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## The Copyright Law and Mechanical Reproduction for Educational Purposes

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### The Copyright Law and Mechanical Reproduction For Educational Purposes\*

In recent years, a controversy has arisen in the United States that is concerned with the right that a classroom teacher may have to make mechanical reproductions of copyrighted books and materials for use as teaching aids and for other educational purposes. This is a result of the increasing availability of inexpensive mechanical reproductions and the increasing demand for creative teaching. The question thus presented is when does a teacher infringe the copyright, and if he does, what is the result.<sup>1</sup>

Congress, is empowered by the Constitution "[T]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries."<sup>2</sup> Pursuant to this grant of power, Congress has enacted the copyright statute.<sup>3</sup>

Section one of this act gives any person who complies with the provisions of this title the exclusive right to "print, reprint, publish, copy, and vend the copyrighted work"<sup>4</sup> and to "make any other version thereof."<sup>5</sup> Thus the rights of the copyright owner are to be protected. However, the courts have stated that reward to the owner is not the sole and primary consideration.<sup>6</sup> In *Fox Film Corp. v. Doyal*,<sup>7</sup> Chief Justice Hughes stated that "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."<sup>8</sup>

It thus appears that the rights given to the copyright owner are not exclusive, and under some circumstances the material may be copied.<sup>9</sup> There are no defenses given by the copyright statute.

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\* This essay was entered in THE NATHAN BURKAN MEMORIAL COMPETITION at West Virginia University, College of Law, 1969.

<sup>1</sup> The scope of this note will be limited to the copyright law as it applies to the classroom teacher. Unexplained legal language will be avoided where possible, so that teachers and other laymen may find it beneficial.

<sup>2</sup> U.S. CONST., art. I, § 8.

<sup>3</sup> Copyrights, 17 U.S.C. (1964).

<sup>4</sup> Copyrights, 17 U.S.C., § 1 (a) (1964).

<sup>5</sup> Copyrights, 17 U.S.C., § 1 (b) (1964).

<sup>6</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

<sup>7</sup> 28 U.S. 123 (1932).

<sup>8</sup> *Id.* at 127.

<sup>9</sup> In this respect a copyright differs from a patent. A copyright contemplates and permits fair use by all persons of the copyrighted work, whereas a patent confers an exclusive right to use. *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941).

One who copies must turn to the courts and the common law to see if he has a defense, and his success will depend on whether his appropriation comes under the doctrine of "fair use."

Fair use has been defined as

a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright. Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary.<sup>10</sup>

What is or is not fair use will depend upon the circumstances in each particular case,<sup>11</sup> and "the court must 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, diminish the profits or supersede the objects of the original work."<sup>12</sup>

The problem was stated by Lord Mansfield to be as follows:

We must take guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.<sup>13</sup>

As a result, the courts in passing upon each particular claim of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the public's interest in the development of art, science and industry.<sup>14</sup>

How then would a teacher who copies for educational purposes fare if these standards are applied? It would appear that since

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<sup>10</sup> H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY*, 260 (1944). No definition of fair use is completely adequate. However, this definition is the best available and it is the one most often quoted and used by the courts.

<sup>11</sup> *Karl v. Curtis Pub. Co.*, 39 F. Supp. 836, 837 (E.D. Wis. (1941)).

<sup>12</sup> *Id.* at 837. For a more complete discussion of the factors and standards that courts look to in a determination as to whether a particular use is a fair use, see Annot., 23 A.L.R. 3d 139 (1969).

<sup>13</sup> *Sayre v. Moore*, 1 East 361, 102 Eng. Rep. 139 n.140 (K.B. 1785).

<sup>14</sup> *Rosemont Enterprises, Inc. v. Random House Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964).

the teacher's activity is an aid to the progress of the arts and sciences and is a reasonable use, it should thus be protected. However, in the only two cases found on this specific point, the teachers have been found guilty of an infringement.<sup>15</sup>

In *Macmillan Co. v. King*,<sup>16</sup> the defendant, a teacher, prepared sheets of memoranda or outlines, from a copyrighted book and used them in the tutoring of students on the subject of economics. He gave or loaned these outlines to each student and none were sold or leased. The contained occasional quotations of words and sentences from the book and were a reproduction in an abridged and paraphrased form of the author's treatment of the subject. The court said that it was not necessary, in order to constitute an infringement, that copies should be offered to all persons who chose to buy them; there was an infringement of the owner's exclusive right to "make any other version"<sup>17</sup> of the copyright work even though the number of persons to whom copies are delivered and their rights to the copies are also limited. The court also stated that typewriting or mimeographing constituted a "printing" with the meaning of the copyright statute.<sup>18</sup> The court further stated that:<sup>19</sup>

I am unable to believe that the defendant's use of the outlines is any the less infringement of the copyright because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the books without infringing, or because his pupils might have taken their own notes of his lectures without infringing.

In the case of *Wihtol v. Crow*,<sup>20</sup> the defendant, who was a choral director in a high school and the choir director of a church, made a new arrangement of a copyrighted song or hymn. He made copies of his new arrangement upon the school's duplicating machine, and it was performed by the high school choir and also by the church choir. He furnished the choirs with copies, but made no reference to the copyright or to the composer. He stated only that he had

<sup>15</sup> *Macmillan Co. v. King*, 223 F. 862 (Mass. 1914); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962).

<sup>16</sup> 223 F. 862 (Mass. 1914).

<sup>17</sup> This action was under the 1909 copyright act. However, the phrase "make any other version" appears in the present statute. 17 U.S.C., § 1 (b) (1964).

<sup>18</sup> *Macmillan Co. v. King*, 223 F. 862, 867 (Mass. 1914).

<sup>19</sup> *Id.* at 867.

<sup>20</sup> 309 F.2d 777 (8th Cir. 1962).

arranged it. The district court found that the defendant had made a fair noninfringing use of the copyrighted song.<sup>21</sup> However, the court of appeals stated that the copying of all, or substantially all, of a copyrighted song cannot be held to be a fair use, and the fact that the defendant's copying was done without intent to infringe would be of no help to him.<sup>22</sup> The court held that the defendant had infringed and the case was remanded to the district court for a determination of damages.

The basic rationale and justification for the privilege of fair use lies in the constitutional purpose in granting copyright protection in the first instance<sup>23</sup> — "[T]o Promote the Progress of Science and the Useful Arts."<sup>24</sup> However, it would appear that even though a teacher copies to further this purpose, it may be found that he is infringing on the copyright and he may be liable for damages, or even criminal penalties.<sup>25</sup> Even if the teacher acknowledges the source from which the material was taken, this does not relieve the teacher from the legal liability for the infringement.<sup>26</sup>

The teacher's copying may be protected if the amount he reproduces is small. In order to sustain an action for infringement of a copyright, a substantial copy of the whole, or a material part, must be reproduced.<sup>27</sup> However, the courts have not been con-

<sup>21</sup> *Wihtol v. Crow*, 199 F. Supp. 682 (S.D. Iowa 1961).

<sup>22</sup> *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962).

<sup>23</sup> *Rosemont Enterprises, Inc. v. Random House Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

<sup>24</sup> U.S. CONST. art. I, § 8.

<sup>25</sup> Civil remedies and criminal penalties for infringement of copyright are dealt with in chapter 2 of 17 U.S.C. entitled "Infringement Proceedings." 17 U.S.C., § 101 (b) provides for recovery of damages which the copyright proprietor may have suffered and profits which the infringer may have made. It also provides for minimum damages of \$250 and maximum damages of \$5000 for infringement which the court may, in its discretion, award. Furthermore, 17 U.S.C. § 104 makes it a misdemeanor to willfully and for profit to infringe, or knowingly and willfully aid or abet such infringement. Upon conviction, the punishment may be imprisonment not exceeding one year, or a fine of not less than \$100 nor more than \$1,000 or both. However, § 104 makes exceptions under certain circumstances. For a discussion of the liability for infringement, see SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, Studies 22-25, 86th Cong., 2d Sess. (1960).

<sup>26</sup> *Henry Holt & Co. to use of Felderman v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938); *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664, 666 (7th Cir 1950).

<sup>27</sup> *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664, 666 (7th Cir. 1950); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 84 (6th Cir. 1943).

sistent as to how much must be taken before they consider it substantial enough to constitute an infringement.<sup>28</sup>

The copying may also be justified under a similar theory by the maxim of *de minimis non curat lex*. This means that the law does not take notice or concern itself with trifles.<sup>29</sup> This theory may be applicable for the reason that the teacher has only copied a small amount and what he has done is insignificant. He has acted reasonably, and what he has done has not really hurt the copyright owner, and thus there should not be an infringement.<sup>30</sup> However, this again presents the question of how much is *de minimis*.<sup>31</sup>

The purpose for which the material is used may also aid in protecting the educator's appropriation as a fair use. [T]he purpose for which the use was made is of major importance, in consideration with various other factors, in arriving at a sound determination of the extent of fair use . . . broader scope will be permitted the doctrine where the field of learning is concerned and a much narrower scope where the taking is solely for commercial gain.<sup>32</sup>

#### PROPOSED REVISION OF THE COPYRIGHT LAW

In recent years there have been many proposed revisions of the copyright law.<sup>33</sup> At this writing there is a bill pending before the Subcommittee on Patents and Trademarks and Copyrights of the

<sup>28</sup> In *Henry Holt & Co. v. Felderman v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938), the court held that the defendant had infringed the copyright when he copied three sentences from a scientific book and used them in a pamphlet used in advertising cigarettes. In the case of *Toulmin v. Rike-Kumler Co.*, 316 F.2d 232 (6th Cir. 1963), cert. denied, 375 U.S. 825 (1963), the court stated that a deliberate copy of a sentence and a half from a copyrighted book of 142 pages was *de minimis* and not an actionable infringement. See also Annot. 23 A.L.R.3d 139 § 6 (c) (1969).

<sup>29</sup> H. BROOM, *BROOM'S LEGAL MAXIMS*, 88 (10th ed. 1939).

<sup>30</sup> Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT LAW SYMPOSIUM, 43, 50 (1955).

<sup>31</sup> See note 28 *infra*.

<sup>32</sup> *Loew's, Inc. v. Columbia Broadcasting System, Inc.*, 131 F. Supp. 165, 176 (S.D. Cal. 1955), *aff'd. sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd. by an equally divided Court* 356 U.S. 43 (1958). The court also stated that absence of competition or an injurious effect upon the copyrighted work will not make a fair use. If the work is infringed the absence of pecuniary damage is immaterial.

<sup>33</sup> Note, *Mechanical Copying Copyright Law and the Teacher*, 17 CLEV.-MAR. L. REV. 299 (1968).

Senate Committee on the Judiciary.<sup>34</sup> If this bill is enacted, it may affect the teacher's ability to copy materials for educational purposes. The bill has codified many of the common law standards and has established four factors to be considered in determining whether the use made of a work in any particular case is a fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>35</sup>

Section 504 of the proposed revision would also aid the classroom teacher. It provides that:

In a case where an instructor in a nonprofit educational institution, who infringed by reproducing a copyrighted work in copies or phonorecords for use in the course of fact-to-face teaching activities in a classroom or similar place normally devoted to instruction, sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under section 107, the court in its discretion may remit statutory damages in whole or in part.<sup>36</sup>

However, it should be noted that the proposed section 506(a)<sup>37</sup> provides that any person who willfully infringes a copyright for the purposes of commercial advantage or private financial gain shall be fined or imprisoned or both. Apparently, it will be necessary for the courts to determine the intention of the legislature in passing the statute and the applicability of the sections involved to determine whether the educator is a willful infringer.

#### CONCLUSION

At the present time, a classroom teacher who desires to copy materials for use in his classes would have a difficult time determining whether he can copy without incurring liability for copy-

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<sup>34</sup> Senate Bill 543 was introduced on January 22, 1969, by Senator John L. McClellan, providing for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes. At this writing, no action has been scheduled on S. 543.

<sup>35</sup> S. 543, 91st Cong., 1st Sess. § 107 (1969).

<sup>36</sup> S. 543, 91st Cong., 1st Sess. § 504 (c) (2) (1969).

<sup>37</sup> S. 543, 91st Cong., 1st Sess. § 506 (a) (1969).