Summary of the Legislative History of Computer-Related Issues and the Photocopy Issue

APPENDIX A

Computer-Related Issues

During the early discussions of copyright revision from 1961 through 1964, copyright questions with regard to computer programs and the use of copyrighted works in conjunction with computers were largely ignored. Section 5(a) of the Preliminary Draft for Revised U.S. Copyright Law dealt with the exclusive rights to copy or record:

§ 5. Exclusive Rights Comprised in Copyright . . .

(a) *The right to copy or record.* Copyright shall include the exclusive right to copy or record the work in any tangible medium of expression, now known or later developed, from which it can be visually or aurally perceived, either directly or with the aid of a machine or device. It shall include the right to reproduce the work in visual copies, to make or duplicate sound recordings of it, to make a translation, adaptation, or any other derivative work from it, *and to reproduce it in any form in the programming or operation of an information storage and retrieval system* [emphasis added].[1]

In addition, a proposed section 6 dealt with fair use.[2]

During a meeting held at the Library of Congress on February 20, 1963, the relation of these two sections to the use of copyrighted works in machine-readable forms was discussed.[3] Throughout the period when the preliminary draft was being considered, the primary concern seems to have been with this use of computers. Several interested parties suggested changes in section 5 during the 1963 discussions [4] and in statements submitted in the summer of 1964.[5]

The Eighty-Eighth Congress

The 1964 Revision Bill

The three identical versions of the revision bill introduced in the second session of the 88th Congress had a modified section 5: [6]

§ 5. Exclusive rights in copyrighted works.

(a) *General scope of copyright.*—Subject to sections 6 through 13, the owner of copyright under this title has the exclusive rights to do or to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures, to perform the copyrighted work publicly;

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[1] U.S., Congress, House, Judiciary Committee, *Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft,* 88th Cong., 2d sess., 1964, p. 4; hereafter referred to as *Copy. Law Rev., Pt. 3.*

[2] See this appendix under the section Eighty-eighth Congress, the 1964 Revision Bill.

[3] *Copy. Law Rev., Pt. 3, supra* note 1, p. 120.

[4] Ibid., p. 374 (statement of Reed C. Lawlor, Esq.).

[5] U.S., Congress, House, Judiciary Committee, *Copyright Law Revision, Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law,* 88th Cong., 2d sess., 1964, pp. 269 (statement of American Book Publishers Council, Inc., and American Textbook Publishers Institute), 315 (Authors League of America, Inc.), and 392 (National Audio-Visual Association, Inc.); hereafter referred to as *Copy. Law Rev., Pt. 4.*

[6] U.S., Congress, 88th Cong., 2d sess., S. 3008, July 20, 1974, sponsored by Senator McClellan; H.R. 11947, July 20, 1974, sponsored by Representative Celler; and H.R. 12354, August 12, 1974, sponsored by Representative St. Onge.

(5) in the case of pictorial, graphic, or sculptural works, to exhibit the copyrighted work publicly.[7]

At a meeting held in New York City on August 6, 1964, Morton David Goldberg, Esq., raised significant questions, which might be paraphrased as follows: (1) Are computer programs "copyrighted works"? (2) Does "the right to reproduce the copyrighted work" include reproduction, storage, and retrieval devices? (3) Is the fixation of magnetic impulses in the storage unit a derivative work? (4) Are computer programs "literary works"? and (5) What are the performing rights of a computer program? [8]

The Register of Copyrights replied, "I don't think there are any more difficult or important problems than the ones you have raised. . . . We deliberately avoided any specific references to 'computers' or 'information storage and retrieval units' in this clause. We think that there are many developments that are going to come in the immediate future, and we think it safer to draft general language which can be interpreted by the courts to apply to particular usages." [9]

The General Electric Company made some specific suggestions on the copyright protection which should be extended to computer programs.[10]

In May 1964, the Copyright Office announced that it had "taken the position that copyright registration for computer programs is possible under the present law" (i.e., the 1909 Act).

In the announcement of the practice, the following statement was made:

The registrability of computer programs involves two basic questions: (1) whether a program as such is the "writing of an author" and thus copyrightable, and (2) whether a reproduction of the program in a form actually used to operate or be "read" by a machine is a "copy" that can be accepted for copyright registration.

Both of these are doubtful questions. However, in accordance with its policy of resolving doubtful issues in favor of registration wherever possible, the Copyright Office will consider registration for a computer program as a "book" in Class A if:

(1) The elements of assembling, selecting, arranging, editing, and literary expression that went into the compilation of the program are sufficient to constitute original authorship.

(2) The program has been published, with the required copyright notice; that is, "copies" (i.e., reproductions of the program in a form perceptible or capable of being made perceptible to the human eye) bearing the notice have been distributed or made available to the public.

(3) The copies deposited for registration consist of or include reproductions in a language intelligible to human beings. If the only publication was in a form that cannot be perceived visually or read, something more (e.g., a print-out of the entire program) would also have to be deposited.[11]

The 1965 Revision Bill

When the 1965 Revision Bill was introduced in the 89th Congress,[12] the Register of Copyrights explained the deletion of the granting of an exclusive right "to reproduce [the work] in any form in the programming or operation of an information storage and retrieval system" as follows:

We became convinced . . . that it would be a mistake for the statute, in trying to deal with such a new and evolving field as that of computer technology, to include an explicit provision that could later turn out to be too broad or too narrow. A much better approach, we feel, is to state the general concepts of copyright in language, such as that in section 106(a), which would be general in terms and broad enough to allow for adjustment to future changes in patterns of reproduction and other uses of authors' works.

At the same time, we should emphasize here that, unless the doctrine of "fair use" is applicable in a particular case, the bill contemplates that certain computer uses would come within the copyright owner's exclusive rights. It seems clear, for example, that the actual copying of entire works (or substantial portions of them) for "input" or storage in a computer would constitute a "reproduction" under clause (1), whatever form

[7] U.S., Congress, House, Judiciary Committee, *Copyright Law Revision, Part 5: 1964 Revision Bill with Discussions and Comments,* 89th Cong., 1st sess., 1965, p. 4; hereafter referred as to *Copy. Law Rev., Pt. 5.*

[8] Ibid., p. 62.

[9] Ibid., p. 63.

[10] Ibid., p. 271.

[11] Announcement SMI-47 from the Office of the Register of Copyrights, May 1964; Copyright Office Circular 31D (January 1965).

[12] 89th Cong., 1st sess., 1965, H.R. 4347 and S. 1006.

the "copies" take: punchcards, punched or magnetic tape, electronic storage units, etc. Similarly, at the "output" end of the process, the "retrieval" or "print-out" of an entire work (or a substantial part of it) in tangible copies would also come under copyright control.[13]

The bill also specifically removed the "performance" aspects of a computer from section 106(b)(1), with the deletion explained as follows:

A computer may well "perform" a work by running off a motion picture or playing a sound recording as part of its output, but its internal operations do not appear to us to fall within this concept.[14]

During hearings on the then pending revision bill, the following individuals presented testimony on statements in computer-related issues: [15]

Anthony J. Celebrezze, Department of Health, Education and Welfare 1131–32
Alanson W. Willcox, Department of Health, Education and Welfare 1132–33
John V. Vinciguerra, Atomic Energy Commission 1135–36
John F. Banzhaf, Computer Program Library 1144–50
Larston D. Farrar, Farrar Publishing Company 1150–51
Maxwell C. Freudenberg, Department of Defense 1163–72
Mark Carroll, Association of American University Presses 1216
Bella L. Linden, American Textbook Publishers Institute, with Kenneth B. Keating, Esq., and Lee Deighton 1420–49, 1455–59
Carl T. J. Overhage, Massachusetts Institute of Technology 1455
Abraham L. Kaminstein, Register of Copyrights 1861
Graham W. McGowan, Electronic Industries Association 1898–99
Reed C. Lawlor, Esq. 1914–16

[13] U.S., Congress, House, Judiciary Committee, *Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill,* 89th Cong., 1st sess., 1965, p. 18; hereafter referred to as *Copy. Law Rev., Pt. 6.*

[14] Ibid., p. 22.

[15] U.S., Congress, House, Judiciary Committee, *Copyright Law Revision; Hearings before Subcommittee No. 3, House Committee on the Judiciary H.R. 4347, H.R. 5680, H.R. 6381, H.R. 6835,* 89th Cong., 1st sess., 1965; hereafter referred to as *Hearings before Subcommittee No. 3.*

Hearings were held before the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyright, on S. 1006, the companion bill, in August 1965. Alanson W. Willcox, general counsel of the Department of Health, Education and Welfare, submitted a statement which made several recommendations with respect to the rights of libraries to duplicate "by any process now in existence or which may hereafter be developed, including such processes as photocopying, sound recording, *and computerization,* any work in its collections or in collections available to it . . ." (emphasis added), and went on to outline specific conditions under which those copies could be made.[16]

The House Committee on the Judiciary reported H.R. 4347 on October 12, 1966, and made the following statements on the application of the proposed law to computer systems on the right of public display:

Clause (5) of section 106 represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works" the exclusive right "to display the copyrighted work publicly."

With the growing use of projection equipment, closed and open circuit television, and computers for displaying images of textual and graphic material to "audiences" or "readers," this right is certain to assume great importance to copyright owners. A recognition of this potentiality is reflected in the proposal of book publishers and producers of audiovisual works which, in effect, would equate "display" with "reproduction" where the showing is "for use in lieu of a copy." The committee is aware that in the future electronic images may take the place of printed copies in some situations, and has dealt with the problem by amendments in sections 109 and 110, and without mixing the separate concepts of "reproduction" and "display." No provision of the bill would make a purely private display of a work a copyright infringement. . . .

[16] U.S., Congress, Senate, Judiciary Committee, *Copyright Law Revision; Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, on S. 1006,* 89th Cong., 1st sess., 1965, p. 50; hereafter referred to as *Hearings on S. 1006.*

The corresponding definition of "display," as amended, covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." The phrase "motion picture" before the word "film" has been omitted to avoid confusion. Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than a "performance") to show their "individual images nonsequentially." In addition to the direct showings of a copy of a work, "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube or similar viewing apparatus connected with any sort of information storage and retrieval system.[17]

On reproduction and uses for other purposes the report stated:

The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. The committee emphasizes again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

For example, the doctrine of fair use would apply to all stages in the operations of information storage and retrieval systems, including input, and output in the form of visual images or hard copies. Reproduction of small excerpts or key words for purposes of input, and output of bibliographic lists or short summaries might be examples of fair use in this area. On the other hand, because the potential capabilities of a computer system are vastly different from those of a mimeograph or photocopying machine, the factors to be considered in determining fair use would have to be weighed differently in each situation. For reasons already explained, the committee does not favor any statutory provision that would exempt computer uses specially from copyright control or that would specify that certain computer uses constitute "fair use." [18]

The 89th Congress adjourned without taking action on either H.R. 4347 or S. 1006.

[17] 89th Cong., 2d sess., 1966, H. Rept. 2237, pp. 55, 57.

[18] Ibid., p. 64.

The Ninetieth Congress

In the 90th Congress, Rep. Emmanuel Celler introduced a revision bill, H.R. 2512, on January 17, 1967; a companion bill, S. 597, was introduced in the Senate six days later.

The House Committee on the Judiciary reported H.R. 2512 on March 8, 1967. The report deals with the use of copyrighted works in information storage and retrieval systems in the following language:

Although it was touched on rather lightly at the hearings, the problem of computer uses of copyrighted material has attracted increasing attention and controversy in recent months. Recognizing the profound impact that information storage and retrieval devices seem destined to have on authorship, communications, and human life itself, the committee is also aware of the dangers of legislating prematurely in this area of exploding technology.

In the context of section 106, the committee believes that, instead of trying to deal explicitly with computer uses, the statute should be general in terms and broad enough to allow for adjustment to future changes in patterns of reproduction and other uses of authors' works. Thus, unless the doctrine of fair use were applicable, the following computer uses could be infringements of copyright under section 106: reproduction of a work (or a substantial part of it) in any tangible form (paper, punch cards, magnetic tape, etc.) for input into an information storage and retrieval system; reproduction of a work or substantial parts of it, in copies as the "print-out" or output of the computer; preparation for input of an index or abstract of the work so complete and detailed that it would be considered a "derivative work"; computer transmission or display of a visual image of a work to one or more members of the public. On the other hand, since the mere scanning or manipulation of the contents of a work within the system would not involve reproduction, the preparation of a derivative work, or a public distribution, performance, or display, it would be outside the scope of the legislation.

It has been argued on behalf of those interested in fostering computer uses that the copyright owner is not damaged by input alone, and that the devlopment of computer technology calls for unrestricted availability of unlimited quantities of copyrighted material for introduction into information systems. While acknowledging that copyright payments should be made for output and possibly some other computer uses, these interests recommended at least a partial exemp-

tion in cases of reproduction for input. On the other side, the copyright owners stressed that computers have the potential, and in some cases the present, capacity to destroy the entire market of authors and publishers. They consider it indispensable that input, beyond fair use, require the consent of the copyright owner, on the ground that this is the only point in computer operations at which copyright control can be exercised; they argue that the mere presence of an electronic reproduction in a machine could deprive a publisher of a substantial market for printed copies, and that if input were exempted there would likewise be no market for machine-readable copies.

In various discussions since the hearings, there have been proposals for establishing voluntary licensing systems for computer uses, and it was suggested that a commission be established to study the problem and recommend definitive copyright legislation several years from now. The Committee expresses the hope that the interests involved will work together toward an ultimate solution of this problem in the light of experience. Toward this end the Register of Copyrights may find it appropriate to hold further meetings on this subject after passage of the new law. In the meantime, however, section 106 preserves the exclusive rights of the copyright owner with respect to reproductions of his work for input or storage in an information system.[19]

The House passed H.R. 2512, with several amendments, on April 11, 1967.

In March and April of 1967, the Senate Judiciary Subcommittee held hearings on the compromise bill S. 597.[20] During the course of those hearings the witnesses expressed concern over the provisions of the bill relating to computers and information storage and retrieval systems. They addressed the specific problems of whether copyright royalties should be levied at the input of copyrighted works into automated retrieval systems or on output; whether computer programs should indeed be copyrightable; and whether a clearinghouse for payment of royalties on computerized use of copyrighted works would be feasible. A number of these witnesses also urged the creation of a study panel or other body to gather data and to deal with computer problems so that the legislative process would not be delayed while Congress considered them. The witnesses who testified on S. 597 are as follows:

Written statements from the following individuals appear in the appendix to the hearings:

[19] 90th Cong., 1st sess., 1967, H. Rept. 90–83, p. 24.

[20] U.S., Congress, Senate, Judiciary Committee, *Copyright Law Revision; Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, on S. 597*, 90th Cong., 1st sess., 1967; hereafter referred to as *Hearings on S. 597*.

The National Commission

The Senate subcommittee convened a meeting on July 25, 1967, to discuss a draft bill to establish a national study commission. The attendees, some 150 representatives of authors, publishers, librarians, educators, computer users, and government agencies, unanimously supported the creation of such a commission. Senator McClellan made this statement when introducing S. 2216:

During the subcommittee hearings there was considerable testimony concerning the relationship between such technologies as information storage and retrieval systems and various forms of machine reproduction, and the copyright law. The Congress, at the present time, lacks sufficient information on which to base an informed judgment as to what changes in the copyright law may be necessary in the light of these scientific advances. On the other hand, the need for modernizing the copyright law is urgent and should not await the resolution of these new issues.

I, therefore, concluded that the most desirable course of action would be to proceed with the consideration of the pending copyright revision bill, but establish at the earliest opportunity a national commission to study the copyright implications of these technological advances and to make recommendations to the President and Congress concerning the need for any changes in our copyright law or procedure.[21]

The report accompanying this bill amplifies further the necessity for establishing the Commission.

Prior to the introduction of copyright revision legislation in the Congress, exhaustive study was given by the Copyright Office and various interested groups to those issues that it was anticipated would require attention by the Congress during the revision program. The current or potential impact of computers and other information storage and retrieval systems on the copyright revision effort was not foreseen and consequently the bill submitted to the Congress did not take into account the significance of this new technology.

The first extensive consideration of these matters in the Congress occurred during the hearings of this committee's Subcommittee on Patents, Trademarks, and Copyrights on S. 597, the general copyright revision bill. At the same time within the executive branch the Committee on Scientific and Technological Information of the Federal Council of Science and Technology was also exploring these problems. It became apparent during the subcommittee examination of this subject that if the Congress were to undertake at this time to make a final determination concerning the possible necessity of modifications in the copyright law, because of various technological advances, it would delay for at least several years the enactment of a general copyright revision bill. Such a delay would be extremely undesirable in view of the obvious need for revision of the copyright statute, which is essentially that enacted in 1909. More importantly, sufficient information is currently not available to provide the foundation for a sound judgment concerning the future development of the technology and the necessity for modification of the copyright statute.

Another important copyright issue arising from technological developments is the reproduction of copyrighted material by the use of various machines. Photocopying in all its forms presents significant questions of public policy, extending well beyond that of copyright law. No satisfactory solutions have emerged in the limited consideration devoted to this problem during the current revision effort.[22]

Also in the report is a supporting statement from the Librarian of Congress, who observed: "As I see it, the goals of the National Commission should be to seek and find genuine answers to what now promises to develop into one of the most significant problems in the history of copyright law." [23]

The Senate passed S. 2216 on October 12, 1967, but the 90th Congress ended before the House of Representatives took any action on the bill.

The Ninety-first Congress

On January 22, 1969, Senator McClellan introduced a bill which combined most of the provisions of S. 597 and S. 2216 from the previous Congress. To effect a compromise between those who proposed a three-year moratorium on copyright infringement for uses in computerized systems and those who adamantly opposed such a moratorium, section 117 was added to S. 543.

[21] 113 *Cong. Rec.* 20909 (1967).

[22] 90th Cong., 1st sess., 1967, S. Rept. 640, p. 2.

[23] Ibid., p. 7.

§ 117. Scope of exclusive rights; use in conjunction with computers and similar information systems

Notwithstanding the provisions of sections 106 though 116, this title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1970, as held applicable and construed by a court in an action brought under this title.[24]

The Ninety-second Congress

Senator McClellan introduced S. 644, a bill almost identical to S. 543, on February 8, 1971, but neither House took any action on it.

The Ninety-third Congress

The Copyright Revision Bill was reintroduced as S. 1361 on March 26, 1973. The following witnesses testified at hearings held by the Senate Judiciary Subcommittee on July 31 and August 1: [25]

Statements from the following individuals and organizations appear in this appendix:

The report to accompany S. 1361 described section 117 in the following manner:

Use in information storage and retrieval systems—As section 117 declares explicitly, the bill is not intended to alter the present law with respect to the use of copyrighted works in computer systems. . . .

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work "in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information." The Commission on New Technological Uses established by Title II is intended, among other things, to make a thorough study of the emerging patterns in this field and, on the basis of its finding, to recommend definite copyright provisions to deal with the situation.

Since it would be premature to change existing law on computer uses at present, the purpose of section 117 is to preserve the status quo. It is intended neither to cut off any rights that may now exist, nor to create new rights that might be denied under the Act of 1909 or under common law principles currently applicable.

The provision deals only with the exclusive rights of a copyright owner with respect to computer uses, that is, the bundle of rights specified for other types of uses in section 106 and qualified in sections 107 through 116. With respect to the copyrightability of computer programs, the ownership of copyright in them, the term of protection, and the formal requirements of the remainder of the bill, the new statute would apply.

Under section 117, an action for infringement of a copyrighted work by means of a computer would necessarily be a federal action brought under the new Title 17. The court, in deciding the scope of exclusive rights in the computer area, would first need to determine the applicable law, whether State common law or the Act of 1909. Having determined what law was applicable, its decision would depend upon its interpretation of what that law was on the point on the day before the effective date of the new statute.[26]

[24] 91st Cong., 1st sess., December 10, 1969, S. Rept. 543 [committee print].

[25] U.S., Congress, Senate, Judiciary Committee, *Copyright Law Revision; Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary on S. 1361*, 93d Cong., 1st sess., 1973; hereinafter referred to as *Hearings on S. 1361*.

[26] 93d Cong., 2d sess., 1974, S. Rept. 983, pp. 112, 154 [*Star* print].

A section of the report also deals with Title II of the bill "to establish a National Commission to study and compile data" in language similar to that of S. 90–640, cited above.[27]

On July 9, 1974, S. 1361 was referred to the Senate Commerce Committee. It was then reported with several amendments on July 29 and was passed by the Senate on September 9 of the same year.

Immediately after the Senate had passed S. 1361, Senator McClellan introduced S. 3976, stating, "[I]t is doubtful that the House of Representatives will have time in this Congress to complete action on the copyright revision bill which was just passed by the Senate. There are several provisions of the omnibus bill which require action before the adjournment of this Congress. . . . [I]t is desirable to establish this year the National Commission which is provided for in Title II of S. 1361 to prepare for the resolution of the copyright issues which are arising from the rapid development of new technology." [28] The Senate considered and passed the bill that same day, September 9, 1974.

The House Judiciary Subcommittee held a hearing on S. 3976 on November 26, at which the Register of Copyrights supported Title II of the bill:

> The inadequacy of the present law to deal with the problems arising from the use of copyrighted works in computer systems is certainly something that no one can deny. This is still in a developmental stage. We really have no experience with the copyright patterns—the concepts and the needs that will arise from this new technology. In the many discussions that took place on this subject the feeling was that what was being expressed on both sides were fears rather than facts. As the result, there was a genuine emphasis on the part of both the users and the potential users on the one side, and the authors and the copyright owners on the other, to have a study of this subject, so that they could base their suggestions on facts rather than fears.
>
> The revision bill literally does nothing to solve this problem. The compromise, if you can call it that, was to specify expressly that the status quo would be preserved. In other words, whatever is the copyright law now with respect to computer uses of copyrighted works would remain the law. This is not very desirable as a legislative solution, but it was tied in directly with the understanding that a Commission would be operating in this area, and would be studying and recommending on a rather short deadline.[29]

The House Committee on the Judiciary amended section 202(3) of Title II to include "that at least one of the four public members shall be selected from among experts in consumer protection affairs" and reported S. 3976 on December 12, 1974, with a dissenting view by Rep. Robert F. Drinan opposing the establishment of the Commission.[30]

The House of Representatives considered and passed S. 3976 on December 17, 1974, and President Gerald R. Ford signed the bill on December 31.[31]

The Ninety-fourth Congress

The Copyright Revision Bill came before Congress again early in the 94th Congress when Senator McClellan introduced S. 22 on January 15, 1975, and Representative Kastenmeier introduced H.R. 2223 on January 28, 1975. The bill was substantially the same as S. 1361, which had passed the Senate in the previous Congress. The Senate Judiciary Committee reported S. 22 on November 20, 1975,[32] and the Senate unanimously approved it on February 19, 1976.

In the meantime, the House Judiciary Subcommittee had been holding hearings on H.R. 2223, during which the following witnesses discussed computer-related issues:[33]

	Page
Bella L. Linden, Linden and Deutsch	311–13
Edwin Meell, Educational Media Producers Association	321
Paul G. Zurkowski, Information Industry Association	332–40, 366–67

[27] Ibid., p. 208.

[28] 120 *Cong. Rec.* 30516 (1974).

[29] U.S., Congress, House, Judiciary Committee, *Copyright Miscellany; Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee of the Judiciary on S. 3976*, 93d Cong., 2d sess., 1974, p. 6; hereinafter referred to as *Hearing on S. 3976.*

[30] 93d Cong., 2d sess., H. Rept. 1581, 1974, p. 17.

[31] P.L. 93–573 (1974).

[32] 94th Cong., 1st sess., 1975, S. Rept. 473.

[33] U.S., Congress, House, Judiciary Committee, *Copyright Law Revision; Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee on H.R. 2223*, 94th Cong., 1st sess., 1975; hereinafter referred to as *Hearings on H.R. 2223.*

The Copyright Office submitted to the House subcommittee a series of eighteen briefing papers on issues raised by H.R. 2223. The section "Computer Uses of Copyrighted Works" outlines the background of the issue and includes summaries of the arguments for and against considering "input" as infringement, a statement of the tasks to be undertaken by the National Commission on New Technological Uses of Copyrighted Works, and an analysis of section 117.[34]

The House subcommittee then held public markup sessions on H.R. 2223 and reported the bill on August 3, 1976. The full Judiciary Committee of the House reported the bill without further amendment on September 3, 1976.[35]

The Committee of Conference reconciled the different versions of the bill as it had been approved by the Senate and House of Representatives and issued its report on September 29, 1976.[36] Both Houses of Congress approved the Conference Committee version of S. 22 on September 30, 1976, and the Copyright Revision Bill finally became law when President Ford signed it on October 19.[37]

The Photocopy Issue

In 1955, the Copyright Office began sponsoring—before any legislative action on revising the existing 1909 law—a series of thirty-four studies on copyright law and practice for the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights. Studies number 14 and 15, "Fair Use of Copyrighted Works" by Alan Latman, and "Photoduplication of Copyrighted Material by Libraries" by Borge Varmer, respectively, appeared in 1960.[38]

After examining the status of fair use under American case law, previous proposals for legislative revision, and the laws of other nations, Latman summarized the issue as follows:

1. Should a statutory provision concerning fair use be introduced into the U.S. law?
2. If so:
   (a) Should the statute merely recognize the doctrine in general terms and leave its definition to the courts?
   (b) Should the statute specify the general criteria of fair use? If so, what should be the basic criteria?
3. Should specific situations be covered? If so, what specific situations? [39]

Varmer followed the same format in his study on photoduplication and made this summary of the basic issues:

The following appear to be the primary questions to be considered.

1. Should the copyright statute provide expressly for the photocopying of copyrighted works by libraries? If so:
   (a) Should the statute merely provide, in general terms, that a library may supply a single photocopy of any work to any person for his personal use in research and study?
   (b) Should the statute specify limitations and conditions with respect to:
      (1) the kinds of library institutions that may make and supply photocopies?
      (2) the purposes for which they may make and supply photocopies?
      (3) the conditions under which they may make and supply photocopies?
      (4) the extent to which they may photocopy, under the specified conditions, the contents of (1) periodicals and (2) other publications?
      (5) the kinds of published material, if any, which they may not photocopy?
   (c) Should the statute provide for photocopying in general terms (as in (a) above) subject to limitations and conditions to be prescribed by administrative regulations?
2. Instead of a statutory prescription, would it be preferable to encourage the libraries, publishers, and other groups concerned to develop a working arrangement, in the nature of a code of practice, to govern photocopying by libraries? [40]

Comments on this study by the following individuals (with their affiliations when given) are appended to the text:

[34] Ibid., p. 2075.
[35] 94th Cong., 2d sess., 1976, H. Rept. 1476.
[36] 94th Cong., 2d sess., 1976, H. Rept. 1733.
[37] P.L. 94–553 (1976).
[38] U.S., Congress, Senate, Judiciary, *Copyright Law Revision; Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary,* 86th Cong., 2d sess., 1960.
[39] Ibid., p. 34.
[40] Ibid., p. 66.

Sixteen years later, following numerous congressional hearings and several attempts at revising the law, these questions were answered by the Copyright Act of 1976.

In July 1961, the House Committee on the Judiciary issued a report containing "the tentative recommendations of the Copyright Office for revision of the law." It was "issued for the purpose of inviting all persons concerned to submit comments and suggestions. . . ." The report dealt with photocopying by libraries in the following language:

> Library photocopying.—The report would permit a library to make a single photocopy of material in its collections for research purposes under explicit conditions. . . .[41]

Photocopying by Libraries

a. *Statement of the problem*

The application of the principle of fair use to the making of a photocopy by a library for the use of a person engaged in research is an important question which merits special consideration. This question has not been decided by the courts, and it is uncertain how far a library may go in supplying a photocopy of copyrighted material in its collections. Many libraries and researchers feel that this uncertainty has hampered research and should be resolved to permit the making of photocopies for research purposes to the fullest extent compatible with the interests of copyright owners.

Scholars have always felt free to copy by hand from the works of others for their own private research and study. Aside from the impossibility of controlling copying done in private, the acceptance of this practice may have been based on the inherent limitations of the extent to which copying could be done by hand. But copying has now taken on new dimensions with the development of photocopying devices by which any quantity of material can be reproduced readily and in multiple copies.

Researchers need to have available, for reference and study, the growing mass of published material in their particular fields. This is true especially, though not solely, of material published in scientific, technical, and scholarly journals. Researchers must rely on libraries for much of this material. When a published copy in a library's collections is not available for loan, which is very often the case, the researcher's need can be met by a photocopy.

On the other hand, the supplying of photocopies of any work to a substantial number of researchers may diminish the copyright owner's market for the work. Publishers of scientific, technical, and scholarly works have pointed out that their market is small; and they have expressed the fear that if many of their potential subscribers or purchasers were furnished with photocopies, they might be forced to discontinue publication.

b. *Approach to a solution: single photocopies for research use*

As a general premise, we believe that photocopying should not be permitted where it would compete with the publisher's market. Thus, when a researcher wants the whole of a publication, and a publisher's copy is available, he should be expected to procure such a copy.

In situations where it would not be likely to compete with the publisher's market, however, we believe that a library should be permitted to supply a single photocopy of material in its collections for use in research. Thus, when a researcher wants only a relatively small part of a publication, or when the work is out of print, supplying him with a single photocopy would not seriously prejudice the interests of the copyright owner. A number of foreign laws permit libraries to supply single photocopies in these circumstances.

c. *Multiple and commercial photocopying*

The question of making photocopies has also arisen in the situation where an industrial concern wishes to provide multiple copies of publications, particularly of scientific and technical journals, to a number of research workers on its staff. To permit multiple photocopying may make serious inroads on the publisher's potential market. We believe that an industrial concern should be expected to buy the number of copies it needs from the publisher, or to get the publisher's consent to its making of photocopies.

Similarly, any person or organization undertaking to supply photocopies to others as a commercial venture would be competing directly with the publisher, and should be expected to get the publisher's consent.

There has been some discussion of the possibility of a contractual arrangement whereby industrial concerns would be given blanket permission to make photocopies for which they would pay royalties to the publishers. Such an arrangement,

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[41] U.S., Congress, House, Judiciary Committee, *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law,* 87th Cong., 1st sess., 1961, iii, v [footnote omitted; committee print].

which has been made in at least one foreign country, would seem to offer the best solution for the problem of multiple and commercial photocopying.

d. *Recommendations*

The statute would permit a library, whose collections are available to the public without charge, to supply a single photocopy of copyrighted material in its collections to any applicant under the following conditions:

(a) A single photocopy of one article in any issue of a periodical, or of a reasonable part of any other publication, may be supplied when the applicant states in writing that he needs and will use such material solely for his own research.

(b) A single photocopy of an entire publication may be supplied when the applicant also states in writing, and the library is not otherwise informed, that a copy is not available from the publisher.

(c) Where the work bears a copyright notice, the library should be required to affix to the photocopy a warning that the material appears to be copyrighted.[42]

A meeting was convened on September 14, 1961, by the Register of Copyrights to discuss the report. Comments on the photocopy provisions quoted above are contained in *Copyright Law Revision, Part 2*.[43] Written comments from the following individuals and organizations also appear in the document:

A third report in this series, issued in September 1964, contains the following proposed section:

§ 7. Limitations on exclusive rights: copying and recording by libraries

Notwithstanding the provisions of section 5, any library whose collections are available to the public or to researchers in any specialized field shall be entitled to duplicate, by any process including photocopying and sound recording, any work in its collections other than a motion picture, and to supply a single copy or sound recording upon request, but only under the following conditions:

(a) The library shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or sound recording of a similarly small part of any other copyrighted work.

(b) The library shall be entitled to supply a copy or sound recording of an entire work, or of more than a relatively small part of it, if the library has first determined, on the basis of a reasonable investigation that a copy or sound recording of the copyrighted work cannot readily be obtained from trade sources.

(c) The library shall attach to the copy a warning that the work appears to be copyrighted.[44]

A discussion of section 7 appears in the transcript of a meeting held at the Library of Congress on February 20, 1963.[45] The following organizations and individuals submitted written responses to the draft:

Those commenting on the proposed section 7 found several phrases disturbing. In particular, they questioned the definitions of "reasonable investigation" and "readily be obtained from trade sources."

Additional responses to the proposed section 7 appear in the fourth volume of the series:[46]

[42] Ibid., p. 25.

[43] U.S., Congress, House, Judiciary Committee, *Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st sess., 1963, p. 31 [committee print].

[44] *Copy. Law Rev., Pt. 3, supra* note 1, p. 6.

[45] Ibid., p. 159.

[46] *Copy. Law Rev., Pt. 4, supra* note 5.

The Eighty-eighth Congress

The 1964 Revision Bill

During the second session of the 88th Congress, three identical versions of the 1964 Revision Bill were introduced: S. 3008 by Mr. McClellan, on July 20, 1974; H.R. 11947 by Mr. Celler, also on July 20, and H.R. 12354 by Mr. St. Onge, on August 12, 1964.

The text of the bill and comments on it appear in *Copyright Law Revision, Part 5*. The bill did not directly address photocopying by libraries; Sections 5(a)(1) and 6 are pertinent to the matter, however.

§ 5. Exclusive rights in copyrighted works

(a) General Scope of Copyright.—Subject to sections 6 through 13, the owner of copyright under this title has the exclusive rights to do or to authorize any of the following:

(1) to reproduce the copyrighted works in copies or phonorecords;

§ 6. Limitations on exclusive rights: fair use

Notwithstanding the provisions of section 5, the fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose, such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

(3) the amount and 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.

On August 6, 1964, the Register of Copyrights convened a meeting in New York City, at which brief testimony on photocopying was presented. The General Electric Company also submitted a brief comment on photocopying.[47]

[47] Ibid., pp. 103, 270.

The 1965 Revision Bill

In light of the comments received on the 1964 bill, two new bills (H.R. 4347 and S. 1006) were introduced in the 89th Congress on February 4, 1965. *Copyright Law Revision, Part 6* contains the 1965 bill in summary. Appendix B is a comparative table showing the language of the then-current law, the 1965 and 1964 bills, and the 1963 draft.

The supplementary report "represents an effort to state . . . the thinking behind the language of the 1965 bill and, in many cases, the arguments for and against particular provisions." [48]

In the portion of the report on fair use, the Register explained why, once again, the 1965 bill did not directly deal with photocopying:

> In a way the comments on section 7 [49] of the preliminary draft represented an interesting case study. Opposition to the provision was equally strong on both sides but for exactly opposite reasons, with one side arguing that the provision would permit things that are illegal now and the other side maintaining that it would prevent things that are legal now. Both agreed on one thing: that the section should be dropped entirely. We also became convinced that the provision would be a mistake in any event. At the present time the practices, techniques, and devices for reproducing visual images and sound and for "storing" and "retrieving" information are in such a stage of rapid evolution that any specific statutory provision would be likely to prove inadequate, if not unfair or dangerous, in the not too distant future. As important as it is, library copying is only one aspect of the much larger problem of changing technology, and we feel the statute should deal with it in terms of broad fundamental concepts that can be adapted to future developments.
>
> The decision to drop any provision on photocopying tended to increase the importance attached to including a general section on fair use in the statute. Thus, in the 1964 bill, further language was added to section 6 in an attempt to clarify the scope of the doctrine of fair use but without freezing or delimiting its application to new uses. . . .
>
> This language elicited a large body of comments, most of them critical. Without reviewing the arguments in detail, it can be said in general

[48] *Copy. Law Rev., Pt. 6, supra* note 13, p. viii.

[49] *Copy. Law Rev., Pt. 3, supra* note 1.

that the author-publisher groups expressed fears that specific mention of uses such as "teaching, scholarship, or research" could be taken to imply that any use even remotely connected with these activities would be a "fair use." On the other side, serious objections were raised to the use of qualifying language, such as "to the extent reasonably necessary or incidental to a legitimate purpose" and "the amount and substantiality of the portion used. . . ."

In addition to opposing this language as unduly restrictive, a group of educational organizations urged that the bill adopt a new provision which would specify a number of activities involved in teaching and scholarship as completely exempt from copyright control. In broad terms, and with certain exceptions, the proposal as it evolved would permit any teacher or other person or organization engaged in nonprofit educational activities to make a single copy or record of an entire work, or a reasonable number of copies of "excerpts or quotations," for use in connection with those activities. It was argued that these privileges are a necessary part of good teaching, and that it is unjustifiable to burden educators with the need to buy copies for limited use or to obtain advance clearances and pay royalties for making copies. These proposals were opposed very strongly by authors, publishers, and other copyright owners on the ground that in the short run the reproduction of copies under this proposal would severely diminish the market for their works, and that the ultimate result would be to destroy the economic incentive for the creation and publication of the very works on which education depends for its existence. It was suggested that a clearinghouse for educational materials, through which it would be possible to avoid problems of clearances, is a practical possibility for the near future.

For reasons we have already discussed at some length, we do not favor sweeping, across-the-board exemptions from the author's exclusive rights unless an overriding public need can be conclusively demonstrated. There is hardly any public need today that is more urgent than education, but we are convinced that this need would be ill-served if educators, by making copies of the materials they need, cut off a large part of the revenue to authors and publishers that induces the creation and publication of those materials. We believe that a statutory recognition of fair use would be sufficient to serve the reasonable needs of education with respect to the copying of short extracts from copyrighted works, and that the problem of obtaining clearances for copying larger portions or entire works could best be solved through a clearinghouse arrangement worked out between the educational groups and the author-publisher interests.

Since it appeared impossible to reach agreement on a general statement expressing the scope of the fair use doctrine, and since in any event the doctrine emerges from a body of judicial precedent and not from the statute, we decided with some regret to reduce the fair use section to its barest essentials. Section 107 of the 1965 bill therefore provides:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright.

We believe that, even in this form, the provision serves a real purpose and should be incorporated in the statute.

The author-publisher interests have suggested that fair use should be treated as a defense, with the statute placing the burden of proof on the user. The educational group has urged just the opposite, that the statute should provide that any nonprofit use for educational purposes is presumed to be a fair use, with the copyright owner having the burden of proving otherwise. We believe it would be undesirable to adopt a special rule placing the burden of proof on one side or the other. When the facts as to what use was made of the work have been presented, the issue as to whether it is a "fair use" is a question of law. Statutory presumptions or burden-of-proof provisions could work a radical change in the meaning and effect of the doctrine of fair use. The intention of section 107 is to give statutory affirmation to the present judicial doctrine, not to change it.[50]

Subcommittee No. 3 of the House Committee on the Judiciary held hearings in May, June, and August of 1965.[51] A number of witnesses presented testimony and statements on photocopying issues:

[50] *Copy. Law Rev., Pt. 6, supra* note 13, p. 26.

[51] *Supra* note 15.

Charles F. Gosnell, American Library Association 460–62, 471–72
Robert T. Jordan 464–65, 468–70
Robert H. Bahmer, General Services Administration 1110–16
Anthony J. Celebrezze, Department of Health, Education and Welfare 1131–32
Alanson W. Willcox, Department of Health, Education and Welfare 1132–33
Julian P. Boyd, Society of American Archivists, etc. 1140–43
Maxwell C. Freudenberg, Department of Defense 1164
Mark Carroll, Association of American University Presses 1216
Bella L. Linden, American Textbook Publishers Institute 1420, 1430–32, 1435, 1438–52, 1460
Carl F. J. Overhage, Massachusetts Institute of Technology 1455
Howard A. Meyerhoff with Gerald Sophar, Committee to Investigate Copyright Problems 1471–83
Ralph H. Devan, Raymond H. Herzog, and Charles Lauder, Minnesota Mining and Manufacturing 1497–1508
Lyle Lodwick and Francis Old, Williams and Wilkins 1511–18
Frederick Burkhardt and Martin F. Richman, American Council of Learned Societies 1550, 1555–57
Fred S. Siebert, Michigan State University 1563–64, 1566
Frank C. Campbell, Music Library Association 1575
Gerhard Van Arkel, International Typographical Union 1650
Harry F. Howard, Book Manufacturers' Institute 1666–67, 1674
Irwin Karp, Authors League of America, Inc. 1755–61, 1765–69
Melville B. Nimmer, University of California at Los Angeles Law School 1810–13, 1817–18
William D. Barns, West Virginia University 1887–88
J. C. Wilson, Xerox Corporation 1930

During August 1965 hearings on S. 1006 were also being held, at which the following individuals submitted statements or testimony on photocopying: [52]

Page

Alanson W. Willcox, Department of Health, Education and Welfare 50–51
Abraham L. Kaminstein, Register of Copyrights 69–70
Harold E. Wigren, Ad Hoc Committee on Copyright Law Revision 84–93
Harry N. Rosenfield, Ad Hoc Committee on Copyright Law Revision 118–27, 129, 132–36, 148–49
Charles F. Gosnell, American Library Association 136–38
Fred S. Siebert, American Council on Education 144
Mark Carroll, American Association of University Presses 180
Kenneth B. Keating, representing publishers 219–20

On October 12, 1966, the House Committee on the Judiciary issued a report to accompany H.R. 4347, the 1965 Revision Bill.[53] Several changes relating to photocopying had been incorporated into the bill: section 107 reinstated the "factors to be considered" in determining fair use from section 6 of the 1964 Revision Bill.

§ 107. Limitations on exclusive rights: fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—

(1) the purpose and character of the use;
(2) the nature of the copyrighted work;
(3) the amount and 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.

The analysis and discussion of this section address fair use within the classroom setting as had most of the testimony and discussion before that time.[54]

The House Report made this commentary on the subject of library copying:

[B]oth the American Council of Learned Societies and the Department of Health, Education and Welfare argued that the problem is too important to be left uncertain, and proposed adoption of a statutory provision allowing libraries to supply single photocopies of material under limited conditions.

[52] *Supra* note 16.

[53] 89th Cong., 2d sess., 1966, H. Rept. 2237.
[54] Ibid., p. 58.

As in the case of reproduction of copyrighted material by teachers for classroom use, the committee does not favor a specific provision dealing with library photocopying.

Unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of all of the applicable criteria and the facts of the particular case. Despite past efforts, reasonable arrangements involving a mutual understanding of what generally constitutes acceptable library practices, and providing workable clearance and licensing conditions, have not been achieved and are overdue. The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected.[55]

This version of the bill added a new section dealing with nonprofit archives:

§ 108. Limitations on exclusive rights: reproduction of works in archival collections

Notwithstanding the provisions of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution.

The discussion of section 108 in the report explains the inclusion of this section:

Section 108.—Reproduction of works in archival collections

Although the committee does not favor special fair use provisions dealing with the problems of library photocopying, it was impressed with the need for a specific exemption permitting reproduction of manuscript collections under certain conditions. . . .

The committee has therefore adopted a new provision, section 108, under which a "nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research," would be entitled to reproduce "any such work in its collections" under certain circumstances. Only unpublished works could be reproduced under this exemption, but the privilege would extend to any type of work, including photographs, motion pictures, and sound recordings.

The archival reproduction privilege accorded by section 108 would be available only where there was no "purpose of direct or indirect commercial advantage," and where the copies or phonorecords are reproduced in "facsimile." Under the exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in "machine-readable" language for storage in an information system.

The purposes of the reproduction must either be "preservation and security" or "deposit for research use in any other such institution." *Thus, no facsimile copies or phonorecords made under this section can be distributed to scholars or the public;* if they leave the institution that reproduced them, they must be deposited for research purposes in another "nonprofit institution" that has "archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research."

This section is not intended to override any contractual arrangements under which the manuscript material was deposited in the institution. For example, if there is an express contractual prohibition against reproduction for any purpose, section 108 could not be construed as justifying a violation of the contract [emphasis added].[56]

This version of the bill also added an "innocent infringer" clause in section 504(c)(2) which would apply in the following instance:

In a case where an instructor in a nonprofit educational institution, who infringed by reproducing a copyrighted work in copies or phonorecords for use in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction, sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under section 107, the court in its discretion may remit statutory damages in whole or in part.

Congress adjourned before taking any action on this bill.

The Ninetieth Congress

In the first session of the 90th Congress, Representative Celler reintroduced the revision bill as H.R. 2512 on January 17, 1967; S. 597 followed on January 23. On March 8, the House Committee on the Judiciary reported

[55] Ibid., p. 65., *cf.* statements of Celebrezze, Willcox, and Burkhardt, above.

[56] Ibid., p. 66.

H.R. 2512. The Sectional Analysis and Discussions for sections 107 and 108 are virtually identical to those found in H.R. 89–2237.[57] The House of Representatives passed the bill, with several amendments, on April 11, 1967.

Meanwhile, the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee held hearings on S. 597 in March and April of 1967. The transcripts of these hearings, issued in four parts, contain numerous references to statements on photocopying: [58]

Cable television emerged as a serious and long-lasting problem; thus, no action was taken on the Copyright Revision Bill in the 90th Congress.

[57] 90th Cong., 1st sess., 1967, H. Rept. 83, p. 29.

[58] *Hearings on S. 597, supra* note 20.

The National Commission on New Technological Uses of Copyrighted Works

By the summer of 1967 it had become apparent that the revision bill then before Congress did not deal with a number of copyright problems in computer-related fields. On August 2, Senator McClellan introduced S. 2216, a bill to create a National Commission on New Technological Uses of Copyrighted Works. Further discussion of this bill is found in the portion of this appendix dealing with computer-related works.

On October 12, S. 2216 was passed by the Senate, but the House of Representatives took no corresponding action during the 90th Congress.

The Ninety-first Congress

On January 22 (legislative day of January 10), 1969, Senator McClellan once again introduced the revision bill in the Senate as S. 543. This bill combined most of the provisions of S. 597 and S. 2216 from the 90th Congress. When the Senate Judiciary Subcommittee referred the bill to the full committee on December 10, 1969, section 108 specified the type of library which would be eligible for "isolated and unrelated reproduction or distribution" exemptions and the conditions under which copies could be made for patrons.

§ 108. Limitations on exclusive rights: reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or distribute such copy or phonorecord, under the conditions specified by this section and if:

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; and

(2) The collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile

form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a normal price from commonly-known trade sources in the United States, including authorized reproducing services.

(d) The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audio-visual work, made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archives, if:

(1) The user has established to the satisfaction of the library or archives that an unused copy cannot be obtained at a normal price from commonly known trade sources in the United States, including authorized reproducing services;

(2) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and

(3) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyrights in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises; provided that such equipment displays a notice that the making of a copy may be subject to the copyright law.

(2) excuses a person who uses such reproducing equipment or who requests a copy under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy, if it exceeds fair use as provided by section 107;

(3) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed by the library or archives when it obtained a copy or phonorecord of the work for its collections.

(f) The rights of reproducing or distributing "no more than one copy or phonorecord" in accordance with this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same work on separate occasions, but do not extend to cases where the library or archives, or its employees, is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same work, whether on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group.

Section 504(c)(2) extended the "innocent infringer" status to librarians and archivists as well as to instructors in educational institutions. Disagreement on issues related to cable television again forestalled further congressional action.

The Ninety-second Congress

Senator McClellan introduced a bill (S. 644) which was, apart from minor amendments, virtually identical to that reported by the Senate Judiciary Subcommittee in the 91st Congress on February 18, 1971. As the Federal Communications Commission was engaged in formulating rules for cable television, the Senate took no action on S. 644. Public Law 92–140, for limited copyright in sound recordings, was enacted during this Congress.

The Ninety-third Congress

The 93d Congress saw the introduction of a Copyright Revision Bill with the same provisions as that of S. 644 of the previous Congress. On March 26, 1973, S. 1361 was introduced, and more copyright hearings were held on July 31 and August 1. Testimony on photocopying was presented at these hearings by the following individuals: [59]

	Page
Stephen A. McCarthy, Association of Research Libraries	89–98
Philip B. Brown, Association of Research Libraries	92–100

[59] *Hearings on S. 1361, supra* note 25.

The subcommittee invited interested parties to submit written statements which were included in the record of the hearings. The following individuals and organizations responded to this invitation:

A number of those who testified at the hearings and submitted written statements urged that the proposed national commission undertake the study of photocopying issues related to both educational uses of copyrighted works and library reproduction and distribution of copyrighted works.

The Senate Judiciary Subcommittee reported S. 1361 on April 9, 1974. The subcommittee made substantial changes in the wording of section 108, adding subsection (a)(3) which required a notice of copyright to be placed on the copies made, and putting the phrase "at a fair price" in subsection (c) in place of an earlier phrase requiring the library to check "commonly-known trade sources in the United States, including authorized reproduction services." Section 108 also distinguishes between copies made for users of portions of works [subsection (d)] and of whole works which are otherwise unavailable [subsection (e)]. The subcommittee added subsection (h) to specify those works which might not be reproduced except for "preservation or security" or because they are "damaged," etc.:

§ 108. Limitations on exclusive rights: reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting

within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or distribute such copy or phonorecord, under the conditions specified by this section, if:

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; and

(2) The collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field,

(3) The reproduction or distribution of the work includes a notice of copyright.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if:

(1) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and

(2) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his request or from that of another library or archives, if the library or archives had first determined, on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if:

(1) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and

(2) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises, provided that such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy, if it exceeds fair use as provided by section 107;

(3) in any way affects the right of fair use as provided by section 107, or any contractual obligation assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the 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 or archives, or its employee:

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d).

(h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c).

The full Judiciary Committee of the Senate reported the bill on July 3, 1974. There is considerable discussion of section 108 in the Senate report. The legislators had found it difficult to define "systematic reproduction or distribution," although they gave three examples of library practice prohibited by section 108(g)(1) and (2). The report goes on to state the following:

> The committee believes that section 108 provides an appropriate statutory balancing of the rights of creators, and the needs of users. However, neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies" as distinguished from "systematic reproduction." Isolated single spontaneous requests must be distinguished from "systematic reproduction."
>
> The photocopying needs of such operations as multi-county regional systems must be met. The committee therefore recommends that representatives of authors, book, and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees. Concerning library photocopying practices not authorized by this legislation, the committee recommends that workable clearance and licensing procedures be developed.
>
> In adopting these provisions on library photocopying, the committee is aware that through such programs as those of the National Commission on Libraries and Information Science there will be a significant evolution in the functioning and services of libraries. To consider the possible need for changes in copyright law and procedures as a result of new technology, title II of this legislation establishes a National Commission on New Technological Uses of Copyrighted Works. It is the desire of the committee that the Commission give priority to those aspects of the library-copyright interface which require further study and clarification.[60]

On July 9, S. 1361 was then referred to the Senate Commerce Committee, which amended several sections and reported the bill on July 29, 1974. The Senate passed S. 1361 with several amendments on September 9, 1974.

The end of the 93d Congress was approaching, and it did not seem likely that there would be time for S. 1361 to be considered in the House of Representatives. On the same day that S. 1361 passed the Senate, Senator McClellan introduced S. 3976, an interim bill which, among other provisions, would establish the National Commission on New Technological Uses of Copyrighted Works. On September 9, 1974, the Senate considered and passed the bill on that same day.

The House subcommittee held a hearing on S. 3976 on November 26, 1974. The Register of Copyrights testified at the hearing in support of the establishment of the Commission.[61] The bill was amended to include on the Commission "at least one member selected from among experts in consumer protection affairs." The House Judiciary Committee reported the bill on December 12, 1974, with a dissenting view by Rep. Robert F. Drinan opposing the establishment of the Commission.[62] The House of Representatives considered and passed the bill on December 19, 1974. It was then signed by President Gerald Ford on December 31 and became Public Law 93–573.

The Ninety-fourth Congress

Early in the 94th Congress a copyright revision bill was introduced by Senator McClellan as S. 22 on January 15, 1975, and by Representative Kastenmeier as H.R. 2223 on January 28. The bill was substantially the same as S. 1361, which had been passed by the Senate in the 93d Congress. The Senate Judiciary Committee reported S. 22 on November 20, 1975. In its discussion of section 108(g), the Committee repeated its recommendation that

> representatives of authors, book and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees. Concerning library photocopying practices not authorized by this legislation, the committee recommends that workable clearance and licensing procedures be developed. . . .

It is still uncertain how far a library may go under the Copyright Act of 1909 in supplying a photocopy of copyrighted material in its collection. The recent case of *The Williams and Wilkins Company* v. *The United States* failed to significantly illuminate the application of the fair use doctrine to library photocopying practices. Indeed, the opinion of the Court of Claims said

[60] 93d Cong., 2d sess., 1974, S. Rept. 983, p. 122.

[61] *Supra* note 29.

[62] 93d Cong., 2d sess., 1974, H. Rept. 1581, p. 17.

the Court was engaged in "a 'holding operation' in the interim period before Congress enacted its preferred solution."

While the several opinions in the *Wilkins* case have given the Congress little guidance as to the current state of the law on fair use, these opinions provide additional support for the balanced resolution of the photocopying issue adopted by the Senate last year in S. 1361 and preserved in section 108 of this legislation. As the Court of Claims opinion succinctly stated "there is much to be said on all sides."

In adopting these provisions on library photocopying, the committee is aware that through such programs as those of the National Commission on Libraries and Information Science there will be a significant evolution in the functioning and services of libraries. To consider the possible need for changes in copyright law and procedures as a result of new technology, a National Commission on New Technological Uses of Copyrighted Works has been established (Public Law 93–573).[63]

Subsection 108(f)(4) was added to the bill:

[B]y the adoption of an amendment proposed by Senator [Howard] Baker [of Tennessee]. It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of television news programs. Despite the importance of preserving television news, the United States currently has no institution performing this function on a systematic basis.

The purpose of the clause is to prevent the copyright law from precluding such operations as the Vanderbilt University Television News Archive. . . .[64]

The text of the new subsection is as follows:

§ 108 (f) Nothing in this section—

(4) shall be construed to limit the reproduction and distribution of a limited number of copies and excerpts by a library or archives of an audiovisual news program subject to clauses (1), (2), or (3) of subsection (a).

Subsection 108(h) was changed in this version to read:

§ 108 (h) The rights of reproduction under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c).

The Senate approved S. 22 unanimously on February 19, 1976.

The House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice held eighteen days of hearings on H.R. 2223 in 1975.[65] The Register of Copyrights testified at several hearings and presented material from the *Second Supplementary Report of the Register of Copyrights*.[66]

During testimony received at these hearings, representatives of the six national library associations,[67] and author and publisher associations discussed, among other topics, the definition of "systematic reproduction" and a proposed copyright clearinghouse. Testimony or statements from the following appear in the record:

[63] 94th Cong., 1st sess., 1975, S. Rept. 473, p. 71.

[64] Ibid., p. 69.

[65] *Supra* note 33.

[66] The report has not yet been published. Copies of the draft are available from the Copyright Office.

[67] American Library Association, Association of Research Libraries, Medical Library Association, Music Library Association, Special Libraries Association, and American Association of Law Libraries.

During the October hearings the Register of Copyrights in a discussion of the *Second Supplementary Report* outlined the history of section 108, defined some of the continued problems in the interpretation of the section, and called for "a much clearer statement in the report concerning the interrelationship between sections 107 and 108, and a careful look at the wording and content of subsections (g) and (h)." [68] She went on to say:

> A line must be drawn between legitimate interlibrary loans using photocopies instead of bound books, and prearranged understandings that result in a particular library agreeing to become the source of an indeterminate number of photocopies. To find that line and draw it clearly is one of the most difficult legislative tasks remaining in the revision program. . . .
>
> I also indicate that I think CONTU, the new National Commission on New Technological Uses of Copyrighted Works, should not be forgotten here. There are legitimate things it can do. But, at the meeting yesterday, at one point, there was a suggestion made that they shouldn't try to reinvent the wheel and that the Congress has a long history behind this provision. And I think that proposals are coming to you, and maybe already have, that you should delay action on, or you should make interim action, pending what CONTU does. And I don't argue with that, as long as you lay a groundwork for what it does. I do feel the interrelationship between 108 and the Commission should be addressed in your report. I think it is important that you get out of the Commission what you want. You created it and it should do what you want it to do, in relation to this problem.

The Register also stated that the phrase "without any purpose of direct or indirect commercial advantage" was a problem with respect to special libraries and needed clarification.[69]

Appendix 2 of the hearings contains a series of eighteen "Briefing Papers on Current Issues Raised by H.R. 2223," prepared by the staff of the Copyright Office, one portion of which covers section 108.[70] Appendix 3 is the "Report of Working Group of Conference on Resolution of Copyright Issues (Dealing with Library Photocopying)." [71]

After these extensive hearings and the public markup sessions which followed, the House subcommittee reported the bill on August 3, 1976. The full Judiciary Committee of the House reported the bill without further amendment on September 3. The subcommittee had made two changes in section 108, which the Judiciary Committee accepted and explained in this way:

> *Multiple copies and systematic reproduction*
>
> Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy or phonorecord of the same material on separate occasions." However, this section does not authorize the related or concerted reproduction of multiple copies or phonorecords of the same materials, whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group.
>
> With respect to material described in subsection (d)—articles or other contributions to periodicals or collections, and small parts of other copyrighted works—subsection (g)(2) provides that the exemptions of section 108 do not apply if the library or archive [sic] engages in "systematic reproduction or distribution of single or multiple copies of phonorecords." This provision in S. 22 provoked a storm of controversy, centering around the extent to which the restrictions on "systematic" activities would prevent the continuation and development of interlibrary networks and other arrangements involving the exchange of photocopies. After thorough consideration, the Committee amended section 108(g)(2) to add the following proviso:
>
> Provided, that nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for dis-

[68] *Hearings on H.R. 2223, supra* note 33, p. 1801.

[69] Ibid., pp. 1801–4.

[70] Ibid., p. 2057.

[71] Ibid., p. 2092.

tribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

In addition, the Committee added a new subsection (i) to section 108, requiring the Register of Copyrights, five years from the effective date of the new Act and at five-year intervals thereafter, to report to Congress upon "the extent to which this section has achieved the intended statutory balancing of the rights of creators and the needs of users," and to make appropriate legislative or other recommendations. As noted in connection with section 107, the Committee also amended section 504(c) in a way that would insulate librarians from unwarranted liability for copyright infringement; this amendment is discussed below.

The key phrases in the Committee's amendment of section 108(g)(2) are "aggregate quantities" and "substitute for a subscription to or purchase of" a work. To be implemented effectively in practice, these provisions will require the development and implementation of more-or-less specific guidelines establishing criteria to govern various situations.

The National Commission on New Technological Uses of Copyrighted Works (CONTU) offered to provide its good offices in helping to develop these guidelines. This offer was accepted and, although the final text of guidelines has not yet been achieved, the Committee has reason to hope that, within the next month, some agreement can be reached on an initial set of guidelines covering practices under section 108(g)(2).[72]

The House committee also addressed the issue of "indirect commercial advantage" in section 108(a)(1), which the Register of Copyrights had pointed out as an area needing clarification in the hearings on H.R. 2223:

> The reference to "indirect commercial advantage" has raised questions as to the status of photocopying done by or for libraries or archival collections within industrial, profit-making, or proprietary institutions (such as the research and development departments of chemical, pharmaceutical, automobile, and oil corporations, the library of a proprietary hospital, the collections owned by a law or medical partnership, etc.).
>
> There is a direct interrelationship between this problem and the prohibitions against "multiple" and "systematic" photocopying in section 108 (g)(1) and (2). Under section 108, a library in a profit-making organization would not be authorized to:
>
> (a) use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or
>
> (b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is "systematic" in the sense of deliberately substituting photocopying for subscription or purchase; or
>
> (c) use "interlibrary loan" arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscriptions or purchase of material needed by employees in their work.
>
> Moreover, a library in a profit-making organization could not evade these obligations by installing reproducing equipment on its premises for unsupervised use by the organization's staff.
>
> Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108, even though the copies are furnished to the employees of the organization for use in their work. Similarly, for-profit libraries could participate in interlibrary arrangements for exchange of photocopies as long as the production or distribution was not "systematic." These activities, by themselves, would ordinarily not be considered "for direct or indirect commercial advantages," since the "advantage" referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located. On the other hand, section 108 would not excuse reproduction or distribution if there were a commercial motive behind the actual making or distributing of the copies, if multiple copies were made or distributed, or if the photocopying activities were "systematic" in the sense that their aim was to substitute for subscriptions or purchases.[73]

In addition, the report contains the Guidelines for Classroom Copying in Not-for-Profit Educational Institutions and Guidelines for Educational Use of Music.[74]

The CONTU Guidelines

On April 2, 1976, the National Commission on New Technological Uses of Copyrighted

[72] 94th Cong., 2d sess., 1976, H. Rept. 1476, p. 77. Corrections appeared in 122 *Cong. Rec.* H10727 (daily edition, September 21, 1976).

[73] Ibid., p. 74.

[74] Ibid., pp. 68, 70.

Works (CONTU) adopted the following resolution: [75]

BE IT RESOLVED, that the National Commission on New Technological Uses of Copyrighted Works shall offer its assistance to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary in helping to develop language and guidelines relating to library photocopying in the Senate Bill 22.

The House subcommittee accepted the Commission's offer, as did the chairman of the Senate Judiciary Subcommittee, Senator McClellan.

The Commission requested written statements from parties who had expressed interest in the library photocopying issue throughout the legislative proceedings. The following submitted comments:

American Association of Law Libraries
American Institute of Physics
American Library Association
American Society for Testing and Materials
Association of American Publishers
Association of Research Libraries
Authors League of America, Inc.
Ben H. Weil
Harcourt Brace Jovanovich, Inc.
Macmillan Publishing Company, Inc.
Medical Library Association
Music Library Association
National Commission on Libraries and Information Science
National Library of Medicine
Special Libraries Association
Williams and Wilkins Company

[75] For a fuller discussion, see Chapter 4 under CONTU Guidelines on Photocopying under Interlibrary Loan Arrangements.

At its meeting on June 9–10, 1976, the Commission discussed the comments received and began to draft guidelines.[76] These guidelines were submitted to the interested parties, further comments were received, and a revised draft was drawn up. Representatives of the principal library, author, and publisher organizations accepted the revised guidelines, which were then submitted to the chairman of the Conference Committee on September 22, 1976. The text of the guidelines may be found in this report under the section CONTU Guidelines on Photocopying under Interlibrary Loan Arrangements.

The Conference Report

As reported by the House Judiciary Committee, S. 22 was approved by the House of Representatives on September 22, 1976. The Conference Committee was appointed to reconcile the differences in the two versions of the bill; as noted above, the Senate had approved S. 22 some seven months previously. The Conference Committee accepted the House version of section 108 along with the CONTU guidelines, which were included in the conference report. The Committee also gave a further clarification of "indirect commercial advantage" as used in section 108(a)(1) in relation to proprietary libraries.[77]

Both Houses of Congress accepted the Conference Committee version of S. 22 on September 30, 1976, and President Ford signed the bill on October 19, 1976.[78]

[76] Transcript, CONTU Meeting No. 7, p. 4, PB 254 766.

[77] 94th Cong., 2d sess., 1976, H. Rept. 1733, pp. 72–73.

[78] P.L. 94-553 (1976).