

---

# THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

---

## FOCUS ON SECRECY AND UNIVERSITY RESEARCH

The First Amendment, Governmental Censorship, and  
Sponsored Research

Peter M. Brody

Secrecy on Campus

John Shattuck

The Myths of Academia: Open Inquiry and  
Funded Research

Wade L. Robison  
John T. Sanders

AAUP Perspectives on Academic Freedom and United States  
Intelligence Agencies

R. Robert Kreiser

## ARTICLES

A Quandary of the Civil Rights Act of 1991: Is the New Law Retroactive?

Michael A. Dymersky  
Jack M. H. Frazier

Fair Use and the Educator's Right to Photocopy Copyrighted Material for  
Classroom Use

Robert Kasunic

## STUDENT CASE COMMENT

An End Run Around the Sherman Act? *Banks v. NCAA* and *Gaines v. NCAA*

Mike Kettle  
Paul B. McCarthy



PUBLISHED BY THE NATIONAL  
ASSOCIATION OF COLLEGE AND  
UNIVERSITY ATTORNEYS AND THE  
NOTRE DAME LAW SCHOOL



VOLUME 19

WINTER 1993

NUMBER 3

# FAIR USE AND THE EDUCATOR'S RIGHT TO PHOTOCOPY COPYRIGHTED MATERIAL FOR CLASSROOM USE\*

ROBERT KASUNIC\*\*

## INTRODUCTION

The recent decision in *Basic Books v. Kinko's Graphic Corp.*<sup>1</sup> demonstrates the need to educate professors about their right to provide students with photocopies of copyrighted material for classroom use. Although the *Kinko's* decision only indirectly affects educators, it reveals the need to confront two problems directly. Are courts interpreting the doctrine of fair use, codified in section 107 of the Copyright Act of 1976 (Act),<sup>2</sup> restrictively? Is activism by publishers chilling educators' use of copyrighted material?

Professors and administrators must be informed that "fair use" permitted under section 107 is broader than the photocopying policies of many universities. Although the Act limits liability and provides professors with specific rights and defenses, it remains difficult to articulate clear rules for educational fair use. In order to provide greater protection to educators and increase certainty in the law of fair use, educators should become more assertive in exercising their rights under the Act. In addition, Congress should amend the copyright laws.

This Article surveys the development of the fair use doctrine as it applies to educational photocopying. Section I examines the historical background of the fair-use doctrine and its codification in the Act. Section II reviews the relevant legislative history of the Act. Section III examines the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Per-

---

\* Awarded First Prize in the 1991 Nathan Burkan Memorial Competition at the University of Baltimore School of Law. The competition was sponsored by the American Society of Composers, Authors, and Publishers.

\*\* The author is a graduate of Columbia University and the University of Baltimore School of Law. He has recently completed a Faculty Guide to Photocopying for Classroom Use which is a practical follow-up to this article. He currently resides in Montgomery County, Maryland and where he intends to pursue a career in criminal law.

The author wishes to express his sincere thanks to Professor Lynn McLain and Professor William Fryer of the University of Baltimore School of Law for their inspiration and support of this article.

1. *Basic Books, Inc. v. Kinko's Graphic Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).  
2. Copyright Act of 1976, 17 U.S.C. §§ 101-914 (1988).

iodicals."<sup>3</sup> Section IV analyzes the law of educational photocopying and its effect on university copyright policies. Section V discusses the public policy involved in educational photocopying. Section VI suggests proposals for universities and for Congress. Finally, section VII discusses a practical approach for professors.

#### I. BACKGROUND AND DEVELOPMENT OF FAIR USE DOCTRINE IN THE EDUCATIONAL CONTEXT

The primary goal of the copyright laws is to promote educational and cultural progress. The United States Constitution grants Congress the power to "[p]romote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>4</sup> Congress viewed the copyright as a limited monopoly and the best incentive for the production and dissemination of creative works to the public.<sup>5</sup> As the Supreme Court recognized in *United States v. Paramount Pictures*,<sup>6</sup> a secondary goal is to reward the owner.<sup>7</sup>

The goals of copyright law may create a tension between fair use and authors' incentive to create works that will produce exclusive benefits. The common-law doctrine of fair use<sup>8</sup> attempted to ease this tension by allowing society to use a copyrighted work without obtaining the owner's consent if the use served the public interest. Thus, fair use limited the owner's exclusive rights and served as a defense to a charge of copyright infringement.

Congress codified the fair-use doctrine in section 107 of the Act.<sup>9</sup> Section 106 of the Act enumerates the exclusive rights Congress granted

3. H.R. REP. NO. 1476., 94th Cong., 2nd Sess. 67-70 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681-83.

4. U.S. Const. art. I, § 8, cl. 8.

5. The Federalist No. 43, at 272 (J. Madison) (Mentor ed. 1961).

6. *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

7. *Mazer v. Stein*, 347 U.S. 201, 219, 74 S. Ct. 460, 471 (1954). See also *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991) ("It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation . . . [This is not a statutory oversight]. It is rather 'the essence of copyright' and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and the useful Arts.');" *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 419, 104 S. Ct. 774, 777 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.');" *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S. Ct. 2040, 2043 (1975) ("But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

8. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

9. Copyright Act of 1976, 17 U.S.C. § 107 (1988). Section 107 provides:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies of phonorecords or by any other means specified by that section, for purposes such as criticism, comment,

copyright owners in sections 107 through 119.<sup>10</sup> Section 107 specifically limits the exclusive rights of copyright owners by citing "teaching (including multiple copies for classroom use)" as a fair-use purpose. Thus, Congress explicitly intended copying for educational use to be a fair use which does not require the owner's permission.<sup>11</sup> However, all fair-use purposes are subject to four criteria: 1) the purpose and character of the work, 2) the nature of the work, 3) the amount of the work copied, and 4) the effect reproduction will have on the potential market value of the material.<sup>12</sup> Since the Act does not indicate how to weigh each of the mandatory four factors, the fair-use doctrine, as defined in the Act, has evolved on a case-by-case basis.

The result is uncertainty for professors, university administrators and counsel. A simple but impractical solution to this uncertainty would be to require professors to obtain permission from copyright owners before using copyrighted works. Consent eliminates any question of fair use, but obtaining it is often a difficult and time-consuming process.<sup>13</sup> The time involved may frustrate the educator's desire to provide current and relevant material to students and consequently may detract from the professor's educational goals.<sup>14</sup> If this occurs, the

---

news reporting, teaching (including multiple copies for classroom use), 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—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (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.

10. 17 U.S.C. § 106 (Supp. II 1990).

11. When the language of a statute such as the Act is clear, the courts do not look to extrinsic aids to interpret the statute. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194 (1917) ("Where the language is plain and admits no more than one meaning, the duty of interpretation does not arise, and the rules which are said to aid doubtful meanings need no discussion. There is no ambiguity in the terms of this act.")

12. The text of section 107 is reproduced in note 9, *supra*.

13. With United States adherence to the Berne Convention, notice is no longer required on copyrighted works. Although most commercial publishers continue to use copyright notice, the absence of notice may be a source of confusion for teachers. Even if a teacher assumes that a work is copyrighted and attempts to obtain permission, copyrights may be transferred, licensed, and devised. This makes it difficult to know from whom to obtain permission. If the owner of a copyright is found, obtaining permission may take considerably more time.

14. *Id.* In education today, it is rare for teachers to rely solely on the use of a textbook. The common practice among educators, particularly those in higher education, is to supplement textbooks with additional information that the teacher believes is relevant and necessary to the student's understanding of a particular subject. The nature of this supplementary material may vary. It may take the form of a current article, an

public's interest in education is thwarted as professors may simply decide to do without up-to-date information. This is a result the codification of fair use was meant to preclude. Often, this result is avoided as many professors simply ignore the copyright laws and provide material to students by alternative means.

Many educators attempt to provide copyrighted material to students without creating a fair-use question by utilizing the library. Section 108<sup>15</sup> of the Act specifically exempts library photocopying. Many professors provide copies of a copyrighted work for students to read by placing a book, periodical or photocopy "on reserve at the campus library."<sup>16</sup> Students read this material in the library or make their own copy for later use. Other professors may still decide to distribute copies of the work directly to students. If either the "reserve" copies or direct distributions are entitled to copyright protection, the professor may be liable for copyright infringement if a fair-use analysis is not performed.

Sections 502 through 505 of the Act define the civil remedies available to copyright owners in infringement actions. Section 502 provides for injunctions. Section 503 provides for the impounding and disposition or destruction of infringing articles. The primary concern for educators, however, is the damage and profit provisions of Section 504.<sup>17</sup> Under section 504(a), an infringer of copyright is liable for either (1) the copyright owner's actual damages and any additional profits of the infringer or (2) statutory damages. The copyright owner can elect either of these provisions but not both.<sup>18</sup>

In an infringement action against a professor, the actual damages would usually be minimal.<sup>19</sup> A professor handing out copies of a

---

example of a concept being taught, a recent development in the field, or part of another's work which the teacher feels is important, but does not justify the student's purchase of the entire work. The teacher may even find that there is no textbook commercially available which meets the student's specific needs. In this latter situation, the teacher may decide to create an anthology or an assortment of materials which can be used by the students.

15. 17 U.S.C. § 108 (1988).

16. See Gail Paulas Sorenson, *Impact of the Copyright Law on College Teaching*, 12 J.C. & U.L. 509, 521-26 (1986). Sorenson points out that some elements of reserve practices must be resolved by reference to the fair use provisions of section 107. Thus, section 108, which protects libraries from liability in certain situations, such as those regarding "inter-library loans," does not provide a complete exemption for all library uses and "reserve" operations.

17. 17 U.S.C. § 504 (1988).

18. *Id.* at § 504(c)(1).

19. Section 504(b) provides:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504(b) (1988).

copyrighted work would face actual damages equal to the author's expected income for that distribution. The copyright owner would also recover any additional profit not considered in computing the actual damages. Since distribution by a professor to a single class is usually minimal, most copyright owners would not elect actual damages.<sup>20</sup>

Instead, the copyright owner may choose statutory damages.<sup>21</sup> Infringements of a copyrighted work, whether by copies,<sup>22</sup> a compilation,<sup>23</sup> or a derivative work, are subject to a statutory-damages award between \$500 and \$20,000.<sup>24</sup> If the copyright owner can show willful

---

20. Nevertheless, a professor should consider the potential of actual damages when distributing copies to a large number of students.

21. Section 504(c) provides:

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In the case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to the sum of not more than \$100,000. In the case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords . . . .

17 U.S.C. § 504(c) (1988).

22. Section 101 provides:

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

17 U.S.C. § 101 (1988).

23. Section 101 provides:

A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

\* \* \*

A "collective work" is a work, such as periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

*Id.*

24. 17 U.S.C. § 504(c)(1) (1988).

infringement, a court can increase statutory damages to \$100,000.<sup>25</sup> This willful-infringement provision should alarm professors who choose to ignore the copyright laws. While most professors will not be caught, a finding of willful infringement carries serious consequences.

On the other hand, the court may reduce statutory damages to \$200 if the infringer proves by a preponderance of the evidence that there was no reason to believe the act constituted an infringement. Ignorance of the law or unreasonable reliance on the lack of copyright notice on a copy are not sufficient for this purpose. Ignorance is not an excuse and since copyright notice is no longer required, the existence of a copyright should be assumed.

The professor's best infringement defense is the reasonable belief of fair use.<sup>26</sup> Reasonable belief should be premised upon an informed decision by a teacher. The third sentence of section 504(c)(2) states: "The court shall remit statutory damages in any cases where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment . . . ." This exculpatory clause provides professors with qualified immunity. If the professor had "reasonable grounds for believing" that a certain use was fair, the court must "remit" statutory damages.

This clause raises a number of questions. What constitutes "reasonable grounds for believing" that a use was fair under section 107? It could be argued that the specific mention of multiple copies for classroom use by professors, as a potential fair-use purpose in section 107, provides professors with reasonable grounds for believing that this type of use is fair. Arguably, this standard is too simplistic. Who bears the burden of proving that the belief was reasonable?<sup>27</sup> Must a professor's reasonable belief involve a balancing of the four fair-use factors? Must it involve a belief based on the analysis of fair use case law?

The exculpatory clause of section 504(c)(2) raises additional questions. What does "remit" mean? Does it mean to decline to award any statutory damages against a teacher?<sup>28</sup> Does it mean merely to reduce damages to the level of an innocent infringer? If the former meaning is correct, should a professor with reasonable grounds for believing a use was fair be entitled to an award of reasonable attorney's fees as

25. *Id.* at § 504(c)(2) (1988).

26. See Michael H. Cardozo, *To Copy or Not to Copy for Teaching and Scholarship: What Shall I Tell my Client*, 4 J.C. & U.L. 59,79 (1977).

27. MELVILLE NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 14.04[B] (1990). Professor Nimmer states that the burden of proof with respect to the defendant's good faith and reasonableness probably lies with the plaintiff.

28. *Id.* ("No statutory damages may be awarded if the defendant believed and had reasonable grounds . . .").

the prevailing party under section 505? Does this exculpatory clause merely provide immunity from statutory damages and thus leave the professor potentially liable for actual damages, costs, or attorney's fees?<sup>29</sup>

There is similar ambiguity in the scope of the phrase "an employee or agent of a nonprofit educational institution." Is a copy center capable of being an agent of a teacher within the meaning of this section? If the teacher has reasonable grounds for believing a particular use is fair, must the agent of a teacher who performs the actual copying have independent reasonable grounds for believing the use is fair, or may the agent rely on the professor's determination? This question is crucial, because professors often request school reprographic departments, commercial copy center, or bookstores to perform the copying necessary for their classes.

To resolve these issues, one must look beyond the language of the statute. The legislative history of the applicable sections is useful in this process.

## II. LEGISLATIVE HISTORY OF THE COPYRIGHT ACT

The common-law doctrine of fair use was the subject of extensive debate during the passage of the Act. The common-law doctrine was difficult to define and required its codifiers to balance competing interests. The legislative history of sections 107 and 504 reveals that Congress intended to protect educators' interest in greater certainty and protection.

When revising the Copyright Act of 1909, Congress authorized a study of the potential problems.<sup>30</sup> In 1958, the Latman Study examined codification of the fair-use doctrine.<sup>31</sup> This study was later reviewed by a panel of nine experts.<sup>32</sup> Eight members of the panel believed that fair use should not be codified. As Walter Dernberg stated: "I believe—and the Latman study seems to bear this out—that the term fair use defies definition and that in the long run more would be accomplished if our courts would be entrusted with setting the outer limits of the doctrine as they have been under the Act of 1909."<sup>33</sup>

---

29. No matter which type of damages the plaintiff elects to seek, section 505 provides for the possibility of an award of attorney's fees and costs to the prevailing party. But a professor's reasonable belief that the distribution was a fair use of the work would be considered by the court in deciding whether to award attorney's fees in its discretion.

30. Copyright Act of 1909, 35 Stat. 1075 (1909). See WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 213 (1985).

31. ALAN LATMAN, *COPYRIGHT OFFICE, STUDY NO. 14: FAIR USE OF COPYRIGHTED WORKS* (1958).

32. PATRY, *supra* note 30, at 214.

33. ALAN LATMAN, *COPYRIGHT OFFICE, STUDY NO. 14*. 87th Cong., 2d Sess. 40 (Comm. Print 1961). Mr. Patry went on to quote John Schulman as follows:

To most of us who are familiar with this branch of the law, the doctrine of

In contrast, Melville Nimmer believed that the new Act should provide "express legislative recognition" of the fair-use doctrine.<sup>34</sup> The Registrar of Copyrights agreed that fair use was "firmly established as an implied limitation on the exclusive rights of copyright owners."<sup>35</sup> Since it was such an important limitation "and occasions to apply that doctrine [arose] so frequently, [the Registrar] believed the statute should mention it."<sup>36</sup> While it eventually adopted this view, Congress debated the Act's wording for nearly twenty years.

The Ad Hoc Committee of Educational Organizations on Copyright Law Revision (Committee) first expressed their opinion on January 15, 1964.<sup>37</sup> They advocated a complete exemption for copying by non-

---

fair use is reasonably definite. It is equally as definite as many legal criteria which we employ to advise clients from day to day. There is no mathematical formula, for example, by which to determine what constitutes negligence, or by which to determine what a reasonably prudent man would do in a given circumstance, but courts and lawyers apply the principles of these legal doctrines all the time. In exceptional situations the line of demarcation may be so hazy that the difference in opinion is extremely wide but for the most part there is little practical difficulty in applying the rules of law. Fair use depends on so many factual circumstance that no adequate statutory language could be more definite and precise than the tests used by the courts, and no statute can cover every conceivable situation.

I think that our difficulties in this area do not stem from the absence of a statutory rule, but from ignorance of the jurisprudence. A greater knowledge about the doctrine of fair use would allay many misconceptions and make a change of law unnecessary.

PATRY, *supra* note 30, at 214.

34. *Id.*

35. *Id.*

36. REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24-25 (Comm. Print 1961).

37. The following organizations were members of the Ad Hoc Committee (as reprinted in COPYRIGHT LAW REVISION Part 4 at 217):

American Association of Colleges of Teacher Education  
 American Association of School Administrators  
 American Association of University Women  
 American Association of Teachers of Chinese Language and Culture  
 American Association of Teachers in French  
 American Association of Teachers of Spanish and Portuguese  
 American Council on Education  
 Association for Higher Education  
 College English Association  
 Council of Chief State School Officers  
 Department of Audiovisual Instruction, NEA  
 Department of Classroom Teachers, NEA  
 Department of Foreign Languages, NEA  
 Department of Rural Education, NEA  
 Midwest Program Airborne Television Instruction, Inc.  
 National Association of Educational Broadcasters  
 National Catholic Welfare Conference  
 National Commission on Professional Rights and Responsibilities  
 National Council of Teachers of English

