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# The Effects of the Fair Use Doctrine on Text-Book Publishing and Copying; Part II

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## STUDENT COMMENTS

### THE EFFECT OF THE FAIR USE DOCTRINE ON TEXT-BOOK PUBLISHING AND COPYING

#### PART II\*

#### VII. The House Committee's Interpretation of Section 107's Fair Use Criteria

Although not expressly authorized by law, it has, through custom, become regarded as a fair use for scholars to make hand-written copies of copyrighted materials needed for research.<sup>40</sup> The basis for allowing hand-copying is that it is such a slow, tedious method of reproduction that scholars usually choose to purchase the complete work rather than to hand-copy excerpts from it. Consequently, hand-copying does not significantly reduce publishers' sales. However, this reasoning obviously cannot be applied to photocopying. As photocopying, a fast and convenient process, becomes cheaper than buying the book, when a professor desires to make a complete volume for his personal use, the question whether he should be allowed to do so without compensating the author will inevitably arise.<sup>41</sup> Most educators do not think they have the right to copy an entire work.<sup>42</sup> Neither does the House Committee on the Judiciary, which expressed its opinion as follows:

Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection. Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.<sup>43</sup>

This statement puts a strict interpretation on the fourth criterion provided by Section 107 for determining what is a fair use: "the

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\* Part I of this Comment appeared in the Fall, 1968 issue.

<sup>40</sup> W. Nimmer, *Nimmer on Copyright* 653-654 (1966).

<sup>41</sup> A Xerox automatic sorter eliminates the need for hand-collating of multi-page documents of all kinds. Fifty copies of a forty-page report can be produced in about an hour, with a complete copy of the report automatically collated. Xerox Corp., Interim Report, June 30, 1966, p. 4.

<sup>42</sup> Hearings on H.R. 4347 before Subcomm. #3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess., ser. 8, pt. 1, at 329-330 (1965). (Hereinafter cited as 1965 Hearings.)

<sup>43</sup> 1967 Committee Report 35.

effect of the use upon the potential market" for a textbook.<sup>44</sup> The House Committee's phrase "no matter how minor the amount of money involved" rankles educators, and they have served notice that if that concept is accepted, they might return to their original position that any use is a fair one if it is not undertaken for profit and is educational.<sup>45</sup>

If photocopies are to be made specifically for students, the House Committee approves as a fair use "the copying for classroom purposes of extracts or portions, which are not self-contained and which are relatively insubstantial in length when compared to the larger, self-contained work from which they are taken."<sup>46</sup> Educators addressing the Committee asserted a privilege to make a single copy of an "entire work"<sup>47</sup> but declared they do not believe that reproduction of an *entire book* is a fair use.<sup>48</sup> What is meant by "extract," "portion" and "entire work"? The Committee suggests that these terms refer to single poems, stories, and articles.<sup>49</sup> Fair use of an "entire work" is limited to a single copy which a teacher might want to read or project in his classroom.<sup>50</sup> If the teacher wants to distribute photocopies of the latter to his pupils, a more restrictive standard would apply, and preparation of even one copy of a *long* "entire work" might not constitute a fair use.<sup>51</sup>

The Committee does not say how many copies of an "extract" or "portion" can be made under the fair use doctrine, nor did it inject any such detail into its bill, since it did not want "to freeze the doctrine in the statute, especially during a period of rapid technological change."<sup>52</sup> The Committee does, however, suggest some factors to be given weight. First, to qualify as a fair user the teacher should work for a non-profit institution, make copies only for temporary use in his classroom without charge to his students, and not be required by the school administration to

<sup>44</sup> S. 597, H.R. 2512, 90th Cong., 1st Sess., Sect. 107 (1967).

<sup>45</sup> Statement by Harry Rosenfeld, *supra* note 31.

<sup>46</sup> 1967 Committee Report 35.

<sup>47</sup> *Id.* at 34.

<sup>48</sup> *Supra* note 42.

<sup>49</sup> 1967 Committee Report 35.

<sup>50</sup> *Id.* at 33 and 35.

<sup>51</sup> *Id.* at 33.

<sup>52</sup> *Id.* at 32.

make copies.<sup>53</sup> Second, in determining the number of copies that can be made, factors to consider are whether the number to be reproduced will be limited to the size of the class, whether they will be circulated beyond the classroom, and whether they will be recalled or destroyed after temporary use.<sup>54</sup> A teacher may safely follow these guidelines and make temporary use of excerpts, but he will overstep the bounds of fair use if he systematically accumulates excerpts from the same work or if he collects excerpts from various works over a period of time so as to make, in effect, an anthology.<sup>55</sup>

Viewing practices of both educators and publishers in the light of the Committee's recommended guidelines, it would seem that preparation of one copy of a long extract for research purposes should be allowable as a fair use.<sup>56</sup> If more copies were permissible teachers could supply them to students who might have purchased copies of the whole work or (as will be discussed *infra*) might have paid nominal royalties for permission to make photocopies. For example, if a college seminar had five students, and the law allowed a professor to make several copies of long excerpts for research, the courts might well be persuaded to treat the distribution of them to such a small group as a fair use. The professor could plausibly ask the court to regard his seminar as a laboratory to test ideas and hence an extension of his research. On the surface there would seem to be nothing wrong with this reasoning, but it ignores the fact that many textbooks are published exclusively for use in small advanced courses in college. The publishers anticipate a small market and expect to amortize the costs of production over several years. The educational market is their only market for textbooks, and to reduce what usually amounts to a small market to begin with could induce many publishers to cease publishing such works.<sup>57</sup>

Nevertheless, educators have maintained that unless publishers offer to supply them with multiple copies of excerpts, lengthy or not, from any book used they should be allowed to photocopy

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<sup>53</sup> *Id.* at 33.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Id.* at 34.

<sup>56</sup> 1967 Committee Report 35.

<sup>57</sup> See generally statement of Lee Deighton, Chairman of the Board, MacMillan Co., before the panel of Subcommittee #3 of the House Committee on the Judiciary, 1965 Hearings 66-70.

what they need themselves,<sup>58</sup> since a denial of this privilege would impose a restraint on learning. The educators have further contended that it is unfair to ask students to pay the full price for a book when only selections from it will be studied. However, even if publishers should agree to supply copies of any excerpt on demand, it is unlikely that all educators would be satisfied. This arrangement would not solve the problem encountered by the teacher who comes across an interesting lengthy piece or "entire work" which fits into his next day's class. Waiting for delivery of copies from the publisher is not feasible in this situation.<sup>59</sup>

### VIII. Recent Licensing Agreement Proposals

The House Committee on the Judiciary did not take a stand in favor of a statutory licensing system. Instead, it said:

Various proposals for some type of Government regulation over fair use and educational reproductions have been discussed since the hearings, but the committee believes that workable voluntary arrangements are distinctly preferable. . . . The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected.<sup>60</sup>

The American Textbook Publishers Institute has proposed that it organize and operate a clearinghouse co-sponsored by an advisory counsel comprised of publishers and professional groups.<sup>61</sup> The Institute would offer to member firms a blanket license to photocopy all educational materials except certain consumable materials such as workbooks, laboratory manuals, and standardized test answer media. Upon payment of an annual fee a non-profit educational institution would be permitted any amount of copying (short of entire books).<sup>62</sup> The clearinghouse would "establish a sampling structure to determine a fair use basis for the blanket fees" and would devote all net income for the first five years to sampling studies.<sup>63</sup>

<sup>58</sup> 1967 Committee Report 34.

<sup>59</sup> 1965 Hearings 335.

<sup>60</sup> 1967 Committee Report 33.

<sup>61</sup> 1965 Hearings 1439.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Id.* at 1440.

The ATPI proposal is subject to a couple of possible objections. First, the idea of charging annual lump fees may not be popular with publishers and authors, who might prefer to match the amount of royalties with the volume of use of particular works. Secondly, some may feel that five years is a long time to wait for a sampling system to be devised, particularly when no one knows how much the experiment will cost. Nevertheless, the ATPI plan has stimulated thinking about the ingredients of a workable system.

A non-profit organization called the Committee to Investigate Copyright Problems has also proposed the establishment of a clearinghouse, which they call the Clearinghouse for Copyright or CHC.<sup>64</sup> The CHC would grant licenses to make copies to all copying services in the system and would pay royalties to all publishers in the system. Participation in the CHC would be regulated by a standard contract. "The contracts would grant immunity from infringement suit and give permission to make unlimited multiples of copies or uses, in return for royalties."<sup>65</sup> A sampling system would be devised to include both large and small publishers and to determine what percentage of royalties each should receive. Again, setting up an acceptable sampling system would be a difficult problem. Such a system would have to be fair to all publishers, regardless of size, and not be so costly as to consume a large percentage of the royalties.<sup>66</sup>

The CHC clearinghouse differs from the ATPI clearinghouse in that the former "would be a clearinghouse for scientific as well as educational publishers and it would be a focal point to take care of all the contracts."<sup>67</sup> The ATPI clearinghouse envisions individual contracts between the schools and the individual publishers.<sup>68</sup> Moreover, the CHC system would welcome supervision by the Government.<sup>69</sup> The high initial cost of setting up the system might be borne by "enlightened persons and corporations who may make it their business to see that such an institution is not only set up but does not fail for want of pump priming,

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<sup>64</sup> Statement by Professor Howard A. Meyerhoff, President of the CICP, before the panel of Subcommittee #3, 1965 Hearings 1471.

<sup>65</sup> *Id.* at 1476.

<sup>66</sup> *Id.* at 1482.

<sup>67</sup> *Id.* at 1480.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Id.* at 1481.

once they are satisfied of its objectives.”<sup>70</sup> Establishment of the CHC clearinghouse would not depend on changes in the copyright law.<sup>71</sup> It would depend solely on the voluntary cooperation of publishers and copiers. Professor Meyerhoff has noted:

“The present (1909) copyright statute is also primarily designed for voluntary contract between user and copyright owner. The thing which has broken down is not the voluntary nature of the contract, but the capability to make the contract rapidly, so as to permit the user to copy on short notice with his modern means of doing so.”<sup>72</sup>

The Committee to Investigate Copyright Problems has studied a simple stamp system for individual copiers, which it suggests might be run by the CHC.<sup>73</sup> This involves a statutory licensing scheme proposed by Irwin Karp, Counsel to the Authors' League of America.<sup>74</sup> Under this proposal Congress would pass a law providing for the issuance of “copyright stamps” by the Copyright Office. The stamps would be obtainable from the Copyright Office itself, from post offices, and from banks. The copier would be required to affix the stamps to a card, write down the name of the author and publisher, and mail the card to a central collection agency. The agency would remit royalties to publishers, who would split them with the authors according to their contracts. The law would stipulate a royalty (per page and per copy), but publishers could fix a different royalty by printing the terms under the work's copyright notice. This proposal would also provide for reduced rates for non-profit educational uses.<sup>75</sup> Librarians believe that Karp's system would entail too much work for them. They envision themselves becoming officers in charge of dispensing stamps and policing the use of photocopying machines.<sup>76</sup> However, the system does have the merit of rewarding publishers and authors in direct proportion to the volume of use of their publications.

One writer recommends that Congress charter a cooperative agency under the general supervision of the Register of Copy-

<sup>70</sup> *Id.* at 1475.

<sup>71</sup> *Id.* at 1480.

<sup>72</sup> *Id.* at 1476.

<sup>73</sup> *Ibid.*

<sup>74</sup> Karp, *A Statutory Licensing System for the Limited Copying of Copyrighted Works*, 12 Bull. Cr. Soc. 197 (1965).

<sup>75</sup> *Ibid.*

<sup>76</sup> Weatherford, *Honest Stamp Lickers*, Library J. 2784, June 1, 1966.

rights.<sup>77</sup> The agency membership would be composed of educators and publishers in equal numbers. The agency would conduct surveys and issue "a specific list of 'do's and don't's' to the teachers." "Legislative guidelines" would give agency decisions "the same legal force and effect as those of other administrative bodies." This proposal, though not without merit, sidesteps the thorny problem of assessing and collecting royalties.

Thus the question remains to be answered, what sort of "workable voluntary (licensing) arrangements"<sup>78</sup> will satisfy all parties—authors, photocopy machine manufacturers, libraries, schools, teachers, and publishers?<sup>79</sup>

### IX. Practical Problems Involved in Devising a Workable System

The most difficult question that one confronts in devising a solution to the photocopying-copyright problem is, how can royalties most efficiently be collected? A system must be developed which will make it convenient for educators to pay royalties and easy for publishers and authors to collect them. The system obviously must not involve much red tape, and this seems to rule out such procedures as requiring that the copier purchase revenue stamps or correspond with a distant clearinghouse.

It would appear that the most logical royalties-collecting agencies are the university libraries and bookstores. Today most libraries have photocopying machines and typically charge students about ten cents per page for copies of library materials.<sup>80</sup> If the libraries were willing to forego making a profit, they would need to charge users only the cost of machine use, paper, labor, and royalties; and the sum of these costs is already substantially below ten cents per page. If costs fall below one cent per page,

<sup>77</sup> Note, *Copyright Law Revision: Its Impact on Classroom Copying and Information Storage and Retrieval Systems*, 52 Iowa Law Rev. 1141, 1156 (1967).

<sup>78</sup> See text accompanying note 60 *supra*.

<sup>79</sup> Joseph C. Wilson, in response to a stockholder's inquiry what Xerox is doing for the writer whose work may be copied, said, "We are trying in every way that we think appropriate to get the people who use our machines to recognize the rights of others when they copy copyrighted material. We speak up for them whenever we find a proper forum. We believe very, very deeply that copyright violations are a serious intrusion upon the rights of others. It is impossible, unfortunately, for us physically to police our machines to ensure that they are not used improperly." Report of Xerox Corporation, 1967 Annual Meeting of Stockholders, p. 9.

<sup>80</sup> The University of Akron Library will duplicate whole articles and parts of books for five cents per page. Interview with H. Paul Schrank, Jr., University Librarian, January 31, 1969.

local copying will commonly be cheaper than purchasing the textbook.

Whether the library or the bookstore would be the better agency to copy and collect royalties is a question best resolved at the local level. There is no reason why both could not be licensed. The library has the advantage of having most of the materials to be copied already on its premises, and the bookstore has the advantage of already having a revenue-collecting system in operation.

Inducing libraries and bookstores to become royalties-collecting agencies will not be easy. Librarians have already reacted negatively.<sup>81</sup> But most of the demand for photocopying facilities is found in libraries, and librarians have partially nullified the force of their protest by installing photocopiers in the libraries. Neither libraries nor bookstores would face a manpower shortage, for there are numerous students willing to work on nearly every campus. As indicated earlier, the operation, if efficiently managed, can be expected to be self-sustaining, assuming the rental and purchase costs of photocopying machines are not raised significantly. If neither the library nor the bookstore of a given school is willing to serve as a royalties-collecting agency, a private corporation should be created and licensed to perform this function.

As a general rule, the photocopying charges fixed by a particular library or bookstore should not be considered the publishers' concern as long as royalties are properly remitted, but in instances where charges are manifestly exorbitant the agency's license might be revoked. In addition, an individual always has the alternative of buying the publication itself if he deems the local photocopying charge to be excessive.<sup>82</sup>

A question touched upon earlier but left unanswered is, who will license the libraries and bookstores and who will distribute

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<sup>81</sup> However, the University Librarian at the University of Akron has no objections, assuming the record-keeping procedures are simple enough that rapidly-changing student personnel can perform the task. Interview with H. Paul Schrank, Jr., January 31, 1969.

<sup>82</sup> This alternative may not be available indefinitely, however, for publishers may eventually cease to produce multiple copies of textbooks and instead merely supply originals to libraries and electronic data storage and retrieval corporations. An experienced field editor of a college textbook publishing company predicts that in time nearly all text material will be reproduced locally from data stored in electronic banks. Interview with R. Jackson Cram, Field Editor, College Department, Charles Scribner's Sons, January 23, 1968.

the royalties to the publishers and authors? Certainly the individual publishers cannot do so unless they cooperate to sponsor a clearinghouse. The clearinghouse would have authority to: license libraries and bookstores as collection agencies; receive fees collected by them; and distribute the fees to the appropriate publishers. The author would be paid his contractual share by the publisher. The royalty rates themselves would be fixed by the publisher, and would be stated in the form of a uniform scale, such as so many cents per five pages. Informing users of royalties rates should be a simple task, for an effective information mechanism is already at hand. All textbook publishers distribute catalogues of their publications to individual professors at least once a year. The royalty rate for photocopies could easily be given along with the price of the textbook. It is true that publishers will probably need to periodically adjust their royalties rates to bring them in line with fluctuating demand, but revised royalties lists could be mailed out to collecting agencies and to educators as easily as advertising brochures are now mailed out.

The problem of preventing unauthorized copying will still exist, but it seems unlikely that once a fair system for copying and paying royalties is available, educators will abuse the privilege. If a teacher wishes to copy for individual use, he may still use the desk copiers found in the offices of most universities and schools. Guidelines determining what an instructor can copy within the doctrine of fair use have been discussed earlier. Publishers have a duty to make these guidelines known to educators.

### X. Conclusion

The practice of duplicating copyrighted materials for classroom use without compensating the publisher or author is becoming increasingly widespread,<sup>83</sup> and unless clearly-defined restrictions are developed and imposed in the near future the present practice will probably eventually be given judicial sanction. A court mentioned this possibility nearly one hundred years ago:

“Equity will not interpose by injunction to prevent the further use [of copyrighted works], . . . where there has

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<sup>83</sup> See generally, the American Textbook Publishers Institute and The American Book Publishers Council, *An Economic Media Study of Book Publishing* (1966). See also text accompanying notes 2 and 3 *supra*.

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been long acquiescence in the infringement, or culpable laches and negligence in seeking redress, especially if it appears that the delay has misled the respondent.”<sup>84</sup>

In a more recent case a federal court in California expressed a view (by way of dicta) that may soon become accepted:

The writer of such works invites reviews, comments and criticism *and we could add, the use of the books and portions and quotations therefrom for the purpose of the advancement of learning.*<sup>85</sup> (emphasis added)

The more time that is expended in devising solutions to the photocopying-copyright problem, the more widely accepted will become the idea that the photocopying of textbooks is an unconfined privilege, one that amounts to an “easement” across the law of copyright.

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<sup>84</sup> *Lawrence v. Dana*, 15 Fed. Cas. 26, 60 (C.C.D. Mass. 1869).

<sup>85</sup> *Loew's, Inc. v. Columbia Broadcasting System, Inc.*, 131 F. Supp. 165, 175 (S.D. Calif. 1955).