

1977

## Education and the Copyright Law: Still an Open Issue

Don Lawrence Pitt

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Don Lawrence Pitt, *Education and the Copyright Law: Still an Open Issue*, 46 Fordham L. Rev. 91 (1977).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol46/iss1/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# COMMENTS

## EDUCATION AND THE COPYRIGHT LAW: STILL AN OPEN ISSUE

### I. INTRODUCTION

On October 19, 1976, then-President Gerald R. Ford signed Public Law 94-553<sup>1</sup> which, when it becomes effective on January 1, 1978,<sup>2</sup> will completely revise and replace the existing United States Copyright Law.<sup>3</sup> Among the groups which have long advocated the need for copyright revision has been the education profession.<sup>4</sup> This Comment will examine the new copyright law as it relates to educators, including the reasons why a change was called for, the characteristics of the New Law, its probable advantages and disadvantages, and some proposed remedies for possible shortcomings.

Revision of the existing law has been a long-awaited event.<sup>5</sup> Unlike many other areas of law, including the related field of property,<sup>6</sup> the field of copyrights is almost exclusively governed by congressional statutes.<sup>7</sup> Indeed,

---

1. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 [hereinafter cited as New Law].

2. Although part of the enactment became effective immediately, the portions with which this Comment will be concerned will take effect on January 1, 1978. Act of Oct. 19, 1976, Pub. L. No. 94-553, § 102, 90 Stat. 2598.

3. 17 U.S.C. §§ 1-216 (1970 & Supp. V 1975). Although retaining some characteristics of the existing statute, the New Law, *supra* note 1, is "a completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act." Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. Sch. L. Rev. 477, 479 (1977) [hereinafter cited as Ringer].

4. See, e.g., H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65-72 (1976) [hereinafter cited as House Report]; *Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 184 (1973) (Statement of Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, Harold E. Wigren, Chairman) [hereinafter cited as Wigren].

5. See, e.g., House Report, *supra* note 4, at 47-50; Ringer, *supra* note 3, 478-79 & n.4.

6. Copyrights are generally regarded as a unique form of property—a form which is "intangible and incorporeal." Register of Copyrights, 87th Cong., 1st Sess., Report on the General Revision of the Copyright Law 3 (House Comm. Print 1961.) [hereinafter cited as Register's Report]. Actually, many writers feel that the theory behind copyrights involves moral rights as well as property rights. See notes 289-92 *infra* and accompanying text.

7. Copyright law is an excellent example of preemption. The Constitution grants Congress the power to legislate regarding copyrights, U.S. Const. art. I, § 8, cl. 8, and provides the basis for making such law supreme under the supremacy clause. U.S. Const. art. VI, cl. 2. Actually, preemption, often used interchangeably with the term "supremacy," is a broader doctrine than the latter in that it will not only invalidate a conflicting state statute, but will also preclude the states from regulating in the field. Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 24 (1976). Since it is such a powerful doctrine, it is not usually applied unless the intent that the federal legislation preempt the field is clear. *Id.* at 24-25. The main consideration is whether "the [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Goldstein v. California, 412 U.S. 546, 561 (1973) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see

the Founding Fathers provided that Congress should control the law in this area,<sup>8</sup> and Congress responded as early as 1790 with the first statute.<sup>9</sup> Because the effect of the statutory law is virtually complete, creators and users of copyrighted works are dependent upon Congress to set down definitive and equitable guidelines which will satisfy modern needs.

Although courts have been as flexible as possible in applying the existing statute to new situations,<sup>10</sup> change has been one of the greatest factors necessitating a new law.<sup>11</sup> Modern technology has produced electronic equipment such as video tape recorders, high quality photographic devices, and the photocopying machine, all of which, with other modern advances, make the duplication of copyrighted works much easier, thus giving rise to possible infringement suits.<sup>12</sup> As technology continues to create new modes of com-

Goldman, *The Copyright Law: Nearly Sixty Years Later*, 28 Ohio St. L.J. 261, 278-79 (1967). This clear intent has long been held to be present in the field of copyrights, so that, with the exception of some remnants of common law and some state statutory doctrines, it is almost completely and solely governed by federal statute. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 375 (1960). It is also clear that, where such preemption has taken place, the federal courts have exclusive jurisdiction over the case. 28 U.S.C. § 1338 (1970).

Nevertheless, federal preemption of the copyright field is not complete. The states are still free to regulate where a national standard is not needed. 412 U.S. at 558-59; Note, *Misappropriation: A Retreat from the Federal Patent and Copyright Preemption Doctrine*, 43 Fordham L. Rev. 239 (1974). On the other hand, the New Law extends federal preemption even further by providing that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [of the New Law] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after [January 1, 1978] and whether published or unpublished, are governed exclusively by [the New Law]. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." New Law, *supra* note 1, § 301(a). For a fuller discussion of the implications of this provision, see S. Rep. No. 473, 94th Cong., 1st Sess. 112-16 (1975) [hereinafter cited as Senate Report]. Despite the greater preemption by the new statute, the states will retain jurisdiction in some instances. 28 Ohio St. L.J., *supra* at 278-79. For the purposes of this Comment, however, only the federal law need be considered.

8. U.S. Const. art. I, § 8, cl. 8. See generally text accompanying notes 26-31 *infra*.

9. Act of May 31, 1790, ch. 15, 1 Stat. 124, covering only maps, charts, and books.

10. Courts, for example, have attempted to adjust their interpretations to account for technological change, as long as the situation at hand was within the intent and meaning of the law. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 158-59 (1975); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395-96 (1968).

11. The House Report stated that "scientific discoveries have made possible new forms of creative expression that never existed before." Some of these were simple extensions of normal copyrightable subject matter, but, for others, "statutory enactment was deemed necessary to give them full recognition as copyrightable works." House Report, *supra* note 4, at 51; see Register's Report, *supra* note 6, at ix-x; Ringer, *supra* note 3, at 479; Project, *New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. Rev. 931 (1968); Note, *Copyright Law Revision: Its Impact on Classroom Copying and Information Storage and Retrieval Systems*, 52 Iowa L. Rev. 1141, 1142 (1967).

12. House Report, *supra* note 4, at 47, 51; see Goldman, *The Copyright Law: Nearly Sixty Years Later*, 28 Ohio St. L.J. 261, 279-80 (1967). It is generally held that a person infringes when he puts a

munication, the possibilities for infringement will multiply.<sup>13</sup>

Among the professions most profoundly affected by modern technology has been education.<sup>14</sup> The onset of technological innovation has coincided with and enhanced a virtual revolution in educational philosophy, bringing new approaches to learning, especially the individualization of the learning experience and the demise of a heavy dependence on the traditional classroom and textbook.<sup>15</sup> This modern philosophy, as well as the increasing need to expose students to ever greater amounts of knowledge, has created new demands for the use of copyrighted works in the schools which were never dreamed of when the old law was written.<sup>16</sup> Teaching and research require access to a wide variety of works ranging from books and periodicals to sound recordings and television programs.<sup>17</sup> The demands multiply when a course is taught in an individualized manner with each student utilizing different resources.

To satisfy the need for multiple copies of teaching materials, educators often find it more convenient to reproduce items "in-house" rather than purchase additional copies.<sup>18</sup> "In-house" reproduction seems to make particu-

work to a use which is designated by law to be that of the copyright owner. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154-55 (1975); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393-95 (1968); *accord*, New Law, *supra* note 1, § 501(a).

13. See generally Lenny, *Copyright Infringement Problems of a Network/Home Cable Record Selection and Playing System*, 5 Rutgers J. Computers and the Law 51 (1975). Congress has attempted to adapt its legislation to the problem of change. For example, the section dealing with definitions has identified devices, machines, and processes as ones "now known or later developed." New Law, *supra* note 1, § 101, cl. 11. In general, the coverage of the law has been expanded so that it will include many types of works not previously protected. House Report, *supra* note 4, at 56, 63. Congress also moved in 1974 to create the National Commission on New Technological Uses of Copyrighted Works [abbreviated CONTU] to study the effects of new technology and recommend changes in the law. Act of Dec. 31, 1974, Pub. L. No. 93-573, 88 Stat. 1873.

14. See, e.g., House Report, *supra* note 4, at 65-72; *Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 190 (1973) (Statement of Alfred Carr, Legislative Consultant, National Education Association) [hereinafter cited as Carr]; W. Wittich & C. Schuller, *Instructional Technology: Its Nature and Use* xii-xxi, 3-41 (5th ed. 1973) [hereinafter cited as Wittich]; Project, *New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. Rev. 931 (1968).

15. It has been said that "school is becoming a *concept* rather than a *place*." *Hearings on H.R. 223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., pt. 1, at 275 (1975) (Statement of James A. Harris, President, National Education Association) [hereinafter cited as Harris]; see, e.g., L. Cremin, *The Transformation of the School* (1961); D. Heath, *Humanizing Schools* (1971); D. Langdon, *Interactive Instructional Designs for Individualized Learning* (1973); J. L. Trump & D. Miller, *Secondary School Curriculum Improvement* (1968); C. Rogers, *Freedom to Learn* (1969); Wittich, *supra* note 14, at 598-628.

16. See Harris, *supra* note 15, at 275; Moore, *The Evaluation of a Media Resource-Based Learning Project and Its Modification of Traditional Classroom Procedures*, *Audiovisual Instruction*, February 1976, 36-40; references cited at notes 14-15 *supra*.

17. See Carr, *supra* note 14, at 189-90.

18. Harris, *supra* note 15, at 275. The feeling has been expressed that the educational community would not choose photocopying if its extensive needs could be met by the publishing industry. J. Marke, *Copyright and Intellectual Property* 87 (1967). It was stated during the hearings on copyright

lar sense when the copies are to be used primarily to save wear and tear on the purchased items. However, these activities, and many more, give rise to the troubling question of whether the use to which the works are being put constitutes a copyright infringement.<sup>19</sup> What seems fair and reasonable to the educator<sup>20</sup> takes on an entirely new light when viewed from the point of view of the copyright owner.<sup>21</sup> Each time "in-house" reproduction is substituted for purchase, the market for the sale of the items which would otherwise exist has been diminished. This may not seem significant to an individual teacher making only a relatively small number of copies, but the effect can become very significant when multiplied by all such activities throughout the potential market for those items. The resulting controversy between the two groups<sup>22</sup> has created an obvious need for clear statutory guidelines.

## II. BACKGROUND—THE COPYRIGHT DILEMMA CONCERNING EDUCATIONAL USES

### A. *The Judicially Developed Doctrine of Fair Use*

Educators have long had questions about the ethics and the legality of the various types of copying in which they have engaged,<sup>23</sup> and the new technology has only served to intensify the crisis.<sup>24</sup> The answers to the questions

---

law revision that the National Education Association "wants a law which will be equitable to both authors and consumers. We wish to see proper protection of the interests of those persons whose creative abilities produce fine instructional materials. At the same time, we wish to insure that teachers and learners are protected in their creative use of materials in the classroom." Carr, *supra* note 14, at 189. The House Committee recognized this as well when it indicated that "teachers are not interested in mass copying that actually damages authors and publishers." H.R. Rep. No. 83, 90th Cong., 1st Sess. 30 (1967) [hereinafter cited as 1967 Report].

19. See, e.g., Register's Report, *supra* note 6, at 26; B. Kaplan, An Unhurried View of Copyright 101 (1967).

20. In addition to the argument about non-profit educational use being reasonable and fair, educators also argue that "[t]he teacher gives visibility to the author's works and creates markets for them," thereby promoting their sale and placing the author in a better position than he would have been in had the educational use not taken place. Carr, *supra* note 14, at 189. Extensive restriction of educational uses, it is argued, would result in a work's neither being used nor purchased. See *id.* at 190.

21. See, e.g., *Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 215-17 (1973) (Statement of Irwin Karp, Counsel for the Authors League of America) [hereinafter cited as Karp].

22. The arguments of the two groups are summarized in 1967 Report, *supra* note 18, at 30-31. The summary concludes with the following statement: "The implications of these opposing positions extend far beneath the surface of the specific arguments and involve fundamental questions of social policy. The fullest possible use of the multitude of technical devices now available to education should be encouraged. But, bearing in mind that the basic constitutional purpose of granting copyright protection is the advancement of learning, the committee also recognizes that the potential destruction of incentives to authorship presents a serious danger." *Id.* at 31.

23. See, e.g., Troost, *The Controversy Over Off-Air Videotaping*, 58 Phi Delta Kappan 463, 464-65 (1977) [hereinafter cited as Troost]; Note, *Mechanical Copying, Copyright Law, and the Teacher*, 17 Clev.-Mar. L. Rev. 299 (1968); notes 37-49 *infra* and accompanying text.

24. J. Marke, *Copyright and Intellectual Property* 88 (1967); notes 14-19 *supra* and accompanying text.

have hinged on the somewhat nebulous concept called the "doctrine of fair use."<sup>25</sup>

It is well established that the owner of a copyright does not have a license to regulate all use,<sup>26</sup> because this would defeat the purpose of the copyright law, which is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>27</sup> This constitutional purpose is best advanced when works may be "used" for the benefit of the public.<sup>28</sup> However, the public interest should not be used to justify such free use of copyrighted works that authors, unable to obtain any benefits, are left with no motive for continuing to create or publish.<sup>29</sup> Not only would the copyright owner suffer, but the public interest would be harmed, as well, because fewer works would be produced.<sup>30</sup> In satisfying the divergent needs of these two

25. See notes 33-36 *infra* and accompanying text.

26. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393 (1968); *Orient Ins. Co. v. Daggs*, 172 U.S. 557, 566 (1869); Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983, 1006-35 (1970).

27. U.S. Const. art. I, § 8, cl. 8; see *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154-55 (1975); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932); Annot., 23 A.L.R.3d 139, 156 (1969).

28. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); Cooper, *Wihl v. Crow: Fair Use Revisited*, 11 U.C.L.A. L. Rev. 56 (1963); Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970); Annot., 23 A.L.R.3d at 168-72 (1969). The Supreme Court has said that, because of the constitutional basis for the copyright laws, "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). See also J. Marke, *Copyright and Intellectual Property* 16 (1967); Esezobor, *Concepts in Copyright Protection*, 23 Bull. Copyright Soc'y 258, 263 (1976); Rosenfield, *The Constitutional Dimension of "Fair Use" In Copyright Law*, 50 Notre Dame Lawyer 790, 801 (1975); Note, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, 56 Va. L. Rev. 664, 666 (1970).

29. The law grants rights in order "to encourage people to devote themselves to intellectual and artistic creation." *Goldstein v. California*, 412 U.S. 546, 555 (1973). As the Second Circuit recently pointed out, "the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public." *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 23 (2d Cir. 1976). It has been said that, were such protection not afforded by copyright statutes, artistic creation would be the "exclusive reserve of the wealthy or politically motivated." 70 Colum. L. Rev., *supra* note 28, at 995. The same feeling was expressed numerous times during the hearings on the new legislation. An example is the statement of Ross Sackett, President of the Encyclopaedia Britannica Education Corporation, speaking on behalf of the Association of American Publishers: "To the extent that the proposed educational exemption would permit educators to copy educational and research materials without paying for its use it would, because of its confiscatory effect upon publishers, retard and ultimately perhaps choke off the creation of further material." *Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 218 (1973) (Statement of Ross Sackett). See also notes 294-297 *infra* and accompanying text.

30. See *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932); Register's Report, *supra* note 6, at 6; M.

interests, the goal is to strike a statutory balance which will best enhance the public's right to benefit from intellectual and artistic endeavor.<sup>31</sup>

Both the new statute and the old specifically grant some rights to the copyright owner, leaving the public free to use the works in a manner which will not infringe upon those rights.<sup>32</sup> Permissible uses, however, extend further than this. Courts have, over the years, developed the concept that, notwithstanding the exclusive rights granted to the copyright owner, certain limited uses are to be allowed because they are reasonable in the light of the circumstances in which the use has occurred. This concept has come to be called the "doctrine of fair use."<sup>33</sup> Although certain guidelines, which will be

Nimmer, *Nimmer on Copyright* § 3.1, at 6.6 (1976) [hereinafter cited as Nimmer]; Note, *Copyright Law and Library Photocopying: Striking a Balance Between Profit Incentive and the Free Dissemination of Research Information*, 48 Ind. L.J. 503 (1973); note 29 *supra* & notes 293-297 *infra* and accompanying text.

31. The Supreme Court has said that "[t]he limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnotes omitted); see *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975); Register's Report, *supra* note 6, at 5; J. Marke, *Copyright and Intellectual Property* 16 (1967).

32. 17 U.S.C. § 1 (1970 & Supp. V 1975); New Law, *supra* note 1, § 106. Section 106 is reprinted at note 58 *infra*.

33. The most commonly quoted definition of fair use states that it is a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . ." G. Ball, *Copyright and Literary Property* 260 (1944), *quoted in* *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). The Register's Report of 1961 said "broadly speaking, it means that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner's market for his work." Register's Report, *supra* note 6, at 24. As in the Register's Report, the competitive aspect has often been emphasized. See, e.g., *Matthews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 84-85 (6th Cir. 1943). Other sources have indicated that the mere absence of competitive or injurious effect does not necessarily make the use fair. See, e.g., Annot., 23 A.L.R.3d 139, 191 (1969). It seems at least safe to say that the doctrine supports the concept that certain uses are fair, and therefore permissible, without the author's consent. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); B. Kaplan, *An Unhurried View of Copyright* 57 (1967); Nimmer, *supra* note 30, § 145. Beyond that, aside from certain guidelines, there is no precise definition. See notes 63-66 *infra* and accompanying text. See also, e.g., *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974); Cooper, *Wihl v. Crow: Fair Use Revisited*, 11 U.C.L.A. L. Rev. 56 (1963); Freid *Fair Use and the New Act*, 22 N.Y.L. Sch. L. Rev. 497 (1977); Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 Notre Dame Lawyer 790 (1975); Schulman, *Fair Use and the Revision of the Copyright Act*, 53 Iowa L. Rev. 832 (1968); Comment, *Copyright Fair Use—Case Law and Legislation*, 1969 Duke L.J. 73; Comment, *Copyright: Limitation on Exclusive*

subsequently discussed,<sup>34</sup> have developed over the years,<sup>35</sup> fair use has never been clearly articulated. Courts have preferred to treat it as an equitable rule of reason, weighing each case upon its own merits.<sup>36</sup>

### B. Fair Use and the Educator

The lack of a clear definition of what constitutes fair use leaves educators in a quandary.<sup>37</sup> The doctrine has been stretched to allow some degree of latitude for educational purposes,<sup>38</sup> but the limits are by no means clear.<sup>39</sup> Generally, educational copying is not based upon any intent to violate the law, but intent is not an element of copyright infringement.<sup>40</sup> Financial damage to the copyright owner is not the only consideration either.<sup>41</sup> There-

*Rights, Fair Use*, 13 Houston L. Rev. 1041 (1976); Note, *Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law*, 34 U. Cin. L. Rev. 73 (1965).

34. See notes 59-66 *infra* and accompanying text.

35. See, e.g., 487 F.2d at 1352; Register's Report, *supra* note 6, at 24. The fair use test which has come to be accepted over the years has been codified by the New Law, *supra* note 1, § 107, which is reprinted in the text accompanying note 63 *infra*. See references cited at note 63 *infra*.

36. See, e.g., *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968); House Report, *supra* note 4, at 65-67.

37. See, e.g., Note, *Mechanical Copying, Copyright Law, and the Teacher*, 17 Clev.-Mar. L. Rev. 299 (1968); Note, *Copyright Law Revision: Its Impact on Classroom Copying and Information Storage and Retrieval Systems*, 52 Iowa L. Rev. 1141, 1145, 1155 (1967); notes 38-44 *infra* and accompanying text. See also references cited at note 33 *supra*.

38. See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Meeropol v. Nizer*, 417 F. Supp. 1201, 1206 (S.D.N.Y. 1976); Note, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, 56 Va. L. Rev. 664, 667 (1970).

39. Referring to the Supreme Court decision in *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975), *affg per curiam by an equally divided court* 487 F.2d 1345 (Ct. Cl. 1973), where the Court deadlocked 4-4, thereby affirming the decision by the Court of Claims upholding library photocopying on the basis of fair use, James A. Harris, President of the National Education Association said that "[i]f eight Justices of the Supreme Court are unable to reach agreement on whether a given use of a work is a fair use, how can one expect a non-jurist to know?" Harris, *supra* note 15, at 275; see Note, *Copyright Law Revision: Its Impact on Classroom Copying and Information Storage and Retrieval Systems*, 52 Iowa L. Rev. 1141, 1145 (1967). For other references indicating the lack of clarity in the meaning of fair use, see note 33 *supra*.

40. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931); *United States v. Brown*, 400 F. Supp. 656, 658 (S.D. Miss. 1975); *Walco Products, Inc. v. Kittay & Blitz, Inc.*, 354 F. Supp. 121, 124 (S.D.N.Y. 1972). Note that although intent is not essential for liability, it may have some bearing on a finding of fair use, for which the presence or lack of a commercial motive can also be important. See Annot., 23 A.L.R.3d 139, 194-95 (1969). On the other hand, copying all or substantially all of a copyrighted work would probably not be fair use regardless of intent. See *Wihitol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962).

41. Some courts do say that commercial motive is relevant. Annot., 23 A.L.R.3d at 191, 193. On the other hand, a profit motive is not necessary—the mere likelihood that defendant's actions will hurt sales has been held to be enough. *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963). See also House Report, *supra* note 4, at 62-63.

Educators urged unsuccessfully that the "for profit" concept in the existing law be retained in the new statute. Harris, *supra* note 15, at 274-76; Note, *Education and Copyright Law: An*



fore, faced with real life necessities which seem to demand copying,<sup>42</sup> educators copy. In most cases, whether based upon ignorance or rationalization,<sup>43</sup> the copying is done simply because the teacher thinks that what he or she is doing is fair use from a common sense point of view. However, what seems fair to the educator may well infringe upon a publisher's, or other copyright owner's, legally protected rights.<sup>44</sup>

Surprisingly, there have been few cases involving teachers directly.<sup>45</sup> Nevertheless, the profession has long been deeply concerned not only by the

*Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, 56 Va. L. Rev. 664, 666 (1970).

42. See notes 14-22 *supra* and accompanying text.

43. Educators have long assumed that they were entitled to special privileges. B. Kaplan, An Unhurried View of Copyright 106 (1967). Speaking before the Senate Subcommittee on Trademarks, Patents, and Copyrights, Harold E. Wigren, Chairman of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revisions said: "Educational users need special protection over and above that provided commercial users because they have a public responsibility for teaching the children entrusted to them." *Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 182 (1973). Whether or not this view is correct, the rationale leads to a great deal of innocent ignorance about possible violations of the copyright laws on the part of teachers. Assuming that their actions are within the law because of the non-profit, educational nature of the copying, educators are surprised when told otherwise. Holland, *The Audiovisual Package: Handle With Care*, 22 Bull. Copyright Soc'y 104, 123 (1974). A survey conducted in Iowa revealed that commercial users of copyrighted works were generally far more familiar with the copyright doctrines than were educators. There was also evidence that those teachers who were sensitive to the copyright problem nevertheless felt justified in their actions in view of the demands with which they were faced. Note, *Copyright Law Revision: Its Impact on Classroom Copying and Information Storage and Retrieval Systems*, 52 Iowa L. Rev. 1141, 1144-54 (1967).

44. See, e.g., *Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 3, at 974-76 (1967) (statement of William M. Passano, President, The Williams & Wilkins Co.); *Library Photocopying—The Publisher's View*, in *Copyright—The Librarian and the Law* (Proceedings of the Eighth Annual Symposium sponsored by the Alumni and Faculty of the Rutgers University Graduate School of Library Service) 23-33 (G. Lukac ed. 1972) (Statement of Charles H. Lieb); A. Goldman in "Can Copyright Law Respond to the New Technology?", Panel Discussion at 3d sess. of 61st Annual Meeting of the American Association of Law Libraries, 61 L. Library J. 387, 393 (1968); note 286 *infra* and accompanying text.

45. In 1962, in a significant case involving the interpretation of fair use, a choral music teacher was held liable for distributing his own arrangement of a copyrighted song for performance purposes, even though he lacked actual intent to infringe or make a profit. The court stressed the fact that the action deprived the author of a possible sale. *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); see Cooper, *Wihtol v. Crow: Fair Use Revisited*, 11 U.C.L.A. L. Rev. 56 (1963). The only other case directly involving teachers took place in 1914 when a teacher distributed outlines of a copyrighted book for the purpose of tutoring. The outlines contained whole sentences from the original text, and amounted to an abridged version of the author's treatment of the subject. The defendant was held liable for the action even though the outlines were not sold and not retained by the students, and an injunction was granted even without proof of actual damages. *Macmillan Co. v. King*, 223 F. 862 (D. Mass. 1914); see Halley, *The Educator and the Copyright Law*, 17 ASCAP Copyright L. Symp. 24 (1969).

potential for legal turmoil which the copyright issue has engendered, but also, and perhaps more important, by the philosophical and ethical problems which it presents to a profession that is supposed to set a good example.<sup>46</sup>

As a result of this legal and moral dilemma, the teaching profession was, understandably, one of the most outspoken interest groups during hearings on the new bill, and the congressional committees spent a great deal of time considering education-related problems. The principal need presented was for a clarification of the doctrine of fair use as it applied to educators.<sup>47</sup> Although many other specific concerns were expressed,<sup>48</sup> they all seemed to hinge on the need for "teachers to have reasonable certainty that a given use of a copyrighted work is permissible so that they won't be afraid to use a wide variety of materials and resources in the classroom."<sup>49</sup>

### III. THE NEW LAW

#### A. *Basic Organization and Philosophy Relative to Education*

The new copyright law,<sup>50</sup> together with the educational guidelines contained in its legislative history,<sup>51</sup> although admittedly leaving many questions unanswered,<sup>52</sup> does represent a commendable attempt to clarify the position of the teacher relative to the use of copyrighted material. Despite the pleas made by educators,<sup>53</sup> however, Congress, considering possible damage to copyright owners who draw their livelihood from sales to educational institutions, avoided blanket exemptions, stating that "a specific exemption freeing certain reproductions [by educators] of copyrighted works from copyright control [was] not justified."<sup>54</sup> On the other hand, Congress recognized that there was a "need for greater certainty and protection for teachers,"<sup>55</sup> which would, of course, provide corresponding certainty for the copyright owners.

46. See, e.g., Troost, *supra* note 23.

47. Wigren, *supra* note 4; see notes 37-44 *supra* and accompanying text.

48. See, e.g., Harris, *supra* note 15, at 275; *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 4, at 1046-47 (1967) (Statement of Harry N. Rosenfield, Esq., Counsel for Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision). The primary concern, however, was the lack of clarity regarding fair use. See notes 37-44 & 47 *supra* and accompanying text.

49. Harris, *supra* note 15, at 275.

50. New Law, *supra* note 1.

51. House Report, *supra* note 4, at 67-71; see section III(B) *infra* for further discussion of the guidelines.

52. House Report, *supra* note 4, at 71-72.

53. There was an effort by educators to have included in the law a section specifically exempting educational uses. Although there were some qualifications, the exemption would have been quite broad in its impact. See, e.g., Wigren, *supra* note 4, at 185, proposing an educational section beginning with the words "[n]otwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship and research is not an infringement of copyright." But see, e.g., Karp, *supra* note 21, strongly opposing such a general exemption for education.

54. House Report, *supra* note 4, at 68-69.

55. *Id.* at 69.

The New Law uses two different methods in attempting to answer the questions of the education profession. First, the law codifies the doctrine of fair use—a concept which was not mentioned by the 1909 statute, and has, instead, been a judge-made guideline.<sup>56</sup> Second, the law does specifically exempt some activities of educators which would otherwise be grounds for an infringement suit.<sup>57</sup> All exempted uses, educational and otherwise, limit the rights of the copyright owner as detailed by section 106 of the new statute.<sup>58</sup>

### B. *The Codification of the Doctrine of Fair Use*

Probably the most significant section limiting the rights of the copyright owner is section 107 which recognizes the judicially developed doctrine of fair use.<sup>59</sup> In codifying fair use, Congress in no sense wished to change the judicial doctrine itself. Section 107, based upon the test which the courts have developed over the years,<sup>60</sup> is clearly intended as a restatement rather than a new concept,<sup>61</sup> and the nature of the doctrine is such that formation of exact rules is neither possible nor advisable.<sup>62</sup>

Section 107 reads as follows:

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,

56. See, e.g., Nimmer, *supra* note 30, § 145 at 645. Such a codification had been recommended by the Register's Report, *supra* note 6, at 25. See Schulman, *Fair Use and the Revision of the Copyright Act*, 53 Iowa L. Rev. 832 (1968), tracing the early development of the fair use codification. See also notes 33-36 *supra* and accompanying text.

57. See section III(C) *infra*.

58. Section 106 defines the exclusive rights of the copyright owner as follows: "Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly." New Law, *supra* note 1, § 106. The House Report points out that, as under the old law, the rights of the owner basically break down into five fundamental categories, including "exclusive rights of reproduction, adaptation, publication, performance, and display." House Report, *supra* note 4, at 61. It would be well to note that, unlike the existing statute, the New Law does not limit the owner's rights when the use is not "for profit." This has particular impact on public performances. *Id.* at 62-63. Educators had sought continuation of this type of limitation, but were unsuccessful. Harris, *supra* note 15, at 275-76. See also references cited in note 41 *supra*.

59. As indicated, the 1909 statute did not mention fair use. See note 56 *supra* and accompanying text. Codification appears to solve the question about whether or not fair use is technically an infringement. Freid, *Fair Use and the New Act*, 22 N.Y.L. Sch. L. Rev. 497 n.4 (1977).

60. 1967 Report, *supra* note 18, at 29-30; see note 63 *infra*.

61. House Report, *supra* note 4, at 65-66.

62. See *id.* at 67; notes 33-36 *supra* and accompanying text.

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.<sup>63</sup>

Note that section 107 is not only generally applicable to educators, but also specifically refers to educational uses by mentioning "teaching (including multiple copies for classroom use)"<sup>64</sup> and indicating that one of the factors to be considered in determining whether a use has been fair is "the purpose and character of the use, including whether such use is . . . for nonprofit educational purposes."<sup>65</sup> This language was expressly intended to make clear the applicability of the doctrine to the teaching field.<sup>66</sup>

Since a section specifically exempting education was rejected,<sup>67</sup> it seems clear that, except for some activities mentioned in later sections,<sup>68</sup> fair use is intended to continue to govern educational uses. This does not resolve the educators' questions, since fair use has always governed educational uses.<sup>69</sup> Undoubtedly recognizing this, Congress has included, in the legislative history of section 107, a detailed description of fair use activities by teachers which appear to have congressional sanction.<sup>70</sup> These guidelines resulted primarily from meetings between representatives of the education profession and the publishing industry,<sup>71</sup> and allow latitude regarding some types of educational

63. New Law, *supra* note 1, § 107. The four factors to be considered are the guidelines that the courts have developed over the years. *See, e.g., Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975); *Matthews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 145 (S.D.N.Y. 1968); Freid, *Fair Use and the New Act*, 22 N.Y.L. Sch. L. Rev. 497, 498-99 (1977); 18 C.J.S. *Copyright and Literary Property* § 94 (1939).

64. New Law, *supra* note 1, § 107.

65. *Id.* § 107(1).

66. House Report, *supra* note 4, at 67.

67. *See* note 53 *supra*.

68. *See* section III(C) *infra*.

69. *See* notes 23-44 *supra* and accompanying text.

70. House Report, *supra* note 4, at 65-71. The guidelines were subsequently accepted, as slightly corrected, 122 Cong. Rec. H 10727, H 10875 (1976), by the Conference Committee "as part of their understanding of fair use." H.R. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976).

71. House Report, *supra* note 4, at 65-71. The guidelines which are available resulted from meetings of three groups, dealing with printed material from books and periodicals, music, and audiovisual material. *Id.* at 67. Guidelines are available in the first two categories but not the last. The reader wishing to consult the guidelines in their entirety may find them reprinted in, *e.g., Association for Educational Communications and Technology & Association of Media Producers, Copyright and Educational Media* (1977); Freid, *Fair Use and the New Act*, 22 N.Y.L. Sch. L. Rev. 497, 511-13 (1977); CCH Copyright Revision Act of 1976 (1976).

copying of literary and musical printed material. Although not part of the law itself, the guidelines provide appropriate source material not only for educational users, but also for courts dealing with education-related infringement suits in the future.<sup>72</sup> It should be clearly understood, however, that these guidelines do not "freeze" the doctrine of fair use, but only serve to clarify it. Congress expressly indicated that courts are free to judge more or less stringently, depending upon the facts of a particular case.<sup>73</sup>

The guidelines allow reasonably extensive freedom to duplicate single copies from books and periodicals for "scholarly research or use in teaching or preparation to teach a class."<sup>74</sup> In general, small excerpts from a larger complete work fall into this category.<sup>75</sup> Similar, although more limited, latitude is allowed for research and preparation (but not the act of teaching itself) involving printed music of an entire performable unit, provided it is not otherwise available either at all or in a form apart from a larger work.<sup>76</sup>

Considerable flexibility is also permitted with respect to multiple copies, not to exceed one per pupil, from books and periodicals. The practice, to be acceptable, must meet tests concerning the brevity of the work copied<sup>77</sup> and the spontaneity of the decision to make copies,<sup>78</sup> must include a notice of copyright,<sup>79</sup> and must satisfy a "cumulative effect test" relative to the aggregate effect of copying done by the teacher.<sup>80</sup> Multiple copies, not to

72. Courts do consider legislative history such as the House Report. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 541-42 (1962); Nimmer, *Preface—The Old Copyright Act as a Part of the New Act*, 22 N.Y.L. Sch. L. Rev. 471, 473 (1977).

73. House Report, *supra* note 4, at 65-66; notes 59-62 *supra* and accompanying text.

74. House Report, *supra* note 4, at 68.

75. *Id.*

76. *Id.* at 71.

77. For poetry, "brevity" would be defined as "[a] complete poem if less than 250 words and if printed on not more than two pages or, . . . from a longer poem, an excerpt of not more than 250 words." For prose, "brevity" is defined as "[e]ither a complete article, story or essay of less than 2,500 words, or . . . an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words." Each of these could be "expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph." For illustrations, "brevity" would consist of "[o]ne chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue." There are also other provisions for certain other "special" works. House Report, *supra* note 4, at 68-69.

78. "Spontaneity" is defined as follows: "The copying is at the instance and inspiration of the individual teacher, and . . . [t]he 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." House Report, *supra* note 4, at 69. The spontaneity concept, which would exclude copying based upon administrative rather than teacher volition, has been objected to. See, e.g., Note, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, 56 Va. L. Rev. 664, 670 (1970).

79. House Report, *supra* note 4, at 68.

80. The "cumulative effect" test includes the following criteria: "(i) The copying of the material is for only one course in the school in which the copies are made. (ii) 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. (iii) There shall not be more than

exceed one per pupil, of excerpts of printed musical works may be made for "academic purposes other than performance . . . provided that the excerpts do not comprise a part of the whole which would constitute a performable unit . . . but in no case more than 10% of the whole work."<sup>81</sup>

As for sound recordings, single copies "of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher,"<sup>82</sup> and single copies of copyrighted music may be made from school or teacher owned sound recordings "for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher."<sup>83</sup>

These general guidelines, moreover, include certain prohibitions: (1) copying may not substitute for purchase;<sup>84</sup> (2) copying may not "create or . . . replace or substitute for anthologies, compilations or collective works;"<sup>85</sup> (3) no copying is allowed from "consumable" items, such as workbooks, tests, and similar material;<sup>86</sup> (4) copied material must include a copyright notice;<sup>87</sup> (5) with one exception,<sup>88</sup> copying of musical works for the purpose of performance is not allowed;<sup>89</sup> and (6) copying from books and periodicals cannot be administratively directed, be repeated by the same teacher with respect to the same item from term to term, or result in a charge being made to the student beyond the actual cost of the photocopying.<sup>90</sup>

The guidelines do not, of course, cover all the questions of fair use which could arise in an educational situation. That they were not so intended is indicated both by the legislators and the educators and publishers who cooperated in writing them.<sup>91</sup> Audiovisual materials, for example, were not

nine instances of such multiple copying for one course during one class term. [The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.] House Report, *supra* note 4, at 69.

81. *Id.* at 71. Also allowed in the printed music category is "emergency copying to replace purchased copies . . . not available for an imminent performance" and editing or simplification of printed copies, provided "the fundamental character of the work is not distorted or the lyrics, if any," are not changed. *Id.* It is interesting in this connection to note that one of the few cases directly involving a teacher concerned musical arrangements. *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); see note 45 *supra*.

82. House Report, *supra* note 4, at 71. The fact that this would otherwise be an infringement is discussed in Diamond, *Sound Recordings and Copyright Revision*, 53 Iowa L. Rev. 839, 841-52 (1968).

83. House Report, *supra* note 4, at 71. The guidelines specify that this provision applies "only to the copyright of the music itself and not to any copyright which may exist in the sound recording." *Id.*

84. *Id.* at 69, 71. The only exceptions allow copying of music to meet an emergency need for an imminent performance or to obtain out-of-print items for research or classroom use. *Id.* at 71.

85. *Id.* at 69, 71.

86. *Id.*

87. *Id.* at 68, 71.

88. See note 81 *supra*.

89. House Report, *supra* note 4, at 71.

90. *Id.* at 69-71. Although the tone of the music guidelines would seem to suggest that the quoted provisions would apply to them as well, express reference is lacking. *Id.* at 70-71.

91. See note 71 *supra* and accompanying text.

covered at all.<sup>92</sup> Nevertheless, as the Committee indicated, the guidelines do provide greater certainty and protection for teachers since copying within the limits they set will almost definitely be fair use.<sup>93</sup> The Committee further expressed the hope that additional cooperative efforts would produce more guidelines where appropriate.<sup>94</sup>

### C. Other Exempted Uses Applicable to Education

The remainder of Chapter 1 of the New Law<sup>95</sup> contains a series of other limitations on the exclusive use granted to the copyright owner beyond the fair use limitations detailed by section 107. A number of these sections are applicable to one degree or another to educational institutions, and are discussed below.

#### 1. Exemptions for the Owner of a Copy or Phonorecord

Section 109<sup>96</sup> provides general exemptions for the owner<sup>97</sup> of a "lawfully made"<sup>98</sup> copy or phonorecord, including the right to sell it or otherwise dispose of it,<sup>99</sup> and the right to publicly display<sup>100</sup> it "either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."<sup>101</sup> This would not allow transmission<sup>102</sup>

92. See note 71 *supra*. The House Report indicates that many questions, such as "[t]he problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts," remain open. House Report, *supra* note 4, at 71.

93. House Report, *supra* note 4, at 72.

94. *Id.*

95. New Law, *supra* note 1, §§ 108-112.

96. Section 109 should be read in the light of the other Article 1 sections which follow since the apparently stringent nature of some of the exemptions described in section 109 may become less so under the effect of related provisions found elsewhere. For example, section 109 appears strict regarding the right to perform, but the restriction does not apply under section 110(1) for "face-to-face teaching activities." New Law, *supra* note 1, §§ 109, 110(1); see notes 103-17 *infra* and accompanying text.

97. An "owner" is not someone who rents an item. New Law, *supra* note 1, § 109(c).

98. *Id.* § 109(a)-(b). A copy would not be lawfully made if the making itself constituted an infringement. *Id.* § 501(a).

99. *Id.* § 109(a).

100. "To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." *Id.* § 101, cl. 12. A "public display" would be a display "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." *Id.* § 101, cl. 23. The House Report further adds that "performances in 'semipublic' places such as clubs, lodges, factories, summer camps, and schools are 'public performances' subject to copyright control." House Report, *supra* note 4, at 64.

101. New Law, *supra* note 1, § 109(b).

102. "To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Id.* § 101, cl. 28.

from a place outside the presence of the viewers,<sup>103</sup> nor would it allow the projection of multiple images, as by sending pictures into individual viewing apparatuses.<sup>104</sup> In addition, under this section, the owner of the copy would not be able to reproduce it<sup>105</sup> or perform it.<sup>106</sup>

## 2. Face-to-Face Teaching Activities

Aside from section 107,<sup>107</sup> by far the most important section for teachers is section 110<sup>108</sup> which extends the section 109 exemptions for the benefit of non-profit educational institutions during the course of "face-to-face teaching activities . . . in a classroom or similar place devoted to instruction."<sup>109</sup> "Face-to-face" requires that the instructors and pupils be in the same general location—at least "the same building or general area."<sup>110</sup> "Teaching activities" include a wide variety of "systematic instruction," but not activities given for "recreation or entertainment."<sup>111</sup> "Instructors" are teachers in the normal sense of the word, but this can include a variety of guest lecturers, provided the instruction given remains classroom oriented.<sup>112</sup> A "classroom or

---

103. House Report, *supra* note 4, at 81-82. The viewers, however, need not see the actual item, provided they are present in the same general physical surroundings. *Id.*

104. *Id.* at 80.

105. *Id.* at 79; New Law, *supra* note 1, § 106(1).

106. House Report, *supra* note 4, at 79, "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." New Law, *supra* note 1, § 101, cl. 18.

107. New Law, *supra* note 1, § 107; see section III(B) *supra*.

108. New Law, *supra* note 1, § 110.

109. *Id.* § 110(1). This clause, and the next three, "deal with performances and exhibitions that are now generally exempt under the 'for profit' limitation or other provisions of the copyright law, and that are specifically exempted from copyright liability under [the New Law]." House Report, *supra* note 4, at 81. The "for profit" limitation of the old statute has not been specifically carried over into the New Law. *Id.* at 62. However, several provisions of the New Law do mention the profit aspect. In addition to the reference in section 110, the "non-profit" restriction also appears in section 107 to qualify the application of fair use to educational institutions. See New Law, *supra* note 1, § 107(1); note 59 *supra* and accompanying text. Moreover, the library section contains a restriction that activities described in the section must be carried out "without any purpose of direct or indirect commercial advantage." New Law, *supra* note 1, § 108(a)(1); see notes 124-50 *infra* and accompanying text. The non-profit provisions would seem, therefore, not to apply to an educational institution whose overall operation is profit-making, even though the profit made from use of copyrighted works might only be very indirect. See also notes 286-87 *infra* and accompanying text, discussing the fact that a use which profited only in a very indirect and insubstantial sense might, in the aggregate, result in substantial market damage. The problem of the "non-profit" restrictions is beyond the scope of the topic of this Comment and no effort is made to deal with it, but the reader should be aware that the situation exists.

110. House Report, *supra* note 4, at 81.

111. *Id.*

112. Congress had some difficulty determining the exact definition of a "teacher." This problem also affected the guidelines for classroom copying. *Id.* at 68-70. The guidelines were subsequently deemed modified so that the term "teacher" included "instructional specialists on the staff of the school, such as reading specialists, curriculum specialists, audiovisual directors,



similar place devoted to instruction" encompasses numerous types of facilities such as studios, workshops, athletic facilities, libraries, and auditoriums, provided they are used for "systematic instructional activities" and not the benefit of the general public.<sup>113</sup>

The exemption regarding "face-to-face teaching activities," unlike the restriction concerning performances contained in section 109,<sup>114</sup> is unlimited in the works it exempts. It does not, however, grant any new latitude for the making of copies,<sup>115</sup> and it clearly specifies that motion pictures and other audiovisual works<sup>116</sup> must have been lawfully obtained.<sup>117</sup>

### 3. Transmissions and Performances

Section 110 also contains several other exemptions relevant to schools, including certain "transmissions"<sup>118</sup> to places "normally devoted to instruction,"<sup>119</sup> provided the transmissions take place during the course of "systematic instructional activities."<sup>120</sup> The exemption only applies, however, to "nondramatic literary or musical work[s]"<sup>121</sup> when the use is a "performance."<sup>122</sup>

As for "performances," clause (4) of section 110 exempts public performance of "nondramatic literary or musical work[s] otherwise than in a transmission to the public," provided there is no direct or indirect private commercial advantage and the copyright owner has not given notice of objection.<sup>123</sup>

### 4. Library Uses

One whole section of the New Law, section 108, sets out in detail the latitude to be allowed with regard to reproduction by libraries and archives.<sup>124</sup> These standards resulted from a long history of recommendations

---

guidance counselors, and the like," but the new meaning seemed to be qualified by the requirement that these people had to be "working in consultation with actual instructors." 122 Cong. Rec. H 10875 (1976). This meaning of the word "teacher," as applicable to the educational guidelines, was subsequently accepted by the Conference Committee. H.R. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976).

113. House Report, *supra* note 4, at 82.

114. See New Law, *supra* note 1, § 109; notes 97-106 *supra* and accompanying text.

115. House Report, *supra* note 4, at 81-82.

116. "'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." New Law, *supra* note 1, § 101, cl. 2.

117. *Id.* § 110(1); House Report, *supra* note 4, at 82.

118. See note 102 *supra*.

119. New Law, *supra* note 1, § 110(2)(C)(i).

120. *Id.* § 110(2)(A).

121. *Id.* § 110(2) (emphasis supplied).

122. *Id.* § 110(2). The term "performance" is defined at note 106 *supra*. Problems which may occur regarding these qualifications are discussed below. See notes 239-245 *infra* and accompanying text.

123. New Law, *supra* note 1, § 110(4).

124. *Id.* § 108.

and demands made by librarians and archivists for clarification of fair use in the copyright area.<sup>125</sup>

One clause of the section identifies a library by specifying that its "collections [must be] . . . open to the public, or . . . available not only to researchers affiliated with the library . . . or with the institution of which it is a part, but also to other persons doing research in a specialized field."<sup>126</sup> Although the section does not mention school libraries as such, school libraries should qualify if they participate in interlibrary loan programs, thereby making their collections "available . . . to other persons."<sup>127</sup>

The section allows some measure of flexibility for the individual user of the library. Copies or phonorecords can be made for individual users of one part of a copyrighted collection or periodical, or a small part of a larger work.<sup>128</sup> Copies or phonorecords of entire works can be made for individual users if it is determined that such a copy or phonorecord is not otherwise available at a fair price.<sup>129</sup> In either case, the copy or phonorecord must only be for "private study, scholarship, or research,"<sup>130</sup> must include on it a notice of copyright,<sup>131</sup> and must be given in compliance with a policy which gives warning to users that their use must not violate copyright laws.<sup>132</sup> The apparent flexibility of these provisions is, however, limited by the fact that they "do not apply to . . . musical work[s], . . . pictorial, graphic or sculptural work[s], or . . . motion picture[s] or other audiovisual work[s] other than . . . audiovisual work[s] dealing with news."<sup>133</sup> An exception is made for pictorial or graphic

125. The library photocopying problem came to a head in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975), briefly mentioned at note 39 *supra*. The split decision in the Supreme Court upheld the Court of Claims decision allowing photocopying on the basis of fair use on the theory that there had been insubstantial harm, that scientific progress would be harmed if the actions which had taken place were held to be infringement, and that, in the final analysis, the decision should be made by the legislature. Since the split decision did not amount to a clear mandate, the intellectual community became even more anxious for clear direction from Congress. See Harris, *supra* note 15, at 275. See also Goldstein, *The Private Consumption of Public Goods: A Comment on Williams & Wilkins Co. v. United States*, 21 Bull. Copyright Soc'y 204 (1973); Frost, "Can Copyright Law Respond to the New Technology?", Panel Discussion at 3d Sess. of 61st Annual Meeting of the American Association of Law Libraries, 61 L. Lib. J. 387 (1968). Section 108 is the result of a legislative effort which will also have an as yet unmeasured effect on the doctrine of fair use. See Freid, *Fair Use and the New Act*, 22 N.Y.L. Sch. L. Rev. 497, 499-509 (1977). See also references cited at note 33 *supra*. For an early reaction by the librarians to section 108, see Holley, *A Librarian Looks at the New Copyright Law*, 8 Am. Lib. 247 (1977) [hereinafter cited as Holley].

126. New Law, *supra* note 1, § 108(a)(2).

127. *Id.*

128. *Id.* § 108(d).

129. *Id.* § 108(e). Note that the term "fair price" is not defined either in the statute or the legislative history, a problem which may lead to questions in the future since it is probably a very relative term. Flacks, *Living in the Gap of Ambiguity; An Attorney's Advice to Librarians on the Copyright Law*, 8 Am. Lib. 252, 253 (1977).

130. New Law, *supra* note 1, § 108(d)(1), (e)(1).

131. *Id.* § 108(a)(3).

132. *Id.* § 108(e)(2), (f)(1).

133. *Id.* § 108(h).

works which are found in material otherwise reproducible,<sup>134</sup> and it should also be remembered that the general doctrine of fair use always applies notwithstanding the limitations of this section.<sup>135</sup> It would be acceptable, therefore, for a music scholar to receive copies of a portion of a score or phonorecord for research use, even though the section would seem to exclude this action.<sup>136</sup>

The individual user is also helped by the fact that the library is allowed to have unsupervised copying equipment on its premises, provided "such equipment displays a notice that the making of a copy may be subject to the copyright law."<sup>137</sup>

The library itself is permitted to make copies or phonorecords to replace ones which are "damaged, deteriorating, lost, or stolen, if . . . an unused replacement cannot be obtained at a fair price."<sup>138</sup> Here, the library must first undertake reasonable research to ascertain that such an item is not available at a fair price.<sup>139</sup> This would require, at the least, contacting commonly-known trade sources, plus the publisher or other copyright owner.<sup>140</sup>

In general, section 108 mandates that the library must not engage in practices the "aggregate" of which result in the "systematic" reproduction of multiple copies of copyrighted works.<sup>141</sup> The word "systematic" suggests that the copying cannot "substitute for a subscription to or purchase of [a] work."<sup>142</sup> This makes sense in that it corresponds to the requirement that none of a library's activities be for "direct or indirect commercial advantage."<sup>143</sup>

Finally, one provision concerning audiovisual news programs deserves attention.<sup>144</sup> An exemption is provided allowing "off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes."<sup>145</sup>

In sum, section 108, assuming that it applies to schools,<sup>146</sup> permits the school library to engage in limited copying mainly for the private benefit of its users<sup>147</sup> and for its own benefit under some circumstances.<sup>148</sup> The individual

---

134. *Id.*

135. *Id.* § 108(f)(4).

136. House Report, *supra* note 4, at 78.

137. New Law, *supra* note 1, § 108(f)(1).

138. *Id.* § 108(c).

139. *Id.*

140. House Report, *supra* note 4, at 76.

141. New Law, *supra* note 1, § 108(g).

142. *Id.* § 108(g)(2); House Report, *supra* note 4, at 78. The guidelines for clause (2) of subsection (g) were developed with the assistance of CONTU. *See* note 13 *supra*.

143. New Law, *supra* note 1, § 108(a)(1). This provision, of course, raises questions relative to the "non-profit" question discussed at note 109 *supra*.

144. New Law, *supra* note 1, § 108(f)(3).

145. House report, *supra* note 4, at 77.

146. *See* text accompanying notes 126-27 *supra*.

147. *See* New Law, *supra* note 1, § 108(d)-(f).

148. *See id.* § 108(b), (c); text accompanying notes 138-40 *supra*.

teacher would certainly be helped by the provisions allowing copying for private research,<sup>149</sup> as would the students of the teacher in their capacities as individual library users. Both groups would be indirectly aided by the general provisions regarding the library itself. However, there are no provisions in section 108 which would solve multiple copying needs in a school situation.<sup>150</sup>

### 5. Broadcasting

One of the major areas of concern which provided the impetus for new copyright legislation was the rapid growth of cable television systems which were in the business of receiving broadcasts, boosting and improving the signal quality, and retransmitting the resulting signals to paying subscribers through wires.<sup>151</sup> Several cases had indicated that existing legislation was inadequate to fully protect copyright owners from the new types of infringement made possible by modern television technology.<sup>152</sup> Section 111 was directed primarily at this problem.<sup>153</sup>

The most important provision in section 111, as it relates to schools, is clause (2) of subsection (a) which exempts a "secondary transmission"<sup>154</sup> [which] is made solely for the purpose and under the conditions specified by clause (2) of section 110."<sup>155</sup> This extends the rights granted under the latter clause to enable schools to receive primary signals, boost them, and retransmit them into classrooms as secondary signals.<sup>156</sup> Clause (4) of section 111(a), which exempts certain secondary transmissions not made by a "cable system,"<sup>157</sup> would also extend the same rights to schools where they are not retransmitting the signals to the public and, therefore, would not be a "cable system."<sup>158</sup>

149. New Law, *supra* note 1, § 108(d), (e).

150. See notes 15-22 *supra* and accompanying text.

151. See, e.g., Note, *Copyrights: The Cable Television Controversy*, 27 Okla. L. Rev. 39 (1974). The nature of "cable systems" is discussed in the House Report, *supra* note 4, at 88.

152. See Krasnow & Quale, *Developing Legal Issues in Cable Communications*, 24 Cath. Univ. L. Rev. 677 (1975). Compare *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974), *modifying* 476 F.2d 338 (2d Cir. 1973), with *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

153. See Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y.L. Sch. L. Rev. 545 (1977).

154. A "secondary transmission" is the retransmission of a signal which has already been transmitted once from its place of origin, which original transmission is known as the "primary transmission." The secondary one normally takes place simultaneously with the primary one (except in certain situations, not herein applicable, where distance prevents a simultaneous transmission). New Law, *supra* note 1, § 111(f), cls. 1, 2.

155. *Id.* § 111(a)(2) (footnote added); see notes 118-23 *supra* and accompanying text for a discussion of § 110(2).

156. House Report, *supra* note 4, at 92. The House Report indicates that the provision is intended to make it clear that instructional transmissions within the scope of § 110(2) are exempt regardless of whether they are primary or secondary. *Id.*

157. A "cable system" retransmits "to subscribing members of the public." New Law, *supra* note 1, § 111(f), cl. 3.

158. See note 157 *supra*.

In either case, clauses (2) and (4) of subsection (a) would allow schools to retransmit all or a portion<sup>159</sup> of telecast programs *simultaneously*.<sup>160</sup> The exemption would not extend any new rights to videotape since it applies only to secondary transmissions, the very definition of which necessitates *simultaneous* retransmission.<sup>161</sup>

There is one curious point about the provisions discussed above which should be mentioned. Clause (2) provides an exemption for secondary transmissions carried out "for the purpose and under the conditions specified by clause (2) of section 110,"<sup>162</sup> which would prevent secondary transmissions by schools of dramatic works.<sup>163</sup> However, if clause (4) of section 111(a) also applies to school-type situations, as it would seem to, this would *lift* the restriction and *allow* simultaneous retransmission of dramatic works since clause (4) contains no such restriction.<sup>164</sup> Schools would seem to be able to rely upon either clause (2) or clause (4) because each of the clauses in subsection (a) is followed by "or," *not* "and."<sup>165</sup> If this interpretation is correct, then, apparently, clause (2) is not needed and schools may simultaneously retransmit *any* program. The only question remaining would be what constitutes "indirect commercial advantage," which must not be present in order for clause (4) to apply.<sup>166</sup>

While section 111 addresses itself to simultaneous retransmission, there is a provision in section 118 which allows limited taping rights. That provision is clause (3) of subsection (d) which permits recording of non-commercial programs transmitted by a public broadcasting entity for use under the provisions of clause (1) of section 110 concerning face-to-face teaching activities.<sup>167</sup> A tape made under this provision would have to be erased within seven days or the action would be considered an infringement.<sup>168</sup> A school would also be an infringer if it received a tape from a broadcast entity and failed, despite instructions, to destroy it in the required period of time.<sup>169</sup> Moreover, the entire provision is further limited by the fact that it applies only to "non-dramatic musical works and pictorial graphic and sculptural works included

159. Clause (3) of subsection (a), although broader in scope than clauses (2) or (4) on which schools would rely, does not allow the party retransmitting the secondary signal to exercise any direct or indirect control over what is being retransmitted. New Law, *supra* note 1, § 111(a)(3). By depending upon clauses (2) or (4), schools would be able to exercise control over the content and, therefore, retransmit an incomplete program.

160. See notes 154-55 *supra* and accompanying text.

161. Note 154 *supra*. See also full discussion of the videotaping situation at notes 254-62 *infra* and accompanying text.

162. Notes 154-55 *supra* and accompanying text.

163. New Law, *supra* note 1, § 110(2).

164. *Id.* § 111(a)(4).

165. *Id.* § 111(a).

166. *Id.* § 111(a)(4).

167. *Id.* §§ 110(1), 118(d)(3). See also notes 107-17 *supra* and accompanying text for a discussion of "face-to-face teaching activities."

168. New Law, *supra* note 1, § 118(d)(3).

169. *Id.*; House Report, *supra* note 4, at 120.

in public broadcasting transmissions . . . [and not to] other works included in the transmissions, or to the entire transmission program."<sup>170</sup>

In effect, what this provision of section 118 does is to give statutory recognition to the existing seven-day rerecording rights which the educational television stations already grant to subscriber schools.<sup>171</sup> Since it does not apply to commercial programs, is applicable only to certain works, and could be further limited by other provisions in section 118, it would not appear to extend taping rights any further than the already existing rerecording arrangements.

#### 6. Other Provisions of Chapter 1

The sections of chapter 1 discussed so far cover all of the provisions of the New Law which have any substantial effect upon schools. The remainder of chapter 1 deals primarily with special situations, some of which acted as strong catalysts leading to the writing of the new statute.<sup>172</sup> The sections are not totally without application to school uses, but their applicability is indirect and slight when compared with the provisions already discussed, so a full treatment of them is beyond the scope of this Comment.

#### D. Remedies

Chapter 5 of the New Law, dealing with copyright infringement and remedies,<sup>173</sup> is one of the most important parts of the new law for educators. The chapter starts by defining an infringer of a copyright as "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118,"<sup>174</sup> and goes on to list and describe the remedies which are available, including injunction,<sup>175</sup> impounding of infringing articles,<sup>176</sup> and damages.<sup>177</sup>

Although teachers and schools should be aware that infringing articles, including the items themselves and the equipment used to produce them, may be impounded and eventually even destroyed, the most important section for present purposes is section 504—the damage section.<sup>178</sup> The section makes an

170. House Report, *supra* note 4, at 119.

171. See note 260 *infra* and accompanying text.

172. Compare, e.g., *Mazer v. Stein*, 347 U.S. 201 (1954), with New Law, *supra* note 1, § 113.

173. New Law, *supra* note 1, §§ 501-10.

174. *Id.* § 501(a). As indicated previously, this helps to clarify the point that a use deemed fair under the fair use doctrine is no longer considered to be an infringement, if, indeed, it ever was. See note 59 *supra*.

175. New Law, *supra* note 1, § 502.

176. *Id.* § 503.

177. *Id.* § 504.

178. The damage provisions are similar to those under the existing statute. See, e.g., *Orgel v. Clark Boardman Co.*, 301 F.2d 119 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962); *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263 (2d Cir. 1959); 17 U.S.C. § 101 (1970 & Supp. V 1975). However, the application of the provisions of the old law were beset with problems due to the lack of clarity. See *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971). Congress faced this problem squarely.

infringer liable for either the copyright owner's actual damages plus additional profits derived by the infringer,<sup>179</sup> or statutory damages as provided.<sup>180</sup> Except in certain circumstances, the copyright owner may elect which type of damage he is going to receive.<sup>181</sup>

Statutory damages normally fall within a range "of not less than \$250 or more than \$10,000 as the court considers just."<sup>182</sup> Such damages would apply to a "single infringer of a single work . . . no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series."<sup>183</sup> Exceptions to the normal range of statutory damages may be made where there has been willful infringement, in which case statutory damages may be increased to not more than \$50,000.<sup>184</sup> Likewise, damages may be reduced where the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."<sup>185</sup>

The provision for reducing the damages is most important for educators. Ordinarily, such reduction would be to a sum of not less than \$100.<sup>186</sup> However, there is a special provision which requires the court to "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 . . . an employee or agent of a nonprofit educational institution . . . acting within the scope of his or her

---

The House Report indicated that "[t]he two basic aims of [section 504] are reciprocal and correlative: (1) to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute." House Report, *supra* note 4, at 161.

179. New Law, *supra* note 1, § 504(a), (b).

180. *Id.* § 504(a), (c).

181. Section 504(c)(1) indicates that the owner may elect either actual or statutory damages, but section 504(c)(2), when discussing remission of statutory damages, removes the discretion which the court would otherwise be allowed. It would seem, therefore, that where remission is applicable, the owner's option to elect the type of damages would no longer exist. See New Law, *supra* note 1, § 504(c)(1), (2). See also notes 187-88 *infra* and accompanying text for a further discussion of the remission provision.

182. New Law, *supra* note 1, § 504(c)(1).

183. House Report, *supra* note 4, at 162.

184. New Law, *supra* note 1, § 504(c)(2).

185. *Id.* This is the so-called "innocent infringer" provision which was viewed as somewhat controversial because of fears that it might reduce the incentive of the copyright owner to sue. See, e.g., Note, *Copyright Law Revision: Its Impact on Classroom Copying and Information Storage and Retrieval Systems*, 52 Iowa L. Rev. 1141, 1153-54 (1967). However, as the House Report points out, the provision is intended "to protect against unwarranted liability in cases of occasional or isolated innocent infringement [while, at the same time,] . . . by establishing a realistic floor for liability, . . . preserv[ing] its intended deterrent effect [as well as] not allow[ing] an infringer to escape simply because the plaintiff failed to disprove the defendant's claim of innocence." House Report, *supra* note 4, at 163.

186. New Law, *supra* note 1, § 504(c)(2).

employment."<sup>187</sup> This exception also applies to the institution itself.<sup>188</sup> The section is, therefore, another clear indication of the congressional desire to make concessions to the education profession.

Chapter 5 goes on to provide for the award of costs and attorney's fees in civil actions<sup>189</sup> and to describe the nature of and penalties for criminal offenses, including infringement which has taken place "willfully and for purposes of commercial advantage or private financial gain"<sup>190</sup> and certain fraudulent actions.<sup>191</sup> This means that, despite section 504's remission of damages for educators, the provision would not preclude an educator's being required to pay costs or attorney's fees,<sup>192</sup> and that certain actions could constitute criminal offenses.<sup>193</sup>

It is also important to remember that any action, civil or criminal, while certainly involving some financial cost, could, at the same time, be very costly in terms of professional reputation.<sup>194</sup>

#### IV. THE UTILITY OF THE NEW LAW AS IT APPLIES TO EDUCATION

On the whole, the New Law, together with the educational fair use guidelines, must be considered a very commendable attempt to remove much of the legal and ethical uncertainty regarding the use of copyrighted works which has long troubled members of the education profession.<sup>195</sup> It is quite clear that Congress genuinely wished to ease the pressure on educators who use copyrighted materials in good faith, thinking the use fair, but either

187. *Id.* See also Goldman, *The Copyright Law: Nearly Sixty Years Later*, 28 Ohio St. L.J. 261, 290 (1967).

188. New Law, *supra* note 1, § 504(c)(2). The provision contains the words "an employee . . . who, or such institution . . . which infringed by reproducing the work in copies or phonorecords." *Id.* The legislative history of the law makes it clear that Congress desires that a court be precluded from awarding any statutory damages "where such a person or institution infringed copyrighted material in the honest belief that what they were doing constituted fair use." House Report, *supra* note 4, at 163. The House Report goes on to say that "[i]t is intended that, in cases involving this provision, the burden of proof with respect to the defendant's good faith should rest on the plaintiff." *Id.*

189. New Law, *supra* note 1, § 505.

190. *Id.* § 506(a).

191. *Id.* § 506 (c)-(e). Such fraudulent acts include fraudulent copyright notice, fraudulent removal of a copyright notice, and false representation in applying for a copyright.

192. The New Law allows "recovery of full costs by or against any party other than the United States or an officer thereof" at the discretion of the court, and the inclusion of "a reasonable attorney's fee to the prevailing party as part of the costs." *Id.* § 505. Courts also allow recovery of full costs and reasonable attorney's fees under the existing statute. 17 U.S.C. § 116 (1970); see *Bell v. Pro Arts, Inc.*, 366 F. Supp. 474, 485 (N.D. Ohio 1973), *aff'd per curiam*, 511 F.2d 451 (6th Cir.), *cert. denied*, 423 U.S. 829 (1975).

193. See notes 189-91 *supra* and accompanying text.

194. See notes 45-46 *supra* and accompanying text.

195. See notes 14-22 *supra* and accompanying text.



know, or are unaware, that their good faith beliefs might not be legally supportable.<sup>196</sup>

A number of matters now appear to be settled. For one thing, and perhaps most important, Congress has specifically sanctioned the application of the fair use doctrine to teaching, including the making of multiple copies for classroom use.<sup>197</sup> The fair use section itself specifies that one of the factors to be considered is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."<sup>198</sup>

It is also quite clear that, within an actual classroom situation—a "face-to-face teaching activit[y]"—the teacher has considerable latitude to use copyrighted works, with the limitation, in the case of motion pictures or other audiovisual works, that the copies be lawfully obtained, or at least that the teacher not know or have reason to believe them not lawfully made.<sup>199</sup> Moreover, besides "face-to-face teaching activities," numerous other provisions of the law work to the benefit of the educator, including, among others, use of library materials<sup>200</sup> and certain activities in the nature of educational transmissions.<sup>201</sup>

Finally, it is clear from the damage section that Congress does not want a teacher to suffer when, in the course of his or her job, he or she makes use of a copyrighted work which the teacher honestly believes is a fair use.<sup>202</sup>

On the other hand, the New Law does not solve all of the problems which educational users have raised over the years. Many questions remain open to interpretation and, in the final analysis, will probably require reliance on the fair use doctrine.<sup>203</sup> It seems safe to say, therefore, that many educators will not be pleased with the New Law. Also, there was, in the long period leading up to the law's enactment, an attempt by various educators to seek blanket exemptions for many types of educational uses,<sup>204</sup> or to have Congress sanction the concept that non-profit educational use created a rebuttable presumption that the use was fair.<sup>205</sup> The fact that these, or even less sweeping proposals, did not receive congressional sanction will dissatisfy many.

Issues left unsettled by the New Law can be grouped into two categories: (1) Specific educational uses the legality of which remains questionable;<sup>206</sup> and

196. See notes 37-49 *supra* and accompanying text.

197. New Law, *supra* note 1, § 107; see section III(B) *supra*.

198. New Law, *supra* note 1, § 107(1).

199. *Id.* § 110(1); see section III(C)(2) *supra*.

200. New Law, *supra* note 1, § 108; see section III(C)(4) *supra*. The educator is, of course, benefited by the library provisions of section 108 only if the section does, in fact, apply to the school libraries with which the educator would ordinarily be associated. Presumably, it does so apply. See notes 126-27 *supra* and accompanying text.

201. New Law, *supra* note 1, §§ 110(2), 111(a)(2), (4); see section III(C)(5) *supra*.

202. New Law, *supra* note 1, § 504(c)(2); see section III(D) *supra*.

203. See section IV(A) *infra* for a fuller discussion of this point.

204. See House Report, *supra* note 4, at 66-67; note 53 *supra*.

205. 1967 Report, *supra* note 18, at 33.

206. This category is discussed in section IV(A) *infra*.

(2) theoretical problems relative to the fair use doctrine as it now applies to educational uses of copyrighted works.<sup>207</sup> The two categories relate directly to one another. An examination of specific educational uses and their legality under the New Law leads to the conclusion that the solution lies in the proper interpretation of the fair use doctrine, whatever that may be.<sup>208</sup>

#### A. *Specific Educational Uses of Questionable Legality*

A few examples will suffice to demonstrate that the legality of many educational uses remains questionable under the new copyright law.

##### 1. Face-to-Face Teaching Activities

Probably the most troublesome question of interpretation will be that surrounding the true meaning of "face-to-face teaching activities."<sup>209</sup> The House Report indicates that Congress saw "no need for a statutory definition of 'face-to-face' teaching activities to clarify the scope of the provision."<sup>210</sup> Undoubtedly, this is correct when one considers the traditional self-contained classroom, with the teacher and students in the same room, in fact working "face-to-face." However, modern education has created many new educational configurations which emphasize *learning* by the student rather than *teaching* by the teacher.<sup>211</sup> Today, the student is often placed in situations designed to enable him to learn on his own without the persistent dominance of a teacher's presence.<sup>212</sup>

The House Report does indicate "that the teacher and students [need not] be able to see each other," but it goes on to say that the "face-to-face" provision "require[s] their simultaneous presence in the same general place."<sup>213</sup> It seems conceivable that there could be some innovative, non-traditional situation which would be open to interpretation because there was no "simultaneous presence." A court would probably not draw such a fine line, especially since Congress seemed primarily concerned with preventing abuse by certain types of transmissions,<sup>214</sup> but the possibility exists.

Perhaps the "face-to-face" and "simultaneous presence" questions would not be so theoretical if the "teaching activity" were created not by an individual teacher but by some type of curriculum team or instructional development group directed by the school administration.<sup>215</sup> At least in terms of copying,

207. This category is discussed in section IV(B) *infra*.

208. See section IV(B) *infra*.

209. New Law, *supra* note 1, § 110(1). See notes 107-17 *supra* and accompanying text for an explanation of the phrase.

210. House Report, *supra* note 4, at 81.

211. See references cited at note 15 *supra*.

212. See, e.g., A. Hertzberg & E. Stone, *Schools Are For Children* (1971); H. Kohl, *The Open Classroom* (1969); W. D. Wiley & L. Bishop, *The Flexibly Scheduled High School* (1968). See also references cited at note 15 *supra*.

213. House Report, *supra* note 4, at 81.

214. *Id.*

215. See, e.g., B. Banathy, *Instructional Systems* (1968); R. Diamond et al., *Instructional*

Congress seems to have wished to prevent certain types of uses directed by a school administration, so that uses of copyrighted works would not be part of a systematic plan which might lead to wholesale abuse.<sup>216</sup> Absent such prevention, administrative programs designed to create innovative learning situations not requiring the "simultaneous presence" of a teacher might lead to questions of possible infringement. A court might consider such a situation to be sufficiently in the nature of a "face-to-face teaching activity," but, on the other hand, it is not at all clear that such would be the interpretation.

One final, but no less important, problem regarding "teaching activities" is the fact that it excludes "performances or displays, whatever their cultural value, or intellectual appeal, that are given for the recreation or entertainment of any part of their audience."<sup>217</sup> This appears to mean that school assembly programs, which are produced for entertainment purposes, but intended to have educational merit as well, are in a different category from traditional classroom instruction. Another portion of the House Report mentions school assemblies, but it says that school assemblies, plus graduation ceremonies, class plays, and sporting events, would not be exempted because "the audience is not confined to the members of a particular class."<sup>218</sup> Although it does indicate that the performance *might* be exempt under another clause,<sup>219</sup> it is not clear why the distinction is necessary at all. An assembly program, even though it entertains, is still part of the bonafide instructional program of the school.<sup>220</sup> Nevertheless, the simple situation in which a certain class is visited by members of another class or by parents would seem no longer to be free from infringement risks because "the audience is [no longer] confined to the members of a particular class."<sup>221</sup>

## 2. Classrooms or Similar Places Devoted to Instruction

Closely related to the problem of assembly programs and other similar activities is the question of what constitutes a "classroom or [such] similar place devoted to instruction."<sup>222</sup> As has been indicated, Congress intended the meaning of the phrase to extend considerably beyond the traditional classroom with chalkboards and desks, so as to include auditoriums, gymnasiums,

---

Development for Individualized Learning in Higher Education (1975); Learning Packages in American Education (P. Kapfer & M. Kapfer eds. 1972); C. Peterson, *Effective Team Teaching: The Easton Area High School Program* (1966).

216. See, e.g., House Report, *supra* note 4, at 70.

217. *Id.* at 81.

218. *Id.* at 82.

219. The exemption might occur under section 110(4). *Id.* at 82.

220. *Id.* at 82.

221. *Id.* These programs might be called "cultural enrichment" activities. See Note, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, 56 Va. L. Rev. 664, 674 (1970).

222. New Law, *supra* note 1, § 110(1).

and other facilities, provided they are being used for "instruction."<sup>223</sup> If instruction is defined as that process which takes place during "face-to-face teaching activities," as it logically seems that it would be, then nonstandard instructional activities<sup>224</sup> carried on in nontraditional locations without a teacher present could raise problems by failing to fit the definition set down in the law. Photocopying for such activities could be deemed illegal because it might be viewed as systematic or "directed by higher authority."<sup>225</sup>

### 3. School Libraries and Learning Resource Centers

Although learning resource centers come in various shapes and sizes, some similar to traditional libraries and others unique learning environments,<sup>226</sup> it is not inaccurate to say that they fit into a broad category called "school libraries," which have problems of their own apart from those of the teachers. For one thing, although, in all probability, the school library does fit the definition of libraries in section 108, nowhere is this clearly specified.<sup>227</sup> This deficiency becomes apparent when one considers that section 108 seems to be aimed primarily at use by an isolated individual user who needs a personal copy of a work strictly for "private study, scholarship, or research."<sup>228</sup> In a certain sense, all of the students in a school are engaged in "private study, scholarship, or research" when each is viewed as an individual. This would suggest that copies could be made for all of them, yet that would almost certainly be infringement because it would be "systematic,"<sup>229</sup> and presumably intended to avoid purchase of the items. On the other hand, the library would not need to make copies for everyone. Six copies to be held on reserve for a class of one-hundred students might suffice. Such an action would not be unusual, and could be justified to preserve the originally purchased item. Section 108, however, does not seem to allow such an activity unless "the library . . . has, after a reasonable effort, determined that an unused replacement [for an already deteriorating original copy] cannot be obtained at a fair price."<sup>230</sup>

A related problem, very real to school libraries, is the fact that "[t]he rights of reproduction . . . under [the] section do not apply to . . . musical work[s] . . . or other audiovisual work[s] other than . . . audiovisual works[s] dealing

223. House Report, *supra* note 4, at 82.

224. See notes 15-17 and 215-23 *supra* and accompanying text.

225. House Report, *supra* note 4, at 69.

226. See, e.g., Bryan & Smith, *A Self-Paced Art History Learning Center at the University of South Carolina*, 20 *Audiovisual Instruction*, November 1975, at 24; Moore, *The Evaluation of a Media Resource-Based Learning Project and Its Modification of Traditional Classroom Procedures*, 21 *Audiovisual Instruction*, February 1976, at 36; Volker & Simonson, *Programmed Videocassettes for Self-Instruction in Media*, 20 *Audiovisual Instruction*, November 1975, at 49.

227. See notes 126-27 *supra* and accompanying text.

228. New Law, *supra* note 1, § 108(d), (e).

229. *Id.* § 108(g)(2).

230. *Id.* § 108(c).

with news."<sup>231</sup> Therefore, even if a school library could make copies of phonorecords for some of the purposes noted above, certain items, including musical works and cassette tapes, which constituted all or part of an audiovisual work, could not be reproduced.

#### 4. New Technological Uses

New uses resulting from modern technology create the most serious questions of all.<sup>232</sup> Technological innovations have revolutionized many aspects of education to the point where educational technology has become a field in itself with a whole new set of concerns and responsibilities.<sup>233</sup> No attempt will be made to deal with even a significant percentage of the technological innovations employed by modern education. Thus, a few examples must suffice.

##### a. Technological Uses In General

One readily apparent problem arises relative to single as opposed to multiple images.<sup>234</sup> An author has a right to ensure that his creation is being shown in the manner he created it.<sup>235</sup> Consequently, a teacher who wished to project two or more copyrighted works onto one screen simultaneously would be infringing upon this right, and might find that he had violated the law because he had "displayed"<sup>236</sup> multiple images rather than individual images.<sup>237</sup>

Another question results from the controversy raised in recent years by the growing cable television industry.<sup>238</sup> In an attempt to solve problems which had arisen, the new statute has much to say about "transmissions."<sup>239</sup> The restrictions placed upon such activities affect not only cable television, but

231. *Id.* § 108(h).

232. *See, e.g.*, Wittich, *supra* note 14, at xiii-xxi, 3-41; Carr, *supra* note 14, at 189-90; notes 11-22 *supra* and accompanying text.

233. *See, e.g.*, R. Heinich, *Technology and the Management of Instruction* (Monograph No. 4, 1970); *Planning for Effective Utilization of Technology in Education* (E. Morphet & D. Jesser eds. 1969); Wittich, *supra* note 14, at xiii-xxi, 3-41.

234. Section 109 grants to the owner of a particular copy the right to "display that copy publicly, either directly or by the projection of no more than one image at a time." *New Law, supra* note 1, § 109(b). Clause (1) of section 110, in mentioning the exemption for "face-to-face teaching activities", uses the words "display of individual images." *Id.* § 110(1).

235. *See* notes 289-92 *infra* and accompanying text, discussing "moral rights" and the "mutilation" of copyrighted works.

236. *See* note 100 *supra* for a definition of "display."

237. This might well be deemed a fair use, but this interpretation would leave the teacher just as uncertain as he was before the *New Law* was written. Note that the multiple image question also makes certain uses of television equipment questionable. For example, "projection" onto a single set might be permissible, but "projection" of two images of the same picture onto two television sets because of the large size of a particular classroom might not be.

238. *See, e.g.*, B. Kaplan, *An Unhurried View of Copyright 102-04* (1967); references cited at notes 151-53 *supra*.

239. *See, e.g.*, *New Law, supra* note 1, §§ 110(2)-(4), 111.

related educational uses as well. For example, a small closed circuit system within a school would be more like an innovative device "for projecting visual images"<sup>240</sup> than a cable television system as such. Nevertheless, such a closed circuit system would fit the definition of a transmission,<sup>241</sup> and the language of both the statute<sup>242</sup> and the House Report<sup>243</sup> suggest that it must be treated separately even though not a transmission in the usual sense of the word. The use might be considered a fair one, but this would still leave some uncertainty regarding how far the picture could be transmitted. Even if such a method of performing or displaying a work were classified merely as a projection device, there remain questions concerning the extent of the "general area" within which the device must be used and what constitutes an "outside location" from which an image could not be sent without classifying it as a transmission.<sup>244</sup> As a result, an educator who wished to use a school's closed circuit system to show a movie would be uncertain about the legality of the activity.<sup>245</sup>

Even when using standard projectors instead of television, a choice among the various ways in which images may be projected onto a screen can be the difference between a legal and an illegal use. For example, a teacher could project a picture from an art book onto a screen using an opaque projector. However, since an opaque projector projects light *reflected* from a flat surface, it does not produce nearly as bright a picture as one resulting from the projection of a slide, in which case the light is *passed through* a transparency.<sup>246</sup> Clearly, much greater justice would be done to the work of art if a slide were used instead. Available technology would enable the teacher to change the form of the lawfully possessed work into some form of transparency,<sup>247</sup> but the law seems to reserve such rights of reproduction to the copyright owner alone.<sup>248</sup>

240. See House Report, *supra* note 4, at 81.

241. For a definition of "transmission," see note 102 *supra*.

242. New Law, *supra* note 1, §§ 109-11.

243. House Report, *supra* note 4, at 81-85.

244. See *id.* at 81 for a discussion of the problems relative to "general area" and "outside location" with regard to "face-to-face teaching activities." See also New Law, *supra* note 1, § 110(1).

245. The need to distinguish closed-circuit systems from ordinary television transmission was pointed out in the hearings. See, e.g., *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 4, at 1046, 1053 (1967) (Statement of Harry N. Rosenfield, Esq., Counsel for Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision).

246. Although improvements have taken place in opaque projectors in recent years by increasing lamp wattage capacity, the fact that such a projector uses reflected rather than direct light will naturally make the image less brilliant. See generally Wittich, *supra* note 14, at 437-39.

247. See Miller, *Copyright and the Copystand*, 20 *Audiovisual Instruction*, October 1975, at 39.

248. New Law, *supra* note 1, § 106. It is possible, of course, that this could be fair use, but the situation is by no means clear.

### b. Computer Technology

One technological innovation which can only briefly be mentioned here, but which well merits fuller treatment in its own right, concerns the effect of computers.<sup>249</sup>

The uses which educational institutions are making of computers are many and varied. When the computer is applied to curriculum development and, especially, to actual teaching, problems surface. For example, if a computer were used to plan teaching sequences and to compile bibliographies for learning packages, an intricately coded and detailed system could conceivably lift entire portions of copyrighted works out of the original context intended by the author.<sup>250</sup> An even more likely source of infringement would be a system programmed to teach students by responding with bits of information from copyrighted works.<sup>251</sup> Such an activity could not only involve unlawful copying, but the lack of the "simultaneous presence" of a teacher could also mean that it would not qualify for exemption as a "face-to-face teaching activit[y]."<sup>252</sup> The New Law does nothing to settle the questions raised by such activities.<sup>253</sup>

### c. Off-the-Air Videotaping

Finally, there is the controversy over off-the-air videotaping, often the first problem to be mentioned when one refers to copyrights in an educational context.

Television equipment may be used for a variety of purposes.<sup>254</sup> When used with a camera to create original programs "in-house," certain questions could arise if students are performing copyrighted works before the cameras and the tape is subsequently retained by the school. This could be fair use since a parallel may be drawn with musical pieces which are recorded by students and retained by the school—an activity which the music guidelines suggest is

249. See, e.g., B. Kaplan, *An Unhurried View of Copyright 102-04* (1967); J. Marke, *Copyright and Intellectual Property 88-105* (1967); Muller, *Education and the New Technology*, in *Planning for Effective Utilization of Technology in Education 30* (E. Morphet & D. Jesser eds. 1969).

250. See, e.g., J. Eisele, *Computer Assisted Planning of Curriculum and Instruction* (1971). See generally Alessi, Anderson, & Biddle, *Hardware and Software Considerations in Computer Based Course Management*, 16 *Educ. Tech.*, April 1976, at 16; Dagnon & Spuck, *A Role for Computers in Individualizing Education—And It's Not Teaching*, 58 *Phi Delta Kappan* 460 (1977).

251. See generally, e.g., Carr, *supra* note 14, at 189-90; Cass, *Education and the Copyright Law*, 49 *Saturday Review*, May 21, 1966, at 53; references cited at notes 249-50 *supra*.

252. See *New Law, supra* note 1, § 110(1).

253. The *New Law* "does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with [computers and similar information systems] . . . than those afforded to works under the law . . . in effect on December 31, 1977, as held applicable and construed by a court in an action brought under [the new statute]." *New Law, supra* note 1, § 117.

254. Wittich, *supra* note 14, at 505-26; Bretz, *In-School Television and the New Technology*, 16 *Educ. Tech.*, May 1976, at 50.

fair.<sup>255</sup> On the other hand, when television equipment is used to tape programs off-the-air to be played later in class, the possibility of infringement becomes a major concern. Taping equipment has already given rise to a law suit in which several producers are contending that such hardware encourages violation of the copyright laws.<sup>256</sup> The resolution of the case is far away, and may well hinge on the fact that the use is a strictly private one. But when schools use this kind of equipment, the use is no longer private<sup>257</sup> and runs a serious risk of cutting into a market for the sale or rental of the items involved.

Despite the fact that off-the-air taping of commercial programs is probably an infringement,<sup>258</sup> particularly if the tapes are retained for any length of time, surveys indicate that most schools engage in the activity, and many retain the tapes for long periods.<sup>259</sup>

Some off-the-air taping is lawful, such as when schools subscribe to educational stations for a fee, but even lawfully taped programs can normally only be retained for a short period,<sup>260</sup> so the effect of the taping is merely that of a delayed telecast.

255. See House Report, *supra* note 4, at 71.

256. *A Right to Replay?*, Time, April 11, 1977, at 64.

257. It has been pointed out, with regard to such taping, that "[w]hatever does not serve the personal use of a private person, including the family circle, must be deemed to be 'public.'" Klaver, *The Legal Problems of Video-Cassettes and Audio-Visual Discs*, 23 Bull. Copyright Soc'y 152, 167 (1975). The article goes on to suggest that such uses by schools should be deemed "semi-public" and treated differently. *Id.* at 170. But see the definition of public performances or displays of works at note 100 *supra*. See also Aleinikoff, *Educational Television—A Non-Commercial Viewpoint*, 53 Iowa L. Rev. 880 (1968).

258. There are only a few provisions mentioning videotaping in the new statute. One of these instances is section 108. New Law, *supra* note 1, § 108; see notes 144-45 *supra* and accompanying text. Another is the provision which sanctions seven-day retention of certain noncommercial broadcasts by public broadcasting entities. New Law, *supra* note 1, § 118(d)(3); see notes 167-71 and accompanying text. One additional mention of videotaping is in section 111 concerning secondary transmissions. New Law, *supra* note 1, § 111. However, regarding that section, the House Report states that "[w]ith one exception provided in subsection (f) [relative to non-simultaneous transmissions by cable systems in Hawaii] and limited by subsection (e) [specifying strict guidelines regarding the disposition of the tapes], the section does not cover or permit a cable system, or indeed any person, to tape or otherwise record a program off-the-air and later to transmit the program from the tape or record to the public." House Report, *supra* note 4, at 91. This statement, together with the House Report's indication that the problem was a difficult one, *id.* at 71-72, would seem to suggest that, except for the taping of news under section 108, there has been no extension of the right to videotape beyond that already permitted under existing seven-day taping rights already permitted by the educational stations. See text accompanying note 171 *supra* and note 260 *infra* and accompanying text.

259. See Miller, *Off-Air-Copying With A License?*, Audiovisual Instruction, March 1975, at 96.

260. Public Broadcasting Service, Public Television Library, Great Plains National Instructional Television Library & Agency for Instructional Television, *Joint Statement of Policy—School Rerecording of Public and Instructional Television Programs* (November 1975), reprinted in Association for Educational Communications and Technology & Association of Media Producers, *Copyright and Educational Media* (1977). As previously indicated, the limited rerecording



Regardless of some instances where the activity is lawful, most off-the-air taping in which teachers engage is illegal unless it is fair use,<sup>261</sup> which, in this context, as Congress implicitly recognized,<sup>262</sup> is vague at best.

### B. *Educational Fair Use Under the New Law*

Most copyright questions arising in an educational situation will still depend upon fair use<sup>263</sup>—a doctrine which educators have insisted fails to set sufficiently specific standards.<sup>264</sup> Undoubtedly with this problem in mind, Congress compromised<sup>265</sup> by publishing the educational guidelines for fair use.<sup>266</sup>

Although backed by good faith intentions to clear up troubling questions, the guidelines may well do more harm than good. Fair use, which, in effect, the guidelines seek to define,<sup>267</sup> is a concept which has long been treated as an equitable rule of reason allowing a court to weigh the facts of an individual case.<sup>268</sup> The very fact that the guidelines are so specific<sup>269</sup> may result in "over-defining" the doctrine to the extent that it no longer exists as a discretionary one. A strict reading of the guidelines by either the courts or the educators or copyright owners themselves may restrict rather than extend the fair use latitude granted to teachers.

Congress did make it clear that courts are free to interpret fair use more or less stringently depending upon the facts of a case.<sup>270</sup> It also must be remembered that the guidelines are only legislative history, not part of the law itself.<sup>271</sup> However, it is questionable how effective these qualifications will be. If educational fair use becomes frozen<sup>272</sup> within the parameters of the

rights allowed by the educational television stations have, in effect, received congressional sanction through the provision of section 118. New Law, *supra* note 1, § 118(d)(3); *see* notes 167-71 *supra* and accompanying text.

261. House Report, *supra* note 4, at 71-72.

262. *Id.*

263. *See* section IV(A) *supra*.

264. *See* notes 37-49 *supra* and accompanying text

265. Essentially, the entire law is the result of one compromise after another. Ringer, *supra* note 3, at 481-82.

266. *See* section III(B) *supra*.

267. Although called "guidelines," the educational guidelines spell out what the groups who wrote them thought was fair or unfair. *See* House Report, *supra* note 4, at 72. Also note the fact that when the guidelines were accepted by the Conference Committee they were accepted "as part of their understanding of fair use." H.R. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976). *See also* section III(B) *supra*.

268. *See* notes 33-36 *supra* and accompanying text

269. The guidelines for books and periodicals, after discussing the standards for "brevity," go on to say that "[e]ach of the numerical limits stated in [the brevity guidelines for poetry and prose] may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph." House Report, *supra* note 4, at 69. For a definition of "brevity," *see* note 77 *supra*.

270. House Report, *supra* note 4, at 72.

271. *But see* note 72 *supra* and accompanying text.

272. The House Report specifically indicated that there was no desire "to freeze the doctrine [of fair use] in the statute." House Report, *supra* note 4, at 66 (emphasis added).

guidelines, its viability as a judicial doctrine of reasonableness may be seriously impaired.

#### V. A PROPOSAL

The continuing lack of clear standards defining the legal limits of the educational use of copyrighted works, together with the disturbing questions raised by the guidelines, demands that the issue not be treated as a closed one. Fortunately, the House Report suggested a willingness to entertain further suggestions.<sup>273</sup> Hopefully, this means that Congress will go beyond the mere consideration of additional guidelines for fair use, because the ultimate resolution of the controversy would seem to lie in the creation of an education section for the law.

As has been pointed out, an education section was considered and rejected. Congress was correct in rejecting the proposals made, because they allowed the educator too much latitude at the expense of the copyright owner.<sup>274</sup> This rejection, however, should not be taken to mean that a section which properly balances the interests of the educators and the copyright owners is not needed.<sup>275</sup> Such a section would benefit both groups by furnishing clear standards which are lacking under the fair use doctrine. The teacher would no longer have to depend upon guesswork, and the copyright owner would clearly understand how the statute protected his rights in an educational context.

An education section should be patterned to a large extent after section 108 dealing with libraries,<sup>276</sup> even though section 108 has not entirely settled the

---

273. *Id.* at 72.

274. See note 53 *supra* and accompanying text. Broad exemption from copyright control would be unjust to authors and publishers who would certainly feel the damage to their markets, and educators would eventually be hurt when materials disappeared from the market as a result of insufficient sales. Speaking during the hearing on behalf of Harcourt Brace Jovanovich, Inc., and MacMillan, Inc., Ambassador Kenneth B. Keating said that "education is in the public interest—but this interest is served in our system by private, commercial businesses which require a profit to survive. The erosion of the rights and incentives accorded by copyright will endanger rather than serve the educational needs of our country." *Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 220 (1973) (Statement of Ambassador Kenneth B. Keating).

275. It is interesting to note that a section dealing with libraries, now section 108, was once thought unnecessary. In 1967, the House Committee considering copyright law revision stated that "[a]s in the case of reproduction of copyrighted material by teachers for classroom use, the committee does not favor a specific provision dealing with library photocopying." 1967 Report, *supra* note 18, at 36. The original drafts of the new law included no section comparable to the present section 108. The draft completed prior to the publication of the 1967 Report, however, included a section 108 which granted "a limited right to duplicate archival collections [which, it was felt,] would not harm the copyright owners' interests but would aid scholarship and enable the storage of security copies at a distance from the originals." *Id.* at 37.

By late 1969, however, a Senate revision had inserted new provisions with regard to library photocopying. Derenberg, *Copyright Law*, 1969/70 Ann. Survey Am. L. 711, 714. The present section 108, New Law, *supra* note 1, § 108, is quite extensive, indicating how markedly the opinion about the necessity for such a section changed in a decade.

276. New Law, *supra* note 1, § 108.

long history of controversy between the librarians and the publishers—dissatisfaction has already been expressed, particularly on the part of the librarians.<sup>277</sup> The questions which remain, however, concern the proper content for section 108. The need for the section itself is certainly beyond question.

The balancing of interests set forth in section 108 differs in a very significant way from the compromise reached with regard to education. The education compromise has resulted in no real statutory rules governing educational uses other than the exemption for "face-to-face teaching activities"<sup>278</sup> and certain other isolated instances of exemptions found in other clauses of the statute.<sup>279</sup> Instead, it has left educators at the mercy of the fair use doctrine. Only the legislative history of the new copyright law confronts the question of what fair use means in an educational context—a solution which has disturbing implications.<sup>280</sup> Section 108, on the other hand, provides specific statutory rules for library uses and leaves fair use alone, making it clear that the doctrine can still apply notwithstanding the provisions of section 108 itself.<sup>281</sup> The library compromise did not seek to *explain* fair use—guidelines in the legislative history of section 108 explain the provisions of the section, *not* the meaning of fair use.<sup>282</sup> While the section does give recognition to uses previously held to be fair,<sup>283</sup> this approach differs markedly from an attempt to explain fair use itself.

#### A. *The Parameters for an Education Section*

In creating the parameters for an education section, the foremost goal must be to achieve an equitable balance between the rights of the copyright owners and the rights of the users.<sup>284</sup>

American copyright law has long directed its primary attention to the economic rights of the creator of an intellectual work—his quasi-property right that whatever financial benefits accrue from his efforts go to him, not to someone else attempting to reap the fruits of his labor.<sup>285</sup> Here the principle

277. See references cited at notes 125-29 *supra*.

278. New Law, *supra* note 1, § 110(1).

279. See sections III(C)(3)-(6).

280. See section IV(B) *supra*.

281. New Law, *supra* note 1, § 108(f)(4).

282. See "Guidelines for the Proviso of Subsection 108(g)(2)," worked out with the assistance of CONTU (see note 13 *supra*), reprinted in H.R. Rep. No. 1733, 94th Cong., 2d Sess. 72-74 (1976).

283. Compare New Law, *supra* note 1, § 108, with *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975).

284. See, e.g., Cass, *Education and the Copyright Law*, 49 *Saturday Review*, May 21, 1966, at 53. This balance has also been identified as a balance between the constitutional right of access and the statutory privilege of the owner of the copyright. Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 *Notre Dame Lawyer* 790, 791 (1975).

285. It has been stated that American copyright law seeks to vindicate primarily the economic rather than the moral rights of the copyright owner. *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (case also deals with "moral rights" in the prevention of "mutilation" of a work, a concept which is further discussed at notes 289-92 *infra* and accompanying text). It is

considerations are the *direct* financial benefits derived from the use of the work and the *indirect* financial rewards stemming from the effect a given use has upon the market for the work.<sup>286</sup> Both of these are, of course, affected by many factors, not the least of which is the *substantiality* of the use made by someone else.<sup>287</sup> The fair use doctrine itself draws heavily upon this latter concept in that certain non-substantial uses are judicially deemed fair, notwithstanding specific statutory rights granted to the copyright owner.<sup>288</sup>

Although the economic factor is the primary one underlying American copyright law,<sup>289</sup> the rights to be accorded the creator of an intellectual work actually run deeper than mere financial remuneration. Also to be considered are certain *moral* rights "inalienably attached to the person of the [intellectual creator]."<sup>290</sup> This second category of rights has never been specifically recog-

---

felt that an author's, or publisher's, economic incentive is threatened if he cannot control the manner in which his work is displayed to the public. *Id.* The result of this concept was best phrased by the Supreme Court when it stated: "[T]o encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the sale or commercial use of copies of their works." Goldstein v. California, 412 U.S. 546, 555 (1973); see Mazer v. Stein, 347 U.S. 201 (1954); Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983, 1029-35 (1970) (pointing out the importance of the economic incentive). See also Note, *Protection of Artistic Integrity: Gilliam v. American Broadcasting Companies*, 90 Harv. L. Rev. 473, 477 (1976), suggesting that the concept of moral rights, discussed at notes 289-292 *infra* and accompanying text, also has an economic basis in that the artist has an economic interest in protecting his reputation.

286. See *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 84-85 (6th Cir. 1943). The general effects of the educational copying must not be to damage the publisher's market—the problem is to agree on how much is damaging. See Lieb, *Library Photocopying—the Publisher's View*, in *Copyright—The Librarian and the Law* (Proceedings of the Eighth Annual Symposium sponsored by the Alumni and Faculty of the Rutgers University Graduate School of Library Service) 23-33 (G. Lukac ed. 1972). Mere indirect effect can, however, be damaging. The mere likelihood that defendant's infringement would hurt sales has been held to be enough. *Addison-Wesley Publ. Co. v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963). Proof of actual damage is not necessary. *MacMillan Co. v. King*, 223 F. 862, 868 (D.C. Mass. 1914). It must also be noted that the fact that a use is noncommercial and limited is not determinative—multiple copies for private distribution among a limited class of persons can be just as damaging, and therefore illegal, as if it were done for the purpose of sale. See generally Comment, *Photocopying and Copyright Law—Williams & Wilkins Co. v. United States—How Unfair Can "Fair Use" Be?*, 63 Ky. L. 256, 259-60 (1975) (citing *Ager v. Peninsular & Oriental Steam Navigation Co.*, 26 Ch. D. 637, 641 (1884)).

287. See generally, e.g., references cited at note 286 *supra*.

288. Note 31 *supra* and accompanying text. The fair use doctrine itself, and the history of its application, provides some good guidelines for the manner in which the rights of the parties should be balanced. See generally Freid, *Fair Use and the New Act*, 22 N.Y.L. Sch. L. Rev. 497 (1977).

289. See references cited at note 286 *supra*.

290. Strauss, *The Moral Right of the Author*, Study No. 4 of Copyright Law Revision, 86th Cong., 1st Sess. 109, 115 (Comm. Print 1960) (emphasis added), quoted in Comment, *Copyright: Moral Right—A Proposal*, 43 Fordham L. Rev. 793, 794 (1975).

Among the attempts to categorize these personal, or moral, rights of an author, probably the best list is that compiled by Professor Nimmer, who has summarized them as follows: "To be

nized by American copyright law,<sup>291</sup> although it has been in many foreign countries.<sup>292</sup> Nevertheless, it would seem that moral rights are so basic to the philosophy underlying rights in intellectual creation that any statutory rules should protect those rights, as well as the more obvious economic interests.

On the other side of the scale are the rights of the educators. Actually, the rights involved on this side of the scale are those of the students being educated. This realization has led many to advocate broad exemptions for educational uses since education is, perhaps more than any other use of copyrighted works, so completely in the public interest.<sup>293</sup> Nevertheless, an overemphasis on the public interest could conceivably rationalize the free use of all intellectual works with the result that the copyright owners, stripped of any hope of financial reward or moral protection, would cease to create.<sup>294</sup> Only the financially independent could afford to be intellectually creative,<sup>295</sup>

known as the author of his work; to prevent others from being named as the author of his work; to prevent others from falsely attributing to him the authorship of work which he has not in fact written; to prevent others from making deforming changes in his work; to withdraw a published work from distribution if it no longer represents the views of the author; and to prevent others from using the work or the author's name in such a way as to reflect on his professional standing." Nimmer, *supra* note 30, § 110.1, at 443. For further definitions of the concept of "moral rights," also called "personal rights" as opposed to "property rights," see, e.g., Register's Report, *supra* note 6, at 4; Esezobor, *Concepts in Copyright Protection*, 23 Bull. Copyright Soc'y 258, 259 (1976); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554 (1940); Streibich, *The Moral Right of Ownership to Intellectual Property: Part II—From the Age of Printing to the Future*, 7 Memphis St. Univ. L. Rev. 45 (1976).

One of the most salient moral rights to be considered is the right of an author to prevent the "mutilation," or "deformation," of his work. As Professor Roeder stated in his classic article, "[t]o deform [an author's] work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for work he has not done." Roeder, *supra* at 569.

This viewpoint recently gained renewed attention in the Second Circuit when the party who had granted ABC Television the right to air the British Broadcasting Corporation's program "Monty Python" convinced the court that ABC's extensive editing constituted "actionable mutilation" by violating "the right of the artist to have his work attributed to him in the form in which he created it." *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 23-24 (2d Cir. 1976) (citing Nimmer in part, *supra* note 30, § 110.1).

For comments on the case, see Note, *Protection of Artistic Integrity: Gilliam v. American Broadcasting Companies*, 90 Harv. L. Rev. 473 (1976); Note, *Copyright—Author's Script Protected From Excessive Editing Under Doctrine of Common Law Copyright and Section 43(a) of the Lanham Act—Monty Python v. American Broadcasting Cos.*, Civil Nos. 75-7693, 76-7023 (2d Cir., June 20, 1976), 50 Temple L.Q. 151 (1976).

291. 538 F.2d at 24; Nimmer, *supra* note 30, § 110.2, at 443.

292. Nimmer, *supra* note 30, § 110.2, at 443; 43 Fordham L. Rev., at 797-803.

293. See notes 26-31 *supra* and accompanying text.

294. "Without [copyright], the writer may be discouraged from writing or from making his work available to the public at large. Without it, too, publishers would lack the security necessary to enable them to invest their capital and energy in making new books available to the public." India Ministry of Education, *International Copyright: Needs of Developing Countries—Symposium*, New Delhi, 1966, at 9, quoted in Esezobor, *Concepts in Copyright Protection*, 23 Bull. Copyright Soc'y 258, 266 (1976); see note 296 *infra*.

295. Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983, 995 (1970).

and even they might hesitate if their works could be used indiscriminately. Therefore, the public interest—the very justification for broad educational exemption—necessitates tempering the rights of the user to ensure that intellectual works will be available for use.<sup>296</sup>

Perhaps Lord Mansfield, nearly two centuries ago, best stated the balance to be achieved when he said:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.<sup>297</sup>

Lord Mansfield's words appear to be an excellent guide for the writing of an education section.

### B. *An Education Section for the Copyright Law*

The Appendix to the Comment contains a proposed education section for the copyright law. An effort has been made to compose the section using the same organizational and linguistic structure that went into the New Law itself. The model for the proposed section was, as noted earlier, section 108. The most crucial characteristic of section 108, which has been mirrored in the proposed section, is that it sets forth specific rules while still making fair use available as a separate doctrine.<sup>298</sup>

The rules put forward by the proposed section are based on various sources including the New Law itself, its legislative history,<sup>299</sup> judicial precedents, and the writings on the subject previously discussed.<sup>300</sup> Particular emphasis has been placed upon achieving a reasonable codification of the standards set forth in the educational guidelines, since these represent compromises already reached by the parties involved.<sup>301</sup> As suggested earlier, these compromises, in-so-far-as applicable and reasonable, should be represented in the law itself rather than being stated as an explanation of educational fair use.<sup>302</sup>

296. The Supreme Court said that "[t]he economic philosophy [of the copyright law] . . . is [based on] the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . . in 'Science and useful Arts.' " *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Professor Nimmer, referring to this quote, indicated that the public will benefit from this, but that monopoly for the copyright owner as granted by the statute is necessary for a full realization of this philosophy. Nimmer, *supra* note 30, § 3.1, at 6.6. Without this type of protection, it is possible that publishers could go out of business. Note, *Copyright Law and Library Photocopying: Striking a Balance between Profit Incentive and the Free Dissemination of Research Information*, 48 Ind. L.J. 503, 510 (1973).

297. *Sayre v. Moore*, 1 East 361, 102 Eng. Rep. 139 n.b, 140 n.b (K.B. 1785).

298. New Law, *supra* note 1, § 108(f)(4).

299. The legislative history of the statute consists of S. Rep. No. 473, 94th Cong., 1st Sess. (1975); House Report, *supra* note 4; H.R. Rep. No. 1733, 94th Cong., 2d Sess. (1976); and 122 Cong. Rec. (1976).

300. See section IV *supra*.

301. See references cited at note 71 *supra*.

302. See notes 273-83 *supra* and accompanying text.

The various sources for the proposed section have suggested five standards, or specific parameters, upon which the section is based.<sup>303</sup>

(1) *Non-Profit Educational Purpose*: The purpose of an educational use must be either the education of the students themselves through activities designed to enhance their educational growth, or other scholarly research aimed, directly or indirectly, toward the same end, not including uses designed for general public consumption nor uses leading to some direct or indirect commercial advantage.

(2) *Spontaneity*: To be entitled to special consideration, any use by a school must be at the instance and inspiration of the teacher in order to produce maximum teaching effectiveness at the time of the use, not part of a systematic plan which evades the rights of the copyright owners in a manner that is unfair even considering the public interest in education.

(3) *Brevity*: Any uses for which schools are to receive special consideration may not exceed in quantity the immediate requirements of the educational activity for which the use is made.

(4) *Cumulative Effect*: Specially allowed educational uses, even though brief in nature, must not excessively use the works of one author, nor be excessive overall, nor be used to create anthologies, collections, or compilations.

(5) *Protection of Fundamental Moral and Legal Rights*: Any specially allowed educational use, while duly attentive to the public interest, must not deprive the copyright owner of his legal and moral rights, including financial reward for his work. In particular, this requirement mandates the inclusion of a copyright notice on copies made and attentiveness to the rights of an owner, especially an author, to ensure that the work is used in a manner not substantially different from that which he intended and involving no substantial distortion of the fundamental character of that work.

A detailed explanation of the provisions of the proposed section would not be fruitful since it would represent a mere repetition of the concepts and problems discussed throughout this Comment. The reader is requested, in reviewing the section, to refer to that part of the preceding analysis to which the various provisions relate. To assist the reader, however, some of the most important points in the section are annotated with footnotes.

## VI. CONCLUSION

The new copyright law specifically exempts some educational activities from copyright infringement actions, but many educational uses of copyrighted works—particularly those resulting from modern technology—will continue to be judged on the basis of fair use. Guidelines were written into the legislative history of the new statute in an attempt to bridge the gap of uncertainty created by the continuing need for educators to depend upon fair use—a doctrine which lacks specific parameters.

This Comment has attempted to focus upon what fair use means for educators, especially in the light of the guidelines. As has been emphasized repeatedly, the fact that the guidelines seek to *explain* fair use may have a damaging effect upon the flexibility of the doctrine. The better course of action would be to set statutory standards for educational uses, while leaving

---

303. The educational guidelines, House Report, *supra* note 4, at 68-71, constituted the primary philosophical source for the standards. See also section III(B) *supra*.

fair use as a tool which could still be employed to evaluate individual situations on the basis of reasonableness. This alternative would furnish the specificity long needed by educators and copyright owners alike, while still leaving room for flexibility in a particular case.

The proposed education section put forward in the Appendix to this Comment is directed toward such an alternative. It represents an attempt to define specifically the legal boundaries of educational uses, while, at the same time, making it clear that fair use can still be applied when reasonable.

It is urged that the solution put forward by the new copyright law, together with its legislative history, not be viewed as a final one from the standpoint of educational uses of copyrighted works. In fact, the solution suggested by Congress should be as temporary as possible so that the doctrine of fair use will remain a viable concept based upon reasonableness, with no definition either mandated or suggested. Until such time as a further effort is made to clarify the relationship between the educator and the copyright law, the situation will remain an open question, and should be considered as such.

*Don Lawrence Pitt*

## APPENDIX

### PROPOSED EDUCATION SECTION

§—. Limitations on exclusive rights: Exemption of certain uses of copyrighted works by non-profit educational institutions.

(a) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:<sup>304</sup>

A “learning activity” refers to any function conducted by a non-profit educational institution, the substantial purpose of which is the educational growth of the students attending that institution.<sup>305</sup>

A “teacher” is any individual employed by a non-profit educational institution who supervises, directly or indirectly, a learning activity, or a non-employee acting in such capacity. The term includes instructional specialists, librarians, audiovisual personnel, guidance counselors, and any persons acting in similar capacities, as well as individuals assisting other persons acting in such capacities, but shall not include school adminis-

---

304. An effort has been made to clarify the meaning of several terms used in the statute and the educational guidelines so that they include logically and reasonably related terms without extending the meaning of the original terms beyond their reasonable intent. See notes 209-30 *supra* and accompanying text. Some additional terms are defined because of their unique meaning within the proposed section. Any other terms used have their normal meaning unless they have been defined by section 101 of the actual statute. New Law, *supra* note 1, § 101.

305. The term “learning activity” has been coined to counter the restrictive nature of the phrase “face-to-face teaching activities,” which might present problems when applied to certain innovative programs. See notes 209-21 *supra* and accompanying text.



trators unless they are acting as teachers or assisting in learning activities supervised by teachers.<sup>306</sup>

The term "library" refers not only to a library organized in the traditional manner, but also to various other facilities such as learning centers or resource centers which make copyrighted works available in a manner similar to a traditional library, regardless of whether that facility passively furnishes books and other materials or conducts active learning programs of its own.<sup>307</sup>

The word "current," when it refers to a learning activity, means that the activity is being conducted at the time in question. Unless otherwise provided, a current learning activity remains current until the end of the school term then in progress or the expiration of four months, whichever is less.

The word "format" refers to the manner in which a copyrighted work has been fixed, such as a slide, filmstrip, cassette tape, or book.

A "compilation," "collection," or "anthology" is created whenever more than nine copies or phonorecords from one or more copyrighted works are produced for a single learning activity, not including copies from current news periodicals or newspapers or current news sections of other periodicals, or the sounds or pictures of current news events in whatever form fixed.

A "textbook substitute" is a compilation, collection, or anthology designed to be used as a text for a learning activity.

(b) EXEMPTED USES: LEARNING ACTIVITIES.—Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by teachers or students in the course of a learning activity, unless, in the case of a motion picture or other audiovisual work, the performance or display is given by means of a copy that was not lawfully made under this title, and the person responsible for the performance or display knew or had reason to believe the copy was not lawfully made;<sup>308</sup>

(2) viewing of or participation in a learning activity by persons other than teachers or students including other persons connected with the institution, parents of the students involved in the learning activity, or occasional visitors to the institution,<sup>309</sup> except that—

306. The word "teacher" is expanded to include other individuals doing teacher-type tasks, but not administrative personnel. See discussion at note 112 *supra*. See also the prohibition against copying "directed by higher authority" contained in the educational guidelines. House Report, *supra* note 4, at 69.

307. The meaning of the word "library" has been extended to include variant forms of such facilities often found in modern educational institutions.

308. Clause (1) replaces clause (1) of § 110 of the actual statute. New Law, *supra* note 1, § 110(1). The provision has slightly reworded the original to include the new terms used by the proposed section, especially the term "learning activities."

309. Clause (2) is intended to make it clear that viewing by persons other than those connected with a specific class does not place it in a separate category, unless the substantial intent of such viewing is a public performance or display. See text accompanying notes 222-25

(A) such viewing or participation shall not be open to the general public;

(B) such viewing or participation shall not be by visitors who would otherwise be prohibited from such activity because of some outside professional connection;<sup>310</sup> and

(C) such viewing or participation by students of other institutions shall not be part of a systematic program for dividing the cost of using copyrighted works unless permitted by another provision of this title, a provision outside of this title, or independent contractual arrangement.<sup>311</sup>

(c) EXEMPTED USES: PHOTOCOPYING OF PRINTED MATERIAL.<sup>312</sup>—  
Notwithstanding the provisions of section 106, it shall not be an infringement of copyright for a school—

(1) to make single copies of the following for a teacher to use in scholarly research, conduct of a learning activity, or preparation to conduct a learning activity: (i) a chapter from a book; (ii) an article from a periodical or newspaper; (iii) a short story, short essay, or short poem, whether or not from a collective work; or (iv) a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.<sup>313</sup>

(2) to make multiple copies for use by students in a learning activity, not exceeding one per student in the activity, of an article from a periodical or a portion of a larger work,<sup>314</sup> provided—

(A) reasonable research indicates that the article or portion copied is not available in that form, and it would be unreasonable for the school to buy the entire work for each student or for the students themselves to be required to purchase the entire work;

*supra* for a discussion of the problem which this provision of the proposed section addresses. See also note 100 *supra*, discussing the definition of “public” performances or displays. Thus, for example, occasional exhibitions of student work incidentally using copyrighted items would be permitted, though they might be seen by the general public. This particular problem was brought out in the Hearings. See, e.g., Harris, *supra* note 15, at 275. A drama production advertised in the local papers and opened to the public, on the other hand, would not be exempt because the public viewing in that case would be the substantial purpose rather than an incidental result.

310. Clause (2)(B) answers the concern expressed in the House Report about outside performers coming into a school and conducting some activity in the auditorium which would not otherwise be permitted. See House Report, *supra* note 4, at 82.

311. Clause (2)(C) is designed to prevent wholesale money-saving operations by school consortiums or other groups, such as joint use of films rented by only one of the organizations, unless they have acquired permission.

312. Subsection (c) follows the general format of the educational guidelines regarding photocopying. See House Report, *supra* note 4, at 68-70. The subsection also draws upon the theories which underlie section 108. New Law, *supra* note 1, § 108.

313. Clause (1) codifies the single copy provisions of the guidelines. House Report, *supra* note 4, at 68; see notes 74-76 *supra* and accompanying text.

314. Clause (2) codifies the multiple-copying guidelines for classroom use. House Report, *supra* note 4, at 68-69; see notes 77-81 *supra* and accompanying text. The rules for multiple copying are slightly more general than the educational guidelines so as to make clear that there is no need to count words. See note 269 *supra* and accompanying text.

(B) the larger work from which the article or portion is copied is not sold primarily for school use in multiple quantities;

(C) the cumulative total of all such portions from a larger work shall not exceed 10% of the whole,<sup>315</sup> except—

(i) where the portion copied is a complete article, story, or essay or an entire performable unit, the portion copied may be as much as 20% of the whole provided the school owns the larger work from which the portion is copied; or

(ii) where the item to be copied is confirmed by the copyright owner to be out-of-print and the item is essential for the proper conduct of the learning activity and no substitute would reasonably suffice, such restriction on the percentage to be copied shall not apply;

(D) the purpose of such copying shall be primarily to update and supplement, not to create a textbook substitute, except as provided by clause (9) of subsection (h);

(E) the teacher shall not repeat substantially the same procedure with respect to the same items in subsequent terms unless there is no reasonable alternative;

(F) not more than one poem, article, story, essay, or two excerpts may be copied from the same author during a current learning activity;

(G) copying of charts, graphs, diagrams, drawings, cartoons, pictures, or other graphic representations from a larger work shall not exceed in quantity the number of such items included in 10% of the larger work unless such items support a complete article, story, or essay lawfully copied under clauses (2)(C)(i) or (2)(C)(ii) of this subsection; and

(H) where the larger work from which a portion is copied is composed of more than one volume or separate unique part, the percentage copied shall be based upon the single volume or part, not the entire work.

(d) EXEMPTED USES: SCHOOL LIBRARIES.<sup>316</sup>—

315. There is no intent to extend substantially the amount of copying which can be done. The general standard that no more than 10% of a larger work may be copied would seem more reasonable than the guidelines, which would restrict the number of pages or words regardless of the size of the type or the work itself. *See* definition of "brevity" at note 77 *supra*. The figure 10% was borrowed from the guidelines where it is used in another context. House Report, *supra* note 4, at 68, 71. Where the work is a very large one, and 10% would, accordingly, be a great number of pages, the cumulative effect would still be minimal because the action could not be repeated (*see* restriction in clause (2)(E)). In certain instances, more than 10% would be allowed, but this is tempered not only by clause (2)(E) but also by the fact that 20% is only allowed if the school *owns* the larger work (*see* clause (2)(C)(i)). No particular restrictions are placed regarding music, but the rights granted by this subsection are subject to the limitations contained in clauses (12) and (13) of subsection (h).

316. Subsection (d), applicable to school libraries in their various forms as defined in subsection (a), extends to school libraries the full rights granted under section 108. New Law, *supra* note 1, § 108. As previously pointed out, there is at least a slight question about the applicability of the existing section to schools. Notes 127-28 and 227-30 *supra* and accompanying text. This subsection also grants certain other rights to engage in copying to directly support learning activities unique to school situations. The actions which constitute an extension of the

(1) The provisions of section 108 of this chapter shall be applicable to school libraries except as extended or otherwise modified by this section.

(2) Notwithstanding the provisions of sections 106 or 108, it shall not be infringement of copyright for a school library to make a reasonable number of multiple copies or phonorecords of a copyrighted work for the preservation of the original or a copy or phonorecord thereof or because student demand for the single item has become so great as to risk excluding some students from the use of it, provided—

(A) such copies or phonorecords do not become a permanent part of the collection;

(B) the practice involving a specific work is isolated and non-recurring and is designed to fill an immediate need in a current learning activity;

(C) the institution owns the original or the copy or phonorecord thereof from which the subsequent copies or phonorecords are made; and

(D) the copies or phonorecords made under the provisions of this clause are used within the library that makes them, not in another facility, regardless of the connection between that facility and the library involved.

(3) Notwithstanding the provisions of sections 106 or 108, it shall not be infringement of copyright for a school library to make and retain a reasonable number of multiple copies of articles from periodicals for the preservation of the original or because student demand for the single item has become so great as to risk excluding some students from the use of it, provided—

(A) the primary purpose of the copying is to update or supplement a current learning activity within the school;

(B) the school subscribes to the periodical from which the article is copied; and

(C) the copy is used within the library that makes it, not in another facility, regardless of the connection between that facility and the library involved.

(4) Notwithstanding the provisions of sections 106 or 108 or clauses (2) or (3) of this subsection, it shall not be infringement of copyright for a school library, in order to satisfy an isolated, spontaneously occurring, and essential need within a current learning activity to—

(A) make a reasonable number of multiple copies or phonorecords from a

---

library exemptions granted under section 108 are limited by the fact that the school must own the item from which the copy or phonorecord is made, except in an emergency as provided by clause (4). This would prevent the school from engaging in wholesale borrowing to avoid building its own collection. Such a restriction is not contained in subsection (c) because the latter is aimed primarily at the traditional classroom teacher, whereas subsection (d) relates more to the institution as a whole.

Clauses (2), (3), and (4) of this subsection contain references to the term "reasonable number." This would be determined in the light of the immediate requirements. It would not, for example, be reasonable for a library to make copies for all of the students in a class if holding a small number on reserve would suffice.

Clause (5) further limits copying by school libraries by specifying that copying for learning activities may not exceed the general standards of subsection (c), and both subsections are limited by the provisions of subsection (h).

non-owned item, provided such copy or phonorecord is not retained and is not made from an item which has been rented or is being held on preview; or

(B) make a reasonable number of multiple copies or phonorecords from an owned or non-owned item to loan to another facility or institution, provided the copy or phonorecord is returned and destroyed and is not made from an item which has been rented or is being held on preview.

(5) Unless otherwise authorized by section 108 of this chapter, any multiple photocopying by a school library to fill a need within a current learning activity shall not exceed, either alone or together with photocopying done under the provisions of subsection (c), the general standards contained in subsection (c).

(e) EXEMPTED USES: TAPING OF BROADCASTS.<sup>317</sup>—Notwithstanding the provisions of section 106, it is not an infringement of copyright for a school to—

(1) make tapes incorporating the sound or pictures or both (including recording of television or radio signals in any form now known or later developed) of broadcasts of copyrighted works for a subsequent use in a current learning activity, provided—

(A) the work taped is not available for purchase or rental in the same or a substantially similar format;

(B) the tape is retained only as long as is necessary, not to extend beyond the end of a current learning activity for which the tape was made;

(C) the taping is done to satisfy a spontaneously arising need presented by a current learning activity;

(D) the taping is not part of a systematic practice, such as the regular taping of all such broadcasts by a media specialist; and

(E) the tape is not used as a substitute for rental or purchase of another work which would otherwise have taken place.

(2) make and retain tapes incorporating the sound or pictures or both (including recording of television or radio signals in any form now known or later developed) of broadcasts of current news events,<sup>318</sup> provided—

317. Subsection (e) attempts to deal with the major problem of off-the-air videotaping. *See* notes 254-62 *supra* and accompanying text. It also covers other broadcast taping of the same general nature. The subsection would allow taping and short term retention, provided the action is spontaneous and not part of a general plan, the program taped is not otherwise available, and the action does not substitute for purchase or rental of the program taped *or any other item*. Because of the restriction contained in clause (7) of subsection (h), this subsection does not extend the restricted taping rights contractually granted by educational television networks. *See* note 260 *supra* and accompanying text. The only exception would be a case where the educational network was attempting to prevent spontaneous taping of programs which could not be gotten in any other way.

318. Clause (2) of the subsection would allow reasonably free taping of news, provided the substantial nature of the broadcast was, in fact, news, and not an original creation by the broadcast entity such as editorials or documentaries. The desire to restrict free taping of such broadcasts to programs that are, in fact, news was brought out in the House Report's discussion

(A) the substantial nature of the broadcast is current news, not original creations such as editorials or documentaries; and

(B) the tapes, if retained, are not used for any purpose except subsequent learning activities, scholarly research, or preparation for the conduct of learning activities.

(f) EXEMPTED USES: ALTERATION OF FORMAT.<sup>319</sup>—Notwithstanding the provisions of section 106, it shall not be infringement of copyright for a school to alter the format of a copyrighted work in order to make presentation of that work to students in a learning activity more convenient, provided—

(1) the alteration shall not consist of transposing a non-transparent work into a transparent version of that work if a transparent version may be purchased or rented within sufficient time at a fair price;

(2) the alteration shall not consist of transposing a non-reproducible work into a reproducible one for the making of multiple copies if the result of such practice would violate the meaning of subsection (c);

(3) the alteration does not distort the fundamental character of the work;

(4) the altered version, where a non-transparent work was transposed into a transparent version because the transparent version, although available at a fair price, could not be obtained within sufficient time, is destroyed after use; and

(5) the changing of formats is not part of a systematic practice designed to avoid the cost of a more expensive format.

(g) EXEMPTED USES: MISCELLANEOUS.<sup>320</sup>—Notwithstanding the provisions of section 106, it shall not be infringement of copyright for a school to—

(1) utilize some form of transmission as the most convenient means to make a copyrighted work available to students, provided the transmission does not distort the fundamental character of the work or violate the restriction imposed by clause (4) of subsection (h);<sup>321</sup>

---

of section 108. House Report, *supra* note 4, at 76-77. Referring to the provision in section 108 of the New Law, the Report states that it "does not apply to documentary (except documentary programs involving new reporting as that term is used in section 107), magazine format or other public affairs broadcasts dealing with subjects of general interest to the viewing public." House Report, *supra* note 4, at 77. The provision of the proposed section is intended to accomplish basically the same objective.

319. Subsection (f) is concerned with the problems raised by isolated copying, such as the making of slides, where the purpose is merely to facilitate a classroom presentation or other similar objective. See notes 246-48 *supra* and accompanying text. Such activity would be allowed if the work could not be obtained either at all or in time in the proper format, but could not be done if another satisfactory option were available. Where the problem is merely a question of timing, the copies would have to be considered temporary and be replaced by purchased items for subsequent use.

320. This miscellaneous subsection lists other uses which either do not logically fit into other subsections or warrant a subsection of their own, or are not clearly enough specified by other subsections.

321. Clause (1) is intended to remove possible restrictions on the use of television equipment in a manner which would technically be a transmission, but where the use of the equipment would more reasonably classify it as a device "for projecting visual images." See text accompany-

(2) expose students to copyrighted works by means of transmissions or projections of multiple images of the same or different copyrighted works, provided the purpose of the practice is comparison, convenience, or other good faith objective and the effect of such multiple image transmission or projection or the purpose thereof does not distort the fundamental character of the works involved;<sup>322</sup>

(3) make and retain single copies or phonorecords of copyrighted works solely for the purpose of preserving the original or a lawfully owned copy or phonorecord thereof, provided the item from which the copy or phonorecord was made is removed from circulation;<sup>323</sup>

(4) make emergency copies of performable works to replace purchased copies which for any reason are not available for an imminent performance, whether or not that performance is part of a learning activity, provided purchased copies are substituted in due course; or

(5) make and retain recordings, sound or otherwise, of performances by students of performable works in sufficient quantity to ensure preservation or satisfactory subsequent use within learning activities, provided such subsequent use does not distort the impression students receive of the fundamental character of the original work.<sup>324</sup>

(h) SPECIFIC RESTRICTIONS UPON SCHOOL USES.<sup>325</sup>—Nothing in this section shall be construed to authorize a school to—

(1) engage in any practices described by this section unless such

ing notes 239-45 *supra*. Such a transmission would not be exempted if it is used to avoid purchase or rental (*see* clause (4) of subsection (h)). Consequently, a school system would not be allowed to rent a single film and use closed circuit television to show it to several schools in order to avoid paying for the rental fee that would be necessary in order to have each school see the film independently.

322. Clause (2) is designed to clear up the multiple image question. *See* notes 234-37 *supra* and accompanying text. A school would be allowed to engage in multiple image projection provided the fundamental character of the works involved is not distorted.

323. Clause (3) allows copying for preservation purposes, necessary because of the heavy wear and tear in a normal school situation not present at institutions such as public libraries, but does not allow the school to use the practice to create additional copies for circulation.

324. Clauses (4) and (5) codify certain actions which the music guidelines suggest are fair. They are intended to be reasonably comparable to clauses 1 and 4 respectively of part A of the music guidelines. House Report, *supra* note 4, at 71. A restriction is added to the effect that any subsequent use of recordings of student performances cannot distort the impression of the work. Many student performances are good ones, but some could be so bad that they should reasonably be classified as a distortion.

325. Subsection (h) is a long list of restrictions which are reasonably self-explanatory and need not be annotated by separate notes. They are based primarily upon the guidelines, plus other concepts which seem reasonable in the light of the source material upon which the proposed section was based. *See* text accompanying notes 299-303 *supra*. Included in the restrictions are the concept of "spontaneity" (clause (1); *see* note 78 *supra*), the cumulative effect test (clause 8 and 9; *see* note 80 *supra*), the prevention of actions directed by higher authority (clause (2); *see* note 90 *supra* and accompanying text), the restriction upon copying consumables (clause (10); *see* House Report, *supra* note 4, at 69, 71), and the requirement for a copyright notice (clause (11); *see* House Report, *supra* note 4, at 68, 71).

practice is performed by or at the request of a teacher to satisfy a requirement within a learning activity supervised by that teacher, unless clearly indicated to be a use permitted for some purpose other than a learning activity;

(2) engage in any practice described by this section where such practice is part of an administratively directed systematic plan except that such restriction shall not preclude a teacher from consulting with the school administration, provided the practice in question shall have been at the instance and inspiration of the teacher;

(3) make copies or phonorecords of copyrighted works as a substitute for purchase, rental, or subscription which would otherwise have taken place;

(4) utilize any form of transmission to avoid purchase or rental which would otherwise have taken place;

(5) make copies or phonorecords of copyrighted works which have been rented or are being held on preview;

(6) make any use of a copyrighted work by means of a copy or phonorecord which has not been obtained lawfully;

(7) extend the time limit for erasing tapes of broadcasts of copyrighted works where such works, although available for rental or purchase, have been lawfully taped under rerecording rights granted by a licensed broadcast agency;

(8) engage in any practice described by this section where the cumulative effect of such practice would be to substitute for or create a compilation, collection, or anthology;

(9) engage in any practice described by this section where the cumulative effect of such practice would be to create a textbook substitute, unless the learning activity involved is so unique that, as indicated by reasonable research, no textbook is available which would satisfy the needs of that activity;

(10) make copies of copyrighted works sold as consumable items, such as workbooks, exercises, standardized tests and answer sheets, and other similar material;

(11) use copies or phonorecords made under the provisions of this section without the affixing of a copyright notice where it is reasonably feasible to so affix such notice;

(12) make multiple photocopies of performable works for the purpose of a performance which is not part of a learning activity except as provided by clause (4) of subsection (g);

(13) use, without permission, any copies or phonorecords for performances or displays which are not part of a learning activity unless otherwise authorized by this chapter;

(14) charge a fee for the making of copies or phonorecords or for the use of copyrighted works or the copies or phonorecords thereof beyond the actual cost of copying unless permission is granted by the copyright owner; or

(15) edit or modify any work, musical or otherwise, where the result of



such practice in a learning activity may be a distortion of the fundamental character of the author's work in the students' minds, or where a presentation not part of a learning activity would represent a distortion of such fundamental character whether or not the audience would necessarily perceive it as such.

(i) GENERAL CONSTRAINTS UPON THE APPLICATION OF THIS SECTION.<sup>326</sup>—Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a school or its employees for the unsupervised use of reproducing or recording equipment located on its premises, provided that such equipment displays a notice that the making of a copy, phonorecord, or recording may be subject to the copyright law;

(2) excuses a person who uses such copying, reproducing, or recording equipment or who obtains a copy or phonorecord under any provision of this section from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

(3) in any way limits the rights already granted to schools under other provisions of this title; or

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the school when it obtained a copy or phonorecord of a work.

(j) REPORTING THE EFFECT OF THIS SECTION.<sup>327</sup>—Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of the education profession, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.

---

326. Subsection (i) is patterned primarily after subsection (f) of section 108. New Law, *supra* note 1, § 108(f). Its most salient feature is the provision contained in clause (4) that fair use can still apply to the facts of a given situation notwithstanding the provisions of the section. The need for this provision has been a major point of this comment. See notes 273-83 *supra* and accompanying text.

327. Subsection (j) is borrowed from section 108(i) of the New Law, *supra* note 1, and would statutorily mandate review of educational uses at five-year intervals.