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LIBRARIES AND COPYRIGHT AT THE DAWN OF THE TWENTIETH
CENTURY: THE 1909 COPYRIGHT ACT

Laura N. Gasaway *

I. INTRODUCTION

A. *General*

As the twentieth century began, Congress again considered revising the copyright law of the United States. Under the leadership of Herbert Putnam, the Librarian of Congress, and Senator Alfred Kittredge, with the assistance of Thorvald Solberg, the Register of Copyrights, a series of conferences with various stakeholders and interested parties were held to discuss various issues.¹ Drafts of bills and amendments were introduced into Congress, and Congressional hearings followed. Signed into law on March 4, the 1909 Act² was the result of several years of very hard work on contentious issues.

Many technological innovations were introduced in the fifty years before the Act was passed, but the telephone, wireless radio and photography were still relatively new.³ Motion pictures were still in their infancy, and reproduction technology was in a state of

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¹ *The Copyright Code: Its History and Features*, 76 THE PUBLISHERS' WKLY, 19 (1909).

² The Copyright Act of 1909, ch. 329, 35 Stat. 1075 (1909) (codified at 17 U.S.C. §§ 101–805 (2006) [hereinafter "the Act" or "the 1909 Act"].

³ Gerald J. Sophar, *Nature of the Problem*, in REPROGRAPHY AND COPYRIGHT LAW 3 (Lowell H. Hattery & George P. Bush, eds., 1964).

continued development. "Technological changes in nineteenth-century printing included the use of stereotyping which lowered the costs of reprints, improvements in paper making machinery, and the advent of steam powered printing presses."⁴ Lithography and photography improved graphic designs for books and other materials.⁵

B. Librarians and Their Relationship with Publishers

Librarians and publishers have enjoyed a symbiotic relationship almost from the founding of modern libraries. Publishers produced and sold copies of books; in fact, early publishers were also printers and booksellers as well.⁶ As libraries developed, they quickly became the purchasers of large numbers of copies. Thus, publishers relied on librarians as a major market for their books. Publishers depended on libraries not only to purchase the books they published, but librarians also publicized the works of authors, encouraged reading, and helped instill a love of the printed word among the reading public, many of whom could not afford to purchase books. Other readers who first encountered an author or a particular book in a library were sometimes inspired to buy their own copies or a work. Libraries were dependent on publishers who produced copies of books and sold them to libraries, often offering discounts for quantity purchasing.⁷

Despite their interdependence, there has always been a tension between librarians and publishers. Libraries, especially public libraries, focus on providing users with free access to books and materials that the library acquires. Publishers have often complained that libraries and their lending practices interfere with

⁴ B. Zorina Kahn, *An Economic History of Copyright in Europe and the United States*, EH.NET ENCYCLOPEDIA, Mar. 16, 2008, <http://eh.net/encyclopedia/article/khan.copyright> (on file with the North Carolina Journal of Law & Technology).

⁵ *Id.*

⁶ See generally Walter L. Pforzheimer, *Historical Perspective on Copyright Law and Fair Use*, in *REPROGRAPHY AND COPYRIGHT LAW* 18 (Lowell H. Hattery & George P. Bush, eds., 1964).

⁷ This practice continues today both for purchases directly from publishers or through jobbers.

the purchase of copies by members of the public.⁸ Librarians' values and those of publishers and producers are often quite different: librarians are trained in the public library ethos and seek to provide requested information to their users free of charge, while publishers produce copyrighted works as a product and want to distribute them and earn a profit for their efforts.⁹ In spite of their symbiosis, publishers and librarians are often at odds just as technologists and content owners are today.¹⁰

C. Copyright Issues That Affected Libraries in 1909

Three major copyright issues affected libraries and their users prior to 1909. The first was the importation of books from foreign countries, authored by foreign writers. Earlier in the nineteenth century, there were attempts to restrict foreign works from entering the country so that Americans would not be negatively influenced by foreign ideas. However, this concern had faded considerably by the end of the century. The second issue concerned books written by American authors but printed abroad. Such books were governed by the 1891 International Copyright Act,¹¹ which contained an exception to the tariff for the importation of such works by libraries under certain conditions. In the years leading up to the 1909 Act, publishers sought to repeal the library privilege, which caused considerable debate and concern on the part of librarians and led to strife between publishers and librarians. The third issue involved the reproduction of copyrighted works or portions of those works in libraries. Since the latter part of the eighteenth century, various copying

⁸ Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 116 (2000).

⁹ *Id.*

¹⁰ Copyright is an issue over which librarians and publishers have disagreed for years, going back certainly to the early twentieth century, and perhaps even earlier. "Throughout the history of the printed word (and a considerable portion of the history of the written word), copyright has been a thorny problem for publishers, authors, scholars and librarians." John M. Budd, *Copyright*, in *ENCYCLOPEDIA OF LIBRARY HISTORY* 170, 170 (Wayne A. Wiegand & Donald G. Davis, Jr., eds., 1994).

¹¹ Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106 (1891).

technologies had developed, and some were used to reproduce copyrighted works in libraries. The scope of such copying, however, was limited due to the state of the technology at the time, and mention of reproduction is scant in the legislative history of the 1909 Act. These early technologies were a harbinger of the more serious debates and discussions from the middle of the twentieth century and continuing today.

1. *Importation of Works by Foreign Authors*

Under earlier copyright statutes, all works by foreign nationals were considered to be public domain,¹² which, not surprisingly, resulted in some difficulties with foreign authors and some countries.¹³ This was in sharp contrast with the policy of European countries, of which France is a good example. Louis Napoleon's Decree of 1852¹⁴ prohibited counterfeiting of both foreign and domestic works.¹⁵ In the United States, by contrast, American copyright did not protect foreign works until almost 100 years later.¹⁶ At the same time, the United States was a net importer of books,¹⁷ especially from other English-speaking countries, and U.S. citizens took advantage of the scholarly and cultural outputs of other countries through inexpensive copies of these works printed by American printers, who paid no copyright royalties to the author. Publishers and printers maintained that the absence of any international agreement resulted in a treasure trove of literature available to the American public at low cost. Moreover, publishers stressed that the reprinting of foreign works by printers in the United States created many jobs for U.S. workers. Since

¹² This was true from the first U.S. copyright law. See Act of May 21, 1790, ch. 15, 1 Stat. 124 (1790). Public domain is "the common space where creative works not protected by copyright exist." Laura N. Gasaway, *A Defense of the Public Domain: A Scholarly Essay*, 101 LAW LIBR. J. 451, 452 (2009).

¹³ A long-running dispute with Charles Dickens is one of the most famous disagreements. See Herbert Channick, *Boz in Egypt*, 10 ILL. HERITAGE 8 (July–Aug. 2007), <http://www.lib.niu.edu/2007/ih070708.html>.

¹⁴ Decree of Mar. 28, 1852, *Le Moniteur Universel: Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 29, 1852, at 511.

¹⁵ Kahn, *supra* note 4.

¹⁶ *Id.*

¹⁷ *Id.*

publishers often maintained a printing operation as well, their advocacy was logical. Publishers had effectively lobbied Congress to prevent any change in the law regarding protection for works of foreign authorship.¹⁸

American piracy of works by foreign nationals was unabated for most of the 1800s. Some American publishers even had agents in London who would obtain printer's plates¹⁹ of new novels from famous British authors (such as William Makepeace Thackeray and Sir Walter Scott) and deliver them to printers in this country where they were printed even before the British edition could be produced. Since no royalties were paid, the cost of the American edition was much less than the British one.²⁰ At the same time, imported books had tariffs attached that were as high as twenty-five percent.²¹ The reading public benefited from the availability of these high quality works at low prices, but relations with other countries and some famous authors did not fare so well. In the eighteenth century, most of the works available and produced in this country were reprints of nonfiction works of foreign authors.²² However, during the next century, works of fiction became increasingly important to the reading public.²³ With the increase

¹⁸ Budd, *supra* note 10, at 172.

¹⁹ Printing plates are devices (usually made from metal) that carry the image to be printed and are "applied directly to paper or to an intermediate image carrier . . . in order to transfer the image to paper." JANE IMBER & BETSY-ANN TOFFLER, *DICTIONARY OF MARKETING TERMS* 443 (3rd ed. 2000).

²⁰ Budd, *supra* note 10, at 172.

²¹ Kahn, *supra* note 4. Tariffs on imported goods had been imposed since 1789. The primary function of tariffs was to provide revenue to the new federal government. Another important function was to protect the economy of the United States. Tariffs continued to be the most significant source of revenue for the country until 1913 when the income tax supplanted it. Gesine Schmidt & Olaf Jansen, *Regular Organization of United States Foreign Trade*, in *U.S. TRADE BARRIERS: A LEGAL ANALYSIS* 107, 108 (Eberhard Grabitz & Armin von Bogdandy eds., 1991).

²² See Kahn, *supra* note 4.

²³ *Id.*

in literacy in the United States, the amount of fiction produced and read increased.²⁴

After the 1840s, major publishers cooperated to establish “synthetic property rights” (protected by contract as opposed to an actual property right) in works of authors from other countries by making arrangements to receive early copies of foreign-authored works and paying for the right to produce an “authorized reprint.”²⁵ These rights were recognized as very valuable, but were the subject of contract law instead of copyright.²⁶

Attempts to limit the importation of books from abroad were viewed by some as an attempt to keep objectionable foreign ideas out of the country.²⁷ Others favored high tariffs on foreign-produced goods as a way to protect nascent American industries.²⁸ Books were no exception—tariffs had been imposed on foreign-produced books for some years, and by 1864, tariffs on such books had reached twenty-five percent.²⁹ Some publishers were high protectionists, while the leading opponents of high tariffs on books were academics, scientists and foreign language groups.³⁰ Copyright protection for works of foreign authors was not recognized in this country until the 1891 Act was enacted.³¹

2. *Importation of Foreign-Produced Works by U.S. Authors*

American publishers and printers complained loudly about foreign printed editions of works of American authors. Congress sympathized, and high protectionists won the day in Congress to include protection for American printers and typographers in the

²⁴ Carl F. Kaestle, *Studying the History of Literacy*, in CARL F. KAESTLE, ET AL., *LITERACY IN THE UNITED STATES: READERS AND READING SINCE 1880*, 28 (1991).

²⁵ Kahn, *supra* note 4.

²⁶ See *Sheldon v. Houghton*, 21 F. Cas. 1239, 1239 (C.C.N.Y. 1865) (No. 12,748) (denying a motion by a publisher to continue to print material at the end of the partnership because no property interest had been acquired in the initial contract).

²⁷ HELLMUT LEHMANN-HAUPT, *THE BOOK IN AMERICA: A HISTORY OF THE MAKING AND SELLING OF BOOKS IN THE UNITED STATES* 204 (2d ed. 1951).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ International Copyright Act of 1891, *supra* note 11.

1891 Act.³² There was, however, an exception for libraries that permitted the importation of works for libraries without paying the duty, but the exception was limited to no more than two copies of a work per single invoice.³³ It was this exception that publishers sought to repeal in the debates leading up to the enactment of the 1909 Copyright Act.

To protect the U.S. printing industry, the manufacturing clause was included in the 1909 Act. It required that “[a] work must have been printed and published in the United States . . . and the editions in this country must have been manufactured from type set within the United States” to receive copyright protection.³⁴ By this time, the importation issue conflated with the manufacturing clause, resulting in a salvo to printers to compensate for the recognition of copyright protection for foreign authors and foreign produced works embodied in the 1891 Act. Though relaxed somewhat over the years, the manufacturing clause remained a staple of U.S. copyright law for almost a century.

3. *Library Reproduction of Copyrighted Works*

Copying in libraries has a long history going back at least to the Great Library at Alexandria established in 290 B.C. by Ptolemy I.³⁵ The library brought great fame to the city for which it is named, and because of the library, Alexandria became famous as the literary and scientific capital of the Mediterranean and the intellectual capital of the Greek world.³⁶ Like any modern library, it held the store of knowledge, but in the delicate storage medium known as papyrus scrolls. Ptolemy asked other rulers around the known world to lend him texts which scribes would then copy for the library.³⁷ Additionally, when ships landed at the port of

³² *Id.*

³³ *Id.* at § 4956.

³⁴ Marjorie McCannon, *The Manufacturing Clause of the U.S. Copyright Law*, Feb. 1963, 1123, 1131, in Arthur Fisher, *STUDIES ON COPYRIGHT* (1963).

³⁵ See generally Ellen Brundige, *Decline of the Library and Museum of Alexandria*, <http://www.digital-brilliance.com/kab/alex.htm> (last visited Jan. 25, 2010).

³⁶ *Id.*

³⁷ See CHARLES ROLLIN, *THE ANCIENT HISTORY OF THE EGYPTIANS, CARTHAGINIANS, ASSYRIANS, BABYLONIANS, MEDES AND PERSIANS*,

Alexandria, vessels were searched not for contraband, but for books and maps.³⁸ These items were confiscated, copied and then returned to their owners, and the copies were added to the library.³⁹ There were complaints, however, that sometimes Ptolemy kept the original for his library and returned the copy to the owner.⁴⁰ Thus, the collection of the first “public” library was built on copying.

Another method of library development was the absorption of cultural property, including libraries. The first libraries in Rome consisted of the booty of war from conquered Greek states.⁴¹ For example, Aemilius Paulus pillaged the library of the Macedonian kings and presented it to his sons in 168 B.C.⁴² Confiscated literature from conquered civilizations made up much of Caliph Harun-al-Raschid’s royal library in Baghdad in the eighth century.⁴³ A host of scribes and translators were then engaged to extend the collection of that library by copying the confiscated texts.⁴⁴

Copying was often done by hand, both by monks in the Middle Ages⁴⁵ and by early library patrons. In fact, monasteries could be considered as early “copy machines.” There was a commercial

MACEDONIANS AND GRECIANS 402 (London, J.B. Lippincott & Co., 1869) (“All the Greek and other books that were brought into Egypt were seized and sent to the Museum, where they were transcribed by persons employed for that purpose. The copies were then delivered to the proprietors, and the originals were deposited in the library.”).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (“Ptolemy Evergetes, for instance, borrowed the works of Sophocles, Euripides, and Aeschylus, of the Athenians, and only returned them the copies, which he caused to be transcribed in as beautiful a manner as possible; and he likewise presented them with fifteen talents, for the originals which he kept.”) (internal citation omitted). *Id.*

⁴¹ *Id.* at 433.

⁴² KONSTANTINOS STAIKOS, *THE HISTORY OF THE LIBRARY IN WESTERN CIVILIZATION* (Oak Knoll Press 2004).

⁴³ *Id.*

⁴⁴ Anne L. Buchanan, et al., *Collection Development* 153, 154 in *ENCYCLOPEDIA OF LIBRARY HISTORY* (Wayne A. Wiegand & Donald G. Davis, Jr., eds., 1994).

⁴⁵ *Id.* at 154-55. In sixth century India, the Jains copied and distributed both sacred and secular works. In Japan, Buddhist leaders in the eighth century created copying centers for texts.

purpose for such copying in that monasteries often sold the copies they made.⁴⁶ Copying technology from the late eighteenth century through the early part of the twentieth century continued to develop from simple letterpresses to mechanized processes. Reproducing portions of books was not easy with these early technologies, however.⁴⁷

The Library of Congress seemed to encourage copying and thereby ignored copyright in 1901. Its regulations at the time indicated that the Library was “ready to suggest . . . persons who will transcribe lengthy extracts where those are desired,” but it also freely allowed photocopying.⁴⁸ Visitors who wanted to copy the library’s selections were allowed to use a special room devoted specifically for this purpose.⁴⁹

II. AMERICAN LIBRARIES AT THE TURN OF THE TWENTIETH CENTURY

A. *Types of Libraries and Their Development*

There were libraries even in colonial America. However, these were private libraries often in the homes of ministers and doctors or in colleges and churches, and books were considered a sign of wealth.⁵⁰ These collections were small, and each usually had no more than a few hundred books.⁵¹ Book collections in churches were often open to the public in the eighteenth century, but there

⁴⁶ Mrs. Edward S. Lazowska, *Photocopying, Copyright, and the Librarian*, 19 AM. DOCUMENTATION 123, 123 (1968).

⁴⁷ See generally BARBARA RHODES & WILLIAM WELLS STREETER, BEFORE PHOTOCOPYING: THE ART AND HISTORY OF MECHANICAL COPYING, 1780–1938 (1999).

⁴⁸ Verner W. Clapp, *Copyright: A Librarian’s View*, prepared for the National Advisory Commission on Libraries 1 (1968) (citing U.S. Librarian of Congress, Annual Report 208 (1901)).

⁴⁹ *Id.*

⁵⁰ StraightDope.com, A Staff Report from the Straight Dope Science Advisory Board, How Did Public Libraries Get Started? (2006), <http://www.straightdope.com/columns/read/2236/how-did-public-libraries-get-started> (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

⁵¹ *Id.*

were no systems in place to maintain the libraries or to ensure that the materials were preserved and returned.⁵² Thus, over the years these libraries tended to waste away.⁵³

Colonial college library collections were small and typically consisted of donated books.⁵⁴ These eclectic collections often had no funding for their upkeep or expansion.⁵⁵ The collections consisted primarily of the classics and religious works.⁵⁶ College libraries grew slowly with little demand for more books.⁵⁷ As a result of the lack of demand, there was no reason to appropriate funds to preserve and add to the college library collection.⁵⁸ Although college libraries are one of the oldest types of libraries in the United States, with the establishment of the Harvard College Library in the 1630s, there were few such libraries before 1820.⁵⁹ Toward the end of the nineteenth century, college collections consisted primarily of works to support the curriculum rather than research materials.⁶⁰ The average library had between 6,000 and 20,000 volumes, acquired primarily through donations.⁶¹ As serial publications gained importance, libraries began to acquire these collections.⁶² The number of college libraries had increased to 750 by 1876.⁶³ By 1880, research had begun to be more important in American universities, and as the number of students seeking

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Sharon Gray Weiner, *The History of Academic Libraries in the United States: A Review of the Literature*, 7 *LIBR. PHIL. & PRAC.* 1, 2 (2005). Other than newspapers, there were fewer than 100 periodicals published in 1825; by 1885, however, more than 9000 were published. *Id.* at 3.

⁵⁶ *Id.*

⁵⁷ See generally *id.* at 3 (describing the deterioration, then subsequent flourish, of libraries at this time).

⁵⁸ STEPHEN E. ATKINS, *THE ACADEMIC LIBRARY IN THE AMERICAN UNIVERSITY* 3–4 (2003).

⁵⁹ Haynes McMullen, *The Distribution of Libraries Throughout the United States*, in *LIBRARY TRENDS: AMERICAN LIBRARY HISTORY, 1876–1976*, 23, 35 (Howard W. Winger, ed., 1976).

⁶⁰ Weiner, *supra* note 55, at 3–4.

⁶¹ *Id.*

⁶² Buchanan, *supra* note 44.

⁶³ McMullen, *supra* note 59.

doctoral degrees increased, academic libraries had to acquire more materials on a variety of subjects.⁶⁴ Fortunately, more money was allocated to support the development of academic library collections.⁶⁵ Universities experienced tremendous growth between 1890 and 1915, and such growth transformed American higher education. Funds were provided by the individuals responsible for the creation of modern American industry, which in turn created the demand for specialty disciplines and library materials to support research in these fields.⁶⁶

Public libraries owe their development to the creation of three types of libraries which introduced the idea of sharing books: (1) social libraries; (2) circulating libraries; and (3) school district libraries. In 1731, Benjamin Franklin created a subscription library as a way to share books among members.⁶⁷ Incorporated in 1742 as the Library Company of Philadelphia, Franklin's library accepted members who purchased stock in the corporation.⁶⁸ Social libraries became popular, and stock usually sold at five dollars per share. Some of these libraries were devoted to a particular subject. For example, the Boston Athenaeum, founded in 1806 for the upper class of society, devoted itself to scholarly magazines and newspapers.⁶⁹ Libraries like the Athenaeum tended to combine the functions of a men's social club with those of a library, a museum, and other cultural institutions.⁷⁰ The annual share cost was a staggering \$300, which insured that only the wealthiest citizens could become members of the Athenaeum.⁷¹ Subsets of social libraries were mercantile libraries, typically

⁶⁴ *Id.*

⁶⁵ Atkins, *supra* note 58, at 14, 16–7.

⁶⁶ *Id.* at 19.

⁶⁷ RICHARD W. CLEMENT, *THE BOOK IN AMERICA* 23–24 (1996).

⁶⁸ See *THE LIBRARY COMPANY OF PHILADELPHIA, AT THE INSTANCE OF BENJAMIN FRANKLIN: A BRIEF OF HISTORY THE LIBRARY COMPANY OF PHILADELPHIA* 3 (1995), <http://librarycompany.org/about/Instance.pdf>.

⁶⁹ Clement, *supra* note 67, at 57; see also Ronald Story, *Class and Culture in Boston: The Athenaeum, 1807-1860*, 27 AM. Q. 178 (1975).

⁷⁰ Charles A. Seavey, *Public Libraries*, in *ENCYCLOPEDIA OF LIBRARY HISTORY* 518, 519 (Wayne A. Wiegand & Donald G. Davis, Jr., eds., Garland Pub. 1994).

⁷¹ StraightDope.com, *supra* note 50.

aimed at middle-class young men and funded by contributions from wealthy citizens to help educate the masses (often their factory employees or mercantile clerks).⁷² The purpose of mercantile libraries was “to promote orderly and virtuous habits, diffuse knowledge and the desire for knowledge, improve the scientific skill and create good citizens.”⁷³

It is said that the nineteenth century belonged to the social library, but thereafter, to the public library.⁷⁴ In 1900, 28% of the 5400 libraries listed as having more than a thousand volumes were social libraries.⁷⁵ These libraries were never particularly well funded, and they tended to languish or close during tough economic times.⁷⁶

Another trend that led to the creation of public libraries was the establishment of circulating libraries.⁷⁷ These libraries, developed in the latter part of the eighteenth century, were housed in bookstores or print shops, and contained primarily popular fiction, especially the novel.⁷⁸ The first of these libraries opened in Annapolis, Maryland, in 1762.⁷⁹ Although it closed after only two years, the idea proved popular and others followed.⁸⁰

The third type of library important in the development of public libraries was the school district library. Districts were expected to have books for their students, but there was no system for maintaining or increasing book collections.⁸¹ Materials donated to school district libraries were not particularly interesting or even all that useful.⁸² In the 1830s, Horace Mann, secretary of the Massachusetts Board of Education, pushed for the establishment and maintenance of school libraries.⁸³ Educators finally convinced

⁷² *Id.*

⁷³ *Id.* (internal citations omitted).

⁷⁴ McMullen, *supra* note 59, at 32.

⁷⁵ *Id.* at 24, 32–33.

⁷⁶ StraightDope.com, *supra* note 50.

⁷⁷ These libraries were also called rental libraries. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ StraightDope.com, *supra* note 50.

⁸² *Id.*

⁸³ *Id.*

legislators to fund school libraries through taxes to provide reading materials for adults as well as children.⁸⁴

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

Although Julius Caesar is credited with the idea of founding a public library,⁸⁵ the first public library in the United States was founded by accident in Peterborough, New Hampshire, in 1833.⁸⁶ The idea's popularity grew, and in 1849, New Hampshire became the first state to permit local taxes to support public libraries.⁸⁷ The Boston Public Library opened in 1854 and is usually recognized as being the first public library because it was intentionally created.⁸⁸

Public libraries opened in Los Angeles in 1889, New York City in 1895, New Orleans in 1896, and Brooklyn in 1897.⁸⁹ Often, the public library absorbed an earlier social library.⁹⁰ At first, public libraries primarily catered to scholars and the upper classes and were open only during daytime hours and had a number of restrictions on use.⁹¹ Andrew Carnegie was a major supporter of public libraries, and by 1920 his estate had contributed fifty million dollars to erect nearly 2500 library buildings, 1700 of which were in the United States.⁹² Carnegie believed that libraries and their collections should be open to everyone, and he supported the idea of using tax revenues to fund public libraries.⁹³

⁸⁴ *Id.*

⁸⁵ Staikos, *supra* note 42.

⁸⁶ StraightDope.com, *supra* note 50. The accidental creation of the library occurred because the town of Peterborough decided to use some of the money the state had collected to start a state college when the college failed to come to fruition. *Id.*

⁸⁷ *Id.*

⁸⁸ Clement, *supra* note 67, at 56.

⁸⁹ StraightDope.com, *supra* note 50.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* Carnegie was called a Communist by the political right because of his support for the use of tax dollars to support public libraries. The left also called him a Communist because they viewed taxes as a drain on the working man. *Id.*

Public libraries in this country and in England contributed to the education system that existed at the time. It was thought that access to a book collection would provide a “beguiling alternative to the temptations of drunkenness, criminal folly and vice.”⁹⁴ Also, it was widely believed that public libraries would “aid in preventing public disorder.”⁹⁵

The public library was a haven for the wave of immigrants who arrived in the United States after 1890.⁹⁶ In fact, storytelling was used to socialize immigrants and explain U.S. traditions and customs, as well as to highlight the expectations of society.⁹⁷ Libraries came to resemble community centers as they provided services to immigrant communities; they apparently considered it a social obligation and a patriotic duty to act as civilizing influences on immigrants.⁹⁸ Even before public libraries served immigrant populations, immigrants themselves recognized the importance of libraries and created their own social libraries.⁹⁹ Indeed, the collections of some of these immigrant libraries became the basis of foreign language collections for the public libraries in the area.¹⁰⁰

B. *Formation of Library Associations*

The American Library Association (“ALA”) was formed on October 6, 1876, during the Centennial Exposition in

⁹⁴ W. Boyd Rayward, *Librarianship in the New World and the Old: Some Points of Contact*, 25 LIBR. TRENDS 209, 210 (1976), available at http://www.ideals.illinois.edu/bitstream/handle/2142/6911/librarytrendsv25i11_opt.pdf?sequence=1.

⁹⁵ *Id.*

⁹⁶ See generally PLUMMER ALSTON JONES, JR., *AMERICAN PUBLIC LIBRARY SERVICE TO THE IMMIGRANT COMMUNITY, 1876–1948; A BIOGRAPHICAL HISTORY OF THE MOVEMENT AND ITS LEADERS* 66–77 (University of North Carolina at Chapel Hill 1991).

⁹⁷ *Id.*

⁹⁸ *Id.* at 72 (“Librarians throughout the country were sensitive as well to what other organizations—social, educational, cultural, religious, philanthropic, patriotic, and political—were doing to promote Americanization and sought means for their respective libraries to cooperate with these agencies.”).

⁹⁹ *Id.* at 77.

¹⁰⁰ *Id.* at 77–78.

Philadelphia.¹⁰¹ The ALA was “created to provide leadership for the development, promotion, and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all.”¹⁰² Twenty-five year old Melvil Dewey was the youngest person present during the formation of the organization.¹⁰³ In 1890, he was elected president of the ALA with the slogan “The best reading, for the largest number, at the least cost,”¹⁰⁴ a philosophy which public libraries continue to share to this day. Other national library associations that serve specialized clientele soon followed suit. The Medical Library Association was founded in 1898, the American Association of Law Libraries in 1906, and Special Libraries Association in 1909.¹⁰⁵

The first reported concerted action of librarians in favor of the international copyright movement began in 1837.¹⁰⁶ In 1888, the editors of *Library Journal* published the following notice:

The copyright leagues have under consideration a plan of asking librarians as well as booksellers to display on their counters a petition for international copyright which readers may have

¹⁰¹ American Library Association, Mission & History, <http://www.ala.org/ala/aboutala/missionhistory/index.cfm> (last visited Mar. 30, 2010).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* See also StraightDope.com, *supra* note 50.

¹⁰⁵ Medical Library Association, About the Medical Library Association, <http://www.mlanet.org/about/index.html> (last visited Mar. 30, 2010); The American Association of Law Libraries, About AALL, <http://www.aallnet.org/about/> (last visited Mar. 30, 2010); and Special Libraries Association, Association Profile, <http://www.sla.org/content/SLA/AssnProfile/index.cfm> (last visited Mar. 30, 2010) (on file with the North Carolina Journal of Law & Technology).

¹⁰⁶ Lawrence C. Wroth & Rollo G. Silver, *Book Production and Distribution from the American Revolution to the War Between the States*, in *THE BOOK IN AMERICA: A HISTORY OF THE MAKING AND SELLING OF BOOKS IN THE UNITED STATES* 63, 108 (2d ed. 1951). Senator Henry Clay first introduced into the Senate a plea from British authors to extend U.S. copyright to their works in 1837, but the bill failed to pass and was reintroduced three times from 1838 to 1842. Two primary reasons for its failure were a desire to protect the nascent U.S. book trade industry coupled with a lack of public interest in higher book prices, which was feared if international copyright was recognized. *Id.*

opportunity to sign, and we trust librarians will show themselves sufficiently liberal-minded to help along a work which appeals alike to American justice, American honor, American patriotism, and American common sense. If each librarian will also drop a line to his Congressman advocating the measure, it will be of much service.¹⁰⁷

Three years later, the ALA presented a petition to the U.S. Senate that advocated for passage of an international copyright law.¹⁰⁸ The petition was signed not only by the Librarian of Congress, but also by 200 of the leading librarians around the country.¹⁰⁹ The petition stated that the signers believed that passage of the international copyright bill, from their knowledge of the reading public, "would stimulate American literature, would promote the sciences and the useful arts, would raise the standard of reading and give it a better and a more national tone, and would be in the interest of the whole people."¹¹⁰ The ALA apparently was pleased with the enactment of the international copyright law in 1891.¹¹¹

Prior to the passage of the 1909 Copyright Act, the ALA was interested in copyright and sent representatives to the conferences held by the Librarian of Congress.¹¹² Because of disagreements among librarians about proposed amendments to the copyright law, however, the ALA did not represent the views of all librarians; as a result, the Librarians Copyright League was formed.¹¹³

¹⁰⁷ A. Cutter & R. Bowker, 13 LIBR. J. 3 (Jan. 1888).

¹⁰⁸ GEORGE HAVEN PUTNAM, THE QUESTION OF COPYRIGHT 114-16 (2d ed. 1896).

¹⁰⁹ *Id.* at 114-15.

¹¹⁰ *Id.* at 115-16.

¹¹¹ 16 LIBR. J. 117, Dec. 1891 ("[T]he A.L.A. records its gratification at the passage of an international copyright act, as promoting justice to authors of books and the development of American literature."). *Id.*

¹¹² *Id.*

¹¹³ *Id.*; see also Chin Kim, *Librarians and Copyright Legislation: The Historical Background*, 2 AMER. LIBR. 615, 618 (1971) ("The league was organized to prevent copyright legislation from abridging the existing rights of libraries to import authorized editions of books.").

III. IMPORTATION OF BOOKS

A. *Before 1891*

For more than a century, there were no U.S. restrictions on the importation of foreign works, and American publishers and printers pirated European works without much concern for the rights of the author. Ultimately, American authors found themselves both deprived of income at home and faced with piracy from European publishers, since the United States did not offer copyright protection to foreign authors—and foreign countries offered no protection to works by American authors.¹¹⁴ It was more profitable for American publishers to publish foreign works, since no royalties were paid to publish works of foreign authors.¹¹⁵ Agitation for copyright protection on an international scale escalated after the mid-nineteenth century, however. The economics of reprinting and publishing forced some “literary men” to side with American publishers on the issue of foreign book competition and a protectionist tariff.¹¹⁶ Scholars, however, opposed any restrictions on importation of foreign books and articles.¹¹⁷

Tariffs on books and the question of international copyright have always been intertwined with the manufacturing clause in the copyright law due to fear that foreign books produced at lower cost would supplant the market for those published in America.¹¹⁸ Through the years, protectionist sentiments prevailed. Moreover, “nationalism and the proud desire to foster American literature and keep out alien philosophies, politics, and religion have influenced Congress.”¹¹⁹ The tariff on books and other imports rose to fifteen percent as the Civil War approached.¹²⁰ After the Civil War, many

¹¹⁴ Kahn, *supra* note 4.

¹¹⁵ McCannon, *supra* note 34, at 1128.

¹¹⁶ Donald Marquand Dozer, *The Tariff on Books*, 36 MISS. VALLEY HIST. REV. 73, 73 (1949). The literary men who supported restriction on the importation of foreign works included Thomas Bailey Aldrich, William Dean Howells, and Oliver Wendell Holmes. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 76.

¹¹⁹ McCannon, *supra* note 34, at 1129 (citing Dozer, *supra* note 116, at 79).

¹²⁰ Dozer, *supra* note 116, at 74 (citing Morrill Tariff Act of Mar. 2, 1861).

scholars and researchers sought to lower the tariff on imported books, but publishers opposed any reduction.¹²¹ The only modification made in 1870 was to add to the free list “books which had been printed and manufactured more than twenty years” before importation.¹²² This modification opened the door to foreign imports, since the only books in this category that anyone would want to import were those that had been received with some success and were now considered to be classics.¹²³ Representatives of scientific and academic groups continued to protest the tariff on foreign books, which had now risen to twenty-five percent.¹²⁴ They sought to add to the free list books in foreign languages and claimed that the duty amounted to “a tax upon the dissemination of knowledge” and acted as a “bar to the progress of intellectual culture.”¹²⁵

The leader of publisher opposition was publisher Henry Oscar Houghton of Houghton, Mifflin and Company.¹²⁶ The concern after the 1830s was a fear that the American book printing business would be destroyed.¹²⁷ Complaints by academics continued, and in 1887, many colleges petitioned Congress to add foreign language books to the free list.¹²⁸

B. *Importation Clause of 1891*

The Act of 1891 was a compromise between the two contingencies to protect the copyright of works by foreign authors (if their countries reciprocated by granting copyright to American authors), while requiring that all works by U.S. authors be printed

¹²¹ *Id.* at 75.

¹²² *Id.* (internal citation omitted). There appears to be no specific reason for the number of years being twenty, but was probably a somewhat blundering effort to differentiate the old from new books.

¹²³ Dozer, *supra* note 116, at 75.

¹²⁴ *Id.* at 75–76. Among this group of scientists who opposed the tariff on foreign books was Joseph Henry, the secretary of the Smithsonian Institution in Washington, D.C. *Id.* at 75.

¹²⁵ *Id.* at 76.

¹²⁶ *Id.* at 78.

¹²⁷ *Id.* at 77–84. At this time, publishers and printers were often one and the same.

¹²⁸ *Id.* at 89.

with type set in the United States.¹²⁹ The manufacturing clause was the exchange upon which printers insisted as a condition precedent for granting international copyright protection in the United States.¹³⁰ The purpose was to protect the U.S. printing industry from foreign competition, even though “[n]o other country required domestic manufacture as a condition of copyright protection.”¹³¹ American publishers feared for the industry and for American jobs.¹³² They were concerned that “once a British edition of a book had been printed, [those copies would be exported] to the United States and [this] . . . would extend the monopoly that British publishers had [over works by] British authors.”¹³³

Denying protection to foreign authors seemed contrary to copyright’s fundamental goal of protecting the author, but after 1891, authors’ rights were sublimated to those of American book printers. Even though authors would most often have their works printed in their own countries, there were some reasons that an author might have chosen otherwise. For example, if an American author lived abroad, wrote in a foreign language, or wrote for a foreign market, she might have preferred printing elsewhere. Another such situation might occur if a foreign publisher was the only one that offered to publish a particular technical or scholarly work. Further, when the market for a work was likely to be small, the printing that most authors would have elected would be that with the lowest cost. Finally, if the superior quality of a particular foreign artisan was the primary consideration, then an author should have been able to select a foreign publisher.¹³⁴

¹²⁹ *Id.* at 94.

¹³⁰ See McCannon, *supra* note 34, at 1130-31.

¹³¹ 2 STUDIES ON COPYRIGHT 1319-20 (Arthur Fisher ed., Fred B. Rothman & Co. & The Bobbs Merrill Co., Inc.) (1963).

¹³² See Dozer, *supra* note 116, at 77-84.

¹³³ EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT, 236, (Thomas Dunne ed., St. Martin’s Press 2002) (2000), available at <http://www.edwardsamuels.com/illustratedstory/isc10.htm> (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

¹³⁴ Abe A. Goldman, *Study No. 1, The History of U.S.A. Copyright Law Revision from 1901 to 1954*, in 2 STUDIES ON COPYRIGHT, *supra* note 131, at 1186-87.

2. *The Library Privilege or Exception*

As a salvo to the academic and scientific communities, Congress included a provision in the 1891 Act to permit the importation of foreign language books in which only translations in English were copyrighted.¹³⁵ Libraries and other institutions were allowed to import foreign copies of works even by U.S. authors, but only two copies of the work could be included on the same invoice.¹³⁶ Books improperly imported were subject to seizure by customs agents.¹³⁷ However, if libraries paid the twenty-five percent tariff, they could import an unlimited number of copies.¹³⁸ Individuals were likewise permitted to import two copies for personal use but not for resale without payment of the duty.¹³⁹

Libraries hired foreign book agents to scour the book publishers of Europe and import the books they needed but restricted the imports to two copies per invoice.¹⁴⁰ Through these agents, libraries were able to build library collections of foreign imprints, including both titles published in foreign languages as well as those published in English.¹⁴¹

C. *Debates 1905–09*

1. *Early Disputes with Publishers*

The Librarian of Congress convened three conferences in 1905 and 1906 on the proposed revision of the copyright law. There were two major issues with significant disagreement: mechanical

¹³⁵ International Copyright Act of 1891, 26 U.S.C. § 4956 (1891).

¹³⁶ *Id.*

¹³⁷ R.R. BOWKER, COPYRIGHT: ITS LAW AND ITS LITERATURE: BEING A SUMMARY OF THE PRINCIPLES AND LAW OF COPYRIGHT, WITH ESPECIAL REFERENCE TO BOOKS 32 (Fred B. Rothman & Co. 1886).

¹³⁸ *Id.*

¹³⁹ STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE FIRST SESSION OF THE CONFERENCE ON COPYRIGHT held at the New York City Club, May 31–June 2, 1905, *reprinted in* 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, at 121 (E. Fulton Brylawski & Abe Goldman, eds., Fred B. Rothman & Co. 1976) (1905).

¹⁴⁰ *Id.* at 123.

¹⁴¹ *Id.*

instrument (player piano) use of copyrighted music and the importation by public libraries of works printed abroad.¹⁴²

The Register of Copyright had opined that the manufacturing clause was an import limitation rather than a curtailment or denial of copyright protection.¹⁴³ If the printing industry still needed protection against foreign competition, the Register opined that it should be handled outside the copyright law. Further, it was difficult for customs agents to stop infringing importations since it required knowledge of rather complex copyright laws.¹⁴⁴

Since passage of the Act in 1891, publishers had complained about the library exception that allowed foreign copies of U.S. copyrighted works to be imported without the payment of duties.¹⁴⁵ The library exception was said to be an inducement for libraries to import works rather than to purchase American produced copies.¹⁴⁶ Speaking for the Periodicals Association of America, Charles Scribner stated that the library privilege should be restricted by requiring consent of the copyright owner.¹⁴⁷ He acknowledged the size of the library market for the purchase of books and periodicals and its importance to publishers,¹⁴⁸ but he criticized the fact that libraries around the country housed books by U.S. authors that were printed in England, which he characterized as “cheap editions.”¹⁴⁹ “Sometimes those foreign made editions contain changes—slight changes, and it is not desirable to have an American work perpetuated in a library with those changes”¹⁵⁰

Librarians certainly disagreed and opposed any change to the library privilege. Arthur R. Bostwick, representing the ALA, stated that librarians thought it made very little difference where

¹⁴² Goldman, *supra* note 134, at 1105.

¹⁴³ Arpad Bogsch, *International Aspects of Copyright*, in ARTHUR FISHER, 2 STUDIES ON COPYRIGHT, *supra* note 131, at 1323.

¹⁴⁴ *Id.* at 1325.

¹⁴⁵ *Id.* at 1313.

¹⁴⁶ *Id.*

¹⁴⁷ 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, *supra* note 139 at 122.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 123.

¹⁵⁰ *Id.* Concern about ensuring the integrity of their works is not an insignificant matter to publishers.

the work was printed, as long as the author received royalties.¹⁵¹ Moreover, he noted that many works first published in England were reprinted in the United States in very inferior editions.¹⁵² He stated that libraries sought to purchase books in the best edition, which might be an English edition.¹⁵³ Bostwick cautioned that if the privilege were revoked, American libraries would be forced to purchase the inferior U.S. edition, which might omit illustrations, use paper of poorer quality, and even omit sections or chapters.¹⁵⁴ If consent of the copyright owner were required, it would force libraries to track down authors before purchasing their work.¹⁵⁵

Frank P. Hill, one of the two representatives of the ALA, reminded delegates that members of the public were represented by both his organization and the National Education Association.¹⁵⁶ Without the public, there would be little need for copyrighted works or publishers, and Hill advocated that therefore members of the public deserved a liberal reading of the copyright law.¹⁵⁷

At the second conference organized by the Librarian of Congress, speaking for the American Publishers Copyright League, George Haven Putnam stated that the law should be returned to its pre-1891 status regarding importation of foreign-produced copies; to do otherwise would be contrary to the interests of the American people and to the copyright interests of authors and publishers.¹⁵⁸ According to William H. Appleton, representing the same organization, in 1891 publishers “were told that [only] a few scientific institutions, Yale, Harvard and other universities” were likely to import scientific books for their libraries, but this

¹⁵¹ *Id.* at 126.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 125.

¹⁵⁷ *Id.*

¹⁵⁸ STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE SECOND SESSION OF THE CONFERENCE ON COPYRIGHT HELD AT THE NEW YORK CITY CLUB, NEW YORK, N.Y., NOV. 1-4, 1905, INCLUSIVE, *reprinted in* 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 10 (E. Fulton Brylawski & Abe Goldman eds., Fred B. Rothman & Co. 1976) (1905).

had proved erroneous.¹⁵⁹ He reported that the reality was that many copies were “imported . . . through international scientific service[s].”¹⁶⁰ A publisher’s agent had been “all over the country” to examine collections and found that many works of modern authors had been imported.¹⁶¹ Neither English libraries and public schools nor individuals could obtain an American book without permission of the copyright owner, but, according to Scribner, U.S. publishers suffered “inroads from . . . English publisher[s]” in instances where the sale of 100 to 300 copies of a work might make the difference between a profit or loss on the title.¹⁶² The greater the price for the work, the greater the inducement to purchase abroad, as English publishers would sell works in the United States for less than they would sell them for in their own country.¹⁶³

Hill, for the ALA, countered this argument by stating that the public would be injured if the law were changed as publishers proposed.¹⁶⁴ Because of “a rule which was adopted by the Publishers’ Association[,]” discounts to libraries were drastically reduced, which decreased the number of books a library could purchase.¹⁶⁵ If the library privilege were to be changed, book prices would increase, thereby hurting members of the public and students since libraries would have fewer funds with which to purchase books.¹⁶⁶ He said that the law that included the library exception had worked well since 1891 and should be retained.¹⁶⁷

Stephen H. Olin, counsel to the American Publishers’ Copyright League, testified in the June 1906 Congressional hearings that publishers believed the library privilege did not work well because of the very large numbers in which libraries had

¹⁵⁹ *Id.* at 92.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 93–94.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 97.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

imported copyrighted books.¹⁶⁸ The situation was said to be especially acute with expensive scientific works and those illustrated with plates, because the market for these works was small.¹⁶⁹ In fact, Olin reported instances in which an American publisher declined to publish a book that would have been beneficial to the public as well as to typesetters and publishers, due to the fact that the segment of the public at whom the work was aimed was so small.¹⁷⁰ Olin believed that library imports reduced these markets.¹⁷¹

According to Olin, ordinarily a library needed only a single copy of a book at a time, which justified the proposal to reduce the number of copies imported to one per invoice.¹⁷² If a library needed a second copy, it could then import a second one on a separate invoice.¹⁷³ Colleges and universities already could import an English edition of an English book because it might be better than the American edition.¹⁷⁴ But Olin questioned why was it important for a library to be able to import an English edition of an American work, which was almost always more or equally complete.¹⁷⁵ He referenced continental editions of American works aimed at travelers but which were not allowed to be imported back into England or the United States.¹⁷⁶ He believed that the rule on

¹⁶⁸ Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright, June 6, 7, 8, and 9, 1906, 59th Cong. (1906) (statement of Stephen H. Olin, Counsel, American Publishers' Copyright League), *reprinted in* 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 33, 37-38 (E. Fulton Brylawski & Abe Goldman eds., Fred B. Rothman & Co. 1976) ("The librarians in libraries and the colleges have generally availed themselves of this privilege, being coupled with the privilege to import without the payment of duty, and have imported copyrighted books in those ways in large numbers."). *Id.* at 37.

¹⁶⁹ *Id.* at 37-38.

¹⁷⁰ *Id.* at 38.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

travelers' editions should apply to works of U.S. authors purchased by libraries.¹⁷⁷

In Congressional hearings in December 1906, George Haven Putnam, again speaking for the American Publishers Copyright League, stated that the 4000 to 5000 libraries, on which publishers depended, had enjoyed the importation privilege for sixteen years.¹⁷⁸ Putnam stated that they had exercised the privilege with increasing facility despite the protestations about unfairness by authors and publishers.¹⁷⁹ In fact, publishers tried to convince librarians of the unjustness of the privilege, but librarians disagreed and "would not stop a practice in which they had found a substantial convenience."¹⁸⁰ The proposed revision of the law would reduce the number of copies per invoice that could be imported by libraries and educational institutions from two to one, but libraries could get between 52 and 104 invoices per year without permission of the copyright owner.¹⁸¹

Vice-President of the American Copyright League, Richard R. Bowker, commented that librarians seemed to want the right to import books as a way to control prices.¹⁸² He thought that this was outside the purview of copyright law, since "[t]he right to vend is the right to control sales[.]" and that right belonged to the copyright owner.¹⁸³ Despite Bowker's categorization of all librarians as a unified group, soon there was disagreement among the librarians participating in the conferences.

¹⁷⁷ *Id.*

¹⁷⁸ Arguments before the Committees on Patents of the Senate and House of Representatives, Conjointly on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright, Dec. 7, 8, 9, 10 and 11, 1906, *reprinted in* 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 55–56 (E. Fulton Brylawski & Abe Goldman eds., Fred B. Rothman & Co. 1976).

¹⁷⁹ *Id.* at 55 ("And as far as the present law is concerned, these libraries and individuals can import and they do import editions produced abroad which did not pay anything to the author at all—piratical editions, so called. The authors . . . have protested against such an opening of the door.").

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 55–56.

¹⁸² *Id.* at 79–80.

¹⁸³ *Id.* at 80.

2. *Disagreement Among Librarians*

After the first Librarian of Congress conference in June 1905, the matter was discussed at the ALA annual conference, where it was decided that librarians speaking at future Librarian of Congress conferences would be speaking for themselves and not for the association.¹⁸⁴ This was a result of protests among librarians, some of whom disagreed with the proposed amendment to reduce the number of imports per invoice to one, which the representatives of ALA had found acceptable.¹⁸⁵ Bernard C. Steiner, Librarian at the Enoch Pratt Library in Baltimore, testified that it was crucial for libraries to import two copies per invoice, since often one copy was needed for the general collection and one for the reference collection, or for a replacement copy.¹⁸⁶ He then detailed the special role of the public library in America:

The public library is a part of the public educational institutions of the country. It is an institution for the public culture. It is supported by the public. It is given special privileges by the public. It is a tax-supported institution. It is a branch of the municipal government in many cases. . . .

Therefore, the Government quite properly gave special privileges to the public library, and among those special privileges was the privilege of importing two copies for use, and not for sale, of all books which are published in any part of the world.¹⁸⁷

Moreover, a title might be published in England two months before it was published in America, and it could be published under different titles in each country.¹⁸⁸ It was difficult to tell whether a U.S. publisher would publish a book or not, so a library might purchase the British edition some weeks or months before publication of an American edition was even announced.¹⁸⁹ For books by American authors, Steiner identified another

¹⁸⁴ Arguments before the Committees on Patents of the Senate and House of Representatives, Conjointly on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright, Dec. 7, 8, 9, 10 and 11, 1906, *reprinted in* 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 59 (E. Fulton Brylawski and Abe Goldman eds. 1976).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 61–62.

¹⁸⁷ *Id.* at 62

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

complication: the question of determining who was an American author.¹⁹⁰ Were only citizens of the United States American authors?¹⁹¹ Or someone domiciled in this country?¹⁹² (For example, did Rudyard Kipling become an American author when he lived in Vermont?¹⁹³) Or was an American expatriate author who did not return to this country a foreign author?¹⁹⁴ With these complications, Steiner thought it would be unfair to expect librarians to search immigration and naturalization records to make this determination.¹⁹⁵

Steiner further stated that not all foreign language books were foreign works.¹⁹⁶ He reported that one of the largest Yiddish publication centers in the world was New York City.¹⁹⁷ German language books were “printed in [both] New York and Chicago[,]” and the largest Lithuanian publisher in the world was based in Plymouth, Pennsylvania.¹⁹⁸

Steiner also noted that it was difficult for librarians to determine whether a work was copyrighted in the United States.¹⁹⁹ Should librarians have to correspond with the U.S. Copyright Office to make this determination? Books printed abroad do not contain a notice of copyright, so that could not be relied upon as the determinate.²⁰⁰ Customs officials had difficulty judging the copyright status of foreign works, not because of any “lack of . . . intelligence, but because of the enormous complexity of the situation.”²⁰¹ If permission of the copyright owner were required before libraries could import books printed abroad, librarians would encounter significant difficulties.²⁰² First, the proprietor

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 62–63.

¹⁹⁷ *Id.* at 63.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

could refuse to consent, and second, it was often difficult to locate and communicate with the copyright owner, who may or may not be the author of the work.²⁰³

Steiner further stated that the quality of books by American authors that were published in Britain was often superior for library purposes than were U.S. produced copies.²⁰⁴ Books produced in England frequently had more plates, more features, such as appendices, and often were printed on better quality paper.²⁰⁵ For some U.S. copyrighted works, the only copies produced in the United States were ten or twenty cent paperback editions, but a library could obtain a copy of the same work in an English edition of superior quality.²⁰⁶ Moreover, Steiner reported that there were books in England which could not be procured either in America or England but that could be found in Europe.²⁰⁷ He questioned whether libraries should be barred from procuring these books because "the American copyright proprietor does not care to publish a decent edition[.]"²⁰⁸

H.C. Wellman of the Public Library of Springfield, Massachusetts, testified that American authors lost nothing when libraries purchased English produced copies.²⁰⁹ Wellman noted that authors had the right to sell their copyrights to a U.S. publisher.²¹⁰ He further noted that while a library that imported copies of a work from England decreased sales of U.S. copies, the author's royalty was not reduced, because he or she received royalties from the sale of the English book.²¹¹ Wellman stated that

²⁰³ *Id.*

²⁰⁴ *Id.* at 64.

²⁰⁵ *Id.* ("Books have been published in England with more plates, with more appendices, on heavier paper, with better binding than the American edition. Is the American public to be deprived of the use of these editions through the public libraries?").

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 70 ("The authors whom I have consulted have told me, without exception, that it made not a penny's worth of difference to them; that they got their royalty whether the copy was bought abroad or bought in this country.").

²¹⁰ *Id.*

²¹¹ *Id.*

to some extent, American publishers were able to set their prices based on prices advertised by English publishers.²¹² In fact, according to Wellman, a representative from Longman Publisher and Bookseller had stated: "We will guarantee to supply you our books, either directly or through book agents, as cheaply as you can import them."²¹³ Wellman reported that American booksellers typically offered libraries a ten percent discount from the net price, and that this discount was not likely to increase, since the American Publishers Association announced in *Publishers Weekly* that it would put out of business anyone who offered deeper discounts to libraries, no matter the size of the purchase.²¹⁴

William P. Cutter, Librarian at the Forbes Library in Northampton, Massachusetts, indicated that he represented public libraries across the country in cities such as Chicago, St. Louis, Pittsburgh, Minneapolis, and Los Angeles, as well as the libraries of a number of colleges and universities.²¹⁵ Cutter discussed one of the difficulties that libraries would face if the importation allowance was restricted to authorized copies only—those imported with permission of the copyright owner.²¹⁶ He stated that

²¹² *Id.* at 71.

²¹³ *Id.*

²¹⁴ *Id.* at 72–73.

[T]he American Publishers' Association and the American Booksellers' Association . . . organized to monopolize the market for copyrighted books. That this combination existed on July 11, 1905, is evidenced by the opinion of Justice Ray in the case of *Bobbs-Merrill v. Strauss* [139 F. 155, 170–71 (S.D.N.Y. 1905)] in which the existence of such a combination is acknowledged to exist by both parties . . .

Id. at 74.

²¹⁵ Arguments before the Committees on Patents of the Senate and House of Representatives, Conjointly, on the Bills S. 6330 and H.R. 19853, to Amend and Consolidate the Acts Respecting Copyright, June 6, 7, 8, and 9, 1906, *supra* note 168, at 62. Bernard C. Steiner, representing the Library Copyright League, stated that there were 200 libraries that protested ALA's agreement to the one copy importation limitation. Arguments before the Committees on Patents of the Senate and House of Representatives, Conjointly on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright, Dec. 7, 8, 9, 10 and 11, 1906, *supra* note 184, at 61.

²¹⁶ Arguments before the Committees on Patents of the Senate and House of Representatives, Conjointly, on the Bills S. 6330 and H.R. 19853, to Amend and

if a large crate of books were imported from abroad with only one book per invoice, and that crate contained one book that was copyrighted in the United States but which was printed in England and contained no notice of copyright, the whole shipment could be seriously delayed if customs officials discovered that one book in the shipment.²¹⁷ He also testified that officials would send the whole crate of books into public storage, and the entire shipment would be in danger of being destroyed.²¹⁸ Cutter stated that the librarian would then be forced to show the Secretary of the Treasury "that he was not guilty of attempting to import that book illicitly."²¹⁹ There were also issues involving individuals who sought to import books for their own personal use.

3. *Individuals and Importation*

William Allen Jenner of New York City testified as an individual, although he was also an attorney.²²⁰ He stated that individuals should have the right to import a book or two for personal use as permitted under the 1891 Act.²²¹ Jenner believed there was no right more innocent than an individual contacting a foreign bookseller to request that a copy of a work be sent to him for personal use and not for resale.²²² According to Jenner, the bill proposed in March 1908 conceded the right of libraries, colleges, and other institutions of higher learning to import books, and also allowed travelers to bring in as many foreign-made copies as they could carry in personal baggage.²²³ Individuals who paid a twenty-five percent duty could bring in unlimited numbers of copies.²²⁴

Consolidate the Acts Respecting Copyright, June 6, 7, 8, and 9, 1906, *supra* note 168, at 63.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Hearings before the Committees on Patents on the Senate and House of Representatives on Pending Bills To Amend and Consolidate the Acts Respecting Copyright, Mar. 26, 27 and 28, 1908, *reprinted in* 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 120 (E. Fulton Brylawski & Abe Goldman eds., 1976).

²²¹ *Id.* at 121-22.

²²² *Id.*

²²³ *Id.* at 121.

²²⁴ *Id.*

What would be prohibited under the bill, however, was the right to order a copy by mail without permission of the copyright holder, and he thought that this prohibition would negatively impact students and those who could not afford to travel abroad.²²⁵ According to Jenner, permitting individual importation through the mail would not harm American authors.²²⁶ However, it could affect publishers by keeping prices down.²²⁷

Jenner disagreed with Putnam, the representative of the Publishers Copyright League, and said that American publishers should be able to tailor English books for the American audience.²²⁸ “Do not include in your bill a single word which will make it possible for any American to degrade himself by soliciting that permission or by paying any amount, I care not how small it be, for the privilege of doing that[.]”²²⁹ The bill, which Jenner believed was a “pervasive and synthetic scheme” for the profit of a few publishers and booksellers to control prices during the term of copyright, would turn Americans who want to import a single copy for personal use into smugglers.²³⁰ Even with the disagreements and discussions, the bill would become a law complete with a manufacturing clause.

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

The manufacturing clause of the 1909 Act was the product of a compromise. The library exception to the importation ban was not repealed, but was reduced somewhat.²³¹ The number of copies that could be imported per invoice was reduced from two to one, but libraries were not required to get authorization from the copyright owner prior to importation.²³² The statute continued to prohibit importation of pirated copies, but included on the free list (and thus free from any duty) were:

²²⁵ *Id.* at 121.

²²⁶ *Id.* at 122.

²²⁷ *Id.* at 122–23.

²²⁸ *Id.* at 124.

²²⁹ *Id.*

²³⁰ *Id.* at 125.

²³¹ Act of Aug. 5, 1909, ch. 6, § 516, 36 Stat. 11 (1909).

²³² *Id.*

Books, maps, music, photographs, etchings, lithographic prints and charts specially imported, not more than two copies in any one invoice, in good faith, for the use and by the order of any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use and by order use of any college, academy, school, or seminary of learning in the United States, or any state or public library and not for sale, subject to such regulations as the Secretary of the Treasury shall prescribe.²³³

The free list also included books and pamphlets printed in foreign languages, books and music in raised print for use by the blind,²³⁴ along with books, maps, music, photographs, and other works that were printed more than twenty years before the date of importation.²³⁵ Librarians complained that the importation provisions were made unnecessarily onerous by Treasury regulations that intended to ensure the identification of the actual copies imported.²³⁶ Actual library practice was to use library agents who acted for the library, and these agents typically made the oath and presented evidence of authorization by the library to customs officials.²³⁷ The librarian was required to certify receipt of the individual copy before it could be cleared from the custom house.²³⁸ Following passage of the 1909 Act, and despite the disagreements among librarians about whether the library privilege should be changed, the editors of *Library Journal* published the following statement: “the new copyright bill . . . does not materially affect the interests of the library profession.”²³⁹

²³³ *Id.* at § 519.

²³⁴ *Id.* at § 518.

²³⁵ *Id.* at § 517.

²³⁶ RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW: BEING A SUMMARY OF THE PRINCIPLES AND PRACTICE OF COPYRIGHT WITH SPECIAL REFERENCE TO THE AMERICAN CODE OF 1909 AND THE BRITISH ACT OF 1911, at 279 (Houghton Mifflin Co. 1912).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 34 LIBR. J. 94 (Mar. 1909). How one could take this position is somewhat puzzling. Both academic and public libraries were now restricted to importing

E. Repeal of the Importation Clause—1986

The manufacturing clause continued into the Copyright Act of 1976²⁴⁰ and banned the importation of protected English language non-dramatic literary works unless they were manufactured in the United States or Canada.²⁴¹ Authority of the copyright owner was not required for either individuals or libraries to import copies, and the number of copies that could be imported was raised to five for the purpose of library lending, unless the copies violated the systematic reproduction or distribution provision of section 108(g)(2).²⁴² Section 108(g)(2) relates to the copying that a library is doing for a user under section 108(d). Libraries are permitted to make single copies of articles, book chapters, etc., at the request of a user if the librarian has no knowledge that the user is going to use the copy for other than fair use purposes and the copy becomes the property of the user. Section 108(g)(2) places another condition on this copying: it may not be systematic copying of either single or multiple copies.

The manufacturing clause was a barrier to the country's adherence to the Berne Convention, but the statute contained a built-in 1986 sunset date.²⁴³ Thus, the manufacturing clause passed into the annals of history in that year.

one copy of a work per invoice which had an administrative and clerical impact on libraries.

²⁴⁰ 17 U.S.C. §§ 601–603 (1982).

²⁴¹ *Id.* at § 601.

²⁴² *Id.* at § 602(a)(3). Libraries are permitted to make copies under section 108 if those copies constitute “isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library . . . engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d)[.]” *Id.* at § 108(g). Subsection (d) states that these materials are one article from a periodical issue or other copyrighted collection or a small part of a copyrighted work. *Id.* at § 108(d).

²⁴³ 17 U.S.C. § 601(a). The Berne Convention is an international agreement on copyright first adopted in the 1886. The United States did not become a signatory until 1987.

IV. REPRODUCTION BY LIBRARIES AND THEIR USERS

Scholars and researchers have long reproduced portions of copyrighted works to use for their own personal use or research. For many years, such copying could be done by the individual scholar by hand or by hiring a transcription service to copy the item for the user.²⁴⁴ In 1909, there were some early reproduction technologies, but reproduction was discussed only in relation to music in the conferences and hearings on the Act.²⁴⁵ The reproduction technologies discussed below are those for reproducing text. There were other processes used for reproducing works of art, graphics, and maps, but they are outside the scope of this article.

A. *Early Reproduction Techniques*

Although one might assume that carbon paper was the earliest form of office copying, it was not. In fact, carbon paper did not gain general acceptance for office copying until the development of greaseless carbon paper in the 1870s.²⁴⁶ Letterpresses, however, had been in use for more than 125 years in the United States by 1909.²⁴⁷ Invented by Scottish inventor James Watt, better known for the steam engine, the first letterpress was sold in America in 1782.²⁴⁸ Used primarily to duplicate letters in office situations, a variety of companies produced and sold presses in this country.²⁴⁹ Thomas Jefferson even owned several.²⁵⁰ By the mid-nineteenth century, letterpresses were generally accepted in business and by the courts.²⁵¹

The letterpress required an original document written in copying ink and a sheet of paper cut to the appropriate size.²⁵² To copy, the sheet was wetted with either patented moisturizing fluid

²⁴⁴ Rhodes & Streeter, *supra* note 47, at 7.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 8.

²⁴⁸ *Id.* at 10.

²⁴⁹ *Id.*

²⁵⁰ Rhodes & Streeter, *supra* note 47, at 11.

²⁵¹ *Id.* at 8.

²⁵² *Id.* at 9.

or plain water and blotted to remove excess water.²⁵³ The moistened paper was then placed over the written surface with a clean sheet of paper or cloth on top.²⁵⁴ The layered package was then pressed in a rolling or screw press, which enabled the ink to wick into the back of the copying paper.²⁵⁵ The copy was then removed and pressed flat, as was the original.²⁵⁶ It was possible to make multiple copies by inserting sheets of oiled paper in front of and behind tissue on which the copy was to be reproduced and placed in the letterpress.²⁵⁷ It could be repeated as necessary to get the required number of copies.²⁵⁸ Thus, copyrighted materials could be reproduced, but only after the original was copied by hand with copying ink.²⁵⁹

The use of stencil processes for copying, in combination with letterpresses, dates to around 1811.²⁶⁰ By 1872, the earliest commercially successful stencil duplication was developed by Eugenio du Zuccato and was called the Papyrograph.²⁶¹ The process, described as “electro-chemical printing,” used a varnished iron plate on which one wrote with a metal stylus to expose the iron under the sheets of thin paper that had been moistened with potassium ferrocyanide solution.²⁶² These sheets were placed on the iron over which a copper plate and moderate pressure was applied.²⁶³ There were a variety of file plate processes developed toward the end of the nineteenth century. By 1880, Thomas Edison had patented a method of making stencils by placing a paper over a bed of needle points or on a grooved metal plate.²⁶⁴

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Early Office Machines, *Antique Copying Machines*, available at http://www.officemuseum.com/copy_machines.htm (last visited Apr.10, 2010) (on file with the North Carolina Journal of Law & Technology).

²⁵⁸ *Id.*

²⁵⁹ Rhodes & Streeter, *supra* note 47, at 9.

²⁶⁰ *Id.* at 128.

²⁶¹ *Id.* at 129.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Rhodes & Streeter, *supra* note 47, at 133.

By 1894, an Edison Mimeograph typewriter was on the market which had steel type and was specifically designed to produce stencil sheets for use with file plates.²⁶⁵

The best known file plate process was the Mimeograph.²⁶⁶ Albert Blake Dick, a Chicago lumber dealer, acquired the Edison file plate patent in 1887.²⁶⁷ He combined it with a flat bed duplicator that he had designed and called it the Mimeograph.²⁶⁸ It became popular especially after typewriter stencils came onto the market, but it still was a “wet” process.²⁶⁹ Libraries and library users could take advantage of the Mimeograph by typing stencils and reproducing copies.²⁷⁰ Researchers and scholars could use Mimeograph copiers to reproduce and distribute papers at scholarly conferences and to duplicate copyrighted articles. It still required the typing of the materials onto stencils from the original work, however.²⁷¹

Considered to be the simplest and least expensive office copying process were gelatin duplicators, introduced in 1878.²⁷² Commonly called Hectographs, they were made from a mixture of gelatin, glycerin, and sometimes glue.²⁷³ To prevent mold, carbolic or salicylic acid was sometimes added to the mixture.²⁷⁴ Hectographs were created by “writing or typing an original document in hectographic ink and allowing it to dry without blotting. It was then pressed faced down on the hectographic surface, which had been moistened with water, and allowed to remain there a few minutes for some of the ink to transfer to the gelatin.”²⁷⁵ By the end of the century, lithography (the process of writing on a thin stone plate from which the transfer is made to an elastic substance, the other plate) had been replaced by the

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 134.

²⁶⁹ Rhodes & Streeter, *supra* note 47, at 134.

²⁷⁰ *Id.* at 134–35.

²⁷¹ *Id.*

²⁷² *Id.* at 137.

²⁷³ *Id.* at 138.

²⁷⁴ Rhodes & Streeter, *supra* note 47, at 138.

²⁷⁵ *Id.* at 139.

hectograph and stencil processes.²⁷⁶ The only mention of reprography during either the conferences or hearings for the 1909 Act involved the Hectograph. J.L. Tindale, a member of the Executive Committee of the Music Publishers Association, spoke on behalf of composers.²⁷⁷ He stated that the composer owned the right to copy regardless of the method of copying, and then listed several methods ranging from pen and ink to hectograph, and whether it consisted of round notes on paper, raised characters for Braille, or punched paper holes for player pianos.²⁷⁸ However, this was the only mention of reproduction, even though some libraries already employed various reproduction technologies.

With the development of photography, different systems for photographic reproduction were created. The development of photosensitive paper in 1840 was crucial to the development of this copy technology.²⁷⁹ Reflex copying was invented by J. Hart Player in 1896.²⁸⁰ Also called Reflectography or Reflexion copying, the process used light reflected through a sheet of photographic paper to produce a negative image that was reflected back from the original document with which it was in contact.²⁸¹ The products of this process were known as “playertypes,” which were negative images from which positive copies could be produced by contact printing exposure through the back of the photo paper.²⁸² Reflex copying was the first technology that could produce copies from opaque originals (such as books and journals) as well as individual

²⁷⁶ *Id.* at 148.

²⁷⁷ Arguments before the Committees on Patents of the Senate and House of Representatives, Conjointly on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright, Dec. 7, 8, 9, 10 and 11, 1906, *supra* note 178, at 227–29.

²⁷⁸ *Id.*

²⁷⁹ See Graphic Comm Central, *Duplicating in the Year B.C.—Before (Xerographic) Copies*, available at <http://teched.vt.edu/GCC/HTML/PrintingsPast/BeforeCopies.html> (on file with author).

²⁸⁰ Rhodes & Streeter, *supra* note 47, at 158.

²⁸¹ *Id.* at 158–59.

²⁸² *Id.* at 158.

documents.²⁸³ It could also be used to produce library catalog cards.²⁸⁴

Microphotography was also an important technological development that affected library reproduction. Microphotography was invented in the 1850s,²⁸⁵ and by 1887, microfilm was touted as a method for preservation of manuscripts and other library materials.²⁸⁶ Originally one viewed microfilm by using a magic lantern device.²⁸⁷ A microfilm camera was patented in 1891,²⁸⁸ and microfilm readers followed.²⁸⁹ Microfilm could be used for reproducing books and materials in libraries, and it tended to be used for archival purposes rather than for providing copies for users.²⁹⁰

Libraries permitted patrons the use of technologies such as photography to reproduce materials around the turn of the twentieth century.²⁹¹ Many libraries were using these technologies immediately before and after the passage of the 1909 Act. For example, as reflected in the 1909–10 annual report of the Board of Directors of the Chicago Public Library, the Board discussed its desire to obtain a means by which photographic facsimiles could be made of materials that could not leave the library.²⁹² The Los Angeles Public Library began using the mimeograph machine in

²⁸³ *Id.* at 159.

²⁸⁴ *Id.*

²⁸⁵ University of California, Southern Regional Library Facility, *The History of Microfilm: 1839 to the Present, Chronology of Microfilm Development*, available at <http://www.srlf.ucla.edu/exhibit/text/Chronology.htm> (last visited Apr. 4, 2010) (on file with the North Carolina Journal of Law & Technology).

²⁸⁶ *Id.*

²⁸⁷ A magic lantern is an early type of hand-held projector for showing still pictures from transparent slides. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1995).

²⁸⁸ *Id.*

²⁸⁹ D.H. Litchfield & M.A. Bennett, *Microfilm Reading Machines, Part III*, 34 SPECIAL LIBR. 123, 127–28 (1943).

²⁹⁰ *Id.*

²⁹¹ See Clapp, *supra* note 48 and accompanying text.

²⁹² THIRTY-EIGHTH ANNUAL REPORT OF THE BOARD OF DIRECTORS OF THE CHICAGO PUBLIC LIBRARY, 1909–10, at 21 (1911).

1906;²⁹³ from 1897 to 1898, the San Francisco Public Library acquired and used a linotype machine for printing, but the annual report makes no mention of copying for patrons using it.²⁹⁴ The Boston Public Library purchased a linotype machine in 1894 to reproduce catalog cards and other printed publications;²⁹⁵ by 1902, it was reported that “[t]he photograph room has been supplied with the necessary apparatus for photographing books, engravings and maps,”²⁹⁶ presumably for patrons as well as for use within the library.

Introduction of the photostatic camera was the dawn of modern reproductive technology, and its invention at almost the exact time of the 1909 Act accelerated advancement in publishing and the ability to reproduce copyrighted works for users in libraries.²⁹⁷

B. *Rapidly Developing Technology*

With the development of photostatic copying, libraries began to add the equipment to their facilities. By 1912, just three years after passage of the 1909 Act, the Library of Congress acquired a Photostat machine and offered a public photocopying service.²⁹⁸

Because early machines were quite large and occupied ten to twelve square feet for the equipment and operator,²⁹⁹ only large, well-funded libraries could afford them. Between 1909 and 1937, photostatic equipment became smaller and more affordable, and since so many libraries had made photostatic equipment available for patrons to use to reproduce copyrighted works, the Gentlemen’s Agreement on copyright and fair use was needed.

²⁹³ CHARLES F. LUMMIS, ANNUAL REPORT, LOS ANGELES PUBLIC LIBRARY FOR THE YEAR ENDING NOVEMBER 30, 1905, at 44 (1906).

²⁹⁴ REPORT OF THE BOARD OF TRUSTEES OF THE SAN FRANCISCO FREE PUBLIC LIBRARY FOR THE FISCAL YEAR ENDING JUNE 30, 1897, at 17–18 (1897); REPORT OF THE BOARD OF TRUSTEES OF THE SAN FRANCISCO FREE PUBLIC LIBRARY FOR THE FISCAL YEAR ENDING JUNE 30, 1898, at 13 (1898).

²⁹⁵ ANNUAL REPORT OF THE TRUSTEES OF THE PUBLIC LIBRARY OF THE CITY OF BOSTON 8–9 (1895).

²⁹⁶ FIFTIETH ANNUAL REPORT OF THE TRUSTEES OF THE PUBLIC LIBRARY OF THE CITY OF BOSTON 27 (1902).

²⁹⁷ *See generally id.*

²⁹⁸ Clapp, *supra* note 48, at 1 (citation omitted).

²⁹⁹ Rhodes & Streeter, *supra* note 47, at 159.

The Gentlemen's Agreement was a negotiated agreement that established acceptable limits on the photographic reproduction of copyrighted materials for scholars and researchers.³⁰⁰ Generally, the agreement permitted libraries to make a single copy of portions of copyrighted works for a patron in lieu of lending the printed copy or of providing transcription services after two conditions were satisfied: (1) notice was provided to the user that she was not exempt from copyright liability if she misused the reproduction, and (2) the reproduction was furnished without any profit to the library.³⁰¹ Libraries followed this agreement until 1978, when the Copyright Act of 1976 became effective and section 108 of that Act embodied many of the concepts and ideas from the Gentlemen's Agreement.³⁰²

V. CONCLUSION

It is interesting to note that disagreements between publishers and librarians were not solely a product of the photocopying debates over the 1976 Copyright Act. Although in 1909 these disagreements were not over photocopying, they seem to have been somewhat acrimonious, thus setting the stage for a strident debate over the 1976 Act.³⁰³ Publishers depend on libraries as a significant market for their products. Likewise, libraries are

³⁰⁰ See generally Mary Rasenberger & Christopher Weston, *Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning*, in THE SECTION 108 STUDY GROUP REPORT app. K at 158–63 (2008) available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>. The Gentlemen's Agreement on library duplication served as the standard of acceptable conduct for duplication of copyrighted works by libraries until passage of the Copyright Act of 1976. It was a voluntary, non-binding agreement negotiated between the National Association of Book Publishers and the Joint Committee on Materials for Research of the American Council of Learned Societies. The Agreement was the authority on what constituted fair use for reproduction of copyrighted works by libraries for their users. *Id.*

³⁰¹ *The Gentlemen's Agreement and the Problem of Copyright*, 2 J. DOC. REPROD. 31 (1939).

³⁰² Section 108 contains a number of exceptions to the exclusive rights of the copyright holders specifically for libraries and archives that meet certain requirements. Some of these relate to reproduction and distribution of copyrighted works at the request of a user.

³⁰³ Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541.

dependent on publishers for the books and materials they acquire for their collections. Perhaps the tension is inevitable between these groups due to their different interests and values in the copyright arena. The digital environment seems to have continued and perhaps even exacerbated disagreements between librarians and publishers.

