

V.F. PHOTOCOPYING FOR EDUCATIONAL USE

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The enactment of a federal Copyright Act (hereinafter, “the Act”), effective January 1, 1978, has produced much misunderstanding among teachers regarding the permissible amount of photocopying for educational purposes.

Only copyrighted works are protected by the Act. This elemental point is often overlooked. Court opinions, legislative hearings and other government documents are not copyrighted, and may be freely photocopied. The same is true of works for which the copyright has expired, and of works which prior to January 1978 were sold or disseminated without proper notice of copyright.

There is a danger, however, of acting unlawfully when one photocopies without permission works which are covered by the Act. The Act applies to all “original works of authorship” in written (or other tangible) form, from the moment the work is created, whether it was created before or after January 1, 1978 and whether or not it has been published.

But even copyrighted materials may be photocopied without permission from, or payment to, the copyright owner, if it is a “fair use,” a doctrine recognized by American courts for nearly a century and a half whose principal purpose is to protect the public interest in the dissemination of knowledge. This doctrine is endorsed in the text of the Act, which explicitly refers to the allowable reproduction of copyrighted works for purposes such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”

Congress appreciated the impossibility of announcing in a statute an exact quantitative measure that would distinguish copying which is a fair use from copying which is an infringement. Rather, the Act provides factors to be considered:

- The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

The making of a single copy of copyrighted material for a teacher’s personal use in teaching, scholarship or research will almost always be a fair use. More difficult questions arise when multiple copies are made for distribution to students. Certainly, the risk of infringement increases in proportion to the amount of copyrighted material that is photocopied and the extent that the photocopying replaces what would otherwise be a purchase of copies of the work from trade sources by (or for) the students. Thus, the making of multiple photocopies of an entire or of a substantial part of an article will raise serious question as to whether such a use is “fair,” while the reproduction of five pages of an article of 25 or 30 pages will generally be regarded as privileged. A teacher should try to avoid making multiple photocopies of copyrighted material that is not truly important for that teacher’s pedagogical needs.

In any event, students receiving such photocopied material should be charged no more than is necessary to cover the cost of photocopying and processing. During Congressional deliberations on the Act, a group of educational associations and commercial publishers developed a set of guidelines that purport to announce the minimum reach of the fair use doctrine as applied to educational photocopying. The guidelines are set forth below. In the report by the House committee submitting the copyright bill, these guidelines were said to constitute a “reasonable” construction of the fair use doctrine. Several misconceptions about these guidelines have developed and should be dispelled.

Although some have read the guidelines as imposing limits upon educational photocopying, in fact they prohibit nothing. They purport to state only the minimum protection of the fair use doctrine and announce a “safe harbor” within which a teacher is assured of protection against claims of infringement. The guidelines acknowledge that there may be allowable photocopying beyond that which is set forth; they do not purport to state where the fair use privilege ends.

Although some have treated the guidelines as though they have the status of legislation, that is not true either. The text of the Act, strengthened in committee deliberations, explicitly refers to “teaching (including multiple copies for classroom use)” as a classic situation in which the fair use doctrine applies. This is the statutory text Congress had before it when it voted, and it is the statutory text that the courts will construe. The extent to which the privately-developed “guidelines” will preempt other “reasonable” interpretations of fair use is a judicial question.

A teacher should consider the potential consequences of an incorrect decision. If the teacher elects not to photocopy in circumstances constituting fair use, students must find the material in the library or elsewhere. Techniques for increasing student access to limited materials will vary; the question of permissible library photocopying for “reserve” purposes raises issues not addressed here.

If a teacher decides to photocopy for classroom use, the possible legal sanctions for an incorrect decision must be appreciated. Book publishers have declared and demonstrated their intention to sue faculty members, universities, and copy centers for copyright infringement. As a general rule, a copyright infringer is liable for damages, measured by the loss of profits to the copyright owner and any additional profits acquired by the infringer. Since in the academic setting there will not generally be profits to the teacher or school, damages will be measured by the likely loss in sales of the copyrighted work, normally an uncertain figure. For this reason, the Act permits the copyright owner to sue for “statutory damages” in lieu of actual damages, and the court is given discretion to enter an award between \$250 and \$10,000 (which may be increased to \$50,000 for willful violations). If, however, a teacher had reasonable grounds to believe that the photocopying was a fair use, he/she is not liable for statutory damages (although he or she may be liable for actual damages). In all cases, the court may issue an order against the teacher or the educational institution barring future infringements.

Without regard to legal implications, a teacher should be sensitive to the dictates of good practice and courtesy in the use of copyrighted material. Authors and copyright owners appreciate notification that uses are being made of their work. It is common for the copyright owner to permit substantial photocopying for educational purposes, provided that the author and copyright owner are identified and proper copyright notice is affixed.

Questions regarding the application of the Copyright Act in specific situations should be addressed to the Office of the General Counsel.

Guidelines

1. Single Copying for Teachers. A single copy may be made of any of the following by or for a teacher at his/her individual request for his/her scholarly research or use in teaching or preparation to teach a class:
 - 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;
 - d. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.
2. Multiple Copies for Classroom Use. Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion provided that:
 - a. The copying meets the tests of brevity and spontaneity as defined below; and
 - b. Meets the cumulative effect test as defined below; and
 - c. Each copy includes a notice of copyright.
- b. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- c. There shall not be more than nine instances of such multiple copying for one course during one class term. [The limitations stated in "b" and "c" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]
3. Prohibitions as to the above. Notwithstanding any of the above, the following shall be prohibited:
 - a. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts there from are accumulated or are reproduced and used separately
 - b. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
 - c. Copying shall not:
 1. substitute for the purpose of books, publisher's reprints or periodicals;
 2. be directed by higher authority;
 3. be repeated with respect to the same item by the same teacher from term to term.
 - d. No charge shall be made to the student beyond the actual cost of the photocopying.

Definitions

Brevity

- a. Poetry: (1) A complete poem if less than 250 words and if printed on not more than two pages, or (2) from a longer poem, an excerpt of not more than 250 words.
- b. Prose: (1) Either a complete article, story or essay of less than 2,500 words, or (2) an excerpt from any prose work of not more than 1,000 words or ten percent of the work, whichever is less, but in any event a minimum of 500 words.
- c. Each of the numerical limits stated in "a" and "b" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.
- d. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- e. "Special" works: Certain works in poetry, prose or in "poetic prose" that often combine language with illustrations and are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "b" above notwithstanding, such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than ten percent of the words found in the text thereof may be reproduced.

Spontaneity

- a. The copying is at the instance and inspiration of the individual teacher, and
- b. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

- a. The copying of the material is for only one course in the school in which the copies are made.

(See page 6 - Almanac, May 23, 1989 (<https://almanac.upenn.edu/archive/v35pdf/n36/052389.pdf>))