The Williams & Wilkins Company vs. The United States

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Approximately ninety years ago a Christmas gift to a child started a chain of events which eventuated in the case of the Williams & Wilkins Company vs. The United States heard before the United States Supreme Court several months ago. This paper will trace the history of The Williams & Wilkins Company; suggest the rationale for the company's suit against the United States; delineate the reason for libraries, librarians, publishers and authors having such a deep interest in the Supreme Court's final decision; and provide some description of how this decision could affect the entire library world including authors, publishers and authors.

The history of The Williams & Wilkins Company began in 1885 when John Williams received a toy printing press for Christmas. The gift so intrigued the youngster that he and a friend, Jim McEvoy, printed calling cards and the like for cash to supplement their modest allowances. This proved so successful that they talked Jims' father into buying a working press and began playing printer in earnest; the small business grew. John Williams decided he had found a career and bought out Jim McEvoy's interest for six hundred dollars. He moved to a room in downtown Baltimore and when his need for capital became acute, he turned to another friend "Henry B. Wilkins, who was able to arrange a bank loan. Thus was born The Williams & Wilkins Company."[1] In 1897, E. P. Passano joined the firm and seven years later bought out the original founders.

In the late 1890's The Williams & Wilkins Company entered the publishing field with a book entitled *Twixt Cupid and Croesus*. This was a facsimile reproduction of a presumed correspondence between two lovers written by Charles Didier. The book touched the hearts of romantic Baltimoreans and sold well. However, after two more books by the same author did not prove to be profitable, The Williams & Wilkins Company returned to job printing which included items like the annual catalog of the Bibb Stove Company.

The Williams & Wilkins Company printed its first scientific journal, *THE JOURNAL OF ZOOLOGY*, in the early 1900's. The advent of World War I was a contributing factor to the company's rapid growth in the field of scientific publishing. Prior to World War I, the Germans had little competition in scientific publishing. As the demand for domestically-produced scientific literature grew, "Williams and Wilkins moved smartly to pick up printing contracts with scientific societies for publication of their journals thereby setting a pattern which has persisted to the present day."[2] The publication of medical and scientific journals led to the publication of medical school text-

books. The first medical book entitled *The Determination of Hydrogen Ions* by Dr. William M. Clark was published in 1920.

Four years later in 1924, eighteen journals and fifty books were listed in the firm's catalog. Today The Williams & Wilkins Company publishes thirty medical and scientific journals and provides varying degrees of publishing services for forty-one additional publications. Two thousand titles are in print in the Book Division and in 1971 thirty-four new domestic titles and editions were published. The 22nd edition of *Stedman's Medical Dictionary* was recently arranged and composed entirely by computer. This is the historical background of a company whose reputation for excellence and quality in the publishing field is unquestioned and one which is also the major independent disseminator of medical and scientific information. This is the company which felt forced to sue the United States.

The reason The Williams & Wilkins Company filed suit against the United States in 1968 can be stated simply in one word — photocopying. However, while a single word can be used to state the reason, the implications of photocopying are extremely complex and far-reaching. William M. Passano, Sr., who is chairman of the Board states:

> As early as 1962 we felt the scientific journal was a sitting duck for photocopying. It became obvious to us that individual subscribers are less likely to renew their subscriptions when they are able to obtain from libraries photocopies of the articles they are interested in. It was also obvious that library subscribers are less likely to renew their subscriptions when they can obtain photocopies of journal articles as interlibrary loans from the twelve regional medical libraries.[3]

In 1968, Williams & Wilkins filed suit against the United States "for infringement of certain copyrights in medical journals resulting from the unauthorized reproduction of our copyrighted materials by photocopying equipment."[4] *AMERICAN LIBRARIES* states:

> At issue in the suit brought in 1968 and amended in 1970 were single copies at the National Institutes of Health Library and at the National Library of Medicine of eight articles in four journals published by Williams & Wilkins that were from 21 to more than 24 months old. The journals are *Medicine, Pharmacological Reviews, Journal of Immunology,* and *Gastroenterology*. All are copyright registered. The government admitted it made at least one copy of each article.[5]

After the Williams & Wilkins Company filed suit against the United States in 1968, there were no significant developments in the case until February 17, 1972. On that date, Commissioner James F. Davis of the United States Court of Claims ruled in favor of The Williams & Wilkins Company and "found that the Baltimore publisher of scientific and medical books was entitled to damages for unauthorized 'wholesale' photocopying of articles in several of its journals by the government libraries."[6]

The April 15, 1972 issue of *LIBRARY JOURNAL contained* "A Statement of Fact and Faith" issued by The Williams & Wilkins Company. This statement contained a paragraph which said:

> We have worked out a single plan based on the idea of a reasonable annual license fee for the right of copying our materials. In this way, the librarian will be licensed to photocopy copyrighted materials without infringing copyright law, and the publisher will be recompensed for the use of his material.[7]

The statement further stated the company would welcome any comments and questions.

LIBRARY JOURNAL called Andrea Albrecht in the Rights and Permissions Department of The Williams & Wilkins Company to inquire about the proposed plan and the corresponding rates. Mrs. Albrecht said "three plans were under consideration, and that the price of any given arrangement was 'the most negotiable point.' She estimated that photocopying rights could range anywhere from one-half cent to five cents a page."[8]

But the "Statement of Fact and Faith" and the notice by The Williams & Wilkins Company that it planned to differentiate between subscription rates to individuals and libraries resulted in an outpouring of protests from librarians. John M. Connor of the Los Angeles County Medical Association wrote a letter to The Williams & Wilkins Company which was reprinted in *SPECIAL LIBRARIES*. Mr. Connor said:

> I have asked my staff to critically examine the Williams & Wilkins subscriptions in terms of their use and need, and intend on the basis of their objective evaluation to be so guided in the number of subscriptions I place to your titles come January 1, 1973.[9]

Donald J. Morton, Director of The University of Massachusetts Medical School Library informed The Williams & Wilkins Company "that his library and 'others' will 'seek reimbursement for an illegal double assessment' if the courts establish that libraries may receive photocopying privileges from conventional subscription arrangements."[10]

The American Library Association received numerous requests from librarians seeking advice in considering journal renewals. In the American Library Association *WASHINGTON NEWSLETTER* dated August 12, 1972 the following statement noted that:

> First, a number of leading libraries have individually determined that they will not renew their subscriptions at the Special Institutional rate;
>
> Second, Williams & Wilkins' assertion that 'a license such as that in the institutional subscription rate is a legal requirement' is based on a Commissioner's Report and is not, to date, the decision of the Court of Claims;
>
> Third, the propriety of the Commissioner's Report is being strenuously contested in the Court of Claims . . .;
>
> Fourth, libraries in which copies are made on coin operated photocopiers not under library supervision and control, derive substantially no protection which they do not already enjoy under the license granted by the Institutional Subscription Rate;
>
> Fifth, general acceptance of the 'use tax' concept of the Williams & Wilkins Institutional Subscription Rate may reasonably be expected to encourage other journal publishers to levy their own 'use taxes' at ever increasing rates;
>
> Sixth, the Institutional Subscription Rate does not authorize copies for interlibrary loans and thus contemplates a continuing and rigorous restriction on access to scholarly materials contained in Williams & Wilkins' publications;
>
> Each library must decide for itself whether it will pay a premium for Williams & Wilkins' works not withstanding the significant limits imposed on their use, and on the access to them, by the Institutional Subscription Rate.

The SUNY Upstate Medical Center Library Bulletin on pages 93-94 of the August-September 1972 issue stated:

> All of the major national library associations have urged libraries not to accede on this point, and to wait until a decision is arrived at the courts regarding the initial lawsuit.
>
> Copyright law is currently being rewritten in Congress, and unless the issues involved in the present suit are resolved in favor of the author rather than the publisher, many journals may well disappear from libraries. One solution to the problem would be for authors to retain the copyright to their work or to publish in journals and for associations which will allow the flow of information to proceed without inhibiting charges.

One reason librarians raised such strong protests against The Williams & Wilkins' decision to charge for photocopying and to increase subscription rates was that they questioned the legal effect of Commissioner Davis' report of February 16, 1972. James Murphy, who is a lawyer and a librarian, wrote:

> Unlike a judge in a Federal district court, the Commissioner has no power to make a judgment. Rather, he prepares a report, which includes findings of fact and a recommendation of law. The Court of Claims may thereupon 'adopt, modify, or reject the Commissioner's report, in whole or in part.' (Court of Claims Rules, Rule 147(b). Even in the absence of timely exceptions, moreover, the report does not constitute a judgment of decision of the court (*U.S. Code* Tit. 28, sec. 2503(b).[13]

Mr. Murphy further stated:

> When the Court of Claims makes a decision in the Williams & Wilkins case, the parties to the suit will be bound by it, pending further appeal. Its value as precedent, however, will depend on the ultimate disposition of the controversy in the Supreme Court, where the case is surely headed.
>
> Through the Commissioner's report is understandably a 'bright beacon' for Williams & Wilkins, libraries would be acting prematurely to accept it as a guide to the law. If they do, and enter into the 'licensing contracts' that have been urged by some, they will become obligated regardless of the final outcome of the case. They would also be admitting liability when it is questionable if there is any . . . [14]

The Williams & Wilkins Company responded to these articles previously cited with a statement written by William M. Passano, Chairman of the Board, which appeared in *PUBLISHERS' WEEKLY* in the issue dated November 13, 1972. Because of the importance of this statement which sought to clarify the actions taken by the company from the initiation of the suit against the United States to the present time, this complete statement follows:

> Several persons have criticized the Williams & Wilkins Company for being premature in seeking compensation for photocopied articles from the journals which it publishes. Photocopying has been held to be copyright infringement by a Commissioner of the Court of Claims in the only case ever brought dealing with the subject. The decision has been appealed and why not wait, say the critics, until at least the full Court of Claims speaks, or until the issue is resolved by the Supreme Court.
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> The answer is that we have protested since 1962 that library photocopying was copyright infringement. After all attempts to resolve the problem failed, we commenced our suit in the Court of Claims in 1968 and received a favorable decision in 1972. We had hoped that after ten years of controversy the Commissioner's opinion would resolve the issue and terminate the litigation. Unfortunately, in this hope, we were mistaken, and the case is being appealed.
>
> The question is asked Is the Commissioner's decision similar to an interoffice memorandum or letter to the editor which has no particular authority, or is it the 'law' which at least until it is reversed, is entitled to respect? In our mind the answer is clear, that the Commissioner's decision is the law as it exists today.
>
> Commissioners serve as trial judges and constitute the trial division of the Court of Claims as provided by rules of the Court of Claims. Of course, any party dissatisfied with the Commissioner's decision may appeal to the full Court of Claims with the next step being the U. S. Supreme Court. If there is no appeal, the Commissioner's findings of fact and recommended conclusions of law will as a practical matter be adopted by the Court of Claims.
>
> The litigation to date has followed in every detail the course followed by a trial in the U. S. District Courts. There were pretrial motions, extensive depositions, interrogatories, pretrial conferences and a six-day trial wtih two evening sessions. The Commissioner was clad in judicial robes and presided in a splendid courtroom. After the trial, post-trial briefs, proposed findings of fact, objections to the proposed findings and objections to the objections were filed. After nine months, the Commissioner's 32-page closely reasoned decision upholding Williams & Wilkins in every particular was handed down. Anyone familiar with the litigation could not have the slightest doubt that the trial was in all respects the equivalent of a U. S. District Court trial.
>
> The Supreme Court in U. S. vs. the United Mine Workers of America, 330 U. S. 258, 294 (1947), quoted with approval the following statement:
>
> *It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected . . .*
>
> More important than the precise procedural posture of our case is the effect of Commissioner Davis's opinion as a precedent. If law is looked at from the standpoint of the lawyer advising a client as to what he may do, or may not do safely, the Commissioner's decision represents the law. If viewed from the standpoint of the individual who would walk in the straight path

of social conduct and wishes it charted for him, the Commissioner's decision is a bright beacon telling him what he ought to do. Judged from the standpoint of the institution or business seeking the way to carry out its plans, the Commissioner's decision represents a clear guide and thus is the 'law.'

In addition, Professor Nimmer in his great treatise on copyright laws supports our position as do most copyright lawyers.

For all of these reasons we are not premature in acting on a Commissioner's decision. It is the law. After ten years of discussion and four years of litigation we have not acted precipitously by finally taking action in accord with the law. Those who chose not to recognize the validity of the Commissioner's decision are saying in effect, the Courts, their position, which has held to be wrong should prevail. We believe our position, which has been held to be right, should be implemented unless and until reversed.

William M. Passano[15]

The next important development occurred on November 27, 1973 when the United States Court of Claims reversed the decision of Commissioner James F. Davis in a four to three ruling holding that photocopying of magazines and books by scientists and libraries does not violate copyright laws.

Judge Oscar H. Davis, writing for the majority, said:

photocopying was subject to 'fair use' but stated that it was up to Congress to draw the line. Judge Davis said the Congress should also consider: 1) the extent to which photocopying should be allowed; 2) whether copiers should be licensed; 3) how much they should pay publishers; and 4) the special status, if any, of scientific and educational needs.[16]

The court further states that the defendants in the case, the National Institutes of Health and the National Library of Medicine had not abused 'fair use' because they have reasonable strict limitations that kept photocopying within appropriate confines. The court also found no evidence that The Williams & Wilkins Company had suffered financial loss from library copying. It was also stated by the court that medical research could be hurt by restricting the flow of information. However the court after reversing the earlier decision by Commissioner James F. Davis warned:

that this reversal should not be taken as a green light for unrestricted, systematic photocopying. Congress should determine the extent of photocopying permissible under the copyright law especially in view of the new technologies. Hopefully the result in the present case will be

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COLLEGE AND UNIVERSITY LIBRARIES:
Leland M. Park
Library of Davidson College
Davidson, North Carolina 28036

SCHOOL MEDIA CENTERS:
William Pendergraft
Pender High School
Burgaw, North Carolina 28425

COMMUNITY AND JUNIOR COLLEGE LIBRARIES:
John Thomas
Davidson County Community College
Lexington, North Carolina 27292

SPECIAL LIBRARIES:
William Lowe
North Carolina State University
Raleigh, North Carolina 27607

PUBLIC LIBRARIES:
Bernadette Martin
Forsyth County Public Library System
Winston-Salem, North Carolina 27101

> but a 'holding operation' in the interim period before Congress enacts its preferred solution.[17]

The Williams & Wilkins Company's next step was to ask the United States Supreme Court to review the adverse decision of the United States Court of Claims. A spokesman for the company said the firm found fault with the decision on many grounds. These disagreements included:

> (1) the court's use of international, rather than domestic, copyright law in coming to a decision; (2) The court's contention that Williams & Wilkins had failed to come up with a valid plan for licensing; and (3) Insinuations by the court that Williams & Wilkins wanted to eliminate photocopying of copyrighted materials altogether.[18]

In the late spring of 1974, the United States Supreme Court granted a petition to review the decision of the United States Court of Claims "which had ruled that the National Library of Medicine and National Institutes of Health Library were not violating 'fair use' provisions in copyright law in their photocopying of Williams & Wilkins' scientific journals."[19] After this decision of the United States Supreme Court to review the case, Daisy Maryles, associate editor of *PUBLISHERS' WEEKLY*, wrote:

> this decision has revived hope in publishing circles for a reversal of the lower court decision against the Baltimore publisher and a strengthening of copyright protection generally. The library and education communities, fighting for exemptions to copyright protection, would have liked to see that decision left alone. Authors and publishers considered it a dangerous precedent.[20]

Librarians, publishers and authors are now waiting for the final court decision on The Williams & Wilkins Company suit. As *LIBRARY JOURNAL* states "its outcome is expected to be a milestone in the issue of copyright — and a setback for one or the other of the contenders — publishers or librarians."[21]

The issues surrounding this problem of photocopying are so numerous and complex it is impossible to discuss all of them. However I would like to conclude by briefly relating the position that both librarians and publishers have taken on this issue and the threat that each feels.

Ralph R. Shaw states:

> The case of Williams & Wilkins v. The United States is of great importance to scholars, libraries and to the advancement of learning and of knowledge in the United States. It questions the right of scholars to make notes or copies for their own study and private use, regardless of the means used, as well as the right of librarians to act as agent for the scholar in making single copies for his private use and at his specific request. It brings up questions of the alleged parlous state of medical publishing, and repeatedly brings up the alleged danger of government control and many other topics.[22]

On this side of the argument many educators, librarians and researchers regard copyright protection and the elimination of photocopying as a "roadblock, a millstone, even a monopolistic device to hamper the spread of information regarded as public rather than private property."[23]

Curtis G. Benjamin of the McGraw-Hill Company enumerates several categories of publications he feels are likely to suffer if the United States Supreme Court upholds the reversal decision of the United States Court of Claims. These include:

> Primary and technical journals, both commercial and not-for-profit; Secondary scientific and technical works that can be easily copied in part, such as abstracts, journals, bibliographies, citation indexes, state-of-the-art reviews, etc.; Technical reports and short monographs; Newsletter, news journals, alert services, and the like; Law reports and legal, financial and tax services; Volumes of digests, symposia, and proceedings; Handbooks, statistical and mathematical compilations, technical manuals, manuals of operating and repair procedures, etc.; Disposable educational materials, such as workbooks, tests, solution manuals; Volumes of poetry, short stories, anthologies, one-act plays, etc.; Encyclopedias, almanacs, chronologies, glossaries, directories, yearbooks, etc.; Musical compositions, scenarios, choreographies, cinema and television; Architectural and industrial designs, blueprints, flow charts, nomographs, and other similar graphical works that are working tools of industry.[24]

Mr. Benjamin feels that even though several of these publications are quite specialized and may appear to be relatively unimportant, each has importance to one or several segments of the book industry. He concludes his article by stating "if copyright protection should be seriously eroded, the publications simply would cease to exist and a part of the book industry would die."[25]

Librarians and publishers each have logical, rational and convincing reasons to support their points of view. Photocopying is not a black or white issue — there are huge gray areas surrounding it. All concerned appear to agree on one point: it is imperative that the Congress of the United States pass new legislation revising the 1909 statute which is now in effect and update present copyright laws to bring them in line with modern technology.

Editor's note:

On February 25, 1976 the Supreme Court announced a deadlock in its ruling on the Williams & Wilkins Co. case. Associate Justice Harry A. Blackmun had disqualified himself from the decision, leaving his eight colleagues evenly split in their opinions. Consequently, the long-awaited definitive position on the photocopy-copyright issue was not taken, and no Supreme Court opinion was written. However, the Court's non-decision effectively upheld the 1973 decision of the U. S. Court of Claims that the extensive photocopying services provided by the National Institutes of Health and the National Library of Medicine constituted "fair use" of the materials in question. It is apparent from the fate of the Williams & Wilkins case that definitive guidelines for the photocopying of copyrighted material will have to come from the legislative chamber rather than the bench.

Footnotes

[1]Susan Wagner, "A Visit with Williams & Wilkins," *PUBLISHERS' WEEKLY*, 203 (April 2, 1973), 22.

[2]*Ibid.*, 23.

[3]*Ibid.*

[4]Williams & Wilkins, "A Statement of Fact and Faith," *LIBRARY JOURNAL*, 97 (April 15, 1972), 1371.

[5]"Williams & Wilkins: Librarians Win Round One," *AMERICAN LIBRARIES*, 5 (February, 1974), 60.

[6]Susan Wagner, "Midnight Oil Burns After Williams & Wilkins, Rule," *PUBLISHERS' WEEKLY*, 202 (August 14, 1972), 29.

[7]Williams & Wilkins, "A Statement of Fact and Faith," *LIBRARY JOURNAL*, 97 (April 15, 1972), 1371.

[8]"*Williams & Wilkins* Has Plan for Photocopying Rights," *LIBRARY JOURNAL*, 97 (May 15, 1972), 1759.

[9]John M. Connor, "A Librarian's Reaction," *SPECIAL LIBRARIES*, 63 (September 1972), 7A.

[10]"Williams & Wilkins Fee Hike is Assailed by Libraries," *LIBRARY JOURNAL*, 97 (September 1, 1972), 2680.

[11]"Librarian Reaction," *SPECIAL LIBRARIES*, 63 (November, 1972), 537-538.

[12]*Ibid.*, 538.

[13]James P. Murphy, "The Legal Effect of Williams & Wilkins," *PUBLISHERS' WEEKLY*, 202 (December 11, 1973), 11-12.

[14]*Ibid.*

[15]Passano, William M., "A Statement from Williams & Wilkins," *PUBLISHERS' WEEKLY*, 202 (November 13, 1972), 17-18.

[16]"Williams & Wilkins Case Overturned," *WILSON LIBRARY BULLETIN*, 48: (January 1974), 368-69.

[17]Susan Wagner, "Court Decides Against Williams & Wilkins," *PUBLISHERS' WEEKLY*, 204 (December 3, 1973), 18.

[18]Susan Wagner, "Williams & Wilkins Seeks Supreme Court Review," *PUBLISHERS' WEEKLY*, 204 (December 10, 1973), 17.

[19]"Williams & Wilkins Case Going to Supreme Court," *LIBRARY JOURNAL*, 99 (July 1974), 1746.

[20]Daisy Maryles, "Supreme Court to Review Williams & Wilkins Case," *PUBLISHERS' WEEKLY*, 205 (June 10, 1974), 16.

[21]"Williams & Wilkins Case: NLM Proposal Okayed," *LIBRARY JOURNAL*, 97 (November 15, 1972), 3666.

[22]Ralph R. Shaw, "Williams & Wilkins v. The U.S.," *AMERICAN LIBRARIES*, 3 (October 1972), 987.

[23]George A. Gipe, *Nearer To The Dust* (Baltimore: Williams & Wilkins Company, 1967), p.viii.

[24]Curtis G. Benjamin, "A Hard Look at the New Williams & Wilkins Decision," *PUBLISHERS' WEEKLY*, 205 (March 11, 1974), 34.

[25]*Ibid.*

TALK TO US.

In the 1940's, when libraries talked about the need for book cover protection, our people listened. Result: we developed the acetate book jacket cover.

In the 1950's, when libraries talked about the need for a way to make popular titles available to patrons while they were still popular, our people listened. Result: The McNaughton book leasing plan.

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