

LIBRARIES AND COPYRIGHT AT THE DAWN OF THE 20TH CENTURY: THE 1909 COPYRIGHT ACT

D-r-a-f-t

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I. INTRODUCTION

A. General

As the 20th Century began, Congress was again considering revising the copyright law of the United States. Under the leadership of Herbert Putnam, the Librarian of Congress, with the assistance of Thorvald Solberg, the Register of Copyrights, a series of conferences with various stakeholders and interested parties were held to discuss various issues. Drafts of bills and amendments were introduced into Congress and Congressional hearings followed. The 1909 Copyright Act was signed into law on March 4, 1909, after several years of hard work.

Many technological innovations were introduced in the 50 years before the Act was passed, but the telephone, wireless and photography were still relatively new.¹ Motion pictures were still in their infancy and reproduction technology was in a state of continued development. The 19th century brought significant changes in printing technology which lowered the cost of reprints (stereotyping), enhanced machinery for making paper and steam powered printing presses.² Lithography and photography improved graphic designs for books and other materials.³

¹ Gerald J. Sophar, *Nature of the Problem*, in COPYRIGHT, REPROGRAPHY AND THE COPYRIGHT LAW 1, 1 (Lowell H. Hattery & George P. Bush eds., 1964).

² A. Zorina Kahn, *An Economic History of copyright in Europe and the US*, in EH.NET ENCYCLOPEDIA (Robert Whaples ed., March 16, 2008), <http://eh.net/encyclopedia/article/khan.copyright>.

³ *Id.*

B. Librarians and Their Relationship with Publishers

Librarians and publishers enjoyed a symbiotic relationship almost from the founding of modern libraries. Despite their interdependence, there has always been a tension between them too. Libraries, especially public libraries, focus on free access to books and materials. Publishers have often complained that libraries and their lending practices interfere with the purchase of copies by members of the public. Librarians' values and those of publishers and producers are often quite different: librarians are trained in the public library ethos and seek to provide requested information to their users free of charge while publishers produce copyrighted works as a product and want to distribute them and earn a profit for their efforts.⁴

Copyright is an issue over which librarians and publishers have disagreed for years, going back certainly to the early 20th century, and perhaps earlier. "Throughout the history of the printed word (and a considerable portion of the history of the written word), copyright has been a thorny problem for publishers, authors, scholars and librarians."⁵

C. Copyright Issues Affecting Libraries in 1909

There were two major copyright issues that affected libraries and their users in 1909; the first was considerably more important than the second. The importation of books from foreign countries, especially those written by American authors but printed abroad were governed by the 1891 Copyright Act which contained an exception for importation of such works by libraries under certain conditions. In the years leading up to the 1909 Act, publishers sought to repeal the library privilege. The second issue was the reproduction of copyrighted works. Since the latter part of the 18th century, various copying technologies had developed, and some were

⁴ See Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 25 COLUM.-VLA J.L. & ARTS 115 (2000).

⁵ John M. Budd, *Copyright*, in ENCYCLOPEDIA OF LIBRARY HISTORY 171,171 (Wayne A. Wiegand & Donald G. Davis, Jr., eds., 1994).

used to reproduce copyrighted works. The scope of such copying, however, was limited due to the state of the technology at the time, and mention of reproduction is scant in the legislative history to the 1909 Act.

1. Importation of works by foreign authors

Under earlier copyright statutes, all works by foreign nationals were considered to be public domain⁶ which not surprisingly resulted in some difficulties with foreign authors and some countries.⁷ This is in sharp contrast with European countries, of which France is a good example. Louis Napoleon's Decree of 1852 dealt with counterfeiting of works, both foreign and domestic, and prohibited such activities. In the United States, by contrast, American copyright did not protect foreign works for almost 100 years.⁸ At the same time, the United States was a net importer of books, especially from other English-speaking countries, and U.S. citizens took advantage of the scholarly and cultural outputs of other countries through inexpensive copies of these works printed by American printers which paid no copyright royalties to the author. Publishers and printers maintained that the absence of any international agreement resulted in a treasure trove of literature available to the American public at low cost. Moreover, they stressed that the reprinting of foreign works by printers in the United States created many jobs for U.S. workers. Publishers had effectively lobbied Congress to prevent any change in the law regarding protection for works of foreign authorship.⁹

Piracy was unabated for most of the 1800s. Some American publishers even had agents in London who would obtain plates of new novels from famous British authors such as Thackeray or Scott and deliver them to this country where they were printed even before the

⁶ This was true from the first U.S. Copyright law, see Act of May 21, 1790, ch. 15, 1 Stat. 124.

⁷ A long-running dispute with Charles Dickens is one of the most famous. See *Boz in Egypt*, http://www.charlesdickenswebpage.com/boz_in_egypt.html, first published in ILL. HERITAGE, July-Aug. 2007.

⁸ Kahn, *supra* note 2.

⁹ Budd, *supra* note 5 at 172.

British edition could be produced. Since no royalties were paid, the cost of the U.S. edition was much less than the British one.¹⁰ At the same time, imported books from abroad had tariffs attached that ranged up to 25 percent.¹¹ The reading public benefited from the availability of these high quality works at a low price, but relations with other countries and some famous authors did not fare so well. In the 18th century, most of the works available that were produced in this country were reprints of nonfiction works of foreign authors. During the next century, however, works of fiction became increasingly important to the reading public.¹²

After the 1840s things settled somewhat, not because this country protected foreign works but because major publishers cooperated to establish “synthetic property rights” in works of authors from other countries by making arrangements to receive early copies of foreign-authored works and paying for the right to produce an “authorized reprint.”¹³ These rights were recognized as very valuable and were subject of contract law.¹⁴ Copyright protection for works of foreign authors was not recognized in this country until the 1891 Act.¹⁵

2. Library reproduction of copyrighted works

Copying in libraries has a long history going all the way back to the Great Library at Alexandria established in 290 B.C. by Ptolemy I. The library brought great fame to the city for which it is named; and because of the library, the city became famous as the literary and scientific capital of the Mediterranean and the intellectual capital of the Greek world.¹⁶ Like any

¹⁰ *Id.*

¹¹ Kahn, *supra* note 2.

¹² *Id.*

¹³ *Id.*

¹⁴ See *Sheldon v. Houghton*, 21 F. Cas. 1239 (1865).

¹⁵ International Copyright Act of 1891, Act of March 3, 1891 26 Stat. 1106, was passed on March 3, 1891, by the 51st Congress. “Chace Act” after Senator Jonathan Chace of Rhode Island.

¹⁶ Ellen Brundige, *Decline of the Library and Museum of Alexandria*, Dec. 10, 1991, <http://www.digital-brilliance.com/kab/alex.htm>.

modern library, it held the store of knowledge, but in the delicate form known as papyrus scrolls. Ptolemy asked other rulers around the known world to lend him texts which he would have copied for the library. Additionally, when ships landed at the port of Alexandria, vessels were searched, not for contraband, but for books and maps. These were confiscated, copied and then returned to their owners and the copies were added to the library. In fact, there were complaints that sometimes Ptolemy kept the original for his library and returned the copy to the owner. Thus, the collection of the first “public” library was built on copying.¹⁷

Another method of library development was the absorption of cultural property including libraries. The first libraries in Rome consisted of the booty of war from conquered Greek states. For example, Aemilius Paulus pillaged the library of the Macedonian kings and presented it to his sons in 168 BC.¹⁸ Confiscated literature from conquered civilizations made up much of Caliph Harun-al-Raschid’s royal library in Baghdad in the 8th century. A host of scribes and translators were then engaged in extending that library.¹⁹

Copying was often done by hand, both by monks in the Middle Ages²⁰ and by early library patrons. Copying technology from the late 18th century through the early part of the 20th century continued to develop from simple letterpresses to mechanized processes. Reproducing portions of books was not easy with these technologies, however.²¹

The Library of Congress seemed to encourage copying and thereby ignore copyright in 1901. Its regulations at the time indicated that the Library was “ready to suggest ... persons

¹⁷ *Id.*

¹⁸ K.Sp. Straikos, Libraries: History of the Private, Royal, Imperial and Monastic Libraries, History (Mesopotamian), http://www.libraries.gr/nonmembers/en/history_romaikos_protes.htm.

¹⁹ Anne L. Buchanan, et al, *Collection Development* 153, 154 in ENCYCLOPEDIA OF LIBRARY HISTORY (ed. Wayne A. Wiegand & Donald G. Davis, Jr. eds., 1994).

²⁰ In 6th century India, the Jains copied and distributed both sacred and secular works. In Japan, Buddhist leaders in the 8th century created copying centers for texts. *Id.* at 154-44.

²¹ See, Barbara Rhodes & William Wells Streeter, BEFORE PHOTOCOPYING: THE ART AD HISTORY OF MECHANICAL COPYING, 1780-1938 (1999).

who will transcribe lengthy extracts where those are desired” but if also freely allowed photocopying. There was even a special room reserved for persons who wished to engage in such copying activity.²²

II. AMERICAN LIBRARIES AT THE TURN OF THE 20TH CENTURY

A. Types of Libraries and Their Development

Even in Colonial America there were libraries, but these were private libraries often in the homes of minister and doctors or in colleges and churches, and books were considered a sign of wealth. These collections were small, ranging from a few dozen volumes to a few hundred. Book collections in churches were often open to the public in the 18th century, but there were no systems in place to maintain the libraries or see that the materials were preserved and returned. So, over the years they tended to waste away.²³

Colonial college libraries were small and typically consisted of donated books. These eclectic collections often had no funding for their upkeep or expansion.²⁴ Books were primarily the classics and religious works. College libraries grew slowly with little demand for more books. Due to lack of demand, there was no reason to appropriate funds to preserve and add to the college library collection.²⁵ Although college libraries are one of the oldest types of libraries in the United States with the establishment of the Harvard College Library in the 1630s,

²² Verner Clapp, *Copyright – A Librarian’s View*, prepared for the National Advisory Commission on Libraries 1 (1968), citing U.S. Librarian of Congress, Annual Report 208 (1901).

²³ Staff Report from the Straight Dope Science Advisory Board, *How Did Public Libraries Get Started?* Jan. 17, 2006. <http://www.straightdope.com/columns/read/2236/how-did-public-libraries-get-started>.

²⁴ Other than newspapers, there were fewer than 100 periodicals published in 1825; by 1885, however, over 9,000 were published. Sharon Gray Weiner, *The History of Academic Libraries in the United States: a Review of the Literature*, 7 LIBR. PHIL. & PRAC. (Spring 2005), www.webpages.uidaho.edu/~mbolin/weiner.htm, citing Eugene R. Hanson, *College Libraries: The Colonial Period to the Twentieth Century*, 8 ADVANCES IN LIBR. ADMIN & ORG. 171-99 (1989).

²⁵ Stephen E. Atkins, THE ACADEMIC LIBRARY IN THE AMERICAN UNIVERSITY 3-4 (2003), <http://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=header&id=History.AcadLib&isize=M>.

there were few such libraries before 1820.²⁶ By the end of the 19th century, college collections consisted primarily of works to support the curriculum rather than research materials. The average library had between 600-20,000 volumes, still mainly received through donations. As serial publications gained in importance, libraries began to acquire these.²⁷ The number of college libraries had increased to 750 by 1876.²⁸ By 1880, research had begun to be more important in U.S. universities, and as the number of PhDs increased, academic libraries had to acquire more materials on a variety of subjects. Fortunately, more money was allocated to support the development of academic library collections.²⁹ Universities experienced tremendous growth in the period 1890 to 1915, and it transformed American higher education. Funds were provided from the creation of American industry, which in turn created the demand for specialty disciplines and library materials to support research in these fields.³⁰

Public libraries owe their development from the creation of three types of libraries which introduced the idea of sharing books: (1) social libraries, (2) circulating libraries and (3) school district libraries. In 1731 Benjamin Franklin created a subscription library as a way to share books among members. Incorporated in 1742, the Library Company of Philadelphia accepted members who purchased stock in the corporation. Social libraries became popular and stock usually sold at \$5 per share. Some of these libraries were devoted to a particular subject. The Boston Athenaeum, founded in 1807 for the top level of society, devoted itself to scholarly magazines and newspapers. Libraries like the Athenaeum tended to combine the functions of a

²⁶ Haynes McMullen, *Distribution of Libraries, citing Public, Society, and School Libraries in the United States of 1,000 and Over in 1900* in 1 U.S. BUREAU OF EDUCATION, REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1899-1900, in AMERICAN LIBRARY HISTORY, 1876-1976, 23, 35 (Howard W. Winger, ed.), 25 LIBR. TRENDS (July 1976).

²⁷ Weiner, *supra* note 24.

²⁸ McMullen, *supra* note 26.

²⁹ Atkins, *supra* note 25, at 14, 16-17.

³⁰ *Id.* at 19.

man's social club with those of a library, a museum and other cultural institutions.³¹ The annual share cost was a staggering \$300 which insured that only the wealthiest citizens could become members.³² A subset of social libraries were mercantile libraries typically aimed at middle-class young men and funded by contributions from wealthy citizens to help educate the masses (often their factory employees or mercantile clerks. The purpose of mercantile libraries was "...to promote orderly and virtuous habits, diffuse knowledge and the desire for knowledge to improve scientific skills" and create good citizens.³³

It is said that the 19th century belonged to social library but to the public library thereafter. In 1900, 28% of the 5400 libraries listed as having more than a thousand volumes were social libraries.³⁴ These libraries were never particularly well funded, and they tended to languish or close during tough economic times.³⁵

Another trend that led to the creation of public libraries, was the establishment of circulating libraries that were also called rental libraries. They were developed in the latter part of the 18th century, housed in bookstores or print shops and contained primarily popular fiction, especially the novel. The first of these libraries opened in Annapolis, Maryland in 1762. Although it closed after only two years, the idea proved popular and others developed.³⁶

The third type of library that was important in the development of public libraries was the school district library. Districts were expected to have books for their students but there was no system for maintaining or increasing book collections. Materials that were donated to school

³¹ Charles A Seavey, *Public Libraries*, in *ENCYCLOPEDIA OF LIBRARY HISTORY* 518, 519 (Wayne A. Wiegand & Donald G. Davis, Jr., eds. 1994).

³² Staff Report from the Straight Dope Science Advisory Board, *How Did Public Libraries Get Started?* Jan. 17, 2006. <http://www.straightdope.com/columns/read/2236/how-did-public-libraries-get-started>.

³³ *Id.*

³⁴ Mullen, *supra* note 26, at 32.

³⁵ *How Did Public Libraries Get Started*, *supra* note 32.

³⁶ *Id.*

district libraries were not particularly interesting or even all that useful. In the 1830s, Horace Mann, secretary of the Massachusetts Board of Education, pushed for the establishment and maintenance of school libraries. Educators finally convinced legislators to fund school libraries through taxes to provide reading materials for adults as well as children.³⁷

Social, circulating and school district libraries contributed three ideas important to the formation of public libraries: (1) books should be shared, (2) popular literature should be collected and (3) from school district libraries, the idea of public funding.

Although Julius Caesar is credited with the idea of founding a public library,³⁸ in the United States, the first public library was founded by accident in Petersborough, New Hampshire in 1833.³⁹ The idea's popularity grew and in 1849, New Hampshire became the first state to permit local taxes to support public libraries. The Boston Public Library opened in 1854 and is usually credited with being the first public library since it was intentionally created.⁴⁰

Public libraries opened in Los Angeles in 1889, New York in 1895, New Orleans in 1896 and Brooklyn in 1897. Often the public library absorbed earlier social library. At first, public libraries primarily catered to scholars and the upper classes and were open only during daytime hours and had a number of restrictions on use. Andrew Carnegie was a major supporter of public libraries, and by 1920 his estate had contribute \$50 million to erect nearly 2,500 library buildings, 1700 of which were in the United States. He thought that libraries and their

³⁷ *Id.*

³⁸ Straikos, *supra* note 18.

³⁹ *How Did Public Libraries Get Started*, *supra* note 31. The accidental creation of the library occurred because the town of Petersborough decided to use some of the money the state had collected to start a state college when the college failed to come to fruition.

⁴⁰ *Id.*

collections should be open to everyone and supported the idea of using tax revenues to support public libraries.⁴¹

Public libraries in this country and England contributed to the education system that existed at the time. It was thought that access to a book collection would provide a “beguiling alternative to the temptations of drunkenness, criminal folly and vice.”⁴² Also, it was widely believed that public libraries would aid in preventing public disorder.⁴³

The public library was a haven for the wave of immigrants who arrived after 1890. In fact, storytelling was used to socialize immigrant and explain U.S. traditions and customs as well as to highlight the expectations of society. Libraries came to resemble community centers as they focused on immigrant communities, performing a patriotic duty to act as civilizing influences by offering to services immigrants which were viewed as a social obligation.⁴⁴ Even before public libraries served immigrant populations, immigrants themselves recognized the importance of libraries and created their own social libraries. Indeed, the collections of some of these immigrant libraries became the basis of foreign language collections for the public libraries in the area.⁴⁵

B. Formation of Library Associations

The American Library Association (ALA) was formed on 1876 October 6, 1876, during the Centennial Exposition in Philadelphia. ALA was “...created to provide leadership for the development, promotion, and improvement of library and information services and the

⁴¹ Carnegie was called a Communist by the right because of his support for the use of tax dollars to support public libraries. The left also called him a Communist because they viewed taxes as a drain on the working man. *Id.*

⁴² W. Boyd Rayward, *Librarianship in the New World and the Old: Some Points of Contact*, in AMERICAN LIBRARY HISTORY, 1876-1976, 209, 210 (Howard W. Winger, ed.), 25 LIBR. TRENDS (July 1976).

⁴³ *Id.*

⁴⁴ Plummer Alston Jones, Jr., AMERICAN PUBLIC LIBRARY SERVICE TO THE IMMIGRANT COMMUNITY, 1876-1948; A BIOGRAPHICAL HISTORY OF THE MOVEMENT AND ITS LEADERS 72 (1991).

⁴⁵ *Id.* at 77.

profession of librarianship in order to enhance learning and ensure access to information for all.”⁴⁶ Twenty-five year old Melvil Dewey was the youngest person present. In 1890 he was elected president of the ALA with the slogan “the best reading for the largest at the least cost,”⁴⁷ a philosophy which public libraries continue to share to this day.

Other national library associations that serve specialized clientele soon followed. The Medical Library Association was founded in 1898, the American Association of Law Libraries in 1906 and Special Libraries Association in 1909. At the time of the Librarian of Congress’ conferences preceding passage of the 1909 Copyright Act, the ALA was interested in copyright and sent representatives to the conferences. Because of disagreements among librarians about proposed amendments to the copyright law, the ALA did not represent the views of all librarians and the Librarians Copyright League was formed

III. IMPORTATION OF BOOKS

A. Before 1891

For more than a century, there were no restrictions on the importation of foreign works, and American publishers and printers pirated European works without much concern for the rights of the author. Ultimately, American authors found themselves both deprived of income at home and faced with piracy from European publishers since the United States did not offer copyright protection to foreign authors which meant that foreign countries offered no protection to works by American authors. It was more profitable for American publishers to publish foreign works since no royalties were paid than to publish works of foreign authors.⁴⁸ Agitation for copyright protection on an international scale escalated after the mid-19th century, however.

⁴⁶ Am. Libr. Assn, Mission & History, <http://www.ala.org/ala/aboutala/missionhistory/index.cfm>.

⁴⁷ *How Did Public Libraries Get Started*, *supra* note 32.

⁴⁸ Marjorie McCannon, *The Manufacturing Clause of the U.S. Copyright Law*, Feb. 1963, 1123, 1128 in Arthur Fisher, *STUDIES ON COPYRIGHT* (1963).

The economics of reprinting and publishing forced some “literary men” to side with American publisher on the issue of foreign book competition and a protectionist tariff. Scholars, however, took the other side of the issue and opposed any restrictions on importation of foreign books and articles.⁴⁹

Tariffs on books and the question of international copyright has always been intertwined with the manufacturing clause in the copyright law due to fear that foreign books produced at lower cost would supplant the market for those published in America. Through the years, protectionist sentiments prevailed. Moreover, “...nationalism and the proud desire to foster American literature and keep out alien philosophies, politics and religion have influenced Congress.”⁵⁰ The tariff on books and other imports rose to 15 percent as the Civil War approached.⁵¹ After the Civil War many scholars and researchers sought to lower the tariff on imported books, but publishers opposed any reduction. The only modification made in 1870 was to add to the free list “books printed and manufactured more than 20 years” before importation. This opened the door to foreign imports since the only books in this category anyone would want to import were those that had been received with some success and were now considered to be classics.⁵² Representatives of scientific and academic groups continued to protest the tariff on foreign books which had now risen to 25 percent. They sought to add to the free list books in foreign languages and claimed that the duty amounted to “a tax on the dissemination of knowledge” and was a “bar to the progress of intellectual culture.”⁵³

⁴⁹ *Id.*

⁵⁰ *Id.* at 1129, *citing* Donald Marquand Dozer, *The Tariff on Books*, 36 MISS. VALLEY HIST. REV. 73, 79 (1949).

⁵¹ Donald Marquand Dozer, *The Tariff on Books*, 36 MISS. VALLEY HIST. REV. 73, 74 (1949), *citing* Merrill Tariff Act of Mar. 2, 1861.

⁵² *Id.* at 75.

⁵³ *Id.* at 75-76.

The leader of publisher opposition was Henry Oscar Houghton (of Houghton Mifflin Publishers). The concern from the 1830s was destruction of the American book printing business.⁵⁴ Complaints by academics continued and in 1887 many colleges petitioned Congress to add foreign language books to the free list.⁵⁵

B. Importation Clause in 1891

The Act of 1891 was a compromise between the two contingencies to protect the copyright of works by foreign authors (if their countries reciprocated by granting copyright to American authors) while requiring that all works by U.S. authors be printed with type set in the United States.⁵⁶ The manufacturing clause was the quid pro quo upon which printers insisted for granting international copyright protection in the United States. The purpose was to protect the U.S. printing industry from foreign competition, but no other country required domestic manufacture as a condition of copyright protection.⁵⁷ The fear of American publishers ran deep. They were concerned that once a British edition had been printed, those copies would be exported to the United States and this would extend the monopoly that British publishers had over works by British authors.⁵⁸

Denying protection to foreign authors seemed contrary to the whole concept of copyright which is to protect the author; but after 1891, authors' rights were sublimated to those of American book printers. Even though authors most often will have their works printed in their own countries, there are some reasons one might choose otherwise. For example, if an American author is living abroad or writing in a foreign language or writing for a foreign market,

⁵⁴ *Id.* at 77-84. At this time, publishers and printers were often one in the same.

⁵⁵ *Id.* at 90.

⁵⁶ *Id.* at 94.

⁵⁷ Report of the Register of Copyrights on the General Revision of the United States Copyright Law, in 2 Arthur Fisher, *STUDIES ON COPYRIGHT* 1199, 1319-20 (1963).

⁵⁸ Edward Samuels, *International Copyright Relations*, *THE ILLUSTRATED STORY OF COPYRIGHT* (2000), <http://www.edwardsamuels.com/illustratedstory/isc10.htm>.

she might prefer printing elsewhere. Another such situation might be if a foreign publisher is the only one that offers to publish a particular technical or scholarly work. Further, when the market for a work is likely to be small, printing should occur wherever the cost is the lowest. Finally, if the superior quality of a particular foreign artisan is the primary consideration, then an author should be able to select a foreign publisher.⁵⁹

2. The library privilege or exception

As a salvo to the academic and scientific communities, Congress included a provision to permit the ban on the importation of foreign language books in which only translations in English are copyrighted. Without the payment of the 25 percent duty on books, individuals were permitted to import two copies of foreign works for personal use but not for sale. Likewise, libraries and other institutions were allowed to import foreign copies of works of even U.S. authors but only two copies of the work could be included on the same invoice.⁶⁰ Books improperly imported were subject to seizure by customs agents.⁶¹

3. How libraries efficiently imported books

Libraries hired foreign book agents to scour the book publishers of Europe and import the books they needed but restricted to two invoices. As librarians will do, they made this an efficient process and were able to build both public and academic library collections of foreign imprints including titles both published in foreign languages but also in English through use of these agents.

C. Debates in 1905 - 1909

⁵⁹ Abe A. Goldman, *Study No. 1, The History of U.S.A. Copyright Law Revision from 1902 to 1954*, in 2 Arthur Fisher, *STUDIES ON COPYRIGHT* 1101, 1186-87 (1963).

⁶⁰ Copyright Act of 1891, § 4956.

⁶¹ Richard Rogers Bowker, *COPYRIGHT: ITS HISTORY AND ITS LAW: BEING A SUMMARY OF THE PRINCIPLES AND PRACTICE OF COPYRIGHT WITH SPECIAL REFERENCE TO THE AMERICAN CODE OF 1909 AND THE BRITISH ACT OF 1911* 279 (1912).

1. Early disputes with publishers

The Librarian of Congress convened three conferences in 1905 and 1906 on the proposed 1909 revision of the copyright law. There were two major issues on which there was major disagreement: mechanical instrument (player piano) use of copyrighted music and the importation by public libraries of works printed abroad.⁶²

The Register of Copyright had opined that the manufacturing clause was an import limitation rather than a curtailment or denial of copyright protection. If the printing industry still needed protection against foreign competition, then it should be handled outside the copyright law. It was difficult for customs agents to stop infringing importations since it required knowledge of rather complex copyright laws.⁶³

From 1891 publishers had complained about the library exception that allowed importing foreign copies of U.S copyrighted works without the payment of duties. This was said to be an inducement for libraries to import works rather than to purchase American produced copies. Speaking for the Periodicals Association of America, Charles Scribner stated that the library privilege should be restricted by requiring consent of the copyright owner. He recognized the size of the library market for the purchase of books and periodicals and its importance to publishers,⁶⁴ but he criticized the fact that libraries around the country housed books by U.S. authors that were printed in England which he characterized as “cheap editions.” “Sometimes those foreign made editions contain changes – slight changes and it is not desirable to have an American work perpetuated in a library with those changes.”⁶⁵

⁶² Goldman, *supra* note 59, at 1105.

⁶³ Report of the Register of Copyrights on the General Revision of the United States Copyright Law, in 2 Arthur Fisher, *STUDIES ON COPYRIGHT* 1199, 1323-25 (1963).

⁶⁴ *Stenographic Report of the Proceedings of the First Session of the Conference on Copyright* held at the New York City Club, May 31-June 2, 1905, in 1 *LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT* 121-22 (E. Fulton Brylawski and Abe Goldman eds., 1976).

⁶⁵ *Id.* at 123.

Librarians certainly disagreed and opposed any change to the library privilege. Arthur R. Bostwick, also representing the ALA, stated that librarians thought it made very little difference where the work was printed as long as the author was receiving royalties. Moreover, he noted that many works first published in England were reprinted in the United States in very inferior editions. He stated that libraries sought to purchase books in the best edition, which might be an English edition and cautioned that if the privilege were revoked, American libraries would be forced to purchase the inferior U.S. edition which might omit illustrations, use paper of poorer quality and even omit sections of chapters.⁶⁶ If consent of the copyright owner were required, it would force libraries to track down authors before purchasing the work.

Frank P. Hill, one of the two representatives of the American Library Association (ALA), reminded delegates that members of the public were represented by both his organization and the National Education Association. Without the public, there would be little need for copyrighted works or publishers and therefore members of the public should be dealt with liberally by the copyright law.⁶⁷

At the second conference organized by the Librarian of Congress, speaking for the American Publishers Copyright League, George Havers Putnam stated that the law should be returned to its pre-1891 status regarding importation of foreign produced copies; to do otherwise is contrary to the interests of the American people and to the copyright interests of authors and publishers.⁶⁸ According to William H. Appleton representing the same organization, in 1891 publishers were told that only a few scientific institutions, Yale, Harvard and other universities were likely to import scientific books for their libraries but this had proved erroneous. The reality

⁶⁶ *Id.* at 126.

⁶⁷ *Id.* at 125.

⁶⁸ *Stenographic Report of the Proceedings of the Second Session of the Conference on Copyright*, held at the New York City Club November 1-4, 1905, in 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 10 (E. Fulton Brylawski and Abe Goldman, eds., 1976).

is that many copies have been imported through international scientific services. A publishers' agent has been all over the country examining collections and found that many works of modern authors have been imported.⁶⁹ Neither English libraries and public schools nor individuals can obtain an American book without permission of the copyright owner but U.S. publishers suffer inroads from English publishers where the sale of 100 to 300 copies of a work may make the difference of profit or loss on the title. The greater the price for the work, the greater the inducement to purchase abroad because English publishers will sell in the United States cheaper than it they will sell in their own country which publishers believed to be unfair.⁷⁰

Hill for the ALA countered stating that the public would be injured if the law were changed as publishers proposed. Because of a rule adopted by the Publishers' Association, discounts to libraries were drastically changed which reduced the number of books a library could purchase. If the library privilege is changed, prices will increase and members of the public and students will be hurt since libraries will have fewer funds with which to purchase books. The law has worked well since 1891.⁷¹

Stephen H. Olin, counsel to the American Publishers' Copyright League testified in the June 1906 Congressional hearings highlighting the fact that publishers believed the library privilege in the 1891 Act did not work well because libraries had imported copyrighted books in large numbers. The situation was said to be acute with expensive scientific works and those illustrated with plates, because the market for these works is small. In fact, there are instances in which an American publisher declined to publish a book that would have been beneficial to

⁶⁹ *Id.* at 91-93.

⁷⁰ Statement of Charles Scribner, American Publishers' Copyright League, *id.* at 91.

⁷¹ *Id.* at 97.

the public as well as to typesetters and publishers due to the fact that the public at whom the work was aimed was very small.⁷²

According to Olin, ordinarily a library needs only one copy at a time and that's the justification for the proposal to reduce the number of copies imported to one per invoice. If it needs a second copy, it can import a second one on a separate invoice. Colleges and universities can now import an English edition of an English book because it may be better than the American edition. But why is it important for a library to import an English edition of an American work which is almost always more or equally complete? There are Continental editions of American works aimed at travelers but which cannot be imported back into England or the United States. The rule on travelers' editions should apply to libraries.⁷³

In Congressional hearings in December 1906, George Havers Putnam, again speaking for the American Publishers' Copyright League, stated that the 4000-5000 libraries, on which publishers depend, have had the importation privilege for 16 years. They have exercised the privilege with increasing facility despite the protestations about unfairness by authors and publishers. In fact, publishers tried to convince librarians of the unjustness of the privilege but librarians disagreed and "would not stop a practice in which they found a substantial convenience." The proposed revision of the law would reduce the number of copies per invoice that could be imported by libraries and educational institutions from two to one, but a library can get from 52-104 invoices per year but only with permission of the copyright owner.⁷⁴

⁷² Arguments before the Committees on Patents of the Senate and House of Representatives, Conjointly on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Representing copyright, June 6,7,8, and 9, 1906, *in* 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 37-38 (E. Fulton Brylawski and Abe Goldman, eds. 1976)

⁷³ *Id.* at 38.

⁷⁴ Arguments, *supra* note 72, at 55-56.

Vice President of the American Publishers Copyright League, Richard R. Bowker, commented that librarians seemed to want the right to import books as a way to control prices. He thought that this was outside the purview of copyright law since the right to vend is the right to control sales, and that belongs to the copyright owner.⁷⁵

2. Disagreement among librarians

After the first Librarians' conference in June 1905, the matter was discussed at the ALA conference where it was decided that librarians speaking at future conferences would be speaking for themselves and not for the association. There were protests among librarians with some not agreeing to the proposed amendment to reduce the number of imports per invoice to one which the representatives of ALA had found acceptable. Bernard C. Steiner, Librarian at the Enoch Pratt Library in Baltimore, testified that it was crucial for libraries to import two copies per invoice since often one copy was need for the general collection and one for the reference collection but also for replacement copies.⁷⁶ He detailed the special role of the public library in America:

The public library is a part of the public educational institutions of the country. It is an institution for the public culture. It is supported by the public. It is given special privileges by the public government in many cases.... The Government quite properly gave special privileges to the public libraries and among those special privileges was the privilege of importing two copies for use, and not for sale, of all books which are published in the world."⁷⁷

Moreover, a title may be published in England two months before it is published in America; and it may be published under different titles in each country. It is difficult to tell whether a U.S. publisher will publish a book or not, so a library may purchase the English edition some weeks or months before publication of an American edition is even announced. Steiner identified

⁷⁵ *Id.* at 79-80.

⁷⁶ *Id.* at 59-62.

⁷⁷ *Id.* at 62.

another complication, determining who is an American author. Is it a citizen of the United States only? Or someone domiciled in this country? (Did Rudyard Kipling become an American author when he lived in Vermont?) Or is an American expatriate author who does not return to this country, a foreign author? With these complications, it would be unfair to expect librarians to search immigration records to make this determination.⁷⁸

Moreover, not all foreign language books are foreign works. The largest Yiddish publication center in the world is in New York City. German language books are printed in both Chicago and New York, and the largest Lithuanian publisher in the world is based in Plymouth, Pennsylvania.⁷⁹

It is difficult for librarians to determine whether a work was copyrighted in the United States. Should librarians have to correspond with the U.S. Copyright Office to make this determination? Books printed abroad do not contain a notice of copyright, so that cannot be relied upon as the determinate. Customs officials cannot determine the copyright status of foreign, works not because of any lack of intelligence, but because the situation is so complex. If permission of the copyright owner is required, librarians would encounter difficulties. The first is that the proprietor may decide not to consent and second, it is often difficult to locate and communicate with the owner who may or may not be the author of the work.⁸⁰

Steiner stated that the quality of books published in Britain is often superior for library purposes than are U.S. produced copies. English books frequently have more plates, more features such as appendices and often are printed on better quality paper. For some copyrighted works in the United States, the only U.S. produced copies are 10 or 20 cent paperback editions, but a library can obtain a copy of the same work in an English edition of

⁷⁸ *Id.*

⁷⁹ *Id.* at 63.

⁸⁰ *Id.*

superior quality. Moreover, there are books in England which cannot be procured either in America or England but which can be found in Europe. He asked whether libraries should be barred from procuring these books because “the American copyright proprietor does not care to publish a decent edition?”⁸¹

H.C. Wellman of the Public Library of Springfield, Massachusetts testified that American authors lose nothing when libraries purchase English produced copies. Authors have the right to sell the copyright to a U.S. publisher. A library that imports copies of a work from England does decrease sales of U.S. copies, but the author’s royalty is not reduced since he received royalties from the sale of the English book. To some extent, American publishers are able to set their prices based on prices advertised in circulars from English publishers. In fact, a circular from Longman Publisher and Bookseller states: “We will guarantee to supply you our books either directly or through book agents, as cheaply as you can import them.”⁸² American booksellers typically offer libraries a 10 percent discount from the net price. This discount is not likely to increase since the American Publishers Association announced in *Publishers Weekly* that it would put out of business anyone who offers deeper discounts to libraries no matter the size of the purchase.⁸³

William P. Cutter, Librarian at the Forbes Library, Northampton, Massachusetts, indicated that he was representing public libraries across the country such as Chicago, St. Louis, Pittsburg, Minneapolis and Los Angeles. A number of colleges and universities also

⁸¹ *Id.* at 64.

⁸² *Id.* at 70-71.

⁸³ *Id.* 72-73. William P. Cutter, Librarian at the Forbes Library in Northampton, Massachusetts, accused the American Publishers Association and the American Book Sellers Association of monopolizing the market for copyrighted books. He alleged that the combination existed on July 11, 1905, as evidenced by the opinion of Justice Ray in *Bobbs Merrill v. Strauss*, 139 F. 155, 170-71 (S.D.N.Y 1905), where both parties acknowledged the existence of the combination. *Id.* at 73.

agreed with the position of the public librarians who testified.⁸⁴ Cutter discussed one of the difficulties that libraries would face if the importation limitation were to be restricted to authorized copies only, i.e., those imported with permission of the copyright owner. If a large crate of books is imported from abroad (but only one book per invoice), and that crate contains one book that was copyrighted in the U.S., but which was printed in England and contained no notice of copyright, the whole shipment could be seriously delayed if customs officials discovered that one book in the shipment. Officials would send the entire crate of books into public store and the entire shipment would be in danger of being destroyed. The librarian would then be forced to show the Secretary of the Treasury that he was not guilty of attempting to import that book illicitly.⁸⁵

3. Individuals and importation

William Allen Jenner of New York City testified as an individual, although he was also an attorney and a lawyer. He stated that individuals should have the right to import a book or two for personal use. There is no right more innocent than an individual contacting a foreign bookseller to request that a copy of a work be send to him for personal use and not for resale. The bill proposed in March 1908 conceded the right of libraries, colleges and other institutions of higher learning to import books, and for travelers to bring in as many foreign-made copies as they can carry in personal baggage. If they pay a 25 percent duty, they can bring in unlimited numbers of copies. What is prohibited, however, is the right to order a copy by mail without permission of the copyright holder, and this negatively impacts students and those who cannot

⁸⁴ Bernard C. Steiner, representing the Library Copyright League, stated that there were 200 libraries that protested ALA's agreement to the one copy importation limitation. *Id.* at 145.

⁸⁵ June 1906 Hearings *supra* note 70, at 63.

afford to travel abroad.⁸⁶ Permitting individual importation through the mails would not harm American authors. It may affect publishers by keeping down prices, however.⁸⁷

Jenner disagreed with Putnam (speaking for the Publishers Copyright League) who said that American publishers should be able to tailor English books for the American audience. “Do not include in your bill a single word which will make it possible for any American to degrade himself by soliciting that permission or paying any amount, not matter how small, for the privilege of doing that.”⁸⁸ This bill, which is a “pervasive and synthetic scheme” for the profit of a few publishers and booksellers to control prices during the term of copyright, will turn Americans who want to import a single copy for personal use into smugglers.⁸⁹

D. Final Language of the 1909 Act As It Applied to Libraries

The manufacturing clause of the 1909 Act was the product of a compromise. The library exception to the importation ban was not repealed but it was reduced somewhat by changing the number of copies that could be imported per invoice from two to one, but libraries were not required to get authorization from the copyright owner prior to importation. The statute continued to prohibit importation of pirated copies but Included on the free list and thus free from any duty were:

Books, maps, music, photographs, etchings, lithographic prints and charts specially imported, not more than two copies in any one invoice, in good faith, for the use and by the order of any society or institution incorporated solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or by use of any college, academy, school, or seminary of learning in the United States, or

⁸⁶ Hearings before the Committees on Patents on the Senate and House of Representatives on Pending Bills To Amend and Consolidate the Acts Respecting Copyright, March 26, 27 and 28, 1908, in 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 121 (E. Fulton Brylawski and Abe Goldman, eds. 1976).

⁸⁷ *Id.* at 122-23.

⁸⁸ *Id.* at 134.

⁸⁹ *Id.* at 125.

by any state or public library and not for sale, subject to such regulations as the Secretary of the Treasury shall prescribe.⁹⁰

The free list also included books and pamphlets printed in foreign languages, books and music in raised print for use by the blind,⁹¹ along with books maps, music, photographs, etc., that were printed more than 20 years before the date of importation.⁹²

Librarians complained that the importation provisions are made unnecessarily onerous by Treasury regulations that intend to insure the identification of the actual copies imported. Actual library practice was to use library agents who acted for the library, and that agent typically made the oath and presented evidence of authorization by the library to customs officials. The librarian was required to certify receipt of the individual copy before it could be cleared from the custom house.⁹³

E. Repeal of the Importation Clause – 1986

The manufacturing clause continued into the Copyright Act of 1976⁹⁴ banning importation of protected English language nondramatic literary works unless they are manufactured in the U.S. or Canada.⁹⁵ Authority of the copyright owner was not required for either individuals or libraries, the number of copies that could be imported was raised to five for the purpose of library lending unless the copies violated the systematic reproduction or distribution provision of §108(g)(2).⁹⁶

⁹⁰ Tariff Act, § 519.

⁹¹ *Id.* at § 518.

⁹² *Id.* at § 517.

⁹³ Melville B. Nimmer & David Nimmer, 2 THE LAW OF COPYRIGHT § 7.22[D][4] (2008).

⁹⁴ 17 U.S.C. § 601-603 (1982).

⁹⁵ *Id.* at § 601.

⁹⁶ *Id.* at § 602(a)(3).

The manufacturing clause was a barrier to the country's adherence to the Berne Convention, but statute contained a built-in 1986 sunset date. So, the manufacturing clause passed into the annals of history in that year.

IV. REPRODUCTION BY LIBRARIES AND THEIR USERS

Scholars and researchers have long reproduced sections of copyrighted works to use for their own personal use or research. For many years, such copying could be done only by hand by the individual scholar or by hiring a transcription service. In 1909, there were some early reproduction technologies but reproduction was discussed in relation to music in the conferences and hearings on the Act. The reproduction technologies discussed below are those for reproducing text. There were other processes used for reproducing works of art, graphics and maps, but they are outside the scope of this article.

A. Early Reproduction Techniques

Although might assume that carbon paper was the earliest form of office copying, it was not. In fact, carbon paper did not gain general acceptance for office copying until the development of greaseless carbon paper in the 1870s. Letterpresses, however, had been in use for more than 125 years in the United States by 1909. Invented by Scottish inventor, James Watt (better known for the steam engine), the first letterpress was sold in America in 1782. Used primarily for duplicating letters in office situations, a variety of companies produced and sold presses in this country. Thomas Jefferson even owned several. By the mid-19th century, letterpresses were generally accepted in business and by the courts.⁹⁷ The letterpress required an original document written in copying ink and a sheet of paper cut to the appropriate size. To copy, the sheet was wetted with either patented moisturizing fluid or just plain water and blotted

⁹⁷ Rhodes & Streeter, *supra* note 21, at 7-10.

to remove excess water. The moistened paper was then placed over the written surface with a clean sheet of paper or cloth on top. The layered package was then pressed in a rolling or screw press which enabled the ink to wick into back of the coping paper. The copy was then removed and pressed flat, as was the original.⁹⁸ It was possible to make multiple copies too by inserting sheets of oiled paper in front of and behind tissue on which the copy was to be reproduced and placed in the letterpress. It could be repeated as necessary to get the required number of copies.⁹⁹ Thus, copyrighted materials could be reproduced but only after copying the original with copying ink.

Using stencil processes for copying, in combination with letterpresses, date back of around 1822. By 1872 the earliest commercially successful stencil duplicating was developed by Eugenio du Zuccato, was called the Papyrograph. The process, described as “electro-chemical printing,” used a varnished iron plate on which one wrote with a metal stylus to expose the iron under the varnish sheets of thin paper that had been moistened with potassium ferrocyanide solution. These were placed on the iron over which a copper plate and moderate pressure was applied.¹⁰⁰ There were a variety of file plate processes developed toward the end of the 19th century. By 1880 Thomas Edison patented a method of making stencils by placing a paper over a bed of needle points or on a grooved metal plate, and by 1894, an Edison Mimeograph typewriter was on the market which had steel type and was specifically designed to produce stencil sheets, for use with file plates..

The best known file plate process was the Mimeograph. Albert Blake Dick, a Chicago lumber dealer, acquired the Edison file plate patent in 1887. He combined it with a flat bed duplicator that he had designed and called it the Mimeograph. It became really popular

⁹⁸ *Id.* at 9.

⁹⁹ Early Office Machines, *Antique Copying Machines*, http://www.officemuseum.com/copy_machines.htm.

¹⁰⁰ Rhodes & Streeter, *supra* note 21, at 129.

especially after typewriter stencils came onto the market, but it still was a “wet” process.¹⁰¹ Libraries and library users could take advantage of the Mimeograph by typing stencils and reproducing copies. Researchers and scholars could use Mimeograph copiers to reproduce and distribute papers at scholarly conferences and to duplicate copyrighted articles. It still required the typing of the materials onto stencils from the original work.

Considered to be the simplest and least expensive office copying process were gelatin duplicators introduced in 1878. Commonly called Hectographs, they were made from mixture of gelatin, glycerin and sometimes glue. To prevent mold, carbolic or salicylic acid was sometimes added to the mixture. The first step to produce copies was hectographic writing or typing of a document in hectographic ink and allowing it to dry without blotting. It was then pressed down on the hectographic surface, which had been moistened with water. It remained in the water for a few minutes for some of the ink to transfer to the gelatin.¹⁰² By the end of the century, lithography (the process of writing on a thin stone plate from which the transfer is made to an elastic substance, the other plate) had been replaced by the hectograph and stencil processes.¹⁰³ The only mention of reprography during either the conferences or hearings for the 1909 Act was made by J. L. Tindale, a member of the Executive Committee of the Music Publishers Association, who spoke on behalf of composers. He stated that the composer owns the right to copy regardless of the method of copying and then listed several methods ranging from pen and ink to **hectograph** and whether it consisted of round notes on paper, raised characters for Braille or punched paper holes for player pianos.¹⁰⁴ But that was the only mention of reproduction.

¹⁰¹ *Id.* at 133-34.

¹⁰² *Id.* at 139.

¹⁰³ *Id.* at 148.

¹⁰⁴ June 1906 Hearings, *supra* note 72, at 227-29.

With the development of photography, different systems for photographic reproduction were developed. Reflex copying was invented by J. Hart Player in 1896. Also called ReflEXTography or Reflexion copying, the process used light reflected through a sheet of photographic paper to produce a negative image reflected back from the original document with which it was in contact. The product of this process were known as “Playertypes” which were negative images from which positive copies could produced by contact printing exposure through the back of the photo paper.¹⁰⁵ Reflex copying was the first technology that could produce copies from opaque originals such as books and journals as well as individual documents. It could also be used to produce library catalog cards.¹⁰⁶

Libraries permitted patrons the use of technologies such as photography to reproduce materials from at least around the turn of the 19th century.¹⁰⁷ The most famous early reproduction process, however, was the Photostatic camera introduced by Eastman Kodak in 1911. The first process that made photographic copying practical for general commercial copying, it was quickly adopted by libraries. By 1912, just three years after passage of the 1909 Act, the Library of Congress had acquired a Photostat machine and could offer a public photocopying service.¹⁰⁸

B. Rapidly Developing Technology

With the development of Photostatic copying, libraries began to add the equipment to their facilities. Because early machines were quite large and occupied to 10 to 12 square feet for the equipment and operator, they were appropriate for only larger libraries. Between 1909 and 1937, enough libraries had made photostatic equipment available for patrons to use to

¹⁰⁵ *Id.* at 158-59.

¹⁰⁶ *Id.* at 159.

¹⁰⁷ See text at note 22.

¹⁰⁸ Clapp, *supra* note 22.

reproduce copyrighted works that the Gentlemen's Agreement was needed. The Gentlemen's Agreement was a negotiated agreement that established acceptable limits on the photographic reproduction of copyrighted materials for scholars and researchers. Generally the agreement permitted libraries to make single copy of portions of copyrighted works for a patron in lieu of lending the printed copy or of providing transcription services after certain conditions were satisfied: (1) notice had to be provided to the user she was not exempt from copyright liability if she misused the reproduction and (2) the reproduction was furnished by the library without any profit to the library.¹⁰⁹

V. CONCLUSION

It is interesting to note that disagreements between publishers and librarians were not solely a product of the debates over the 1976 Copyright Act. Although in 1909 these disagreements were not over photocopying, they seem to have been somewhat acrimonious, thus setting the stage for what would become even more strident over the 1976 Act. Publishers depend on libraries as a significant market for their products. Likewise libraries are dependent on publishers for the books and materials they acquire for their collections. Perhaps the tension is inevitable between these groups due to their different interests and values in the copyright arena. The disagreements do not appear likely to abate in the digital environment.

¹⁰⁹ The Gentlemen's Agreement and the Problem of Copyright, 2 J. of Doc. Reproduction 31 (1939).