



---

# The Premise of Copyright, Assaults on Fair Use, and Royalty Use Fees

by Richard B. Schockmel

---

**Publishers intent on maximizing revenues have shifted the delicate balance inherent in copyright toward economic incentive and against the promotion of fundamental public needs. Unrestricted exploitation of use fees could make access more costly than ownership. Librarians must aggressively fight for reasonable fair use of both owned and accessed information.**

**L**ibrarians can sometimes lose sight of the fundamental principles of their profession as they maneuver through what appears to be endless traffic engulfing the modern information highway as well as the more traditional byways. They are constantly confronted with innumerable difficulties in their attempts to provide information to an expanding, diversifying and increasingly distant clientele. Copyright often appears as another of these obstacles, a speed bump slowing down the flow of information while driving up the cost of document delivery.

It is important to recognize that the premise of copyright is consistent with the overall mission and goals of librarianship. The American Library Association (ALA) declares that its mission to promote librarianship exists "in order to enhance learning and ensure access to information for all," and, further, "to insure that every individual has access to needed information at the time needed and in the format the individual can utilize."<sup>1</sup> In addition to equal and timely access, ALA's goals for librarianship include: enhancing library instruction; the development, preservation, and bibliographic organization of collections; and the assertion that fees should not become a barrier to library access and services.

These goals obviously seek to serve larger societal interests. The extent to which libraries can provide equal access to information needed by every individual, or the exact point at which fees become obstacles, are issues on which there is currently no unanimity. There is, however, a consensus that the very premise for the existence of libraries is that they enhance learning and attempt to ensure access to information for all. The foundations for our Copyright Law are very similar.

---

**"It is important to recognize that the premise of copyright is consistent with the overall mission and goals of librarianship."**

---

## **THE PREMISE OF COPYRIGHT: NATURAL LAW PROPERTY RIGHT OR LIMITED LICENSE FOR THE PUBLIC GOOD**

The premise for Copyright is set forth in the Constitution: "The Congress shall have Power ... : To 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."<sup>2</sup> This seemingly simple statement contains the seeds for two opposing views: one contends that copyright is a natural law/ property right, secured within the constitution as a monopoly for the individual creator; the other favors copyright as a limited license granted by statutory legislation, limited not just for a specified time, but also constrained to avoid abuses that would hinder the progress of fundamental public needs.<sup>3</sup> Duane E. Webster, Executive Director of the Association of Research Libraries (ARL), has summarized what he believes librarians should recognize as the essential premise of Copyright:

The purpose and character of the provisions of the Copyright Law are to serve social interests and the public welfare by encouraging learning, free speech, and the advancement of knowledge. The core concept of copyright is the granting of special and exclusive, but limited, rights to authors as an incentive to create and distribute their works. These exclusive rights are limited to ensure that copyright does not become an undue

*Richard B. Schockmel is  
Acquisitions Librarian, Merrill Library,  
Utah State University, Logan, Utah  
84322-3000.*

obstacle to learning. Fair use and the economic incentive to publish are both recognized in the Copyright Law as integral to social discourse and the general benefit of society; market share and profitability of the publisher are not.<sup>4</sup>

### LIMITATIONS OF EXCLUSIVE RIGHTS: FAIR USE

The concept of fair use is not new. For centuries scholars and educators have operated under the belief that certain fair use of copyrighted materials is not an infringement of an author's rights. The notion of an allowable "fair abridgement" of a copyrighted work was recognized by the courts shortly after the enactment of the first English copyright law, the Statute of Anne of 1709.<sup>5</sup> Justice Story set forth the initial American meaning of fair use in 1841.<sup>6</sup> Since then, in addition to the recognition offered in Article I of the U.S. Constitution, and given statutory weight within the Copyright Law of 1976, the doctrine of fair use has also been associated with the First Amendment in that the rights of access to information form a basic prerequisite to freedom of inquiry. The doctrine is further associated with the Ninth Amendment, which some scholars have interpreted to include the right to information as a basic, yet unenumerated right reserved for the people.<sup>7</sup>

Several sections of the 1976 Copyright Law set forth limitations on the exclusive rights, provided under section 106 to copyright holders. Section 106 grants to the owner of copyright "the exclusive rights to do and to authorize any" reproduction, preparation of derivative works, distribution, public performance or display of the copyrighted work. These rights "to do and to authorize" are granted "subject to (the limitations in) sections 107 through 118."<sup>8</sup>

Fair use is given statutory recognition in section 107. It allows copying without permission from, or payment to, the copyright owner for reasonable use: "... the fair use of a copyrighted work, ... , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." The section also includes the following four factors which must be considered "in determining whether the use made of a work in any particular case is fair use:"<sup>9</sup>

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 or value of the copyrighted work.

---

**"There is no doubt, however, that fair use exists with considerable depth and breadth."**

---

The language within section 107 was crafted in an ambiguous fashion; it does not attempt to define the boundaries of what is legitimate fair use.<sup>10</sup> Determination of fair use is to be made on a case by case basis, with an examination of the particular circumstances of each use. While the courts have provided guidance, they have not developed a coherent or predictable interpretation for all cases of fair use.<sup>11</sup> Nonetheless, certain precedents may be employed to amplify an understanding of the factors to be considered in cases of fair use. Judge Constance Baker Motley cited many in her opinion on the *Kinko's* case.<sup>12</sup> The concept of transformative value, regarding the purpose and character of use, is one example. The use of copyrighted material within criticism, commentary, news reporting, scholarly research, or for other educational purposes, often transforms the original by adding value to it, and through such productive use, contributes to the public welfare.<sup>13</sup> Certain instances of non-productive (and non-commercial) copying, wherein copies have been made simply for later use ("time-shifting"), have also been considered fair use.<sup>14</sup>

Factual works containing information in the public interest are, as a general rule, given greater scope within fair use than creative or non-factual works.<sup>15</sup> Where adverse effects on potential markets of copyrighted work could be demonstrated to be caused by the widespread use of copies, fair use has been substantially limited.<sup>16</sup> The critical component when analyzing fair use is "the balancing of the four factors [in section 107] must be complete, relying solely upon no one factor."<sup>17</sup> Thus, the transformative value of the use of copyrighted material for criticism, com-

mentary, or other scholarly research, may be balanced against its commercial intent, its non-factual nature, or the quantifiable or qualitatively substantial portion used, and the result may tip the scales in favor of fair use.<sup>18</sup>

Certain guidelines regarding fair use in research, classrooms, and in reserve situations have also been advanced. A set of specific classroom guidelines for brevity, spontaneity, and cumulative effect of copying were developed in 1975 by the Ad Hoc Committee on Copyright Law Revision (representing educators), the Authors League of America, and the Association of University Publishers.<sup>19</sup> Alternatives were developed by those who felt that these guidelines were too restrictive toward fair use.<sup>20</sup> Expanded guidelines for fair use, recognizing a broader scope of allowable uses than offered in the 1975 Guidelines, were adopted by ALA in a 1982 Model Policy.<sup>21</sup> There is considerable room within the wide expanse of private rights and public welfare for interpretation regarding the maximum or minimum limits of allowable fair use. There is no doubt, however, that fair use exists with considerable depth and breadth.

### PUBLISHER REVENUE-BASED APPROACH TO COPYRIGHT

Yet, many publishers, by insisting that their rights to copyrighted material are so exclusive and revenue based, are in effect closing the door on *any* fair use. The Association of American Publishers (AAP) strongly advocates a property rights position on copyright which is overwhelmingly revenue based:

the purpose of the copyright law is to ensure authors and publishers the economic wherewithal to devote their energies, talents and funds to the creation and effective packaging and distribution of intellectual works. The publishers' revenue base ... is essential to scholarship, research, education and simple enjoyment of the written word.<sup>22</sup>

By shifting the focus entirely to revenues, the promotion of education through fair use is severely diminished. The AAP statement further contends that:

The copyright law provides the copyright holder with the exclusive right to control the making of copies of a copyrighted work. Exceptions to this exclusive right are intended to permit limited, occasional copying for individuals in particular circumstances which will not impair the rights of the copyright holder,

nor generate regular business-like activities based upon usurpation of copyright owners' rights, markets, or materials.<sup>23</sup>

A circular and restrictive logic underlies this 1992 AAP statement which, in effect, nullifies fair use: Copyright holders have exclusive rights to control all copying and no exceptions are allowed which would impair these rights. It is difficult to imagine any copying, made without permission and/or fee, which would not impair the "exclusive right to control the making of copies."

The exclusive control over the making of copies can be very expensive for libraries. Consider, for example, one library's recent attempt to acquire a copy of an out-of-print conference proceedings.<sup>24</sup> The exclusive monopoly/property rights point of view contends that even though a particular item is no longer commercially available on any market, the copyright holder is entitled to compensation at a level established by the copyright holder. An independent publisher speaking at a Utah library-vendor relations workshop once described this rationale in terms of real estate: Holding copyright to an out-of-print property is like owning a vacant lot: No one can build anything on my property without my permission and paying me rent.

The book in question is out-of-print (o.p.) and not available on any market. To acquire a copy in order to meet the demands of patron study and research, a library would have to: (1) incur all the costs of an interlibrary loan (ILL) for the book; (2) incur all costs relating for the physical reproduction of the book; and (3) pay an additional permission to copy fee required by the publisher/copyright holder.

This permission fee represents an unreasonable restriction. Consider the case of the 1982 proceedings of the conference mentioned above, a 237-page book, now out-of-print, but originally available from the publisher at a cost of \$35.00. To acquire this book, a library is forced to follow the three steps listed above and the total cost paid would be more than twice the original purchase price. First, account for the cost of the loan. According to a recent ARL/RLG study, the median cost for a research library to borrow an item is \$18.62.<sup>25</sup> Then add the cost of making a copy. At \$.10 per page, the cost of reproduction is \$23.70. Add another \$5.00 for some kind of binding. Finally, add the \$35.00 fee the publisher requires as a *permission to copy*

on all o.p. conferences. The total is \$82.32 for a copy which is produced totally by the library and which would be of inferior quality when compared to the original \$35.00 item. Considering that the publisher extracts the same price for the intangible permission fee as for the actual product, the fee is unreasonably restrictive and opens the publisher (in this case one associated with an academic institution) to charges of avarice similar to those levelled against commercial publishers of expensive scientific journals.

This is not an isolated case. For all practical purposes, libraries are responsible for warehousing an ever increasing stock of scholarly titles which, due to shorter press runs and leaner publisher inventories, are slipping out-of-print at an accelerated rate. Academic institutions often sponsor the research that leads to these publications. Academic libraries are nonetheless expected to provide substantial reimbursement to publishers for the use of properties which are exclusively warehoused by other libraries.<sup>26</sup>

Some publishers are attempting to place a policy which denies any fair use into practice by advertising it on the verso of their new books, in language which offers the facade of legality. A striking example of this misinformation appears on a recent imprint from the Free Press:

All rights reserved. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the Publisher.<sup>27</sup>

Taken at face value, this message denies any fair use without prior consent. It requires permission (and possibly fees) for recording any quotation, including that made with a pencil on paper, such as in taking notes (which is, of course, a mechanical information storage system). It also forbids, without prior permission, the reproduction of the message itself for purpose of comment and/or criticism. This is an absurd and extremely dangerous assault upon free speech; a blatant censorship which, by requiring prior consent, attacks the essential foundation of scholarly communication. The scholarly community should be outraged and alarmed that certain copyright holders are demanding advance notice of any contemplated criticism or commentary which might be illustrated with some small portion of the original text.

A more concise version of this ominous message appears on another recent book which reprints the full text of, or excerpts from, a hundred documents the editor felt were key to American democracy, along with a certain amount of original commentary:

All rights reserved. No portion of this book may be reproduced, by any process or technique, without the express written consent of the publisher.<sup>28</sup>

Ignoring any claim for fair use without prior permission of their original commentary, the publisher would also have one believe that "express written consent" was required before a single portion of "the Mayflower Compact" (1620), Thomas Paine's "Common Sense" (1776), George Washington's "Farewell Address" (1796), the "Appeal of the Cherokee Nation" (1830), Lincoln's "Emancipation Proclamation" and "Gettysburg Address" (both 1863), or scores of other documents, so obviously in the public domain, could be "reproduced, by any process or technique." This is, of course, humbug: pretentious words proclaiming deceptive misrepresentation.<sup>29</sup>

Taking another approach, certain notices authorize internal or personal use, but require that fees be paid for such use. Again, the copyright holder claims an unwarranted prior consent to possible fair use. In this case the publishers are granting it in advance for a fee which is to be collected by an agency specifically established for such a purpose, the Copyright Clearance Center (CCC).<sup>30</sup> The following notice appears on the verso of a 1992 university press imprint publishing the proceedings of an 1988 symposium, amusingly (for the purposes of this article) titled, *Poisonous Plants*:<sup>31</sup>

Authorization to photocopy items for internal or personal use, or the internal or personal use of specific clients, is granted by Iowa State University Press, provided that the base fee of \$.10 per copy is paid directly to the Copyright Clearance Center, 27 Congress Street, Salem MA 01970. For those organizations that have been granted a photocopy license by CCC, a separate system of payment has been arranged. The fee code for users of the transactional Reporting Service is 0-8138-1241-0/92 \$.10.

While it is possible that the authors of this notice may have intended to allow for a certain fair use which is neither internal nor personal, they neglect to mention fair use altogether. One is left to wonder what

is meant by internal use. Is it sharing a copy of a chapter or perhaps just a bit of a bibliography at the end of a chapter, with a colleague down the hall? Does personal use include copying for non-funded research? And who are these clients; the library itself, or possibly the individual patrons, users, or clients resorting to a library? The verso does also contain the appropriate notice that copyright is not claimed for 23 of the book's chapters which are in the public domain. The underlying message remains, however, that copyright demands both prior consent and the payment of fees, here made less cumbersome by prior authorization and a transactional collection mechanism.<sup>32</sup>

Another interesting aspect of this particular 661-page book, which has a list price of \$69.95 (the use fees to copy all pages equal \$66.10), was that it was produced directly from the author/editor's camera-ready copy, and that the institution which hosted the symposium paid the press \$5,000 in advance of publication.<sup>33</sup> This is comparable to the requirements often associated with scholarly periodicals, especially if one considers the \$5,000 subsidy as page charges.<sup>34</sup> While no criticism is intended regarding the economic arrangements surrounding the production of this scholarly imprint, it is clear that the authors/editor provided not only the original research but also contributed significantly toward the cost of production. The value of this essential contribution, coupled with the realization that scholars are likely to be the primary users for a system of publication which often appears dysfunctional, provides the basis for recent arguments which seek realignment in scholarly publishing. Scholars such as Harlan Cleveland argue for building an electronic information commons with an end to copyright as we know it. Others suggest that universities and their presses should assume a greater and more benign role in scholarly publishing.<sup>35</sup>

These and other restructuring scenarios presuppose that scholarly communications exists as a logical and interdependent system capable of orchestrated manipulation. Charles Schwartz recently demonstrated, however, that it "is in reality, a loosely coupled system of largely autonomous constituencies with little communication, coordination, or even direct cause-and effect relationships."<sup>36</sup> The system's vital flexibility is ill-suited to major structural reform. The entire scholarly enterprise could well lapse into total chaos if copyright were to be abandoned.<sup>37</sup>

## ASSERTING THE RIGHTS TO FAIR USE

Before such drastic measures are contemplated, the current law of fair use must be revisited with an emphasis on the social bond upon which it rests. Certain essential elements of this bond, recognizing both the rights of the creator and the benefits fair use bring to society, are missing from the examples of the copyright notices cited above. There would be precious little fair use at all if the message imbedded in these notices were to be construed, due to their ubiquitous disbursement throughout academic library collections, as precedent signifying common practice. A counter-measure may be necessary to re-establish a balance within copyright. Section 54.19, "Reproduction of Noncommercial Educational and Scholarly Journals," of the ALA policy manual offers a path which academia should vigorously pursue.<sup>38</sup>

ALA encourages authors writing primarily for purposes of educational advancement and scholarship to reserve to themselves licensing and reproduction rights to their own works in the publishing contracts they sign.

ALA, in cooperation with other educational organizations, urges publishers to adopt and include in journal or similar publications a notice of a policy for non-commercial reproduction of their materials for educational and scholarly purposes.

---

### **"Left unchecked, academic libraries may soon overflow with scholarly books which advertise the ruse that fair use is prohibited without prior consent and payment of fees."**

---

The obvious limitation of this policy is that it is, in the end, merely a suggestion. Its focus is also primarily on journals, although the term "similar publications" could certainly include those books which are collections of scholarly articles. It is difficult to imagine, given the loosely coupled nature of scholarly publishing, that such a policy would ever, on its own, be universally embraced. It is also unlikely that academia would ever regard publications issued under such a statement as exhibiting an inherently significant value within the publish or perish rewards structure.

Left unchecked, academic libraries may soon overflow with scholarly books which advertise the ruse that fair use is prohibited without prior consent and payment of fees. The fact that libraries own their copies of these books may offer some form of, albeit radical, redress. Ownership of a book is the ultimate property right for that particular physical volume. Libraries have always taken great advantage of this. They assign either commonly accepted or totally unique classification codes to their books. They affix labels indicating these codes, and others for location, or for circulation purposes to their books. They stamp their books with symbols of ownership. They may completely remove or trim and reposition dust jackets. Some libraries restrict use of or paste on warning labels indicating a perceived controversial nature of some books. Libraries often pre-bind or re-bind their books. In the end they may withdraw, recycle, discard, trade, or sell their books. It is possible, then, that they may affix their own copyright notice which promotes fair use. The following example, which was originally intended for use by an individual creator on an individual work, is extremely radical for use as a paste-on label, and is likely rife with legal implications due to its avowed granting of permission;

Copying in excess of rights otherwise established under copyright law is permitted, without individual permission or payment of a fee, provided that copies are made and distributed for non-profit purposes and credit is given for the source.<sup>39</sup>

It is, however, of equal intensity to, but in the opposite direction of, the legal balderdash contained on the versos of many scholarly books. A fair use notice more reasonably suited for pasting on the inside cover of a scholarly book can be constructed from the notice which began appearing in *College & Research Libraries» (C&RL)* in January, 1975:<sup>40</sup>

All material in this publication subject to copyright may be photocopied for the noncommercial purpose of scientific or educational advancement.

If these proposals appear immodest, consider the warning offered by a former U. S. Register of Copyrights and cited in the preamble to the ALA Model Policy:<sup>41</sup> "If you don't use fair use, you will lose it."

## SECTION 108, THE CONTU GUIDELINES AND THE RIGHTS OF LIBRARIES TO MAKE COPIES

Libraries are permitted to make copies for purposes of interlibrary loan, preservation, and replacement under section 108 of the Copyright Law: "Limitations on exclusive rights: Reproduction by libraries." The language within this section is somewhat more specific than that describing Fair Use in section 107. The provisions within section 108 allow for making single copies of materials by libraries and archives which do so without commercial intent or advantage, which are open to the public or to researchers, and which insure that a notice of copyright is included in the reproduction. Section 108 permits this copying in the following instances for:<sup>42</sup>

- 108(b): Unpublished works for the purpose of preservation, security, or deposit at other libraries;
- 108(c): Replacement copies of published works that cannot be obtained at a fair price.
- 108(d): Articles from periodicals or collections or small parts of other collections for a patron's personal private study, scholarship, and research.
- 108(e): Entire works, or substantial portions of works borrowed from another library at the request of a patron, that cannot be obtained at a fair price, and which become the property of the patron for their use in private study, scholarship, or research.<sup>43</sup>

Under subsections (d), (e), and (f), libraries are also required to display notices prominently that the making of copies is subject to copyright law. By so doing, under 108 (f)(1), libraries are removed from liability for copyright infringement for unsupervised use of reproduction equipment. Patrons who knowingly make copies in violation of the law, or libraries which authorize such infringement, remain liable. Subsection 108 (f)(4) recognizes that nothing in section 108 can affect the rights of fair use as provided in section 107.

Subsection 108(g) grants libraries the right to make "isolated and unrelated" single copies of the same material on separate occasions. These rights are not extended in cases of "systematic or concerted reproduction or distribution of multiple copies of the same material." Subsection 108(g)(2) allows, however, that the lan-

guage which excludes "systematic reproduction" of "single or multiple copies" shall not prevent "libraries from participating in interlibrary loan arrangements, that do not have, as their purpose or effect, that the library receiving such copies ... does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."

This section reinforces the problematic balance, inherent in the premise of copyright, between fair use and economic incentive. It recognizes, on the one hand, the essential value libraries bring to the educational process by allowing, without prior consent, a variety of copying scenarios including those made within interlibrary loan arrangements. The publishers' position in the marketplace, on the other hand, is also acknowledged and offered protection against practices which thwart purchases. The law does not, however, prescribe the exact nature of "systematic reproduction," neither does it plot nor prescribe any particular paths which might lead to a similarly unspecified point of market disruption.

---

**"While 6 out of 240 (a ratio of .0250) may seem to be an arbitrarily low mark at which to represent the substitution of a subscription, a limit of 6 out of 8,500 (.0007) is arguably exponentially less than what libraries could have reasonably expected under section 108(g)."**

---

Some specific guidelines for interlibrary loans were recommended, at the request of Congress, by the National Commission on New Technological Uses of Copyrighted Works (CONTU).<sup>44</sup> While not actual statute, the CONTU guidelines attempt to address, albeit arbitrarily, that point where the borrowing of copies might substitute for a purchase. Its most noted and arbitrary proviso is the limit to 5 copies, made within a given year, of articles published within the last 5 years of a periodical. Consider, for example, that in 1992 *C&RL* published 6 issues averaging 7 articles and 1 research note (about 48 per year or about 240 over five years), while *Brain Research* published 66 issues averaging 15 articles and 10 short communications (about 1,700 per year or over 8,500 in five years). While 6 out of 240 (a ratio of

.0250) may seem to be an arbitrarily low mark at which to represent the substitution of a subscription, a limit of 6 out of 8,500 (.0007) is arguably exponentially less than what libraries could have reasonably expected under section 108(g).

The CONTU guidelines, perhaps because they offer a simplistic solution to a complex problem, have been broadly accepted. Many universities have incorporated them into their policy statements on Copyright.<sup>45</sup> Kenneth Crews, in his examination of copyright and fair use issues affecting universities, offers the ominous assessment that the guidelines "have overwhelmed the understanding of relevant copyright limits."<sup>46</sup>

Several examples considered to be illustrative of practices thought to be prohibited under provisions of section 108(g) were offered in a *Senate report* issued in 1974.<sup>47</sup> In the first, a library with a core collection of journals informs other libraries that it will provide them with copies of articles from these journals, and "accordingly, the other libraries discontinue or refrain from purchasing" the journals. The other example has branch libraries agreeing to divide out subscriptions to a set of journals "in lieu of each branch purchasing its own subscription," with each branch who owns a particular journal lending copies of articles to those who do not. These examples are used in the AAP Statement on Commercial and Fee-Based Document Delivery to argue that coordinated resource sharing within library consortia exceeds the limits contemplated by Congress or offered under CONTU, which they claim were intended to provide only for "generally cumbersome, slow, unthreatening photocopying designed to fill certain ILL requests incidental to the Library's overall activity."<sup>48</sup> The AAP statement notes that the CONTU report specified that its guidelines could not be applied to commercial document delivery.<sup>49</sup> Emphasizing that their revenue base "relies on multiple opportunities to exploit a product" within a variety of markets, the AAP statement concludes: "The interlibrary copying without permission and other non-authorized document delivery denies the copyright owner its rights under the law."<sup>50</sup>

The two examples from the Senate report cited by the AAP are hypothetical. They exist without real context, floating in some imaginary market, supposedly fixed in a, now distant, "low-tech" past. This market mirage also appears to be based on the illusion that the funding base for

libraries is infinitely expandable and that they are free to act without outside influence. With such a fantastic free agency, they should be able to provide their patrons with an information nirvana acquired through the purchase of all the relevant, and ever-expanding, publishing output. Anything less than that appears to be a violation of the sizable claim staked out by the AAP. Missing from these examples, however, is any recognition of the practical factors and issues at play in the real world in which scholars, publishers, and libraries interact.

Kenneth Crews has recently analyzed some of these issues, noting publisher studies claiming declining serial subscriptions, library studies arguing that copying actually generates more demand than ownership of the originals, and assertions that reduced budgets actually cause declining subscriptions and that improvements in document delivery are the result of, and not the cause of, these declines.<sup>51</sup> Crews observes "The evidence for almost any position on these issues is weighty, but inconclusive," and that it is very difficult to derive "an appropriate balance under a copyright law that both separates and links often opposing camps."<sup>52</sup>

A more conclusive analysis of the factors which affect the library market may lead us back to an understanding of the relevant copyright limits. It is conceivable that the loss in a library's ability to provide information for the benefit of society may have some weight on the scales, now so prominently occupied by the possible loss of publishing revenues. It is in the interest of libraries to promote their position within this market. Certainly, publisher groups like the AAP have made it clear that they view library consortia lending to be subject to both permission and fees along with documents supplied by commercial vendors. With the CCC acting as a national collection agency, publishers are in a position to argue for the collection of fees for all copying by either transactional reporting or institutional licensing. In Britain, 30,000 state primary and secondary schools, and all universities, polytechnics, and independent colleges, were recently brought under copying licenses, wherein they all prepaid annual fees to the Copyright Licensing Agency (CLA).<sup>53</sup>

The enormous effect that publishers and learned societies have on the scholarly market should be recognized in relation to copyright limits. This influence may derive from direct manipulation, and/or it may be inherent in the loosely coupled

system of scholarly communication. Nonetheless, this influence has produced a demonstrable impact upon libraries.

Librarians have devoted considerable attention to the escalating prices of scholarly journals, which have increased more rapidly than library budgets, and have been linked to shrinking library collections.<sup>54</sup> The practice of differential pricing, wherein libraries are charged higher rates than other subscribers, has also been chronicled.<sup>55</sup> A study of journal prices over a 20-year period, by Kenneth Marks et al., concluded that most of these increases could be attributed to inflation, currency conversion rates, and larger output of articles, but not necessarily to differential pricing.<sup>56</sup> This longitudinal study also found that prices per page for commercially published journals increased much more rapidly than those for non-profit publishers, and that foreign commercial publishers exhibited the greatest price per page increases.<sup>57</sup> Focusing on a set of publishers earlier identified as problematic by Dougherty and Johnson, Marks found that three foreign publishers not only had the largest long-term increases in price per page, but also started out with the greatest price per page.<sup>58</sup> In this case the most expensive titles also exhibited the greatest rate of price increase.

---

**"In this case, a journal held by four libraries was three times more expensive than one uniquely held, while a journal held by three libraries cost twice as much. Due to their enormous economic impact, these particular journals were, in effect, targeting themselves for possible cancellation."**

---

The announcement made in 1990 by certain European publishers that their journal prices would increase by 30 percent provided a compelling impetus for a cooperative study of journals published by four European firms that were held by research libraries in Utah.<sup>59</sup> Several relevant points can be made from a summary of the price and overlap data accumulated on these 815 journals.

First, the price increases projected for 1991 amounted to a continuation of a long-standing trend documented in other price studies. During 1985-1990, the aver-

age annual price increase per title studied was 16 percent (1987 showed overall rates of 29 percent).

These data also indicated that there was more overlap than uniqueness within the state. All four libraries held 23 of the titles, 197 were held in triplicate, and 228 were duplicated within the four libraries. Thus, 448 titles were shared and 367 were unique. All four libraries combined paid \$969,056 in 1990 for 1,508 subscriptions to these 815 individual titles, single subscriptions for these titles cost \$448,430. These costs were to rise by 30 percent in 1991.

A third, and very interesting, observation was that shared titles were much more expensive than uniquely held titles. The average price in 1990 for titles held in quadruplicate was \$1,122.70, for triplicate titles it was \$822.50, for duplicate titles, \$507.90, and for unique titles only \$394.48. In this case, a journal held by four libraries was three times more expensive than one uniquely held, while a journal held by three libraries cost twice as much. A recent study of journals in the field of economics reported another indication that journal prices are not always cost based: a positive and significant correlation exists between how often a journal was cited and its price.<sup>60</sup>

Finally, the study recognized that this relatively small set of journals was affecting an increasingly significant, and inevitably compelling, economic role. The share that these titles consumed of one university library's serials expenditures increased from about one-sixth in 1986 to one-quarter in 1990, while their share of the library's total number of subscriptions remained constant at about 6 percent. At a specialized health science institution the situation was even more alarming. In 1986, the library's set of these foreign titles represented 12 percent of all their total serial titles but 27 percent of their corresponding expenditures. By 1990, the title ratio had remained constant but these same foreign journals consumed 38 percent of their serials expenditures.

Due to their enormous economic impact, these particular journals were, in effect, targeting themselves for possible cancellation.<sup>61</sup> If, as the AAP argues, the language in sub-section 108(g) allowing interlibrary lending refers only to incidental copying in a "low-tech" environment, the phrase "substitute for a subscription" may also only refer to a "low-cost" era where the purchase of subscriptions was still possible.

As collection development librarians at the four institutions began examining this set of data with the idea of affecting cancellations based on economic realities, public services librarians made it clear that existing interlibrary lending operations were woefully inadequate. The average time of delivery for copies of articles obtained within the state was much longer than the 48-72 hours considered to be acceptable levels of patron service. Several steps were taken to enhance the performance of interlibrary loan offices, including the installation of Ariel workstations for the electronic delivery of copies, the development of more efficient means for handling copyright fees on articles borrowed in excess of CONTU guidelines, and the initiation of daily drops by UPS. Less progress was made, however, in an often troublesome low priority area in the operation of large research libraries which, nonetheless, exerts an overwhelming influence on interlibrary loan performance: Inventory control. The latest technology for interlibrary document delivery is of little value if the original volume is not in its proper place on the shelves.<sup>62</sup>

Libraries faced with this situation may opt for commercial document delivery, though commercial vendors have not always offered a marked improvement over traditional ILL. Studies comparing the speed and cost of commercial document suppliers with that of traditional ILL have concluded that there is often little difference in delivery time, but that the cost of commercial documents is significantly higher than ILL.<sup>63</sup> A review of recent studies revealed average times of a week or more for the delivery of documents from a variety of sources.<sup>64</sup> Under special contractual arrangements, however, commercial document delivery suppliers may offer a certain set of articles within a 48 to 72 hour limit.<sup>65</sup>

The widespread use of commercial vendors by libraries may, for reasons other than just increased cost, turn out to be a Faustian bargain. There is always the concern that patrons wishing to acquire journal articles may come to view libraries as superfluous intermediaries, an unnecessary extra step in a purely commercial transaction. Commercial vendors have been reaching individual clients directly for some time. Libraries have often assisted in this by offering their patrons increasing levels of access to the large national databases used by commercial document suppliers. For articles readily

and rapidly available through commercial sources, the most that libraries might appear to offer is a subsidy for the cost of the transaction.<sup>66</sup>

---

**“The widespread use of commercial vendors by libraries may, for reasons other than just increased cost, turn out to be a Faustian bargain.”**

---

**COPYRIGHT USE FEES  
AND THE COST OF ACCESS:  
A HYPOTHETICAL COPYRIGHT  
ACCESS INDEX**

The most ominous feature of commercial document delivery for libraries is the implied abrogation of their rights granted under Section 108 of the Copyright Law. Even the arbitrarily low limits offered by the CONTU guidelines allows libraries five ILL transactions for each title within a year without payment of fees. Documents supplied by a commercial vendor often carry a copyright clearance fee on the first and every subsequent delivery which is either built into a base price, added to that base if the fee exceeds a certain level, or is billed as a special charge.<sup>67</sup> These royalty fees, which one study reported ranging from \$2 to \$10, account for a significant portion of the cost of commercial document delivery.<sup>68</sup> Libraries should take care that an alleged willing acceptance of these fees is not considered as a precedent which could be interpreted to negate the premise of copyright allowing for fair use through ILL. Again, libraries could lose rights they do not use. Libraries should, above all, resist the temptation to mimic commercial vendors, to transform education into enterprise, if they wish to retain the benefits granted educational institutions. The government sponsored British Library appears to be on the forefront of library commercialization with its Document Supply Centre, which includes a copyright clearance fee in the base price for all its document services. This is the result of confidential negotiations between the British Library and the CLA, and it reflects an interpretation of British copyright law.<sup>69</sup> Many American librarians may be surprised, however, to discover that even articles from U.S. journals, obtained via ILL transactions from Britain's premier publicly supported library,

are not accorded the minimum limits allowed by CONTU.

The AAP, with its revenue based view of copyright as a total monopoly, includes all international document delivery in its lexicon of transactions requiring licensing and copyright fees:

Publishers are entitled to and must assert the privileges and exclusive rights of copyright ownership, including the right to set their own prices for use of their works, throughout the world. Publishers have a legitimate interest in maintaining these rights, including compensation, with respect to importation (whether electronic, hard copy, or other means) into the United States of copies of their works lawfully made and paid for abroad.<sup>70</sup>

There is an inherent danger for abuse in any market involving a monopoly, even a government sponsored limited license, wherein producers claim the exclusive and unrestrained right to set not only the purchase price of their products, but also “their own prices for use of their works.”

Copyright use fees represent an important element in the total cost of accessing information, and these fees alone may, in some cases, cost more than ownership. One possible method for assessing the current economic effects of these fees on access is the development of a Copyright Access Index (CAI) for articles in periodicals. This index would relate the cost of copyright fees and the possible demand for articles to the cost of ownership, that is, to the actual cost of subscribing to the journal.<sup>71</sup>

An example of a hypothetical CAI, recording values for an arbitrary rather than random set of scientific journals, is provided in Table 1. It lists the number of articles which appeared in five separate journals in 1993 along with the publisher assigned base copyright fee for use of one article. These fees are available either from the journal itself or from a semi-annual list published by CCC.<sup>72</sup> An Aggregate Copy Use Fee (ACUF) for the complete set of the journal's annual output of articles is derived by multiplying the number of those articles by the base fee. The Copyright Use Fee Factor (CUFF) represents the ratio of the ACUF and the annual subscription cost. If the copyright fees for borrowing a complete annual set of articles exceed the cost of subscribing to the journal, the CUFF value would be greater than 1.

Up to this point, the model equates access and ownership in a simplistic rela-

**Table 1**  
**Hypothetical Index of Copyright Access Fees for Journal Articles**

ISN: Vols for 1993	Number of Articles	Per Article Copyright Use Fee	Aggregate Copyright Use Fee*	1993 Subscription Cost	Copyright Use Fee Factor	ISI Impact Factor 1992	Copyright Access Index	Hypothetical Copyright Access Costs
0016-660X:49-54	132	\$6.00	\$792	\$1,167	0.679	0.276	0.187	\$218
0029-599X:63-65	85	\$1.50	\$128	\$1,115	0.114	0.667	0.076	\$85
0305-1978:21	108	\$6.00	\$648	\$608	1.066	0.712	0.795	\$483
0165-0327:27-29	94	\$6.00	\$564	\$730	0.773	1.76	1.36	\$993
0008-8749:146-152	288	\$5.00	\$1,440	\$983	1.47	2.127	3.137	\$3,084

Note: \*Per one complete set of published articles.

tionship: a single access to each article published in a year is equivalent to ownership of those articles. A more realistic model requires a factor which provides some relative indication of the level of demand that might exist for the articles within specific journals. This demand would certainly vary among journals and the need to access articles would also vary among libraries. It may ultimately be impossible to predict the actual number of times any particular library might need to borrow articles from a specific journal. Indexes do exist, however, which give some indication of a journal's usefulness within the scholarly community. Certain methods of citation analysis record the number of times scholarly articles are cited in other scholarly articles. These data can be arranged to examine the journals in which the cited articles are published. The Institute for Scientific Information annually calculates an impact factor (IF) for journals, which is the ratio of the citations made to a journal's articles and the number of articles recently published.<sup>73</sup> Assuming a correlation between citations to articles and demand for articles, the IF appears the logical choice for a relative index of demand for access.

Under this model, a journal's CAI is calculated by multiplying its IF by its Copyright Use Fee Factor. A hypothetical copyright access cost for a particular journal may be derived from applying its CAI to its ACUF.

There is a remarkable range of copyright access fee values within the five journals listed in Table 1. In cases where a high subscription cost is associated with an annual output of articles that is both low and seldom cited, anticipated annual copyright use fees are modest compared to the purchase price. This should not be used to excuse excessive base royalty fees for using individual articles. Two of the five

journals used as examples in Table 1 had ACUF values greater than 1. In these instances, the base use fee levels established by publishers are obviously excessive. The cost of the intangible permission to use each article one time exceeds the purchase price for a printed product—a product for which the publisher would have associated production costs and the purchaser would have the opportunity for multiple uses.

---

**“It becomes clear that no  
'library without walls' will exist  
outside of El Dorado.”**

---

This model for a CAI is a relative index and is not intended to predict actual costs. The Hypothetical Copyright Access Costs are indeed hypothetical. The sample data suggests, however, that where demand is high, the copyright cost of access can be several factors greater than that of ownership. Clearly, the record of what has been termed the “classical” model of print-on-paper publishing exemplified by the traditional scientific journal, reveals an imperfect, monopoly-like marketplace where many publishers have raised prices at rates that far exceed inflation.<sup>74</sup> Libraries now moving into the “modernized” model, which embraces increasing levels of article-by-article access, delivered on demand, often through electronic channels, should not expect long-term savings. Even the sample values in the hypothetical CAI support the caution issued in a recent Association of American Universities (AAU) Research Libraries Task Force report:

...it is reasonable to expect that the copyright fee imposed for the use of individual articles (over and above those uses

granted by U.S. copyright law for educational and fair use) will be set by publishers at levels that would make up for any revenue lost from cancellation of journal subscriptions.<sup>75</sup>

The same pricing practices which have forced libraries to discontinue current and forgo new journal subscriptions will make access to information on an article-by-article basis even more problematic. In addition to access fees, how will institutions afford the enormous and continuing cost of providing the latest equipment for campus-wide networks to channel electronic information, and then meet the demands for archiving it? It becomes clear that no “library without walls” will exist outside of El Dorado.

It is, therefore, imperative that the library community reevaluate the fundamental aspects of document delivery within the modernized model in relation to the premise of copyright. Library associations might then recommend that the CONTU guidelines should be reviewed and made less arbitrary. Specific limits which more reasonably reflect the substitution of a purchase could be calculated for individual journals based on output of articles or some other relative index. Although the CCC would undoubtedly resist it, such new CONTU-indexed limits could be published in CCC's semi-annual list of journals and associated copyright royalty fees. It is possible that a set of CONTU-indexed guidelines could also be developed for library use of copyrighted material supplied by commercial vendors.

**POSTSCRIPT: LIVING IN THE  
MODERNIZED MATERIAL WORLD:  
LOOKING TOWARD NEW  
ELECTRONIC MODELS**

There is an ominous shadow looming over our electronic future. Libraries may find it very difficult to fulfill their tradi-



tional mission while avoiding total commercialization. The final report of the federal government's Information Infrastructure Working Group on Intellectual Property Rights for the digital age, known as the White Paper, is almost entirely focused on commercial potential and "appears to be based on the premise that only the legal protection of copyrighted works—and the consequent restriction of their use—will spur creativity."<sup>76</sup> The Working Groups' White Paper envisions a commercial marketplace where technology provides metered and encrypted access to information on what is often a pay-per-view basis and under which "the ability of libraries to serve a public mission, which allows for—no fee—access to published and unpublished works, may be diminished."<sup>77</sup> The Working Group postponed a conclusive treatment of fair use, and will wait to see if a Conference of Fair Use (CONFU) can establish voluntary agreements among interested parties on the nature of fair use in the digital environment, but again, the White Paper appears to be based in favor of commercial interests that wish to restrict it.<sup>78</sup>

Left unchecked, a systematic exploitation of the economic incentives licensed to publishers could overwhelm the very principles such licenses were envisioned to serve: the promotion of education, free speech, and the advancement of knowledge. If, in the end, the fundamental premise of copyright were to rest solely on unrestrained markets, revenues, and royalties, the traditional mission for libraries to "enhance learning and insure access to information for all" would become untenable. If information in this country is indeed simply another commodity, libraries may be forced to evolve new goals which would be market based, economically oriented, and designed to enhance revenues derived from the educational enterprise. Reference services and bibliographic instruction might be re-fashioned as sales and customer support. The substantial resources libraries are currently funnelling into broad-based electronic accessibility to bibliographic records for books and journal articles could be recovered, not from the end-user, but primarily from the producer whose products libraries are, in effect, advertising. Publishers that preferred not to pay advertising fees could find their publications excluded from library databases. Those publishers that might challenge a library for excluding these records would be in a difficult position. In the process of establishing

their case of possible loss, publishers would also be substantiating the essential market value provided by libraries. Libraries could also consider charging publishers product placement as the whole concept of inventory control and on-campus document delivery is reconsidered. The market share of total information consumers, represented by an information elite who could comfortably bypass libraries and absorb access fees, copyright use fees, and delivery charges for direct access to documents, might actually be quite small. Economically, libraries could thrive in the larger middle market.

---

**"If information in this country is indeed simply another commodity, libraries may be forced to evolve new goals which would be market based, economically oriented, and designed to enhance revenues derived from the educational enterprise."**

---

Librarians may hope that publishers, or Congress, will recognize that libraries offer a considerable market value to publisher products, in addition to a fundamental contribution to society, and, thus, avoid the commercialization of libraries. The record to date is clear, however, that in efforts to maximize revenues, the powerful copyright industry will ignore that these practices threaten the ability of libraries to perform their mission. Librarians must become stronger advocates for the essential social values which form the basis for both the principles of their profession and the premise of copyright. Either the principles of fair use for libraries and the public must be carried forward into the digital age, or new scenarios must be attempted where scholarly authors, universities and academic consortiums take control of the publishing process away from commercial interests.<sup>79</sup> As mentioned earlier, scholarly publishing is ill-suited to major structural reform. Major change could possibly occur in the digital age if scholars and their educational institutions recognized that revenue-based copyright had become a greater threat to scholarly communication than the change itself. In the end, aggressive tactics may offer the best defence against assaults on fair use.

**Acknowledgment:** The author would like to thank John Elsweller, Charles Hatch, Robert Murdoch, Reed Painter, Vickie Reed, Leonard N. Rosenbnd, and Kathy Schockmel for their helpful comments on various drafts of this article.

#### NOTES AND REFERENCES

1. *ALA Policy Manual* 1.2, 1.3.
2. Art I, sec 8, cl. 8.
3. L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens, GA: University of Georgia Press, 1991), p. 11.
4. Duane E. Webster, "Promoting the Principles of Copyright," *ARL: A Bimonthly Newsletter of Research Library Issues and Actions* 169 (July 1993): 1-3.
5. Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review* 103 (March 1990): 1105-1136. Patterson and Lindberg also trace the history of copyright in *The Nature of Copyright*, pp. 25-106. These authors view copyright as a limited license and stress the value of fair use.
6. *Folsom v. Marsh*, 9 F. Cas. (No 4901) 342 (C.C.D. Mass. 1841). For fair use "we 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" (p. 348).
7. Harry N. Rosenfield, "The American Constitution, Free Inquiry, and the Law," in *Fair Use and Free Inquiry*, edited by John S. Lawrence & Bernard Timberg (Norwood, NJ: Ablex, 1989), pp. 281-304.
8. Copyright Act of 1976, 17 U.S.C. sec 106.
9. Copyright Act of 1976, 17 U.S.C. sec 107.
10. See Kenneth D. Crews, *Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education* (Chicago: University of Chicago Press, 1985), pp. 31-36. He provides a succinct legislative history of section 107 and an excellent appraisal of copyright, fair use, the meaning of both concepts to academic libraries and their relationship to higher education.
11. Pierre N. Leval, "Fair Use or Foul?" *Journal of the Copyright Society of the U.S.A* 36 (1989): 167-81.
12. *Basic Books, Inc. v. Kinko's Graphic Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991).
13. *Ibid.*, pp. 13-15.
14. *Ibid.*, p. 19.
15. *Ibid.*, pp. 19-20.
16. *Ibid.*, pp. 22-23.
17. *Ibid.*, p. 20.
18. *Ibid.*, pp. 18-21. Judge Motley also noted that the Classroom Guidelines promulgated in the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions" [H.R. Rep. No. 1476, 94th Cong., 2d Sess. 68 (1976)], require that the "courts must balance the interests involved" based on "equitable considerations" which may "be

- more or less permissive" than the guidelines' fair use standards (p. 29). She held, for example, that not all unconsented anthologies, which are flatly prohibited by the Guidelines, can be so unequivocally "prohibited without a fair use analysis" (p. 31).
19. "Agreement on Guidelines for Classroom Copying," pp. 68-70.
  20. For an analysis of the evolution of the 1975 guidelines, the reaction to their limitations by Stedman and Gullickson and their development of the Wisconsin Guidelines, and the subsequent work by Nancy Marshall to develop the ALA Model Policy, see Crews, *Copyright, Fair Use, and the Challenge for Universities*, pp. 34-55.
  21. American Library Association, *Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use* (Washington, D.C., 1982).
  22. Association of American Publishers, *Statement of the AAP on Commercial and Fee-Based Document Delivery* (New York: AAP, 1992).
  23. *Ibid.*, p. 1.
  24. *Off Campus Library Services Conference Proceedings, 1982* (Mount Pleasant, MI: Central Michigan University Press, 1983). Requested by the Utah State University Merrill Library.
  25. Marilyn M. Roche, *ARL/RLG Interlibrary Loan Cost Study* (Washington D.C.: Association of Research Libraries, 1993).
  26. Ann Okerson, "With Feathers: Effects of Copyright and Ownership on Scholarly Publishing," *College & Research Libraries* 52 (September 1991): 425-438. Okerson shares credit for the genesis of thoughts regarding this oxymoron with John R. Haak.
  27. Neil H. Snyder, James J. Dowd, Jr., & Dianne M. Houghton, *Vision, Values, and Courage: Leadership for Quality Management* (New York: The Free Press, 1994), verso. It is a sad incongruity that a press so named should require prior consent for any and all use and thus deny not only fair use but also restrict free speech.
  28. Peter B. Levey (ed.), *100 Key Documents in American Democracy* (Westport, CT: Greenwood Press, 1994), verso.
  29. An excellent source for the conceptualization of the type of misrepresentation which forms the salient feature of these copyright messages is to be found in the essay "On Bullshit," which appears as Chapter 10, in Harry G. Frankfurt, *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988), pp. 117-133.
  30. The recent *American Geophysical Union v. Texaco* case has provided CCC with a significant endorsement as a reasonable mechanism for the granting of permission and collection of fees within the profit sector. CCC offers both transactional and licensing programs. George Alan, when Vice President of CCC, told the author, who was coordinating a pilot Universities Licensing project with CCC and Utah State University, that CCC had provided the funding for the Kinko's case. It would be ironic if the transactional or licensing fees paid to CCC by academic institutions were to be used to fund legal assaults on their fair use.
  31. *Poisonous Plants: Proceedings of the third International Symposium*, edited by L.F. James (Ames, IA: Iowa State University Press, 1992).
  32. It is in the interest of publishers and CCC to demonstrate that mechanisms for permissions and the collection of fees are in place which do not pose a restrictive burden on the educational process.
  33. The camera-ready copy notice is also on the verso of *Poisonous Plants*. The record of payment is with the Controllars Office of Utah State University as confirmed in a personal communication with the editor.
  34. Society publishers derive more of their journal revenues from page charges (16 percent to 35 percent), then did commercial (.6 percent), or university (.4 percent); yet University presses have indicated the greatest interest among all publishing groups in expanding or newly initiating page charges. See, for example, Bernard M. Fry & Herbert S. White, *Publishers and Libraries: A Study of Scholarly and Research Journals* (Lexington, MA: D.C. Heath, 1976), pp. 93-103; Fritz Machulup & Kenneth Leeson, *Information through the Printed Word: The Dissemination of Scholarly, Scientific, and Intellectual Knowledge*, Vol 2: *Journals* (pp. 104-105); Vol 4: *Books, Journals and Bibliographic Services* (New York: Praeger, 1978), pp. 222-236; Jenna Roberts, "NFS Rethinks Its Proposal to Revise Page-Charge Rules," *Nature* 362 (March 4, 1993): 7.
  35. Harlan Cleveland, "How Can 'Intellectual Property' Be Protected?," *Change* 21 (May/June, 1989): 11; Kent Hendrickson and Katina Strauch, "Intellectual Property Rights and Scholarly Publishing in the Twenty-first Century," *Library Acquisitions: Theory & Practice* 15 (1991): 419-421; Sharon J. Rogers & Charlene S. Hurt, "How Scholarly Communication Should Work in the 21st Century," *Chronicle of Higher Education* 35 (October 18, 1989): A56; Richard M. Dougherty, "Turning the Serials Crisis to Our Advantage: An Opportunity for Leadership," *Library Administration & Management* 3 (Spring 1989): 59-64; Scott Bennett & Nina Matheson, "Scholarly Articles: Valuable Commodities for Universities," *Chronicle of Higher Education* 38 (May 27, 1992): B1-3.
  36. Charles A. Schwartz, "Scholarly Communication as a Loosely Coupled System: Reassessing Prospects for Structural Reform," *College & Research Libraries* 55 (March 1994): 101-117.
  37. Okerson, "With Feathers," p. 431. This article provides an excellent overview to the debate concerning the adequacy of copyright to address the realities of modern scholarly communication.
  38. *ALA Policy Manual* 54.19.
  39. This notice is reprinted with gratitude, from a working paper prepared by Kenneth D. Crews for ARL entitled: "Copyright Law, Libraries, and Universities: Overview, Recent Developments, and Future Interests" (October 1992).
  40. The exact notice first appearing with the new design of *C&RL* in Vol 36, no. 1, Jan. 1975, read: "All materials in this journal subject to copyright by the American Library Association may be photocopied for the noncommercial purpose of scientific or educational advancement." More recent issues of *C&RL* have lengthened this notice and it has become somewhat more specific with the addition of the following phrase to the end of the sentence: "... granted by Sections 107 and 108 of the Copyright Revision Act of 1976." The notice also supplies an address where permission may be requested for use beyond that specified.
  41. *ALA Model Policy*, 1.
  42. Copyright Act of 1976, 17 U.S.C. sec 108.
  43. Under this sub-section, a library could borrow the o.p. proceedings listed earlier in note 24, copy them in total, and provide the copy to the requesting patron, without having to seek permission or pay a fee. It may be prudent to inform the patron that, by law, the copy becomes their property for private study. The library may also wish to emphasize that in no way is it encouraging patrons, when they have completed their research, to donate the copy to the library. It may be less than gracious, however, to refuse an unsolicited donation.
  44. U.S. National Commission on New Technological Uses of Copyrighted Works, *Final Report* (Washington, D.C.: Library of Congress, 1979).
  45. See, for example, *University Copyright policies in ARL libraries*, SPEC KIT 138 (Washington, D.C.: Association of Research Libraries, Office of Management Studies, 1987).
  46. Crews, *Copyright, Fair Use, and the Challenge for Universities*, p. 99.
  47. *Senate Report* 93-983 (1974), p. 122.
  48. *AAP Statement on Commercial and Fee-Based Document Delivery*, p. 5.
  49. *Ibid.*
  50. *Ibid.*
  51. Crews, *Copyright, Fair Use, and the Challenge for Universities*, p. 97.
  52. *Ibid.*, pp. 97-98.
  53. David Fanning, "Copyright Licensing in Britain," *British Book News* (May 1992), pp. 316-318. Some also pay fixed costs per copy on a transactional basis to CLA.
  54. Ann Okerson, "Of Making Many Books There is No End: Contractor Report for the Association of Research Libraries," in Report of the ARL Serials Prices Project (Washington, D.C.: Association of Research Libraries, 1989).
  55. Patrick Joyce and Thomas E. Metz, "Price Discrimination in Academic Journals," *Library Quarterly* 55 (July 1985): 273-283.

56. Kenneth E. Marks, Steven P. Nielsen, H. Craig Petersen, & Peter E. Wagner, "Longitudinal Study of Scientific Journal Prices in a Research Library," *College & Research Libraries* 52 (March 1991): 125-138.
57. *Ibid.* pp. 133-134.
58. *Ibid.* p.126; Richard M. Dougherty & Brenda L. Johnson, "Periodical Price Escalation: A Library Response," *Library Journal* 113 (May 15, 1988): 27-29.
59. A report of this study and related activities was presented by the author in a paper, "Access versus Ownership: Recent Utah Academic Library Experience in Cooperative Collection Development", presented on November 1, 1991 at the MPLA Conference in Phoenix. For the overlap and price study each library provided lists of their subscriptions to titles issued by these publishers. The Otto Harrassowitz *FIVE YEAR PRICING SURVEYS* were used to record journal costs from 1985 through 1990 for Elsevier, Springer, and Karger titles. Publishers price lists were used for Pergamon journals. While these provide somewhat arbitrary cost data, which omit supplemental billings, they were readily available for expeditious data entry. The holdings and price data were input at Utah State University into an EXCEL spreadsheet file. Several reports were produced on titles held by all four institutions, triplicate holdings, duplicate holdings, and unique titles.
60. H. Craig Peterson, "The economics of Economics Journals: A Statistical Analysis of Pricing Practices by Publishers," *College & Research Libraries* 53 (March 1992): 176-181.
61. Paul McCarthy, "Serial Killers: Academic Libraries Respond to Soaring Costs," *Library Journal* 119 (June 15, 1994): 41-44. McCarthy reports widespread cancellation of expensive serial titles due to rising prices and a decline in the percentage of university budgets allocated to libraries, with 27 ARL libraries cutting over \$200,000 in subscriptions in 1993.
62. ILL staff speculated that it was not so much a matter of a needed volume being currently in use, as it was a case of being in-between uses, most likely tied up in some process of reshelving which required more time to complete than libraries commonly allowed themselves under OCLC ILL protocols. Local users of library collections also find this turn-around time unacceptable. For a recent study reporting both scientists' expectations for rapid delivery and their distress over slow ILL turn around, which some feel are due to poor library inventory management, see, Jullie Hallmark, "Scientists' Access and Retrieval of References Cited in Their Recent Journal Articles," *College & Research Libraries* 55 (May 1994): 199-209.
63. Kathleen Kurozman & Barbara Ammerman Durniak, "Document Delivery: A Comparison of Commercial Document Suppliers and Interlibrary Loan Services," *College & Research Libraries* 55 (March 1994): 129-139. The authors also reviewed studies at Cornell, Virginia, and Chicago.
64. Cheryl B. Truesdell, "Is Access a Viable Alternative to Ownership? A Review of Access Performance," *Journal of Academic Librarianship* 20 (September 1994): 200-205.
65. USU has recently contracted with ISI and UMI for a 48 hour guaranteed turnaround time which, through the initial use of penalty clauses, appear to be more successful than experiences reviewed by Truesdell.
66. This limited view ignores the immense contribution ILL makes in tracking down the most obscure items which are often concealed in sometimes recalcitrant locations. Requests of this type are most often outside of the scope of commercial vendors.
67. Kurozman & Durniak, "Document Delivery," pp. 135-138. One supplier even charges \$.25 for establishing copyright fee payments.
68. *Ibid.*, p. 138.
69. Small, nonconfidential extracts of the contract, noting that the CLA is established under U.K. law to negotiate licenses, that records will be maintained to allow CLA to remit fees to copyright owners, and that the CLA will provide a list American publishers with whom they have reciprocal agreements, is provided in a press release "TO ALL INTERESTED PARTIES," prepared by Graham P. Cornish, Copyright Officer for the British Library (May 4, 1993).
70. Association of American Publishers, *AAP Position on Cross-Border Document Delivery*, (New York?: AAP, July 22, 1992).
71. Access charges and costs beyond copyright fees could also be considered in an overall access index, but these are difficult to determine. Kurozman & Durniak, "Document Delivery" (p. 134), reviewed several studies reporting costs for borrowing items ranging from about \$6 to \$18, but they opted to use only direct costs charged by suppliers for their study, which reported average direct cost of an ILL transaction at \$.56, arguing that staff time and other indirect costs were evenly spread across all borrowing activities. Extending this logic to the development of a comprehensive index of access costs, it is possible to argue that a variety of indirect costs are associated with both purchasing (ownership) and borrowing (access), that, on a per unit basis, these costs for borrowing may be somewhat greater than they are for purchasing, and, that the cost of commercial transactions are greater than those of traditional ILL.
72. *Catalog of Publisher Information: COPI Transactional Reporting Service* (Salem, MA: Copyright Clearance Center, May 1993). This issue was used as the source for data in Table 1. It may be that large volume commercial document delivery services receive discounts on these rates. As copyright revenues are intended to support the copyright holders ability to create, it would be a shameful misuse of copyright privileges for commercial suppliers not to pass this discount on to their clients.
73. Institute for Scientific Information, *1992 Science Citation Index Journal Citation Reports: A Bibliometric Analysis of Science Journals in the ISI Database* (Philadelphia, PA: ISI, 1993). ISI collects and reports this information annually. For a discussion of methods of calculating a journal's impact see Eugene Garfield, "Citation Analysis as a Tool for Journal Evaluation," *Science* 178 (1972): 471-479.
74. For an analysis of the classical, modernized and emergent models, see Association of American Universities, "Report of the AAU Task Force on A National Strategy for Managing Scientific and Technical Information," in *AAU Research Libraries Project: Reports of the Three Task Forces* (Washington, D.C.: Association of Research Libraries, 1994), pp. 47-98.
75. *Ibid.*, p. 53.
76. Gordon Flag, "Intellectual Property Group Unveils Report; ALA Has Misgivings," *American Libraries* 26 (October 1995): 867. The 238 page report itself is titled, *Intellectual Property and the National Information Infrastructure* (Washington, D.C: Department of Commerce, September, 1995), available on the Internet at [www.uspto.gov](http://www.uspto.gov), or by Gopher at [iipf.doc.gov](http://iipf.doc.gov).
77. For an analysis and review of the Working Groups' White Paper prepared for five library associations see Arnold P. Lutzker, *Commerce Department's White Paper on National and Global Information Infrastructure: Executive Summary for the Library and Educational Community* (Washington, D.C., September, 1995), Section A-2. The full document is available via the ARL Gopher: [arl.cni.org](http://arl.cni.org).
78. *Ibid.*, Section D. For an excellent articulation of principles that should have been included in the White Paper see, "Affirming the Rights and Responsibilities of the Research Library Community in the Area of Copyright," *ARL* 175 (July, 1994): 1-3.
79. For an analysis of copyright in the digital age and a description of four scenarios that might change who controls copyright of scholarly information, see Association of American Universities, "Report of the AAU Task Force on Intellectual Property Rights in an Electronic Environment," in *AAU Research Libraries Project: Reports of the Three Task Forces* (Washington, D.C.: Association of Research Libraries, 1994), pp. 104-139.