periodicals. . . .

However, the agreement on guidelines itself said that the statement of guidelines was not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in section 107.<sup>18</sup>

The guidelines say:

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching . . . a class:

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<sup>13</sup> *Id.*

<sup>14</sup> Treece, *supra* note 10, at 1040.

<sup>15</sup> 17 U.S.C.A. § 107 (Historical note, page 112).

<sup>16</sup> *Id.*, Historical note, pages 112-113.

<sup>17</sup> H.R. REP. NO. 1733, 94th Cong., 2d Sess. 70 (1976).

<sup>18</sup> 17 U.S.C.A. § 107 (Historical note, page 113).

- A. A chapter from a book.
  - B. An article from a periodical or newspaper.
- Multiple copies (not to exceed . . . more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:
- A. The copying meets the test of brevity and spontaneity as defined below; and
  - B. Meets the cumulative effect test as defined below; and
  - C. Each copy includes a notice of copyright.

The guidelines say copying meets the brevity test if—

- either a complete article, story or essay of less than 2,500 words is copied, or
- not more than 1,000 words or 10% (whichever is less) of a longer work is copied.<sup>19</sup>

Even accepting the guidelines, it is not clear why if a work consists of 2,499 words it may be reproduced in its entirety but if it has one additional word, then not more than 1,000 words may be reproduced.<sup>20</sup> The brevity guidelines may well be impractical in many higher education situations and more extensive use may well meet the more general fair use criteria.<sup>21</sup> For example, three to four pages in the *Harvard Business Review* constitute 2,500 words. Most articles in that journal are a good deal longer than that (and faculty members often put photocopies of articles from this journal on reserve). One writer has simply said that he does not believe a court would find the length limitations binding upon university instructors in professional schools.<sup>22</sup>

One commentator has argued:

Teachers requesting copies for use in teaching that are within the guidelines can be assumed by library employees to be acting within the limits of fair use; teachers requesting copies for use in teaching that are not far outside the guidelines can reasonably be assumed by employees to be acting within the limits of fair use; and teachers requesting copies that are far outside the guidelines may nevertheless be acting within the limits of fair use, depending upon the circumstances. Thus libraries and their employees need not in deciding to honor teachers requests for copies actually count words; in most instances a glance will inform the employee that the request can be filled.<sup>23</sup>

One librarian said: "We pay special heed to any article that comprises more than one-third of an issue, and we give individual attention, trying to make the best judgment we can about substantiality in terms of the whole, to any article that exceeds 25 pages."<sup>24</sup> If the nature of the work is such that its publication was clearly for purposes of sharing research results and without either a profit motive or even a break-even need, the decision to copy becomes easier.<sup>25</sup>

<sup>19</sup> *Id.* at 113-114.

<sup>20</sup> NIMMER, *supra* note 2, at 13-67.

<sup>21</sup> Stedman, *Academic Library Reserves, Photocopying and the Copyright Law*, COLLEGE AND RESEARCH LIBRARY NEWS, no. 9: 263, 266 (1978).

<sup>22</sup> Donnell, *supra* note 1, at 36.

<sup>23</sup> Treece, *supra* note 10, at 1040.

<sup>24</sup> Gillies, *Fair Use Criteria: An Interim Application*, 2 SERIALS LIBRARIAN 241, 243 (1978).

<sup>25</sup> *Id.*

The guidelines say copying is spontaneous if—

- the copying is at the instance and inspiration of the individual teacher, and
- the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.<sup>26</sup>

The Congressional reports indicate that spontaneity is an important qualification for fair use. The guidelines go further (probably further than most courts would go, says Professor Donnell) and say that the decision to use should be so close in time to the use that it would be impossible to obtain permission. Normally, a semester would seem long enough to obtain permission even in the absence of the projected clearinghouse.<sup>27</sup> The statute and guidelines leave unanswered the question of what would constitute a reasonable time for reply to a request for permission to use the copyrighted material. The question thus becomes whether the teacher perceived that he had a reasonable amount of time to secure the copyright owner's permission to use the material.<sup>28</sup> Even if the decision to copy is spontaneous, if the instructor accumulates copies over a period of time or collects other copies so as to constitute an anthology, this would not, according to the committee reports, be fair use.<sup>29</sup> The problem is determining at what point the instructor has really prepared an anthology or set of readings. So long as the number of items is relatively small and they are not used without permission for more than one semester, such copy conceivably comes within fair use.<sup>30</sup> With respect to spontaneity, nothing in section 107 suggests that either the teacher's initiative or pressure of time is indispensable to a fair use finding.<sup>31</sup>

The guidelines say copying meets the cumulative effect test if—

- not more than one article (or essay or two excerpts) is copied from the same collective work or periodical volume during one class term, and,
- there is not more than nine instances of such multiple copying for one course during one class term.

In addition, copying shall not:

- (a) substitute for the purchase of books, publishers reprints or periodicals; . . .
- (c) be repeated with respect to the same item by the same teacher from term to term.<sup>32</sup>

Thus one writer said that he doubted that a court would hold that copying of a considerable number of complete articles and distributing substantially the same group semester after semester to students in lieu of (or possibly even as a supplement to) a textbook would be eligible for remission of statutory damages.<sup>33</sup> In a survey taken of twenty-seven New York libraries, three said they were restricting all photocopied material to one-term use while fifteen said they were not. Several librarians felt

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<sup>26</sup> 17 U.S.C.A. § 107 (Historical note, page 114).

<sup>27</sup> Donnell, *supra* note 1, at 37.

<sup>28</sup> Educators, Fair Use, and the New Act: *supra* note 4, at 139.

<sup>29</sup> Donnell, *supra* note 1, at 27.

<sup>30</sup> *Id.* at 38.

<sup>31</sup> Stedman, *supra* note 21, at 266-267.

<sup>32</sup> 17 U.S.C.A. § 107 (Historical note, page 114).

<sup>33</sup> Donnell, *supra* note 1, at 33.

strongly that there was no need to restrict items to one-term use since the copyright law and the guidelines forbid the repeated *copying* of material but nowhere forbid the repeated *use* of material.<sup>34</sup>

#### E. *Guidelines as a Whole*

The guidelines state merely the minimum extent of fair use in connection with teacher photocopying. It remains open to the courts to determine that given acts of photocopying, although they go beyond the limits of the guidelines, nevertheless constitute fair use.<sup>35</sup> William Nasri, a lawyer and librarian at Pittsburgh University, said:

The reserve room is not included per se in the new law, but the room's purposes and functions are probably very close to classroom use, if not an extension of it. I believe the fair use guidelines for classroom use apply to the reserve room. Therefore, there is no problem in putting a single copy of an article or a chapter from a book . . . on reserve. Copying could be done by either the professor or the library staff. It would behoove the library to prepare a put-on-request form which would indicate that the professor owns the copy which he acquired for his own study or research. The form should be signed by the professor, submitted with the copy, and kept on file in the library. The library should return the photocopy to the professor at the end of the term.<sup>36</sup>

Strictly speaking, the guidelines represent merely the Congressional committees' understanding of what the courts would regard as fair use in applying the traditional judicial doctrine of fair use. Congress does not purport to substitute its judgment for that of the courts in any particular case. Nevertheless, one commentator says that it seems clear that the courts will be greatly influenced by this understanding, so that for practical purposes the guidelines may usually be regarded as the equivalent of statutory text.<sup>37</sup>

Some have simply accepted the guidelines as part of copyright law. Robert Wedgeworth has surmised that copyright permission would be required in most cases where a professor tried to put a quantity of photocopies on reserve. To back up his opinion, Wedgeworth noted that the guidelines, which authorize multiple copies in certain cases, "emphasize that the item must be brief and the circumstances under which the copies were made for classroom purposes were spontaneous."<sup>38</sup> Fifteen of twenty-seven libraries surveyed have based their policies on both the concept of fair use and the guidelines.<sup>39</sup>

However, others view the guidelines differently. Although most of the legislators voting on the bill may have thought these guidelines represented agreement by all relevant parties, the American Association of University Professors and the American Association of Law Schools separately notified the House Judiciary

<sup>34</sup> *Copyright and Reserve Books—What Libraries Are Doing*, COLLEGE AND RESEARCH LIBRARIES NEWS, no. 5: 125, 157 (1978).

<sup>35</sup> NIMMER, *supra* note 2, at 13-66.

<sup>36</sup> *Copyright and Reserve Shelf: More on Library Liability*, 103 LIB. J. 416, 416-17 (1978).

<sup>37</sup> NIMMER, *supra* note 2, at 13-66.

<sup>38</sup> *Copyright and reserve shelf*, *supra* note 12.

<sup>39</sup> *Copyright and Reserve Books*, *supra* note 34, at 126.



Committee that they thought the guidelines unworkable. This, as well as the specific disclaimer in the agreement of intent to limit the definition of fair use by the courts, may weaken the likelihood that a court would apply them literally as criteria in determining a case.<sup>40</sup> Another writer has noted that vagueness in the terms of the guidelines is mitigated by the fact that they are guidelines and not minimum standards of fair use in education. An alleged infringer not clearly within the proscription of the guidelines may still assert a defense based upon the terms of fair use.<sup>41</sup>

John Stedman, emeritus professor of law at the University of Wisconsin and chairman of the AAUP Committee on Copyright Law, contends that the guidelines refer only to classroom usages and say nothing about reserves.<sup>42</sup> He says there is nothing in either the provisions of section 107 or the committee reports to support the restrictive test set forth in the guidelines or to suggest that the fair use defense is not available to one who goes beyond these guideline limits in classroom use or in reserve photocopying.<sup>43</sup> "The classroom guidelines should be taken for what they are—a voluntary agreement as to minimum permissible practices, with the validity still to be determined under the general fair use doctrine set forth in section 107 as to practices that go further than those approved in the guidelines."<sup>44</sup>

The function of faculty in promoting the dissemination of knowledge and ideas should not be thwarted by guidelines that result in cumbersome procedures and costs to educators and educational institutions. One can argue that the guidelines could hinder university teaching.<sup>45</sup> Although not limited in their phraseology to elementary and secondary schools, Stedman notes there are indications that these, rather than institutions of higher education, were what the drafters had in mind.<sup>46</sup> Charles Martell, Assistant to the University Librarian at the University of California at Berkeley, says that legal judgment suggests that since the guidelines are not part of the law, they do not carry the force of law. One interpretation is that the academic community should establish separate procedures that conform to the intent of the fair use provisions as distinct from the guidelines.<sup>47</sup>

Ten of the twenty-seven institutions surveyed in New York felt strongly that the guidelines do not apply to the reserve operation since it is not an extension of the classroom. These ten have established reserved policies based on the principle of fair use.<sup>48</sup>

#### IV. FAIR USE IN GENERAL

The rationale of the fair use doctrine—the right to copy without permission of the copyright holder in some instances—is that the purpose of the copyright system

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<sup>40</sup> Donnell, *supra* note 1, at 30. The committee's report, noting the objections, made these points: (1) representatives of higher education helped develop the guidelines, (2) the purpose of the guidelines was to state the minimum and not the maximum standards of educational fair use, and (3) the guidelines themselves acknowledged that there may be instances not within the guidelines that nonetheless are within fair use. (H 10881; 1976 House Report, p. 72).

<sup>41</sup> *Educators, Fair Use, and the New Act*, *supra* note 4, at 141.

<sup>42</sup> Stedman, *supra* note 21 at 266.

<sup>43</sup> *Id.* at 267.

<sup>44</sup> *Id.* at 267-268.

<sup>45</sup> Donnell, *supra* note 1 at 31.

<sup>46</sup> Stedman, *supra* note 21, at 266.

<sup>47</sup> Martell, *Copyright Law and Reserve Operations—an Interpretation*, COLLEGE AND RESEARCH LIBRARIES NEWS, no. 1: 1, 1-2 (1978).

<sup>48</sup> *Copyright and Reserve Books*, *supra* note 34, at 126.

is to promote the dissemination of knowledge and ideas. However, to give the copyright holder a complete monopoly would thwart the policy objective. Therefore, reproducing portions of copyrighted works for purposes of teaching and research and similar uses that promote the underlying policy objective is permitted without approval of the copyright holder.<sup>49</sup> Equitable principles, as applied by the courts, arguably tend to favor educational use over copyright owners' right to profit.<sup>50</sup>

Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts probably should be free to adapt the doctrine to particular situations on a case-by-case basis.<sup>51</sup> The House Committee report said: "Since the doctrine of fair use is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."<sup>52</sup> With time, this vagueness in the law may be further clarified, but a degree of flexibility is inherent in it.<sup>53</sup>

Anyone who has had much experience in trying to gain permission to copy knows that this is often a time-consuming and frustrating endeavor. This should be taken into account in determining fair use in any particular situation.<sup>54</sup> A balancing of the burdens upon users (in terms not only of financial costs but also of uncertainty, delay and *nonuse*) of denying the right to engage in reserve photocopying against the miniscule benefits likely to accrue to copyright owners supports a conclusion that reserve copying, within reason, should be deemed a fair use under section 107.<sup>55</sup> Some people believe that the reserve collection is more like the classroom and deserves the same kind of latitude allowed in classroom situations.<sup>56</sup> Reserve photocopying incontrovertibly qualifies as being "for non-profit educational purposes" (section 107). Furthermore, if it is permissible to make "multiple copies for classroom use" (section 107), it would seem to follow logically that one could make a small number for use under the restrictive conditions that typically apply to a library reserve program.<sup>57</sup>

The guidelines for classroom copying of books and periodicals are highly arbitrary but when combined with the reasonable and equitable concept of fair use, the result is a flexible rule allowing the distribution of a whole work or a whole portion of a work if the length of the distributed portion approximates the limits in the guidelines. Consequently, libraries would have freedom to fill teachers' requests for multiple copies for teaching purposes without any genuine fear that requests from "unfair users" would be difficult to identify.<sup>58</sup>

#### A. *Reserve Room as Agent*

As a rule of thumb, it could be considered fair use (unless and until the courts rule otherwise) for a teacher either directly or operating through a library to put on

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<sup>49</sup> Donnell, *supra* note 1, at 18-9.

<sup>50</sup> *Educators, Fair Use, and the New Act*, *supra* note 4, at 146.

<sup>51</sup> H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976).

<sup>52</sup> *Id.* at 65.

<sup>53</sup> D. JOHNSTON, COPYRIGHT HANDBOOK 9 (1978).

<sup>54</sup> Donnell, *supra* note 1, at 31.

<sup>55</sup> Stedman, *supra* note 21, at 265-66.

<sup>56</sup> *Copyright and Reserve Shelf*, *supra* note 36, at 416.

<sup>57</sup> Stedman, *supra* note 21, at 264-265.

<sup>58</sup> Treece, *supra* note 10, at 1039-40.

reserve those materials that could be distributed to individual members of the class consistent with the fair use doctrine; a practice that a teacher can engage in directly should be permissible acting through a library as agent.<sup>59</sup> What a user may do for himself, he should be able to have another do for him. A handicapped fair user surely may ask another to reproduce a copy for him. Nothing in the statute suggests that a user with a privilege to photocopy must himself operate the machine or lose the privilege.<sup>60</sup> Thus if an instructor puts on reserve several copies of an article from a recent issue of the *Wall Street Journal* or *Time* in lieu of distributing a copy to each member of the class, the librarian, who is given no right to make multiple copies under section 108, is acting as agent for the instructor.<sup>61</sup>

### B. Solutions and Procedures

Progress is being made in developing a clearinghouse that would provide a single source of licenses for photocopying material owned by cooperating copyright holders. The Copyright Clearance Center (CCC) is an organization formed by serials publishers to facilitate the obtaining of permission to copy their serials. Once a library is registered with the center it can keep a log of copies made and need make payments only monthly or quarterly, depending on the volume of copying it does. The prices per copy are listed on the title pages of every journal article of the member publishers, beginning with 1978 issues. The center also distributes a handbook with prices for articles before 1978. More and more publishers will be participating in this center.<sup>62</sup> The CCC, a nonprofit organization, was set up to facilitate photocopying by libraries beyond that permitted by sections 107 and 108. As of February 1, 1978, 122 publishers had registered 1,120 periodicals—predominantly scientific, technical and medical. The median price set by publishers for photocopying an article published prior to February 1, 1978 was \$2.25. The chairman of the CCC said it was a service organization and had nothing to do with setting prices or with monitoring compliance with the law and interpreting it.<sup>63</sup> If this kind of licensing system, based upon individual transaction licenses with varying prices per work, does not prove workable, it may be necessary to go to a blanket licensing system.<sup>64</sup>

Law librarian J. Myron Jacobstein, of Stanford Law School, urges that every library administrator have a written statement on photocopying policy and submit this statement to the institution's legal counsel for approval. Even if the librarian does not receive a reply, he or she would be in much better position with respect to section 504.<sup>65</sup> It may be necessary for colleges and universities to send notices to their faculty each term or year reminding them to request copyright approval well in advance (though some say that most faculty would never go to this trouble). Libraries could also include such a reminder on all their correspondence to faculty

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<sup>59</sup> Stedman, *supra* note 21, at 268.

<sup>60</sup> Treece, *supra* note 10, at 1039.

<sup>61</sup> Donnell, *supra* note 1, at 34.

<sup>62</sup> Ray, *One Solution*, COLLEGE AND RESEARCH LIBRARY NEWS, no. 6: 161, 162 (1978). (CCC's address: Box 765, Schenectady, N.Y. 12301)

<sup>63</sup> *Strong Start Reported for Copyright Clearance Center*, 213 PUBLISHERS WEEKLY 78, 78-9 (February 27, 1978).

<sup>64</sup> NIMMER, *supra* note 2, at 13-79.

<sup>65</sup> *Copyright and Reserve Shelf*, *supra* note 12, at 310-11.

dealing with reserve operations.<sup>66</sup> Care should be taken to avoid unreasonable and excessive photocopying.<sup>67</sup>

If the faculty members inform the library that they intend to reuse the material, the reserve librarian could try to purchase the reprints and keep accurate records of these requests and purchases. This may involve tremendous paperwork but these records are important because the library is more liable than an individual faculty member to be cited with violations of the law.<sup>68</sup> The burden of persuading a judge or jury that a use of a copyrighted work was fair is upon the party charged with infringement. If a library's records show that photocopies were provided for patrons who are fair users, these photocopies need not be included in section 108 photocopies, if the library is treated as an agent of the user.<sup>69</sup>

With respect to multiple copies, William Nasri has said a two-week period of waiting for permission to photocopy is sufficient to prove the librarian's good intentions. At the end of this period, the librarian might be able to put the material on reserve and pay the royalty later. The librarian can, of course, always withdraw and discard the reserve material if the copyright owner refuses to grant permission despite the librarian's willingness to pay.<sup>70</sup> Another librarian has said that his library is not waiting to receive permission before making copies since he does not anticipate absolute refusals.<sup>71</sup> Librarians, not the teaching faculty, should perhaps take the initiative in the dealing with authors and publishers so that they can compile records that prove they have acted in good faith.

#### V. LIBRARY RESERVE OPERATION PROPOSALS

Paying deference to the guidelines (which—as discussed above—may not be binding), the reserve operation should keep the following records for photocopies the library itself makes:

- the teacher for whom the photocopy was made;
- the date the teacher first learned of the article;
- the date of the request to photocopy it;
- the number of students in the course;
- the title of the course;
- the number of semesters the photocopies will be used;
- the complete citation of the article—
  - author
  - title of article
  - name of periodical
  - volume
  - date

Clearance or payment should perhaps be attempted through the Copyright Clearance Center for photocopies which will be used for more than one semester.

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<sup>66</sup> Martell, *supra* note 47, at 4.

<sup>67</sup> Stedman, *supra* note 21, at 267.

<sup>68</sup> Swinton, *A Personal View from Penn. State*, COLLEGE AND RESEARCH LIBRARY NEWS, no. 5: 129 (1978).

<sup>69</sup> Treece, *supra* note 10, at 1040.

<sup>70</sup> *Copyright and Reserve Shelf*, *supra* note 36, at 417.

<sup>71</sup> Ray, *supra* note 62, at 162.

However, this is arguably not necessary if the reserve room is the agent of the faculty member and if the guidelines do not apply to a university library reserve operation.

When a faculty member puts photocopies (single or multiple) of something on reserve, the photocopies should be identified as belonging to that faculty member and should include full bibliographic information.

If a notice of copyright does not appear on the first page of copied material, the required notice should be stamped on in substantially the following form:

Copyright 1978 by John Doe.

## VI. CONCLUSION

Publishers who hold most of the more valuable copyrights undoubtedly are somewhat reluctant to sue teachers, particularly college professors who frequently make the decision on textbook acquisitions and influence library acquisitions.<sup>72</sup> Probably only the gross violation, the massive infringements, would spark the necessity for judicial resolution.<sup>73</sup> Some libraries have placed no limitations on photocopied material, stating that if an instructor supplies multiple photocopies for reserve use, the library will assume the instructor is acting in full knowledge of his or her rights under the new copyright law and the library will accept the material without requiring proof that permission to duplicate has been granted.<sup>74</sup> The library could assume that such photocopies are in the fair use category unless they obviously are not. For example, the photocopying of an entire play published by itself or of an entire book is clearly not fair use. Also, the reserve operation should pay special heed to any article that comprises more than one-third of an issue and to any article or excerpt that exceeds twenty-five pages.

Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright.<sup>75</sup> Fair use should be essentially supplementary by nature.<sup>76</sup> One can only guess what practices courts will hold to fall within the fair use doctrine. Probably the courts will try to give effect to the intent of Congress of promoting the dissemination of knowledge and ideas and of encouraging, through the hope of financial reward, inquiry, scholarship, and publication.<sup>77</sup> If the copied materials come within the fair use test applied pursuant to the "multiple copies for classroom use" provision or meet the criteria of section 108, such use should probably be deemed reasonable for reserve purposes, both because this conclusion seems to conform to the basic thinking of the Congress as expressed in sections 107 and 108 (since injury to copyright owners would be minimal) and because a contrary holding would pose serious enforcement problems—a result that courts are unlikely to view with much enthusiasm.<sup>78</sup>

In approaching the law and the guidelines, relentless literalism is no substitute for good judgment and a basic understanding of the law's intent to balance the rights of creators on the one hand and the public's right to information on the

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<sup>72</sup> Donnell, *supra* note 1, at 20.

<sup>73</sup> *Educators, Fair Use, and the New Act*, *supra* note 4, at 147.

<sup>74</sup> *Copyright and Reserve Books*, *supra* note 34, at 126.

<sup>75</sup> S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975).

<sup>76</sup> *Id.* at 65.

<sup>77</sup> Donnell, *supra* note 1, at 30-31.

<sup>78</sup> Stedman, *supra* note 21, at 266.

other.<sup>79</sup> A practice that appears reasonably within the language and spirit of the new law and which is important in the furtherance of higher education may and should be pursued up to the point where such practice is authoritaively held to constitute infringement. To refrain from practices that can reasonably be deemed permissible is a disservice to the cause of education and runs the risk of setting a pattern of conduct that ultimately grows into a legal interpretation of the law.<sup>80</sup>

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<sup>79</sup> A.L.A. and A.R.L. Address, *Copyright Clearance*, 8 AM. LIB. 624, 625 (1977).

<sup>80</sup> Stedman, *supra* note 21, at 267.