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ABSTRACT

The historical and legal background of the Federal Copyright Law with special implications for education was studied within five general areas of concern. The areas included: (1) historical development, (2) copyright revision issues, (3) principles of copyright law embodied in state and Federal statutes, (4) decisions of the courts pertaining to fair use of copyrighted materials, and (5) alternative solutions to the copyright revision impasse. The major findings were: (1) there have been three general revisions of the law, but the law is basically the 1909 Act, (2) state laws in conflict with federal legislation would be unconstitutional, (3) federal copyright statutes do not support the fair use doctrine, (4) the courts were not hospitable to two reported federal copyright cases involving educators, (5) the courts have held that fair use hinges on the circumstances of each case but there is a greater latitude for writers and others in scholarly pursuits, and (6) fourteen proposals, centering on achievement of a fair balance between the rights of authors and those of users of copyrighted materials, have been introduced to alleviate specific deadlocks in the revision attempts. (AB)

FINAL REPORT
Project No. 9-H-031
Grant No. OEG 8-9150031-2025 (058)

The Legal Status of The Federal Copyright Law

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and
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University of Denver
Denver, Colorado 80210

August 1970

U.S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

Office of Education
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U.S. DEPARTMENT OF HEALTH
EDUCATION AND WELFARE

Office of Education
Bureau of Research

TABLE OF CONTENTS

LIST OF TABLES

SUMMARY

Purpose of the Study

The purpose of the study was to determine the historical and legal background of the Federal Copyright law with special implications for education. Six questions were developed for the research and represented major areas of the study.

1. What has been the historical development as set forth in the United States Constitution?
2. What issues have arisen in Congressional deliberations on general copyright revision pertaining to education?
3. What principles of copyright law have been embodied in state and Federal statutes?
4. What decisions have been handed down by the courts pertaining to fair use of materials under copyright?
5. What possible alternative solutions have been suggested for the resolution of the current impasse in copyright law revision?
6. What findings and conclusions could be made regarding the entire problem of copyright as it pertained to education?

Research Methods and Procedures

The basic research design used in the study was that of historical-legal research. This method provided a background of historical and legal precedent for determining the legal status of the copyright law, its revision issues and progress, and the implications fair use and infringement have for education. This background was developed from a review and analysis of historical and educational literature, legal references and writings, government publications, and general writings on the subject of copyright.

The legal status of the copyright law was determined from three sources: (a) state legislative enactments, (b) Federal legislative enactments, and (c) court of record cases.

Alternative solutions to the copyright revision impasse were identified from copyright revision proceedings and the works of writers on the subject. The solutions were classified under categories developed in the study.

The findings of the study were recorded under major divisions developed for the purpose. Conclusions were subsequently drawn from the findings and recorded in a similar fashion.

Scope of the Study

The legal status of the Federal Copyright law was determined from applicable state statutes and from Federal copyright statutes in effect as of January 1, 1970, and from court record cases reported from 1841 to 1969 inclusive.

For the purpose of the study, the subject of copyright was subdivided into five general areas of concern. The areas were: (a) historical development, (b) copyright revision issues, (c) principles of copyright law embodied in state and Federal statutes, (d) decisions of the courts pertaining to fair use of copyrighted materials, and (e) alternative solutions to the copyright revision impasse.

Major Findings

The following is a summary of the major findings of the study:

1. There have been three general revisions of the copyright law. These revisions took place in 1831, 1870, and 1909.

2. The Copyright law has remained basically the 1909 Act. Efforts at revision have come to an impasse over the issues of fair use and classroom copying of copyrighted material.

3. Any state laws in conflict with federal copyright legislation would be unconstitutional under the supremacy clause.

4. The doctrine of fair use had no specific support in federal copyright statutes.

5. There have been only two reported federal copyright cases involving educators. In both situations, the courts were not hospitable to fair use claims.

6. The courts have held that fair use was a question which turned on the circumstances of each case.

7. The courts have, however, allowed greater latitude of fair use for writiers and others in scholarly pursuits.

8. Individuals and groups concerned with copyright have introduced fourteen proposals which were designed to alleviate specific deadlocks in the revision attempts.

9. The proposals have centered on achievement of a fair balance between the rights of authors and the rights of users of copyrighted materials.

INTRODUCTION

The basis of the United States copyright law is that provision of the Constitution which empowers Congress ". . . to promote the Progress of Science and the useful Arts by securing for limited times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries." This purpose of copyright--to promote progress--may ultimately be hampered. Unresolved disputes among several interest groups have blocked revision of the law for over sixty years.

The last general copyright revision was enacted in 1909, after President Theodore Roosevelt admonished Congress with these words:

> Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles, which, under modern reproductive processes, are entitled to protection. . .

Now, even more than then, copyright law needs revision. Progress in the instruction of our American youth could be greatly hampered by continued unrest and conflict between competing commercial interests and the public's right to freely use materials of a copyrighted nature for educational purposes.

Many educators have been unaware of the importance of copyright law to educational processes. Harry Rosenfield, copyright lawyer for the National Education Association, stated as follows:

> The copyright law is a legal "sleeper" in the field of school law. It has a vital impact on the education profession but is often unknown to those whom it affects.

Educators, as users and producers of copyrighted materials for direct use in the classroom, have experienced change, both in the needs of education and in technological means to these ends. Photocopiers, computers, and television have been found to be highly useful in the instructional field, but their use has posed copyright questions not met in prior copyright legislation.

Organizational interest has been high in copyright revision. Representatives of the Ad Hoc Committee of forty educational organizations, the Author's League of America, Incorporated, the American Association of Book Publishers and others have been active in copyright hearings. However, general agreement has not been reached on specific issues within copyright revision attempts.

Therefore, there remains a need for basic understanding of the copyright concept and the relevance of copyright revision to daily teaching and learning situations in the United States.

OBJECTIVES

The purpose of the study was to determine the historical and legal background of the Federal Copyright law with special implications for education. Six questions were developed for the research and represented major areas of the study. The questions were stated as follows:

1. What has been the historical development as set forth in the United States Constitution?
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RESEARCH METHODS AND PROCEDURES

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The legal status of the copyright law was determined from three sources: (a) state legislative enactments, (b) Federal legislative enactments, and (c) court of record cases.

The statutes of all fifty states were searched for principles of copyright law and references pertinent to the problem were categorized and recorded. A similar procedure was followed with Federal statutes pertinent to the problem. Court of record cases pertaining to the problem were identified through use of the Descriptive Word Index, Decennial Digests, and General Digests of the American Digests of the American Digest System. The appropriate units of American Jurisprudence 2d and Corpus Juris Secundum provided general principles of of law and additional cases which dealt with the related issues of fair use or infringement of copyright materials. The cases noted were then briefed from the National Reporter System, the Federal Reporter, and the Federal Supplement. Cases used in the final report were shepardized to determine their most current status.

Alternative solutions to the copyright revision impasse were identified from copyright revision hearings and the work of writers on the subject of copyright. The solutions were classified under categories developed in the study.

Analyses were made of the historical development, revision issues, statutory law data, case law data, and alternative solutions utilizing categories developed in the study. These analyses of the data collected revealed certain findings which were recorded under major divisions developed for the purpose.

HISTORICAL-LEGAL DEVELOPMENT OF THE FEDERAL COPYRIGHT LAW

From the earliest times authors and booksellers have been important to each other in dissemination of learning. The author gained the fame and the booksellers the profit.

About 200 B.C. the center of learning in Alexandria was the scene of a flourishing bookselling business. Emigrant Greeks, known for their trickery and fraud, were introducing much new material into Greek manuscripts which they were copying for the Alexandrian market. This work was done hastily and inaccurately and caused concern among authors that volumes were copied only for profit and not the perpetuation of knowledge.

A similar problem existed during the days of the Roman Empire. The employment of hundreds of slaves as transcribers of manuscripts facilitated the multiplication of books at little expense. Roman writers felt compelled to seek protection of their work as the copying practices continued. The concept of copyright was born at this time. Common law regulations were established whereby the owners of literary property were allowed exclusive rights to the use of their works until dedication to the public.

Through the years, the problems of author rights remained unsolved. Ultimately, written copyright legislation was established by the English. This legislation originated with the chartering of the Stationer's Company in 1556. The Company's primary purpose was the suppression of Protestant Reformation ideas in England. The printing of any book for sale was prohibited unless it was registered by a member of the Company. This effected a virtual monopoly over the press and afforded the publishing industry the right to exclude non-members from publishing. In 1694, the Licensing Act, under which the Company operated, expired and there followed a period in which no copyright protection existed. Pirating during this period became common and publishers joined with authors in petitioning Parliament for protection.

Finally, in 1709, the Statute of Anne was passed. The purpose of this first copyright statute was to protect authors from unauthorized copying of their work. A term of fourteen years of copyright protection was provided for authors, with a fourteen year renewal term. The statute changed the concept of copyright from censorship to protection. This statute, with its provisions for author protection, served as a model for American state's copyright acts and this country's first federal copyright act of 1790.

State Copyright Statutes

Copyright was not secured by law in Colonial America, but the colonies recognized the importance of protection of published works. On May 2, 1783, the Continental Congress passed a resolution urging the several states to secure copyright protection to authors. Twelve states passed copyright laws prior to the Constitutional Convention. Eight of these states protected writings in the literal sense. Three states provided protection for maps and charts, also. Connecticut implied that maps and charts were, in a sense, writings, thus joining with the eight other states in protecting writings in the literal meaning. These statutes were limited to the territorial jurisdiction of the particular states. There was no national uniform copyright protection at that time.

The lack of complete national coverage produced an incentive for the members of the Constitutional Convention to establish a federal copyright law. Ultimately, the federal copyright clause, when approved, established harmony between the copyright protection on a federal level and the development of common law protection. The copyright clause was intended to assure uniform protection throughout the nation.

All necessity for state copyright legislation ended in 1787 with the adoption of the Constitution of the United States. Article I, Section 8, Clause 8, of the Constitution conferred on the Congress the power "to promote the Progress of Science and the useful Arts, by securing for limited times to authors and inventors, the exclusive Right to their respective Writings and Discoveries."

The Chronological Development of Copyright Laws

Act of 1790. The first federal copyright law in 1790 specified maps, charts, and books as objects of protection. There was no definition of books within the statute. In fact, everything within the interpretation of writings may or may not have been protected. From the beginning it became necessary to construe the act in other than literal terms.

Act of 1802. Copyright protection was extended at this time to cover engravings, etchings, and historical prints. There was evidence of widespread pirating of these objects, hence the Congressional activity.

Act of 1831. The new act, which became effective on February 3, 1831, consolidated all previous acts and provided that authors should have the sole right of printing and publishing for a right of renewal of fourteen years in favor of the author and his family.

Act of 1856. This amendatory act of August 18, 1856, secured to dramatists the rights to exclusive performance and added dramatic compositions to the list of copyrightable subjects. This statute also defined books for the first time as meaning every volume and part of a volume, including maps, prints, or other engravings contained within the volume.

Act of 1865. The privileges of copyright were conferred upon the authors of photographs and the negatives thereof, by the amendatory act of March 3, 1865. In searching for a justification of the protection of photographs and negatives, writers have ascertained that this was the period of emergence of the commercial value of photography, hence the need for protection.

Act of 1870. In this year a general act took the place of all copyright acts preceding it. This Revised Act of 1870 caused the addition of paintings, drawings, chromos, statuettes, statuary, and models to the list of copyrightable items. For the first time dramatic compositions were also listed as protected.

Act of 1909. Finally, in 1909, there was passed the new copyright code repealing all previous legislation and providing comprehensively for the whole subject of copyright, literary, artistic, dramatic, musical, or other. The 1909 Copyright Act became and still is the basic copyright law of the nation.

The Act broadly set forth and defined the scope of copyright by providing that anyone entitled to copyright protection would have the exclusive right to print, reprint, publish, copy, and vend his work. He would also be entitled to complete, execute and finish models or designs for a work of art, and to control in general any lectures, addresses, and other literary productions.

Sections one through thirty-one of the United States Copyright Code of 1909 were both broader and more definite than previous copyright laws enacted in the United States. The Act became and still is the basic copyright law of the nation. Specific author rights under Federal copyright laws have been summarized in Table 1.

The new American code was specific in preserving to an author all common-law rights previous to the publication of his work. Section 2 stated that nothing in the act would annul the rights of an author of an unpublished work to prevent copying or publishing of an unpublished work without his consent.

The effect of Section 2 of the Copyright Code was to give the federal courts the special authority of Congress to accept and enforce the principles of common law in the case of unpublished works.

Section 5, in addition to continuing protection for the works enumerated in prior statutes, expanded the list of protected subjects. Certain objects, such as compilations and periodicals, were spelled out. Lectures, sermons, and addresses prepared for oral delivery were added.

The net result of the 1909 Act was that the list of protected objects was expanded. Thus, Congress strove to be inclusive in affording protection to all material which fell under the term "writings."

Table 1

Summary of Author Rights Under Federal Copyright Laws

Copyright Law, Title 17	Author acquires rights on specific work by conformance with U.S. Code, Title 17
Exclusive Rights of Owner of 'Literary' Work	Author is tecnhically able to prevent copying, publication or use of work Author's exclusive rights: 1. To print, reprint, publish, copy and sell work. 2. To translate work or make any other version of it. 3. To dramatize it, or make any other version of it. 4. To deliver, authorize the delivery of, read, or present it in public for profit. 5. To make or have made any record of work by which, in whole or in part, work may in any manner be presented, produced or reproduced. 6. To play or perform work in public for profit, and to represent, produce, or reproduce work in any manner or by any manner.

Table 1 (continued)

Copyright Law, Title 17	Author acquires rights on specific work by conformance with U.S. Code, Title 17
Exclusive Rights of Owner of Dramatic Work	Author is technically able to prevent copying, publication of use of work Author's exclusive rights: 1. To print, reprint, publish, copy and sell work. 2. To translate work or make any other version of it. 3. To convert it into a novel or other non-dramatic work. 4. To deliver, authorize delivery of, read or present in public for profit. 5. To have made any record of work by which, in whole or in part, work may in any manner be presented, produced or reproduced. 6. To play or present in public for profit, and to exhibit, produce, or reproduce in any manner or method. 7. To perform or represent it publicly. 8. To sell manuscript or record of work if it is unpublished. 9. To arrange or adapt it. 10. To perform dramatic work publicly for profit. 11. To make any arrangement of work, or its melody, in any system of notation or form of record from which work can be read or reproduced.

Table 1 (continued)

Copyright Law, Title 17	Author acquires rights on specific work by conformance with U.S. Code, Title 17
Exclusive Rights of Owner of Model or Design for a work of art	Author is technically able to prevent copying, publication or use of work Author's exclusive rights: 1. To print, reprint, publish, copy and sell model or design. 2. To make or have made any record of design or model by which, in whole or in part, these designs or models may in any manner be presented, produced or reproduced. 3. To complete, execute and finish design or model.

Act of 1912. The addition of motion pictures to Section 5 of the 1909 Act was the last Congressional extension of copyright. Motion pictures had emerged as a new industry and needed protection, according to its spokesmen.

Act of 1947. This act codified Title 17 of the United States Code into positive law. This was basically the act of 1909 with a number of subsequent amendments of individual provisions.

Major Issues

Since the beginning in 1790, the Copyright Act has been controversial, with many people urging changes in the law. The major revision, as evidenced by the 1909 Act, was somewhat out of date at its inception. There have been numerous attempts at copyright revision since that period, but no actual achievements have been made toward the solution of copyright problems which have arisen over the years.

In general the major controversies arising out of copyright laws have centered on the conflicting interests of author and publisher groups and the users of copyrighted material. Of particular concern in the more recent years has been the dilemma educators faced with regard to fair use of copyrighted materials.

The silence of the 1909 Act on the question of fair use was consistent with prior history. There has never been any specific statutory provision in the copyright law of the United States which dealt with the question. At least one provision of the 1909 Act had an indirect effect. Section 1 (b) extended to the owner of a copyright the exclusive right to make any version thereof. In general however, criteria for fair use application was negligible in existing statutes.

Subsequent Congressional hearings on copyright revisions had attempted to deal specifically with the question of fair use, which had been defined as the privilege to use copyrighted material in a reasonable manner without consent of the author. Education, with the heavy demand upon its resources, naturally turned to newer devices to disseminate information. This involved greater use of copyrighted materials suitable for educational purposes. Subsequently, there appeared a national concern by involved parties over the question of fair use of material. The federal government began to deal with these problems during the decade of the 1950's and has continued to the present.

Fair use. Writers on the subject of copyright have increasingly pointed out that attempts to revise copyright statutes have failed because of basic disagreement among authors, publishers, and classroom teachers.

Modern technology has made possible easy copying of ideas with a subsequent dilemma regarding over-use of copyrighted material.

The major dilemma lay in the conflict of the theory of free access to significant information and the protection of authors and publishers. Educators were favoring changes in the copyright law while the protagonists were for strong protection of ownership.

With regard to the problem of copying as fair use, the copyright statutes inferred that any copying without permission was infringement. The federal courts have, however,recognized a limited amount of copying where it was necessary and did not involve any encroachments. The courts have produced some guidelines with the principal factors being the nature of the copyrighted work and the use made of it.

The courts have acted with uncertainty regarding the rationale of fair use, thus adding to the confusion in copyright cases. Legal analysis has been avoided by emphasizing the circumstances of each copyright case.

Writers in several law journals concurred that an important factor in the determination of fair use was whether the unauthorized use caused a decrease in demand for the copied work. The effect of the infringement, then, was the initial consideration in resolving the ultimate question of infringement or fair use. Writers have rated that there has been no rule of thumb by which teachers could determine how much use of copyrighted work would be considered fair use. It has been further stated that the scope and limits of fair use have been so obscure as to become the most troublesome in the entire copyright law.

Classroom copying and creative teaching. Creativity in the classroom has long been an educational goal, but teachers have been handicapped by limited access to information. Today's teachers have had more access to books and periodicals containing information on all subject areas. If, between the discovery of the new material and the instruction period, the teacher would have to seek authorization for reproduction, the teachable moment would be lost. The present alternatives offered would allow the teacher to either infringe with permission or curtail certain instruction due the student.

Educators' recommendations for revision. Educators have urged classification of various copyright revision bills on the subject of fair use. They have asked that fair use extension be applied to teaching, scholarship, and research. Especially important to educators have been proposals for limited exemptions from copyright infringement in order to allow classroom copying. These exemptions would permit reasonable copying of certain excerpts or quotations necessary for instructional purposes.

The publishers' position on classroom copying. In expanding the language of the fair use clause there could be severe damage to those in the publishing field. What disturbed authors and publishers most was that some revision proposals substituted "free use" for that of fair use. As the publishers saw it, fair use without permission depended upon the type of material, the amount copied, and the economic

impact of the infringement on sales of the copyrighted work. The need for copyright clearance and payment of royalties were by no means unnecessary. These clearances and payments were mandatory for the system of incentive and creativity under which authors and publishers produced and diseminated works for the teacher and research scholar. Publishers opposed unrestricted use unless fair payments were made to those who have brought the books into being.

The "not for profit" and term of copyright clauses. In 1969, the then proposed copyright revision bill would have removed safeguards necessary to education. Among those safeguards being eliminated were:

(1) the "for profit" clause had enabled teachers to use copyrighted materials for their instructional purposes for years;

(2) copyright length was being extended to the "life of the author plus fifty years," thus removing important material from the public domain;

(3) educational broadcasting would force stringent restrictions necessitating payment of prohibitive licensing fees;

(4) new legislation would virtually eliminate use of new educational technology.

Senate Bill 543, in its efforts to control the situation, placed education in a serious position.

State and Federal Statutes

As indicated previously, Article I, Section 8 of the United States Constitution empowered Congress to bestow copyright privileges upon authors. The stipulated Constitutional clause did not expressly prohibit the States from enacting legislation pertaining to copyright. However, federal authority has been considered the supreme law in copyright jurisdiction. In an Illinois Supreme Court case, Sears, Roebuck and Company v. Stiffel Company, it was ruled that Federal copyright laws were the supreme law of the land and federal policy could not be set aside.

While recognizing federal supremacy, twenty-three states had particular principles of copyright embodied within their statutes. The individual states and their specific copyright provisions have been summarized in Table 2. The state statutes were largely concerned with improper uses of copyrighted material. Examples of these improper uses were pooling of copyrighted works for commercial purposes, invasion of author rights, and performances of copyrighted material without proper licensing.

Some states granted copyrights before the ratification of the United States Constitution. However, since the adoption of the Constitution, the states cannot in the areas of patents and copyrights conflict with or set aside federal legislation or policies. A state cannot grant a patent or copyright to a person who does not qualify under the federal laws. Although there was no case in evidence at the

Table 2

States With Statutory Provisions Relating to Copyright

State	Provisions
Alabama	Textbook copyright purchase privilege
Alaska	Legal to pool copyrighted works, copyright subject to state police powers
Arizona	Artistic work entitled to copyright
Arkansas	Referral to federal copyright laws
California	Legal to license state developed copyrighted material, misdemeanor to illegally publish copyrighted work (musical)
Conn.	Illegal performance of musical productions subject to penalty
Florida	Provisions for protecting state owned copyright, Penalty for fixing performance license fees
Iowa	State can secure copyright on student-instructor developed materials
Kansas	Copyrights on educational research activities belong to state
Kentucky	Referral to federal copyright laws
Maine	Referral to federal copyright laws
Mass.	Surreptitious procurement of another's literary property illegal, owner's consent necessary for public performance of dramatic or musical compositions, even though previously unpublished
Mich.	Owner consent necessary for public performance of copyrighted play for profit. Same truth for uncopyrighted dramatic or musical compositions
Minn.	Misdemeanor to sell or perform copyrighted operatic compositions. Prohibited unauthorized use of unpublished dramatic or musical compositions
Miss.	Referral to federal copyright laws
Montana	Any product of the mind made public can be reproduced without owner consent
Nebraska	Unlawful to sell or dispose of performing rights of copyrighted dramatico-musical compositions without first obtaining license and paying royalty fee
New Jersey	Person causing unauthorized use of copyrighted plays and operas declared disorderly
N.M.	Provided "Protection of Copyrights Act" relating to illegal performance of musical and dramatico-musical compositions
New York	Printing, publishing, selling copyrighted musical-dramatical composition without owner consent constituted misdemeanor, unauthorized duplication of sound recordings or reproducing works of fine arts also misdemeanors

Table 2 (continued)

State	Provisions
N.C.	Prohibition against further collection of royalties by performers already paid for initial recording performance
N.D.	Registration necessary with state treasurer before composer could sell rights to dramatical or musical works. Violators subsequently guilty of misdemeanor if use of copyrighted work without owner's consent.
Oregon	State Board of Education entitled to copyrighted property if developed in state by state employee. This property would be acquired by purchase, gift, or profit-sharing with assignor of copyright
R.I.	Referral to federal copyright laws
S.C.	Copyrighted literary, musical, or artistic compositions taxable property
Texas	Permit necessary to sell or license copyrighted dramatic or musical compositions
Virginia	Referral to federal copyright laws
Wash.	Provisions against unlawful performance of any federally copyrighted work
W. Va.	Referral to federal copyright laws
Wisc.	Referral to federal copyright laws
Wyoming	Referral to federal copyright laws

time of the study, it can be accepted that a state law in conflict with federal copyright legislation would be unconstitutional under the federal supremacy clause which states that laws of the United States shall be the supreme laws of the land.

The philosophy behind the clause which empowered Congress to grant copyrights was the conviction that public welfare would be advanced. Encouragement of writers' creative efforts with incentive or personal gain through copyright protection would promote science and the arts, thus benefiting man.

Specific Federal copyright statutes which pertained to the legal status of copyright provisions pertinent to this report follow.

Section 1--Exclusive rights of copyright owners. This section stated that authors who complied with the title provisions could have exclusive rights to print, reprint, copy, and vend their copyrighted work. Further provisions of this section extended author rights to any manner of presentation and reproduction for profit. Royalties were due owners of copyrighted musical compositions if all or part of such works were reproduced mechanically. After payment of two cents on each part manufactured mechanically, further royalties were not due except in case of performance for profit. Musical renditions upon coin-operated machines were not deemed performances for profit, hence no royalty fee was due. The singular exception to this was in the case where fees were charged for admission to the place where such machine renditions occurred.

Section 2--Rights of authors or proprietor of unpublished work. This section indicated that authors or proprietors of unpublished works could obtain damages for unauthorized copying or use of their works.

Section 3--Protection of component parts of work copyrighted; composite works or periodicals. This section provided protection of all copyrightable parts of works copyrighted. The copyright upon composite works or periodicals would give the author the same rights as if each part were individually copyrighted.

Section 5--Classification of works for registration. Application for copyright registration would specify that the work belonged to one of the following classifications:

(a) Books
(b) Periodicals
(c) Lectures, sermons, addresses (oral delivery)
(d) Dramatic or dramatico-musical compositions
(e) Musical compositions
(f) Maps
(g) Models or designs
(h) Reproductions or a work of art
(i) Drawings or plastic works of a scientific or technical character
(j) Photographs
(k) Prints or pictorial illustrations

(l) Motion picture photoplays
(m) Motion pictures other than photoplays

These specifications were not held to limit the subject matter of copyright.

Section 7--Copyright or compilations or works in public domain or of copyrighted works; subsisting copyrights not affected. Within this section, all adaptations, dramatizations and works of similar nature in the public domain were to be regarded as new works subject to copyright. Also regarded as new works subject to copyright were previously copyrighted works with new material. This section further stated that publication of new material would not affect subsisting copyright upon material employed or imply exclusive right to use of original work.

Section 8--Copyright not to subsist in works in public domain or published prior to July 1, 1909, and not already copyrighted, or government publications; publication by government of copyrighted material. No copyright was to subsist in work in the public domain, or in work published in this country prior to July 1, 1909. There were further provisions that no copyright was to exist in United States Government publications, or reprints in whole or in part.

Section 12--Works not reproduced for sale. Copyright, within the provisions of this section, could be attained by authors whose works were not reproduced for sale. The requirement was a deposit of the complete copy of the lecture, dramatico-musical composition, motion picture photoplay, or similar work of art with the Registrar of Copyrights.

Section 13--Deposit of copies after publication; action or proceeding for infringement. No action or proceeding for infringement of copyright would be maintained until deposit of copies and registration of such work was complied with.

Section 24--Renewal and extension. This section provided for copyright protection for a period of twenty-eight years from the date of first publication of the specified work. Further provision was made for an extension of an additional twenty-eight years upon application.

Section 101--Infringement. This section enumerated provisions against copyright infringers. The pertinent provisions follow:
(a) Restraining injunctions against infringements;
(b) Damages and profits that were to be paid the copyright proprietor varied according to nature of material reproduced. Accommodations for innocent infringers were made in the cases of motion pictures of undramatized or non-dramatic work. The same was true of motion picture makers of dramatic or dramatico-musical work.

Section 104--Willful infringement for profit. Any person who knowingly infringed copyrighted work would be guilty of a misdemeanor and subject to fine or imprisonment at the discretion of the court. The exception to this rule allowed schools, church choirs, and vocal societies

to perform rented or borrowed religious or secular works. The performances by these groups were to be given for charitable or educational purposes and not for profit, however.

Section 112--Infringement; service and enforcement. Any court injunction could be served on infringers anywhere in the United States and would be operative throughout this country.

Section 115--Criminal proceedings. No criminal or civil proceedings could be maintained unless the same was commenced within three years after the cause of action arose.

Section 202.1--Material not subject to copyright. This section indicated that materials such as designs, slogans, ideas, charts, tables, schedules, and similar materials were not copyrightable. Specifically, ideas, methods, and systems as distinguished from the manner in which they were expressed in writing were not subject to copyright.

Federal statutes have, therefore, authorized granting of copyrights with exclusive rights as shown in Table 2. Section 101 of the Copyright Act specified these rights. If rights were infringed, this section provided for injunctive relief plus recovery of actual damages and profits according to a schedule. However, aside from musical and dramatic production provisions, no statute has been enacted defining fair use and infringement, two major concerns of this report.

Court Decisions on Fair Use of Copyrighted Materials

The doctrine of fair use has been frequently judicially employed in the resolution of copyright infringement. Uncertainty as to the function of fair use and its rationale has caused confusion in copyright cases. In applying this difficult concept, Federal courts have avoided legal analysis by emphasizing that fair use was a question which turned on the circumstances of each case.

Fair use has been widely defined as a privilege enabling others to use copyrighted material in a moderate manner without owner consent. This definition, although debated at some length, has proven to be of some help in particular cases.

Fair use patterns followed by the courts have evolved from the United States Constitution. Section 8 of the Constitution granted copyright protection to authors, thus benefiting the author and simultaneously advancing public welfare. The author was to have benefited through protection against unlawful copying; hence lost sales of his work. The courts reasoned that fair use, if not causing economic hardship upon the author, would therefore be allowable.

Reasonable infringing and the economic benefit criteria have not been the sole guides used by the courts. The nature of the use for

which infringed material was utilized and the test of substantial similarity have also been followed by the courts. Even further guides have gone to the extent of determining the amount of the portion copied in relation to the whole work.

Two factors have appeared to be enduring elements in copyright cases. These factors were the lessening of economic benefit to the author, better known as decrease in demand, and the nature of the use. The isolation of these factors has come about through their association with the original constitutional policy detailed in Section 8 of the Constitution.

Educator cases. Since the enactment of the 1909 Copyright Act, courts have indicated that copying from protected work must be of a substantial nature to constitute actionable infringement. However, this has not automatically allowed the doctrine of fair use to take effect. The courts have ruled that it was enough if the appropriated material diminished the value of the original work.

In the case of MacMillan Company v. King, an example of decrease in demand was found, thus constituting willful infringement. Mr. King, a university professor, claimed that in teaching economics he made use of the textbook and that each of his pupils was expected to study the book for his class. His pupils were allowed to consult him for further private instruction on the subject of economics. During these private sessions, he presented to the students brief outlines of the material to be covered at that particular session. After each session, the outlines were destroyed. King claimed that what he did was within the custom of teachers and owner consent was implied through distribution and selling of the textbook.

In the final analysis, the court ruled that the detail of the outlines prepared for the private sessions might have allowed students to meet the course requirements without the text. Further court reasoning indicated that continued use of similar outlines would have resulted in substantially fewer sales of the textbook. An injunction against continual use of the outlines was granted the plaintiff, Macmillan Company.

The Copyright Act protects against copying or adaptation of copyrighted music. Routine warnings by publishers against infringement of copyrighted materials, including music, have had little effect. However, few publishers have cared to risk loss of good will of the education profession, and have not pressed the issue. The exception to the line adopted by publishers occurred in the only public school case on record, that of Wihtol v. Crow.

Mr. Crow, a public school teacher and church choir director in Iowa, copied a hymn without permission and incorporated it in a new arrangement. He reproduced the new arrangement and subsequently had it performed once by his school choir and once by his church choir.

Later events included Crow informing Wihtol, the publisher, of the new arrangement. Crow failed to follow the instructions of the publisher regarding the reproduction and rearrangement of the hymn. In ensuing court action, the higher court reversed a lower court's decision and ruled Crow guilty of infringement. The higher court, in finding for the plaintiff, Wihtol, stated that Crow's intent, though innocent, could not be construed to be fair use. Section 1 of the Copyright Act clearly gave only the owner of the copyrighted song the privilege of arranging it. The court further ruled that Crow had altered the original work enough to substantially injure possible future value of the song.

Related cases. Most cases which involved the issue of fair use had to do with compilations, listings, digests, and the use made of these publications. There have been few cases with direct implications for education. Those cases utilized for this section were selected on the basis of the following criteria: (a) the cases typified the problems most likely to occur in schools; (b) the cases served as a basis for subsequent decisions on fair use; (c) the cases were frequently cited by writers in the field of copyright law; and (d) the cases were submitted to a University of Denver professor and writer in school law for his perusal.

It has been said that fair use posed a serious question and was considered the most troublesome in copyright law. Consequently, the cases presented in this report have displayed inconsistencies of fair use definitions. The one definite pattern appearing throughout the reported cases has been that fair use was a defense to charges of infringement.

In the cases reviewed for principles of fair use doctrine, the question of infringement had been interrelated with what constituted fair use. It was noted that infringement consisted in doing without consent that which the Copyright Act gave only the copyright owner the right to do. Ultimately, whether there had been infringement and not fair use was determined by the facts involved in each case.

Determining factors have been those pointed out previously: nature of the use, economic effect of the infringement, and the test of substantial similarity. The intent of the user and other factors were also considered by the courts, if applicable.

Basically, if the courts determined fair use in a case, there was no liability imposed, whereas the reverse was true in finding actionable infringement. Therefore, when used in an interrelated manner, fair use and infringement have been considered to be on a similar level.

The cases presented in this report were arranged according to court fair use decisions in specific areas.

Scholarly works. The first authoritative and earliest collection of the various criteria used to determine fair use occurred in the case of Folsom v. Marsh. The case involved a two-volume history

of George Washington based on his private papers. The papers had been published earlier in a copyrighted work on the same topic. The defendant claimed that his copying of approximately 320 pages from the previously published work constituted fair use.

Justice Story, in ruling infringement, indicated that nature of the selections made, quantity used, and effect on future sales of the infringed work were determinative factors in fair use doctrine.

The courts have generally, however, allowed a greater latitude for writers and others in scholarly areas such as science, history, and technical fields. Theories, opinions, and exact words from a copyrighted work have been permitted on the premise that science and the arts must progress.

In one case, Henry Holt and Company v. Liggett and Myers Tobacco Company, fair use based on advancement of science did not stand. The cigarette company was found to have infringed upon an article written by a doctor stating that smoking had no effect on the auditory passages. The court ruled that three sentences of the article which were appropriated by the company had not constituted fair use. The portion copied represented a pertinent section of the doctor's pamphlet. Thus, in this case, no factor of fair use was applicable. Failure to advance knowledge and the commercial nature of the infringement had ruled out principles of fair use.

Winwar v. Time was a case in which latitude of fair use was allowed. Time magazine admitted appropriating one passage from Winwar's copyrighted book, George Sand and Her Times. In this instance, the court ruled fair use because of the historical nature of the work. Reasonable use of earlier copyrighted work on the same subject was allowed in order to convey knowledge to the public.

In the case of Toksvig v. Bruce Publishing Company, the court ruled that substantial copying of the plaintiff's copyrighted book was an infringement. In spite of the scholarly nature of the works involved in the case, it was determined that fair use depended on many circumstances. It was not fair use in this instance because the infringers had saved research time by infringing upon Toksvig's biography. The fact that the defendants had no intent to infringe proved to be no excuse.

In Thompson v. Gernsback, the court questioned the scientific validity of "Sexology" magazine. However, because of issues raised regarding fair use interpretation, the magazine's infringement of a copyrighted article on homosexuality was ruled fair use. The decision indicated there was a possibility of fair use within the loose meaning of science; hence the privilege of quoting directly from an earlier and similar topic.

The general privilege accorded writers of historical work was upheld in Eisenschiml v. Fawcett Publications, Inc. True magazine had used two scholarly books about Lincoln's assassination. The court noted that a number of extracts from Eisenschiml's book were used in

the magazine article. It was pointed out that infringement was not necessarily exact reproduction and might include paraphrasing. The further test, as was the case in Toksvig v. Bruce, was whether the magazine writer had done his own research rather than make unfair use of the plaintiff's work. This issue of independent research raised doubts, with the court subsequently determining fair use. It was noted in this case that treatments of historical work could result in similarities because of common sources, and would not necessarily denote infringement. The court stated that it could not clearly say there was sufficient copying to warrant charges of infringement.

The case of Greenbie v. Noble brought forth the previously adhered to principle that fair use depended on many circumstances. Included among these circumstances were nature of the use of appropriated material, effect on sales of original works, and advancement of knowledge. In this case of similarity between two historical works about a Civil War character, the court ruled fair use. It was pointed out that reasonable use of a copyrighted work may be condoned if the intent was to convey information and knowledge to the public. The similarity between the works was defended on the premise that common sources were allowable so long as modes of expression were different.

Even though appropriation of scientific, medical, and historical materials may be considered reasonable and customary, there could not be similarity of style. This action was ruled an infringement in Holdredge v. Knight Publishing Corporation. Citing the Eisenschiml and Toksvig cases as precedents, the court stated that the publishing company mirrored the style of Holdredge. This was beyond the scope of fair use and also was not considered to be independently researched, thus constituting infringement.

The United States Court of Appeals reversed the lower court's finding of infringement in the case of Rosemont Enterprises, Inc., v. Random House. The higher court concluded that Random House had made fair use of a previous article about Howard Hughes when preparing its own biography of the public figure. Fair use was based on the principle that it was reasonable to utilize and quote from earlier works on the same subject. The court further held that fair use was not restricted to scholarly materials, but turned on the nature and use of copyrighted materials. In this case, the biography was deemed to advance the arts; hence public benefit, a major purpose in copyright protection. The economic gain concept was considered irrelevant to the case.

Criticism and review. In a number of cases the courts have ruled that extracts or quotations from a copyrighted work may be used for review or criticism. This type of use has been classified as fair use. In the early Folsom case, it was ruled that a reviewer could cite from a copyrighted work if his intent were to criticize.

Criticism as fair use of copyrighted material appeared in New York Tribune, Inc. v. Otis and Company. A newspaper editorial had been

photostated by an investment company and copies along with a critical letter had been mailed to selected persons. The newspaper company contended there had been an infringement, while the defendant claimed fair use. The court said that fair use depended on purpose claimed, value of the copyrighted material, and effect upon the original work. It was noted that, as was ruled in the Folsom case, true intent to criticize was a question at hand. The court said that determination of the fair use issue could not be resolved on the sworn statements in the case, but was to be left to the trial judge. Consequently, motions were denied and the case dismissed.

One test in criticism and review cases has been in determining whether the review reproduced so much of the original that demand for it was partially reduced.

This principle was utilized in Hill v. Whalen and Martell, Inc. The defendant had arranged a dramatic performance featuring two characters similar to Hill's original characters. The intent was parody of the original work with substantial use of important quotations as well as other language. The court ruled infringement because it reasoned that the parody led people to believe they were seeing the original work, thus diminishing the value of Hill's copyrighted creation.

Criticism as an important and proper exercise of fair use was the issue in Loew's Inc. v. Columbia Broadcasting System, Inc. As in the Hill case, a parody on burlesque was the medium used for criticism. The court decided that the burlesque television presentation of the copyrighted motion picture "Gaslight" could not be defended as criticism. The court noted further that the major decisive point in the case was that one could not copy the substance of another work without infringing. This was especially true in distinguishing burlesque from more scholarly endeavors. The defendants were granted injunctive relief restraining the showing of the television burlesque.

The Berlin v. E. C. Publications, Incorporated decision supported the principle that fair use allowed critics to employ limited quotations from copyrighted work. Also, the court noted that parody and satire were forms of literary criticism and that "many a true word had been spoken in jest." In this instance, a satirical humor magazine had published a collection of parody lyrics to several copyrighted songs. The court stated that the parody lyrics did not substantially resemble the theme, content, and style of the copyrighted songs, thus no great amount of infringing. The court's views on forms of literary criticism, in contrast to previous cases, resulted in a ruling of fair use in the case.

Lectures and addresses. Under the Copyright Act, the author or owner of a lecture or address has had the exclusive right to deliver or authorize its delivery. The act further prohibits publication of these materials without express consent. This has not, however, given the copyright owner a monopoly over the contents within the lectures and similar works. A person admitted to these lectures has the right to

full benefits derived from the lectures, short of oral delivery or exact duplication of the material.

In Chautauqua School of Nursing v. National School of Nursing, the plaintiff correspondence school for nurses had copyrighted a lecture on hypodermic medication. The defendant correspondence school later obtained the right to print, sell, and distribute a surgeon's copyrighted lecture, also dealing with hypodermic injections. In both lectures, the injection method was shown in twelve successive steps, accompanied by photographs illustrating the procedure. The Court of Appeals noted that the plaintiff school had no monopoly over the original lecture contents because these things were common teachings. The surgeon, in preparing his copyrighted lecture, had the right to consult previous publications and had displayed sufficient originality. Consequently, the court decided that there was no infringement by the defendent correspondence school.

The question of fair use of material contained in addresses appeared in Public Affairs Associates v. Rickover. The publishers brought action against Rickover claiming he could not restrict quotations from his public speeches. The district court held that Rickover could legally copyright his prepared speeches, thus gaining exclusive right of delivery. The court also held that prior distribution of his speeches before delivery was not an abandonment of his literary work, and would not enable the publisher to utilize his work. The publisher appealed and the higher court reversed the trial court's decision on the latter point. It was held that distribution of the speeches took place before Rickover gained copyright protection, therefore constituting dedication of his work to the public domain. Consequently, the publisher was within his rights in publishing the speeches.

The Court of Appeals did not determine what constituted fair use on later properly copyrighted speeches since the publisher failed to indicate uses intended for the speeches. These speeches were the subject of a later trial and Admiral Rickover prevailed in his right to control delivery of his own original material.

In a somewhat similar case, Williams v. Wisser, a teacher brought action to enjoin publication of his lecture notes. The Superior Court of Los Angeles County found for the teacher and the defendant appealed. The Court of Appeals held that the teacher, not the university owned common law copyright to his lectures. It was further contended by the court that delivery of his lectures did not divest the teacher of his common law copyright privileges. The judgement in the plaintiff's favor was based on the ground that Weisser's publication of the lecture notes infringed the teacher's common law copyright. The court also noted that California common law copyright prohibited unauthorized verbatim duplication of the lecturer's material. In addition, Weisser conceded substantial similarity between the lectures and the published notes, thus ruling out fair use.

Music. The Copyright Act protects against those who copy or make new arrangements of a copyrighted composition. In several cases, the decisions of the courts have varied according to the circumstances of the particular case. In the case of Bloom and Hamlin v. Nixon, a mimic imitated five actresses during her act while singing one chorus of a copyrighted song. The court declared that the mimic had acted in good faith, and had good intentions. Additionally, singing only the chorus of the song did not infringe the copyrighted work.

In another case, Boosey v. Empire Music Company, the use of a phrase and comparable lines of music warranted a finding of infringement. The court pointed out that the case involved only the rights under copyright statute with commercial intent not the issue.

A magazine's use of a copyrighted song was held to be fair use in Broadway Music Corporation v. F-R Publishing Corporation. The court, in reading its decision, applied three tests. These tests were value, purpose, and economic effect criteria used frequently in other fair use cases.

Somewhat similarly, the court ruled fair use in the case of Karll v. Curtis Publishing Company. The court pointed out that a magazine had been within its rights to reprint a composer's song dedicated to a professional football team. The same tests were applied in this case as were used in the Broadway Music Corporation case.

The copyright on a musical composition has given the owner an exclusive right to perform the work in public for profit. An unauthorized broadcast of a recording has been held to be a public performance for profit within the meaning of the copyright statute. In Associated Music Publishers, Incorporated v. Debs Memorial Radio Fund, Incorporated, a radio station had not made fair use of a copyrighted composition. It was held that the nonprofit station, which devoted one-third of its time to commercial broadcasts, had infringed though it broadcasted but a portion of a copyrighted musical composition. The court concluded that the station also was not free to use a copyrighted musical composition merely because it was taken from a phonograph record.

Robertson v. Batten, et al., was a case in which a beer commercial was found to be substantially similar to a popular song. The court concluded that such copying with a profit motive was not fair use.

The rights of the owner of copyrighted music have not always been determined through the standard infringement tests of value, purpose, and economic effect.

The court, in Life Music, Incorporated v. Wonderland Music Company, declared that the plaintiff must also prove positive infringement beyond any doubt. The mere similarity between two versions of a

tongue twister word used in both songs was deemed insufficient proof to warrant a charge of unfair use.

Art. Within the scope of copyright protection, the copyright owner of art work has been given exclusive rights to publish, copy, and vend his work. The Copyright Act has also given the creator of a model or design the exclusive right to complete, execute, and finish the work.

The courts have said that it was the artist's expression of his idea that was protected against substantial or unauthorized copying of art work. The primary test of infringement has been that of substantial similarity between the original and the alleged infringing work. The substantial similarity must be recognizable by an average lay observer, according to the courts.

Another factor which had entered into cases of infringement of artistic works had been that of copying in another medium. Bracken v. Rosenthal was an early case in point. The court ruled infringement when a photograph was taken of a copyrighted piece of sculpture.

In the case of M. J. Golden and Company, Incorporated v. Pittsburgh Brewing Company, Incorporated, a charge of infringement was sustained by the court. A plaque of a "Gay Nineties" scene had been designed by the plaintiff to be used by the defendant in radio and television advertising. At a later time the defendant had a third party sketch and subsequently manufacture additional plaques. The court held that the sketch was a substantial copy of the original plaque and constituted an infringement. It was noted that any method or reproduction, such as sketching or photographs, would be cause for infringement charges in cases involving artistic creations.

In cases where small changes occurred between the original and the copy, there was still infringement. Such was the decision in F. W. Woolworth Company v. Contemporary Arts, Incorporated, and in Fristot v. First American Natural Ferns Company. In both instances, the slight changes between the original and the copy had not disguised the similarity.

On the other hand, a copyrighted picture displaying an approach to a bridge was not infringed by construction of a bridge with a similar approach. Such was the decision in Muller v. Triborough Bridge Authority.

The earlier case of Jack Adelman, Incorporated v. Sonners and Gordon, Incorporated gave support to the principle that only artist's ideas could be copyrighted. In this case, the court declared there could be no cause of action against a company manufacturing the same dress as the plaintiff. It was held that the drawing of the dress was the work of art, and not the dress itself; hence no infringement.

In numerous fair use cases, the court decisions have been determined by the economic facts in each instance. The economic effect principle was used by the court in ruling fair use in Mura v. Columbia Broadcasting System, Incorporated. Hand puppets were used in an incidental manner on a children's television variety hour. The creator of the puppets charged infringement of his copyright. The court supported its decision of fair use with the contention that, if anything, sales of the puppets would be stimulated through their use on television. Additionally, the court concluded that evanescent reproduction of the puppets was not actual copying of the original creation.

Instructional materials. It has been pointed out in copyright cases that ideas were not protected, only the manner or style in which they were expressed. This principle has allowed subsequent individuals to write, publish, and copyright new and original works upon the same subject. The courts have indicated that the information disclosed within this type of material belongs in the public domain.

In the early case of Baker v. Selden, the court said that the object of publishing work in science or the arts was to communicate useful knowledge. It was concluded that the defendant in this case had therefore not infringed in his publication of account books based upon the plaintiff's copyrighted bookkeeping system.

However, in the desire to advance knowledge, subsequent writers or previously copyrighted subjects have had to maintain originality. This was the issue in Reed v. Holliday, a case in which the defendant had published an unauthorized manual to accompany a previously published grammar text. The grammar text had purposely left a number of sentences to be diagrammed by the students. The unauthorized manual contained forty of the original book's diagrams and additional diagrams of those sentences originally left for solution. The court held that material portions of the text had been copied and that the full key would impair sales of the textbook. It was declared by the court that the manual did not, therefore, constitute a fair use of the copyrighted grammar book.

Conversely, in the case of Oxford Book Company v. College Entrance Book Company, a finding of infringement on a textbook matter was reversed by the higher court. The court explained that the plaintiff's book was designed to convey information to the public and the defendants were also free to glean any information to the public they could. The clear evidence indicating that the defendants had indeed infringed upon an elementary school history book proved incidental. The court was primarily concerned with conveying of knowledge to readers. An extenuating circumstance was that of the common base of historical facts available to both plaintiff and defendant, thus giving no one a monopoly of the book's contents. The manner of expression was substantially different and the court was satisfied that infringement was not supportable.

The concern of the courts for the rights of the copyright owner was again displayed in the case of College Entrance Book Company v. Amsco Book Company. In this instance, the defendant's copying of less than 15 percent of the plaintiff's copyrighted French word lists for students warranted unfair use. The court declared that the copying was to avoid independent work and would injure sales of the first French booklet. Additionally, the arrangement of both booklets were substantially similar, indicating little doubt of unfair use.

In a similar case, Colonial Book Company v. Amsco School Publications, the substantiality test was again employed. The defendant had infringed upon a chemistry review book in preparing his own similar work. The court declared that the diagrams appropriated were of importance to the original work and had been recognized as such by teachers of chemistry. Thus, the copying of the eleven diagrams constituted substantial appropriation and a subsequent decision of unfair use was made. As in the previous College Entrance Book issue, the fact that sales of the plaintiff's book would be affected aided the court in reaching its decision.

Mere alterations of the original text have not been adequate in avoiding charges of infringement. The case of Orgel v. Clark Boardman Company involved a legal text writer who updated an earlier law text. The court declared that while writings on a common subject could result in similarities, there must be more than mere editing when utilizing copyrighted materials for subsequent work.

The later case of Addison-Wesley Publishing Company v. Brown clarified the degree of latitude allowed users of copyrighted textbooks. The court stated that those who avail themselves of the textbook material for their own edification or application did not infringe the copyrighted textbook. Infringement, the court pointed out, would be the case whenever a later publication used the same methods, whether in words or statement, as the original author.

In the Addison case, the defendant had prepared an unauthorized manual of solutions to problems contained in a college physics textbook. The court ruled that the manual did not constitute fair use since its language was substantially similar to the physics book. Additionally, the court felt that sales of the physics book would be decreased by the continued reading of the manual, thus violating the economic protection afforded copyright owners.

Traditionally, material which has passed into the public domain has been available for all to use without fear of infringement proceedings. However, a court ruled that a copy of something in the public domain will support a copyright if it is a distinguishable variation. Such was the case in Gelles-Widmer Company v. Milton Bradley Company. The plaintiff company had arranged public domain arithmetical problems in an original manner. The defendant company also developed flash cards of the same nature. The court held that the defendants were

subsequently guilty of infringement since the Gelles-Widmer Company had earlier copyrighted its flashcards of the arithmetic problems. The court reasoned that, no matter how poor the originality used, it was enough to obtain a copyright of material once in the public domain.

Educational television. The present copyright law has allowed the copyright owner to control the performance of a nondramatic literary or musical work if it has been for profit. The for profit limitation has caused problems in regard to the performance of nondramatic works on non-commercial educational television stations.

The profit referred to in the copyright law meant indirect as well as direct profit. This was recognized in the previously cited Debs Radio case. In this case an educational radio station was held to have infringed a copyright by broadcasting a musical performance without first obtaining authorization. The unauthorized performance was considered for profit since one-third of the station's time was devoted to paid advertising.

The present copyright law is silent on the subject of educational broadcasting. Since radio and television have been considered public performances, the for profit limitation has become the decisive factor. Nondramatic literary and musical materials may be used in non-profit educational broadcasting at the present time. However, no case has yet decided the point.

Photocopying. Under the copyright law, authors have exclusive rights to print, reprint, publish, copy and vend the copyrighted work. Photocopying for educational purposes has been, therefore, considered an infringement of the author's copyright unless it could be justified under the doctrine of fair use.

In practice, use of photocopying machines to make copies of copyrighted materials has been widespread. There have been no cases to decide the fair use aspects of these copying actions. Jolliffee stated in his article dealing with the subject that the rights of copying given to the copyright owner were not exclusive. He further stated that circumstances would determine whether some materials could be copied.

Since there have been no defenses given by the copyright statutes, one would have to turn to the courts and previous decisions to determine whether his appropriation came under fair use. Occasionally, as in the Rosemont Enterprises case, the courts have subordinated the copyright holder's interest in financial return to the benefit the public would gain from development of knowledge.

Jolliffee also noted that teacher's copying activities appeared to be aids to the progress of arts and science and should thus be protected.

Information storage and retrieval systems. The interest in electronic storage and retrieval with accompanying computer use has raised the question of the effect of copyright laws upon these operations. Copyright law has dealt with owner rights in a variety of works and any copying of these materials has meant the possibility of infringement. Kastenmeier noted in his article that unless the doctrine of fair use was appropriate, reproduction of work for input into a storage and retrieval system would be an infringement.

Unless fair use were applicable, the following computer uses would be infringements of copyright: reproduction of a work in the form of punched cards or magnetic tape for input into an information storage and retrieval system; reproduction of a work in copies such as the printout or output of the computer; preparation for input of a detailed abstract; and computer transmission of a visual image of a work to the public. On the other hand, simple manipulation of a work's content within a system would not involve reproduction, hence it would be outside the scope of infringement.

A complicated issue, and the issue upon which the computer program would turn, would be that of the copy utilized for the computer program.

Puckett felt that the present limitations on what constituted a copy would work in favor of the computer question. The limitations were that a true copy must be in tangible form and visually perceivable.

The White-Smith v. Apollo case would seem to support this definition of a copy. In the case, the court ruled that a piano roll was not a copy. The court reasoned that few could read the piano roll without special skills, hence it could hardly be considered a copy in the strictest sense.

It was contended by Puckett that neither were punched cards nor tape intended to be read by more than a few skilled individuals. Thus, there could be no infringement up through the storage state of a computer program. From that point on, however, reproduction for usage would constitute infringement unless fair use doctrine were allowable.

The specific question within the dearth of problems surrounding the computer would be whether fair use could be interpreted to include all computer operations. At the present time, Congress has not provided a foundation in law in this field. Any application of the doctrine of fair use would have to be decided on the situation in each case, as has been the practice in the past in fair use dealings.

Graduate theses and dissertations. Shaw stated that restrictions placed upon these varied with institutions. He described a case in which a department head refused a request to copy a thesis because the thesis was too poorly done. A person who was not the author presumed to give or deny permission to copy. Conversely, any scholar who copied with permission based on such authority would have infringed the rights of the author.

A more recent article reported that filing of a dissertation in a library almost certainly constituted publication. This filing, or any other method of publication, would subject the author of the work to copyright law regarding quoting of material. Consequently, graduate students probably would have to obtain permission before incorporating copyrighted material within their manuscripts unless fair use were applicable.

No court cases have arisen with regard to the fair use of material for graduate theses or dissertations. It has appeared that, in the interests of criticism and research, liberal quoting would be the governing rule in operating without authorization.

Additional cases considered applicable to specific subject areas were placed in Appendix C.

ALTERNATIVE SOLUTIONS FOR RESOLUTION OF THE COPYRIGHT REVISION IMPASSE

The purpose of this section of the report was to identify alternative solutions that have been suggested for resolution of the current impasse in copyright law revision.

ALTERNATIVE SOLUTIONS

As has been indicated in the study, there have been major controversies between author-publishers groups and users of copyrighted materials. These very controversies have been the cause of impasse and subsequent lack of progress toward satisfactory copyright law revision.

Kaminstein indicated that fair use and reproduction rights were the issues which had stalled progress in revision. Computer use and educational television were also issues in which agreement could not be reached.

A combination of circumstances caused the Senate Subcommittee on Patents, Trademarks, and Copyrights to defer action on the latest revision bill in 1969. According to the Assistant Register of Copyrights, the current revisions before the Senate Subcommittee have centered upon a number of issues with subsequent lack of action during 1970.

Proposals and Solutions

The following alternative solutions to the copyright revision impasse have been suggested by various groups or individuals.

Ad hoc committee solutions. A recent position paper was published which summarized the stand taken by the Ad Hoc Committee of forty educational organizations. This organization had offered a number of alternative proposals to sections of S. 543. The position paper contained at least basic recommendations for preservation of the rights of students and teachers under the copyright law.

The committee recommended that the language in section 107 of S. 543 be changed. This section carried the statement as follows:

> Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection.

The Ad Hoc Committee urged that the words "no matter how minor the amount of money involved" be eliminated. It was indicated that the elimination of the words would permit a more balanced application of criteria used to determine fair use.

In order to clarify existing ambiguities contained in S. 543, an ad hoc proposal was made to incorporate an entire section related to instructional television. This section, entitled 110 (1A), was developed with support of both classroom teaching and educational broadcasting groups. Its intent was to make a distinction between instructional broadcasts and controlled transmissions. The committee felt that a clearer interpretation of controlled transmission would allow classroom use of copyrighted materials via educational television techniques.

Again in section 107 relating to fair use, the committee suggested the following paragraph be included:

> Depending on the circumstances and in order to protect spontaneous, creative teaching situations, the same would also be true for temporary use of very short self-contained works such as poems, maps in a newspaper, vocabulary builders from a monthly magazine, essays, short stories, and songs. This should not be construed as permitting a teacher to make multiple copies of the same work on a repetitive basis or for continued use.

The recommended paragraph would extend the scope of S. 543, which stated that it was permissible to make multiple copies of short essays, stories, and songs.

Section 110 (1) of S. 543 dealt with exemption of performances and displays in face to face teaching activities. The Ad Hoc Committee advocated the dropping of the words "face to face" because not all instruction occurred by teachers working face to face with students. It was noted that the proposed dropping of the words would widen the scope of exempt instructional performances.

Further alternative proposals were made requesting that fair use be extended to educational broadcasting. The intent of the committee was that fair use would then be as equally applicable to this instructional method as to other uses.

Other pertinent proposals offered by the Ad Hoc Committee as alternatives to sections of S. 543 concerned the following: (1) no limits on the number of years and the number of copies or phonorecords which could be made of a particular program by a non-profit organization;

(2) reduction of damages for infringement; (3) inputs into a computer not to be considered infringements until an authorized commission had studied the problem; (4) elimination of increase in statutory damages for infringers; (5) a change in copyright duration to twenty-eight years plus an equal renewal term, rather than life of the author plus fifty years as originally proposed in S. 543; and (6) inclusion of a not-for-profit provision in the copyright bill, thereby allowing reasonable freedom of copying for educators.

A particularly important proposal advocated by the committee was that fair use of materials be presumed until proven otherwise. The committee indicated that there was no reasonable assurance of a use being considered fair use at that time. The proposed revision to S. 543 would place the burden of proof of infringement on the party holding the evidence. Teachers would therefore be assured a degree of freedom of use without fear of law suits.

At the time of this study, none of the listed alternatives had been incorporated into the current or proposed copyright law. The Ad Hoc group has urged the Senate Judiciary Committee to take favorable action on the proposed alternatives so that passage of a comprehensive copyright law would be expedited.

A statutory solution. Copyright owners and educators have differed as to whether the statutory solution would be general or detailed. They have also disagreed on whether the copyright problem would be solved by formation of an independent clearinghouse to handle permission requests for use of copyrighted material.

Halley maintained that statutory resolution of the impasse between educators and copyright owners would take several directions. The statute would aid copyright owners by supporting statutory damages for copying. In turn, it could support nonprofit educational use for which no payment would be made. It was pointed out by Halley that the best provision would allow educators free use of copyrighted works so long as the author's market would, therefore, require payment.

An equitable agreement for resolving the copyright revision impasse would best be reached through the issuance of flexible regulations by the Copyright Office. This alternative had not been considered very often because all parties involved were concerned with incorporating their own views in a statute.

Section 107 of the 1966 Bill did not put forth any rules of decision regarding fair use, but admitted that each case presented questions of fact. Halley indicated that the flexible standard of Section 107, plus given examples of fair or unfair use, would be a good compromise for all concerned.

The goal of promoting "the Progress of Science and useful Arts" would be furthered by allowing unimpeded, yet paid for use of copyrighted material.

C.I.C.P. solution. The Committee to Investigate Copyright Problems Affecting Communications and Education proposed establishment of a central clearinghouse. The clearinghouse, acting as a middleman, would give member users contractual permission to copy while giving appropriate royalties to subscribing publishers.

Under the system, paying members would be entitled to make any number of copies in any form and would be free from infringement suits. Through a sampling system, royalties would be distributed equally among participating publishers. The C.I.C.P. maintained that properly adjusted royalties would not be a burden to users and publishers would receive substantial revenues. Consequently, the net result would be beneficial to all.

The C.I.C.P. also suggested that a proposed clearinghouse be chartered as a non-profit corporation run by producers and users of educational works.

It was noted by the committee that the users were willing to pay, but found procedures for obtaining permission burdensome. The clearinghouse system with its simplified procedure would alleviate this problem, thus ensuring earlier settlement of differences among groups concerned with copyright.

Solution involving storage and retrieval systems. It was proposed by Ramey that a creation of a copyright commission would be an additional avenue of approach for solution of copyright problems. The hearings before the Subcommittee of Patents, Trademarks, and Copyrights in 1967 provided the impetus for the inauguration of such a commission.

The commission would study the complexities of the computer area in regard to use of copyrighted material. Subsequent recommendations for amendment and revision of the existing copyright law would then be made by the group. The ultimate purpose of the commission would be to alleviate difficulties inherent in drafting a statute resolving conflicts between technology and copyright law.

Ramey also indicated that one alternative to statutory resolution was the possibility of establishment of a copyright clearinghouse. In connection with computer use, fees for use of copyrighted material would be fixed at the input stage by the clearinghouse. This method would allow time to negotiate permissions, fees, and calculation of potential usage.

Publishers' solution. The American Textbook Publishers Institute, which represented 90 percent of all textbook publishers in the United States, proposed an alternative solution to the copyright revision issue. The A.T.P.I. would sell annual licenses granting blanket permission to copy anything in its published catalog. Permissions would be granted entire school systems, with costs varying according to the amount of copying the purchaser anticipated. The Institute would extend the system to include educational television,

photocopying, and other educational uses of copyrighted material. Publishers have stated that the method would facilitate resolving the issue of clearance delays, a major concern of educators and a frequent cause of infringement.

Stamp plan solution. Wigren noted that several plans for resolution of the copyright issue have been proposed. One of these plans suggested the purchase of copyright stamps from post offices and banks. These stamps could then be affixed to reproductions teachers made of copyrighted materials.

ASCAP plan. The American Society of Composers, Authors, and Publishers proposed giving automatic clearance to all teachers using copyrighted materials. The automatic clearance was contingent upon the teacher's notifying a clearinghouse immediately after using the copyrighted material and sending in the required payment. The payment was to have been figured on a per word basis.

A.L.A. proposal. S. 543 expanded the rights of the copyright proprietor in words which suggested that any copying without authorization constituted infringement. Libraries were, therefore, placed in a precarious position because of their photocopying activities.

Consequently, the American Library Association proposed an amendment to S. 543 in the hopes of expediting passage of satisfactory legislation related to photocopying. The amendment recommended that libraries be allowed to reproduce single copies of copyrighted material in the interests of scholarship and research. It was further proposed that libraries be permitted to reproduce works for the purpose of replacement of physically damaged materials.

Statutory licensing system. Karp suggested a statutory licensing system for granting permission to use copyrighted materials. He proposed that Congress aid authors and publishers by writing a statutory licensing system into the Copyright Act. With adoption of this solution to the copyright revision impasse, any person would be allowed to make single copies. Educational institutions would pay a lower rate.

Karp's solution would have permitted the making of visible copies of published literary and dramatic works for normal purposes. It would not have permitted making of tapes, film recordings or translations of new versions of a work.

E.R.I.C. plan. The Educational Research Information Center's copyright clearinghouse test project was conducted in cooperation with textbook publishers organizations. Eighteen regional offices were utilized to channel applications for use of copyrighted material.

All essential application data were sent to a central office and from there to the appropriate publisher's permission department. Any rejection of user permission to utilize copyrighted materials was accompanied by a notice of prices of published editions of the specific works.

The originators of the E.R.I.C. plan indicated that a direct result of the plan would be improved communication between users and owners of copyrighted material.

National network alternative. A group of interested individuals in Washington attacked copyright as a monopoly. They advocated setting copyright aside in the interest of the public. Their solution to the problem was to create a national information network into which all copyrighted materials would be placed. This alternative would result in free input-free use, and free output of all materials. Writers would be endowed with grants in order to prepare materials for the network.

Other alternatives. Writers in the field of copyright law revision have proposed other solutions to the copyright problem. Wigren foresaw state associations of classroom teachers appointing task forces of experts on the copyright situation. These task forces would be action oriented and would identify the needs of teachers and learners in the uses of copyrighted material. The groups would then seek assistance and support, hoping to press for greater Congressional action on the problems.

Further solutions have involved variations of the previously suggested compulsory licensing with the additional use of judicial or administrative arbiters to set reasonable fees for copyright uses.

Educators have also proposed an automatic, but limited exemption for classroom copying. The exemption would permit teachers to copy a reasonable number of excerpts and quotations provided they were not substantial in length. In the hopes of reaching agreement with publishers, educators proposed not to include consumable materials such as workbooks within the automatic exemption concept.

On August 5, 1969, Senator McClellan introduced Joint Resolution 143, a bill to extend the term of subsisting renewal copyrights until December 31, 1970. The bill was passed by the Senate on October 6, 1969, and at the time of the completion of this study, still awaited action by the House of Representatives. The joint resolution would provide an interim extension of the renewal term of copyrights pending Congressional enactment of a general revision of the copyright laws.

The accompanying report of the joint resolution stated that the general revision bill (S. 543) had been unavoidably delayed. It was indicated within the report that the delay had been caused by failure of various groups to reach agreement on several controversial topics.

Senator McClellan urged removal of the broadcasters and television issue from the revision bill. He indicated that removal of that specific issue would aid in resolving the copyright law revision impasse.

REVIEW, SUMMARY, AND CONCLUSIONS

The primary purpose of this section was to review the activities, summarize the findings, and report the conclusions of the study.

REVIEW OF ACTIVITIES

The purpose of this study was to determine the historical and legal background of the Federal Copyright law with special implications for education. Six questions were developed for the research and represented major areas of the study. First, the historical development of the copyright concept, as described in past and current literature, was traced from its inception to the present copyright impasse. Second, copyright issues pertinent to education and related interests were identified from Congressional hearings on copyright revision and from the works of individual writers on the subject. Third, an index search of standard bound volumes of state and federal legislation was made to ascertain pertinent principles of copyright law. Fourth, court cases were analyzed for principles of law pertaining to the related issues of fair use and infringement. Fifth, alternative solutions to the copyright revision impasse were identified from copyright revision hearings and from the works of writers on the subject. Sixth, findings were presented in summary form and conclusions were drawn from these findings.

SUMMARY OF THE FINDINGS

The findings presented in this study pertained to historical development and revision issues, written law, common law, and alternative solutions to the copyright revision impasse.

Historical Development and Revision Issues

First, the concept of copyright has existed since the days of the Roman Empire.

Second, the English Statute of Anne became the forerunner of American legislation on the subject of copyright.

Third, there have been three general revisions of the copyright law. These revisions took place in 1831, 1870, and 1909.

Fourth, the Copyright law has remained basically the 1909 Act with a number of subsequent amendments.

Fifth, the major controversies in copyright revision have centered on fair use and classroom copying of copyrighted material.

Lastly, educational leaders and publishing concerns have extended efforts to bring about satisfactory solutions to the problems of copyright revision.

Written Law

First, there were twenty-three states that carried copyright provisions in their statutes.

Second, these statutes were largely concerned with unlicensed performances of copyrighted dramatico-musical works.

Third, state copyright statutes also dealt with illegal pooling of copyrighted works for commercial purposes and with invasion of author privacy.

Fourth, eight states simply referred to the federal government's jurisdiction over copyright matters.

Fifth, the balance of the states were silent on the subject of copyright.

Sixth, federal copyright statutes gave copyright protection to an original work only so far as its expression was concerned.

Seventh, performances of copyrighted works by schools and church societies for charitable and educational purposes have been allowed without penalty.

Eighth, the doctrine of fair use had no specific support in federal copyright statutes.

Ninth, public benefit was the sole interest of Congress in granting copyright privileges to authors.

Lastly, infringement has not been defined in federal statutes.

Common Law

First, courts have held that fair use was a question which turned on the circumstances of each case.

Second, the single point of agreement among the courts was that fair use has become a defense to a charge of infringement.

Third, criteria used by the courts to determine fair use were as follows: reasonable infringement, economic effect on the author's works, nature of the use of the appropriated material, test of substantial similarity, and proportion of amount copied to the whole work.

Fourth, the two principal factors used in copyright case decisions were (1) decrease in demand for copyrighted work, and (2) the nature of the use of the approrpiated material. The isolation of these factors has come about through their relationship to the original intent of the copyright act.

Fifth, further alternatives proposed that committees evaluate various copyright issues and make subsequent recommendations for inclusion in any copyright revision.

Lastly, a joint resolution was introduced to extend the copyright renewal term until December 31, 1970. The accompanying report indicated that the interim would allow time for Congressional action on the general revision of the copyright act.

CONCLUSIONS

The conclusions drawn in this report pertained to historical development and revision issues, written law, common law, and alternative solutions to the copyright revision impasse.

Historical Development and Revision Issues

Conclusion Number 1: The Copyright Act has never totally accommodated itself to the changing needs of society. This has been evidenced by the three general revision efforts plus the numerous amendments made to the Copyright Act. Further proof rests on the fact that current revision efforts have been characterized by complex issues involving fair use, technological developments, and diverse positions of educator and publishing groups.

Conclusion Number 2: The lack of statutory provisions for fair use in the Copyright Act has led to a dilemma for educators which inhibits teaching practices. Several writers in the field of copyright law have indicated that the fair use question has posed an obstacle for educational use of copyrighted material.

Conclusion Number 3: The need exists for more uniform fair use criteria. This has been substantiated in the form of requests by educational organizations for introduction of specific fair use criteria into the current bill.

Written Law

Conclusion Number 4: Statutory copyright principles within the states serve a subordinate role to Federal legislation on the subject. The United States' Constitution gives the Federal Government jurisdictional authority over copyrights. Federal policy and its benefits may not be denied by state law.

Conclusion Number 5: The Federal Copyright Law bestows upon authors a virtual monopoly over their works. Section one of the Copyright code gives authors exclusive rights to print, reprint, copy and vend their work. The lack of any fair use provision further substantiates the rights of authors to control their creations.

Conclusion Number 6: The Federal Copyright Law negates the original intent of the Constitutional copyright provision to advance the

public welfare. Educators are inhibited in the use of copyrighted material because of the powers accorded authors to control their own works. Consequently, advancement of knowledge and subsequent public benefit are affected.

Conclusion Number 7: A need exists for a specific definition of infringement within the Federal Copyright Code. Contemporary teaching practices involve the use of a wide array of copyrighted materials. Without a clear understanding of what constitutes infringement, teachers will be liable to charges of infringement.

Common Law

Conclusion Number 8: There has been no uniformity in cases dealing with fair use. With the exception of the educator cases, varied circumstances resulted in divergent court decisions in copyright cases.

Conclusion Number 9: Until recently, copyright owners have not concerned themselves with educational infringement of their works. The fact that there are only two educator cases on record attests to this. However, the current concern over the issue of fair use evidences implications for change in this area.

Conclusion Number 10: Fair use of theories and exact words in scholarly works is generally allowed in the interests of science and the arts. The advancement of knowledge and the necessity to review and criticize are the criteria for supporting fair use of scholarly works.

Conclusion Number 11: The economic effect principle can override any claims to fair use. Substantial similarity between works, copying out of proportion to the whole work, or similar instances affecting author's sales can be ruled infringements despite the nature of the use, scholarly or otherwise.

Conclusion Number 12: Case law does not clearly establish educational fair use guidelines. The wide diversity of fair use decisions emphasizes the confusion educators and others are experiencing in the fair use of copyrighted materials.

Alternative Solutions

Conclusion Number 13: The Ad Hoc Committee's alternative solution most nearly solve copyright problems relating to education. Although the proposed solutions are favorable to education, authors also receive fair treatment in the suggested rewording of the fair use section of S. 543.

Conclusion Number 14: Other proposed alternative solutions fail to offer satisfactory conditions for educators. The suggested solutions involve time consuming clearance procedures that would delay use of copyrighted material at the necessary time.

General Conclusion

Conclusion Number 15: The specific issues of fair use and reproduction rights have been the chief causes of revision delay. Authors, publishers, and educators have failed to reach agreement on the question of fair use. The ease with which materials may be reproduced and the subsequent implications has resulted in a need for redefinition of the fair use doctrine. Revision efforts will progress when the fair use question has been resolved.

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