The Copyright Problem in Library Reprography: A Critical Examination of Section 108 of the 1976 Copyright Act

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Introduction

The rapid development of technology, especially electronic-based technologies, that occurred in the 20th century necessitated an adaptation of the copyright law to changing conditions. In this paper I will critically examine how the copyright law has been adapted to resolve various questions raised by the new technologies with regard to electrostatic photo-reprography used for library copying. The present paper therefore begins with a historical perspective on copyright laws and the present status of library reprography, comments on the various subsections of Section 108, evaluates issues along with my suggestions, and concludes with a section on the position of Korea with regard to international copyright conventions.

1. Historical Perspective on Copyright Laws and the Present Status of Library Reprography

1.1 A Historical Perspective on Copyright Law[1]

An ancient case dealing with literary pirating goes back to the beginning

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1) See Walter L. Pforzheimer, "Historical perspective on copyright law and fair

of the 18th century in England, when the Company of Stationers[2] addressed Parliament in 1709 that they were threatened financially by piratical presses that had been illegally publishing their books. As the result, the first copyright act called the Statute of Anne[3] was passed in the following year in 1710 by Parliament, establishing the main lineaments of modern copyright law, the basic pattern of which is said to have changed very little until the 1976 copyright act.[4]

The first American copyright act[5] was enacted in 1790 by the first Congress of America. It has since undergone four general revisions in 1831, 1870, 1909, and recently in 1976 after an interval of more than 65 years. Maps, charts, and books were included in 1790, prints in 1802, musical compositions in 1831, photographs in 1865, and works of fine arts in 1870, and even the benefits of American copyright protection was even granted to foreign authors in 1891. A comprehensive revision

use," in George P. Bush (ed.), *Technology & Copyright*, Mt. Airy, Maryland: Lomond Systems, Inc., 1972, pp. 269-86; Maurice J. Holland, "A brief history of American copyright law," in Herbert S. White (ed.), *The Copyright Dilemma*, Chicago: A.L.A., 1978; pp. 3-18; Verner W. Clapp, Libraries: on the spot with present and future copyright legislation," in George J. Lukac (ed.), *Copyright: the Librarian and the Law*, New Brunswick, N.J.: Rutgers University Graduate School of Library Service, 1972, pp. 59-71; Roy G. Saltman, *Copyright in Computer-readable Works*, Washington, D.C.: U.S. Department of Commerce, National Bureau of Standards, 1977, pp. 3-18, A18-20, A46-53; Neville B. Nimmer, "New technology and the law of copyright," *ULLA Law Review*, 15: 931-1030 (April 1968).

2) One of the great guilds of England originated in the 16th century, which is equivalent to today's printers or publishers, to whom the Crown gave a virtual monopoly in publishing books.

3) Titled "An act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of each copies, during the term therein mentioned." See Pforzheimer, *op. cit.*, p. 272.

4) Holland, *op. cit.*, p. 8.

5) Titled "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the term therein mentioned" (1 statutes at large 124), which is "almost a verbatim copy of the Statute of Anne." See Pforzheimer, *op. cit.*, p. 278, and Holland, *op. cit.*, p. 11.

was undertaken in 1909 with regard to the relatively new system of international copyright protection, modernizing the 1909 law in line with the laws of other countries, bringing together all works, published and unpublished, into the federal system for protection only for the term allowed by the copyright.[6]

Library-based research has always been dependent on copying and copying services. Originally a library user made his own copies by hand, and the earliest library user stressed the importance of providing copying facilities;[7] at a later stage, libraries undertook to provide or arrange for copying services. At the turn of the 20th century, transcription by typewriter became general, and at that time, the Library of Congress permitted photocopying, including the copying of copyrighted materials. Library copying services have increased rapidly through the introduction of the photostat (1912-), the development of the portable typewriter (1910-), microfilm (1930-), and office photocopying devices (1950-). Before the present copyright law, libraries assisted users in the making of single copies. However, a person cannot do his research by depending on the aid of a time-consuming distant supplier; the copying service must be at hand and, moreover, be provided promptly, conveniently, and inexpensively. The increasing inexpensiveness and convenience of photocopying services, however, occasioned the raising of copyright questions with respect to library copying.

The basis of copyright is stated in broad terms in the U.S. Constitution (Article 1, Section 8, Clause 8), empowering congress "to promote the progress of science and useful arts, by securing for limited times to

6) Irwin Karp, "The author's view of the new copyright act," in White (ed.), *op. cit.*, p. 67.

7) Gabriel Naudé, *Advis pour dresser une bibliotheque*, Paris: I. Lisieux, 1876, pp. 100, 105, 108-09, as cited in Verner W. Clapp, *Copyright: a Librarian's View*, Washington, D.C.: Copyright Committee, 1968, p. 18.

authors and inventors the exclusive rights to their respective writings and discoveries" and again in the 1954, U.S. Supreme Court case called "Mazer v. Stein" (347, U.S. 201, 219): "the economic philosophy behind the clause empowering Congress to grant patents and copyright is the conviction that encouragement of individual effort by personal gain is the best way to enhance public welfare through the talents of authors and inventors in 'science and useful arts'." The two major interests embodied in Americae copyright law are then the public interest in dissemination of information and ideas on the one hand and the private interest in compensation for the effort on the other. The dual values of private gain of individual writers and public benefit have not come into serious conflict until modern times with the emergence of new photo-copying technology, which has brought "these two values into a head-on clash."[8] In the 1909 copyright law, the copyright holder reserved an exclusive right to copy the copyrighted work; accordingly, libraries withheld from their users copying services. However, exceptions were made to the rule in particular cases for non-profit educational purposes.[9] Nevertheless, libraries lacked regulatory authority to impose their own interpretation upon the Copyright Law, so they resorted to find some theoretic bases to justify copying without authorization in the "Gentle-men's Agreement" (1935), "the Private Right to Copy", "the Single Copy Policy", and "the Doctrine of Fair Use."[10]

Photocopying by definition is the duplication of a printed page by modern copying machines whether the process used by the machine is photographic or thermal or xerographic. At an early stage mechanical

8) Nimmer, *op. cit.*, p. 939
9) See Library of Congress. Photoduplication Service, *Order for Photoduplication*, 1963.
10) See Clapp, *op. cit.*, pp. 21-24.

reprography was done by primitive mimeo and ditto duplicators, which hence constituted little economic threat to authors since these machines required an expensive 'master' to make even single copies from, until they were replaced by early modern photocopying machines which required no 'master' to make copies from. Reproduction by these early modern machines, however, was not so economical because of the costly specially treated (sensitized) copying paper. Then came the wonderchild of photo-copying machine. This machine which uses the 'electrostatic' process produced copies on regular paper even on both sides at as little as a nickel at Hillman Library, University of Pittsburgh, and is installed almost everywhere in libraries or offices.

The issue of library photocopying as a serious concern to copyright owners of printed matter dates from the 1930's during which microphotography came to be extensively used for reproduction of printed matter at a reasonable cost. The so-called "Gentlemen's Agreement" of 1935 is the result of discussions in May 1935 between the Joint Committee on Materials for Research of the American Council of Learned Societies and the Social Science Research Council on the one hand and the National Association of Book Publishers on the other,[11] to define the boundaries of acceptable noninfringing photocopying and to solve a national copyright problem among themselves without recourse to Government instrumentalities. The Agreement, though not binding, provided guidelines that had since been followed by libraries and which hence stood as a basis for governing library photocopying for a generation. The following is some important portions of the Agreement: "A library, archives office, museum, or similar institution owning books or periodical vol-

11) American Council of Learned Societies, *Bulletin* 23:4 (June 1935), 25:4 (July 1936), pp. 67-68; R.C. Binkley and W.W. Norton, "Copyright in photographic reproductions," *Library Journal* 60 (1935), 763-64.

umes in which copyright still subsists may make and deliver a single photographic reproduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purpose of research; provided that (1) the person receiving it is given due notice in writing that he is not exempt from liability to the copyright to the copyright proprietor for any infringement of copyright by misuse of reproduction constituting an infringement under the copyright law; (2) that such reproduction is made and furnished without profit to itself by the institution making it."

In 1956 the Association of Research Libraries, dissatisfied with the legal basis of library photocopying, appointed a committee, which soon became the Joint Libraries Committee on Fair Use in photocopying, representing the four associations: the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, and the Special Libraries Associations. In 1961 the Committee investigated the Kinds of material being photocopied in principal American research libraries and the likelihood of damage to copyright holders and reported four findings and a recommended policy for single-copy photocopying, as given below: Findings: 1. The making of a single copy by a library is a direct and natural extension of traditional library service; 2. Such service, employing modern copying methods, has become essential; 3. The present demand can be satisfied without inflicting measurable damage on publishers and copyright owners; 4. Improved copying processes will not materially affect the demand for single copy library duplication for research purposes. Recommended policy: The Committee recommends that it be library policy to fill an order for a single photocopy of any published work or any part thereof. Before

making a copy of an entire work, a library should make an effort by consulting standard sources to determine whether or not a copy is available through normal trade channels.[12] However, neither the validity of the "exemption" extended either by the Gentlemen's Agreement nor the Single Copy Policy has ever been tested in a court of law.

A principle selected with increasing frequency for the justification of library copying since its mention in the Gentlemen's Agreement of 1935 is the judicial Doctrine of Fair Use.[13] The doctrine of fair use was used to claim exemptions for machine copying in two ways, one of which is the claim that any single copy of a work is a fair use whether the copy is made by hand or machine, and the other is that even if there is no general fair use exemptions for single copies, there should be a specific fair use exemption for educational users, such as teachers. With the aid of the doctrine a court can find that under certain circumstances the unauthorized printing or publication of a copyrighted work does not justify the infliction of penalties for infringement. The problem with the Doctrine of Fair Use, however, is that only the courts can tell whether a particular instance of copying may or may not be executed as fair use. The fair use of library copying, like the other principles mentioned, has not met a court test either.[14] However,, it is to be noted that fair use is a judicially-created doctrine that cannot be defined with precision, and that the principal factors in determining what constitutes a fair use depended on the well-known four factors, which have been rested in Section 107 of the 1976 Act—hence will not be repeated

12) Edward G. Freehafer, "Summary statement of policy of the Joint Committee on fair use in photocopying, *Special Libraries*, 55:104-106 (1964).

13) Copyright Law Revision, *Reports of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, Washington, D.C.: Government Printing Office, 1961-65, Vol. 6, pp. 24-26.

14) Clapp, *op. cit.*, p. 24.

here.

The principles underlying the "Gentlemen's Agreement," "the Single Copy Policy," and the "Fair Use Doctrine" helped Congress to establish sets of basic principles and subsidiary conditions and exceptions to resolve various issues, aided by the spirit of compromise and accommodation in which interested groups negotiated agreements among themselves on the principles of the legislative provisions and on practical guidelines for their application.

1.2 The Present Status of Library Photocopying

The issue created by photocopying and copyright, in the words of Lieb, is not whether libraries should be prevented from making copies on order from their patrons. The issue is what happens when those copies exceed the limits of fair use and also exceed the new privilege granted to libraries by the new law.[15]

According to the King Report, which researched the volume of photocopying performed by library staff of library materials, an estimated 114 million photocopy items were by library staff in 1976. Less than one-half of this volume, however, was from copyrighted materials. This means that the per library average is about 2,500 copyrighted items from 54 million photocopies made from copyrighted materials. Public libraries accounted for the largest share of photocopying of all library material, with 64 million photocopy items. Special libraries were next, with 26 million photocopy items, followed by academic libraries, with 17 million, and federal libraries with 7 million.[16] Serials accounted for

15) Charles H. Lieb. "Library photocopying: the publisher's view," in Lukac(ed.), *op. cit.*, p. 29-31.

16) King Research, Inc., *Library Photocopying in the United States: a Summary*, Washington, D.C.: Government Printing Office, 1977, p. 3.

the largest number of items photocopied from copyrighted materials, at about 48 million photocopy items. Most photocopy items of copyrighted serials (about 22 million) are made for local users. Twelve million items of copyrighted serials are made for intrasystem loans and about 4 million are made for interlibrary loan.[17] In 1967 the Committee to Investigate Copyright Problems conducted (under contract to the U.S. Office of Education) a study of photocopying in libraries. It concluded that 97% of library photocopying consists of single copies; 90% of the materials copied in U.S. libraries are less than 10 years old; 54~59% of the material copied is copyrighted; and over a billion copyrighted pages were copied in the U.S. in 1967.[18]

Copyright owners expressed fear of damage from library copying through reduction of demand leading to loss of sales including the loss of subscriptions to journals, and in the case of journals through reduction of advertising revenue. However, findings with respect to loss or damage in various studies and statistics, were found to be somewhat negative, as shown in the following survey report.[19] Again, according to a recent study,[20] made on the application of the copyright guideline limits to interlibrary loan photocopying for 1976, 1977, and the first quarter of 1978 at a large, special, scientific library, over 63% of requests were found to be for articles published within 10 years prior to the date of request and more than 79% of requests involved 5 or fewer articles per periodical per year. Interlibrary photocopying requests in excess of the

17) Ibid., pp. 4-5.

18) Gerald J. Sophar and Laurence B. Heilprin, *The Determination of Legal Facts and Economic Guideposts with respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright: a Status Report*, Washington, D.C.: Bureau of Research, Office of Education, HEW, 1967, pp. iii-iv, 71.

19) Clapp, *op. cit.*, pp. 29-30.

20) See John Steuben, "Inter-library loan of photocopies of articles under the new copyright law," *Special Libraries*, 70: 227-232 (May/June 1979).

five-copy "CONTU" (National Commission on New Technological Uses of Copyrighted Works) limit amounted to only 1.0% of requests in 1976, 0.9% of requests in 1977, while none were identified for the first quarter of 1978. Results of this study thus show that most requests involved five or fewer requests per periodical per year.[21]

2. Section 108 "Limitations on Exclusive Rights: Reproduction by Libraries and Archives": Explanation and Comments

Section 107 and 108 are related in such a way that nothing in Section 108 "in any way (could) affect the right of fair use as provided by Section 107" (see subsection (f)(4)). This, of course, does not preclude librarians from using Section 107 where it is applicable. The application of a library's "right of fair use as provided by Section 107" will be determined by the scope of the library's copy activities undertaken through the use of Section 108.

Section 108, which consists of 9 subsections (a) to (i), deals with copying by libraries for scholars and researchers, authorizing certain types of library photocopying that could not qualify as "fair use". It is covered by a statute itself (108), Guidelines, and Congressional Committee Reports, setting forth in the main the requirements libraries have to meet, specified categories of exemptions, types of works excluded, and prohibition of systematic reproduction activities. Some subsections of it are straightforward and less controversial, such as subsections (b), (c), (e), for example, while others are somewhat controversial, such

21) Ibid., p. 232. However, the study concludes that the number of interlibrary photocopy requests for periodical articles is said to be on the increase. Thus between 1976 and 1977 the number increased by 288 requests. The projected number of requests for 1978 is said to be 1,260, or 190 more than in 1977.

as the so-called "single copy issue", which became the origin of the now-famous prohibition of systematic reproduction and distribution, the phrase "aggregate use" (g), and the phrase "without...indirect commercial advantage" in relation to subsection (a) (1).

A library or archives are allowed by Section 108 to make certain reproductions and distributions of copies, provided that they meet the three basic requirements set forth in subsections (a) (1)-(3) and that their reproduction or distribution fall within specified categories of exemption (b)-(e). However, certain types of works are excluded from the library reproduction provisions (h), and any systematic reproduction activities are prohibited (g). In the following, the various subsections of Section 108 will be evaluated with the exception of subsection (f) which will be only briefly commented on in passing.

2. 1 The Three Basic Requirements for Reproduction or Distribution.

A library is eligible to exercise Section 108 rights if its collections are either open to the public or, if that is not the case, are available to researchers (a) (2), and its copies are made or distributed without commercial advantage "without any purpose of direct or indirect commercial advantage" (a) (1). Thus the subsection (a) prevents a purely commercial enterprise from establishing a collection of copyrighted works, whether it is called a library or archives and engaging in for-profit reproduction and distribution of photocopies; it also prevents a non-profit institution from authorizing a commercial copying enterprises (such as University Microfilms Inc.) to carry out copying functions that would be exempt if conducted by the nonprofit institution itself.

2.2 Types of Library Photocopying

Subsections (b) and (c) deal with a library's reproduction of a copy for its own use—for archival reproduction for preservation of an unpublished work (b) and for replacement of lost, damaged copy (c). Subsections d) and e) on the other hand permit a library to provide a single photocopy of certain works (see below) to a user, to make the copy from its own collection, i.e. "in-house" photocopying or provide a copy reproduced by another library, i.e. "interlibrary" photocopying. The works covered by the provisions are periodical articles and small excerpts, regardless of whether they are in or out-of-print (d); out-of-print works (e). Under this exemption covered by subsection (b), a repository could make photocopies of manuscripts by microfilm or electrostatic process but could not reproduce the work in "machine-readable" language for storage in an information system.

2.3 Works Excluded from the Library Reproduction Exemption (h)

An eligible library under Section 108 may, under defined circumstances, make and distribute a copy of an entire work (or a substantial part of it) in conformity with a user's request at the same or another library (e), but this right does not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than those dealing with news (hence these are the types of works excluded from the library reproduction provisions), but no such limitation applies to the rights granted by subsections (b) and (c) relating to preservation of unpublished work and replacement of published work respectively, or the pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced in accordance with subsections (d) and (e) relating to

extracts or portions of work which are unsubstantial in length and to entire work unobtainable at a fair price respectively.

2.4 Multiple Copies and Systematic Reproduction (g)

Section 108, however, makes clear that the granted photocopying rights apply only to the "isolated and unrelated" reproduction of a single copy of the same material on separate occasions, and that these library photocopying rights do not extend to the making of "multiple" copies (f) nor to the "systematic reproduction" of single or multiple copies of journal articles and other materials described in subsection (d). Therefore, systematic in-house or interlibrary photocopying of periodical articles and contributions is prohibited. However, this does not prevent a library from participating in interlibrary arrangements so long as their purpose is not to substitute for a subscription to or purchase of such work.

Section 108 is supplement by "Guidelines" interpreting the provision of subsection (g) (2) on interlibrary arrangements for photocopying, as approved by the House Committee on the Judiciary.[22] Of the five guidelines, numbers 1 and 4 are worth commenting on. Concerning articles copies, the guideline 1 considers only what we might call "recent" articles and issues, i.e., articles published in issues within 5 years prior to the date of a library's request for a copy from another library, and a calendar year is the base period for applying the guidelines; hence, the sixth copy is beyond the guideline. The five copies may be of the same article or a combination of different articles from the publication. The guideline do not deal with the subject of requests for articles from journal issues that are more than 5 years old. The

22) It is, however, to be noted that these are only guidelines, not a statute.

guideline 4 has to do with maintaining records by the requesting entity of all requests for copies, and these records are to be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request has been made.

2.5 Two Remaining Subsections Dealing with the Constructions of Library Reproduction Provisions (f) and a Periodic Five-year Interval Report (i)

The subsections (f) exempts a library for phtocopying activities on an unsupervised machine, provided that the machine contains a notice that the making of a copy may be subject to the copyright law. The last subsection (i) directs the register of copyrights, by the end of 1982 and at five year intervals thereafter, to report "any problems that may have arisen" to make recommendations for any needed changes.

3. Problems and Suggestions

This section of the paper will deal with various problems and issues relative to Section 108 and offers some additional guidelines.

3.1 The Clearinghouse

A clearinghouse is a center of payment of all royalties for all copies that are made from copyrighted works, especially by libraries. The Senate report said that when copying exceeds the limits of Sections 107 and 108, mechanisms should be established or created for payment, and the Register of Copyright regarded favorably the proposal for a clearinghouse to license phtocopying.[23] As of 1976, when the copyright law

23) Copyright Law Revision, *op. cit.*, p. 14.

was revised for the fourth time, there existed no fully-established clearinghouse or other mechanism for payment of royalties for photocopying beyond the guidelines established.

Various systems of collection and payment, including private collection agencies as well as legislatively created collection systems (the per-use system and the flat fee system) have been proposed.[24] Clearinghouse licensing and direct licensing are examples of licensing types that may be employed. However, with either of these situations, there is said to be the possibility of a blanket license or a per-use license,[25] and Nimmer suggests "a statutory flat fee taxing system based on machine classification as the most feasible response to the reprographic revolution"[26] The advantage of a clearinghouse over direct licensing is that the user has a single point of negotiation, a single place to send royalty payments. With a per-use license, however, the major cost is collecting the information, and the cost of collecting per-use data is too high. With blanket licensing (a single yearly fee for all uses), the amount of data needed to be collected is reduced.

On the method of operation of the clearinghouse, the following suggestion has been proposed: Beginning with 1978 periodical issues, participating publishers would print a copying fee on the first page of each article with a standardized code identifying the article and the publisher. Use of the code would in effect be a license to copy on payment of those fees to the payment center. Libraries and other user that wish to participate in the center could register; receive an organizational code number, and report their copying and payment fees.[27]

24) Nimmer *op. cit.* pp. 963 ff.
25) Saltman, *op. cit.*, pp. 34-35.
26) Nimmer, *op. cit.*, p. 973.
27) Irwin Karp, "The author's view of the new copyright act," in White (ed.), *op. cit.*, pp. 72-73.

The real problem is whether or not there is useful income to benefit the copyright holders with its attendant complexity and high installation and operating costs to be deducted by the clearinghouse for their services. Moreover, everybody in the publishing business is a little bit uncertain about possible antitrust actions, hence nervous about any cooperative effort. Therefore, they feel the need for additional legislation to provide them with antitrust protection and an 'umbrella statute' to protect libraries from infringment suits by publishers who do not participate in the copy paymentcenter plan.

The clearinghouse can be operated by either any publisher or only certain types of publishers. In 1977 the Association of American Publishers (AAP) unveiled a plan to establish a nonprofit payment center for technical, scientific, and medical journal articles.[28] Some objects to the AAP plan and proposes instead to have to membership open to all types of publishers. But Wedgeworth objects to combining two types of publishing in the same clearinghouse—the commercial publications and those authors who publish for profit on the one hand, and the nonprofit scientific society-type publications established by scientific societies whose object is to disseminate information—since their objectives are entirely different.[29] In 1977 there existed three clearinghouses for collecting royalty payments for public performances of musical works: they were ASCAP (the American Society of Composers, Authors and Publishers, Inc.), BMI (Broadcast Music, Inc.), and SESAC, Inc.,[30] but ASCAP and BMI type organization could not be useful on account of the inherent

28) Association of American Publishers, Inc., "Program for the provision of copies of technical-scienctific-medical journal articles and for related information service copies," March 17, 1977.

29) Robert Wedgeworth, "How the American Library Association views the new copyright," in White (ed.), *op. cit.*, p. 141.

30) Saltman, *op. cit.*, pp. 35-36.

differences between literary material and music.[31]

3.2 On "Systematic Reproduction"

The House bill amended Section 108 (g) (2) to make clear that in cases involving interlibrary arrangements for the exchange of photocopies, the activity would not be considered 'systematic' as long as the library receiving the reproductions for distritution does not do so in "such aggregate quantities as to substitute for a subscription to or purchase of such works". There are two questions relative to this statement: what are such "aggregate quantities" and "systematic reproduction"?

The CONTU guidelines say with respect to interlibrary loans that the aggregate quantity which goes over the limit is six photographic copies of articles from a single periodical within a year, of articles in the last five years of that periodical title. This provision was apparently made n the assumption that five requests for articles from a given journal in a single year is usually more than enough to trigger a request for a subscription or pay a reasonable royalty to the publisher through the clearinghouse if the five-copy limit is exceeded. The CONTU Commission, however, did not arrive at an agreement on guidelines with respect to copies from periodicals more than five years old and did not deal with several other parts of Section 108 about which questions still exist.[32]

The Senate report stated correctly that there was no difinition in the law, nor could they supply a definition of what "systematic" photocopying meant. They simply listed six specific examples of systematic photocopying. Now there is a direct interrelationship between "indirect

31) Lieb, *op. cit.*, p. 32.

32) Robert W. Frase, "CONTU's activities and spheres of interest," in White (ed.), *op. cit.*, p. 46.

commercial advantage" referred to in Section 108 (a) (1) and the prohitions against "multiple" and "systematic" photocopying in Section (g) (1) and (2), which forbids a library in a profit-making organization to use a single subsciption or copy to supply its employees with multiple copies or to copy "systematically" in the sense of delibratively substituting photocopying for subscription or purchase. Only "isolated" and "spontaneous" making of single photcopies by a library in a for-profit organization could be covered, so long as no systematic photocopying is involved. For-profit libraries could participate in interlibrary arrangement for exchange of photocopies as long as the reproduction or distribution is not "systematic".

However, as to whether the non-commercial advantage restriction mean that a library in a for-profit organization may not avail itself of Section 108 to provide copies to the organization's employees for their research activities, the answer is not clear.[33] In the case of article copying, the availability of Section 108 rights calls for a library to have had no notice that the copy would be used for any purpose other than "private study, scholarship, or research" (108 (d) (1); also see 108 (e) (1)). Would a library in a for-profit institution have "no notice" when, say, the employee is a research chemist and requests a chemistry article? If it is concluded that the library has notice that the purpose is for the organization's research purposes, is such a purpose one for "private study, scholarship, or research"? If it is not, Johnston concludes, Section 108 then could not apply to the copy made.[34] However, the above cited House report clearly implies that Section 108 covers such a case even when such a library happens to have had notice that the article would

33) See Donald F. Johnston, *Copyright Handbook*, N.Y.: Bowker, 1978, pp. 99-101.
34) Ibid., pp. 100-101.

be used for the organization's research purposes.

However, neither the law, nor the guidelines, nor the Conference report are either crystal clear or all-inclusive. Some questions will have to wait for us to gather experience as we operate under the new law, and some may not be resolved without resorting to law suits.

3.3 Additional Guidelines to be Considered

Existing guidelines are only for interlibrary photocopying of journal articles and other contributions not more than 5 years old. There are no guidelines for the practical application of Section 108 to the kinds of copying the account for most of the library copying, such as copies made, for patrons, of material in the library's own collection, or copies obtained, for patrons, from other libraries of material more than 5 years old.[35]

The following additional guidelines should be considered for Section 108.

(1) Further guidelines for a periodical article over 5 years old.

(2) Guidelines with respect to subsection (g) (1), which relates to multiple copying, one at a time or over a period of time.

(3) Guidelines spelling out the meaning of reasonable effort and fair price under the subsection permitting single copy reproduction to replace lost or stolen copies.

(4) Guidelines for the provison of subsection (g) (2) item 4 on record retention requirements on libraries. The cost of keeping the records and informing the copy center of its use of copies is an additional cost to that which is already intrinsic in making photocopies. The publishers

35) Association of American Publishers, Inc., *Photocopying by Academic, Public and Nonprofit Research Libraries*, Washington, D.C.: The Association, 1978, p. 9.

refused to accept that cost as a deduction from the fee.[36]

4. Korea and International Copyright

The first American statute on copyright was adopted in 1790, but it was not until 1891, with the passage of the Chace Act, that America granted protection to foreigners and made it possible for them to obtain copyright in the U.S. and the first move toward international copyright in the English speaking countries was through a law passed July 31, 1838, in England, entitled "An act for securing to authors, in certain cases, the benefit of international copyright". Six years later, an act known as "the International Copyright Act" was passed, extending the benefits of the British copyright acts to works first published in any foreign country.

There are three major international copyright conventions, the Berne Copyright Union founded in 1910, the Universal Copyright Convention in 1952, and the Buenos Aires Convention in 1910. The newly revised 1976 Copyright Act contains a section 602, titled "Infringing importation of copies or phonorecords", dealing with importation of "pirated" articles and unauthorized importation of copies that were lawfully made, thus making unauthorized importation an act of infringement. However, subsection (a) of Section 602 lists three specific exceptions to which the general rule of infringement does not apply, one of which is importation under the authority or for the use of a government body, but not including material for use in schools, and the other is importation for the private use of the importer of no more than one copy ot a work at

36) See Efren Gonzalez, "The view of a special librarian," in White (ed.), *op. cit*, p. 173.

a time, or of articles in the personal baggage of travelers from abroad.

Subsection (b) retains the present statute's prohibition against importation of "piratical" copies. A typical example would be a work by an American author produced piratically in a foreign country such as Korea which has no copyright relations with the U.S.; the making and publication of an unauthorized edition would be lawful in that country, but the Bureau of Customs could prevent that importation of any copies of that edition.

The international copyright problems, however, are rendered more difficult of definition because copyright in each country is subject to the domesic law of the country and to the vagaries of its judicial system. Korea is no exception and a member country of none of the conventions. The reasons are obvious; she gains nothing -only loses- from joining them. However, not all developing countries take the same position as Korea. For example, both India and Korea are developing countries, but India is a member country of international copyright conventions because she is an exporting country of books written in English. One reason why Korea does not show interest in becoming a member contry of an international copyright convention and is not under stong pressure from outside to become one is that a work unlawfully translted into Korean and published in Korea is not likely to be exported overseas, to affect the economy of the country of the origin adversely, since Korean is a regional, not an international, language. The situation is different with respect to an English speaking country like India, which could export English translations of works whose copyrights could be secured at a lower rate. Thus a compromise petition was made for a revision of the Berne Union at a meeting held in January of 977 in New Delhi for the benefit of the developing coun-

tries like India which uses English as an official language. The petition was approved at the meeting, and in January of 1967 the proposed amendment was presented to the meeting held at Stockholm and was approved by the participating delegates from member countries. This amendment is known as the "Stockholm Protocol Regarding Developing Countries" to benifit developing countries by allowing them to translate a work and publish it freely with terms of payment of royalties determined flexibly by domestic laws. The reactions to the Protocol by developed countries like the U.S. and Great Britain were down right unfavorable, to say the least.[37]

What are then Korea's advantages and disadvantages from becoming a member country of an international copyright convention? As pointed out before, Korea gains nothing from joining it since Korea has practically limited overseas market for her cultural products. Kore still could protect the copyright of her products overseas 100% even ifshe did not join one of the conventions. On the other hand, if Kore joined the UCC, for example, she stand to lose since even a singl quotation from a work would require prior permission from the publihers, which would not only delay the publication data but also add cost o the translated work, thus affecting the domestic market adversely. Fo this reason and others, the Korean government considers the time is nc yet ripe for the country to join an international copyright convention.

37) See Moo Yong Min, "International copyright and developing couries, *Chulpan Munhwa*, Nov. 1970, pp. 13-15 (In Korean); Kyong Hoon Lee, "O Korean copyright laws," *National Assembly Library Bulletin*, 13:4 (1976), pp3-24.

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