

its judicial responsibility when it acts even in indirect contravention of that law.⁶⁹ Furthermore, although it is not the court's general responsibility to be the keeper of public morality, it is the court's equitable responsibility to determine, even in the limited context of a copyright infringement action, what is and what is not fraudulent.⁷⁰ A refusal to accept that responsibility is to allow illegal conduct to continue, and, as is the case in *Belcher*, to continue with the court's blessing.⁷¹

The court in *Belcher*, if it accepts the district court's finding of fraud with respect to the sixth publication,⁷² had a number of alternative ways to determine whether or not such material should be protected by copyright. Although its apparent confusion of the constitutional theory with the clean hands doctrine clouded its reasoning, its ultimate conclusion appears unsupportable and its decision is one which compromises the integrity of the judicial system.

JEAN S. PERWIN

Copyright—Photocopying as Fair Use—*Williams & Wilkins Co. v. United States*.¹—Plaintiff, Williams & Wilkins Company, a publisher of medical journals, brought a copyright infringement action against the United States.² Specifically, plaintiff alleged that the Department of Health, Education and Welfare, through the National Institutes of Health (NIH) and the National Library of Medicine (NLM), infringed plaintiff's copyrights in four of its medical journals.

The facts reveal that the government libraries had distributed the articles free of charge and on a no-return basis. Nevertheless, they generally enforced their self-imposed regulations of limiting requests to fifty pages and to a single copy of a journal article. The utilization of this regulated photocopying resulted in the yearly

⁶⁹ See note 46 *supra*.

⁷⁰ There seems to be a conflict of authority over whether the determination of fraud is outside the scope of a copyright infringement action. Professor Nimmer states that since an allegation of fraudulent content necessarily puts in issue facts extraneous to the work itself, it seems proper to regard such facts as insufficient to constitute a defense in a copyright infringement action even though it may constitute grounds for rendering the plaintiff liable in a separate proceeding. M. Nimmer, Copyright § 36, at 146.29 (1973). However, deceptive and misleading advertising is specifically listed as an affirmative defense to copyright infringement in 9 Am. Jur. Trials, Copyright Infringement Litigation § 78, at 383 (1965).

⁷¹ 486 F.2d at 1090.

⁷² See note 49 *supra*.

¹ 487 F.2d 1345 (Ct. Cl. 1973), cert. granted, 94 S. Ct. 2602 (1974).

² Suit was brought pursuant to 28 U.S.C. § 1498(b) (1970), which provides that in the event of copyright infringement by the United States "the *exclusive* remedy of the owner of such copyright shall be . . . recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages . . ." [Emphasis added.]

distribution of over 200,000 copies of articles in medical and scientific journals, with the average article being ten pages long.³ Most of the requests were from government researchers, though some were from private or commercial organizations.

On the basis of the foregoing facts the Commissioner to the Court of Claims held that the library's unauthorized photocopying of plaintiffs copyrighted articles constituted actionable infringement.⁴ But on review, the Court of Claims reversed the decision of the Commissioner and HELD: on the basis of all the elements in the case, the photocopying of copyrighted articles in medical journals by public, nonprofit government libraries was fair use, and as such did not amount to an infringement of copyright.⁵

This note will analyze the traditional elements of fair use. The different approaches used by the Commissioner and the reviewing Court of Claims will then be contrasted in order to determine future treatment of fair use in light of the "reprographic revolution."⁶

The Copyright Act of 1909⁷ is presently being put to the test by the "reprographic revolution." The outdated Copyright Act is given present effectiveness through the judicially created doctrine of fair use. This doctrine has been in existence since 1841,⁸ and it has tempered the exclusive rights granted by the Copyright Act.⁹ Although no mention of fair use is made whatsoever in the statute, the Copyright Office has recommended statutory recognition of the doctrine since 1961.¹⁰ Six years later, the House passed a bill for the general revision of the copyright laws,¹¹ one of whose provisions was to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."¹² Congress was grap-

³ 487 F.2d at 1348-49.

⁴ *Williams & Wilkins Co. v. United States*, 172 U.S.P.Q. 670, 679 (Ct. Cl. 1972). See also Note, 25 Vand. L. Rev. 1093 (1972); Note, 51 Texas L. Rev. 137 (1972) for analyses of the Commissioner's decision.

⁵ 487 F.2d at 1362.

⁶ Project, *New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A.L. Rev. 931, 950 (1968) [hereinafter cited as Project]. The ability to produce single copies, as distinguished from the need to make multiple copies, is the major feature of the reprographic revolution. *Id.* at 941.

⁷ 17 U.S.C. §§ 1 et seq. (1970).

⁸ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (No. 4901) (C.C.D. Mass. 1841). "The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs." *Id.*

⁹ 17 U.S.C. § 1 (1970), which provides in part: "Any person entitled thereto . . . shall have the *exclusive* right: (a) To print, reprint, publish, *copy*, and vend the copyrighted work" [Emphasis added.]

¹⁰ See First Annual Report of the Committee to Investigate Problems Affecting Communication in Science and Education, 10 Copyright Soc'y Bull. 1, 14-15 (1962).

¹¹ H.R. 2512, 90th Cong., 1st Sess. (1967). The bill before the Senate was S. 543, 91st Cong., 1st Sess. (1969).

¹² H.R. Rep. No. 83, 90th Cong., 1st Sess. 32 (1967). See also Project, *supra* note 6, at 953.

pling with a doctrine that is "entirely equitable and is so flexible as virtually to defy definition."¹³

Nevertheless, the courts have come to accept the following weak definition:

"Fair use" may be defined as a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent. Though technically an infringement of copyright, it is allowed by law on the ground that the appropriation is *reasonable* and *customary*.¹⁴

This definition, however, offers little guidance, in that it merely defines "fair use" as "reasonable and customary." A fact question is presented, and the judicial considerations have been capsulized by section 107 of the House bill into four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and the substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁵

These four factors were accepted by both the Commissioner¹⁶ and by the Court of Claims on review in *Williams & Wilkens*.¹⁷ But after listing the four factors, the two opinions diverged. According to the Commissioner, "[w]hile these criteria are interrelated and may vary in relative significance, the last one, *i.e.*, the competitive character of the use, is often the most important."¹⁸ The reviewing court, however, took a much broader position, and went beyond the four-fold test:

In addition, the development of "fair use" has been influenced by some tension between the direct aim of the copyright privilege to grant the owner a right from which he can reap financial benefit and the more fundamental purpose of the protection "To promote the Progress of Science and the useful Arts."¹⁹

This early divergence in views toward photocopies foretold the opposing conclusions that would be reached.

All of the factors of fair use enunciated by the House bill in

¹³ *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

¹⁴ *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963) (emphasis added). See also *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966); *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664, 666 (7th Cir. 1950).

¹⁵ H.R. 2512, 90th Cong., 1st Sess. § 107 (1967). See also 2 M. Nimmer, Copyright § 145, at 646 (1973).

¹⁶ 172 U.S.P.Q. at 679.

¹⁷ 487 F.2d at 1352.

¹⁸ 172 U.S.P.Q. at 679. But see Comment, 1969 Duke L.J. 73, 86-95, which considered diminution of demand and nature of the use as the primary components of fair use.

¹⁹ 487 F.2d at 1352 (emphasis added), quoting U.S. Const., art. 1, § 8.

section 107 measure the tension between economic reward and unhampered dissemination of knowledge. The latter part of the balance is reflected primarily by the first two factors, namely, the purpose of the use and the nature of the copyrighted work. As such, "the privilege [of fair use] has been applied to works in the fields of *science, law, medicine, history and biography.*"²⁰ The rationale behind permitting the fair use privilege in these areas is that the distribution of such materials would "serve the public interest in the free dissemination of information and . . . their preparation requires some use of prior materials dealing with the same subject matter."²¹ Nevertheless, the publishers of scientific articles have argued that because of the very nature of their journals, they are the ones most hurt by photocopying.²² The rationale is that since subscription lists have traditionally been small for a company like Williams & Wilkins, the loss of even a few subscribers may force a technical journal out of business.²³ The argument is basically an economic one—sufficiency of reward to authors and their publishers—and its proponents strive for the same goal as do those urging unhampered dissemination of knowledge.

The interest of copyright owners has been succinctly stated by the Supreme Court in *Mazer v. Stein*:²⁴

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."²⁵

As a result of this reasoning, the scope of permissible fair use is

²⁰ *Rosemont*, 366 F.2d at 307 (emphasis added).

²¹ *Id.* At this point it should be noted that no distinction can properly be made between researchers photocopying for their own use and libraries photocopying material for the researchers. Here, the libraries are not selling the photocopies at a profit, and the same purpose behind the photocopying is achieved whether the researchers do it themselves or the library does it for them. In either event, it has been argued that the library should not be caught in the middle between the copyright owner and the ultimate user in an infringement action. Furthermore, the library should not be liable even though library photocopying is *not* fair use. Pforzheimer, *Historical Perspective on Copyright Law and Fair Use, Reprography and Copyright Law* 18, 32-33 (1964) [hereinafter cited as Pforzheimer].

²² Passano, *How Photocopying Pollutes Sci-Tech Publishing*, 197 *Publishers' Weekly*, 63-64 (1970).

²³ Project, *supra* note 6, at 944. But see Joint Libraries Committee on Fair Use in Photocopying, Report on Single Copies, 9 Copyright Soc'y Bull. 79, 81 (1962), where the Committee's findings of fact included a determination that the present demand for photocopies can be satisfied without inflicting measurable damage on publishers and copyright owners. Furthermore, improved copying processes will not materially affect the demand for single copy library duplication for research purposes. As such, the Committee recommended that it be library policy to fill an order for a single photocopy of any published work or any part thereof.

²⁴ 347 U.S. 201 (1954).

²⁵ *Id.* at 219.

tempered by the last two factors listed in section 107, namely, the substantiality of material used and the effect on a copyright owner's potential market.

The factor of substantiality of material used has received wide judicial sponsorship.²⁶ At the outset it would seem that since a photocopy makes an exact duplicate, a photocopied article would be the product of wholesale copying.²⁷ The reviewing court in *Williams & Wilkens* responded by rejecting the dicta in *Leon v. Pacific Telephone & Telegraph Co.*²⁸ that wholesale copying of a copyrighted work could never be fair use. The Court concluded that "the extent of the copying is one important factor, but only one, to be taken into account, along with several others."²⁹ As such, it was not overwhelmed by the more than two million photocopies which NLM and NIH made in a single year.³⁰ Instead, because of the vast numbers served by the photocopies, the court was more influenced by the libraries' system of limitations which confined the duplication to the personal use of scientific personnel.³¹ In effect, the purpose and character of the use was permitted to moderate the factor of substantiality of use, the court being unwilling to adopt a per se rule of unfair use even in the case of wholesale copying.

The court noted with approval the libraries' policy of restricting copying to articles of less than fifty pages.³² Presumably the libraries' consideration was economic in nature—it became cheaper to purchase the entire journal rather than photocopy such a large number of pages. Precisely this kind of thinking highlights the heart of this case and future photocopying cases: whether publishers will *in fact* be so financially hurt by the reprographic revolution as to justify a ban on the privilege of fair use surrounding photocopies altogether.

The issue of financial detriment calls to mind the last of the four factors of fair use listed in section 107, namely, the effect of the use on a copyright owner's potential market for his work. The Commissioner's heavy reliance on this factor³³ was grounded on

²⁶ "One cannot copy the substance of another's work without infringing his copyright." *Benny v. Loew's Inc.*, 239 F.2d 532, 537 (9th Cir. 1956), *aff'd*, 356 U.S. 43 (1958). See also *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 350 (S.D. Cal. 1955).

²⁷ The Commissioner reached this same conclusion, 172 U.S.P.Q. at 679, and the reviewing court correctly did not seek to attach a different label.

²⁸ 91 F.2d 484, 486 (9th Cir. 1937).

²⁹ 487 F.2d at 1353. Immediately after stating that "[i]t is not necessary in the case before us to discuss generally the question of what constitutes 'fair use,'" the court in *Leon* went on to say: "Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use." 91 F.2d at 486.

³⁰ See note 3 and accompanying text *supra*. The representative year for NIH was 1970, and 1968 was NLM's representative year.

³¹ 487 F.2d at 1355.

³² *Id.* at 1354.

³³ See text at note 18 *supra*.

much judicial authority.³⁴ Being of the same opinion, the court in *Karll v. Curtis Publishing Co.*³⁵ concluded:

[I]t is safe to say that where the later work differs greatly in nature, scope, and purpose from the original, a larger liberty in making quotations and extracts will be permitted than in cases where the respective works are more or less competitive.³⁶

This generally vague standard becomes even further obscured in that the absence of a competitive or injurious effect will not necessarily make the use fair, especially where a large portion of the protected work is used. The Ninth Circuit in *Leon* agreed that "copyright is property, and an action will lie even if no damage be shown."³⁷

The state of affairs surrounding the doctrine of fair use is still "the most troublesome in the whole law of copyright."³⁸ A case-by-case fact determination must always be made, with confident predictions an impossibility. Somehow all the factors going into fair use are drawn together. But due to the differing assessments of importance by the courts, different results can be expected even given the same set of facts. Such was the case in *Williams & Wilkens*. Both the Commissioner and the reviewing court considered the same four factors listed in section 107. Yet opposite conclusions were reached, along with a vigorous dissent to the reviewing court's majority opinion. This note will now examine the difference in approach used by the Commissioner and the reviewing court. This difference may well reveal the present thrust of that amorphous conglomerate called fair use, a thrust not otherwise revealed by the stark factors listed in section 107 of the House Report.

The Commissioner viewed fair use as a defense to copyright infringement, with the burden of proof on the defendant.³⁹ He rejected the defendant's contention that the plaintiff had the burden of showing financial harm. Instead, "damage may be *inferred* in this case from the fact that the photocopies are intended to supplant the original articles."⁴⁰ In essence, according to the Commissioner, the burden was on the defendant to show that there was *not* any effect on the copyright owner's potential market, and if there were, that

³⁴ See cases cited by the Commissioner, 172 U.S.P.Q. at 679. See also 2 M. Nimmer, Copyright § 145, at 646 (1973) and cases cited therein.

It is believed that the actual decisions bearing upon fair use, if not always their stated rationale, can best be explained by looking to the central question of whether the defendant's work tends to diminish or prejudice the potential sale of the plaintiff's work.

2 M. Nimmer, Copyright § 145, at 646 (1973).

³⁵ 39 F. Supp. 836 (D. Wis. 1941). See also Annot. 23 A.L.R.3d 139, 186-94 (1969).

³⁶ 39 F. Supp. at 837-38.

³⁷ *Leon*, 91 F.2d at 487.

³⁸ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

³⁹ 172 U.S.P.Q. at 678-83.

⁴⁰ *Id.* at 679 (emphasis added).

such effect was overshadowed by the other considerations of fair use. Such was the Commissioner's treatment of the fourth factor of fair use, namely, the effect of the use on a copyright owner's potential market for his work. Considering the very high importance placed by the Commissioner on this factor,⁴¹ it is not surprising that the reviewing court's disagreement on this point led to a reversal of the lower decision.

The reviewing court in *Williams & Wilkens* concluded that it was unreasonable to infer financial detriment claimed by the plaintiff in light of the defendant's opposing evidence.⁴² Quite simply, the defendants had met their burden of proof in showing that there was not any detrimental impact on the plaintiff's market. To this extent the methodology used by the Commissioner and the reviewing court do not differ, each seeming to place the burden of proof on the defendant as to each factor of section 107. As such, fair use is treated as an affirmative defense. It is submitted, however, that language in the reviewing court's decision indicates that the burden of proof may in the future be placed on the plaintiff to prove any claimed detrimental effect on his potential market:

To us it is very important that plaintiff has failed to prove its assumption of economic detriment, in the past or potentially for the future. . . . This is a matter of proof and plaintiff has not transformed its hypothetical assumption, by evidence, into a proven fact. . . .

Fusing these elements together, we conclude that plaintiff has failed to show that the defendant's use of the copyrighted material has been "unfair," and conversely we find that these practices have up to now been "fair."⁴³

Concededly, the reviewing court specifically declined to extend any views on the situation where the copyright owner is shown to be hurt by the photocopying.⁴⁴ As such, no clear statement is made as to who really has the burden of proof concerning the fourth factor of section 107—whether the defendant has the burden of proving no effect, or whether the plaintiff has the burden of proving his claimed effect. It is submitted that the latter approach is the better and more fair one, although reputable authors have had differing views.

Typical of this split in views is the contrast between a project undertaken by the U.C.L.A. Law Review⁴⁵ and a study by Professor Breyer of Harvard Law School.⁴⁶ The underlying basis of the entire Project is its conviction that the publishers of scientific jour-

⁴¹ See text at note 18 *supra*.

⁴² 487 F.2d at 1357.

⁴³ *Id.* at 1359, 1362.

⁴⁴ *Id.* at 1362.

⁴⁵ Project, *supra* note 6, at 931.

⁴⁶ Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 Harv. L. Rev. 281 (1970) [hereinafter cited as Breyer].

nals suffer a financial detriment as a result of free photocopying.⁴⁷ The Project thus reaches a result in agreement with the Commissioner in *Williams & Wilkens*, and boldly concludes: "We think the doctrine of fair use, at least as presently construed, ought not survive the reprographic revolution."⁴⁸ On the other hand, Breyer would require of publishers a "substantial showing" that additional fees are in fact needed to maintain continued publication.⁴⁹ This is the identical approach taken by the reviewing court in *Williams & Wilkens* when it determined that the plaintiff had not shown that "it is being or will be harmed substantially . . ."⁵⁰ Given the antipodal views toward the economic effect of photocopying on copyright owners, it is not surprising that the reviewing court, having sided with Breyer's view, ultimately also agreed with Breyer's favorable treatment of fair use.⁵¹

The most significant difference between the Commissioner's and the reviewing court's treatment of fair use was the latter's concern over the detriment to medical and scientific research if the photocopying were held unlawful.⁵² In effect, the reviewing court added a fifth factor to the list of section 107: the detrimental effect to the public interest of promoting "the Progress of Science and the useful Arts."⁵³ This is not to say that the Commissioner was unaware of this public interest,⁵⁴ but only that he limited his inquiry concerning fair use to the four factors listed in section 107. The reviewing court, however, went further. It stressed that fair use should be applied in such a way as to recognize the tension between economic reward and unhampered dissemination of knowledge.⁵⁵ In recognition of this tension, fair use can rightfully be viewed as "a further limitation, in the public interest, on the limited monopoly granted by statute to the copyright owner."⁵⁶

The underlying tension has surfaced in judicial opinions preceding the *Williams & Wilkens* decision: "[C]opyright protection is designed 'to promote the Progress of Science and useful Arts,' and

⁴⁷ Project, *supra* note 6, at 943-44. "If nothing is done to give them meaningful copyright protection, scientific and technical journals seem destined to become solely reliant on government support." *Id.* at 946.

⁴⁸ *Id.* at 954.

⁴⁹ Breyer, *supra* note 46, at 334.

⁵⁰ 487 F.2d at 1354.

⁵¹ 487 F.2d at 1362. Specifically, Breyer advocated:

Congress might simply provide that the copying of periodical publications and extracts from books by an individual for his own use does not violate the copyright law provided that he does not make more than one copy within a certain period of time.

Breyer, *supra* note 46, at 337.

⁵² 487 F.2d at 1354, 1362.

⁵³ U.S. Const. art. 1, § 8. It should be noted that this balancing of harm was not between plaintiff and defendant, but rather it was between plaintiff and the whole broad area of medical and scientific research.

⁵⁴ See 172 U.S.P.Q. at 686-87.

⁵⁵ See note 19 and accompanying text *supra*.

⁵⁶ Pforzheimer, *supra* note 21, at 31.

the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself."⁵⁷ Nevertheless, the treatment in *Williams & Wilkens* represents the first conscious balancing between (1) the present and foreseeable burdens on the copyright owner from a ruling of fair use, and (2) the burden on the public's interest in the unhampered dissemination and promotion of knowledge. The court's justification for including a consideration of defendant's potential harm, as well as the public's harm in general, rested on its desire to do the least amount of harm while Congress was considering a legislative solution.⁵⁸

The question remains whether the *Williams & Wilkens* approach will continue even after congressional action, and to what extent the decision will affect fair use generally. It is submitted that the balancing done by the reviewing court should not be limited to a " 'holding operation' in the interim period before Congress enacts its preferred solution."⁵⁹ Instead, future applications of the doctrine of fair use should always consciously weigh the potential harm to the public interest if infringement would otherwise be found. The very design of fair use was to temper the statutory monopoly granted to copyright owners in light of the public interest.⁶⁰ The copyright monopoly was statutorily created to advance the public interest on the basis of the economic reward theory.⁶¹ Such a statutory grant should be revocable if its very aim—promotion of "the Progress of Science and the useful Arts"—would be thwarted by a finding of infringement in favor of the copyright owner. As such, the Court of Claims in *Williams & Wilkens* correctly considered the potential detriment to the public interest.

Clearly the *Williams & Wilkens* decision was simplified by plaintiff's failure to make a detailed study of the actual effect of photocopying on its business, and by its failure to refute defendant's figures.⁶² The more difficult situation will arise when both parties introduce their own experts, both sides demonstrating much harm in the event of an adverse ruling. As a result of *Williams & Wilkens*

⁵⁷ *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir. 1964). See also *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." 334 U.S. at 158.

⁵⁸ 487 F.2d at 1354, 1359. In a similar case, where the technology of community antenna television (CATV) systems outpaced the 1909 Copyright Act, the Supreme Court declined to render a compromise solution to accommodate the various competing interests of copyright, communications, and antitrust policy. Instead the Court deferred to Congress the task of devising a proper compensatory scheme for copyright owners. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401-02 (1968). The case was thus ultimately decided on the basis of strained interpretations of words in the outdated Copyright Act: "We must read the statutory language of 60 years ago in the light of drastic technological change." *Id.* at 396. See also *id.* at 398-402.

⁵⁹ 487 F.2d at 1363.

⁶⁰ *Pforzheimer*, *supra* note 21, at 31.

⁶¹ 347 U.S. at 219.

⁶² 487 F.2d at 1358.

the procedure would appear to include a weighing of all *five* factors comprising fair use, with the end result as unpredictable as ever. Nevertheless, it is submitted that courts in the future will pay particular attention to the underlying tension between economic reward and unhampered dissemination of knowledge. As such, any claims on either side can no longer expect to have the benefit of inferred detriment, but should be able to substantiate any claims with proof. Such proof, however, is often unreliable and difficult to obtain, and the stringency of the proof requirements has yet to be tested.

In conclusion, as a result of *Williams & Wilkens*, certain photocopying of copyrighted journal articles will be permitted as a fair use, despite the literal language of section 1 of the Copyright Act.

The factors used in applying fair use are now five-fold: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect of the use upon the potential market for or value of the copyrighted work; and (5) the detrimental effect to the public interest of promoting "the Progress of Science and the useful Arts."

The first four factors represent the traditional judicial standards of fair use. *Williams & Wilkens* modified this traditional approach by adding the fifth factor, thereby consciously balancing the competing interests of economic reward and unhampered dissemination of knowledge. The decision further modified the traditional approach by indicating that the burden of proof, with respect to the fourth factor, may in the future be placed on the plaintiff instead of on the defendant.

MARC R. K. BUNGEROTH

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1. TITLE OF PUBLICATION Boston College Industrial and Commercial Law Review		2. DATE OF FILING Sept. 30, 1974
3. FREQUENCY OF ISSUE Six issues per year		
4. LOCATION OF KNOWN OFFICE OF PUBLICATION (Street, city, county, state, ZIP code) (Not printers) 38 Commonwealth Avenue, Newton, Mass. 02167		
5. LOCATION OF THE HEADQUARTERS OR GENERAL BUSINESS OFFICES OF THE PUBLISHERS (Not printers) Same as 4		
6. NAMES AND ADDRESSES OF PUBLISHER, EDITOR, AND MANAGING EDITOR		
PUBLISHER (Name and address) Boston College Law School, Brighton, Massachusetts 02135		
EDITOR (Name and address) Prof. Paul R. McDaniel, Boston College Law School, Brighton, Mass. 02135		
MANAGER/EDITOR (Name and address) Dean Richard G. Huber, Boston College Law School, Brighton, Mass. 02135		
7. OWNER (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given.)		
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Trustees of Boston College	140 Commonwealth Avenue, Chestnut Hill, MA 02167	
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9. FOR OPTIONAL COMPLETION BY PUBLISHERS MAILING AT THE REGULAR RATES (Section 132.121, Postal Service Manual) 39 U. S. C. 3626 provides in pertinent part: "No person who would have been entitled to mail matter under former section 4359 of this title shall mail such matter at the rates provided under this subsection unless he files annually with the Postal Service a written request for permission to mail matter at such rates." In accordance with the provisions of this statute, I hereby request permission to mail the publication named in item 1 at the reduced postage rates presently authorized by 39 U. S. C. 3626. (Signature and title of editor, publisher, business manager, or owner)		
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B. PAID CIRCULATION		
1. SALES THROUGH DEALERS AND CARRIERS, STREET VENDORS AND COUNTER SALES	50	50
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G. TOTAL (Sum of B & F—should equal net press run shown in A)	1500	1250
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