

Before Congress for revision this year is the nation's 1909 copyright law. Proposed changes and how they might affect educators is the topic of this article.

The Impending Copyright Law and the Educator

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EDUCATORS may soon face thorny copyright questions if the bill passed by the House of Representatives (HR2512) and now resting with the Senate (S644) becomes law. This bill, designed to revise the 1909 copyright law, could place stringent restrictions on teachers' use of copyrighted materials.

To date, the teacher has had comparatively easy access to copyrighted materials for classroom use, but the new bill, if passed into law, could hamper new teacher methodology and effective teaching during the coming years. Moreover, should the teacher not comply with the new law, it could lead to embarrassing law suits for the school district.

The copyright law now up for revision was passed in 1909, and the need for revision is quite apparent to most observers. But the problems facing the Congress are many and technical. Educational pressure groups are attempting to make congressmen realize that very careful wording of the new law is necessary if educators are not to be unduly hampered in their use of copyrighted material.

History of Copyrighting

The first known law dealing with the concept of copyrights goes back to 1710 in England when Parliament passed an act

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known as the Statute of Queen Anne (8 Anne c. 19). Before this time, it was common practice for a book publisher to print an author's work without permission or without the author's consent. The purpose of the Statute of Queen Anne was to give the author exclusive rights of printing for a term of 14 years, providing for penalties if the law was not followed. This Statute has been used as a model for all subsequent copyright laws.

Article I, Section 8, of the U.S. Constitution gives power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and their discoveries."

In 1790, Congress passed a law (1 Stat. 124) which provided ". . . for the encouragement of learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned." In 1902, Congress broadened the law to include "arts of designing, engraving . . . and other prints." In addition, the law stated that the publisher had exclusive rights of printing, publishing, and vending for a period of 14 years, with the option of renewing the copyright for another 14 years.¹

The "fair use" concept, which will be discussed in greater detail later, was created by Justice Story's decision in *Wheaton v. Peters* (8 Peters 591) in 1834 and in *Folsom v. Marsh* (2 Story 113) in 1841.²

The last major revision of the nation's copyright laws in 1909 changed the renewal period of 14 years to 28 years, and it established the Office of Register of Copyrights under the Librarian of Congress.

Copyright and the Educator

There are two types of copyright protection that an educator should be familiar with to avoid errors in judgment. The common law copyright is written to include all creative works not published. Section 2 of the present copyright law reads:

That nothing in this act shall be construed to annul or limit the right of the author or proprietor of an unpublished

¹ Julius J. Marke, "Copyright Revisited," *Wilson Library Bulletin*, September 1967, p. 36.

² *Ibid.*, p. 37.

work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent and to obtain damages therefor.³

An unpublished thesis or dissertation would be protected by this section of the copyright law. Another example of common law copyright would be the case of a novelist who had completed a novel but had not yet sent it to a publisher. In other words, any writer has first publication rights on anything he has written. Should someone steal his work and try to publish it, all the original creator would have to do is prove that he, and not the other man, had created the work.

The second type of copyright that an educator should be familiar with is the statutory copyright. Essentially, the statutory copyright applies to artistic works that have been sold to a publisher. When this occurs, the owner of the common law copyright releases his claim of copyright to the publisher. Unless the contract between the writer and the publisher states otherwise, the work to be published comes under the aegis of the publisher. Of course, a transfer of money is usually involved or a royalty agreement is established prior to the time the work comes under statutory copyright laws.⁴

The need to revise the copyright law is largely the result of a growing use of mass media such as radio and television, and new and effective varieties of duplication such as the offset press, microfilm, microfiche, and computers. New media and processes give teachers easy access to published materials in large quantities and from great distances. Because of this easy accessibility, teachers are finding it necessary to be aware of both the existing copyright laws and the concepts involved in the new revision now before Congress.

Educators constantly use published material under the "fair use" interpretation of the existing copyright law. The fair use provision is "designed to permit a reasonable use and copying of protected works 'for purposes such as criticism, comment, news reporting, teaching, scholarship, or research'."⁵ This provision

³ Stephen P. Ladas, *The International Protection of Literary and Artistic Property* (New York: Macmillan Co., 1938), p. 687.

⁴ *Ibid.*, pp. 685-86.

⁵ John C. Stedman, "The Copyright Law Revision: Its Impact upon Educational Activities," *AAUP Bulletin*, June 1967, p. 128.

in the 1909 copyright law has been the basis for teachers' using one copy of protected material to make multiple copies for classroom use.

No problem can arise, presumably, for the teacher who uses copyrighted material that has been provided in multiple copies by the school district. However, many questions must be taken under consideration before a teacher takes published material and "lifts" it himself for his own classroom use. Is information and knowledge a complete right of everybody? Does a teacher have to quote sources everytime he uses someone else's original or creative idea? What is an original or creative idea? What constitutes knowledge? Or specific information? Many teachers are not sure how to avoid law suits under copyright laws.⁶

Two Basic Principles

Considering these rights to information, the teacher should and must study two basic principles: public interest and financial interest. The teacher's world revolves around the principle of public interest. He generally feels it his duty to bring as much pertinent information as he can into the hands of his students. And because of this, he frequently uses copyrighted materials without the permission of the author or publisher.

On the other hand, the teacher rarely considers the author's financial interest. And this appears to be one of the prime reasons for the revision of the copyright laws. Apparently, the author or creator of an artistic work believes that the indiscriminate use of his work by teachers will discourage him from spending his time and energy in the creation of scholarly and intellectual works if there are no financial rewards involved.⁷ "Copyright owners and publishers fear erosion of their economic benefits and the originality of their works. On the other hand, teachers seeking new information and materials for their students feel it is necessary to get that information by any legal means."⁸

It is a well established fact that currently many publishers are very much concerned over what they consider to be teacher

⁶ William Jovanovich, "Information as a Property," *Wilson Library Bulletin*, September 1967, p. 46.

⁷ *Ibid.*, p. 49.

⁸ M. Dale Baughman, "Copyright vs. Free Access?" *Educational Leadership*, December 1968, p. 236.

violations of copyright laws. They are kind enough to state that these infringements by teachers are unintentional and that these violations occur because teachers are unaware of the law prohibiting their actions. Publishers are generally in sympathy with teachers but, while they relate their sympathies, they are giving fair warning to the education profession that they are getting ready to put teeth into the copyright provisions.⁹

For example, publishers are attempting to make educators aware of the implications of copyright laws by placing certain statements on the title pages of their textbooks and, in several cases, their copyrighted novels. In Drury and Ray's textbook, *Principles of School Law*, the following statement appears on the back of the title page:

All rights reserved. This book, or parts thereof, must not be used or reproduced in any manner without written permission.¹⁰

This statement is very restrictive and the wording is such that it leaves little or no room for "fair use." Along with textbooks, many of the paperback novels generally used in high school classrooms throughout the nation carry the following explicit warning:

CONDITIONS OF SALE: This book is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, resold, hired out or otherwise circulated without the publisher's prior consent, and without a similar condition including the condition being imposed on the subsequent purchaser.¹¹

The above statement implies that a teacher could purchase copies of a novel for classroom use but that she could not pass those copies on from one group of students to another or from one school year to another without penalty of law. Most educators ignore such statements of copyright protection, but at what risk? Publishers are making serious attempts to forewarn teachers of the impending dangers of illegally using their materials. As one

⁹ Lowell H. Hattery, and George P. Bush, ed., *Reprography and Copyright Law* (Baltimore: Port City Press, 1964), pp. 61-62.

¹⁰ Robert L. Drury, and Kenneth C. Ray, *Principles of School Law* (New York: Appleton-Century-Crofts, 1965).

¹¹ John D. MacDonald, *The Last One Left* (New York: Fawcett Publications, 1967).

author put it, "Literary property, like all other goods, wares and merchandise, attracts a thief."¹²

Revisions in New Law

Harold Wigren, in 1968, pointed out educators' major concerns in the revision of the copyright law.

Elimination of the not-for-profit provision which has been in the law since 1909 and which presently provides double-barreled protection (when combined with judicial "fair use") for education's use of copyrighted materials [would have disastrous results for education by drastically curtailing school use of copyrighted materials].¹³

Elimination of the not-for-profit provision in the 1909 law is, in fact, now being considered. Wigren speaks for all educators when he says that it would be tragic to lose the non-profit use of copyright materials. He believes that during the coming years it is of greater importance than ever before for teachers to have free use of published materials.

Another point that Wigren is vitally concerned with is the law's wording of what would constitute fair use. He says:

Despite a valiant effort in the House Committee's report, there is still a lack of clear-cut guidelines as to what constitutes "fair use" or "limited copying" under the law so that teachers and students will know with certainty what they can and cannot do legitimately in the course of learning.¹⁴

Wigren believes that if the wording were specific a teacher would not knowingly break the law. As the law now reads, and as legal experts have interpreted the fair use idea, the teacher is in a never-never land, rarely knowing whether he is breaking or complying with the law.

Still another consideration in thinking about the proposed new copyright law involves the future technology in reprography:

The inclusion in the bill of Section 110 (2) D virtually eliminates the use of the new technology, including remote access

¹² Philip Wittenberg, *The Protection and Marketing of Literary Property* (Boston: The Writer, Inc., 1937), p. 65.

¹³ Harold Wigren, "Don't Touch! This is Copyrighted!" *Educational Leadership*, December 1968, p. 254.

¹⁴ *Ibid.*

information retrieval systems and instructional uses of computers by individual learners.¹⁵

The following is an example of what the inclusion in the new law of Section 110 (2) D would mean: when a student is taken to a computer center by his teacher to study a particular program in world history, the copyright law is not broken if the teacher stays there to supervise the student's progress and to select his program to be fed into the computer. However, should the selection of the program be left to the discretion of the student, at the time when he selects his own program to be fed into the computer, the copyright law is broken.

John C. Stedman, professor of law at the University of Wisconsin, raises the following questions that he feels lawmakers should ask themselves as they are constructing the new revision:

- If broad copyright protection were granted, to what extent and under what circumstances would educators simply by-pass copyrighted materials?
- To what extent and under what circumstances would they refrain from engaging in salutary activities, rather than sustain the burden and obstructions of copyright demand?
- To the extent that copyright levies were imposed, who would bear the brunt of them?
- In what circumstances and to what extent would the returns to authors and publishers be reduced if educational use were more generously allowed—and under what circumstances might they be actually increased?
- What effect would the allowance or rejection of copyright in the new technology have upon the incentives, the structure, competitive relationships, and marketing practices of the industries that supply such technology?
- To the extent that returns were reduced, would the incentive to write and publish be lessened or destroyed?
- Where copyright protection does not adequately do the job, what alternatives of stimuli may be available to encourage writing and publication?¹⁶

It would appear that Stedman is trying to make legislators aware of the dangers of making the revisions in the new law too stringent.

Doris M. Timpano relates several situations where the classroom teacher might violate the copyright law if the revision is

¹⁵ *Ibid.*

¹⁶ Stedman, *op. cit.*, p. 130.

passed in its present state. She describes the case of an audio-visual director who sees a picture that is applicable to an English class. He makes a transparency and brings it to the teacher for his use. This is illegal. Or a teacher makes multiple copies of an item for his class to study and tells his students to keep them for future reference. This, too, is in violation of the copyright law. He should have called them back in and perhaps even destroyed them.¹⁷

In another unusual, but soon perhaps to be usual, case, the teacher is presenting a lesson on dissecting a frog over closed-circuit television to several classes. Before him he has both a dead frog and a copyrighted commercial frog model that may be disassembled to further illustrate his procedure. Most teachers would say that this use of copyrighted materials is legal; it is not, however. It would be if the teacher were in a face-to-face situation with his students, but not under the conditions of closed-circuit television. The copyright owners will contend that the possibility of selling several frogs in a face-to-face situation would have been likely but that in the television presentation their financial interest has been violated.¹⁸

It is, then, of vital importance that all educators follow the progress of the 1909 copyright law that will be before the Senate this year and to use their influence toward achieving a fair law. In this era of advanced technology, the teacher, in order to perform his job, must have reasonable access to copyrighted materials. If he allows the financial interests of writers and publishers to inhibit educators through passage of a copyright law at odds with educational interests, the public school teacher may find himself without the kinds of teaching aids that have been of great use to him in the past. Worse yet, he may find himself in court facing a charge of plagiarism.

¹⁷ Doris M. Timpano, "Copyrighted Legislation and You," *Today's Education*, April 1969, pp. 18-19.

¹⁸ *Ibid.*

REFERENCES

1. Corbin, Richard, "Poetry and Hard Fact." *College English* 27(1966) : 341-46.
2. Shaw, Ralph R. *Literary Property in the United States*. Chicago: Scarecrow Press, 1950.

3. Siebert, Fred S. *Copyright, Clearances, and Rights of Teachers in the New Educational Media*. Washington, D.C.: American Council on Education, 1964.
4. Squire, James R. "A New Copyright Law: What Are the Issues?" *Educational Leadership* 26 (1968) :258-59.
5. Wittenberg, Philip. *The Law of Literary Property*. Cleveland: The World Publishing Company, 1957.

Danger: That This, Too, Will Pass

Concern about the quality of our environment and the sins of inattention which we've heaped upon our land and in our waters and air reached fever pitch across this nation in record time. With such a wave of concern, there is the danger that intensity of interest may decline as rapidly as it reached crescendo and that "another fad" will pass. We must not let this happen. We must articulate our needs and assign responsibility to both the public and private sectors to devise programs to accomplish those needs.

Education is the tool we need to put to use, in a well-defined and well-organized role. We're not talking about single courses, or even a series of courses comparable to driver education or drug education. We're talking about an overall approach in education throughout the entire educational process in our schools whereby man will continually relate to his environment, to the rivers, oceans, mountains, lands, forests and wildlife. We need to lay a foundation of insight into the relationship man has with other living things on this planet so his actions are compatible with his environment and he keeps his need in balance with nature's needs.

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Editorial by Governor Tom McCall
of Oregon.