In the

Supreme Court of the United States

The William & Wilkins Company,

Petitioner,

v.

The United States,

Respondent.

No. 73-1279

Washington, D. C.
December 17, 1974

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The above-entitled matter came on for argument at 10:08 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ALAN LATMAN, ESQ., 200 East 42nd Street, New York, New York 10017, for the Petitioner.

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first in No. 73-1279, The Williams & Wilkins Company against the United States.

Mr. Latman, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALAN LATMAN

ON BEHALF OF THE PETITIONER

MR. LATMAN: Mr. Chief Justice, and may it please the Court: This is an action for copyright infringement against the United States Government. It is here on a writ of certiorari from the United States Court of Claims. It's brought under the provisions of title 28, United States Code, section 1498(b) which is an eminent domain type of statute passed by Congress 15 years ago to cover cases of this type.

An exclusive remedy of that statute is an action in the Court of Claims for reasonable compensation. Therefore, there is no injunction possible in this case nor is any sought.

The issue is whether the Government system of reproducing petitioner's copyrighted journal articles in their entirety through library photocopying is compensable under this jurisdictional statute as copyright infringement, or excusable under the defense of fair use.

Petitioner believes that this issue vitally affects the future of journals such as its medical and scientific

journals involved in this case ranging to journals of political affairs, poetry, literary journals which have a small circulation, privately published, and respected.

Petitioner also believes that this issue should be resolved in favor of compensation because its property, namely, its copyright, has been taken and it should be reasonably compensated. I say taken because the Government system of furnishing reproductions here come within the policy and the language of the copyright statute which provides exclusive rights to print, reprint, publish, and copy, and the defense of fair use is completely inapplicable, as I will indicate in a moment. That's a doctrine and a defense that applies to an incidental use by one writer of someone else's work in terms of a portion of the work but never so as to constitute an effective substitute for the original work.

In this case --

QUESTION: Has the doctrine of fair use ever been upheld or specifically adopted by any opinion of this Court?

MR. LATMAN: I don't believe it has, Mr. Justice Rehnquist. The doctrine was raised in the so-called Jack Benny case which did reach this Court and it was a case which held that a taking of someone else's work even as a parody constituted infringement. That was a Ninth Circuit case. The affirmance by this Court was 4 to 4 of necessity and without opinion.

The issue also was raised in a case involving

Admiral Rickover where Mr. Justice Reed, who was then retired, was sitting in the District of Columbia circuit and he had some remarks to say about fair use which we do quote in our brief which we think are pertinent, basically that taking a whole work has never been held to be fair use, but when it came to this Court the judgment was vacated for an insufficient record on other issues.

I think the answer to the question has to be no.

QUESTION: Was the Ninth Circuit case the Gas Light case?

MR. LATMAN: Yes, it is, Mr. Justice Stewart.

QUESTION: At least the parody or the burlesque of Gas Light.

MR. LATMAN: Yes. Mr. Benny put on what he called Auto Light as a parody of Gas Light. He had the same star, Ingred Bergman, and the District Court in the Ninth Circuit held that even though parody changed the serious melodrama of Gas Light to a comedy, nevertheless the defense of fair use did not apply, nevertheless it was infringement.

QUESTION: And that was affirmed by an equally divided Court?

MR. LATMAN: Yes, your Honor.

The learning of those cases is that the essence of fair use is that the use should not be an effective substitute. In this case when we are dealing with a photocopy of a 40- or

50-page article, we think it's unquestionable that that does substitute for the original.

The trial judge held for the petitioner on the issue of liability, reserving the amount of reasonable compensation for later determination. The Court of Claims in a four-to-three decision disagreed and dismissed the petition.

The Government agencies involved are two libraries of the Department of Health, Education, and Welfare. One is the National Library of Medicine, which is a library's library. It sits at the apex of a nationwide network of 10 regional and 400 local medical libraries.

QUESTION: 'Who are the principal constituents of those libraries, the users?

MR. LATMAN: They vary, your Honor. They include not only other Government libraries and medical schools and institutions, but also private companies including drug companies, for example. And the service that the National Library of Medicine renders to this variety of constituents is the same. And that service is that they furnish, they take a few subscriptions, as does the sister library, the National Institutes of Health or NIH. NIH, as your Honors know, is here in Bethesda. It's a super library and it's a super institution. It furnishes its thousands of employees with their needs for journals subscribing to only one or two copies.

Now, concededly these copies don't do the job by themselves, so as an integral part of the operations of both libraries, there is a system of the following: When a patron or staff wants a journal, he or she gets a complete photocopy of the article. It's complete, it's no return, it's free. I say free. I mean no charge. Of course, it costs the taxpayer money. Indeed, the Government pays the Xerox Corporation for each page they copy. And, of course, they do not pay the people who produce and disseminate the material being copied.

QUESTION: What did the practice used to be before your Xerox?

MR.LATMAN: The practice of individuals?

QUESTION: Yes.

MR. LATMAN: Was namely to take notes by hand,and then in the turn of the century and going up to the 'thirties, there was the system of photostats and rather elaborate system of stockroom facilities which meant that until you got to the era of Xerox, Mr. Justice Stewart, you had a situation where it was impracticable and uneconomical and slow to reproduce an entire article. And that's why we think that all those methods -- hand, typewriter, mimeograph, whatever the system was -- it was a system geared to taking notes, as we all do, of making an excerpt or taking a photostat of one page or a chart. Whereas the era of Xerox, which the parties seem to admit really came in in the early 'sixties, I think that the

opinion below and the Government's brief her, the Government's brief below, concedes the fact that in the early 'sixties, late 'fifties, there was virtually no photocopying as we know it today.

QUESTION: Did the libraries, the National Library and the National Institutes of Health, before the early 'sixties, subscribe to more copies of your publications than they now do?

MR. LATMAN: No, I don't believe the record is conclusive one way or another. I don't think I can say they subscribed to more. However, we have a few sequels, really. One is this, that in certain areas, for example, one of the journals in suit is called Journal of Immunology. I suppose we all recognize that in the era of transplants and in the era of cancer research, and the like, that the interest in immunology has so mushroomed that for subscriptions to stay about the same, which in many cases they have, or for reprints, which is an alternative form that the publisher has. That is, the publisher doesn't only sell subscriptions; the publisher is interested in disseminating this material, that is what it's in the business of doing. So that in addition to subscriptions, it sells reprints, it licenses microfilm, which is another convenient alternative form of utilization, and indeed it has an authorized photocopying agency. So that these alternative forms which are needed to keep these very small base journals alive -- for example, take medicine or the Journal of Immunology.

There are four journals in suit. And even though everyone agrees these are the respected journals in their fields in the world, the journals that have subscriptions from three to seven thousand, the subscription price for 6 to 12 issues are $12 or $44.

The National Library of Medicine in achieving this has a system of an overhead microfilm camera which swings up and down the aisles of the stacks of the library to take photographs of the journals. In other words, one does not even have to bring the journal out. And I mention that only to indicate that this is an integral day-by-day operation.

Similarly, the National Institutes of Health have four employees who do nothing else all day but grind out these reprints. And in the year in question in the record, it shows that that operation at NIH with those four full-time employees entails an expenditure of slightly more than the library spent for acquisition of journals.

QUESTION: Does the record show how many reprints are supplied to each author of his article?

MR. LATMAN: It does, Mr. Justice Blackmun. It shows that on the average about 300 reprints are furnished.

QUESTION: Furnished free of charge.

MR. LATMAN: No, there is a certain amount that's free of charge, 25 or 50 and the rest are purchased. Now, they are purchased, and, of course, the amount of reprints that

were purchased in the past used to be an indication of the popularity of the article, something that the editors are interested in. But it isn't any more, and we think the reason it isn't any more is that once the reprints which are furnished by the author to people who request it are used up that the people just photocopy.

QUESTION: What barriers are there, if any, to having a person who desires one of these copies to write to the publisher, your client, and get a copy directly?

MR. LATMAN: We don't think there is any barriers. We think that in order to facilitate the situation, because in the past it is hard to stock actual back copies, our client has authorized two reprint houses to furnish reprints. And, secondly, as I indicated, a photocpying agency to furnish people with that. So that while there may be a barrier, we think that the key is authorized photocopying. Because, I would like to emphasize to the Court in this situation that the petitioner is not interested in stopping or slowing down or faulting this photocopying at all. What the proprietor is interested in doing is securing some reasonable royalty. Therefore, Mr. Chief Justice, we think that working through our licensed representative is one way. If one would consider that that's too slow and that that's a barrier, then the alternative which we would prefer and which we have offered is a blanket license covering all the journal articles which

could be paid for by the Library when they buy the subscription. So far all the proposals we have made have been turned down because, as our efforts show, when we tried to set up such a system before the lawsuit, we were told that there would be no system of royalties until the court ordered the Government to do so.

QUESTION: Mr. Latman, have you had this same experience with private libraries?

MR. LATMAN: Well, we have had almost a worse experience, Mr. Justice White, in that we almost ran into a boycott, and I think I have appended to our brief, in our experience.

The National Library of Medicine is, after all, a well-respected agency. We respect it greatly ourselves. When it suggested that any proposal to license during the pendancy of this suit was somehow inelegant and improper, the National of Library of Medicine threatened to not only not take our license, but to cease subscribing to the journals. That's of record. And when I say of record, I mean it's in a letter which the Government called to the attention of the court and which we thought would be helpful if we appended in full. The private libraries indicated that they would follow suit.

Of course, the licenses that we are talking about would extend to private libraries. The Government, in effect, has a compulsory license in this case, as the Court knows. We

can't stop the Government. We don't want to. But the offer of licensing has been extended, but we are told that we had better not extend licenses or talk about licenses until there was a definitive word on this case. And that's why we are here.

QUESTION: Somewhere in this mass of briefs, perhaps in one of the amicus briefs, there was a reference to the Library of Congress.

MR. LATMAN: Yes.

QUESTION: Could you clarify, if you know, what is their practice with respect to furnishing full copies?

MR. LATMAN: Yes. Mr. Chief Justice, their practice is in direct and dramatic contrast to the libraries in question. They have a policy which was introduced into evidence, the Library of Congress photoduplication, the key to which is copyright material will ordinarily not be copied without the signed authorization of the copyright owner. Exceptions to this rule may be made in particular cases or responsibility for use is on the applier. In other words, we find that dramatically different, and we suspect that it's different for the same reasons that the libraries purport to have limitations. That is, that respect for the law, respect for the rights of property in copyright, particularly in these journals.

QUESTION: Does that apply to the public? Does it

also apply to Members of Congress?

MR. LATMAN: Does what apply, Mr. Justice Marshall?

QUESTION: That rule you just read.

MR. LATMAN: I believe it does. I don't know of any exceptions to their policy. On the other hand, I am not familiar with the practice with regard to a Member of Congress.

Of course, the purpose of the statute that we are suing on is to immunize individuals within the Government and to make the Government liable for Government use, which might possibly cover the --

QUESTION: The two libraries you are talking about, that's limited to Government use.

MR. LATMAN: Not the National Library of Medicine. The National Library --

QUESTION: For example, if somebody in the National Institutes of Health wants a copy of an article, you think you should be paid for that?

MR. LATMAN: Yes. We think they should pay for it just as they pay for the subscriptions they buy, just as they pay for the microfilm editions, all of which are alternative ways to use the journals, alternative ways to use it within the meaning of the copyright law which provides exclusive rights to print, reprint, and copy. We think it's a copy and we think it fulfills the policy of the copyright law which is to grant economic incentives to publishers.

QUESTION: So that if they have several thousand people out there, they would have to buy several thousand --

MR. LATMAN: No. What they could do is to take a license and pay literally a few more dollars a year in order to get --

QUESTION: A few more thousand dollars each time they did it.

MR. LATMAN: No. No. The proposal we --

QUESTION: What are we talking about? How much money are we talking about?

MR. LATMAN: Well, the proposal that we talked about which we had to withdraw under the threat of boycott that they indicated averaged about $3.65 a year for the library for the life of that particular journal. That would mean that they could furnish each and every one of their users with a copy.

QUESTION: How much would that be per year?

MR. LATMAN: Well, it would vary. The amounts we are talking about are small but important. For example, in the case of Medicine, the subscription price is $12 a year. The libraries probably account for most of the subscribers or half of the subscribers. So it would amount to perhaps $10,000 a year to the publisher, which in terms of Medicine, whose gross revenues are maybe $50,000 --

QUESTION: That's all the license would bring in is

$10,000 per year?

MR. LATMAN: That's all it would bring in if it were accepted.

QUESTION: Is that all we are talking about?

MR. LATMAN: No. We are talking about a lot more, Mr. Justice Marshall, because --

QUESTION: I'm trying hard to find out how much more.

MR. LATMAN: Well, it's hard to put a specific dollars and cents tag on it. The reason I say -- first of all, I would like to say that $10,000 to the life of a journal is extremely important. But passing that, the petitioner publishes, for example, 37 journals, and we are talking about other people, as I indicated before. I do not have an estimate for you, Mr. Justice Marshall,on how much would be involved if that particular license proposal was achieved. We were and indicated and that we were completely open to any variation of a licensing proposal. They do pay Xerox Corporation, as I said, per page, but we think per page is perhaps a little too complicated.

QUESTION: Of course, the Court of Claims said that -- Judge Davis said that the court didn't have the power to compel you to license to a private individual, and while you might be willing to, some other person in a similar situation might not.

MR. LATMAN: Well, to begin with, Mr. Justice Rehnquist, a person in a similar situation, of course, suing the Government has no alternative. And the Government is a very important subscriber and a very important factor here.

But, secondly, we think that if the Court of Claims did what we think is the proper job, namely, to decide reasonable compensation in this case -- and this might even give a hint as to what the answer might be to Mr. Justice Marshall's question -- that this would serve as a pilot example to people as to what reasonable compensation would be. I see no indication on the part of any of the publishers, including the hundreds and hundreds who have joined as amicus in this action, of any interest to stop this photocopying. So that I think that if they went into court and, let's say, went into court against a private individual, that the standards set by the Court of Claims in this case would show what reasonableness would be. And that's what we would urge.

QUESTION: And the matter would be open for Congressional regulation, too, I take it.

MR. LATMAN: Well, it's been open for Congressional regulation, Mr. Justice White, for many years. I think the Court probably became aware of that in the 'sixties. I must say that I spent a very pleasant year of my life in the Copyright Office in 1958 across the street at the early days of the revision when I used to take good lunch hours here

listening to the arguments in this Court. And I'm still waiting, and I think the Court is still waiting, for action.

But I think more important than that is that the Court of Claims has really legislated. The Court of Claims ignored the fair use doctrine completely and in a sense, if you read their three core propositions, what they said was, we think it might hurt this fellow more than that fellow.

We think they were wrong, and we show that we believe that in our brief. We think that it's important that this is a judge-made doctrine and that the fair use question, as we have indicated at some detail in our brief, even if the most recent movement -- I was going to say gesture, which is unfair and disrespectful -- but I mean the most recent movement in Congress towards revision were to become law, that the fair use question before this Court would still be with us. And the reason it would be is that the Government argues that the fair use doctrine excuses whereas they admit that this case is different from any case in which the fair use doctrine has been applied in the past.

We agree with that. The fair use doctrine deals with incidental use, as I indicated earlier, where the key question in every case is, Does it substitute? If a fellow writing a biography of Howard Hughes decides to borrow from an earlier work on the same subject and his work wouldn't substitute for your getting and reading the original, he is and was in the

Rosemont case held to be using it fairly. And I agree. But where a high school teacher, instead of buying copies makes his own arrangement and reproduces 48 copies for his students, something which is indistinguishable from the situation here, he is held infringing. The reason I say indistinguishable, is that the library speaks about one at a time, that they only furnish it one at a time. I submit to your Honors that one at a time is a prototype. One at a time is the way that a bookstore sells books; one at a time is the way we sell to subscribers,and to use the colorful language of the trial judge, babies are still born one at a time but the world is becoming overpopulated. We don't think that one at a time changes it. We think it's the accumulation.

Similarly, we don't think that the fact that the Government is nonprofit changes things at all. We think that there are certain rights in the statute which are limited to profit, such as performance rights that have been before the Court. There is also rights such as the ones we are talking about where it is not.

The legislative history of this statute is important because all Government use is nonprofit and most of it is laudable. And the activity in this case is laudable. I say that quite sincerely. But when Congress went to pass the statute, maybe worrying about either the Congressman that was asked about or someone else, they had a twofold purpose. One

was to exempt the individual from liability, and the second was to make the Government liable, because until 1960 you could not sue the Government for copyright infringement. And in the course of that, the House report shows that the photocopying acceleration that was coming into play in '59 and '60 was one of the reasons they passed this statute.

The potential effect on this is severe. We have noted that some of the things we were simply talking about at the trial are now realities. Consortia, networks of libraries that are getting together at this stage because they are finding that costs go up -- and we are caught in that vicious cycle ourselves -- costs go up. The audience we have is relatively static, and photocopying gets cheaper. We can't raise subscription prices. That will just make the cycle more vicious. If we raise it, more people will decide they would rather photocopy. The consortia intend to share, the Soviet Union which has a practice of buying one or two copies of a journal and furnishing, I would presume, millions or thousands of scientists and others with it, are with us. And as I said, it is not the intention of petitioner to stop this, it's an intention and a request that its copyright be recognized. We think that that would be consistent to the economic incentive of Mazer v. Stein issued by this Court. We think it would comport with the constitutional and statutory purpose of

copyright, and we think it would preserve the viability of scientific journals.

QUESTION: Mr. Latman, could I go back to my former question about reprints? Does the record show what your clients charge for a reprint? Does it depend on the length and so forth?

MR. LATMAN: I believe it does.

QUESTION: Is it nominal?

MR. LATMAN: I am not sure I know or whether the record shows exactly what is charged.

QUESTION: I ask this because I know the tendency, and I personally think it's been abused greatly, of the medical profession at least, and I think scientists in general, to request almost automatically with penny postcards -- it used to be penny postcards -- for thousands of reprints literally and offering to pay no charge, expecting the author to supply these. And I suppose this, or does it, similarly come in in a flow to the publisher?

MR. LATMAN: It does, but we think that what's happened, Mr. Justice Blackmun, is instead of doing it that way, I have found similarly that people will indiscriminately gather reprints but in the form of photocopies. Even though we don't want to stop this, we think that it's convenient, in a certain sense it's a mixed blessing, and I think that what really has happened is the very practice that you describe,

Mr. Justice Blackmun, is now in effect but through photocopying.

QUESTION: It's not uncommon for judges, members of this Court and others, to call on the Library of Congress for a book, sometimes perhaps it's a book, of which they have only one or a very few copies, at least I assume that, because frequently we get a request, "Will you please return the book." Well, sometimes instead of returning the book if we are not finished with it, speaking personally, I have Chapter 13 or Chapter 14 copied on the xerox machine. As far as I know the Library of Congress has never sent photocopies of anything. They send the original.

Is the borrower running up against this statute and these claims by making a copy for his own use, copyrighted material?

MR. LATMAN: That is a harder question which we think is quite different from this case. And therefore, I could just give my opinion on that. Of course, to begin with, there is an interesting phenomenon when your Honor mentions a chapter. The libraries will not -- these libraries that we are suing will not copy a chapter from a book. When they call it a book or a monogram -- when the libraries classify it as a book or a monogram, even the libraries we are suing won't copy it. They somehow see a distinction. I think there is a lot of significance to that fact, because the world didn't come to an end when they didn't do that.

But let's get back to the example. It would be harder -- my opinion is that it would -- first, my opinion is that nobody would sue. And I think that's quite significant here, because it's impractical for anyone to sue, for a number of reasons.

QUESTION: Is it your opinion nobody would sue the Chief Justice or that nobody would sue anybody?

(Laughter.)

MR. LATMAN: Nobody would sue the Chief Justice or an individual. No one would sue an individual. It's an impractical medium --

QUESTION: It's a damage claim. Suppose I make 10 copies to send to my colleagues so that we would all be sharing in that. The recovery might be de minimus, so that no one would have any incentive to.

MR. LATMAN: Exactly. It would be precisely that. And therefore it is to be contrasted with the libraries here which generate, coordinate, install the machinery, decide, incidentally, whether to photocopy or send you the original. They make the decision. They perform the operation, and they have the microfilm camera, they print it themselves, and they give it to you. And the result is some 2 million pages a year of journal articles being copied by these two libraries alone. So that we can't call it de minimus.

QUESTION: It's so much faster than getting a

reprint.

MR. LATMAN: That the procedure is fast.

QUESTION: Faster than getting a reprint.

MR. LATMAN: It would be faster than getting a reprint and that's why we encourage --

QUESTION: It might be an emergency.

MR. LATMAN: It might be, and that's why we encourage the authorized licensing fee. Just as they would have the microfilm which is another alternative, that they have the opportunity to do it quickly. In fact, we think we have a wiser way for them to do it. They ought to make it off the microfilm. They shouldn't make different microfilms and copies as they do. We think that's wasteful. They should have the microfilm sitting there with a license to make copies.

QUESTION: You don't want to run the library, do you? You don't want to do that, do you?

MR. LATMAN: No, I do not, Mr. Justice Marshall. But I am suggesting that when we are talking about economics, which is all we are talking about here, there is a concession by the NIH library, and that all we are talking about is budgetary considerations. I am just trying to suggest how in that context it would be fair, it would be proper, it would be manageable, we think it would be very important in saving the journals and enforcing the copyright law.

I would like to save whatever time I do have for

rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK

ON BEHALF OF THE APPELLEE

MR. BORK: Mr. Chief Justice, and may it please the Court: Throughout most of this century libraries have permitted their patrons to make single copies of articles from journals, or have made such articles upon the request of customers. And not until now in this case has any publisher or other copyright holder ever challenged that well-known practice, that well-known means of providing access to collections in libraries.

QUESTION: General Bork, that doesn't mean that they haven't complained about it, does it, surely.

MR. BORK: There have been remarkably little complaint, Mr. Justice Blackmun. I admit there has been some. But I think the complaint is generally directed at practices other than that followed by the National Library of Medicine and NIH here.

QUESTION: Of course, I can't testify, but I have heard many complaints personally.

MR. BORK: Well, I think there has been.

QUESTION: Aren't the level of complaints rising in direct proportion to the number of photocopying machines --

MR. BORK: I think so, Mr. Chief Justice, but I think the number of complaints have to do with practices other than that followed by the National Library of Medicine and National Institutes of Health. One of petitioner's modes of arguing this case is to lump together all photocopying practices with the quite specific and limited practices followed by NLM and NIH. So I don't think the kind of practice we are examining here today in this case is the kind of practice that does any injury to the publishers in this industry or other industries.

QUESTION: Let me suggest what is probably a simplistic hypothetical proposition with a very obvious answer. I am sure the Library of Congress has got copies of many, many plays and suppose someone wants to put on a play and they write in and get one copy and then make a hundred copies. There is a copyright problem there for the use of that play, is there not?

MR. BORK: I have no doubt, Mr. Chief Justice, that that is a clear infringement. That is a practice totally unlike the practice followed by the National Library of Medicine.

QUESTION: Is it different because the medium of use is different?

MR. BORK: Oh, it's different for a complete variety of reasons. One is the noncommercial use here. Another, I must say, is that these photocopied articles are in no sense substitutes for a subscription to petitioner's journals. They

are not substitutes. If you were a worker in a research field, you will subscribe, and do subscribe and indeed get subscriptions through the professional associations you belong to of the main journals in your field, and keeping abreast of your field and its developments cannot be done by sending off for the occasional photocopy to the Library of Medicine.

So that what the Library of Medicine provides is not a substitute for subscriptions in your field. What it does provide are other things. It provides that when an article of direct interest to your work appears in a journal you never anticipated it would appear in, peripheral journal, or perhaps a journal from another specialty which has a cross feed into your field, or perhaps an out-of-date issue of your own that you no longer have. That is the kind of copying the National Library of Medicine does.

QUESTION: Well, if I am interested in the first act of the Mikado, I suppose I could say that the first act of the Mikado isn't a substitute for the whole operatta so I will just copy the first act, and it's not a substitute. Would that be fair use?

MR. BORK: It might well not be fair use, Mr. Justice Rehnquist. My primary answer to it is that is not this case. This case involves copying that I think has no effect upon the petitioner's subscription list.

Something is happening to the subscription lists of

medical journals and what will continue to happen is data flow through computers and other means increases. But that's not because of the photocopying practices of the National Library of Medicine.

I was merely pointing out that the ability to get a photocopy is no substitute for a subscription to the journals in your field. On the other hand, you cannot subscribe -- the National Library of Medicine has 18,000 journals it subscribes to. One doesn't know for sure where in that range of journals an article that might be relevant to one's research will appear. To tell a man that he must subscribe to any substantial fraction, any small fraction of that number of journals is to tell him that he cannot have the article. And that is --

QUESTION: Is it quite that broad? Perhaps it means he can have a copy of that article for 75 cents instead of getting it for nothing.

MR. BORK: Oh, if we --

QUESTION: So that the publisher gets some sort of a royalty. I don't know what the amounts would be. That's the issue. That's what we are here --

MR. BORK: That's correct, Mr. Chief Justice, and to that I have two answers: One is that there is no infringement of the Copyright Act here, either because the Copyright Act doesn't cover this practice, or because it is covered by fair

use. And I think that's fairly clear.

My other answer is that we are here dealing with a status quo in medical research, which is enormously complex. This is not a problem that is homogenous, and the petitioner offers us a tiny slice of a total problem and asks for a sweeping rule that is going to upset the status quo in medical research.

QUESTION: Twenty years ago what would you guess would be the number of copies that were furnished out of the medical library, if the medical library was in existence then.

MR. BORK: No.

QUESTION: NIH was, I guess, wasn't it?

MR. BORK: NIH may have been, Mr. Chief Justice. I don't know -- NIH only furnishes copies to its own researchers It is not the outside use, is the National Library of Medicine. And for a while the increase in photocopying did increase until about 1968. Then it took a dip, and I think it is now back up somewhere near the 1968 level. But it has been a strong factor for some time.

But I think -- it's important for me to say that this has been a practice which has been understood not to violate the Copyright Act of 1909 for decades. Our brief refers to, and I will not take us through, evidence of that. The gentlemen's agreement of 1935 which is answered by a

statement that we are not bound by it, nobody suggested the petitioner is bound by that agreement. One does suggest that it indicates an understanding of practices at that time. The Sound and Recording Act of 1971 which we discuss in our brief on pages 18 and 19 I will not take time now to point out, but that is evidence that Congress said two things: That people may make recordings for their personal use from copyrighted recordings without violating the Act, and that the reason they left people free to do that was that they didn't want to give copyright protection broader than other holders of copyrights had, which would seem to be a statement by Congress that they understood the 1909 statute not to extend to noncommercial copying for private use.

But we need not, I think, spend our time rehearsing the long practice or taking gleanings from legislative understanding, because I think there are two cases in this Court that are quite parallel, and I refer to Fortnightly Corporation v. United Artists Television and Teleprompter v. CBS. Those were cases of community antenna television systems which went out and picked up signals from stations licensed to telecast motion picture film, relayed them to their own subscribers whom they charged to receive these films, and they paid no royalties and had no license -- no royalties to or license from the owner of the copyright.

Now, that was infringement alleged under sections

1(c) and 1(d) that give the exclusive right to perform in public for profit and perform publicly.

Now, this Court held that it must really decide whether the CATV function fell upon the performers, the broadcaster side of the line, or on the viewer's side of the line. And it said essentially a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signal, and it used an analogy which I think is quite appropriate here. Indeed, I think these two cases I am relying upon are much broader than anything I ask this Court to hold here.

This Court said in Fortnightly, "If an individual erected an antenna on a hill, strung a cable to his house and installed the necessary amplifying equipment, he would not be performing the programs he received on his television set. The only difference in the case of CATV is the antenna system is owned and operated not by its users, but by an entrepreneur."

The analogy to this case is striking.

QUESTION: Except, Mr. Solicitor General, the only thing to be decided in those two cases was the meaning of the word "perform" under the 1907 Act. I can understand that casual readers of the opinion, perhaps, particularly in view of the dissenting opinions, might have thought those cases had to do with something else. But all they were directed to

was the meaning of the statutory word "perform". And now here we have the statutory word "copy". And certainly there isn't any ambiguity about that.

MR. BORK: I think there is, Mr. Justice Stewart. That's precisely my point. I think we have the same kind of ambiguity in this case as you had in Fortnightly and in Teleprompter. The reason for that is this: We know, as a matter of law, that copy does not mean that the making of any copy violates the Copyright Act. If it did, there would be no doctrine of fair use. You must decide if it did there would not have been a long practice agreed to of individual persons making copies for a variety of things. So we know that one must construe the word "copy" as not a word that applies itself in a dictionary sense. We know that about the Act. Therefore, it seems to me we have to draw a distinction much like that involved in Fortnightly which asks is this like viewing or is it like sending, performing? Here I think we have to ask is this like what the reader does properly under fair use or is it like publishing? I think the situations are quite analogous in that sense. I grant that they construe different words.

QUESTION: The United States is taking the position, then, that this simply isn't copying and that we don't even need to reach the fair use issue?

MR. BORK: That is correct. We take the view that

it is not --

QUESTION: Is that in your brief?

MR. BORK: In our brief we say in a footnote citing some other briefs and some of these cases I am now discussing that it is argued persuasively that. The primary reliance of our brief is upon fair use.

Conceptually, Mr. Justice White, I don't know that it makes a great deal of difference because I learned from Mr. Latman's article on the subject that the law is not entirely clear whether fair use means there is no infringement or whether fair use means that it is an excused infringement. And to say that the Act doesn't cover it and in any event it is fair use may be a redundancy or may not.

QUESTION: But it does direct you to some of the history of the Act. And you could arrive at this conclusion without ever having had a fair use doctrine.

MR. BORK: That's true. That is true. That is true. But I think that it's inescapable that the word "copy" must be construed unless we are prepared to say that there is no doctrine of fair use for anybody who copies something out of an article or something out of a book. We know that is not the law.

QUESTION: There is quite a difference between copying a couple of paragraphs and quoting it and copying the whole thing, isn't there?

MR. BORK: There is quite a difference. I think there is no difference in practical result in this case because a couple of paragraphs is no substitute for the whole.

QUESTION: Well, sometimes a copyright owner will, for example, a syndicated columnist or the writer of an article, will have some sort of a footnote saying that up to 700 words may be used out of this article by permission of the copyright owner.

MR. BORK: That is correct.

QUESTION: So that suggests that for many purposes there is regarded to be quite a difference under copyright law.

MR. BORK: It may be regarded as quite a difference. I think the reason the owner may do that is he regards 700 words as not a substitute for the whole. And one of my points here, which I cannot stress too strongly, is that a reprint of a single article is not a substitute for what petitioner sells, which is a journal. The National Library of Medicine will not xerox that journal, will not xerox half of that journal.

QUESTION: Don't you occasionally have journals, though, that may have one very important lead article that might comprise two-thirds of the journal?

MR. BORK: That may occur, Mr. --

QUESTION: It's true in the Law Review certainly.

MR. BORK: Yes, it is.

QUESTION: And would you say it is a fair use to copy the lead article --

MR. BORK: As I understand the National Library of Medicine's policy, they will not copy as much as half of a journal, so I would guess that that policy would not cover copying all of such an article. But I cannot answer the question definitely.

QUESTION: But it is true that the of this material could not get it free from the National Library of Medicine. He would have to pay something, 25 cents or a dollar for a reprint, isn't it?

MR. BORK: That is true. Maybe I should address that question directly, because I think the more important thing here is what is going to happen to medical research information flow. Indeed, information flow in general. This case. It should be stressed that petitioner is seeking a flat, sweeping rule which if applied to this case will cover hundreds of other cases we know not of now. The Court of Claims decision which we are trying to uphold is quite narrow, quite limited, and will have no such sweeping effect. And that is one reason I think the Court of Claims should be confirmed, and Congress left to this task.

And I must say it is not true that Congress has not been addressing this. Now on the floor of the House are two bills passed by the Senate, one of which would

establish a commission to study this very problem, the other of which addresses this problem in substantive terms. I happen to prefer the commission approach because this problem is far more complex than we have given it credit for here. There are any number of differences in scholarship and in subsidization of journals and in competing interests here that are not reflected in this record and cannot be reflected in a record of litigation like this. So that --

QUESTION: Why won't the Medical Library copy an entire journal?

MR. BORK: Well, I think, Mr. Justice White, that the reason that they respect petitioner's copyright --

QUESTION: On what?

MR. BORK: He has a copyright interest on each article -- by the way, there is left open in this case the question of who does own these copyrights.

QUESTION: I know, but copyright attaches to each article, I take it, and yet the library is not reluctant to copy an entire article.

MR. BORK: No, but what petitioner sells is a journal.

QUESTION: I know, but we are talking about a copyright, we are talking copyright, not whether -- not subscriptions.

MR. BORK: For the reasons I am arguing today, Mr. Justice White, the National Library of Medicine believes that

it is not infringing a copyright when it does that.

QUESTION: It might as well copy the entire magazine, then.

MR. BORK: No, Mr. Justice White. If it copied the entire magazine, it would be providing a substitute for what petitioner sells. WE are not now providing any such substitute.

QUESTION: Mr. Bork, doesn't petitioner also sell reprints?

MR. BORK: It does sell reprints. Let me say this, Mr. Justice Blackmun. We are talking here not just about the petitioner. We are talking about five or six hundred publishers of medical journals in very different circumstances. We are talking about thousands of libraries. Petitioner seeks a rule that will apply to all of those publishers who will be able, if they wish, to get injunctions against private libraries, although not against Government libraries. If petitioner gets this rule, we can then begin negotiation. I can't imagine the negotiation that would be involved between thousands of libraries and five or six hundred publishers, all with very different interests, very different views of the matter and very different appetites for gain.

QUESTION: Now, there is a statute on record piracy, I have forgotten the particular statute, that provides an automatic licensing. If there is a hit record, you or I or anyone else who are in the business of making records may copy

it without the consent of the copyright owner, but we have to keep a written record of how many copies we make and pay him, I think the statute provides, 5 cents for each copy. Would that not be a feasible mechanism here?

MR. BORK: I think it may be feasible, Mr. Chief Justice, but let me tell you why I think it ought not to be imposed by a rule of court rather than by a rule of legislature. I have just suggested a reason why I think --

QUESTION: We haven't come to that point yet whether a court has got any power. You are going to discuss that --

MR. BORK: I think this is tied in intimately with this question. I have just suggested why I think that this proposed solution of give us this hard and fast rule and we will go out there and negotiate is no solution, because w think the negotiations will break down,too many libraries, too many other interests involved. So that what we have is an invitation to chaos, not an invitation to order in the industry.

But let us assume, along the lines of your question, Mr. Chief Justice, that such an agreement were possible or that such an agreement were imposed by rule of Court, the only thing that is going to happen immediately is that there will be a much greater burden of compliance upon libraries, not just a burden of the royalties which would be quite substantial, because the numbers we are talking about as

small happen to be royalties for four journals in one library. Now, if you add the 18,000 journals in thousands of libraries, we are talking about a large increase in the cost of medical research dissemination over the current practice. In addition to that there will be a very heavy burden of compliance by the libraries as they have to check out and add administrative apparatus to count photocopying instances.

Now, what that's going to mean is that the holdings of libraries around this country, medical libraries around this country, are going to be cut back sharply, not the National Library of Medicine. The National Library of Medicine I am sure can get an appropriation to pay whatever it costs and, indeed, the National Library of Medicine is now paying the higher price for petitioner's journals and it has agreed to do so. The National Library of Medicine is not going to cut back or these journals, but the National Library of Medicine is trying to encourage holdings and has been encouraging holdings, in fact, has spent $12.25 million for grants for acquisitions to libraries around this country, much of which is spent on subscriptions for petitioner's and others' journals, so it's increasing the subscriptions out in regional and local libraries.

This rule that petitioner seeks is going to increase the royalties greatly. It's going to increase the burdens of compliance and costs in libraries, the number of smaller

journals held by libraries is going to be cut back drastically, even if they don't raise their own subscription price or try to license themselves, because library budgets are going to be eaten up.

Now, maybe that's what should happen. Maybe peripheral journals should go out of business. Maybe a Darwinian approach to this thing is the correct approach. I am merely suggesting that that's a choice that really ought to be made, that's a change in the status quo and with drastic results for medical research dissemination, and that's the choice that should be made, I suggest, by the Congress rather than by a court.

QUESTION: I think your brother's point on the other side is that choice has been made by Congress.

MR. BORK: Well, Mr. Justice Stewart, if it has been made by Congress, it's a choice that has not been enforced for 50 or 60 years while copying practices have been going on and growing. It's a choice that is not reflected in Congress' understanding of what it was doing in the 1971 Sound Recording Act. I don't think it is a choice that has been made by Congress.

QUESTION: Well, that's what this case is about.

MR. BORK: That is true. That is true. But I do think that one of the things this case is about on a fair use question is -- fair use, after all, is basically a constitutional

doctrine. It asks whether a rigid conceptualized application of the Copyright Act would in fact retard the progress of science as a useful art. And when I address myself to this question, I am talking about what would happen to medical research and what is not happening to petitioner despite his claims. I am talking about fair use.

QUESTION: Are you suggesting that Congress would be constitutionally obligated to incorporate a doctrine of fair use into the copyright law?

MR. BORK: That is debatable. I have seen it debated both ways, Mr. Justice Rehnquist. I don't know that I need to -- well, I --

QUESTION: I thought you said a moment ago that fair use was a constitutionally --

MR. BORK: The courts have derived their power to evolve a doctrine of fair use from the constitutional value, the constitutional principle. Whether or not the court could second-guess Congress' decision about what would promote rather than retard, I don't know. Certainly that's not involved in this case.

But when I talk about harm to medical research and the lack of harm to petitioner -- and after all, there is nothing in this record that shows petitioner's loss of subscriptions except hearsay remarks. We are talking scare rhetoric on the side of injury to the petitioner. when I

talk those two elements, I am talking the doctrine of fair use. The Court of Claims, after all, said it was moved in this case by the fact that holding for petitioner would heavily damage medical research, and secondly, that petitioner had shown no damage to itself. Now, it says these journals may go out of business. There is nothing in the record about that. In fact, common sense indicates that they won't, for the reasons we have talked about, the reasons that photocopying doesn't substitute for subscriptions.

QUESTION: Is that a demonstrable proposition or simply an arguable one?

MR. BORK: Mr. Chief Justice, I think it's about as demonstrable, if I may make a comparison, as market definition in antitrust cases. One looks at these two things and it is apparent in this industry, photocopies of single articles serve a different function and a different market than journal subscriptions. They complement rather than substitute for each other, and therefore I think are in different markets.

I suppose, had petitioner taken this trial into the question of how much it was injured, we might have a record on these points. But we have here only petitioner's rather dire speculation about his future, and that's the only record on injury.

QUESTION: If I understand petitioner's position,

they don't want to curtail the dissemination of information, medical or scientific. They simply want a piece of the pie, as it were.

MR. BORK: Mr. Chief Justice, they are bound to curtail it. If they get this rule, we will then have a chaotic situation in negotiation with thousands of parties in interest. If that negotiation comes out the way they want it to, we are going to have a dramatic impact on the peripheral journals, not upon petitioner's journals, petitioner's journals are not peripheral. The libraries will continue to stock them, there is no doubt about it. But peripheral journals are going to find that library budgets have shrunk and they are not going to be sold.

QUESTION: I take it what you are saying is that this can only be resolved, or this ought only be resolved, by Congress doing something like what they have done with the mandatory copying of records.

MR. BORK: Well, Congress doing something of that sort or perhaps making a solution that differentiates among the different interests involved here.

I should mention that the Library of Congress through its copyright office is now holding conferences, including international conferences to comment in an effort to arrive at norms in this quite complex situation, norms which may perhaps be translated into legislation.

I should also say one further thing which I think shows how little petitioners really are talking about here. There are over 400,000 volumes of journals, not individual issues, volumes of journals, in the NLM holdings. Now, in 1970 there were 93,000 articles photocopied. That is less than one-fourth of one request per volume of journals held. When you look at this thing spread across the number of journals, sure, there are men microfilming constantly in one library. But when you look at the universe of what they are copying from and see how its impact is negligible upon the individual journals --

QUESTION: In one breath you say the thing is going to result in chaos and then in the next breath you say how negligible it is.

MR. BORK: Yes, that's right, Mr. Justice Rehnquist, and I confess that I think both of those breaths are internally consistent, yes.

I'm pointing out that it's negligible as an impact upon an individual journal by showing how thinly it is spread across this vast storehouse of medical information in journals. It is crucial to individual researchers here and there who need a particular article in an obscure, peripheral magazine or in some other magazine or in a back number they have lost or a specialty they don't belong to. For that research it is crucial. The effect at one end upon medical research is quite

important. The effect at the other end upon subscriptions to journals is infinitesimal, if it exists. There is no showing in this record that it exists.

I think I would quote the Teleprompter decision about the facts that the detailed regulation of what was involved here cannot be solved really by litigation and a flat rule. It requires something much more sensitive. And I suggest, for the reasons I have given, that both the law and the policy of the law press to the conclusion that the Court of Claims opinion ought to be affirmed.

MR. CHIEF JUSTICE BURGER: Mr. Latman, you have just one minute left.

REBUTTAL ARGUMENT OF ALAN LATMAN

ON BEHALF OF THE PETITIONER

MR. LATMAN: If I may, I think that the Solicitor General's market potential test is a good test. I think it means that an antitrust competitor doesn't have to be out of business or bankrupt before he can come in and show that there is a certain potential. That is what the petitioner is trying to do here. That's what was recognized by the gentlemen's agreement referred to. It said that it would not be fair to the author or publisher to make possible the substitution of the photostats for the original. Photostats is what they were dealing in. That's at Appendix page 97 of petitioner's appendix.

Computer uses which the Solicitor General referred to

of course will follow a sequel, perhaps. In other words, we can't recover for any use if this Court takes the approach the Court of Claims did. The reason that we are suing in this case is because if the massive system is excused in this case, it's impossible to almost picture what is left of the proprietor's rights. And the important thing, I think, to remember is that we are not just talking about subscriptions as some of the question, and Mr. Justice Blackmun's question emphasizes. We are talking about all the traditional and new media. The Government in its amici conceded that we are talking about a new separate medium of distribution, and we think that that medium should be encouraged. We don't want to stop it. We want reasonable compensation for it.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Latman.

Thank you, Mr. Solicitor General.

The case is submitted.

[Whereupon, at 11:07 a.m., the argument in the above-entitled matter was concluded.]