

§ 108(a), preceding sub-paragraphs (1) and (2), uses the phrase "and if." The "and" is, at the least, superfluous; and more significantly, it may create doubt as to the *cumulative* nature of Section 108.

The foregoing are merely intended as examples of poor draftsmanship having potential substantive effect on the principles embodied in the Section. As noted earlier, we urge that such principles themselves be subjected to examination and evaluation.

#### IV. CONCLUSION

Title II of the Senate Revision Bill would establish a "National Commission on New Technological Uses of Copyrighted Works." One of the stated purposes of the Commission is to "study and compile data on (1) the reproduction and use of copyrighted works . . . by various forms of machine reproduction . . ." <sup>12</sup> It is surprising that provisions for library copying which will seriously impair proprietary rights would be considered without the proper investigation which the Senate itself called for in appending title II to the Revision Bill.

Senator McCLELLAN. Very well.

Call the next witness.

Mr. BRENNAN. The Association of American University Presses. You have been allocated 5 minutes.

Senator McCLELLAN. All right.

Mr. BRENNAN. Would you identify yourself, Mr. Rosenthal?

#### STATEMENT OF ARTHUR J. ROSENTHAL, CHAIRMAN, COMMITTEE ON COPYRIGHT, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC.; ACCOMPANIED BY JOHN B. PUTNAM, EXECUTIVE DIRECTOR, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC.

Mr. ROSENTHAL. I am Arthur J. Rosenthal, director of the Harvard University Press. I represent the Association of American University Presses in my capacity as chairman of that organization's Committee on Copyright. I do not speak for Harvard University.

With me on my right is Mr. Sanford C. Thatcher, social science editor of Princeton University Press, a member of our Copyright Committee and on my left, Mr. John B. Putnam. Mr. Putnam is executive director of the association.

The 64 university presses of the country are, I believe, in a fortunate position in helping to assess where the public interest lies in the problem you are studying this morning. We live in the world of the librarian. In Cambridge, my press, for example, is surrounded by no less than 89 Harvard libraries.

Our day-to-day work is almost exclusively with scholars and educators; yet, the necessity to protect each scholarly book and journal we publish is as real for us as it is for the most commercial of commercial publishers.

I hope that this special perspective will cause our testimony to be without any note of special pleading and will be regarded as cooperative and flexible by our library and educational colleagues.

In a very real sense, the university press bears a primary responsibility for dissemination of scholarship in this country; although their dollar volume is low, our members publish nearly half of the nonfiction books addressed to a scholarly audience that are issued each year.

<sup>12</sup> S. 644, title II, sec. 201(b) (1) (B).

If the orderly reporting of such research is to continue, the medium through which it occurs must be protected, and the author's claim to the copyright of his own work must be safeguarded. Toward this end, our suggested rewording of section 107 is an attempt at precision in the critical area of fair use. We believe that the present vagueness of this section could be construed as an invitation to unlimited photocopying of copyrighted material and that our suggested rewording gives added structure to the meaning of this section.

Senator McCLELLAN. Do you have any proposed language?

Mr. ROSENTHAL. I do. I have been skipping fairly rapidly, Mr. Chairman.

Senator McCLELLAN. Is it in your prepared statement?

Mr. ROSENTHAL. It is.

Mr. THATCHER will continue our testimony.

Mr. THATCHER. Mr. Chairman, in our prepared statement we have referred in a general way to the threat to nonprofit publishing we perceive in passage of a bill amended in other ways than we propose, but in these supplementary remarks, I should like to direct particular attention to the plight of the one form of such publishing that is apt to be most endangered by the photocopying privileges sought by educators and librarians—the publication of scholarly journals, in which university presses happen to be heavily engaged (collectively publishing 280 journals).

There is no single medium more responsible for the advancement of knowledge and the dissemination of information than the scholarly journal. Its contribution is perhaps most conspicuous in the natural sciences where the rate of progress and the collaborative nature of the enterprise make the production of books by individual authors the exceptional, rather than the normal, form of publication. But its prominence in the natural sciences should not obscure the vital role the scholarly journal plays also in the humanities and social sciences. There, too, although it is more often the outstanding book that establishes a scholar's reputation than a series of articles, most such books could never have been written but for the essential groundwork that had been laid previously by dozens of articles on aspects of the topic treated. Take a look at the bibliography of practically any university press book, and you will immediately realize the truth of this assertion. The truly original work of scholarship, like the revolutionary discovery in science, is a rare phenomenon.

Yet for all their universally recognized value to the advancement of scholarship—indeed, their indispensable contribution—scholarly journals seldom pay their own way through income received from subscriptions and advertising, at least for a very long time after publication is initiated and sometimes never. A case in point is *World Politics*, a leading journal in the field of international relations that my press publishes at Princeton: it began to break even only after 9 years of publication at a loss. The situation is such that many journals have to be subsidized or supported in other ways by professional associations or research institutions, whose own funds for publication are usually quite limited. Outside help from other sources is difficult to find. Foundations and Government agencies, which have over the years been very generous in providing funds for the scholar's research activities, have traditionally shied away from extending that support

to its logical conclusion by assisting the journals that publish the results of his research.

It is no solution to sell the journal at a price that will insure its economic viability, however high the price may have to be. For, unlike a book, which as a more or less unified treatment of a single subject can be sold even at a high price to those individuals who have a special professional interest in it, a journal typically provides a general forum for the discussion of a range of diverse issues within a broad field of inquiry, not all of which are likely to be of interest to the scholar who subscribes to it; hence, raising the price of the subscription is apt to make the alternative of photocopying those articles of particular interest to the professional relatively more attractive than continuing his subscription.

And here is the rub, as far as publishers of specialized journals are concerned. For as the cost of printing and publishing inexorably rise, and the charges for photo reproduction increasingly become cheaper, the journal publisher finds himself unable to pass on the higher costs to the consumer, who at some point on the scale will prefer photocopying to subscribing. The final result, if carried to its logical end, of course is self-defeating: the erosion of the journal's subscription list will sooner or later compel the publisher to cease publication of the journal altogether—and then the scholar will have nothing to copy. The publisher, the scholar, and the rest of us will all be poorer as a result.

It is this unhappy situation which I believe passage of S. 1361 with sections 107 and 108, unamended—or as amended in the ways educators and librarians desire—would bring even closer to reality than it already is because it would provide legal sanction for activities directly detrimental to the continued viability of scholarly journal publishing, activities which are now limited partly, I am sure, by the uncertainty which exists about their legal status. Allowing uncompensated use of copyrighted materials, as envisaged explicitly in the library amendment and the educational exemption, would ultimately dry up the very wellsprings of creative and productive scholarship which it is the concern of educators and librarians themselves to promote. They cannot have it both ways: eating their cake and having it, too.

What needs to be done, I want to suggest, is to find some practical means of implementing the principle that fairness most clearly dictates: that the user of copyrighted material, when the use involves more than fair use as traditionally understood, should bear some of the cost of its production. Photocopying is here to stay, and nothing that educators, librarians, or publishers decide is going to change that fact. Realistically, then, our efforts should be concentrated on devising workable mechanisms for linking up photocopying in support of original publication, rather than permitting it to remain a free rider, a parasitical form of publishing.

To explore alternative mechanisms, to see how the costs of producing and disseminating knowledge can be most equitably distributed among the parties concerned, users as well as producers, would be a fit task for the proposed National Commission to carry out, for only it will be in the position of judging impartially on the basis of information independently gathered what is in the best interest of the Nation as a whole.

In the meantime, it would seem best to proceed with caution, safeguarding rights that have long been recognized as vital to the creation and distribution of knowledge and not giving in to immediate pressures however forcefully applied. We of the AAUP believe that our proposed amendments to sections 107 and 108 would insure the maximum protection to these rights while providing the incentive needed to promote serious investigation of schemes for licensing the reproduction of copyrighted materials—incentive hitherto lacking because of the expectation that something—namely, free photocopying—can be gotten for nothing. It is a position we hope you will support. Thank you.

Senator McCLELLAN. Very well. Thank you.

Thank you very much, gentlemen.

Now, we are going to recess until 1:30, and we urge those of you who are scheduled to testify this afternoon to be present so we will not have to wait on anyone.

[Whereupon, at 12:27 p.m., the committee recessed to reconvene the same day at 1:30 p.m.]

[The prepared statement of Arthur J. Rosenthal follows:]

STATEMENT OF ARTHUR J. ROSENTHAL, ON BEHALF OF THE ASSOCIATION OF  
AMERICAN UNIVERSITY PRESSES, INC., ON S. 1361

I am Arthur J. Rosenthal, Director of Harvard University Press, a department of Harvard University engaged in not-for-profit publishing of scholarly books and journals. I represent the Association of American University Presses, Inc., in my capacity as Chairman of that organization's Committee on Copyright. With me are Mr. Sanford Thatcher, Social Science Editor of Princeton University Press and a member of AAUP's Copyright Committee, and Mr. John B. Putnam, Executive Director of the Association of American University Presses, Inc.

AAUP is a not-for-profit educational corporation operating in the interests of its membership, comprising 64 scholarly university publishers which are either departments of their respective parent institutions or wholly owned corporations thereof. All are engaged in the not-for-profit publication of works of scholarly distinction. Although AAUP's members together constitute something less than 5% of the dollar volume of books published in the United States, the titles they publish constitute a substantial portion—nearly half—of the serious non-fiction titles published for scholarly readers. This disproportionate balance of income to number of titles published is a measure of the commitment of the university presses of this country to the dissemination of valuable but economically unprofitable scholarly books.

We appreciate this opportunity to present our views on certain specific aspects of S. 1361 and proposed amendments thereto, particularly since the university press community has not previously participated in the hearings relating to this important piece of legislation. Allow me, therefore, to state our position in brief:

1. We propose a substitute for section 107, as set forth in Exhibit A.
2. We oppose the proposed library amendment to section 108(d) (1).
3. We oppose the proposed "educational exemption" which will be discussed at a later session of these hearings.
4. We wish to associate ourselves, with certain reservations, with the position of the Association of American Publishers in respect of Section 108.
5. We support enactment of S. 1361, with sections 107 and 108 amended as indicated elsewhere in this testimony.

The university press in the United States has traditionally occupied a unique position between the worlds of commerce and scholarship. In fulfilling their responsibility to publish books by and for scholars that would not otherwise be published by reason of their limited marketability, the university presses of this country find themselves actively engaged in the world of business, buying goods and services, selling books and rights thereto, and otherwise fulfilling all the functions of a profit-oriented business, while at the same time maintaining a

paramount interest in the editorial and scholarly integrity of their respective institutional imprints, and, hence, reputations.

It is this unique perspective that allows—or obliges—the university press to view the issue of copyright in general and of library photocopying in particular from the viewpoints of both educator and entrepreneur. The university press has always existed to insure the systematic and orderly transfer of important scholarly information to an appropriate readership, and to act as a faithful steward of its authors' rights and interests in doing so. The scholar is, after all, not only the reader-consumer, but the author-creator as well. Had he the time and resources, he would undertake to transfer his intellectual offerings directly to those who want and need them; since he usually has neither, the publisher—in the case of unprofitable scholarship, the university press—has provided the vital link between producer and user. If the orderly reporting of scholarly research and thought is to continue, the medium through which it occurs must be safeguarded. A vital component of that medium is the traditional privilege and responsibility of registering and protecting an author's claim to copyright in the writings which represent his intellectual achievement, and of exercising and managing all subsidiary rights depending on that copyright in accordance with contractual conditions agreed upon by author and publisher. This component—the responsibility of stewardship—is gravely threatened by the present vagueness of section 107, which is in effect an invitation to undertake unlimited photocopying of copyrighted materials with impunity. Accordingly, we therefore respectfully submit that section 107 be amended as set forth in Exhibit A appended to this testimony, in order to set more specific guidelines for the photocopying of materials in copyright.

It is not, and never has been, the position of the university presses that photocopying for library use is to be prohibited. Indeed, to the contrary, scholarly publishers have long recognized the value, in certain specific circumstances, of the photocopy as a means of assuring further distribution of their works amongst their readerships. Scholarly presses are sympathetic to the growing need for library materials and the shrinking resources with which libraries must seek to satisfy this need. At the same time, it is manifest that the increasingly prevalent practice of systematic library photocopying, in which works are reproduced in their entirety for distribution to multiple users, poses a grave threat both to the integrity of the copyright in the works copied, and to the proprietors—in this case university publishers—who have invested considerable financial and human resources in their production and publication. The present draft of 108 contains the minimum conditions necessary to assure reasonable protection of authors and publishers with regard to copyright; even these minima place strong emphasis on the intent of the library and educational communities to observe them in good faith. Indeed, to invoke the necessary means to assure compliance—particularly in regard to such provisions as 108(d)(1)—would be economically and practically unfeasible. Moreover, these conditions are entirely dependent on the amendment of section 107 I have suggested elsewhere in this testimony, which would give more structure to the circumstances under which limited photocopying of copyrighted materials might be undertaken. Failing such an amendment of 107, AAUP would be forced to argue strongly for revision of section 108 to allow photocopying of archival materials only.

In a field of endeavor where little if any financial reward accrues to the creator, every effort must be made to assure at least that he retains control over the format and content of his creation. Without copyright, this is impossible, and without adequate protection, there is no copyright. Our purpose as stewards of scholarship is to protect the environment in which authorship happens, for without the author, there is nothing to publish, and when nothing is published, there is nothing to read, and when there is nothing to read, the intellectual environment stagnates and ultimately dies.

With regard to the proposed educational exemption, let me once more invoke the dual perspective of the university press, in noting that the long-range interests of scholarship are assuredly ill-served by this proposed amendment. Its provisions are indeed so imprecise and subject to manipulation as to render virtually all copyright material void of any protection against unlimited photocopying.

In the event that S. 1361 cannot be enacted with the changes we have proposed, we would favor the referral of the entire question of library photocopying to the National Commission on New Technological Use of Copyrighted Works proposed in Title II.

## [EXHIBIT A]

**SUBSTITUTE SECTION 107 TO S. 1361 PROPOSED BY THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. JULY 31, 1973**

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies of phono-records or by any other means specified by that section, for purposes such as criticism, comment, news reporting, display or lecture in teaching, scholarship, or research, is not an infringement of copyright. Fair use does not include the reproduction of a copyrighted work for its own sake, as in an anthology or book of readings, or as a self-contained unit such as an appendix to another work, or as a substantial part of the text of another work. In determining whether the use of a work in any particular case is a fair use the principal factors to be considered shall be the market value of the use of the copyrighted work and the effect of the use upon the potential market of the work. Factors in making this determination shall include:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work; and
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole.

**AFTERNOON SESSION**

Senator McCLELLAN. The committee will come to order.

Mr. BRENNAN. The Association of American Publishers, Inc., has been allocated 3 minutes, Mr. Chairman.

**STATEMENT OF W. BRADFORD WILEY, CHAIRMAN OF THE COPYRIGHT COMMITTEE, APPEARING ON BEHALF OF THE AMERICAN ASSOCIATION OF PUBLISHERS, INC.; ACCOMPANIED BY ROSS SACKETT, CHAIRMAN, ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AND CHARLES H. LIEB, COPYRIGHT COUNSEL**

Mr. WILEY. Mr. Chairman, I am Bradford Wiley, chairman and chief executive officer of John Wiley and Sons, Inc., New York, publishers of textbooks, reference books, and encyclopedias, journals and audio-visual materials. In behalf of the Association of American Publishers, Inc., I have submitted a full statement from which this oral presentation is abstracted. With me are, on my right, Ross Sackett, chairman of the association, and, on my left, Charles H. Lieb, our copyright counsel.

Our position on library photocopying was stated in our December 5, 1972, letter to Mr. Brennan in response to his request. Our position, in brief, is:

1. We support section 107.
2. We support section 108, but only with drafting changes.
3. We oppose a substitute for section 108(d)(1).
4. We oppose the overlapping "limited educational exemption" offered by the NEA Ad Hoc Committee.
5. We support the enactment of S. 1361 in its present form except for drafting changes which we have suggested.

AAP does not dispute the need for libraries in given instances to make photocopies of journal articles and some book reference materials.

I wish to emphasize, however, accepting as we do section 107 as a codification of the principles of fair use, we have offered in the past