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Copyrights: The Law, the Teacher, and the Principal

Gloria Jean Thomas

INTRODUCTION

Anyone who has walked into a commercial copy center since March, 1991 has noticed some changes. Warnings about violations of copyrights are bigger and bolder. Any item to be copied is scrutinized carefully to see if it is copyrighted. If any question exists about the legality of making a copy, a patron must make his or her own copy on a machine well-marked with a copyright notice. One might wonder what has caused this upsurge in interest in a fifteen year-old law--the United States Copyright Act of 1976.¹

The increased awareness of copyrights is the result of a federal court decision.² In March, 1991 the United States District Court of New York ruled in favor of eight major publishing companies that had filed suit against Kinko's Graphics Corporation.³ For twenty years, Kinko's, a national chain of copy stores, sold university course packets that included copyrighted materials. However, permission from copyright owners was seldom obtained before multiple copies were made and sold for profit. The judge ruled that Kinko's had to pay damages of \$510,000⁴ plus nearly \$1.4 million in attorneys' fees and court costs for a total settlement of \$1.875

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1. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (1988) [hereinafter Copyright Act]).

2. Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

3. *Id.* (naming the parties petitioning relief as Basic Books, Inc.; Harper & Row Publishers, Inc.; John Wiley & Sons, Inc.; McGraw-Hill, Inc.; Penguin Books USA, Inc.; Prentice-Hall, Inc.; Richard D. Irwin, Inc., and William Morrow & Co., Inc.).

4. *Id.* at 1545.

million⁵ as a result of violating the Copyright Act.

For educators, the impact of the court's ruling in *Kinko's Graphics* might seem minimal. After all, Kinko's is a commercial copy center that was making a profit on its professor publishing operation. However, the *Kinko's Graphics* decision, along with the explosive increase in new technologies that make copying easier and cheaper every year, provides an opportunity to remind educators about their responsibilities to understand and obey national copyright laws.

New technology has affected all fields of education. The invention of the electrostatic copying machine has made hand written copies, smeared ditto sheets and messy mimeograph pages nearly obsolete. The video cassette recorder has made the duplication of television programs, movies and educational films simple and inexpensive. Yet with the proliferation of copying techniques that have aided education has come the proliferation of copyright violations. This has threatened the fame and financial rewards for authors, composers, and artists.⁶

Most educators do not willfully violate copyright laws. However, tight budgets sometimes tempt high school choir directors to buy one copy of sheet music and duplicate the other needed copies. Lack of time may force elementary school teachers to copy rhymes for use in Christmas programs instead of writing original poems. Desire to increase students' appreciation of Shakespearean drama may be the rationale for the junior high English teacher to add videotaped television broadcasts of "Othello" to the library. Misunderstanding copyright law exemptions for educational uses may result in teachers violating the law while believing they are acting within its guidelines.

This article provides background information about the copyright law, addresses the reasons for the law, explains the sections of the current law that pertain to duplication of educational materials, and applies the law to duties of teachers and principals.

5. Mark Miller, *Kinko's Suit*, WASH. TIMES, Nov. 3, 1991, at B6.

6. See *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 480-81 (1984); see also VIRGINIA M. HELM, WHAT EDUCATORS SHOULD KNOW ABOUT COPYRIGHT 7-8 (1986) [hereinafter HELM].

What is a Copyright?

A copyright is a right granted by statute to the author, composer or originator of a literary, musical or artistic production.⁷ The right grants the holder the sole and exclusive privilege of reproducing copies of his or her work and publishing and selling them for a limited period.⁸ Works that can be copyrighted include literary works; music works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.⁹ Copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle or discovery.¹⁰

Why Are Copyright Laws Passed?

Creativity cannot be copied, packaged or sold. Therefore, the law protects authors, composers, and artists from the unlawful duplication of their creative works so that they receive the credit due to them and the economic reward for their work. One book, one piece of sheet music or one tape of a performance will not yield much financial gain for the author, composer or recording artist. However, duplicating books, sheet music or audio tapes and selling copies provides recognition and financial incentive for creative persons to continue producing literary, artistic and musical works. Copyright legislation encourages and protects the financial interests of creative individuals by prohibiting others from copying or otherwise misusing their works.¹¹

However, if copyright laws are too restrictive, everyone suffers. A new book remains unknown if it cannot be duplicated or marketed, and society loses the opportunity to enjoy a new contribution to a literary genre. Copyright laws are passed in an attempt to balance the need of society for reasonable access to copyrighted materials with the practical need to prop-

7. See 17 U.S.C. § 102(a) (1988).

8. See *Id.* §§ 106, 302.

9. *Id.* § 102(a).

10. *Id.* § 102(b).

11. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 450 (1984).

erly compensate authors, composers and their publishers.¹²

When Did Copyright Law Begin?

Copyrights to protect original works were rare until the invention of the printing press allowed mass production of multiple copies.¹³ However, many nations were slow to pass laws protecting creative works of authors, composers and artists. Much of the controversy about authorship of early works stems from the lack of laws protecting works from being copied, altered or otherwise misused.

An English edict of 1710, known as the Statute of Anne, was the basis for the first copyright law in the United States. The first federal copyright statute was passed in the United States in 1790 and then amended in 1831, 1870 and 1909.¹⁴

Advancements in technology after 1909 meant that by the 1970s the national copyright laws were woefully outdated. On October 19, 1976, President Gerald Ford signed into law the Copyright Act of 1976, which was implemented on January 1, 1978.¹⁵ The law has been amended several times since 1976.¹⁶

What is the Legal Premise upon Which Copyright Laws Are Based?

The United States Constitution provides the legal foundation for copyright law: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁷

Federal legislation supporting this constitutional clause was passed primarily to promote the creation and dissemination of knowledge and ideas, and secondarily, to provide incentives and rewards to creative people for their contribution to society.¹⁸

12. *Id.* at 429.

13. *Id.* at 430.

14. HARRY G. HENN, HENN ON COPYRIGHT LAW: A PRACTITIONER'S GUIDE 10 (3d ed. 1991) [hereinafter HENN].

15. *Id.* at 9.

16. See EDMUND W. KITCH & HARVEY S. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 566 (rev. 4th ed. 1991) [hereinafter KITCH].

17. U.S. CONST. art. I, § 8, cl. 8.

18. HELM, *supra* note 6, at 9.

What Guidelines Exist that Pertain to the Copyright Act of 1976?

Title 37 of the Code of Federal Regulations provides some guidelines for application of the Copyright Act. These regulations are updated whenever the law is amended.

However, since concerns about implementation of the 1976 law were voiced immediately, Congress appointed a committee to prepare guidelines regarding the Copyright Act.¹⁹ Although lacking the force of law, these guidelines establish parameters for educators in applying the 1976 law. Available as part of the legislative history behind the Copyright Act, these guidelines were formed through the collaboration of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America, Inc., and the Association of American Publishers.²⁰ Moreover, the judge in *Kinko's Graphics* acknowledged the guidelines' role in helping teachers decide what fits within the fair use doctrine.²¹ Hence, educators who follow the guidelines will likely be within the boundaries of the law and in a position to claim good faith if accused of a violation.

As Congress amends the law, the committee develops new guidelines to deal with the changes. For example, computer software is an area where new guidelines are constantly needed.

19. H.R. REP. NO. 1476, 94th Cong., 2d Sess., 68-70 (1976) reprinted in 1976 U.S.C.C.A.N. 5659, 5681-83 (reciting the agreement on guidelines for classroom copying in not-for-profit educational institutions); see *infra* Appendix A at p. 17.

20. *Id.* at 67.

21. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1536 (S.D.N.Y. 1991) (where Judge Motley acknowledges the guidelines' preamble explains that the guidelines "state the minimum and not the maximum standards of educational fair use under Section 107 [of the Copyright Act]"); see also Eileen N. Wagner, *Beware the Custom-Made Anthology: Academic Photocopying and Basic Books v. Kinko's Graphics*, 68 Educ. L. Rep. (West) 1, 11 (1991) (explaining how Judge Motley's fair use analysis implies that strict adherence to the Classroom Guidelines will ensure fair use protection, but that educators who exceed the guidelines' boundaries must take their chances under the standard four-pronged fair use analysis of § 107 of the Copyright Act) [hereinafter Wagner].

What Rights Do Copyright Owners Have?

Once an author obtains a copyright, he or she acquires the exclusive rights to engage in and to authorize the following activities:

1. To reproduce the copyrighted work in copies or phonorecords;
2. To prepare derivative works based on the copyrighted work;
3. To distribute copies of 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 and other audiovisual works, to perform the copyrighted work publicly; and
5. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.²²

How Are Original Works Copyrighted?

The creator of a work of authorship has a protectable interest the instant the work becomes "fixed in any tangible medium of expression,"²³ meaning reduced to the written word or otherwise recorded. Notice, deposit and registration are not necessary for copyright protection,²⁴ but the Copyright Act requires registration in order to bring an action for infringement in the courts of the United States.²⁵

In addition, the statute provides advantages for those who provide copyright notice and deposit.²⁶ The three essential elements to providing copyright notice include: (1) the symbol ©, the word "Copyright", or the abbreviation "Copr."; (2) the

22. 17 U.S.C. § 106 (1988).

23. *Id.* § 102(a).

24. KRICH, *supra* note 16, at 568; *cf.* 17 U.S.C. §§ 401(d), 407(a), 408(a) (1988).

25. 17 U.S.C. § 411(a) (1988); *see* *Dodd v. Fort Smith Special Sch. Dist.* No. 100, 666 F. Supp. 1278, 1282 (W.D. Ark. 1987).

26. KRICH, *supra* note 16, at 568; *cf.* 17 U.S.C. §§ 401(d), 407(d), 411(a), 412 (1988).

year the work was first published, and (3) the name of the copyright owner.²⁷ The notice must be affixed to the copies in such manner and location "as to give reasonable notice of the claim of copyright."²⁸

The requirements of deposit are satisfied when two complete copies of the best edition of the work are deposited in the Copyright Office.²⁹ One may register a work of authorship at any time during the existence of the copyright by delivering to the Copyright Office the requirements for deposit, an application for copyright registration on a form prescribed by the Register of Copyrights and the required fee.³⁰ Those seeking copyright protection should officially register their works with the Copyright Office to ensure maximum protection rather than rely on the deterrent of having a © designation on the work.

How Can One Tell if a Work is Copyrighted?

All copyrighted works bear a copyright notice which includes the date of first publication, as explained above. The copyright notice is to be "affixed to the copies in such manner and location as to give reasonable notice of the claims of copyright."³¹ There is no requirement under law to indicate whether the copyright has been renewed.

How Long Does a Copyright Last?

Under the old law, the copyright term of was twenty-eight years with the possible renewal of an additional twenty-eight years.³² Those time limits were changed in the 1976 law. The new law stipulates that works created after January 1, 1978, will be protected for the life of the composer, author or artist plus fifty years after the author's death.³³ If, however, the work is anonymous, pseudonymous or a work made for hire, the copyright endures for a term of seventy-five years from the year of first publication, or 100 years from the year of creation, whichever comes first.³⁴

27. 17 U.S.C. § 401(b) (1988).

28. *Id.* § 401(c).

29. *Id.* § 407(a)(1).

30. *Id.* §§ 408(a), 409, 708.

31. 37 C.F.R. § 201.20(a)(1) (1990).

32. HENN, *supra* note 14, at 8.

33. 17 U.S.C. § 302(a) (1988).

34. *Id.* § 302(c).

Of course, many copyrights were in effect when the new law was passed. Copyrights in their first term on January 1, 1978, were allowed to continue for twenty-eight years from the date they were first secured and then could be renewed for forty-seven years. Copyrights in their renewal term on January 1, 1978, were allowed to continue for seventy-five years from the date they were originally secured.³⁵

If a teacher desires to learn if a copyright has expired she may contact the Copyright office or the publisher.

What Happens When an Illegal Copy is Made?

Authors and composers often contract with publishing companies to market their creative works. The copyright then usually belongs to the publisher rather than to the author or composer, and profits from sale of the work accrue to the publisher. In exchange for the copyright, the publisher agrees to pay the author or composer a royalty for every copy sold; the royalty is a small percentage of the selling price. When illegal copies are made, the publisher loses the profit from the sale, and the author or composer loses the royalty.

The same principle applies to other creative works, such as paintings, sculptures, films and videotapes. When the work is duplicated without permission from the copyright holder, the holder loses profit and the originator loses the royalty. Similarly, when music or a play is performed without permission, the copyright holder and the composer, arranger, lyricist, author, choreographer and others are deprived of their financial benefits.

Sometimes the assumption is made that publishers, authors and composers are getting rich from sharing the retail purchase price of a work. This erroneous assumption may provide a rationale for making illegal copies. Teachers may believe that "rich" publishing companies are in a better financial position to afford the loss of profit than are school districts to pay high prices for music, books, videotapes, or other materials.

Considering the high costs of publishing, the profit margin is very low for the publishing company, usually less than ten percent of the retail price. Royalties to composers and authors may be only five percent of the retail price. For example, on a piece of sheet music that costs \$5.00, the publisher may net

35. *Id.* § 304.

only \$.50 and the composer may receive only \$.25. On a textbook that costs \$40.00, the publisher may net only \$4.00 and the authors may receive only \$2.00. Therefore, the more copies sold, the greater the profits will be for the publisher, the greater the incentive for the author or composer to write more works, the lower the publishing costs, and the lower the retail costs. The advantage accrues to composers, authors, artists, teachers, students, and publishers when copyright laws are obeyed.

What Are the Penalties for Violation of the Copyright Laws?

In a suit for copyright violation, the court initially may issue an injunction to prohibit further reproduction or distribution of the work in question.³⁶ The court also may impound illegal copies of the copyrighted work.³⁷ If charges of infringement are later substantiated, the court may order the destruction of illegal copies.³⁸

The Copyright Act provides for monetary damages and other penalties.³⁹ At the discretion of the copyright holder a copyright infringer is liable in civil suit for either of the following:

1. The copyright owner's actual damages⁴⁰ and any additional profits of the infringer, or
2. Statutory damages.⁴¹

Courts may award statutory damages as follows:

1. A sum of not less than \$500 or more than \$20,000 as the court considers just.
2. A sum of up to \$100,000 if the infringement was committed willfully.
3. A sum of not less than \$200 if the infringer is able to show he or she was not aware and had no reason to believe the act constituted an infringement of the law.⁴²

36. 17 U.S.C. § 502(a) (1988).

37. *Id.* § 503(a).

38. *Id.* § 503(b).

39. *Id.* §§ 504-06.

40. *Id.* § 504(a)(1).

41. *Id.* § 501(a)(2).

42. 17 U.S.C. § 504(c) (1988).

The prevailing party may, at the court's discretion, be awarded court costs and reasonable attorneys' fees in addition to damages.⁴³ A copyright infringer who is convicted for criminal actions receives a much higher penalty which may include fines and a prison term.⁴⁴ Copyright infringement is criminal if done willfully and for purposes of commercial advantage or private financial gain.⁴⁵

When May Out-Of-Print Works Be Copied?

Teachers cannot merely assume that it is all right to copy out-of-print works. Once a work is out of print, the only financial reward to the copyright holder is whatever fee is charged for permission to make copies.⁴⁶ Therefore, publishers or others who hold copyrights should be contacted for permission to copy out-of-print works.

How May Permission to Copy or Perform Copyrighted Works Be Obtained?

Publishing or recording companies, not composers or authors, hold most copyrights. This is illustrated by the copyright notice on books, sheet music, or audio tapes. To obtain permission to copy or perform copyrighted works for purposes outside the fair use doctrine, the copyright holder must be contacted. The Copyright Office can provide the location of a copyright holder.⁴⁷ Also, libraries, book stores, music stores and museums are sources for addresses of publishing and recording companies.

Is Permission Difficult to Obtain?

When educators contact publishers, recording companies, television networks, or other common holders of copyrights, permission is often readily granted. Sometimes there is a fee for granting permission. The type and amount of fee often depends on the nature of the copyrighted work and its anticipated use.

43. *Id.* § 505.

44. *Id.* § 506(a).

45. *Id.*

46. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991).

47. The address of the Federal Copyright Office is: The Copyright Office, Library of Congress, Washington, D.C. 20559.

Teachers who contemplate using a work in a way that falls beyond fair use must plan ahead. Publishing companies are getting increasing numbers of requests which slows response time. Publishing companies are presently developing procedures to expedite responses to copyright requests.⁴⁸

What is Fair Use?

For educators, the most important limitation on the exclusive rights of copyright holders is the fair use doctrine. This doctrine is intended to balance the interests of copyright owners with the needs of educators for access to copyrighted material. The courts have defined fair use as the "privilege in others than the owner of a copyright to use the copyrighted materials in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner"⁴⁹

The Copyright Act outlines the fair use doctrine as follows:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section [§ 106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.⁵⁰

What Criteria Are Used to Determine Fair Use?

Many educators mistakenly assume that if a copyrighted work is copied for a nonprofit educational purpose, no violation of the copyright law has occurred, especially if students are not charged for the copy. However, the courts have consistently held that "a finding of a nonprofit educational purpose does not automatically compel a finding of fair use."⁵¹

The standards for fair use were established as early as 1841 by a Massachusetts federal court: "In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits,

48. Wagner, *supra* note 21, at 20.

49. Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966).

50. 17 U.S.C. § 107 (1988).

51. Marcus v. Rowley, 695 F.2d 1171, 1175 (9th Cir. 1983).

or supersede the objects, of the original work."⁵²

The Copyright Act specifies four factors to be considered in determining fair use of a copyrighted work:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
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.
4. The effect of the use upon the potential market for or value of the copyrighted work.⁵³

In other words, fair use may apply to situations in which *all* of the following elements are present:

[T]he amount of material copied or used is a small part of the work from which it is taken, no profit is made from the use, the economic loss to the copyright holder is not significant, the material was not originally published specifically for educational use, and there is no intent to republish or display publicly. Further, a claim of fair use always presupposes good faith and fair dealing by anyone asserting it.⁵⁴

To Which School Personnel Do Copyright Laws Apply?

The United States Supreme Court has stated that an infringer includes anyone who "was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner."⁵⁵ Therefore, no one is exempt from the copyright laws. Often teachers or administrators believe that if students, aides or volunteers make copies, the law is circumvented. This is a misconception. Anyone who violates the law can be held liable. In fact, school administrators and teachers who fail to inform students or staff about copyright laws may be held liable under the concept of

52. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

53. 17 U.S.C. § 107 (1988).

54. Michael C. Smith, *Classroom Use of Copyrighted Materials*, 43 Educ. L. Rep. (West) 1, 2 (1988).

55. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 437 (1984).

"contributory infringement." The employing school district of a teacher who infringes could be held liable together with the teacher.⁵⁶

What Plea May an Educator Make Who Sincerely Believed He or She Was Operating Within the Fair Use Guidelines?

The fair use provision of the Copyright Act limits the copyright owner's exclusive rights so that society can fully benefit from copyrighted works. Educators are the prime beneficiaries of this provision.⁵⁷ However, educators who act in "good faith" are still liable for copyright infringement despite their belief they are following the law. A "good faith" defense is only useful in helping the infringer avoid attorneys' fees. A Federal District Court in New York explained that while the educators' use of copyrighted works constitutes infringement, their good faith effort to comply with copyright law shielded them from having to pay the copyright owner's attorneys' fees:

[A] determination of bad faith depends not only on whether a defendant deliberately used copyrighted material which it had been denied permission to use, but also on whether the defendant genuinely believed that, nevertheless, it had the legal right to make such use. Put another way, the issue of good faith or bad faith in this context depends in large part on the substantiality of the defense offered as justification for the offending acts.⁵⁸

Although attorneys' fees in copyright cases have been used sparingly,⁵⁹ the *Kinko's Graphics* decision may have changed that trend. The *Kinko's Graphics* court reiterated that "[b]ecause the award of fees has a statutory basis, a finding of subjective bad faith is not necessary."⁶⁰ The court granted an award of attorneys' fees because it found Kinko's copying to be willful.⁶¹

56. Roe Sturdevant, *Commonsense Photocopying*, 61 PHI DELTA KAPPAN 619, 620 (1980).

57. HELM, *supra* note 6, at 11.

58. *Encyclopedia Britannica Educ. Corp. v. Crooks*, 558 F. Supp. 1247, 1252 (W.D.N.Y. 1983) (quoting *Roy Export Co. v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137, 1155 (S.D.N.Y. 1980)).

59. *Id.*

60. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1547 (S.D.N.Y. 1991) (quoting *Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142, 148 (2d Cir. 1984)).

61. *Id.*

What Price Can Students Be Charged for Copies Made in Compliance with Fair Use Guidelines?

A student cannot be charged more than the actual price of duplication.⁶² The usual practice of charging a set amount for each copy may be satisfactory if, indeed, the set price is the actual price of duplication. Charging students high prices to discourage copying or to make a profit is forbidden by the law. School personnel should compute the actual price of duplication and establish copy prices accordingly.⁶³

Who Owns the Copyright When a Teacher Creates an Original Work?

Generally, a publisher owns a copyright for an original work according to the contractual terms negotiated between the composer or author and the publisher. A dilemma arises when a teacher creates a work because it may fall under the laws governing "work for hire." If the teacher cannot document that all work was done outside of school hours with no use of school equipment or personnel, the copyright (or royalties if a publisher owns the copyright) may belong to the school district unless there is a signed written agreement to the contrary.⁶⁴ School districts should have policies and procedures in place for dealing with the ownership of copyrights for creative works produced by teachers and other school employees and for dispersion of royalties that may accrue to such works after publication.

What Are the Teacher's Responsibilities in Regard to Copyright Laws?

Because teachers are faced with copyright issues almost daily, they must be aware of the reasons for the law and procedures to follow to ensure compliance with the law. Most teachers realize that violation of copyright laws stifles the creativity of authors, composers, and artists by minimizing both the de-

62. Wagner, *supra* note 21, at 14.

63. See *id.*

64. 17 U.S.C. § 201(b) (1988); Margaret D. Smith & Perry A. Zirkel, *Implications of CCNV v. Reid for the Educator-Author: Who Owns the Copyright?*, 63 Educ. L. Rep. (West) 703, 704 (1991).

mand and the financial rewards for their works. Therefore, teachers should do the following:

1. Set a good example by complying with the federal guidelines and insisting that other teachers, staff, student teachers, and students follow the guidelines.
2. Teach students and student teachers about the need for compliance with the law and the guidelines that govern fair use.
3. Seek permission when use of copyrighted materials may fall outside the guidelines for fair use of materials.
4. Attend workshop sessions that deal with copyright laws and issues to stay current on changes in the law.
5. Be sure that copyright notices are included on any legal copies made.
6. Purchase adequate numbers of books, music, or other works so that illegal copying is not needed to meet student demands or performance group needs.
7. Avoid copying works for the purpose of making anthologies or collections.
8. Understand and follow the doctrine of fair use so that students can enjoy full advantage of educational opportunities.

What Are the School Administrator's Responsibilities in Regard to Copyright Laws?

School administrators must be informed about copyright laws to ensure compliance with the law throughout the school district. Moreover, administrators are responsible for passing this information along to others.⁶⁵ Therefore, the school administrator should do the following:

1. Set a good example by complying with the law and insisting that teachers, staff, and students follow the guidelines.
2. Include copyright laws and guidelines in teacher handbooks, updating such handbooks as new laws, guidelines, or recommendations are available.
3. Encourage teachers and staff members to get permission

65. See, e.g., Steve Permut & Ralph Mawdsley, *The Copyright Law: New Technology and Today's Principal*, A LEGAL MEMORANDUM (National Ass'n of Secondary Sch. Principals, Reston, Va.), Sept., 1991, at 1, 2.

when their use of copyrighted materials may exceed the guidelines for fair use. Develop policies and standard forms for seeking permission from copyright holders.

4. Develop a centralized system for seeking copyright permission with someone designated to maintain records.
5. Provide regular in-service workshops for teachers and staff members about copyright laws, stressing the reasons for copyright laws, fair use guidelines, and importance of compliance.
6. Meet with groups of faculty who have specialized concerns regarding copyright laws; such faculty groups may include the music teachers, English teachers, librarians, and media personnel.
7. Understand and follow the fair use guidelines so that students are able to participate fully in educational activities without fear of violating the law.
8. Post guidelines and warnings near duplication facilities to keep users informed of laws.⁶⁶
9. Prepare a stamp or other mechanism for marking copyright information on all copies made in compliance with copyright laws.⁶⁷
10. Compute the actual cost of duplication so that students are not overcharged when assessed for the making of legal copies.
11. Encourage the purchase of adequate numbers of copies so that noncompliance with the law becomes the exception rather than the rule.

CONCLUSION

Copyright laws are much more complex when applied to the educational setting than is generally thought. Fair use does not mean that educators are free to copy or use any work without complying with the law. Public school teachers are especially vulnerable to charges of violating the law because of the extensive use of expensive, copyrighted works for educational and performance purposes. Every educator has an obligation to understand and follow the copyright law, especially the fair use guidelines so that students are not denied educational opportunities.

66. See *infra* Appendix B p. 24.

67. See *infra* Appendix B p. 24.

APPENDIX A
GUIDELINES FOR CLASSROOM COPYING IN
NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS⁶⁸

*Guidelines with Respect to Books and
Periodicals*

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of [the Copyright Act of 1976]. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future, that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the [Copyright Act]. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book.
- B. An article from a periodical or newspaper.
- C. A short story, short essay or short poem, whether or not from a collective work.
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

68. The following guidelines have been excerpted from the legislative history of the Copyright Act. See H.R. REP. NO. 1476, *supra* note 19, at 68-74, *reprinted in* 1976 U.S.C.C.A.N. at 5681-88.

Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion, provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below.
- B. The copying meets the cumulative effect test as defined below.
- C. Each copy includes a notice of copyright.

Definitions:

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages; or (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words; or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term. [The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

Prohibitions as to Single and Multiple Copies

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) Substitute for the purchase of books, publishers' reprints or periodicals;

(b) Be directed by higher authority;

(c) Be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Guidelines for Educational Uses of Music

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of [the Copyright Act of 1976]. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright [Act]. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

Permissible Uses:

- A. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.
- B. For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10% of the whole work. The number of copies shall not exceed one copy per pupil.
- C. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.
- D. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.
- E. A single copy of a sound recording (such as a tape, disc or cassette) or copyrighted music may be made from sound recordings owned by an educational institution or individu-

al teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording).

Prohibitions:

- A. Copying to create or replace or substitute for anthologies, compilations or collective works.
- B. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.
- C. Copying for the purpose of performance, except as in A above.
- D. Copying for the purpose of substituting for the purchase of music, except as in A and B above.
- E. Copying without inclusion of the copyright notice which appears on the printed copy.

Guidelines for Music Performances

The 1976 law considerably expanded the rights of educators to perform copyrighted materials without special permission. Section 101 of the Copyright Act deals with unlawful performance of copyrighted works and defines performance of a work to include "to recite, render, play, dance, or act it, either directly or by means of any device or process." However, § 110 provides for the special needs of music educators by stating that the following qualifications are not infringements of the law. (These qualifications apply strictly to the performance of nondramatic literary and musical works):

- A. Performance of a copyrighted work by instructors or pupils in the course of face-to-face teaching activities of a non-profit educational institution, in a classroom, or similar place devoted to instruction.
- B. Performance of a nondramatic literary or musical work on closed circuit TV to other classrooms or to disabled students for teaching purposes, only if the transmission is part of the systematic instructional activities of a nonprofit educational institution, and only if the performance is directly related to and of material assistance to the teaching content of the program.
- C. Performance of a nondramatic literary or musical work at

a school concert if there is no purpose of direct or indirect commercial advantage, no fee or compensation paid to the performers, promoters, or organizers, and no admission charge; if there is an admission charge all of the proceeds must be used only for educational or charitable purposes. The performance may not take place if the copyright owner objects in writing seven days before the performance.

- D. Performance of nondramatic literary or musical works or of dramatico-musical works of a religious nature, in the course of services at places of worship or at a religious assembly.

Guidelines for Transmittal Over Educational or Interactive Television Systems

Transmitted performances in educational settings became an issue with the advent of interactive television. A transmitted performance is one for which the "images or sounds are received beyond the place from which they are sent" with the definition originally applying only to radio or television.

§ 110(2) limits the transmission of copyrighted nondramatic literary or musical works much the same as it limits the live performance of such works. In order for transmitted performances of copyrighted works to be legal, they must meet the following guidelines:

- A. They must be part of the "systematic instructional activities" (that is, related to the curriculum) of a nonprofit education institution that is transmitting them for noncommercial purposes.
- B. They must be received in classrooms or other instruction-related places, or be received by persons unable to attend classes at an education institution site because of disabilities or other special circumstances.
- C. They must be transmitted through either a cable system a noncommercial educational broadcast station, or radio subcarrier authorization.

Guidelines for Taping Commercial Broadcasts from Television

The guidelines for videotaping commercial broadcasts are contained in the "Guidelines for Off-the-Air Recording of Broadcast Programming for Educational Purposes," ratified in 1981 as a retroactive part of the 1976 Copyright Act. These guide-

lines should be followed whether the taping is being done by school personnel on school equipment or by teachers on home equipment.

- A. Videotaped recordings may be kept for no more than 45 calendar days after the recording date, at which time the tapes must be erased.
- B. Videotaped recordings may be shown to students only within the first 10 school days of the 45-day retention period.
- C. Off-air recordings must be made only at the request of an individual teacher for instructional purposes, not by school staff in anticipation of later requests by teachers.
- D. The recordings are to be shown to students no more than two times during the 10-day period, and the second time only for necessary instructional reinforcement.
- E. The taped recordings may be viewed after the 10-day period only by teachers for evaluation purposes, that is, to determine whether to include the broadcast program in the curriculum in the future.
- F. If several teachers request videotaping of the same program, duplicate copies are permitted to supply their request; all copies are subject to the same restrictions as the original recording.
- G. The off-air recordings may not be physically or electronically altered or combined with others to form anthologies, but they need not necessarily be used or shown in their entirety.
- H. All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.
- I. These guidelines apply only to nonprofit educational institutions, which are further "expected to establish appropriate control procedures to maintain the integrity of these guidelines".

APPENDIX B

A notice of copyright must appear on all copyrighted items photocopied for distribution. The following wording was suggested by the American Library Association:

This material may be protected by copyright law
(Title 17 U.S. Code).

Notices about copyright laws should be posted on unsupervised reproduction equipment. The following wording was suggested by the American Library Association:

Notice: The copyright law of the United States
(Title 17 U.S. Code) governs the making of photocopies or other reproductions of copyrighted material. The person using this equipment is liable for any infringement.