Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935

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Introduction

New technologies that lower the cost of reproduction and distribution have always challenged the copyright balance between producers and consumers. It is true today with the widespread use of digital technologies.[1] It was true in the early 1960s when the common availability of photocopiers and mainframe computers threatened to upset the copyright balance.[2] And it was true in the 1930s, when the revolutionary low-cost publishing and reproduction technology of the day – microfilm – disturbed the traditional limited monopoly right of publishers to reproduce and distribute published works.

In response to the challenge posed by the easy reproduction of research materials, a voluntary agreement that set guidelines for the limits of acceptable reproduction by libraries on behalf of scholars was established. The Gentlemen's Agreement of 1935[3] allowed library, archives, museum, or similar institutions to make single photographic copies of a part of a copyrighted work in lieu of loaning the physical item. The copies were not supposed to substitute for the purchase of the original work, and they were intended solely to facilitate research. Liability for misuse was to rest with the individual requesting the copy, and not with the institution making the reproduction.

The Gentlemen's Agreement has long been recognized as one of the most important landmarks in the history of the fair use privilege. Kenneth Crews, for example, calls the agreement "one of the first attempts to interpret fair use for education," and noted that it

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[1] *See, e.g.*, JESSICA LITMAN, DIGITAL COPYRIGHT (2001); WILLIAM FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004); EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT (2000).

[2] See the bibliography and readings in TECHNOLOGY AND COPYRIGHT: SOURCES AND MATERIALS (George P. Bush & Robert H. Dreyfuss, eds., 1979); Jon A. Baumgarten, *"New Technology" Copyright Issues Are Not So New: The Continuing Legacy Of The Photocopying Wars*, prepared for the A.B.A. SEC. OF SCI. & TECH. L. Program – CONTENT WARS: HOW NEW TECHNOLOGY, DIGITAL CONTENT AND COPY PROTECTION WILL REMAKE THE WORLD OF ENTERTAINMENT (2003), *at* http://www.abanet.org/scitech/annual/6.pdf.

[3] *See* Appnedix A.

"remained the only major copying standard for almost a quarter of a century."[4] It served as the basis for the "Reproductions of Materials Code" adopted by the American Library Association (ALA) in 1940.[5] It was cited by both the trial[6] and appellate[7] courts in the decisions in the Williams & Wilkins cases, and served as a basis for some of the provisions of Section 108 of the Copyright Act on exemption for libraries and archives.[8] Stephen Breyer in his classic article on "The Uneasy Case for Copyright" noted that "under the Gentlemen's Agreement" of 1939 (sic), machine copying is legal when it substitutes for hand copying."[9]

In addition to its importance to the actual development of copyright law, the model of consensual voluntary guidelines agreed to by copyright owners and users, first used with the Gentlemen's Agreement, has become an important technique in clarifying the limits of fair use.[10] Based on the assumption that the Gentlemen's Agreement represented a successful approach to solving copyright issues, other efforts to develop mutually-agreed upon voluntary guidelines have followed.[11] These include suggested guidelines for off-air recording of broadcast programming for educational purposes,[12] classroom copying in not-for profit educational institutions,[13] and the educational uses of music.[14] Even when they were promulgated, however, agreement on these guidelines was far from universal. The failure of the most recent effort to develop consensus guidelines, the Conference on Fair Use, [15] an effort to reach agreement on the extent of fair use in the digital age, suggests that it may be valuable to explore why the mechanism established with the Gentlemen's Agreement apparently succeeded when subsequent efforts to reach agreement have either failed or met with limited success.

The Gentlemen's Agreement, therefore, has been essential in the development of the library exemption in copyright as well as contributing to our understanding of fair use and serving as a model on how to apply it. Yet little attention has been paid to its genesis

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[4] KENNETH CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION 30-31 (1993). While Crews is correct in singling out the Gentlemen's Agreement as the only guideline for reproduction for over a quarter of a century, he is wrong to suggest that its purpose was to support educational copying. In reality, the Gentlemen's Agreement disavowed any connection with reproduction for educational use. *See infra* the text accompanying n. 54.

[5] *Reproductions of Materials Code* 35 ALA BULL. 84 (1941).

[6] Williams & Wilkins Co. v. United States, 172 U.S.P.Q. 670 (Ct. Cl. 1972), *rev'd*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

[7] Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

[8] 17 U.S.C. § 108.

[9] Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs* 84 HARV. L. REV. 330 (1970).

[10] A similar system of negotiations during the process of copyright legislation revision is described in Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

[11] CREWS, *supra* note 4, discusses the development of many of these guidelines. *See also* Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599.

[12] Reprinted in U.S. COPYRIGHT OFFICE, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS (Circular 21) 22.

[13] *Id.* at 7-8.

[14] *Id.* at 9.

[15] BRUCE A. LEHMAN, THE CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE (1998).

or intended audience.[16] Most commentators view the agreement as primarily a product of negotiation with librarians, and hence a reflection of their interests. Commissioner Davis, for example, in his initial decision in *Williams & Wilkins Co. v. United States* stated that the Gentlemen's Agreement was "the product of meetings and discussions between representatives of the book publishing industry and libraries."[17] The Court of Claims subsequently characterized the Gentlemen's Agreement as being between the National Association of Book Publishers and the Joint Committee on Materials for Research "*representing the libraries*" (emphasis added).[18] Most of the few legal scholars who have examined the Gentlemen's Agreement have assumed as well that the agreement was between publishers and librarians.[19]

A closer examination of the history of the creation of the Gentlemen's Agreement, however, reveals both the limitations of the common assumptions about the Gentlemen's Agreement and also the limitations of mutually-agreed upon guidelines. The individuals involved with the negotiations from both the scholarly and publishing side were far from representative of their respective areas, and had no authority to negotiate on behalf of their respective spheres.[20] The Agreement itself was largely a product of one afternoon's meeting, with limited discussion and review afterwards.[21] As a result, many communities, such as museums, were forgotten in the discussions.

Furthermore, the Gentlemen's Agreement was intended to serve the needs of research scholars, not librarians.[22] Through an accident of history, however, it was a librarian who conducted the primary negotiations with publishers. As a result, library interests, and not the interests of the research community, came to dominate. Furthermore, the librarian who led the negotiations was different from most of his colleagues in both his professional dependence on the good will of New York publishers and the limited scope of his own library's involvement with library reproduction. As a result, broader issues,

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[16] The only study of the origins of the Gentlemen's Agreement was published a compilation on copyright problems in scientific publishing. See Jackson S. Saunders, *Origin of the 'Gentlemen's Agreement' of 1935, in* REPROGRAPHY AND COPYRIGHT LAW 159-174 (Lowell H. Hattery and George P. Bush, eds., 1964), *reprinted in* TECHNOLOGY AND COPYRIGHT: ANNOTATED BIBLIOGRAPHY AND SOURCE MATERIALS 301-318 (George P. Bush, ed., 1972). Saunder's study has seldom been cited in the literature since publication.

[17] Williams & Wilkins Co. v. United States, 172 U.S.P.Q. 670 (Ct. Cl. 1972), *rev'd*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

[18] Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

[19] *See, e.g.*, Laurie C. Tepper, *Copyright Law and Library Photocopying: An Historical Survey* 84 LAW LIBR. J. 341, 346 (1992) ("The Agreement was entered into by the Joint Committee on Materials for Research of the American Council of Learned Societies and the Social Research Council (sic), *representing the interests of the library communities*, and the trade association of American book publishers, representing the interests of the copyright holders.") (emphasis added); LIBRARY OF CONGRESS. COPYRIGHT OFFICE, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108): REPORT OF THE REGISTER OF COPYRIGHTS 14 (1983) ("Even before the development of modern photocopiers, copyright proprietors were concerned about librarians furnishing photographic reproductions of copyrighted materials to users, as from wet-process copying. In the 1930s, controversy over the issue led to negotiations between *librarians and publishers*.) (emphasis added).

[20] *See infra* p. 20.

[21] *See infra* p. 21.

[22] *See infra* p. 7.

such as the educational use of copyrighted material or the extent of acceptable copying under fair use, were consciously excluded from the discussions.

Other factors influenced both the development and eventual acceptance of the Gentlemen's Agreement. For example, unlike the publishers, the research community did not have a trained copyright lawyer at the table during the negotiations. In addition, the librarians and archivists never discussed formally why an explicit exemption from liability for libraries, archives, and museums was warranted.

Most of all, the Agreement began the process of subjecting to legal scrutiny private behaviors that up to that point had existed outside of the copyright system. Private actions that had needed no defense in the past came to be viewed as potential infringements of copyright that needed the permission of the copyright owner. Copyright, which up to this time had been a system for controlling publication and widespread commercial distribution of material, began to be seen as a system for controlling private reproduction and use of copyrighted material.

Codifying an agreed-upon set of sanctioned behaviors was not without its dangers. In particular, behaviors that were not part of the initial discussions and hence were not officially sanctioned by the Agreement suddenly seemed suspect rather than simply unresolved. The Gentlemen's Agreement thus began to be seen by some as a defacto cap on the extent of acceptable reproduction by librarians and researchers.

In the 1976 Copyright Act, the limited vision of acceptable behavior by librarians acting on behalf of researchers became codified in law in Section 108. In very real ways, researchers, librarians, archivists, and museum specialists still live with the consequences of the process that led to the development of the Gentlemen's Agreement.

The Gentlemen's Agreement and the Joint Committee on Materials for Research

In order to understand the Gentlemen's Agreement, one must know something about the Joint Committee on Materials for Research.[23] The Joint Committee was created in November, 1929, as a joint initiative of the American Council of Learned Societies (ACLS) and the Social Science Research Council (SSRC).[24] The impetus for the Joint Committee came from the recognition by both groups that there was a general need to foster the acquisition, identification, and preservation of source materials. The purpose of the Joint Committee was exceptionally ambitious: "to survey America's total equipment for research in the social sciences and humanities, to bring to light unnecessary omissions or duplications, and to review the entire establishment of libraries, historical societies, research institutes, museums, and archives as if it were one vast national enterprise committed to a common purpose of providing material for research."[25]

[23] The history of the Joint Committee on Materials for Research has yet to be written, though the broad scope of its activities can be found in the annual reports of the committee included in the published proceedings of the American Council of Learned Societies.
[24] *Meeting of the Executive Committee, November 9, 1929,* n.12. A.C.L.S. BULL. 13-14 (1929).
[25] Solon J. Buck & Robert C. Binkley, *Report of the Joint Committee of the SSRC and the ACLS on the Materials for Research,* n.15 A.C.L.S. BULL. 366 (1931).

For the first few years of its existence, the Joint Committee suffered the fate of many such groups. While the desire to address the identified issues was strong, the ability of a small group of volunteers with other major professional responsibilities to advance the Joint Committee's agenda was limited.[26] The work of the committee may have been hampered as well by the fact that for the historians and other scholars who made up the committee, addressing issues of documentation, indexing, publishing, and reprographic techniques was secondary to their primary scholarly concerns. Nevertheless, during its first few years the Joint Committee undertook a number of important initiatives, including surveys of materials found in state and local archives, studies on the durability of paper and ink, and preliminary investigations of reproduction techniques.[27] The level of Joint Committee activity changed dramatically, however, when Robert C. Binkley was appointed to the Joint Committee in 1930 and was named the chair almost immediately.

Robert C. Binkley

At the time of his appointment, Binkley was a young (thirty-three year old) historian of European diplomatic history based at Smith College (though in the process of moving to Western Reserve University). He was most well known for a series of articles that developed from his doctoral thesis on the Treaty of Versailles of 1919, though he had also recently published a popular volume addressing the failure of prohibition entitled *Responsible Drinking* as well as a marriage manual co-authored with his wife.[28]

Binkley's experience with archival research made him aware of the problems associated with gaining access to research materials as well as their preservation. During his sophomore year at Stanford University, Binkley had enlisted in the U.S. Army Ambulance Service and served in France from January 1918. Upon his discharge in 1919, he joined Professor E.D. Adams of Stanford in gathering research materials on the War and Peace Conference for the newly-established Herbert Hoover Library at Stanford. He worked in France and in England where he had a hand in securing a large part of the enemy propaganda collection of the British Ministry of Information, papers that were about to be discarded since the Ministry, as a special wartime creation, was about to be

[26] The initial membership of the Joint Committee consisted of two representatives from each organization under the chairmanship of Solon Buck of the Minnesota Historical Society. Representing the SSRC were Norman S.B. Gras of Harvard University and Clark Wissler of the American Museum of Natural History. ACLS representatives were Waldo G. Leland, the Permanent Secretary of the ACLS, and Henry Lydenberg of the New York Public Library. *American Council of Learned Societies. Officers, Advisory Boards, and Committees*, n.13 A.C.L.S. BULL. 201 (1930). In 1930 membership in the Joint Committee was expanded to include Robert C. Binkley of Western Reserve University and Arthur H. Quinn of the University of Pennsylvania. *Meeting of the Executive Committee, March 8, 1930*, n.13 A.C.L.S. BULL. 216 (1930).

[27] Social Science Research Council, *Joint Committee on Materials for Research, in* SIXTH ANNUAL REPORT, 1929-30, at 26 (1930).

[28] Binkley's thesis at Stanford, completed in 1927, was entitled "The Reaction of European Opinion to the Statesmanship of Woodrow Wilson." In 1929, he published with Frances Williams Binkley *What Is Right With Marriage: An Outline Of Domestic Theory*. *Responsible Drinking* appeared in 1930. According to a history of the History Department at Case Western Reserve University, Binkley also authored several plays and short stories, at least some of which had been submitted under assumed names. *See* MARION C. SINEY, THE MAKING OF A DEPARTMENT: THE HISTORY OF HISTORY AT CASE WESTERN RESERVE UNIVERSITY (3rd ed. 1998), *at* http://www.cwru.edu/artsci/hsty/hsty1.html (last visited 2 Jan. 2006). A full bibliography of Binkley's extensive scholarly writings is found in ROBERT C. BINKLEY, SELECTED PAPERS OF ROBERT C. BINKLEY (Max H. Fisch, ed., 1948) [hereinafter Binkley, *Papers*].

abolished, and no one else wanted this material. From 1923-1927 he was the reference librarian at the library.[29] His experience working with archival materials also sparked an interest in their preservation, which led him present a paper at the First World Congress of Libraries and Bibliography in Rome, on "The Problem of Perishable Paper."[30] Binkley was especially interested in the use of microfilm as a way of both distributing and preserving documents found in remote archives. In addition, it was often difficult to discover what different library and archives held. This led Binkley to consider the issues associated with the cataloging and indexing of libraries and archives. He brought to the committee an abiding interest in its subject and an incredible capacity for work.[31]

Within a year of his appointment, Binkley reorganized the group around several major topical areas. One concerned the inventorying and description of archives; another looked at the issue of scholarly communication and how the cost of academic publishing could be decreased; a third addressed the need to establish archival programs in American businesses; a fourth initiative sought to improve the quality of paper used in publications in order to ensure their longevity; still other initiatives sought to develop cooperative acquisition programs in libraries, archives, and museums.

The issue of greatest interest to Binkley, however, was how new reprographic techniques could be used to further the work of the research scholar and to lower the cost of scholarly and documentary publishing. Binkley envisioned a world in which copies of archival documents were readily available on microfilm. He believed that emerging reprographic techniques such as hectographs[32], mimeographs, or planographic[33] prints could be used to lower the cost of publishing documentary and scholarly publications, as well as republish out-of-print items that otherwise would be unavailable. Binkley's prophetic vision is well captured at the conclusion of his first report as a member of the Joint Committee:

> It seems possible, moreover, that technological innovations may alter fundamentally some of the problems of gathering research materials, as they have altered innumerable manufacturing problems. Innovations in applying technology to scholarship were not concluded when the typewriter and filing system invaded the professor's study and the Photostat[34] installed itself in the library basement. If

[29] SINEY, *supra* note 28.
[30] Robert C. Binkley, *The Problem of Perishable Paper*, *in* Binkley, *Papers*, *supra* note 28. *See also* Robert C. Binkley, *Note on Preservation of Research Materials*, 8 SOC. FORCES 74 (1929).
[31] Harry M. Lydenberg's memorial of Binkley illustrates the range of Binkley's interests and his productivity by quoting one of Binkley's colleagues who, upon hearing his footsteps in the hall, said "Here comes Binkley, all five of him." Harry M. Lydenberg, *Robert C. Binkley, 1897-1940*, n. 33 A.C.L.S. BULL. 504 (1941).
[32] A reproductive process that involves making a master document using aniline dye, and then pressing the document against a gelatin pad. Up to 100 copies could be made by pressing paper against the gelatin pad. BARBARA RHODES & WILLIAM WELLS STREETER, BEFORE PHOTOCOPYING: THE ART & HISTORY OF MECHANICAL COPYING, 1780-1938, at 137-145 (1999).
[33] "Printing from a flat surface such as an engraved plate or lithographic stone, as opposed to raised types." *Id.* at 469.
[34] A document camera manufactured by Eastman Kodak that photographer documents directly onto sensitized paper, without the need for a negative intermediate. The system also developed the paper, obviating the need for a darkroom. *Id.* at 159-160.

> the method of miniature photography and projecting used in the Library of Congress were to be developed to the highest efficiency that the theory of physics indicates as possible we should be able to reproduce whole newspaper files for less than the cost of binding, and bring copies of any rare and valuable material within the purchasing power of a modest college library. It may be possible to devise some method of sub-publication that will release research scholarship from some of its dependence upon commercial publishing.[35]

Binkley believed that technology had the potential to, as he put it, "liberate scholarship, future as well as present, from material limitations."[36] Under his direction the Joint Committee undertook a number of experimental publishing projects to further his belief, including the publication on microfilm of code hearings of the National Recovery Association[37] and Agricultural Adjustment Administration,[38] and hectographic publication of Stanton Davis's thesis, *Pennsylvania Politics, 1860-1863*.[39] The culmination of Binkley's work was the publication of *Manual on Methods of Reproducing Research Materials*, a veritable encyclopedia of the reproduction technologies in use in the early 1930s.[40]

Yet while Binkley himself became a recognized expert in microfilm cameras, readers, and other reprographic techniques, his primary focus always remained that of the scholar. Binkley was not interested in reprography for its own sake, but only as to how it could be used to make the life of the research scholar easier. In this, he reflected perfectly the interests of the ACLS and the SSRC, the sponsors of the Joint Committee.

The Joint Committee and Copyright

Binkley and the Committee's desire to use new, low-cost reproduction technologies to use "mechanical means of increasing the working power of scholars throughout the country"[41] brought them face-to-face with the issue of copyright. Existing copyright practices were in part a reflection of the capabilities of current technologies. The question facing the Joint Committee was whether and how to adapt current practices to reflect the revolutionary potential of ubiquitous, low-cost reproduction. Binkley put the issue succinctly in a letter to George Zook, the Director of the American Council on Education:

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[35] Buck & Binkley, *supra* note 25, at 369.
[36] *Id.*
[37] UNITED STATES. NATIONAL RECOVERY ADMINISTRATION. HEARINGS ON THE CODE OF FAIR COMPETITION HELD UNDER THE NATIONAL INDUSTRIAL RECOVERY ACT, DEPOSITED AT THE CODE RECORD STATION OF THE NATIONAL INDUSTRIAL RECOVERY ADMINISTRATION. (*microform*) (1934).
[38] UNITED STATES. AGRICULTURAL ADJUSTMENT ADMINISTRATION. THE HEARINGS ON THE MARKETING AGREEMENTS, CODES, LICENSES AND PROCESSING TAX MATTERS OF THE AGRICULTURAL ADJUSTMENT ADMINISTRATION. (*microform*) (1934).
[39] STANTON LING DAVIS, PENNSYLVANIA POLITICS, 1860-1863 (1935).
[40] ROBERT C. BINKLEY, MANUAL ON METHODS OF REPRODUCING RESEARCH MATERIALS; A SURVEY MADE FOR THE JOINT COMMITTEE ON MATERIALS FOR RESEARCH OF THE SOCIAL SCIENCE RESEARCH COUNCIL AND THE AMERICAN COUNCIL OF LEARNED SOCIETIES 41-43 (1936).
[41] *Id.* at 135.

> The present law makes no distinction between a copy taken for a person's own use and copies multiplied for public sale….
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> This created no difficulty so long as the high cost of photostat and typewriting made it difficult to make extensive unique copies. The development of micro-copying now puts things on another footing. The individual scholar is in a position to use a micro-copying camera as an amanuensis, and libraries are in the position to offer this kind of amanuensis services to him. Especially micro-copies of whole articles from periodicals, or of whole books out-of-print, can now become available anywhere in the country to an individual scholar who has a unique copy made for his research use. But the copyright law stands in the way.[42]

If scholars were going to be able to exploit fully the potential that new technology offered, then the Joint Committee had to tackle the copyright question. During the next decade, it addressed copyright concerns in at least five different areas (though not all at the same time or with the same intensity of interest).

The first area of concern for the Joint Committee was the inaccessibility of many foreign periodicals to American scholars. This inaccessibility was due in part to the relative rarity of the journals in the U.S., and partly it was due to the relatively high cost of the journals.[43] A researcher who wanted to consult an article in one of those journals had few ready options. Rarely would a library loan the physical volume in which the article was found, and travel to one of the few American libraries that held foreign journals was expensive and time-consuming. An inexpensive copy of the article was clearly the most efficient solution from the perspective of the researcher and would have no economic impact on the publisher since only a few libraries could afford to subscribe. Binkley would come to learn, however, that some considered this copying to be a technical violation of copyright.[44] Furthermore, as he noted in a letter in 1935 to Waldo Leland, Permanent Secretary of the American Council of Learned Societies, copyright expiration would be of little help. Because copyright term could be as long as fifty-eight years, even an article published in a European *Zeitschrift* in 1890 could still be protected by copyright in 1935, when it was primarily only of historical interest.[45] Clearly copyright stood in the way of the distribution of foreign research results.

The problem was not just with foreign research results, however. Access to American journal literature was also an area of concern. As Binkley noted, the normal scholarly communications practice was for authors to send off-prints of their articles in learned publications to their colleagues. The colleagues would then include the off-prints in their own research files. There is no indication that either Binkley or the publishers felt that

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[42] Letter from Robert C. Binkley to George F. Zook, Director, American Council on Education (1 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[43] Much as today, librarians were concerned about the cost of foreign scientific periodicals and the fact that the price of these journals was increasing much faster than the rate of inflation. Since at least 1924 American librarians, especially medical librarians, had sought means of combating unacceptable price increases. *See, e.g.*, Eileen R. Cunningham, *The Present Status of the Publication of Literature in the Medical and Biological Sciences*, 24 BULL. MED. LIBR. ASS'N 64 (1935).

[44] BINKLEY, *supra* note 40, at 135.

[45] Letter from Robert C. Binkley to Waldo G. Leland, Director, American Council of Learned Societies (28 Mar. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

this distribution to individuals by the author of copies of his or her own work impinged on the publisher's ability to sell subscriptions to the journal; it was just part of normal scholarly practice.[46] Binkley assumed that a scholar should be able to have the library make a copy for the scholar's files when the scholar's colleagues did not send an off-print. The end result would be the same - a single copy in the scholar's files – with the only difference being that one copy might have come from the author whereas another might have come from a library.[47]

Out-of-print books presented a third area of concern. Again, it was difficult to gain access to obscure, out-of-print titles that were unlikely to ever be published again. Limited reproduction using photographic or micrographic techniques could make these materials accessible again to researchers.[48]

A fourth area concerned unpublished and archival material. Since time immemorial it was the practice of historians to spend long hours copying by hand manuscript materials (and occasionally printed books) that might be of use to their research. No one had ever suggested that this copying was an insult to copyright. Modern reprographic techniques held out the promise of changing the method by which the copies were made, but without changing the end result. Instead of spending months or even years in remote memory institutions, such as foreign libraries, archives, or museums, laboriously copying material by hand, the scholar could identify very rapidly the material he or she desired. The memory institution could then use modern technology to make the copies, and the scholar could spend his or her time at home reading and using the provided copies. The efficiencies for scholarship were obvious, and with time Binkley came to see that the action would be perfectly in agreement with the Constitutional purpose of copyright – namely, the advancement of science and the arts. The purpose of this copying, Binkley noted, is so that the scholar "can be more productive in the writing of books."[49]

A fifth area in Binkley's thinking is that in order to increase the productivity of the scholar, the mechanized copying and note-taking that should be legal for the scholar to undertake should also be legal for the scholar's agents to perform. The most likely agents that could assist scholars were libraries, archives, and museums. Reproduction programs in libraries, archives, and museums could replace the drudgery of hand copying with the advantages of new, efficient technology.[50]

One area that the Joint Committee ignored completely was the possible use of the copied material for purposes other than research. Binkley and the Joint Committee, for example, never addressed the question of how the researcher would use the material once he or she

[46] Authors were normally given by the publisher a certain number of offprints that they were free to give away. They could also buy additional copies at the publisher's cost. Offprint sales were seldom if ever viewed as a revenue source for the publisher.

[47] Letter from Robert C. Binkley to H. M. Lydenberg, Director, New York Public Library (19 Mar. 1935) (on file in the H.M. Lydenberg papers at the New York Public Library).

[48] Whether libraries could become surrogate publishers for these out-of-print works and bring them back into print, or whether the reproductions should be limited to on-demand copying is not clear in Binkley's, or the Committee's, writings. They seemed to argue for both approaches.

[49] Letter from Robert C. Binkley to Harry M. Lydenberg (11 Mar. 1935) (on file in the H.M. Lydenberg papers at the New York Public Library).

[50] *Id.*

received a copy. Binkley seemed to assume that documentary editions or volumes of letters would only be published with the permission of the authors. Other researchers would most likely limit themselves to short quotes in transformative works.

Most of all, Binkley and the Joint Committee rejected any suggestions that tried to link copying for research purposes with copying for educational purposes. From his teaching experience, Binkley was aware that some faculty required students to read selected, reproduced portions of works rather than requiring them to buy the entire volume from the publisher. In 1933, just as he started thinking about the copyright problem, he received from the Dean of University Administration at Western Reserve University (where he was teaching) a memo informing all faculty that the National Association of Book Publishers had sent a communication seeking the university's "cooperation in protecting authors and publishers from the widespread infringement of copyrights often unwittingly practiced by instructors who furnish students with mimeographed pages or comprehensive digests from copyright books." The practice was, according to the publishers, illegal and unethical.[51] Binkley knew that any efforts to clarify copyright law to support new forms of scholarly research using low-cost reproductive techniques were likely to fail if publishers thought the exemption authorized making copies to replace the sale of volumes in classes. Educational copying, therefore, was never added to the agenda of the Joint Committee, which was, after all, created to address the problems of research materials, not education.[52] Research copying, Binkley insisted, "has absolutely nothing in common with the multiplying of chapters of books to be used by classes of students, or with any system of multiplying a number of copies of anything."[53] The focus instead was to remain on the personal, non-commercial, unique, copying undertaken to assist the research scholar.[54]

With educational and multiple copying not at issue, five areas of potential scholarly reproduction - copying of articles in foreign periodicals, copying of articles in American periodicals, the reproduction of out-of-print books, the reproduction of unpublished manuscripts and archives, and the role of the librarian and archivist as an agent for the scholar – began the focus of the Joint Committee's copyright efforts during the decade of the 1930s.

The Quest for Legal Advice

While the Joint Committee's understanding of the copyright issues surrounding research deepened and clarified over time, at least initially the Joint Committee had only a vague idea that some might view the use of microreproduction to enhance research and

[51] Memorandum from Dean of University Administration, Western Reserve University to Heads of Departments (28 October 1933) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[52] The fact that the lead institution in negotiations with the publishers, the New York Public Library, was not an educational institution may also have contributed to the willingness of the Joint Committee not to argue for educational uses. *See infra* p. 20.

[53] Letter from Robert C. Binkley to H. M. Lydenberg, *supra* note 47.

[54] The failure of the Binkley and the Joint Committee to address issues associated with educational copying became one of the major areas of criticism of the Gentlemen's Agreement. *See infra* p. 21.

scholarship as an infringement of copyright.[55] One area where it was apparent that copyright might be an issue was with proposed solutions to the problem of the high price of foreign periodicals. Many of the proposed solutions favored replacing subscriptions with an interlibrary loan system under which only a few libraries would subscribe to a journal. These libraries would then provide researchers with inexpensive microfilm copies of articles of interest.[56]

Binkley was concerned about the issue of access to foreign periodicals, but he also realized that the proposed solution – coordinated acquisition of foreign periodicals by a few libraries with distribution of reproduced articles to all - would force librarians to cooperate. One goal of the Joint Committee was to foster a more coordinated, rational approach to collection development in libraries; Binkley saw that the foreign periodical issue could be an important first step. As he wrote to Robert T. Crane, Executive Director of the Social Science Research Council, in August, 1933: "Under pressure of this economic necessity and in a special and outrageous case[,] the libraries are being drafted into the development of exactly the kind of practice that will be most helpful in our larger strategy: the sharing of work, the use of copies taken by new and cheap methods, and the zoning system of distribution."[57] The ability to make copies of articles in foreign periodicals not only would aid scholarship directly; it would also create the infrastructure needed for the other initiatives of the Joint Committee.

Therefore in June, 1933, Binkley wrote to the Librarian of Congress about the copyright issues associated with making copies of articles for researchers. While Binkley's letter cannot be located, we can surmise that he asked for confirmation that his analysis that non-commercial, research-oriented reproduction of foreign periodical literature would be legally acceptable. The Librarian forwarded the letter to William L. Brown, Acting Register of Copyright, for response. The response must have come as a shock to Binkley:

> If the proposal is to make copies of copyrighted works for rather general use in libraries or elsewhere, the owners of the copyright would probably have grounds for action for infringement. This would be especially true if the copies were to be used in such a way as to prejudice or limit the sales of the work. It is difficult to see how this could be regarded as anything else than a straight out copyright infringement. The tenor of the decisions of the courts is that wherever the copying of a work tends to lessen the demand for the original, infringement is prima facie shown.

[55] There is no mention of copyright issues in the minutes of the Joint Committee until 1935, for example. In addition, the first draft of the MANUAL ON METHODS OF REPRODUCING RESEARCH MATERIALS, distributed in 1930, did not include any mention of copyright, though the final version published in 1935 did include a brief discussion of copyright issues.

[56] Atherton Seidell, *Reforms in Chemical Publication (Documentation)*, 80 SCIENCE (n.s.) 70 (1934); Peter B. Hirtle, *Atherton Seidell and the Photoduplication of Library Material*, 40 J. AM. SOC'Y. FOR INFO. SCI. 424 (1989).

[57] Letter from Robert C. Binkley to Robert T. Crane, Executive Director, Social Science Research Council (14 Aug. 1933) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

> "Fair use" of copyrighted works is recognized although no general rules have been laid down as a guide to follow. Doubtless the making of extracts from a copyrighted work for one's own private reference or study, would come within the limits of so-called fair use. But when the copying is likely to limit the proprietor's sales, the copyright law could probably be invoked to stop it.
>
> In general it is to be observed that the proprietor of a copyright has the exclusive right to make copies. *As the copyright law now stands the proposed copying of copyrighted periodicals by the film method would appear to be prohibited.* (emphasis added)[58]

Brown's response made two things abundantly clear to Binkley: copyright issues could be a problem for researchers, and that the Copyright Office would not be a source of help. As he noted in a subsequent letter, "the Register of Copyright and his legal advisor at the Library of Congress with whom I had a long conference on this question was [sic] strongly inclined to take the copyright holder's point of view."[59] Furthermore, he recognized that "[i]t is not improbable that Springer [the leading high-price publisher] will threaten legal action if the libraries substitute copying of articles in outrageously priced periodicals."[60] The solution, Binkley suggested, was for outside counsel to develop wording for a photographic copy order form that would make it clear that the copying was being made by the library purely as the agent of the scholar, and that the scholar was responsible for ensuring that his or her use of the copy did not infringe the rights of the copyright owner. Binkley sought to give "maximum protection to the copier."[61] Without such protections, many libraries would be unwilling to make any copies of any length for researchers.[62] Since scholars were unlikely to know what they could and could not do with a copy, Binkley later added that it would also be necessary to provide "instruction as to what they may do without violating the law" to those requested photographic reproductions intended for their own use.[63]

In June, 1934, in response to Binkley's entreaties, Walter G. Leland, Permanent Secretary of the American Council of Learned Societies, wrote on Binkley's behalf to Thorvald Solberg, the retired first Register of Copyright, seeking the latter's advice. "As you know," Leland wrote, "plans are on foot to supply to scholars who may need them photographic copies…of sections of copyrighted works – sometimes even of the entire

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[58] Memorandum from William L. Brown, Acting Register of Copyrights, to the Librarian of Congress, in reference to a letter from Dr. Robert C. Binkley (13 June 1933)) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[59] Letter from Robert C. Binkley to Waldo G. Leland, Director, American Council of Learned Societies (1 Nov. 1933) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[60] Letter from Robert C. Binkley to Robert T. Crane, *supra* note 57.

[61] Letter from Robert C. Binkley to Robert T. Crane, Executive Director, Social Science Research Council (28 Aug. 1933) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[62] One historian wrote to Binkley that the historian's "careful library" became so angry with his requests to borrow items to copy that "they nearly took away my library privileges." He also reported that the John Crerar Library "has refused to allow even a single page of any of their books to be photographed." Letter from C.W. de Kiewiet to Robert C. Binkley (19 Nov. 1934) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[63] Letter from Robert C. Binkley to Waldo G. Leland, *supra* note 59.

works." Leland stressed the scholarly use of the material (and not the role of the library): "Each copy, of course, is made for the needs of some scholar, who pays for the cost of making the copy." Leland had two questions for Solberg. First, he wanted to know if such copying would be an infringement of copyright. Second, Leland sought Solberg's advice as to who might go into more depth on the legal issues, if such advice was necessary.[64]

Solberg's response was hardly any more encouraging than Brown's response to the similar question a year earlier:

> Any final determination of the question of copyright infringement in any special case, of such use as you indicate, might depend on careful consideration of all the facts involved, but it should be borne in mind that the law gives to the author or other copyright owner the exclusive right to authorize such reproduction of his work.
>
> His consent would eliminate question or controversy.[65]

As for advice on a good copyright attorney, Solberg reported that while he did not currently meet with copyright lawyers, he had heard good things about William I. Denning, a lawyer in Washington, D.C. with a special interest in intellectual property.[66]

Solberg's defense of the rights of the copyright owner over the user met with nothing but disdain from Binkley. It reminded him, Binkley reported, "of Marie Antoinette and 'letting them eat cake.'"[67] While Binkley does not explain this allusion, he seems to be arguing that Solberg's understanding of the research processes of scholars was no better than Marie Antoinette's understanding of the dietary options of peasants. We can guess that in Binkley's eyes, a system in which copies could only be made with the consent of the copyright owner would needless favor the interests of the propertied classes, to the detriment of the *sans-culottes* researchers toiling in the workshops of scholarship.

Nevertheless, Solberg's observations seemed to have convinced Binkley that the problem was larger simply drawing up a proper form. Solberg's observation that "careful consideration of all the facts involved" was required also raised the possibility that outside legal counsel might be able to offer an alternative approach. Following Solberg's suggestion, therefore, Binkley wrote to Denning on 17 July 1934. In his letter he inquired not so much about the nature of the form that should be used, but as to the legality of many of the activities the Joint Committee hoped to undertake (and not just the

[64] Letter from Waldo G. Leland, Permanent Secretary, American Council of Learned Societies, to Thorvald Solberg (11 June 1934)) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[65] Letter from Thorvald Solberg to Waldo G. Leland (24 June 1934) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[66] *Id.*
[67] Letter from Robert C. Binkley to Waldo G. Leland (17 July 1934) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

legality of copying from foreign periodicals, the basis of the original query to the Copyright Office).[68] The problem, as he saw it, was as follows:

> Let us say that a film copying service is available at the Library of Congress. If I were working on some problems and came across footnotes and references to additional material that I would like to have, the Library of Congress could make copies of this material for me. In referring to these materials, it would be found that some are non-copyright materials, some materials on which copyright has expired, some materials of foreign, not American, copyright, and some of American copyright still valid. Under what circumstances does the copying of this material for purposes of use in research by filmslide[69] method infringe a copyright? What state of facts would constitute an infringement and what would constitute non-infringement? What directions could be given to librarians and scholars for the protection of all concerned?[70]

Denning's response gave Binkley hope that the current and former officials of the Copyright Office might have been overly-zealous in their advocacy of the rights of the copyright owner. In a letter sent to Binkley on 9 August 1934, Denning argued:

> If I correctly understand what you have in mind, I think the matter should be considered from the broad public interest standpoint. In other words, I have never believed that the constitutional grant of copyright was intended to confer a complete and exclusive monopoly on the author. If this were so the author could prevent the library from loaning a book, or permitting any one to read the book….
>
> This brings us to the question of whether the service you contemplate should not be regarded as an extension of the library service and be justified under a broad policy of public interest.[71]

Denning's letter, in contrast to the opinions of the current and former Registers of Copyright, demonstrated great sympathy for the constitutional purpose of copyright and its inherent balance between user rights and owners rights.[72] In particular, he recognized that libraries play an important role in the creative process. Providing an economic incentive to authors to create new works by granting a limited monopoly on those works was one way to encourage their creation and distribution and thus advance the constitutional goal of "progress in science and the arts." Libraries, too, were a method by which new information could be widely distributed, and a broad exemption for libraries (including possibly limited, non-commercial publishing) could be an alternative method for addressing the constitutional mandate. It was not a violation of copyright when

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[68] Noticeably absent from Binkley's letter is any discussion of a formal publication program for out-of-print or rare volumes, the third area of concern to the Joint Committee. *See supra* the text accompanying n. 48.
[69] *I.e.*, microfilm.
[70] Letter from Robert C. Binkley to William I. Denning (17 July 1934) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[71] Letter from William I Denning to Robert C. Binkley (9 Aug. 1934) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[72] On the principle of user rights in copyright, see L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS (1991).

libraries, by loaning copies of a work to the public, interfered with an author's distribution rights in the work; library duplication of a copyrighted work might similarly be an accepted limitation on the author's right to control reproduction. Limited copying, Denning suggested, could be seen as a natural extension of the socially beneficial role that libraries had traditionally played.

If Denning's analysis had been pursued, it could have been the basis for the development of a doctrine of user rights and a vision of copyright that stressed the constitutional purpose of copyright rather than solely on the narrow monopoly interests of authors and publishers. It may even have opened the discussion of whether non-commercial copying for personal use is the kind of reproduction envisioned in the Copyright Act, which had been originally developed to regulate publishing.

Unfortunately for the subsequent history of the Gentlemen's Agreement in particular and the principle of fair use in general, Denning's involvement with the Joint Committee ended at this point. The problem does not seem to have been with Denning's legal analysis, since Binkley cites it favorably several times afterwards. It may have been because Binkley was unwilling to pay for further legal advice from the Joint Committee's own funds.[73] It may also have been because copyright issues, while important, remained at best of secondary importance to the work of the Joint Committee.[74] The end result in either case was that the Joint Committee's efforts moved forward without direct knowledgeable legal advice.

Alternative Solutions: Legislation, Litigation, and Negotiation

With the legality of some of the Committee's desired activities in doubt, three approaches to solving the copyright dilemma emerged. The first was to litigate a test case that would confirm in the courts the rights that researchers felt they possessed. The second possibility was to pass new legislation that would guarantee the rights that some lawyers felt were missing in the current law. The third was to negotiate directly with publishers, either for their support for a legislative change or, at worst, for an exemption from them for copying for research purposes of copyrighted material. From 1934 until 1940, Binkley and the Joint Committee moved forward on all three fronts, but it was only the last option, and in an extremely limited form, that succeeded.

The Litigious Solution

In his heart Binkley and the other researchers on the Joint Committee could not believe that personal, non-commercial reproduction for research purposes could even be subject to copyright law. Copyright law existed to protect the authors and publishers engaged in the wide-spread vending of multiple copies. The reproduction that Binkley and the Joint Committee envisioned was not commercial and not widespread, but rather for the

[73] Binkley several times asked the SSRC to pay for legal advice, but Robert Crane, Executive Director of the SSRC, always refused, insisting instead that Waldo Leland could secure legal advice in Washington for free. There is no readily apparent evidence in the Committee files that Denning was paid for his initial analysis.

[74] There is, for example, no mention of these copyright investigations in the annual reports of the Joint Committee in either 1933 or 1934.

personal, private use of an author. Even though created with mechanical means, the copies were the equivalent of the notes and extracts that researchers had previously taken by hand. It seemed inconceivable to them that this could run afoul of copyright law. As Dallas D. Irvine, an historian and officer of the ACLS, wrote to Binkley:

> The purchaser of a copyright work certainly acquires certain property rights in his copy of that work… Part of that property right certainly consists in the right to copy or digest the work in any manner he sees fit, for his own use and provided nothing is published by him in violation of the law. It is quite immaterial whether any copying for such purpose be by longhand or by camera…. But it is a matter of public interest to allow such use by the owner of a copy of a copyright work, for the progress of learning depends upon it. *I do not doubt for a moment that the courts would sustain copying for such purposes by hand, hence constructively by machine* (emphasis added).[75]

The solution that Irvine proposed was a test case to establish that scholarly practice since time immemorial was not illegal when done by a camera.

In his desire to see the issue of research copying brought to the courts, Irvine echoed Binkley's own desires.[76] Binkley was convinced that no court could find personal copying undertaken by a researcher in support of his or her scholarship to be an infringement of copyright. The legal advice he received from Denning had convinced him that while some might believe that copying articles and manuscripts for research might be a technical violation of the law, no court would concur. "The letter of the statute," he wrote, "would seem to indicate that the scholar with a fountain pen copying paragraphs out of an article in a learned journal was engaged in technical violation of the copyright statute, but it seemed evident that the courts would necessarily make a distinction between the kind of copying that is done in the course of research, when the copied matter merely enters a scholar's note file, and the reprinting of material for sale or distribution."[77]

It is important to note that Binkley's confidence in the courts was not based on a presumed fair use defense. Fair use, Binkley notes, has been defined to apply when "copyright material is republished for profit."[78] Since copies made for a researcher are not resold, a fair use defense was not necessary. Copying for personal, as opposed to commercial, use was outside of the realm of copyright. Binkley also saw that a court challenge might encourage publishers to support other alternatives. As Binkley wrote to Denning, "publishers might be disposed to be more broadminded in considering the social implications of the problem if there were a prospect of securing some pioneering court decision."[79]

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[75] Letter from Dallas D. Irvine to Robert C. Binkley (16 Aug. 1934) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[76] In a letter to Denning on 14 Aug. 1934, which sparked Irvine's enthusiastic support, Binkley inquired as to whether a test case was possible. *See* Letter from Robert C. Binkley to William I. Denning (14 Aug. 1934) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[77] BINKLEY, *supra* note 40, at 135.
[78] *Id.*
[79] Letter from Robert C. Binkley to William I. Denning, supra note 76.

In the end, however, the lack of funding for a court challenge removed it as an option from the table. The ACLS and SSRC could not afford to hire a lawyer to develop a form; they were not about to engage publishers in a major copyright lawsuit. Periodically the issue would come up again, but according to Crane the ACLS was not in a position to undertake potentially expensive legislation[80], and the idea never advanced beyond the theoretical stage.

A Legislative Solution

The mid-1930s was a time of legislative turmoil in copyright, and the possibility of a new Copyright Act seemed great.[81] In particular, the president in 1934 transmitted to the Senate for possible ratification the Berne Convention as revised in Rome in 1928.[82] If the U.S. wished to comply with international copyright law, certain features of U.S. law would have to be changed. It seemed likely, therefore, that copyright law was going to change, and soon.

Binkley realized that the Joint Committee might be able to include in any new law an explicit, formal exemption for reproductions for research use. He admitted to the Joint Committee that in light of the responses he had received up to that point, he had been forced to conclude that "neither the statute nor the decisions in copyright law are adapted to the problems that arise in photo-copying for research." A legislative solution would clarify the rights of researchers.

There was also a likely partner to assist in this effort. The American National Committee on International Intellectual Cooperation, a committee chaired by James T. Shotwell and associated with the League of Nations, had started exploring the issues of international copyright. Binkley saw that they might be influential advocates for the research scientist. "If we could isolate the photographic-copying aspect of the copyright law from its many other aspects," Binkley wrote to a member of the Joint Committee, "and get Shotwell to take that in hand, he would be able to get results on this point without stirring up the publishers."[83] Prophetically, Binkley added, "I may be wrong in this surmise."[84]

At Binkley's request, Harry C. Lydenberg, a member of the Joint Committee and Director of the New York Public Library, prepared a draft paragraph to be included in the proposed law. It read:

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[80] Letter from Robert T. Crane to Robert C. Binkley (16 Aug. 1933) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[81] On the various bills put forward to modify copyright, see Abe A. Goldman *The History Of U.S.A. Copyright Law Revision From 1901 To 1954* in LIBRARY OF CONGRESS COPYRIGHT OFFICE. COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, FIRST [-SECOND] SESSION (1961); and Litman, *supra* note 10.
[82] S. EXEC. DOC. NO. 73-E.
[83] Letter from Robert C. Binkley to William W. Bishop, Librarian of the University of Michigan Library (2 Mar. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[84] *Id*.

> Nothing herein set forth shall render liable to infringement of copyright any library, museum, archives office, or similar organization reproducing copyright material in its care on behalf of a scholar, student, or investigator who, in the opinion of the librarian or curator or archivist, calls for this reproduction in good faith – not for republication – for the purpose of study or scholarship or research, and who in writing orders this reproduction and absolves the library, museum, or archives office of responsibility for infringement.[85]

According to Binkley, the purpose of the text was to differentiate between research and commercial interests, to protect librarians who copied materials for researchers, and to increase access to learned journals, especially foreign learned journals.[86] It was not, Binkley admitted, a solution to the "whole copyright question."[87] For example, there is no direct protection for the research scholar in the proposed legislation – the initial interest of the Joint Committee. There was some question, however, whether researchers needed any protection under the law. A draft of the language was shared by Thomas P. Martin, Assistant Chief of the Manuscript Division at the Library of Congress with William Brown, the Register of Copyright. In a letter to the Executive Secretary of the Joint Committee, Martin reported that in Brown's opinion, "private workers do not need this amendment";[88] making a personal copy for research use was not a violation of copyright. But, Martin noted, "any institution or person who virtually re-published the material by making it available to others would infringe the copy-right as it now stands."[89] The proposed legislation, therefore, had to be to protect the library, archives, or museum acting on behalf of the scholar, but there was no need to protect scholars directly; their actions were outside the realm of copyright.

Nor did the legislation do more for libraries, archives, and museums than protect their personnel. It did not provide for any of the other copying a library, archives, or museum might wish to undertake, including for the preservation of their collections or to share rare and unique items with other institutions.

Most of all, there was also by design no mention of copying for education. As Binkley later wrote to Lydenberg, "Above all, we must establish clearly in the publisher's mind the distinction between the making of a unique copy for research purposes and the multiplying of copies for teaching purposes. The two have absolutely nothing in common."[90]

While reluctant to do anything that might interfere with the delicate negotiations over the proposed new copyright law, Shotwell's committee did endorse the proposed language at

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[85] American National Committee on International Intellectual Cooperation, Minutes of the Meeting held at 8 West 40th Street, New York, NY 9 (9 Mar. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[86] *Id.* at 8.
[87] Letter from Robert C. Binkley to William W. Bishop, *supra* note 83.
[88] Letter from Thomas P. Martin, Assistant Chief, Division of Manuscripts, to Theodore R. Schellenberg, Executive Director, Joint Committee on Materials for Research (13 Dec. 1934) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[89] *Id.*
[90] Letter from Robert C. Binkley to Harry M. Lydenberg , *supra* note 49.

its meeting in 1935.[91] The language was never added to the draft bills under discussion, however. Binkley formally joined the Committee on Intellectual Cooperation a few years later and spent the last few years of the decade working assiduously for legislative reform. As is discussed below, the proposed legislative solution finally appeared in the Shotwell bill of 1940, but that bill, too, failed to pass. In spite of Binkley's best efforts, legislation, even when limited in scope and applicability, was not going to be the solution to the problem.

The Negotiated Solution

Binkley's third possible solution was to see if the publishers would agree to a set of mutually agreeable guidelines regarding reproduction for research purposes. There were, of course, real limitations to this approach. No small group of publishers, for example, could bind all publishers to the terms of the agreement; there was always the possibility that a publisher might still sue over what it considered to be infringing reproduction. This was especially true of the foreign journal publishers, one of the major initial foci of concern for Joint Committee. A negotiated agreement with publishers would also not address the issue of duplication of unpublished material found in archives, another major concern of the committee. Nevertheless, Binkley maintained that a negotiated agreement with some publishers was better than nothing. If at least some publishers would agree that the Joint Committee's proposed activities were socially beneficial and not within the scope of the publishers' copyright monopoly, Binkley argued, scholarship would be able to advance unencumbered.

Binkley was convinced that publishers shared the research scholar's interest in clarifying the extent of acceptable copying for research purposes. After all, if scholars were more productive, they would write more books, and the publishers would have more things to sell.[92] Binkley often cited the example of the *Readers Digest*, which published extracts and condensations of published items every month without the permission of the publishers.[93] If publishers tolerated this reproduction, Binkley argued, it does not seem likely that they would object to film copying.[94] Furthermore, an exemption that allowed researchers to request copies of articles found in expensive foreign periodicals might encourage some libraries to cancel their subscriptions to those periodicals, thus freeing up money in tight acquisition budgets that could be used to purchase more American publications.[95] Binkley even thought some publishers might welcome film duplication if it was used to distribute copies of books that were otherwise unprofitable for the

[91] American National Committee on International Intellectual Cooperation, *supra* note 85, at 9.
[92] Letter from Robert C. Binkley to H. M. Lydenberg, *supra* note 47 ("If the publishers will make it easy for the scholars to use this technique [making copies by mechanical means] as a substitute for note-taking, they will enormously increase the potential productivity of the scholars, which will redound ultimately to their mutual advantage.").
[93] For example, Binkley noted to Lydenberg that "[i]t appears, for instance, that the magazine publishers are quite willing to have the Readers' Digest pirate their material. Conceivably, the general attitude of the publishers toward a bonafide [sic] use of the film copying would have the same character." Letter from Robert C. Binkley to Harry M. Lydenberg (10 Sept. 1934) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[94] X wrote to Binkley to suggest to him that his frequent comparison to *Readers Digest* was incorrect.
[95] Letter from Robert C. Binkley to H. M. Lydenberg, *supra* note 47; Letter from Robert C. Binkley to H. M. Lydenberg, *supra* note 49.

publisher to distribute.[96] Binkley could see clearly that research scholars and publishers shared common interests – the question was how to convey this information to the publishers.

Fortunately for Binkley, one member of the Joint Committee was well-connected with New York publishing circles and could represent the Joint Committee's concerns to the publishers. Consequently, on 10 September 1934, Binkley wrote to Harry Lydenberg to ask if he would discuss the Joint Committee's activities with Frederic G. Melcher, the publisher of *Publisher's Weekly* and the chairman of the National Association of Book Publishers' Committee on Copyright, and get a publisher's point of view on the subject.[97]

Harry M. Lydenberg

Harry M. Lydenberg must have seemed the perfect choice for the job of approaching the publishers. Born in Dayton, Ohio, on Nov. 18, 1876, Lydenberg started working in 1896, immediately after his graduation from Harvard, at the Lenox Library, one of the libraries that combined to form the New York Public Library. He served for a time as head of the Manuscripts Division and then as the library's chief reference librarian from 1908 to 1927. In 1928, he became Assistant Director; in November, 1934, he succeeded to the Directorship.[98] Because of his position, he was in frequent communications with major figures in the New York publishing houses. As Binkley would write to Lydenberg, "I feel it is a godsend that you should be the man who presents this problem to the publishers."[99]

In retrospect, however, the decision to assign Lydenberg the task of approaching the publishers subtly altered the nature of the discussions. First, the New York Public Library is not directly associated with an educational institution. Lydenberg, therefore, had no experience with how reproductions were being used in teaching and the classroom. In this, Lydenberg's ignorance reinforced Binkley's own bias against including educational use of reproductions in the discussions of the Joint Committee; educational use of materials did not matter to either man.[100]

In addition, Lydenberg's natural desire as a librarian to protect the position of libraries at times seemed to take precedence over Binkley's concerns about copying by and for the scholar. Binkley, in line with the mandate of the Joint Committee, viewed the problem

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[96] Letter from Robert C. Binkley to William I. Denning, *supra* note 76.

[97] Binkley to Lydenberg, *supra* note 93. The National Association of Book Publishers is known today as the American Association of Publishers.

[98] Biographical Note *in* INVENTORY OF THE HARRY MILLER LYDENBERG RECORDS, 1926-1970 (BULK 1926-1944) (Laura O'Keefe, compiler, 2003), *available at* http://digilib.nypl.org/dynaweb/ead/human/arc6lyde/@Generic__BookView (last visited 30 Dec. 2005). *See also* Andrew B. Wertheimer, *Harry Miller Lydenberg*, AMERICAN NATIONAL BIOGRAPHY ONLINE, Feb. 2000, *available at* http://www.anb.org/articles/09/09-00452.html (last visited 30 Dec. 2005).

[99] Letter from Robert C. Binkley to H. M. Lydenberg, *supra* note 47.

[100] When criticized about the failure to include educational copying in the agreement, Lydenberg was openly opposed to it. "It seems to me it is improper and unfair," he wrote, "to reproduce for distribution to students any part of a book, whether text book or trade book, unless the owner of the copyright gives his consent." Letter from H.M. Lydenberg to H.B. Van Hoesen, Librarian, Brown University Library (24 Aug. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

primarily from his position as a researcher. At one point, he even felt compelled to describe to Lydenberg the note-taking habits of researchers in order that Lydenberg could better understand how making micrographic copies of research materials would be a boon to the research process.[101] For Binkley, the primary goal was to increase the efficiency of the research scholar.

In contrast, Lydenberg's primary goal appeared to be to ensure that the library making a copy was protected – even if it meant the needs of the researcher were not fully met. In order to achieve this goal, Lydenberg was willing to accept whatever concessions the publishers offered. This may have been due in part to the problematic relationship between the New York Public Library and the primarily New York-based publishing industry. Much of the success of the library depended on good interactions with the publishers in the city. It was unlikely, therefore, that Lydenberg would ever place himself in a confrontational position with publishers.

More importantly, the New York Public Library's experience with photographic reproduction, while long, was also limited in its scope. The library up to this time had primarily used Photostats for photographic reproduction. It introduced one of the first Photostat services in libraries in December 1912, but had only just begun to experiment with microfilm starting in 1934; it did not initiate a major in-house microfilming program until 1937.[102] Photostats are photographic reproductions that use light-sensitive paper to capture an image. The process was labor-intensive and expensive, and thus ideally suited for capturing brief excerpts or short articles. It was not practical to use the Photostat method to capture longer articles or entire books.[103] The library's primary experience, therefore, had been with relatively brief, expensive copies using established technology. Staff at the library had not yet developed a sense of the revolutionary potential of new technologies, specifically microfilm, to alter the way libraries conducted their business. The library's experience with Photostat technology narrowed the opinions of the library's staff on the nature of the copyright questions in library reproduction, and as we shall see shaped how Lydenberg approached the copyright issue.

The "Memorandum on Problems of Copyright Law Involved in Film Copying"

To assist Lydenberg in his discussions, Binkley prepared a "Memorandum on Problems of Copyright Law Involved in Film Copying."[104] In the memorandum, Binkley presented ten different scenarios of possible research copying of copyrighted material. Each scenario came with its own options as well. For example, the first case concerned a library that allowed scholars to use their own cameras to make photographic copies of material that they would normally copy with a portable typewriter. The copies could be

[101] *Id.*
[102] On the history of photoduplication at the New York Public Library, see John P. Baker, *Preservation Programs of the New York Public Library. Part Two: From the 1930s to the '60s*, 11 MICROFORM REV. 22 (1982), and Thomas A. Bourke, *The Photostat-Microfilm War at the New York Public Library in the 1930s, the 1940s, and the 1950s*, 18 MICROFORM REV. 145 (1989).
[103] For more on the Photostat, *see* Hubbard W. Ballou, *Photography in the Library*, 5 LIBRARY TRENDS 265 (1956); BINKLEY, *supra* note 40; and RHODES, *supra* note 32, at 159.
[104] Memorandum on Problems of Copyright Law Involved in Film Copying (Sept., 1934), *in* Saunders, *supra* note 16, at 172. *See infra* Appendix B.

of passages from books, whole chapters from books, whole pamphlets or books, or whole articles from periodicals. This scenario was further complicated by whether the scholars hoped to receive pecuniary rewards for their research or whether the normal alternative to copying would have been the purchase the work. Other scenarios considered reproduction in place of interlibrary loan, the role of third party agents (other than the scholar and the library) who might be hired to do the copying, and, for the first time, a series of explicit scenarios concerning unpublished material. Binkley assumed that some of the scenarios were clearly cases of infringement, some were clearly not cases of infringement, and some were doubtful. He hoped that Lydenberg and the publishers could clearly identify each type, and determine analyses that would place the doubtful cases in the most positive light for the scholar.[105]

Upon receipt of Binkley's scenarios, Lydenberg sent the memo to Charles J. Shaw, the head of the photographic reproduction unit at the New York Public Library, for his comments. Shaw responded that the library's experience with Photostats had led to him to reach certain definite conclusions about the copyright status of the different scenarios. The conclusions Shaw reached were not based on an understanding of the balance inherent in copyright law, but rather were based to a large extent on the technical limitations of Photostat technology.

While it was permissible, Shaw argued, to make reasonable quotations from a copyright work,

> …the copying of whole chapters from books, whole pamphlets or books, and whole articles from periodicals is a technical violation of the copyright law. The fact that the copyist makes the copy for his own personal use and not for publication in any way does not make any difference.[106]

While Shaw cites the law as the basis for rejecting the copying of whole articles, such copying using Photostat technology was also expensive and impractical.

With one sharp blow, Shaw rejected the core principle that Binkley and the rest of the Joint Committee had advanced: namely, that non-commercial personal copying for research purposes was not an infringement of copyright. Shaw went on to consider each of Binkley's ten scenarios, and almost every one he found to be a technical violation of copyright. Shaw by and large dismissed the gray areas for debate that Binkley saw in his scenarios. The only hope Shaw extended to the research scholar was his closing observation that while these may be technical violations, many of them can be disregarded. Copyright cases that go to court get there because there has been actual publication. So long as libraries avoid publication, their risk would be low. "In other words," Shaw concluded, "there is such a thing as being too cautious in keeping technically within the law."[107]

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[105] *Id.* It is a mark of the limited success of the Gentlemen's Agreement and the subsequent legislation that many of the questions that Binkley posed in the memorandum are still extremely difficult to answer.
[106] Letter from Charles J. Shaw to Harry M. Lydenberg (21 Sept. 1934) (on file in the H.M. Lydenberg papers at the New York Public Library).
[107] Ibid.

The position adopted by Shaw did not augur well for future negotiations. Shaw assumed that libraries were in technical violation of copyright law when they made copies and that there was no copying that fell outside of the boundaries of copyright law. There is no mention in his analysis of the public purpose of libraries or the boundaries of traditional library service, as Denning discussed.[108] Nor is there any suggestion that there might be a personal copying right that exists outside of the commercial transactions governed by copyright law. Rather, Shaw expressed the conviction that any copying that reproduces more than brief excerpts was an infringement. His (and Lydenberg's) primary goal, therefore, was to seek confirmation from the publishers that the limited reproduction then being undertaken by the New York Public Library was acceptable. Binkley had seen how the potential inherent in newer reproductive technologies could radically remake scholarship, but the librarians charged with the task of conveying Binkley's vision to the publishing community lacked his belief in the revolutionary power of new technologies or the willingness to challenge traditional practices. Before discussions with publishers had even begun, Binkley's librarian partners had conceded most of the important points.

The Opening of Communication with Publishers

On 22 September 1934, at Binkley's request, Lydenberg forwarded for comment Binkley's memorandum containing the copyright scenarios to Frederic Melcher, the publisher of *Publisher's Weekly* and the chairman of the National Association of Book Publishers' Committee on Copyright. In addition, he decided on his own to enclose a copy of Shaw's response that found almost all the scenarios to be technical infringements.[109]

As might be expected, Melcher praised Shaw's analysis in his response dated 7 November 1934. Shaw had yielded on almost every issue to the presumed interests of the copyright owner, and Melcher did not see any need to correct him. Melcher noted that new creative work was dependent on the ready availability of material. Furthermore, he observed that the Constitutional mandate for copyright was intended to create "public and social benefits" by giving authors a property right in their creations. He added, "[f]or reasons of public interest the term of protection is limited; and for public and practical reasons the copying out or using in form of a reasonable quotation has always been permitted." He recognized, however, the emergence of new reprographic technologies made it worthwhile to restudy the issue of the extent of permissible copying.[110]

Melcher's first observation concerned an issue that Binkley and Lydenberg had purposefully not raised, knowing that it would be problematic – namely the use of reproductions in educational settings. "The most common indifference to authors' rights, since the photo-reproductive processes have been perfected," Melcher noted,

> is the reproduction by teachers of whole pages or chapters from books or complete stories, these being sold to students in obvious damage of the rights of

[108] *See* the discussion *supra*, at p. 14.
[109] Letter from H. M. Lydenberg to Frederic G. Melcher, The Publishers' Weekly (22 Sept. 1934) (on file in the H.M. Lydenberg papers at the New York Public Library).
[110] Letter from Frederic Melcher to H. M. Lydenberg (7 Nov. 1934) (on file in the H.M. Lydenberg papers at the New York Public Library).

> the author. In some cases this has been done after knowledge of its illegality on the ground that educational interest is above property rights, even though those rights are for the purpose of encouraging creative scholarship.[111]

Melcher noted as well that the mere fact that a book is out-of-print does not make it fair game for copying. (Binkley had hoped that microfilm could be used to make otherwise out-of-print works more widely available.) Finally he considered each of Binkley's ten scenarios and, like Shaw, concluded that almost all of them were infringements. The only non-infringing activity he identified was the copying of scattered passages from copyrighted works. Unlike Shaw, he did not distinguish technical but excusable violations. The conclusion that Binkley must have reached after reading Melcher's response is that, at least in the eyes of the publishers, the development of new reprographic technologies did not warrant any expansion in the amount of material that could be copied, but instead called for, if anything, more stringent laws.[112]

The Genesis of the Gentlemen's Agreement

Melcher's response was one more confirmation that perceptions as to the extent of existing copyright law might interfere with the degree to which new low-cost reproduction techniques could transform scholarship. Hence the perceived need for legislative change became even stronger. Binkley recognized that the effort to add to a new copyright bill the language drafted by Lydenberg and approved by the Joint Committee and the American National Committee on International Intellectual Cooperation would be greatly enhanced if the support of the publishers could be secured. Binkley, therefore, tasked Lydenberg to seek the support of the publishers for the new legislation. "The important thing," he wrote to Lydenberg, "is to get Melcher and the publishers persuaded of the degree to which our mutual interests will be served by the revision of the copyright law…"[113] In his presentation to the publishers, Lydenberg was "to present them, not only with the librarians' point of view, but also with that of the research man." Furthermore, Binkley added, "Above all, we must establish clearly in the publishers' mind the distinction between the making of a unique copy for research purposes and the multiplying of copies for teaching purposes. The two have absolutely nothing in common." [114]

On the afternoon of 26 March 1935, a small group of librarians and publishers met.[115] Ostensibly representing the research community were Lydenberg, Milton J. Ferguson, the librarian of the Brooklyn Public Library and chairman of the Book Buying Committee of the American Library Association, and Andrew Keogh, Librarian of Yale University. On the publishers' side were Frederic Melcher, John Macrae, president of Dutton's, Harold Guinzburg, founder of Viking Press, Marjorie Griesser, the Executive Secretary for the

[111] *Id.* The sentiment's expressed in Melcher's letter are similar to those found in the memorandum circulated to faculty at *supra* note 51. It is unclear what alternative the publishers preferred. There is never any mention of licensing revenue; my impression is that the publishers were concerned about lost sales.
[112] Unfortunately, we can only surmise what Binkley's reaction to Melcher's letter may have been. No written analysis of Melcher's position has been found.
[113] Letter from Robert C. Binkley to Harry M. Lydenberg, *supra* at note 49.
[114] *Id.*
[115] Lydenberg does not say where the meeting took place, but it is likely to have been in Melcher's offices.

National Association of Book Publishers, and an unidentified attorney for the Association.

The membership of this group was notable for at least three reasons. First, in spite of Binkley's concern that the matter at hand concerned the research use of materials, all three participants attending on behalf of the Joint Committee were librarians. Ferguson and Keogh had had no involvement with the Joint Committee either before the meeting or after it. Hence, as a negotiating team, they were not representative of the Joint Committee and its interests, and may have been in direct violation of Binkley's order that Lydenberg convey more than the view of librarians. Why were Keogh and Ferguson present? Perhaps they were asked to represent the library profession in the meeting - but there is no request for library representation either in the archives of the Joint Committee as the Library of Congress. It is more likely that Lydenberg simply asked two other librarians personally knowledgeable about copyright to accompany him.

Second, in contrast to the publishers, there was no legal representation on the Joint Committee's side.[116] Binkley later came to realize the danger associated with negotiating without a lawyer, noting in later analysis of the weakness of the Gentlemen's Agreement that "[t]he publishers were at that time represented by counsel, though those who spoke on behalf of the library interests were not so represented."

Last, on the publisher's side, it is similarly unclear why these particular individuals attended the meeting. None of them represented journal or foreign publishers, in spite of the fact that the problems of learned journals and foreign journals had been identified by the Joint Committee from the start as a source of particular vexation.

We do not know how long this afternoon meeting lasted, but Lydenberg reported that the representatives discussed "at length" the problem of copyright and photographic reproduction.[117] They agreed that the chance that a new copyright bill would pass was good. The publishers, Lydenberg reported, were willing to concede the justice of the Joint Committee's proposed amendment to the draft bill, but the attorney for the publishers argued against it, on the grounds that if it went into the bill there would be "so great a need of hedging it about with restrictions, whereases, and provisos, as to endanger, it not nullify, the end we sought."[118] The group concluded with a different suggestion:

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[116] Binkley later came to realize the danger associated with negotiating without a lawyer, noting in later analysis of the weakness of the Gentlemen's Agreement that "[t]he publishers were at that time represented by counsel, though those who spoke on behalf of the library interests were not so represented." Memorandum on Copyright from Robert C. Binkley (26 Oct. 1937) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[117] In the absence of any evidence to the contrary, it is reasonable to assume that the meeting did not extend beyond normal working hours, which suggests that at most there were four hours of discussion (from 1PM to 5 PM). This was the only face-to-face meeting with the publishers, in contradistinction to Commissioner Davis's assertion of "meetings" in Williams & Wilkins Co. v. United States, 172 U.S.P.Q. 670 (Ct. Cl. 1972), *rev'd*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

[118] Letter from H.M. Lydenberg to Robert C. Binkley (27 Mar. 1935) (on file in the H.M. Lydenberg papers at the New York Public Library).

> That the Joint Committee, as representative of persons engaged in research and institutions furthering or aiding research, write to the National Association of Book Publishers stating what it felt was a fair and proper practice for libraries engaged today in providing photostat or other photographic reproductions for their readers; indicating what it felt was ethical and legal practice in connection with the use of photostat or photographic reproductions; and asking whether the publishers approved this practice as legal and ethical.[119]

Lydenberg admitted that a voluntary agreement would not be legally binding, but that it would enable the research scholar and the librarian to know what was acceptable, what was forbidden, and what ought to be done in the case of debatable problems. On behalf of the Joint Committee, Lydenberg prepared a draft of the proposed agreement.[120] The next day he referred to the proposed agreement as a "gentlemen's agreement," a name that stuck.[121]

Binkley had sent Lydenberg to gain the support of publishers in revising copyright law to openly acknowledge the right of individuals to make copies for personal, non-commercial use, to allow libraries and other to reproduce on demand out-of-print books, and in general open up the law in order to be able to take advantage of new technologies for reproduction and distribution. Lydenberg failed in this quest on almost all counts. Rather than the courts or the legislature determining whether the private, educational copying that the Joint Committee favored was permissible, Lydenberg acquiesced to the publishers' position that any copying by libraries was likely to be a violation of copyright law, and was willing to accept any legal concessions that publishers might be willing to grant. Furthermore, Lydenberg's account raised for the first time ethical concerns, with the suggestion that reproduction that might not be illegal could still be unethical, and hence unacceptable. Yet as Judge Gerard Lynch has noted, "Copyright and trademark law are not matters of strong moral principle," but are economic, not ethical, legislation.[122]

As a practical strategy to ensure that some copying by libraries was protected, the approach proposed by Lydenberg and the publishers was reasonable. It is unlikely that any individual publisher would sue a library for actions that a group of publishers said were legal. Yet it was likely to fail utterly as a means of radically transforming the nature of scholarly research, the ultimate goal of the Joint Committee.

Lydenberg's draft of the proposed agreement, written immediately after the meeting with the publishers and hence one assumes in line with the nature of their discussion, is interesting in its structure. It opens with a paragraph on the history of note taking in research and the technical improvements that have occurred in note taking as researchers moved from pencils to fountain pens to typewriters to Photostats to microfilm cameras. He notes that almost all research reproductions are made from books in the public

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[119] *Id.*
[120] *Id.*
[121] Letter from H.M. Lydenberg to Robert C. Binkley (28 Mar. 1935) (on file in the H.M. Lydenberg papers at the New York Public Library).
[122] Sarl Louis Feraud Intern. v. Viewfinder Inc., 406 F.Supp.2d 274 (2005)

domain; he estimates that only 2 to 10% of the reproduction orders come from copyrighted books, and most of the orders are only for a few paragraphs or pages.[123]

Lydenberg then asks whether in the opinion of the publishers a group of library practices are acceptable.[124] The first practice Lydenberg stipulates is that no library, archives, or museum would reproduce a whole book or a large portion of a book without the permission of the copyright owner. The second practice stipulated by Lydenberg is that copying by the library, archives, or museum cannot be for profit. Reproductions are made to relieve the researcher "of the physical and nervous task of transcription," and the researcher must assume responsibility for any non-research related use of the reproduction.[125]

Following Binkley's admonition that it should be made clear to the publishers that educational use was not contemplated,[126] Lydenberg closed with a paragraph on the matter:

> We are told that from time to time instructors in various schools and colleges have reproduced in one way or another extensive portions or whole chapters from copyrighted text books, which have then been sold or given to their classes as substitutes for the text books. We see how keen an injustice and how severe a harm is done to the owner of the copyright by such practices, and we make no plea for, nor enter any defense of, such obvious violations of copyright.[127]

Lydenberg's phrasing was in some ways more liberal than the language used by Melcher in his response to Binkley's copyright memorandum six months earlier.[128] Melcher, for example, objected to the reproduction of "whole pages or chapters"; Lydenberg limited the issue to "extensive portions or whole chapters." Lydenberg as well limited the problem only to text books, and only to those reproductions which cost the publisher a sale (by substituting for the purchase of the book). Arguably, if the assigned portions of a book were not extensive enough to warrant its purchase, then reproductions for a class could be done with impunity. At the same time, Lydenberg was also more restrictive than the publisher. Melcher, for example, limited his concern to reproductions sold to students; Lydenberg included reproductions given to students as well.

"Protecting what had been done in the past"

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[123] Draft letter from H.M. Lydenberg to the President, National Association of Book Publishers (27 Mar. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress). Lydenberg provides no source for these figures; they may have been based on reproductions made by the New York Public Library for scholars.

[124] This portion of the draft letter is reprinted in Saunders, *supra* note 16, at 171.

[125] Draft letter from H.M. Lydenberg to the President, National Association of Book Publishers, *supra* note 123.

[126] *See supra* the text accompanying note 90.

[127] Draft letter from H.M. Lydenberg to the President, National Association of Book Publishers, *supra* note 123.

[128] *See* the Letter from Frederic Melcher to H. M. Lydenberg, *supra* note 110; *see also supra* text accompanying note 110.

While publicly appreciative of Lydenberg's efforts, Binkley privately was disappointed in what Lydenberg had achieved. In a letter to Waldo Leland, Binkley complained that the Lydenberg's proposal (which he attributes to the publishers) "would leave us strapped in respect to the two most important uses in copyright practice to relieve pressure on research materials: namely, the right to copy complete articles from learned periodicals, and the right to copy books out-of-print and not available in the market."[129] The mention of existing expensive Photostat technology in the summary of the meeting is telling. In a letter to Shotwell, Binkley noted that the proposed agreement "protects what libraries have done in the past, but not what they might do in the future."[130]

In his response to Lydenberg's report on the meeting with the publishers, Binkley identified four areas where he thought that the proposed Gentlemen's Agreement could be pushed farther. They were:

- Out-of-print books
- Separate articles from periodicals (but not entire runs of periodicals)
- A more concrete statement that the responsibility for obeying copyright belongs to the person placing the order
- More consideration of the possibility of using photographic reproduction in lieu of interlibrary loan.[131]

Lydenberg used a report of a chance meeting with the publisher Lippincott as the basis for dismissing Binkley's first two concerns. Articles from periodicals were not of concern to a trade publisher like Lippincott; Lydenberg implied that they would also not be of concern to the other trade publishers that comprised the National Association of Book Publishers.

As for out-of-print books, Lippincott felt that it would be easy for a library to gain permission from the publisher to reproduce an out-of-print book, so long as the reproduction was not for commercial purposes. Lippincott's one concern was whether publishers would be able to accurately assess the demand for reprinting out-of-print books if libraries were reproducing them.[132]

Law versus Guidelines

In light of the perceived shortcomings of the proposed Gentlemen's Agreement, Binkley's preferred solution remained a change to copyright law. On 1 April 1935 Binkley met with a Mr. Townsend of the Western Reserve Law School.[133] Together

[129] Letter from Robert C. Binkley to Waldo G. Leland (1 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[130] Letter from Robert C. Binkley to James T. Shotwell, Chairman, American National Committee (1 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[131] Letter from Robert C. Binkley to H. M. Lydenberg (1 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[132] Letter from H. M. Lydenberg to Robert C. Binkley (8 Apr. 1935) (on file in the H.M. Lydenberg papers at the New York Public Library).
[133] Probably Wayne L. Townsend

Binkley and Townsend prepared a new draft amendment to the copyright law that exempted from civil and criminal liability:

> The making and delivery of a single photographic reproduction of any copyrighted book, newspaper, journal or other publication or a part thereof, by a library or museum, when such reproduction is made without profit for the benefit of, and upon the order of, a scholar or investigator who represents to such a library or museum, in writing, that he desires such reproductions in lieu of the loan of the relative publication and solely for purposes of research. Nothing herein contained shall be construed to exempt from liability, civil or criminal, for infringement of copyright, the person who shall receive from a library or museum any photographic reproduction as hereon described. The exemption from liability of the library or museum herein provided for shall extend to every officer, agent or employee of such institution in the making and delivery of such reproduction when acting within the scope of his authority or employment.[134]

In recognition that a blanket exemption to make reproductions might trouble publishers, Binkley crafted a limitation that could be added if the publishers desired it that limited the ability of libraries to make reproductions of publications less than three years old:

> The exemption herein provided for shall apply only as to the reproduction in whole or in part of any book or other publication, the effective copyright date of which antedates the delivery of the reproduction described herein by three years or more.[135]

Binkley's proposed legislation is indicative of the state of his thinking – and how far apart he was from Lydenberg in his approach to the problem. For Binkley, libraries and museums were nothing but agents for the research worker, copying on the latter's behalf. He still could not accept that personal copying for research use in any way violated the publisher's right to sell for a profit copyrighted works – and the right to vend for profit was the extent of the publisher's limited monopoly. As a courtesy, he exempted publications less than three years old, but this concession was for practical, not legal, reasons. Binkley did not consider other reasons for reproducing library and archival materials, such as for preservation, or for deposit in another library or archives, or for educational use; his focus was purely on the immediate needs of the researcher.

In letters to Leland, Shotwell, and George F. Zook, Director of the American Council on Education, Binkley urged that they use any influence they had to insert the exemption he and Townsend had drafted into the proposed copyright law. The best solution, Binkley felt, was to exempt explicitly in the law copies made for research use (as opposed to multiple copies made for public sale or for the classroom).[136] To Shotwell, Binkley

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[134] Circular mailing from Robert C. Binkley (1 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[135] *Id.*
[136] *See, e.g.*, Letter from Robert C. Binkley to James T. Shotwell (25 Mar. 1935); Letter from Robert C. Binkley to Walter Leland (28 Mar. 1935), Letter from Robert C. Binkley to Walter G. Leland (1 Apr. 1935) and Letter from Robert C. Binkley to George Zook, Director, American Council on Education (1 Apr. 1935) (all on file in the Joint Committee on Materials for Research papers at the Library of Congress).

suggested that the former might want to constitute in Washington a committee "consisting of people whose primary interest is in research rather than in library administration" to develop the exact wording of the desired amendment. Shotwell's committee, Binkley notes, "has interests which extend beyond those that Lydenberg can fairly be called upon to protect."[137]

Nevertheless, in spite of his own reservations about the proposed Gentlemen's Agreement, Binkley felt compelled to poll the members of the Joint Committee, as well as a group of informed outsiders, as to which of the two courses the Joint Committee should follow. Binkley reminded his committee that their goal was "to change completely the organization of [the] means of distributing research materials."[138] Copyright law was potentially an obstacle to that goal. The question facing the Committee was whether it should it pursue a legislative amendment protecting the rights of researchers as outlined by Binkley, or should it settle for the Gentlemen's Agreement with publishers as secured by Lydenberg?[139]

The responses to Binkley's poll varied widely, but most of the recipients favored the development of a Gentlemen's Agreement, with the librarians being particularly cautious. The response of William Warner Bishop, librarian at the University of Michigan, is typical. Like Lydenberg, Bishop took a conservative position that sought to protect existing practice, but without thinking about how new technologies might change scholarship. He reported on a meeting with William B. Warner of the McCall Corporation and President of the Association of Periodical Publishers. Warner assured Bishop that "the incidental photostat copying by libraries of copyrighted material was altogether too small an item in the publishing business…to deserve any recognition in the copyright law."[140] Furthermore, Warner suggested that the person requesting a copy and not the library would be at fault in any infringement suit. Bishop concluded:

> This is such a perfectly common sense point of view that I am afraid no lawyer will see it, but between trying to get a clause inserted into the copyright law which will protect libraries and on the other hand a policy of mutual understanding and explanation[,] I am all for the latter.[141]

Bishop could not envision photoreproductive services rising to a level that would be of concern to the publishing industry.

Other respondents were similarly cautious. Laurence Vail Coleman, the Director of the American Association of Museums, preferred the Gentlemen's Agreement to a legislative solution, but still worried that the Agreement was not very gentlemanly and that the research community was trying to take advantage of writers. "A copyright," he noted, "is to prevent copying and I see no reason why scholars should be excepted here any more

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[137] Letter from Robert C. Binkley to James T. Shotwell, *supra* note 130.
[138] Circular, *supra* note 134.
[139] *Id.*
[140] Letter from William Warner Bishop, Librarian, University of Michigan, to J.E. McCarter, Secretary, Joint Committee on Materials for Research (12 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[141] *Id.*.

than they are when it comes to paying income taxes."[142] Edward A. Henry, Director of Libraries at the University of Cincinnati, objected strongly to the provision in Binkley's draft amendment that would allow libraries to reproduce out-of-print books for scholars. He also wondered whether the insistence upon copies purely for research was reasonable, given that many of the things that libraries purchased for scholars eventually became part of the library's collection.[143] Thomas P. Martin of the Manuscript Division at the Library of Congress cautioned that they "should not press publishers to the point of discouraging their work in the academic field; for, after all, we individually want to get our "stuff" published on the best possible terms, and concluded that "We might find it best to learn how to get along under a gentleman's agreement."[144] Herbert Putnam, Librarian of Congress, objected to the proposed amendment because he felt that by favoring one fair use explicitly, it might disparage other uses that otherwise would be considered to be fair.[145]

Of those who responded to Binkley's poll, only Charles H. Brown, Librarian at Iowa State College, supported strongly the idea of legislative change. In his letter to Binkley, he noted that the proposed agreement was only with one small group of American publishers and would not be binding on any other publishers, either domestic or foreign.[146] His support for legislation was based in part because of his university's experience in trying to use copyrighted works in new ways. Lydenberg reported that Brown had told him that some American publishers had declined to permit the Iowa State broadcasting service "to quote a single line or word from their publications without incurring the danger of prosecution."[147] Brown realized that the proposed Gentlemen's Agreement might authorize some of the traditional copying done in libraries, but would do nothing to help users exploit copyrighted works in new ways.

In light of the support for the Gentlemen's Agreement among the conservative librarians and scholars with whom Binkley consulted, Binkley was forced to conclude that the Joint Committee should further pursue the possibility of negotiating a Gentlemen's Agreement with the publishers along the lines first proposed by Lydenberg. He hoped that at worst both avenues of activity, namely a Gentlemen's Agreement and a legislative change, could be pursued.[148] On the 26th of April, however, Shotwell reported that after conferring with the State Department on the matter, he did not think it wise at that time to pursue a legislative exception, though he did hold out hope for future action if it should

[142] Letter from Laurence Vail Coleman, Director, American Association of Museums, to Robert C. Binkley (5 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[143] Letter from Edward A. Henry, Director of Libraries, University of Cincinnati, to Robert C. Binkley (9 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[144] Letter from Thomas P. Martin, Division of Manuscripts, Library of Congress, to Robert C. Binkley (10 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[145] Letter from Herbert Putnam, Librarian of Congress, to Robert C. Binkley (23 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[146] Letter from Charles H. Brown, Librarian, Iowa State College, to Robert C. Binkley (6 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[147] Letter from H. M. Lydenberg to Robert C. Binkley (19 Apr. 1935)) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[148] Letter from Robert C. Binkley to James T. Shotwell, Chairman, American National Committee (16 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

prove necessary.[149] For the time being Lydenberg and the publishers had won; a negotiated agreement was the only option open to the Joint Committee.

Negotiations over the Gentlemen's Agreement

With the proposed Gentlemen's Agreement now the sole focus of committee attention, Lydenberg on 30 April mailed to Binkley a slightly amended version of the draft agreement he prepared immediately after the 26 March 1935 meeting with the publishers.[150] In it he made an honest effort to address one of the issues that had troubled Binkley and others. The revised text notes, in deference to Binkley's concern about the foreign publication problem, that while that the agreement could not represent foreign publishers, nevertheless it would be safe to assume that given the commonality of interests between foreign and American publishers, a practice approved by American publishers would also be acceptable to foreign publishers.

Yet on at least two issues important to the Joint Committee, Lydenberg conceded defeat. First, the proposal stated flatly that "Out of print books should be reproduced only with permission, even if this reproduction is solely for the use of the institution making it, and not for sale."[151] The possibility of using inexpensive reproduction technology to foster the distribution of out-of-print material was stricken from the Joint Committee's agenda.

Second, Lydenberg's revised draft text added new language describing the publisher's monopoly in the broadest possible terms:

> We understand also that under the law of copyright the author or his agent is assured of "the exclusive right to print, reprint, publish, copy and vend the copyrighted work", all or any part. This means that legally no individual or institution can reproduce by photography or photo-mechanical means a whole book or any page or part of a book without the written permission of the owner of the copyright.[152]

The contrast with Binkley's proposed legislation could not be greater. Binkley suggested that the individual had an unfettered right to make a copy for scholarly purposes. Lydenberg, on behalf of the publishers, argued instead that the rights of the copyright owner were absolute, and that not even a single page of a book could be reproduced without the copyright owner's permission. The primary value to libraries of the proposed Gentlemen's Agreement was that libraries would not have to ask for permission for any copying that fell under its scope. If there was a case of doubt about whether the Gentlemen's Agreement applied, the proper thing to do was "to defer action until the

[149] Letter from James T. Shotwell to Robert C. Binkley (26 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress). The State Department evidently was playing a key role in both pushing for the adoption of the Berne Treaty as well as encouraging the work of Shotwell's committee on international cooperation.
[150] Letter from H. M. Lydenberg to Robert C. Binkley (30 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress.
[151] Draft letter from Robert C. Binkley to the President, National Association of Book Publishers (30 Apr. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[152] *Id.*

owner of the copyright has approved the reproduction."[153] All library reproduction was to be done with the forbearance of the publishers; the purpose of the Gentlemen's Agreement was to identify times when the publishers' grant of permission would be automatic.

The second draft of the Gentlemen's Agreement rejected the idea that some reproduction of a copyrighted work fell outside of copyright law in favor of a vision of copyright in which the rights of the copyright owner were absolute. But what of the practice of researchers making copies by hand that Binkley insisted could serve as a model for mechanical reproduction? And what about fair use? Could either of these be used to justify wholesale reproduction for research purposes? Lydenberg attempted to address both issues in the second draft, using text provided by Melcher.[154] The draft reads:

> The right of quotation without permission is not provided in law, but the right to a "fair use" in quotation is recognized by the courts, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest.
>
> A student has always been free to "copy" by hand; and mechanical reproductions from copyrighted material are presumably intended to take the place of hand transcription, and to be governed by the same principles governing hand transcription.

The juxtaposition of these two paragraphs in the draft Agreement is confusing. The first paragraph suggests that fair use is purely a right of quotation, and of limited extent. The second suggests that students have a right to make personal copies, so long as they are made by hand. The juxtaposition of these two concepts implies that to be legal, the copying done by students, whether by hand or by mechanical means, should be the equivalent of a "quotation" – but not the wholesale copying of an entire work.

Lydenberg's willingness to concede to the interests of publishers meant that alternative theories of copyright, including the notion that publisher's rights extended only to commercial uses, were removed from the table for discussion. Fair use, while recognized, was defined in the narrowest possible fashion. Lydenberg's goal was not to challenge the extent of the copyright owner's limited monopoly, but to defer to it. As Lydenberg later remarked to one of his critics, "what we as librarians want to do is to assure the publishers of our desire to work with them in protecting vested copyrights."[155] For the rest of the negotiations, the Joint Committee would approach the publishers as supplicants, not active participants in possession of comparable rights.[156]

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[153] *Id.*

[154] In commenting on a section edited by Binkley, Lydenberg wrote "the text, as quoted to you, was lifted entirely from a contribution by Melcher." Letter from H.M. Lydenberg to Robert C. Binkley (11 May 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[155] Lydenberg to Leupp, 9/17/1935:

[156] This point was made forcefully be Verner W. Clapp in his critique of the Gentlemen's Agreement. Clapp noted that "the Agreement extended its "exemption," not as flowing from rights already possessed by librarians, but as an act of grace on the part of the copyright owners who would by this Agreement charitably diminish their own rights and suspend the infliction of pains and penalties in the enforcement of

In spite of Lydenberg's capitulation to the interests of publishers, the revised text met with Binkley's approval. Even Lydenberg's inability to secure permission to reproduce out-of-print books, one of Binkley's major goals, no longer seemed to trouble him. Binkley suggested only two changes. One was important. In the paragraph defining fair use, Binkely proposed that "the right of quotation without permission" be changed to "the right *to publish* a quotation *from a copyrighted book* without permission" (emphasis added).[157] Binkley indicated that his proposed change was "more in the interest of clarity than for the purpose of changing the meaning of the letter," but then added: "I have tried to maintain the distinction which the publishers sometimes miss between republishing and research copying."[158] Binkley continued to insist that reproduction for publication (and by implication for profit) was fundamentally different than reproduction for research purposes. Nevertheless, in spite of this fundamental difference with the publishers, the revised draft agreement, with Binkley's revisions in place, was delivered to the National Association of Book Publishers on 11 May 1935.[159]

It took the publishers less than a week to respond. On 16 May 1935, W. W. Norton, President of the National Association of Book Publishers, wrote back to Binkley. Norton praised the Joint Committee for trying to develop a code of fair practice that would protect the rights of authors and publishers without endangering the important work of scholars and research workers. He concluded:

> As publishers we naturally do not wish to impose restrictions which might hamper students in collecting research material, but on the other hand it is necessary for us all to face this problem realistically and not permit the rapid extension of photo-copying to lead to a disregard of the fundamental principles of copyright.[160]

As for the agreement itself, Norton noted that the publishers had made some changes to clarify a few points. First, they altered the statement to make it clearer that copying only a few pages, and not entire texts, was permitted. Lydenberg's analysis of the current practice of libraries regarding the making of reproductions and how only a small percent of all reproductions were made from copyrighted books was dropped in its entirety. The publishers also stipulated that all notices to researchers about the latter's liability for misuse of any copies made for them must be in writing. Interestingly, Norton broadened the Joint Committee's single-minded focus on researchers by including students in the language, though the focus remains on students as researchers. Most surprisingly, Norton dropped entirely, and without comment, the discussion of the applicability of the agreement to foreign publishers.[161]

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them." Verner W. Clapp, "*Library Photocopying and Copyright: Recent Developments,"* 55 Law Libr. J. 10, 12-13 (1962)

[157] Letter from Robert C. Binkley to H.M. Lydenberg (7 May 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[158] *Id.*

[159] Lydenberg reported to Binkley on 11 May 1935 that he had posted Binkley's letter "today." Letter from H.M. Lydenberg to Robert C. Binkley (11 May 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[160] Letter from W.W. Norton, President, National Association of Book Publishers, to Robert C. Binkley (16 May 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[161] *Id.*.

Lydenberg's reaction to the publishers' draft was as might be expected. He wrote to Binkley, "I am ready to see it go out as it stands."[162] Tellingly, he noted that he also shared the publishers' draft with the head of the New York Public Library's Photostat operation, who remarked, "Why, that's all right. It's just about what we have always tried to do."[163] Lydenberg had achieved his goal: a document that made explicit the presumed legitimacy of the current limited reproduction practices at his library, but did nothing to position libraries, archives, and museums to use new technologies in any new or revolutionary fashion.

Binkley was slightly less effusive in his praise. In his response to Norton, Binkley first noted that he was under contract to Norton for the production of a book about Napoleon III, and hence obviously interested in protecting the rights of authors and publishers in copyright. He went on, though, to admit that he was troubled by the exclusion of the discussion of foreign works. Binkley did not see how the reproduction of foreign publications would be of much concern to American publishers. All research libraries, Binkley noted, already subscribed to all pertinent American learned periodicals, whereas not even the Library of Congress could subscribe to all foreign periodicals. He therefore somewhat disingenuously suggested that researchers would only need libraries to make copies of foreign periodicals, not American ones.[164]

Binkley's proposed solution to the foreign periodical issue was to edit some of the correspondence between Binkley and Norton in order that it might serve as covering correspondence to the Agreement. This allowed Binkley to include in the correspondence the discussion of foreign periodicals as well as a condemnation of instructors who reproduced chapters from copyrighted books.

Binkley suggested one other important modification. He noted that the publisher's draft indicated that libraries "owning *material* in which copyright still subsists" (emphasis added) could, under this agreement, make a copy for a researcher. Binkley suggested that "material" be changed to "books or periodicals" to make it clear that the limitation in the Agreement on making extensive excerpts from a book could not be interpreted to prohibit making a copy of an article from a learned periodical.[165] The Agreement made clear that the ability of libraries to make reproductions should not conflict with the sale of books. By distinguishing books from periodicals, Binkley left open the right of librarians to substitute reproductions for some periodical subscriptions (presumably the expensive foreign periodicals that were the impetus for initial agreement).[166]

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[162] Letter from H.M. Lydenberg to Robert C. Binkley (23 May 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[163] *Id*.
[164] Letter from Robert C. Binkley to W.W. Norton (25 May 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[165] *Id.* In a letter to Harold L. Leupp, Binkley noted that he had changed the wording in the first paragraph of the agreement "to make it clear that a part of bound volumes could be copied. I think the agreement as it stands permits the copying of a complete article out of a magazine or encyclopedia…" Letter from Robert C. Binkley to Harold L. Leupp, Librarian, University of California, Berkeley (16 Sept. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[166] In a letter to Watson Davis of Science Service in which he discussed the Gentlemen's Agreement, Binkley gave an example of the exorbitant prices that librarians had to pay for periodicals from the German

On 3 June 1935, Norton agreed to Binkley's proposal, and the Gentlemen's Agreement was concluded.

It is worth noting that while it had taken the Joint Committee two years to get to this point, the negotiations over the actual agreement itself were exceptionally quick. Lydenberg had one afternoon meeting with the publishers and immediately prepared a brief draft. He prepared a slightly longer draft, apparently incorporating language from the publishers, in response to some suggestions from Binkley, and this draft was provided to the publishers. The draft was not distributed to any members of the Joint Committee other than Lydenberg and Binkley. The publishers took less than a week to make a number of small changes to the second draft. It was for all practical purposes the publishers' revision of Lydenberg's second draft that constituted the final Gentlemen's Agreement.

The Reception of the Gentlemen's Agreement

With the Gentlemen's Agreement complete, the Joint Committee turned to publicizing its work. The text of the Agreement was published in the *Library Journal*[167] and in Melcher's journal, *Publishers Weekly*.[168] It was also distributed by the Association of Research Libraries to all of the research libraries in the country. While many recipients praised the Gentlemen's Agreement as a useful clarification, the Joint Committee also received criticism of the work. One frequent criticism was that while the spirit of the joint agreement was good, it was in practice too difficult to implement. One could not easily, for example, capture the nature of the agreement on a photocopy order form.[169] Others noted that the agreement had little legal standing, and that at best it could protect libraries as far as members of the National Association of Book Publishers were concerned.[170] Still others noted that in spite of Binkley's hope in the cover letter that foreign publishers would follow the Agreement, in reality it did nothing to address the issue of periodical or foreign publishers.

More problematic were the critics who pointed out the many areas that the Gentlemen's Agreement did not address, especially making copies for educational use, reproducing out of print books, and using photographic reproduction as a method of building library

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publisher Fock. Binkley indicated that the Gentlemen's Agreement allowed librarians to substitute copies of articles for subscriptions, giving them more leverage against the publisher. Letter from Robert C. Binkley to Watson Davis, Director, Science Service (13 Sept. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

[167] Robert C. Binkley and W.W. Norton, *Copyright in Photographic Reproductions*, 60 LIBR. J. 763 (1935).

[168] Robert C. Binkley and W.W. Norton, *Copyright and Photostats*, 128 PUBLISHERS WKLY. 1655 (1935).

[169][169] *See, e.g.*, Letter from Donald Coney, Librarian, The Library of the University of Texas, to J. E. McCarter, Secretary, Joint Committee on Materials for Research (1 Nov. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress). The criticism of the agreement's failure to provide a form-ready analysis is particularly ironic since one of Binkley's original goals was to be able to create a legal form that would absolve librarians from liability. S*ee infra* p. 12.

[170] *See, e.g.*, Letter from Nathan van Patten, Director, Stanford University Libraries, to J.E. McCarter, Secretary, Joint Committee on Materials for Research (19 Aug. 1935)) (on file in the Joint Committee on Materials for Research papers at the Library of Congress); Letter from Donald Coney, Librarian, The Library of the University of Texas, to H.M. Lydenberg (1 Nov. 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).

collections when material was not directly available from a publisher. These last two issues struck an especially responsive chord with Binkley, particularly since he had argued with Lydenberg over their importance.

Binkley raised some of these criticisms in a circular letter to Joint Committee members in the fall of 1935. "The librarians," Binkley noted, "have called our attention to two problems with within the agreement." The first concerned the problem of making microfilm copies of complete out-of-print books. The second raised the issue of making copies of items assigned as readings to students. In addition, Binkley noted that microfilm technology was at the heart of two new document delivery and publishing initiatives.[171] Both the library-based Bibliofilm Service and Watson Davis's proposed Documentation Division of his Science Service threatened to push microfilm copying far beyond the limits envisioned in the Gentlemen's Agreement.[172]

One of the extant issues came to a head in 1936. The Science Service had advertised that they made reproductions in accordance with the terms of the Gentlemen's Agreement. J. W. Hiltman, the Chairman of the Board of the D. Appleton-Century publishing company, wrote to Watson Davis objecting to the inclusion of any of their publications in the service. Hiltman noted:

> The National Association of Book Publishers has no authority to speak for the book industry, or to sign the agreement of which you sent me a copy and which was the first we had heard about it. The text of that agreement is not in accordance with the law. …[T]he party making the reproduction is the one that will be held responsible.[173]

In rejecting the Gentlemen's Agreement, Hiltman also struck out at one of the basic organizing principles of the agreement – namely, that the requestor of the material, and not the library or archives acting in the requestor's stead, was liable for any reproductions made.

Rather than settling all copyright matters, the Gentlemen's Agreement only made clearer those areas where there was no consensus on what constituted fair practice. As Binkley himself ruefully noted in a letter to Davis just months after the Gentlemen's Agreement had been issued, it "cleared up certain immediate library problems but leaves other matters undetermined."[174] New publishing and interlibrary loan initiatives such as the Bibliofilm Service and the Documentation Division of Science Service in particular raised anew the issues that the Joint Committee had identified.

For the next five years, Binkley and the Joint Committee played an active role in trying to address the issues left unsettled in the Gentlemen's Agreement. In 1936, the Carnegie

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[171] Circular from Robert C. Binkley to Committee Members (17 September 1935) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[172] On the Bibliofilm Service and other film initiatives, see Hirtle, *supra* note 56.
[173] Letter from J.W. Hiltman, Chairman of the Board, D. Appleton-Century Co., to Watson Davis, Editor, Science News Letter (30 Dec. 1936) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[174] Letter from Robert C. Binkley to Watson Davis, *supra* note 166.

Corporation commissioned Elihu Root, Jr. to examine the copyright question and its impact on scholarship, and Binkley consulted with him on the possibility of legislative changes. Root concluded that the possibility of legislative change was slight and encouraged Binkley to try to perfect the Gentlemen's Agreement (in spite of the fact of its evident weaknesses).[175] With the legislative option seemingly closed, Binkley turned next to the idea of a test case to set the limits of what was acceptable under law.[176] He explored the legal possibilities of this with Root's firm, and sought financial support for a suit from the Carnegie Corporation.[177] Once again, however, no action took place.

The most promising possibility arose late in the decade. In 1938 the American National Committee on International Intellectual Cooperation's Copyright Committee began a series of conferences with interested parties, the purpose of which was to develop a new copyright bill that would allow the United States to join the Berne Convention. The bill the committee drafted was introduced by Senator Thomas on 8 January 1940.[178] The Thomas (Shotwell) bill contained the first explicit exemption for reproduction by libraries and archives. Included in it are provisions for scholarly copying of research materials, copying by libraries and archives for scholars, and copying by libraries of out-of-print materials.[179]

The text in the bill was developed in part from a memorandum prepared by the Joint Committee in July, 1938. The memorandum reflected Binkley's new understanding of the copyright issue, and it is in many ways a rejection of the underlying ideas in the Gentlemen's Agreement. "Scholars," according to the memorandum,

> …need the right to make copies of any material they read in order to form a part of the body of research notes with which they work…. The provisions of the copyright law should leave intact a *free right to copy* as a part of the normal procedure of research. This right to copy should never be confused with the right to publish. (emphasis added).[180]

In the 1938 memorandum, Binkley had come full circle from the sensibilities that led to the Gentlemen's Agreement and returned to his original position. The Agreement had been drafted in the belief that almost all copying by researchers was at a minimum a technical violation of copyright, and that libraries must work with publishers to protect

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[175] Letter from Elihu Root, Jr., Counsel, Root, Clark, Buckner & Ballantine, New York, to Robert C. Binkley (7 Dec. 1936) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[176] Memorandum on Copyright from Robert C. Binkley, *supra* note 116.
[177] *See, e.g.*, Letter from Robert C. Binkley to Richard E. Manning, Root, Clark, Buckner & Ballantine, New York (8 Nov. 1937)) (on file in the Joint Committee on Materials for Research papers at the Library of Congress). *See also* Letter from Robert C. Binkley to Frederick P. Keppel, President, Carnegie Corporation of New York (26 Oct. 1937) (on file in the Joint Committee on Materials for Research papers at the Library of Congress).
[178] Goldman, *supra* note 81, at 10-11.
[179] Borge Varmer, *Photoduplication of Copyrighted Material by Libraries. Study No. 15,. in* LIBRARY OF CONGRESS COPYRIGHT OFFICE. COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, FIRST [-SECOND] SESSION 49, 54-55 (1961).
[180] *Id.* at 55.

the latter's copyrights. By mid-1938, Binkley had come to realize that Lydenberg and the other librarians had confused publication with copying, and that personal copying had been and should continue to be outside of the realm of copyright. It was, however, the approach of the Gentlemen's Agreement that was codified in practice.

Binkley's fully mature ideas on copyright extended beyond the right of scholars to make copies. The 1938 memorandum also stipulated that libraries and archives should not be held responsible for copying that they do at the request of individuals. In addition, since the authors of journal articles usually want their writings to reach colleagues and be used, Binkley argued that it should be possible to copy journal articles. Lastly, Binkley stated that it should be lawful to make copies of out-of-print books, though he did raise the possibility of creating a statutory license to permit this.[181] In sum, the 1938 memorandum presented a fully articulated vision of a new copyright regime that would work to support rather than thwart scholarship.

No action was taken on the Thomas Bill in 1940. Nevertheless, the memorandum and the possibility of legislative action could have formed the basis for future Joint Committee action. In April of 1940, however, Robert Binkley died of lung cancer at the age of forty-two. With him died the Joint Committee; without his energy and vision, it was dissolved in less than a year.[182]

Conclusion

It has been traditional to think of the Gentlemen's Agreement of 1935 as a success. It apparently achieved, for example, the consensus that eluded the Conference on Fair Use (CONFU).[183] For more than forty years, libraries made copies for researchers under its banner, and many of the sensibilities that influenced the Gentlemen's Agreement found legislative expression in the 1976 Copyright Act. Specifically, the heart of the Gentlemen's Agreement – that libraries, archives and museums could make single copies of small portions of copyrighted works at the request of individual researchers – was incorporated almost entirely, with the exception of removing museums and similar organizations as eligible institutions, into Section 108(d) of the 1976 Act.

Yet on deeper investigation, it is far from clear that the Gentlemen's Agreement succeeded. Of the five main areas of concern to the Joint Committee - copying of articles in foreign periodicals, copying of articles in American periodicals, the reproduction of out-of-print books, the reproduction of unpublished manuscripts and archives, and the role of the librarian and archivist as an agent for the scholar – the Gentlemen's Agreement addressed only the second and last. Yet since the publishers represented trade, and not journal, publishing, the applicability of the Gentlemen's Agreement to the copying of journal articles was limited. Furthermore, as the complaints from D. Appleton-Century proved, the ability of the Gentlemen's Agreement to protect librarians and archivists was also limited.[184]

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[181] *Id*.
[182] Adeline Barry, *Report of Activities, 1940*, n. 33 A.C.L.S. BULL. 526 (1941).
[183] LEHMAN, *supra* note 15.
[184] *See supra* text accompanying note 173.

The Gentlemen's Agreement also failed in engaging a large cross-section of interested parties in a discussion about the proper role of copyright in advancing science and the arts. Legislative efforts to reform copyright in the 1920s and 1930s had failed in part because of insurmountable differences between the parties interested in copyright. The Gentlemen's Agreement avoided this problem by being extremely unrepresentative – only a few individuals elected to speak for all of publishing and scholarship. Even within the small confines of the Joint Committee there was extensive division of opinion about what should be covered in the Gentlemen's Agreement. The Joint Committee elected to have a group of librarians articulate a defense of the researcher's right to copy, and the librarians failed them, preferring instead to side with the publishers. Opening the discussion to a more representative group would have highlighted the differences between publishers, researchers, and librarians even more.

Further, while the Gentlemen's Agreement is often described as a landmark in the development of the concept of fair use, in reality, fair use had little to do with it. The Agreement noted that fair use extended to quotations, but that extensive quotation would be beyond the limits of fair use. Lydenberg in particular failed to grasp that there was a difference between copying for personal use and quoting for publication, and that different rules should apply to each. Binkley knew this intuitively, but it was only late in the 1930s, after the development of the Gentlemen's Agreement, that this position was explicitly articulated.[185] The Gentlemen's Agreement recognized, as a traditional fair use, the scholar's right to copy by hand, but did little more; photographic reproduction was done not so much as a right but at the forbearance of the publishers.[186]

More problematic is the failure of Lydenberg to express on behalf of the library and scholarship communities a defense of limited copying in support of research. Denning had proposed to Binkley in their initial meetings the outline of one such position based on the traditional role of libraries in support of the progress of science and the arts. Binkley's late recognition that not all copying was publication, and hence not subject to the copyright law, was another possible argument. Yet neither was developed before the Gentlemen's Agreement was signed.

The harm in the approach taken by the Gentlemen's Agreement was just as Herbert Putnam feared.[187] Because the Agreement only authorized limited copying for "research," copying for other purposes, such as educational use or for preservation, became suspect. Because the Agreement stipulated that out-of-print books could only be

[185] *See supra* text accompanying note 180.

[186] Interestingly, in spite of Binkley's private frustration with the limitations of the Gentlemen's Agreement, in public he continued to express confidence in its value – especially when it was challenged. In 1938 Vernon Tate suggested that the Agreement was no longer in force because the National Association of Book Publishers had ceased to exist. Binkley wrote in haste noting that the agreement had never been repudiated, and that it was not in effect a contract that could be repudiated. It was, he argued instead "a statement of the practical scope fo the established doctrine of fair use as applied to the making of photostat or other copies by libraries for scholars." "The principles of the agreement," he added, "had actually been established in practice before they were put on paper, and they will, I believe, continue to constitute the principles of fair use whatever may happen to the organizations and individuals who set them down." Robert C. Binkley, *Published letter to V.D. Tate*, J. Documentary Reproduction (1939).

[187] *See supra* note 145.

copied with the permission of the copyright owner, the ability of libraries to develop their collections in a cost-efficient manner was restricted.

Scholars and librarians today face many of the same issues that faced the Joint Committee in the 1930s. The cost of reproducing materials continues to drop, while the ease of doing so continues to grow. Today we want to use digital reproduction technologies, and not microfilm, to preserve books and manuscripts, make the fruits of research widely and freely accessible, challenge the monopoly pricing of foreign periodical publishers, support teaching, foster new intellectual works, and in the process transform scholarship. As Binkley found, expansive notions of the copyright monopoly can interfere with this transformation. The solution that the Joint Committee adopted with the Gentlemen's Agreement continues to shape how scholarship adapts to copyright.

APPENDIX A: THE "GENTLEMEN'S AGREEMENT" OF 1935[188]

May 27, 1935

Dr. Robert C. Binkley, Chairman
Joint Committee on Materials for Research
Western Reserve University
Cleveland, Ohio

Dear Dr. Binkley:

We deeply appreciate your desire to work out a code of fair practice which will protect the rights of authors and research workers. As publishers we naturally do not wish to impose restrictions which might hamper students in collecting research material, but on the other hand it is necessary for us all to face this problem realistically and not permit the rapid extension of photo-copying to lead to a disregard of the fundamental principles of copyright.

The results of the conference in our office, attended by Mr. Lydenberg, Mr. Ferguson, and Dr. Keogh and members of our committee, have been discussed with Mr. Frederic Melcher, Chairman of the Association Copyright Committee, and by our Board of Directors. We are happy to have the results of these conferences put in the form of an agreement and published with this correspondence.

Very sincerely yours,
(signed) W. W. Norton, *President*
National Association of Book Publishers

The Joint Committee on Materials for Research and the Board of Directors of the National Association of Book Publishers, after conferring on the problem of conscientious observance of copyright that faces research libraries in connection with the growing use of photographic methods of reproduction, have agreed upon the following statement:

A library, archives office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction 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 purposes of research; provided

(1) That the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law;

[188] *Gentlemen's Agreement*, 2 J. OF DOCUMENTARY REPRODUCTION 29-30 (1939),

(2) That such reproduction is made and furnished without profit to itself by the institution making it.

The exemption from liability of the library, archives office or museum herein provided for shall extend to every officer, agent or employee of such institution in the making and delivery of such reproduction when acting within the scope of his authority of employment. This exemption for the institution itself carries with it a responsibility to see that library employees caution patrons against the misuse of copyright material reproduced photographically.

Under the law of copyright, authors or their agents are assured of "the exclusive right to print, reprint, publish, copy and vend the copyrighted work," all or any part. This means that legally no individual or institution can reproduce by photography or photo-mechanical means, mimeograph or other methods of reproduction a page or any part of a book without the written permission of the owner of the copyright. Society, by law, grants this exclusive right for a term of years in the belief that such exclusive control of creative work is necessary to encourage authorship and scholarship.

While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. Extensive quotation is obviously inimical to the' author's interest.

The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription.

In order to guard against any possible infringement of copyright, however, libraries, archives offices and museums should require each applicant for photomechanical reproductions of material to assume full responsibility for such copying, and by his signature to a form printed for this purpose assure the institution that the duplicate being made for him is for his personal use only and is to relieve him of the task of transcription. The form should clearly indicate to the applicant that he is obligated under the law not to use the material thus copied from books for any further reproduction without the express permission of the copyright owner.

It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photo-copying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted. In case of doubt as to whether the excerpt requested complies with this condition, the safe thing to do is to defer action until the owner of the copyright has approved the reproduction.

Out-of-print books should likewise be reproduced only with permission, even if this

reproduction is solely for the use of the institution making it and not for sale.

(signed) Robert C. Binkley, *Chairman*
Joint Committee on Materials for Research
W. W. Norton, *President*
National Association of Book Publishers

APPENDIX B:

MEMORANDUM ON PROBLEMS OF COPYRIGHT LAW INVOLVED IN FILM COPYING[189]

Prepared by Robert C. Binkley, Chairman, Joint Committee on Materials for Research of the Social Science Research Council and the American Council of Learned Societies, September 1934.

It is impossible to find adequately the state of copyright law in reference to film copying problems by setting up one particular situation and asking whether it is or is not legal. It seems better, therefore, to suggest a series of situations having different characters but all alike in this respect--that they are things that are either being done or likely to be done in the near future. Therefore, I am outlining a number of cases; it is to be understood in all these cases that there already exists a well-defined research technique in the pursuit of which scholars take notes from books containing their material and use these notes in drawing conclusions which they mayor may not publish. The scholars' note system, by long custom, has come to include the excerpts taken from other writings, whether copyright or not, which have been made either with his own hand or with the typewriter.

Case 1. Library L. knowingly permits scholar S. to use a camera to make photographic copies of exactly the same type of material which, ordinarily, he would copy with a portable typewriter or by hand. These photographic copies are used by the scholar by himself alone and consist of, a) passages from books--that is, scattered pages, b) whole chapters from books, c) whole pamphlets or books, d) whole articles from periodicals.

Does L. infringe? Does S. infringe? Is the situation affected by any or all of the following considerations: whether the research in which S. is engaged involves any pecuniary rewards to him; whether the normal alternative to copying, according to the practices of research workers doing the same type of work, is to purchase the book or magazine article or to take a longhand or typescript copy of it; whether there are available in the market for purchase the items which S. is photo-copying.

Case 2. is on the same state of facts except that the Library L., a non-profitmaking institution, goes further than merely to permit with its knowledge the act of copying. It makes the copy itself at the request of S., who reimburses it for the expense.

Case 3. In cases 1 and 2, photo-copying was used alternative to normal manuscript or typescript copying in compiling notes, a normal procedure in research. Now let us say that the object is not a note system to be used by an individual in his own research, but rather a complete and adequate collection of material to be used in general by a number of scholars. Library L sends a mission through the country to copy from other libraries such materials as pamphlets, books, periodicals, and so on, in order to fill out its own files and when having filled out its files in this way, allows the use of the film copies in exactly the same way as if they were books. In respect of copy-written material, does Library L infringe? Does Libraries M, N, O, in which the copying was

[189] *See supra* note 104.

done, infringe?

Case 4. The same situation as Case 3. Library L is filling out its files by copying items in Libraries M, N, and O But instead of sending its own agents to do the copying, it arranges to have Libraries M, N, and O make copies.

Case 5. Library L has been in the habit of borrowing from Libraries M, N, and O for the use of its own readers. This is a well-established custom. But now Library L requests that instead of sending the books on an inter-library loan, Libraries M, N, and O should make a film copy for which they are paid by Library L. The items copied would be exactly the same as the items ordinarily loaned: namely, books, periodicals, and so forth.

Case 6. Library L has possession of manuscript letters, but does not have the literary property in them. It permits a scholar S to make a film copy of them for his own use. S studies these but never publishes any quotations from them. Is the owner of the literary property, the heir of the writer of the letters, injured in his right by this act of Library L? It is understood that Library L would have the right to allow the scholar to read the documents. It is also understood that Library L would *not* have the right to permit publication of the documents. In this case, the documents have never been copyrighted.

Case 7. Under the same situation as the above, Library L makes a copy of its manuscript for Libraries M, N, and 0, stipulating that M, N, and O are not to permit publication of any part, but may permit scholars to study them.

Case 8. This is the same as case 1. A scholar wants copies of books, pamphlets, and periodicals, and excerpts therefrom, from Library L, but instead of copying them himself or having the Library copy them he employs an agent who, with the permission of the Library, does the copying. Does this agent infringe? He is making a business of doing copying of this type.

Case 9. The agent offers to libraries generally the use of his skill and equipment and undertakes to make copies for them of anything in other libraries with the permission of the other libraries.

Case 10. The last, and certainly the clearest, case of infringement. An agent, as above, and his photographer offer to the general public film copies of copyrighted material.

I should think it quite probable that some of these cases are clearly cases of infringement, some are clearly not cases of infringement, and others are doubtful. The most useful information would be a distinction between these three types, together with an analysis of those elements of the doubtful cases which are most favorable to each of the alternative interpretations.