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Mechanical Copying, Copyright Law, and the Teacher

Nancy Schuster and Marc J. Bloch***

SUPPOSE PROFESSOR X, an enthusiastic teacher of American History and government, has devised an exciting new plan for the teaching of theories of government. He selects from the school library: a Jefferson essay, with annotations, from a recently published anthology; a pamphlet by Thomas Paine; a Walter Lippmann book; and a New York Times editorial. From the six chapter pamphlet he reproduces four chapters; from the book he copies one two-paragraph section verbatim and paraphrases several ideas, acknowledging Mr. Lippmann as the author. He copies the editorial and the annotated essay in full.

He duplicates the material on the school duplicating machine. He distributes one copy to each member of his class, and one to a friend in another district. The plan is so successful that it is discussed in a national magazine. Professor X is ecstatic until he is served in three civil copyright infringement actions and threatened with a criminal charge under Section 104 of the United States Copyright Act (Title 17 of the United States Code).

But has he infringed? May a teacher copy for his class? If so, how much and how many? The answer is neither evident nor simple.

He will defend as follows:

N.Y. Times v. X:	Fair use, innocent intent.
Anthology v. X:	Fair use, public domain.
Lippmann v. X:	de minimis
U. S. v. X:	No profit, innocent intent.

Whether he is successful may depend on the fate of S. 597 "A Bill for the general Revision of the copyright law," now pending in the United States Senate.

This article deals with the infringement problems encountered by a teacher in duplicating copyrighted material for his class. Since the teacher is the "real party in interest," we have attempted to avoid legalistic language (at least without explanation), so as to produce a paper to which the layman, as well as the lawyer may turn for understanding.

We present first a definition of infringement, followed by the common law defenses available to Professor X since, at present, he has none by statute.¹ We then discuss the attitude of the educator (made known

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¹ As an "innocent" offender his present position in re: criminal charges is somewhat better.

through his lobby) to the new revision, what he hopes to gain, and his rationale. To keep these arguments in perspective, we counter with the views of the author whose rights X's compatriots wish to limit. An examination of pertinent sections of S. 597 and the probable effect of its passage concludes the article.

Infringement

The Federal Constitution invests Congress with the power "to promote the progress of science and useful arts by securing for limited times to authors, the *exclusive* right to their . . . writings." (Emphasis added.)² "Copyright" is defined by Black's Law Dictionary as an intangible right granted to the author which invests him, for a certain limited time, with "the *sole and exclusive* privilege of multiplying copies. . . ." ³ (Emphasis added.)

"Infringement" is defined by Black as a "breaking into; . . . or encroachment upon." ⁴ Thus copyright is actually infringed whenever the sole right of the author to copy is broken into.

Defining the type of infringement which is actionable at law is not so simple. The present statute⁵ makes no attempt at a definition and it has been stated that the meaning is "presumed to be known to the law." ⁶

Corpus Juris Secundum attempts enlightenment with the statement that infringement of copyright is the "doing, without the consent of the owner, anything the sole right to do which is vested in such owner by the common law. . . ." ⁷ Accepting this definition, the questions become: What are the "sole rights" vested and on what things do they settle, i.e., what is copyrightable?

Copyright is not available for an idea or plan, but only for the actual embodiment, or expression, of the idea.⁸ The essence, however, is originality.⁹ It is not available for literature which is in the "public domain," ¹⁰ or for collections or representations unless the author can show "originality" and "creativity." ¹¹

The rights conferred by the copyright are to be exercised by the

² U.S. Const. art. I, § 8.

³ Black's Law Dictionary 406 (4th ed. 1951).

⁴ *Id.* at 920.

⁵ Copyrights, 17 U.S.C. (1964).

⁶ *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 at 84 (6th Cir. 1943).

⁷ 18 C.J.S. Copyright and Literary Property § 15 (1955).

⁸ *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932).

⁹ *Mathews Conveyor Co. v. Palmer-Bee Co.*, *supra* note 6.

¹⁰ *Christianson v. West Pub. Co.*, 149 F.2d 202 (9th Cir. 1945).

¹¹ *Gorman, Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569 (1963).

owner at his pleasure and for his own profit.¹² He has, in fact, a monopoly on the printing, publishing, copying and vending of his works.

In 1914, in *Macmillan Co. v. King*,¹³ the court found that mimeographing another's work and distributing it to a class was, by definition copying and publishing, it was therefore, also by definition, an infringement.

According to the 1967 U.S. House of Representatives committee report on the copyright law, the infringement takes place immediately upon violation of any of the owner's rights, i.e. directly upon the printing, before any distribution.¹⁴ The taking does not have to be direct, a parody¹⁵ or paraphrase¹⁶ is sufficient.

Acknowledgment of the source,¹⁷ the absence of intent to infringe,¹⁸ or lack of knowledge that the work was copyrighted¹⁹ does not vitiate an encroachment on the owner's monopoly.

The monopoly is limited only insofar as certain uses of copyrighted works by others than the owner are considered fair. A "fair use" is not an infringement of a published work. An unpublished work, however, can never be used without the permission of the author.²⁰ If S. 597 is passed this common law anachronism will be abolished.²¹

One of the modern problems of infringement, especially for the teacher, and the one with which this article attempts primarily to deal, is mechanical copying. The photocopy machine has been called a "do-it-yourself" tool for infringement²² as it puts the means for infringement within the reach of all.

¹² 18 Am. Jur. 2d, Copyright and Literary Property § 9 (1965).

¹³ 223 F. 862 (D. Mass. 1914).

¹⁴ Hearings on S. 597 Before Subcomm. on the Copyright Law Revision of The Senate, on the Judiciary, 90th Cong., 1st Sess., sec. 8, pt. 4, at 1042 to 1048 (1967). (Hereinafter cited as 1967 Hearings.)

¹⁵ *Marx v. U.S.*, 96 F.2d 204 (9th Cir. 1938).

¹⁶ *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (D.C. Pa. 1938), here plaintiff sued to enjoin respondent from using a short medical statement in advertising; respondent merely paraphrased, the court found an infringement stating that direct copying was not necessary to infringement.

¹⁷ Goldman, *The Copyright Law; Nearly Sixty Years Later*, 28 Ohio St. L. J. 261 (1967).

¹⁸ See discussion of innocent intent *infra*.

¹⁹ *American Press Ass'n. v. Daily Story Pub. Co.*, 120 F. 766 (7th Cir. 1902); *appeal dismissed*, 24 S. Ct. 852 (1903).

²⁰ Wilson, *The Scholar and the Copyright Law*, 10 ASCAP Copyright Law Symposium, 104 (1959).

²¹ See discussion of proposed revision *infra*.

²² Needham, *Tape Recording, Photocopying, and Fair Use*, 10 ASCAP Copyright Symposium 75 (1959).

De Minimis as a Defense to Copyright Infringement

De minimis non curat lex, "the law does not notice, or care for, trifling matters" is a principle as old as the Common Law.²³

It is applied over the whole spectrum of the law²⁴ to rid the courts of those cases which have no place there. It is an affirmative defense, in the nature of a confession or avoidance, which says, "I did what you say, but it is so minor, that I have not in fact damaged you." In the words of Judge Learned Hand: ". . . there comes a point where what may be literally a wrong, is of too trifling importance to justify the intervention of a court."²⁵

The question is, of course, how large is a trifle? In *Toulmin v. Rike-Kumler Co.*,²⁶ the court declared one and a half sentences chosen from 142 pages to be *de minimis*; in *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*,²⁷ three sentences from a text were termed "not so insubstantial as to be *de minimis*." It must be noted that defendant, Liggett & Myers, used the copied material commercially to advertise its product, cigarettes, while in the former case the plaintiff's book which had been out of print for twenty-five years was printed in part in the preface of a novel. Thus the size of a "trifle" may depend somewhat on circumstances such as the nature of the work involved, the purpose of the infringement, and whether it might continue or happen again, i.e. whether the court feels justice is to be done by leaving the parties as it finds them.²⁸

Our Professor X copied two paragraphs of the expert work of a scholar. He copied, however, for the purpose of benefiting his class and as a part of his job as teacher. X would seem to have a small psychological advantage over Mr. Lippmann who has not been truly damaged and may, in fact, have benefited by the distribution of a small sample of his wares.²⁹ The court must consider, however, that the copyright act gives Mr. Lippmann a monopoly³⁰ on the use of his book. Mr. Lippmann's labor has produced this work and he should not be required to distribute even a small part without compensation, or is this so small a part that it could not matter? Does *de minimis* care that Defendant is a teacher? Theoretically, no. But this is a question for the Court.³¹

²³ Mayer's Appeal, 73 Pa. 164 (1873); 26A C.J.S. 175, n. 20 (1956).

²⁴ Anderson v. Mt. Clemens Pottery Co., 69 F. Supp. 710 (D. Mich. 1947).

²⁵ Condenser Corp. of America v. Micamold Radio Corp., 145 F.2d 878 at 880 (2nd Cir., 1944), cert. denied 34 U.S. 861 (1945).

²⁶ 316 F.2d 232 (6th Cir. 1963).

²⁷ Henry Holt & Co. v. Liggett & Myers Tobacco Co., *supra* note 16 at 304.

²⁸ Toulmin v. Rike-Kumler Co., *supra* note 26.

²⁹ See G. Ricordi & Co. v. Mason, 201 F. 182 (C.C.N.Y. 1911).

³⁰ 18 Am. Jur. 2d, Copyright and Literary Property § 1 (1965).

³¹ Toulmin v. Rike-Kumler Co., *supra* note 26.

Fair Use as a Defense to Copyright Infringement

Copyright, the handmaiden of censorship in Elizabethan England,³² is again under attack as restricting the free flow of ideas. "Fair use," a limitation on copyright recognized as early as the Eighteenth Century,³³ has recently, because of greater and greater demand for information, become the cause celebre of Copyright Law.

The earliest cases which dealt with the subject were concerned with abridgements rather than direct copies. In *Gyles v. Wilcox*,³⁴ Lord Harwicke found the question to be whether there was a verbatim taking from the plaintiff's work or whether there was a "real and fair abridgement of work."³⁵ The law in 1740 did not restrain persons from new literary works any more than it does today.

But a colourable abridgement which is a work of scissors and paste rather than of intelligent labor and literary skill is an infringement of copyright.³⁶

Thirty years later, in *Newberry's Case*,³⁷ the reporter recorded an agreement with the earlier decision.

A true and proper abridgement, being the result of intelligent labor and literary skill, condensing into a small compass the substance of a comparatively large work by retrenching unnecessary and uninteresting circumstances, and conveying the sense of fresh language, is a new and meritorious work, and does not infringe the copyright of the larger work.

Macklin v. Richardson,³⁸ was another case of abridgement, but here the defendant was found to have infringed the right of plaintiff by having taken approximately one-half of the plaintiff's play, reproducing it in defendant's magazine. The court stated that the question to be determined was "what proportion the part published in the magazine bears to the whole work out of which it was taken."³⁹

Thus the English Courts were forming the basic elements of "fair use":

- 1) Extent of the material copied.
- 2) The value of that material to the new work.

The underlying question was: What influence will defendant's work have commercially on that of the plaintiff?

³² Kaplan, *An Unhurried View of Copyright*, 101-105 (1967).

³³ *Macklin v. Richardson*, 27 Eng. Rep. 451 (1770); *Newberry's Case*, 98 Eng. Rep. 913 (1774); *Gyles v. Wilcox*, 26 Eng. Rep. 489 (1740); *Sayre v. Moore*, 102 Eng. Rep. 139 (1785).

³⁴ 26 Eng. Rep. 489 (1740).

³⁵ *Id.* at 489.

³⁶ *Gyles v. Wilcox*, *supra* note 33.

³⁷ *Newberry's Case*, *supra* note 33.

³⁸ 27 Eng. Rep. 451 (1770).

³⁹ *Id.* at 452.

In a landmark opinion, Lord Mansfield, the great Scottish jurist, set down one of the basic precepts of the doctrine of fair use. *Sayer v. Moore*⁴⁰ was an action for infringement of maps and charts. The plaintiff had prepared and published four sea charts. Defendant combined the four maps into one and used additional information to prepare what he believed to be a new document.

Lord Mansfield began his opinion with a now famous statement:

... We must take care to 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.⁴¹

Thus was established the doctrine that it may be necessary to society that in some situations persons be permitted to consult previous works for use in a *new and original* work.⁴²

Sixty years later Justice Story heard the landmark American case, *Folsom v. Marsh*.⁴³ Reverend Charles Upham had used 353 letters and documents from Jared Sparks 7000 page, 12 volume work, *Writings of President Washington* in an 866 page biography of Washington. The good Mr. Sparks, somewhat distraught, asked the court for an injunction.

Justice Story was unable to accept the work of Upham as an abridgement. He recognized, however, a need for leeway and that certain other uses might be "fair."

... No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.⁴⁴

But a work done with a view toward superseding or substituting for the original would not be fair:

... If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. The entirety of copyright is the property of the author; and it is no defense, that another person has appropriated a part, and not the whole, of any property. Neither does it necessarily depend upon the quantity taken, whether it is an infringement of the copyright or not. It is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work. ... We must ... look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which they may prej-

⁴⁰ 102 Eng. Rep. 139 (1785).

⁴¹ *Id.* at 140.

⁴² *Id.* at 140.

⁴³ 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841).

⁴⁴ *Id.* at 344.

udice the sale, or diminish the profits, or supersede the objects, of the original work.⁴⁵

Justice Story's test can be rather neatly divided into four parts:

- 1) The quality (value to the original) of the part taken;
- 2) The purpose of the taking;
- 3) The nature of the copyrighted work;
- 4) The effect on the market and objects of the original work.

These principles have remained nearly unchanged and are today, in essence, the criteria of fair use. Thus the groundwork of Sec. 107 of the 1967 proposed copyright revision was laid before 1850.⁴⁶

The Present Doctrine

This misty area of court-made law, tested by nuances of fact and law, was called by Augustus Hand ". . . the most troublesome in the whole law of copyrights."⁴⁷

Nevertheless, the doctrine of fair use is truly called a "rule of reason"⁴⁸ by which the "promotion of science and useful arts"⁴⁹ can be the result of copyright. If society is to benefit to the fullest extent, the author's monopoly must be limited, sometimes Professor X must copy.⁵⁰

The present law makes no mention of fair use, although, as pointed out, it was well known at the time of adoption. The method of limitation and the criteria of enforcement have been left to the courts. Each case rests on its own merits and is tested in light of the circumstances which spawned it.⁵¹

Fair use, tremendously useful in matters concerning scholarly works especially scientific,⁵² legal,⁵³ and historical,⁵⁴ has also been applied to:⁵⁵

⁴⁵ *Id.* at 348.

⁴⁶ *Id.* at 348. See also H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967).

⁴⁷ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939).

⁴⁸ Lattman, *Howell's Copyright Law* (1962); Cooper, *Use of Fair Use*, 5 *Publishing, Entertainment, Advertising and Allied Fields, Law Quarterly*, 509 (1965); Yankwich, *What is Fair Use?*, 22 *Chi. L. Rev.* 203 (1954).

⁴⁹ U.S. Const. art. I, § 8.

⁵⁰ Shaw, *Literary Property in the United States* 81 (1950).

⁵¹ H.R. Rep. No. 14, 86th Cong., 2d Sess. (1960).

⁵² *Weatherby and Sons v. International Horse Agency and Exchange Ltd.*, 2 Ch. 297 (1910).

⁵³ *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (2nd Cir. 1903).

⁵⁴ *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921 (1963); *Thompson v. Gernsback*, 94 F. Supp. 453 (S.D.N.Y. 1950); *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950); *Holmes v. Hurst*, 174 U.S. 82 (1898).

⁵⁵ Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 1961, 424. (Hereinafter cited as 1961 Report.)

1. Quotations of excerpts in a review or criticism for purposes of illustration or comment.⁵⁶
2. Quotations of short passages in scholarly or technical works, for illustration or clarification of the author's observations.⁵⁷
3. Use in parody, of some of the work parodied.⁵⁸
4. Summary of an address or article, with brief quotations in a news report.⁵⁹
5. Reproductions by a library of a portion of work to replace part of the damaged copy.⁶⁰
6. Reproduction by a teacher or a student of a *small* part of a work to illustrate a lesson.⁶¹
7. Reproductions of a work in legislative or judicial proceedings or reports.⁶²
8. Incidental and fortuitous reproduction, in a newsreel or broadcast of a work located at the scene of an event being reported.⁶³

Like "due care" the term defies definition.⁶⁴

Addenda to Fair Use

Fair use as it has been applied in the area of library copying must be examined at this point. Most large modern libraries are well equipped with the latest sophisticated copying equipment, generally at the disposal of the copying public.⁶⁵

The needs of the scholar for ready access to research material and the desire of the library to be able to keep their older works in repair, prompted an effort to compromise their countervailing interests. As a result, the Joint Committee on Materials for Research of the American Council of Learned Societies, the Science Research Council and the Na-

⁵⁶ H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967).

⁵⁷ *Folsom v. Marsh*, *supra* note 43.

⁵⁸ *Loew's, Inc. v. Columbia Broadcasting System*, 131 F. Supp. 165 (S.D. Cal. 1955). See also *Marx v. U.S.*, *supra* note 15.

⁵⁹ *Folsom v. Marsh*, *supra* note 43.

⁶⁰ *Ginn and Co. v. Appollo Pub. Co.*, 215 F. 772 (E.D. Pa. 1914).

⁶¹ *Folsom v. Marsh*, *supra* note 43.

⁶² *Holmes v. Hurst*, *supra* note 54.

⁶³ *Folsom v. Marsh*, *supra* note 43.

⁶⁴ Hearings on H.R. 4347, Before the Subcommittee on the Copyright Law Revision of the House Comm. on the Judiciary, 89th Cong., 1st Sess. Ser. 8, pt. 1, at 53 (1965) (hereinafter cited as 1965 Hearings). Here speaking for the Copyright Office, Abe Goldman confessed that there is a definition problem even for them.

⁶⁵ Before the days of mechanical reproduction, scholars were permitted to copy by hand for their own use. The thought was apparently that human endurance was protection enough for the author.

tional Association of Book Publishers have reached an accord known euphemistically as the "Gentlemen's Agreement."

The Agreement provides, in substance, that libraries and similar institutions, may make a single copy of part of a work for a scholar who represents in writing that the copy is in lieu of a loan, in place of a manual transcription, and is solely for purposes of research.⁶⁶

This joint, ad hoc action by two groups of diverse view, represents formalized acceptance, albeit limited, of the concept of fair use. It is the permit slip for the photocopy user in the library today, although the non-profit aspect is missing in many cases.

In a 1953 article, Louis Smith acknowledged the forward step of the Agreement, but lamented the fact that there are not sufficiently positive guidelines to protect the librarians.⁶⁷

The concept of fair use has been in the law in some form for over two centuries, but except for the "Gentlemen's Agreement," it remains unwritten in the United States. At Common Law, the position of the doctrine is well established, nonetheless, those in education feel unsure of their position.⁶⁸

The British Exemption

In contrast, the United Kingdom, as early as 1911, provided by statute that fair dealing with any work "for the purpose of private study, research, criticism or review . . . should not constitute an infringement."⁶⁹

In 1956 the law was revised and made more explicit. Sections 6 and 41 of the revised act specifically allow the inclusion of short passages from a copyrighted work in a collection of non-copyrighted works intended for school use.⁷⁰ Interestingly, works published directly for school use are excepted. Moreover, an author can take no more than two excerpts from any one author in a five year period.⁷¹

Subsection I of Section 6 of the English statute allows for fair dealing in research and private study, criticism, and review, as in the past.

⁶⁶ Smith, *The Copying of Literary Property in Library Collections*, 46 *Law Library Journal* 202-203 (1954). See also Hays, *Fair Use: A Controversial Topic in the Latest Revision of our Copyright Law* 34 *U. Cin. L. Rev.* 73 (1965); H.R. Rep. No. 15, 86th Cong., 2d Sess. (1906).

⁶⁷ Smith, *supra* note 66 at 202.

⁶⁸ *Dymow v. Bolton*, 11 F.2d 690 (C.C.N.Y. 1926); *Rossiter v. Hall*, 20 F. Cas. 1253 (No. 12,082) (C.C.E.D.N.Y. 1866), *supra* note 50 at 52; Bishop, *Fair Use of Copyrighted Books*, 2 *Houston L. Rev.* 206; Smith, *supra* note 102; see also 1965 Hearings 340-45.

⁶⁹ James, Cowinger and Kowi, *The Law of Copyrights* 163 (1955).

⁷⁰ See 36 *Halsbury Statutes of England* 81 (1956).

⁷¹ *Id.* at 135.

Section 41 allows for school use of reproductions on exams, or for a classroom otherwise than by the use of a duplicating process.⁷²

At this time no case has been reported under the new revision.⁷³

Innocent Intent

If innocent intent is relevant to copyright infringement, our Professor X might have no problem . . . *IF*.

Copyright infringement is held to be a tort.⁷⁴ But is it an *intentional* tort such as misrepresentation or an *unintentional* tort in the nature of negligence? And if intent is an element, what intent is it, that completes the tort of infringement?⁷⁵

A requirement of intent simply to copy would be met immediately in most cases of teacher use. Such an intent surely exists in the mind of the teacher who copies for his class. This is precisely what he is doing and he will have infringed merely by doing it.⁷⁶

On the other hand, if the completing element is a specific intent to infringe on the owner's copyright, the classroom teacher has only to show that he copied with something resembling good faith and he is not liable.⁷⁷

The courts may hold him liable regardless, by presuming his mind to hold an intent which it in fact does not. Such was the case in the 1869 decision of *Lawrence v. Dana*.⁷⁸

Mere honest intention . . . will not suffice . . . he must be presumed to intend all that the publication of his work (or his copying) effects. . . .⁷⁹

This view in fact makes intent immaterial and has led to the recent case of *Toksvig v. Bruce Publishing Co.*⁸⁰ in which the Court stated intent to be "immaterial if infringement appears." Perhaps infringement of copyright is a tort of omission resembling negligence. Perhaps one who copies, even in a classroom has not taken due care to avoid a harm so that if plaintiff is injured by something defendant has done, the tort is complete without any intent to harm and whether or not defendant knew or had reason to know that he was copying.

⁷² *Ibid.*

⁷³ The British Copyright Office has advised us that there have been no cases arising under this act.

⁷⁴ *Leo Fiest, Inc. v. Young*, 138 F.2d 972 (7th Cir. 1943); *Turton v. U.S.*, 212 F.2d 354 (6th Cir. 1954).

⁷⁵ *Cain v. Universal Pictures Co.* 47 F. Supp. 1013 (S.D. Cal. 1942).

⁷⁶ *Wihtol v. Crow*, 199 F. Supp. 682 (D.C. Iowa 1961) *rev'd* 309 F.2d 999 (8th Cir. 1962).

⁷⁷ *Ibid.*

⁷⁸ *Lawrence v. Dana*, 15 F. Cas. 26 (No. 8136) (C.C. Mass. 1869). Also *Folsom v. Marsh*, *supra* note 43.

⁷⁹ *Ibid.*

⁸⁰ *Toksvig v. Bruce Publishing Co.*, *supra* note 54.

Such is the present state of the case law.⁸¹ Thus the state of mind of the infringer is no defense, per se. It is possibly an aid in obtaining the sympathy of the court for a claim of de minimis and a great help in fair use—but that is the extent of the worth of innocence to Professor X and his fellow teachers.

Towards Revision: The Educator v. the Author

The present state of the law, its advantages and disadvantages, can be stated in two words: uncertain and flexible. These are, of course, the result of each other, and all the effect connoted is the ground over which rages the battle for statutory revision to affect the educator.

The storm, we feel, can best be viewed from its perimeter. For this purpose, we have attempted to distill the arguments of each side, the educators wanting specific and sure exemption,⁸² and the authors and publishers afraid of their markets and satisfied with the law as it now is.

We include some arguments never stated, so far as we can discover, by either side but implied in their positions.

The Arguments of the Educator Listed:

1. The U.S. Constitution authorizes copyright for the purpose of promoting the progress of science and the useful arts. The intent is to protect the property of the author only insofar as such protection advances this purpose.⁸³

2. Copyright is not a right, but a privilege, which can be limited or removed for the benefit of society. Education of the young is in the public interest.⁸⁴

3. Classroom teachers, untrained in techniques of legal research, need clear and readily discernible guidelines of permissible copying.⁸⁵

4. The doctrine of fair use hides in a confused jumble of cases which provide little notice for the trained attorney and none for a lay teacher.⁸⁶

5. The absence of statutory definition and the past reluctance of authors to sue the educator have led the public to believe in the lawfulness of copying. Teachers and members of the public are thus

⁸¹ H.R. Rep. No. 25, 86th Cong., 2d Sess. at 144 (1960).

⁸² The educators seem to recognize this as a "pie-in-the-sky" approach and will settle, although not happily for a clearly set out and delineated "fair use." See also 1967 Hearings *supra* note 14 at 1042-46.

⁸³ U.S. Const., art. I, § 8. See also 1965 Hearings *supra* note 64 at 341 and 1512.

⁸⁴ *Id.* at 341-44.

⁸⁵ *Id.* at 1573-74.

⁸⁶ H.R. Rep. No. 83, *supra* note 56 at 30.

subjected to the whim and caprice of the publisher and the author who may, in fact, sue at any time.⁸⁷

6. Since the concept of fair use is universally accepted as part of the common law of copyright, it should be included in the statutory definition.⁸⁸

7. Proper teaching requires the use of numerous writings, often on brief notice. Permission as a requisite to this use would inordinately hamper the teaching process.⁸⁹

8. It has long been common practice for the scholar to make manual transcripts of published material. Photocopying is only the modern form of handcopying.⁹⁰

9. A teacher, having no intent to harm, should not be held liable if he unwittingly infringes a copyright.⁹¹

10. The market is not damaged, but improved by the use of excerpts in the classroom. Such excerpts whet, not satisfy, the appetite of the student.

11. Teachers not permitted to copy will simply not use the materials and the market *will* be damaged.⁹²

12. The publishing industry shows ever increasing profits in spite of the alleged increased opportunity for infringement.⁹³

The Arguments of the Author and Publisher Listed:

1. The author has a property right which is deprived him by the person who uses his work without permission.⁹⁴

2. Any infringement of copyright takes profit from the author and destroys his incentive to produce. The end result of an exemption to educators would be, therefore, a diminution of intellectual production.⁹⁵

3. The legitimate ends of education are well served by the doctrine of fair use which is implicit in the law and needs no further recognition.⁹⁶

⁸⁷ 1965 Hearings at 1498.

⁸⁸ 1965 Hearings at 317.

⁸⁹ H.R. Rep. No. 15, 80th Cong., 2d Sess. 57 (1960).

⁹⁰ *Id.*

⁹¹ H.R. Rep. No. 25, 86th Cong., 2d Sess. (1960).

⁹² 1965 Hearings at 341-343.

⁹³ 1965 Hearings at 344.

⁹⁴ Copyrights, 17 U.S.C.A. § 1 (1959).

⁹⁵ Nimmer on Copyright § 145 at 653 (1967). See also 1965 Hearings 1809-21.

⁹⁶ 1965 Hearings at 1768.

4. Publishers have historically refrained, without statutory compulsion from action against teachers.⁹⁷

5. The teacher needs no protection beyond the existing sympathy of the court.⁹⁸

6. It is not fair to permit by statute what cannot be considered a fair use.

7. Codification of common law fair use would solidify the outlines and restrict the margin for error currently allowed the user. The present uncertainty provides a much needed flexibility.⁹⁹

8. Hand copying, although actually an infringement, has been permitted because of the built-in limitation of human capacity. There is no limit in the capacity of modern means of reproduction.¹⁰⁰

9. Specific statutory exemption for the educator opens the door to other exemptions.

10. A blanket exemption, even in a small, well-defined area, provides a niche which can become a canyon. Machinery for copying will be even more refined and accessible. The ultimate result of an exemption is thus impossible to predict.¹⁰¹

11. The contractor, plumber and hardware merchant are not required to furnish their labor free to schools. Neither should the intellectual producer.

12. The fact that a use is not for profit is immaterial.

13. The fact that there was no intent to infringe is immaterial as intent is not an element of the tort of copyright infringement.

The Positions Weighed and Balanced

The United States Constitution, Article I, Section 8, Clause 8, which enables Congress to grant copyrights, consists, say the educators, of two distinct phrases: (1) The reason behind the clause, i.e.: promotion of the arts and sciences; and (2) the grant itself, i.e.: The exclusive rights of the author, for a limited time, to his writings.¹⁰²

The phrases are placed in the order of their importance and must be interpreted in this light. So interpreted, continues the argument, the thrust of the entire clause is the benefit to be derived by the public from the promotion of the arts and sciences, in other words, education. We

⁹⁷ *Ibid.*

⁹⁸ *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (2nd Cir. 1903).

⁹⁹ 1965 Hearings at 1752-1770.

¹⁰⁰ 1965 Hearings at 1755-56.

¹⁰¹ See 1965 Hearings at 260-314. In 1909 jukeboxes were rare and 1¢ a play. Today jukeboxes are part of a one billion dollar industry. Composers did not have to be paid under the 1909 act for use of their works in jukeboxes, but feel today that they are being deprived of their just due.

¹⁰² U.S. Const., art. I, § 8.

have, then, a constitutional mandate to which the profit and right of the author is only incidental. The author's purpose is to educate the public and he may profit only insofar as this primary object is served. If it is best served through a complete exemption for the educator, the author may not complain.¹⁰³

But the author does complain. He cries that such an exemption does not serve the public. That depriving him of his profit deprives him also of his incentive and he will cease writing. There will then be no writings with which to educate.

The right of the public to benefit from the advancement of science must be balanced with the author's and publisher's right to benefit from his intellectual property. This has been the purpose and function of fair use as the common law knows it. According to Nimmer, the piecemeal exploitation of copyrighted works by educators has gone beyond fair use, and, in toto, becomes a serious infringement.¹⁰⁴ This area, continues the argument, is undergoing a technological revision. Further, authorship is a natural resource which must be preserved.¹⁰⁵

While teachers speak of a confused myriad of cases, there are, in fact, only two cases which deal with a teacher's right to copy for his class.¹⁰⁶ This confusion is apparent, too, in library copying,¹⁰⁷ for there are no cases which discuss the now common practice of the library making reproductions available to scholars.¹⁰⁸ The confusion thus stems not from a jumble of decisions but from a paucity.¹⁰⁹ Thus the fears of educators are based on speculation, not law.

This fear prompts the educator to require guidelines which specifically spell out the number and length of permitted copying.

. . . Statutory fair use is not enough for education to do its job. Fair use is not a sufficient guideline to the classroom teacher to know when copyrighted materials may or may not be used.¹¹⁰

Leaving fair use up to Court is not enough of a certainty for the educators.

If all their copyright experts cannot agree on what is "fair use," how can anyone reasonably expect a third grade teacher in a rural school to know? . . . and . . . how . . . can one reasonably expect and require all teachers to decide whether their contemplated lesson for tomorrow is "fair use"?¹¹¹

¹⁰³ 1967 Hearings at 1054; 1965 Hearings at 1811.

¹⁰⁴ Nimmer, *op. cit. supra* note 95 § 145 at 654.

¹⁰⁵ H.R. Rep. No. 83, *supra* note 56 at 3.

¹⁰⁶ Macmillan v. King, *supra* note 13; Wihtol v. Crow, *supra* note 76.

¹⁰⁷ H.R. Rep. No. 83, *supra* note 56 at 31.

¹⁰⁸ Nimmer, *op. cit. supra* note 95 at 652-53.

¹⁰⁹ 1965 Hearings at 1573-74.

¹¹⁰ *Id.* at 317.

¹¹¹ *Id.* at 343-44.

The educators' lobby was opposed to the 1965 proposed revision¹¹² which recognized fair use in a single sentence¹¹³ and are still not in agreement on the new proposed revision.¹¹⁴ This dispute was brought to the fore when a House of Representatives subcommittee published its comments. One statement especially repugnant to the educators was:

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 needs protection.¹¹⁵ (Emphasis added.)

The Ad Hoc Committee has stated that if this statement is allowed to remain, it will have no choice but to object to the report.¹¹⁶

Fair use . . . is not an "occasional" or only a "casual" use . . . it is a fundamental statutory charter. There is nothing "occasional" or "casual" about educators' right of fair use . . . it is constant. . . . Anything less than language allowing educational copying is a perversion of our agreement (the closed door compromise between the two sides) and an automatic breach. . . .¹¹⁷

The publishers, on the other hand, argue that fair use is well defined, although each case must be decided on its own merits. Certainly Folsom,¹¹⁸ Palmer-Bee,¹¹⁹ King,¹²⁰ and the Crow Appeal,¹²¹ have defined the doctrine of fair use well enough for the average man. Codification is not needed since historically common law fair use has been sufficient to protect the educator.¹²² Furthermore, say the authors, the law in general has been tolerant of the teacher's position.¹²³ This view, unfortunately, is not borne out by the only two cases on point in which the publishers were favored by the court.¹²⁴ Though when there has been a minimal copying, *de minimis* and fair use are generally successful defenses.¹²⁵

Thus far there have been no suits against persons not actively distributing the copy.

¹¹² S. 597, 90th Cong., 2d Sess., § 107 (1967).

¹¹³ ". . . The fair use of a copyrighted work is not an infringement. . . ."

¹¹⁴ 1967 Hearings at 1045.

¹¹⁵ H.R. Rep. No. 83, *supra* note 56 at 35.

¹¹⁶ 1967 Hearings at 1045.

¹¹⁷ *Ibid.*

¹¹⁸ Folsom v. Marsh, *supra* note 43.

¹¹⁹ Mathews Conveyor Co. v. Palmer-Bee Co., *supra* note 6.

¹²⁰ Macmillan v. King, *supra* note 13.

¹²¹ Wihtol v. Crow, *supra* note 76.

¹²² 1965 Hearings at 1768.

¹²³ *Ibid.* See also Lattman, Howell, Copyright Law 135 (1962).

¹²⁴ Macmillan v. King, *supra* note 13; Wihtol v. Crow, *supra* note 76.

¹²⁵ Karl v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Pa. 1914); H. A. Toulmin, Jr. v. Rike-Kumler Co., *supra* note 26.

Libraries have, for some seventy years, been making copies for private use of scholars in lieu of their coming to the library and, to date, not a single case can be cited in which a library was sued for making copies.¹²⁶

The teachers, however, feel the power of the author. There is, after all, no assurance in past practice that the teacher will not be sued because of a small or undistributed copy. A specific exemption would cure this doubt, the educators tell.

Without an *automatic educational exemption* . . . "fair use" might well become a snare and a delusion to teachers.¹²⁷

It would also, answer the authors, lead to further encroachments on their legitimate rights. They recognize that the present state of the law works to their advantage. The uncertainty admittedly, say the authors, limits the wondering educator and enforces that which has been termed his "moral" obligation not to infringe.

After weighing both arguments, the House subcommittee reported that:

After full consideration, the committee believes that a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is *not* justified. . . . Any education uses that are fair use *would* be fair use *under* the bill.¹²⁸ (Emphasis added.)

Mechanical Reproduction as Fair Use

It is a mistaken belief of some¹²⁹ that the public has a right to copy. During the Hearings, a copy machine manufacturer stated that mechanical reproduction must be specifically mentioned in the proposed revision in order to clear the confusion of private owners. He recommended that:

Fair use shall include the right to reproduce the copyrighted work for personal or private use but not for sale. . . . Thousands . . . of people have purchased copying machines and copy papers and have also long used that equipment to make copies of copyrighted material for their own use. Since no legal action has ever been brought against anyone for engaging in . . . the practice (it) is perfectly lawful, and copyright owners have acquiesced.¹³⁰

While this is certainly the present situation, the authors could not agree to give legislative sanction to it.

Irwin Karp, of the Authors League, in a report to the Committee stated:

¹²⁶ L. Hattery and G. Bush, *Reprography and Copyright Law* 95 (1964).

¹²⁷ 1965 Hearings at 344.

¹²⁸ H.R. Rep. No. 83, *supra* note 56 at 31.

¹²⁹ 1965 Hearings at 1498.

¹³⁰ *Ibid.*

The type of device used does not affect the making of unauthorized copies; infringement is infringement whether it is by a letter-press, an offset . . . or by other means. . . . There is no case that says this, but it is not even worth debating because of the vast differences in nature, extent and effect between copying by hand and copying from a machine. What the machines replace are not the pen, but the printing press.¹³¹

George Cary, Deputy Registrar of Copyrights, stated the position of his office as follows:

. . . Use of new devices for this purpose (copying) should be encouraged. It *has* already become clear, however, that the unrestrained use of photocopying . . . and other devices for the reproduction of author's works, going far beyond the recognized limits of fair use, may severely curtail the copyright owner's market for his copies.¹³² (Emphasis added.)

The conscientious teacher tends to use numerous writings from various sources on brief notice. The educators argue that taking the time to seek permission from the publisher will destroy the spontaneity which is the very essence of good teaching practice. In fact, they go on, simply because of the valid needs of teachers, there is a high correlation between good teaching and infringement.¹³³

The publishers answer by saying that there always has been room under the existing law for creative teaching, however when an entire school or school district distributes such "off-the-cuff" copies, there is a serious taking, and one which cannot be ignored.¹³⁴

The present revision considers the positions of both sides by appearing to allow creative teachers to copy as long as the use is not substantial.¹³⁵

The educators argue, with some supporting case law,¹³⁶ that publishers who allow their works to go out of print for some time, showing no intention to reprint the work, are in no position to restrict copying for teaching.¹³⁷

The publishers fear, however, that to allow the educator this privilege, will destroy some of the economic incentives of writing and pub-

¹³¹ *Id.* at 1755 and 1765.

¹³² *Id.* at 33.

¹³³ *Id.* at 317-19. See also Hattery, *op. cit. supra* note 126 at 4.

¹³⁴ Nimmer, *op. cit. supra* note 95 at 654. See also 1967 Hearings at 1054 and 1965 Hearings at 1811.

¹³⁵ H.R. Rep. No. 83, *supra* note 56 at 31 and 33.

¹³⁶ *Karll v. Curtis Publishing Co.*, *supra* note 125.

¹³⁷ H.R. Rep. No. 83, *supra* note 56 at 14. See also *Mathews Conveyor Co. v. Palmer-Bee Co.*, *supra* note 119; Yankwich, "What is Fair Use?" 22 U. Chi. L. Rev. 203 (1954).

lishing.¹³⁸ They fear that unregulated taking from out-of-print works will lead to also taking from new works.

An author's income from any individual sale is "minor"; his royalty is only a few cents. His compensations and reward for prolonged work on a book comes from the *accumulation* of these *minor* amounts of royalties and payments from individual sales, and uses of the work. Consequently each unauthorized sale and each loss of "minor" income, contributes to the process by which accumulation of unauthorized copyings and resulting losses of sales, harm the author and publisher.¹³⁹

They ask, what will prevent the educators from reproducing segments of works, both in print and out, and creating their own anthologies?

Nimmer, among others, has decried the tendency of the educator to insist on the right to copy. Perhaps the educators imply, that they are more interested in their own convenience than in promotion of the arts and sciences.¹⁴⁰

In the main, educators are not willful infringers. If they infringe at all, it is unwittingly. The educators thus argue that they should not be liable as willful infringers.

We do not use copyright material for our own gain but rather for the benefit of students for whom we are responsible.¹⁴¹

The innocence of the defendant, however, serves to influence the jury and mitigate damages.¹⁴² The publishers reply again that they would be economically harmed if teachers were absolved of all liability for infringement.¹⁴³ S. 597 is a compromise which leans a bit, perhaps, toward the educator.

Eight years ago, Borg-Warner, foreseeing the sheaves of testimony to come, suggested that both sides sit down and try to work out a new "Gentleman's Agreement."¹⁴⁴ But the lines were drawn and emotions have run high through years of planning and testimony. While both sides have tacitly agreed to some compromises, actually little has been accomplished in bringing them together.

We are not pretentious enough to suggest a better "mousetrap" but it appears that only by continuing the dialogue between the poles can

¹³⁸ 1965 Hearings at 1811 and 39; 1967 Hearings at 1054.

¹³⁹ 1967 Hearings at 1150-51.

¹⁴⁰ Nimmer, *op. cit. supra* note 95 at 652-53; 1965 Hearings at 1810.

¹⁴¹ 1965 Hearings at 321.

¹⁴² 18 C.J.S. Copyright and Literary Property § 135 (1939).

¹⁴³ 1967 Hearings at 1052.

¹⁴⁴ H.R. Rep. No. 25, *supra* note 91 at 61.

anything lasting appear. Our proposal, which should be looked into deeper, is the licensing system suggested by the authors.¹⁴⁵

If the law impedes and interferes with the procedures necessary to accomplish the end that society seeks, it usually is amended, rescinded or, in those cases where the law protects one group to the detriment of the legitimate rights of another group, the two groups eventually work out a compromise which will serve and satisfy both needs.¹⁴⁶

1967 Revision Proposed

The whole system of copyright law in the United States, in the light of interpretation by the courts, calls for a revision. The courts are more and more called upon to consider these questions. And . . . the reproduction of various things which are the subject of copyright has enormously increased. The wealth and business of the country and the means of duplication have increased immeasurably. The law requires adaption to these modern conditions.¹⁴⁷

So said an eminent attorney in the year 1909, so repeated an award winning essay in 1958;¹⁴⁸ so said the registrar of copyrights in 1961.¹⁴⁹ Now in 1968, the United States Senate struggles with the third proposed revision in three and one half years.¹⁵⁰

In 1955, preliminary to revising the copyright law, and at the instance of Congress, the Library of Congress undertook a series of thirty-four studies on the law of copyright as it appears in practice. The studies culminated in a report by the Registrar of Copyrights¹⁵¹ and after numerous meetings and discussions, H.R. 11947 was prepared and introduced in 1964.¹⁵² H.R. 11947 died with the close of the 88th Congress and emerged in 1965 with some important changes,¹⁵³ as H.R. 4347. Again testimony was taken (this time some 1042 pages) and again the bill died with the Congress, reappearing this time and with a particularly interesting change, as H.R. 2512.

H.R. 2512 passed the House in April, 1967, and is at this writing,

¹⁴⁵ 1965 Hearings at 1811 and 1930. See also Kaplan, *An Unhurried View of Copyright* 16 (1967).

¹⁴⁶ Hattery, *op. cit. supra* note 126 at 3.

¹⁴⁷ Address by Samuel J. Elder before the Maine St. Bar Ass'n. quoted in H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

¹⁴⁸ Needham, *op. cit. supra* note 22.

¹⁴⁹ See 1961 Report at IX. "It seems unnecessary to dwell at length upon the changes in technology in the last half century that have affected the copyright law. A large body of judicial interpretation and business practice has grown up around the present statute."

¹⁵⁰ H.R. Rept. No. 83, *supra* note 56 at 2.

¹⁵¹ 1961 Report.

¹⁵² 1961 Report at 71.

¹⁵³ Particularly, for all purposes, in Sec. 107, the "Fair Use" provision.

pending (as S. 597) before the Subcommittee on Patents and Trademarks and Copyrights of the Senate Committee on the Judiciary.¹⁵⁴ An additional 341 pages of testimony have been added to the record,¹⁵⁵ but it is unlikely that the bill will be reported out of committee before the decision of the Supreme Court in *Fortnightly v. United Artists Television*.¹⁵⁶

How does S. 597 affect the ability of the classroom teacher to make unauthorized copies of a work without incurring liability? Will Professor X fare better or worse if the bill is enacted into statute? Or will there be no difference?

A user will not presumably be more certain of where he stands. First he must determine whether the work he is considering falls into one of the seven categories¹⁵⁷ listed in § 102 and therefore copyrightable. Once decided, he has no problem, as he does under existing law, of whether the item has been published, since published or not, all works would henceforth be subject only to a Federal copyright.¹⁵⁸ The old common law copyright sprang up immediately, and automatically and without limit, attached itself to unpublished copyrightable works. It remained to protect them forever so long as they remained unpublished, but fell away automatically at the moment of publication.

S. 597 abrogates the Common Law in this regard and substitutes a single time-limiting system¹⁵⁹ for the present "anachronistic, uncertain, impractical and highly complicated dual system."¹⁶⁰ This change will be especially helpful to the scholar dealing with historical papers.

There will still be the problem, however, of whether the work has in fact been registered. Protection of the user is one of the purposes of the requirement that notice be printed on the work. However, failure to register a printed notice within five years of publication¹⁶¹ does not in some cases abrogate protection.¹⁶² The teacher cannot, then, rely on a look at the work and is saved only by § 404(b) which provides that a person misled by lack of notice will not be liable.¹⁶³

As does the present statute,¹⁶⁴ S. 597 grants to the author a number of exclusive rights which are, together, the copyright.

¹⁵⁴ H.R. Rep. 83, *supra* note 56.

¹⁵⁵ 1967 Hearings.

¹⁵⁶ *Fortnightly v. United Artists Television*, 88 S. Ct. 589 (1968).

¹⁵⁷ H.R. Rep. 83, *supra* note 56 at 102 (1967).

¹⁵⁸ The statutory federal copyright (the common law counterpart) henceforth: "subsists from creation" (the work) but is limited to the life of the author plus 50 years—published or not. See H.R. Rep. 83, *supra* note 56 at 302.

¹⁵⁹ S. 597, 90th Cong., 1st Sess. § 301.

¹⁶⁰ 1961 Report at 96.

¹⁶¹ The word is equally hard to define in this context.

¹⁶² This seems to have been a concession to the authors and publishers. See H.R. Rep. 83 *supra* note 56 at 110.

¹⁶³ Whereby the statute avoids fastening a strict liability without fault on the user.

¹⁶⁴ The author has the exclusive right to "print, reprint, publish, copy and vend the copyrighted work." Copyrights, 17 U.S.C. § 1(a) (1964).

These are the "exclusive rights to do and to authorize" the following:¹⁶⁵

- 1) Reproduction in copies or records.¹⁶⁶
- 2) Derivative works (such as ballet, pantomime, condensation,¹⁶⁷ abridgement, dramatization).
- 3) Distribution (by sale, transfer, rental, loan).¹⁶⁸
- 4) Public performance (reading, singing, dancing or acting out).¹⁶⁹
- 5) Display (showing a copy including film of performance).¹⁷⁰

Impingement on any of these rights (except where they are limited by the statute) will be an actionable infringement. The Legislature has made its intent eminently clear: The making of a copy is alone an infringement which needs no distribution to complete it.¹⁷¹

The effect is somewhat mitigated by the Committee's reminder that infringement still requires reproduction in whole "or in any *substantial* part."¹⁷² (Emphasis added.)

Comments on the Proposed New Statute

The Courts have come, through the years, to accept essentially four tests as guidelines for the determination of whether a use is fair:¹⁷³

- 1) The size, and relative importance of the part used in relation to itself and the copyrighted work (extent).
- 2) The nature of the copyrighted work (nature).
- 3) The users reason for using the work (purpose).
- 4) The competition of the use with the copyrighted work and the author's market (competition).

These standards were set out in the 1964 bill, eliminated in 1965 and re-established in the present bill.¹⁷⁴ They are presented as a "gauge for balancing the equities." This gauge can be considered a victory for the

¹⁶⁵ S. 597, 90th Cong., 1st Sess. § 106 (1967).

¹⁶⁶ H.R. Rep. No. 83, *supra* note 56 at 24.

¹⁶⁷ *Id.* at 27.

¹⁶⁸ *Id.* at 28.

¹⁶⁹ 1-3 describe together the author's right to copy, record, excerpt and publish.

¹⁷⁰ H.R. Rep. No. 83, *supra* note 56 at 23.

¹⁷¹ Compare older common law view requiring publication (distribution) for completion of the tort.

¹⁷² H.R. Rep. No. 83, *supra* note 56 at 24.

¹⁷³ See Ringer and Gitlin, Copyrights 20 (1965).

¹⁷⁴ S. 597, 90th Cong., 1st Sess., § 107 (1967). "The factors . . . include (but are not limited to):

(Continued on next page)

teachers who claimed that the vague statement of H.R. 4347, that "fair use of a copyrighted work is not an infringement of copyright," left them in the woods without a guide.¹⁷⁵ The authors too can chalk up a win having avoided the complete statutory exemption claimed by the teachers as a necessary gate post.

What is it that the teachers have won? The committee states clearly that it has "no purpose of either freezing or changing the doctrine of the common law."¹⁷⁶ But can this be accomplished? It seems that the mere act of putting words into legislative form gives them a pre-eminence they lacked before. The court may make law where there is none—but where the law is set forth by legislation, it must be followed. The committee disclaimer notwithstanding, the gauge will be frozen into law.

The greatest risk is that the criteria will become more important than the result. The court may become so concerned with meeting the proper tests that it will forget the ultimate question: Is this use fair?¹⁷⁷ Is the committee's wish to provide the educator due notice, pushing copyright into a dilemma from which the law of conflicts is struggling to remove itself?¹⁷⁸

§ 107 is the first of a group of four limitations carved out of the exclusive rights granted by § 106. § 107 of the revision states that a copy *can* be a fair use. It sets out a list of the type of uses upon which the legislature looks with favor¹⁷⁹ and lists the criteria of fair use. It does not, as already pointed out, grant anything for sure.¹⁸⁰

The teacher who copies is theoretically aided, in addition, by § 504C(2) which deals with "the special situation of teachers who reproduce copyrighted material for classroom use in the honest belief that what they are doing constitutes fair use."¹⁸¹ The committee assumes the average classroom teacher has heard of fair use and read § 107. The

(Continued from preceding page)

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."

¹⁷⁵ H.R. Rep. No. 83, *supra* note 56 at 27.

¹⁷⁶ *Id.* at 31.

¹⁷⁷ John Schulman has developed a simple and true test: "When clients ask . . . whether they may use this or that material I ask them a preliminary question, namely, how would you feel if somebody did that to you? It is a pretty good test." 1965 Hearings at 1714.

¹⁷⁸ See Ehrenzweig, *Conflict of Laws* (1959).

¹⁷⁹ Criticism, comment, news reporting, teaching, scholarship and research.

¹⁸⁰ S. 597, 90th Cong. 1st Sess. § 108 (1967), grants libraries the specific right to copy for deposit and § 110 specifically exempts "performance or display (not copying) . . . by instructors or pupils in face to face teaching. . . ." (Emphasis added.)

¹⁸¹ H.R. Rep. No. 83, *supra* note 56 at 130.

burden, the comment and the statute tell us, is on the teacher, to prove that "he believed and had reasonable grounds for believing that the reproduction was a fair use under Section 107."¹⁸²

May the teacher then, if he is aware of the terms of the statute, look to the naked statute to find fair use—or must he look to the cases behind it? The comment has stated the section to be merely declarative of the common law. Knowledge of that law is then necessary to interpretation. Is he then in any better position than he was before? And how much of a basis makes a belief reasonable? One criteria fulfilled? Two?

No one to our knowledge has said so, but the 1964 case of *Wihtol v. Crow*¹⁸³ may be the enveloping darkness which caused the teachers to feel so strongly a need not yet quite evident.¹⁸⁴ Defendant Crow, a music teacher and choir director,¹⁸⁵ arranged one of plaintiff composer's songs for his school choir. This he duplicated on the school copy machine and distributed one copy to each member of his class. The arrangement was performed publicly and was such a success defendant decided to offer it to plaintiff. Plaintiff sued. Defendant Crow pleaded fair use and that plaintiff had only taken a folk song already in the public domain.

The district court was singularly unimpressed by "the sincerity of plaintiff's testimony"¹⁸⁶ and his "indefensible" attempt to frighten Crow (on a *groundless* threat of criminal prosecution) into conceding damages.¹⁸⁷ The court, emphasizing the fact "that defendant had no thought of financial gain"¹⁸⁸ said:

The crucial issue, however, is whether the sum total of defendant Crow's actions in experimenting with the copyrighted song, drawing a new arrangement and testing (it) . . . constituted such unfair use of plaintiff's work as to amount to infringement. . . .¹⁸⁹

Citing *Mathews Conveyor Co. v. Palmer-Bee Co.*¹⁹⁰ the court reasoned:

. . . subsequent workers in the same field (should not be) deprived of all use . . . as . . . the progress of science and the useful arts would be unduly obstructed.

¹⁸² *Id.* at 131.

¹⁸³ *Wihtol v. Crow*, *supra* note 76.

¹⁸⁴ Statement of Harry Rosenfield for the Ad Hoc Committee 1965 Hearings at 1045, "We (compromised) only on the basis of an iron bound assurance."

¹⁸⁵ The situation includes certain notable similarities to that of Professor X.

¹⁸⁶ *Wihtol v. Crow*, *supra* note 76.

¹⁸⁷ *Id.* at 686. ". . . Wihtol, in an obvious attempt to gain the sympathy of the court, testified with tears . . . concerning . . . his wife and little child . . . (he had no child and was separated from his wife) . . . the court was not impressed with the sincerity of Wihtol's testimony."

¹⁸⁸ *Id.* at 684. "Plaintiffs well knew criminal sanctions required a willful infringement for profit."

¹⁸⁹ *Id.* at 685.

¹⁹⁰ *Mathews Conveyor Co. v. Palmer-Bee Co.*, *supra* note 6.

And concluded that:

The use of the new arrangement by the school and the church choirs on one occasion was not an infringement.¹⁹¹

The Eighth Circuit balancing the equities without benefit of plaintiff's tears found different weights.¹⁹² Said the court:

Whatever may be thought of *Wihtol*, the song in suit is a copyrighted production, which the plaintiff can protect and defend against all infringements, intentional or otherwise.¹⁹³

"Obviously," the court continued, "the plaintiffs had the exclusive right to copy their copyrighted song and obviously Nelson E. Crow had no right whatever to copy it."¹⁹⁴ (Emphasis added.)

Whatever may be the breadth of the doctrine of "fair use" it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a "fair use" merely because the infringer had no intent to infringe.¹⁹⁵

Obviously the court has no special sympathy for Crow as an educator. It sees him standing in the position of any other infringer. It, in fact, asks us to note the decision for the plaintiff in the prior case of *Wihtol v. Wells*.¹⁹⁶ The court fails to mention that defendant Wells, dba Evangel Music Company, published and sold a book in which he included plaintiff's copyrighted song without permission. Application of the commercial competition or purpose test would itself have swung the balance away from such a defendant.

"It must be kept in mind," remonstrates the court after citing *Wells*, "that the applicable law is purely statutory and that the copyrighted act has little elasticity or flexibility," but fair use is flexible, we might reply and application of the test of fair use should put Crow and Wells in different positions.

The educator has little to cheer him in this decision. While the property rights of the author are emphatically brought out, the court nowhere mentions the purpose clause of Article I, Section 8 of the United States Constitution. The educator is perhaps justified in believing that although past courts and the authors and publishers themselves have given lip service to the *special position* of the educator, it is, in fact, only lip service. In any case, the fact is, that in the first case squarely on point, the classroom teacher who copied for his class, lost.

Section 504C (2) (referred to above) provides that if defendant is an instructor in a non-profit educational institution; if he copied for use in the course of face to face teaching in a classroom, or similar place,

¹⁹¹ *Wihtol v. Crow*, *supra* note 76 at 684.

¹⁹² *Ibid.*

¹⁹³ *Id.* at 782.

¹⁹⁴ *Id.* at 780.

¹⁹⁵ *Ibid.*

¹⁹⁶ 231 F.2d 550 (7th Cir. 1956).

normally devoted to instruction; and if he believed or had *reasonable grounds* to believe that his use was fair under § 107 (fair use), the court has discretion to remit damages although he has, in fact, infringed.

Would the teacher in light of Wihtol's clear statement that his use is not fair have reasonable grounds to believe—or is he required only to look at the criteria spelled out? Is he protected if it would seem to a reasonably prudent teacher in like or similar circumstances that this use was a fair one according to the statutes? This would seem the proper view if anything is to be accomplished. Perhaps the criteria are included only as guidelines for the user, and the court, having an understanding, of the law, can lay them aside to balance the equities with a simple: *Is this fair?*

A word about the crime of infringement is necessary for a complete picture of the confusion which reigns. While § 504 attempts to deposit the unwitting teacher in safe water, § 506 carries him in the opposite direction. Old § 104, Willful Infringement for Profit contains the following proviso:

That nothing in this title shall be so construed as to prevent the performance of religious or secular works . . . by public schools, church choir . . . provided the performance is given for charitable or educational purposes and not for profit.¹⁹⁷

New § 506 (a) provides as follows:

Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined . . . or imprisoned . . . or both. . . .

No comment is necessary.

Conclusion

It should be evident that we cannot say with certainty that poor Professor X would fare better under the proposed new revisions than he will under the present law. Fair use is still fair and very clearly not an infringement. *De minimis* is not a defense peculiar to copyright and is nowhere mentioned in any version of Title 17. The fact that the original is in the public domain is now easier to define and still a good defense: *innocent intent* never has been. But innocence, will by specific exemption, save the teacher, in his classroom, from the payment of damages.

Thus we cannot measure how much of a work may be copied or how many copies of parts of a work may be made. Each case, as it always has in theory, must be tried on its own merits in light of the circumstances surrounding it. These must include the prospective harm to the author, the state of mind of the copier, and the benefit to education. All in the light of the real reason for copyright in this country: to benefit the arts and sciences by encouraging the author and scholar to produce.

¹⁹⁷ The current law lists maximum fines to infringers without knowledge in certain areas such as newspaper reproduction.