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Copyright Violation and Personal Liability in Education: A Current Look at "Fair Use"

INTRODUCTION

One of the least understood laws that affects or potentially affects perhaps 90% of the school teachers in the country is the Copyright Act. New technology makes copying cheaper and the public display of copyrighted media easier than ever before. But the ease of reproducing copyrighted works is also setting public educators up for prosecution in civil litigation for copyright violation. Infringing on copyrights is so easy to do many teachers cannot believe it is against the law.

The primary violations are of two types: illegal copying and illegal display or performance. Illegal copying occurs when public educators copy music, poetry, literature, current news articles, and computer software without permission of the copyright holder. Illegal display occurs when teachers use videos rented from a local video store for use in class without paying royalties for public performance.

A typical response by educators of kindergarten children through university graduate programs is that as long as they do not sell what they copy and pay the copy center or rental fee at the video store, then their use is an exception since it is for non-profit educational use. There is an exception for copyright infringement in the area of education known as "Fair Use." However, fair use is rarely construed as such in the light of Congressional intent or in light of recent court decisions that indicate how the courts construe the copyright statute.

Building contractors are not expected to build schools free of charge as a public service, nor are classroom equipment and furniture manufacturers expected to sell to schools at a discount merely to support a good cause. Likewise, "owners of copyright[s] are not singled out to provide subsidies to worthy causes through limitations on their rights."¹

1. Edmund W. Kitch & Harvey S. Perlman, *Legal Regulation of the Competitive Process*, 753 (4th ed. 1991).

The intent of this paper is to inform public educators of what is legal and what is not, and some of the reasoning behind the law. The five main parts of this paper will: I) examine the copyright statute itself, including the "Fair Use" doctrine; II) examine the reports that Congress relied upon when they passed the law showing what they hoped to accomplish with the law; III) explore recent court decisions as to what constitutes fair use and what constitutes copyright infringement that an educator can be personally liable for; IV) outline what schools can and cannot do regarding use of copyrighted material; and V) offer suggestions about how teachers and administrators, schools and school districts can protect themselves.

I. THE STATUTE

The copyright laws of the United States are just that, federal statutes that cover the whole country (those who think that this article does not apply to them because they are in a different state are mistaken). There are no longer state copyright statutes although at one time there may have been. Federal copyright law is appropriate as the United States Constitution directs Congress "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."²

A. *Things Protected by Copyright.*

The current Copyright Act is found in Title 17 of the United States Code. Protected by the copyright statutes are original works fixed in a tangible medium that can be perceived, reproduced, or otherwise communicated directly or with the aid of a machine. The following categories of original works are protected:

1. literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works;
7. sound recordings; and

2. U.S. CONST. art. I, § 8, cl. 8.

8. architectural works.³

Copyright protection does not extend to ideas, processes, discoveries, procedures, systems, methods of operation, concepts, or principles.⁴

B. Fair Use

The copyright act gives the authors of any original work in one or more of the above categories a virtual monopoly on how that work is used.⁵ Some exceptions to the monopoly of the author of an original work arise under what is called the "Fair Use Doctrine."

Fair use allows someone other than the copyright holder to use parts of the copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research."⁶ The typical teacher, supposing that all copying is for teaching, scholarship, or research purposes may invoke fair use prematurely.

The law does not allow indiscriminate use of copyrighted materials. The factors used to determine whether something is fair use or copyright infringement are:

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; and,
4. The effect of the use upon the potential market for or value of the copyrighted work.⁷

Congress was aware of the fact that the nation's teachers would be at risk with the passage of the new copyright statutes in 1976, and therefore put language in the statute that would give teachers "broad insulation against unwarranted liability for infringement."⁸

In the section of the code that deals with the penalties for infringement, the statute allows courts to suspend statutory damages for infringement in cases "where an infringer believed

3. 17 U.S.C.S. § 102(a)(Law. Co-op. 1978 & Supp. 1994).

4. 17 U.S.C.S. § 102(b) (Law. Co-op. 1978).

5. 17 U.S.C.S. §§ 106, 106A (Law. Co-op. 1978 & Supp. 1994).

6. 17 U.S.C.S. § 107 (Law. Co-op. 1978 & Supp. 1994).

7. *Id.*

8. H.R. REP. NO. 1476, 94th Cong., 2nd Sess., 67 (1976).

and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was. . . an employee or agent of a nonprofit educational institution. . . ."⁹ However, if a publisher is suing a school teacher or similar party and can prove that the copying was done in bad faith, with knowledge that it may have been against the copyright laws, then the exception does not apply and the teacher or other similar party can be held liable for full damages.¹⁰

II. THE INTENT OF CONGRESS

The fact that the fair use exception covers educational use of copyrighted materials does not protect teachers who copy everything. Before passing the current legislation, Congress discussed their intent as to what should be allowed as fair use and what should not. They employed the help and advice of a committee of educators and publishers to insure that the legislation was evenhanded and workable.

The committee came up with a list of guidelines to be a minimum, non-comprehensive standard. These include such things as allowing a single copy for teachers of: "A) a chapter from a book; B) an article from a periodical or newspaper; C) short story, short essay or short poem. . . ; D) a chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper."¹¹

Multiple copies, according to the code, may be made by a teacher for use in class, provided that the copy meets the standards of brevity, spontaneity and cumulative effect and each copy includes a notice of copyright.¹²

Brevity means: 250 words or less for a poem or excerpt from a poem; a complete article, story or essay of less than 2,500 words or an excerpt not more than 1,000 words or 10% of the total work, whichever is less; one chart, graph, diagram, drawing, cartoon or picture per book or periodical issue.¹³ Books that combine language with illustrations are often short of 2,500 words, and if that is the case, one cannot use more than

9. 17 U.S.C.S. § 504(c)(2) (Law. Co-op. 1978).

10. See H.R. Rep. No. 94-1476, at 163.

11. H.R. Rep. 94-1476, at 68.

12. *Id.*

13. *Id.*, at 68-69.

2 pages of the work as an excerpt.¹⁴ Word limits can be exceeded to finish a line of poetry or the paragraph.¹⁵

Spontaneity is described as copying "at the instance and inspiration of the individual teacher."¹⁶ Also when,

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.¹⁷

The cumulative effect standards provide that the copying is allowed if it is for one course taught in the school that does the copying.¹⁸ Nine instances of copying is the limit for one term of a class.¹⁹ "No more than one short poem, article, story, essay or two excerpts" from the same author, "nor more than three from the same collective work or periodical volume" per term per class are allowed.²⁰

House Report 94-1476 also lists some prohibitions. "Copying shall not be used to create or to replace or substitute for anthologies, compilations, or collective works."²¹ Compilations can occur by accumulating copies of the different parts over a period of time.²² If that is the case, then the school should purchase the book.

No copying is allowed of works intended to be consumable in the course of study, such as workbooks, exercises, standardized tests, test booklets and answer sheets.²³ Copying shall not be a substitute for the purchase of books, publishers' reprints or periodicals.²⁴ Teachers are not allowed to copy the same items term after term.²⁵ A charge to students only for cost of copying is allowed.²⁶

14. *Id.*

15. *Id.*

16. H.R. Rep. No. 94-1476, at 69.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

III. RECENT COURT DECISIONS

In *Marcus v. Rowley*, a case arose between two San Diego area teachers where one had borrowed the copyrighted work of the other and included it in the teaching materials for a class. The court ruled that such copying, even though for educational purposes, was not protected by fair use.²⁷

Marcus, the owner of the copyright, had produced a 35 page booklet about cake decorating, and Rowley borrowed 11 pages of it to include in the materials for a continuing education class she taught. Rowley used the material for three years and neither she nor the school district made any profit on its use.

In reaching its decision, the court examined the guidelines contained in House Report 94-1476 as discussed above. Rowley's use of Marcus' work did not meet either the brevity test or the spontaneity test, nor was there a notice of copyright included in the materials.²⁸ The court determined that this was not fair use and granted summary judgment without a hearing before a jury.²⁹

In *Withol v. Crow*, a music teacher who arranged a solo piece for use by his choir was guilty of copyright infringement.³⁰ The court said that although fair use is not clearly defined in all cases, it does not mean that copying all or substantially all of a copyrighted song is fair use simply because the infringer did not intend to infringe.³¹ Derivative works and the authority to make them are part of the virtual monopoly given to the owner of a copyrighted work. The making of a musical arrangement of an original work is a derivative work³² and the choir teacher's arrangement constituted making unauthorized copies of a derivative work.

In *Encyclopedia Britannica Educational Corporation v. Crooks*, a school district, acting as a government body, video-

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

28. *Id.* at 1177. (Noting that the inclusion of copyright notice would not have made a difference in this case, the lack of copyright notice might only have increased the damages).

29. The case does not say what the damages were or if the infringing teacher was able to escape payment because she had reasonable grounds for belief that her use of the copyrighted material was fair use.

30. *Withol v. Crow*, 309 F.2d 777 (8th Cir. 1962).

31. *Id.* at 780.

32. 17 U.S.C.S §101 (Law. Co-op. 1978).

taped television broadcasts for use by the schools in that district.³³ Licensing agreements between Encyclopedia Britannica and schools did make allowances for some taping of broadcast programs, but on condition that the tapes be used and then destroyed within a seven day period.³⁴ The problem arose when the school district made many copies and retained them for future use rather than destroying them.

IV. WHAT SCHOOLS CAN AND CANNOT DO

In summary, schools cannot:

1. use photocopying as a means of avoiding payment for books, periodicals, maps, charts and music;
2. use photocopying as a means of avoiding purchase of a whole collection or anthology just because they only want to use a few of the pieces in the anthology;
3. make copies of arrangements of copyrighted music, even when the arrangement is the effort of the teacher who does the copying;
4. photocopy worksheets, workbooks, or other kinds of copyrighted material designed to be consumed and not reused in the course of a class;
5. use photocopies that are considered fair use for the same class term after term;
6. use video tapes and movies for recreational or entertainment purposes unless they qualify under not-for-profit exemptions.

Schools can:

1. photocopy excerpts that meet the brevity and spontaneity tests as outlined in House Report 94-1476;
2. perform copyrighted literary or musical works in the face to face educational classroom setting;
3. perform copyrighted literary or musical works at not-for-profit programs and concerts. This does not include dramatic works, however.

V. HOW TO PROTECT YOURSELF

Because of the potential for liability which comes upon the heads of the teachers themselves and not upon the school district or the schools themselves, it is the teacher's responsibility to

33. *Encyclopedia Britannica v. Crooks*, 542 F.Supp. 1156 (W.D.N.Y. 1982).

34. 17 U.S.C.S. §118(d)(3) (Law. Co-op. 1978).

ensure that what they copy and use in class is allowed under the copyright laws.

Section 504(c) of the code allows the courts to be lenient with respect to employees of non-profit educational institutions (e.g. public school teachers) if those teachers had reasonable grounds to expect that their copying constituted fair use.³⁵

If the attorney for the school district approved guidelines for copying, for what can and cannot be copied, and teachers follow those guidelines, then teachers can most likely claim that they had reasonable grounds to believe that the copying they did constituted fair use under the law.

It is important that teachers strongly encourage principals and school boards to provide copying guidelines under the justification that school districts have the responsibility to protect their teachers. The guidelines for minimum fair use in House Report 94-1476 (a complete copy; do not rely on the partial one in this article) and a check of current case law should provide school district attorney's with a basic framework for drafting their own copying policy.

Once a copying policy is in place, a librarian or other designated person within each school could learn the procedure for obtaining copyright owner's permission to use copied reproductions of the product. One does not have to be an attorney to do this. Copy shops that produce class packets for college and university courses obtain permission all the time as a matter of self preservation since the *Kinko's*³⁶ decision.

Securing permission to copy for school use is often a simple matter of calling the publisher's office and asking.³⁷ If the publisher employs the services of a copyright clearinghouse, the publisher should be able to direct interested parties to the particular service. Publishers and copyright owners sometimes allow use of their materials free of charge to schools.³⁸ Others will allow copying with the stipulation of a specified low fee per page copied and trust the school to keep track of the number of pages copied and the amount owed.³⁹

35. 17 U.S.C.S. § 504(c) (Law. Co-op. 1978). See also H.R. REP. NO. 94-1476, at 163.

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

37. Interview with Barry Merrell, employee, Alexander's Printstop, Provo, Utah (Mar. 20, 1995).

38. *Id.*

39. *Id.*

CONCLUSION

Those who produce works that are used in schools, whether especially designed for education or general use, are not expected to donate their labors. Such artists, authors, and composers retain all the rights of any other copyright holder amounting to a virtual monopoly of use of their work. The "Fair Use" doctrine provides for limited use of a copyrighted work without the author's permission, but it does not grant generous license simply because the copying is for an educational purpose. Even though the law provides limited protection for teachers in the ordinary course of their teaching, it is simpler and safer to protect oneself from a lawsuit in the first place. Such protection can be more firmly established by having a copying policy approved by school district attorneys. Any policy should include instructions on how to obtain publisher's permission.

John Wm. Maddox