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# 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.*[1] 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),[2] 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-

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** 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.

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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."[3] 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."[4] Congress viewed the copyright as a limited monopoly and the best incentive for the production and dissemination of creative works to the public.[5] As the Supreme Court recognized in *United States v. Paramount Pictures*,[6] a secondary goal is to reward the owner.[7]

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[8] 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.[9] Section 106 of the Act enumerates the exclusive rights Congress granted

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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 privide 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 an other means specified by that section, for purposes such as criticism, comment,

copyright owners in sections 107 through 119.[10] 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.[11] 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.[12] 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.[13] 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.[14] If this occurs, the

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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[15] 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."[16] 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.[17] 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.[18]

In an infringement action against a professor, the actual damages would usually be minimal.[19] A professor handing out copies of a

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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.[20]

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

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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.
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> (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 preexisting 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.
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> 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.[25] 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.[26] 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?[27] 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?[28] 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

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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?[29]

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.[30] In 1958, the Latman Study examined codification of the fair-use doctrine.[31] This study was later reviewed by a panel of nine experts.[32] 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."[33]

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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.[34] The Registrar of Copyrights agreed that fair use was "firmly established as an implied limitation on the exclusive rights of copyright owners."[35] Since it was such an important limitation "and occasions to apply that doctrine [arose] so frequently, [the Registrar] believed the statute should mention it."[36] 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.[37] They advocated a complete exemption for copying by non-

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> 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.
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> 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

profit educational institutions. The Committee advocated this position because "[e]ducation is the most universal expression of the public interest in the United States."[38] The Committee believed that while fair use provided a modicum of help to educators, it was risky and thus "inadequate to meet the public interest as expressed in education's needs."[39] In contrast to the Committee's position, authors and publishers vigorously opposed the proposed exemption for educators. They sought to retain a case-by-case determination of fair use. Others suggested a compulsory-licensing scheme for educational institutions. Under this scheme, educators would compensate copyright owners according to a schedule established by the Copyright Royalty Tribunal. Congress rejected this alternative as extreme because it believed that compulsory licensing might "destroy fair use altogether."[40]

Congress concluded that a complete exemption for educational use was unnecessary, but realized that the uncertainty of a case-by-case approach might detrimently affect education. A House report found that "[t]he [common law] doctrine of fair use, as properly applied, [was] broad enough to permit reasonable educational use . . . ."[41] With this guarantee, Congress was confident that it did not have to change the common law,[42] but still attempted to provide "greater certainty and protection" to educators by modifying the fair-use provision.[43] Congress added the phrase "for purposes such as . . . teaching (including multiple copies for classroom use), scholarship, or research"

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National Education Association of the U.S.
National Educational Television and affiliated stations
National School Board Association
National Science Teachers Association

38. PATRY, *supra* note 30, at 225 (quoting Copyright Law Revision Part 4 at 224-225).

39. *Id.*

40. The full discussion of this issue at the 1975 House Hearings was as follows:

> *Mr. Rosenfield* [counsel for the Ad Hoc Committee]. We do not, for example, think . . . that we ought to have a thousand copies. The Department of Justice went further than [the Ad Hoc Committee]. We do think that if [teachers] have a class of 30, 40, 60, or 100, the class ought to have the copies—thus, it is limited copying.
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> *Congressman Railsback.* Would you feel the same way if copies were available at a reasonable amount and easily accessible?
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> *Mr. Rosenfield.* No; because then you would be destroying fair use altogether. The thrust of your remark, if you would permit me to put it this way goes to whether there is to be fair use at all, or whether you are to have a payment system which overrides everything and forbids any fair use. Our answer to that question is that to the extent that fair use or a limited exemption applies, there should be no payment. Beyond that, payment.

*Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 296-297 (1975), *reprinted in* PATRY *supra* note 29, at 286.

41. H.R. REP. No. 2237, 89th Cong., 2d Sess. 61 (1966).

42. *Id.* at 61 (1966); H.R. REP. No. 1476, *supra* note 3, at 66, *reprinted in* (1976) U.S.C.C.A.N. at 5679.

43. H.R. REP. No. 1476, *supra* note 3, at 67, *reprinted in* 1976 U.S.C.C.A.N. at 5680.

to assure educators "that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for members of a class."[44] Congress also amended section 107 to include a standard concerning whether the use was for commercial or non-profit educational purposes. A non-profit educational use carries a presumption of fair use.[45]

In addition, section 504(c)(2) was amended "to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement."[46] These modifications of the Act provide strong protection for educators. Still, without an explicit exemption, educators must balance the relevant factors on a case-by-case basis.

## III. The Guidelines for Classroom Copying in Not-for-Profit Educational Institutions

To provide educators with increased certainty, Representative Kastenmeier, Chairman of the House Judiciary Subcommittee responsible for the copyright bill, insisted that educators, authors and publishers arrive at a compromise "as to permissible educational uses of copyright material."[47] In June of 1975, negotiations began among the Ad Hoc Committee, the Authors League of America and the Association of American Publishers. Nine months later, these groups produced the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals" (Guidelines).[48]

The Guidelines[49] are an agreement between private parties and are intended as only a "reasonable interpretation of the *minimum* standards of fair use."[50] They expressly provide that their purpose "is to state the minimum and not the maximum standards of fair use under section 107."[51] Thus, the Guidelines create a "'safe harbor,' assuring

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44. *Id.* at 66, *reprinted in* 1976 U.S.C.C.A.N. at 5679.

45. *See, e.g.*, Justine Stevens opinion in Sony v. Universal Studios:

> A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. . . . . What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed, but if it is for a noncommercial purpose, the likelihood must be demonstrated.

(emphasis added) 464 U.S. 417, 451, 104 S. Ct. 774, 793 (1984).

46. H.R. Rep. No. 1476, *supra* note 3, at 72, *reprinted in* 1976 U.S.C.C.A.N. at 5680.

47. *Id.*

48. *Id.* at 68-70, *reprinted in* 1976 U.S.C.C.A.N. at 5681-83.

49. *Id.*

50. *Id.* at 72, *reprinted in* 1976 U.S.C.C.A.N. at 5685.

51. *Id.* at 68, *reprinted in* 1976 U.S.C.C.A.N. at 5681 (first sentence of the Guidelines).

the professor who stays within their scope that he or she will not be liable for infringement."[52]

The American Association of University Professors (AAUP) and the American Association of Law Schools (AALS) objected to the Guidelines. The AAUP and AALS disassociated themselves from the Guidelines' promulgation because they feared the Guidelines would be misread to express the limits of fair use.[53] These fears were justified. Publishers have promoted the Guidelines as the limit of fair use and universities fearful of lawsuits by vigilant publishers have adopted the Guidelines as the maximum fair use. Under this interpretation of the Guidelines, professors' rights to use photocopied material are unduly limited, as any additional copying of copyrighted work requires the author's permission.[54] Since the Guidelines lead to this result, they conflict with Congress' intent in codifying fair use in section 107.

The publishers' interpretation of the Guidelines should not restrict an intentionally flexible doctrine. Congress, in section 107, "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[55] Courts, therefore, must interpret the limits of fair use, not by using the Guidelines, but by analyzing the relevant case law.

## IV. THE CASE LAW

The paucity of case law increases the uncertainty professors face in photocopying copyrighted material. The Act provides exculpatory protection only to educators who reasonably believe that their use is fair. Educators who wish to establish this reasonable belief must be informed of the factors which the courts consider in fair-use analysis.

### A. *Pre-Act Fair Use*

In 1914, the first educational fair-use case was decided. In *Macmillan v. King*,[56] the court rejected a professor's claim of fair use. The professor outlined a copyrighted economics textbook and loaned the outlines to students. The district court held that the outlines could replace the original textbook and consequently reduce the market for the book. This "limited publication" constituted an infringement of the copy-

52. CHRON. HIGHER EDUC., Nov. 15, 1976 (quoting letter by the American Association of Law Schools, the American Association of University Professors, and the American Council of Education).

53. PATRY, *supra* note 30, at 315.

54. *See generally* Jay Dratler, *To Copy or Not to Copy: The Educator's Dilemma*, 19 J.L. & EDUC. 1, 7 n.116 (1990) (discussing the potential costs to education involved in obtaining permission). *See also* Eric D. Brandfonbrener, Note, *Fair Use and University Photocopying: Addison-Wesley Publishing v. New York University*, 19 J. L. REFORM 669 (1986) (analysis of the effect of the Guidelines on university policies).

55. H.R. REP. NO. 2237, *supra* note 41, at 61.

56. 223 F. 862 (D. Mass. 1914).

right.[57] The *MacMillan* decision emphasized what became the fourth factor of section 107—the effect on the potential market for the copyrighted material.[58]

Fifty years after *MacMillan*, the Eighth Circuit decided *Wihtol v. Crow*.[59] The defendant, a music professor, created a new arrangement of a copyrighted hymn. He reproduced forty-eight copies of the hymn for performances at school and church. He later tried to sell the new arrangement to the plaintiff's publisher. The court held that the defendant's use violated fair use. According to the court, the plaintiff had the exclusive right to reproduce the copyrighted hymn and the defendant's unintentional violation did not make the infringement a fair use.[60] Since the copyright owner earned approximately $25,000 annually in royalties and licenses, the professor's use had the potential to affect the plaintiff's market.[61]

Ten years later, *Williams & Wilkins Co. v. United States*[62] became the first case to discuss whether photocopying of entire works constitutes a fair use. The plaintiff, a publisher of thirty-seven medical journals, sued the National Institute of Health and the National Library of Medicine for copyright infringement. The organizations provided free photocopies of journal articles upon the request of researchers. This practice resulted in the photocopying and distribution of approximately 120,000 articles a year.[63] The court held that this was a fair use based on public policy; if libraries stopped photocopying the articles, it would harm medical science.[64]

Judge Davis, writing for the majority,[65] observed that the defendants' use resembled a judge's photocopying a law-review article for a col-

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57. *Id.*

58. *Id.* at 867-68. *See generally* Harper & Row Publishers v. Nation Enter., 471 U.S. 539, 566-69, 105 S. Ct. 2218, 2233-35 (1985) (effect on the potential market of the copyrighted work is "the single most important element of fair use."). When the intended market for a copyrighted work is the educational community, copying by educators harms the author and education. If professors could photocopy copyrighted materials, authors might stop writing and publishers might not publish because potential profits are lost.

59. 309 F.2d 777 (8th Cir. 1962).

60. *Id.* at 780.

61. *Id.* at 778.

62. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376, 95 S. Ct. 1344 (1975). For a detailed discussion of the case, *see* Harvey S. Perlam & Laurens H. Rhinelander, *Williams & Wilkins Co. v. United States: Photocopying, Copyright, and the Judicial Process*, 1975 SUP. CT. REV. 355 (1976).

63. *Williams & Wilkins Co.*, 487 F.2d at 1349.

64. *Id.* at 1345. Plaintiff was not requesting an injunction and did not seek to stop this process, but did seek royalties or licensing fees. The court found that since no harm was proven and a "viable licensing system" was absent, legislation was the only means of creating such a system. *Id.* at 1360.

65. The precedential value of *Williams & Wilkins Co.* is limited because the Supreme Court affirmed by a split decision (4-4). Of the sixteen judges who heard the case at

league. The court stated that it was unrealistic to expect scientists to subscribe to journals that only occasionally addressed the scientists' research. Additionally, since the plaintiff did not offer any proof that the articles would have been purchased if photocopying was prohibited, the plaintiff failed to prove substantial harm. The court said that "medical and scientific personnel would simply do without, and have to do without, many of the articles they now desire, need, and use in their work," or they "might expend extra time in note taking or waiting their turn for the library's copies of the original issues."[66]

*Williams & Wilkins Co.* examines issues applicable to the educational setting. The first issue is the *cost* of obtaining copyrighted material. Professors restricted from freely using copyrighted material will do without material that is too difficult or expensive to obtain. While not all authors write merely for compensation, the financial reward does motivate some and the fact that some would not write must be weighed against the threatened educational interest. Additionally, publishers expect compensation for their services. But, the educational interest must be balanced against the expectations of publishers. The public interest would suffer if publishers refused to publish material susceptible to a fair use claim.[67]

*Williams & Wilkins Co.* also addresses the *time* required to obtain permission to use copyrighted material. Time is a critical factor in the educational setting.[68] In *Williams & Wilkins Co.*, researchers could have obtained the information by note-taking or waiting for copies of the articles to become available. Instead, photocopying saved time. Similarly, rather than a professor providing photocopies, students could wait for an article to become available in the library. A professor's distribution of photocopies at no charge saves time.

Practitioners and educators should analyze the *Williams & Wilkins Co.* decision in terms of the section 107 factors. The purpose and

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the various levels, the division is even; eight found fair use and eight did not.

In addition, section 108 of the 1976 Act has preempted the question at issue in the case. Similarly, infringement by the government is now limited by 28 U.S.C. § 1498(b).

66. *Williams & Wilkins Co.*, 487 F.2d at 1357.

67. The educational interest must be offset against even those who appear to publish without economic incentive. Universities publish journals and treatises to promote the progress of knowledge and to enhance the reputation of the institution. However, even in this situation, publishers have some economic or commercial motive.

68. *Id.* at 1358 ("If photocopying were forbidden, the researchers, instead of subscribing to more journals or trying to obtain or buy back-issues or reprints (usually unavailable), might expend extra time in note-taking or waiting their turn for the library's copies of the original issues—or they might very well cut down their reading and do without much of the information they now get . . . . In the absence of photocopying, the financial, time-wasting, and other difficulties of obtaining the material could well lead . . . to a simple but drastic reduction in the use of many articles (now sought and read) which are not absolutely crucial to the individual's work but are merely stimulating or helpful. The probable effect on scientific progress goes without saying . . . .").

character of the use was noncommercial because the photocopies were free.[69] The use was also productive because it benefitted the advancement of science. The nature of the copyrighted work was factual, scientific material. These facts favored the defendant.[70] The effect fair use would have on the potential value of the copyrighted work was questionable, but the court found no substantial harm. After balancing the factors, the court concluded that the copying of entire works was a fair use.[71]

In *Encyclopedia Britannica Educational Corp. v. Crooks*,[72] the plaintiff was a producer and licensor of movies and television programs. Educational institutions constituted the primary market for the plaintiff's works. The defendant was a nonprofit corporation created under the state educational code. The corporation provided videotaped educational-television programs to public schools. The defendant copied, librariied and distributed entire works. In analyzing whether defendant's activity fell within fair use, the court focused on the plaintiff's primary market for the copyrighted work and found that the copying had a significant effect on this market. The court granted an injunction prohibiting the defendant from copying without obtaining a license.[73]

### B. *Post-Act Fair Use*

*Basic Books, Inc. v. Gnomon Corp.*[74] and *Harper & Row Publishers v. Tyco Copy Service*[75] were the first photocopying cases decided after Congress passed the Act. Both cases involved infringement suits by publishers against commercial copy centers. The copy centers had numerous outlets located near universities. In both cases, the court enjoined the copy centers from photocopying or distributing copyrighted material unless 1) the copy center obtained permission from the copyright owner, 2) the requestor provided permission, or 3) the requestor was a faculty member of a nonprofit educational institution who certified on an agreed to form that the copies were being made in full compliance with the 1976 House report guidelines on classroom copying.[76] Publishers immediately argued that the Guidelines stated the limit of fair use. As a result of the decision, the publishers intimidated two private companies to accept the Guidelines as the maximum allowable photocopying without permission.

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69. *Id.* at 1354.

70. *Id.*

71. *Id.* at 1353 ("There is, in short, no inflexible rule excluding an entire copyrighted work from the area of 'fair use.' Instead, the extent of the copying is one important factor, but only one, to be taken into account, along with several others.").

72. 447 F. Supp. 243 (W.D.N.Y. 1978).

73. *Id.* at 253.

74. Copyright L. Dec. (CCH) ¶ 25,145 (D. Conn. 1980).

75. Copyright L. Dec. (CCH) ¶ 25,230 (D. Conn. 1981).

76. *Id.*

In 1983, an influential case involving university photocopying policies was settled. In *Addison-Wesley Publishing Co. v. New York University*,[77] nine publishing companies sued New York University (NYU), nine NYU faculty members and Unique Copy Center. The publishing companies claimed that the defendants unlawfully selected, reproduced, anthologized, distributed and sold copyrighted works without the permission of the copyright owners. Since the parties agreed to a settlement, a court never addressed the fair-use issue. The dismissal of the publishers' claims was conditioned on the institution of a copyright policy at NYU. The policy NYU adopted was similar to the Guidelines, yet more restrictive. It used the Guidelines as the maximum limit of fair use. Under the policy, if a professor finds that the indended use of copyrighted material is not within the Guidelines, the professor or copier must obtain permission from the copyright owner. If the copyright owner does not authorize the use or if the professor determines that the authorization is inappropriate, the educator may request that NYU's general counsel determine whether the use is fair. If the professor does not comply with these procedures, she may be held individually liable for the infringement. NYU indemnifies professors who comply with the policy.[78]

As a practical matter, policies similar to NYU's have a chilling effect on educators. Publishers wish to persuade university administrations and commercial copy centers to adopt policies more restrictive than fair-use doctrine and take the determination of fair use out of the courts. Publishers have succeeded, as the policies of the NYU settlement have made their way into many universities.[79] The practical effect has been to turn the Guidelines into the maximum limit of fair use, rather than the minimum limit, as intended.

### C. *The Guidelines*

The first reported case involving the Guidelines was *Marcus v. Rowley*.[80] The plaintiff was a professor and the author of a copyrighted cake-decorating textbook. The defendant was a former student who purchased the book while attending the class. Subsequent to taking the plaintiff's class, the defendant created a similar book which she

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77. Copyright L. Dec. (CCH) ¶ 25,544 (S.D.N.Y. 1983). The settlement between the publishers, university, and faculty members was signed on April 7, 1983. The settlement between the publishers and Unique was filed May 31, 1983.

78. *Id. See also*, David Izakowitz, *Fair Use of the Guidelines for Classroom Copying: An Examination of the Addison-Wesley Settlement*, 11 RUTGERS COMPUTER & TECH. L.J. 111 (1985); Dale P. Plson, *Copyright and Fair Use: Implications of Nation Enterprises for Higher Education*, 12 J.C. & U.L. 484, 518-21 (1986); Eric D. Brandfonbrener, Note, *Fair Use and University Photocopying: Addison-Wesley Publishing v. New York University*, 19 U. MICH. J.L. REFORM 669 (1986).

79. This result is disturbing.

80. 695 F.2d 1171 (9th Cir. 1983).

distributed at no charge to a class she taught. The defendant's revision copied eleven of the plaintiff's twenty-nine pages, but failed to include any notice that part of the work was written by the plaintiff. The district court concluded that the defendant's use of entire pages from the plaintiff's book did not constitute an unlawful infringement.[81]

The court of appeals reversed, finding that the use of plaintiff's work was an infringement. The use of the work for educational purposes and the lack of commercial motive did not alter the court's evaluation of the use.[82] The court found that defendant's use of the work for the same purpose as the plaintiff was "strong indicia of no fair use."[83] The court, quoting the legislative history of the Act, concluded: "Textbooks and other material prepared primarily for the school market would be less susceptible to reproduction for classroom use than material prepared for general public distribution."[84] The court also found that the defendant acted in bad faith by copying the works verbatim and by not crediting the plaintiff. Thus. the copying was substantial, both quantitatively and qualitatively.[85]

In considering the Guidelines, the court stated that "while they are not controlling on the court, they are instructive on the issue of fair use in the context of this case."[86] It considered the three tests of the Guidelines: brevity, spontaneity and cumulative effect. The defendant passed only the cumulative-effect test. The court emphasized the defendant's failure to provide on the copies notice of the plaintiff's copyright.[87] The court considered the Guidelines as a fifth factor, supplementing the four factors listed in section 107.

The problem with this view is that it may assume that if one is not within the Guidelines, there is a presumption which weighs against the defendant. Since the Guidelines state the minimum of fair use, they should not weigh against the defendant. The Guidelines should be viewed as a safe harbor: if a teacher is within the Guidelines, it is a fair use; if a teacher is outside of the guidelines, the court must look to the Section 107 factors.[88]

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81. *Id.* at 1172.

82. *Id.* at 1179.

83. *Id.* at 1175.

84. *Id.*

85. *Id.* at 1179. *See also* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 564-65, 105 S. Ct. 2218, 2232 (1984) (not only is the quantitative amount of the portion used relevant, but also the qualitative amount used even if an insubstantial portion is used, if it is the "heart of the work," this factor will weigh against the defendant).

86. *Marcus*, 695 F.2d at 1178.

87. *Id.*

88. For analysis of those factors, *see, e.g.*, Association of American Medical Colleges v. Mikaelian, 571 F. Supp. 144 (E.D. Pa. 1983) which involved a test preparation course for the Medical College Admissions Test (MCAT). The defendants copied previous MCAT test questions for use in the course. The court determined that the course was a profit making business and not a nonprofit educational use. The assertion of teaching

D. *The Kinko's Decision*

The most recent case to deal with educational photocopying was *Basic Books, Inc. v. Kinko's Graphic Corp.*[89] The plaintiffs, eight publishing companies, brought suit against Kinko's, a nationwide commercial-photocopying center, alleging infringement of the Act and violation of the Guidelines. The plaintiffs claimed that Kinko's copied excerpts from numerous copyrighted books, without permission or the payment of required fees, for a profit-making purpose. Kinko's admitted to copying excerpts from these books without permission. After obtaining requests from university professors for specific material needed in courses, Kinko's photocopied this material, compiled the material into course packets or anthologies and sold these photocopied packets directly to students. Kinko's argued that although it was a commercial enterprise, the purpose of the material was educational and, since it was providing an educational service, this photocopying constituted fair use.[90]

The court analyzed the four fair-use factors of section 107 and the alleged violation of the Guidelines. The court found that the purpose and character of the use weighed against the defendant. Although the use of the photocopied works in the hands of the students was educational, Kinko's use was commercial. Kinko's argued that it was performing a necessary service for education, but the court looked beyond the claim of "altruistic motives" and found that Kinko's enjoyed substantial profits from this service.[91] The court also found the use unproductive because Kinko's added neither improvements nor analysis to the works. The court noted that the only creative effort associated with the anthologies was the selection of the articles which was performed not by Kinko's, but by professors.[92]

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and free dissemination of the copies did not disguise the fact that the nature of the use was commercial. The court also found that the nature of the copyrighted work deserved protection because the tests were used to determine who would be admitted to medical school. Since 90% of the work was copied, the third factor weighed against the defendant. The court determined that the defendant's continued use of the work would render the plaintiff's tests worthless.

The essential factor was the commercial use of the work. The work was the means by which the course made its money. The court thereby granted a preliminary injunction.

89. 758 F. Supp. 1522 (S.D.N.Y. 1991).

90. Kinko's claimed three additional defenses: 1) that the plaintiffs misused their copyrights by trying to create an industry standard beyond the Act; 2) that plaintiffs were estopped from suit due to their knowledge of Kinko's practices for over twenty years; and 3) failure to record two copyrights prior to filing of the complaint. *Id.* at 1526.

91. 758 F. Supp. at 1530-31. In 1988, the net profits were $200,000; in 1989, the net profits totalled $3 million. *Id.* at 1529. *See Nation Enters.*, 471 U.S. at 562, 105 S. Ct. at 2231 ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price.")

92. In dicta, the court stated that a professor's anthologizing may be a nonprofit, *productive* use. 758 F. Supp. at 1531.