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STUDENT COMMENTS

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

I. Introduction

The doctrine of fair use (of published materials) has been compared to “an easement or a right of way through private property for the public’s benefit.” ¹ With the development of cheaper photocopying a new “easement” across the privilege of copyright is gaining recognition. In a recent newspaper article² an enthusiastic columnist reported that growing numbers of students are purchasing copies of books and other materials—copies made in libraries and book stores. For example, at the Xavier University library students have been ordering an average of 1,350 copies per month at 12 to 15 cents a page; and across town at the University of Cincinnati copiers in the library and in the geology and aerospace departments have been producing a total of 11,000 copies a month. A librarian said that most of the copying was of articles from periodicals and books on reserve and that she could not keep up with the demand. The only apparent solution to the crisis, she observed, would be to get another copier.³

Perhaps nowhere will photocopying be more beneficial than in the field of education. The question is, what effect will it have on publishing? Senator Quentin Burdick stated the basic problem when he said, “. . . [Y]ou have someone who spends years in perfecting a textbook, and all of a sudden it is used free of charge. Where does he sell textbooks?” ⁴ The problem of unauthorized photocopying of textbooks is considered one of the more difficult ones encountered in the area of fair use, an area itself regarded as one of the most troublesome in the whole law of copyright.⁵ This article will examine the case law concerning

* Just Part I of this Comment appears in this issue. Part II will appear in the Spring, 1969 issue.
¹ J. Wincor, How to Secure Copyright, 38 (1950).
³ Ibid.
⁴ Statement in a hearing as a member of the Subcommittee on Patents, Trademarks and Copyright of the Senate Judiciary Committee, Publishers Weekly 33, April 3, 1967.
the photocopying problem, the opposing positions of educators and publishers, the effect of these arguments on Congress as it moves toward a new copyright law, and the possible development of a system allowing educators to photocopy and pay royalties.

II. Copyright Protection as an Incentive for Textbook Authors

The principal skill of a textbook writer is his ability to marshal known facts and ideas in such a way as to enable students to learn more effectively. He is entitled to expect a reward for employing this skill, because it is normally the only commodity he has to sell. It is commonly assumed that the textbook writer is rewarded by an enhancement of his reputation, which will lead to a higher salary. However this assumption is correct only when its application is restricted to the writer of a scholarly work. The textbook author seldom improves his professional reputation substantially, since textbooks are not generally considered a contribution to knowledge. Educators set down their new discoveries in scholarly periodicals and books, usually published by non-profit university presses. It is from this scholarly work that they derive material to be used in a textbook. In writing a textbook a professor risks his reputation to an extent, for the work obviously reflects his pedagogical skill. A textbook, though obscure and poorly organized, will nevertheless be sent out by the publisher to the author's colleagues for a free examination.

Once a professor has experienced the pride of having his first textbook published and, hopefully, used by his colleagues, he will usually find his next textbook project much less fulfilling. He experiences none of the excitement of intellectual discovery that comes from engaging in scholarly research, and he realizes that he is not significantly augmenting his reputation as a scholar. He is instead engaged in a commercial enterprise while using his employer's classrooms as his pedagogical laboratory. The University is not displeased that he writes textbooks but (usually) would prefer that he write something scholarly. It is apparent from the foregoing that the average professor has little incentive to write a textbook unless he can make some money for his efforts. The only way he can make money is through the receipt of royalties, and the only way to produce royalties is to give his book copyright protection.
III. The Limitations of Copyright Protection

Ideas by themselves cannot be copyrighted, but an artful and original way of expressing ideas can be. When an educator embodies his pedagogical skill in a well-written textbook, the result is a kind of artform. The same facts might be used in another textbook by another professor and be wholly ineffective as a teaching tool. All that is required by the law is that a work be original; it need not be novel. A reworking of the same facts—even use of the same order of presentation as in an earlier textbook—is a fair use. As Lord Mansfield put it, what is prohibited is servile imitation. In *W. H. Anderson Co. v. Baldwin Law Pub. Co.* the court defined a textbook as:

the product of intellectual labor and literary skill, the results of which are unique each time the subject is handled independently, even though the same materials are dealt with. Moreover, in a textbook there is ordinarily a critical discussion of earlier writers and a reexamination of their sources.

IV. Proof of Injury to Plaintiff's Market Not Required

In most of the cases involving infringement of authors' rights in textbooks copies were made for profit. However, the courts have not been concerned solely over the fact that infringers un-

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6 Sayre *v.* Moore, 1 East 361, 102 Eng. Rep. 139 (1785) in which Lord Mansfield said, "The Act that secures copy-right to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject."

7 If a book is novel neither its ideas nor modes of expression have ever been published before. If a book is original the author has not copied from anyone else though he might have copied from the same sources as another or accidentally have used exactly the same wording. See Nimmer, *supra* note 5, at 33.

8 "This doctrine (of fair use) permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writing dealing with the same subject matter." *Thompson v. Gernsback*, 94 F. Supp. 453, 454 (S.D.N.Y. 1950); *Simms v. Stanton*, 75 Fed. 6 (C.C.N.D. Calif. 1896).


fairly profit from the fruits of another’s labor. They have also been disturbed over the possible damage that textbook piracy might do to the market for the work pirated. Nevertheless, the courts have not required proof that the market for the plaintiff’s textbook was in fact reduced. In Reed v. Holliday the plaintiffs were owners of the copyrights of two textbooks entitled Graded Lessons in English and Higher Lessons in English. Each individual lesson began with a one-sentence diagram illustrating certain rules. Other sentences were provided in the lesson for students to diagram in similar fashion. The defendant published a booklet entitled A Teacher’s Manual to Accompany Reed & Kellogg’s English Lessons as Prepared by Robert P. Holliday. The manual simply copied forty diagrams from the textbook and diagrammed the problem sentences. The court ruled that defendant had infringed upon plaintiff’s rights, reasoning as follows:

The defendant . . . asserts, further, that the plaintiffs sustain no damages by reason of the sale of his work, but, on the contrary, are benefited thereby, as the key promotes the sale of the original works . . . But the plaintiffs entertain a very different view of the effect of the sale of the key, and they allege that it will prove highly detrimental to them, in this, that the availability of a full key to all the work to be

(Continued from preceding page)


done by the pupils will impair the popularity, usefulness, and sale of said works. I confess that this strikes me as a consequence very likely to follow the general sale of the defendant's book. But at any rate, the defendant has no right to subject the plaintiffs to such risk.

In the recent case of Addison-Wesley Publishing Company v. Brown the same problem occurred. In that case defendants published a manual containing solutions to the problems in the plaintiff's textbooks, College Physics and University Physics, Part II. The case is distinguishable from Reed v. Holliday in that to avoid being charged with copying, the defendants published only the calculations necessary to solve the problems and did not repeat the problems themselves. The court held that "the disguise of the source from which the material was derived does not defeat the protection of the copyright. . . ." As in Reed it expressed the belief that availability to the students of a book of solutions to the exercises incorporated in the texts would adversely affect the prospect of their collegiate adoption, and it concluded with the following colorful language: "It is clear that defendants' parasitical excrescence upon plaintiffs' distinguished and useful works profits defendants alone." In both Reed and Addison-Wesley the mere likelihood that the defendant's infringement would hurt sales of the plaintiff's copyrighted textbook was sufficient to bar acceptance of the defense of fair use.

V. Proof That Defendant Infringed for Profit Not Required

In MacMillan v. King the defendant—unlike those in the two cases just discussed—was not guilty of infringing for profit. Defendant, a teacher, produced a summary of a textbook, made copies on a mimeograph machine, and handed them out free of charge to his students. It appeared that defendant, an economics instructor, had no motive other than a desire to benefit his students. Each week for thirty weeks he handed out to his students a single mimeographed sheet on which were summarized the readings assigned in the textbook, Principles of Economics. Some words and sentences were lifted directly from the book, but for

13 Id. at 327.
15 Id. at 227.
16 Id. at 228.
the most part the summaries were outlines. Moreover, they were to be handed back to him after use. Nevertheless, the court decided in favor of plaintiff. The court placed emphasis on the fact that “the Copyright Act of 1909 secures to the owner of a copyright in a literary work an exclusive right to ‘print, reprint, publish, copy and vend the copyrighted work’ (section 1a), and to ‘make any other version thereof’ (section 1b).”

Defendant argued that what he did was within the license given by implication in distributing and selling the books, was within the custom of teachers, and hence was a fair use. The court replied that it did not consider the defendant’s use of the outline any the less an infringement of the copyright because he was a teacher. Disregarding the fact that at no time were there more than seventeen students in the teacher’s class, the court went on:

“It seems obvious that what he was trying to give, and what his pupils were trying to get, was an acquaintance with the contents of the book, which should resemble as much as possible that acquaintance which they would have obtained for themselves by following with sufficient diligence the University course of instruction for which the book was the appointed textbook. Nor do I see any reason to doubt that, as the author testifies, these ‘outlines’ might readily ‘cause the student to think he (could) meet the minimum requirements without using the book itself.’"

Citing Reed v. Holliday it concluded, “Proof of actual damage is not necessary for the issuance of an injunction, if infringement appears and damage may probably follow from its continuance.”

Although no other cases have been found in which a teacher abridged a textbook and gave copies of the abridgment to his students, there are other cases of nonprofit copying in the reports; and among them are two which support the holding in MacMillan. In Novello v. Sudlow the Liverpool Philharmonic Society, a non-profit organization, lithographed 250 copies of the plaintiff’s copyrighted music without permission. 

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18 Id. at 863.
19 Ibid.
20 Id. at 867.
21 Id. at 866.
22 Id. at 868.
used the copies to prepare a concert which they performed gratuitously. When sued for infringement, the Society argued that "the legislature did not intend to interfere with persons who were not moved with a desire for profit." The court summarily rejected this argument and decided in favor of plaintiff. In *Wihtol v. Crow* the choral director in an Iowa high school prepared a new arrangement of the plaintiff's copyrighted song, "My God and I," and manufactured 48 copies on the school duplicating machine. He used the copies for student choral work and for his church choir, charging no one for the music. He did make the mistake, however, of offering his arrangement for a fee to the plaintiff (the copyright holder). If he had not so alerted plaintiff, it is improbable that the infringement would have been detected. At the trial, the defendant pleaded the defense of fair use. Without explaining its reasoning the court held that this was not a fair use.

VI. Fair Use and Innocent Intent Under a New Copyright Law

Congress is considering adopting a copyright law amendment giving express statutory recognition to the doctrine of fair use. Educators have argued before a subcommittee of the House Committee on the Judiciary that they require a specific copying exemption or at least some statement of the criteria by which they may know when their copying is a fair use. Authors and publishers have vigorously opposed any specific copying exemption. The result of the conflict is the following bill:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

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24 *Id.* at 873.
25 309 F.2d 777 (8th Cir. 1962).
26 *Id.* at 782.
29 *Ibid.* See also *infra* note 31.
(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.  

Educators, authors, publishers and librarians all seem prepared to accept this bill as it now stands.  

There is nothing new in the four criteria provided by Section 107 for determining what is a fair use. The 1967 Report on H.R. 2512 states that Section 107 "is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." An excellent discussion of all four of the criteria can be found in the opinion of Justice Story in Folsom v. March, an early case on fair use. But in that case, as in most controversies over the question of fair use, the infringer borrowed someone else's copyrighted work for economic gain. Thus the judicial guidelines discussed in Folsom were meant to prevent piracy. Guidelines are so lacking in the area of nonprofit copying by teachers that the 1967 Report attempts to provide some. The only discussion that it offers of the four criteria in Section 107 concerns educational uses of copyrighted materials.  

In addition to incorporating the doctrine of fair use into the proposed law, the House Committee considered the problem presented when a teacher who mistakenly believed his copying was a fair use is accused of infringement. The earliest suggestion that innocent intent may be a possible defense for an infringer  

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31 "On this most sensitive issue in the bill even though they may differ in their estimates of how a court might interpret 'fair use' in a given case, librarians, authors and publishers have joined in preferring to rest on the present judicial doctrine of 'fair use' with no special statutory exemptions and in opposing efforts to write such exemptions in the law." Statement of Dan Lacy, Managing Director, American Book Publishers Council, in a letter to the editor of Publishers Weekly 22, August 15, 1966. See also the statement by Harry Rosenfield, counsel for the Ad Hoc Committee of Educational Institutions, before the panel of the Senate Subcommittee on Patents, Trademarks and Copyrights on April 28, 1967, asking that Section 107 be retained unchanged, Publishers Weekly 34, May 8, 1967.
32 1967 Committee Report 32.
34 1967 Committee Report 32-36. See next section infra for a discussion of the application of these criteria to the use of textbooks.
35 Id. at 130.
was voiced in Lawrence v. Dana.\textsuperscript{36} In more recent cases the
courts have held that innocent intent does not transform what
otherwise would be an infringement into a fair use. In declining
to rescue a high school teacher, the court in Wihtol v. Crow\textsuperscript{37}
declared:

“Obviously the plaintiffs had the exclusive right to copy
their copyrighted song, and obviously Nelson E. Crow had
no right whatever to copy it. The fact that his copying was
done without intent to infringe would be of no help to him,
as the trial court recognized, if the copying constituted an
infringement.”

But in Massapequa Publishing Co. v. The Observer, Inc.\textsuperscript{38}
the court recommended a lighter penalty for innocent infringers,
as follows: “In an action for injunctive relief based on infringe-
ment, lack of intent is no defense although it may be a bar to the
award of damages.” The House Committee, at the insistence of
educators, accepted this idea and incorporated it in Section 504
(c) (2):

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 face-
to-face teaching activities in a classroom or similar place
normally devoted to instruction, sustains the burden of prov-
ing that he believed and had reasonable grounds for believ-
ing that the reproduction was a fair use under section 107,
the court in its discretion may remit statutory damages in
whole or in part.\textsuperscript{39}

As this provision implies, there is a need to inform educators
what the limits of fair use of textbooks are, assuming, of course,
that such limits can be defined with any precision.

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(To be continued in the Spring, 1969 issue)

\textsuperscript{36} 15 Fed. Cas. 26, 60 (C.C.D. Mass. 1869). In Lawrence the court said,
“Evidence of innocent intention may have a bearing upon the question of
‘fair use’ . . . but it cannot be admitted that it is a legal defense where it
appears that the party setting it up has invaded a copyright.”
\textsuperscript{37} 309 F.2d 777, 780 (8th Cir. 1962); accord Reed v. Holliday, 19 Fed. 325,
327 (W.D. Pa. 1884).
\textsuperscript{39} S. 597, H.R. 2512, 90th Cong., 1st Sess. (1967).