

REPROGRAPHY AND THE UNCERTAINTY OF COPYRIGHT
IN THE INFORMATION AGE

Karl A. Boedecker, Ph.D., J.D., McLaren College of Business, University of San Francisco

ABSTRACT

Recent litigation involving the classroom use of copyrighted materials has prompted some concern on the part of educators. This paper briefly considers the background of federal copyright law and the present uncertainty regarding the distribution to students of photocopied materials as a "fair use" exception under the Copyright Revision Act of 1976.

INTRODUCTION

From the days when the vital information in Western Civilization was preserved by chiseling letters into stone tablets to the present era of electromagnetic impulses recorded onto floppy disks, information has been the stock-in-trade of scholars and teachers. Although modern technology continues to develop new devices for the collection, storage, retrieval and distribution of information, the basic functions of educators remain unchanged. They continue to engage in the creation, preservation and dissemination of knowledge.

The efficiency with which educators can perform these traditional functions has changed, however, as a result of contemporary advances in information systems technology. In particular, modern developments in reprography have greatly enhanced the ability of university faculty to provide their students, on a timely basis, with a seemingly unlimited amount of published information from the broadest possible base of sources. The development and marketing of a plain paper photocopying machine by Xerox in 1960 was the leading breakthrough in this field. One source estimates that users made 9.5 million copies in 1964 and had increased their usage of xerography to the level of 12 billion copies by 1967. By 1970, photocopying had already become a \$1.3 billion market. (Greenwood 1980, p. 129)

As is true for most significant technological developments, these photocopying machines have generated a substantial degree of conflict and controversy. Educators see the remarkable expansion of classroom teaching possibilities which flow from the unrestricted use of xerographic reproduction of published materials. Copyright holders and publishers view with alarm the potential threat to their economic interests posed by the new devices. This has recently resulted in litigation among publishers, university faculty and the operators of off-campus photocopying services in an effort to reconcile the sometimes competing interests of educators and those who market copyrighted materials.

Thus, this paper will examine the educational functions performed by the classroom teacher in

distributing photocopied materials to students, some of the litigation concerning the classroom use of copyrighted materials and the current uncertainties which surround the extent to which federal copyright law allows for the use by educators of copyrighted materials without prior permission from the owners.

THE EDUCATOR'S TASK
FROM A MARKETING PERSPECTIVE

The role of a university faculty member with respect to classroom teaching functions in some ways closely resembles that of a middleman in the marketing process. The professor's primary tasks consist of sorting and matching, i.e., gathering information from a vast array of heterogeneous sources (books, journals, government documents, trade publications and so on), sorting it into a meaningful set of materials (required readings and lectures) for the course at hand, and presenting this assortment to the students in the form of required texts, handouts or assigned readings.

This is analogous to the operation of the economic process as Wroe Alderson depicted it. He noted the "radical heterogeneity of markets" as it existed on both the supply and demand sides. (Alderson 1958, p. 32) He observed that, "The whole economic process may be described as a series of transformations from meaningless to meaningful heterogeneity." (Alderson 1958, p. 32.) These transformations were achieved through sorting, which Alderson described as the "root idea of marketing." He further observed that "...the aim of marketing is to cope with the heterogeneity of both needs and resources." (Alderson 1958, p. 33.)

Radical heterogeneity certainly describes the array of information which the marketing educator has available from a variety of academic disciplines and a myriad of information sources. Thus, the educator is faced with the task of transforming this abundance of heterogeneity into a meaningful educational experience for the students.

In order to facilitate this sorting process, the faculty member is likely to rely heavily upon the distribution of multiple photocopies of articles, chapters and other excerpts from a wide variety of published (and probably copyrighted) sources. Doing so without first obtaining permission from the copyright holder generally provides the fastest and most efficient means of carrying out this task.

This approach, however, has understandably provoked protests from the publishers of books, journals and other copyrighted materials. These

publishers see the unrestrained use of photocopying for classroom purposes as a particular threat to the economic viability of journals, texts and other scholarly works for which limited markets exist. They also express concern about the adverse impact upon the demand for the more widely utilized journals and textbooks.

Unfortunately, Alderson's works do not specifically address the issue of how to treat the institutional constraints which copyright considerations impose upon this particular sorting process. Instead, marketing educators must look to other sources for guidance as to how present copyright law affects their sorting task.

PUBLISHER SUITS AGAINST UNIVERSITY FACULTY

The first reported case of a textbook publisher filing suit over the unauthorized use of copyrighted text involved the Macmillan Company in 1869. (Macmillan Company v. King 1869.) The defendant, Meliam L. King, tutored Harvard economic students in a course which used F. W. Taussig's Principles of Economics text. King distributed outlines of the text to his pupils, along with some quoted words and phrases, with the stipulation that they would return the materials after the final exam. The court found that this practice amounted to an infringement of the copyright. In reaching this conclusion, the judge expressed a concern that the summaries were prepared to enable students to pass the course without actually having read the book.

In 1963, Addison-Wesley filed suit against a faculty member who published a complete solutions manual for a college physics text which had included the answers to only its odd-numbered problems. (Addison-Wesley Publishing Co. v. Brown 1963.) The separately produced solutions manual utilized paraphrased versions of the text's problems. The court found that the availability of a solutions manual had adversely affected the market for the original text and, therefore, held that the defendant had infringed upon the copyright.

In a more recent action, eight textbook publishers sued nine New York University faculty members, an off-campus copy center and NYU itself for alleged copyright violations under the Copyright Revision Act of 1976. The plaintiff-publishers included Addison-Wesley, Alfred Knopf, Basic Books, Houghton-Mifflin, Little, Brown & Company, Random House and Simon & Schuster. The complaint accused the defendants of "...causing and engaging in the unlawful and unauthorized reproduction, anthologizing, distribution and sale of published copyrighted works." (The Wall Street Journal 1982.)

The Unique Copy Center, the off-campus defendant, apparently had put together and sold anthologies of materials for the students in the defendant faculty members' courses. The Copy Center did so without authorization from the copyright holders. (New York Times 1980.)

The parties settled the suit short of trial, so

the fundamental issues which surround the photocopying of copyrighted materials for classroom use were not resolved by that action. Both the American Association of University Professors and the American Library Association had indicated their willingness to support NYU and the faculty members in the litigation. (Chronicle of Higher Education 1983.)

In a similar suit filed in 1980, again under the 1976 Act, several publishers sued the Gnomon Corporation, which provided photocopying services in several college towns throughout the northeast. Plaintiffs accused the copy center operation of violating the 1976 Act by operating a "micro-publishing" company which produced photocopies of copyrighted materials for use by local college students. Gnomon maintained that their practices were legal, but entered into a consent decree settlement. The owner said that he could not afford the estimated \$250,000 in legal costs to fight the suit. (The Wall Street Journal 1980.)

The reasons for the indeterminate outcome of these recent, widely publicized suits may be better understood when viewed in light of how the present federal copyright statute evolved.

A BRIEF OVERVIEW OF COPYRIGHT LAW

Congress enacted the first copyright statute in 1790 under its constitutional authority, "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (United States Constitution 1788.) This exclusive right amounted to a grant of monopoly, for a specified period, over the expression of ideas embodied in the copyrighted work. (The ideas themselves have never been subject to protection under any American copyright statute.) Subsequent acts have retained this grant of monopoly to the copyright holder in order that authors and other creators of copyrightable works would have an economic incentive to contribute to the progress of science and the arts. Or, as the well-chronicled Dr. Johnson put it so succinctly, "No man but a blockhead ever wrote except for money." (Boswell 1791. Boswell's opinion of those who write for publication in academic journals and conference proceedings can be readily deduced from this remark.)

Copyright ownership does not amount to the power to control all use of the protected material, however. Advancement of science and the arts requires the effective dissemination of knowledge as well as its creation and expression. Thus, the concept of "fair use" of copyrighted items has evolved to allow, under certain circumstances, the reproduction without permission of part of a copyrighted work or, in some instances, all of it.

This doctrine originated in the 19th Century (Folsom v. Marsh 1841.) and became an equitable rule of reason that offered protection for the use of copyrighted work in the context of literary criticism. (Lawrence v. Dana 1869.)

For all the subsequent attention that fair use has attracted within the field, the only widespread agreement on the topic seems to be that the issue is the most troublesome in the whole law of copyright. (Dellar v. Samuel Goldwyn, Inc. 1939.) The most frequently cited definition of the term is, "...a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner..." (Ball 1944). Thus, "the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the sciences or art." (Henry Holt & Company v. Liggett & Meyers Tobacco Co. 1938.)

Beyond these broadly drawn principles, neither the statutory law nor the cases which construe it provide much specific guidance with respect to fair use. Rather than setting forth an arbitrary rule, the courts have resorted to an examination of the facts in each case when they rule upon a question of fair use. (Meeropol v. Nizer 1977.) The judiciary can then weigh the copyright holder's economic interests against the general public interest in promoting science and the arts. This offers the advantage of allowing for a balancing of the conflicting interests in light of the facts surrounding each dispute.

Some authority does exist to support the idea that a reward to the copyright owner is secondary (Mazer v. Stein 1954.), and that when addressing questions of infringement, courts must occasionally subordinate the financial interests of an owner to the greater public interest in the development of art, science and industry. (Berlin v. E. C. Publications, Inc. 1964) Nonetheless, no standards have emerged that would enable either a faculty member or a copyright holder to understand with a reasonable degree of certainty the extent to which the distribution of multiple photocopies for classroom purposes constitutes a fair use of copyrighted materials.

The courts have, however, developed and consistently cited a set of four criteria which they employ for their "fair use" analysis. The standards include (Williams & Wilkins v. United States 1973.):

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 work as a whole.
4. The effect of the use upon the potential market for or value of the copyrighted work.

Considerable uncertainty surrounds the interpretation of these elements as they apply to specific situations. For example, despite the explicit reference in the standards to the effects upon the potential market for a copyrighted work, the leading case on fair use holds that the plaintiff's failure to show that it suffered actual economic harm from defendant's photocopying of the copyrighted materials was a significant factor in the finding of a fair use by the defendant. (Williams & Wilkins v. United States 1973.) Other authority exists, however, which strongly suggests that a plaintiff need not prove measurable

pecuniary damage in order to establish that a defendant's actions did not amount to fair use. (Marcus v. Rowley 1983.)

THE COPYRIGHT REVISION ACT OF 1976

The Copyright Revision Act of 1976 does not reduce any of the ambiguity surrounding the fair use doctrine and, therefore, the fundamental questions involving the classroom use of photocopied materials remain unresolved by the statute itself.

Section 107 of the act provides statutory recognition of the fair use doctrine. It does not, however, go beyond the previously developed case law regarding the factors to use in judging whether a particular use is "fair." In fact, this section lists the same four factors cited in the previous section as the basis upon which to do a "fair use" analysis. It does not offer any guidance as to how these criteria might be applied.

Section 108 of the statute, which deals with reproduction of copyrighted materials by libraries, also relates to photocopying for classroom purposes. Even when read with Section 107, however, none of the ambiguity which envelopes this issue diminishes.

The legislative history of the 1976 Act likewise fails to reduce the uncertainties of fair use. (House Report 1976.) The record reflects only the intense lobbying done by both publisher and educator interests. The publishers, having lost their major court test of photocopying and fair use in the 1975 Williams v. Wilkins decision, wanted to win back by Congressional statute what they had lost in court. Educators, on the other hand, wanted a complete exemption for faculty who reproduced copyrighted materials for any classroom purpose. Congress apparently compromised by writing the then-current case law standards into the statute.

Some of the groups which had participated in the lobbying efforts subsequently negotiated an agreement which the House committee included as part of its report. (House Report 1976.) The Ad Hoc Committee On Copyright Revision (a coalition of educational organizations), the Association Of American Publishers and the Authors League of America entered into this agreement.

The document, entitled "Agreement On Guidelines For Classroom Copying In Not-For-Profit Educational Institutions," provides that:

The purpose of the guidelines is to state the minimum and not the maximum standards of educational fair use ... [It] is not intended to limit the types of copying permitted under the standards of fair use under judicial decision ...

It is especially important to note that, in addition to the above-quoted disclaimers within the guidelines themselves, both the American Association of University Professors and the American

Association of Law Schools rejected the guidelines as unworkable. Each group had its own disavowal put into the Congressional Record. (Donnell 1978.) This further reduces the impact of the guidelines upon the interpretation of the "fair use" doctrine.

The guidelines may, however, have created a "safe harbor" for those whose uses of copyrighted materials fit within these self-described minimum standards. The important unresolved issue is how much copying in excess of these standards remains within the boundaries of fair use.

As one commentator has observed (Stedman 1977, p. 12):

Guidelines such as [these] are just that: guidelines, not binding rules ... Depending upon their terms and on the intent of the parties, they may or may not have a binding effect upon non-participants, however useful these latter may find them in arriving at their own policy decisions.

CONCLUSION

Neither the Copyright Revision Act of 1976 nor the ensuing litigation initiated by textbook publishers against university faculty has lessened the uncertainty regarding the photocopying for classroom use of copyrighted materials without permission of the owner. The textbook publishers' trade association has threatened to continue litigation over this issue while the AAUP and the American Library Association appear ready to support the college and university faculty members. (Stedman 1977, Appendix C; Chronicle of Higher Education 1983, p. 19.)

Over the long run, some aspects of this conflict reflect an acute case of marketing myopia. From a marketing perspective, no such thing as the "textbook business" or the "academic press" business exists and any publisher who fails to understand this will not survive to see the Twenty-First Century. The market under consideration here consists of those individuals who need an effective and efficient means of delivering information for classroom instruction, i.e., university faculty and their students. The educator who oversees and directs the process of concentration and dispersion which matches the heterogeneous supply of information with the heterogeneous informational needs of each of his classes merely endeavors to perform this sorting as best he can. Widespread use of photocopied materials is presently the best available tool for facilitating the performance of this traditional educator's function.

Thus, the long-run resolution of the present conflict between copyright holders and university instructors lies in the adaptation by publishers of present information storage and delivery technology to the needs of classroom instruction. This would involve such techniques as computer-based information storage and retrieval systems, facsimile transmission, micrographics and all of the other tools of modern reprography. None of

this will happen, however, until academic publishers let go of their production-oriented views and adopt a marketing concept approach.

In the meantime, educators need to keep abreast of how the copyright law affects their use of photocopied materials for classroom purposes in order to cope with the current conflicts and uncertainties which surround this practice.

REFERENCES

- Addison-Wesley Publishing Co. v. Brown (1963) 223 F. Supp. 219.
- Alderson, Wroe (1958) "The Analytical Framework for Marketing," Proceedings: Conference of Marketing Teachers From Far Western States Berkeley: University of California, 1958, reprinted in Enis, Ben and Cox, Keith (1977) Marketing Classics 3rd Ed., Boston: Allyn and Bacon, Inc.
- Ball, H. (1944), Copyright and Literary Property, cited in Rosemont Enterprises, Inc. v. Random House, Inc. (1966) 366 F. 2d. 303.
- Berlin v. E. C. Publications, Inc. (1964) 329 F. 2d. 541 (2d Cir.)
- Boswell, J. (1791) The Life of Samuel Johnson, cited in William C. Walker, (1983) "Fair Use: The Adjustable Tool For Maintaining Copyright Equilibrium," 43 Louisiana Law Review 735.
- Chronicle Of Higher Education (1983) February 20, p. 1; April 20, 1983, p. 1.
- Copyright Revision Act of 1976 (October 19, 1976) Public Law No. 94-553, 17 U.S.C. Sec. 101 et seq.
- Dellar v. Samuel Goldwyn, Inc. (1939) 104 F. 2d. 661 (2d Cir.)
- Donnell, John D. (1978) "Fair Use By University Faculty Members Under The Copyright Revision Act of 1976," 16 American Business Law Journal 17.
- Folsom v. March (1841) 9 F. Cases 342 (C.C.D. Mass.)
- Greenwood, Val D. (1980) "Fair Use And Photocopy," 24 Copyright Law Symposium 113.
- Henry Holt & Co. v. Liggett & Meyers Tobacco Co. (1938) 23 F. Supp. 302 (E. D. Pa.)
- House of Representatives Report (1976) No. 1476, 94th Congress, 2d Session.
- Lawrence v. Dana (1869) 15 F. 26 (D. Mass.)
- Macmillan Co. v. King (1914) 223 F. 862 (D. Mass.)
- Marcus v. Rowley (1983) 695 F. 2d 1171 (9th Cir.)
- Mazer v. Stein (1954) 347 U.S. 201.
- Meeropol v. Nizer (1977) 560 F. 2d. 1061 (2d Cir.)

New York Times (1950) February 6, Col. 11, p. 12.
 Stedman, John C. (1977) "The New Copyright Law: Photocopying for Educational Use," 63 AACE Bulletin 5.
 United States Constitution, Article I, Clause 8.
 The Wall Street Journal (1982) December 16, p. 12; (1980) March 21, p. 23.
 Williams & Wilkins Co. v. United States (1973) 487 F.2d 1319 (5th Cir.) affirmed by an equally divided court (1976) 430 U.S. 376.