PHOTOCOPYING OF COPYRIGHTED MATERIALS IN LAW TEACHING

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INTRODUCTION

The purpose of this statement is to provide guidance in
claimed in arrangements of information that is not itself within the scope of copyright protection, solely to the arrangement. (3) There is no copyright in the text of material officially promulgated by government agencies. Thus, a teacher is free to copy the official text of court opinions, of statutes and ordinances, and of government rules and regulations. As will be noted below, however, a commercial compiler or publisher may properly claim copyright protection for independently authored notes and other material accompanying such official declarations, as well as the sequence and organization of the official declarations themselves.

In addition to the prerequisite of original authorship, the Copyright law until 1989 required published works to bear notice of copyright. The notice states the person to be contacted if it is determined that permission is required. However, for works published after March 1989, the absence of notice does not signify the absence of a claim of copyright. Thus, the absence of copyright notice on a recent work means only that the author or publisher should be contacted to determine whether copyright protection is claimed in that material. It should be assumed that a work may be protected, despite the absence of notice.

2. Rights Protected

When copyright protection attaches, the statute grants five exclusive rights: these rights are: reproduction, distribution, public display, public performance, and the right to make a derivative work. Anyone other than the rightholder exercising any of these rights may be liable for infringement.

For law teaching, the reproduction and derivative work rights are paramount. The latter right materially expands the reproduction right by imposing on a user of protected material the obligation to obtain permission when protected material is transformed, recast, or adapted in such a way as to constitute a new work. For example, it would be a violation of the derivative work right for a law teacher to reproduce substantial parts of a multi-volume treatise in a single volume format for student use, even though the resulting paperback may have many pages of original writing by its preparer.

Copying without permission or the preparation of a derivative work without permission, may, however, be done if the fair use doctrine controls. This doctrine, to be discussed more fully below, along with certain Guidelines for classroom photocopying, permits some reproduction, elaboration, display or performance of copyright material without liability.

The need for care in the use of copyrighted materials is underscored by the extensive arsenal of copyright remedies including injunctive relief, actual damages, statutory damages of up to $100,000, attorney’s fees, seizure and destruction of infringing copies, as well as the devices by which copies may be reproduced. Accordingly, it is prudent to consider the controlling statutory and caselaw requirements in advance of the decision to copy.

B. LIMITATIONS ON PROTECTION:

The Fair Use Doctrine and the Educational Copying Guidelines

1. Fair Use
II. COPYRIGHT APPLIED TO LAW SCHOOL PHOTOCOPYING

A. COPYRIGHT STATUS OF WORKS LIKELY TO BE REPRODUCED IN THE LAW
   SCHOOL

1. PUBLIC DOMAIN MATERIALS [These may be reproduced without
   permission.]

   a. Official United States Government Documents

   Documents published by any department of the United States are
   expressly barred from copyright protection under Sec. 105 of the
   Copyright Act. Thus, for example, the Annual Report of the Secretary
   of the Treasury, Congressional Hearings, and the text of a bill
   pending in Congress may all be copied without permission. When
   enacted, the text of a statute may also be copied. Clearly, it can
   be copied from the official text in the statutes at large of the
   federal and state governments. The official text may also be copied
   without permission from codification whether published by the
   government of by private law publishers. However, if copied from
   the latter, care must be taken to avoid copying any accompanying
   privately authored matter, such as commentary, annotation, or
   analysis. Moreover, the compilation and arrangement of statutory
   text may be copyrighted by private publishers. Accordingly, it would
   be an infringement of the publisher’s compilation copyright to
   reproduce the full arrangement in the exact sequence.

   [The above analysis follows logically from the well-known
   decision of the Eighth Circuit extending copyright protection to the
   star pagination in court reports published by the West Publishing
   Company. Although a number of copyright scholars were critical of
   that decision when issued and think that its force has been eroded
   by the Supreme Court decision in *Feist* (no copyright protection in
   an alphabetized white page telephone directory). Lacking any
   authoritative decision on the scope of copyright in statutory
   compilations, it is best to make conservative assumptions when
   copying from privately published statutory compilations.]

   b. Judicial Opinions

   The literal word order of judicial opinions is in the public
   domain, outside the scope of copyright protection on the authority
   of a spate of Supreme Court opinions and Section 105 of the
   Copyright Act. Accordingly, the text of a state or federal opinion
   may be reproduced without permission when taken from the official
   governmental reports, e.g. United States Reports or United States
   Tax Court Reports, or official state court reports. Similarly, the
   text of the same opinion is outside the scope of copyright
   protection if it is printed in a volume of the West Publishing
   Company's National Reporter System. Although there is copyright
   ownership in this latter volume, the scope of that protection is
   limited to the arrangement of the cases and to the text of the
   headnotes, syllabi, and key numbering system.

   Law teachers may therefore reproduce the text of a judicial
   opinion from a volume of the West Reporter System without
   permission, so long as they excise the syllabus, headnotes, and key
   numbers. Judicial opinions down-loaded from an electronic database
   are also within this unprotectible category. However, extensive
   reproduction of down-loaded material should be made only after
   reviewing the contract between the law school and the data base
not extend to the text of judicial opinions, statutes, and
government regulations, as noted above.

Some periodicals published by tax-exempt educational
institutions, e.g. Yale Law Journal, expressly grant the right to
copy for classroom use, subject to three conditions as follows.
First, copies are distributed at or below cost. Second, the author
and the journal are identified on the copied material. Third, the
named copyright owner is notified of the use. Law school journals
subscribing to this convention so indicate by a paragraph headed,
"copyright" within the first pages of each issue.

Law school periodicals that do not subscribe to this practice,
may claim full copyright protection. Lawful duplication of matter
from these latter periodicals, is governed by three factors: 1)
applicable copyright principles as set out above, 2) the fair use
provision 3) as supplemented by the Classroom Guidelines.

If, after a review of the facts and circumstances pertaining to
the materials and their proposed reproduction, it is determined that
the reproduction and distribution is within the zone of fair use, no
permission need be sought.
If is determined after a review of these three elements of
controlling authority, that permission is required, the publisher or
the author, if she has retained the copyright, should be contacted.

B. Examples of Law School Copying Potentially Subject to Challenge
by Copyright Owners

1. Course Packets

The greatest potential for copyright infringement is posed by
the preparation of course-specific materials consisting of
substantial portions of protected material. Both the reproduction
right and the distribution right may be infringed in the process.
Moreover, in this case, the fair use defense is effectively
foreclosed if the course material is sold at a profit to students as
a substitute for commercially available copyrighted materials.

When the use of substantial amounts of protected material is
contemplated in the preparation of course packets, permission of the
rightsholder must be obtained. [See the final section for the
procedural information concerning permission requests.]

2. Classroom Handouts

Classroom handouts are to some extent governed by the
Educational Guidelines set out in App. B. In interpreting the
Guidelines, the limitations set out below should be taken into
account. First, the Guidelines themselves state expressly that
they set minimum fair use standards—a safe harbor of uses about
which there is neither need for permission, nor an issue of
infringement. However, uses beyond the stated minima may still be
fair and non-infringing. Second, as the express terms of the
Guidelines suggest, the negotiating background of the Guidelines
gives emphasis to the concerns of the elementary and secondary
school representatives. Thus, the feasibility and meaning of the
Guidelines to large institutions of higher education, including
professional schools, are quite speculative, never having been
authoritatively tested, although in a recent case involving
undergraduate materials, they were cited without being expressly
If the multiple copies are distributed to the class at a charge, that price per copy should also be reviewed. The Guidelines do not permit a charge exceeding the cost of the photocopying. That figure would include the cost of the paper, plus a reasonable charge for the time of the person running the machine, electricity, and amortization of the machine.

For use of materials obtained from Lexis, Westlaw, and other electronic data bases, it is necessary to consult the underlying license arrangement between the data base owner and

3. Research And Scholarship

A single copy of an entire periodical article or of a chapter in a book, made by or for a teacher for that teacher’s own files in a area of scholarly interest. It is generally accepted by the copyright bar and by commentators as a fair use and considered not to be actionable. Recent litigation involving a chemist employed by the Texaco Corporation, a profit-making enterprise, does not unsettle this conclusion. However, prudence suggests limitations. For example, a tax teacher who copied a current, single volume treatise on corporate taxation under this doctrine might be considered by a substantial portion of the copyright bar to be an infringer. Such copying effectively substitutes for the purchase of the treatise, and adversely and directly affects the author’s and publisher’s remuneration -- particularly when the treatise is readily available for purchase. This exception for scholarly use is probably limited to materials not otherwise readily available in that form, e.g. a complete article from a bound volume of a law review of which there are no commercial (or author’s) reprints.

Moreover, this privilege is limited to a single copy for personal use. It does not extend to further reproduction or distribution.

III. OBTAINING PERMISSION

If, after a review of the circumstances of the proposed reproduction of copyrighted material, it is determined that permission from the copyright owner is to be sought, there are three basic ways to do so.

First, there is the direct communication with the right holder, if the author has retained her copyright. This method need involve no more than locating another law teacher in the AALS Directory and using the telephone.

Second, if the school or university has a permissions center, the request may be made through that office.

Finally, there are the central licensing organizations, such as the Copyright Clearance Center. The Copyright Clearance Center administers licenses, including the collection of royalties, for some eight thousand publishers of books, periodicals, and newsletters. The Center’s licenses are of two modes. One is a Transaction Reporting Service, which is an arrangement for duplication in which records are kept and royalties transmitted according to use. The second mode of licensing in a blanket annual license. For an agreed upon fee, protected material may be copied as needed. There are other such arrangements for permission among
APPENDIX A

17 U.S.C. §107 Limitations on exclusive rights: Fair Use

Notwithstanding the provision of sections 106 and 106A, * the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[* Section 106 grants the rightholder the right to reproduce, prepare derivative works, to distribute, and where relevant, the right to perform and to display. Section 106A applies only to works of visual art, granting rights of attribution and of integrity--Ed.]
excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

(Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.)

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the
USING PARAPROFESSIONALS AT THE REFERENCE DESK
BIBLIOGRAPHY
(Prepared by Gordon Russell)

BOOKS

ARTICLES


