IMPACT OF THE COPYRIGHT LAW
ON COLLEGE TEACHING

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Typical of the notices prominently displayed near copying machines in college and university copy centers is the following warning: "Congress by statute, has forbidden the copying of the following subjects under certain circumstances. Penalties of fine or imprisonment may be imposed on those guilty of making such copies." Among the subjects listed are "copyrighted materials of any manner or kind without permission of the copyright owner."

Notices such as this one, along with a highly publicized suit against professors at New York University, have magnified the dilemma faced by college professors in attempting to provide the best possible education for their students. The former U.S. Register of Copyrights, David L. Ladd, has said recently that the "photocopying issue still has not gone away," despite the emergence of problems associated with even newer technologies.\(^1\) This is nowhere more true than in college and university classrooms where the problems professors face in providing multiple copies of instructional materials to their students or in disseminating educational materials through library reserve mechanisms is an illustrative paradigm. As one scholar has commented, "To ask librarians and users of library materials to determine whether a particular work may legally be copied under this [copyright] statute is indeed like asking an ancient Greek-in-the-street to understand, without the help of priestly interpreters, the cryptic words of the Oracle at Delphi."\(^2\)

Although federal copyright law contains specific educational exemptions for the performance and display of copyrighted materials,\(^3\) this paper will focus only on those provisions (and various interpretations thereof) that are directly relevant to photocopying for classroom or library reserve use. It will analyze the dilemma faced by college professors; it will report the results of a case study of the use of scientific articles in a college classroom; and it will review various approaches for dealing with the issue of multiple copying. The complexities inherent in using library reserve mechanisms to disseminate information to students will then be considered, followed by a review of
legislative and judicial guidance on the "fair use" of copyrighted materials. The concluding section will outline possible solutions to the problem of information dissemination in higher education.

The copyright issues dealt with in this paper represent only a small part of a much larger problem that affects not only students and teachers but all of society. Apart from the continual need for individuals and communities to educate themselves in order to preserve the fabric of democratic society, institutions of higher education have been created for the express purpose of performing the essential public function of educating students and creating new knowledge. This new knowledge, coupled with ever-increasing technological sophistication, has the potential to enhance the fundamental mission of higher education. As publishers and other disseminators of knowledge lose more control over the process of dissemination, however, many are redoubling their efforts to enforce traditional and possibly outmoded notions of economic protectionism and piracy. The private, limited monopoly of copyright is legitimate, however, only insofar as the public good is thereby promoted; ideally public and private interests should coalesce and, ultimately, it may be a practical necessity that they do. The implications for public policy of any unreasonable restrictions on the exchange of information and ideas in college and university classrooms, and the ultimate diminution of knowledge production, can hardly be overstated: In addition to furthering individual development, education is a means to desirable social evolution, to political stability, and to economic and national security. If effective teaching were inhibited by federal copyright provisions, with no corresponding public benefit, free speech principles would be eroded and our long-term national interests threatened.

**Federal Copyright Provisions**

The copyright clause of the U.S. Constitution, by its terms, grants Congress the power "[t]o Promote the Progress of Science and useful Arts by securing for limited
Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.\textsuperscript{5} However, as the Supreme Court said in 1984: "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved."\textsuperscript{6} Because the first amendment limits undue governmental interference with free intellectual exchange,\textsuperscript{7} and the Constitution is the supreme law of the land,\textsuperscript{8} if portions of the Copyright Act of 1976\textsuperscript{9} were held to violate first amendment principles, either on their face or as applied, they could be rendered inoperative.\textsuperscript{10} Meanwhile, professors and other users of copyrighted materials will have to adhere to the presumption that federal copyright provisions are constitutional\textsuperscript{11} and seek to interpret and apply them in good faith.

It is likely that the major provisions of the Copyright Act\textsuperscript{12} are now known, at least superficially, to educators and scholars. The Act provides that the owner of a copyright has exclusive rights to reproduce the copyrighted work, to prepare derivative works, to distribute copies, and to perform or display the work publicly.\textsuperscript{13} These exclusive rights protect the copyright owners' interest in the manner of expression but not the ideas expressed. That ideas, along with procedures, processes, systems, methods of operation, concepts, principles, and discoveries are not protected,\textsuperscript{14} has been thought to accommodate copyright protection to the underlying purposes of the first amendment free speech provisions, particularly the preservation of a democratic system and the realization of individual personal development. In defending the usefulness and reasonableness of the idea-expression dichotomy for furthering self-governance, a noted copyright scholar, Melville Nimmer, has argued that "[i]t is exposure to ideas, and not to their particular expression, that is vital if self-governing people are to make informed decisions."\textsuperscript{15} Even though this may generally be true, it is not always desirable or possible to rely exclusively on the effective or accurate communication of ideas apart from their manner of expression. It is often exposure to the particular medium and
manner of expression, as much as to ideas themselves, that conveys meaning. Ideas are evoked by the emotive aspect of language as well as the cognitive aspect.\textsuperscript{16}

It is also a dubious assumption that exposure to ideas per se will not be constrained if access to their particular expression is limited. We may hope that those individuals and libraries that can afford to buy publications and lend them to others will do so, but not all can. Thus, access to ideas is effectively limited by copyright and must be justified by the benefits resulting from economic protectionism. It may be that many authors would cease to write if their profits were lessened, but this is not a truism; it is a particularly erroneous assumption with regard to scholarly writing, which often is motivated by professionalism and/or humanitarianism, and which is accomplished with substantial public subsidies.

Nimmer has also argued that the self-fulfillment function of freedom of speech "does not come into play" when one is denied "the right to reproduce an author's expression."\textsuperscript{17} While it may be true that "[o]ne who pirates the expression of another is not engaging in self-expression in any meaningful sense,"\textsuperscript{18} one must read or otherwise have access to the expression of others in order for the self-fulfillment that derives from inter-communication to be effected. The point is not that we should allow the wholesale reproduction of copyrighted works, and especially not for profit, but that we should recognize and justify those limitations on freedom of speech that do, in fact, derive from copyright protections. That we are dealing with potential limitations on the development of human personality and the preservation of democracy suggests that serious attention should be given to the evidentiary justification for a limited copyright monopoly, especially in the educational context.

The limited monopoly granted to copyright owners by Section 106 of the Copyright Act is qualified by an exception that is of particular importance to college professors. Section 107 qualifies owners' rights by indicating that others may make "fair use" of materials for purposes of "criticism, comment, new reporting, [and] teaching (including
multiple copies for classroom use), scholarship, or research. ..."19 (See Appendix A.) The provision relating to multiple copying, apart from its inherent importance to college professors, is notable because it gives statutory approval to a non-traditional fair use--the copying of expression, which has been called an iterative or intrinsic use. Thus, Section 107 itself suggests that Congress did not intend the idea-expression dichotomy to preclude iteration for certain defined purposes.

The fair use provisions of Section 107 of the Copyright Act, which were culled from a long history of judicial decision, list some of the factors to be considered in judging whether a particular use is fair. These statutory factors are:

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.20

If this were all that had to be considered, the practice of making multiple copies for classroom use and the attendant question of any limitation on the exchange of information and ideas in higher education would appear less problematic than it now does.

Multiple Copying: A Problem for College Professors

A major complicating factor in a professor's decision to make multiple copies of book chapters or articles for instructional use stems from the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions (Guidelines or Classroom Guidelines)21 drawn up by the ad hoc Committee on Copyright Law Revision, the Authors League of America, Inc. (Authors League), and the Association of American Publishers, Inc. (AAP). (See Appendix B.) Although not a part of the federal statute itself, the Guidelines have been adopted by some colleges and universities; they have been widely quoted and relied upon by many instructors; and they are part of the legislative history of the copyright law. As Melville Nimmer has explained:
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, 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.22

Although it is certainly arguable that the Guidelines should be "regarded as the equivalent of statutory text," the fact that a noted authority on copyright law has made the suggestion can only add to the dilemma presented by the substance of the Guidelines themselves.

Provisions in the Guidelines relating to multiple copying for classroom use are extraordinarily restrictive, allowing one copy per student if the tests of brevity, spontaneity, and cumulative effect are all met. These tests would allow a professor to use an article, for example, if it were less than 2,500 words (approximately six printed pages); if the inspiration to use the article did not allow time to request permission; and if not more than nine articles were copied for use in a single college course. The cumulative effect test would also prohibit the copying of more than one article or two excerpts from articles by the same author and the reproduction of more than three articles from the same work or volume.

Even if college professors could meet the often insurmountable test of spontaneity, for those who might want to copy articles of more than 2,500 words, the brevity limit would be the lesser of 1,000 words or ten percent (but at least 500 words). This leads to the anomalous result that only 500 words (1-2 pages) could be copied from an article that was over 2,500 words (approximately 12 pages). For articles of 10,000 words or more (approximately 24 or more pages), only a thousand words (approximately 2-3 pages) could be copied. Given the need to transmit ever-increasing amounts of new knowledge through education, the comment by one group of observers that "these minimum standards normally would not be realistic in the University setting"23 seems understated.
Although the authors of the Guidelines have said explicitly that the guidelines are minimum standards that are not intended to limit fair use,\textsuperscript{24} the Guidelines have been actively disseminated and promoted by the AAP and the Authors League\textsuperscript{25} and accepted by defendants in a number of recent consent decrees.\textsuperscript{26} If professors are not vigilant and do not make full use of the fair use exception to a copyright holder's exclusive rights, these minimum Guidelines could readily become maximum limitations to the right of fair use.

It is likely that the long-standing practice of multiple copying for classroom use is still a wide-spread phenomenon on college and university campuses. Although some of the copying is no doubt legal, some of it may be illegal under current copyright provisions. Even among professors who have an incomplete understanding of the provisions of the federal copyright law, there are those who make every effort to comply with their personal conceptions of the law, there are those who disregard the law, and there are those who seek to evade the law in a variety of ways: "I simply lend the articles to a student in the class and I don't ask what is done with them."

Is it legal for a professor to lend her personal copy of a journal to a student so that a particular article can be copied for the student's use? What if the professor instead lends the student her personal photocopy for the same purpose? What if the student decides to make multiple copies of an article from the journal or from the photocopy to distribute to other members of a class taught by the professor?

Some professors who seek to disseminate information to students have sought (without permission or payment) to avoid the problems implicit in these questions by placing photocopies of journal articles, or the journal itself, on the library reserve shelf. This solution is fraught with similar problems: Can the professor submit his personal photocopy to the library without permission of the copyright holder? Can the professor first make an added copy for his own use? Can the library photocopy the article from its own collection or request it through inter-library loan for reserve...
purposes? If any of these means to dissemination are legitimate (without approval of the copyright holder), can more than one copy be placed on reserve for the use of a large class?

Before outlining an approach to dealing with the types of questions elicited by the Copyright Act, data derived from an informal survey of seventeen publishers will be used to suggest the problems college and university professors may encounter when they attempt to provide the most effective education to their students. For those professors who seek to abide by copyright provisions, but are not satisfied with providing limited access to journal articles through library reserve mechanisms, it may be necessary to seek permission from copyright holders in order to use multiple copies of journal articles in the classroom.

Using Scientific Articles in a College Classroom: A Case Study

Survey data were obtained from correspondence sent and received on behalf of a professor who desired the use of a set of articles for a course in the Spring of 1983. The particular course was an advanced science seminar taught to undergraduate pre-medical majors at a liberal arts college. In addition to a textbook purchased by twenty-five students for under fifteen dollars, the purposes and nature of the course made it necessary for the students to read a large number of recently published articles. The instructor's intent was to teach the students not only the substance of the articles but how to read and evaluate recent scientific and medical research. Because students needed access to the actual articles, this example illustrates a situation where the usual distinction between ideas (which are not subject to copyright protection) and the expression of ideas (which generally is subject to copyright) does not solve the professor's problem.

Rapid scientific advances led the instructor to select primarily articles published between 1972 and 1982. Most of the ninety-seven articles selected were relatively
short, technical articles, averaging eight pages in length. The longest article was thirty-five pages and the shortest only one page. One article was selected from a semi-popular magazine; the rest had been published in scholarly journals.

Because the articles were selected well in advance of the course, which is the typical practice among college professors, their inclusion did not meet the test of spontaneity. This made requests to publishers for permission to use them presumptively necessary. In all, seventeen publishers were contacted by letter in the Fall of 1982. Two letters were returned with the notation "return to sender," one letter was sent to the wrong publisher, and there were two instances of no response. An additional response was received, dated June of 1983, well after the course had been completed.

Of the responses received, permission was given without charge by nine publishers to use forty-nine articles. Charges were made, primarily for permission to copy and use the articles rather than for reprints, by eight publishers of forty-three articles. Despite the informality of this survey, these results are strikingly similar to the results of studies included in the 1983 Report of the Register of Copyrights. Of the U.S. publishers of scholarly, scientific, and technical (SST) journals who received requests for permission to make photocopies in 1980, about 73% of the sample reported that they granted all requests in full; about 56% of these permissions required no payment.

When charges were imposed by publishers in the informal survey, they ranged from $.02 per page per student to $1.75 per page, with the average cost per page being $.35. Of the nine publishers not requesting payment for the use of articles, three were professional organizations, five were private publishing companies, and one was a university press; the eight publishers requesting payment were private publishing companies with no professional affiliation. While two publishers limited the number of multiple copies that could be made by the instructor to twenty-five and thirty, respectively, reflecting the number of students enrolled in the course, one publisher of a total of three articles asked for payment to reproduce a minimum of 100 copies.
even though permission was requested for only twenty-five. Charges of $.15 per page per student were requested for multiple copies of a scientific article authored by the instructor.

If the instructor had chosen to make multiple copies for use in the course, as was the original intention, the per-student cost would have been $108 for permission to use the articles and an additional $25 for copying costs. Assuming the department or the college were able to absorb the costs for the twenty-five students involved, the total expenditure for this one-time use would have been over $3,000. Because it was not thought feasible for either the students or the college to pay the charges, the instructor duplicated and provided free of charge to the students only the articles requiring no payment and made arrangements for the other articles to be placed on reserve in the library. All twenty-five students in the course found it necessary to make their own copies of the articles because of frequent classroom references to particular substantive details, tables, figures, and research methods. While it is the policy of the instructor's department to notify publishers of decisions not to make multiple copies, the instructor reported that an occasional publishing company specifically requests verification that multiple copies of the article have not been used.

Although the original intent of the copyright law was to "restate the present judicial doctrine of fair use," which many observers believe to be more liberal than the Guidelines (if not the law) suggest, and not to "change, narrow, or enlarge it in any way,"30 it takes no more than one example to illustrate the dilemma professors face: The manner in which some educators (and many publishers) are interpreting the copyright law, and particularly the well-disseminated Guidelines,31 may be doing a substantial disservice to American higher education. The availability of multiple copies in the case study described above was necessary to accomplish course objectives. Multiple copying, arranged by the instructor and paid for by the institution, would have been the most efficient and cost-effective means of providing the materials. Because
paying requested costs to publishers was not economically feasible in this not-for-profit educational situation, the resulting compromise merely shifted the cost and the burden of copying to the students. The publishers did not directly benefit (though students certainly gained familiarity with their journals—a significant value in itself), not because anyone desired to deny them profits, but because of economic constraints.

Mawdsley and Permut note that "[r]ather than allowing the learning process to be defined by the planned creativity of the teacher, the present copyright scheme now appears to be moving toward a limitation of that process to the confines of a particular textbook." With regard to scientific and medical research, which generally is not available in textbooks, it is also significant that much of this work is produced by academics who, because of institutional reward structures and substantial public subsidies, neither seek nor desire economic reward; in fact, professors sometimes pay production costs. Thus, they promote the same public purposes sought to be achieved by copyright law, without the necessity of statutory protection for property interests. That ownership of intellectual property may be a necessity for those who disseminate scholarship needs to be tempered by an understanding that there would be less scientific knowledge to disseminate if it were not for the vast public subsidy of scholarly efforts. A system that does not permit the creators of knowledge and their students (the future creators of knowledge) to benefit, in non-economic ways, may not be in the long-term public interest. Despite the opinion of the Association of American Publishers that copyright infringement in higher education is "widespread, flagrant, and egregious," it is doubtful that most professors resort to multiple copying if alternative efficient and economically feasible methods are available for obtaining necessary educational materials; and even when professors do copy, it may be fair use. Nevertheless, with the threat of personal and institutional liability, it is likely that many instructors and institutions are taking a conservative approach to multiple copying for educational use.
The New York University Settlement: A Conservative Approach to Multiple Copying

On April 14, 1983, New York University (NYU) and nine individual faculty members entered into a consent agreement with nine publishing companies, resolving a judicial dispute that had begun in December of 1982. The publishers had alleged that New York University faculty had violated federal copyright provisions by securing and distributing to their students copyrighted materials without the consent of copyright owners. More specifically, the complaint alleged that the professors regularly caused the making and sale to their students of multiple copies of copyrighted works or "substantial portions thereof." The complaint specifically listed ten books, three book chapters, and four articles that had allegedly been illegally copied; it did not specify what portion of the individual works was copied or how many copies were made.

In resolving this dispute, New York University agreed to adopt, implement, and publicize a particular policy statement on multiple copying for classroom use; to advise the publishers regarding various agreed-upon publicity measures; and to insure compliance with the policy by promptly investigating alleged violations and "taking appropriate action," when necessary, "consistent with remedial and disciplinary actions taken in respect of violations of other important University policies." Furthermore, the university agreed to investigate and inform the publishers of actions taken pursuant to future violations or alleged violations noted by the publishers themselves (or by the Association of American Publishers); nonetheless, the publishers were to remain free to sue individual faculty.

The parties agreed that the policy statement would be followed at least until January 1, 1986, absent a negotiated change. Entitled "Policy Statement on Photocopying of Copyrighted Materials for Classroom and Research Use," it provided, in part, that faculty would follow the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions." (See Appendix A.) (These guidelines contain the tests of brevity, spontaneity, and cumulative effect discussed above.) Pursuant to the
policy, faculty would be asked to determine whether or not proposed copying fell within the Guidelines, and, if it did not, would be obliged to seek written permission from the copyright holder before proceeding. If a negative or unsatisfactory conditional response were received, the faculty member would have the opportunity to consult with university legal counsel. If counsel agreed that the proposed use would be legal, the individual faculty member would be protected if infringement were later proven.

On June 10, 1983, about two months after the New York University dispute had been settled, Townsend Hoopes, President of the Association of American Publishers (AAP), wrote to college and university administrators. Enclosing the New York University Policy Statement (including the Guidelines for Classroom Copying), he urged administrators to give "serious attention" to the statement for the purpose of influencing the policies of their institutions. He cautioned that the policy was not intended to "prohibit the photocopying of copyrighted works for educational purposes, but to make photocopying subject to reasonable and lawful limits." He urged that the policy statement be adopted by the institutions contacted, and made clear, in closing, that "[t]hrough this Association (AAP), publishers will be actively pursuing the goal of formal undertakings and assured copyright compliance by the university community as a whole." It has been reported elsewhere that "[c]olleges and universities throughout the country responded to the [NYU] settlement by implementing copyright policies similar to those required at NYU."

The policy approach suggested by the AAP was vociferously opposed by professional library associations, among them the Association of Research Libraries. In a briefing paper prepared subsequent to the NYU case and the AAP letter, the Association of Research Libraries argued, contrary to the AAP's suggestion that the NYU policy statement be adopted by other colleges and universities, that "a better guide to what is permissible and appropriate in the context of higher education" might be found in policies based on the American Library Association's model policy. "This
policy provides a more realistic approach to a university's need to disseminate meaningful and current information in its instructional program than do the arbitrary quantitative standards proposed by the ad hoc Committee/AAP/Authors League guidelines.45

The copyright policy of the American Library Association (ALA), prepared by ALA legal counsel Mary Hutchins and others, interprets the Section 107 fair use provisions of the Copyright Act of 1976 as they apply to research, classroom, and library reserve uses.46 The model policy suggests that faculty "should not feel hampered" by the Guidelines adopted in the New York University settlement but should, nevertheless, "attempt a 'selective and sparing' use of photocopied, copyrighted materials."47 The policy outlines classroom and library reserve practices, using the principle that such practices not have a negative impact on the market for copyrighted materials. While not entirely avoiding problematic numerical guidelines, the ALA policy's conception of the library reserve operation is that it is an extension of the classroom. By faculty request, up to six copies of an article, a book chapter, or a poem copied from the library's own collection may be placed on reserve for student use. Even though many questions are left unanswered, the policy provides an approach to their resolution that is tailored to the needs of higher education. The preface to the ALA policy states:

Too often, members of the academic community have been reluctant or hesitant to exercise their rights of fair use under the law for fear of courting an infringement suit. It is important to understand that in U.S. law, copyright is a limited statutory monopoly and the public's right to use materials must be protected.48

It is important for professors to use their statutory fair use rights because, as the ALA has said (quoting a former U.S. Register of Copyrights), "If you don't use fair use, you will lose it."49 Despite the aggressive position taken by the Association of American Publishers, there have been few suits against college professors and, in recent history, no professors have been held personally liable for copyright infringement. It is likely that much of the copying initiated by college professors is legitimate fair use,
making the copying of materials for educational use a much safer endeavor than some professors may now believe.

**The Library Reserve Operation: A Solution to the Dilemma of Information Dissemination?**

For professors who turn to library reserve in order to solve the problem of making journal articles accessible to students, the first question that arises is whether reserve practices are governed by Section 108 of the Copyright Law (See Appendix C), covering reproduction by libraries, or whether they are governed by the Section 107 fair use provisions. Section 108(d)(1), which is relevant to that question, would allow most college and university photocopying,

from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article [from a] periodical issue . . . if--(1) the copy . . . becomes the property of the user, and the library or archives had no notice that the copy . . . would be used for any purpose other than private study, scholarship, or research. . . .

According to the Report of the Register of Copyrights: Library Reproduction of Copyrighted Works (17 U.S.C. 108), transmitted to Congress by the then Register of Copyrights, David Ladd, on January 5, 1983, the issue of placing copies or multiple copies of journal articles on reserve for student use "did not receive great attention. . . . Thus one is left with the statutes alone for guidance." Because copying for reserve purposes is "not addressed by Section 108," according to the Report, the question of reserve practices must be resolved by reference to the fair use provisions of Section 107.

The exclusive application of Section 107 to reserve operations has not been clear to some librarians and may account, in part, for the common practice of giving to the professor, at the end of the term, articles that libraries may have copied from their collections or received through interlibrary loan (ILL) and placed on reserve at a professor's request. Even though such copying (if accomplished pursuant to Section 108) is done to meet the request of a professor-user, it will be used for purposes other than the professor's "private study, scholarship, or research" if it is placed on reserve.
To argue that the professor's students will use the copy for their "private study" would certainly stretch congressional intent, particularly since Congress did not address reserve room operations. In addition, if the practice of giving reserve items to the professor at the end of the term is meant to comply with the Section 108(d)(1) requirement that the copy become "the property of the user," it ignores the express provision in the same section that the library may not solicit from interlibrary loan or make the copy in the first instance--under Section 108--if the library has notice that it will "be used for any purpose other than private study, scholarship, or research. . . ." Assuming then, in conformity with the Register's Report, that reserve practices are governed primarily by Section 107, what are the limits and the scope of a library's authority to make, solicit, or accept from a professor photocopied materials for reserve?

Controversy has existed over whether a library may acquire a reserve copy of an article through ILL under the fair-use provisions of Section 107. A house report states that "Section 108 authorizes certain photocopying practices which may not qualify as a fair use." Not surprisingly, librarians and publishers have not always agreed on the relationship between Sections 107 and 108, librarians arguing that they may, at times, do more of the types of copying authorized under Section 108, basing their justification on the fair use provisions of Section 107. The Report of the Register of Copyrights says that "The Copyright Office does not believe that Congress intended that there should never be fair use photocopying 'beyond' Section 108." However, the Report concludes that "all ILL copying, a form of systematic copying lawful only via the [Section 108] proviso, could not be a fair use." In view of this definitive conclusion, while not uncontroversial, a library probably should not request a copy of an article through ILL for reserve purposes.

Another question that arises concerning the ILL problem is whether or not Copyright Law would permit a professor to request a copy of an article for actual or potential reserve purposes, knowing that it might be obtained through ILL. Because
Section 108 does not place an obligation on the library to ascertain the reason for a professor's request, and the professor's request itself would be governed by Section 107 (which allows reproduction for teaching purposes).\textsuperscript{61} Section 107 would appear to sanction such a request. Presumably, the library would obtain the copy (possibly from I.L.L. under Section 108) and give it to the professor who would then or later submit it to the reserve room for student use. The only argument that would seem to preclude such a result would be that a copy legally obtained by the professor under Section 107, and by the library as an agent for the professor under Section 108, is only conditionally owned or merely conditionally possessed by the professor. Such an argument is at least impractical since in many instances the professor who secures an article from the library may not know precisely where the copy was acquired— or when— and will certainly regard it as his or her property.

Although the problem of ownership is beyond the scope of this paper, it illustrates again the considerable difficulty faced by professors and others in interpreting the complexities of the Copyright Act. Since "the owner of a particular copy ... lawfully made" can "sell or otherwise dispose of possession of that copy . . . .",\textsuperscript{62} it could be argued that if a professor owns a copy obtained under Section 107, it could be sold—a result probably not intended by Congress. In dealing with the question of "ownership" of copies, Melville Nimmer notes that copies secured by libraries under Section 108 must become the "property of the user."\textsuperscript{63} Although the term "ownership" is not defined in the law itself, it seems reasonable to conclude that the professor who obtains a copy of an article from a library becomes the owner—at least for purposes not inconsistent with Section 107. If this is true, the professor might be able to reproduce and distribute copies for a variety of fair use purposes, whether those purposes were the professor's, a student's, or someone else's.

The uncertainties evident in the above analysis are magnified when one considers the statutorily prescribed warning notice that must be displayed and included on order
forms for library materials—whether those materials come from the library's own collection or from ILL. 64 (See Appendix D.) The notice must say that one of the conditions under which a library may make a copy is that "the photocopy or reproduction is not to be 'used for any purpose other than private study, scholarship, or research.'" 65 This would seem to oblige the library to ascertain the professor's motive for the request and to preclude the use of a copy for other purposes. The very next sentence of the notice says, however, that "[i]f a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of 'fair use,' that user may be liable for copyright infringement." 66 The implication is that the copy can be used for fair use purposes—which include teaching, and which are not limited to private study, scholarship, or research.

The question of libraries copying from their own collections for reserve use has not been controversial—at least when only one article or contribution from a given source has been made. Although Section 107 would seem to permit a library to copy from its collection for reserve teaching purposes—despite the notice discussed above, the Register's Report does not clarify this issue, except by implication. The Report says that a copy received through ILL and intended for reserve is "different from 'in house' reserve photocopying"; 67 the latter presumably is accomplished legitimately by the library as an agent of the professor for "teaching" purposes pursuant to Section 107.

With regard to multiple copying for reserve use, the Report concludes that "[t]he only time when multiple copying is clearly permitted . . . is multiple copying for classroom use, which is the subject of what are known as the 'classroom guidelines' [Guidelines]." 68 Analogizing multiple copying for classroom purposes to multiple copying for reserve room use, the Report suggests that the same guidelines should apply—that is, the guidelines of brevity, spontaneity, and cumulative effect. Furthermore, "[p]ermission should generally be sought before making multiple reserve copies when no 'original' is owned by the library where the reserve copies will be stored." 69 Thus,
according to the Report, the only time when it is reasonable to assume that multiple copies may be placed on reserve without permission and/or payment to the copyright holder is when they (1) meet the classroom guidelines, and (2) are obtained by the library or a professor from the library's own collection.

The Association of American Publishers, Inc. (AAP) and the Authors League of America (Authors League) have argued that library photocopying for teaching purposes, including reserve use, is governed exclusively by the Guidelines developed pursuant to Section 107.70 "The Classroom Guidelines establish standards for copying, either by or for the teacher. Librarians may therefore make copies for the teacher, to the same extent and subject to the same limitations that teachers themselves may make copies."71 While there may be no disagreement that fair use copying by librarians for teaching purposes must be congruent with the professor's fair use right, the question of the scope and limits of a professor's fair use copying is not as clear as the AAP and the Authors League assert.

The controversy over the use of the Guidelines has been noted previously with respect to the multiple copying of articles for use in the classroom. The application of these Guidelines to the question of college and university reserve operations is even more problematic. First of all, the Guidelines concern "single copying for teachers" and "multiple copies for classroom use"; there is no evidence, on the face of it, that reserve uses were considered when the Guidelines were created. Furthermore, the Guidelines' provisions with respect to "single copying for teachers" do not contain brevity limitations: "A single copy may be made . . . by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class. . . ."72 Only the AAP and the Authors League appear certain that reserve copying by libraries or teachers--whether of single or multiple copies--is exclusively controlled by the Classroom Guidelines,73 including the requirements of brevity, spontaneity, and cumulative effect. This view, importing the Guidelines to
the making of even a single copy for reserve use, is highly restrictive (as is the multiple copying view expressed in the Report of the Register of Copyrights) and is in conflict with common practice. If the position of the AAP and the Authors League were accepted, it would effectively prohibit reserve room use of most materials unless permission from or payment to the copyright owner were secured. Even if it were argued that permission costs would be minimal, the complexities involved in seeking and making advance payments would impose repeated and substantial burdens on professors and librarians. Furthermore, if the AAP/Authors League position were combined with the argument that the Guidelines should control multiple copying for classroom use, the effective and efficient dissemination of information to students would be severely curtailed. It is, thus, necessary to turn again to the Copyright Act itself, and to the interpretations of others, for an approach to information dissemination that might better serve the needs of professors and students in higher education.

Section 107 and Congressional Intent

Section 107 of the Copyright Act says that "the fair use of a copyrighted work... is not an infringement of copyright." Specifically delineated as encompassed within the concept of "fair use" is "reproduction in copies... for purposes such as teaching (including multiple copies for classroom use)..." If reserve room operations support the teaching function (as many professors, librarians, and others assume is true), and if reserve room practices otherwise comport with Section 107, it would seem that both single and multiple copies of copyrighted works legitimately may be placed on reserve without payment or permission. For classroom use as well as reserve use, the following factors, taken verbatim from Section 107, would need to be considered in each case:
(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.76

The most important fair use considerations will often be the purpose of the use and "the effect of the use upon the potential market for or value of the copyrighted work,"77 which may account for the suggestion in the Report of the Register of Copyrights that receiving copies for reserve purposes through ILL is "different"78 from making a photocopy of a journal article, for example, from a journal the library owns.

For professors, their non-profit educational use of copyrighted materials will be unproblematic; determining the economic effect of the use arguably could be more difficult. Is one to consider the actual effect of multiple copying, including whether or not particular students could be expected to purchase journals or pay for permissions? Is one to consider the probable effect? The possible effect? The hypothetical effect of extending such a use to all possible users?79 In the informal survey discussed above, it was thought that a student could not have been expected to pay permission fees of $108 (with some per page costs ranging as high as $1.75). Neither professors nor students have any control over these costs and, in many cases, might simply have to do without needed materials.

Looking beyond the classroom are we to consider the economic decision that makes journals, books, or reprints unavailable? Or that makes a book available only in an expensive hard-bound edition? If copying for reserve use is contemplated, are we to consider that libraries are often charged much higher subscription prices for serials than are individuals? On the other hand, how is a publisher to tailor subscription costs to potential aggregate use or judge whether permission costs may be burdensome in particular situations?
While the Supreme Court has recently said that actual harm need not be proven, and that probable future harm must be demonstrated where the use is non-profit, the advice it has given falls short of clarifying whether evidence of harm must take account of particular contexts:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.80

While the admonition of "some meaningful likelihood" of harm seems to entail a contextual analysis, when the Court suggests extrapolating to a hypothetical widespread use, contextual particularities are likely to be lost and the possibility of fair use eviscerated.

For educational endeavors, a non-contextual analysis is inconsistent with much photocopying that is expressly permitted under Section 107. If a professor, for example, made a copy of a chapter from a book for teaching or research, the market value of the book necessarily would be diminished by its cost. If one were to generalize this behavior across countless numbers of professors, the hypothetical market effect could be great. Nevertheless, Congress apparently felt that it was not reasonable, from a public policy point of view, to force the purchase of an entire volume when only a small portion was useful. If effect on market value is not evaluated contextually (e.g., What is the probability that a particular user would simply forego access?), the doctrine of fair use could cease to serve the underlying purposes of copyright. As the case study of the science course suggests, multiple copying often will not have a negative effect on the value of copyrighted works. Where permission costs are great, professors will forego multiple copying or will select other materials. Students will suffer the negative
effects because they will bear the burden of copious note-taking, photocopying, and/or using materials of lesser educational value.

The leading case on educational photocopying, Williams and Wilkins v. United States, supports a contextual approach to determining market effect. In that case, the court approved the large-scale library photocopying of articles from scientific journals for scholarly purposes, finding no proof of actual or potential economic harm to the publisher-plaintiff. If the government libraries involved in the suit had been unable to supply requested copies to users, the court was "convinced that medicine and medical research ... [would be] injured...." It appears that in the absence of clear legislative guidance, the court was prepared to broadly construe the permissible scope of fair use library photocopying for scholarly purposes. The emphasis the court gave to the public interest is consistent with the finding that, before and after Williams and Wilkins, the public interest has been the most pervasive, non-statutory fair use consideration. Solicitude for the public interest is also consistent with the general judicial reluctance, most recently expressed by the Supreme Court, to expand even public-benefit monopolies without clear legislative guidance.

Melville Nimmer has argued that this "landmark case" was "seriously in error" because it denied liability where actual damages could not be proven. Furthermore, according to Nimmer, the court's conclusion regarding lack of damages rested on the conjecture that researchers would give up access to materials, in many cases, if the photocopying at issue were halted. Although the Williams and Wilkins case was decided before the effective date of the new Copyright Act, Nimmer's argument regarding damages is equally applicable to the present law. In answer to his objections, it can be said that proof of damages--whether actual, potential, or hypothetical was not and is not necessarily conclusive on the issue of fair use. There are other fair use considerations, many of which are now enumerated in Section 107, and even these do not include all judicially applicable criteria. More importantly, if conclusions of
economic harm or lack thereof must be based on conjecture, it is probably not unreasonable to favor educational and scholarly use, which more directly promotes the underlying purposes of copyright than does economic protectionism. Nevertheless, facts are certainly needed, in these types of situations, as elsewhere, if the copyright scheme is to survive the onslaught of new technologies while serving essential public purposes. Copyright protection itself is based on the conjecture that economic protectionism is necessary to promote knowledge production and dissemination. Evidence could help to prove or disprove the suggestion that this may not be true in the context of higher education.

There is no doubt that considerable uncertainty exists regarding what Congress actually intended by the fair use provisions of Section 107. As stated in a House Report, "The specific wording of Section 107 ... is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes." As one commentator has noted: "The principle reason for Congress' failure really to define fair use ... is the disorienting impact of photocopying and phonorecording technology." But despite this failure, the "process of accretion," and the explicit congressional approval of restrictive guidelines, it is difficult to believe that Congress intended for the Guidelines it approved to nullify the special attention it had given to non-profit educational use, including approval of multiple copying for the classroom. In responding to those organizations that disavowed the Guidelines as too restrictive in the context of higher education, a House committee noted that higher education representatives had been involved in their drafting and that the Guidelines themselves emphasized that copying beyond what was outlined therein could be considered fair use. Nevertheless, it seems clear, at the present time, that neither Section 107, nor the Guidelines' approach of the AAP and the Authors League, nor the ALA policy approach will definitively enable one to answer all the questions suggested by
the hypothetical professors' remark that she simply lends the articles she is using for a class to a student and doesn't ask what use is made of them. In retrospect, because of the considerable confusion and lack of clarity surrounding Section 107 and the Guidelines, the questions seem inapt. In addition, the case study example of the professor who needed multiple copies of scientific journal articles illustrates that the adoption of the Guidelines advocated by the AAP and the Authors League (and incorporated into the NYU settlement) would be far too burdensome for many teaching situations. More importantly, that example suggests the probable futility of numerical guidelines or inflexible standards for higher education in general.

Congress was aware of the need for flexibility as it discussed the purpose of fair use:

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.95

If the doctrine of fair use is "an equitable rule of reason," as Congress has said, and if "each case raising the question must be decided on its own facts,"96 then it appears, in the absence of statutory clarification or revision, that judicial interpretations of fair use must guide professors' attempts to disseminate information to their students. Lest higher education expect too much from the judiciary, however, it should be noted that "[Congress] has failed to articulate a coherent rationale for copyright, it has failed to define fair use, . . . and it has in the end tossed the fair use question, now thoroughly enmeshed in contradiction, back to the courts."97
The Judicial Doctrine of Fair Use

It has been said that the judicial doctrine of fair use is "entirely equitable and... so flexible as virtually to defy definition." Nevertheless, a theme often repeated by the judiciary is that a fair use must be a reasonable use. Fair use, which inevitably involves public policy considerations, allows those other than "the owner of a copyright to use the copyrighted material in a reasonable manner... notwithstanding the monopoly granted to the owner." An examination of selected copyright cases spanning the last century and a half suggests that judicial determinations of reasonableness have varied according to the public versus private orientation of the judges involved in the various controversies.

The notion of "fair use" emerged in the United States in the case of Folsom v. Marsh (1841), where Justice Story considered the substantive identity of two similar works. Among the various factors that might preclude a finding of "studied evasions" or "piracy," according to the Justice, were "the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information..." In judging whether fair use had been made of a prior work, one necessarily had to consider not only the possibility that similarities might have occurred by chance but, if not, then the fairness of the secondary use in general. The issue for Justice Story was one of piracy or infringement versus fair use, although the term "fair use" did not appear in the legal literature until 1869.

In the Folsom case, the defendants (a writer and a publisher) appropriated 353 pages from a twelve volume, 6,763-page work on the life and writings of George Washington. The plaintiffs had a property interest in these materials (which consisted primarily of Washington's letters) and, therefore, alleged that the verbatim copying constituted an injurious piracy. The defendants claimed that they had a "right to
abridge and select"; that their work was "original and new"; and that the resulting two volume, 866-page work did not constitute piracy.\textsuperscript{104} In determining whether or not the defendants' use was "a justifiable use of the original materials, [one that] the law recognizes as no infringement of the copyright of the plaintiffs,"\textsuperscript{105} Justice Story looked to the quantity and the value of the taking. "[W]e must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."\textsuperscript{106} Even though only a portion of the plaintiffs' work was copied, Justice Story determined that the most interesting and valuable letters had been taken for the defendants' work and that such copying, if engaged in by others, would destroy the value of plaintiffs' copyright.\textsuperscript{107} Although the purpose of the defendants' use was not considered by the Justice, it is significant relative to later judicial developments that he expressed regret that his conclusion of infringement "may interfere, in some measure, with the very meritorious labors of the defendants, in their great undertaking of a series of works adapted to school libraries."\textsuperscript{108}

The judicial focus on the substantiality of the taking and the presumed detriment to private property interests continued in education cases and elsewhere through the middle of the twentieth century. In a case where a music teacher copied and rearranged a copyrighted song, for example, the court examined the copyright provisions and found "little elasticity or flexibility."\textsuperscript{109} Due to this perceived rigidity, injury generally was presumed from the appropriation, without proof of damages.\textsuperscript{110} By the mid-1960s, however, a new perspective evolved that allowed certain types of potentially infringing uses to be declared reasonable and hence non-infringing.

In Rosemont Enterprises v. Random House,\textsuperscript{111} biographical information published in a magazine was later used by the defendant in a new work. The district court narrowly defined fair use, confining its applicability to "scholarly works written and prepared for scholarly audiences."\textsuperscript{112} Based on this formulation, the court determined
that the defendant's commercial purpose precluded a finding of fair use, regardless of the nature of the work. The appellate court disagreed, finding that the arts and sciences should be defined broadly in those instances where the public derives a benefit from the second work.\textsuperscript{113} The court found that commercial motive or gain had no bearing on the consideration of public benefit,\textsuperscript{114} that there was no actual damage to the copyright owner as a result of the secondary use, and that no competition existed between the parties.\textsuperscript{115} Therefore, in balancing the equities, the public interest was deemed of greater importance than potential damage to the copyright owner.

The \textit{Rosemont} case\textsuperscript{116} illustrates the transition to a period where the courts were not eager to find infringement (without a showing of actual harm to the copyright owner) even in cases where the purpose of the use was patently commercial rather than scholarly or educational. When publication of the alleged infringing work entailed a public benefit, the courts did not infer harm to the copyright owner based on mere publication, as they had in the past. Rather, the focus on public benefit tilted the scales toward a finding of fair use. Even in cases of large scale copying, the earlier judicial focus on the substantiality of the appropriation was examined in light of the emerging public benefit theory.\textsuperscript{117}

In the case of \textit{Williams and Wilkins v. United States},\textsuperscript{118} the publisher of medical journals brought an infringement action against a government agency due to the acts of two national libraries, the National Institute of Health Library (NIH) and the National Library of Medicine (NLM). NIH had an in-house photocopying operation where scholars could request copies of articles for their personal research endeavors. NLM had an inter-library loan program through which copies of hard-to-obtain articles could be secured. Although it was found that both services engaged in large-scale photocopying, the court held that the iterative and substantial use of copyrighted works did not preclude a finding of fair use where copying served a public purpose and was limited in terms of the quantities provided and their intended uses. The court did not assume
a negative impact on the value of the copyrighted works and did not "mechanically ... hold that the amount of photoduplication proved ... 'must' lead to financial or economic harm." The public interest has not always been determinative, however, even in non-commercial settings.

In the case of Encyclopaedia Britannica v. Crooks, the plaintiffs were profit-making corporations that created educational materials and distributed them by sale, lease, or rental. These corporations brought an infringement action against a non-profit educational cooperative (BOCES) that regularly videotaped copyrighted works appearing on television and later distributed them to the various schools comprising the cooperative. Although the court noted the liberal application of the fair use doctrine in non-commercial and non-profit educational settings, it found that the BOCES' large-scale videotaping service fulfilled the demand for and interfered with the marketability of the copyrighted materials. "The massive scope of the videotape copying and the highly sophisticated methods used by the defendants in producing and distributing these copies cannot be deemed reasonable, even under the most favorable light of fair use for non-profit educational purposes."

The court distinguished the Encyclopaedia Britannica case from the case of Williams and Wilkins primarily because of the demonstrated harm to the copyright owners. In the former case, unlike the latter, substantial copying fulfilled the demand for entire works, thus affecting potential profits. In addition, Encyclopaedia Britannica intended to invest its profits in the creation of new films. Unlike the situation in Williams and Wilkins, where the creators of the articles were scholars, in the Encyclopaedia Britannica case, a diminution in profits would directly affect the corporations that created the works and thus decrease their motivation to engage in the creative process. Other factors considered by the court included the ready availability of films as compared with journals and the fact that the BOCES cooperative placed no limitations on the works copied at the request of teachers. In
contrast, the copying permitted in *Williams and Wilkins* was limited to single copies of journal articles and to a specified number of individual or institutional requests per month.\textsuperscript{127} Despite many of these considerations, however, the *Encyclopaedia Britannica* case appears to support the proposition that extensive and systematic uses that inflict significant and demonstrable financial harm (or potential harm)\textsuperscript{128} will not be judicially approved, at least in situations where the public interest readily can be served by less intrusive arrangements. On the other hand, as *Williams and Wilkins* demonstrates, where there is no reasonable likelihood of harm to the owners of copyright, substantial, iterative uses may be permitted when they directly serve scholarly purposes.\textsuperscript{129}

Nearly a century and a half of judicial decisionmaking in the United States has produced the now codified doctrine of fair use. The doctrine has evolved from mid-nineteenth century decisions that were private property-oriented to mid-twentieth century decisions that focused on general public benefit. In early cases, where the focus was on "piracy," with all of its negative connotations, the substantiality of the taking and the corresponding presumed negative effect on the market value of the copyrighted work was the predominant consideration. It was not relevant that the alleged infringement directly produced substantial public benefit. Considerations of purpose were subordinated to the substantiality of the taking; and all substantial takings were banned, including those that directly enhanced education. At least by the mid-1960s, however, the judiciary turned its attention to the purpose of the alleged infringing use and, when the use was scholarly, presumed a measure of public benefit that was then balanced against alleged economic detriment. When the judicial focus shifted from private to public benefit, the question of the substantiality of the taking was correspondingly less relevant than the public purpose sought to be achieved.

Even if a precise definition of fair use is still elusive, it appears that the judiciary has evolved an approach to the questions that gives serious attention to those uses that may directly benefit the public. The concern for the public interest
demonstrated in the leading Williams and Wilkins case, however, will not solve the copying dilemma faced by educators. Although college professors who are thought to have infringed copyrights can expect and hope for favorable treatment by the courts, it is hardly a reasonable solution to suggest reliance on the often cumbersome, painful, and expensive judicial process to resolve an important matter of public policy.

**Possible Solutions to the Copying Dilemma**

Frustration with the inconclusivity evident in the Copyright Act, the Guidelines, and the survey of fair use case law is commonly reflected in the legal literature: "If ever an action by Congress has portended a 'chilling effect' on a legitimate activity, surely this Act and its guidelines are classic examples." A note in the Harvard Law Review concludes that the results of applying current copyright law in the context of new technologies "foreshadow either an unworkable scheme of copyright enforcement or a scenario in which social progress in the arts and sciences is inhibited." As copyright owners lose more control over knowledge dissemination, their interpretations of user's rights are likely to become correspondingly more restrictive. If we value the underlying purposes of copyright, which may be served by freedom as well as control, a workable scheme is sorely needed. While the Harvard note stops short of recommending the abandonment of copyright, the solution it proposes deserves much more serious consideration than it is likely to receive. According to the note, a unified and workable theory of copyright could be achieved by limiting an infringing use of a copyrighted work to that use which reproduces the work for commercial purposes: an iterative, commercial use. Iterative, non-commercial uses, like multiple copying of journal articles for the classroom or library reserve, would be non-infringing, as would an interactive, commercial use such as parody, and all interactive non-commercial uses.

Other possible solutions to the problems educators have encountered include an exemption for non-profit educational purposes, a solution Congress has rejected in the
past;\textsuperscript{134} legislative clarification of the scope of fair use in the educational context, which may need to be broadened if information dissemination is to be effective in higher education; and blanket copying licenses, which while administratively complex would at least have the virtue of making costs and profits public. In addition to these statutory solutions, the Copyright Office has made several non-statutory recommendations related to library reproduction of copyrighted materials.\textsuperscript{135} Among the recommendations was the encouragement of collective licensing arrangements, something the American Library Association (ALA) does not wholly endorse because "[t]hey tend to erode fair use," are administratively complex, are not comprehensive, and are unilaterally controlled (including fee-setting mechanisms).\textsuperscript{136} With regard to the recommendation that a surcharge on photocopying equipment be studied, the ALA has responded that most photocopying is not relevant to copyright and, when it is, may nonetheless be fair use.\textsuperscript{137} A further recommendation for a study of compensation schemes based on a sampling of photocopying impressions in various institutions was likewise opposed by the ALA on the grounds that such a system would be too costly relative to likely benefits.\textsuperscript{138} Two commentators have concluded that the only practical options for resolving the multiple copying problem in education are a complete educational exemption and a compulsory licensing system, providing for a yearly blanket fee.\textsuperscript{139}

Clearly the simpler and preferred course of action would be for Congress to amend the 1976 Copyright Act and create a specific exemption allowing multiple photocopying of copyrighted materials. But regardless whether Congress pursues the compulsory licensing or the exemption route, the copyright scheme as it now exists is unacceptable.\textsuperscript{140}

For educators, the Copyright Act is unacceptable not because it lacks appropriate flexibility. Rather, its various interpretations, and particularly the endorsement by Congress of the restrictive Guidelines, have made its application unclear and unduly burdensome. To the extent that the position of the American Association of Publishers is accepted, the Copyright Act will impede effective education and knowledge production
by imposing unacceptable transaction costs on higher education. In the case study discussed at the beginning of this paper—and despite the position of many publishers—good arguments could be made that multiple copying without permission or payment to copyright holders would have been within the "equitable rule of reason" embodied in Section 107. The copying was for non-profit purposes; the articles came from a variety of journals that were owned by the professor or the institution; no more than three articles were selected from any one volume; and permission-to-copy charges were prohibitive under the circumstances. As often may be true in higher education, the imposition of charges for multiple copying merely made student access more costly and difficult rather than in any practical way negatively affecting the value of the copyrighted works. It might even be suggested that relatively free access to journal articles during the years of formal schooling may have long-term economic benefits to publishers; students of higher education will be the future producers of knowledge, as well as continuing consumers.

For those professors who are willing to help define the outer-limits of fair use in higher education, the Copyright Act exempts from fixed statutory damages, but not actual damages, an employee of a nonprofit education institution who "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107." It should be noted that this is more than a subjective standard. Professors must have "reasonable grounds" for their decisions, and proof of fair use apparently falls on the user. Even though actual damages for educational photocopying are likely to be non-existent or minimal, some professors may hesitate to make their own fair use determinations. In the absence of legislative change or clarification, an alternative approach would be for the higher education community—associations of professors, administrators, librarians, and higher education counsel—to develop a coherent, unified, and liberal approach to multiple copying (and other copyright problems as they arise) and be prepared to promote and defend it collectively. Unless
new resolutions to apparently conflicting interests are developed and found to be equitable, this may be the only way that institutions of higher education can help to preserve the essential public purposes of the Copyright Act. Intellectual freedom, a vital first amendment concern, is as important to education and to individual students as it is to democratic society: Reading, thinking, discussing with others, producing and exchanging new knowledge, and making decisions, enables the evolution of conceptions of self and community. Institutions of higher education have more than an interest in effective teaching/learning and the production of new knowledge, they have an obligation to safeguard the means to achieve the very purposes for which they exist.

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APPENDIX A

17 U.S.C., Section 107

Limitations on exclusive rights: Fair use

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for 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.
APPENDIX B

AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN
NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS

WITH RESPECT TO BOOKS AND PERIODICALS

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

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

GUIDELINES

I. Single Copying for Teachers

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

A. A chapter from a book;
B. An article from a periodical or newspaper;
C. A short story, short essay or short poem, whether or not from a collective
work;
D. A chart, graph, diagram, drawing, cartoon or picture from a book,
periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a
course) may be made by or for the teacher giving the course for classroom use or
discussion; provided that:

A. The copying meets the tests of brevity and spontaneity as defined below; and,
B. Meets the cumulative effect test as defined below; and,
C. Each copy includes a notice of copyright.
Definitions

Brevity.

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated as "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity.

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect.

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

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

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
(C) Copying shall not:
   (a) substitute for the purchase of books, publishers' reprints or periodicals;
   (b) be directed by higher authority;
   (c) be repeated with respect to the same item by the same teacher from
term to term.
(D) No charge shall be made to the student beyond the actual cost of the
photocopying.

Agreed MARCH 19, 1976.
Ad Hoc Committee on Copyright Law Revision:
   By SHELDON ELLIOTT STEINBACH

Author-Publisher Group:
Authors League of America:
   By IRWIN KARP, Counsel
Association of American Publishers, Inc.:
   By ALEXANDER C. HOFFMAN,
      Chairman, Copyright Committee
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, if--

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
(3) the reproduction or distribution of the work includes a notice of copyright.

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

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.
APPENDIX D

37 C.F.R., Section 201.14(b)

NOTICE WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.
NOTES


4. Sony Corp. of America v. Universal City Studios, Inc., 104 S.Ct. 774, 782-783. But cf., M. Nimmer, Nimmer on Copyright, sec. 1103[A] (1984) (suggesting that the purpose phrase of the copyright clause "must be read largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise").


7. U.S. Const. amend I ("Congress shall make no law . . . abridging the freedom of speech or of the press . . .").

8. Id., art. VI, sec. 2; see Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).


10. Melville Nimmer, a leading authority on copyright, concludes that the copyright clause (and presumably attendant legislation) "may not be read as independent of and uncontrolled by the First Amendment," however, he also notes that the Supreme Court has not "delineate[d] the respective claims of copyright and freedom of speech." M. Nimmer, supra note 4, at sec. 1.10[A]. The only case to date that has nullified an infringement claim on first amendment grounds is Triangle Publications, Inc. v. Knight-Rider Newspapers, Inc., 445 F.Supp. 875 (S.D.Fla. 1978), aff'd on other grounds, 626 F.2d 1171 (5th Cir. 1980) (affirmed on grounds of fair use). Cf. Brittin, Constitutional Fair Use, 28 ASCAP 178 (1982) (case law suggests that first amendment limits scope of copyright).

11. See, e.g., New York v. O'Neill, 359 U.S. 1, 6 (1959) ("[T]he presumption of constitutionality . . . is the postulate of constitutional adjudication.").

12. 17 U.S.C., Sec. 101 et seq.

13. Id. at Sec. 106.

14. Id. at Sec. 102(b).
15. M. Nimmer, supra note 4, at Sec. 1.10[B].


17. M. Nimmer, supra note 4, at Sec. 1.10[B].

18. Id.


20. Id.


22. M. Nimmer, supra note 4, at Sec. 13.05[E][3][a].


25. See infra note 40 and accompanying text; American Association of Publishers, Inc. and Authors League of America, Inc., Photocopying by Academic, Public, and Nonprofit Research Libraries: A statement on library photocopying of journal articles and other short works under the new copyright law, interim guidelines, and answers to questions frequently asked (May 1978) [hereinafter cited as AAP/Authors League Statement].


27. 17 U.S.C. sec. 102(b); see text accompanying note 14 supra.


29. Id., Appendix I (King Research Report), at p. 4-31.


31. See text accompanying note 21 supra for a discussion of the Guidelines, which are reproduced in Appendix A.


34. News reports have indicated that the AAP will not hesitate to institute judicial proceedings against individuals and institutions. Id. at 27, col. 4. See text accompanying notes 40-42 infra.


36. Id. at 3-17 (S.D.N.Y. Dec. 14, 1984) (complaint).

37. Id. at 5 (consent decree).

38. Id. at Exhibit A (attached to consent agreement).

39. Supra note 21 and accompanying text.

40. Letter from Townsend Hoopes to college and university administrators (June 10, 1983).

41. Id. at 2.

42. Id.


44. Association of Research Libraries, Reproduction of Copyrighted Materials for Classroom Use: A Briefing Paper for Teaching Faculty and Administrators (Although not dated, from its contents it is clear that the briefing paper appeared subsequent to the NYU litigation and the AAP letter.).

45. Id. at 4.

46. ALA Model Policy, supra note 23.

47. Id. at 11.

48. Id. at preface.

49. Id.


52. Id. at 108.
53. Id. at 109.

54. See id.


56. Id.


59. Id. at 98.

60. At least one commentator has come to the opposite conclusion: "[T]he proviso portion [of Section 108(g)(2)] makes clear the validity, under the fair use doctrine, of 'interlibrary loans' that are not intended as a 'substitute for a subscription to or purchase of a work.'" Cardozo, supra note 2, at 73.

61. See M. Nimmer, supra note 4, at Sec. 8.03[E][2][d]. The warning that a library must place on copied works says that photocopies may be used for purposes not in "excess of 'fair use'." 37 C.F.R. Sec. 201.14(b) (1983); See Appendix D.


63. M. Nimmer, supra note 4, at Sec. 8.03[E][2][b].

64. 17 U.S.C. Sec. 108(d)(2).

65. 37 C.F.R. Sec. 201.14(b).

66. Id.


68. Id. at 109 (emphasis added).

69. Id. at 114.

70. AAP/Authors League Statement, supra note 25, at 12.

71. Id. at 18.

72. Guidelines, supra note 21. See Appendix B.

73. See AAP/Authors League Statement, supra note 25, at 18 (under heading "Library Copying for Teachers") & 20 (questions 23 & 26).


75. Id.
76.  Id. at 107(1)(2)(3)(4).


78.  See Register's Report, supra note 28, and text accompanying note 67 supra.

79.  Melville Nimmer argues that it is a mistake to consider economic effect in isolation: "The factor rather poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's work." M. Nimmer, supra note 4, at Sec. 13.05[A][4]. Accord, Sony Corp. of America v. Universal City Studios, Inc., 104 S.Ct. 774, 793 (1984); MacMillan v. King, 223 F. 862, 868 (D.Mass. 1914).

80.  Sony, 104 S.Ct. at 793.


82.  Id. at 1354, 1359.

83.  Id. at 1354.

84.  See id.


86.  See Sony, 104 S.Ct. at 783.

87.  M. Nimmer, supra note 4, at Sec. 13.05[E][4][c].

88.  Id.

89.  The fair use provisions state that the "factors to be considered shall include . . .," thus suggesting that the enumerated factors are not inclusive. See 17 U.S.C. Sec. 107 (emphasis added).

90.  With regard to copyright clearinghouses or a system of blanket licenses for libraries and schools, one commentator has said that "[i]t is entirely possible that a xerography charge high enough to yield a moderate revenue will at the same time discourage a sizable amount of photocopying, depriving users of the considerable benefits [to research and education] that the xerox machine can bring. Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281, 333 & note 212 (1970).

91.  Cf. id. at 321 (economic case for copyright protection of books, including texts and scholarly works, is "weak").


95. Id. at 88; see also S. Rep. No. 473, at 62-3.

96. Id. at 65 and 62, respectively.

97. L. Seltzer, supra note 93, at 17.


101. Id. at 344.


104. Id. at 347.

105. Id. at 348.

106. Id.

107. Id. at 349.

108. Id. (dicta).

109. Wihtol v. Crow, 309 F.2d 777, 781 (8th Cir. 1962). The court focused on the substantiability of the taking and noted that lack of intent to infringe could not mitigate the infringement if substantial portions of the work were copied.

110. MacMillan v. King, 223 F. 862, 867-68 (D.Md. 1914). A teacher made outlines for students covering the subject matter of a course. The court stated that continued use of the outlines "may well result in substantial damage" because students might think they need not use the book. Id. at 868.

111. Rosemont, 366 F.2d 303.

112. Id. at 306.

113. Id. at 307.

114. Id.

115. Id. at 310-11.
116. Id.


119. Id. at 1359. Although three judges dissented, it is interesting to note that one distinguished this case from the situation where the multiple copying is for classroom use, and would probably have allowed the latter as a fair use. Id. at 1364 (Cowen, C.J., dissenting).

120. 542 F.Supp. 1156 (W.D.N.Y. 1982).

121. Id. at 1174.

122. Id. at 1175.


124. Williams and Wilkins, 487 F.2d 1345.


126. Id. at 1177. Journals published within the last five years were considered widely available. Williams and Wilkins, 487 F.2d at 1349.

127. Williams and Wilkins, 487 F.2d at 1348-49.


129. Williams and Wilkins, 487 F.2d 1345.

130. Id.

131. Cardozo, supra note 2, at 76.


133. Id. at 463-65.


137. Id. at 9.

138. Id. at 10.


140. Id. at 25.

141. 17 U.S.C. Sec. 504(c)(2) (emphasis added).