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CURRENT DECISIONS

Copyright Law—LEGALITY OF PHOTOCOPYING COPYRIGHTED PUBLICATIONS. *Williams & Wilkins Co. v. United States*, — F.2d — (Ct. Cl. 1972).

The United States Constitution provides for the protection of authors by empowering Congress “[t]o promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹ That power has been exercised by the enactment of Title 17 of the United States Code.² Title 17 provides in pertinent part that:

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

- (a) To print, reprint, publish, copy, and vend the copyrighted work³

The lack of statutory definitions for the various rights given to the copyright owner has created some difficulty,⁴ but the courts generally agree that a copyright secures to its owner the exclusive right to reproduce the work.⁵

The violation of any of the exclusive rights given to the copyright owner is termed an infringement.⁶ “Infringement” is another undefined

1. U.S. Const. art. 1, § 8.

2. The body of this Act was passed in 1909. It provides for an original copyright of 28 years which is generally renewable for another 28 year period. 17 U.S.C. § 24 (1970). 28 U.S.C. § 1338 (1970) provides that the federal district courts shall have exclusive jurisdiction of all actions arising under the copyright laws of the United States. The state courts have jurisdiction of the author's common law copyright, which extinguishes when the author complies with the federal copyright provisions. *Loew's Inc. v. Superior Ct.*, 18 Cal. 2d 419, 115 P.2d 983, 986 (1941).

3. 17 U.S.C. § 1 (1970).

4. Note, *Copyright Infringement and Fair Use*, 40 U. CIN. L. REV. 534, 538 (1971). Justice Story has observed that:

Patents and copyright approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.

Folsom v. Marsh, 9 F. Cas. 342, 344 (No. 4901) (C.C.D. Mass. 1841).

5. *Mazer v. Stein*, 347 U.S. 201, 218 (1954); *Perris v. Hexamer*, 99 U.S. 674, 675-76 (1878); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Carr v. National Capital Press, Inc.*, 71 F.2d 220 (D.C. Cir. 1934).

6. *Forntightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 394-95 (1968); Note, *supra* note 4.

phrase in the Copyright Act.⁷ The courts, however, have had no trouble in implementing a standard definition. The courts have established that in order for there to be an infringement, there must first be a copying of the copyrighted work.⁸ However, the entire copyrighted work need not be reproduced; an infringement may be found if a substantial and material portion is copied.⁹ It is not necessary that the infringer intend his copying to be an infringement,¹⁰ nor must there be a sale of the infringing reproduction.¹¹ The test primarily employed in determining if there has been an infringement is whether or not a member of the general public could recognize that there has been a copying.¹² If the copyright owner can show that he has complied with all the provisions of Title 17,¹³ and that there has been an infringement, he may be awarded damages, or an injunction,¹⁴ or both.

The defense raised in the majority of infringement actions is the common law doctrine of fair use,¹⁵ a doctrine which has been branded by

7. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 n.10 (1968); *Eggers v. Sun Sales Corp.*, 263 F. 373, 375 (2d Cir. 1920).

8. *Mazer v. Stein*, 347 U.S. 201, 218 (1954); *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 (2d Cir. 1946); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

9. *Perris v. Hexamer*, 99 U.S. 674, 676 (1878); *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664, 666 (7th Cir. 1950); *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 (2d Cir. 1946); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *Kustoff v. Chaplin*, 120 F.2d 551, 560 (9th Cir. 1941); *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131, 137 (8th Cir. 1932); *Eggers v. Sun Sales Corp.*, 263 F. 373, 375 (2d Cir. 1920); *Greenbie v. Noble*, 151 F. Supp. 45, 68 (S.D.N.Y. 1957); *Henry Holt & Co. ex rel. Felderman v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

10. *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962); *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664, 666 (7th Cir. 1950).

11. *Greenbie v. Noble*, 151 F. Supp. 45, 63 (S.D.N.Y. 1957); see *Macmillan Co. v. King*, 223 F. 862 (D. Mass. 1914).

12. *Bradbury v. Columbia Broadcasting Sys., Inc.*, 287 F.2d 478 (9th Cir.), *appeal dismissed*, 368 U.S. 801 (1961); Note, *Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law*, 34 U. CIN. L. REV. 75-76 (1965).

13. 17 U.S.C. § 13 (1970).

14. 17 U.S.C. § 101 (1970) provides that the infringer may be liable to an injunction; to pay the copyright owner his actual damages as well as any profits which the infringer has derived from the infringement; or, if the copyright owner is unable to prove actual damages and profits, the court in its discretion may award statutory damages, for which the minimum is \$250 and the maximum \$5,000.

15. Note, *supra* note 4, at 534. Title 17 makes no provisions for the defense of fair use. It is a judicially created, common law doctrine which continues to be recognized by the courts. Note, *Mechanical Copying, Copyright Law, and the Teacher*, 17 CLEV.-MAR. L. REV. 229 (1968); Project, *New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. REV. 931, 950 (1968); Note *supra* note 12, at

one court as "the most troublesome in the whole law of copyright."¹⁶ A finding that the defendant made a fair use of the copyrighted work is a complete defense to an action for infringement.¹⁷ In an attempt to give meaning to the "fair use" defense, the courts have been forced to develop various criteria to facilitate the resolution of whether or not there has been a fair use.¹⁸ The most significant criteria include: whether the copying was of the plaintiff's mode of expression;¹⁹ the nature and function of the two works;²⁰ the amount of the original work which was copied;²¹ the value of the appropriated material to the original work;²² and the effect which the defendant's work may have upon the marketability and value of the plaintiff's work.²³

A discussion of several cases involving the issue of fair use will illustrate the judicial employment of this doctrine. In *Karll v. Curtis Publishing Co.*,²⁴ the plaintiff wrote and copyrighted the "official song" of

76. There are two schools of thought on the relationship between fair use and infringement. One maintains that a fair use is not an infringement, while the other holds that a fair use is a privileged infringement. Note, *supra* note 12, at 76. Apart from possible evidentiary considerations, the disparity is of little consequence.

16. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

17. Note, *supra* note 12, at 76. See *Karll v. Curtis Publishing Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941).

18. Whether or not there has been a fair use of the plaintiff's copyrighted work is an issue of fact. *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 604 (7th Cir. 1957); Note, *The Copyright Law and Mechanical Reproduction For Educational Purposes*, 71 W. VA. L. REV. 347, 348 (1969). See *Karll v. Curtis Publishing Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941).

19. This is not considered a fair use, whereas the copying of the plaintiff's ideas may be. *Bradbury v. Columbia Broadcasting Sys., Inc.*, 287 F.2d 478 (9th Cir. 1961); *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131, 137-38 (8th Cir. 1932); *Greenbie v. Noble*, 151 F. Supp. 45, 67 (S.D.N.Y. 1957).

20. *Folsom v. Marsh*, 9 F. Cas. 342, 348-49 (No. 4901) (C.C.D. Mass. 1841); Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832 (1968); Project, *supra* note 15, at 950; Note, *supra* note 4, at 543-44.

21. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (No. 4901) (C.C.D. Mass. 1841); Schulman, *supra* note 20; Project, *supra* note 15, at 950.

22. *Carr v. National Capital Press, Inc.*, 71 F.2d 220 (D.C. Cir. 1934); *Folsom v. Marsh*, 9 F. Cas. 342, 348-49 (No. 4901) (C.C.D. Mass. 1841); Schulman, *supra* note 20; Note, *supra* note 15, at 305; Project, *supra* note 15, at 950; Note, *supra* note 12, at 86.

23. *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262, 272 (D.C. Cir. 1960); *Carr v. National Capital Press*, 71 F.2d 220 (D.C. Cir. 1934); *Folsom v. Marsh*, 9 F. Cas. 342, 348-49 (No. 4901) (C.C.D. Mass. 1841); Schulman, *supra* note 20, at 832; Note, *supra* note 15, at 305. See *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Hill v. Whale & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914). "[T]here can be no fair use if there is substantial injury to the copyright owner by virtue of the use." Note, *supra* note 12, at 85.

24. 39 F. Supp. 836 (E.D. Wis. 1941).

the Green Bay Packers football team. The defendant *Saturday Evening Post* included the lyrics of plaintiff's song in an article about the Packers. Noting that the defendant's article was not intended to be a musical reproduction, that it differed in scope and nature from the plaintiff's song, and that it did not compete in the same market with the copyrighted song, the court held that the copying of the song was purely incidental to the purpose of the article and therefore was a fair use of the copyrighted song.²⁵

In *Macmillan Co. v. King*,²⁶ plaintiff was the owner of a textbook copyright. The book was a required text for the defendant professor's economics class, and before each lecture he prepared brief typewritten memoranda from the textbook. These memoranda were lent to the students, who were requested to return them within a week.²⁷ The professor frequently quoted one or two words from the textbook, and there were several quotations of an entire sentence—all were set off by quotation marks. In holding that the defendant had infringed the plaintiff's copyright, the court stated, "[Although] the reproduction of the author's ideas and language is incomplete and fragmentary, and frequently presents them in somewhat distorted form, important portions of them are left recognizable."²⁸

The plaintiff in *Henry Holt & Co. ex rel. Felderman v. Liggett & Myers Tobacco Co.*²⁹ wrote and copyrighted a book designed for voice teachers and their pupils. In an advertising pamphlet the defendant copied, though not exactly, three sentences from the book, placing quotation marks around the copied sentences. The court held that the defendant had infringed the plaintiff's copyright and that there had not been a fair use. The court observed that the reproduction need not be of plaintiff's exact words in order for there to be an infringement,³⁰ and that the defendant was not relieved from liability simply because he acknowledged the source of the material.³¹ The court emphasized the fact

25. *Id.* at 837.

26. 223 F. 862 (D. Mass. 1914).

27. The defendant also gave copies of the memoranda to students he was tutoring for the final exam. The defendant requested that these copies be returned, but they were not. *Id.* at 863-64. The court concluded that "printing" included typewriting as well as mimeographing. *Id.* at 867.

28. *Id.* at 866. The court felt that the fact that the defendant was a teacher and used the materials in the course of teaching had no bearing on the issue of infringement. *Id.* at 867.

29. 23 F. Supp. 302 (E.D. Pa. 1938).

30. See *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131, 138 (8th Cir. 1932).

31. *Accord*, *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950).

that the reproduction was for commercial purposes, hinting that had the copying been for scientific purposes a fair use might have been found.

The foregoing cases represent several of the situations in which the courts have considered the doctrine of fair use. A more current issue involving the doctrine of fair use concerns the photocopying of copyrighted materials by means of a Xerox or similar machine—a process known as reprography. To date, only one case has dealt with this precise issue.³² In *Williams & Wilkins Co. v. United States*,³³ the plaintiff's copyrights in medical journals were held to have been infringed by the National Institute of Health and the National Library of Medicine, which had photocopied articles appearing in the journals.³⁴ As a result of this copying, the court found plaintiff to be entitled to "reasonable and entire compensation."³⁵ The defendant had interposed several defenses to the infringement action, the most important of which was the defense of "fair use." The court rejected defendant's claim of fair use, stating:

Defendant's photocopying is wholesale photocopying and meets none of the criteria for "fair use." The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to

32. The influence which this case may have upon the challenge which photocopying presents to copyright law is illustrated by the number of organizations filing briefs as amicus curiae, as well as by the fact that two articles in this area have considered the mere filing of suit by the Williams & Wilkins Company of sufficient importance to warrant notation. Breyer, *The Uneasy Case For Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 330 n.194 (1970); Project, *supra* note 15, at 945 n.20.

33. No. 73-68 (Ct. Cl. 1972). Suit was brought under 28 U.S.C. § 1498(b) (1970), which provides that any action against the United States, for infringement of a copyright granted under the copyright laws of the United States, shall be brought in the Court of Claims.

34. The National Institutes of Health, as part of its service to the thousands of persons on its research staff, provides a photocopying service from which any researcher may obtain photocopies of articles appearing in any of the approximately 3,000 journals to which the Institutes subscribe. These photocopies are normally kept by the researchers in their private files for future use. The National Library of Medicine cooperates with other libraries in an "interlibrary loan" program. As part of this program, the Library upon request makes photocopies of articles from medical journals. These photocopies are supplied to other members of the program free of charge and are not returned. This suit involved eight articles appearing in four of the plaintiff's medical journals. The defendant conceded that it made at least one photocopy of each of these articles.

35. This is the measure of damages provided for in 28 U.S.C. § 1498(b) (1970). The court ordered that the amount of recovery be determined before a trial commissioner in further proceedings.

diminish the plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market.³⁶

In reviewing the various criteria used in determining fair use, the court announced that the greatest weight is to be given to the determination of the impact of defendant's work on plaintiff's market. The court emphasized that the pernicious effects of photocopying are particularly acute in the area of medical journals where subscription rates are high due to the limited number of subscribers. Noting that potential subscribers now find it less expensive to photocopy, the court recognized that a further reduction in subscriptions was probable, and that the resulting decline in subscriptions would necessitate an increase in subscription prices. The court foresaw a perilous cycle in which increased photocopying would decrease subscriptions, raise prices, and encourage additional photocopying. Additionally, the court stressed the principle that wholesale copying is never a fair use.³⁷ In an attempt to terminate this costly maelstrom of photocopying, the court struck down defendant's argument on the grounds of financial injury to the copyright owners.

Williams presents a microcosm of the problems which the "reprographic revolution" has created for copyright owners. There has been an alarming increase in the number of photocopying machines as well as the number of photocopies being made of copyrighted materials.³⁸ In *Williams* the court observed that as the photocopies of a work increase, the demand for the original will decrease.³⁹ Although many photocopiers may be unwilling to pay the higher purchase or subscription price, the number willing to do so is sufficient to constitute an invasion of the copyright owner's market. Nowhere is the problem greater than in the area of technical and scientific journals⁴⁰ due to the high cost for the original work and the limited number of interested persons. In view of the accessibility of photocopying machines and the propensity

36. *Williams & Wilkins Co. v. United States*, No. 73-68 at 16 (Ct. Cl. 1972).

37. *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262, 272 (D.C. Cir. 1960), *vacated and remanded*, 369 U.S. 111 (1962); This principle has been recognized in prior decisions, e.g., *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937).

38. Note, *Statutory Copyright Protection For Books and Magazines Against Machine Copying*, 39 NOTRE DAME LAW. 161 n.2 (1964); Project, *supra* note 15, at 941-43.

39. See Crossland, *The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 S.C. L. REV. 153 (1968).

40. Project, *supra* note 15, at 943, 973.

of subscribers to use them in lieu of continued subscription, the cost of many scientific journals may become prohibitive.⁴¹ In an attempt to prevent the potential demise of many of these journals commentators have advanced several proposals to adjust the competing interests of the copyright owner and the would-be photocopier. One suggestion involves the establishment of a clearinghouse patterned after that of the American Society of Composers, Authors and Publishers.⁴² Under this procedure, authors, publishers, and other copyright owners would become members of a clearinghouse which would grant to libraries, and other large scale reprography facilities, permission to make photocopies of any copyrighted materials owned by the clearinghouse members. In return the photocopying institution would tender periodic payments to the clearinghouse, computed on the basis of amount of anticipated photocopying in a particular period. The clearinghouse would then distribute the payments to its members.

A somewhat similar proposal would employ the library as a royalty-collection agency.⁴³ Under this system, a clearinghouse would be established to license the libraries as collection agencies. The clearinghouse would receive the royalties collected by the libraries and would distribute them to the publishers who in turn would pay authors their contractual share. The royalty rates would be fixed by the publisher on the basis of the number of pages copied.⁴⁴

An extensive inquiry into the problems of reprography and copyright law was conducted by the *UCLA Law Review*.⁴⁵ This project concluded that the best approach would be the enactment of a statutory flat-fee taxing system on individual photocopying machines. The tax would be based upon classification of machines according to the amount of copyrighted material which it is anticipated the machine will photocopy. Initially, the tax would be placed only on machines which photocopy scientific and technical works, since these materials suffer the greatest injury from infringing photocopying. A discount could be granted

41. *Id.* at 944.

42. The ASCAP licenses television and radio stations, nightclubs and others to perform copyrighted music. This proposal is discussed, but not endorsed in Breyer, *supra* note 32, at 331-34 and Project, *supra* note 15, at 964-71.

43. Comment, *The Effect of the Fair Use Doctrine on Textbook Publishing and Copying* (pts. 1 & 2), 2 *AKRON L. REV.* 64, 112 (1968-69).

44. *Id.* at 118-20.

45. Project, *supra* note 15. This project is highly recommended to anyone wishing a more complete understanding of the problems created by reprography as well as possible solutions.

to educators under such a system. Distribution of the tax could then be made to copyright owners on the basis of studies determining what types of materials are most often photocopied.⁴⁶

The primary criticism leveled at the clearinghouse system is that it involves high administrative costs as well as the necessity of judicial proceedings to police non-cooperating facilities.⁴⁷ Therefore, the employment of a tax upon the individual photocopying machine appears to be the most efficient and least expensive solution to the problem. But while scientific and technical journals may be the most endangered species of copyrighted material at this time, it is suggested that the tax not be limited to these works. The alarming increase in photocopying will soon become apparent in other forms of copyrighted works, and revisionary legislation to protect such works may be slow.

CONCLUSION

The Constitution provides for the promotion of the arts and sciences by empowering Congress to grant copyrights to authors. This provision recognizes that copyright protection many times affords the financial impetus which is necessary for the production of literary and scientific works.⁴⁸ But the arts and sciences are also promoted by the free exchange and flow of the benefits produced by authors.⁴⁹ The doctrine of fair use is the vehicle which balances these competing forces.⁵⁰ Fair use permits a limited amount of copying, but prohibits wholesale copying and the reproduction of a substantial and material portion of the copyrighted work. Fair use permits the author's financial expectations to be of secondary consequence when it appears that the reproduction of a copyrighted work will be of substantial benefit to the public.⁵¹ This is exemplified by the judicial tendency to permit a greater amount of copying from scientific and medical works than from commercial writings.⁵²

46. *Id.* at 973-75.

47. Breyer, *supra* note 32, at 332-34.

48. *Mazer v. Stein*, 347 U.S. 201 (1954); *Project*, *supra* note 15, at 955. See *Continental Cas. Co. v. Beardsley*, 151 F. Supp. 28, 31-32 (S.D.N.Y. 1957).

49. See Note, *supra* note 15, at 303.

50. Schulman, *supra* note 20, at 832-33; Note, *supra* note 4, at 543-47. See Note, *supra* note 18, at 350.

51. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); Note, *supra* note 18, at 348. See *Greenbie v. Noble*, 151 F. Supp. 45, 67 (S.D.N.Y. 1957).

52. *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 175 (S.D. Cal. 1955); *Henry Holt & Co. ex rel. Felderman v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302,

Williams does not deviate from these principles.⁵³ The court demonstrates that the continued photocopying of articles from the plaintiff's journals could result in their ultimate demise,⁵⁴ an event which would retard the progress of science. In the absence of any forthcoming legislation⁵⁵ or voluntary agreement between copyright owners and photocopiers, it is hoped that courts confronted with the large scale photocopying of copyrighted materials will be persuaded to follow *Williams* in closely scrutinizing the financial effects of massive reproduction on the publication involved.

Federal Taxation—SECTION 482, ALLOCATION OF INCOME AND DEDUCTIONS AMONG TAXPAYERS—WHAT IS CONTROL? *B. Forman & Co. v. Commissioner*, 453 F.2d 1144 (2d Cir. 1972).

B. Forman & Co. and McCurdy & Co. operate retail department stores. In 1958, they caused Midtown to be formed.¹ Each company retained 50 percent of Midtown's common stock.² Midtown was to own and operate a shopping center from which Forman and McCurdy would lease space for their respective operations.³ During the years 1965, 1966, and 1967 Midtown borrowed \$1 million from each Forman and Mc-

304 (E.D. Pa. 1938); Note, *supra* note 4, at 544. See *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905) (dictum); *Thompson v. Gernsback*, 94 F. Supp. 453, 454 (S.D.N.Y. 1950).

53. As has been pointed out:

Multiple copying for limited circulation or for gratuitous or scholarly use is an infringement where there is the finding that the copies may be a substitute for, and therefore in competition with, the copyrighted material.

Note, *supra* note 37, at 183.

54. Project, *supra* note 15, at 955, 957.

55. During the infancy of radio broadcasting the court in *Jerome H. Remick & Co. v. American Auto. Accessories, Co.*, 5 F.2d 411 (6th Cir. 1925), when forced to construe a copyright statute which made no provision for the broadcasting of copyrighted musical compositions, observed:

[B]ut, until Congress shall have specifically determined the relative rights of the parties, we can but decide whether and to what extent statutes covering the subject-matter generally, but enacted without anticipation of such radical changes in the method of reproduction, are, fairly construed, applicable to the situation.

Id. at 411-12.

1. *B. Forman & Co. v. Commissioner*, 453 F.2d 1144, 1147 (2d Cir. 1972).

2. *Id.* at 1148.

3. *Id.*