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# Modern Technology, Leaky Copyrights and Claims of Harm: Insights from the Curious History of Photocopying

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**Modern Technology, Leaky Copyrights, and Claims of Harm: Insights from the Curious History of Photocopying**  
**Diane Leenheer Zimmerman<sup>1</sup>**

*The core problem this paper attempts to address what should count as “economic harm” in determining whether particular kinds of copying are appropriately treated as copyright infringement. When copying occurs in a commercial setting, concrete evidence of harm is often available, but even where it is not, Congress and courts have been generally (and appropriately) comfortable in inferring that the copyright owner’s legitimate interests probably have been interfered with; hence provision is made for the award of statutory damages. But what if the copying is not commercial in any ordinary sense? Over the past 60 years or so, the advent of copying technologies has allowed individuals to reproduce content on a small scale for personal or small-group use, and the question of economic harm to copyright owners in these instances has been far more contested. Today, serious disagreements exist about whether or not private copying is always, or at least often, harmless to owners, and hence should fall outside the reach of copyright. The argument that owners should be entitled to control all such copying could rest on a pure property-rights foundation – I own it and therefore the user must have my permission to use it. But the more common explanation for why noncommercial copying is a violation of the letter and spirit of copyright is that it does cause economic harm, albeit in a way that is subtle and cumulative. Death by a thousand cuts, the copyright owners claim, is still death, and as such wholly inconsistent with the maintenance of a healthy environment for the production and distribution of information goods. The argument that copying without permission, especially on the internet, is per se harmful has led to a variety of increasingly stringent self-help and legislative measures designed to prevent and to punish the activity, although often without evidence of success. But researchers who study such things continue to find evidence of the damage, at least from noncommercial activity, elusive. The reasons this might be so, and the inferences to be drawn from it are an interesting subject for copyright theorists to consider, but so far, very little serious attention has been paid to examining the phenomenon. This paper is an effort to begin filling in that blank by setting out a case study of a rampant form of copying technology that long pre-dates the internet: photocopying. In many ways, the photocopying story is a microcosm of what happens when a new technology bursts onto the copyright scene, and as such, it is a possible source of learning about how copyright should treat the issue of noncommercial copying generally, whether it happens compliments of Xerox, or compliments of your regional ISP.*

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<sup>1</sup> Samuel Tilden Professor of Law Emerita, New York University School of Law. The author first wishes to thank Yochai Benkler, at whose instigation this project began. Thanks, also, to Rochelle Dreyfuss for her helpful comments on earlier drafts. I also am grateful for the insights of the many readers of more recent drafts, including Katherine Strandberg, Brett Frischman, Felix Wu, Cynthia Ho, Matthew Sag, Edward Lee, Margaret Chon, Hiram Melendez-Juarbe, Anthony Reese, Haochen Sun, and all the participants in the Cardozo and Loyola/Chicago-Kent intellectual property colloquia.

*What the paper concludes is that adequate copyright protection does not mean virtually airtight control over works by their owners. Considerable room for compromise between the public's desire for free access, and the owners' interest in retaining incentives to produce exists. Furthermore, it demonstrates that, in some instances at least, allowing greater user breathing space for unlicensed use reduces, at least as to some significant categories of works, the opportunity for damaging rent-seeking to occur.*

## **I. INTRODUCTION**

This is a story about leaky copyrights and the pros and cons of deciding, as a matter of policy, that all such leaks must be stemmed to maintain the integrity of the copyright system. Until about fifty years ago, the only kinds of leaks that had salience were commercial in nature; these were occasioned by competitors who copied protected works, and then attempt to sell them to the public in competition with the copyright holder. Although occasionally, arguments would arise over whether copying had actually occurred, and if so, whether the use was nonetheless “fair,” there was very little controversy over the need to caulk leaks by stopping proven infringers. But, with the advent of technologies that allowed individuals to make copies – not to sell, but for their own use or for the use of small groups (such as school classes), for the first time noncommercial leaks became a subject of controversy. Was personal or noncommercial copying something copyright permitted or forbade?

The labor-intensive practices of note-taking and hand-copying were acknowledged to exist but no definitive resolution regarding their legitimacy or lack thereof was reached. The copyright-owning community was on record as regarding these kinds of noncommercial copying as permissible only as a matter of industry custom, not as of-right uses.<sup>2</sup> A “Gentlemen’s

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<sup>2</sup> In the rare early cases where the issue was raised, the lower courts resolved the uncertainty in favor of defendants. In 1914, Macmillan Co. successfully sued a Harvard tutor who made typewritten study sheets and examination-preparation outlines based on an economics text as study aids for students using the book in question in class. *Macmillan Co. v. King*, 223 F.

Agreement” between libraries and publishers on the subject of noncommercial copying was entered into in 1937,<sup>3</sup> but in it, the publishers conceded that there was nothing in the existing statute that authoritatively supported their position that this kind of unconsented copying infringed.<sup>4</sup>

Beginning in the 1960s, however, new technologies that were not labor-intensive to use and that permitted multiple copies to be made simply and quickly began to come into common use – first photocopying machines,<sup>5</sup> then tape recorders<sup>6</sup> and video recorders<sup>7</sup> and eventually personal computers<sup>8</sup> and the internet. This change transformed noncommercial copying from a minor

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862 ((D. Mass 1914). At least two other cases, brought decades later, were equally unreceptive to copying by teachers for distribution to students. *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (music teacher); *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983) (home economics teacher). In these latter cases, courts expressed serious doubt that copying a complete work could be fair under any circumstances.

<sup>3</sup> Typewriters could make multiple copies using carbon paper, but the number of copies that could be made this way was quite limited. Mimeograph machines could also make multiple copies of documents prepared on special paper. Some early forms of photographic reproduction were available in the 1930s, and this technology is what prompted the “Gentlemen’s Agreement” between book publishers and librarians to establish forms of personal copying that were acceptable to publishers. The agreement is reprinted at 2 J. of Doc. Repro. 31 (1939).

<sup>4</sup> *Id.* at 52.

<sup>5</sup> The photocopier, the first major copying technology to appear, was introduced in 1959. Gannett News Service, *Xerox’s Meteoric Rise Is Similar to Some of Today’s Technology Rookies*, DesMoine Register, Oct. 10, 1999, at 1.

<sup>6</sup> Compact cassette recorders hit the general market in the 1960s. See Compact Cassette in Wikipedia at [http://en.wikipedia.org/wiki/Compact\\_Cassette](http://en.wikipedia.org/wiki/Compact_Cassette).

<sup>7</sup> Sony introduced the Betamax, the first video recorder, in 1975; a competing format, the Video Home System, or VHS as it is better known, recorder was introduced in the United States in 1977. See Wikipedia, Betamax, at <http://en.wikipedia.org/wiki/Betamax>.

<sup>8</sup> Computers for personal use came on the market in the 1970s, but it was the introduction of the IBM personal computer, or PC, in 1981 that ignited the popularity of mass

concern into a topic of serious debate. An individual who wanted to read an article on the evening train could now copy it rather than buying (and carrying) the entire volume in which the article appeared. A teacher who found something pertinent to his class could run off free copies for the students. A committee member who found an article bearing on the topic of a meeting might decide to copy it and hand out the copies, for free, to fellow members. And, as time went on, someone who wanted to watch a movie or listen to a song could easily copy it from another person's hard disc, whether that someone else was a friend or a complete stranger who made the work available on a peer-to-peer network.

If copyright owners had qualms about the legitimacy of hand-copying, they had no doubt that widespread private or noncommercial copying by technological means was an evil requiring immediate redress. Users on the other hand argued that photocopiers merely were mechanical assists to note-taking<sup>9</sup> or more an accurate way than a verbal summary to convey information to a small group; that equipment used to tape television shows off the air simply permitted time-shifting; and that copying music onto a variety of digital devices was merely space-shifting, or sampling or sharing an nice experience with friends. It was not a harm to anyone's market. Copying for purely personal use was also defended on privacy grounds, with arguments that what users do in their homes is not the business of copyright owners.<sup>10</sup>

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market computing. Computer History Museum, Timeline of Computer History, at <http://www.computerhistory.org/timeline/?category=cmptr>.

<sup>9</sup> Comment, *New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. Rev. 939, 951 (1968).

<sup>10</sup> James Lardner, in a book on the copyright dispute over the Sony Betamax video recording device, recounts a debate between the head of Universal Studios and Sony U.S.A. in which the head of Universal said use of the Betamax was stealing and the head of Sony shot back that no one had a right to tell him what he could or could not do in the privacy of his bedroom.

Mostly, the dispute came down to an argument, not over whether the copying was noninfringing, but rather whether or not it was a “fair use,” even though, at least in theory, whether it constituted infringement at all – that is, whether copyright actually applied only to commercially significant copying – remained questionable.<sup>11</sup> Today, U.S. law contains a number of discrete exceptions for personal and non-profit uses, leading to the inference that copying for personal use or sharing among small groups is also subject to copyright. The extent to which this change represented a conscious policy decision by Congress is not entirely clear, but it lends credence to the treatment of personal and nonprofit copying for educational use as a problem of fair use, rather than of prima facie infringement..

But the scope of the fair use defense for such behavior still remains largely uncharted,<sup>12</sup> and some reluctance to press too hard on personal and noncommercial uses continues to be evident both in the United States and abroad. One commentator, discussing criminal sanctions for digital music downloading in Germany, noted that the lawmakers exhibited considerable ambivalence about making noncommercial copying a crime and that German prosecutors were very reluctant to bring cases against individuals.<sup>13</sup> And when Germany passed its law prohibiting

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James Lardner, *Fast Forward: A Machine and the Commotion It Caused* (2002 ed.) at 82-83.

<sup>11</sup> Jessica Litman, *Lawful Personal Use*, 85 *Tex. L. Rev.* 1871, 1871-72.

<sup>12</sup> Compare *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (copying broadcast programming off the air for time-shifting purposes a fair use) with *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001) (neither copying for purposes of sampling music or space-shifting was fair use).

<sup>13</sup> Spain, for example, has been extremely reluctant to criminalize peer-to-peer sites or as a general matter to crack down on illegal copying of digital content. Spain: International Intellectual Property Alliance (IIPA) 2012 Special 301 Report on Copyright Enforcement and Protection, available at <http://www.iipa.com/rbc/2012/2012SPEC301SPAIN.PDF>. Spain was removed from the United

circumvention of digital management technology, it exempted individual users from the law's criminal sanctions.<sup>14</sup>

When cases directly or indirectly involving individual acts of noncommercial copying for personal or educational purposes have come before the United States Supreme Court, that body, too, has moved cautiously in dealing with the legitimacy or lack of same of copying for personal or educational uses.<sup>15</sup> One of the sticking points for the Court has been the ambiguity – indeed the paucity of evidence – about whether this kind of copying causes harm to copyright owners.<sup>16</sup> Intuitively, it seems reasonable to suppose that, that when someone makes a copy for personal use, or hands out copies in the course of teaching a class, the act is too insignificant to be harmful, and that, in the spirit of no harm, no foul, it should not be grounds for liability. This view also makes sense in light of positive law – the existence, extent or absence of economic harm is a crucial factor in fair use determinations.<sup>17</sup> Ordinarily law-abiding citizens are unlikely to

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States 301 Watch List in 2012, but is subject to ongoing monitoring, in part because of a 2006 Prosecutor General Circular that treats file sharing on peer-to-peer networks as not subject to criminal sanctions. Ambassador Ronald Kirk, Office of United States Trade Representative, 2012 Special 301 Report at 9, available at <http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report.pdf>.

<sup>14</sup> Alexander Peukert, Why Do “Good People” Disregard Copyright on the Internet?, in *Criminal Enforcement of Intellectual Property – A Blessing or a Curse?* (Christophe Geiger ed.) (forthcoming, Edward Elgar Publ., 2012).

<sup>15</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (off-the-air videotaping for personal use); *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975), aff. ‘g by equally divided Court 487 F.2d 1345 (Ct. Cl. 1973) (library photocopying for patrons).

<sup>16</sup> *Sony*, 464 U.S. at 451-54.

<sup>17</sup> Section 107 of the Copyright Act of 1976 lists as a factor to be considered in determining fair use “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. 107 (4) (2012).

think twice about engaging in activities that they do not see as inflicting actual harm – that is, the loss of revenues on which the copyright owner’s economic future depends. Thus harm – its existence or absence – has continued to loom large over the ongoing debate about how to regard noncommercial copying.

The response among copyright owners to this debate generally takes two forms. The first is to argue that the harm is obvious on the face of the matter because copying is a substitute for purchasing a legal copy of the work. Even if it is difficult to demonstrate exactly how much the copyright owner has been injured by unconsented copying, they argue that the lack of solid evidence is irrelevant.<sup>18</sup> Unless the copyist can prove that what she has done is harmless, a presumption of harm should exist in favor of the copyright owner because common sense tells us that massive copying has to hurt the sales of copyrighted works. In other words, owners should not be disabled from defending their copyrights until they can show that they are on the brink of failure or beyond.

Another approach is to attempt to bypass the question of harm entirely by asserting that copyright owners are entitled to all value that accrues from the use by others of their expression. If the work has sufficient value to the user to warrant copying it, then the user should be required to license the use. This view is defended in a couple of ways. One way, increasingly in favor among copyright owners, is to argue that copyright is a property interest that carries rights similar

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<sup>18</sup> The Supreme Court attempted to resolve this in Sony by suggesting that harm would be presumed for commercial, but not for noncommercial, copying. Sony, 464 U.S. 417, 451 (1984). Several years later, in Campbell v. Acuff-Rose Music, Inc., 507 U.S. 569, 583-84 (1994), the Court backed away from this conclusion, recognizing that not all commercial uses are unfair.

to those enjoyed by owners of real property and tangible goods.<sup>19</sup> Since the right to exclude is a core feature of property regimes, it follows that anyone who wants to use copyrighted expression cannot come onto the owner's "property" without first seeking permission to do so. The second, most notably articulated by former Register of Copyrights David Ladd,<sup>20</sup> is that the authors and disseminators of copyrighted works are risk-takers who will continue to take such risks only if, as a matter of justice, they are able to reap all the economic return that can be made to flow from what they produce.<sup>21</sup> The focus on harm, in Ladd's view, was misplaced because the just compensation promised authors by the Copyright Clause and the statute was to be "measured solely by what the public chooses to pay,"<sup>22</sup> not by the degree of harm inflicted if they do not pay.

The problem with attempts to sidestep the harm issue is that the theories supporting total control by copyright owners are in considerable tension with another mainstream view of copyright's appropriate function, which is to favor access except to the extent necessary to provide sufficient economic incentives to induce authors and disseminators to provide a stream of

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<sup>19</sup> Both Edmund Kitch and later R. Polk Wagner have discussed the benefits of a property approach to intellectual property generally, including copyright. See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 *J L & Econ* 265, 266 (1977); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 *Colum L Rev* 995 (2003). It is generally agreed that continental European copyright is strongly premised on a property right notion. See, e.g., Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: from Private Property to Human Rights*, 26 *Cardozo Arts & Ent. L. J.* 775, 822-23 (2009).

<sup>20</sup> David Ladd, *The Concept of Harm in Copyright*, 30 *J. Copyright Soc. U.S.A* 421 (1983).

<sup>21</sup> *Id.* at 431.

<sup>22</sup> *Id.* at 423. Ladd's article was prompted by his concern that digital technology would allow individuals to make almost costless, perfect copies, thereby undercutting markets for the works..

new works.<sup>23</sup> If one assumes that copyright is intended to support a viable market for copyrighted works and not to channel all possible value to copyright owners, then proof of harm inevitably becomes relevant. An incentive approach would only worry about those leaks that undercut an owner's willingness to participate in the knowledge market; it does not depend on maintaining a tightly-caulked system that resists all leaks. Although adherents to this view of copyright may disagree in particular instances about which "leaks" count and which do not, they would require some plausible story about harm – actual or seriously threatened – to condone liability for copyright infringement. As a practical matter, admittedly, it is impossible to calibrate the exact degree of incentives necessary for any particular work, but mainstream incentive theorists would be likely to look to the overall robustness of the sector in light of the degree of uncontrolled copying that exists. Threats that look systemic would be the focus of regulation, whereas if evidence of harm is slight to non-existent, and particularly if some public good is also furthered by allowing the copying, the benefit of the doubt would tilt toward the user community.

Decades have passed without resolving the debate about harm, and digital technology has clearly escalated the battle over personal and noncommercial use. But the outlines of the arguments over why it should be controlled – and why it is harmless – remain strikingly similar. When home taping equipment came on the market, it was declared that the record industry faced impending doom.<sup>24</sup> James Lardner reports that the music industry blamed audiocassette

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<sup>23</sup> For an in-depth discussion of the role of copyright as balancing incentives against public access, see Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-access Paradigm*, 49 *Vanderbilt L. Rev.* 483 (1994).

<sup>24</sup> See Note, *Home Taping*, 56 *So. Cal.L.R.* 647 (1983) arguing that taping substituted for buying recordings. is substitution. In a study done for the European Union, Gillian Davis reported in the 1980s that widespread copying of audio-visual works and sound recordings were

recorders for a serious slump in the sale of records:

The year 1981 had been a bad one for the recording industry. So had 1980 and 1979. After years of phenomenal growth, revenues had flattened out, and the number of new albums produced had actually declined by 32% since 1978. Many people in the business attributed their problems to the use of audiocassette recorders to tape radio broadcasts or records (often owned by someone other than the tapper). The *Wall Street Journal* estimated that taping cost the industry as much as \$1 billion a year.”<sup>25</sup>

But the music industry seems to have recovered, and when digital audio recording devices came on the scene to cause renewed perturbation, legislation passed in response attached a small royalty payment to sales of the devices for the benefit of copyright owners and performers<sup>26</sup> but barred the industry from suing individuals for using either the digital or *analog* recorders to copy music<sup>27</sup> – a strong hint that Congress believed that doomsday, at least, had not ridden in on the back of the analog tape recorder.

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“devaluing the rights of authors, producers of phonograms and videograms and performers.” Gillian Davis, *Private Copying of Sound and Audio-Visual Redordings* at 2 (1983). The report agreed with the industry estimate that at least 25 per cent of the music tape-recorded by individuals would otherwise have resulted in purchases. *Id.* at 164. A study of consumer behavior with regard to taping, released in 1982, estimated that \$2.85 billion worth of music was privately taped by individuals in 1980. Martin Fishbein, Susan Middlestat & Michael Kapp, *Home Taping: A Consumer Survey* at 24 (1982). The authors concluded that not all the music taped would have been purchased if taping were unavailable, but they assumed that a high percentage of it would have been. At a minimum, they wrote, it was reasonable to assume that the \$609 million spent on blank audiotape was money that otherwise would have been spend on prerecorded music. *Id.* at 43.

<sup>25</sup> James Lardner, *Fast Forward: Hollywood, the Japanese, and the Onslaught of the VCR* 200 (1987). Lardner reports that the industry regretted not having sued to stop the use of the recorders.

<sup>26</sup> 17 U.S.C. §1004. The digital devices also were required to be designed to permit copying only from original recordings, and not copies. *Id.*, § 1002.

<sup>27</sup> *Id.*, § 1008.

The death of the music industry was predicted again when compact disks could be ripped onto computer hard drives, and then traded on peer-to-peer networks. But once again, the evidence that file sharing and copying for one's own use and that of one's friends were the disease that was about to kill the record companies was highly contestable.<sup>28</sup> In 2004, for example, a study by Oberholzer and Strumpf found no correlation between file-sharing and sales of records.<sup>29</sup> Subsequent studies were mixed. Some found damage to record sales;<sup>30</sup>

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<sup>28</sup> Initially, the record industry acted on its position that private copying was infringement by suing thousands of individuals for downloading music without permission. See Electronic Frontier Foundation, *RIAA v. The People* (Sept. 2008), at <https://www.eff.org/wp/riaa-v-people-five-years-later>. Then, in 2008, it decided to drop the practice of suing consumers in favor of pressuring internet service providers to cut off their service if they are repeat offenders. Eliot Van Buskirk, *RIAA to Stop Suing Music Fans, Cut Them Off Instead*, *Wired* (Dec. 19, 2008), at <http://www.wired.com/business/2008/12/riaa-says-it-pl/>.

<sup>29</sup> Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales as Empirical Analysis* (2004), available at [http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf).

<sup>30</sup> The average estimate was a 20 per cent reduction. Felix Oberholzer-Gee & Koleman Strumpf, *Working Paper: File-Sharing and Copyright* at 16 (2010), available at <http://musicbusinessresearch.files.wordpress.com/2010/06/paper-felix-oberholzer-gee.pdf>. The paper cites numerous studies, including ones showing loss of sales and ones finding little or no loss.

some did not. One economist concluded that file-sharers were actually likely to buy more music than the average person, but that their purchases were more likely to be of individual songs, rather than albums.<sup>31</sup> This suggested that album sales might not be the relevant measure of “harm.”<sup>32</sup> And the most recent study by Oberholzer-Gee and Stumpf also indicates that, indeed, the relevant measure of harm is not the impact of file sharing on the revenues of the record industry (which is, after all, a form of music delivery, but not the only form); rather it is the effect on musicians and composers themselves. They write:

Record companies may find it more difficult to profitably sell CDs, but the broader industry is in a far better position. In fact, it is easy to make an argument that the business has grown considerably. ... The decline in music sales – they fell by 15% from 1997 to 2007 – is the focus of much discussion. However, adding in concerts alone shows the industry has grown by 5% over this period. If we also consider the sale of iPods as a revenue stream, the industry is now 66% larger than in 1997.<sup>33</sup>

Video recorders, too, were declared to be a source of dire harm to television and movie

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<sup>31</sup> Wendy Chi, Does File Sharing Crowd Out Copyrighted Goods? Evidence from the Music Recording Industry at 20, available at <http://www.econ.sinica.edu.tw/upload/file/0224-3.pdf>.

<sup>32</sup> It has been said that Steve Job’s iTunes saved the music industry by offering individual songs, rather than whole albums, for download at a relatively low price. Jeff Goodell, How the Apple Co-founder Changed the Computer Industry and Then Went after the Music Business, Rolling Stone, Oct. 6, 2011, available at <http://www.rollingstone.com/music/news/steve-jobs-rolling-stones-2003-interview-20111006#ixzz22jSjbCR9>. Price appears to be crucial in the decision to pirate music or buy it. Bellemare and Holmberg estimate that dropping the price of a song from \$.99 to \$.81 would decrease piracy by 25 per cent. Marc F. Bellemare and Andrew M. Holmberg, The Determinates of Music Piracy in a Sample of College Students at 27 (2009), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1481272](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481272).

<sup>33</sup> See File Sharing and Copyright, supra note \_\_\_, at 21.

makers.<sup>34</sup> But, ironically, the Supreme Court's refusal to bar their sale actually turned out to open valuable new markets for selling content directly to customers on videocassette and later on DVDs and by direct electronic delivery.<sup>35</sup>

When the personal computer became widely available, the ease with which digital copies of programs could be made led again to claims of the impending economic ruin of software developers. Certainly, unlicensed copying remains to this day a high-volume activity. The Business Software Alliance, for example, estimated in a 2010 study that 42 per cent of the software copies in use worldwide are unlicensed.<sup>36</sup> Although at one time, the industry experimented with copy protection schemes to shield their products against unauthorized duplication, that effort has long since been abandoned. Why software designers abandoned copy protection is subject to various explanations. Pam Samuelson suggests that it was dropped because it was a temptation to hackers, and because it led to user resistance.<sup>37</sup> Ariel Katz notes

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<sup>34</sup> Jayashri Srikantiah, in 71 N.Y.U.L.Rev. 1634, 1634 (1996), reported industry estimates that home video recording was costing the industry \$600 million dollars in losses domestically and many millions more abroad.

<sup>35</sup> The entertainment industry sued Sony to have the Betamax, a kind of videorecorder, taken off the market because they allowed individuals to infringe by copying programming off the air. Sony Corp., 464 U.S. at 441 at n. 21. The United States Supreme Court refused, however, to use the theory of contributory infringement to ban the recorders. See generally Lardner, *supra* note \_\_, for a discussion of how the technology opened new and lucrative markets for the entertainment industry.

<sup>36</sup> Business Software Alliance, 2010 Piracy Study, available at [http://portal.bsa.org/globalpiracy2010/downloads/study\\_pdf/2010\\_BSA\\_Piracy\\_Study-Standard.pdf](http://portal.bsa.org/globalpiracy2010/downloads/study_pdf/2010_BSA_Piracy_Study-Standard.pdf).

<sup>37</sup> She writes:

The main reason for the failure of copy protection schemes was that consumers did not favor them. Software consumers felt that they should be able to make backup copies of their programs. They could not do this with copy-protected software. Companies marketing only copy-protected software found themselves

that, while those explanations are of historic interest, they do not account for the industry's subsequent failure to develop improved technological fixes against piracy.<sup>38</sup> They have not done so, he claims, because piracy actually is economically beneficial to software companies. It helps increase the size of the pre-existing installed user base, with the result that the software becomes more and appealing to more new users as the numbers of existing users increases.<sup>39</sup> Whether the lack of copy protection is canny business strategy or a desire not to annoy buyers, software is eminently copyable, but software creation continues to be a lively economic sector of the high tech world.

In other words, when individuals copy for themselves or to share with friends or colleagues on a comparatively small scale and not for profit, copyright owners see inevitable and severe injury ahead – but as an empirical matter, whether and to what degree such harm actually occurs is far from clear.<sup>40</sup>

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losing out in the marketplace to those firms willing to risk distribution of unprotected programs. Eventually, software developers adapted to market demands by abandoning sales of copy-protected software altogether.

Pamela Samuelson, *Will the Copyright Office Be Obsolete in the Twenty-first Century?*, 13 *Cardozo Arts & Enter. L. J.* 55, 59 (1994)

<sup>38</sup> Ariel Katz, *A Network Effects Perspective on Software Piracy*, 55 *U. Toronto L. Rev.* 155, 160 (2005).

<sup>39</sup> *Id.* at 214. This is known as a network effect. He also suggests that, as high switching costs lock in users of illegal copies, companies may also be able to charge more than the going price when the user tries for any reason to regularize his situation. *Id.* at 215.

<sup>40</sup> Publishers, too, are very fearful that they will be ruined by copying of their works in digital form; in fact, digital copying has been referred to as “the great nightmare.” This quote is attributed to Ted Narkin, vice-president of McGraw-Hill’s professional book division. Bob Tedeschi, “E-Commerce Report: On-Line Publishing Ventures Are Still Looking for a Way Around Readers’ Sales Resistance,” *NY Times* at C14, col. 1 (October 4, 1999). Publishers

Despite evidence to suggest that unlicensed copying of this kind is not damaging, or is only mildly so, the reaction of copyright owners, and of legislators, has been to enlarge the tool kit available to caulk these leaks.<sup>41</sup> What remains unanswered is whether the effort can be justified. Should personal or non-profit copyists be subject to the same legal restraints as commercial ones? Or should copyright develop and maintain clear exemptions, premised on some combination of public interest and lack of nontrivial economic impact? Should the public's sense of fairness or that of the copyright owners, roughly speaking, prevail?

The approach taken by this paper in trying to shed light on this topic is somewhat unusual in that it looks not so much to theory as to experience.<sup>42</sup> Assuming that, in life as in Shakespeare, "what's past is prologue,"<sup>43</sup> this Article will examine the history of a specific technology, photocopying, for insights into the justifications, or lack of them, for exempting at least some kinds of noncommercial copying from the ambit of copyright.<sup>44</sup> Although

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admit, however, that real difficulty that exists in establishing the amount of piracy that is occurring and the extent to which pirated copies substitute for purchases. Association of American Publishers, Comments in Response to the Department of Commerce "Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy at 1-4 (2010), available at [http://www.publishers.org/\\_attachments/docs//issues//piracy-aap%20response%20to%20noi%2012-10-2010.pdf](http://www.publishers.org/_attachments/docs//issues//piracy-aap%20response%20to%20noi%2012-10-2010.pdf).

<sup>41</sup> For discussion of some legislative efforts, see nn. \_\_, \_\_, supra.

<sup>42</sup> One very interesting example of a more theoretical approach, leading to the conclusion that private copying is indeed very different in its consequences for copyright owners is Glynn S. Lunney, Jr., Copyright, Private Copying, and Discrete Public Goods, 12 Tulane J. Tech. & Intell. Prop. 1 (2009).

<sup>43</sup> William Shakespeare, *The Tempest*, Act II, scene 1, line 253 (1611)

<sup>44</sup> Other examples could be given that are also sufficiently mature to permit some evaluation and conclusions – the video cassette recorder comes to mind immediately. But I have chosen to address photocopying because quantity of data is so great.

photocopying is not a digital technology, and the copies it generates are far from perfect, the concerns that photocopying generated share common ground with claims about the impact of virtually all modern copying technologies.

What is particularly attractive about photocopying as a case study is that it has been around for half a century, has been extensively studied, debated, litigated and cabined by self-help devices. Over time, the photocopying dispute has matured enough as a controversy to be able to measure some of the consequences of the legal approach to it and to evaluate the plausibility of claims about its effects on publishers.

From this examination, I hope to arrive at some tentative general conclusions about the pros and cons of permitting at least some forms of personal and noncommercial copying to occur outside the control of copyright owners. What is meant by “personal and noncommercial use” in this context is, primarily, instances of copying: for purely personal uses, whether for enlightenment, amusement or for sharing with some limited group of friends and associates, and copying for socially beneficial purposes, like research and reportage; or the making of multiple copies for free or at-cost distribution in a classroom.

The Article begins by examining historical traditions of copyright law to show that generous exemptions for personal or noncommercial use would not inherently run counter to longstanding norms. The discussion then turns to the specific history of the photocopying dispute, in particular on the strength of the claim that photocopying would cause journals to cease publication and would push up the prices of those that survive. In addition to examining the generally abortive efforts to substantiate this “harm,” the Article will describe the developments in the case law and how a licensing mechanism that ultimately gave the publishers a way to charge

for copying. The final section discusses the consequences of those developments and why they underline the weakness of the case against unlicensed nonprofit photocopying. The Article then concludes by offering some insights about private and noncommercial copying suggested by the photocopying story.

## *II. The Photocopying Dispute*

### A. The Dispute in Context

To put the forthcoming discussion into context, a brief review of copyright policy as reflected in various incarnations of the statute may be helpful. Statutory copyright – the primary mechanism for awarding property rights in information -- has traditionally given the owner of an expressive work a variety of advantages, including the exclusive rights to copy and distribute the work, create derivative works based on it, and even to perform or display it in public. But copyright law also reflects an attempt to balance interests of the public against those of copyright owners; although in many instances those interests are congruent, that is not always the case. Historically, American copyright attempted to insure that enough profits from public demand for a work would flow to an author and her successors to make it worthwhile to continue producing and disseminating authored content.<sup>45</sup> To do this, the law focused on creating remedies to deal with commercial copyists who, because they need not pay the author for rights, could undersell the copyright owner's version. But the statute was initially limited in what it sought to protect, starting solely with coverage of books, maps and charts;<sup>46</sup> only gradually did the law expand to

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<sup>45</sup> See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (copyright creates incentive to create by providing the opportunity for economic gain to authors).

<sup>46</sup> Copyright Act of 1790, 1 Stat. at Large 124 (“securing the copies of maps, Charts, And books, to the authors and proprietors of such copies”), available at

cover other kinds of content.<sup>47</sup> Despite their privileged position as original beneficiaries of copyright, books were protected largely against commercial copying of their exact text;<sup>48</sup> not until late in the nineteenth century did it become an infringement to create such derivative works as abridgements or translations out of them without the owner's permission.

Even as the subject matter and breadth of copyright increased, the statute continued to exempt uses that were either deemed harmless, or socially productive relative to the degree of financial loss to owners incurred by omitting them from copyright. Until 1978, not-for-profit performances, for example, were exempt from copyright owners' control.<sup>49</sup> The first sale doctrine was, and remains, an important carve-out from copyright, allowing purchasers of all but a few kinds of works to lend, sell or give away copies of works once they are lawfully acquired. The doctrine encourages the availability of cheap access by allowing second-hand and rental markets to form outside the copyright owner's control and by allowing the formation and growth of libraries. Even where a particular use would facially constitute infringement, the law has long permitted the user to plead the defense of "fair use." Chapter I of the Copyright Act of 1976 is

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<http://www.copyright.gov/history/1790act.pdf>.

<sup>47</sup> Not until the Copyright Act of 1909 was copyright extended to "all the writings of an author." Copyright Act of 1909, §4, available at <http://www.copyright.gov/history/1909act.pdf>.

<sup>48</sup> See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.Pa. 1853) (translation of *Uncle Tom's Cabin* into German does not violate Stowe's copyright).

<sup>49</sup> Section 1(c) and (e) of the 1909 Act prohibited the unlicensed performance for profit of nondramatic literary works or musical compositions. Public performances of dramas, however, were prohibited whether for profit or not. 1909 Act, Section 1(d). Under the 1976 Act, the scope of copyright protection was changed to encompass public performances of all sorts of works, whether or not for profit, unless specifically exempted. 17 U.S.C. §106(4).

replete with small but significant limits on copyright owners' rights to prevent copying or use.<sup>50</sup>

In short, copyright has been explicitly designed to provide its beneficiaries important, but incomplete, control.

From a practical perspective, even if the owner of a copyright wanted complete control over how the public accessed, used or copied their works, historically she would have been hard-pressed to effectuate that wish. First of all, individual copyists were hard to catch. Only commercial ones operated in ways that were obvious enough to call attention to themselves. The lawyer who, in the course of researching a brief, took notes on a law review article or even copied it in its entirety was largely invisible to copyright owners. Kids on a school outing whose teacher encouraged them to sing popular songs on the bus were likely to fall below the radar screen of the most vigilant copyright claimant.<sup>51</sup> An art student who copied a photograph or a painting in the course of his training was rarely apt to gain the notice of the person who owned the rights in the original.<sup>52</sup>

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<sup>50</sup> See, e.g., 17 U.S.C. §110, carving out exceptions permitting unlicensed use for specific educational, religious, and other uses.

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ASCAP, however, did decide at one point to demand license fees from summer camps for the songs that were sung by the children who attended them. In an instance that received a great deal of attention, the organization threatened to sue the Girls Scouts of America for unlicensed musical performances by kids at their camps. Negative publicity, however, led to a retreat from the demand for royalties. See Elizabeth Bumiller, *ASCAP Asks Royalties From Girl Scouts, and Regrets It*, NY Times Archives, Dec. 17, 1996, available at <http://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html?pagewanted=all&src=pm>.

<sup>52</sup> Jessica Litman has pointed out that “Fifty years ago, copyright law rarely concerned itself with uses that were not both commercial and public.” Jessica Litman, *Lawful Personal Use*, 85 *Tex. L. Rev.* 1871, 1873 (2007). She goes on to add that not only were personal uses not limited by the express language of the law at that time, but were often protected by the courts. *Id.* at 1882.

But new copying technologies, analog and digital, it is argued, have changed the stakes. Private acts of copying, the argument goes, do not destroy markets wholesale the way commercial copying could, but when good copies can easily and quickly be generated by millions of individuals over time the end result is just as damaging. Death can as easily occur by a thousand cuts as by a single commercial blow: individuals who can copy works rather than buying them will do so, with the result that the market for the work will simply evaporate. Although owners can respond by raising the prices of the copies they can sell, this strategy cannot be successful in the long run. As Jane Ginsburg once explained, in the context of photocopying:

A publisher, particularly of a journal, is likely to set a very high price, in part at least because it anticipates that some number of copies will be made of the journal. In effect, the subscriber is buying the original, plus an indeterminate number of additional copies to make on her photocopier. This pricing policy tends to have a vicious circle effect. Users, knowing that the price anticipates some copying, will copy even more. Publishers will then charge even more. And so on, until the *reductio ad absurdum*: some day, only one copy will be published, and that copy will cost a million dollars.<sup>53</sup>

Presumably, well before the million dollar copy stage, the publication would have ceased because it would be uneconomical to continue publishing.

As has been noted earlier, this prediction is reiterated each time a new reproduction technology comes along -- although it has caused the greatest consternation among copyright holders whose works are disseminated on line or in digital format. The anxiety has been

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<sup>53</sup> Jane C. Ginsburg, *Reproduction of Protected Works for University Research or Teaching*, 39 *J. Copyrt. Soc'y of the U.S.A.* 181, 183 (1992). Professor Ginsburg was certainly not alone in her belief. Economists, too, hypothesized that the journal publishing business was highly vulnerable to losses attributable to photocopying. See, e.g., Roger G. Noll, *The Economics of Scholarly Publications and the Information Superhighway in The Internet and Telecommunications Policy* at 231 (Gerald W. Brock & Gregory Rosston eds.) (1996) (arguing that efficient photocopying technology will drive “down average circulation and increase[] subscription prices for libraries”).

particularly acute because of the perception that traditional copyright enforcement is simply not up to the task of preventing the market for copyrighted works from collapsing under a rush of individual and academic copying.

Thus, a push has been on for some time to develop tools outside copyright that will enable content providers to regain control over copying across the board. Various digital rights management techniques, from copy controls to digital watermarks are now available and in many cases, taking steps to evade these techniques can make the user liable not only for infringement but for violating laws that specifically make such circumventions civilly and criminally actionable, independent of any infringement claim.<sup>54</sup> Pressure is increasing on internet service providers and internet hosting sites to take action (including denial of further service) against those who upload

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<sup>54</sup> See Digital Millennium Copyright Act, 17 U.S.C. §1201(a) & (b) (identifying prohibited acts); §§1203, 1204 (setting out civil and criminal penalties). The European Union issued a directive, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, designed to import similar concepts into European national laws. The directive, however, proved “more contentious than its drafters foresaw,” delaying its implementation. Foundation for Information Policy Research, *Implementing the EU Copyright Directive at 1 (2003?)*, available at <http://www.fipr.org/copyright/guide/eucd-guide.pdf>. The effectiveness of the directive was called into question in a study commissioned by the EU. IVIR, *Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/ec on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (2007)* (see Executive Summary of Final Report), available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/infosoc-exec-summary.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-exec-summary.pdf). . One domestic attempt, at the state level, to add legal protections for self-help, was the Uniform Computer Information Transactions Act (UCITA). UCITA, promulgated in 1999 (although subsequently amended) was designed to make nonnegotiable shrinkwrap and clickwrap licenses enforceable. These contracts often contain terms that deny consumers rights that copyright would ordinarily grant. Although the uniform act was adopted by a couple of states (Maryland and Virginia), it proved too controversial for wide adoption and within a couple of years the Commissioners of Uniform Acts ceased attempting to convince states to pass it. UCITA On Line (2012) at <http://www.ucitaonline.com/>. For the current status of the law, see <http://www.uniformlaws.org/Act.aspx?title=Computer%20Information%20Transactions%20Act>.

or download copyrighted materials without the owner's permission.<sup>55</sup>

Critics, on the other hand, complain that many enforcement techniques are overly draconian, imperil privacy and free speech, harm educational institutions, upset the traditional copyright balance between the interests of users and producers, greatly exaggerate the harm that copyright owners suffer from private copying and are unfair to users.<sup>56</sup> Claims are also made that too tightly caulking the copyright system will lead to abusive market practices<sup>57</sup> and a cast a pall on the creation of new works. These conflicting versions of reality are what prompted the writing of this Article. Does the evidence available to us throw any light on who, if anyone, has

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<sup>55</sup> Two recent attempts to force more aggressive action by ISPs failed in Congress. See the Stop Online Piracy Act (SOPA), HR 3261 (112th Cong., 1st Sess.) (2011); the Protect IP Act (PIPA), S. 968 (112th Cong., 1st Sess.) (2011). See also Statement from Chairman Smith on Senate Delay of Vote on PROTECT IP Act, Jan. 20, 2012, available at <http://judiciary.house.gov/news/01202012.html?scp=2&sq=lamar%20smith&st=cse>.

<sup>56</sup> Some assert that the only fairness concern that need trouble regulators is ensuring that economically underprivileged persons are not further disadvantaged by the inability to pay the modest licensing fees that internet content providers will charge. Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure at 53, 84 (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

<sup>57</sup> Copyright owners argue in response, that copyright does not convey a classic monopoly and therefore they lack the market power that could endanger continued, open and affordable access to work. Although the subject was the economic impact of legislation that had been proposed several years ago to protect the content of factual databases, Kenneth Dam gave expression to the standard view on the likelihood that information products can be the subject of monopoly pricing. He wrote: "The likelihood of full monopoly pricing is easily exaggerated. Just because there may be only one database in a particular scientific field, it does not follow that full monopoly prices can be charged. To do so could easily invite entry [by competitors]." Kenneth W. Dam, Intellectual Property and the Academic Enterprise, John M. Olin Law & Economics Working Paper 68 (2<sup>nd</sup> Series) at 16, [http://www.law.uchicago.edu/files/files/68.Dam\\_IP.pdf](http://www.law.uchicago.edu/files/files/68.Dam_IP.pdf). (The paper also appears in *The Changing Character, Use and Protection of Intellectual Property* at (German American Academic Council Foundation, 1999). A major reason that many, including Dam, assume the absence of market power in copyright is that substitution can so easily occur. This subject will be dealt with in greater length later in this paper. See *infra* text accompanying nns. \_\_\_ to \_\_\_.

the better side of the argument? Do Congress and the courts have any significant leeway to excuse at least some noncommercial or personal copying, or is the greatest feasible amount of control the only sensible approach?

No claim is made that these questions will be answered here in a definitive way; rather, the hope is that much food for thought can be generated by looking back at the half century we have lived with photocopying as legislatures, courts, creators and users grapple with newer and even better technologies of reproduction.

### **B. Why Study Photocopying?**

Photocopying is an interesting model for a study of noncommercial copying for a number of reasons. First, the sorts of arguments made for and against allowing users to engage in noncommercial copying of materials in digital form bear an uncanny similarity to those made over the fifty-year life of the “Battle of the Photocopier.” Back in the sixties and seventies, publishers also insisted that because photocopying was so cheap and easy, unlicensed use of it to copy for personal or educational purposes would result in economic devastation for content providers, who would now be competing with “free” versions of their own work and could no longer sell enough copies to maintain a viable business.<sup>58</sup>

But a second interesting facet of the photocopying dispute is that it has almost entirely involved copies that were made for personal or small group use and without any obvious commercial aim. This distinguishes the photocopying dispute from that over copying movies or

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<sup>58</sup> Indeed, similar claims have greeted a number of new technologies. See *supra* notes \_\_\_ to \_\_\_ and accompanying text. . In the long run, it would be difficult to show that the record industry, the film industry and television were any the worse for these technologies. A more complete study of the relationship between the copyright industries and unconsented copying will, hopefully, eventually be done to include case studies in these other technologies.

recorded music, where the data often lumps together personal or small group copying with that of large commercially oriented operations.

Finally, photocopying is an especially appealing case study because it comes complete with its own imperfect, but nonetheless useful, control group. Early in the story, publishers had little success in controlling personal and educational photocopying, and therefore were forced to operate under a very leaky regime. Eventually, however, as a result of a variety of high-profile judicial decisions by lower courts and the formation of a rights-clearance mechanism, a switch occurred, and photocopy licensing became routine for many educational institutions and businesses (albeit not, I believe, for most individuals making copies for themselves or their friends). Indeed, licensing is now a substantial revenue source for publishers (and to a lesser degree, for authors).

Although publishers of hard copy have less available to them in the form of self-help mechanisms than do digital content owners, they have succeeded in making the risk of a law suit for unlicensed photocopying, at least in institutional settings, substantial enough to encourage widespread voluntary compliance with their demand that license fees be paid. It should be possible, therefore, to use the experience with photocopying to learn something about the impact on copyright owners of massive uncontrolled copying, and also to understand something about the relationship, if any, between copying and the pricing decisions and overall economic health of an important sector of content-producers.<sup>59</sup>

Although this article tries to bring together a broad collection of previously disconnected

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<sup>59</sup> But even if the reader at the end rejects the relevance of the photocopying to the digital future, the exercise will nonetheless be of some use. After all, photocopying, and whether it is fair use or foul, remains a vexing question for owners and users in its own right, and may demand its own set of policy correctives.

information about photocopying practices and their economic consequences, the special focus will be on the impact of the technology on scholarly journals, with particular emphasis on what was going on in the academy. For a variety of reasons, the claim by publishers of scholarly journals that they were peculiarly damaged by photocopying was the issue that became a major focus of congressional attention during the drafting of the 1976 Act, and over the next decades the copying of academic journal articles became the poster child for the embattled copyright community. The user groups most vocal in their defense of photocopying without a license, unsurprisingly, were librarians, researchers and faculty.<sup>60</sup>

Academics study the things they worry about. As a result, a vast body of economic, information science and other literature on photocopying, journal pricing and other elements critical to understanding the impact of weak and tight controls on the shape of information production and use is available to be organized and evaluated. This material is relied on here for much of the interpretation that follows.

### **III. The Case History**

As indicated in the introduction, the only copyists who counted, historically, were those who produced wares for commercial distribution. To infringe, the wrongdoer usually needed access to substantial ancillary assets, such as a printing press, paper, bookbinding, and a distribution system. It would not be worthwhile to infringe unless the actor was confident of covering those significant additional costs. Noncommercial copying was not costly in the same

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<sup>60</sup> Interestingly, today, among the most vocal opponents (so far with only limited success) to ratcheting up the level of protection for digital information products are also librarians, researchers and academics who continue to express concern over the vulnerability of academic pursuits to what they see as overly aggressive copyright and information ownership policies.

sense, but it was sufficiently time-consuming to copy a book or an article by hand or by typewriter that copyright owners could afford to view the impact on their economic well-being insignificant.<sup>61</sup>

A. In the Beginning: from 1959 to the 1976 Copyright Act

Then Xerox Corporation introduced its original office copier in 1959.<sup>62</sup> With access to a copying machine at work, in a library, or even at home, it became practical for the first time to reproduce one or two copies of an article or even an entire book fairly quickly instead of taking notes or laboriously typing out the copy. In this regard, photocopying machines, albeit clumsier and less efficient than digital copying, threatened copyright owners with a similar loss of physical control over their products. During the long genesis of the 1976 Copyright Act, how, under the law, to treat photocopying (particularly by libraries for their clients) was the subject of much discussion and disagreement.<sup>63</sup>

One reason, as previously noted, is that statutory copyright had not yet expressly confronted the legitimacy of copying for noncommercial, private purposes. Copyright owners were adamant from the start that photocopying was, per se, a violation of copyright, but in fact there was considerable uncertainty in Congress about whether this was so, and if so, the extent to which it should nevertheless be privileged. While the debate was going on, however, a scientific journal publisher in the early 1970s launched what may have been intended as a preemptive strike

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<sup>61</sup> For a discussion of early forms of private copying in multiples, see *supra* note \_\_\_.

<sup>62</sup> See note \_\_\_, *supra*.

<sup>63</sup> A succinct rendition of the long negotiations over fair use and photocopying can be found in REPORT OF THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) at 6-18 (1988).

by suing two major federal research libraries.<sup>64</sup> According to the estimates relied on by the court, the National Institutes of Health had distributed 93,000 unlicensed copies of scientific articles to doctors and researchers who requested them in 1970; the National Library of Medicine made approximately 120,000 unlicensed copies for its users in 1968.<sup>65</sup> The publisher lost the case. The Court of Claims ruled in 1973 that the government's activity constituted "fair use."<sup>66</sup> An equally divided Supreme Court affirmed the lower court's decision in 1975.<sup>67</sup> The *Williams & Wilkins* case, in retrospect, is important not simply for its holding, but for the fact that it assumed that photocopying by parties such as libraries for their clients was indeed prima facie infringement. Nevertheless, it concluded that where, as here, the copying was nonprofit and for a socially significant purpose, the fair use doctrine offered a defense.

Congress in the end chose to address the question of photocopying as a fair use explicitly as it related to libraries, largely tracking the resolution in *Williams & Wilkins*. Section 108 of the new statute exempted research libraries and libraries open to the public<sup>68</sup> from liability for making single copies of articles at a user's request or even, under some circumstances, of entire works for purposes of scholarship and research. The statute said that libraries were free to make

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<sup>64</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), judgment aff'd, 420 U.S. 376 (1975).

<sup>65</sup> 487 F.2d at 1348-49. For further discussion, see William Patry, *The Fair Use Privilege in Copyright Law* at 179 (1985).

<sup>66</sup> A "fair use" is one that can be made without permission or payment. Until the 1976 Copyright Act was passed, fair use was entirely a judicially-derived doctrine; it was included in a copyright statute in the United States for the first time in the 1976 Act. 17 U.S.C. §107.

<sup>67</sup> *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975).

<sup>68</sup> 17 U.S.C. § 108 (a)(2).

photocopies for their patrons, but only if they were making “isolated and unrelated reproduction or distribution of a single copy ... of the same material on separate occasions.”<sup>69</sup> The section also permits libraries to copy for purposes of interlibrary loan,<sup>70</sup> so long as such photocopying does not occur “in such aggregate quantities as to substitute for a subscription to or purchase of such work.”<sup>71</sup>

Section 107 of the 1976 Act, which codified general principles of fair use for the first time, also mentions photocopying in its preamble, giving as one example of a possible fair use “teaching (including multiple copies for classroom use).” Whether additional statutory attention

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<sup>69</sup> Id. at § 108(g). The statute goes on in subsection (g)(1) to add that the privilege to make copies for patrons does not extend to situations where the library “is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies . . . .” Professors Jane Ginsburg and Robert Gorman, in an earlier edition of their copyright casebook, said the following with regard to the ambiguous terms of Section 108: “It is no wonder that some libraries, preferring to avoid th[is] mine field . . . are removing themselves from photocopying activities,” in large part by asking patrons to use coin-operated machines to do the copying themselves. Robert A. Gorman & Jane C. Ginsburg, *Copyright Cases and Materials* at 722 (5<sup>th</sup> ed. 1999).

<sup>70</sup> 17 U.S.C. § 108 (d). A set of guidelines implementing the provision on interlibrary loans were promulgated by the National Commission on New Technological Uses of Copyrighted Works (CONTU) Final Report of the National Commission on New Technological Uses of Copyrighted Works (1978) [hereinafter CONTU Report] at 135-37. The report is available at <http://digital-law-online.info/CONTU/contu18.html>.

<sup>71</sup> Id., § 108 (g)(2). The guidelines set out what is sometimes referred to as the “rule of five.” That is, under the guidelines, libraries for interlibrary loan may photocopy no more than five articles from any given periodical (not issue) or other work a year. The rule applies to works published within the prior five year period only (reasonableness with regard to older works is left undefined). Contu Report, *supra* note \_\_, at 136-37.. For a discussion of the rules, see Copyright Clearance Center, *Interlibrary Loan: Copyright Guidelines and Best Practices* (2007), available at <http://www.copyright.com/media/pdfs/ILL-Brochure.pdf>; Mary Brandt Jensen, *Is the Library without Walls on a Collision Course with the 1976 Copyright Act?*, 85 L. Libr. J. 619, 683-85 (1993); Johanna E. Tallman, *One Year’s Experience with CONTU Guidelines for Interlibrary Loan Copies*, 5 J. Acad. Libr. 79 (1979). As a result, much of the exchange of photocopies through interlibrary loan is subject to licensing by copyright owners.

should be paid to photocopying was a question punted to a special study commission commonly known as CONTU.<sup>72</sup> CONTU authorized a number of studies on the issue; although different points of view were expressed,<sup>73</sup> the group charged with studying photocopying came back with the conclusion that allowing nonprofit photocopying was socially beneficial and not injurious to copyright owners.<sup>74</sup>

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<sup>72</sup> CONTU stands for National Commission on New Technological Uses of Copyrighted Works. CONTU's members were appointed by President Ford in 1975, and spent three years studying the effect of various forms of technological reproduction of copyrighted works. Photocopying was a significant part of the mandate of CONTU. Chapter Four of the Report is devoted to the subject. The dispute over the legitimacy of photocopying was not unique to the United States. For discussions of the issue, at roughly the same time in other parts of the world, see, e.g., Maurice B. Line & D. N. Wood, *The Effect of a Large-Scale Photocopying Service on Journal Sales*, 31 J. Documentation 234, 234 (1975); D. M. Wylie, *Photocopying – the New Heresy?*, 39 N. Zealand Libr. 174 (1976).

<sup>73</sup> The journal publishers, unsurprisingly, were opposed to treating photocopying as a fair use, with many anticipating the development of a revenue stream from permissions that would be granted by a photocopying clearing house. CONTU Report, *supra* n. \_\_\_, at Appendix H – Summaries of Commission-Sponsored Studies, in Research Center for Library and Information Science, Graduate Library School, Indiana University at Bloomington, *Survey of Publisher Practices and Current Attitudes on Authorized Journal Article Copying and Licensing*.

<sup>74</sup> The summary of a report by the Public Interest Economics Center (PIE-C) reported that:

no one making photocopies of copyright material should have to pay the publisher a copying fee unless the photocopies are resold. These economists found that the overall publishing industry had adequate returns. They were unable to find that photocopying especially has a deleterious effect on publishing. Hence, they saw no reason why students, teachers, researchers, and librarians should not be able to make essentially unlimited numbers of photocopies for their own noncommercial use. Specifically, PIE-C recommended that any organization that qualifies for tax exemptions under section 501 (c) (3) of the Internal Revenue Code be permitted to do such copyright-exempt internal photocopying as long as the copies are not resold.

Id. at Appendix H – Summaries of Commission-Sponsored Studies, PIE-C, *An Analysis of Computer and Photocopying Issues from the Point of View of the General Public and the Ultimate Consumer*.

When the CONTU Report was issued in 1978, it said the following:

The Commission's investigations and the testimony it heard support the determination that, with one exception, the Commission need not recommend changes in the provisions of the Copyright Act of 1976 affecting photocopying. The one exception deals with photocopying by organizations that are in the business of making copies.<sup>75</sup>

The implication of this conclusion was that the only "unfair" uses of photocopying equipment for noncommercial ends were the making of the copies by intermediaries for whom the activity was a business -- that is, copy shops. For whatever reason, Congress did not amend the law as CONTU suggested.

The question of the "fairness" of personal copying and of noncommercial copying for group uses, however, continued to be controversial. The statute itself seemed to embody considerable ambiguity. Although the preamble of Section 107 suggested that photocopies could be "fair," how generously one could interpret that possibility was thrown into question by language in the Section 108 exemption for libraries, which states in passing that:

Nothing in this section—... excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107.<sup>76</sup>

The lack of clarity was especially distressing to institutions of higher education. Photocopying was a useful way to update courses, or to tailor materials for courses not adequately supported by existing texts. Universities, however, were understandably concerned about risking suits over the question of whether, in any particular instance, the practices of faculty in making such copies were indeed "fair." Professor Ann Bartow reports that, prior to the

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<sup>75</sup> CONTU Report, supra note \_\_, at 119.

<sup>76</sup> 17 U.S.C. §108 (f)(2).

passage of the 1976 Act, twenty-five universities petitioned for an explicit exemption to allow photocopying for education purposes.<sup>77</sup>

Instead of granting the academy the kind of highly specific exemption won by libraries, Congress incorporated into the legislative history of Section 107 something called the Guidelines for Classroom Copying in Not-for-Profit Educational Institutions.<sup>78</sup> The Guidelines were not a product of Congress; rather, they were promulgated by an ad hoc group of educators, authors and publishers.<sup>79</sup> The guidelines seemed to be directed more toward the needs of elementary and high schools than colleges and universities, being fairly ungenerous in detailing the kinds and amounts of photocopying for classroom use that was acceptable. For that reason, the guidelines were unacceptable to such organizations as the American Association of Law Schools and the American Association of University Professors.<sup>80</sup> Furthermore, the exact purpose of including the Guidelines in the Act's legislative history was unclear. Debate continues today over whether the Guidelines are authoritative and, if so, whether they set a minimum or a maximum for the amount of copying that could constitute fair use.<sup>81</sup>

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<sup>77</sup> Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 *Vill. L. Rev.* 13, 32-33 (2003).

<sup>78</sup> Judiciary Comm. Report on H.R. Rep. 94-1476 (94th Cong., 2d Sess.) at 65-74 (1976).

<sup>79</sup> Guidelines for Educational Uses of Music, *id.* at 70-72..

<sup>80</sup> H.R. Rep. 94-1476, *supra*, at 72; Bartow, *supra* n. \_\_, at 33-34.

<sup>81</sup> The House of Representatives, in its report, refers to the Guidelines as establishing a baseline, suggesting that copying in excess of what they would allow might nevertheless be fair use. See *supra* note \_\_, H.R. Rep. 94-1476 at 72.. But the lack of authority on the point has allowed for considerable litigation. Starting in the early 1980s, a number of suits were brought against academic institutions or those who copied on their behalf (NYU was a defendant in one of these). Most settled out of court, creating anxiety among academic institutions, but leaving the

Adding to the uncertainty over the legitimacy of nonprofit and personal copying was a major Supreme Court case, decided in 1984, involving another new technology.<sup>82</sup> *Sony* was an attack by the movie and television industries on the recently introduced Betamax, a device that could be used by owners to record and save broadcasts received by their home television sets. Although the actual defendant was the company that made the Betamax, a major focus of the Court's debate was over the behavior of those making the actual copies. The rule that the majority agreed to apply was one borrowed from patent law. Under it, an actor could be barred from making or vending something that enabled infringing activity to occur only if the device or technology had no legitimate non-infringing use. The Court then examined what users did with the Betamax and concluded that a substantial number of them used it to record programs they would otherwise have missed, watched them when it was convenient, and then erased them. Although the Court appeared to take a more negative view about the "fairness" of the other common use -- recording for the purpose of creating a library of video offerings -- the majority

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plaintiffs with little in the way of clear law on the issue of licensing. The most recent case discussing the guidelines is *Cambridge University Press v. Becker*, \_\_ F.Supp.2d \_\_, 2012 WL 1835696 (N.D. Ga. 2012); there the court refused to treat them as setting a cap on what could be considered fair use with regard to copying for educational use. *Id.* at 27-28. A couple of cases were also brought against educators for instances of non-mechanical copying, and were then cited as evidence that educational institutions had no right to provide students with photocopied materials. These cases, however, involved the making of derivative works, and as a result of their peculiar facts (or the time when the suit was brought) were of doubtful precedential value on the issue of photocopying materials for use in teaching. For example, *Marcus v. Rowley*, 695 F.2d 1171 (9<sup>th</sup> Cir. 1983), involved copying of about a third of someone else's work, with no acknowledgment of its source, into her new classroom materials. The second, *Wihtol v. Crow*, 309 F. 2d 777 (8<sup>th</sup> Cir. 1962) involved the adaptation and subsequent distribution in multiple copies, of a piece of choral music. Both decisions preceded the Supreme Court ruling in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and operated on the assumption that it could never be fair use to copy all or substantially all of a work without permission.

<sup>82</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

agreed that time-shifting, at the very least, was “fair.” While many ways can be found to read the holding in Sony narrowly, at the time it assuredly added weight to the argument that, as long as people were copying for their own use or for an nonprofit publicly beneficial purpose, their actions were unlikely to fall safely within the harbor provided by “fair use.”

Whatever the doubts and debates about the status of noncommercial photocopying in those early years, users clearly did not think that they were engaging in illegal behavior when they made personal copies or copies for classrooms; photocopyists used the machines without guilt or hesitation. My husband tells the story of meeting a colleague at a publicly accessible photocopying machine in a major university library. The colleague jokingly told him, “These machines are wonderful. I can copy in five minutes what it used to take me two hours to read!” Looking back, it is easy to see that photocopying was rapidly supplanting handwritten notes for reference and research purposes, was supplementing or even replacing printed texts in classrooms, and was allowing people to share items of interest casually with friends and family..

Sony, the *Williams & Wilkins* case,<sup>83</sup> and the vagueness of section 107 aside, a factor that complicated any serious efforts by copyright owners to push more assertively to gain control over nonprofit photocopyists was the sheer complexity of licensing thousands, indeed millions, of low-value transactions. An early study conducted by students at the University of California (Los Angeles) [UCLA] under a grant from the National Endowment for the Arts noted that one publisher, McGraw-Hill, found that it cost it \$65,000 at the time to take in \$35,000 in fees for noncommercial copying.<sup>84</sup> Licensing on a case-by-case basis was just too expensive to

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<sup>83</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct.Cl. 1973), judgment aff’d by equally divided court, 420 U.S. 376 (1975).

<sup>84</sup> Comment, *New Technology*, supra note \_\_\_, at 962. A 2006 study of barriers to

administer.

Publishers, taking a leaf from the practices of the music industry, attempted to overcome this difficulty by setting up a collective rights organization to license and manage photocopying rights. The Copyright Clearance Center (the CCC) was formed in 1978, the same year that the CONTU Report was issued. CCC's initial focus was on facilitating licenses for businesses to photocopy, but getting clients to buy licenses turned out to be a difficult process.<sup>85</sup> Publishers did not rush to make their content available, either, so that by the early 1990s, the CCC still represented only a comparatively small fraction of journals.<sup>86</sup> Hence users who wanted to obtain permissions were still largely left to identify, locate and bargain with, each relevant copyright owner. The most avid owners' rights advocates had to face up to the fact that the transactions costs involved in such an effort were a serious barrier to compliance. Having gone through the process myself, I can attest that it was labor-intensive, and that the result of a request for permission was often total silence on the part of the prospective licensor.

Thus, from 1959 until the early 1990s, unlicensed photocopying was largely uncontrollable and voluminous. In the *Williams & Wilkins* suit, plaintiff alleged that more than 200,000 copies

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educational uses of digital materials shows that the problem has not gone away. The authors note that "large rightsholders and intermediaries may simply ignore approaches from small would-be educational users." William W. Fisher & William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age: A Foundational White Paper* (Berkman Center for Internet & Society, Research Publ. No. 2006-09, Aug. 10, 2006) at 82.

<sup>85</sup> The 1988 Copyright office report on photocopying indicates that the Copyright Clearance Center had few clients and those it had frequently reported no instances of copying that required licensing. See *supra* note \_\_\_ at 29-34..

<sup>86</sup> *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 915, 937 (2<sup>nd</sup> Cir. 1994), as amended Dec. 23, 1994 and further amended July 17, 1995 (Jacobs, J. dissenting) (only 30 per cent of the journals subscribed to by institutions like Texaco covered by CCC licensing).

of individual articles were made in a single year by the two federal libraries. Clearly this was small potatoes relative to the situation nationwide. A number of empirical studies of the quantity of photocopying were done in the late 1960s and the 1970s, mostly dealing with libraries. One estimate was that close to 164 million copies of articles or other text blocks were made in libraries in 1969 alone.<sup>87</sup>

In 1977, another such study, looking only at copying by library staff, came up with the slightly more modest estimate of 114 million items copied.<sup>88</sup> The study also pointed one of the many complexities of estimating harm to copyright owners from copying: it found that only about 54 million (or some 48 per cent) involved copyrighted materials.<sup>89</sup> The 1977 study did not include any estimate of the extent of copying in libraries by individuals engaging in unsupervised use of coin-operated machines. Of particular interest was its finding that articles from serials were the most frequently copied; of those, 79 per cent were covered by copyright.<sup>90</sup> The journals most subject to photocopying were scientific and technical ones, accounting for 64 per cent of the

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<sup>87</sup> Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 *Harv. L. Rev.* 281, 316-17 (1970). Justice Breyer was citing to a 1967 study by the Committee to Investigate Copyright Problems, estimating that 1.8 millions pages of photocopies would be made in 1969, averaging 11 pages per selection.

<sup>88</sup> NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE, *LIBRARY PHOTOCOPYING IN THE UNITED STATES* 3 (1977).

<sup>89</sup> *Id.* The phenomenon was not limited to the United States. In a well-known report on the impact of photocopying by British libraries, the authors stated that the number of pages copied increased by 36 per cent from academic year 1970-71 to 1972-73. Maurice B. Line & D. N. Wood, *The Effect of a Large-Scale Photocopying Service on Journal Sales*, 31 *J. Documentation* 234, 234 (1975).

<sup>90</sup> *Id.* at 4. Almost 86 per cent of this copying involved only 20 per cent of serials. *Id.* at 10.

total.<sup>91</sup>

Journal publishers argued that this volume of photocopying (by and for local users and via document retrieval services) threatened to force down their number of paid subscriptions to an unsustainably low level. The UCLA student study claimed that, within the first decade of the availability of the Xerox office copier, damage to publishers was clear. To support this, the authors cited anecdotal evidence, including statements by an executive at Williams & Wilkins attributing cancellation of the production of two journals and a 50 per cent drop in revenues of another journal that had been in existence for 50 years to the effects of unlicensed photocopying.<sup>92</sup>

A similar account of the effects of photocopying was offered a decade later by a representative of the publishing industry who wrote that unregulated copying had caused a destructive downward spiral in his company: falling numbers of subscriptions were leading to rapidly rising prices, which in turn were leading to further reduction in subscriptions. The result, he claimed, was a crisis in scientific journal publishing such that “the total collapse of scientific information dissemination” was a realistic possibility. Specialized “core” scientific journals, in particular, were deemed at risk because they tended to rest small circulation bases. For example, the author pointed out that the six most important journals published by his company averaged only 2,250 subscriptions a piece world-wide, and in two cases, actually had only 1000

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<sup>91</sup> Id. at 146.

<sup>92</sup> UCLA Comment, *supra* n. \_\_\_, at 994. In a 1967 book on photocopying, a similarly grim prediction was made. The author wrote that if physicians persist in copying only what interests them from medical journals and canceling their personal subscriptions, they will cause the destruction of publishing in this area. “For a time, the medical publisher may continue to edit and sell the journal, perhaps operating at a loss or raising the subscription price until the eventual demise of the magazine as an unprofitable venture. At that point, the doctor will have zero articles to Xerox from that particular publication.” George A. Give, COPYRIGHT AND THE MACHINE: NEARER TO THE DUST at 6-7 (1967).

subscribers.<sup>93</sup> Extensive testimony prior to the passage of the 1976 Copyright Act similarly warned that photocopying would kill the legitimate publishing industry.<sup>94</sup> In summary, the use of photocopiers was supposed to be responsible for pushing up subscription costs and closing down journals.

### **B. The Subscription Price Issue**

The “hard” data that was considered the strongest evidence of the disaster to journal publishers that the photocopier represented was the dramatic upward movement of subscription prices, particularly for scientific, mathematical and technical journals, after the introduction of the photocopier. The rate of increase was well above the rate of inflation and, suggesting that photocopying was also bad for the public interest, libraries found themselves increasingly hard-pressed to deal with these increases within the confines of their annual acquisition budgets. The problem for libraries was exacerbated because, as time went on, they were increasingly likely to be charged far more for each subscription than were individuals. Because journal pricing became such a bone of contention between publishers and, in particular, academic libraries, it became the subject of numerous studies.

For example, one study of the pricing of agricultural and biological science journals found that, over a period of six years, the journals in question averaged an increase in price on a per

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<sup>93</sup> E. Van Tangerine, *The Effect of a Large-Scale Photocopying Service on Journal Sales*, 32 *J. Documentation* 198,199 (1976).

<sup>94</sup> See, e.g., *Hearings on H.R. 2223 (94<sup>th</sup> Cong., 1<sup>st</sup> Sess.)*, Copyright Law Revision, Serial No. 36, Pt. 1 at 221-22 (1975) (statement of Irwin Karp, Counsel, Authors League of America)(journal publication a “marginal” business and will be severely injured by unlicensed photocopying; *id.* at 230 (1975) (statement of Robert W. Cairns, Executive Director, American Chemical Society) (same). The hearing transcript is available at <http://dcom.sirsi.net/Archimages/451.PDF>.

page basis of 67.7 per cent.<sup>95</sup> But what virtually all the studies agreed on was that the price increases for journals put out by large commercial publishers were of an entirely different order of magnitude<sup>96</sup> from that of journals produced by professional associations and other nonprofit entities.<sup>97</sup> The sums of money per subscription for commercial journals were (and are) often surprisingly large in absolute as well as in relative terms. It is not uncommon for commercially published scientific and mathematical journals in particular to sell for many thousands of dollars a year per subscription.<sup>98</sup>

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<sup>95</sup> Cornell University Faculty Taskforce, *Journal Price Study: Core Agricultural and Biological Journals*, Executive Summary, p. ii (Nov. 1998) [hereinafter *Cornell Study*]. A study of the cost of legal materials (excluding those available on line) also found that costs for some categories of works in the late 1990s outpaced inflation by a considerable margin (in at least one instance the increase was over 28 per cent over the course of three years). Mae M. Clark & Donna Alsbury, *Back to the Future: Predicting Materials Costs by Analyzing Past Expenditures*, 92 *L. Lib. J.* 147, 152 (2000). The sciences, however, have experienced the most dramatic pricing problems.

<sup>96</sup> Commercial publishers are sensitive to claims that their products are overpriced. One, Gordon and Breach, responded by suing or threatening to sue critics of its pricing policies. See, e.g., *OPA Amsterdam BV v. American Institute of Physics*, 973 F. Supp. 414 (S.D.N.Y. 1997), *aff'd sub nom. Gordon and Breach Science Publishers S. A. v. American Institute of Physics*, 166 F.3d 438 (2d Cir. 1999) (publishers unsuccessfully sued a University of Wisconsin physicist and two nonprofit societies for violations of § 43 (a) of the Lanham Act resulting from articles by the professor purporting to demonstrate that several Gordon and Breach journals were overpriced relative to their value to physicists). The publisher also brought similar suits, apparently also to no avail in the end, in several European countries. *Inside Publishing*, 10 *Lingua Franca* (Dec. 2000/Jan. 2001), available at [http://linguafranca.mirror.theinfo.org/print/0012/insidepub\\_suitor.html](http://linguafranca.mirror.theinfo.org/print/0012/insidepub_suitor.html).

<sup>97</sup> The *Cornell Study*, *supra*, studied 222 core agricultural and 174 core biological journals (the categories overlapped to some extent; 84 journals appeared on each list). The Taskforce reported that, "The commercial publishers' titles which constituted 40% of all titles are responsible for the average price change being so great, since all the other publisher types are between 55.5 and 33.3% increase." Commercial titles averaged a price per page increase of 64.7%. *Id.* at 8.

<sup>98</sup> The journal *Applied Economics*, published by Routledge, costs institutional subscribers in the United States \$10,226 a year for a combination of the print and on-line versions; the on-line

The pricing situation seemed on the surface to support precisely the predictions of those who believed that unregulated photocopying would be a disaster that would lead to market failure. It would seem that hotcopying was indeed pushing up the cost of journals, which in turn was leading to dropped subscriptions. Professor Ginsburg's prediction of the absurd \$1 million a year subscription with no one able to pay for it seemed just over the horizon.<sup>99</sup>

Further support for the thesis that photocopying was responsible for the upward price spiral was found in two other pieces of evidence. Studies suggested that the sharp increases in subscription rates began in the 1960s and 1970s. Between 1960 and 1977, libraries reported a nearly 200 per cent increase in subscription costs, measured in constant dollars.<sup>100</sup> This trend, of course, neatly correlated with the time period during which photocopying equipment first became widely available.

The case was complicated, however, by the paucity of hard empirical evidence to substantiate either a drop in journal subscriptions overall, or a causal link between any drops that

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version alone costs \$9203. See <http://www.tandf.co.uk/journals/journal.asp?issn=0003-6846&linktype=rates>. Agribusiness, a publication of Wiley Periodicals, Inc., has a subscription fee of \$2,261 for a combined print/on-line subscription, and it costs \$1966 for print only. <http://ordering.onlinelibrary.wiley.com/subs.asp?ref=1520-6297&doi=10.1002/%28ISSN%291520-6297>. 10/11/11

<sup>99</sup> See Ginsburg, *supra* note \_\_, at 183. This scenario assumes, as is generally true for copyrighted works, that, independent of the cost of making each additional copy of a work, the copyright owner must also recover what are known as “first copy” costs – that is, all the production costs that are incurred prior to the first copy being sold.

<sup>100</sup> Donald W. King, Dennis D. McDonald & Nancy K. Roderer, *SCIENTIFIC JOURNALS IN THE UNITED STATES: THEIR PRODUCTION, USE, AND ECONOMICS* at 38 (1981). The study covered the period from 1960 to 1976. These authors, however, viewed the cost increase as a result, not of photocopying, but of “economic pressures” on the publishing industry.

did occur and photocopying.<sup>101</sup> Some studies purported to find at least a small effect on subscriptions; others found none at all. What everyone did agree upon was that, predictions to the contrary notwithstanding, the number of journal titles overall continued to increase.<sup>102</sup> A scientist commenting on the photocopying controversy around the time of the *Williams & Wilkins* litigation referred to “the increasing flood of new journals that are being established each year.” He noted that one publisher alone had introduced 31 new specialty journals within a two year period.<sup>103</sup> Even in the humanities, where the financial status of journals was often chronically precarious, 13 per cent of all those in publication in 1973 had been started within the previous

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<sup>101</sup> Line and Wood wrote that:

For a loss in potential journal sales less evidence is available. Circulation figures of a sample of 100 journals showed an overall increase of 10% between 1967-8 and 1973-4, only 18 of the 100 showing a decrease. A separate sample, of 50 British journals only, showed an overall increase of 5%. . . . It is hard to guess what the potential increase in sales might have been.

Line & Wood, *supra* note \_\_\_, at 235.

<sup>102</sup> An extensive study of scientific journal publishing pointed out that, since the inception of the scientific journal in 1665, the number of titles had been growing steadily by about 5 per cent a year, with the number doubling every 15 years. Donald W. King, Dennis D. McDonald & Nancy K. Roderer, *SCIENTIFIC JOURNALS IN THE UNITED STATES* 7 (1981). Not everyone would agree that the increase in the number of journals is a symptom of the health of the publishing industry. Roger Noll argued, for example, that, at least in the sciences, publishers were driven to proliferate the number of journals by unrealistic conventions and practices of scholarly institutions. Noll claimed that these practices helped to push journal prices upward, destabilizing the publishing industry’s profitability. Roger Noll, *The Economics of Scholarly Publications in The Internet and Telecommunications Policy: Selected Papers from the 1995 Telecommunications Policy Research Conference* at 231, 231-34, 237-38 (1996). See generally Roger Noll & W. Edward Steinmueller, *An Economic Analysis of Scientific Journal Prices: Preliminary Results*, \_\_ *Serials Review* 32 (1992). These arguments will be discussed in more detail at \_\_\_, *infra*.

<sup>103</sup> Maurice B. Visscher, *Copyright and Other Impediments to Scientific Communication*, in *COMMUNICATION OF SCIENTIFIC INFORMATION* at 122 (S. Karger ed. 1975).

four years.<sup>104</sup>

The failure to find a clear negative effect on subscriptions or the numbers of titles published was not the result of failure to look for it. Researchers devoted enormous quantities of time and energy studying the relationship between journal health and photocopying without ever really being able to substantiate the harmfulness of reprography. Repeated studies through the 1970s were either inconclusive or found no evidence of injury.

CONTU's inability to find proof that noncommercial copying in particular damaged journal publishers, was, therefore, just another instance of seeking and not finding. In fact, the Commission actually showed that, despite rampant copying, commercial publishers were continuing to earn a respectable rate of return. The earnings rate, estimated at the time to be a net 6 per cent a year, did not correspond with publishers' claims of financial distress.<sup>105</sup> Their report concluded:

There is no immediate, measurable crisis in the publication of periodical journal literature – which is, by all accounts, the segment of publishing most directly affected by photocopying. No persuasive evidence exists that journals for which there is sufficient demand are going out of existence because of photocopying. Nor is there a reliable means of separating the effects of photocopying from those of the pressures of rising costs and limited demand on the viability of individual journal titles.<sup>106</sup>

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<sup>104</sup> S. J. Liebowitz, *THE IMPACT OF REPROGRAPHY ON THE COPYRIGHT SYSTEM* at 51 (1981). In his study, done for the Canadian government, Liebowitz noted that this observation was particularly interesting because “this set of journals [were] the least profitable and therefore most prone to claim that outside influences, such as reprography, were harming the journal publishing industry.” *Id.*

<sup>105</sup> Similar conclusions were reached by Line & Wood in their study of the effects of photocopying by the British Lending Library Division. They found “little hard evidence of declining journal sales so far,” and added that what trouble publishers faced seemed more a result of increasing costs of production than of photocopying. Line & Wood, *supra* note \_\_\_, at 244-45.

<sup>106</sup> CONTU Report, *supra* note \_\_\_, at 121-22.

M. B. Line in a 1974 study offered one reason that photocopying unlikely to have a measurable economic effect on subscriptions – the lack of frequency with which any given article was copied. By his estimate, an article had only a one in 20 chance of being photocopied at all in a given year. He also pointed out that financial losses were hard to substantiate because the money libraries were paying to journal publishers for serials was also steadily increasing.<sup>107</sup>

In 1981, economist Stanley Liebowitz, at the request of the Canadian government, reviewed all the studies that had been done to date in Britain, the United States and Canada on the impact of photocopying on journal subscriptions, whatever their approach. Most had been made of library practices, some focusing entirely on copying by library staff, while others included copying done by patrons at pay machines. Other studies tried to evaluate the impact of the technology by looking at individual and library subscription data, factoring in increases or decreases in the numbers of potential readers as measured by the influx of new Ph.D.s. Still other researchers examined the quantity of journals published, both in numbers of publications and in numbers of pages to see if claims of damage to the journal publishers could be substantiated in that way. Finally, others collected data on journal pricing over time. After thorough examination of all of them, Liebowitz concluded simply:

The evidence provides very little support for the thesis that photocopying has reduced the demand for journal subscriptions. .<sup>108</sup>

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<sup>107</sup> D. M. Wylie, *Photocopying – the New Heresy?*, 39 *New Zealand Libraries* 174, 184-85 (citing to M. B. Line, *Access to Resources Through the British Lending Division*, 27 *Aslib Proceedings* 8-15 (1975)). In another publication, Line and Wood said that British libraries were spending 17 per cent more each year to keep up with increased prices and increased numbers of journals. M. B. Line & D. N. Wood, *Photocopying and Journal Sales: A Reply*, 32 *J. Documentation* 204, 205 (1976). See also Line & Wood, *supra* note \_\_, at 236.

<sup>108</sup> S. J. Liebowitz, *supra* note \_\_, at v. In a later section of the study, Liebowitz in fact speculated that journal subscriptions were increasing relative to the population of scientists,

Some of those who continued to puzzle over that absence of any palpable proof of harm to journal publishers theorized that publishers were managing for the time being to cover their revenue losses from copying through their reliance on differential pricing. The introduction of tiered subscription prices did pretty much coincide with the introduction of the photocopier, and publishers increasingly began to charge libraries more – often two or three times more – for scholarly journals than the rate for individual subscribers.<sup>109</sup> Liebowitz<sup>110</sup> posited that this new business model might be insulating publishers from harm if – a claim he viewed as by no means certain<sup>111</sup> -- subscriptions were actually being lost as a result of the availability of cheap

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but pointed out that it would be difficult to obtain the data that would permit anyone to state this categorically. *Id.* at 47. At a minimum, he wrote, there had been no dramatic decline in subscriptions. *Id.*

<sup>109</sup> That library copies were frequent sources of photocopied articles seems quite uncontroversial. One study found that almost all members of the mathematics, chemistry/biochemistry and physics/astronomy faculties photocopied from library copies of journals. Cecelia M. Brown, *Information Seeking Behavior of Scientists in the Electronic Information Age: Astronomers, Chemists, Mathematicians, and Physicists*, 50 *J. Am. Soc. For Info. Sci.* 929, 935 (1999). See also David Pullinger, *Academics and the New Information Environment: the Impact of Local Factors on Use of Electronic Journals*, 25 *J. Info. Sci.* 164, 165 (1999) (in absence of electronic access, users visit libraries to browse and photocopy).

<sup>110</sup> S. J. Liebowitz, *Copying and Indirect Appropriability: Photocopying of Journals*, 93 *J. Pol. Econ.* 945, 949-50 (1985). Other scholars similarly pointed to the possible importance of differential pricing. See Stephen Breyer, *supra* note \_\_ at 335; John Circace, *When Does Complete Copying of Copyrighted Works for Purposes Other than for Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases*, 28 *St. Louis U. L. Rev.* 647, 680-81 (1984); Comment, *Photocopying and Fair Use: An Examination of the Economic Factor in Fair Use*, 26 *Emory L. Rev.* 849, 868 (1977). Cf. Stanley M. Besen, Sheila Nataraj Kirby, *PRIVATE COPYING, APPROPRIABILITY, AND OPTIMAL COPYING ROYALTIES* (1987) (pointing out that differential pricing may, but does not necessarily, allow publishers to maintain profit level).

<sup>111</sup> Liebowitz found in his study that subscriptions to academic journals kept pace with the growth of new Ph.D.s, suggesting that publishers were both maintaining their subscription levels, and increasing their use of price discrimination, thereby coming out ahead., 954-55

photocopying. Liebowitz looked, for example, at a sample of economics journals, and found that, among those in existence when Xerox introduced its 914 copier, only 8 per cent price-discriminated at the time between libraries and individual subscribers; by 1983, however, 74 per cent of them did so.<sup>112</sup>

Since this pricing scheme would allow publishers to obtain compensation from those subscribers whose copies were most likely to be reproduced, it did not offer a clear justification for excluding nonprofit copying from the control of copyright owners. As defenders of copyright control over photocopying like Professor Ginsburg implied, at some point, however, the need to keep increasing prices to compensate for lost individual subscriptions would eventually result in the collapse of the library subscription market as well. Oddly, though, it did not take account of the fact that no one was able to demonstrate conclusively that photocopying had led to any reductions in subscriptions.

### **C. The Middle Years: Licenses are Required, but Prices Continue to Rise**

The copyright community remained convinced, however, that it needed compensation for photocopying. Whether this was because they were convinced that the studies were flawed, or because they believed that, whatever the studies did or did not show, they were entitled to profit from this “new market,” is unclear. As noted earlier, in the late 1970s, publishers forged ahead by established a clearing house to manage the licensing of photocopying rights.

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(1985). Others made similar suggestions.

<sup>112</sup> *Id. at 952.*

As noted above, the CCC was originally designed to manage photocopying licenses to corporate customers from serials (that is, journal) publishers.<sup>113</sup> That getting started was not easy is evident in Leibowitz's 1981 report. He found that only 335 journal publishers had listed journals with the CCC, and a mere 923 organizations had registered as users of the licensing service.<sup>114</sup> Although within the next year, the number of publishers willing to license through the CCC had nearly doubled;<sup>115</sup> the number of works available was still small relative to the potential pool of publications. It was apparent also that users and user groups were in no hurry to sign up to pay royalties, either; in the year after the Leibowitz report was issued, the number of registered licensees had increased by a mere fifty percent.<sup>116</sup> A study by the Copyright Office says that, in 1984, the CCC actually went to Congress – unsuccessfully as it turned out -- to ask it to pass legislation to limit the recovery available for infringement by photocopying if the copyright owner did not license his content through the CCC.<sup>117</sup>

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<sup>113</sup> David P. Waite, "Who's Using the Copyright Clearance Center?," Proceedings of the ASIS Annual Meeting, Vol. 17, at p. 387 (1980).

<sup>114</sup> Leibowitz, *Reprography*, supra note \_\_, at 64.

<sup>115</sup> The figure was now 604. Register of Copyrights, Second Report on Library Reproduction of Copyrighted Works (17 U.S.C. 108) (January 1988) at 30.

<sup>116</sup> There were now 1399 of them. *Id.*

<sup>117</sup> *Id.*

Despite the setbacks in *Williams & Wilkins* and in *Sony*, copyright owners also continued to press for legal recognition of their rights by filing more law suits. In a couple of instances, cases were brought against businesses whose employees made unlicensed copies of documents for internal use.<sup>118</sup> In at least three cases, however, rightsholders brushed up against the practices of educators by suing copy shops for making course packs. And in one, the attack on academic photocopying was made explicit by adding a university and several faculty members as defendants.<sup>119</sup> In each instance, however, the dispute was settled, rather than being litigated to judgment. One might fairly assume that neither side was anxious to push these cases too hard out of doubt about the strength of their respective claims. The suits against corporations did have the effect of encouraging more businesses to buy safety from litigation by obtaining licenses and pay permission fees either directly to publishers or to the CCC for the photocopying that they were doing.<sup>120</sup> And they certainly managed to create concern among academic institutions (who at this point could not turn to the CCC for licensing assistance).<sup>121</sup>

By the early 1990s, however, the legal climate began to shift in favor of publishers. A number of high profile suits asserting that photocopying without permission was infringement

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<sup>118</sup> The companies sued were Squibb and American Cyanamid. *Id.* at 27-28.

<sup>119</sup> The university defendant was New York University. For a description of these cases, see REPORT OF THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) at 25-27 (1988).

<sup>120</sup> One author who studied the response of several business entities to litigation on photocopying reports that taking a license with the CCC began to be viewed as an insurance policy, and that, as a practical matter, businesses at least became unwilling to take any chances that their practices, even if legitimate, would be tested in court. Kenneth D. Crews, Copyright at a Turning Point: Corporate Responses to the Changing Environment, 3 J. Intell. Prop. L. 277, 292 (1996).

<sup>121</sup> See text accompanying nn. \_\_\_ to \_\_\_.

went to judgment and were won by plaintiffs. Two were against commercial copy shops that prepared course packs for university faculty (although neither the faculty nor the universities involved were joined as defendants).<sup>122</sup> The third suit was something of a replay of *Williams & Wilkins*, dealing with copying by and for researchers -- and this time it came out the way copyright owners had hoped the original case would be resolved. Scientific journal publishers successfully sued Texaco, Inc., for infringement based on the practice of permitting research scientists to make (or ask the library to make for them<sup>123</sup>) photocopies of scientific articles from journals to which the library subscribed.<sup>124</sup>

### **B. The Turnaround: Texaco and Its Cohorts: Same Facts, Different Result.**

Although the plaintiffs continued to assert that, at least as to “marginal” publications, the inability to license photocopying would result in closing down journals,<sup>125</sup> the evidentiary ground

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<sup>122</sup> The earliest was *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991). The second was the Michigan Documents case. In that litigation, a panel of the 6<sup>th</sup> Circuit found for the defendants, ruling that the making of course packs by a commercial copy shop at the behest of faculty was fair use. The Circuit, sitting en banc, reversed. *Princeton Univ. Press v. Michigan Document Servs, Inc.*, 99 F.3d 1381 (6<sup>th</sup> Cir. 1996) (en banc), cert. denied 117 S. Ct. 1336 (1997).

<sup>123</sup> The library at Texaco’s Beacon, New York, research facility did not qualify for the protection of 17 U.S.C. § 108 because that provision is expressly limited to libraries either open to the public, or “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 . . . .” *Id.*, § 108(a)(2).

<sup>124</sup> Although Texaco had entered into an agreement to pay a licensing fee to the Copyright Clearance Center for any photocopying that took place in the company, the CCC found that virtually no copying was reported to it. Hence, the publishers sued, taking as their target photocopying by and for scientists in a research laboratory operated by Texaco in Beacon, New York.

<sup>125</sup> See, e.g., Leslie Hallewell, *The Book Menaced by Underprinting and Overcopying*, 83 *Libr. Assoc. Record* 376 (1981) (failure to control photocopying will be the end of the scholarly book publishing industry).

on which economic harm could be established shifted in an important way. Now, instead of relying solely on the questionable claim that photocopying without permission was a death knell for the industry, the plaintiffs argued that respondents' fair use claims failed the critically important fourth prong – “the effect of the use upon the potential market for or value of the copyrighted work”<sup>126</sup> – because publishers had now created and were exploiting a market for photocopy licenses. Unconsented copying caused direct losses in that market. This argument ultimately turned the tide in favor of the plaintiffs in the courts.

Both the *Kinko's* and the *Princeton University Press* cases addressed academic copying. In each, however, books rather than journals were the primary type of work subject to copying, and copy shops made the actual reproductions. Judge Motley in *Kinko* concluded that the copying at issue “impacts upon the plaintiffs' sales of their books,”<sup>127</sup> even though she recited no supporting evidence.<sup>128</sup> During the litigation, the judge reportedly informed the publishers that the failure to provide the same clearing house service for academic photocopying that CCC offered businesses was a problem, and urged that such a service be offered. As a result, said a spokesman for the CCC, “Our Academic Permissions Service was built literally overnight.”<sup>129</sup> The publishers won.

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<sup>126</sup> 17 U.S. C. §107.

<sup>127</sup> *Kinko's*, 758 F. Supp. at 1534.

<sup>128</sup> It would have been difficult to do so. A study undertaken by the Association of American University Presses, issued in 1990, found an increase in the number of books published by these presses between 1978 to 1988 in “nearly all disciplines.” Hot Type, 46 *Chronicle of Higher Education* A24 (Oct. 1, 1999).

<sup>129</sup> The history of the CCC's involvement in academic licensing came from an interview of Frederic Haber, the CCC's General Counsel, by the author on November 18, 2011.

Once the licensing setup was in place, evidence of loss of sales was no longer so important to the courts; they could now point to a different kind of harm – that of lost permission fees for “out-of-print” books.<sup>130</sup> For example, in the subsequent *Princeton University Press* litigation, the plaintiff’s whole argument against the fair use defense was not the loss of sales, but the loss of permission fees.<sup>131</sup> The majority hypothesized that “marginally profitable books” could probably not be published at all unless publishers could cross-subsidize them from profits earned through photocopying licenses, but the decision was not based estimates of the books that did not get published or that failed to sell the expected amount; instead, the majority rested its holding entirely on the fact that “licensing income is significant” to the publishers.<sup>132</sup>

In the *Texaco* case – this time, involving a corporate rather than an academic user – the plaintiffs put in both kinds of evidence of harm: that relating to losses of royalties for photocopying and also that of lost sales. The plaintiffs argued that photocopies were indeed substituting for additional subscriptions to their journals.<sup>133</sup> Judge Pierre Leval, who tried the case in the District Court, found that the plaintiffs had “demonstrated a substantial harm to the value of their

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<sup>130</sup> 758 F. Supp. at 1534.

<sup>131</sup> Judge Ryan, in his dissent, wrote:

The plaintiffs certainly have not demonstrated that the coursepacks affected the market for the original copyrighted works. Neither have they presented any evidence of likely harm to their potential market for derivative works, such as published anthologies. Remarkably, they have limited their showing of “market effect” to the loss of permission fees that they would like to receive from copyshops like MDS.

99 F. 3d at 1407 (Ryan, J., dissenting).

<sup>132</sup> *Id.* at 1391.

<sup>133</sup> *American Geophysical Union v. Texaco, Inc.* 802 F. Supp. 1, 18 (S.D.N.Y.), *aff’d* 60 F.3d 915, 937 (2<sup>nd</sup> Cir. 1994), as amended Dec. 23, 1994 and further amended July 17, 1995..

copyrights through such copying,<sup>134</sup> even though he admitted that, were Texaco unable to photocopy without permission, it would at most have been apt to increase the number of its journal subscriptions by a small number.<sup>135</sup>

The Second Circuit subsequently affirmed. For the panel, lost licensing fees seemed to be what carried the day because the court had to agree with Judge Leval that the evidence of the harm to subscriptions caused by photocopying was fairly weak. Ultimately, the majority adopted Judge Leval's stance, stating that "it is reasonable to conclude that Texaco would purchase at least a few additional subscriptions . . . to provide certain researchers with personal copies of particular articles in their own offices" if that demand were not instead filled by photocopying.<sup>136</sup> The Court gave the plaintiffs the benefit of the doubt on this empirical point, in part, it said, because, although the publishers could not prove that photocopying of this sort "impair[s] the marketability of journals," neither could Texaco prove that it did not.<sup>137</sup>

In a sense, the *Texaco* court was demonstrating the problem caused by the dog that didn't bark.<sup>138</sup> By the 1990s, cheap, easy photocopying had been around for more than 30 years, long enough, one might have thought, for the destructive effect of massive photocopying on the

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<sup>134</sup> *Id.* at 21.

<sup>135</sup> *Id.* at 19.

<sup>136</sup> *Id.* at 897.

<sup>137</sup> 37 F. 3d 881, 896 (2d Cir. 1994).

<sup>138</sup> The Register of Copyrights was directed by Congress to report periodically on issues arising from photocopying in libraries. In its second report, issued in 1988, it had no new information to add on the issue of harm; indeed the only notable development was the filing of a number of law suits alleging infringement by photocopying. Register of Copyrights, Library Reproduction of Copyrighted Works (17 U.S. C. 108): Second Report (1988).

publishing industry – on journals and books alike -- to be demonstrable, if indeed such an effect existed.<sup>139</sup> Yet, as Judge Jacobs pointed out in his dissent in the *Texaco* case, the numbers of journal titles continued to increase at more or less a constant rate, doubling every ten to fifteen years. At the time of the decision, some 200,000 titles were extant.<sup>140</sup> The scholarship bore out Jacobs' view. An article in the mid-1990s, commenting on the general state of scholarly journals, found that, "This type of recorded knowledge has doubled in quantity about every seventeen years...[I]n the United States, the number of articles published has increased from 208,000 in 1960 to 382,000 in 1977 to 601,000 in 1990."<sup>141</sup>

Not everyone agreed that this was evidence of lack of harm, however. Some economists argued that proliferation was a symptom of academic practices that pushed up publishing costs by expecting journals to address ever-smaller and ever more specialized audiences.<sup>142</sup> The plethora

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<sup>139</sup> Judge Merritt, in Princeton University Press, said:

The use complained of by plaintiffs here has been widespread for many years and the publishers have not been able to demonstrate any significant harm to the market for the original works during that time. The publishing industry tried to persuade Congress in 1976 to ban the type of copying done by defendant here. Congress declined to do so and the publishing industry has been trying ever since to work around the language of the statute to expand its rights.

99 F. 3d at 1395 (Merritt, J., dissenting).

<sup>140</sup> *Id.* at 907 (Jacobs, J., dissenting).

<sup>141</sup> Donald W. King & Jose-Marie Griffiths, *Economic Issues Concerning Electronic Publishing and Distribution of Scholarly Articles*, 43 *Library Trends* 713 (Mar. 22, 1995).

<sup>142</sup> See *supra* note \_\_\_. It makes sense that, as long as publish-or-perish is the mantra for gaining tenure and academic recognition, journal proliferation with greater and greater specialization is a likely outcome. On the other hand, this trend may not be as economically costly for publishers as would first appear, since it has also been pointed out that researchers provide the content for these journals free of charge, and in many cases even pay "page" fees to the publisher to get their work into print. See Cornell University Faculty Taskforce, *Journal*

of new specialized journals, in turn, caused older, more generalized journals to raise their subscription rates to compensate for the subscribers they lost to the more specialized journals. In the context of this reality, Roger Noll was convinced that photocopying simply aggravated the vulnerability of publishers. As more journals tried to reach fewer readers for higher prices, they were becoming increasingly unstable, and hence more susceptible to failure if exposed to such additional stresses as scholars and others opting to make photocopies of articles rather than buy subscriptions<sup>143</sup>.

The high vulnerability theory, however plausible, did not adequately account for the fact that profits, particularly of commercial publishers, actually continued to be healthy, if not downright robust. At the end of 1998, for example, one major publisher, Wolters Kluwer nv, showed a net profit margin of 11.3 per cent, up .2 per cent from the previous year.<sup>144</sup> Coincidentally, textbook publishers (another target of photocopyists) also were enjoying continued success, despite having to compete with photocopied course packs. The year 1997, for example, was an excellent one for in the textbook market, even when other types of book sales were flat.<sup>145</sup> That same year, other reports showed that commercial publishers of scientific

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Price Study: Core Agricultural and Biological Journals at 24-25 (Nov. 1998).

<sup>143</sup> Noll, Information Superhighway, supra note \_\_, at 241

<sup>144</sup> Wolters Kluwer nv Financials, Hoover's Online, <<http://www.hoovers.com/annuals/2/0,2168,91352,00.html>>.

<sup>145</sup> William F. Lofquist, Statistical Series: U.S. Publishing Industry 1 (1998). Sales continued to strengthen in 1998, along with "university press books and technical, scientific, and professional" ones. Id. Available at <http://www.springerlink.com/content/g5912w0811913705/fulltext.pdf>.

journals were earning profits of as much as 42 per cent.<sup>146</sup>

### III. What the Litigation Wrought: The Growth of the CCC and Licensing

The publicity from these cases emboldened copyright owners to push their claims more aggressively, with the result that more publishers signed up with the CCC, and more schools and businesses, to protect themselves from litigation, began seeking photocopying licenses from it both for class materials and for copies made for research and other noncommercial purposes. The results were immediately apparent in royalty collections. For fiscal years 1993 and 1994, the CCC distributed \$32 million in royalties – a figure that represented 60% of all royalties paid by the CCC since its inception in 1978. In 1995, the CCC paid owners another \$21.6 million. And by 2000, more than \$57 million in licensing fees were distributed to rightsholders. The 2000 Annual Report does not give comparable information, but in 1999, \$12.4 million of the \$49.5 million in royalties came from the licensing of course packs – an increase of 22 per cent over the previous year.

Since then, the amounts have risen considerably. By 2005, the CCC collected \$137.5 million a year and distributed \$97.3 million of that as royalties.<sup>147</sup> By then, it was also licensing

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<sup>146</sup> Raymond Snoddy, Reed Elsevier Forward 10%: Anglo-Dutch Group Improves Mainly Through Organic Growth, *Financial Times*, March 13, 1997, in *Financial Times Historical Archive 1888-2008* (available in Proquest). In 2002, its profit margin, reportedly, was close to 35 per cent. Aaron S. Edlin & Daniel L. Rubinfeld, *Exclusion or Efficient Pricing? The “Big Deal” Bundling of Academic Journals*, 72 *Antitrust L. J.* 119, 142 (2004). Publishing for Elsevier continues to be remarkably profitable even in recent times. The *Economist* recently reported that the company made a profit of 36 per cent in 2010. *Scientific Publishing – The Price of Information: Academics are Starting to Boycott a Big Publisher of Journals*, *The Economist*, Feb. 4, 2012, available at <http://www.economist.com/node/21545974>.

<sup>147</sup> Copyright Clearance Center, 2005 Annual Report: Sharing Knowledge, Information, Ideas at 2.

digital copying as well as photocopying rights (collecting royalties, for example, for material uploaded to such academic services as Blackboard)<sup>148</sup> and, through cooperative arrangements with other rights organizations, collecting royalties from foreign users.<sup>149</sup> The 2010 Annual Report showed total revenue at \$215,469,000, \$155,307,000 of which was distributed as royalties. These figures, of course, do not take into account licensing fees collected for copyright owners by other rights clearance organizations such as XanEdu,<sup>150</sup> or directly by copyright owners themselves from permissions individually negotiated by faculty, university personnel, and businesses.

The numbers of rightsholders who share in CCC royalty payments and the numbers of works represented are not easily discoverable, but one researcher in early 2007, in a report to the Canadian analog of the CCC, said that the CCC at that time represented 9600 publishers and “hundreds of thousands of authors and other creators.”<sup>151</sup> In 2009, an official of the CCC said that the organization then managed 300 million works;<sup>152</sup>

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<sup>148</sup> Id. at 4.

<sup>149</sup> Id. at 6.

<sup>150</sup> An example is XanEdu Publishing. Although it cooperates with the CCC, does its own copyright clearance. See <http://www2.xanedu.com/faculty>.

<sup>151</sup> Martin Friedland, Report to Access Copyright on Distribution of Royalties at 24 (Feb. 15, 2007). Individual authors came to the CCC rather late in its evolution; the original beneficiaries were publishers. In its 1988 report on photocopying, the Copyright Office noted that, as of the date the report was issued, no authors had yet received royalties from the CCC. Register of Copyrights, Second Report on Library Reproduction of Copyrighted Works (17 U.S.C. §108) at 31, n. 67 (January 1988).

<sup>152</sup> Christopher Kinneally, director of author relations for the CCC, gave this figure in an interview with copyright lawyer Lois Wasoff on April 14, 2009. See <http://www.copyright.com/content/dam/cc3/marketing/documents/pdfs/Lois-Wasoff-4-14-09-Tra nscript.pdf>. A current estimate in Wikipedia is 400,000 works. See

The pricing and conditions under which licensing can occur, at least for individual transactions, is set by the rights claimants, with the CCC acting as the claimants' agent. This arrangement allows the CCC to manage licensing for copyright owners without running afoul of the antitrust problems that have plagued the music performing rights societies, for example, because rates are set by the owners, not the CCC.<sup>153</sup> (Blanket licenses are, perforce, arrived at by a committee, made up of participating copyright owners.)<sup>154</sup> How owners place a value on copyright licenses for photocopying (or now digital copying) rights is less than clear. There are no obvious standards used to value them.<sup>155</sup> The publishing literature I have examined suggests that the setting of these fees is fairly random, without such concrete points of reference as the amount of the assumed revenue shortfall in sales caused by copying. One might predict based on theoretical<sup>156</sup> and practical considerations that the rights are apt to be valued toward the high end

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[http://en.wikipedia.org/wiki/Copyright\\_Clearance\\_Center](http://en.wikipedia.org/wiki/Copyright_Clearance_Center).

<sup>153</sup> In addition to transactional licenses (that is, licensing for a specific use), the CCC also offers blanket licenses covering large swaths of the works in its system, although not necessarily all works. Haber interview, *supra* note \_\_.

<sup>154</sup> *Id.*

<sup>155</sup> In fact, many publishers initially seems unaware that selling reprints or photocopying rights could be a source of revenue and had to be urged to join the CCC. Many initially simply did not charge when asked for permission to copy articles. See note \_\_, *supra*; see also, e.g., Nancy Rouse, How to Get the Most Out of Reprints, 24 *Folio: The Magazine for Magazine Management* 232 (Jan. 1996) (discussing the desirability of exploiting a market for reprints). In a survey conducted for CONTU, researchers found that half of the respondent publishers, were they to participate in a clearing house, expected to charge no royalties; of the remainder, most expected to charge \$.50, while a minority said they would want \$5.00 in fees for each copy. CONTU Report, *supra* note \_\_, Appendix H, Bernard M. Fry, Herbert S. White, and Elizabeth L. Johnson, Survey of Publisher Practices and Current Attitudes on Authorized Journal Article Copying and Licensing.

<sup>156</sup> On the theoretical side, what economists call the "endowment effect" leads rights holders to value their work more highly than users do. See Frank P. Darr, Testing an Economic

of the range. As one CCC Annual Report noted, “It is worth noting that these royalties, which have virtually no corresponding costs to rightsholders, go straight to the bottom line.” An idea of the range of current per-copy charges can be obtained by going to the CCC website.<sup>157</sup>

Some publications also began to print their expected fee for photocopying in each issue. In a random exploration of psychiatric journals several years ago, I found that one informed all potential photocopiers that they were required to pay a licensing fee of \$3.00 per article.<sup>158</sup> Another routinely demanded a \$5.00 base fee plus \$.05 per page be paid to the Copyright Clearance Center.<sup>159</sup>

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Theory of Copyright: Historical Materials and Fair Use, 32 Boston College L. Rev. 1027, 1046-47 (1991).

<sup>157</sup> <http://www.copyright.com/>.

<sup>158</sup> See 156 Am. J. Psych. at A3 (Nov. 1999)/

<sup>159</sup> Biological Therapies in Psychiatry Newsletter, published by Geleburg Consulting & Publ., L.L.C. (2000). On the masthead, the journal announced that this was the fee for copies intended for “internal or personal” use. Distribution or sale of multiple requires written permission. The journal also carried a prominent warning that “Any unauthorized reproduction constitutes a violation of federal law.” In another journal, the following legend appeared: “*Psychosomatics* is protected by copyright and may not be reproduced in any manner without written permission.” *Psychosomatics: The Journal of Consultation and Liaison Psychiatry*, Vol. 40, No. 6 (Nov.-Dec. 1999) (unnumbered page). A similar logo could be found at the bottom of each page of *The Brown University Geriatric Psychopharmacology Update*, see, e.g. 5 *Brown Univ. Geriatric Psychopharm. Update* at 2-8 (Nov. 2001). The restrictions on photocopying were not unique to psychiatric journals. A reprint from a 1987 issue of *Clinics in Perinatology* asked for a flat photocopying fee of \$.20 a page. Some of these practices changed over time, possibly as a result of increasing pressure by grantors and by universities for freer access to journal content. Reed-Elsevier (the publisher of *Clinics in Perinatology*) now states a general copying policy on its website for all journals published electronically:

You may print or download Content from the Site for your own personal, non-commercial, informational or scholarly use, provided that you keep intact all copyright and other proprietary notices.

You may not copy, display, distribute, modify, publish, reproduce, store, transmit,

But monitoring the license fee situation to see how it has evolved, and the extent to which prices for licenses have fallen or risen over time is not easy to accomplish because the kind of systematic data that would allow rates to be tracked are unavailable, as far as this author could discover. The Copyright Clearance Center, for example, does not keep records of rates over time; when a client changes what it charges, the new amount is entered on the website and the old one is obliterated.<sup>160</sup> But anecdotal information about the prices asked for academic and other photocopying rights show why courts accept that royalties for personal and educational photocopying are a significant market. For example, the *Kinko* court noted that, in that case, permissions to copy individual articles ran between 50 cents and \$5.00 per copy. As a result, payment of fees for the course packs at issue in that case would have been increased above the copying costs alone by anywhere from \$12.50 to \$125.<sup>161</sup>

An examination of the cost of course packs produced for a single law school in the fall of 1999 found that 27 different sets of course materials had been photocopied and sold that semester in the law school's book store. Of these, no royalty payments were incurred for one set, while another fifteen incurred copyright fees of less than \$10 per course pack. However, in eleven instances, copyright royalties exceeded \$10 per packet (and in about half those cases, the charges

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<sup>160</sup> Interview with Frederic Haber, November 18, 2011.

<sup>161</sup> *Kinko's*, 758 F. Supp. at 1539, n. 16. See also Bartow, *supra* note \_\_\_, at 207 and accompanying notes (arguing that permission fees were in many cases increasing).

were in excess of \$20 per student). The licensing fee topped out at \$82 for a 840 page hand-out.

The Seattle University guide to faculty on preparing course packs cautions that:

Copyright permissions vary widely in cost depending on who holds the rights.

Many individual rights-holders will grant permission to use their work without charge. Others will charge a nominal fee of \$0.10 per page/per copy. Still others charge market rates that can materially increase the price of the course-pack to students. Harvard Case Studies range in price from \$4.00 to \$6.00 per case study/per copy. Major metropolitan newspapers, such as The New York Times and The Washington Post, charge \$1.00 per page/per copy.<sup>162</sup>

That course packs of photocopied materials can be expensive is supported by a report in the Harvard Crimson a few years ago that the price for at least one of them had reached \$500, with the clear implication that copyright-related licensing fees were primarily at fault.<sup>163</sup>

The royalty rates that are set by owners do not, however, account fully for the costs of photocopying permissions. One must also take into account administrative costs involved in collecting and distributing royalties. The total cost to each user for a photocopy will include the cost of making it, plus the cost of the copyright license, plus the cost of obtaining the license. In the 1999 course pack review referred to a short while ago, copyright permissions plus associated administrative costs accounted for a quarter to a half of the price of each set of materials. Notably, for 15 of the sets, less than \$10 in royalties was paid per course pack, but in 18 of the twenty-six sets, costs were incurred in clearing the rights, and that cost exceeded that

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<sup>162</sup> Seattle University, University Policies, Faculty Guide to Course-Pack Production, available at [http://www.seattleu.edu/policies/faculty\\_guide\\_course\\_packs.aspx](http://www.seattleu.edu/policies/faculty_guide_course_packs.aspx).

<sup>163</sup> The Crimson Staff, Attack of the Wallet Killers, The Harvard Crimson (Feb. 18, 2005), available at <http://www.thecrimson.com/article/2005/2/18/attack-of-the-wallet-killers-students/>.

for royalty payments.<sup>164</sup>

Overall, copyright owners and the CCC have been quite aggressive in their insistence on licensing,<sup>165</sup> including in academic settings, and courts have generally been supportive. In the Princeton University Press case, the Court of Appeals was careful to limit its finding of infringement to the facts – copying by a profit-making copyshop. The court noted that it took no stance on whether copying by students or faculty themselves would be similarly illicit.<sup>166</sup> In reliance on the idea that who makes the copy is crucial to whether it is fair use, a copyshop serving the University of Michigan came up with an alternative model. It took possession of master copies of class materials from faculty members, and when students enrolled in the pertinent course wanted to obtain the materials, they were given the master and permitted to use the equipment to make the copy themselves.<sup>167</sup> The District Court granted summary judgment on

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<sup>164</sup> The CCC's administrative costs come to about 25 per cent of the total amount they collect from licensees. See, e.g., Copyright Clearance Center, *Rights Right Now: 2010 Annual Report*, showing that 75 percent of the royalties collected are paid to copyright owners. (Copy on file with Author.)

<sup>165</sup> 'This aggressiveness may extend to attempts to license materials in the public domain. At least one law school concluded that, to avoid copyright disputes, it must negotiate permission from a legal database provider to permit downloading and reproduction of material, including cases to which copyright does not attach. (Private communication to author.) Scholars have reported several instances of claimants demanding royalties for reproducing works unambiguously in the public domain. See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. Rev. 1086 (2006). Mazzone cites numerous examples of broad copyright notices in compilations and reprints of public domain works that seem on their face to apply to the public domain material itself as well as to anything original that the copyright claimant has added. Paul Heald earlier gave as examples of works that putatively needed to be licensed to be copies Johann Sebastian Bach's *Mass in B minor*, a "sourcebook" of writings dating from 1620 to 1865, and in piano sonatas by Beethoven. Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 J. Intell. Prop. L. 259 (1994).

<sup>166</sup> *Princeton University Press*, 99 F.3d at 1389.

<sup>167</sup> *Blackwell Publ., Inc. v. Excel Research Group, LLC*, 661 F.Supp.2d 786, 789 (E.D.

the plaintiffs' behalf, concluding that, whoever pushes the copier button, the copyshop is still profiting from the activity.<sup>168</sup> This still left open some possibility that copies made on a completely nonprofit basis— that is, without participation by a commercial intermediary -- by students or faculty could be a fair use.

Academic institutions, however, are being pressured to pay royalties for copies made by the faculty without regard to who owns the copying equipment, and with the introduction of digital technology, the pressure is being extended to the licensing of electronic reserves and teaching tools such as Blackboard.<sup>169</sup> Many libraries have developed careful policies about what can be put on electronic reserve and how often without obtaining copyright permission to avoid running into trouble.<sup>170</sup> Those calculations are under reconsideration presently, as a result of a law suit brought by publishers against Georgia State University.<sup>171</sup>

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Mich. 2009).

<sup>168</sup> Id. at 794.

<sup>169</sup> The CCC continues to offer transactional licenses (that is, licenses obtained for each copy) for both print and electronic reproduction, and in 2007 it began to offer a kind of blanket license under which, after paying an annual fee, permitted copying of material in either hard copy or in digital format. Copyright owners choose whether and to what extent to participate in this licensing scheme, with the result that institutions can rely on it only after ascertaining that the works to be copied in any individual case, are actually covered by the license or covered for the desired use. Interview with Frederic Haber, Nov. 18, 2011.

<sup>170</sup> See, e.g., Brandeis University Library Reserve Policy, available at <http://its.brandeis.edu/research/help/copyright/reserve.html>; Manhattan College Library Reserve Policy, available at <http://www.manhattan.edu/library/reserve.html>.

<sup>171</sup> Cambridge University Press v. Becker, \_\_ F.Supp. 2d \_\_, 2012 WL 1835696 (N.D. Ga. 2012).

The Georgia State litigation brought the fair use question out of the copyshop and directly into the university, challenging the direct actions of faculty and librarians.<sup>172</sup> The challenge was to the university's electronic reserves system for books, established to meet the requests of faculty for their classroom use. The Court ultimately concluded that the university copyright policy contributed to infringement by the faculty and library by being too vague about the amounts that were permissible to copy, and that certain copies in the reserve system exceeded what was "fair."<sup>173</sup> The Court clearly had difficulty deciding the case. The opinion – 160 pages of it – issued fully a year after oral argument and in it, the judge voiced serious concern about possible negative effects on students of having to pay the royalty fees for their course materials.

The Court tried to resolve the conflict by distinguishing between small excerpts and longer ones. Copying small pieces of works, the judge wrote, had no significant negative effect on authors or publishers and were, therefore, fair. The rough divide used by the Court between a little and too much was 10 per cent of the book. This meant that, in some cases, copying a single chapter could be infringing.<sup>174</sup> The Court reasoned, however, that fairness could be determined only on a case-by-case basis, requiring a close look at numerous individual faculty reserve requests, to see how much was used and the circumstances surrounding the use.

But the ten per cent rule may not be a reliable guide in the future. The Court went on to add that "where permissions are readily available from CCC or the publisher for a copy of a small excerpt of a copyrighted book, at a reasonable price, and in a convenient format . . .," failure to

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<sup>172</sup> Id. at 163.

<sup>173</sup> One witness testified that the Georgia State policy was actually more restrictive than those at many other universities. Id. at 20.

<sup>174</sup> Id. at 41.

license even a small amount could be infringing<sup>175</sup> In light of caution that even small snippets could amount, as licensing becomes easier, to actionable copying suggests that universities, their staff and faculties, are at significant risk of litigation if they fail to resolve any doubt at all in favor of paying for everything in electronic or hard-copy course packs..

Fear of litigation is extremely effective in shaping behavior inside academia; the desire to avoid it inclines institutions to take a conservative position with regard to their copyright obligations. When NYU settled the suit brought against it for photocopying in the early 1980s, not only did it agree to extremely restrictive limits on unlicensed copying,<sup>176</sup> but it made clear to its faculty that anyone who went beyond those limits, if sued, could rarely expect to be defended by the university.

But paying is not a guarantee of safety. As the problem of orphan works, for one, so clearly shows, licensing rights is at best a complicated business. Figuring out who actually owns the interest in question is often difficult.<sup>177</sup> One great potential benefit of the now-defunct Google book settlement was the promise of a rights registry with the capacity to sort out tangled and overlapping claims of ownership in particular works.<sup>178</sup> Without some mechanism for clarifying

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<sup>175</sup> Id.

<sup>176</sup> The university adopted the photocopying guidelines that had been promulgated during the drafting of the Copyright Act of 1976 by an ad hoc group of publishers and educators. As noted above, supra note \_\_, the meaning of the guidelines was unclear: many would have argued that they merely indicated the minimum amount of photocopying for classroom use that was permissible under fair use. In the NYU settlement, however, the guidelines became the maximum copying permissible without permission.

<sup>177</sup> See Diane Leenheer Zimmerman, Cultural Preservation: Fear of Drowning in a Licensing Swamp, in *Working within the Boundaries of Intellectual Property* at 36-39 (Rochelle C. Dreyfuss, Harry First & Diane L. Zimmerman eds. 2010).

<sup>178</sup> Id. at 138-39.

ownership questions, a claimant may in perfectly good faith list herself or itself as the party entitled to royalties even though she or it actually doesn't own the work or interest in question.<sup>179</sup> This means that a user who has paid for rights is not necessarily immune from suit if a plaintiff can show that the user dealt with the wrong party.<sup>180</sup> For that reason, the CCC, understandably, will only warrant to academic licensees that it has been assured by the licensor that it owns the rights at issue. The organization does not purport to stand behind the accuracy of that representation.<sup>181</sup>

#### **IV. When License Fees Go Up, Subscription Costs Go – UP??? What Is Happening**

##### **Here? A. The New Consensus**

If copyright claimants were correct that nonprofit and personal copying were the reason for ever-increasing journal prices, one would expect that, once the CCC and other rights clearance organizations were firmly established and income began to flow to publishers from licensing fees, journal prices would stabilize and price increases would begin to bear some relationship to inflation

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<sup>179</sup> The CCC represents publishers primarily (although it encourages authors to register as well). Publishers may post and receive permissions fees for works in their inventories, although in some instances, actual ownership is with the author of the work. See, e.g., Kenneth Frazier, *The Meaning of Fair Use*, 14 *Computers in Libraries* 21 (1994). See also Fisher & McGeeveran, *supra* note \_\_, at 80 (noting that rightsholders may decline participation in the CCC because determination of legal rights is too complex relative to the payoff, or because they do not wish to grant permission for “secondary uses of content.”)

<sup>180</sup> “[T]he CCC has an understanding with the Association of American Publishers (‘AAP’) the major trade association for publishing companies, that the AAP will not support litigation against a CCC licensee, perhaps even if the copying in question is from materials not covered by the license agreement. This point is of major significance. Copyright litigation is extremely expensive, and many of the major infringement cases in recent years have been supported and coordinated by the AAP.” Crews, *supra* note \_\_, at 307.

<sup>181</sup> CCC, *Academic Pay-Per-Use Services (formerly APS and ECCSJ): Terms and Conditions*, Paragraph 7 (2011). As a result, some institutions rely on other rights clearance organizations that guarantee their results. See, e. g., XanEdu Publishing, *Copyright Compliance Guarantee*, at <http://www2.xanedu.com/faculty/why-xanedu/copyright-compliance-guarantee>. 2011.

and changes in fixed costs. One might have expected this, but one would have been wrong.<sup>182</sup>

Although the phenomenon of rising licensing fees coupled with rising subscription fees seems puzzling, by the 1990s, students of the phenomenon were more and more pointing to culprits other than unlicensed copying.<sup>183</sup> Where the suspicion began to turn was to something that was not supposed to happen under copyright: the existence of enough market power by journal publishers to enable them to engage in monopoly pricing.<sup>184</sup>

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<sup>182</sup> There was one apparent exception to this blanket statement: a major commercial journal publisher did in fact announce that, effective in 2000, it would cap increases in subscription prices in the countries where its journals were sold to a maximum of ten per cent per year. 227 Newsletter on Serials Pricing (June 20, 1999) (The publisher, it was noted, anticipated an actual 7.5 percent increase in the United States in 2000.) Not only was this “cap” set at about three times the then-current inflation rate in the United States, but it was also building on a base price that was already extremely high as a result of the large yearly increases that had preceded it.

<sup>183</sup> Some pointed to the proliferation of highly specialized, small-audience journals as part of the problem. See supra note \_\_. King et al. noted that dramatic price increases had occurred during that time period, the predominant cause of which was said to be rising production costs. Donald King, etc., supra note \_\_, at 32-38. See also Maurice Line & D. N. Wood, *The Effect of Large-Scale Photocopying Service on Journal Sales*, 31 *J. Documentation* 234, 236 (same); Jeanne G. Howard & Dick Van Der Helm, *The CONTU Guidelines and the Transfer of Scientific Information: Fair Use or Unfair Use?*, 22 *J. Chem. Inf. Comp. Sci.* 85 (1982) (suggesting that part of the cost increase attributable to growth of resources put into sciences after WW II).

<sup>184</sup> One of the first to suggest that pushing for high profits was the problem was M. B. Vissher, *Copyright and Other Impediments to Scientific Communication*, in *Communication of Scientific Information* 118 (Stacey B. Day ed. 1975) (arguing that part of the cost problem was caused by the increasing role of for-profit publishers). Other early authors making a similar argumen include Arthur W. Hafner, Thomas J. Podsadecki, & William P. Whitely, *Journal Pricing Issues: an Economic Perspective*, 78 *Bull. Med. L. Assoc.* 217 (1990) (large publishers lack incentives to control costs that exist in competitive markets); Gary D. Byrd, *An Economic “Commons” Tragedy for Research Libraries: Scholarly Journal Publishing and Pricing Trends*, 51 *College & Research Librs.* 184 (1990) (reviewing the literature on the economics of publishing and pointing out the distortions in the market for scholarly publications); Michael A. Stoller, Robert Christopherson & Michael Miranda, *The Economics of Journal Pricing*, 57 *College & Research Librs.* 9 (1996) (market power of publishers leads to inflated prices); Mark Bebensee, Bruce Strauch, & Katina Stauch, *Elasticity and Journal Pricing*, 2 *Acquis. Libr.* 219 (1989) (discussing relative inelasticity of library market for journals); David I. Rosenbaum & Meng-Hua Ye, *Price Discrimination and Economics Journals*, 29 *Applied Economics* 1611 (1997) (discussing profit

Scholars who tracked journal prices observed an escalation in subscription costs well above the rate of inflation.<sup>185</sup> This situation got the attention of economists because it was putting a severe strain on university library acquisition budgets. What was observed was that the increases were largely concentrated in the scientific and technical areas. Journals in the humanities (including art journals which might have been expected to have high production costs because of their illustrations) did not experience these kinds of subscription rate hikes.<sup>186</sup> Furthermore, the rapid increase in price was actually located, not in all scientific and technical journals, but in those published by commercial presses.<sup>187</sup>

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maximization strategies of publishers of economics journals); David W. Lewis, *Economics of the Scholarly Journal*, 50 *College & Research Librs.* 674 (1989) (journals as natural monopolies). For a different perspective, see Roger Noll & W. Edward Steinmuller, *An Economic Analysis of Scientific Journal Prices: Preliminary Results*, [1992] *Serials Rev.* 32 (arguing that academic practices rather than rent-seeking by publishers accounts for the rapidly increasing level of journal prices).

<sup>185</sup> To give some examples, the average price increase in 1987 for a scholarly journal was five times the Consumer Price Index (CPI), 2.5 times CPI in 1988, and two times in 1989. Arthur W. Hafner, *Journal Pricing Issues: An Economic Perspective*, 78 *Bull. Med. Libr. Assoc.* 217, 217 (1990); Gary D. Byrd, *An Economic "Commons" Tragedy for Research Libraries: Scholarly Journal Publishing and Pricing Trends*, 51 *Coll. & Res. Librs.* 184, 184 (1990).

<sup>186</sup> Stoller, Christopherson & Miranda, *supra* note \_\_, at 15, citing H. Craig Peterson, *Variations in Journal Prices: A Statistical Analysis*, 17 *Serials Librarian* 307-14 (1990).

<sup>187</sup> Studies have suggested that the cost of commercial journals is not necessarily a function of the superiority of their product. Attempts to take such things as citation rates into account have led researchers to conclude that price and quality bear little relationship to one another. See, e.g., Natalie Schoch, *Relationship Between Citation Frequency and Journal Cost: A Comparison between Pure and Applied Science Disciplines*, 31 *Proc. Am. Soc. Inform. Science* 34, 37 (1994). This sort of observation has resulted in acrimonious battles and some lengthy litigations. The publisher Gordon and Breach has brought suits or threatened to do so in a number of instances. The publisher sued a physicist and two scholarly organizations in several countries, including the United States, for reviews critical of the cost of several Gordon and Breach journals relative to their price. *OPA Amsterdam BV v. American Institute of Physics*, 973 F. Supp. 414 (S.D.N.Y. 1997), *aff'd sub. nom. Gordon and Breach Science Publishers S.A. v. American Institute of Physics*, 166 F. 3d 438 (2d Cir. 1999). As of the fall, a comparable case

The other interesting fact was that libraries responded to these price increases by trying their best to continue buying the costly journals. Normally, one might expect the opposite: that purchasers would fight back by switching to cheaper products (nonprofit journals), thereby pressuring the commercial publishers to moderate their subscription fee increases. This did not happen for a good reason: if individual subscriptions became too pricey, individuals could drop them and go to the library instead. Libraries, on the other hand, felt compelled to continue supply a wide range of journals to meet the demands of academic researchers.<sup>188</sup> As a result, they continued to pay even as prices rose – even at times slighting the acquisition of books and other types of works to do so.<sup>189</sup>

This response is understandable, given what studies have shown about how researchers use journals. A study by King and Griffith showed that the act of browsing through journals was considered important to researchers, even where their reading had no immediate research use.<sup>190</sup>

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was still pending in France. Hot Type, 46 Chronicle of Higher Education A24 (Oct. 1, 1999). As a result, other researchers studying journal pricing began pointedly omitting Gordon and Breach publications from their samples.

<sup>188</sup> One indication that publishers recognized their market power is hinted at by a comment in a 1988 report to scholarly publishers: it noted that journal prices were “elastic,” so that publishers who lowered their prices could not expect any significant increase in subscriptions; all they would do is lose money. Margaret M. Quinlin, Pricing: Its Place in the Marketing Mix & Its Contribution to Profit, 3 Soc. Schol. Publ. Spec. Rep. Series 1, 2-3 (1988), quoted in Byrd, *supra* note \_\_, at 188-89.

<sup>189</sup> Edlin & Rubinfeld, *supra* note \_\_, at 125. A study by the Association of Research Libraries covering the period 1986 to 2000 found that research libraries cut the purchase of monographs by 17 per cent, but the number of serials, where the increase in costs were striking, were cut by only 7 per cent. *Id.*

<sup>190</sup> Donald W. King & Jose-Marie Griffiths, Economic Issues Concerning Electronic Publishing and Distribution of Scholarly Articles, 43 Library Trends 713, \_\_ (Mar. 22, 1995) [hereinafter King & Griffith].

The authors noted that “[o]ne indicator of the value of scholarly articles is the time professionals are willing to spend reading them.”<sup>191</sup> It turned out that professionals in non-academic organizations averaged 51 hours per year of journal reading (86 hours if they were research and development professionals), while academic researchers devoted on average 205 hours to such reading.<sup>192</sup> The study showed that the amount of time spent reading literature in the researcher’s field was highly correlated with the quality of her work, recognition by others, and the level of assignments she received.<sup>193</sup>

When pushed to the limits, libraries, including those at some of the best funded institutions, were eventually forced to drop some very expensive subscriptions, making their content less readily accessible to faculty and students. This raised a new set of problems. While copies of specific articles could be gotten, on request, from document delivery services, the process was time consuming and could itself be quite costly after administrative and copyright permission costs were factored in. One study reported in 1994 that in the prior 12 months, the cost of commercial document delivery services at the University of Wisconsin had increased by 50 per cent, and that much of the increase was attributable to higher copyright clearance costs.<sup>194</sup>

A further factor that allowed price increases to go unchecked and that pressured libraries to continue subscribing to expensive publications is that users of academic, including scientific, journals, unlike recreational readers of popular fiction, are classic examples of an audience that

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<sup>191</sup> Id. at 717.

<sup>192</sup> Id..

<sup>193</sup> Id. at 718.

<sup>194</sup> Kenneth Frazier, *The Meaning of Fair Use*, 14 *Computers in Libraries* 21 (1994).

cannot easily substitute one product for another if the cost of the preferred product exceeds their willingness to pay. (Although, it should be added here that the additional complication in this situation is that the library, not the user, is the entity doing the paying.) A biologist who comes to the library to look for an article that was published in Reed-Elsevier's Journal of Molecular Biology (institutional subscription rate: \$8021<sup>195</sup>) is not going to be satisfied by being offered in its place one from Molecular and Cellular Proteomics<sup>196</sup> (institutional and nonmember rate: \$925) because the latter is cheaper – even if, overall, the cheaper journal is a superior one.<sup>197</sup>

The result, as a number of economic studies pointed out, was comparatively little elasticity on the demand side, allowing publishers, with their eyes on their bottom lines, to ratchet prices up in excess of costs and inflation each year.<sup>198</sup> Several economists also point to growing concentration in the journal publishing industry<sup>199</sup> and to the increased reliance selling subscriptions

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<sup>195</sup> See

[https://eselect.elsevier.com/journal-subscription/immunology-and-microbiology-disc16.html?initlist=true&prodtype\\_name=journal\\_subscription&prodtype\\_](https://eselect.elsevier.com/journal-subscription/immunology-and-microbiology-disc16.html?initlist=true&prodtype_name=journal_subscription&prodtype_). (10/11/11)

<sup>196</sup> This is a publication of the American Society of Biochemical and Molecular Biology. Subscription information is available at <http://mcponline.org/site/subscriptions/cost.xhtm>.

<sup>197</sup> Similarly, academics preparing course material often cannot substitute one journal article or a chapter from one book for another and achieve the desired pedagogic results. A recent article in *The Chronicle of Higher Education*, for example, complains that “A rarely discussed form of self-censorship happens routinely on college campuses” because faculty worry about the time and expense of obtaining copyright permission they believe would be necessary to use them – even if, were the unconsented use of those materials were tested in a court of law, the use might well be deemed “fair.” Jeffrey R. Young, *Pushing Back Against Legal Threats by Putting Fair Use Forward*, *The Chronicle of Higher Education* (May 29, 2011), available at <http://chronicle.com/article/Pushing-Back-Against-Legal/127690/>.

<sup>198</sup> Edlin and Rubinfeld note that subscriptions to journals published by commercial publishers can run as much as 500 times the price of a subscription to a non-profit journal, and that the phenomenon runs across subject matter lines. Edlin & Rubinfeld, *supra* note \_\_, at 120.

<sup>199</sup> Theodore C. Bergstrom, *Librarians and the Terrible Fix: Economics of the Big Deal* at

to electronic versions of their journals only in bundles (the so-called “Big Deal” approach) as aggravating factors in the relentlessly rising costs of subscriptions.<sup>200</sup> Interestingly, the fact that, around 2000, publishers began offering many of their journals in electronic form did nothing to moderate price increases, despite the fact that production costs are likely to have gone down.

Obviously, there are a variety of complex factors other than rent-seeking that contribute to the pricing of any particular journal,<sup>201</sup> and it is not the purpose of this article to present a comprehensive reprise of the various studies and points of disagreement. The purpose instead is to point out that today there is fairly general unanimity about the fact that the market for academic journals is broken, and the focus of scholars is now on what can be done to fix it.<sup>202</sup> Funders are insisting that the research results they underwrite be publicly made accessible through open

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2 (July 2010) (available at [http://works.bepress.com/ted\\_bergstrom/111](http://works.bepress.com/ted_bergstrom/111)); Edlin & Rubinfeld, *supra* note \_\_\_, at 119. Bergstrom points out that this phenomenon is not limited to journal publishing:

After a series of mergers, four publishing companies in the United States control about 70 percent of college textbook sales. Over the past twenty years, textbook prices have risen at approximately twice the rate of inflation. (Typical introductory textbooks with large markets are now priced at about \$200, far above their production costs.)

Bergstrom, *supra*, at 2.

<sup>200</sup> See generally, *id.*; Edlin & Rubinfeld, *supra* note \_\_\_.

<sup>201</sup> Some journals, particularly nonprofit ones, charge authors per page to publish their work, clearly a factor that might explain the price differential between them and commercial publications. However, Edlin and Rubinfeld found that, once this difference was factored in, commercial journals still cost subscribers on average 30 per cent more per page. *Id.* at \_\_\_.

<sup>202</sup> Theodore C. Bergstrom & Daniel L. Rubinfeld, *Alternative Economic Designs for Academic Publishing*, in *Working within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* at 137 (Rochelle C. Dreyfuss, Harry First & Diane L. Zimmerman eds.) (2010).

databases,<sup>203</sup> although publishers have tried to push back on this in Congress.<sup>204</sup> Open access journals, self-archiving by academics, and a variety of other remedies have been suggested, and are beginning to be implemented. It is too soon to be sure how effective this rebellion will be.<sup>205</sup>

What is striking to someone who has followed the controversy over noncommercial copying from journals into the digital era is that the literature today (despite the special concerns about digital copying) seems devoid of any mention of the effects of unlicensed copying, even though I am absolutely sure that large amounts of it continue to occur. Plainly and simply, no one is talking about it. If copyright comes up at all, it is entirely from another perspective: as a factor that contributes to rent-seeking by limiting the options available to users to escape the yoke of exorbitant prices.<sup>206</sup> This turns out to be a story that might induce a long-time observer to begin

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<sup>203</sup> For a list of open access policies of major funders, see MIT Libraries, Research Funder Policies, at <http://libraries.mit.edu/sites/scholarly/publishing/research-funders/>. By law, research funded by the National Institutes of Health (NIH) must be made available to the public via its digital archive, PubMed Central. Papers are deposited with the NIH in their final form and become open access no more than twelve months from publication. See Revised Policy on Enhancing Public Access to Archived Publications Resulting from NIH-Funded Research (Jan. 11, 2008), available at <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-08-033.html>.

<sup>204</sup> Publishers, most notably Elsevier, lobbied to have Congress overturn the NIH policy, but ultimately backed off (reportedly a response to a contributor boycott of Elsevier journals), causing the so-called Research Works Act, H.R. 3699 (112<sup>th</sup> Cong., 2<sup>nd</sup> Sess.) to die. Jennifer Howard, Legislation to Bar Public-Access Requirement on Federal Research Is Dead, *Chronicle of Higher Education*, Feb. 27, 2012, at <http://chronicle.com/article/Legislation-to-Bar/130949/>.

<sup>205</sup> For example, Princeton University's faculty recently adopted a policy in favor of posting publicly accessible copies of faculty scholarship on line. This is part of a growing trend in academic institutions. Jennifer Howard, Princeton U. Adopts Open-Access Policy, *The Chronicle of Higher Education* (Sept. 25, 2011), available at <http://chronicle.com/blogs/wiredcampus/princeton-u-adopts-open-access-policy/33450>.

<sup>206</sup> Michael W. Carroll, *The Role of Copyright in Academic Journal Publishing*, in *Working within the Boundaries*, supra note \_\_, at 149 (pointing out that new entrants cannot compete down the prices of journals by selling competing goods, i.e., copies).

muttering under her breath that line from Stephen Sondheim, “Isn’t it rich? Isn’t it fine?”

### **Conclusion:**

Now the question is, what do we make of this history? To answer that question, one must start with an agreement about what this Author means when she discusses “harm” from unlicensed copying. Harm, as defined here, is not loss of any possible remuneration that can be gained from having control over a copyrighted work. While, as noted at the beginning, this is a position that explicitly or tacitly underlies arguments against privileged uses of such works, it seems to me to be inconsistent with the utilitarian nature of American copyright. The comment made recently by President Obama about banks has pertinence to copyright, too: owners “don’t have some inherent right ...to... get a certain amount of profit.”<sup>207</sup> What they should have instead is the opportunity to make sufficient returns on their investment of creativity, money and time to make it worthwhile to continue producing and dissemination new works. Furthermore, copyright’s goal is to incentivize the creation and dissemination of works, not particular business models. Hence evidence that a particular distribution mechanism has fallen on hard times in the face of technological change is not evidence of harm for copyright purposes.<sup>208</sup>

Having said that, evidence of harm from noncommercial photocopying is perishingly slight after a full half century of experience with it. (Indeed, even though digital technology seems to be replacing the photocopier in reproducing works for classroom or scholarly use, I have seen no evidence to suggest that the metric of harm is changing for the worse, and that the exemption

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<sup>207</sup> Chelsea Rudman, Fox Nation, Erickson Distort Obama’s Comments On Bank Of America To Paint Him As Anti-Capitalist (Oct. 3, 2011), available at <http://mediamatters.org/blog/201110040004> (transcript of President’s remarks).

<sup>208</sup> Obholzer-Gee & Stumpf, supra note \_\_.

should be limited to the photocopier.)

Why were the claims of death by Xerox machine so wrong? The probable reason is that almost no personal or noncommercial copy was a substitute for a purchases. People copied things they needed or wanted, but that did not mean, had they been unable to make those copies, they would have paid the market price; instead they would have taken notes.

As a result, it is very difficult to see a reason why virtually all personal or noncommercial copying, particularly for academic purposes should be not deemed fair instead of actionable copyright infringement. (An alternative, widespread in Europe, but controversial, is to deal with all private copying by attaching a royalty to the sale of equipment that can be used for in making reproductions.<sup>209</sup>) Strengthening that doubt is the existence of weighty public benefit argument in favoring of privileging noncommercial copying.

To begin with, suing individuals and noncommercial actors carry a lot of downsides. Searching for infringing content or activity on individual computers,<sup>210</sup> in personal files<sup>211</sup> or by

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<sup>209</sup> See Martin Kretschmer, *Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe*, A Report for the UK Intellectual Property Office (2011), available at [http://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_ip\\_econ\\_ge\\_1\\_12/wipo\\_ip\\_econ\\_ge\\_1\\_12\\_ref\\_kretschmer.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_econ_ge_1_12/wipo_ip_econ_ge_1_12_ref_kretschmer.pdf); Jörg Reinbothe, *Private Copying, Levies and DRMs against the Background of the EU Copyright Framework* (2003), available at [http://ec.europa.eu/internal\\_market/copyright/documents/2003-speech-reinbothe\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/2003-speech-reinbothe_en.htm).

<sup>210</sup> Recently, so-called “copyright trolls” have tried to track down illicit copies on computers and sue the individuals who own the computers. For a description of their activities, see Electronic Frontier Foundation, *Copyright Trolls*, at <https://www.eff.org/issues/copyright-trolls> <https://www.eff.org/issues/copyright-trolls>. These efforts have been not been received favorably by many courts. See, e.g., *Mick Haig Productions E.K. v. Stone*, \_\_\_ F.3d \_\_\_ (5<sup>th</sup> Cir. 2012) (upholding sanctions on plaintiff film company’s attorney for improper attempt to subpoena names of alleged individual infringers from internet service provider).

<sup>211</sup> In the *Texaco* case, plaintiffs were permitted to search the files of a “representative”

means of spying<sup>212</sup> raises serious issues of privacy and even civility. Also, when individuals are sued for what the larger community perceives as normatively reasonable activity, the voluntary compliance on which the success of copyright largely rests is undercut.

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researcher to discern whether or not he had “illicit” copies of journal articles. *Texaco*, 60 F.3d at 915.

<sup>212</sup> The home page of the Software Business Alliance, for example, urges viewers to report instances of piracy, see [http://www.bsa.org/country.aspx?sc\\_lang=en](http://www.bsa.org/country.aspx?sc_lang=en). It may reward the person who files a report if the terms and conditions set out at <https://reporting.bsa.org/r/report/usa/rewardsconditions.aspx> are satisfied.

Another consideration is the social good achieved by removing restraints on copying wherever the copying seems highly likely to cause little or no harm. For one thing, the lower the cost and the greater the ease of access to communicative works, the less the wealth of the prospective user is a factor in whether or not these goods can be effectively utilized.. This goal has occupies a respectable place in core copyright philosophy, as evidenced by such things as the first sale doctrine, and the limitations on copyright owners' rights that appear in places like Section 110 of the act.<sup>213</sup>

Furthermore, when it is possible to give consumers free access to works without disturbing the adequacy of author incentives, society as a whole is often the beneficiary of a spillover of benefits that the user herself cannot internalize.<sup>214</sup> These benefits may be in the form of new and inventive ideas, or of a new generation sufficiently educated and knowledgeable to take on new technological and social challenges. If, instead, users are required, without adequate economic justification, to forego exposure to a desirable work, or to substitute a second best option, as a result of licensing requirements (as is quite plausibly the case in the academic setting), society may suffer a significant part of the loss.<sup>215</sup>

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<sup>213</sup> See supra nn. \_\_\_ to \_\_\_ and accompanying text.

<sup>214</sup> An important function that the Framers expected copyright to serve was to help promote the growth of an educated, creative citizenry. Diane Leenheer Zimmerman, *The Statute of Anne and Its Progeny: Variations Without a Theme*, 47 *Houston L. Rev.* 965, 984 (2010).

<sup>215</sup> A report by the National Research Council provides an example of the kind of social loss that can occur in academia when information costs exceed available resources. The Landsat system of remote sensing satellites that provides detailed photographs of the earth's surface was privatized in 1985. The Earth Observation Satellite Co., which took over operation of the satellite, immediately increased the charge for Landsat images from \$400 to \$4400 a piece. Numerous research projects had to be abandoned; others were continued but had to rely on an inadequate number of images or on old data. Several remote sensing laboratories at universities are reported

Taking these factors into account makes the case of personal use, research and study, at the very least, particularly suitable for more generous standards of fair use<sup>216</sup> -- in contrast, say, to commercial users who can pass along to their consumers the costs associated with licensed uses of copyrighted goods.<sup>217</sup>

But is the argument in favor of exempting noncommercial or personal copying of textual materials from liability sufficient support for exempting all such uses from copyright? To conclude that on the basis of one case study clearly would be over-reading the data. But if one looks at the photocopying story in light of the honest disputes over claims of harm in music, computer software and other areas at least, it would not be overreading to suggest that courts (and Congress) tread carefully in addressing personal and noncommercial copying generally. Given what we have been able to learn about photocopying, it seems at least plausible to posit that the reason showing harm from personal copying of broadcasted programming or music and other works off the internet has been hard is because most (but probably not all) of the copying will turn out not to be substitutional. Maybe people really do copy music primarily to sample or place-shift.

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to have closed in large part due to the cost of the Landsat images they would otherwise have needed for their research. National Research Council, *Bits of Power: Issues in Global Access to Scientific Data* 121-23 (1997).

<sup>216</sup> See, e.g., Eric D. Bandfonbrener, *Fair Use and University Photocopying*, in 36 *Copyright Law Symposium* 33 (1989) (arguing that if copying increases dissemination without substantial economic loss, it should be permitted).

<sup>217</sup> Of course, commercial uses are not per se unfair. Examples of commercial uses that have passed muster as fair uses are *Campbell v. Acuff-Rose Music, Inc.*, 507 U.S. 569 (1994) (parody of the song *Pretty Woman*); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11<sup>th</sup> Cir. 2001) (sequel to *Gone with the Wind*, told from the perspective of the slaves at Tara).

When offered a reasonable price (for example, when the iTunes store was up and running for copies of singles), those who liked the music and wanted to keep a copy seemed inclined in significant numbers actually to buy it, whether or not they had already downloaded it from a peer-to-peer site. Whether the same story will repeat itself with digital movies or with e-books obviously cannot be predicted without more data. But at least these questions deserve to be approached with an open mind.

What the story of photocopying shows is that it is simply not plausible to assume that the death of copyright is riding in on every new technology.