



THE LAW FORUM

University of Baltimore School of Law

Departments

Letter From The Editor-In-Chief	1
---------------------------------------	---

Articles

Discipline of Disabled Students By Patrick P. Spicer, Esquire	3
A Faculty Guide to Photocopying for Classroom Use By Robert J. Kasunic, Esquire	10

Commentary

Chiropractor as an Expert Witness By Mark A. Shulman, M.A., D.C.	21
--	----

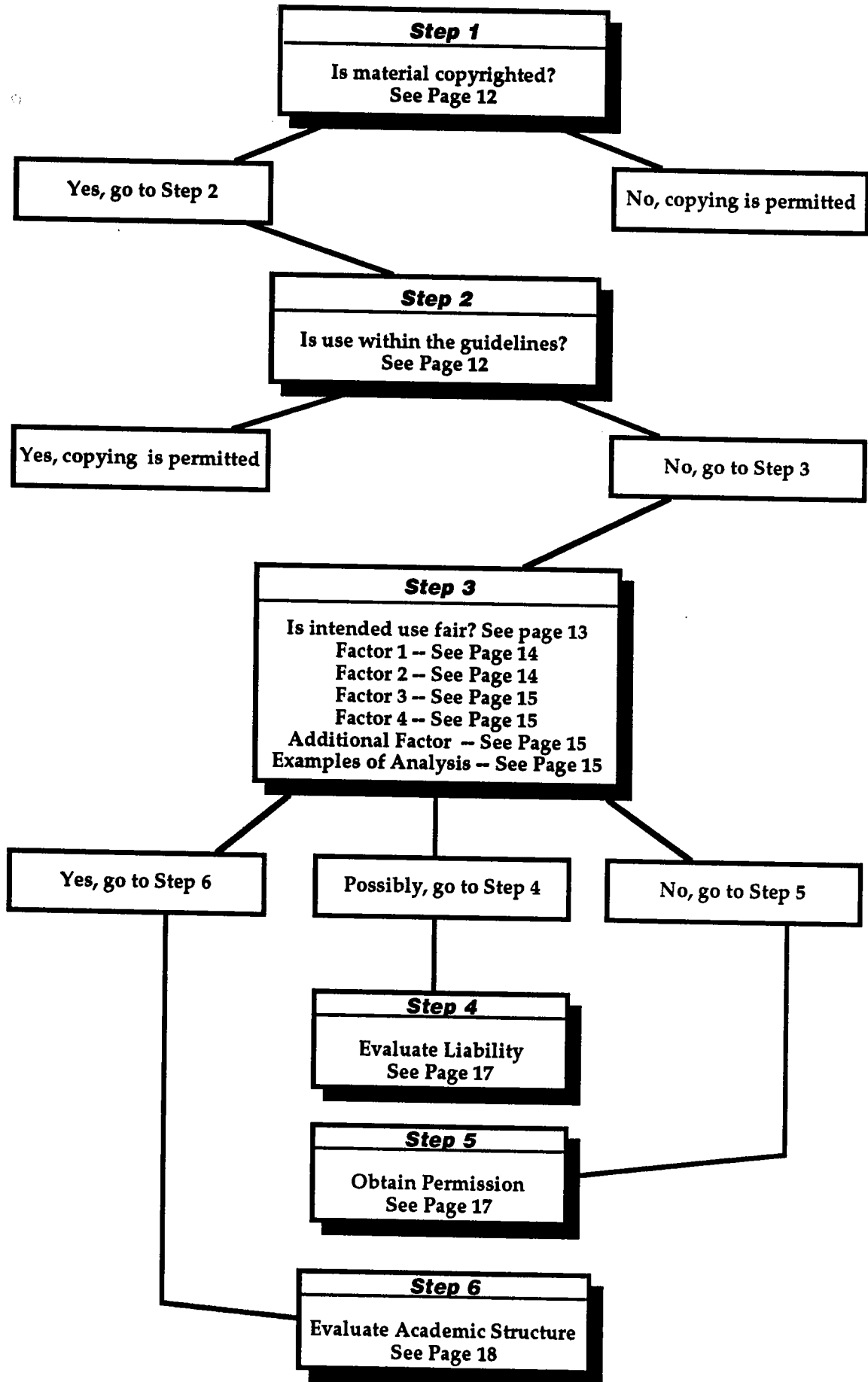
Recent Developments

<i>Reed v. Campagnolo</i>	22
<i>Acuna v. Maryland</i>	24
<i>Godinez v. Moran</i>	26
<i>State v. Thompson</i>	28
<i>St. Mary's Honor Center v. Hicks</i>	30
<i>State v. Sheldon</i>	32
<i>United States v. Hill</i>	34
<i>Minnesota v. Dickerson</i>	36
<i>United States v. Joseph</i>	38
<i>Garay v. Overholtzer</i>	40
<i>Campbell v. Allstate</i>	42
<i>Zobrest v. Catalina Foothills</i>	44

Legislation

Recent / Pending Legislation	46
------------------------------------	----

Figure 1



A FACULTY GUIDE TO PHOTOCOPYING FOR CLASSROOM USE

Robert J. Kasunic, Esquire

INTRODUCTION

The issue of photocopying for classroom purposes has become a significant concern for faculty members of many schools and universities. Educators should be aware of the rules governing photocopying. In particular, they should know when it may be done without the consent of the copyright owner, how exposure to liability may be reduced, when and how permission to photocopy should be obtained, and under what circumstances a university will indemnify an educator against claims of copyright infringement arising out of photocopying for classroom use.

Educators need to have clear answers to all of these questions. The present state of copyright law, however, demands more than answers. It requires that the decision of whether to photocopy copyrighted material for classroom use be based on a teacher's informed understanding of the subtlety and complexity of the copyright law and the doctrine of fair use. Many educators believe that knowledge of copyright law is unnecessary in order to carry out their roles as teachers. Yet, there are many practical reasons why faculty members should become informed on the law of copyright, such as damages for infringement, restrictive university photocopying policies, and restrictive policies by commercial copy centers.

The Copyright Act of 1976¹ specifies the exclusive rights of copyright owners and permits actual or statutory monetary damages when copyrights are infringed. Actual damages are awarded when the copyright owner proves the direct results of the infringement. This often includes profits realized by the infringing party. Statutory damages of up to \$100,000 may be imposed if the copyright owner proves that the infringement was committed willfully. Statutory damages, however, are precluded if the court determines that an employee or agent of a nonprofit educational institution had reasonable grounds for believing that a particular use was fair.²

Educators may underestimate the likelihood of getting sued for copyright infringement. While the likelihood of suit may not be great, most university administrations have adopted copyright policies to limit potential liability for infringement. These university policies are often more restrictive than the Copyright Act itself.

Moreover, most commercial copy centers have adopted

restrictive photocopying policies in accordance with copyright law and a recent decision in the United States District Court for the Southern District of New York.³ As a result of this decision, a teacher can no longer walk into most commercial copy centers and ask to have copyrighted material photocopied without first obtaining permission from the copyright owner or paying for the copy center to obtain permission.

The purpose of this article is to provide educators with a practical step-by-step guide to copyright law as it relates to educational photocopying. It will present a logical analysis that educators should follow when faced with the necessity or desire to photocopy material for students. Figure 1 presents a flow chart of the sequence of the steps followed in this guide.

Step One. First, determine whether a copyright exists for a given work. This requires a brief analysis of the material to determine copyright duration and whether the material has notice of a copyright.

Step Two. If a copyright exists, then review the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with respect to Books and Periodicals" ("Guidelines").⁴ The Guidelines represent the minimum standard of the fair use doctrine and, therefore, it is permissible to photocopy copyrighted material within these guidelines.

Step Three. If the teacher wants to photocopy material outside the limits of the Guidelines, a third step in the analysis is necessary. The educator should examine the intended use of the material in relation to the purpose of the copyright law and the doctrine of fair use. An understanding of the doctrine and its four codified factors is essential for determining whether a particular use is fair.

Step Four. Once an educator understands the fair use doctrine, he must then examine the Copyright Act's damage and excuse provisions to determine the risk of suit for copyright infringement. This fourth step outlines a teacher's options if he is uncertain whether fair use is applicable.

Step Five. The fifth step examines what to do if fair use does not apply and explains how to obtain permission to photocopy material.

Step Six. The final step in the analysis considers the academic structure and the process of photocopying and distributing material to students. The teacher must consider the academic environment, including whether the teachers, the school, or an outside service photocopies and/or distributes materials for classroom use.

At first glance, the scope of this paper seems broader than necessary. Nevertheless, photocopying copyrighted material beyond the boundaries of the narrow Guidelines requires either permission or a claim of fair use. Therefore, since permission is usually difficult and time-consuming to obtain, a sufficient understanding of fair use in copyright law is an essential tool for an educator. Providing material to students and updating that material is an important aspect of teaching, and if the right of fair use is not understood and used by educators, it will be lost.

STEP ONE: IS THE MATERIAL COPYRIGHTED?

Notices. The most obvious sign that a work is copyrighted is the presence of either "Copyright," "Copr.," or "(c)" in addition to the name of the author or copyright owner and the year in which the work was first published. This copyright notice is usually located in the front pages of a book or periodical, but the notice may appear in any location which is reasonably conspicuous. For compilations, such as periodicals or anthologies, the volume, not each article, requires a copyright notice. Some journals permit photocopying for certain purposes which are usually explained near the copyright notice.

Published works which were never copyrighted. Generally, works published before January 1, 1978 without copyright notice are not protected by copyright law because they have entered the "public domain." These publications may be copied without restriction. If the copier is informed by the owner that the material is copyrighted and there is no notice due to an omission, the copyright owner has the right to remedy this defect by informing the copier of the existence of a copyright. No liability attaches until the copier receives notice from the copyright owner.

Published works whose copyrights have expired. Copyrights on materials in effect prior to 1916 have expired because the maximum protection available prior to January 1, 1978 is seventy-five years. Some material copyrighted after 1917 was initially covered for twenty-eight years and renewable upon request. Before copying such materials,

either assume that they are still protected or contact the publisher, author, or U.S. Copyright Office in Washington, D.C. and inquire as to whether the copyright was renewed for an additional twenty-eight years. If fifty-six years had gone by before September 9, 1962, the material is in the public domain and may be copied.⁵

Government Publications. Material prepared by the United States Government or by an employee of the Government within the scope of his official duties may be copied freely. The U.S. Government may, however, receive and hold copyrights transferred to it by an assignment or bequest. These transfers of copyright are indicated by notice.

Material prepared by state governments may also be copied, but it is important to first determine whether the state government is the actual publisher. In some states, private companies publish the codes and case reporters, thus acquiring copyrightable elements, such as headnotes or the selection and arrangement of the material.

Copyrighted Works. To be cautious, all other publications should be assumed to be copyrighted. In addition, on March 1, 1989, the United States became a member of the Berne Convention, and by doing so removed the requirement of copyright notice. All materials written on or after March 1, 1989 are copyrighted with or without notice unless the copyright is expressly waived.

Unpublished Works. Unpublished works are given special protection by the courts under section 107 of the

Copyright Act of 1976, which was recently amended. Unpublished works are not distributed to the public by sale or other transfer of ownership, rental, lease, or lending. Although unpublished works are protected from the moment of their creation, the amended section 107 includes the necessity of a fair use analysis in the copying of unpublished as well as published works. Therefore, before photocopying unpublished works, teachers must either obtain permission or perform a fair use analysis. Based on the case law preceding the amendment of section 107, a teacher should be cautious in photocopying unpublished works because it

is difficult to ascertain its potential market, and this is a critical factor in a fair use analysis.

STEP TWO: IS USE WITHIN THE GUIDELINES?

If a work is copyrighted or presumed to be copyrighted, the next step for a teacher is to determine whether it is within the boundaries of the Guidelines. The Guidelines were promulgated as an unofficial compromise between publishers and educational associations. The Guidelines are not the law and do not set any limits on the teacher's right to copy under fair use. They are, in fact, a "reasonable interpretation of the minimum standards of fair use."⁶ As such, they

*The most
obvious sign
that a work is
copyrighted
is the presence
of either
'Copyright,'
'Copr.,' or '(c)'. . .*

represent a safe harbor for educators who stay within their scope. Therefore, it is worth determining whether an intended use of a copyrighted work is within the boundaries of the Guidelines before embarking upon a more complex fair use analysis.

Photocopying which is permitted under the Guidelines in not-for-profit educational institutions.

1. Single copies for teachers. Any of the following may be copied for scholarly research or for classroom purposes, and the property becomes the property of the user:

- a. a chapter from a book,
- b. an article from a periodical or newspaper,
- c. a short story, short essay, or short poem whether or not from a collective work, and
- d. a chart, graph, diagram, drawing, cartoon or picture from a book, periodical or newspaper.

2. Multiple copies for classroom use. A teacher may make multiple copies for a one-time distribution in a class to students when:

- a. no more than one copy for each student is made,
- b. a notice of copyright is written on the first sheet, or a copy of the page on which the copyright appears is attached,
- c. copied material amounts to only a small proportion of the original work,
- d. selections of poetry, prose or illustrations are sparing (poems of no more than 250 words, prose if the complete article is less than 2500 words, or an excerpt not to exceed 1000 words or 10% of the work, whichever is less),
- e. the copying is at the instance and inspiration of the individual teacher,
- f. the decision to use the work and its use are so close in time that it would be unreasonable to expect a timely reply to a request for permission,
- g. the copying is for only one course in the school,
- h. there is no more than one poem, article or essay or two excerpts are copied from the same author, and no more than three excerpts from the same collective work or periodical volume during one class term,
- i. there are no more than nine instances of such multiple copying for one course during one term, and
- j. the same material is not repeatedly copied.

While it is useful to determine whether material intended for use is within the Guidelines, the quantity and frequency limitations are seldom met. For instance, the requirement that the same material may not be repeatedly copied means that use within the Guidelines for one semester may be outside the Guidelines if the teacher chooses to use the same material the following semester. If the material intended for use is beyond the scope of the Guidelines' safe harbor, then the teacher must go to the next step in the analysis.

STEP THREE: IS USE FAIR?

Many works which faculty members want to photocopy for classroom use are copyrighted. Most required uses of photocopied material will not meet the tests of brevity, spontaneity, and cumulative effect of the Guidelines. The teacher is then faced with four options:

1. to not use the copyrighted material,
2. to require the students to purchase the entire work,
3. to obtain permission to photocopy the material, or
4. to determine whether the use is within the *maximum* limits of fair use.

The first option is unacceptable if a teacher considers material to be relevant and important for his students. The purpose of the copyright law is to promote the dissemination of creative works to the public, not to deter this dissemination.⁷ The primary goal of copyright law is to promote progress and the public interest. Education is the "paramount public interest" and the most important means of promoting progress.⁸ The legislative history of the Copyright Act clearly supports this interest in education.

The second option is unreasonable if only a portion of a work is to be used. Students cannot afford to purchase libraries of works in order to utilize parts of each work. The unreasonableness of such a proposition seems to be a major consideration in the creation and codification of the fair use doctrine.

The third option is a valid consideration; permission may, in many cases, be the best alternative. This option, however, should be utilized only after the fourth option, a fair use analysis, has proved unhelpful. If the doctrine of fair use applies to the situation in question, permission is unnecessary. Fair use is a limitation on the exclusive rights of copyright owners. It protects the primary goal of copyright law which is the promotion of progress and public interest.

A more practical reason for undertaking a fair use analysis before seeking permission is that a request for permission is a time-consuming process. If permission is denied or the process is overly burdensome, then the teacher will have spent considerable time and effort without obtaining the anticipated result. This consumption of time could have been avoided had the teacher made an independent analysis first. Therefore, the next appropriate step for a teacher to make is an analysis of fair use.

Fair use is a means of balancing the interests of the public with those of the author. The limited monopoly of copyright was viewed by Congress as the best incentive for the production and dissemination of creative work to the public. However, rewarding the copyright owner is a secondary consideration.⁹ "The primary objective of copyright is not to reward the labor of authors but [t]o promote the Progress of Science and the useful Arts."¹⁰

The courts accomplished a compromise between society's interest in the use of a copyrighted work and the interest of

the author by means of the common law doctrine of fair use. This doctrine allowed a copyrighted work to be used in a manner which served the public interest without the necessity of obtaining the owner's consent.

Congress codified the judge-made law of fair use in section 107 of the Copyright Act of 1976. It provides:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (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 or value of the copyrighted work (emphasis added).¹¹

Section 107 specifically identifies teaching, including multiple copies for classroom use, as a potential fair use. In order to determine whether any particular use is fair, the four mandatory factors must be considered. Fair use is determined by a step-by-step evaluation of these factors by the educator. After each factor is considered, the final decision of fair use should be based on the reasonable and informed judgment of the teacher.

Factor One -- The purpose and character of the use.

This first factor in the fair use analysis is paramount because it leads to presumptions. If the use of a copyrighted work is for commercial purposes, then it is presumptively an unfair use. On the other hand, if the use is for nonprofit educational purposes, the use is presumed to be fair. These presumptions may, however, be altered by the other factors.

The mere assertion of nonprofit educational status is insufficient. The teacher and the institution he works for must have no direct or indirect profit motive. At most accredited schools and universities, the nonprofit educational purpose will be legitimate.

Another consideration is that any charge for photocopied material must reflect only the actual cost of photocopying. The use may be categorized as commercial if additional charges above the actual cost of photocopying are levied. Additional charges could be viewed as an encroachment on the traditional role of publishers and retailers.

In addition to the commercial/nonprofit distinction, courts will consider a productive/nonproductive analysis. To strengthen a presumption of fair use, it is helpful to make a productive use of the photocopied work. The addition of original commentary or questions by an educator may persuade a court to consider a use productive. The court in *Basic Books, Inc. v. Kinko's Graphics Corp.* noted that a professor's selection of articles for anthologies may be enough to constitute a productive use.¹²

Factor Two -- The nature of the copyrighted work.

This factor focuses on the type of copyrighted material copied rather than on the intended use. The use or copying of factual, functional or nonfictional works is more likely to be viewed as fair use than is the use of fictional works. The reason is that facts contained in these types of works are considered to be important to the public. A monopoly of factual information is not the purpose of the copyright law. Copyright law is a means of encouraging original expression

